THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT

The Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-23-5757

Appellate Case No. 2018-001444

Encore Technology Group, LLC..... Respondent/Appellant,

v.

Keone Trask and Clear Touch Interactive, Inc..... Appellants/Respondents.

RETURN TO MOTION TO STAY

In an unwarranted effort to overturn a narrowly-tailored Receivership Order that provides for only the monitoring and preservation of the judgment debtor's non-exempt assets, Appellants mischaracterize the Receivership Order and rely upon unsupported and false statements of fact and erroneous arguments of law. Accordingly, Appellants' motion to stay the Receivership Order should be denied.

On July 23, 2018, the Honorable R. Lawton McIntosh entered an Order Appointing Receiver (the "Receivership Order") to monitor and preserve the non-exempt assets of Appellant Keone Trask ("Trask"). Trask became a judgment debtor to his former employer, Respondent Encore Technology Group, LLC ("Encore") when, on September 29, 2017, a Greenville County jury rendered a verdict of nearly $3 million in actual damages and $5 million in punitive

damages against Trask for, among other things, violating his duties of loyalty, fiduciary duties, contractual duties, and the South Carolina Trade Secrets Act.

FACTS

Encore paid Trask nearly $200,000 per year to serve as its director of product development and locate suppliers for Encore's products, including interactive panels for K-12 schools. Instead, Trask formed a side company, Clear Touch Interactive, Inc. ("Clear Touch"), to divert profits away from Encore while he was on its payroll. As noted by the Court in the Receivership Order, the reasons the jury rendered such a significant punitive damages verdict was because evidence at trial indicated that Trask:

- Did not disclose his involvement in Clear Touch to Encore while he was an employee of Encore;
- Transferred his ownership in Clear Touch to his mother to hide his affiliation;
- Got Encore to sign a Reseller Agreement and had his mother sign for Clear Touch;
- Had the true suppliers remove their labels from panels and replace them with Clear Touch labels to hide the suppliers' identities from Encore;
- Marked up the prices of the panels from the suppliers to Encore;
- Had Encore send its checks to a Nevada post office box and forwarded them back to South Carolina;
- Had his wife, Tamara Trask, working for Clear Touch but posing to Encore under the false name "Amy Andrews";
- While at conferences for Encore, worked to sign resellers for Clear Touch by initially leading them to believe Encore was an owner of Clear Touch;

- Got Encore's employees, Leo Gallant and Jimmy Higginbotham, to sign non-disclosure agreements – including one on the day Trask left Encore – so that he could induce them to leave Encore months later by disclosing his ownership of Clear Touch but prevent them from disclosing same to Encore; and
- Permanently deleted incriminating e-mails.

In other words, Trask has a long history of subterfuge and dishonesty that warrants protection for Encore from efforts by Trask to hide and transfer assets beyond the control of the Court. As shown by the above, these efforts involve his wife, Tamara Trask, who posed to Encore using a false name while Trask was Encore's employee, and Appellant/Respondent Clear Touch, over which Trask admits to having "[o]perational management and control." Motion to Stay at 3. Meanwhile, despite having a nearly $8 million judgment against him, Trask has not paid any money to Encore, nor has he produced any documents regarding his assets to Encore, despite Encore's requests for production of documents served in April 2018.

Appellants/Respondents ("Appellants") chose not to support their motion with an affidavit. Accordingly, they supply no sworn testimony or other evidence to support their requests. Instead, they make the same false statements of fact and arguments that the jury emphatically rejected with its $8 million verdict. Specifically, Appellants falsely state:

- "Operational management and control of Clear Touch was transferred from Trask to his mother," motion at 3, when the truth is Trask always maintained management and control of Clear Touch and simply used his mother to hide that fact from Encore;
- "Trask brought Clear Touch to Encore as a potential panel supplier," motion at 4, when the truth is Trask's job was to find panel suppliers for Encore, and instead he only brought Clear Touch, his own company, to Encore without disclosing – and actively hiding – his involvement in it and without disclosing the true suppliers;
- "On January 15, 2014, Trask notified Encore of his intention to leave" but "Encore encouraged Trask to stay through the end of March," motion at 4, neither of which happened;

