IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-CA-01120-SCT

ADAM ROSENFELT AND ELEMENT STUDIOS, LLC — APPELLANTS

v.

MISSISSIPPI DEVELOPMENT AUTHORITY AND GLENN McCULLOUGH, JR., IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MISSISSIPPI DEVELOPMENT AUTHORITY — APPELLEES

Appeal from the Chancery Court for the First Judicial District
of Hinds County, Mississippi
Civil Action No. 16-cv-948 O/3

ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

On June 29, 2018, this Court determined to retain this appeal pursuant to M.R.A.P. 16(b). Because this Court has already recognized the significance of the issues presented by this appeal, appellants suggest that oral argument would be of assistance to this Court. Although "the dispositive issue," within the meaning of M.R.A.P. 34(a)(2), has been resolved for well over a century, the Mississippi Development Authority is asking this Court to rule that contracts lawfully made by its Executive Director must be recorded in minutes, even though no Board exists. The reasons that a multi-member body must record its decisions in minutes were well explained long ago in *Lee County v. James*, 178 Miss. 554, 174 So. 76 (1937), but Executive Director Glenn McCullough, Jr., asks this Court to impose that duty for the first time upon him and every other officer of the State of Mississippi. Because of the threat that this argument imposes to the validity of contracts lawfully executed by State and local officers, this Court should have the opportunity to hear arguments and thoroughly to question counsel.

This case is not the beef plant. This case is the opposite. The State was not lured into investing Mississippi tax dollars with a private party that broke its promises. Rather, the State, acting through the false promise of defendant Mississippi Development Authority ("MDA") of a ten million dollar investment, R53, RE12, lured plaintiff Adam Rosenfelt, with his family, to Mississippi to create jobs in the movie industry. Having knowingly promised money it did not have, MDA, hoping to use federal money, next promised a ten million dollar revolving loan guaranty, inducing Rosenfelt to secure a private loan commitment and commence filming a movie in Greenwood. Although the beef plant produced no beef, Rosenfelt produced a movie, creating jobs in the process, and, in so doing, by his uncontradicted sworn testimony, suffered damage by his reliance on MDA's broken promises. There is no evidence in the record that MDA has provided any money at all to plaintiff Rosenfelt or his production company.[1] Because this Court must protect this State's residents from this sort of chicanery by MDA, it should remand for trial so MDA can be held accountable for its actions.

STANDARD OF REVIEW

By declining to contest the standard of review set forth at pages 15-16 of the original appellate brief (hereinafter "Pl.Br.") of plaintiffs Rosenfelt and Element Studios, LLC (hereinafter "Element"), defendants concede that the summary judgment in their favor may not stand "[w]here disputed facts exist or where different interpretations or inferences may be drawn from undisputed facts." *Eckman v. Cooper Tire & Rubber Co*., 893 So. 2d 1049, 1052 (Miss. 2004), citing *Johnson v. City of Cleveland*, 846 So. 2d 1031, 1036 (Miss. 2003). Because M.R.C.P. 8(a)(2) allows plaintiffs to plead for "[r]elief in the alternative," defendants must show that they have proven it impossible for any plaintiff to recover any relief on any one of the three

[1] The tax rebates earned by that company, Mississippix Studios, LLC, were not any special deal from the State, but were earned under a generally applicable law administered by the Department of Revenue and available to any eligible taxpayer. Miss. Code Ann. §§ 57-89-1 *et seq*. (Rev. 2014).

successive promises made and signed by three different MDA officers and attached to the complaint as required by M.R.C.P. 10(d).

MDA, acting through its defendant Executive Director, Glenn McCullough, Jr., does not appear to understand that plaintiffs do not need to show on appeal that summary judgment should have been entered in their favor. Defendants say at page 19 of their brief (hereinafter "MDA Br.") that "plaintiffs failed to establish standing and that their failure to do so justifies summary judgment," but plaintiffs do not have to establish anything to preclude the entry of summary judgment against them. To support the summary judgment they received on the standing issue,[2] MDA and Director McCullough must prove that neither Rosenfelt nor Element can possibly establish standing, even though the facts must be "viewed in light most favorable to the nonmoving party." *Eckman*, 893 So. 2d at 1052, citing *Hardy v. Brock*, 826 So. 2d 71, 74 (Miss. 2002). They make no attempt whatsoever to distinguish *Vickers v. First Miss. Nat'l Bank*, 458 So. 2d 1055 (Miss. 1984), in which a shareholder was permitted to sue for damages for breach of alleged promises to his corporation, and Rosenfelt has provided unrebutted sworn testimony that he has personally suffered damages from the breach of MDA's promises, regardless of whether they were made to him or to one of his companies. "There is certainly, at a minimum, a factual dispute as to [plaintiffs'] status, which is all that must be shown to defeat summary judgment." *Robinson v. Guarantee Trust Life Ins. Co.*, 389 F.3d 475, 581 (5th Cir. 2004). *Accord*, *Johnson*, 846 So. 2d at 1036.

Rosenfelt, to whom MDA made its promises, sought to enforce them by means of a specific performance judgment ordering MDA to issue a loan guaranty in favor of Element, one of the named promisees of the MDA's third promise. R61, RE20. Because the five-year duration

[2] Their contention that MDA's contracts must be approved on the minutes of a Board that the Legislature abolished 30 years ago is, of course, an issue of law that is reviewed *de novo*.

of the second promise, executed in 2014, R54, RE13, is on the verge of expiration, plaintiffs now seek only damages as a remedy for MDA's breaches of its successive promises. Because Executive Director Brent Christensen and the other MDA officers properly exercised their authority to make those promises, and because evidence exists to show plaintiffs were damaged by their breach, the summary judgment cannot stand.

STATEMENT OF THE CASE

Adam Rosenfelt came to Mississippi, at the invitation of the Governor, to make movies.[3] In the fall of 2014, despite MDA's breach of the first contract it signed in 2013, R53, RE12, and the second contract it signed in 2014, R54, RE13, Rosenfelt completed shooting a movie in and around Greenwood. Consistent with the terms of the third contract signed by MDA in 2015, R61, RE20, Rosenfelt secured a private loan commitment to finance additional movies in Mississippi, and he spent the first half of 2016 collecting and providing all of the forms and information that MDA said it required to issue its promised guaranty. However, by letter of June 27, 2016, MDA, speaking through its first lawyer, refused to issue its guaranty and concluded, "MDA disputes your claim that it has any contractual obligation to provide a $6,000,000 guaranty without adherence to the terms outlined in the July 1, 2015, term sheet, and all other reasonable prudence and due diligence." R66, RE25. Because Rosenfelt believes the guaranty to be required by the 2014 and 2015 contracts, he promptly sued for breach of all three contracts.

