STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS
ENCORE TECHNOLOGY GROUP, LLC, Plaintiff, vs. KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC, Defendants.	Case No. 2015-CP-23-05757 **FINAL ORDER AND JUDGMENT**

THIS MATTER is before the Court following a week-long trial and jury verdict in favor of Plaintiff Encore Technology Group, LLC ("Encore") against Defendants Keone Trask ("Trask") and Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch") on September 29, 2017. The Court gave the parties 10 days to make post-trial motions concerning the verdict. The following post-trial motions are currently before the Court:

1. Encore's Motion for Judgment including Restitution, Exemplary Damages, Attorneys' Fees, Expert Witness Fees, Costs and Other Expenses, which Defendants ask the Court to deny;

2. Defendants' Motion for Judgment Notwithstanding the Verdict;

3. Defendants' Motion for New Trial Absolute;

4. Defendants' Motion for New Trial *Nisi* Remittitur;

5. Defendants' Motion for New Trial pursuant to the Thirteenth Juror Doctrine;

6. Defendants' Motion for Relief from Judgment pursuant to Rule 60(b), SCRCP;

7. Defendants' Motion for Election of Remedies;

8. Defendants' Motion to Stay Execution of the Judgment; and

9. Defendants' Supplemental Post Trial Filings, filed March 5, 2018, including a motion to deposit the amounts of the judgment in court pursuant to Rule 67, SCRCP.

The parties have filed responses to the others' motions and a hearing was held on November 17, 2017, at which counsel for all parties attended. After considering the matters of record and the arguments of counsel, for the reasons set forth herein, the Court grants Encore's motion except for restitution, denies Defendants' motions except to deposit the amounts of the judgments in court, and directs the entry of judgment in favor of Encore against Trask in the amount of **$7,917,468.40** and in favor of Encore against Clear Touch in the amount of **$1,715,335.00.**

DISCUSSION

In considering the pending motions, the Court must have due respect for the jury's verdict. As the South Carolina Supreme Court has stated:

> The Court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors. One is entitled to the constitutional privilege of the fair judgment of a jury rather than that of the Court ....

Brabham v. S. Asphalt Haulers, Inc., 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953).

For these reasons, "it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003). Specifically, "[a] jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention." *Id.* at 234, 432 (internal quotations and citations omitted).

In this case, Trask secretly set up and pursued a side company, Clear Touch, to sell interactive panels to Encore at a profit while employed by and under a Non-Disclosure and Non-

Solicitation Agreement (the "Contract") with Encore. Trask admitted that he breached his duty of loyalty to Encore, for which the jury awarded $375,733.40 actual damages and $175,000.00 punitive damages. The actual damages award appears to compensate Encore for Trask's wages, benefits and a portion of conference expenses Encore paid for Trask. Plaintiff's Exhibits 10.B and 10.G.

Trask also admitted that he breached his fiduciary duties to Encore, for which the jury awarded Encore $675,361 actual damages and $1,500,000 punitive damages. The actual damages award appears to compensate Encore for its lost profits on sales to its customers as a result of Trask's not disclosing that Encore could purchase products directly from the true suppliers, TSI Touch and CVTE, instead of Clear Touch. Plaintiff's Exhibit 10.C.

The jury also awarded Encore actual damages of $424,945, which appears to compensate Encore for lost profits on sales to Leon County Schools made by Clear Touch. Plaintiff's Exhibit 10.D. The jury awarded these damages on Encore's claim of breach of contract against Trask, claim of tortious interference against Clear Touch, and violation of the South Carolina Trade Secrets Act by both Defendants. On the latter claim, the jury found that Defendants' conduct in violating the South Carolina Trade Secrets Act was willful, wanton and in reckless disregard of Encore's rights. The jury also awarded Encore punitive damages in the amount of $500,000 against Clear Touch for tortious interference with the Encore-Clear Touch Contract.

Finally, the jury found Trask liable for breach of contract accompanied by a fraudulent act in the amount of $1,476,039 actual damages and awarded $2 million punitive damages. This verdict appears to compensate Encore for a portion of the net profits lost to Clear Touch when Trask breached the "business opportunity" provision of the Contract. Plaintiff's Exhibit 10.E.

I. Encore is entitled to judgment amounts consistent with the jury verdicts, plus exemplary damages, attorneys' fees, expert witness fees, costs, and other expenses, but not restitution.

Based upon the evidence and foregoing jury verdicts, Encore is entitled to judgments against both Defendants, including awards by the Court of exemplary damages, attorneys' fees, expert witness fees, costs and other expenses, as follows:

A. Exemplary damages under the South Carolina Trade Secrets Act

Under the South Carolina Trade Secrets Act, "[u]pon a finding of wilful, wanton, or reckless disregard of the plaintiff's rights, the court may award separate exemplary damages in an amount not exceeding twice any award" of actual damages. S.C. Code Ann. § 39-8-40. It is appropriate to award exemplary damages in an amount that is twice the actual damages award where the evidence demonstrates a willful and wanton disregard of the plaintiff's rights. *See Sonoco Products Co. v. Guven,* No. 4:12-CV-00790-BHH, 2015 WL 127990, at *11 (D.S.C. Jan. 8, 2015) (doubling the amount of actual damages to set the award for exemplary damages under the South Carolina Trade Secrets Act).

In this case, the jury found that Defendants' violation of the Trade Secrets Act was willful, wanton, and in reckless disregard of the plaintiff's rights. The evidence demonstrated that Defendants misappropriated Encore's trade secrets intentionally and used them to take business from the Leon County Schools in the amount of $424,945. In fact, the case of misappropriation was one of the most egregious this Court has ever seen. Therefore, the actual damages of $424,945 should be doubled and awarded as exemplary damages in the amount of $849,890.