- "On January 21, 2014, Clear Touch was converted from an LLC to a corporation resulting in a change of operational control from Cruse to Trask," motion at 4, when the truth is the "conversion" from an LLC owned by Trask to a corporation ostensibly owned by an IRA was not done legally and therefore was ineffective;

- "In October 2014 Trask disclosed his interest in Clear Touch to Encore leadership," motion at 4, when the truth is Trask only disclosed – after he had left Encore's employ – that he had "acquired an interest in" Clear Touch, not owned it all along; and

- Encore's verdict and judgment "all aris[e] out of Trask not disclosing his relationship with Clear Touch while an employee of Encore," motion at 5, when the truth is Encore's damages also arise from Trask's breaches of his employment contract, post-termination covenants, and theft of Encore's trade secrets.

In short, the truth is that Trask has a long history of lying to and stealing from Encore, and he seeks to escape a receiver's monitoring and preserving his assets in hopes of continuing to do so during the appeal. The Court should not tolerate this effort.

ARGUMENT

Appellants do not ask to stay the nearly $8 million judgment against Trask, nor would such a request be meritorious. Rule 241(b)(1), SCACR, makes clear that money judgments are not stayed pending appeal. Additionally, the General Assembly has provided courts with broad authority to appoint a receiver after entry of a money judgment, specifically:

1. to carry the judgment into effect, S.C. Code Ann. § 15-65-10(2);

2. to preserve the judgment debtor's property during the pendency of an appeal, S.C. Code Ann. § 15-65-10(3); and

3. when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment. S.C. Code Ann. § 15-65-10(3).

All of those provisions apply here. Accordingly, Appellants do not contest the validity of the Receiver, but instead ask the Court to stay provisions of the Receivership Order that would

allow them to hide and transfer assets beyond the control of the Court during the pendency of the appeal. These requests should be denied.

A. The Receivership Order does not violate the law.

Contrary to Appellants' arguments, the Receivership Order does not grant the Receiver "dominion and control" over exempt assets. Instead, it provides only for the monitoring and preservation of Trask's non-exempt assets. *See* Receivership Order at 6, ¶ 3 ("all funds or other property that are received by Trask, **except for Exempt Property**, shall be delivered to the Receiver and deposited with a bank of Receiver's choice or otherwise secured by Receiver pending resolution of Trask's appeal."); at 7, ¶ 5 ("The Receiver will be and hereby is authorized and directed to take immediate possession of Trask's assets and to exercise full control over Trask's assets, **except for Exempt Property**, provided that Receiver shall not sell or dispose of such assets until further order of this Court.") (emphasis added).

1. The Receivership Order exempts, not controls or garnishes, Trask's wages.

With regard to a debtor's wages, the South Carolina Code exempts only "earnings of the debtor for his personal services." S.C. Code Ann. § 15-39-410. In recognition of this exemption, the Receivership Order expressly exempts from the Receiver's control $200,000 per year in Trask's earnings from Clear Touch. Receivership Order at 6. Although Trask complains that "the basis for calculating the amount of it is questionable," motion at 12, n.4, he never says what his earnings are. In fact, his counsel has represented to the undersigned that Trask's salary from Clear Touch is $200,000 per year.[1]

[1] Plaintiff's Trial Exhibits showed that Trask's wages were $190,512 in 2013 and $163,496 in 2015. Plaintiff's Exhibits 10.G, 10.I, and 10.J. Trask's counsel's representation was consistent with and higher than these figures.

Nevertheless, even though Appellants admit that Trask has "[o]perational management and control" over Clear Touch, they ask the Court to allow him to direct Clear Touch to give himself unlimited raises, bonuses, and commissions and not allow the Receiver to preserve them during the appeal. This request should be denied for at least two reasons.

