IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

JULVANNA, LLC — APPELLANT

VS. — CASE NO. 2007-CA-02226

ECONOMY INNS, INC., A MISSISSIPPI CORPORATION — APPELLEE

BRIEF OF APPELLEE

(ORAL ARGUMENT NOT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Honorable Sanford R. Steckler	*Chancery Court Judge of Harrison County*
2. Julvanna, LLC, a Mississippi Limited Liability Company	*Appellant*
3. Economy Inns, Inc., a Mississippi Corporation	*Appellee*
4. Beau A. Stewart, Esq.	*Counsel for Appellant*
5. Michael B. Holleman, Esq.	*Counsel for Appellee*

HOLLEMAN LAW FIRM, PLLC

Michael B. Holleman, attorney of record for Economy Inns, Inc.

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II. STATEMENT OF CASE

This is an appeal from the Chancery Court of Harrison County, Mississippi, First Judicial District, Honorable Sanford R. Steckler presiding. Economy Inns, Inc., a Mississippi corporation, [Economy] and Julvanna, LLC, a Mississippi limited liability company, [Julvanna] are seller and buyer, respectively, under a Purchase and Sales Agreement [Purchase Agreement], over which the parties were litigating when Hurricane Katrina made landfall on August 29, 2005, causing substantial damage to one of the properties. The parties settled their dispute and the Chancellor entered an Agreed Judgment on March 31, 2006, which embodied the settlement. Thereafter, both parties claimed breach. Julvanna filed a Motion to Enforce (Specific Performance) and Economy filed a counter-claim for award of the earnest money deposit. The Chancellor ruled in favor of Economy on both issues.

Julvanna appeals the adverse judgment on its Motion to Enforce the Court approved settlement of a contract dispute and on Economy's counter-claim, the award of the escrow deposit to Economy pursuant to the Purchase Agreement. However, Julvanna, having lost the factual and legal arguments raised and decided by the Chancellor, now stakes its claims in this appeal on issues that it either waived or conceded in the proceedings below. As will be developed further, Julvanna seeks from this Court consideration of a case that the Chancellor

never decided. Nevertheless, the new assertions, considered on the merits, do not undermine the Chancellor's rulings.

A. STATEMENT OF FACTS RELEVANT TO THE APPEAL[1]

The original contract consists of the Purchase and Sale Agreement, dated December 14, 2004, pursuant to which Economy agreed to sell to Julvanna two parcels of property, the Biloxi Beach Campground property, a vacant property, and the Super 8 Motel and Suites [Super 8], which is located on Highway 90 in Biloxi, Mississippi. This Purchase and Sale Agreement was in dispute in these proceedings before Hurricane Katrina. The parties settled that dispute through the Agreed Judgment dated March 31, 2006.[2]

On August 29, 2005, Katrina made landfall and caused substantial wind and flood damage to the Super 8. Since Economy had only wind and no flood insurance, there was a substantial question whether it could reconstruct the Super 8 with the proceeds that might eventually be paid[3].

Economy faced a dilemma. Mitigation efforts had to be undertaken immediately to protect the heavily damaged property and some arrangements had to be made to reconstruct the Super 8. Like most businesses on the Mississippi Coast following the storm, these decisions had

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[1] The Appellee has submitted an Appellee's Record Excerpts, which is cited as "Appellee R.E. __." The Appellant's Record Excerpts contain some confusing, but not substantive, errors carried forward from the improperly assembled Clerk's Papers. Appellee will designate the trial transcript as "Tr. T. ___" and Clerk's Papers as "R. Vol. __, p.___".

[2] Although Julvanna attempts throughout its brief to impugn Economy's motives in this case by arguing the merits of the settled claims, as it concedes, those merits are not in issue here and were not in issue in the proceedings from which Julvanna appeals an adverse judgment. While Economy can defend its position in the settled litigation, the relative merits of the settled claims are simply immaterial here.

[3] Tr. T. Vol. II, pp. 152-153.

to be made long before Economy would know what insurance proceeds would be available. Add to these issues, the pending lawsuit over a Purchase Agreement, under which Julvanna might have the option to make those decisions.

In September, Economy received a proposal from Southern Construction Services, Inc. [SCSI] to reconstruct the Super 8 to its pre-Katrina condition in exchange for any proceeds paid under its casualty policies and for use of the Super 8 to house its workers. Economy allowed SCSI to begin basic mitigation efforts, without a contract, while it presented options to Julvanna under the Purchase Agreement.

On September 23, 2005, Economy's counsel (Mr. Holleman) wrote a letter to Julvanna's counsel (Mr. Wetzel), addressing this provision and the Hurricane damage:

> As a compromise of the disputes between Julvanna and Economy, Economy offers Julvanna the option contained in the disputed agreement regarding loss or destruction of the property:
>
> 7. DAMAGE OR DESTRUCTION. The risk of loss shall remain with the Seller until the date and time of the closing. If any damage or destruction occurs to the buildings or improvements described on Exhibit "A" prior to the initial closing date, the Purchaser shall have the right to elect either;
>
> (A) To receive any proceeds of insurance payable in connection with such damage or destruction and close on the aforesaid property as scheduled herein, after receiving said proceeds or;
>
> (B) To terminate the contract and receive a full refund of all earnest money deposits.
>
> Economy is in the position of having to make important decisions about the property because of the Hurricane damage and therefore must have your client's response with two (2) weeks from today.[4]

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[4] Holleman Letter, 9-23-2005, Trial Exhibit 4, Appellee's R.E. 158.