B. Attorneys' fees, expert witness fees, costs and other expenses

The Trade Secrets Act provides that if "willful misappropriation exists, the court may award reasonable attorney's fees to the prevailing party." S.C. Code Ann. §§ 39-8-80(3). The Contract also provides that, in the event Encore "prevails, in whole or in part, in any such action, [Trask] shall be liable to [Encore] for all of its costs and expenses, including, without limitation, reasonable attorney fees and expert witness fees." Plaintiff's Exhibit 2, p. 2 ("General Provisions"). "The law is clear in South Carolina that attorney fees are recoverable when authorized by contract or statute." *Charleston Lumber Co. v. Miller Housing Corp.,* 318 S.C. 471, 483, 458 S.E.2d 431, 438 (Ct. App. 1995).

Encore prevailed at the trial of this action in that the jury awarded it damages for breach of contract, breach of contract accompanied by a fraudulent act, tortious interference with contract, and willful violation of the South Carolina Trade Secrets Act. Accordingly, Encore is entitled to attorneys' fees, expert witness fees, and other costs and expenses.

It is for the Court to fix a reasonable amount of attorneys' fees. In determining the amount of reasonable attorneys' fees, the Court must consider: (1) the nature, extent, and difficulty of the legal services rendered; (2) time and labor necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).

As demonstrated by the Affidavit of Gregory J. English, Encore's counsel worked on this case for the following number of hours at the following hourly rates:

Attorney	Hours Worked	Rate	Total Billing
Greg English	491.1	$ 400.00	$ 196,440.00
Rita Bolt Barker	24.2	$ 380.00	$ 9,196.00

Rita Bolt Barker	277.4	$ 350.00	$ 98,507.00
Meliah Jefferson	37.3	$ 375.00	$ 13,987.50
Andrew Coburn	5.3	$ 400.00	$ 2,120.00
Chris Schoen	1.1	$ 310.00	$ 341.00
Mark Bakker	0.6	$ 400.00	$ 240.00
Jillene Van Hoy	24.7	$ 185.00	$ 4,569.50
Jillene Van Hoy	92.4	$ 200.00	$ 18,480.00
Denise Eubanks	0.3	$ 200.00	$ 60.00
Lynda Romanstine	8	$ 195.00	$ 1,560.00
Lynda Romanstine	0.5	$ 200.00	$ 100.00
		TOTAL:	**$345,601.00**

Based upon the facts of this case and the law concerning awards of attorneys' fees, Encore should receive the amount requested above for attorneys' fees, plus costs and associated expenses. The hours devoted to this case and Encore's attorneys' rates justify this award of attorneys' fees, in addition to all costs and expenses. Additionally, as noted in *Blumberg*, several factors other than time and an hourly rate are relevant to an award of attorneys' fees:

The case required a jury trial. Attorneys were required to be in court the entire week of September 25, 2017. In a day when most cases are settled and few cases are tried, this case was more difficult and required more skill to resolve than most.

Because Defendants had lost or destroyed many e-mails and other documents, Encore had to seek relevant documents from third parties through subpoenas. Defendants moved to quash nearly all of these subpoenas, requiring Encore's counsel to attend hearings to obtain denials of Defendants' motions to quash to collect relevant evidence.

The professional standing of Encore's counsel is outlined in the Affidavit of Gregory J. English, Esq. Encore's counsel have litigated numerous other cases involving business disputes, such as *Powell v. Floyd*, Case No. 97-2686, Unpub. Decision at 11-12 (4th Cir. Oct. 12, 1999), and *South Carolina Department of Transportation vs. Jetport Eighty-Five Associates. Powell* involved disputes over the value of businesses in Spartanburg County, South Carolina and the

District Court awarded, and the Fourth Circuit Court of Appeals affirmed, $241,000 in attorneys' fees and costs in 1999. The *Jetport* case involved a condemnation by SCDOT and Judge Cole awarded the full amount of attorneys' fees and costs requested at full hourly rates ($325 per hour for Mr. English in 2008).

As outlined in the Affidavit, Encore's attorneys had other available opportunities to handle work at reasonable fees at higher hourly billing rates than set forth above, but accepted this case with the belief that they would be fairly compensated.

The fee requested is in line with that customarily charged in the locality for similar services. A case such as this – involving a jury trial and court appearances for five (5) days – would be considered undesirable within the legal community.

The Wyche Firm obtained beneficial results for Encore. It obtained favorable verdicts totaling millions in actual and punitive damages. The results obtained were very beneficial for Encore.

In addition, Encore incurred, or the Wyche Firm incurred on Encore's behalf, the following expenses and other costs for this litigation:

Expert Fees	$57,326.50[1]
Trial Exhibit Presentation	14,418.14
Deposition transcripts	7,988.08
Out-of-state subpoenas	5,076.20
Westlaw legal research	3,662.04

[1] Encore's expert, Mike Meilinger, prepared both a preliminary report for mediation and a final report after receiving Defendants' books and records. Because those books and records were prepared on a cash basis, substantial effort was required to convert them to an accrual basis. In addition, Mr. Meilinger was required to review third-party documents to complete his assessment of Defendants' financial records.

Witness travel		1,983.51
Copy costs		1,281.80
Mediation Fees		1,004.72
Other costs & expenses		1,739.90
Lunch expense during trial		+ 419.56
	Total:	**$94,900.45**

A statement detailing these costs is attached to the Affidavit of Mr. English.

Defendants argue that $70,505.00 in Encore's attorneys' fees and a substantial portion of the costs are excessive because, for example, this amount includes time Encore's attorneys spent seeking documents via third-party subpoenas and fees for two attorneys to attend certain depositions and hearings. Encore, however, was forced to seek documents through third parties because Defendants did not produce them and/or claimed to have lost or destroyed them. Defendants' complaint regarding there being two Encore attorneys in attendance at certain depositions and hearings is unpersuasive considering that two attorneys routinely appeared for Defendants.

