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IN THE MISSOURI SUPREME COURT

Appeal No. SC96514

GARY S. HEIFETZ, *et al.*,

Respondents,

vs.

APEX CLAYTON, INC.,

Appellant.

RESPONDENTS' SUBSTITUTE BRIEF

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INTRODUCTION AND PROCEDURAL POSTURE

For ease of reference, appellant Apex Clayton, Inc., is referred to in this brief as "Apex" or "Apex Clayton".

Respondents Gary S. Heifetz, Steven M. Stone, Jean Maylack and Fallon Maylack, Jeffrey S. Gershman, the Estate of Sidney L. Stone, and Steven B. Spewak, are referred to collectively as the "Limited Partners".

8182 Maryland Associates, a Missouri limited partnership, is referred to as "8182" or "8182 Maryland". Apex is the general partner and the Limited Partners are some of the limited partners in 8182.

While the appeal was pending, the parties settled that part of Apex's appeal relating to judgments in favor of the Limited Partners against Apex for breach of contract and in favor of the Limited Partners' lawyers against Apex for attorney fees and expenses under the 8182 partnership agreement (the "Agreement").

Remaining to be resolved on appeal are judgments in favor of the Limited Partners against Apex for breach of fiduciary duty, which included awards of punitive damages. These judgments relate to the parties' status as partners in 8182.

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JURISDICTIONAL STATEMENT

The court lacks jurisdiction to hear this appeal because Apex failed to timely file its notice of appeal. The appeal should be dismissed.

This case was tried to a jury in St. Louis County, the Hon. Robert Cohen presiding. The jury returned its verdicts June 19, 2015. [LF 11 (Docket); 555-56, 560-66 (Verdicts)]. Judgments on the verdicts were entered June 26, 2015. [LF 11-12; LF 593-94 (Judgment)].

Apex timely filed its authorized after-trial motion July 27, 2015. The trial court denied Apex's after-trial motion October 26, 2015. The order stated: "Defendant's Motion for Judgment Notwithstanding The Verdict Or For New Trial Is Denied." [LF 14; LF 921-23 (Order)].

When the trial court denied Apex's after-trial motion, the Limited Partners' judgments against Apex became final and appealable. Rule 81.05(a)(2).[1] Apex's notice of appeal was due within 10 days of the judgments becoming final. Rule 81.04(a). The 10th day after the judgments becoming final was November 5, 2015. Apex did not file a notice of appeal

[1] "Rule" references are to the Missouri Rules of Civil Procedure.

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by November 5. Apex did not file its notice of appeal until more than three months later, February 17, 2016. [LF 16; LF 966-997 (Notice of Appeal)].

In its jurisdictional statement, Apex contends its notice of appeal was timely filed. Apex asserts two contentions in support of its statement that the notice of appeal was timely filed. Apex first contends that the June 26 judgment was not a judgment because it did not resolve plaintiffs' claim for attorney fees and expert witness costs (hereinafter, "attorney fees") and therefore had not adjudicated "all the claims and rights and liabilities of all the parties." *Apex Substitute Brief* ("*Brief*") at 3, *quoting* Rule 74.91(b). As a result, according to Apex, the June 26 judgment did not start the clock running for the filing of its notice of appeal.

Apex is mistaken. There was no claim for attorney fees pending when the June 26 judgment was entered. The petition did not plead a right to attorney fees. [LF 17-27]. Limited Partners did not file a motion seeking attorney fees until July 24, 2015, weeks after the June 26 judgment was filed. [LF 12; LF 608-14 (Attorney fees motion)]. The June 26 judgment adjudicated all claims and rights and liabilities of all parties then before the trial court.

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These legal issues are discussed in detail in the argument section of this brief in Section I.

Apex's second contention is that, even if the June 26 judgment was a judgment (and it was), it was rendered a "nullity" by the trial court's entry October 26, 2015 of a document captioned "amended judgment" (the "October 26 filing"). *Brief* at 5 n.3. *See* LF 924 (October 26 filing).

The October 26 filing restated without alteration the judgments in favor of the Limited Partners set out in the June 26 judgment. The October 26 filing then added three new judgments in favor of the Limited Partners' *lawyers* against Apex for attorney fees. *See Brief* at 4; *compare* LF 593-94 (June 26 judgment) *with* LF 924-26 (October 26 filing).

Although the October 26 filing was captioned "amended judgment," it was not. That is because as of October 26, 2015 the trial court no longer had any power to "vacate, reopen, correct, amend, or modify its [June 26] judgment" under Rule 75.01. Nor did it have any power under Rule 78.07(d) to "amend or modify" the June 26 judgment.

The October 26 filing was not an amended judgment for two reasons. First, the October 26 filing was entered after the expiration of the 30-day

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period during which the trial court retained full control over the June 26 judgment under Rule 75.01. Thus the trial court on October 26 no longer had any inherent power to amend the judgment under Rule 75.01. Once the 30-day period expired, the trial court could only amend its judgment as requested in an authorized after-trial motion timely filed by a party.

This gives rise to the second reason why the October 26 filing was not an amended judgment despite the caption placed on it by the trial court. Rule 78.07(d) gives the trial court the power to "amend or modify any judgment in accordance with Rule 75.01 or upon motion by any party." As discussed in the argument section of this brief in Section II, "upon motion by any party" means that a trial court may amend or modify a judgment only as requested in an authorized after-trial motion sustained by the trial court.

Apex's authorized after-trial motion was not sustained by the trial court; it was denied. Thus Apex's after-trial motion did not give the trial court the power to amend or modify the June 26 judgment under Rule 78.07(d).

While the trial court granted the Limited Partners' post-judgment motion for attorney fees, this also did not give the trial court the power to amend or modify the June 26 judgment under Rule 78.07(d). That is because a motion for attorney fees is not an authorized post-judgment motion. Thus, granting a post-judgment motion for attorney fees does not trigger the power to amend a judgment under Rule 78.07(d). This is also discussed in the argument section in Section II.

In short, while the October 26 filing was captioned "amended judgment," it was not. The June 26 judgment became final and appealable October 26 when Apex's after-trial motion was denied. The deadline for filing Apex's notice of appeal expired ten days later on November 5, 2015.

For all these reasons, many of which are discussed in further detail in argument Sections I and II below, Apex's appeal should be dismissed for lack of appellate jurisdiction because of its failure to timely file its notice of appeal.

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STATEMENT OF FACTS

I. The appeal should be dismissed for Apex's failure to comply with Rule 84.04(c), which requires Apex to state in its brief the facts that support the judgment.

"The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination …" Rule 84.04(c). "A brief does not substantially comply with Rule 84.04(c) when it highlights facts that favor the appellant and omits facts supporting the judgment." *Osthus v. Countrylane Woods II Homeowners Ass'n*, 389 S.W.3d 712, 715 (Mo. App. E.D. 2012) (citations and internal quotations omitted). Omitting trial evidence supporting the judgment is a "failure … to provide a fair and concise statement of facts [and] is a sufficient basis to dismiss an appeal." *P & J Ventures, LLC v. Yi Yu Zheng*, 479 S.W.3d 748, 753 (Mo. App. E.D. 2016).

The statement of facts in Apex's opening brief is concise. Indeed, it is too concise — and, thus, unfair and incomplete — because it omits mention of any of the evidence supporting the judgments in favor of the Limited Partners on their breach of fiduciary duty claims.

How do we know that the statement of facts omits evidence supporting the judgments? Initially, one might note the almost complete absence of citation to trial testimony. Although this week-long trial generated 829 pages of transcript, inclusive of arguments, Apex cites almost none of it.

To the extent that Apex cites the transcript at all, it cites mostly to the opening statements, closing arguments, and legal arguments made outside the presence of the jury, none of which is evidence. *There are a total of only seven citations to trial testimony in the brief, although several of those citations are repeated.* All of the testimony cited in Apex's brief comes from pages 100-01, 125, 131, 183, 437, 443-44, and 694 of the trial transcript. None of the cited testimony includes testimony supportive of the judgments.

What was said on the nine pages of trial testimony transcript Apex chose to cite?

❶ Pages 100-01 is Limited Partners' expert Ray Price explaining Paragraph 10.5(F) of the Agreement.

❷ Page 125 is Price's opinion that Paragraphs 9.2(A) and 10.5(F) of the Agreement required Apex to

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determine the contractually-defined "available cash flow" ("ACF") on an annual basis and to distribute ACF at least annually.

❸ Page 133 is Price's opinion that Apex breached its contractual obligation to annually determine and distribute ACF.

❹ Page 183 is Limited Partner Heifetz reading from his demand letter to Apex (Exhibit 186) and testifying that his demand letter stated he believed the Limited Partners should be receiving substantial cash flow from the building and asking for a detailed explanation about why this was not happening.

❺ Page 437 is Limited Partners' expert Michael Prost's testimony that distributions to partners always decrease the net worth of the partnership by the amount of the distribution.

❻ Pages 443-44 is Prost agreeing that if distributions of one million dollars were made from a partner-

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ship, then the value of the partnership would go down by the same million dollars.

❼ Page 694 is Apex's expert Steven Twele's testimony that the value of partnership interests go down by the amount of the distributions it makes.

That is it.

Although there was testimony supporting the finding that Apex breached its common law fiduciary duties to the Limited Partners, Apex's brief does not cite any of it. Apex's brief also does not cite any of the testimony and other evidence about the actual damages the Limited Partners suffered as a result of Apex's breach of its fiduciary duties.

While "[c]ases should be heard on the merits if possible, construing the court rules liberally to allow an appeal to proceed … where disposition is not hampered by the rule violations," *S.M. v. E.M.B.R. (In re C.M.B.R.)*, 332 S.W.3d 793, 822 (Mo. 2011), it would be impossible here for the court to resolve the appeal on the statement of facts submitted by Apex *unless* the court (or respondents' counsel) becomes an advocate for Apex, scouring the record to find the relevant facts Apex chose not to include. Needing "to

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become an advocate for" the appellant "is generally the basis for an appellate court's dismissal of an appeal" for violation of Rule 84.04(c). *Id.*

Apex's appeal should therefore be dismissed not only because of a lack of appellate jurisdiction, but also because of Apex's gross violation of Rule 84.04(c) in its presentation of its statement of facts.[2]

II. Evidence supporting the judgments in favor of Limited Partners on their breach of fiduciary duty judgments.

While the Limited Partners should be able to conclude their brief at this point, and keep their judgments through dismissal of the appeal, due to an excess of caution the Limited Partners have assembled below some of the evidence showing that the judgments in their favor against Apex for breach of fiduciary duty should be affirmed.

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[2] The deficiency in the *Brief* cannot be a surprise to Apex. Limited Partners pointed to almost identical deficiencies in Apex's opening brief in the Court of Appeals. *See* Limited Partners' brief in the Court of Appeals at 8-10. In this court Apex adds citations to two additional transcript pages (pages 129 and 443) that were not cited in Apex's brief below.

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During the course of the week-long trial, the jury heard testimony from the following witnesses on the fiduciary duty claims:

- Limited Partners Heifetz and Jean Maylack.
- Anthony ("Tony") Novelly, the president of Apex.
- Steven Twele, CPA, accountant for Apex and for 8182.
- Michael Prost, CPA, the Limited Partners' expert witness on damages.
- William Ray Price, the Limited Partners' expert witness on fiduciary duty.

Gary Heifetz was the first fact witness to testify. Heifetz is a 77 year old lawyer. He practiced law for 50 years. [Tr. 159-60].

Heifetz became a limited partner in 8182 in 1984. [Tr. 162]. At the time of trial, Heifetz had been a limited partner in 8182, either directly or through two other limited partnerships, for 31 years. [Tr. 173].[3] The other

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[3] Apex discussed the two limited partnerships, PS I and PS II (alternatively, PSM I and PSM I), and the distribution of their limited partnership interests in 8182 to the Limited Partners, in its substitute brief. *Brief* at 7-8, 9.

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Limited Partners, other than the Maylacks, became limited partners in 8182 with Heifetz in 1984 in the same way. [Tr. 163].

The Limited Partners each made capital contributions to 8182. Heifetz's capital contribution was $212,000. Steven Stone's was $96,000. Sid Stone's was $33,000. These figures are approximations. Spewak's was $6,848. Gershman's was $45,653. The Maylacks' capital contribution was $46,794. [Tr. 71-72].

In March 1999 Heifetz wrote to Apex about his concerns about 8182. These concerns included Apex's failure to provide him with financial statements and information about a refinancing of 8182's mortgage. Heifetz wanted information about the proposed Forsyth Centre project. Heifetz wrote that since 8182's building had been fully occupied since 1993 or 1994, he should be receiving distributions from the substantial cash flows generated by the building. Heifetz asked for a detailed explanation of the reasons why there had been no distributions. [Tr. 181-83; Exhibit 106].

Heifetz received no explanation from Apex. [Tr. 183].

The Forsyth Centre project was a new office building to be built next door to 8182's building. The building was to be owned by a new entity, a

Missouri limited liability company to be named Forsyth Centre Associates LLC ("Forsyth").

Ultimately, Apex became the manager of Forsyth and 8182 became a member.

In May 1999 Heifetz wrote to Apex objecting to a capital call being made upon the 8182 partners. The capital call was to pay to increase the size of 8182's garage from four to 11 stories. The additional parking was going to serve Forsyth's future building. Heifetz did not believe that this was a proper purpose for the use of 8182's funds. [Tr. 183; Exhibit 108].

Although he disagreed with the capital call, Heifetz paid it. He paid his capital call of $51,211 "to avoid losing my interest" in 8182. Heifetz explained that the Agreement provided that if a Limited Partner did not pay a capital call when made, the Limited Partner's interest in 8182 "would be forfeited and the general partner could take it over just by making the capital call, so that all the money that the partner had paid in previously would be lost." [Tr. 185; Exhibit 110].