Concerned that there was insufficient insurance to cover the losses, Julvanna failed to choose an option under Paragraph 7 of the Purchase Agreement.[5] Unable to reach an agreement and facing huge uninsured losses, on December 7, 2005, Economy entered into a Construction and Lease Agreement with SCSI to reconstruct the Super 8 [SCSI Agreement].[6] Under the terms of the SCSI Agreement, SCSI agreed, *inter alia*, to reconstruct the Super 8 in exchange for all insurance proceeds payable for property loss because of the hurricane. The SCSI Agreement provided that SCSI would ***"remediate, construct, renovate, and/or rebuild the Super 8 to the condition, as it existed on August 28, 2005, to be franchise compliant with Super 8 QA standards B+"***. Since Economy had no flood insurance, SCSI assumed the risks of inadequate coverage.[7]

On December 9, 2005, Economy's counsel wrote Julvanna's counsel a letter, enclosing the SCSI Agreement.[8] On December 16, 2005, Economy's counsel conveyed an offer of compromise to Julvanna's counsel, which in pertinent part stated:

> Economy will sell the properties that are the subject of the original contract under the same terms, subject to the following additional conditions:
>
> ****
>
> 2. Julvanna, LLC, and its assigns, must accept the liabilities and benefits of Economy's contract with SCSI; [and]
>
> 3. Economy will assign its interest in any proceeds of insurance covering the property, subject to the SCSI contract [Emphasis Added][9]

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[5] Tr. T. Vol. I, p. 151.

[6] SCSI "Construction and Lease Agreement", Trial Exhibit "2", Appellee R.E. 115-128.

[7] The SCSI Agreement also gave SCSI a lease of the Super 8 for a period of 13 months dated from September 25, 2005, when it first began mitigation work on the Super 8.

[8] Holleman Letter, 12-9-05, Trial Exhibit 10, Appellee R.E. 162.

[9] Holleman Letter, 12-16-05, Trial Exhibit 10, Appellee R.E. 164.

On February 7, 2006, Julvanna's counsel wrote a letter to Economy's counsel affirming the terms of the proposed settlement:

> Pursuant to our most recent correspondence of December 9, 2005, as well as our most recent meeting, the principals of Julvanna, LLC would like to go forward and consummate this sale within 60 days, in accordance with the Contract. We understand, pursuant to the rental construction agreement and lease agreement [SIC] entered into by Economy Inns and Southern Construction Services, Inc. that ***we assume this Construction Agreement and Lease with notice.***
>
> You advised that you would provide me with a letter from Southern Construction Services, Inc., stating that pursuant to 4.3 of the Construction Lease Agreement my client would not have to assume additional costs not covered by the insurance proceeds which Southern Construction Services, Inc. would receive, if any, and that this particular paragraph was for any additional costs required as an improvement or modification to the building construction resulting from any local ordinance, law or regulation ***which may be required by the City Building officials.*** (Emphasis Added)[10]

On March 31, 2006, the Chancery Court entered an Agreed Judgment.[11] Regarding the Super 8, the Agreed Judgment provided ***"Julvanna, LLC, will purchase the property under the Purchase and Sales Agreement entered into on December 14, 2004".*** The judgment also provided that Julvanna *"will take the Super 8 Motel property upon the sale contemplated above,* ***subject to the rights and liabilities*** *of [the SCSI Agreement]."* The parties acknowledged, *"****all other terms of the Purchase Sales Agreement ... shall control to the extent that they are not inconsistent*** *with the provisions of the settlement agreement or judgment herein."* The closing on the Super 8 Motel & Suites property was to occur within ninety (90) days of the written notice from Economy Inns of its request to close *or* ***no later than*** December 31, 2006.

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[10] Wetzel Letter, 2-7-06, Trial Exhibit 5, Appellee R.E. 159-160.

[11] As noted by the Appellant, the Clerk's papers attach copies of documents to the Agreed Judgment, which were exhibits to other pleadings. A correct copy of the Agreed Judgment was admitted into evidence and is contained in the Appellee's Record Excerpts at 71-100.

On December 4, 2006, Economy notified Julvanna that it was ready to close and offered Julvanna an opportunity to inspect. Economy offered to extend this deadline until January 2007, if needed. The letter also provided notice that Economy's Super 8 Franchise had been terminated by the Franchisor.[12]

On January 5, 2007, Economy's counsel wrote Julvanna's counsel, enclosing an inventory as required under the Purchase Agreement and a Contractor's Affidavit from SCSI affirming that there were no additional construction costs under Section 4.3 of the SCSI agreement. Regarding the Franchise, the letter offered to have the Franchise reinstated at Julvanna's expense and cooperate in the transfer of the Franchise to Julvanna[13], should Julvanna decide to close. The letter asserted that Economy was not required to keep the Franchise under the Purchase Agreement.[14]

On January 8, 2007, Julvanna's counsel wrote a letter,[15] which, *inter alia*, conceded that Economy was not required by the Contract to keep the Super 8 Franchise. The letter asserted the SCSI Agreement required Economy to rebuild the Super 8 to be "franchise compliant with Super 8 QA standards B+".

> ***We agree with you that Economy is not required to provide a Franchise Agreement***, but under the Economy/Southern Construction Agreement and

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[12] Holleman Letter, 12-4-06, Trial Exhibit 1, Appellee R.E. 102.

[13] Wyndham Hotels, the new owner of the Super 8 franchises, had cancelled the Franchise sometime after the Agreed Judgment. It could be reinstated and transferred for the sum of $5000.00. Otherwise, Julvanna would have to pay $50,000.00 to apply for a new Franchise. Since the storm, Wyndham had upgraded its standards for Super 8 Motels and Suites, which now required construction of additions that were not required pre-Katrina. Tr. T. Vol. I., p. 94; Exhibit 4, Appellee R. E. 152-157.

[14] Holleman Letter, 1-5-07, Trial Exhibit 1, Appellee R.E. 104-105.

[15] Wetzel Letter, 1-8-07, Trial Exhibit 1, Appellee R.E. 106-107.

> Lease, which was contemplated during the Settlement Agreement, all of the property was to be remediated, reconstructed and rebuilt according to Super 8 standards so that Julvanna could apply for the franchise with Super 8 to continue this hotel under a Super 8 franchise agreement.
>
> ***
>
> We are hereby calling upon Economy Inns to fulfill its obligations under the Settlement Agreement and have the property reconstructed and all of the units rentable in accordance with the [SCSI Agreement].