Despite MDA's multiple breaches, Rosenfelt's preferred objective was not to collect damages, but to establish a viable movie business in Mississippi, as he had already begun with the production in Greenwood. The problem, according to MDA's first lawyer's letter, was a dispute over the meaning of the 2015 contract, so Count I of the complaint asked for a declaratory

[3] MDA's Chief Financial Officer Kathy Gelston affirmed that "Governor Bryant made a commitment to Adam Rosenfelt to provide $10 million." R563, RE130.

judgment to resolve the disputed terms. MDA's second lawyer represented to the Court that the only dispute concerned whether MDA's 80 percent guaranty would be paid before or after the lender credited the borrower's expected tax rebates. "MDA today would give Mr. Rosenfelt another guaranty at 80 percent as long as that -- as long as the motion picture rebate was part of the collateral." R785.

By its first summary judgment opinion of November 16, 2016, the Chancery Court told MDA that it misunderstood its obligations under the contract of 2014 and the subsequent agreement of 2015. The Court found that a contractual commitment had been made in 2014, R339, RE85, which had been partially performed by a loan guaranty to Planters Bank ("Planters") in connection with the movie filmed in Greenwood, R340, RE86, and that nothing in the 2015 agreement changed the nature of the required guaranty, so that "MDA is required to guarantee a loan to Rosenfelt up to $7.5 million, either pursuant to the loan commitment from The First Bank or any other qualified lender." R342, RE88.

When the Court rejected the construction of the 2015 agreement advocated by MDA's first two lawyers, MDA could have issued the required guaranty or sought relief on appeal. Instead, MDA hired its third set of lawyers. Although those lawyers represented to the Court that, after the rendition of the November 16 opinion, "We hear nothing from him," R827, Rosenfelt undertook the painstaking and expensive task of gathering the massive amounts of discovery MDA had demanded. By March 1, 2017, Rosenfelt's counsel wrote the new lawyers to ask when they would agree to exchange documents, R568, but MDA kept silent. R834.

Because MDA continued to take no action, plaintiffs moved two weeks later for partial summary judgment on their claim in Count II for specific performance, asking the Court to order MDA and Executive Director McCullough to issue a guaranty in favor of Element consistent with

the first summary judgment opinion. R357.[4] Although MDA had already breached the 2013 and 2014 contracts, an order of specific performance would have prevented the accrual of any additional damages. While MDA had originally apologized for its breach of the 2013 contract, offering the 2014 promise of a loan guaranty as an effort to "mitigate the damage," R561, RE128,[5] by 2017, MDA was not interested in finding a way to repair the damage. Instead, its new lawyers for the first time raised two new defenses challenging the existence of any contract, and not just a dispute over its terms. Indeed, they acknowledged that they had not previously raised the legal bases for their motion to reconsider. R829.[6]

Defendants, however, concentrated their attention on an unsuccessful unclean hands defense, R449, which they do not renew on appeal, based on a factual matter which Sara Jo Watson had sworn had no legal significance, the status of the loan from Planters to Mississippix, Rosenfelt's production company:

> No requirement was ever stated to Mr. Rosenfelt that the current loan be paid off in full. This is not, nor has it ever been, a requirement. In fact, MDA has previously authorized additional guaranties for current borrowers without full repayment of their current loans.

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[4] Element had applied to MDA for a loan guaranty, R360, because Rosenfelt had signed the 2015 contract on behalf of Element as well as himself. R61, RE20. Although all three contracts were addressed to Rosenfelt, Element was a named beneficiary of the 2015 contract and a necessary party to the specific performance claim, because it was Element's loan that MDA was obliged to guarantee.

[5] Remarkably, defendants attempt to excuse their breach of the 2013 contract by declaring that "[i]t was also understood from that outset that legislation would be required" to permit the promised ten million dollar investment. MDA Br. at 6. Not surprisingly, defendants offer no citation to record evidence in support of this insupportable assertion. The 2013 contract itself declares, "Proposed legislation notwithstanding, the initial ten million dollar commitment will be firmly committed by Mississippi and will not be contingent upon proposed legislation being passed by the legislature at any time in the future." R53, RE12.

[6] It takes nerve for defendants, who change their arguments as often as they change lawyers, to accuse plaintiffs of presenting "constantly evolving" arguments. MDA Br. at 18. The complaint alleges that MDA executed and breached three contracts, and Rosenfelt has never departed from that position. Once the Chancellor ruled in the first summary judgment opinion that the 2014 contract obligated MDA to issue a guaranty, there was no need to refer to the other contracts in seeking specific performance. However, MDA breached all three contracts, and damages are sought for all breaches.

R169, RE49. On the night before the first summary judgment hearing, defendants filed an affidavit purportedly signed that same day by an officer of Planters asserting that "no payment has been received, therefore, the loan is currently in default." R329, SRE Tab 3. That same officer, on July 27, 2016, had acknowledged transmission of a tax rebate check in the amount of $1,448,094 for the bank's benefit. R700-02, RE137-39. At the hearing, Rosenfelt's counsel moved to strike the affidavit as irrelevant, in light of Watson's testimony. Counsel accurately explained what he knew at the time:

> No requirement was ever stated to Mr. Rosenfelt that the current loan be paid off in full. This is not nor has it ever been a requirement. If it's not a requirement of their contract, then Mr. Quinn's affidavit is irrelevant.
>
> But just as importantly, again it's obviously an attempt to prejudice the Court because the bank says the loan is in default. The bank hasn't told my client the loan is in default. I don't know whether the loan is in default or not.
>
> Financing agreement is about this thick. I promise you, I've never read it. So my client is making payments on the - - the movie is making money. They're making payments to the bank.

