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**

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 the 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)	Michael B. Holleman, Esq.	*Counsel for Appellee*
5)	Beau A. Stewart	*Counsel for Appellant*

STEWART ~~LUND~~, PLLC

BY: _____
Beau A. Stewart, attorney of record for
Julvanna, LLC

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II. **THE LOWER COURT ERRED IN AWARDING ECONOMY MONEY DAMAGES FOR BREACH OF CONTRACT WHEN THAT MATTER WAS NOT PROPERLY BEFORE THE COURT**

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition in the Court Below

This case involves a contract dispute arising from a real estate transaction. Following the seller's refusal to complete the sale, the buyer brought a suit for specific performance before the Chancery Court of the Second Judicial District of Harrison County, Mississippi. Prior to trial, the parties reached a settlement which was reduced to an Agreed Judgment. The Agreed Judgment reaffirmed the original contract as modified by the terms of the judgment. Subsequent to the entry of the Agreed Judgment which ordered specific performance, as modified, the parties appeared to disagree about their respective duties under the Agreed Judgment. The seller filed a motion before the court to enforce the terms of the Agreed Judgment; specifically, the specific performance directed by the judgment. In response, the seller filed a putative motion to dismiss and a putative counter-claim together with its response to the motion. After a full hearing, the court entered its Order Denying Motion to Enforce Agreed Judgment, which did not order performance and awarded seller money damages (forfeiture of earnest money). It is from that order that appeal is made to this Honorable Court. Not only did the lower court deny the motion, but purported to, by the same presents, award money damages to the respondent pursuant to the original contract and the putative counter-claim.

* * * * *

On December 14, 2004, Appellant, Julvanna, LLC, (hereinafter "Julvanna"), entered into a contract to purchase the "Super 8 Motel and Suites" from Appellee Enconmy Inns, Inc. (hereinafter "Economy"). The property was located in Biloxi, or the Second Judicial District of Harrison County, Mississippi.

Within the time allowed for completing the sale, a dispute arose over a putative condition to the seller's obligation to sell the property. As the parties were unable to resolve their differences, Julvanna filed suit for specific performance of the contract in May, 2005. Julvanna amended its complaint in August, 2005, to add money damage and punitive damage claims. In response to both the original and first amended complaints, Economy filed counter-claims for rescission of the contract.[1]

The matter was set for trial to begin on April 12, 2006. Hurricane Katrina struck the Mississippi Gulf Coast on August 29, 2005, and while this matter was pending before the Chancery Court, it is undisputed that improvements to the subject property sustained heavy damage.

By March 31, 2006, the parties had reached a settlement of the case and the court entered an Agreed Judgment. To that judgment and made a part thereof were the original Purchase and Sales Agreement of December 14, 2004, (Exhibit A), an unrelated [2]"Purchase Agreement," (Exhibit B), and a Full and Final Mutual Release (Exhibit C). Additionally, the Agreed

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[1] Though ultimately resolved by the entry of Agreed Judgment, see *infra* 26 - 69, the allegations of the counter-claims are relevant to this Court's decision. Respectfully, the learned Chancellor made erroneous findings in the order now on appeal to this Court. *See* Order Denying Motion to Enforce Agreed Judgment at Findings of Fact ¶3 (R. E. 9, R. 291,) (erroneously finding that Economy counter-claimed for retention of the $250,000.00 earnest money deposit), *and* Findings of Fact ¶6 (R. E. 10, R. 292,) (erroneously finding that Economy counter-claimed to retain the $250,000.00 earnest money to the Amended Complaint).

[2] The December 14, 2004 Sale and Purchase Agreement that is the genesis of this matter pertained to two separate parcels of real estate which, for clarity's sake, will be herein referred to as the "Super 8 parcel" and the "Shapley parcel." Although the purchaser of the Shapley parcel intervened to affect a binding settlement in both this action and a separate action brought by the Shapley purchaser in another forum, the instant appeal relates only to the Super 8 parcel.

