IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-02226

JULVANNA, LLC, A MISSISSIPPI LIMITED LIABILITY COMPANY — APPELLANT

VS.

ECONOMY INNS, INC., A MISSISSIPPI CORPORATION — APPELLEE

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT
IS REQUESTED

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REPLY TO ECONOMY'S STATEMENT OF THE CASE

Where Appellee Economy states in the second paragraph of its statement of the case that "Julvanna . . . stakes its claims in this appeal on issues that it either waived or conceded in the proceedings below," Economy fails to realize that the settlement of the underlying lawsuit was reduced to the judgment of a chancellor. Brief of Appellee, p. 2. Thus, no issues are *waived*; rather, (if anything) a Chancellor makes rulings in support of its judgment. To the extent that a party is aggrieved by those rulings, it appeals them. As will be discussed further *infra*, the rulings at issue, being on matters of law, are reviewed *de novo*.

Reply to Statement of Facts Relevant to the Appeal

Economy's contention: "*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.*" Brief of Appellee, p. 3.

It is first to be remembered that Economy's actions in entering that contract were, at best, fairly suspect. *See* Brief of Appellant, pp. 5 - 6. For Economy now, in its Brief, to suggest that it allowed SCSI to *begin basic mitigation without contract while it presented options to Julvanna* (1) have the effect of misleading the Court, and (2) are legally inaccurate. A fair reading of the facts makes readily apparent that what Economy did was to cut a side deal with SCSI in derogation of its obligations to Julvanna,[1] hide it from Julvanna, *purport* to give Julvanna

[1] Appellant R.E. 40. Section 21.C of the Sales and Purchase Agreement prohibit "contracts, leases, arrangements, or any other agreements . . . which affect the propert[y] . . . ."

options, and then accelerate Julvanna's decision to a two-week window in the aftermath of the greatest natural disaster in US history.[2]

And thus the stratagem comes ever more clearly into focus. Julvanna was being pressured by Economy to either (1) buy the property with significant damage having occurred since entering into the contract and face the potential of limited insurance coverage, or (2) walk away. Brief of Appellee, p. 3 (and citations contained therein). Economy knew that it had inadequate insurance. Brief of Appellee, p. 2 (because of substantial question of adequate coverage, "*Economy faced a dilemma.*"). Economy also knew that it could now expect a windfall that it otherwise could never have dreamed of, i.e., immediate income generation from a devastated motel, AND A NEW MOTEL...FOR FREE! It was no happenstance that Economy's "offer" to Julvanna was made on September 25, 2005. **That is the same day that SCSI entered onto, and took possession of Economy's wrecked, uninhabitable, and untenable motel.** So says Economy's contract with SCSI at sections 7.1 and 7.5. Appellant's R.E. 109.

That contract was not reduced to writing until December 7, 2005. Even then, **it was agreed that it would not be recorded in the public record.** Appellant's R.E. 117. Finally, the record shows that Julvanna was not notified of the existence of the granting of tenancy and possession of the property promised to it until December 9, 2005.

Julvanna contends that the only dilemma that Economy faced was how to get Julvanna to rescind the contract so that Economy could (1) get cash flowing, (2) get out of the lawsuit filed by Julvanna, and (3) get a new motel built for free. The answer was an exquisite one: enter into

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[2] Economy's deception is no more clear than in its own words to this Court. " 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." Brief of Appellee, p. 18. **Why didn't Economy give Julvanna the benefit of the SCSI deal at the point it was struck (which, under the Sales and Purchase Agreement it was required to do)? Why did Economy only offer that deal when it was backed into a corner by the advance of the litigation?**

an undisclosed oral agreement with SCSI and slip away from its contract with Julvanna, all under the cover of secrecy and devastation.

These facts are important because they illuminate Economy's current dilemma: how to avoid the stark reality of the foregoing in light of its tacit admissions to this Court. Brief of Appellee, p. 3. In sum:

- Economy had already tried to avoid its obligations to Julvanna once, which lead to the underlying action;
- Between August 29, 2005, (Hurricane Katrina) and September 23, 2005, SCSI approached Economy to (1) rebuild a Super 8 Motel, and (2) pay Economy for worker housing on-site;
- SCSI immediately began reconstruction;
- Economy cut its deal with SCSI on September 23, 2005;
- That same day Economy sent Julvanna notice to take the damaged property and uncertain insurance proceeds *or* walk away;
- Economy didn't inform Julvanna that it had an agreement to receive income for lease of space;
- Economy didn't inform Julvanna at that time that SCSI would rebuild to Super 8 standards for the insurance proceeds and take risk of loss over that;
- Economy gave Julvanna two weeks to make a decision on the incomplete information (incidentally, a two-week period approximately one month following substantial area devastation and a declared state of emergency);
- Economy would otherwise have been without any income from the property until repaired (which the record shows was sometime in 2007);
- Economy and SCSI did not commit the agreement to writing until December 7, 2005 (some 10 weeks later);
- The lease and construction was not to be recorded on pain of default;

Finally, it is beyond question that the withholding of material information from Julvanna affected its decision; Economy concedes this point. Brief of Appellee, p. 4, n. 5. (and record citation).