On January 11, 2007, Economy's counsel extended another offer to allow inspection of the property.[16] On January 11, 2007, Julvanna's counsel wrote:

> In order for us to do a final inspection, you are definitely going to have to address the issue of only 80 of the 217 units being rentable and 137 units having yet to be renovated to meet Super 8 system standards. It is our position, which we think is very clear, that ***in order for Economy Inns to fulfill its obligations under the Settlement Agreement, must have the property reconstructed and all units rentable in accordance with the Economy/Southern Construction Agreement and Lease***. To do a formal inspection in light of the December 26, 2006 punch list for conversion provided by Super 8 Motel, would be premature in my opinion due to the fact there is so much that has to be completed by Economy.[17]

The Inspection Report provided by the Franchisor, which had previously been provided to Julvanna, was based on an inspection conducted during construction. The report that it provided during the inquiry about reinstating the Franchise for Julvanna's benefit was misleading in that it had a December 26, 2006 date on it, but showed the condition of the Super 8 months earlier during construction. In response to the allegation that the report showed the Super 8 was

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[16] Holleman Letter, 1-11-07, Trial Exhibit 1 Appellee R.E. 108.

[17] Wetzel Letter, 1-11-07, Trial Exhibit 1, Appellee R.E. 109.

not completed, Julvanna's counsel provided an *updated* report from Franchisor showing 217 rooms ready for occupation as of December 26, 2006.[18]

On January 22, 2007, Julvanna allowed another inspection of the property by Julvanna's principals, including Mr. Chang, the only witness to testify in the proceedings.

Following that inspection, Economy's counsel wrote Julvanna's counsel on January 24, 2007:

> At this point, your client must decide whether it intends to close under the Contract, and if so, to close, as agreed. My client cannot simply carry this property for yours, while they shop the property to other buyers.
>
> The Super 8 is practically new and operating with all rooms refurbished. At the time of the original Contract, more than 30 rooms were out of service. Nevertheless, ***the Contract provides that Julvanna must take the property "as is" or exercise their option to walk away under Contract because of the change in the franchise status.***
>
> ******
>
> At present, my client has signed a Franchise Agreement, which can be transferred to yours for a small fee. Only when my client signs the Punch List, will the Franchise Agreement be in force. Super 8 officials are requesting this document immediately. If your client desires to close and wants mine to complete the franchise acquisition so that yours can then apply for the transfer after closing, we will need an agreement that Julvanna will assume that obligation.
>
> Once again, my client demands that Julvanna exercise its option to close this transaction. You or Julvanna must notify me in writing of that decision ***on or before January 31, 2007.*** Closing must occur ***by February 24, 2007. Time is of the essence*** with respect to these dates. Failure to meet these deadlines will result in forfeiture under the Contract.[19]

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[18] Franchisor Corrected Inspection Report, Exhibit 10 to Motion, Response and Counter-Complaint, Paragraph 17. Appellee R.E. pp 67. While the corrected Franchisor's report was not introduced in evidence, Julvanna did not deny these allegations or the authenticity of the exhibits to the pleading.

[19] Holleman Letter, 1-24-07, Trial Exhibit 1, Appellee R.E. 111-112.

On February 1, 2007, counsel for Julvanna wrote a letter in which he again demanded that Economy undertake repairs of perceived deficiencies in the reconstruction of the Super 8.[20] On February 2, 2007, Economy's counsel notified Julvanna's counsel that it considered the Contract terminated when Julvanna failed to notify Economy by January 1, 2007 of its intent to close by February 24, 2007.

On February 8, 2007, Julvanna filed a Motion to Enforce Settlement in these proceedings.[21] The motion alleged that "Economy Inns, and its attorney have carried on a course of conduct..... which would indicate their failure to comply with the Court order ***to put this motel back in order it was prior to Hurricane Katrina***....". In response, Economy filed a Motion to Dismiss, Response to Motion to Enforce and a Counter-Claim[22] seeking an award of the escrow deposit as liquidated damages. Julvanna did not file any response to the Counter-Claim.

At trial, the only issued tried under Julvanna's Motion was whether Economy was required to reconstruct the Super 8 "as it existed on August 28, 2005, to be franchise compliant with Super 8 QA standards B+" and whether it or SCSI or Economy had, in fact, done so. It was Economy's position that Julvanna had to accept the property "as is, where is" and that Julvanna assumed the rights and liabilities of the SCSI Agreement. In essence, Julvanna contended that Economy guaranteed performance of the SCSI Agreement.

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[20] Wetzel Letter, 2-1-07, Trial Exhibit 1, Appellee R.E. 113-114.

[21] Motion to Enforce, Clerk's Papers, R. Vol. II, 184. The exhibits to this motion are not accurately placed in the Clerk's paper. The Motion and Exhibits were introduced as Exhibit "1" at the hearing and are correctly organized in Appellee's Record Excerpts at 68-114.

[22] Motion to Dismiss, Response and Counter-Claim. Clerk's Papers, R. Vol. II, pp. 187-196, with Exhibit 1-10, pp. 197-253; Appellee R.E. 1-67.

Mr. Chang, a Julvanna managing member, whom the Chancellor ruled was a sophisticated businessman, was the only witness to testify. The other evidence considered by the Chancellor consisted of contracts, documents and letters between counsels.[23] More important, however, is the evidence that was not presented:

- Julvanna produced *no evidence* of the condition of the Super 8 before Hurricane Katrina. Mr. Chang, the only witness, testified that he did not know the condition of the Super 8 anytime before his January 22, 2007 inspection.[24]
- Julvanna produced *no evidence* that the Super 8, as reconstructed by SCSI, failed to return the property to its pre-Katrina condition.
- Julvanna produced *no evidence* of what "Super 8 QA standards B+" were at any point in time, including the day before Katrina, the time of the original contract or the date of trial. Mr. Chang was unfamiliar with the standards.[25]
- Julvanna produced *no evidence* that the Super 8, as reconstructed by SCSI, failed to meet "Super 8 QA standards B+".