Judgment makes reference to "the Southern Construction Agreement and Lease".[3] Because Julvanna appeals from the Chancery Court's order denying its motion to enforce the foregoing Agreed Judgment, interpretation of those documents is focal to this appeal.[4]

The Agreed Judgment resolved "all disputes between them arising out of the underlying transactions" R.E. 27, R. 128. That is where the current troubles began. Ultimately, the parties disagreed in their interpretation of the rights and duties of Julvanna and Economy pursuant to the terms of the Agreed Judgment, including those agreements referenced therein. Believing Economy to be in violation of the Agreed Judgment, including its direction for specific performance,[5] Julvanna filed its Motion to Enforce Agreed Judgment. R. E. 83 - 85, R. 184 - 186

Statement of Facts Relevant to the Issues Presented for Review

On December 14, 2004, Julvanna entered into a contract to buy the Super 8 Motel property from Economy. R. E. 31 - 44, R. 132 - 145. Among the relative terms of the agreement is Section 23.H. wherein Julvanna (Purchaser) acknowledged that Economy (Seller) *intended* to effect a Section 1031 exchange. R. E. 42, R. 143.

It later became apparent to Economy that it was not going to be able to affect a Section 1031 exchange after all and, on April 21, 2005, Economy attempted to repudiate the agreement by insinuating that obtaining the 1031 exchange was *a condition* to the contract. R. 18. Julvanna denied the assertion and demanded that Economy go forward, R. 19. Economy then

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[3] The Agreed Judgment with exhibits and the construction agreement appear in the record in sequence. R.E. 26 – 69, R. 127 – 170. Inexplicably annotated to the construction agreement is the footer legend, "Exhibit '3' – Response to Motion to Enforce". That motion appears later in the record. However, the construction agreement was entered into evidence at the hearing. R.E. 106 – 118.

[4] As is discussed *infra*, the Agreed Judgment (1) expressly modifies certain specified terms of the original agreement; (2) reaffirms the original agreement to the extent not modified by the foregoing; and, (3) by its very essence, orders specific performance of the contract as modified.

[5] As will be discussed *infra*, it is important to note the Agreed Judgment's provisions which specify performance remain under the jurisdiction of the issuing court pursuant to its inherent authority to enforce such performance.

baldly repudiated the agreement and invited litigation. R. 21. On May 18, 2005, Julvanna joined issue. R. 1.[6]

Economy answered the complaint and filed a counter-claim for rescission or termination of the contract. R. E. 127, R. 24 *et sequitur*. Economy did not request forfeiture of Julvanna's earnest money deposit. R. E. 135, R. 32. Julvanna was allowed to amend its complaint, R. 61 *et sequitur*, and Economy again filed a counter-claim; again *seeking only avoidance of the contract.* R. E. 148, R. 107.[7]

Subsequent events bear little on this appeal until March 31, 2006, when Julvanna and Economy, having settled their claims, agreed to the entry of a judgment of that date which, together with the documents exhibited to or referenced therein, reaffirmed all of the provisions of the original contract except those modified by the judgment. R.E. 26 – 69, R. 127 – 170. Per those modifications, as relevant to this controversy, it was adjudged that "Economy Inns, Inc. acknowledges that the purchase and sale agreement is full (sic) force and affect . . ." and "Economy will sell and Julvanna will purchase the Super 8 Motel . . . under the Purchase and Sales Agreement . . . ." R. E. 27, R. 123. The judgment further provided that the closing "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." *Id.* The judgment recognized that Economy and Julvanna were to cooperate to affect a Section Section 1031 exchange, but Economy was not entitled to an extension of the December 31, 2006, deadline "on account of the Section 1031 exchange . . . ."

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[6] There is a scrivener's error in the clerk's papers, viz., two pages numbered "004." It not being necessary to this appeal to differentiate between those two pages, Record references will be to the numbers provided.