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Other Limited Partners also objected to the capital call for the same reason as Heifetz, seeing it as financing Forsyth's project with 8182's money. [Tr. 187; Exhibit 113].

Forsyth's building was built on land once owned by 8182. Forsyth did not buy the land from 8182. Instead, Apex had 8182 "contribute" the land to Forsyth in exchange for an ownership interest in Forsyth. Heifetz explained that although the Agreement contemplated that the lot next door to the 8182 building would be developed in the future, it did not specify how it was to be developed. The Limited Partners had not contemplated, however, "that a $4.3 million piece of land would be contributed to a limited liability company." [Tr. 236].

Novelly admitted that this land, which he refers to as "the Christmas tree lot," was contributed by 8182 to Forsyth. It was not a sale. [Tr. 505].

In addition to objecting to contribution of their partnership's land to another entity associated with Novelly, Heifetz and the other Limited Partners objected to Apex's use of 8182's funds to finance the operations of Forsyth's building. Heifetz testified that 8182 loaned up to $2.4 million

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to Forsyth. Heifetz testified that these were funds that should have been used to make distributions out of 8182 to the partners. [Tr. 243-44].

Heifetz's testimony that the loaned funds should have been used instead to make distributions to the Limited Partners was not tied to any contractual provision in the Agreement. It was not related to ACF.

In September 2005 Heifetz wrote again to Apex, this time attempting to exercise the forced-sale provision of the Agreement. Heifetz's letter complained about multiple acts of misconduct by Apex, including its failure to make distributions from 8182, its contribution of 8182's property to Forsyth, and its lending of more than $1 million (at that time) of 8182's money to Forsyth to finance its operations. [Tr. 174-76; Exhibit 114].[4]

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[4] When Heifetz attempted to exercise the forced-sale provision, he had been a limited partner in 8182 for 21 years and had never received a distribution from the partnership. [Tr. 177]. Apex refused Heifetz's demand to be bought out. [Tr. 178-79; Exhibit 115]. Heifetz and the Limited Partners then made a demand attempting to exercise the forced-sale provision collectively. [Tr. 179; Exhibit 116]. Apex did not respond to this demand. [Tr. 179-80]. Apex's refusal to honor the forced-sale provision

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Although Apex contends that the Limited Partners' demand for distributions was based solely on a provision in the Agreement for distribution of ACF, Heifetz's testimony on cross-examination contradicts that contention:

> Q. … What's in the partnership agreement for available cash flow is just a calculation, don't you agree? It's not about how 8182 operates its financial books.
>
> A. Oh, I don't agree. I think it has very much to do with how 8182's operations go on, and who's doing the operating, and what they are doing with the money.

[Tr. 214].

Heifetz did not believe that Apex was basing its decision on whether to distribute money to the Limited Partners on the ACF formula in the Agreement. (Heifetz was correct. *See* below at 23-25.) Heifetz noted that Apex never provided the Limited Partners with annual calculations of

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of the Agreement was the basis of the Limited Partners' breach of contract claims. Those claims were settled after judgment during this appeal.

ACF. [Tr. 216]. Moreover, 8182's financial statements never included reserves, although reserves were referenced in the ACF formula. [Tr. 215].

As noted previously, Heifetz testified that 8182 should have made a distribution rather than lend its cash to Forsyth — again, a perspective on distributions different than simply following the contractual terms of the ACF formula in the Agreement. [*See* Tr. 243-44].

Heifetz described Apex's actions as a squeeze-out, by which Apex starved and tried to force out the Limited Partners. [Tr. 222-23]. The squeeze-out was effected by a provision of the Agreement that allowed Apex to pay a capital call in place of a Limited Partner who failed to pay. "And get the capital interest that had already been paid for for nothing other than the amount of the newly-requested capital call. … That's the way the agreement was written, and that's the way many of the partners were squeezed out." [Tr. 222].

Some former limited partners did not pay capital calls because, "[t]he manner in which the partnership was being operated caused some of the partners not to want to continue their interests." [Tr. 222].

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During the course of this case, Apex bought out two of the limited partners who had been plaintiffs. Both were "distress sales" "for far less than fair market value." One of the limited partners was dying at the time he sold his interest to Apex. [Tr. 218-19].

Apex is now both a general partner and a limited partner in 8182. By the time of trial, Apex had acquired an approximately 16.7% limited partnership interest in 8182 resulting mostly from multiple limited partners defaulting on capital calls. [Tr. 676-77].

PS I and PS II, the original limited partners in 8182, had been dissolved because Apex had made a capital call, and Heifetz and others were concerned that some partners would not pay their share of the capital call. "We were concerned that some of the partners might not want to make the capital calls, and so we dissolved the partnerships, passed out the interests to the individual partners, and many of us made the capital calls. Many of the people tried to make the capital calls, and their money was rejected by the general partner." [Tr. 221].

One person who tried to make the capital call and had her money rejected by Apex was Jean Maylack, the other Limited Partner to testify.

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Maylack is a business lawyer. [Tr. 322]. She became a partner in PS I jointly with her husband Fallon in 1991. [Tr. 323].

Maylack, like Heifetz, never received any distributions from 8182. [Tr. 336].

Maylack was one of a group of former PS I and PS II partners who were not admitted as limited partners in 8182 in 1993. Others who were refused admission by Apex were Gershman, Spewak, and Jeff Michelman. [Tr. 326].

Maylack received the cash call in 1993 previously mentioned. She and her husband paid their share. But it was rejected.

Q. What happened after you paid the cash call?

A. We received a notice that our cash contribution was rejected, and that we had forfeited our interest in the partnership.

[Tr. 326-27].

The Maylacks were given no explanation for the rejection. [Tr. 327]. Maylack was upset that Apex had rejected her check and told her that her entire investment in 8182 was forfeited. [Tr. 353].

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Maylack joined with other former PS I and PS II partners whose capital contributions were rejected by Apex, hired a lawyer, and filed suit in 1993. That suit was resolved in 1997. [Tr. 328]. In the settlement of the lawsuit, Apex finally accepted for 8182 the capital contribution money that Maylack had attempted to pay four years earlier. Pursuant to the settlement, Maylack and her husband were admitted as a Limited Partner in 8182 retroactively as of 1993. [Tr. 328-29; Exhibit 103].[5]

Steven Twele is a CPA. He owns his own accounting practice, named Pinnacle Consulting, Inc. ("Pinnacle"). [Tr. 640]. Twele started Pinnacle in 1991 to serve Tony Novelly, his family, and his entities. [Tr. 641-42]. Novelly is the president of Apex. [Tr. 455].

Twele has worked with almost all of the many companies associated with Novelly. [Tr. 642]. In the 10 years before the trial, Novelly and his companies and other entities have essentially been Twele's only clients.

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[5] As further evidence of Apex's malice, Maylack testified that Apex reneged on the settlement less than a day after it was agreed upon. Maylack and the other limited partner plaintiffs had to file a motion with the court to enforce the settlement. [Tr. 331].

[Tr. 707-08]. Twele is vice president and chief financial officer of numerous companies associated with Novelly, as well as trustee of a couple of Novelly family trusts. [Tr. 498-500; 642-44].

Twele's personal office is located in Apex's suite, just 30 feet from Novelly's personal office. For the past 30 years, Twele and Novelly have talked multiple times almost every day, no matter where in the world Novelly might be. (In addition to offices in St. Louis, Novelly has offices in Boca Raton, Florida and Monte Carlo, Monaco.) Twele acknowledges he lacks independence from Novelly under the standards established by the American Institute of Certified Public Accountants ("AICPA"). [Tr. 647, 707, 709; *see also* Tr. 407, 466, 490-91].

While it was Apex's theme throughout the trial, as well as in this appeal, that the issue of distributions from 8182 was simply an issue of contract, and that Apex merely followed the Agreement in not making distributions to the Limited Partners,[6] the evidence at trial was to the

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[6] During the instruction conference, Apex's attorney put its theory succinctly: "The only duty Apex Clayton had was to follow the wording of the partnership agreement on available cash flow. And accordingly,

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contrary. Although the Agreement calls for an annual ACF calculation to determine distributions [Tr. 125], and although Twele has been 8182's accountant since 1993 [Tr. 644], Twele never calculated ACF for 8182 until after this lawsuit was filed.

Twele first prepared an ACF analysis for 8182 in 2012. [Tr. 661]. He did so at Novelly's request to assist the lawyers in defending this case. This was the first time Twele had been asked to do an ACF analysis. [Tr. 715]. Indeed, the first time Twele ever even looked at the definition of ACF in the Agreement was in March 2012. [Tr. 714].

Novelly, the president of Apex, explained that a calculation of ACF as defined in the Agreement was not necessary to determine whether or not 8182 would make distributions to the Limited Partners. Novelly himself has never calculated ACF as defined in the Agreement. [Tr. 456]. It was not as if the ACF analysis under the Agreement was being performed for Apex by someone other than Twele or Novelly. No one else ever told Twele

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there is no basis to submit fiduciary duty. And furthermore, *we contest whether fiduciary duty even applies in the context of a private dispute*." [Tr. 760 (emphasis added)].

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that they had done an ACF analysis for 8182. [Tr. 716]. Novelly never asked anyone to make an ACF calculation under the formula until 2012. [Tr. 487-88]. *Novelly did not have ACF calculated under the Agreement because he did not feel a need to do so*. [Tr. 489].

Instead, to determine whether to make distributions to the Limited Partners, Novelly got daily reports about the cash held by 8182, its investments, the status of building vacancies and potential tenant renewals, the cost of anticipated tenant improvements, the cost of commissions on leases, and upcoming capital needs of the building. [Tr. 456-59].

Based on all of this business information — and not the ACF formula — Novelly determined whether, in his opinion, there was enough "cash … laying around" to make a distribution to the Limited Partners:

> Q. Sure. It's just, how often are you determining, with looking at the cash, looking at the leasing needs, look at your capital needs, if you have enough cash for distributions?
>
> A. I know every day. I know what the investments are, of any cash that's laying around, and whatnot.

Q. And in your years of running this building, has it ever been close to having enough cash to make a make distributions?

A. No, it has not.

[Tr. 461-62].[7]

Novelly acknowledged that,"There were no distributions." [Tr. 487].

So, when Twele was asked by Novelly, for the purposes of this litigation, to calculate ACF under the Agreement, Twele had to develop an approach that would justify Novelly's decision to never make distributions to the Limited Partners. While Twele never admitted that his purpose was to justify Novelly's conduct, it is evident from the approach Twele took to supposedly calculating ACF that this was indeed his purpose.

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[7] Twele admitted that 8182's cash on its books increased from $2,186,000 in the beginning of 2002 to just a hair under $6 million at the end of 2014. [Tr. 730].

Limited Partners suggest that there would appear to have been enough cash "laying around" to support a distribution to them regardless of what the never-used ACF formula might have shown if considered.

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Michael Prost is a Missouri CPA and managing partner of Mueller Prost, LLC, a CPA firm with 520 employees in three locations. Prost has numerous professional certifications. Prost testified as an expert witness for the Limited Partners. [Tr. 368-70].

Prost testified that Twele's calculations were not consistent with the Agreement's ACF definition. [Tr. 408]. Two of the main problems with Twele's calculations were: (1) Twele subtracted from cash flow for reserves numerous categories of expense not mentioned in the Agreement's ACF formula as being expenses to reserve against; and (2) Twele subtracted many expenses twice — first as a purported "reserve" and then again as an expense — thereby turning years with positive cash flow into years with negative cash flows under his "interpretation" of the ACF formula.

Prost explained that the ACF definition in the Agreement does not reference tenant improvements, leasing commissions, or capital calls for companies in which 8182 was invested. [Tr. 389]. Twele's calculations, however, created fictitious "reserves" for all of these items. [Tr. 389-92]. Yet, while these "reserves" were used by Twele for this lawsuit, 8182 did not actually have any reserves set aside for capital expenditures, tenant

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improvements, leasing commissions, notes payable, or the other items supposedly "reserved" by Twele. The sole exception was a reserve for property taxes. This was required by 8182's mortgage lender. [Tr. 383-85].

Twele admitted that the ACF formula in the Agreement does not mention leasing commissions or tenant improvements. [Tr. 718-19]. Twele admitted that 8182 had not set aside any money in a reserve for repairs and replacements, and that it did not have an account in which money was reserved for working capital. [Tr. 720]. 8182 did not have a reserve for capital projects. [Tr. 501]. No one examining the books and records of 8182 would find any reference to a reserve on its general ledger. [Tr. 722].

In making his ACF calculations, Twele created a paper "reserve" for potential future cash calls by Forsyth. Forsyth's operating agreement allows it to make cash calls on its members, which include 8182. It was up to Novelly whether to have Forsyth make a cash call. The fictional "reserve" Twele set up for this lawsuit used the possibility that Novelly would require 8182 to make additional contributions to Forsyth to reduce ACF by more than $1 million, according to Twele's calculation. [Tr. 731].[8]

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[8] Apex used Forsyth to squeeze-out the Limited Partners in

Twele's calculations double-counted expenses in determining ACF. Prost explained: "He's taking money out of the reserve in year one, and then in year two, when he pays those expenditures, he subtracts those expenditures from cash again." [Tr. 378]. In accounting for expenses, one can either reserve against them or do an actual cash expenditure, but "you don't do both of them. You do one of them." [Tr. 378-79]. "[I]f you reserve for it one year, you don't deduct it again as a capital expenditure the next year." [Tr. 430].