First, the statutory exemption does not include commissions or bonuses based upon a business's performance as opposed to the debtor's personal services. *See In re Davis,* 1999 WL 33486078, at *3 (Bankr. D.S.C. May 28, 1999) ("'[E]arnings for personal services' are to be distinguished from the proceeds of a business carried on by the debtor; the legislative intent being to protect the fruit of someone's labor for the benefit of his family, rather than income derived from passive sources, such as investment income or return on capital."); *Mathews v. Mathews,* 207 S.C. 170, 35 S.E.2d 157 (1945) (applying the predecessor of S.C. Code Ann. § 15-39-410 and indicating that "earnings of the debtor for his personal services" are limited to wages and ordinary salaries necessary for the use of a family supported wholly or partly by his labor); *In re Strong*, No. Civ. A. 94-75489, 1995 WL 1930448, at *3 (Bankr. D.S.C. April 14, 1995) (rejecting a debtor's argument that S.C. Code § 15-39-410 entitled him to receive real estate commissions).

Appellants contend that these cases "do not support the notion that Trask's commission payments or bonuses fall outside the realm of 'earnings of the debtor for his personal services.'" Motion at 11. This is not accurate. While *Davis* held that earnings of an independent contractor do not fall within the exemption for "earnings of the debtor for his personal services," 1999 WL 33486078 at *3, the reasoning of the case is far more expansive than Appellants contend. The *Davis* court engaged in a thorough analysis of the meaning of the term "earnings...for personal services," noting the "distinction between wages and salaries as compared to commissions and

fees due to independent contractors ***or small business owners***." *Id.* at *4 (emphasis added). The court further noted that "profits and business earnings are outside the meaning of wages and salary," the latter category "needed to support the wage earner and his family on a week-to-week, month-to-month basis," thus justifying an exemption for these specific funds. *Id.* Finally, the *Davis* court looked to other provisions of the S.C. Code to reinforce its decision, an analysis that applies here:

> Further support for the Trustee's argument that § 15-39-410 does not apply to the circumstances of this case can be found by referencing other statutes. Section 15-41-30(5) provides that a debtor who does not take a homestead exemption may take up to a $1,000 exemption in "cash and other liquid assets." The term "liquid assets" is defined to include "unpaid earnings not otherwise exempt...and other receivables." Based upon this statute, it does not appear to be the intent of the legislature to allow a debtor in a bankruptcy case to exempt *any* amount of earnings for personal services. The Court can readily envision situations where the amount asserted as "earnings for personal services" could be very substantial in the situation of accounts receivables for physicians, commissions for insurance agents and real estate brokers, and fees for attorneys working on a contingency fee basis. In such cases, the amounts exemptible could be well beyond that necessary for preservation of a debtor's fresh start or for the support of his dependents. The Court is of the opinion that this legislative cap of $1,000 is an indication that the legislature did not intend for an unlimited exemption in earnings for personal services as would follow from acceptance of the Debtors' position.

Id. at *5.

The cases Appellants cite to support their far-reaching interpretation of what funds fall within the category of "earnings...for personal services" are inapposite because they do not interpret S.C. Code Ann. § 15-39-410. Rather, the courts in *Jarrett v. S.C. Employment Sec. Comm'n*, 290 S.C. 533 (1986), and *Toner v. S.C. Employment Sec. Comm'n*, No. 2005-UP-115, 2005 WL 7083464, interpreted statutory schemes inapplicable to this case—in *Jarrett*, a statute governing unemployment benefits, 290 S.C. at 860-61, and in *Toner*, a statute governing workers' compensation benefits. 2005 WL 7083464, at *1. In *Garrett v. Mutual Ben. Life Ins.*

Co., 239 S.C. 574 (1962), the Court was not interpreting any South Carolina statute at all, but was instead referring to the meaning of "earned income" as contractually defined by private disability insurance policies. *Id.* at 578.

Second, even if Appellants had identified authorities to support their overly broad interpretation of "earnings of the debtor for his personal services" in S.C. Code Ann. § 15-36-410, this case is unique because of the level of complete control Trask admits he exercises over what payments Clear Touch makes to him and how those payments are categorized. It was therefore reasonable for the Receivership Order to provide a specific exemption amount, one that far exceeds what would be required to provide for family support, the purpose of the "earnings for...personal services" exemption.

2. The Receivership Order does not restrict Trask's power over exempt assets.

Contrary to the claims by Trask, the Receivership Order does not "unlawfully attempt[] to both cap Trask's accumulation of his Exempt Earnings and overly restrict his ability to encumber Exempt Property." Motion at 11. Instead, it provides only that, with regard to Exempt Property, "Trask shall not dispose of or encumber such property **beyond the statutory amount of the exemption**. If such property is already encumbered such that the owner's equity in the property is less than the amount of the exemption, the owner shall not further encumber or dispose of the property." *Id.* at 6 (emphasis added).