[7] Prior to Economy filing its response to the amended complaint and its counter-claim, certain factors changed dramatically with the landfall of Hurricane Katrina on August 29, 2005. It is undisputed that Super 8 received heavy damage as a result.

Id.[8] The Agreed Judgment went further to address the effect of an agreement entered into by Economy Inns and Southern Construction Company.

Inapposite to the original Purchase and Sales Agreement of December 14, 2004, which, at Section 6, required Economy to convey "good, marketable and insurable fee simple title" to the Super 8 parcel free of all liens and encumbrances except for those listed therein, and during pendency of the underlying litigation, Economy entered into an agreement with Southern Construction Services both to construct improvements to the property but also granting Southern Construction Services a leasehold interest in the property. R. E. 106 – 118. That construction/lease agreement was in derogation of Economy's duties pursuant to the Purchase and Sales Agreement.

In the Agreed Judgment, however, the lower court effectively modified Section 6 to include the construction/lease agreement and further to provide that "Julvanna, LLC will take the Super 8 Motel property . . . subject to the rights and liabilities of Economy-Southern Construction Services, Inc. Construction Agreement and Lease (sic)." R. E. 28, R. 129.[9] Moreover, and though it is less a modification than a clarification, the Agreed Judgment obligated Economy to obtain "from Southern Construction Services clarification of Section 4.3 of the Southern Construction Agreement and Lease . . . ."[10] *Id.*

While the Economy-Southern Construction agreement was purportedly entered into on December 7, 2005, the leasehold provisions of that agreement, pursuant to Section 7.1 thereof,

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[8] Nonetheless, it was contemplated that extensions were allowable for other reasons. *See* R. E. 23, R. 305 (wherein the lower court found that "such language anticipates the possibility of an extension of the closing date." R.E. 23, R. 305.

[9] This is the same agreement entered into evidence as Exhibit 2 to the hearing on the motion to enforce Agreed Judgment. R.E. 8 - 25.

[10] Section 4.3 of the Economy-Southern Construction Agreement required Economy and Southern Construction Services to "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." R. E. 58, R. 159. As will be discussed *infra* this provision becomes important in that the Super 8 franchisor imposed new requirements to maintain the franchise that would be subject to Section 4.3 of the agreement.

began on September 24, 2005. R. E. 59, R. – 160. Additionally, as noted in that agreement, possession of the leased premises was delivered to Southern Construction on September 25, 2005. *Id.* (Specifically, Section 7.5 of the Agreement).[11]

Contemporaneous with Economy granting a leasehold interest to Southern Construction in derogation of the Purchase and Sales Agreement was the "offer" of Economy to resolve the litigation by allowing Julvanna to elect either of its remedies following damage or destruction of the *res*. Exh. 4. The so-called offer is, at best, disingenuous in that it purports to give Julvanna two weeks from September 23, 2005, to elect its remedy at the same time Economy had already committed itself to a leasehold interest in favor of Southern Construction Services. The so-called offer can, however, fairly be read as an attempt by Economy to improve its position in one of two ways: (1) obtain the original purchase price and assign what is now known to be grossly inadequate insurance proceeds[12] to the distinct economic disadvantage of Julvanna;[13] or, (2) avoid the contract altogether and receive nearly $40,000.00 per month in rent for 13 months, at the end of which Economy would have essentially a brand new structure.[14] Julvanna was first notified of the existence of the Economy-Southern Construction Agreement, including the leasehold provisions thereof, on December 16, 2005.

One week later, Economy "offered" to impress the Economy-Southern Construction Agreement upon Julvanna. R. E. 123.

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[11] The agreement clearly demonstrates that some type of leasehold interest in the Super 8 property was created in favor of Southern Construction Services on September 25, 2005, although the exact nature is not revealed in the record, However, Section 7.1 of the agreement brings that then-undefined leasehold interest under the terms of a thirteen-month tenancy. R. E. 59, R. 160.