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several ways. One was to avoid distributions they could have received had 8182's lot been sold for $4.3 million rather than contributed to Forsyth. A second was to amplify the tax-burden aspect of the relationship. 8182 owned about 41% of Forsyth. Every year that Forsyth reported income to 8182 on its Form K-1, 8182 reported a proportionate share of this income to the Limited Partners. Forsyth, however, never made distributions to 8182, and 8182 never made distributions to the Limited Partners. As a result, the Limited Partners had to pay taxes on Forsyth's sometimes substantial income without receiving any distributions to cover the tax burden. [Tr. 733].

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Twele, however, did both — he reserved against a future expense (deducting it from cash) and then expensed it once incurred (again deducting it from cash). [Tr. 378-79].

> [I]n Mr. Twele's report … He's taking money out of the reserve in year one, and then in year two, when he pays those expenditures, he subtracts those expenditures from cash again. So he's taking it outside twice of [8182's] cash. And so that goes on year after year.

[Tr. 378].

In addition to reserving expenses not included in the list of expenses to be reserved against, and in addition to deducting many expenses from cash flow twice — once as a reserve and again as an expense — Twele multiplied the squeeze-out by calculating his "reserves" based on the assumption that 8182 would receive no rental income in the upcoming year. Greater reserves are required when one assumes that a landlord, like 8182, will have no rental income, but will continue to have to pay its mortgage and its other expenses. [Tr. 726-28].

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According to Prost, Twele's approach to calculating ACF led Twele to reduce 8182's cumulative cash flow over the 12-year period before trial by a total of $12,332,000. [Tr. 392-93].

Prost opined that, if one properly applied the ACF formula in the Agreement, 8182 had cash to distribute to the Limited Partners as required by the Agreement in six out of the 13 years he examined. [Tr. 377, 379; Exhibit 147].

Based on each Limited Partners' individual ownership percentage in 8182, over that 13-year period each Limited Partner should have received distributions from 8182, under the Agreement's ACF formula, as follows:

> Gary Heifetz has sustained damages of at least $192,814 in undistributed income … Jeffrey S. Gershman has sustained damages of at least $41,521.19 in undistributed income … Jean and Fallon Maylack have sustained damages of at least $42,559.20 in undistributed income … Steven Spewak has sustained damages of at least $6,228.16 in undistributed income … Steven Stone

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> has sustained damages of at least $87,453.99 in undistributed income … [and the Estate of] Sidney Stone has sustained damages of at least $30,362.36 in undistributed income …

[Tr. 393-94; Exhibit 147 at 5, 7 (Prost's expert report, "Background," ¶¶ 31–36; "Independent Calculation of Available Cash Flow")].

The second witness to testify at trial, and the last to be discussed in this brief, was William Ray Price, a former judge of the Missouri Supreme Court. Price testified as an expert witness for the Limited Partners on the subject of fiduciary duty. [Tr. 74-77].

Price explained the concept of fiduciary duty to the jury and expressed his opinion that Apex owed a fiduciary duty to the Limited Partners. [Tr. 80-103]. While helpful to the jury, this portion of his explanations and discussions are not needed by this court.

Price testified that both Twele's and Novelly's deposition testimony led him to conclude that Apex had breached its fiduciary duties in not making distributions from 8182 to the Limited Partners.

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Twele was not independent of Novelly. [Tr. 111-12]. As a result, the Limited Partners were not bound by Twele's conclusions as to whether distributions were owed or not. [Tr. 113].

Because 8182 had sufficient funds to make loans to the Forsyth project, it had sufficient funds to make distributions. [Tr. 116-17].

Discussing Novelly's deposition testimony, Price noted that Novelly admitted he was the general partner of 8182 and determined whether to make distributions from 8182. [Tr. 119]. Novelly's testimony indicated he was acting with animus towards the Limited Partners. [Tr. 120-22]. Novelly had plans to develop the entire block on which 8182's building was located and wanted to recover the almost $7 million he had invested in a small building on the block. [Tr. 122]. This testimony, Price stated, showed that Novelly's "purposes were other than the purpose stated in the partnership agreement." [Tr. 122-23].

Considering all of the facts, Price reached several opinions to a reasonable degree of certainty. Apex, as general partner of 8182, had a fiduciary duty to the Limited Partners. The duty is imposed by law and is

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not waivable. The duty was to, among other things, "always to act for the benefit of the person you're the fiduciary for." [Tr. 123-25].

While Apex breached its fiduciary duty by not making annual ACF calculations [Tr. 132-33], *Apex's duty to make distributions to the Limited Partners was not limited to the ACF provisions in the Agreement. Fiduciary duties "apply to everything," including "when a general partner should make a distribution to the limited partners."* [Tr. 141].

In cross-examination, Apex attempted to get Price to agree that 8182's obligation to make distributions to the Limited Partners was solely derived from and limited to the ACF terms of the Agreement. Price would not agree. *Price testified that in determining what impact the loan Apex caused 8182 to make to Forsyth had on the cash available for distribution, one would need to look at more than just the ACF formula. The first thing one would look at, "is there cash in the bank."* [Tr. 143].

While "cash in the bank" is not part of the formula, "I think that's just common sense," Price testified. [Tr. 144]. "But what I'm saying is, if there was cash to be made for a loan, there was cash receipts to be used for available cash flow." [Tr. 145].

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"[E]ach of the limited partners … might have wanted to make their own determination on what to do with that available money, instead of make a loan to an affiliated Novelly company." [Tr. 146].

Q. Okay. So as to the impact of a loan to available cash flow, we'd have to look at the definition of the formula. The formula.

A. I think there's a number of provisions in the partnership agreement that would apply to that loan.

Q. That — I don't think that was anywhere close to my question, sir.

A. Oh, I'm sorry, I didn't understand your question.

Q. *As to the impact of a loan on available cash flow, we would have to look at the formula for available cash flow?*

A. *I think there were more things you would look at than that. You would look at, is there cash in the bank, and then you'd go through the calculations of*

the formula. But the first thing, you know, is there cash in the bank.

Q. Does — anywhere in Section 9 does it say, in trying to make distribution, look at cash in the bank?

A. No, it doesn't, sir. I don't believe so. I think that's just common sense.

Q. I don't believe it does either. If you want to take time to look, but I'm pretty sure it does not say that.

A. *I'm not quibbling with you about the words, I'm quibbling with you about your argument.*

[Tr. 143-44].

The argument with which Price was "quibbling", was Apex's argument that distributions are to be based solely on the contractual terms of a partnership agreement, including, in this case, the ACF provision of the Agreement. Price, the expert on fiduciary duty, testified to the contrary.

Ironically, the opinions stated by Price, for which he was criticized by Apex's counsel — that is, that in considering whether to make distribu-

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tions to the Limited Partners in 8182, Apex as the general partner is required to look at factors beyond just the ACF formula in the Agreement, such as cash in the bank — closely parallel the opinions expressed by Novelly in his trial testimony. [*See also* Tr. 762 (summarizing evidence supporting non-contractual theory of breach of fiduciary duty for failure to make distributions)].

When Novelly testified about the approach he used in deciding not to make distributions to the Limited Partners, he claimed to have looked at the overall economics and financial condition of 8182 — and not to have looked at all at the ACF provisions of the Agreement. [*Compare* Tr. 143-46 *with* Tr. 456-62, 487-88].

In short, Heifetz, Novelly, and Price all agreed that in determining whether Apex was required to have 8182 make distributions to the Limited Partners, Apex had to look not simply at the ACF provisions of the Agreement, but at all of the economic reality of 8182 — including, in Novelly's words, whether there was "cash … laying around," or, as Price put it, "is there cash in the bank?"

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STANDARD OF REVIEW

> The standard of review for the denial of a judgment notwithstanding the verdict (JNOV) is essentially the same as review of the denial of a motion for directed verdict. When reviewing a circuit court's denial of a judgment notwithstanding the verdict, this Court must determine whether the plaintiff presented a submissible case by offering evidence to support every element necessary for liability. Evidence is viewed in the light most favorable to the jury's verdict, giving the plaintiff all reasonable inferences and disregarding all conflicting evidence and inferences. This Court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion.

Spalding v. Stewart Title Guar. Co., 463 S.W.3d 770, 778 (Mo. 2015) (brackets, citations, and internal quotations omitted).

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ARGUMENT

I. Apex's appeal should be dismissed for lack of appellate jurisdiction, because the June 26 judgment awarding Limited Partners damages on their breach of fiduciary duty claims was a judgment and Apex's notice of appeal was filed more than ten days after the June 26 judgment became final and appealable, in that (a) the June 26 judgment resolved all the claims and rights and liabilities of all the parties, (b) Apex's after-trial motion attacking the June 26 judgment was denied November 5, and (c) Apex's notice of appeal was not filed until more than three months later on February 17. *(Response to Jurisdictional Statement.)*

The court lacks jurisdiction to hear this appeal because Apex failed to timely file its notice of appeal. "Timely filing of a notice of appeal is jurisdictional. A notice of appeal must be filed no later than ten days after the judgment or order being appealed becomes final." *Berger v. Cameron Mut. Ins. Co.*, 173 S.W.3d 639, 640 (Mo. 2005) (citations omitted).

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Here, the judgments from which Apex appeals were entered June 26. The court entered *six separate judgments*, one in favor of each Limited Partner except Jean and Fallon Maylack. The Maylacks owned their limited partnership interest as tenants by the entireties and received a separate joint judgment against Apex. [LF 11-12 (separate docket entries for each judgment); LF 593-94 (judgment)]

Apex filed its authorized after-trial motion July 27, 2015. [LF 13; LF 642-65 (after-trial motion); LF 666-867 (exhibits)]. Apex's motion does not assert that the June 26 judgment was not a judgment. Rather, Apex's motion states that Apex "moves to … vacate the judgment entered in this case on June 26, 2015…" [LF 642]. Apex states: "The Court then reduced the jury's findings to judgment (June 26, 2015 Judgment)." [LF 643].

Apex filed a second "post-judgment motion" on November 11, 2015. [LF 927-59].[9] This second post-judgment motion gives a history of the case, which includes the statement: "The Court then reduced the jury's findings to judgment (June 26, 2015 Judgment)." [LF 928].

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[9] "Apex's Second Post-Judgment Motion" is the description Apex gave the motion in the table of contents of the Legal File Apex prepared.

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The trial court denied Apex's July 27 after-trial motion October 26, 2015. [LF 14; LF 921-23 (order)].When the order denying Apex's after-trial motion was entered, the Limited Partners' judgment against Apex became final. Rule 81.05(a)(2). Apex's notice of appeal was due within 10 days. Rule 81.04(a); *see also Burton v. Klaus*, 455 S.W.3d 9, 12 (Mo. App. E.D. 2014) (notice of appeal from summary judgment filed after subsequent "judgment" awarding attorney fees held untimely "[b]ecause the motion for attorney fees did not extend the time for appeal").

The 10th day after denial of Apex's after-trial motion was November 5, 2015. Apex did not file a notice of appeal by that date. Apex filed its notice of appeal more than three months later, on February 17, 2016. [LF 16, 956].

When Apex filed its notice of appeal, Apex had not yet taken the position that the June 26 judgment was not a judgment. Apex said the June 26 judgment was a judgment in its authorized after-trial motion. [LF 642, 643]. Apex again said it was a judgment in its second post-judgment motion. [LF 928]. But, in its substitute brief filed in this court, as well as in its opening brief in the Court of Appeals (which was filed after Limited

Partners moved to dismiss the appeal for being filed out of time), Apex changed its mind to assert the June 26 judgment was not a judgment:

> On June 26, 2015, following a jury trial, the trial court entered an order entitled "Judgment" (the "June 26 Judgment"), which did not mention or otherwise dispose of Limited Partners' claim for attorneys' fees. (LF 11-12, 593-94.) In addition, the June 26 Judgment did not include a Rule 74.01(b) "no just reason for delay" determination. (LF 593-94.) As a result, the claim for attorneys' fees remained pending, the action was not terminated, and the June 26 Judgment was not an appealable judgment and was subject to revision at any time.

Brief at 2-3.

There is just one little problem with Apex's argument: the Limited Partners did not have a claim pending for attorney fees when the June 26 judgment was entered. *The petition stated no claim for attorney fees, and the Limited Partners' motion for attorney fees was not filed until July 24,*

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2015, after the June 26 judgment was entered. [LF 12, 17-27, 608-13]. When the June 26 judgment was entered, it resolved all claims of all parties then before the court, and thus was a judgment. *See* Rule 74.01.

An examination of the petition filed by the Limited Partners shows that there are no allegations in it for any claim to recover attorney fees from Apex. [*See* LF 17-27]. "Legal fees" are mentioned only in the requests for relief at the end of each count, which requests included legal fees along with pre-judgment interest, costs, and "whatever additional relief the Court deems appropriate under the circumstances." [LF 23, 25, 27].

"It is well established that the form of an action is determined by the substance of the petition, and that the demand for relief, or the prayer, is no part of the cause of action." *State ex rel. Hammerstein v. Hess*, 472 S.W.2d 362, 364 (Mo. 1971). Thus, at the time the June 26 judgment was entered, the petition did not contain any cause of action or allegations entitling the Limited Partners to attorney fees from Apex, and the Limited Partners had not filed a motion seeking attorney fees from Apex. Attorney fees simply were not on the table when the June 26 judgment was entered.

Finality of a judgment should not be affected by the possibility that some new claim, such as a claim for attorney fees, not pled by any party, might be made by someone sometime later.