Defendants also argue that, because some of Encore's fees are not specifically attributable to causes of action for which attorneys' fees are eligible, they are not recoverable. The case Defendants rely on for this proposition, *Uhlig v. Shirley*, 895 F. Supp. 2d 707 (D.S.C. 2012), actually rejects Defendants' position. Although the *Uhlig* court performed an analysis of whether there was a particular cause of action that permitted an attorneys' fees award, once it determined there was one, it did not subtract attorneys' fees for work on causes of action that did not provide for an attorneys' fees award. *Id.* at n.3. In other words, even under the authority Defendants cite, Encore has prevailed upon a cause of action that provides for attorneys' fees,

and once attorneys' fees may be awarded under any cause of action, no apportionment of fees is required.

Defendants argue that, because Encore did not prevail upon two causes of action and must elect between others, it may only recover the fraction of fees represented by the cause of action it elects entitling it to fees divided by the total causes of action. In considering the reasonableness of a fee award, however, the Court should not simply divide the attorneys' fees and costs by the number of causes of action and then award only that fraction. Where a plaintiff recovers on certain claims but not others, "[i]n determining what is proportional, courts should not employ a strict 'mathematical approach.' Rather, courts should look at 'the degree of the plaintiff's overall success.'" *Dowling v. Litton Loan Servicing LP*, 320 Fed. Appx. 442, 449 (6th Cir. 2009) (internal citations omitted); *Hensley v. Eckerhart*, 461 U.S. 424, 456 n.11 (1983) (in evaluating an award of statutory attorney's fees, agreeing with the district court's rejection of "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon" and noting "[s]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors," "[n]or is it necessarily significant that a prevailing plaintiff did not receive all the relief requested.").

Here, Encore achieved a successful result despite not prevailing on two of its causes of action, and no proportional adjustment is justified. Although Encore did not prevail upon two causes of action, any additional fees and costs to present each additional cause of action would only be minimal. Additionally, Defendants' multiple post-trial motions have cost Encore additional attorneys' fees that are not being awarded by this Order.

Finally, the *Uhlig* court awarded $1,816,494.28 in attorneys' fees and costs to plaintiff in what the court described as "a straightforward claim against an employee for misappropriation

of...trade secrets." *Id.* at 713. In this case, Defendants' loss and/or destruction of documents caused Encore to have to do much more work, with third parties and otherwise, to present the facts to the jury. In light of *Uhlig*'s award of $1,816,494.28 and the additional work caused by Defendants since the request for attorneys' fees and costs, Encore's request for $345,600.00 in fees and $94,900.00 in costs and expenses is reasonable.

Accordingly, Encore is entitled to judgments against the Defendants as follows:

Against Defendant Keone Trask

Actual Damages	**Punitive Damages**	
$ 375,733.40	$ 175,000.00	breach of loyalty (Trask's wages + conference expenses)
675,361.00	1,500,000.00	breach of fiduciary duty (Encore's lost profits from non-disclosure of suppliers)
424,945.00	849,890.00	violation of Trade Secrets Act (Leon County profits–same actual damages as breach of contract)
+1,476,039.00	+2,000,000.00	breach of contract accompanied by a fraudulent act (portion of Clear Touch profits)
$2,952,078.40 +	$4,524,890.00 =	$7,476,968.40
Plus attorneys' fees		+ 345,600.00
Plus costs & expenses		+ 94,900.00
TOTAL JUDGMENT AGAINST TRASK:		**$7,917,468.40**

Against Defendant Clear Touch Interactive, Inc.

Actual Damages		**Punitive Damages**	
$ 424,945.00		849,890.00	violation of Trade Secrets Act (Leon County profits)
	or		
424,945.00		500,000.00	tortious interference ($424,945.00 in actual damages same as Leon County profits)[2]
$ 424,945.00	+	$ 849,890.00 =	$1,274,835.00
Plus attorneys' fees			+ 345,600.00
Plus costs & expenses			+ 94,900.00

TOTAL JUDGMENT AGAINST Clear Touch: $1,715,335.00[3]

C. Encore is not entitled to a restitution award from Defendants.

Encore also argues that Defendants have been unjustly enriched in the amount of the value of Clear Touch, appraised at $5,536,254, and should be required to pay restitution in that amount. Specifically, Encore argues that, while he was Encore's employee, Trask built the Clear Touch business using Encore's monetary, personnel, and other resources, with Encore taking all of the risk. Encore's expert testified that Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254. Plaintiff's Exhibit 10.E.

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[2] Encore acknowledges that the $424,945.00 represents its lost profits from the sales to Leon County Schools and that it must elect among its Trade Secrets, Breach of Contract, and Tortious Interference claims for such damages. The Court is awarding Encore the amount under the Trade Secrets Act because it includes the higher amounts for exemplary damages, attorneys' fees, and costs and expenses. Such election would be without prejudice to Encore to claim such damages under its other causes of action if the jury verdict on the Trade Secrets claim were ever overturned or otherwise invalidated.

[3] Because the jury determined that both Defendants were liable for misappropriation of Trade Secrets, Defendants are jointly and severally liable to Encore for the actual damages of $424,945, the attorneys' fees of $345,600, and the costs and expenses of $94,900, or a total of $865,445 on this claim. Therefore, payment by one Defendant of this amount on this claim will reduce the other Defendant's liability for this claim. Each Defendant, however, will owe exemplary damages of $849,890 for this claim because each engaged in willful, wanton, and reckless disregard of the Plaintiff's rights.

Defendants argue that Encore is not entitled to restitution because "there is an adequate remedy at law afforded by the jury's verdict." The Court agrees and therefore denies Encore's request for restitution. *See Milliken & Co. vs. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009) ("Generally, equitable relief is available only where there is no adequate remedy at law ....").