B. THE CHANCELLOR'S RULING

After considering post-trial briefs, the Chancellor ruled against Julvanna on its Motion to Enforce and in favor of Economy on its counter-claim for the earnest money deposit of $250,000.00.

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[23] The letters were admitted, subject to objections based on hearsay and the parole evidence rule, which the Chancellor took under advisement.

[24] Tr. T. Vol. I, pp. 85-87.

[25] Tr. T. Vol. I, p. 90.

III. SUMMARY OF ARGUMENT

A. THE CHANCELLOR RULED CORRECTLY IN DENYING THE REQUEST FOR SPECIFIC PERFORMANCE OF THE PURCHASE AGREEMENT, AS MODIFIED BY THE AGREED JUDGMENT DATED MARCH 31, 2006

The Chancellor correctly decided this issue. Under the Purchase Agreement, as modified by the Agreed Judgment, Julvanna assumed the rights and liabilities of the SCSI Agreement, including any deficiencies in performance. As stipulated by Julvanna in this appeal, Economy could have asked Julvanna to close *at any time*, even if SCSI was not finished with the reconstruction.[26] Furthermore, Julvanna, through the Agreed Judgment, clearly recognized that it assumed the risks under the SCSI Agreement, by demanding inclusion of a provision requiring SCSI to clarify that Section 4.3 of the SCSI Agreement applied only to increased costs caused by post-Katrina governmental regulations.

Julvanna advances a new argument in this appeal, i.e., that the Franchise was a material provision of the Purchase Agreement and that Section 4.3 of the SCSI Agreement applied to the Franchisor's heightened quality assurance standards. The new argument recognizes the weakness of its position at trial. It crumbles under minimal scrutiny.

Julvanna *conceded* in the proceedings below that Economy was not required to maintain the Franchise. Furthermore, the record is clear that Section 4.3 has nothing to do with the Franchise. If fact, Julvanna insisted at the time of settlement that SCSI make a representation that Section 4.3 was understood to make Julvanna liable for increased costs caused by *governmental* regulations only. Even if Section 4.3 applied, the increased costs of the Franchisor's new requirements would be paid by SCSI and Julvanna, not Economy.

B. THE CHANCELLOR PROPERLY AWARDED ECONOMY THE EARNEST MONEY DEPOSIT, WHEN JULVANNA REFUSED TO CLOSE WITHOUT IMPOSING DEMANDS TO WHICH IT WAS NOT ENTITLED UNDER THE AGREED JUDGMENT

Julvanna's only claim on appeal regarding this issue is a procedural claim. It has no merit. Economy's counter-claim for the earnest money deposit was not only proper in these proceedings, but was compulsory under the doctrines of res judicata and/or collateral estoppel and the Mississippi Rules of Civil Procedure. Julvanna failed to file responsive pleadings to the Counter-Complaint. Julvanna held Economy under this Purchase Agreement, while refusing to close, unless Economy assumed liabilities that it did not own under the Purchase Agreement, as modified by the Agreed Judgment. Julvanna's breach was clear and the award of the liquidated damages entirely reasonable.

IV. ARGUMENT

A. THE CHANCELLOR RULED CORRECTLY IN DENYING THE REQUEST FOR SPECIFIC PERFORMANCE OF THE PURCHASE AGREEMENT, AS MODIFIED BY THE AGREED JUDGMENT DATED MARCH 31, 2006

1. A settlement agreement is a contract and a proceeding to enforce it is subject to the same rules of construction and pleading as any contract

A settlement agreement memorialized through an Agreed Judgment is no more, no less *a contract*. The law of contract applies to govern the rights and liabilities of the parties. *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278 (Miss. 2005):

> We begin with an acknowledgment of the general premise that compromise reached by way of mediation or otherwise, is favored in the state of Mississippi. Moreover, the law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the agreement which the parties have made, absent any fraud, mistake, or overreaching. *Hastings v. Guillot*, 825 So.2d 20, 24 (Miss. 2002) (citing *First Nat'l Bank v. Caruthers*, 443 So.2d 861, 864 (Miss.

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[26] Brief of Appellant, p 7, footnote 15.

1983); *Weatherford v. Martin*, 418 So.2d 777, 778 (Miss. 1982)). Importantly, we apply contract law analysis to settlement agreements. This is true of any type of negotiated settlement. *Newell v. Hinton*, 556 So.2d 1037, 1042 (Miss. 1990); *East v. East*, 493 So.2d 927, 931-32 (Miss. 1986). Settlement agreements are contracts made by the parties, upon consideration acceptable to each of them, and the law will enforce them. *Id.* at 932-33. Courts will not rewrite them to satisfy the desires of either party. *Travelers Indem. Co. v. Chappell*, 246 So.2d 498, 510 (Miss. 1971).

Chantey Music Publ., Inc. v. Malaco, Inc., 915 So. 2d 1052, 1055-1056 (Miss. 2005).

Mississippi follows the "four corners" rule of contract construction. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 351-53 (Miss. 1990).

> We have set out a three-tiered approach to contract interpretation. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 351-53 (Miss. 1990). First, the "four corners" test is applied, wherein the reviewing court looks to the language that the parties used in expressing their agreement. *Id.* at 352 (citing *Pfisterer v. Noble*, 320 So. 2d 383, 384 (Miss. 1975)). Second, if the court is unable to translate a clear understanding of the parties' intent, the court should apply the discretionary "canons" of contract construction. *Id.* at 352. Finally, if the contract continues to evade clarity as to the parties' intent, the court should consider extrinsic or parol evidence. *Id.* It is only when the review of a contract reaches this point that prior negotiations, agreements and conversations might be considered in determining the parties' intentions in the construction of the contract.
>
> *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278, 284 (Miss. 2005).

2. The Agreed Judgment

Through the Agreed Judgment, the parties agreed to release each other from all claims pending in both actions[27], under the terms set forth in the Agreed Judgment and Exhibit "C" to that judgment. All parties complied with the Court's order and both actions were dismissed.