Indeed, in its second post-judgment motion, filed after the trial court awarded attorney fees, Apex specifically raised as a basis to amend the October 26 filing the fact that attorney fees were not pled in the petition:

> Plaintiffs also are not entitled to recover attorney's fees and expenses because they failed to specifically plead entitlement to them … Attorney's fees are special damages that must be specifically pleaded to be recovered. Rule 55.19; *see also Fisher v. Fisher*, 874 S.W.2d 543, 546 (Mo. App. W.D. 1994) ("since plaintiffs failed specifically to plead attorney's fees, they may not recover them"). … Asserting a claim for attorney's fees in the prayer for relief is insufficient because the prayer is not a part of the petition; therefore, sufficient facts must be pleaded and proved. …

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In this case, Plaintiffs are not entitled to an award of attorney's fees and expenses because nowhere in the body of the petition did they plead facts that demonstrated an entitlement to attorney's fees … Plaintiffs' prayer for relief requested attorney's fees; as noted above, however, it is not a part of the petition for purposes of seeking relief. Plaintiffs attached a copy of the limited partnership agreement to the petition, but failed to attach the 1993 Amendments containing the attorney's fees provision. Therefore, no one referring to the petition, including Apex, would be able to discern the basis of the prayer for attorney's fees and expenses. As such, Apex was surprised when it received Plaintiffs' motion for an award of attorney's fees and expenses, because Apex was not put on notice that Plaintiffs would ultimately invoke the provision in a post-trial motion.

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[LF 27-29 (some citations omitted)].

In short, as Apex made clear, the petition did not include a claim for an award of attorney fees. Thus it is odd to suggest, as Apex now does, that the June 26 judgment was not a judgment because it did not resolve a claim for attorney fees that had not been made.[10]

The cases cited by Apex do not support a contrary conclusion. In *State ex rel. Kinder v. Dandurand*, 261 S.W.3d 667, 669 (Mo. App. W.D. 2008), "After trial, *but before a judgment was entered*, … [wife's] attorney … filed a motion for attorney fees, determination of attorney's lien, and judgment and execution on the attorney's lien" (emphasis added). Thus, the motion for attorney fees in *Kinder* was filed and pending *before* the purported judgment was entered, and thus the purported judgment did not resolve all claims then pending before the court. *Id.* at 671. Indeed, in another appeal the Court of Appeals distinguished *Kinder* on this very ground:

[10] Whether Apex's argument would have been sufficient to obtain a reversal of the attorney fees award on appeal is now of purely academic interest, as the attorney fees issue has since been resolved by settlement.

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> The *Kinder* court held that the judgment was not final because it did not dispose of all pending issues. Therefore, the trial court had jurisdiction to dispose of the lien claim, along with all of the other issues in the underlying case, by entering a timely amended judgment.
>
> The procedural posture of the case at bar is different. *The record demonstrates that the judgment disposing of all claims in the underlying suit had become final before Williams filed his motion to assess his attorney's lien.*

Drake Dev. & Constr. LLC v. Jacob Holdings, Inc., 366 S.W.3d 41, 45 (Mo. App. S.D. 2012) (emphasis added).

The result in *Kinder* is not remarkable and teaches us nothing about what the result should be in the present appeal, where the motion for attorney fees was filed *after* entry of the June 26 judgment.

Ackerson v. Runaway II, Inc., 961 S.W.2d 933 (Mo. App. S.D. 1998), also provides no support to Apex's position. In that case, *A* sued *B*, and *B*

filed a third-party petition against *C*. The third-party petition demanded indemnity from *C* for any judgment entered against *B* in favor of *A*, and also demanded indemnity from *C* for *B*'s attorney fees and expenses of litigation incurred in the action brought by *A*. *Id.* at 934. The trial court entered a default judgment in favor of *B* due to *A*'s failure to appear for trial. The judgment failed, however, to mention or dispose of the third-party petition. *Id. A* appealed. The Court of Appeals dismissed the appeal, holding that the judgment failed to resolve all issues for all parties, in that *B*'s claim for indemnity of its attorney fees and litigation expenses was still outstanding, and therefore the mis-captioned "judgment" was not final and appealable. *Id.* at 935.

The result in *Ackerson* is also not remarkable and teaches us nothing about what the result should be in the present appeal, where the petition did not assert a claim for attorney fees.

A third case cited by Apex is *Rheem Mfg. Co. v. Progressive Wholesale Supply Co.*, 28 S.W.3d 333 (Mo. App. E.D. 2000). *Rheem* presents a different issue than that presented here. In *Rheem*, both sides filed authorized after-trial motions. "Appellant filed a motion for judgment notwithstand-

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ing the verdict. Rheem filed a motion for judgment notwithstanding the verdict or alternatively for additur and a motion to alter or amend the judgment to include awards of attorney fees, costs, and prejudgment interest." *Id.* at 338.

The trial court in *Rheem* heard argument on the motions, denied both JNOV motions, and took under advisement the motion to alter or amend the judgment, which included a request for attorney fees. *Id.* No one in the case, including the appellate court, said that the motion to alter or amend was not an authorized after-trial motion. The trial court later entered its amended judgment, which awarded Rheem attorney fees and costs as requested in its motion to alter or amend the judgment. *Id.*

Appellant in *Rheem* argued that the trial court lacked authority to enter the amended judgment, contending that Rule 81.05 (1999) required all of the after-trial motions to be disposed of at the same time, and that therefore Rheem's motion to amend the judgment should have been deemed denied when the JNOV motions were denied. Appellant contended that, since the motion to amend should have been deemed denied, the initial judgment became final with that deemed denial and the trial court

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lacked jurisdiction to later issue its amended judgment awarding attorney fees. *Id.* at 343.

The Court of Appeals disagreed, holding that the motion taken under advisement was not deemed denied when the other after-trial motions were denied and that the judgment did not become final until the attorney fees and expenses issues raised in the motion were resolved. *Id.*

Rheem is distinguishable from the present case because the request for attorney fees there was made in an authorized after-trial motion that kept the initial judgment open for 90 days until the fee issue was resolved. Here, in contrast, while there was a motion for attorney fees, that motion was not part of an authorized after-trial motion.

Bituminous Cas. Corp. v. Moore, 64 S.W.3d 356 (Mo. App. S.D. 2002), also does not support Apex's position. In *Bituminous*, the court noted that the prevailing party's declaratory judgment claim requested an award of attorney fees, and held that because the trial court did not resolve the attorney fees, its judgment was not final and the appeal must be dismissed. *Id.* at 357-58. Noting that there was no express provision for attorney fees in the declaratory judgment act, the appellate court stated that courts

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have nonetheless awarded attorney fees in declaratory judgment cases under "very unusual circumstances." This showed that "the attorney fee issue raised by Bituminous was not wholly frivolous or nonexistent, yet the trial court did not dispose of the issue, nor address it in any manner." *Id.* at 358. The appellate court therefore found the judgment not final and appealable, and dismissed the appeal. *Id.*

One cannot tell whether the appellate court found the judgment not final because Bituminous had sought attorney fees at trial — or because a request for attorney fees had been made in the petition. If it was the former, then the decision is in line with the other cases and is contrary to Apex's position. If it was the latter, then one still cannot know whether the decision may support Apex's position because one cannot tell whether a claim was pled for attorney fees, or whether attorney fees were merely mentioned in a request for relief. The opinion does not say.

Limited Partners suggest that any decision that holds that the mere mention of attorney fees in a request for relief is sufficient to raise the issue and require a decision by the trial court prior to judgment (if that is what happened in *Bituminous*) is misguided and should not be followed.

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Requiring our trial courts to rule on every request for attorney fees made in a request for relief, but not pled and not brought to the court's attention by motion or at trial, would be unworkable from a practical perspective.

As the court knows from experience, many lawyers include a request for attorney fees in every count of every petition as a matter of routine. These requests for fees are tacked onto tort counts and contract counts and statutory counts without regard for whether there might be any possible basis in the law for an award of fees. Opposing counsel generally never bother to move to strike these baseless requests for attorney fees because it would be a waste of time (and of the client's money) to brief and argue a motion to strike a ritualized request for fees that, more likely than not, will never be seen or heard from again.

If Apex's apparent position is accepted, and if every ritualized request for attorney fees in every petition has to be ruled on before judgment can be entered, such a requirement will lead to a huge and pointless waste of legal resources, both by the courts and by the lawyers on all sides. No law requires such a result, and Apex has not expressly requested such an absurd extension of the law.

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II. Apex's appeal should be dismissed for lack of appellate jurisdiction notwithstanding the October 26 filing captioned "amended judgment," because the October 26 filing was not an amended judgment that would restart the clock for the filing of a notice of appeal, in that the trial court had no authority to amend the June 26 judgment on October 26 because (a) the trial court lost its inherent power to amend the June 26 judgment 30 days after it was entered, (b) Apex's after-trial motion had been denied, giving the trial court no power to amend the June 26 judgment, and (c) the Limited Partners' post-judgment attorney fees motion was not an authorized after-trial motion that would give the trial court power to amend the June 26 judgment. *(Response to Jurisdictional Statement.)*

Apex timely filed its after-trial motion July 27, 2015. The trial court denied Apex's motion October 26, 2015. [LF 14; LF 921-23 (order)].

Shortly before Apex filed its after-trial motion, the Limited Partners filed their motion for attorney fees. [LF 12; LF 608-14 (motion); LF 615-41

(exhibits)]. A motion for attorney fees is not an authorized after-trial motion that can extend the time in which to file a notice of appeal.[11] *Burton*, 455 S.W.3d at 11-12, *following Glandon v. Daimler Chrysler Group*, 142 S.W.3d 174, 178 (Mo. App. E.D. 2004); *see also Taylor v. United Parcel Service, Inc.*, 854 S.W.2d 390, 392 n.1 (Mo. 1993) ("Under the current Supreme Court Rules, an 'authorized after-trial motion' is a motion for which the rules expressly provide"; listing six such motions, which do not include a motion for attorney fees). That is because a motion for attorney fees, like a motion for pre-judgment interest, concerns matters incidental to the judgment. *Payne v. Markeson*, 414 S.W.3d 530, 539 n.9 (Mo. App. W.D. 2013).

The trial court granted the motion for attorney fees. [LF 921, 923]. The trial court entered the October 26 filing the same day. [LF14-16; LF

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[11] The motion was captioned, "Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses per the Parties' Contractual Agreement." [LF 608]. Nowhere in the motion do the Limited Partners ask that the June 26 judgment be amended or modified. The motion does not cite any rule concerning the altering of a judgment. [LF 608-13].

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924-26]. Although captioned “Amended Judgment,” it was not. The October 26 filing did not amend any judgment. Rather, it was a post-judgment order that awarded attorney fees *directly to the Limited Partners’ lawyers*. [*Compare* LF 593-94 *with* LF 924-26].[12]

Although the motion for attorney fees was not an authorized after-trial motion, a trial court retains power to award attorney fees after judgment is entered so long as the fees are awarded while the court retains jurisdiction over the judgment either during the 30-day period provided by rule or during the extended period resulting from a party’s filing of an authorized after-trial motion. *See McLean v. First Horizon Home Loan, Corp.*, 369 S.W.3d 794, 800 (Mo. App. W.D. 2012).

A comparison of the June 26 judgment with the October 26 filing shows that none of the individual judgments entered in favor of the Limited Partners in June was altered in October.

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[12] While the propriety of awarding attorney fees directly to the lawyers, who were not parties, might be a suitable issue to raise on appeal, Apex did not raise the issue in its second post-judgment motion and, in any case, the attorney fees issues were settled during this appeal.

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The June 26 judgment stated in its entirety:

> Pursuant to the Verdicts of the Jury herein, Judgment is hereby entered, as follows, to-wit:
>
> 1.) In favor of Plaintiff Gary S. Heifetz and against Defendant Apex Clayton, Inc. in the sum of $1,348,793.00 for his ownership interest plus $1,000.00 for breach of fiduciary duty plus $1,346,000.00 for punitive damages, aggregating a total Judgment of $2,695,793.00;
>
> 2.) In favor of Plaintiff Steven M. Stone and against Defendant Apex Clayton, Inc. in the sum of $611,767.00 for his ownership interest plus $1,000.00 for breach of fiduciary duty plus $610,000.00 for punitive damages, aggregating a total Judgment of $1,222,767.00;
>
> 3.) In favor of Plaintiffs Jean Maylack and Fallon Maylack and against Defendant Apex Clayton, Inc. in the sum of $297,714.00 for their

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ownership interest plus $1,000.00 for breach of fiduciary duty plus $297,000.00 for punitive damages, aggregating a total Judgment of $595,714.00;

4.) In favor of Plaintiff Jeffrey S. Gershman and against Defendant Apex Clayton, Inc. in the sum of $290,453.00 for his ownership interest plus $1,000.00 for breach of fiduciary duty plus $290,000.00 for punitive damages, aggregating a total Judgment of $581,453.00;

5.) In favor of Plaintiff Estate of Sidney L. Stone and against Defendant Apex Clayton, Inc. in the sum of $212,394.00 for its ownership interest plus $1,000.00 for breach of fiduciary duty plus $212,000.00 for punitive damages, aggregating a total Judgment of $425,394.00;

6.) In favor of Plaintiff Steven B. Spewak and against Defendant Apex Clayton, Inc. in the sum of

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> $43,568.00 for his ownership interest plus $1,000.00 for breach of fiduciary duty plus $45,000.00 for punitive damages, aggregating a total Judgment of $89,568.00.
>
> 7.) Plaintiffs shall transfer, assign and convey all right, title and interest in and to their ownership interests in the 8182 Maryland Associates Limited Partnership to the General Partner, Apex Clayton, Inc.; simultaneously, and in exchange therefor, Apex Clayton, Inc. shall pay over to Plaintiffs the aforesaid values of their ownership interests.
>
> Court costs assessed to Defendant Apex Clayton, Inc.