[12] *See, e.g.* R. E. 123.

[13] Interestingly, the prospect of a 1031 exchange, so important to Economy that it would breach the Purchase and Sales Agreement many months before, has fallen by the wayside in view of the potential windfall to Economy as the result of Hurricane Katrina.

[14] Under the terms of the lease portion of Economy-Southern Construction agreement, Southern Construction was to pay rental significantly in advance of the due date thereby giving Economy the value of the interest on the decreasing balance; a significant sum.

No time for performance of the scope of work was stated under the Economy-Southern Construction Agreement *See* R. E. 56, R. 157. Although pursuant to the terms of the Agreed Judgment Julvanna was to take the property subject to the Economy-Southern Agreement, nonetheless, Julvanna was a stranger to the contract. Further, while the Agreed Judgment contemplated that, in the first instance, Economy would give 90 days written request to close[15] (which request Economy *could have made* immediately following entry of the judgment), Economy waited until December 4, 2006 to request a closing less than **30** days away.[16] R. E. 93.

Perhaps more focal to Economy's motivation, franchisor Super 8 Motel, Inc. conducted an inspection of the subject property on or before November 9, 2006[17] and prepared a punch list of items needed to convert the property to an authorized Super 8 motel. R. E. 119. This punch list, on its face prepared for Marty Desai for Economy,[18] viewed *in para materia* with Economy's request of December 4, 2006 to close on the subject property, reveal the true nature and impact of the statements (1) that "final repairs to the Super 8 should be completed before the end of the month," and (2) that Economy "does not intend to renew [the Super 8 Franchise Agreement]." R. E. 93.

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[15] Unlike the market-customary real estate contract which places the onus on the purchaser to close within a given time, the effect of the Agreed Judgment was to cast Economy as the master of the bargain, given that Economy could trigger Julvanna's obligation to purchase (or not) at virtually any time prior to December 31, 2006.

[16] Economy did, in that letter, agree to extend the closing into January, 2007. Further, although Section 10 of the Purchase and Sales Agreement (which section was still in full force and effect) clearly demonstrated the materiality of the Super 8 Franchise Agreement, the December 4, 2006, request by Economy to close the transaction Julvanna was the first notice to Julvanna that, not only had the franchise agreement been terminated (in derogation of the Purchase and Sales Agreement) but Economy boldly stated its intent not to renew the franchise agreement nowithstanding its obligations under the Purchase and Sales Agreement. R. E. 93.

Certain inferences bear mention. Although Economy was in the position to know when construction would be complete, and in inapposite to the spirit of the Agreed Judgment and the clear preference for ninety-days notice, Economy waited to the eleventh hour to push Julvanna to close. Unquestionably, that gave Economy the fullest benefit of the leasehold portion of the Economy-Southern Construction agreement at a time when the whole of this record suggests otherwise limited marketability.

[17] Although apparent from the face of the punch list it was revised on December 26, 2006, nontheless it is equally apparent that the inspection and original punch list were prepared on or before November 9, 2006.

[18] Madhusudan "Marty" Desai is President of Economy. *See, e.g.* R. E. 42, R. 143.

Locked in combat with Economy's mantra that it was ready to close pursuant to the Agreed Judgment and related documents, [19] is Julvanna's insistence that Economy comply *fully* with the terms of judgment and settlement to include suitability of the subject property to fly the Super 8 flag.[20] That combat was moved back to the Chancery Court by Julvanna in pursuit of enforcement of the court's Agreed Judgment. R. 184 – 185.

SUMMARY OF THE ARGUMENT

THE LOWER COURT ERRED IN DENYING JULVANNA'S MOTION TO ENFORCE THE JUDGMENT AND ORDER SPECIFIC PERFORMANCE OF THE AGREED JUDGMENT AND RELATED DOCUMENTS

In first reviewing the Agreed Judgment sought to be enforced, the court found the terms to be clear and unambiguous. Julvanna agrees. Further, the lower court correctly notes that conveyance of the property was to be by general warranty deed in an "as-is, where-is" condition. *Id.* However, Julvanna respectfully contends that the court overstates the effect of the *as-is, where-is* condition. Within the confines of real estate contracts, this condition exists in contrast to a seller's warranty of the condition of the property as free from latent defects.