R768. Not until May 4, 2017, over nine months after transmission of the check for $1,448,094 and over six months after the summary judgment hearing, did Planters notify Rosenfelt of the claimed default by Mississippix. R446, SRE Tab 4.[7]

[7] Defendants' assertion that the May 26, 2017, demand by Planters to enforce the guaranty, R687, SRE Tab 5, precluded Mississippix from participating in the tax rebate program administered by the Department of Revenue, MDA Br. at 3-4, does not excuse MDA's obligations under its contracts. Kathy Gelston confirmed, in an email to Rosenfelt's partner, that "the rebate is not part of our deal." R557, RE124. MDA breached the 2013 contract in March of 2014 when Gelston admitted MDA never had the ten million dollars it promised. R213, RE64; R561, RE128. MDA breached the 2014 contract on September 4, 2014, when Executive Director Christensen refused to issue the guaranty of the Regions loan. R159, RE39. MDA breached the 2014 and 2015 contracts on June 27, 2016, when it refused to issue its guaranty of the loan to Element which Rosenfelt had negotiated with The First. R65, RE24. Defendants do not suggest that Rosenfelt breached any one of those three contracts, nor can they in light of the Chancellor's finding that MDA's offer became a unilateral contract when Rosenfelt "completed the performance." R339, RE85. Whether or not Mississippix became ineligible for tax benefits in 2017 has no bearing on MDA's liability for damages for its three breaches in 2013, 2014, and 2016.

The inability of Mississippix timely to repay the Planters loan is a proximate result of MDA's refusal to guarantee a ten million dollar loan, as required by the 2014 contract, previously offered by Regions Bank. MDA hoped to satisfy its obligations under the 2014 contract with federal money, R241, 243, and now claims that "it was deemed prudent to seek prior approval or a waiver from Treasury before the deal was finalized." MDA Br. at 10.[8] MDA's own evidence shows that Treasury approval was received on August 18, 2014, R301, RE80, but by letter of September 4, 2014, MDA nevertheless refused to issue its guaranty, R159, RE39, causing Regions Bank to withdraw its loan commitment. R301, RE80. When MDA finally agreed to guarantee a smaller loan from Planters,[9] the first lien position had already been taken by emergency financing that Rosenfelt had found to keep production going. R161, RE41. Planters, and therefore MDA, went to the end of the line. MDA's breach in refusing to guarantee the Regions Bank loan impeded production, increased costs, and made it impossible to complete the film as originally planned, thereby depressing revenues. If MDA is required to compensate Planters with federal money, the cause is MDA's own breach, as will be shown at trial.

[8] MDA did not need Treasury's approval to assent to the Regions Bank terms. *See* Best Practices from Participating States: Loan Guarantee Programs, (September 2015), at 2, found at www.treasury.gov/resource-center/sb-programs/Documents/LGP%20Best%20Practices_Sept%202015_v%20FINAL.pdf.

[9] On remand, the evidence may establish why MDA refused to meet its ten million dollar commitment, but was willing to issue a four million dollar guaranty of the Planters loan. Under M.R.E. 201(b)(2), this Court should take judicial notice of State Small Business Credit Initiative: A Summary of States' Quarterly Reports as of June 30, 2014, found at www.treasury.gov/resource-center/sb-programs/Pages/ssbci-program-reports.aspx. The charts on pages 8 and 9 show that Mississippi had committed $8,660,985 out of a total allocation of $13,168,350. The $4,507,365 remaining from the original allocation was enough to guarantee 80 percent of the Planters loan, but not the ten million dollar Regions loan.

Defendants' legally irrelevant attack on Rosenfelt's good faith[10] evidently had some impact on the Chancery Court. In granting reconsideration of the original declaratory judgment, denying specific performance, and granting summary judgment to defendants without a damage trial, the Court declared "that Mr. Rosenfelt failed to make any payment on the loan" and concluded, "The repercussions of this failure would seem to preclude any further loan guaranty courtesy of MDA." R708, RE145. Even defendants in their brief do not rely on this statement as a basis for affirming the judgment.[11] Defendants' repeated emphasis on the Planters loan is as disconnected from the evidence as it is from the law.

ARGUMENT

I. THE RECORD ESTABLISHES DECEPTION, NOT BY PLAINTIFFS, BUT BY MDA.

The principal message conveyed by MDA's Statement of the Case is that plaintiffs deserve to lose because they and their counsel are liars. Rosenfelt's communications are described as "deceptive," MDA Br. at 3, "false," MDA Br. at 8, and a "misrepresentation," MDA Br. at 14. MDA claims that Rosenfelt "misled" a bank, MDA Br. at 12, and twice that his counsel "misled" the Court, MDA Br. at 4, 14. The irrelevance of those unsubstantiated allegations to the legal issues of the case is demonstrated by their complete absence from the Argument.

The Court's second summary judgment opinion of July 18, 2017, R703, RE140, made no finding that plaintiffs or their counsel had deceived anybody in the earlier summary judgment proceeding. The Court did not find that it had been misled when it held the letter of April 7, 2014, from Executive Director Brent Christensen to Adam Rosenfelt, R54, RE13, to be a valid and

[10] In their continuing attack on Rosenfelt's character, defendants twice berate him for suing his Louisiana lawyers, MDA Br. at 5 n.7, 32 n.33, failing to advise the Court that the Chancellor excluded the supposedly supporting evidence. R865.

[11] MDA does not dispute plaintiffs' demonstration in Part III of their Argument that the Court's closing comment on Mississippix's failure to repay the Planters loan constitutes dictum. Pl.Br. at 32-35.

enforceable contract in its original opinion of November 16, 2016, R336, RE82. Instead, the Chancellor invalidated what she had previously found to constitute a valid contract because of two issues belatedly raised by MDA's third set of lawyers: plaintiffs' standing and the absence of MDA minutes memorializing its promises. Deception had nothing to do with it.

Deception, however, lies at the very root of MDA's dealings with Rosenfelt. Whether or not MDA's letter of June 27, 2013, to Rosenfelt from Chief Financial Officer Kathy Gelston, R53, RE12, constitutes an enforceable contract, it unequivocally promised "an initial investment of ten million dollars," and confirmed that "the initial ten million dollar commitment will be firmly committed by Mississippi and will not be contingent upon proposed legislation being passed by the legislature at any time in the future." However, Rosenfelt's uncontradicted sworn testimony demonstrates that, later, "I was told that nonetheless, the MDA did not have the money and knew they didn't have the money when they sent me the letter." R213, RE64. Not only has MDA produced no sworn evidence to contradict that testimony, but its own documents confirm it. Gelston told Rosenfelt in an email of March 4, 2014, "I cannot express how sorry I am that you were misled." R561, RE128. The making of a knowingly false promise is fraud. *Singing River Mall Co. v. Mark Fields, Inc*., 599 So. 2d 938, 945 (Miss. 1992) ("A promise of future conduct may be found fraudulent only if the hearer proves that the speaker intended, at the time of the statement, to induce reliance by speaking a falsehood."). If MDA were a private corporation, this Court would find liability as a matter of law and order a trial on punitive damages. *See, e.g., T.C.B. Const. Co. v. W.C. Fore Trucking, Inc*., 134 So. 3d 701 (Miss. 2013).