Thus, the Receivership Order expressly protects Trask's interest in the exempt portion of his assets, i.e., partially-exempt assets. The limitation upon further encumbrance is reasonable because it only applies when Trask's equity is less than the exemption, so that further encumbrance would only diminish what a creditor could recover from such asset. Moreover,

Trask has failed to identify – by affidavit or otherwise – any partially-exempt asset that he has a legitimate need to transfer or further encumber.

Likewise, the Receivership Order does not unlawfully cap Trask's accumulation of Exempt Earnings. S.C. Code Ann. § 15-41-30(A)(5) expressly exempts only "cash and other liquid assets to the extent of a value not exceeding five thousand dollars ...." As Appellants note, the term "liquid assets" includes **"unpaid** earnings not otherwise exempt," *id.* (emphasis added), but once earnings have been paid they are no longer exempt beyond the $5,000 cap. In other words, once earnings have been paid, they become cash and/or liquid assets subject to the $5,000 cap of the exemption statute.[2]

3. The Receivership Order only allows the Receiver standard discovery concerning Clear Touch, and does not affect its assets.

Also contrary to the claims by Trask, the Receivership Order does not "unlawfully afford[] the Receiver access to Clear Touch's assets." Motion at 13. Instead, it provides only for the Receiver to preserve "**all assets of Trask** in Clear Touch." Receivership Order at 5, ¶ 2 (emphasis added). In other words, the Receivership Order expressly distinguishes between Clear Touch's assets and Trask's assets and only allows the Receiver to preserve the latter.[3]

---

[2] Of course, a debtor may deposit $5,000 in earnings in an account, immediately spend it, reducing the account to near $0, and then replenish the account during the next pay period. If Trask causes Clear Touch to pay his $200,000 salary weekly, he will only have $3,846.15 in gross wages – and less after taxes -- to deposit into his account and then spend.

[3] Appellants make the argument – with no substantiation – that Trask converted Clear Touch from an LLC to a corporation and then transferred his ownership of Clear Touch to an exempt IRA. The Receivership Order does not allow the Receiver to sell such equity, so Appellants' argument is irrelevant. Moreover, the Receiver should be allowed to examine the books and records of Trask and Clear Touch to ascertain whether such claims are true and whether the IRA really is a qualified individual retirement account under the Internal Revenue Code as required for the exemption.

Nor is the fact that the Receiver is given access to Clear Touch's records a reasonable objection. Access to those records is limited to "records of Clear Touch that relate to or may lead to the discovery of assets, property, and income of Trask." Receivership Order at 5, ¶ 2. As noted above, Trask admits that he has full control over Clear Touch. This means that Trask may have rights and assets in Clear Touch that would enable him to pay the judgment, so that discovery of such rights and assets from Clear Touch is warranted. Moreover, the Receiver's discovery is "subject to the Confidentiality Order in this case, which the Receiver shall acknowledge he has read and will follow." *Id.* at 6. Therefore, Appellants have no legitimate complaint about the Receiver's access to Clear Touch's records.

4. The Receivership Order gives no control over Tamara Trask's assets.

Again contrary to the claims by Trask, the Receivership Order does not "unlawfully grant access to and control over Tamara Trask's personal finances and assets." Motion at 14. Instead, it provides only for the Receiver to "**[g]ather all books and records** of Trask, **and subpoena or otherwise require production of books and records** of third parties, including but not limited to... records showing any asset transfers or dispositions by Trask, family members, or affiliated entities and all salary, dividend, distribution, and other compensation payments to Trask, his family members, or any entity with which he is affiliated, to determine the existence and amount of all Trask's rights, debts and obligations together with all their assets." Receivership Order at 8, ¶ 5(b) (emphasis added). In other words, the Receivership Order only allows standard discovery to ascertain whether Trask has rights in – or has made fraudulent conveyances of – assets held by his family. Given Tamara Trask's posing with an alias to Encore to cover up Trask's breaches of fiduciary, contractual, and other duties to Encore, such discovery is entirely warranted.