II. Defendants are not entitled to judgment notwithstanding the verdict.

A motion for judgment notwithstanding the verdict, or JNOV, should be denied where the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

A. The restrictive covenants are enforceable.

Defendant Trask argues that his Non-Solicitation and Non-Disclosure Agreement is unenforceable as a matter of law because it contains overly broad provisions. South Carolina law expressly allows an employer to protect its existing, former, and prospective customers. "Prohibitions against contacting existing customers can be a valid substitute for a geographic limitation." *Wolf v. Colonial Life and Acc. Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217 (Ct. App. 1992).[4] Covenants preventing the solicitation of former customers are enforceable. *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (S.C. Ct. App. 2013) ("[A]n

[4] Trask cites *Collins Music Co. v. Parent*, 288 S.C. 91, 92, 340 S.E.2d 794, 795 (Ct. App. 1986), for the proposition that customer restrictions must be limited to "specific customers," but that case does not so hold. In fact, it upheld a non-solicitation provision on much broader grounds: "The provision merely prohibits pirating of [employer's] customers. It is not a territorial restriction. A restriction which allows the former employee to sell anywhere else, subject only to the employer's protection of his own clients, is valid." *Id.* That is exactly what Encore's Agreement does.

otherwise reasonable limitation on the solicitation of former clients can substitute for a territory restriction."). Likewise, covenants preventing the solicitation of prospective customers are enforceable. *See Vessel Medical, Inc. v. Elliott*, Civil Action No.: 6:15-cv-00330-MGL (D.S.C. September 15, 2015); *Hagemeyer North America Inc. v. Thompson*, C/A No. 2:05-cv-3425, 2006 WL 516733, at *5 (D.S.C. Mar. 1, 2006) (finding reasonable a non-solicitation agreement limited to the employer's customers from a certain period of time who were served by the defendant, with whom he had contact, or whose names or addresses the employer provided to the defendant in furtherance of the employer's business).

Trask argues that the Non-Solicitation of Customers provision, Plaintiff's Ex. 2, at 2, is overly broad because it could be interpreted to reach "customers with whom he had absolutely no contact." That is not correct, because the Contract does require that Trask at least had to have had access to Encore's "pricing, advertising and/or marketing schemes developed ... for such customer." Furthermore, there is no South Carolina law that says protection of such customers is overly broad. Moreover, Trask has failed to identify any Encore customer with whom he had no contact. The fact is, the only customer at issue was Leon County Schools, with whom Trask had direct contact. And even if the subsection (iii) that Trask claims is overly broad were severed—as would be required by the severance provision of the Contract and *Team IA, Inc. v. Lucas*, 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011)—Trask would still be prohibited from selling to Leon by sub-sections (i) and (ii) of the Contract's Non-Solicitation of Customers provision.

Trask's arguments that the confidentiality provisions of the Contract are overly broad also lack merit. Encore's confidentiality provision is akin to that approved by the Supreme Court in *Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012), which held that "an employer may restrain a former employee from disclosing and using confidential information

which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employment relationship." *Id.* The Court upheld Milliken's confidentiality provision because, "rather than covering general skills and knowledge, it encompasses only important information not generally known to the public which becomes known to the employee through his employment with Milliken." *Id.* Accordingly, the Court held that while "Morin may be restricted from using certain information he learned at Milliken for his own personal advantage, these agreements are designed to strike an appropriate balance between protecting an employer's valuable interest in its proprietary information and permitting an employee to find gainful employment in his chosen field." *Id.* at 38-39.

Encore's Contract is the same. All Encore's Contract required was that Trask not use the confidential information he learned about Leon to sell to it directly, and that is what the jury found he did. This in no way prohibited Trask from using his "general skills and knowledge" to find gainful employment. Consequently, Trask is not entitled to JNOV.

B. Breach of contract accompanied by a fraudulent act.

Trask contends that he is entitled to JNOV on the grounds that the breach of contract accompanied by a fraudulent act claim is dependent on the enforceability of the non-solicitation and confidentiality provisions of the Contract. "The law ... forbids this court assuming to take upon itself the powers, duties, rights, and privileges of a jury. Obviously, the absolute power to change or modify the findings of a jury upon an issue of fact properly submitted to them would, when exercised, amount to the substitution of the trial judge[']s findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury." *Camden v. Hilton*, 360 S.C. 164, 173, 600 S.E.2d 88, 92 (Ct. App. 2004) (quoting *Anderson v. Aetna Cas. Sur. Co.*, 175 S.C. 254, 282, 178 S.E. 819, 829 (1934)); *see also Keeter v. Alpine Towers Int'l, Inc.*, 2012 WL

11867308, *11 (S.C. Ct. App. June 27, 2012) ("This court has stated that 'it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.' In fulfilling this duty, we may not substitute our judgment for that of the jury.") (citations omitted).

Instead, it is just as if not more likely that the jury relied upon the "business opportunity" clause of the Contract to find Trask guilty of breach of contract accompanied by a fraudulent act. Trask's argument assumes, without support, that the jury did not make an independent assessment of the breach of contract accompanied by a fraudulent act claim. Such an assumption is inappropriate under the law. Accordingly, Trask can find no relief from the jury verdicts on this basis.

C. Trade secrets claim

Defendants argue that Encore failed to provide evidence from which the jury could determine it had "trade secrets" and return a verdict for Encore on its misappropriation claim. The Court disagrees. The South Carolina Trade Secrets Act provides a broad definition of "trade secrets," "misappropriation," and remedies for their misappropriation. S.C. Code Ann. § 39-8-20(5) (defining "trade secret" to include broad categories of information, including "a simple fact" that "may be the basis of a marketing or commercial strategy"); -20(2) (defining misappropriation to include "disclosure or use of a trade secret of another without express or implied consent by a person who ... at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was ... acquired ... under circumstances giving rise to a duty to maintain its secrecy or limit its use"); -30(C) ("A person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secret may ... recover damages incurred as a result of the wrongful acts ...."). Specifically, a "trade secret" is information that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. § 39–8–20(5); *see also Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct.App.1996) ("[I]n determining whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others.").

The evidence demonstrated that Encore's customer list was a trade secret and, more particularly, that Encore had trade secrets regarding its customer Leon County Schools' needs for, preferences for, and plans to purchase interactive displays. Encore presented evidence at trial from which the jury reasonably found that this information pertaining to Leon's needs, preferences, and plans were trade secrets. The evidence also showed that Trask took those trade secrets with him when he left, that Trask had Jimmy Higginbotham deliver the customer list to him at Clear Touch, and that he and Clear Touch used those trade secrets to take sales away from Encore and sell directly to Leon. Clear Touch Dep. at 149:22-23; 150:3-151:8; 151:19-23; Plaintiff's Exhibits 9, 53, and 58.