* * * * *

Economy's machinations did not stop there, and certain other factual representations in Economy's Brief bear mention. **Even after the court ordered specific performance**, Economy was trying to change the bargain. In its Brief of Appellee, Economy leads the Court to believe that it met its new obligations under the settlement and Agreed Judgment., stating in material part:

- Per the judgment, sale could take place any time prior to December 31, 2006 (Brief of Appellee, p. 5 and citations contained therein);
- On December 4, 2006, Economy notified Julvanna that it could close on December 31, 2006, but would agree to a January, 2007 closing;
- On December 26, 2006, Economy purports to have provided a Franchisor's Inspection Report that shows all rooms ready for occupation (Brief of Appellee, p. 8, n. 18)(**that is not what the report states**);[3]
- On January 5, 2007, Economy contends that it provided an Inventory and Contractor's Affidavit that there were no additional construction costs (Brief of Appellee, p. 6)(**the existence of the Inventory and Affidavit is not supported by citation and are not of record on this appeal; the assertions should not be considered by this Court**[4]);
- On January 24, 2007, Economy pressed the issue of continuing to closing, stating *inter alia*, that "The Super 8 is practically new and operating with all rooms refurbished." (Brief of Appellee, p. 8 and citations contained therein);
- On February 2, 2007, Economy repudiated the "Contract." (Brief of Appellee, p. 9 and citations contained therein).[5]

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[3] **Julvanna very much denies counsel's assertions regarding this document.** Julvanna agrees that the so-called "updated" report was not introduced into evidence, though it is a part of the record on appeal. Inapposite to Economy's contention, nowhere does the report state that 217 rooms are "ready for occupation." Just the opposite, in the last paragraph of the document, it states that "there are 137 closed/partially stripped rooms on site. Total renovation of all FF&E [furniture, fixtures, and equipment] to meet System Standards prior to opening will be required." There is no functional difference between this document and the its counterpart except that this one merely identifies "217" rooms (not 217 rooms ready for rent) in the caption instead of a separate delineation, and the competing documents are identical in nearly every respect, including that each one states that it is current through December 26, 2006, and 137 rooms **ARE NOT** ready for occupation.

[4] There was a question before the Court about whether an Inventory was ever received from Economy as represented in its letter of January 5, 2007. At various parts of the transcript, counsel for Julvanna denies having received it. Of equal weight and credibility is the statement of Economy's counsel that it was sent. Mr. Chang of Julvanna testified under oath that he never received it. Perhaps the question is best answered with reference to the transcript where the dispute is discussed and Economy's counsel states, "I'm not moving it into evidence at this point."

[5] This is perhaps the greatest curiosity of all. Nowhere in Mississippi jurisprudence does Julvanna find support for the ability of a litigant subject to the lawful judgment of a court with jurisdiction to unilaterally "repudiate" the judgment.

A review of the entire record, however, reveals a different picture:

- The Agreed Judgment was entered on March 31, 2006 (Appellant's R.E. 72);
- The Agreed Judgment reaffirmed the Sales and Purchase Agreement, as amended by the Agreed Judgment (Appellant's R.E. 73);
- Under the Sales and Purchase Agreement, Economy had to deliver the premises as-is, where-is,[6] AND subject to the Super 8 franchise agreement (Appellant's R.E. 80 - 81);
- The Agreed Judgment incorporated the SCSI contract, Julvanna taking title subject thereto (Appellant's R.E. 73);
- Section 2.A. of the SCSI contract recognized that, on August 28, 2005, the property was Super 8 QA standards B+ compliant AND that SCSI was required under the contract to reconstruct the property to that same standard (Appellant's R.E. 106);
- Section 2.B. of the SCSI contract further obligated SCSI to furnish a renovated, fully equipped fitness room (Appellant's R.E. 106);
- Section 2.G. of the SCSI contract further obligated SCSI to furnish all labor and material to restore the property to its intended use (i.e., a Super 8 Motel)(Appellant's R.E. 107);
- Thus, Julvanna bargained in settlement for property *as-is, where-is* **as of August 29, 2005;**
- Economy could request closing at any time after March 31, 2006, and Julvanna would be required to close within 90 days of that request *but not later than December 31, 2006* (Appellant's R.E. 73);[7]
- The SCSI lease contract expired on October 25, 2006, after which Economy would not be paid any further money in rental (Appellant's R.E. 109);
- The language of the contract makes apparent that construction was to be completed by October 25, 2006 as well; Economy agrees (T. p. 40, ll. 24 – 25);
- On or before November 9, 2006, a Super 8 representative inspected the property and found it to be woefully deficient for operation as a Super 8 (Appellant's R.E. 119);
- On December 4, 2006, Economy represented that SCSI would complete construction prior to the end of the month, after which Economy could close;

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[6] Meaning prior to the loss occurring within the meaning of Section 7 of the Sales and Purchase Agreement. *See infra* at ###.