Further, the Agreed Judgment itself does not contain an *as-is, where-is* condition; therefore, the condition to which the lower court makes reference is that same condition set out in the original contract. The terms of the original contract clearly state the effect of the condition as a disclaimer of seller's warranties with respect to the character of it as being free from defects.

The lower court was also correct in finding that Julvanna took the property subject to the Economy-Southern Construction Agreement. However, subsequent to the entry of the judgment and its incorporation of that construction agreement along with the original contract, Economy materially prejudiced the rights of Julvanna under those agreements. First, with respect to the

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[19] *See* Economy's letters of December 4, 2006, (R. E. 93), January 5, 2007 (R. E. 93), January 11, 2007 (R. E. 99), and January 24, 2007 (R. E. 102 - 103).

[20] *See* Julvanna's letters of December 22, 2006 (R. E. 94), January 8, 2007 (R. E. 97 - 98), January 11, (R. E. 99 - 100), January 18, (R. E. 101), February 1, 2007, (R. E. 104 - 105).

original contract, the clear intention of the parties was for seller to convey and purchaser to take the property and improvements subject to the franchise agreement. However, following the entry of the Agreed Judgment (and during the period of time when Economy had the unilateral right to request a closing), Economy rode the lease and then determined that the cost of performance was going to be higher than anticipated; and so refused to perform its obligations under the original contract which made the conveyance subject to the franchise agreement. Also, at a time when Economy was in control of the construction agreement and had the power to keep Julvanna from realizing the benefit of it, Economy changed the character of that construction agreement by declining to pursue and maintain Super 8 franchise status. In so doing, Economy obstructed the performance of the Agreed Judgment. A motion requiring Economy to specifically perform the terms as written and as contemplated at the time of entering the settlement was proper.

THE LOWER COURT ERRED IN AWARDING ECONOMY MONEY DAMAGES FOR BREACH OF CONTRACT WHEN THAT MATTER WAS NOT PROPERLY BEFORE THE COURT

Initially, if Julvanna was not required by the Agreed Judgment to purchase the property which had been significantly devalued by Economy in derogation of the express terms of the Agreed Judgment, then *ipso facto*, the lower court could not award Economy money damages in the form of forfeiture of the earnest money deposit. Moreover, that issue was not even property before the court.

Courts have the inherent authority to enforce the judgments issuing therefrom. Although a settlement agreement is a contract, when reduced to a judgment, that inherent authority is implicated. The terms of the Agreed Judgment required Economy to do certain things, and having done so, Julvanna would have been required to complete the transaction. Thus, both parties had duties of specific performance.

Economy did not seek specific performance before the lower court. Economy did not seek relief from the judgment due to impossibility or commercial impractibility of performance based on the newly imposed requirements to maintain Super 8 franchise status. Just the opposite, Economy took steps to either prevent performance under the Agreed Judgment or to shift the burden of performance of its obligations under the original contract and the construction contract to Julvanna.

Julvanna moved the court to enforce its judgment. In response, Economy filed a putative motion to dismiss and counter-claim.[21]

ARGUMENT

The underlying facts of this case are complex. They introduce a purchase and sales agreement that may or may not conditioned upon the ability of the seller to affect a Section 1031 exchange. To that controversy, were it a *legal* one, Julvanna would point first to the express terms of the agreement where, at ¶ 21 there are listed four separately-numbered conditions precedent to closing (none of which speak to a Section 1031 exchange). R. 12-13. Under Section 23, titled "MISCELLANEOUS," subpart H. obligates the purchaser only to cooperate with the seller in an attempt to obtain a Section 1031 exchange.