Encore presented evidence to support its trade secret claims against Defendants. The jury found in favor of Encore and the Court upholds that verdict.

III. Defendants are not entitled to a new trial absolute.

Rule 59, SCRCP, permits the Court to grant a new trial "on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have theretofore been granted in actions at law in the courts of the State...." SCRCP 59(a).

Defendants contend that Encore's presentation of evidence that Mr. Trask destroyed one category of e-mails and the submission of Table 3 reflecting certain damages to the jury entitle them to a new trial. The admission or exclusion of evidence is within the sound discretion of the trial court. *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012); *American Fed. Bank v. No. 1 Main Joint Venture*, 321 S.C. 169, 174-75, 467 S.E.2d 439, 442 (1996). To the extent any evidence has been improperly admitted, the party seeking relief must also show that he was prejudiced by the admission. *Id.* Applying the law, neither of Defendants' grounds justifies a new trial.

A. The Court's admission of Mr. Knight's testimony confirming that Defendant Trask destroyed one category of e-mails was proper.

At trial, Encore presented evidence that Mr. Trask lost and/or destroyed relevant evidence, including three different categories of e-mails:

1. E-mails from Mr. Trask's personal "gmail" account that he used while he was an Encore employee, which Encore discovered only after third-party witness Dale Viola came forward and produced such e-mails that he had preserved. Plaintiff's Exhibits 79 and 80;

2. Clear Touch e-mails, which Defendants claim they "lost" in an e-mail "migration," Plaintiff's Exhibit 73, ¶¶ 7-9, and Clear Touch's 30(b)(6) Deposition by Keone Trask, p. 193, l. 17 – p. 194, l. 7 & p. 194, l. 14 – p. 195, l. 9 (read into evidence at trial) (admitting that Clear Touch emails were "lost" during a migration from one email

provider to the other, but that no efforts had been made to retrieve those lost emails, and that Clear Touch had no email preservation policy); and

3. Trask's e-mails on Encore's server sent to or from Trask's Encore e-mail address.

Trask admitted losing and/or destroying e-mails in the first two categories and never denied deleting e-mails in the third category. Defendants contend, however, that the presentation of the third category of evidence, via the testimony of Michael Knight, resulted in surprise and unfair prejudice to Defendants, requiring a new trial. The Court, however, properly admitted Mr. Knight's testimony regarding Trask's email deletion and in no way were Defendants prejudiced by this testimony.

1. Defendants were on notice that Encore would introduce evidence of Trask's deletion of e-mails from Encore's servers.

Defendants cannot reasonably assert they were surprised by testimony that Trask destroyed emails. Encore alleged as much in the Complaint. *See* Complaint, ¶ 33 ("Trask intentionally breached his duty of loyalty while he was still employed by Encore by...accessing Encore's computer system without or in excess of authorization [and] misappropriating and/or destroying Encore property, software, and files....") Mr. Trask even admitted that his Encore "emails were deleted" at trial, though he offered no explanation as to how that occurred.

Defendants contend that one of Encore's 30(b)(6) deponents, Todd Newnam, had no evidence of Mr. Trask's deletion of emails, but Defendants mischaracterize that deposition testimony.[5] Mr. Newnam never said he had no evidence and in fact referred to the evidence he

[5] Defendants' 30(b)(6) deposition notice did not identify Mr. Trask's deletion of emails as a topic, but Matter No. 46 simply referenced "[t]he factual bases for all claims asserted by [Encore] in your Complaint in this case," so did not provide specific notice that he, or any Encore representative, would need to be prepared to discuss this specific topic.

recalled at the time of his deposition to support his allegation. In fact, Defendants admit Mr. Newnam testified during the deposition that "Mr. Trask purged emails at Encore" and that he "deleted some information while he was at Encore, previous emails. There are tidbits of emails that we have that show communications that were deleted from our system." Defendants' Post-Trial Motions at 6.

Encore's presentation of evidence regarding Trask's deletion of emails was also discussed in response to Defendants' motion *in limine* to exclude such references. In evaluating the issue in a pre-trial telephonic hearing, the Court stated that Encore would need to prove that emails were deleted to present such evidence. Accordingly, Mr. Knight's testimony was presented to establish a foundation for the identification of the emails in Encore's proposed Exhibit 84 that were representative of those emails that Trask deleted.

Plaintiff's Exhibit 84 was not admitted into evidence, but even assuming it had been admitted, Defendants had these documents before trial. Each page of Plaintiff's Exhibit 84 was bates-numbered and produced to Defendants well before trial.

Following the Court's statement during the hearing on the parties' motions *in limine* that, in order for Encore to present evidence that Mr. Trask had deleted email, Encore would need to demonstrate that such deletion had occurred, the Court instructed Encore to make sure it produced any documents it intended to introduce in evidence to support this claim. Because Encore had already produced the documents in Exhibit 84, there was no need for Encore to provide these documents again.[6] Additionally, the parties exchanged electronic copies of exhibits, and then met and reviewed exhibits, including Plaintiff's Exhibit 84, before trial.

[6] Exhibit 84 was a compilation of representative emails Mr. Knight confirmed were deleted from Encore's email server. Encore produced all but one of these emails nearly four months before trial. Specifically, Encore produced documents Bates labeled 205428, 205222, 205217, 205142,

Defendants' argument amounts to a claim that Encore was under an obligation to explain to them each point its witnesses would testify to and the significance of each exhibit. Encore had no such obligation, nor did Defendants.