[7] Economy still sought to make a 1031 exchange and was given the time to do accomplish it. The Agreed Judgment would naturally have assumed a motivated seller.

- At the time of the foregoing representation, it is undisputed that Economy was in control of the premises and remained obligated to live up to the terms of the Agreed Judgment to include the SCSI contract;

- In January, 2007, (within the time agreeable to Economy for closing) a representative of Julvanna inspected the property and found it to be incomplete in many respects (T. 76 - 78);

- **The testimony of Chang is the ONLY evidence produced at the hearing/trial on the issue of completion, the property clearly NOT being complete as represented by Economy on December 4, 2006;**

- Economy steadfastly refused all requests to provide assurance that the property was in compliance with the terms of the Sales and Purchase Agreement and the SCSI Contract; in other words, **in compliance with the Agreed Judgment** (Brief of Appellee, 6 – 9);

- *Though not evidence*, at the hearing/trial of the Julvanna's Motion to Enforce Agreed Judgment, counsel for Economy told the court that repairs to the property were complete (T. p. 31, l. 28; p. 33, l. 24; p. 35, l. 15; p. 35, l. 25);

- ...and then again, maybe not (T. p. 33, l. 28 – p. 34, l. 6; p. 35, l. 23 – 24).

Julvanna was being coerced to take the property in an state that was incomplete, and not built according to the SCSI contract upon which Julvanna relied **yet which was represented by Economy to be complete per all requirements**. Further, Julvanna had no remedy to achieve its bargain. That is because, according to the terms of the SCSI contract and the express understanding of Economy (as stated by counsel, T. p. 40, ll. 24 – 25), the contract expired on October 25, 2006 (roughly six weeks before Economy requested closing). To what rights would Julvanna succeed at closing? None. The contract having expired, and Economy having represented that construction, though incomplete at that time, would be complete by time of closing (by some mythical extension?) For Julvanna to have gone to closing would have been to its serious detriment and in substantial violation of Julvanna's rights under the Agreed Judgment. Chang's testimony on that point is unrefuted. Some of those incomplete items were:

- Exercise room was empty and unfurnished (T. p. 76, ll. 17 – 18);[8]

[8] Per the SCSI, the exercise room was to be complete ***and furnished***. (Appellant's R.E. 106)

- Rooms upstairs and downstairs were incomplete and unfurnished (T. p. 76, ll. 18 – 22);
- Damage to interior walls and missing fixtures (T. p. 76, ll. 19 – 23);
- Mix-matched furniture in rooms (T. p. 77, ll. 4 – 9);
- Two buildings were substantially incomplete (no flooring, not painted) (T. p. 77, ll. 10 – 13);
- Of 217 rooms, only 70 to 80 rooms were complete and ready to rent (T. p. 78, ll. 3 – 7).

Inapposite to the contention of Economy that Julvanna failed in its proof, Brief of Appellee, p. 10, Julvanna made a prima facie case through the exhibits and Mr. Chang's testimony. It is Economy that **proved nothing; attempted to prove nothing**.

REPLY TO THE ARGUMENT OF ECONOMY

More a reiteration than a reply, the first point of law to which Julvanna directs the Court's attention is the standard of review. It being adequately covered in its principal brief, Julvanna reiterates its position and notes the absence of any *contra* contention by Economy. Thus Julvanna respectfully asks the Court to review these issues *de novo*.

Denial Of Motion To Enforce Settlement Agreement Seeking Specific Performance

Economy contends that an Agreed Judgment is "no more no less *a contract*." Brief of Appellee, p. 12 (emphasis in the original). Julvanna disagrees. More importantly, this Court disagrees; and strongly. In *Riley v. Wiggins*, 908 So. 2d 893 (Ct.App.Miss. 2005), a race track operator (Appellant Riley) was sued by area residents in Chancery Court. They settled their differences. The court reduced that settlement to a ***Judgment***. As a part of the agreement of the parties, should Mr. Riley violate the terms, he was subject to a $200 liquidated damages penalty per violation. *Id.* at 896. From the facts of the case it appeared that Mr. Riley was more than happy to pay that paltry penalty, and so, violated the agreement routinely. *Id.*

On a hearing for citation for contempt, the Court found that Mr. Riley violated the terms of the agreement, but timely paid his penalty on each occasion. *Id.* Then, however, the Court found that Mr. Riley was "'in total derogation and in contumacious disregard of the **Final Judgment**' and 'routinely operated the racetrack in violation of the judgment.'" *Id.* (emphasis added).