[LF 593-94].[13]

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[13] Throughout its brief, Apex continually refers to breach of contract "damages" awarded to the Limited Partners. It is clear, however, from the jury instructions and paragraph 7 of the June 26 judgment, that

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The October 26 filing was identical to the June 26 judgment in all respects relevant to the issues remaining on appeal. In comparing the two documents, one notes the following:

First, the initial, unnumbered paragraph of the June 26 judgment was changed, with the October 26 filing beginning:

> Pursuant to the Verdicts of the Jury herein*, and Plaintiffs' Motion For An Award Of Attorneys Fees And Expenses,* Judgment is hereby entered *amending the Judgment entered on June 26, 2015*, as follows, to wit:

[LF 924 (italics denote text new in the October 26 filing)].

Second, the six numbered paragraphs in the June 26 judgment stating the judgments awarded to each of the individual Limited Partners were restated without change in the October 26 filing.

Limited Partners did not get damages. Rather, the jury determined the value of each Limited Partner's interest, and the June 26 judgment ordered Limited Partners to convey their interests in 8182 to Apex in exchange for Apex paying the value of those interests as set by the jury.

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Third, the paragraph numbered 7 in the June 26 judgment was renumbered 10 in the October 26 filing, but was otherwise unaltered.

Fourth, the October 26 filing added three new paragraphs not found in the June 26 judgment. These paragraphs state, in their entirety:

> 7.) In favor of Green Jacobson, P.C. and against Defendant Apex Clayton, Inc. in the sum of $135,388.12 as and for attorneys fees herein;
>
> 8.) In favor of the Law Offices of Martin Green, P.C. and against Defendant Apex Clayton, Inc. in the sum of $49,241.25 as and for attorneys fees herein;
>
> 9.) In favor of Jacobson, Press and Fields, P.C. and against Defendant Apex Clayton, Inc. in the sum of $54,382.88 as and for attorneys fees herein, together with expert witness expense of $74,018.60, aggregating a total Judgment of $128,401.48.

[LF 925].

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The tenth day after denial of Apex's after-trial motion was November 5, 2015. Apex did not file a notice of appeal by that date. Instead, five days after the deadline for filing its notice of appeal, Apex filed a second, duplicative, post-judgment motion. [LF 16; LF 927-59 (second post-judgment motion)].

The second post-judgment motion was, with respect to the breach of fiduciary duty claims now on appeal, essentially a motion to reconsider the trial court's denial of Apex's first after-trial motion. The two motions raised the exact same issues in exactly the same way. "Generally speaking, motions for reconsideration have no legal effect because the Missouri Rules of Civil Procedure do not recognize such a motion." *Agnello v. Walker*, 306 S.W.3d 666, 674 (Mo. App. W.D. 2010); *see also Beck v. Patton*, 309 S.W.3d 436, 439 n.4 (Mo. App. W.D. 2010) (same lack of legal effect for "renewed" motions). It seems obvious that a motion without legal effect cannot, by definition, effect a retention of jurisdiction over a case in the trial court, yet that is exactly what Apex's position on the timeliness of its notice of appeal would require.

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Apex justified its filing of a second post-judgment motion instead of a notice of appeal by stating: "Under Rule 78.07(d), an amended judgment 'shall be deemed a new judgment for all purposes.' As such, this motion is necessary to challenge the amended judgment and preserve issues for appeal." [LF 927].

Apex was mistaken. The October 26 filing was not an amended judgment under Rule 78.07(d) because the trial court had denied Apex's after-trial motion and therefore had no authority to amend the judgment. "Merely calling an order a 'judgment' does not make it one." *Dangerfield v. City of Kansas City*, 108 S.W.3d 769, 776 (Mo. App. W.D. 2003).

Similarly, merely calling an order an "amended judgment" also does not make it one. A trial court cannot amend a judgment more than 30 days after it is entered except as requested in an authorized after-trial motion. "Once the thirty day period in Rule 75.01 expires, a trial court's authority to grant relief is constrained by and limited to the grounds raised in a timely filed, authorized after-trial motion." *Massman Constr. Co. v. Missouri Highway & Transp. Comm'n*, 914 S.W.2d 801, 802-03 (Mo. 1996); *Developers Sur. & Indem. Co. v. Woods of Somerset, LLC*, 455 S.W.3d 487,

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491 (Mo. App. W.D. 2015) ("This continued authority is limited to remediating matters raised in the motion"). A trial court's attempt to amend a judgment does not amend the judgment if an amendment is not permitted under the rules. *Seitz v. Seitz*, 107 S.W.3d 478, 485, 488 (Mo. App. S.D. 2003).

Apex's proper course of action upon denial of its (first) after-trial motion was to file a notice of appeal. Its notice of appeal could have included an appeal from the award of attorney fees. Because the attorney fees were awarded by the trial court without a jury, "neither a motion for a new trial nor a motion to amend the judgment or opinion [was] necessary to preserve any matter [about the attorney fees] for appellate review." Rule 78.07(b).

Apex should not be surprised that its notice of appeal was filed out of time or that the Court of Appeals dismissed the appeal. *The Limited Partners warned Apex on the first page of their opposition to its second post-judgment motion that the judgments in favor of the Limited Partners were already final for appeal:*

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> The first 24-1/2 pages of the [second post-judgment] motion essentially repeat … contentions made by Apex Clayton in its first after-trial motion. Apex Clayton says it is repeating these contentions to preserve the issues for appeal.… It is not necessary. Apex Clayton preserved its issues for appeal when it filed its first after-trial motion. *The judgment became final when that motion was denied October 26, 2015. Rule 81.05(a)(2)(B).*

[LF 960 (opposition to second after-trial motion; emphasis added)].

"Additional motions filed after the judgment becomes final do not extend the jurisdiction of the trial court." *Spino v. Bhakta*, 174 S.W.3d 702, 706 (Mo. App. W.D. 2005).

When the Limited Partners warned Apex that the judgment was already final for purposes of appeal, Apex's deadline to file its notice of appeal had expired only two weeks earlier. Having been alerted by the Limited Partners that the judgment was already final for appeal, Apex could have — should have — asked the Court of Appeals to enter a special

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order allowing Apex to appeal the judgment out of time. While such a special order is not a matter of right, the barrier to obtaining one is low. *See* Rule 81.07(a); *accord Burton*, 455 S.W.3d at 13 n.3.

Apex chose not to heed the Limited Partners' warning that the judgment was final. Apex never sought a special order to file its notice of appeal out of time. The six-month window during which Apex could have filed a motion for leave to file a late notice of appeal expired April 27, 2016. Apex can no longer seek leave to appeal the judgment. *Dudley v. Southern Union Co.*, 327 S.W.3d 19, 21 (Mo. App. W.D. 2010).

Apex's reliance on Rule 78.07(d) to justify its late filing of its notice of appeal based on the entry of the October 26 filing is misplaced. *Rule 78.07(d) requires that an actual amended judgment be entered*. Here, no matter how captioned, the October 26 filing was not an actual amended judgment. The trial court had no power to make alterations to the judgment beyond those requested in Apex's authorized after-trial motion. *State ex rel. Missouri Parks Assoc. v. Missouri Dept. Nat'l Resources*, 316 S.W.3d 375, 383-84 (Mo. App. W.D. 2010). Apex did not request an award of attorney fees to the Limited Partners, and the Limited Partners' motion

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was not an authorized after-trial motion. The trial court could not amend the judgment to add attorney fees in response to either motion. The October 26 filing is just a post-judgment order awarding attorney fees.

The case law makes it clear that the October 26 filing was not an amended judgment for purposes of extending the time within which Apex had to file its notice of appeal. *Burton,* 455 S.W.3d 9, held that a post-judgment motion for attorney fees is not an authorized after-trial motion that extends the time in which to file a notice of appeal. *Burton* arose out of a contract for the sale of residential property. The real estate contract included a provision that stated, "in the event of litigation between the parties, the prevailing party shall recover, in addition to damages or equitable relief, the cost of litigation including reasonable attorney's fees." *Burton*, 455 S.W.3d at 10. The trial court entered summary judgment in favor of defendant on all counts November 21, 2011. On December 15, 2011, defendant filed a motion for attorney fees and expenses based on the contract provision. The trial court entered an order and judgment February 24, 2012 awarding defendant some of the fees and expenses

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requested. The plaintiffs filed a notice of appeal March 5, 2012. The notice stated that plaintiffs were appealing the summary judgment. *Id.*

This court issued an order to show cause why the appeal should not be dismissed as untimely filed. Appellants responded that the motion for attorney fees was a motion to amend the judgment because defendant had requested attorney fees in her answer, and that the attorney fees motion therefore held the judgment open. *Id.* at 11. The court rejected that argument, holding that because the motion for attorney fees was not an authorized after-trial motion extending the time to appeal, the notice of appeal was filed too late to appeal the summary judgment. *Id.* at 12.

Dangerfield, 108 S.W.3d 769, also demonstrates that the October 26 filing did not create an amended judgment under Rule 78.07(d). *Dangerfield* was a case against the City of Kansas City that alleged a dangerous condition of city property. The trial court entered judgment in favor of the plaintiff following a jury verdict in the sum of $269,866.67. The City filed two motions. First, the City filed a motion to reduce the judgment to $100,000 in conformity with Section 536.610.2, which limits the liability of public entities for tort damages. The following day the City filed a

motion for judgment notwithstanding the verdict or, in the alternative, a new trial. *Dangerfield*, 108 S.W.3d at 771.

The trial court issued a ruling, captioned an "Order," denying the City's motion for JNOV or new trial, and granting the motion to cap damages at $100,000. This ruling was issued November 29, 2001. On December 10, 2001, the trial court issued another ruling, identical to the November 29 "Order," except that it was now designated a "Judgment." *Id.* at 771. Ten days later, the City re-filed a verbatim copy of its earlier motion for new trial. This time, the trial court granted the City's second motion for a new trial, finding jury misconduct. Plaintiff appealed the trial court's decision to grant a new trial. *Id.* at 772.

The court in *Dangerfield* went through a detailed analysis of the time line and applicable rules. *Id.* at 772-74. The key to its analysis was determining whether the November 29 order reducing the judgment amount from $269,866 to $100,000 "created an amended judgment"; if it did, then the City could file its second after-trial motion. *Id.* at 774.

The court held the order did not create an amended judgment. *Id.* Reducing the judgment to comply with the statutory limit functioned

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as a *remittitur*. "The entry after *remittitur* [*i.e.*, the actual remitting of the judgment] is a correction of the judgment originally entered and not actually a new judgment. The appealable judgment is the original judgment (as corrected of course) but still the appeal is from the original judgment, that is[,] from what remains of it." *Id.* at 775 (brackets in original), *quoting Steuernagel v. St. Louis Pub. Serv. Co.*, 238 S.W.2d 426, 429 (Mo. 1951).

Here, the individual judgments awarded to the Limited Partners were not reduced or otherwise changed from the June 26 judgment to the October 26 filing. With respect to these judgments, as in *Dangerfield*, the October 26 filing was also "not actually a new judgment." *Id.*

Dangerfield speaks directly of the inefficiencies and redundancies that would result from treating an order following a judgment as an amended judgment:

> Treating the August 22nd judgment *cum* November 29th order as a new, amended judgment would risk creating a policy nightmare. A party could, as the City has done, move to amend the judgment to

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> comply with, say, a statutory cap and then file a motion for a new trial. If the court denied the latter and granted the former in an (aptly denominated) order, the party could then move for the order to be re-branded a "judgment." Then the party could, as the City has done here, make the identical motion for new trial. Alternatively, if the trial court had initially denied the party's post-trial motions in a so-denominated "judgment," the party could turn around and file the exact same motion for new trial, though it would be rather futile to do so (unless one were interested in delaying execution of the judgment or one discovered more evidence to substantiate the motion for new trial). After denying the motion, the process could be repeated *ad infinitum*.

Id. at 775.

Glandon, 142 S.W.3d 174, is also instructive on the effect of motions for attorney fees on a judgment's finality. In *Glandon*, plaintiff bought a

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new automobile that had multiple defects. After suit was filed, defendants, in a settlement offer, "offered to make the necessary repairs and to pay $6,500, including attorneys' fees." *Glandon*, 142 S.W.3d at 176. Plaintiff did not respond. Defendants then made a formal offer of judgment for $6,500, which plaintiff accepted. Judgment was entered and paid two weeks later. Plaintiff then sought attorney fees under the federal Magnuson-Moss Warranty Act. The request for attorney fees was made less than 30 days after entry of the judgment. The trial court denied the request 37 days after entry of the judgment. Plaintiff appealed the denial two weeks later. *Id.*

The appellate court dismissed plaintiff's appeal, finding that her notice of appeal was filed out of time. "Because Glandon's petition for attorneys' fees did not qualify as an authorized after-trial motion that could extend the time beyond October 9, 2003, and the trial court did not rule on the motion until October 16, 2003, the September 9, 2003 judgment became final thirty days later on October 9, 2003, and no notice of appeal was filed within ten days of that date. Thus, Glandon's October 31, 2003 notice of appeal was untimely." *Id.* at 178.

While *Missouri Parks*, a case on which Apex relies, states, that, "'[u]nless an amended judgment shall otherwise specify, an amended judgment shall be deemed a new judgment for all purposes,' including the time from which a party can file an authorized post-trial motion from the amended judgment," *id.* at 381-82 (citing Rule 78.07(d)), it did so in a context where a trial court had amended a judgment after *granting* authorized after-trial motions requesting the changes made. *Id.* at 383.