2. Defendants were not prejudiced by Mr. Knight's testimony.

Not only is Defendants' claim that they were surprised by the evidence regarding Trask's deletion of emails unsupported, but also Defendants were not prejudiced by Mr. Knight's testimony. First, as noted above, Plaintiff's Exhibit 84 was not admitted into evidence and thus could not have prejudiced Defendants in any way. Second, as also noted above, there was no prejudice to Trask from Mr. Knight's testimony because there was significant evidence presented at trial which demonstrated that Trask destroyed emails. In addition to the evidence cited above, Dale Viola presented testimony and exhibits at trial which confirmed that Trask sent emails to Mr. Viola that were never produced by Trask, and Trask admitted on cross-examination that he did not have these e-mails, and therefore they were destroyed.

Defendants admit as much in their Post-Trial Motions: "Defendants had already admitted liability on two causes of action prior to trial. Plaintiff had ample evidence to attempt and prove its case as to all of its claims, including those with elements of willful or wanton behavior with things such as the Amy Andrews and Kathy Cruse emails." Defendants' Post-Trial Motions at 12 (emphasis added). Because there was already "ample evidence" in the record to prove that Trask engaged in deceptive and fraudulent conduct, including deletion of emails, Mr. Knight's testimony could create no prejudice to Defendants.

Finally, Defendants were not prejudiced because Trask knew that he had deleted these emails. The Court allowed Defendants to delay putting Trask on the stand to testify. Even then,

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and 204880 on May 30, 2017, and Encore produced document Bates labeled 214870 on September 19, 2017.

Trask did not deny that he had deleted these emails. Truthful evidence from Mr. Knight does not constitute legal "prejudice" entitling Defendants to a new trial.

B. The Court's admission of Table 3 was proper and caused no prejudice.

Defendants allege that the Court's admission of Plaintiff's Exhibit 10-H, Table 3 was improper and prejudiced Defendants. The Court rejects this argument on both counts.

First, in allowing Encore to present the damages in Table 3, the Court was relying on well-settled law regarding damages available to Encore. *See, e.g., Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1997) (purpose of damages for breach of contract is to put the plaintiff in as good a position as he would have been if the contract had been performed).

The evidence was undisputed that, while he was Encore's employee, Trask built the Clear Touch business using Encore's monetary, personnel, and other resources, with Encore taking all of the risk. If Trask had used Encore's resources to build a rental house and collected rent from its tenants, he would be required to pay Encore the amount of the rent collected plus the value of the house. Encore's expert testified that Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254, so that this amount was properly admitted.

Second, Defendants were not prejudiced by the admission of Table 3. As Defendants acknowledge in their Post-Trial Motions, the jury did not award all of the damages set forth in Table 3. Defendants' Post-Trial Motions at 3 & 13. Accordingly, it is impossible to have resulted in prejudice to Defendants.

Defendants contend, however, that "the sheer admission of Table 3 into evidence and submission of it to the jury created an artificially inflated damages range which unfairly prejudiced its determination of damages." *Id.* at 13. This argument ignores that the valuation of

Clear Touch in Table 3 was significantly more conservative than the $10 million valuation Defendants placed on Clear Touch in their memorandum to investors shortly after Trask left Encore. *See* Plaintiff's Ex. 68 (setting forth a $10,000,000 valuation of Clear Touch). Accordingly, Defendants have not shown prejudice from the admission of Table 3.

IV. Defendants are not entitled to a new trial *nisi remittitur*.

A new trial or new trial *nisi* should be granted only when the Court finds the amount of the verdict to be excessive. *Proctor v. Dept. of Health & Environmental Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). However, the jury's determination of damages is entitled to substantial deference. *Rush*, 310 S.C. at 379, 426 S.E.2d at 805; *Gastineau v. Murphy*, 323 S.C. 168, 182, 473 S.E.2d 819, 828 (Ct. App. 1996), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998).

Additionally, where the amount of the verdict falls within the range of damages testified to, the verdict should not be disturbed on the ground of excessiveness. *Id.* at 183, 828; *Buzhardt v. Cromer*, 272 S.C. 159, 163, 249 S.E.2d 898, 900 (1978). The damages awarded by the jury were within the range of damages presented by Encore's economic damages expert Mike Meilinger. *See* Plaintiff's Ex. 10-H. Furthermore, they were below the $10 million valuation of Clear Touch presented by Defendants to investors shortly after Trask left Encore and the $7.7 million alternative lost profits damage calculation of Mr. Meilinger. *See* Plaintiff's Ex. 68 (setting forth a $10,000,000 valuation of Clear Touch); Plaintiff's Exhibit 10.J, last page (setting forth lost profits of $7,798,632). Accordingly, the jury's verdicts were not excessive and are entitled to deference.

The same is true of the jury's punitive damages awards. In reviewing punitive damages awards, the Court should evaluate several factors, including: (1) defendant's degree of

culpability, (2) duration of the conduct, (3) defendant's awareness or concealment, (4) the existence of similar past conduct, (5) likelihood the award will deter the defendant or others from like conduct, (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) defendant's ability to pay, and (8) other factors deemed appropriate. *Gamble v. Stevenson*, 305 S.C. 104, 111-12 (1991).

Analysis of these factors reveals that the jury's verdicts were well-supported by the evidence presented at trial. There was overwhelming evidence of Defendants' culpability. Indeed, Trask admitted liability on two causes of action giving rise to punitive damages, breach of fiduciary duty and breach of duty of loyalty. The conduct at issue occurred over a multi-year period, and was initiated and actively concealed from Encore by Defendants both during and after Trask's employment by Encore. Defendants built an extremely profitable and successful business in Clear Touch through their unlawful conduct.[7] Finally, an award of punitive damages will deter Defendants and others from engaging in similar behavior in the future. The jury's awards of punitive damages, like its awards of actual damages, are justified in light of the evidence presented at trial and cannot be viewed as the result of passion or prejudice. With a ratio of actual to punitive damages of far less than 1 to 9, the punitive damages cannot be said to be excessive. Defendants are not entitled to a new trial *nisi remittitur*.