This Court went further to point out that "Riley's argument misconstrues the nature of the court's authority to issue an order of contempt. Although an agreed order or consent decree is in the nature of a contract, **it is also a judgment of the issuing court, subject to the court's enforcement powers**." *Id.* at 899 (citing *Guthrie v. Guthrie*, 233 Miss. 550, 556-57, 102 So. 2d 381, 383 (1958) (consent judgment given same force and effect as judgments rendered after litigation)(emphasis mine). Citing further analogous authority, the *Riley* Court noted with approval the opinion of the United States Court of Appeals for the Fifth Circuit, thus: "while '[a] settlement is simply an agreement between the parties and can only be enforced by a subsequent suit,' a consent decree has the force of a judgment and 'can be enforced by judicial sanctions, including citation for contempt, if the decree is violated.'" *Id.* (citing, *Williams v. City of New Orleans*, 729 F.2d 1554, 1559 n.6 (5th Cir. 1984). In turn, that court cited to an eloquent concurring opinion of Judge Rubin in *U. S. v. City of Miami*:

> The parties to litigation may by compromise and settlement not only save the time, expense, and psychological toll but also avert the inevitable risk of litigation. If the parties agree to compose their differences by a settlement agreement, however, the only penalty for failure to abide by the agreement is another suit. Litigants, therefore, have sought to reinforce their compromise and to obtain its more ready enforceability by incorporating it into a proposed consent decree and seeking to have the court enter this decree.
>
> A consent decree, although founded on the agreement of the parties, is a judgment. It has the force of res judicata, protecting the parties from future litigation. It thus has greater finality than a compact. As a judgment, it may be enforced by judicial sanctions, including citation for contempt if it is violated.

U. S. v. City of Miami, 664 F.2d 435, 439-40 (5th Cir. 1981)(en banc)(Rubin, J., concurring). The *Riley* Court's final admonition on that point was, "The court's ability to hold a person in contempt for violation of an agreed order, thus, **depends not on the agreement of the parties but on the agreement being incorporated into an order of the court and subject to enforcement as a court order**." 908 So. 2d at 899 (emphasis added). Economy was so squarely within its rights and the inherent power of courts to enforce their judgments that little more need be said on that point.

As to the law that applies in construing the Agreed Judgment, the four-corners doctrine (a doctrine of contract – *not judgment* – construction), has no application. First, there were perhaps *sixteen corners*, i.e., the Agreed Judgment, the settlement agreement, the original contract, and the SCSI contract. More to the point, however, no rules of construction obtain inasmuch as the court subordinated the agreements to its judgment. Courts are daily called upon to construe the meaning an agreement where the parties to it disagree on the matter. Here, the learned chancellor was called upon to gauge compliance with, not a mere contract, but its own judgment.

But that interpretation is not unfettered. The Agreed Judgment ordered that a sale take place on certain terms and conditions. Rather than recite them word for word, the court incorporated the documents containing them into its judgment, adding amendatory provisions in aid of the court's intent. Now, while the judgment has the force of law, it must surely be lawful in its own right and application. That takes Julvanna back to a cornerstone of its appeal; the "as-is, where-is" clause and the court's interpretation of it in light of happenings subsequent to the entry of the Agreed Judgment.

At subsection IV.A.3 of its Argument, Economy contends that it *had no duty to complete construction of the Super 8*. Brief of Appellee, p. 14. Then at subsection IV.A.3.a., Economy contends that *Julvanna's insistence on clarification of the SCSI agreement demonstrates that it*

would assume the risks under the agreement. Id. at p. 15. Finally, at subsection IV.A.3.b., Economy says that *it could have demanded closing well before reconstruction was complete* as though that fact shows it was not liable to reconstruct the Super 8. *Id.* at p. 16. Those arguments may be collectively termed in the vernacular, "coulda, shoulda, and woulda." Julvanna shall address them collectively.

Economy says that it "coulda" walked away shortly after the hurricane because (and this is somewhat confusing) Julvanna ***opted*** to take the property as-is, where-is. Brief of Appellee, p. 14. In the next sentence, Economy contends that Julvanna ***rejected that option*** out of concern for insufficiency of proceeds. *Id.* at 15. Not only do those two statements conflict with each other, they both conflict with Economy's earlier assertion that Julvanna ***failed to make an election***. *Id.* at 4.