Rosenfelt could not sue MDA for its fraud, because fraud is excepted from the waiver of sovereign immunity in the Mississippi Tort Claims Act. Miss. Code Ann. § 11-46-5(2) (Rev. 2012). He could, however, sue for compensatory damages for breaches of MDA's contractual promises, as he has done. This appeal addresses whether there is any legal theory by which MDA

can immunize itself against liability for compensatory damages, as it can from the punitive damages to which a private party would be subject.

II. THE CHANCELLOR CORRECTLY FOUND THE LETTER OF APRIL 7, 2014, TO CONSTITUTE A CONTRACT.

Of course, before any plaintiff can recover damages for breach, there must have been a contract to enforce. In Part II.B of their Argument, defendants renew their second lawyer's assertion that none of MDA's three separate signed promises can reasonably be construed as meeting the requirements for contract formation. The Chancellor properly rejected that contention in the original partial summary judgment opinion of November 16, 2016, finding Executive Director Christensen's letter of April 7, 2014, to be "an unconditional obligation on the MDA to a revolving loan guaranty of $10 million over five years to fund Rosenfelt's Mississippi-based film projects." R339, RE85.[12] The Chancellor never departed from the reasoning of that opinion, but reversed her conclusion based only on the two new issues of standing and MDA's supposed failure to comply with the minutes rule.

Although defendants' second lawyer did not couch the argument in terms of the six points of contract formation specified in *Woodruff v. Thames*, 143 So. 3d 546 (Miss. 2014), the original summary judgment opinion necessarily found that the 2014 contract fully satisfied them. "The elements of a valid contract are: (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, (6) no legal prohibition precluding contract formation." *Id*., at 554, citing *Rotenberry v. Hooker*, 864 So. 2d 266, 270 (Miss. 2003).

[12] The Chancellor did not address the enforceability of the original written promise of June 27, 2013, R53, RE12, as plaintiffs' partial summary judgment motion asked only for a ruling on the MDA's obligation to provide a loan guaranty, the subject of the 2014 and 2015 promises. R51, RE10.

The first point, requiring "two or more contracting parties," 143 So. 3d at 454, was satisfied by the Court's identification of MDA and Rosenfelt as the promisor and promisee. R339, RE85. Addressing the new standing argument in the second summary judgment opinion, the Chancellor did not withdraw her finding that there had been two contracting parties, but simply identified Mississippix, not Rosenfelt, as the promisee. R704, RE141. As will be explained in Part V hereafter, there is at least a genuine issue of material fact concerning the identity of the promisee, but that dispute does not render the promise unenforceable by the proper party. Similarly, the original summary judgment opinion had no reason to address the final *Woodruff* point, whether there is a "legal prohibition precluding contract formation," *id.*, because MDA's second lawyer did not raise the minutes rule. R829 ("It was not raised."). The second summary judgment opinion found such a prohibition when the third set of lawyers raised it for the first time. R705-08, RE142-45. The applicability of the minutes rule is refuted in Part IV hereafter.

The first summary judgment opinion plainly found the 2014 contract to satisfy the other four *Woodruff* requirements, findings not contradicted by the second summary judgment opinion. Defendants do not dispute that they received "consideration," *id.*, for their promises. As the Court reasoned, "A unilateral contract becomes enforceable when the promisee performs," and concluded that "Rosenfelt completed" the performance requested of him. R339, RE85. Describing that performance, the Court set forth the undisputed evidence that Rosenfelt "incurred additional significant expenses in preparing for the production of motion pictures in Mississippi," and that "he negotiated with financial institutions and received commitment of private financing to be guaranteed by MDA." R337, RE83. Defendants do not now contest that finding.

Although defendants claim that the 2014 letter fails to meet the third *Woodruff* requirement, of "an agreement that is sufficiently definite," *id.*, the Court found that the "letter's terms are unambiguous," obligating MDA to provide "a revolving loan guaranty of $10 million

over five years to fund Rosenfelt's Mississippi-based film projects." R339, RE85. The Court found nothing indefinite about this unambiguous promise.[13] Certainly, the parties could have added additional provisions to the agreement, as the Court recognized MDA had tried to do in its third promise, the terms agreement of July 1, 2015. R61, RE20. However, the Court found that no "language in the July 2015 terms agreement purports to withdraw the firm commitment found in the April 2014 letter." R340, RE86.

As to the fourth *Woodruff* point, defendants do not deny that Executive Director Christensen had the "legal capacity to make a contract." 143 So. 3d at 554. Defendants never addressed his authority in the Chancery Court, which is why neither opinion had any occasion to address it. Declining to address Rosenfelt's demonstration of the Executive Director's authority, defendants simply assert, "The existence of substantive authority is irrelevant to noncompliance with the minutes rule." MDA Brief at 30. It is, however, relevant to the capacity to contract, and defendants do not dispute that Executive Director Christensen had the authority to make the contractual promises contained in the April 7, 2014, letter; they simply say his failure to record that contract in minutes is fatal to its enforcement.

[13] Even if this Court were to find as a matter of law that the 2014 letter by itself is ambiguous or indefinite, there is ample evidence in the record to complete the terms and clarify that the parties agreed to provide a loan guaranty on the terms required by Regions Bank and ultimately provided to Planters Bank. *See id*., quoting *Rotenberry*, 864 So. 2d at 270 ("'Only when the intent of the parties is not clear' after examining the language and construing the language most favorably to the nondrafting party should the Court resort to examining extrinsic evidence."). Kathy Gelston on behalf of MDA specified in her emails to Rosenfelt's counsel prior to the Executive Director's April 2014 letter that the motion picture tax rebates could be used as additional security to the private lender, R332-34, as both Planters and Regions required. Likewise, the MDA's delivery of its guaranty to Planters constituted partial performance of its commitment to Rosenfelt and evidence of the terms of the guaranty that MDA had committed to provide. Defendants cite no authority for their baseless contention that "security" is an essential term of the parties' contract. MDA Br. at 36. Guaranties are often provided with no security at all; for example, the federal government guarantees loans to students with no security. Reasonable people can debate the wisdom of such guaranties, but they are not rendered unenforceable for lack of security provisions.