V. Defendants are not entitled to invocation of the "thirteenth juror doctrine."

Defendants also seek a new trial under the "thirteenth juror doctrine." The "thirteenth juror doctrine" is a vehicle by which the trial court may grant a new trial absolute when it finds

[7] Defendants complain that the Court allowed testimony from Mr. Meilinger's report that Clear Touch had revenue of over $17 million in 2016, but they opened the door and made this evidence relevant by criticizing Mr. Meilinger for not considering their 2016 and subsequent financial information. This evidence was thus properly admitted to refute Defendants' arguments about the thoroughness of Mr. Meilinger's assessment of damages.

the evidence does not justify the verdict. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). To support their request, Defendants argue that "[t]he evidence in this case shows that the jury rendered an inconsistent verdict and was confused as to one or more issues it was charged to decide." Defendants' Post-Trial Motions at 12-13.

The jury's verdicts do not reveal that the jurors were confused about any issues. In fact, the verdicts show that they carefully considered each cause of action, awarding different amounts of actual and punitive damages and even ruling for Defendants on two claims. The jury's verdicts should be given the deference the law requires and upheld.

VI. Defendants are not entitled to relief from judgment.

Rule 60(b), SCRCP, permits the Court to grant relief from a final judgment because of (1) mistake, inadvertence, surprise, or excusable neglect... [or] (3) fraud, misrepresentation, or other misconduct of an adverse party." Rule 60 is inapplicable in this context, where no judgment has been entered, Defendants made their arguments at trial, and the Court overruled Defendants' arguments and admitted the testimony in question.

Nevertheless, Defendants contend that they were surprised by Mr. Knight's testimony and that the presentation of such evidence by Encore's counsel constitutes fraud on the Court. Defendants' Post-Trial Motions at 14-15. For the reasons set forth above, the Court finds unpersuasive Defendants' arguments that Encore or its counsel engaged in any fraudulent actions or that Defendants were surprised by evidence that Trask permanently deleted emails.

Even if Defendants had been surprised, a party may not prevail under Rule 60(b)(3), SCRCP, on the basis of fraud where he has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct. *Raby Constr., LLP v. Orr*, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004) (holding that a Rule 60(b)(3)

movant could not prevail where a party was "on notice" of the relevant issue); *see also Bowman v. Bowman*, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004) (in denying a Rule 60(b)(3) motion, referring to "South Carolina's strong policy towards finality of judgments[, which] trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial"). Moreover, while Encore contends and the Court finds that Encore has done nothing unfair in this case, "lack of fairness is not a ground for relief under Rule 60(b)." *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009).

In this case, Encore repeatedly alleged that Trask deleted emails, Trask admitted to doing so, and Encore provided other evidence that substantiates these allegations. Moreover, Trask himself was in the best position to provide the particulars of his deletions to his counsel. For all of these reasons, Defendants' Rule 60(b) motion is denied.

VII. Other than its claims against Trask for breach of contract and against Clear Touch for tortious interference with contractual relations, Encore should not be required to elect remedies.

Encore acknowledges that the jury verdicts of $424,945 were to compensate Encore for lost profits on sales to Leon County Schools made by Clear Touch. Plaintiff's Exhibit 10.D. The jury awarded these damages on Encore's claim of breach of contract against Trask, Encore's claim of tortious interference against Clear Touch, and violation of the South Carolina Trade Secrets Act by both Defendants. Accordingly, assuming these damages are coupled with double exemplary damages, attorneys' fees, costs and expenses as set forth above, Encore seeks to recover these actual damages only under the Trade Secrets Act.

Even regarding the other verdicts, however, Defendants argue that Encore should have to elect one (other than breach of duty of loyalty) because they committed a "single wrong" and that Encore "sought the exact same damages" for the "same injury." But Encore presented

evidence and argued – and the jury found – that Defendants committed at least five (5) different wrongs causing at least five (5) different injuries and damages. Specifically, the evidence, including but not limited to Plaintiff's Exhibit 10-H ("Summary of Damages"), supported the jury's findings that Defendants committed the following distinct breaches of duty to Encore that caused Encore separate and distinct damages:

1. Breach of the duty of loyalty by Trask by spending time setting up his own company while taking wages and conference expenses from Encore, which the jury found he should forfeit in the amount of $375,733.40.[8] In addition, the jury determined that Trask should pay $175,000 in punitive damages for this breach of the duty of loyalty (Cause of Action I).

2. Breach of fiduciary duty by Trask by failing to disclose to Encore that it could purchase products directly from suppliers TSI Touch and CVTE instead of through Clear Touch, which the jury found caused Encore lost profits of $675,361.[9] In addition, the jury determined that Trask should pay $1,500,000 in punitive damages for this breach of fiduciary duty (Cause of Action II).

3. Violation of the South Carolina Trade Secrets Act by using Encore's trade secret information regarding Leon County Schools' need for and purchase price of panels, which caused Encore lost profits of $424,945.[10] (This also violated Trask's contract with Encore, Cause of Action III). In addition, the jury determined that Trask's violation was a willful, wanton, or reckless disregard of Encore's rights, for which Trask should pay double exemplary damages of $849,890 under the Act (Cause of Action IV).

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[8] Summary of Damages, Table 1 (portion only).
[9] Summary of Damages, Table 2, lines 1-3.
[10] Summary of Damages, Table 2, lines 4-5.

4. Breach of contract accompanied by a fraudulent act, specifically Trask's violation of the "business opportunity" clause of his Non-Disclosure and Non-Solicitation Agreement with Encore, Plaintiff's Exhibit 2, page 2, seventh paragraph, for which the jury awarded Encore a portion of Clear Touch's profits of $1,476,039.40.[11] In addition, the jury determined that Trask should pay $2,000,000 in punitive damages for this breach of contract accompanied by a fraudulent act (Cause of Action VI).

5. Clear Touch's violation of the South Carolina Trade Secrets Act by using Encore's trade secret information regarding Leon County Schools' need for and purchase price for panels, which caused Encore lost profits of $424,945. (This also tortiously interfered with Trask's contract with Encore, Cause of Action V, for which the jury awarded $500,000 in punitive damages). In addition, the jury determined that Clear Touch's violation was a willful, wanton, or reckless disregard of Encore's rights, for which Clear Touch should pay double exemplary damages of $849,890 under the Act (Cause of Action IV).