Set aside the incongruity for a moment, and bypass the reality that the issue as to that election *vel non* was settled upon the entry of the Agreed Judgment; focus then on Economy's statement that it "***then*** had no choice but to enter into [the SCSI] agreement". Brief of Appellee, p. 15. That is simply not supported by the record. As noted before, Economy cut its deal with SCSI ***before*** it gave Julvanna an accelerated ultimatum while withholding vital information from Julvanna (remembering Economy's recognition that, if Julvanna walked away, it was a "much sweeter deal" for Economy. Brief of Appellee, p. 18).[9]

There is no question that the Agreed Judgment directs clarification of Section 4.3 of the SCSI Contract; the agreement to which Julvanna became subject as a result of the Agreed Judgment. Of course, SCSI was not a party to the litigation and thus not subject to the court's judgment. That necessarily means that *Economy*, the only party to the litigation AND the

[9] One further observation on that point bears mention. At a time when a great many residents were living in FEMA trailers, and housing, <u>any housing</u>, was at a premium, the Economy – SCSI agreement gave Marty Desai (principal in Economy) and his family a place to live free of charge for thirteen months *on property which he had already obligated himself to convey to Julvanna.*

agreement, was obligated to seek that clarification. Appellant R.E. 28 ("The parties . . . acknowledge that Economy shall obtain from Southern Construction Services clarification of Section 4.3 . . . .") Julvanna would readily have assumed the rights of Economy under the SCSI agreement (along with the monthly rental) because, while the contract was still viable, Julvanna could have enforced the scope of the work under that contract. Instead, Economy held on to the SCSI contract until it expired by never requested a closing. Economy "shoulda" either called for a closing or made SCSI meet its obligations by October 25, 2006 (or, *at the latest*, by December 31, 2006). Because Economy held onto (and thus controlled) the contract through its termination, and because it did so, *as a matter of law*, for the benefit of Julvanna who would succeed to Economy's rights under it, and finally because Economy squeezed all the juice out of the SCSI contract and then foisted the hulls (i.e., the incomplete and useable parts of the property) onto Julvanna, Economy cannot now be allowed to beat that plow share into a sword.

Finally, had Economy *seasonably* requested closing, Julvanna "woulda" succeeded to the rights of Economy in the contract in time to make SCSI fulfill it. This Economy did not do. Instead, the property having substantially failed the Super 8 inspection, Economy declared the construction under the SCSI contract complete (when the uncontroverted evidence in this case demonstrates that it was not), gave Julvanna yet another short window to close, and once more avoided its obligations under the original contract (having already plundered the SCSI agreement).

On the Issue of the As-Is, Where-Is Clause

Turning to the substantive paragraphs of Economy's argument on this issue (those being found in the Brief of the Appellee at page 18), Economy's argument is incongruous. It first asserts that there is no "operative bond" between the *as-is, where-is* clause of the original agreement and the SCSI agreement while, at the same time, it asserts that the SCSI agreement

"replaced" the risk-of-loss provision. *Id.* With respect to the learned chancellor and counsel opposite, Julvanna contends that there can be but one interpretation of the judgment and its subordinate agreements on this point. Julvanna first recalls the argument of its principal brief at page 8. "As-is, where-is" clauses are waivers of the duty to convey property free of certain defects; nothing more. *See*, *Grace v. Hahn,* 754 So. 2d 471 (Ct.App.Miss. 1999)(citing *Stonecipher v. Kornhaus,* 623 So. 2d 955 (Miss. 1993)). Respectfully, the court erroneously bootstrapped that concept into the risk-of-loss provision of the original contract (section 7: DAMAGE OR DESTRUCTION) vitiating the intent of it.

An "as-is, where-is" clause of a real estate contract contains another, implied provision; the "when is." In other words, the point at or by which (i.e., "when") the buyer is required to take the property "as-is, where-is" is a necessary and material part of the clause. The burden is not infinite; it is defined by the contract which creates it. According to the original contract in this case, the "when" was on a date of closing not more than 150 days after entering the agreement. Appellant R.E. 32.

A loss occurred to the property within the meaning of Section 7 of the Sales and Purchase Agreement prior to closing, and litigation ensued over the rights and obligations of Julvanna and Economy following that loss. Enter the SCSI contract. Julvanna and Economy settled their differences based in material part on that contract, ***and the court cast that settlement into a judgment***. Economy in mistaken in its contention that the SCSI contract replaced the *risk-of-loss* provision under section 7 of the original Sales and Purchase Agreement; **it actually replaced the *as-is, where-is* provision**. To conclude that an *as-is, where-is* clause could somehow leapfrog a *risk-of-loss* provision without effect is to ignore the ordinary meaning and intent of each; and a rule of law based thereupon would bind every future purchaser to the perilous unforeseeable.