The controversy *is* of some factual significance as it reveals that the buyer, unable to obtain a Section 1031 Exchange, first tried to sell his difficulty as a condition precedent to closing. R. 18. When that didn't work Economy then got closer to the bare bodkins, when it repudiated the contract because it found out too late that it was going to cost too much money to perform. R. 21.

[21] It is clear from those pleadings that Economy erroneously treated Julvanna's motion as a new action which, under Mississippi law, Economy could not obtain. Therefore, the motion and counter-claim are nullities. No other claim for relief by Economy was before the court and the court was without jurisdiction to aware money damages to Economy.

Standard of Review

From the record it will be apparent that those matters occurred prior to settlement and entry of an Agreed Judgment, and thus while not operative here, still in subtle, Shakespearean fashion, introduce what will become a familiar pattern. This case is not impeded by competing facts, as those factual matters relevant to this Honorable Court's decision are not in dispute. What little testimony is in the record is unrefuted; thus again, not in dispute.

It is beyond question that this Honorable Court will not disturb the findings of [a] chancellor unless it is shown the chancellor is clearly erroneous and the chancellor abused his discretion. *McCord v. Heathcare Recoveries, Inc.*, 960 So. 2d 399, ¶13 (Miss. 2007) (and cases cited therein). Respectfully, (and though that standard has been applied to a circuit judge's decision, there likened to that of a chancellor, *See Ill. Cent. R.R. v. McDaniel*, 951 So. 2d 523, ¶7 (Miss. 2006)). Where as here there are no factual disputes, Julvanna contends the standard is *de novo*. In *Bush v. Lang*, 2006-CT-02016-SCT (Miss. 2008), and specifically at ¶ 17, the court held that, because there was no dispute as to the material facts and because the court there addressed a question of law, a chancellor's application of the law was reviewed *de novo.* (Citing *City of Picayune v. Sp Reg'l Corp.* 916 So. 2d 510, 519 (Miss. 2005).

The Lower Court Erred In Denying Julvanna's Motion To Enforce The Judgment And Order Specific Performance Of The Agreed Judgment And Related Documents

The first substantive point of law for which Julvanna seeks review is the effect of an "as-is, where-is" clause or condition in a real estate contract. The learned chancellor applied *as-is, where-is* broadly. R. E. 22, R. 304 and R. E. 24, R. 306. It seems apparent from its conclusions of law that the lower court formed a necessary, operative bond between the *as-is, where-is* condition of the original contract [22] and a construction agreement executed over a year later.

[22] It should be noted that the Agreed Judgment does not reassert an *as-is, where-is* condition, but rather, incorporates that condition as it existed in the original contract.

There *is* a relationship between those two agreements. The construction agreement, because it also creates a leasehold interest in the subject property, is an encumbrance. Reference is made to the original Purchase and Sales Agreement where, at Section 6, Economy warranted the title to be free of any such encumbrances other than those listed in the agreement. R. E. 33, R. 34. Although the Economy-Southern agreement with leasehold provisions at the time Julvanna and Economy entered into the purchase and sales agreement, it became a valid encumbrance where the Agreed Judgment modified Section 6 of the Purchase and Sales Agreement. R. E. 28, R. 29. That relationship, though, does not create a deeper bond between the *as-is, where-is* provision (of the original contract contained in Section 9 "CONDITION OF THE PREMISES." R. E. 34, R. 135) and the Economy-Southern Agreement. R. E. 56 – 69, R. 157 – 170.

But it seems that the lower court appears to *create* an amalgamated duty on the part of Julvanna via the merger of these two separate concepts (i.e., (1) the *as-is, where-is* condition of the original contract; and (2) Julvanna's obligation to take property subject to the construction agreement). R. E. 22, R. 304 at ¶ 24 and R. E. 24 at ¶¶ 28 and 29.