Notably, *Missouri Parks* held that a portion of an amended judgment that added new relief not requested in an authorized after-trial motion "constitute[d] an unauthorized modification" of the prior judgment because it was entered "after the trial court lost its general authority to modify the judgment." *Id.* at 383-84. The court struck down these purported amendments of the earlier judgment as unauthorized. *Id.*

Thus, unlike the present appeal, *Missouri Parks* involved an actual amended judgment — not just an order awarding attorney fees mislabeled as an amended judgment. And, even in that context, those portions of the amended judgment that exceeded the scope of relief requested in the after-trial motion were struck down as outside the trial court's authority.

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Consequently, under the rules and applicable case law, Apex's notice of appeal was untimely. The court lacks jurisdiction to hear Apex's appeal. The appeal should be dismissed.

III. A general partner in a limited partnership has a fiduciary duty to make distributions to its limited partners independent of the specific contractual terms of their partnership agreement; a breach of the duty to make distributions can be submitted as a tort claim even if the partnership agreement addresses distributions. *(Response to Point Relied On No. 1.)*

Relying solely on *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896 (Mo. 1990), and on a single paragraph of the Petition, without regard for any of the testimony at trial supportive of the Limited Partners' claims, Apex argues that the Limited Partners "failed to specifically plead or prove any fiduciary duty separate from and independent of Apex's contractual obligations," *Brief* at 30, and that the Limited Partners' breach of fiduciary duty claim therefore fails.[14]

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[14] Apex's brief slides frequently between assertions of failure to plead and failure to prove. These are different issues and their conflation

Apex's argument fails to comply with the standard of review because it does not set forth the evidence favorable to the jury's verdict, giving the Limited Partners the benefit of all reasonable inferences. *Spalding*, 463 S.W.3d at 778. For this reason alone, Apex's point relied on should be denied. It should also be denied for the following reasons:

Apex misstates the record. While the petition asserts Apex's fiduciary duty to make distributions under the Agreement, the evidence at trial was not limited to the ACF formula in the Agreement, and the verdict-directing instruction on breach of fiduciary duty did not reference the ACF formula or the Agreement.

Apex did not raise its *Peterson* argument in a pretrial motion directed at the pleadings, raising it for the first time in a motion for directed

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by Apex confuses the analysis. Limited Partners adduced sufficient evidence at trial to prove the common-law breach of fiduciary duty claim submitted to the jury and upon which judgment was entered. This evidence came in without objection, often through Apex's cross-examination and the testimony of Apex's President, Tony Novelly. Apex's pleadings arguments are not within the scope of any of its points relied on.

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verdict at the close of plaintiffs' evidence. [LF 533, 535]. Thus, to the extent that Apex's argument is directed to the pleadings — and it appears that the argument is directly primarily to a perceived defect in the pleadings notwithstanding the absence of an applicable point relied on — the argument is essentially waived because if Apex had raised the argument in a motion to dismiss, the petition could have been easily amended to satisfy any defect in pleading. "A petition will be found sufficient after verdict if after allowing all reasonable inferences and matters necessarily implied, there are sufficient facts to advise the defendant, with reasonable certainty, as to the cause of action it is called upon to meet and bar another action for the same subject matter." *Browning v. Salem Mem'l Dist. Hosp.*, 808 S.W.2d 943, 946 (Mo. App. S.D. 1991).

Moreover, the common-law fiduciary duty theory came in without objection through Apex's cross-examination of Limited Partners' witnesses and through Novelly's testimony. "Under Supreme Court Rule 55.33(b), issues not raised in the pleadings are considered, in all respects, as if they had been raised by the pleadings when they are tried by implied or express consent of the parties. Trial by implied consent allows for issues not raised

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in the pleadings to be determined by the trial court when the party raising the issue offers evidence without objection by another party." *Bone v. Director of Revenue*, 404 S.W.3d 883, 886 (Mo. 2013).

The evidence in support of the breach of fiduciary duty judgment is described in Limited Partners' statement of facts. Although Apex repeatedly attempted to get witnesses to agree that the Limited Partners' right to receive distributions was based solely on the Agreement, its efforts were generally unsuccessful. To the contrary, the evidence showed that both the Limited Partners and Apex looked to 8182's overall financial performance, without consideration of the ACF formula in the Agreement, to see whether 8182 was in a position to make distributions to the Limited Partners. [*See, e.g.*, Tr. 141-46 (Price); Tr. 214-16, 243-44 (Heifetz); *see also* Tr. 762 (summarizing evidence supporting non-contractual theory of breach of fiduciary duty for failure to make distributions)].

Novelly testified that a calculation of ACF as defined in the Agreement was not needed to determine whether to make cash distributions to the Limited Partners. Novelly felt no need to calculate or have anyone calculate ACF. [Tr. 456, 487-89]. Instead, Novelly reviewed the condition

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of 8182's business daily to see if there was enough "cash … laying around" to permit a distribution to the Limited Partners. [Tr. 456-59, 461-62]. Novelly concluded daily that there was not.

Apex misstates the law when it states that a limited partner is limited to his contractual remedies and cannot assert a claim in tort for breach of fiduciary duty if the general and limited partners are parties to a written partnership agreement. The rule that Apex suggests would free general partners from their fiduciary duties, and reduce them to the standards applicable to businessmen in arm's-length business transactions to the extent that they reduce their fiduciary relationships to writing. This is not the law. "Because of the fiduciary relationship, fiduciary principles modify any contract between the parties. This allows the breach of fiduciary duty to give rise to claims in tort, as well as contract." *Zakibe v. Zakibe*, 28 S.W.3d 373, 385 (Mo. App. E.D. 2000).

The nature of fiduciary duties, and the need of the fiduciary to subordinate his own interests to those who hold him in trust, has been established in the law for centuries:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

In re Cupples, 952 S.W.2d 226, 235 (Mo. 1997), quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.).

"A partner's fiduciary duty includes the duty to be candid concerning business opportunities, the duty to be fair, the duty not to put self-interests before the interests of the partnership, and the duty not to compete with the partnership in the business of the partnership." *Id.* at 235-36.

Because Apex owed Limited Partners a fiduciary duty to make distributions arising from their status as general partner and limited partners, respectively, as part of its "duty to be fair, the duty not to put self-interests

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before the interests of the partnership," which duty exists independently of the Agreement, and because there was probative evidence at trial establishing that Apex breached its duty to make distributions, the trial court did not err in submitting the Limited Partners' breach of fiduciary duty claim to the jury or in denying Apex's motion JNOV on the grounds asserted in Apex's first point relied on.

The trial court described the Limited Partners' theory during the instruction conference:

> [Y]our position and your colleague's is that the law imposes a standard of adherence to fiduciary duties, and that is part of the law always, can't be taken away, and exists in any event in our body of law, and so there is this obligation apart from what is contained specifically [in the Agreement].

[Tr. 764].

The evidence at trial supported submission of the Limited Partners' claim for a breach of a common-law fiduciary duty of a general partner to make distributions. This is true regardless of whether the damage

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numbers presented to the jury were based on the ACF formula in the Agreement or not.

Limited Partners' verdict-directing instruction for breach of fiduciary duty stated:

> INSTRUCTION NO. 9
>
> Your verdict must be for Plaintiffs and against Defendant Apex Clayton, Inc. on Plaintiffs' claim for breach of fiduciary duty if you believe:
>
> First, Defendant did not make distributions to Plaintiffs from the 8182 Maryland Associates Limited Partnership in 2005 or thereafter when there was cash available for distribution, and
>
> Second, in failing to make distributions as submitted in Paragraph First, Defendant failed to act in the best interests of the Plaintiffs or failed to act in a manner which placed the interest of the Plaintiffs above those of Defendant, and

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> Third, as a direct result, Plaintiffs sustained damages
>
> Unless you believe that Plaintiffs are not entitled to recover by reason of Instruction Number 10.

[LF 557]. Apex's affirmative defense instruction stated:

> Jury Instruction No. 10
>
> Your verdict must be for Defendant Apex Clayton if you believe that Apex Clayton has acted in good faith and without fraud, intentional misconduct or gross negligence in determining Available Cash Flow as the term is used in the Partnership Agreement.

[LF 558].

Apex's first point relied on is directed at the third element in Instruction No. 9. That is, Apex asserts that the Limited Partners failed to establish they were damaged by Apex's breach of its fiduciary duty because the breach of fiduciary duty claim is solely contractual in origin, in that

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Apex as a general partner allegedly had no obligation to make distributions to the Limited Partners except as provided by the Agreement, and because any unpaid distributions were incorporated into "damages" received on the breach of contract claims.

During the instruction conference, Apex stated its position as:

> The only duty Apex Clayton had was to follow the wording of the partnership agreement on available cash flow. And accordingly, there is no basis to submit fiduciary duty. *And furthermore, we contest whether fiduciary duty even applies in the context of a private dispute.*

[Tr. 760 (emphasis added)].

Apex is wrong. The fiduciary duty a general partner owes to its limited partners goes beyond what is stated in the partnership agreement. Moreover, the verdict-directing instruction does not premise Apex's liability for breach of fiduciary duty on breach of any particular contractual term. Rather, the claim was submitted based on the fiduciary duties inherent in the relationship of general partner to limited partner.

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"When breach of fiduciary duty is asserted as a tort claim, as here, the proponent must establish that a fiduciary duty existed between it and the defending party, that the defending party breached the duty, and that the breach caused the proponent to suffer harm." *Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 15 (Mo. 2012).

These were the elements Instruction No. 9 required the jury to find.

The fiduciary duties owed by a general partner to its limited partner investors include a fiduciary duty to make distributions. The general partner violates his fiduciary duties to the limited partners if he withholds distributions to them in order to, among other things, squeeze them out of the partnership and acquire their partnership interests at a low price. *Labovitz v. Dolan*, 545 N.E.2d 304, 305 (Ill. App. 1st Dist. 1989), *appeal denied*, 550 N.E.2d 557 (Ill. 1990).

Labovitz involved a successful cable TV programming limited partnership. The partnership agreement gave the general partner, Dolan, sole discretion to determine the availability of cash flow for distribution to the partners. *Id.* at 306. Although the partnership made large profits, Dolan reinvested the profits in the business — and lent funds to his affiliates —

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rather than make more than nominal distributions to his partners. "[T]he limited partners were required to pay taxes on these earnings, but Dolan did not distribute cash in an amount sufficient to cover their tax liability. Dolan did, however, lend [partnership] money to other companies he controlled." *Id.*

Dolan offered his limited partners the opportunity to sell their interests to him at a profit, although at prices well below book value. The sales offered the limited partners the added benefit of allowing them to change their tax positions from one where they had huge tax liabilities from imputed income to one where they had sizable tax losses. *Id.* at 307.

Over 90% of the limited partners accepted the opportunity to sell. *Id.* They then sued. *Id.*

The trial judge ruled in favor of Dolan, relying on partnership agreement language that gave Dolan sole discretion to determine whether there was cash flow available for distribution. The appellate court reversed.

> It is abundantly clear, as defendants point out, that Dolan was granted rather wide latitude in deciding whether or not to distribute cash to the limited

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partners; the Articles grant him "sole discretion" in the matter and do not mention any distribution for the purpose of meeting the limited partners' tax obligations. …

It is no answer to the claim that plaintiffs make in this case that partners have the right to establish among themselves their rights, duties and obligations, as though the exercise of that right releases, waives or delimits, somehow, the high fiduciary duty owed to them by the general partner — a gloss we do not find anywhere in our law. On the contrary, the fiduciary duty exists concurrently with the obligations set forth in the partnership agreement whether or not expressed therein. Indeed, at least one of the authorities relied upon by defendants is clear that although "partners are free to vary many aspects of their relationship

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> *inter se*, they are not free to destroy its fiduciary character."

Id. at 310 (citations omitted).

The Illinois appellate court concluded:

> Our courts are not bound to endow it as doctrine that where the general partner obtains an agreement from his limited partner investors that he is to be the sole arbiter with respect to the flow that the cash of the enterprise takes, and thereby creates conditions favorable to his decision that the business is too good for them and contrives to appropriate it to himself, the articles of partnership constitute an impervious armor against any attack on the transaction short of actual fraud. That is not and cannot be the law. And that is precisely the gravamen of plaintiffs' complaint: that the general partner refused unreasonably to distribute cash and thereby forced plaintiffs to continually dip into

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> their own resources in order to pay heavy taxes on large earnings in a calculated effort to force them to sell their interests to an entity which Dolan owned and controlled at a price well below at least the book value of those interests. Such a claim plainly presents an issue for the finder of fact, namely, whether or not Dolan was serving his own interests or those of the partnership. …
>
> Plaintiffs therefore correctly maintain that they "were entitled to a trial in which Dolan must prove he acted fairly and not as his limited partners' business adversary."

Id. at 313-14 (citations omitted).

While *Labovitz* is not a Missouri decision, it is well-reasoned, is right on point, and has been followed by numerous courts, although not necessarily on the issue of distributions. *Labovitz* is "frequently cited." *Alloy v. Wills Family Trust*, 944 A.2d 1234, 1265 (Md. App. 2008) (following *Labovitz*); *see also BT-I v. Equitable Life Assurance Soc'y*, 75 Cal. App. 4th

1406, 1412, 89 Cal. Rptr. 2d 811, 816 (1999) ("We agree with several recent decisions holding a limited partnership agreement cannot relieve the general partner of its fiduciary duties in matters fundamentally related to the partnership business"); *Konover Dev. Corp. v. Zeller*, 635 A.2d 798, 806, 808 (Conn. 1994) ("The plaintiff, as a fiduciary, had the duty to deal fairly with the defendant, not simply to act reasonably based upon the relevant information. … This position is consistent with the conclusions reached by other courts, which have likewise held that the terms of a limited partnership agreement cannot negate the fiduciary duty");

The First Circuit in a case following *Labovitz* explained:

> Nor can the fiduciary obligation be avoided on the grounds that the partnership agreement authorized Bedford's actions. …
>
> [E]ven if the partnership agreement can be interpreted as defendant claims, it cannot nullify the fiduciary duty owed by Bedford to the partnership. The fiduciary duty of partners is an integral part of the partnership agreement whether or not

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> expressly set forth therein. It cannot be negated by the words of the partnership agreement.