Julvanna respectfully contends that the only reasonable interpretation of the judgment and subordinate agreements is that, in light of the loss suffered by the property prior to closing, and further in view of a binding contract to put it back ***as it was immediately prior to that loss***, Julvanna was entitled under the Agreed Judgment to be tendered the property at closing in just that condition. Essentially, the SCSI contract "related back" to the condition of the property immediately prior to the loss, thus supplanting the *as-is, where-is* provision. Had Economy lived up to that duty, Julvanna would have gotten what it bargained for in the first place. The uncontroverted proof in this case amply demonstrates that did not occur. All that Julvanna asked was that, since Economy prevented Julvanna from being able to succeed to a viable contract for reconstruction, Economy make good on its promises under the settlement and its obligations under the Agreed Judgment.

REPLY TO CLAIM OF NEW ARGUMENT ADVANCED ON APPEAL

Julvanna advances no new arguments before this Court. It is clear from the original agreement that the Super 8 franchise was an important part of the deal. Economy cannot deny that, or that it was valuable to Economy. After all, Economy exacted the very burden from SCSI that it now seeks to avoid, to restore the property to Super 8 standards as they existed immediately before the loss (though apparently relieving SCSI of that duty when it was to flow to Julvanna, and thus of no further utility to Economy). And while Economy tried to avoid that duty by suffering the franchise to be terminated sometime after learning of the costly repair requirements in November, 2006, once it had repudiated its obligations under the Agreed Judgment (though before a ruling from the Court) Economy re-obtained a franchise. T. p. 33, l. 27 – 28.

THE AWARD OF THE EARNEST MONEY

Julvanna respectfully contends that the procedural path that lead to the entry of the judgment now on appeal to this Court is a tortuous one. As part of the settlement of the original civil action, it was agreed by the parties that no action of any kind could be filed based on the actions being resolved ***except as to seek enforcement of the duties and obligations imposed upon the parties hereto by the Agreed Judgment.*** Appellant R.E. 90. As stated *supra*, it was appropriate for Julvanna to file a motion to enforce the Agreed Judgment. While the underlying civil action was dismissed with prejudice, the Court retained jurisdiction over the Agreed Judgment by express agreement of the parties ***as well as*** the court's inherent authority to enforce its judgments. Dismissal or no, a court's jurisdiction over its judgment does not expire until the judgment has seen full compliance with its terms.

In recognition of that continuing jurisdiction, Julvanna filed the appropriate procedural device to put the matter before the Court; a motion in the same action where it all began. Miss.R.Civ.P. 7(b).[10] What followed, Economy's "Motion to Dismiss, Response to Motion to Enforce and Counterclaim," was, with respect to capable and innovative counsel opposite, a procedural Gordian Knot. Without question, a respondent to a motion may file a written response (though it is not required under the Mississippi Rules of Civil Procedure, the Uniform Rules of Circuit and County Court Practice, or the Uniform Chancery Court Rules).[11] Julvanna does not take issue with the pleading in its character as a response to a proper motion.

As a "motion to dismiss," however, Julvanna contends that the pleading was not procedurally sound. The Mississippi Rules of Civil Procedure contemplate dismissal only of viable actions. In this case, all such viable civil actions had been dismissed with prejudice, there

[10] The motion, incidentally, was not a new civil action filed as a complaint pursuant to Miss.R.Civ.P. 3(a).
[11] Certainly responses to motions are *allowed* to be filed and are, perhaps with only rare exception, advisable. Memoranda and briefs in trial court are required for dispositive motions, but are not filed (and thus not part of the record on appeal). *Cf.*, A responsive Statement of Undisputed Facts, which is required to be filed. U.R.C.C.C. 4.03(2).

remaining only the benefits inuring to the parties pursuant to the Agreed Judgment. There was simply nothing to dismiss. Julvanna made application to the court for an order, i.e., a *motion* under Rule 7(b).[12] Julvanna's redress was as the beneficiary of that judgment; not the claimant under a new civil action; a motion was proper.

As a "counterclaim," Economy's request for an award of the earnest money was flawed procedurally and substantively. Miss.R.Civ.P. 13 defines the right of a litigant to bring a counterclaim. A litigant's *pleading* must "state as a *counterclaim*" any *claim* against an opposing party "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's *claim* . . . ." Miss.R.Civ.P. 13(a)(emphasis mine).[13] The italicized words in the preceding sentence are both operative and terms of art. A "claim" is the basis for a "civil action." Miss.R.Civ.P. 2 *and Comments*. A "claim" is the successor to the familiar (if disfavored) "cause of action." *Id.* For a "counterclaim" to be valid it must certainly run *counter* to a "claim," not oppose a "motion," i.e., an application to a court for an order.