The final *Woodruff* requirement is "mutual assent." *Id*. Contracting parties express their assent by a valid offer and acceptance. Here, the Chancellor could not have been clearer: "MDA's offer invited Rosenfelt to accept the terms of the letter by rendering a performance, which Rosenfelt completed." R339, RE85. MDA submitted little sworn evidence in this case, but Sara Jo Watson did swear that "MDA offered an eighty percent (80%) loan guaranty not to exceed $10 million." R165, RE45. The making of an offer indicates an assent to be bound.[14] Defendants may dispute the details of the offer MDA made, but the Chancellor's finding that MDA made an offer is indisputable. Similarly indisputable is her finding that Rosenfelt accepted that offer by securing financing commitments and preparing to make movies in Mississippi, as MDA invited him to do.

In their brief, defendants offer new law in support of their argument "that the plaintiffs had abundant reason to know that any commitments indicated by the documents they rely upon constituted no more than 'preliminary negotiations.'" MDA Br. at 42, quoting Restatement (2d) of Contracts § 26 (1981). Although defendants assert, without citation to authority, that "the documents relied upon by plaintiffs were, by operation of law, 'preliminary negotiations' with no binding effect," MDA Br. at 43, they cannot begin to explain why Rosenfelt "had reason to know" that those communications were just negotiations when Sara Jo Watson described them under oath as an "offer." R165, RE45.[15] If defendants want the Chancellor to abandon her finding that

[14] An offer is "a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract." Black's Law Dictionary 1113 (8th ed. 2004).

[15] It is more than a little remarkable for Executive Director McCullough to suggest that, "by operation of law," no rational person could believe the Governor of Mississippi. Although defendants' second lawyer never asked Rosenfelt whether the 2014 letter constituted "preliminary negotiations," he did ask whether the 2013 letter "la[id] out the terms of what the financing is going to be." Rosenfelt then swore:

those communications constituted an offer and an acceptance, rather than preliminary negotiations, they will need a trial to do it. The notion that there cannot be a genuine issue of material fact concerning the effect of those communications is insupportable.

At this point in the proceedings, this Court need not determine which, if any, of the three separate written promises made to him by MDA should be deemed an enforceable contract. This Court need not reinstate the Chancellor's original partial summary judgment, although the opinion supporting that decision remains very strong. To require reversal of the summary judgment entered in favor of defendants, it is enough to show that this record contains evidence from which at least one enforceable contract could be established. With regard to the second promise, set forth in the April 7, 2014, letter, the Court properly rejected the objections to contract formation reasserted here. This Court should do the same and should permit further consideration of the 2013 and 2015 contracts on remand.

III. BECAUSE ROSENFELT PROVIDED VALUABLE CONSIDERATION, MDA'S THREE SUCCESSIVE PROMISES DID NOT CONSTITUTE UNCONSTITUTIONAL DONATIONS.

Defendants characterize Rosenfelt's assent to their second lawyer's leading question that the 2013 letter promises a ten million dollar investment with "no strings attached" as rendering any agreement "tantamount to a gift," MDA Br. at 34, in contravention of Miss. Const. art. 4, § 66 (1890). The actual transcript, however, makes clear that Rosenfelt and, for that matter, defendants' lawyer understood Rosenfelt's obligation to work:

> Q. And you don't have to do anything but *make movies*; no strings attached?

> From my perspective, as I said, I get a letter from the Governor firmly committing $10 million for me, referencing a plan that I gave them that they want me to use here and nowhere else, I think it does.

R225. Defendants have offered no evidence that the Governor's promise should not have been taken seriously in either 2013 or 2014, although they will be free to do so at trial.

A. Firmly committed.

Q. No strings attached?

A. Absolutely not.

Q. And what type of consideration were you going to do for the State of Mississippi?

. . .

THE WITNESS: I was going to go about being in the movie business and not shop this plan elsewhere.

R244-45 (emphasis added).

The actual record, which defendants attempt to obscure, is that MDA offered Rosenfelt, not a gift, but a job. As their second lawyer acknowledged, Rosenfelt's job was "mak[ing] movies." R244. In her initial summary judgment opinion, the Chancellor, drawing from Rosenfelt's sworn complaint, described the work he performed after receipt of the 2013 letter:

> Rosenfelt asserts he relied upon MDA's promise as he moved his family to Mississippi and incurred significant expenses in preparation for the production of motion pictures in Mississippi. Among other things, he engaged professional services to organize necessary business entities and began arranging for necessary crews to be available.

R337, RE83. Although the Chancellor had no need to decide the legal effect of the 2013 letter, the subject of the "no strings attached" question in Rosenfelt's deposition, her opinion declared that "[t]he April 2014 letter created an unconditional obligation on the MDA." R339, RE 85. The Court also described the work Rosenfelt performed after his receipt of that letter:

> In reliance on MDA's promise as set forth in the April 2014, letter, Rosenfelt claims that he incurred additional significant expenses in preparing for the production of motion pictures in Mississippi. Among other things, he negotiated with financial institutions and received a commitment of private financing to be guaranteed by MDA.

R337, RE83. Rosenfelt also "incurred additional significant expenses" after MDA's execution of the 2015 terms agreement. R338, RE84. All of Rosenfelt's claims were verified by his affidavit, R63, RE22, and defendants introduced no evidence to contradict any of them.

Rosenfelt's sworn answer to defendants' question about the consideration given for the 2013 promise and the Chancellor's recitation of the services performed under all three promises in 2013, 2014, and 2015 preclude any suggestion that any contract may have been a donation. Section 66 was authoritatively construed in *Craig v. Mercy Hospital -- Street Memorial*, 209 Miss. 427, 45 So. 2d 809, *sugg. of error overruled*, 209 Miss. 490, 47 So. 2d 867 (1950). In conjunction with a federal grant program, the Legislature had granted funds to a hospital in Vicksburg for the construction of facilities in exchange for the promise to provide charity care to needy citizens. This Court rejected the argument that the grant constituted a donation in contravention of § 66. "[T]he term 'donation or gratuity' implies absence of consideration, the transfer of money or other things of value from the owner to another without any consideration." 45 So. 2d at 814. *Accord*, *Tunica County v. Town of Tunica*, 227 So. 3d 1007, 1018 (Miss. 2017). The Court upheld the arrangement "for the reason that the statute by its plain provisions has clearly disclosed that the so-called 'grant' of funds therein mentioned were for valuable considerations in return, and therefore in no sense a donation." 45 So. 2d at 815. Accordingly, a payment supported by consideration cannot violate § 66.

The Chancery Court described the consideration Rosenfelt provided:

> MDA's offer invited Rosenfelt to accept the terms of the letter by rendering a performance, which Rosenfelt completed. He not only completed the performance, but Rosenfelt also relied on MDA's commitment by commencing several Mississippi-based film projects.