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[27] There was a second action pending in Circuit Court involving the Biloxi Beach Campground property, referred to as the Shapley property in Julvanna's brief. It is not relevant to this appeal.

With respect to the Super 8 sale, the Agreed Judgment reaffirmed the original Purchase and Sales Agreement, providing that ***"Julvanna, LLC, will purchase the property under the Purchase and Sales Agreement entered into on December 14, 2004".*** The Agreed Judgment further provided:

> In consideration for said settlement agreement, Economy Inns, Inc. acknowledges that the Purchase and Sales Agreement in full force and effect and that Economy will sell and Julvanna will purchase ... the Super 8 Motel & Suites property .... under the Purchase and Sales Agreement for the remaining sum of Five Million Five Hundred Thousand Dollars ($5,500,000.00) and the closing on the Super 8 Motel & Suites property shall occur within ninety (90) days of the written notice from Economy Inns of its request to close or no later than December 31, 2006.
>
> Regarding the SCSI Agreement, the Agreed Judgment provided:
>
> The parties further agree that Julvanna, LLC will take the Super 8 Motel property upon the sale contemplated above, ***subject to the rights and liabilities*** of Economy-Southern Construction Services, Inc. Construction Agreement and Lease. Should the closing occur before the expiration of the lease to Southern Construction Services, then the lease payments contemplated to be paid to Economy Inns, Inc., will be pro-rated between Economy Inns, Inc. and Julvanna, LLC based on the number of days left in the lease agreement. The parties further acknowledge that ***all other terms of the Purchase Sales Agreement*** between Julvanna, LLC and Economy Inns, Inc., dated December 14, 2004, attached hereto as Exhibit "A", ***shall control to the extent that they are not inconsistent with the provisions of the settlement agreement or judgment*** herein.

3. Under the settlement agreement, Economy had no duty to complete the reconstruction of the Super 8

Julvanna's option under the original Purchase Agreement, in the event of disaster, i.e., was to close and accept the insurance proceeds and or walk away. Economy's counsel tendered this option to Julvanna in the September 23, 2005, letter. Julvanna's option was to take the property "as is, where is" and the insurance proceeds. (Chang, Tr. T. Vol. I, p. 151) Julvanna

rejected that option, because it was understandably concerned that there was insufficient insurance available to repair the Super 8. (Chang, Tr. T. Vol. II, pp. 152-153)

Economy then had no choice but to enter into an arrangement to rebuild from the disaster with limited insurance funds. Economy reached an agreement with SCSI to rebuild the Super 8 to its pre-Katrina condition in exchange for all insurance proceeds payable for the loss.[28]

Thereafter, any settlement of the claims and closing on the property with Julvanna would necessarily have to incorporate the SCSI Agreement. Economy proposed a settlement under which *"**Julvanna would accept the liabilities and benefits of Economy's contract with SCSI"**.*, in lieu of the insurance proceeds. Mr. Wetzel acknowledged this understanding in his response of February 7, 2006: *"We understand, pursuant to the [SCSI] agreement entered into by Economy and Southern Construction Services, Inc., that **[Julvanna] assumes the Construction Agreement and Lease..."**[29]*

a. Julvanna's insistence of clarification of Section 4.3 demonstrates that it would assume the risks under the SCSI Agreement

While SCSI agreed to assume the risks of insufficient insurance coverage to reconstruct the Super 8 to its pre-Katrina condition, the SCSI Agreement provided that the parties would share in any increased costs caused by governmental regulations. This would cover, e.g., new building standards promulgated to make buildings more resistant to flood and wind. Section 4.3 of the SCSI Agreement provided:

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[28] The SCSI Agreement also provided rooms for SCSI's crews for a period of 13 months.

[29] Wetzel Letter, 2-7-06, Trial Exhibit 5, Appellee R.E. 159-160.

> 4.3 The parties shall bear equally any additional costs in the construction, not covered by insurance, resulting from any law, ordinance, rule, or regulation that requires an improvement or modification in the building construction over the condition that existed on August 28, 2005.

In his February 7, 2006, letter Julvanna's counsel was clear that Julvanna understood that it would be assuming the SCSI Agreement, including its risks:

> You advised that you would provide me with a letter from Southern Construction Services, Inc., stating that pursuant to 4.3 of the Construction Lease Agreement ***my client would not have to assume additional costs not covered by the insurance proceeds*** which Southern Construction Services, Inc. would receive, if any, and ***that this particular paragraph was for any additional costs*** required as an improvement or modification to the building construction resulting from any local ordinance, law or regulation ***which may be required by the City Building officials***. (Emphasis Added)

Julvanna clearly understood that it would be required to share costs under Section 4.3, if it became applicable. It wanted clarification that the circumstances under which that could happen were limited as stated. Toward this end, the Agreed Judgment provided:

> The parties, Julvanna, LLC and Economy Inns, Inc., acknowledge that Economy shall obtain from Southern Construction Services clarification of Section 4.3 of the Southern Construction Agreement and Lease to the effect that the provision only applies to improvements not covered by insurance which also result "from any law, ordinance, rule or regulation that requires an improvement or modification of the building construction over the condition that existed on August 28, 2005."

Therefore, Julvanna's liability under Section 4.3 reinforces what it already clear: Julvanna assumed the risks, liabilities and benefits of the SCSI Agreement.

b. The fact that Economy could have demanded closing well before reconstruction was complete demonstrates that Economy was not obligated to reconstruct the Super 8

Under the Agreed Judgment, Economy could have called for closing months before SCSI completed the reconstruction. This is clear from the terms of the Agreed Judgment and Julvanna

so stipulated in the Brief of Appellant.[30] Necessarily therefore, Economy was not required to rebuild the Super 8 as a condition of closing or to guarantee SCSI's performance under the SCSI Agreement. The reconstruction of the Super 8 rested in the assignment of insurance proceeds and the SCSI Agreement that Julvanna assumed. Counsel conceded this point in at trial: *"If Southern doesn't do their job....we [Julvanna] stand in the shoes of Economy."*[31]

c. The Chancellor correctly held that Julvanna took the property "As is, Where is" and subject to the rights and liabilities of the SCSI Agreement

On the claims that Julvanna made at trial, the Chancellor reached a correct decision. The language of the Purchase Agreement, as modified by the Agreed Judgment, can have only one meaning. Economy agreed to deliver the Super 8 in an "as is, where is" condition[32] and subject to the rights and liabilities of the SCSI Agreement.