While the generic "pleading" may refer loosely to any written document filed with the Court, the Mississippi Rules of Civil Procedure are very specific as to what is a "pleading." Rule 5(a) treats service of "pleadings," "motions," and numerous other "papers." These are not differences without distinction. Rule 7 clearly distinguishes pleadings and motions in the title of the rule, in the specific enumeration of allowable pleadings in subsection (a) and the admonition that, "[n]o other pleading shall be allowed . . . ," and by the distinct treatment of "motions" by separate paragraph (which expressly are not pleadings, and thus not "claims;" remembering that a claim for relief is by *civil action* the opening volley of which is a "complaint"). Rule 8 sets out the rules for pleadings which sets forth a claim for relief, *whether an original claim* (i.e., a

[12] Indeed, Julvanna had a right to have the Court pass on its application for relief by order. While a "dismissal" and a "denial" may perhaps be functionally similar, they spring from different rights (viable substantive claims versus application to a court for an exercise of the court's power to grant non-substantive relief in the premises).
[13] A permissive counterclaim **may** state a "claim" of a defendant *cum* counter plaintiff that **does not** arise from the same operative facts as the plaintiff's "claim."

complaint), *counterclaim, cross-claim, or third-party claim.* Rules 8, 9, and 10 all deal exclusively with "pleadings," excepting from their collective ambit any "motions." Rule 11 and Rule 12 both deal with "pleadings" and "motions." Thus, Julvanna contends, it may be said with some force that its Motion to Enforce the Agreed Judgment was a motion and by the mutual exclusion defined by the rules governing it, expressly ***not*** a pleading setting forth a claim to which Economy was compelled, permitted, or even allowed, to counter. *A fortiori*, Julvanna was not required (or, in truth, permitted) to reply to it pursuant to Miss.R.Civ.P. 12(a).

* * * * *

And yet, that is not the end of the mischief. Reviewing the transcript in the record on appeal, it is readily apparent that, while Economy presented vociferous argument of counsel, and thorough cross-examination of Julvanna's witness, it offered no proof of its own at the hearing (or, as to which it is otherwise referred, "trial"). *See also* Appellant R.E. 8 (court's finding that "Economy rested without calling a witness.") Nonetheless, at the close of the proof, Economy sprang from tall grass with a cry of "DEFAULT!"[14]

Julvanna contends with respect and great deference to the learned chancellor, that the court misperceived Economy's random movements as legitimate; and treated them as such, though not procedurally appropriate to do so. From the ORDER DENYING MOTION TO ENFORCE AGREED JUDGMENT now before this Court, Julvanna must, with respect, point to the findings with which it takes issue:

- At paragraph 3, the Court found that Economy filed a counterclaim to the original claim, "seeking to retain the earnest money on deposit." Appellant R.E. 9. Respectfully, that finding is in error. *See*, R. 24 – 32. The only relief sought was for rescission of the contract. *Id.* at 32;

- At paragraph 6, the Court found that Economy filed a counterclaim to the original claim, again "seeking to retain the earnest money on deposit." Appellant R.E. 10. Respectfully, that finding is also in error. *See*, R. 95 – 107. The relief sought was alternative

[14] No counterclaim surely means no default.

declarations that the contract was rescinded or that Julvanna had waived any rights under the contract. *Id.* at 107;

- At paragraph 11, first subsection labeled "01-05-07," the Court found that, among other things, Economy provided an Inventory and Contractor's Affidavit. Appellant R.E. 13. The record of the hearing and the evidentiary matters undertaken do not appear to support that finding. *See, supra*, at p. ##########.

These are not insignificant matters. The learned chancellor treated Economy's response to Julvanna's motion as a viable counterclaim, and while Economy whispered not a sound at the hearing that would betray the presence of the counterclaim until the evidence was closed, nonetheless the court granted relief. The court unquestionably and erroneously believed that Economy had made a valid claim for the money earlier in the litigation, and Julvanna cannot say that the court's misperception did not color the court's judgment. As to the inventory and its importance, that will covered further *infra*.

Moving to the conclusions of law, at paragraphs 13 through 19 of the Order on appeal, the Court placed considerable moment on the question of whether Julvanna was in default on the counterclaim. Appellant R.E. 16 - 18. As to the propriety of default judgment *at all*, Julvanna will simply reiterate that there was no counterclaim upon which to base a claim of default. However, the court again found that Economy thrice made a claim for the earnest money,[15] findings that Julvanna does thrice refute. Likewise, Julvanna respectfully disagrees with the court that Julvanna "was required to file an answer to the counter-claim filed by Economy in response to the motion to enforce, and failed to do so." Appellant R.E. 17 (paragraph 15).