Julvanna respectfully contends that an *as-is, where-is* provision is nothing more than the disclaimer of a warranty as to the condition of real property and is limited to that. In *Grace v. Hahn,* 754 So. 2d 471 (Ct.App.Miss. 1999), that court reaffirmed the *Stonecipher* rule that an *as-s, where is* a clause in a contract that exempts a seller from suit by a buyer based on the condition of the premises. *See Stonecipher v. Kornhaus,* 623 So. 2d 955 (Miss. 1993). It is nothing more than that. Thus, while Julvanna *would have taken* the Super 8 property subject to the Economy-Southern Contract "As-is, Where-is" would not have yoked Julvanna to whatever sad mule Economy and Southern Construction could have (and incidentally, did) create between the time

of the Agreed Judgment and the late, late hour at which Economy made its spurious request for Julvanna to close.

Instead, Julvanna respectfully contends that matters developed differently and somewhat more sinister as can be inferred from the undisputed facts. Among the obligations of Southern Construction pursuant to the scope of work and its agreement with Economy is the requirement that it renovate the subject property to (the pre-Katrina) condition as it existed on August 28, 2005; and further, to be "franchise-compliant with Super 8 Q.A. standards B+" R. E. 106, ¶ 2.A.

Further, at Section 4.3 of that agreement, Southern Construction and Economy agreed to share equally any construction costs not covered by insurance and which resulted from "any law, ordinance, rule, or regulation that requires an improvement or modification in the building's construction condition that existed on August 28, 2005. Economy was a Super 8 franchisee. R. E. 35, R. 136, ¶10. Pursuant to its duties under the Purchase and Sales Agreement with Julvanna, it was clearly contemplated that Julvanna would be assigned Economy's status as franchisee. It is equally apparent that it was a material provision to the contract. Then, on November 9, 2006, or sometime prior to that day, Super 8 Motels, Inc. inspected the subject property and found that, if it were going to be a Super 8 franchise it was going to have to comply with "System Standards" R. E. 119.

At this juncture, it is to be recalled that only Economy could move the sale of the subject property forward according to the terms of the Agreed Judgment. There is no evidence in the record of any attempt by Economy to consummate the terms of the Agreed Judgment in good faith. Notwithstanding the preference suggested in the Agreed Judgment that Economy give ninety days notice, none was forthcoming. What the undisputed facts reveal is:

(1) Economy made no attempt to consummate the sale to which it agreed before it had collected every dime of rent from Southern Construction under the leasehold provisions of the Economy-Southern Agreement;

(2) On or before November 9, 2006, Super 8 Motels, Inc. gave Economy and Southern Construction the bad news that *according to the franchise rules*, somebody was about to have to spend a lot of money bringing the subject property up to standards. But who would that be? According to Section 4.3 of the Economy-Southern agreement, Economy and Southern were going to have to share that cost;

(3) Only after Economy collected all the rent there was to collect, and only after Economy was notified of the great prospective expense of renovating the premises to Super 8 standards to maintain its franchise as was contemplated of Section 10 of the original Purchase and Sales Agreement, did it occur to Economy to request that Julvanna close the transaction;

(4) In its request, Economy first stated that the "buyer repairs" were to be completed "before the end of the month." Next, it advised Julvanna for the first time that it was no longer a Super 8 franchisee and **did not intend to renew the franchise.**

Economy invited Julvanna to pay it $5.5 million dollars for the property and to take on the enormous expense that rightly belonged to Economy and Southern Construction.

And so the earlier-referenced "familiar pattern" re-emerges. Essentially, every time Economy didn't like the deal it cut, it simply tried to re-invent it. However, "where the performance of the contract is prevented by either party, the other who is willing to perform is entitled to damages from the other sufficient to compensate for the loss." *Consolidated Amer. Life Ins. Co. v. Covington*, 297 So. 2d 894, 896 (Miss. 1974). In the instant case, and consistent with contracts for distinct real estate parcels, the measure of damages is not money; it is the specific performance adjudged by the lower court. In accord with *Covington* is *Lebleu v. Jim Murphy & Assoc., Inc.*, 557 So. 2d 526, 528 (Miss. 1990)("[t]his court has repeatedly stated that a party may not defend a breach of contract action on the grounds of non-performance when the preventing party has prevented performance by repudiating the contract). Here, Economy doesn't attempt to repudiate the settlement agreement as it did the original Purchase and Sales contract; it seeks to re-invent it.