Wartski v. Bedford, 926 F.2d 11, 20 (1st Cir. 1991) (citations and internal quotations omitted).

Alloy concerned a situation similar to that here, in that the general partner was accused of exploiting its discretion under a partnership agreement to control distributions to the partners to apply economic pressure on its limited partners using the partners' allocated shares of taxable gains as part of the economic pressure.

> [C]ourts have widely recognized that a general partner's exercise of management authority with the goal of putting coercive financial pressure on a limited partner may amount to a squeeze-out in breach of the general partner's fiduciary duties, even though that exercise of authority is explicitly permitted by the partnership agreement. Whether a technical breach has occurred is not the sole consideration because actions taken in accordance

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> with a partnership agreement can still be a breach of fiduciary duty if partners have improperly taken advantage of their position to obtain financial gain. Thus, actions allowed by an agreement can be a breach of fiduciary duty when they are not taken in good faith and for legitimate business purposes.

Alloy, 944 A.2d at 1264 (internal citations, quotations, brackets omitted).

> Accordingly, as the *Labovitz* Court recognized, "[i]n determining whether to make distributions the general partner must act in good faith." Callison & Sullivan, *Partnership Law and Practice, supra*, § 22:13. A general partner's broad authority over distributions, although granted by a partnership agreement, is conditioned by his unwaivable duties of loyalty and good faith. The burden rests on the fiduciary to prove that his or her exercise of power under the terms governing the business relationship was in good faith.

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Id. at 1265-66 (some citations omitted); *accord Lansing v. Carroll*, 90 U.C.C. Rep. Serv. 2d (Callaghan) 270, 2016 U.S. Dist. LEXIS 98877, at *63 (N.D. Ill. July 28, 2016) (temporary withholding of distributions breached contract, but was not sufficiently dishonest to breach fiduciary duty).

Apex's reliance upon *Peterson v. Continental Boiler Works*, for the contrary position, is odd. Apex appears to read *Peterson* as teaching two lessons: First, that fiduciary duty is limited to the duty of loyalty, and that the duty of loyalty only has ten specific, narrow aspects. *Brief* at 30. Second, that unless the specific fiduciary duty that is the basis of the Limited Partners' claims is not mentioned in the Agreement, it cannot be submitted to the jury except as a breach of contract claim. *Id.* at 31.

The response to Apex's argument is that *Peterson* does not say what Apex contends it says, and what Apex contends *Peterson* says is not the law.

First, *Peterson* does not hold or even state in dicta that fiduciary duties are limited to the duty of loyalty. Although *Peterson* includes an extensive discussion of the duty of loyalty, quoting various academic authors on the subject, it immediately moves on to discuss the obligations

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of good faith and fair dealing that also fall within the scope of fiduciary duties. 783 S.W.2d at 905.

Contrary to Apex's assertions, under Missouri law the "duty of loyalty" and "fiduciary duties" are not the same thing. Every employee owes his employer a duty of loyalty, but few employees owe any fiduciary duties. "[A]n at-will employee who is not subject to a non-compete agreement and is neither an officer, director, partner or member of a limited liability corporation" does not owe any fiduciary duties to his employer, but all employees owe a duty of loyalty to their employer so long as they are employed. *Western Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 16 (Mo. 2012). "[T]he law is unclear whether or to what degree the two concepts overlap," but an action for breach of the duty of loyalty is a different cause of action than an action for a breach of fiduciary duty. *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. 2005).

Second, *Peterson* does not hold that one must plead a fiduciary duty that is entirely separate from the terms of a partnership agreement to state a tort case for breach of fiduciary duty. *Peterson* merely holds that the fiduciary duty must also exist independently from a parties' contrac-

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tual obligations to be asserted as a tort claim. 783 S.W.2d 896. Here, the duty to make distributions exists separately from and independently of any partnership agreement. The duty to make distributions when cash is available for distributions is one of the inherent obligations of a general partner to its limited partners. *See Labovitz, supra.*

And the parties themselves over the many years of their partnership treated the duty to make distributions as something separate and apart from the Agreement and any formula contained in the Agreement.

Consequently, the trial court did not err in permitting the Limited Partners' breach of fiduciary duty claims to go to the jury.

Apex's first point relied on should be denied.

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IV. The Limited Partners established that they suffered actual damages from Apex's breach of fiduciary duty in not making distributions to them; the jury was required to find actual damages to enter a judgment for breach of fiduciary duty; Verdict Form B directed the jury to award only nominal actual damages to avoid the awarding of duplicative actual damages. *(Response to Point Relied On No. 2.)*

Apex's objection to the award of nominal damages for the Limited Partners' breach of fiduciary duty claims is misplaced because Apex misreads *Henry v. Farmers Ins. Co.*, 444 S.W.3d 471 (Mo. App. W.D. 2014).

Henry does not state that a jury cannot award nominal damages for a breach of fiduciary duty. What *Henry* states is: "Where pecuniary damage is an element of the tort cause of action, however, *nominal damages cannot be presumed*.... Pecuniary damage is, therefore, an intrinsic element of a breach of fiduciary duty claim and is essential to recovery." *Id.* at 481 (emphasis added).

Here, nominal damages were not presumed. The Limited Partners presented substantial evidence of the actual pecuniary damages each

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suffered as a result of Apex's refusal to make distributions to them for over a decade in breach of its fiduciary duty. These damage figures were stated in Prost's expert report, portions of which were displayed to the jury during the trial and during closing argument. Prost's report stated the actual damages suffered by the Limited Partners as a result of Apex's nonpayment of distributions. [Tr. 393-94; Exhibit 147 at 5, 7].

That the Limited Partners had to prove actual damages, and that nominal damages could not merely be presumed, was clear in the verdict-directing instruction. Instruction No. 9 told the jury that one of the elements they were required to find to render a verdict for the Limited Partners for breach of fiduciary duty was, "Third, as a direct result, Plaintiffs sustained damages." [LF 557].

To the extent *Henry* holds that nominal damages cannot be awarded for a breach of fiduciary duty, that holding is contrary to Missouri law. *Henry* states:

> A breach of a fiduciary obligation is constructive fraud. Because breach of a fiduciary duty is constructive fraud, it is an action sounding in fraud or

> deceit. Like an actual fraud claim, a breach of fiduciary duty/constructive fraud claim is not characterized by violence or breach of the peace and does not involve trespass for violence to person or property. Pecuniary damage is, therefore, an intrinsic element of a breach of fiduciary duty claim and is essential to recovery. The circuit court properly determined that nominal damages could not be awarded to Appellants on their breach of fiduciary duty claim.

Henry, 444 S.W.3d 471.

This syllogistic Jenga tower has a number of flaws — *all* breaches of fiduciary duty are constructive frauds? — and collapses when asserting that nominal damages cannot be awarded where pecuniary damages are an intrinsic element of a claim. That statement is just dead wrong. It cannot be disputed that pecuniary damages are an intrinsic element of a claim for breach of contract. "A breach of contract action includes the following essential elements: … (4) damages suffered by the plaintiff."

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Keveney v. Missouri Military Academy, 304 S.W.3d 98, 104 (Mo. 2010). Yet a plaintiff can recover nominal damages in a breach of contract case. "[N]ominal damages are available where a contract and its breach are established." *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. 1999) (citations omitted).

When Apex states, "this is not a case in which a plaintiff proved that he or she suffered actual damages as a result of an alleged breach but voluntarily asked the jury to award less than the damages actually suffered," *Brief* at 33, Apex has it exactly backwards. This is precisely a case where the Limited Partners proved they suffered actual damages and voluntarily asked the jury to award less than the damages suffered. While the verdict-directing instruction required the jury to find actual damages to enter a verdict in favor of the Limited Partners, Verdict Form B only permitted the jury to award nominal damages on this claim.

Limited Partners submitted a verdict form that voluntarily did not permit an award of their full actual damages because awarding separate full actual damages for Apex's failure to make distributions would inevitably duplicate a portion of the "value" to be awarded to the Limited

Partners under the breach of contract count. That is because any money distributed out of 8182 reduces the value of the partnership on a dollar-for-dollar basis. [Tr. 437, 444, 694].

The Limited Partners and the court therefore decided that, to avoid the complexity of reconciling potentially duplicative actual damages verdicts on the two claims, the jury would be limited to awarding nominal actual damages on the breach of fiduciary claim even though the Limited Partners showed hundreds of thousands of dollars of actual damages.

This was a reasonable approach to trial management. This does not mean that Limited Partners received a verdict on breach of fiduciary duty claims without proof of actual pecuniary damage. *The Limited Partners had to prove actual damage to prove their case and get a verdict. That's what Instruction No. 9 required*. Verdict Form B, in turn, simply provided that the Limited Partners would not receive the actual damages they proved, but would be limited to nominal damages, so as to avoid the danger of duplicative judgments.

Apex's concern on appeal about the Limited Partners being awarded duplicative damages, *Brief* at 34-35, makes no sense. Limited Partners

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were not awarded duplicative damages. Their appropriate modification of the verdict forms insured that damages were not duplicated. Apex had voiced throughout the case its concern that any actual damages the Limited Partners might obtain on their breach of fiduciary duty claims would duplicate a part of the value awarded to them for their partnership interests under the breach of contract claim. The trial court considered Apex's concern and gave Instruction No. 9 to avoid this danger by awarding nominal damages only. Apex should not now be heard to complain about the trial court remedying the situation that had caused Apex concern. [*See* Tr. 764-66].

Apex's assertion that the Limited Partners admitted that they had no actual damages from Apex's failure to make distributions is inaccurate. The Limited Partners made no such admission. What the Limited Partners stated in testimony, and what their lawyer stated in closing argument, was that the actual damages that they suffered from Apex's failure to make distributions would duplicate a portion of the value of their partnership interests that the jury would be determining in deciding the breach of contract claim.

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In the instruction conference, there was the following dialogue between the court and a lawyer for the Limited Partners on this issue:

> THE COURT: Now, punitive damages being submitted. We have this format where you're asking for a nominal sum, and then for a finding of the propriety of punitive damages to be determined in a second stage. How would you respond to Mr. Sandberg?
>
> MR. JACOBSON: I responded well before the break. So we had an issue in this case involving the fact that the failure to make distributions, if we pursued that claim, could cause confusion on the back end, because our expert testified and then we agreed that money that comes out in the form of distributions reduces the overall value of the partnership and therefore would, dollar for dollar, decrease the amount that —

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> THE COURT: So Mr. Sandberg is saying, you're being awarded this sum, and ultimately it's all wrapped in together in the first award.
>
> MR. JACOBSON: But it still was damages to us. What we're doing is avoiding the complexity of trying to decide whether the jury subtracted it or didn't subtract it when they did that.
>
> All that's required for punitive damages is nominal damage. You have to have a wrong. It has to be, you know, outrageous, evil motive, reckless indifference to their rights. There are plenty of cases that have punitive damages based off of a nominal damage.

[Tr. 764-65].

In closing, the Limited Partners' lawyer showed the jury portions of Prost's damages report and spoke about the nominal actual damages being requested on the breach of fiduciary duty claims:

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> When you see the verdict form, you'll see that it says, you may award plaintiffs nominal damages for breach of fiduciary duty. Nominal damages. Why does that say that? Well, the fiduciary duty claim relates to the distributions. You heard Mr. Prost, our expert accountant, say, well, every dollar that goes out in distribution reduces the value of the whole partnership. So it's — if you put money in one pocket it comes out of the other. We don't want any confusion. *To reduce these numbers, these are the numbers we think the evidence supports, the evidence justifies that these plaintiffs are entitled to.* But they are also entitled, we suggest, to punitive damages …

[Tr. 785 (emphasis added)].

The jury ultimately awarded each of the Limited Partners $1,000 in "nominal damages," for a total of $6,000.[15] That was well within the dollar

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[15] Because of the $1,000 awarded on Verdict Form B to each

amount of actual damages established by the evidence for the breach of fiduciary duty and more than sufficient to support an award of punitive damages, as discussed in the next section of the argument.

Rather than damages, the trial court effectively ordered specific performance of the Agreement, requiring Limited Partners to deliver their partnership interests to Apex in return for Apex paying the value of those interests as determined by the jury. Thus the $1,000 in damages awarded to each Limited Partner for breach of fiduciary duty did not duplicate "damages" awarded for breach of contract because the Limited Partners were not awarded damages for breach of contract.

Limited Partner, it appears the jury awarded more than nominal damages on their breach of fiduciary duty claims, and that the jury also awarded some actual damages as well. *See Burg v. Dampier*, 346 S.W.3d 343, 359 (Mo. App. W.D. 2011) (noting that nominal damages are to be a "trifling sum, usually no more than $1.00, sometimes less," and that $5,000 could represent a combination of nominal damages and special damages for the inconvenience the plaintiffs sustained as a result of the defendants' misconduct). Here, Limited Partners suffered decades of "inconvenience."

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Agnello, cited by Apex, does not lead to a different result. In *Agnello*, homeowners obtained a default judgment against a cabinetmaker with respect to custom cabinets for their home. Count I was for breach of contract. It asserted that the cabinets were defective, made of the wrong wood, and improperly installed, requiring complete replacement. Count II was for fraud, asserting that the cabinetmaker had committed fraud in stating that the cabinets would be made entirely of clear alder wood, when he instead used an inferior wood for some of the cabinets. *Agnello*, 306 S.W.3d at 676. Homeowner's evidence was that the cost of removing and replacing all of the cabinets was $53,300. *Id.* at 676 & n.10.