R339, RE85. Rosenfelt produced a movie in Greenwood, creating jobs for local workers and business for local merchants. R89-90, RE77. Moreover, the evidence shows that MDA received extremely important additional consideration from Rosenfelt in his willingness to accept Director Christensen's offer of April 7, 2014. MDA officers had informed him that MDA did not have the ten million dollars promised in the 2013 letter, and that it had never had the money it promised.

R242-43, 245-48, RE71.[16] MDA, through its Chief Financial Officer, Kathy Gelston, told him, "I cannot express how sorry I am that you were misled. I will continue to work with you within our current programs to try and mitigate the damage." R561, RE128. His forbearance from going to court to enforce his rights was essential to preserving MDA's reputation, as Gelston told a member of the Lieutenant Governor's staff. MDA would keep the Governor's "commitment to Adam Rosenfelt to provide $10 million in loan guarantee" because "MDA cannot fail to carry through on a commitment of the state, or we will be completely ineffective in economic development from that point forward." R563, RE130. Rosenfelt's forbearance provided substantial consideration for MDA's new promise.[17] For Executive Director McCullough now to suggest that Rosenfelt simply received a gift without providing consideration is contrary to the law and the facts.[18]

As the Chancery Court found, MDA's 2014 promise to Rosenfelt is a contract supported by consideration. Therefore, it cannot be a donation in violation of § 66.[19]

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[16] MDA's failure to provide the promised funds is a complete answer to defendants' repeated complaint that Rosenfelt did not carry out the plan he described to the Governor. MDA Br. at 3, 7. This Court well knows that no one can make bricks without straw. Exodus 5:6-18.

[17] Rosenfelt recalled this forbearance during his deposition, including his desire to accommodate the MDA, complete his work, and avoid problems after MDA admitted it could not fulfill its original 2013 commitment. R218-19, 222, 255, RE66-67.

[18] Defendants' argument that the contract became a gift because of "grossly inadequate consideration" also fails. *Hill v. Thompson*, 564 So. 2d 1 (Miss. 1989), cited by defendants, makes no mention of § 66, relying instead upon Miss. Const. art. 4, § 95 (1890), which forbids donation of public lands. The value of land is easily ascertained, as appraisers are regularly permitted to offer expert opinion on that subject. Even if *Hill* were to apply to § 66, defendants have offered no evidence, expert or otherwise, to establish that the value of Rosenfelt's promise to "make movies" in Mississippi, R244, which resulted in the spending of millions of dollars in this State, R280, RE77, was grossly inadequate.

[19] Defendants also refer, without explanation, to Miss. Const. art. 4, § 96 (1890). That provision prohibits the Legislature from granting "extra compensation" to any "contractor, after service rendered." The Supreme Court has applied it "in the context of employment and contractual relationships, that is, to prohibit governmental entities from making unauthorized payments." *Tunica County*, 227 So. 3d at 1019. However, the defense asserted under § 66 is that plaintiffs rendered no service. Because defendants claim there has been no contract and no service, any reliance on § 96 is obviously misplaced, and *Farrish Gravel Co. v. Mississippi State Hwy Comm'n*, 458 So. 2d 1066 (Miss. 1984), has no bearing on this case.

IV. BECAUSE MDA HAS NO BOARD AUTHORIZED BY LAW, THE EXECUTIVE DIRECTOR'S AUTHORITY TO BIND IT BY CONTRACT IS NOT RESTRICTED BY THE MINUTES RULE.

As already noted, defendants do not dispute plaintiffs' demonstration, Pl.Br. at 26-27, that Executive Director Christensen and the other officers to whom he delegated his authority were fully empowered to bind MDA to its three contracts with Adam Rosenfelt. Encouraging movie production is exactly the sort of "economic development of this state," Miss. Code Ann. § 57-1-1(a) (Rev. 2014), that MDA was created to promote. The decision of Executive Director Christensen to promise to provide a ten million dollar guaranty was fully consistent with his authority "[t]o formulate the policy of the department regarding the economic and tourist development of the state." Miss. Code Ann. § 57-1-5(3)(a) (Rev. 2014).

Executive Director Christensen's authority to promise that guaranty is established by General Hood's opinion letter of June 7, 2013, expressly declaring that "the Executive Director of the MDA is authorized to execute an agreement to guarantee the Loan." R554, RE121. Unable to contest Executive Director Christensen's "substantive authority," defendants assert that his exercise of that authority is void for "noncompliance with the minutes rule." MDA Br. at 30.

It is certainly true, as defendants emphasize, MDA Br. at 27, that Executive Director Christensen was obliged to act, not only "within [his] authority," but also "in the mode and manner by which this authority is to be exercised under the statute." *Lee County v. James*, 178 Miss. 554, 174 So. 76, 77 (1937). They utterly fail, however, to identify any statute which required Executive Director Christensen to record the exercise of his authority in minutes in order to be valid. Indeed, they cite no precedent of this Court which has ever held that the minutes rule

applies to the Executive Director of MDA or to any other single officer of the State of Mississippi.[20]

Their own brief demonstrates that the minutes rule has its foundation in statute. Both cases originally adopting the minutes rule involve boards of supervisors. *Bridges v. Clay County Sup'rs*, 58 Miss. 817 (1881); *Crump v. Colfax County Sup'rs*, 52 Miss. 107 (1876). Defendants identify the statute which required those boards to keep minutes, MDA Br. at 25 n.26, citing Miss. Code § 1361 (1871), and *Crump* acknowledged that the sheriff, to whom § 1361 did not apply, could "bind the county" when the board failed to act. 52 Miss at 112. From those cases, through *Lee County*, to *Groundworx, LLC v. Blanton*, 234 So. 3d 363 (Miss. 2017), this Court has applied the minutes rule only to multimember boards which are required to keep minutes. That is exactly what Justice Griffith explained over 80 years ago. *Lee County*, 174 So. at 77.