Using the "four corners" test, the Chancellor found the intent of the parties clear and unambiguous. The Chancellor rejected Julvanna's interpretation of the Agreed Judgment:

> Julvanna takes the position that Economy had the duty to complete reconstruction of the property before Julvanna had the obligation to close on the sale. The Court finds that Julvanna's position is without merit. *Under the Agreed Judgment, Julvanna had the duty to take the property subject to the Construction Agreement in an "as is, where is" condition upon demand or no later than December 31, 2006.* There is nothing in the Agreed Judgment that required Economy to complete the Construction Contract prior to conveying the property to Julvanna. *The Court further finds that Julvanna was not ready and willing to complete the sale on December 31, 2006, nor at any other time,* based upon its misinterpretation of the terms of the Agreed Judgment. Based upon the

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[30] Brief of Appellant, p. 7, footnote 15.

[31] Mr. Wetzel for Julvanna, Tr. T. Vol. II p. 169.

[32] Purchase and Sale Agreement, Paragraph 9. Trial Exhibit 1, Appellee R.E. 16-41.

> foregoing, the Court finds the Motion to Enforce Settlement Agreement is without merit and should be denied.[33]

It is unclear how the "warranty analysis" aids Julvanna in this appeal. While the "as is, where is" provision of the Purchase Agreement adds weight to the Chancellor's decision, there is no "operative" bond between these provisions and the SCSI Agreement. Julvanna was accepting a damaged property "as is, where is" and an assignment of the insurance proceeds and the SCSI Agreement, in lieu of the Super 8 that existed at the time of the original Purchase Agreement.

The SCSI Agreement replaced Julvanna's option under Paragraph 7 of the Purchase Agreement, in the event of disaster. Julvanna had the option to walk away after Katrina or close and accept the insurance proceeds. When Julvanna failed to select, Economy was forced to assign the insurance benefits as part of the SCSI Agreement. Then Economy gave Julvanna the option of walking away or closing and accepting the SCSI Agreement and insurance proceeds, subject to the SCSI Agreement. It was a much sweeter deal for Julvanna and if Julvanna had walked away, for Economy.

4. Julvanna is prohibited from advancing new claims on appeal

What Julvanna did not contend below and the Chancellor never decided are the issues that Julvanna advances for the first time in its brief. Julvanna now argues that the Franchise was a material provision of the Purchase Agreement and Economy was required to maintain the Franchise. Julvanna submits that Section 4.3 of the SCSI Agreement required that Economy refurbish the Super 8 to meet the new Quality Assurance standards imposed by the Franchisor. In other words, Julvanna contends that "law, ordinance, rule, or regulation" as used in Section

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[33] Appellant R.E. 24.

4.3 refers to Franchisor's Quality Assurance standards.[34] How this analysis aids Julvanna's cause is unclear.

Not only were these issues not presented for the Chancellor's consideration, precluding consideration on appeal, they were conceded by Julvanna. "Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation. *Banes v. Thompson,* 352 So.2d 812, 812 (Miss. 1977)." *Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003) Furthermore, this Court does not consider issues raised for the first time on appeal. *Wilburn v. Wilburn*, 991 So.2d 1185, 1191 (Miss. 2008). Even if Julvanna were allowed to raise these issues for the first time in this appeal, the claims are without merit.

a. The Franchise was not a material provision of the Purchase Agreement, which Economy was required to maintain for Julvanna's benefit

In his January 8, 2007, letter, Julvanna's counsel conceded that Economy was not required to maintain the Franchise agreement, although it was claiming that Economy was required to reconstruct the Super 8 to be "franchise compliant with Super 8 QA standards B+". [35] At trial, Julvanna *stipulated* that Economy was not required to deliver a Franchise.[36] Furthermore, Mr. Chang, the Julvanna Manager-Member, testified that Economy was not required to bring the Super 8 into compliance with the new Wyndham standards. [37]

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[34] Brief of Appellant, p. 14.

[35] Wetzel Letter, 1-8-07, Trial Exhibit 1, Appellee R.E. 106-107, 107.

[36] Tr. T. Vol. I, pp. 127-128.

[37] Tr. T. Vol. I., p. 94; Exhibit 4, Appellee R. E. 152-157.

b. The plain meaning of Section 4.3 limits its scope to increased costs from governmental regulations

Not only is Section 4.3 of the SCSI Agreement clearly limited to increased costs from governmental regulation, Julvanna insisted, as part of the settlement, that it be made clear that this provision applied to increased costs resulting only from "any local ordinance, law or regulation ***which may be required by the City Building officials***". (Emphasis Added)[38] Furthermore, even if Section 4.3 applied to increased costs caused by the Franchisor, it is clear that *this was Julvanna's burden* under the Agreed Judgment. Obviously, that is why Julvanna needed clarification.

Julvanna ultimately stipulated that it stood in the shoes of Economy, with respect to the SCSI's performance of the SCSI Agreement. Mr. Wetzel: *"Now, if Southern Construction doesn't do their job -- I agree with you, Judge, we stand [in] the shoes of Economy Inn."*[39]

5. Julvanna failed to prove that it was at all times "ready, willing and able to perform"

In addition to refusing to close, without demand that Economy own obligations that were not a part of the Agreed Judgment,[40] Julvanna failed to prove that it was financially "ready, willing and able" to close. Even if Economy was required to meet its demands, Julvanna was required to prove, as an element of a claim for specific performance, that it was *at all times* "ready, willing and able" to perform.