The Lower Court Erred In Awarding Economy Money Damages For Breach Of Contract When That Matter Was Not Properly Before The Court

Aggrieved by Economy's refusal to live up to its obligations as a Super 8 franchisee, and its shared obligation under the Economy-Southern contract, Julvanna sought relief from the lower court in the form of enforcement of the Agreed Judgment. The Agreed Judgment is, in many ways, an order of specific performance. That is what Julvanna sought. That is what lies at the heart of every court; the inherent authority to enforce its own orders.

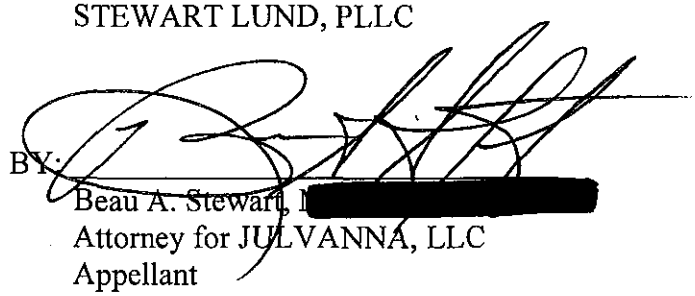
There is no statute, no rule, and no case that would allow Economy to bring forth a motion to dismiss a motion to enforce a judgment as though it were a new, substantive claim for relief. Likewise, there is no basis for a "counter-claim" to a motion to enforce a judgment.

Finally, Economy did not request enforcement of a contract from the court, but rather that the contract be deemed terminated. R. 195. Rather, Economy frustrated, delayed, and engaged only at the last minute in an effort to avoid an agreement that, once again, was not as sweet as the one it had hoped for.

CONCLUSION

Julvanna respectfully request that this Honorable Court, upon a *de novo* review of the Motion to Enforce Agreed Judgment, reverse the lower court and remand the case back to the Chancery Court in and for the Second Judicial District of Harrison County for further proceedings consistent with the true rights and liabilities of the parties.

Respectfully submitted,
STEWART LUND, PLLC



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

CERTIFICATE OF SERVICE

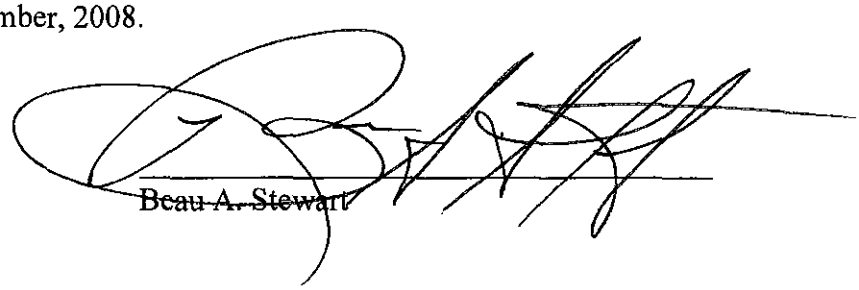
I, Beau A. Stewart, attorney for appellant JULVANNA, LLC, certify that I have this day served a copy of this ***BRIEF OF APPELLANT*** by United States mail with postage prepaid on the following persons at these addresses:

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 13th day of December, 2008.



Beau A. Stewart

STEWART LUND, PLLC
2409 14th Street (39501)
P.O. Box 320
Gulfport, Mississippi 39502-0320
Telephone: 228-864-8750
Facsimile: 228-864-8630
beau@stewartlund.com