Defendants tacitly recognize the absence of any precedent in their favor. That is why they argue for the first time, "The Legislature expanded the obligation to make and keep minutes and imposed it on every 'public body,' broadly defined, when the open meetings law was adopted in 1975. MISS. CODE ANN. § 25-41-1 et seq. (1975 Miss. [Gen.] Laws ch. 481)." MDA Br. at 28.[21] However broad the definition in Miss. Code Ann. § 25-41-3(a) (Supp. 2017) may be, they cite no court decision or Attorney General opinion declaring that MDA falls within it. More importantly,

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[20] The single officer whose contracts appear most often in court is the Attorney General. In *Pursue Energy Corp. v. Mississippi State Tax Comm'n*, 816 So. 2d 385 (Miss. 2002), Pursue sought to invalidate the retention agreement whereby Attorney General Moore hired private counsel to investigate its tax liability. This Court found the agreement valid because it complied with the terms of the authorizing statutes. *Id*., at 390-91. Neither this Court nor the highly-motivated plaintiff made any suggestion that the validity of the contract depended on its recordation in minutes which the statutes did not require. Similarly, in a contest between the Auditor and General Hood, this Court found a retention agreement to be valid so long as it was administered consistently with the controlling statutes. *Pickering v. Hood*, 95 So. 3d 611, 616-19 (Miss. 2012). Once again, those statutes did not require minutes, and neither this Court nor the Auditor suggested that any such requirement should be imposed.

[21] The short title of the 1975 act says nothing at all about minutes, much less about revising the minutes rule explained in *Lee County*.

even if MDA falls within the definition, the obligation to keep minutes imposed by Miss. Code Ann. § 25-41-11(1) (Rev. 2010) applies only to "meetings of a public body." That language imposes no obligation on Executive Director Christensen, or any other single officer, to keep minutes because he is not required to have a meeting to exercise his authority.[22] Even if the open meetings law imposed a requirement that the Executive Director keep minutes, defendants neither dispute nor distinguish the holding of *Shipman v. North Panola Consolidated School District*, 641 So. 2d 1106, 1116 (Miss. 1994), that a violation of the open meetings law does not void the actions of a public body.

For a significant number of years after the passage of the open meetings law in 1975, economic development in Mississippi was vested in the hands of a board which did keep minutes. The Board of Economic Development was created in 1979 to take the place of the old Agricultural and Industrial Board. 1979 Miss. Gen. Laws ch. 438, § 3. In 1986, the Legislature adopted a new statute, the short title of which declared its purpose "TO CONSOLIDATE THE STATE'S ECONOMIC DEVELOPMENT ACTIVITY INTO A SINGLE STATE AGENCY." 1986 Miss. Gen. Laws ch. 500. Section 44 of that statute vested that authority in the Mississippi Board of Economic Development, and declared, in a provision codified at Miss. Code Ann. § 57-1-3(3):

> The secretary, to be named by the executive director, or in his absence, some person designated by the executive director to act in his place, shall keep regular and accurate minutes of the board's proceedings in a minute book provided for that purpose which shall be a public record, and all orders, findings and acts of the board shall be entered upon its minutes.

[22] Defendants are absolutely correct that "a new statute will not be considered as reversing long-established principles of law and equity unless the legislative intention to do so clearly appears," MDA Br. at 30, quoting *Lawson v. Honeywell Intern.*, 75 So. 3d 1024, 1029 (Miss. 2011), quoting *Thorp Commercial Corp. v. Miss. Road Supply Co.*, 348 So. 2d 1016, 1018 (Miss. 1977), which is why the open meetings law should not be construed to place new limitations on single officers who are under no statutory obligation to have meetings to exercise their powers. The Legislature would have known that *Lee County* explains that the minutes rule applies to multimember bodies and that no reported decision applies it to a single officer. The 1975 law shows no intent to reverse those "long-established principles of law."

Two years later, however, the Legislature abolished the Board, vesting its authority in "the Department of Economic Development operating through its executive director." 1988 Miss. Gen. Laws ch. 518, § 26, codified as Miss. Code Ann. § 57-1-2(g). At the same time, § 27 of that statute amended § 57-1-3 to delete the requirement for a secretary to keep minutes of a Board that no longer existed.[23] Certainly, the new Department of Economic Development[24] was under no doubt about the effect of the 1988 statute, advising Attorney General Moore, "The Board of Economic Development ceased to exist on July 1, 1988 and those duties previously administered by the Board are now handled by our Executive Director . . . ." Letter of October 19, 1988, to Mr. Mac Holladay, 1988 WL 250230 (Miss. A.G.).

Defendants rely upon another opinion in which General Moore had been asked to construe the Mississippi Farm Reform Act of 1987. Letter of October 25, 1988 to Mr. Mac Holladay, 1988 WL 250130 (Miss. A.G.). After providing the requested interpretation of the Farm Reform Act, General Moore volunteered that the reasons for a decision under that statute "must be spread on the Board's minutes." That, of course, is what the Legislature would have intended when it adopted the Farm Reform Act, because the Board then existed and was required by statute to keep minutes. General Moore did not explain how in 1988 an abolished Board could keep minutes. Apparently, General Hood by 2013 had accommodated himself to the new statutory reality, because his June 7, 2013 opinion, R554, RE221, used by MDA to entice Rosenfelt to accept the

[23] That same amendment eliminated the provision of § 44 of the 1986 act that minutes and the secretary's signature were required to prove agency action. Under § 57-1-3(1) as it now reads, the Executive Director's signature "shall be given full faith and credit in any proceeding of a court in this state."

[24] That Department became the MDA in 2000. 2000 Miss. Gen. Laws, 2d Ex. Sess., ch. 1, § 3, codified as Miss. Code Ann. § 57-1-54 (Rev. 2014).

2014 promise of a loan guaranty, stated no requirement for the Executive Director to record his contract anywhere. R554, RE121.

Of course, the very statute which authorizes the Attorney General to give opinions makes plain that no court is bound by them. Miss. Code Ann. § 7-5-25 (Rev. 2014).[25] However, that same statute protects from both civil and criminal liability a state employee "who, in good faith, follows the direction of such opinion and acts in accordance therewith." Whereas Executive Director Christensen could sign his name to the letter of April 7, 2014, without fear of the consequences, Executive Director McCullough contends that Rosenfelt must absorb the damage for believing what General Hood wrote in his 2013 opinion letter. A public contractor like Rosenfelt may well be "charged with knowledge of the law," MDA Br. at 32, but, had he gone beyond General Hood's opinion to review the law, he would have found that the Board and any obligation to keep minutes were abolished in 1988. Had he looked at MDA's own explanation of its loan guaranty program, R594-601, SRE Tab 6, he would have seen no requirement for Board approval or recordation in its minutes because no Board exists.[26]

On these facts, then, it is nothing short of outrageous for defendants to hide behind the minutes rule "to preclude any fraud." MDA Br. at 32. It was MDA's first lawyer who sent General Hood's 2013 opinion to Rosenfelt's lawyer in order "to get the process started." R552, RE119. That process resulted in the contract embodied in the letter of April 7, 2014. Executive Director McCullough invokes the minutes rule here, not to protect the State against a fraud

[25] Just last month, this Court made clear that courts must construe statutes without deference to the opinions of the Executive Branch. *King v. Mississippi Military Dept.*, No. 2017-CC-00784-SCT ¶ 12 (Miss. June 7, 2018).