The court next undertook consideration of a Rule 12 motion for judgment on the pleadings. Appellant R.E. 20 - 21. For reasons Julvanna contends are adequately set forth hereinabove, Rule 12 is not applicable, though the matter is harmless in light of the court's ruling on the issue. Appellant R.E. 21.

[15] Appellant R.E. 16 (paragraph 14).

* * * * *

Though this Court reviews matters of law *de novo*, the first resort must doubtless be a consideration of the lower's court's ruling and the rationale that underlies it. Thus turning to the lower court's analysis of Julvanna's motion, Julvanna agrees that the Agreed Judgment together with the original contract, the SCSI contract, and the settlement agreement comprise the agreed resolution of the parties. Appellant R.E. 21 – 22 (paragraph 23). However, the reanimation of the *as-is, where-is* clause of the original contract[16] without a concomitant recognition of the viability and critical impact of the SCSI contract (and Julvanna's rights under it, rights prejudiced by Economy) on that clause is problematic. *See, supra*, at ###. As to the "counterclaim," the matter was not properly before the court and, in any case, for the reasons set forth hereinabove, should have been denied on the merits of a proper application.[17]

CONCLUSION

Julvanna bargained for a viable, marketable property with an active Super 8 franchise. Economy failed in its attempt to secure a 1031 exchange and repudiated the contract. While the matter was in litigation, a hurricane virtually destroyed the property. Economy made a new bargain outside of the litigation, then offered Julvanna a bogus deal to avoid both the contract and the court. Failing in that attempt, it later settled for selling the property, though holding on to it so long as to receive the full benefit of the side deal. With lucre then in hand and its house again troubled, Economy sought to force the inherited ill wind on Julvanna.

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[16] The Agreed Judgment does not contain any language that changes the original *as-is, where-is* clause. Thus, the sole as-is, where-is provision at issue is the one contained in the original contract. Appellant R.E. 34 (paragraph 9 of the contract, "CONDITION OF THE PREMISES").

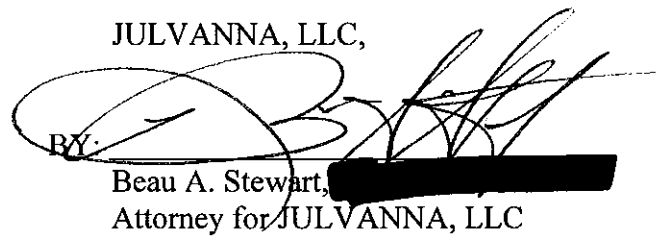
[17] A lingering curiosity is that Economy contends that the court lacked authority to enforce its judgment *in favor* of Julvanna, yet irreconcilably argues that the court nonetheless was correct in granting Economy new relief never before claimed prior to responding to Julvanna's motion.

With deference to the learned chancellor that cast a reasonable and negotiated resolution into the stone of judgment, Julvanna respectfully contends that the court later subjugated that judgment to a shiftier purchase; the sands of contract construction. Therein lied error.

Julvanna now seeks relief in this Court, asking that the agreed judgment setting the rights and duties of the parties be vindicated, that the later Order Denying Motion to Enforce Agreed Judgment now before this Court be reversed, and that the matter be remanded to the lower court for further proceedings consistent the rights of Julvanna as are appropriate in the premises.

Respectfully submitted,

JULVANNA, LLC,



BY:

Beau A. Stewart, [redacted]
Attorney for JULVANNA, LLC
Appellant

CERTIFICATE OF SERVICE

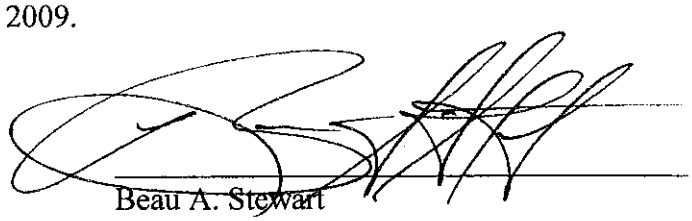
I, Beau A. Stewart, attorney for appellant JULVANNA, LLC, certify that I have this day served a copy of this ***REPLY BRIEF OF APPELLANT*** by United States mail with postage prepaid on the following persons at these addresses:

Honorable Betty W. Sephton, Clerk
Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Post Office Box 249
Jackson, Mississippi 39205-0249

Honorable Sanford R. Steckler
Harrison County Chancery Court Judge
Post Office Box 659
Gulfport, Mississippi 39502

Michael B. Holleman, Esq.
Post Office Box 1598
Gulfport, Mississippi 39502

This, the 15th day of May, 2009.



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