Homeowners' allegations of damages for Count II, for fraud, were the same as for Count I, for breach of contract. The evidence at trial on Count II included $1,743 for the difference in value between the clear alder wood that was promised and the inferior wood that was delivered, as well as numerous other small items not alleged in the petition. *Id.* at 677.

The Court of Appeals held that the $1,743 could not be awarded in addition to the $53,300 because replacing all of the cabinets would naturally replace the inferior wood cabinets as part of the process. Hence

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the $1,743 was duplicative of the damages awarded for breach of contract. *Id.* 677. The court also held that any damages not specially pled in the petition could not be awarded in a default judgment. *Id.* Consequently, the court found that there were no damages on the fraud count and thus an award of $10,000 in punitive damages on that count could not be sustained. *Id.* Specifically, the court held that: "Compensable harm stemming from a cognizable cause of action must be shown to exist before punitive damages can be considered. This is particularly true of punitive damages in a contract action setting." *Id.* at 678, citing *Peterson* (internal quotations and parentheses omitted).

Agnello can be distinguished from the current case on three bases. First, in the present case, unlike *Agnello*, the Limited Partners were not awarded damages on their breach of contract claim. Rather, the value of their partnership interests were determined and the forced-sale provision of the Agreement was specifically enforced. Second, the present case involved a breach of fiduciary duty. There was no element of a fiduciary relationship in *Agnello*. Third, and most significantly, in the present case the breach of fiduciary duty count resulted in awards of nominal actual

damages, which are sufficient to support punitive damages. In *Agnello*, when the duplicative damages were eliminated, there was nothing left on which to support punitive damages.

Consequently, the trial court did not err in permitting the jury to award the Limited Partners nominal actual damages for breach of fiduciary duty.

Apex's second point relied on should be denied.

V. The Limited Partners' breach of fiduciary duty claim was not a breach of contract claim, and thus Apex's argument is inapposite; the Limited Partners were awarded nominal actual damages, which are sufficient to support punitive damages. *(Response to Point Relied On No. 3.)*

Apex argues that punitive damages may not be recovered in a breach of contract claim, except under two "narrow exceptions," and that therefore the Limited Partners are not entitled to punitive damages. *Brief* at 36-37.[16]

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[16] Apex does not dispute that its conduct was outrageous because of its evil motive or reckless indifference to the rights of others. Apex also does not challenge the amount of punitive damages awarded.

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Apex's statement of law is inapplicable because the Limited Partners' breach of fiduciary duty claim was not a breach of contract claim. Instruction No. 9, which submitted the claim to the jury, is not a breach-of-contract verdict-directing instruction. The instruction sounds in tort for breach of fiduciary duty.

Paragraph First and Second of Instruction No. 9 direct the jury to find for the Limited Partners if they believe:

> First, Defendant did not make distributions to Plaintiffs from the 8182 Maryland Associates Limited Partnership in 2005 or thereafter when there was cash available for distribution, and
>
> Second, in failing to make distributions as submitted in Paragraph First, Defendant failed to act in the best interests of the Plaintiffs or failed to act in a manner which placed the interest of the Plaintiffs above those of Defendant …

[LF 557].

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This instruction does not submit a breach of contract case to the jury. Thus the first half of Apex's third point relied on is inapposite.

Even if it were apposite, Apex's statement of the law is unsound because the ability to obtain punitive damages for a breach of contract coupled with a breach of fiduciary duty is not as narrow as Apex states.

Apex cites two cases to support its narrow argument, *Peterson*, 783 S.W.2d 896, and *Brown v. Mercantile Bank of Poplar Bluff*, 820 S.W.2d 327 (Mo. App. S.D. 1991). Apex cites these two cases for the proposition that one can only recover "punitive damages when the breach of contract is coupled with violations of a fiduciary duty that breach a 'public trust.'" *Brief* at 37, citing *Brown*, 820 S.W.2d at 340 (citing *Peterson*).

The term "public trust" is not clearly defined in either case. Assuming that it relates to a case cited in *Peterson*, it is not at all clear why one should be able to obtain punitive damages against a real estate broker or a lawyer who breaches her fiduciary duty, but not against the general partner of a limited partnership. Apex offers no reason for imposing such a limitation on the award of punitive damages.

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In any case, *Peterson* and *Brown* are not good authority for Apex's proposition. *Peterson* expressly reserves for another day, and did not decide, the question whether a violation of fiduciary duty in a private setting, or only in connection with a "public trust," could give rise to punitive damages. The *Peterson* court simply "assume[d], without deciding and for the sake of argument only, that *Forinash*[17] correctly states the law of Missouri," when it held that punitive damages were available in all cases where a breach of contract was coupled with a violation of fiduciary duty. *Peterson*, 783 S.W.2d at 904.

Moreover, *Peterson* is inapposite because it was a decision on the pleadings only, not after a full trial, and because the plaintiffs there did not allege any breach of a duty arising out the parties' relationship as opposed to just their contract. "All of the acts of Continental the Petersons allege as breaches of Continental's fiduciary duty emanate from obligations imposed by the contract, not from a duty owed the Petersons as shareholders." *Id.* at 905. Thus, *Peterson*'s inclinations — which did not even reach the level of dicta — were expressed in a case where, unlike the

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[17] *Forinash v. Daugherty*, 697 S.W.2d 294 (Mo. App. S.D. 1985).

present case, there was no evidence of a breach of a common-law fiduciary duty existing apart from the parties' contract.

Brown is also not good authority for the proposition for which Apex cites it, again for several reasons.

First, in *Brown*, the trial court refused to award punitive damages. The appellate court found no abuse of discretion in this denial. *Brown*, 820 S.W.2d at 341. The procedural posture is such that *Brown* provides no guidance here, a case where punitive damages were submitted to the jury, awarded by the jury, and accepted by the trial court.

Second, *Brown* did not involve a fiduciary relationship. "The Browns have pointed to no evidence that establishes the existence of a fiduciary relationship. Thus we believe this was a dispute between borrower and lender to be resolved according to principles of contract law." *Id.* at 334-35.

Unlike general partners dealing with partners, lenders do not owe fiduciary duties to their borrowers. Thus, anything *Brown* might have to say about punitive damages in a case, like this, where existence of a fiduciary relationship is undisputed and unwaivable, is dicta.

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While neither *Peterson* nor *Brown* decided the issue, *Forinash* did — and its holding favors the Limited Partners' position. *Forinash* says:

> The rule properly stated, then, is not that plaintiff must plead and recover upon an independent tort, but that the manner in which the breach occurred constitutes a willful tort for which an action for exemplary damages will lie.
>
> An elementary but reliable text carries the rule further: Punitive damages are also awarded where the breach also involves the malicious or wanton violation of a fiduciary duty even where the violation does not constitute an independent tort. Calamari and Perillo, Contracts § 14-3, p. 521 (2d ed. 1977). We conclude that an award of punitive damages was permissible here and that there was evidence to support an award of such damages.

Forinash, 697 S.W.2d at 307 (quotations, ellipses, brackets, and some citations omitted). Thus the award of punitive damages in *Forinash*, which

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Peterson characterized as a case involving a breach of contract coupled with a violation of fiduciary duty not in connection with a public trust, was affirmed. *Id.*

Apex's contention that the Limited Partners were not entitled to an award of punitive damages on their breach of fiduciary duty claim because they were only awarded nominal damages, *Brief* at 38-40, is also mistaken. The case law to the contrary is overwhelming:

"Nominal damages, properly found, serve as an adequate basis for an award of punitive damages where either actual or legal malice is present." *Herberholt v. De Paul Cmty. Health Ctr.*, 625 S.W.2d 617, 624 (Mo. 1981) (action under service letter statute; judgment "modified to provide for actual damages in the nominal amount of $1.00 and punitive damages of $50,000"); *Coonis v. Rogers*, 429 S.W.2d 709, 716 (Mo. 1968) ("We recognize the rule that actual or nominal damages must be recovered before punitive damages can be awarded").

> Accordingly, nominal damages are fixed at a trifling sum, usually no more than $ 1.00, sometimes less. *A judgment for nominal damages nevertheless is a*

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> *substantial right* since such a judgment determines the incidence of costs. It gives a "peg to hang costs on." *It also suffices to sustain an award of punitive damages*. *Herberholt v. DePaul Community Health Center*, 625 S.W.2d 617, 624[5-7] (Mo. banc 1981); RESTATEMENT (SECOND) OF TORTS § 908, *comment c* (1979). Actual damages, on the other hand, are not presumed but must be proven.

Simpkins v. Ryder Freight Sys., Inc., 855 S.W.2d 416, 423 (Mo. App. W.D. 1993) (emphasis added; some citations omitted).

The historic formulation is "nominal actual damages," which has been used historically, and still occasionally today, to ensure the availability of punitive damages under circumstances where nominal damages are awarded. *Id.* at 423 n.5.

> Thus, the consensus at common law that punitive damages are not recoverable without actual damages is a very different thing from holding that

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> they are not recoverable in connection with nominal actual damages. …
>
> It is by now forthrightly established that a nominal damages award of $1.00 will sustain punitive damages.

Id. (citations and internal quotations omitted); *see also Roney v. Organ*, 161 S.W. 868, 870 (Mo. App. S.D. 1913) (same).

Apex finally contends that after the trial, after the judgment, after the after-trial motions, and after the notice of appeal, the Limited Partners finally conceded that their breach of fiduciary duty claim was just a breach of contract claim all along, thereby forfeiting the punitive damages they were awarded by the jury. *Brief* at 37-38.

Once again, Apex misreads a document. The consent to appeal bond does not say that the Limited Partners' punitive damages judgments arose out of a contract. The consent says that the judgment valuing their partnership interests and awarding attorney fees and expenses arose out of a contract (the Agreement), and that the fiduciary duty "arose out of the same contractual relationship." [A41].

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This language was carefully drafted to maximize the likelihood of obtaining post-judgment interest while never conceding that the breach of fiduciary duty claim was merely a claim for breach of contract. Apex's argument to the contrary falls into the fallacy of the excluded middle. There are more bases for liability than tort and contract. There is also property and status.[18] Status is a separate legal category from tort, and fiduciary duty is a status relationship that may arise out of a contract, like marriage[19] or adoption,[20] or may not. Indeed, Apex's favorite case, *Peterson*,

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[18] "[M]any problems in the conflict of laws raise delicate and complicated questions in the borderland between torts, on the one hand, and contracts, property, status, and other branches of the law, on the other." *Torts, Contracts, Property, Status, Characterization, and the Conflict of Laws*, 59 Columbia Law Review 440, 456 (1959), *available online* at http://digitalcommons.law.yale.edu/fss_papers

[19] "A contract between two marriageable persons … creates the status of marriage, which is not a contract." *Davis v. Stouffer*, 112 S.W. 282, 285 (Mo. App. W.D. 1908).

[20] *Carlin v. Bacon*, 16 S.W.2d 46, 48 (Mo. 1929) (claim of oral adoption asserted upon death of adoptive mother; "It is not a suit for

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discussed the distinction between contractual duties that arise from a contract and fiduciary duties that arise from a person's status to another:

> When conducting corporate affairs as dominant shareholders, Continental owes the Petersons the obligations of good faith and fair dealing as shareholders because they are shareholders. In this case, the fiduciary analysis is complicated by the existence of a contract between the majority and minority shareholders establishing, *inter alia*, a procedure for effectuating a purchase of the minority's stock by the majority. *The stock restriction agreement does not destroy Continental's fiduciary duty to the Petersons as shareholders; nor does that agreement create additional fiduciary duties flowing from Continental to the Petersons*. The obligations

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breach of contract, nor for the specific performance of a contract: it seeks a judicial determination of the status, if any, resulting from an executed contract").

> flowing to the Petersons under the agreement are not fiduciary in nature but contractual.
>
> The failure to distinguish between contractual obligations that arise by virtue of the agreement and fiduciary duties that arise as a result of the Petersons status as shareholders permeates the Petersons' analysis of this case.

Peterson, 783 S.W.2d at 905.

Apex's analysis is permeated by the same confusion in failing to distinguish between contractual duties arising out of the Agreement and fiduciary duties arising out of Apex's status as general partner to the Limited Partners in the 8182 Maryland limited partnership.

Consequently, the trial court did not err in entering judgment in favor of the Limited Partners against Apex for breach of fiduciary duty, including nominal actual damages and punitive damages.

Apex's third point relied on should be denied.

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CONCLUSION

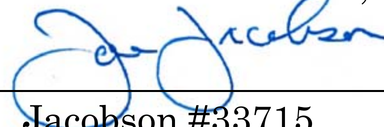
Apex's appeal should be dismissed for lack of appellate jurisdiction because Apex's notice of appeal was filed too late.

Alternatively, Apex's appeal should be dismissed because its statement of facts in its brief violates Rule 84.04(c) because it does not set out the evidence supporting the judgment.

Alternatively, the judgment below should be affirmed in all respects.

Respectfully submitted,

JACOBSON PRESS & FIELDS, P.C.



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CERTIFICATE OF COMPLIANCE AND OF SERVICE

The filing attorney certifies that this brief complies with the requirements of Rule 84.06, including the limitations stated in Rule 84.06(c); that the brief contains a total of 20,582 words, excluding words not required to be included in the total count, according to the word-count function of the WordPerfect X6 software in which the brief was prepared; that the typeface in 14 point Century Schoolbook (except for larger type on the cover); and that all of the information required by Rule 55.03 is included in the brief.

This brief was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic case filing system upon all pants in the Missouri Court's eFiling system on September 30, 2017.

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