B. The Court should not limit the Receivership Order to "oversight alone" as requested by Appellants.

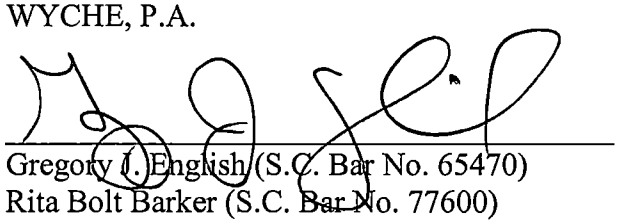
In the receivership statute, the General Assembly expressly provided that one of the purposes of a receiver is "to preserve the judgment debtor's property during the pendency of an appeal." S.C. Code Ann. § 15-65-10(3). Appellants ask the Court to eliminate this function of a receiver for no reason other than their claim that "Encore is sufficiently protected by oversight alone." Motion at 16. In light of the facts that Trask has made no payments on Encore's judgment, Appellants have produced no documents to Encore, and Trask has a long history of lying to and stealing from Encore that resulted in an $8 million dollar judgment – including $5 million in punitive damages – against him, Trask's arguments carry no weight. In fact, in both the underlying case and since the judgment was entered against him, Trask has withheld and/or destroyed key evidence, forcing Encore to rely upon third parties to produce what Trask should be producing to Encore and the Receiver.

Moreover, the Receivership Order notes that during the pendency of this case, Trask has already been involved in two transfers of assets, including a transfer of real estate from his individual ownership into the "Trask Family Trust" of which he and his wife are the trustees. Receivership Order at 3, ¶ 6. Accordingly, Trask's arguments that Encore and the Court should just "trust him" ring hollow.

CONCLUSION

For the foregoing reasons, Encore requests that Appellants' motion to stay be denied.

WYCHE, P.A.



Gregory I. English (S.C. Bar No. 65470)
Rita Bolt Barker (S.C. Bar No. 77600)
P.O. Box 728
Greenville, SC 29602-0728
Phone: (864) 242-8200
Fax: (864) 235-8900
genglish@wyche.com
rbarker@wyche.com
Attorneys for the Respondents

August 24, 2018

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT
The Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-23-5757
Appellate Case No. 2018-001444

Encore Technology Group, LLC..... Respondent/Appellant,

v.

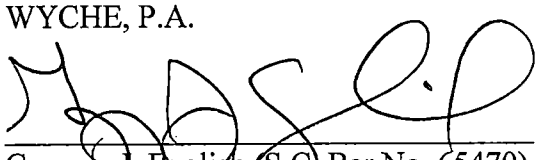
Keone Trask and Clear Touch Interactive, Inc..... Appellants/Respondents.

PROOF OF SERVICE

I hereby certify that I have served the foregoing Return to Motion to Stay on the above-named Appellants by depositing a copy of it in the U.S. mail, first class postage prepaid, addressed to their counsel of record as follows:

Joseph O. Smith, Esq.
Joshua J. Hudson, Esq.
Roe Cassidy Coates & Price, P.A.
1052 N. Church Street
Greenville, SC 29601

WYCHE, P.A.



Gregory J. English (S.C. Bar No. 65470)
Rita Bolt Barker (S.C. Bar No. 77600)
PO Box 728
Greenville, SC 29602-0728
Phone: (864) 242-8200
Fax: (864) 235-8900
genglish@wyche.com
rbarker@wyche.com

August 24, 2018

W Y C H E

Attorneys at Law

August 24, 2018

BY FIRST CLASS MAIL

Hon. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Encore Technology Group, LLC vs. Keone Trask, et al., Case No. 2015-CP-23-5757
Appellate Case No. 2018-001444

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of the Return to Motion to Stay in the above-referenced case, along with the Proof of Service and for same. Please return a file-stamped copy of these documents to us in the self-addressed, stamped envelope provided.

Thank you for your assistance.