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[38] Wetzel Letter, February 7, 2006. Trial Exhibit 5, Appellee R.E. pp 159-160.

[39] Tr. T. Vol. II, p. 169.

[40] Order Denying Motion to Enforce, Para. 28, p. 17, Clerk's Papers, R. Vol. III, p. 306, Appellant R.E. 24.

Specific performance is an equitable remedy that is applied with caution. While the remedy is available to a prospective purchaser under a real estate contract, the purchaser must prove all of the elements of the claim. Julvanna must prove a breach or anticipatory breach of contract by Economy and that Julvanna was at all times and is "ready, willing and able" to perform. On this element, Julvanna only offered testimony that Julvanna was "ready, willing and able" to perform thirty (30) days after a judgment.

> Q. If the court were to order that this matter be closed in 30 days, would you be able to fund the $5,000,000?
>
> A. Yes, Sir.
>
> Q. Do you have any problem at all with funding that?
>
> A. No, sir.[41]

While this proof is required, it is not sufficient. A vendee seeking to enforce a real estate sales contract is not required to make a formal tender of the purchase money, if the evidence shows that it would not have been accepted, but is required to show that he was ***at all times*** ready, able and willing to pay the purchase price. *Cooley v. Stevens*, 240 Miss. 581, 592 (Miss. 1961); *Lauchly v. Shurley,* 217 Miss. 728, 732 (Miss. 1953).

> It is important to recognize that in seeking specific performance, the plaintiff invoked the equitable powers vested in the trial court. "[A]n action for specific performance of a contract to sell real estate is an equitable action and is to be determined by equitable principles." *Morris v. Costa*, 174 Conn. 592, 599, 392 A.2d 468 (1978); *Parkway Trailer Sales, Inc. v. Wooldridge Bros., Inc.*, 148 Conn. 21, 25, 166 A.2d 710 (1960). ****As already noted, the plaintiff alleged in his complaint that he was "at all times . . . ready, willing and able to perform" his obligations under the agreement. "In order to be awarded specific performance, the plaintiff had the burden of proving that ***he was ready, willing and able at all times*** to purchase the property".

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[41] Tr. T., Vol. I, pp. 80-81.

> *Eastern Consolidators, Inc. v. W. L. McAviney Properties, Inc.*, 159 Conn. 510, 510-11, 271 A.2d 59 (1970)." *Allen v. Nissley,* 184 Conn. 539, 542, 440 A.2d 231 (1981). The plaintiff must meet this burden even in a situation where the defendant-seller indicates her refusal to participate in any closing. *See, e.g., Allen v. Nissley, supra,* 540-42.
> ******
>
> It has been stated that when a purchaser of land is left to depend upon a purchase price loan from a third party who is in no way bound to furnish such funds, the purchaser cannot be considered to be able to perform so as to be entitled to specific performance. [Cites omitted] The Wisconsin Supreme Court, in discussing an "able" buyer in a case for a broker's commission, stated: "The authorities outside Wisconsin uniformly hold the word 'able' includes a reference to financial ability not only to make the initial payment required to meet the terms of the seller, but also to complete the contract of purchase according to its terms. A proposed purchaser cannot be said to be able to purchase when he is dependent upon third parties who are in no way bound to furnish the funds." [Cites Omitted]
>
> *Frumento v. Mezzanotte*, 192 Conn. 606, 615-618 (Conn. 1984) (Emphasis Added).

Here, Julvanna did not attempt to prove that it was ***at all times*** ready, willing and able to perform under the contract. To allow a buyer to sue for specific performance and only require that he prove that he is ready, willing and able at the time of trial to perform or 30 days later would confer a valuable property right on the buyer, tantamount to a free option of undetermined length, during which property prices could increase in value or a prospective second purchaser could be found to pay the purchase price. Thus, the reason behind the rule. Julvanna wholly failed to meet this burden.

The terms of the Purchase Agreement, as modified by the Agreed Judgment, are clear and unambiguous. Julvanna was required to take the property "as is, where is", subject to the rights and liabilities of the SCSI Agreement. The Agreed Judgment is clear that Julvanna assumed any risks of non-performance by SCSI, if there were any deficiencies, and assumed any additional liabilities under the SCSI Agreement. Julvanna stood in Economy's shoes.

Even if Julvanna's interpretation of the Purchase Agreement, as modified by the Agreed Judgment, were correct, Julvanna wholly *failed to present any proof* that the Super 8, as reconstructed, did not meet the standards of the SCSI Agreement, i.e., to place it in the same condition as existed on August 28, 2005. Specifically, there was no proof of the condition of Super 8 on August 28, 2005, nor was there any proof of what "Super 8 QA standards B+" were at any point in time, including the day before Katrina. The only witness in the trial, Mr. Chang, testified that he was unfamiliar with the condition of the Super 8 before Katrina and "Super 8 QA standards B+".

This Court should affirm the Chancellor's ruling on the Motion to Enforce.

B. THE CHANCELLOR PROPERLY AWARDED ECONOMY THE EARNEST MONEY DEPOSIT, WHEN JULVANNA REFUSED TO CLOSE WITHOUT IMPOSING DEMANDS TO WHICH IT WAS NOT ENTITLED UNDER THE AGREED JUDGMENT

1. The Motion to Enforce the Agreed Judgment was a Motion for Specific Performance

It is clear that the Motion to Enforce was a claim for specific performance of the settlement agreement. A settlement agreement is enforceable as with any contract and the same rules apply. *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278 (Miss. 2005) While the Agreed Judgment modified the Purchase Agreement and thus became part of a new contract to be enforced, all of the terms of the judgment, which could be enforced by motion, had been met.

The Agreed Judgment required (1) Julvanna pay to Shapley Development (in connection with the Biloxi Beach Campground) $137,027.38; and (2) Julvanna, Economy and Shapley execute a mutual release of claims and (3) Orders of Dismissal in the pending actions "and then

the terms of this settlement are satisfied". What was left was a contract, as modified by the Agreed Judgment. The proper procedure for enforcing that contract was by a new complaint alleging the elements of a claim for specific performance.