[26] He would also have seen that MDA reserved the right to "waive any requirement of the guidelines." R601, SRE Tab 6. Whatever technical arguments its lawyers may now devise, MDA's own public statement of its authority leaves no doubt that it could deliver the loan guaranty its officers promised.

perpetrated by Rosenfelt, but to protect MDA from the consequences of its own fraud in promising Rosenfelt ten million dollars it did not have. Executive Director Christensen's contract of 2014 was intended to mitigate the damage caused by that fraud, and it must be enforced.

V. BECAUSE PLAINTIFFS HAVE BEEN FORESEEABLY INJURED BY MDA'S BREACH OF CONTRACTS INTENDED FOR THEIR BENEFIT, THEY HAVE STANDING TO SUE FOR DAMAGES.

The limited sworn evidence provided by defendants renders insupportable the Chancellor's conclusion that there is no genuine issue of material fact to dispute the Court's ruling that "Element Studios, LLC and Mr. Rosenfelt cannot show a right of themselves to invoke the jurisdiction of this Court." R705, RE142. The Court added that "allegedly Mississip-Pix Studios, LLC has" suffered actual damage, R705, RE142, but the record is broader than that.

"MDA offered an eighty percent (80%) loan guaranty not to exceed ten million dollars . . . ." R165, RE45. Sara Jo Watson's affidavit unmistakably refers to Executive Director Christensen's letter of April 7, 2014, which the Chancellor had originally found to constitute an unambiguous contract. R339, RE85. If there could have been any ambiguity about the party to whom MDA made its offer, Watson removed it by swearing that MDA was later willing to guarantee a loan from Planters, "superseding all previous offers to Mr. Rosenfelt." R166, RE46. Her sworn evidence makes no assertion that MDA ever intended to make any offer to Mississippix, either in the 2013 letter or the 2014 letter. Rosenfelt swore without contradiction that the use of "your" in the 2013 letter was "meaning me." R205. At the very least, in the face of MDA's own evidence, the Chancellor's conclusion that there is no evidence to support Rosenfelt's contention that he contracted with MDA in either 2013 or 2014 cannot stand.

Watson's testimony goes on to indicate that MDA contracted with both Rosenfelt and Element in the term sheet of July 1, 2015. She swore, "I drafted the term sheet and reviewed it with other MDA staff." R166, RE46. The document she drafted shows in its signature line that

Adam Rosenfelt signed on behalf of both himself and Element. If there is any doubt as to whether Rosenfelt and Element are contracting parties to the 2015 agreement, that doubt must be resolved against MDA, which drafted the document. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352-53 (Miss. 1990).

In the negotiations leading up to MDA's refusal to guarantee The First's proposed loan to Element in 2016, MDA never suggested that Mississippix was the only proper contracting party. Plaintiffs' counsel wrote MDA's first lawyer regarding Element's application, "If you believe that there is anything else that my client must do as a prerequisite to MDA's execution of its guaranty, please let me know." R623. In her explanation of MDA's rejection of Element's application, its first lawyer never suggested that Element lacked standing or the MDA had contracted only with Mississippix. Relying on the 2015 document naming Element as a party, Rosenfelt undertook extensive efforts on behalf of Element to seek financing and to make movies. As plaintiffs explained in Part I.C of their original brief, MDA is therefore estopped from challenging plaintiffs' standing to enforce the contract documents. Defendants in their brief make no argument to the contrary.

Defendants likewise ignore *Vickers*, which Rosenfelt and Element followed to the letter in initiating this action. There, Vickers alleged that he had bought a corporation based on the bank's promise to lend money to that corporation. 458 So. 2d at 1057. The bank failed to lend the money, the corporation went into bankruptcy, and Vickers sued for his damages. *Id*., at 1059. The trial court held that Vickers had no standing, and this Court reversed.

This Court began by noting what Vickers should have done. "Back in the Spring of 1976, he could have brought an action for specific performance." *Id*., at 1062. That is exactly what Rosenfelt did here, seeking the loan guaranty that had been promised to "a film production company" in the 2015 term sheet, which Rosenfelt signed on behalf of Element. R61, RE20. In

the absence of specific performance, which might have avoided some or all of the damages, "[t]here is no reason on principle why he should not now be allowed to prosecute an action for foreseeable damages he has sustained as a proximate result of the breach." *Id.* While Vickers had not proven his right to damages, he had proven his right to escape summary judgment. "We certainly cannot say *on this record* that damages of this nature were not reasonably foreseeable by the Bank back on January 19, 1976, as likely to result if it failed to perform its obligation to provide interim construction financing." *Id.* (emphasis in original).

The extent of the damages suffered by plaintiffs is not apparent on this record because they were first seeking specific performance, as *Vickers* advises, in an effort to avoid those damages. However, the Chancery Court in its first summary judgment opinion acknowledged the evidence showing that Rosenfelt had incurred expenses in reliance on MDA's promises. R337-39, RE83-85. Defendants do not deny that plaintiffs suffered damages, but merely contend that neither one of them "had a right to judicial enforcement of a legal duty of the defendant." MDA Br. at 22, quoting *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 827 (Miss. 2009). The Chancellor has never withdrawn her initial finding that MDA had a legal duty to execute "a revolving loan guaranty of $10 million over five years to fund Rosenfelt's Mississippi-based film projects." R339, RE85. Whether that legal duty was owed to Mississippix or to Rosenfelt individually, *Vickers* allows him to sue to recover damages caused to him by its breach. Similarly, Element may sue for damages it incurred from the breach of the July 2015 term sheet.

MDA breached a legal duty, and both Rosenfelt and Element were foreseeable victims of that breach. They are entitled to a trial.

CONCLUSION

The judgment of dismissal should be reversed and the case remanded for trial. In addition, the present record supports reinstatement of the original partial summary judgment order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Reply Brief of Appellants with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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I hereby further certify that I served a true and correct copy of the foregoing Reply Brief of Appellants via United States mail, first class, postage prepaid, to the following:

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Trial Court Judge

This, the 13th day of July, 2018.

/s/ Michael B. Wallace
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