Best regards,

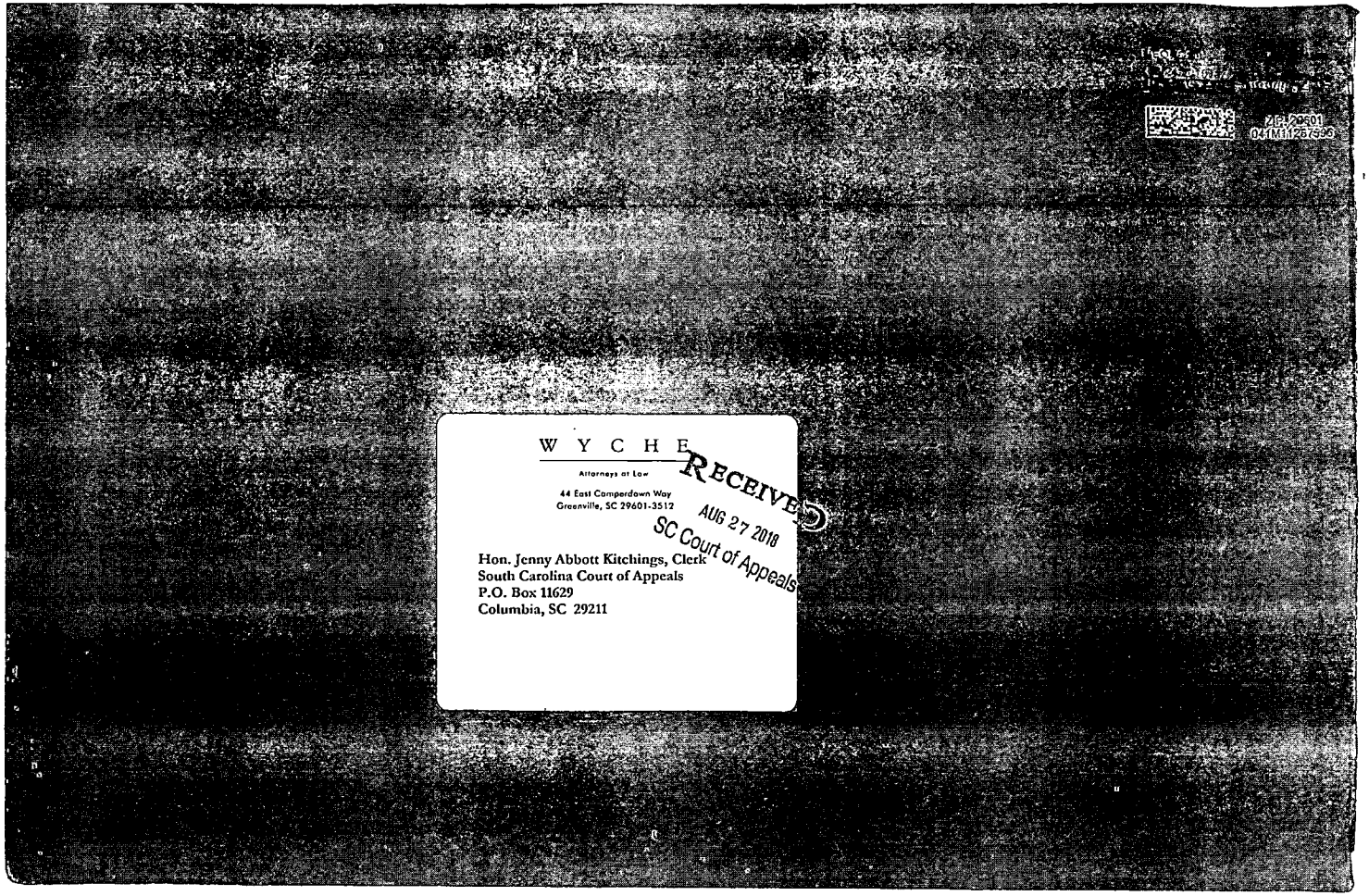
Gregory J. English

(864) 242-8247
genglish@wyche.com

GJE/sc

Enclosures

cc: Joseph O. Smith, Esq. (by mail and e-mail)
Joshua J. Hudson, Esq. (by mail and e-mail)
Mr. Todd Newnam (by mail and e-mail)



WYCHE

Attorneys at Law

44 East Camperdown Way
Greenville, SC 29601-3512

RECEIVED
AUG 27 2018
SC Court of Appeals

Hon. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211