Julvanna did not file a new action, but instead couched its claim for specific performance as a Motion to Enforce the Agreed Judgment. Economy filed a Motion to Dismiss[42] on this ground, contending that the claim was under contract for specific performance and required pleading and proof of the elements of specific performance such as, *inter alia*, that Julvanna was "ready, willing and able to perform". With the Motion to Dismiss, Economy filed its Response to the Motion to Enforce and a Counter-Claim, seeking award of the earnest money deposit. Julvanna failed to file any response to the Motion to Dismiss or Counter-Claim.

On Economy's counter-claim, the Chancellor awarded Economy the $250,000.00 in earnest money, which had been deposited pursuant to the Purchase Agreement. In this appeal, Julvanna asserts *for the first time* that the Chancellor could not reach the counter-claim because "[t]here is no statute, no rule, and no case that would allow Economy to bring forth a motion to dismiss a motion to enforce a judgment as though it were a new, substantive claim for relied". (Brief of Appellant, p. 15) Julvanna *does not* attack the correctness of the ruling or the reasonableness of the award, only the right of Economy to file and/or the power of the Court to hear the counter-claim.

Not unlike the other *de novo* assertions, Julvanna did not assert this defense in the lower Court. Even without this waiver, the claim is without merit.

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[42] Appellee R.E. 1-67.

2. Economy was compelled to file its Counter-Claim for the earnest money deposit

Economy's breach of contract claim was a compulsory counter-claim to Julvanna's action for specific performance. *Copiah Medical Associates v. Mississippi Baptist Health Systems*, 898 So.2d 656 (Miss. 2005).

M.R.C.P. 13(a) requires a party to

> state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

The Mississippi Supreme Court has applied a four-prong test to determine the connection of a claim to a counterclaim:

> (1) Whether the same evidence or witnesses are relevant to both claims;
>
> (2) Whether the issues of law and fact in the counterclaim are largely the same as those in the plaintiff's claim;
>
> (3) Whether, if the counterclaim were asserted in a later lawsuit, it would be barred by res judicata;
>
> (4) Whether or not both claims are based on a "common nucleus of operative fact"
>
> *Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, 804 So.2d 1000, 1004(¶ 5) (Miss.2001) (citing *Fulgham v. Snell*, 548 So.2d 1320, 1322-23 (Miss.1989) (citing Robertson, Joinder of Claims and Parties-Rule 13, 14, 17, and 18, 52 Miss. L.J. 47, 48-63 (1982))). We have further stated:
>
> In applying the four-prong test stated in *Fulgham,* the logical relationship test is used to determine whether a claim and counterclaim arise from the same transaction or occurrence such that a counterclaim is compulsory; it exists when the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant. *See American Bankers Ins. Co. v. Alexander,* 2001 WL 83952, [818] So.2d [1073] (Miss.2001).

Reid ex rel. Reid v. Am. Premier Ins. Co., 814 So.2d 141, 146 (¶ 21) (Miss.2002).

Copiah Medical Associates v. Mississippi Baptist Health Systems, 898 So.2d 656, 661 - 662 (Miss. 2005).

3. Julvanna's defense on appeal, i. e., that the counter-claim was not appropriate in response to the Motion to Enforce was waived by failure to raise it in the lower court

Julvanna did not file any pleadings in response to the counter-claim and never asserted the defense at trial that "[t]here is no statute, no rule, and no case that would allow Economy to bring forth a motion to dismiss a motion to enforce a judgment as though it were a new, substantive claim for relied". Since the defense was not raised or decided in the lower court, it cannot be raised for the first time in this appeal. "Failure to raise an issue in a trial court procedurally bars the issue on appeal." *Daniels v. Bains,* 967 So.2d 77, 81 (Miss.Ct.App. 2007).

> This Court finds that Chasity's "Motion for Reconsideration" was untimely. However, there is no evidence in the record that William either objected or responded to Chasity's "Motion for Reconsideration." The Mississippi Court of Appeals addressed a similar issue in *Scally v. Scally,* 802 So.2d 128 (Miss.Ct.App.2001), stating:
>
> [t]his Court does not review matters on appeal that were not first raised at the trial level. *Shaw v. Shaw,* 603 So.2d 287, 292 (Miss.1992). Before an issue can be presented to this Court, it must first be presented to the trial court. This is done by an objection. *Queen v. Queen,* 551 So.2d 197, 201 (Miss.1989). A timely objection brings the issue to the court's attention, and gives it the opportunity to address the issue. *Kettle v. State,* 641 So.2d 746, 748 (Miss.1994).
>
> *Scally,* 802 So.2d at 132. Based upon that same reasoning, this Court concludes that William is procedurally barred from raising this issue for the first time on appeal.
>
> *Wilburn v. Wilburn*, 991 So.2d 1185, 1191 (Miss. 2008).

Julvanna's defense with respect to the award of the earnest money deposit must be rejected under this rule. It is nevertheless meritless, since Economy not only had a right to bring the counter-claim, but was required to bring it or have it deemed barred. Since Julvanna does not attack the correctness of the award, but only the power to hear it, the award must be affirmed.

V. CONCLUSION

In conclusion, Economy Inns, Inc. urges the Court to affirm the decision of the Chancellor and award Economy Inns attorney fees, costs and penalties, as provided by law and contract.

RESPECTFULLY SUBMITTED, this the 17th day of March 2009.

ECONOMY INNS, INC., APPELLEE
HOLLEMAN LAW FIRM, PLLC
By: Michael Holleman, its Attorney

Michael B. Holleman

CERTIFICATE OF SERVICE

I, Michael B. Holleman, attorney for Appellee, ECONOMY INNS, INC., certify that I have this day served a copy of this Brief of Appellee by United States mail with postage prepaid on the following persons at these addresses:

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This the 17th day of March 2009.

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