A. The doctrine of election of remedies does not apply to the causes of action upon which the Court is entering judgment.

As shown by the above, the evidence demonstrated – and the jury found – separate acts by Defendants giving rise to separate injuries and damages. The doctrine of election of remedies has no application where separate causes of action based on different facts exist. *GTR Rental, LLC v. DalCanton*, 547 F. Supp. 2d 510, 515 (D.S.C. 2008) (holding that election was unnecessary because the jury awards for breach of fiduciary duty, conversion, fraud, violation of the South Carolina Unfair Trade Practices Act, and breach of contract were based on different elements, and the facts supporting the separate claims occurred "over a lengthy period and involved numerous activities involving [plaintiff's] customers, property, and finances," so that

[11] Summary of Damages, Table 3 (portion only).

"the complex series of transactions undertaken by Defendants does not comprise a single wrong that would give rise to but one cause of action."); *see also Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995); *Rivers v. Rivers*, 292 S.C. 21, 29-31, 354 S.E.2d 784, 788-90 (Ct. App. 1987), *overruled on other grounds by Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992) (holding no election of remedies required of a plaintiff who received damages for the "twin causes of action" of both alienation of affection and criminal conversation because "[t]he causes of action are distinct, they arose out of separate and distinct facts, and the two alleged wrongs did not result in a single and the same loss.").

In this case, because the causes of action were based on different elements and because there were different facts supporting the various claims involving numerous activities, "the complex series of transactions undertaken by Defendants does not comprise a single wrong that would give rise to but one cause of action." The fact that the jury awarded different actual damages and different punitive damages shows that Defendants committed multiple wrongs, not a "single wrong." Therefore, except for the verdicts for the Leon County Schools profits of $424,945, which are addressed above to avoid a double recovery, election among the legal claims should not be required.

B. Encore's attorneys' arguments do not require ignoring four of the jury's six verdicts.

Defendants argue that Encore must choose one of "causes of action II-VI because it presented its damages for those claims as identical to the jury at trial." There are several problems with this argument.

First, it is not correct. Encore's attorney argued that there were multiple ways that Trask breached his duties to Encore and each breach could lead to different damages. Closing Transcript – Plaintiff's Closing Argument at 21 ("Now what that means, Ladies and Gentlemen,

is that you will have a broad range of damages to consider for this cause of action."); at 21-26 (covering multiple items of damages the jury could find). Specifically, Encore's attorney argued the jury could award Encore:

1. the wages, benefits, and expenses it paid Trask while he was breaching his duty of loyalty. Plaintiff's Closing Argument at 18 ("[W]hile he was an employee of Encore, Mr. Trask received salary, bonus, benefits and expenses .... So for the first cause of action, Breach of Duty of Loyalty, we're asking you to check the box A, for plaintiff ...."); 21 ("The first element of damages you can consider are the wages that Encore paid ....");

2. the profits Encore lost by Trask's breaching his fiduciary duty by not disclosing the identities of the true suppliers of the products. *Id.* at 20 ("An employer and an employee have that [fiduciary] relationship in a couple of different ways. First of all, an employee could breach it if the employee fails to fully disclose to the employer known information that is significant and material. We know that Mr. Trask did that with regard to the true suppliers of these products."); 22 ("Now, the second category of damages is Lost Profit, and there are two categories of that.... The first category are the products that Encore sold to its customers that it acquired from Clear Touch at the mark up.... That's the first three categories in Table Number 2. Those categories total $675,361.");

3. the profits Encore lost from Leon County Schools by Trask's and Clear Touch's misappropriating Encore's trade secrets. *Id.* at 14 ("Then Mr. Trask also used specific information he learned about Leon County Schools to take an opportunity and orders for about 1000 of these panels .... So he had specific knowledge that he learned at Encore about that that constitutes a trade secret ...."); at 22-23 ("The second category are those bottom two lines, and those are the sales made to Leon County Schools.... [T]he profit amount is $424,945.");

4. the lost business opportunity of Clear Touch that breached the "business opportunity" clause of Trask's contract. *Id.* 28-29 ("Encore claims that Mr. Trask breached his contract in five ways.... The fourth breach is the business opportunity provision. He breached that. He didn't notify them of ... the opportunity to build the reseller network."); at 24-25 ("[T]he third calculation ... is the business opportunity calculation.... There are actually two components of this.... One is just for ... the profits that Clear Touch made through the end of 2015, and that figure is $1,636,254.... And then at the end of 2015, what was Clear Touch worth? ... That's where he comes up with the figure of $3,900,000. Those two components add up to the $5.5 million figure that you heard."); and

5. damages against Clear Touch for tortiously interfering with Encore's contract with Trask. *Id.* at 31 (The next cause of action is Tortious Interference. This is against Clear Touch only ....").

Although Encore's attorney argued that, as an alternative to awarding lower amounts for each injury, the jury could award $5.5 million actual damages for each of Causes of Action II-VI, the jury chose not to do that. Instead, the jury awarded different actual damage amounts and different punitive damage amounts, clearly intending to treat Defendants' different acts and Encore's different injuries as separate and distinct. The verdicts, interpreted in a way that "logical reason for reconciling them can be found," *Daves,* 355 S.C. at 231, 584 S.E.2d at 430, indicate that the jury chose to find that the distinct and different acts set forth above violated the distinct duties set forth above and caused the different injuries and damages set forth above.

Second, Defendants' argument assumes the jury was bound by Encore's attorneys' arguments, but it was not. An attorney's arguments are not evidence. *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are ... not evidence."),

quoting McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). The jury was the judge of the facts based upon the evidence, not upon attorneys' arguments, and it was the jury's prerogative to award different damages for different injuries like it did.

Third, Encore's attorneys never contended that liability or damages under Causes of Action II-VI were based on a single fact, a single injury, or single damage. Defendants' argument that these claims "simply represent[ ] alternative theories of recovery for the same injury," is inconsistent with the facts presented at trial.

Fourth, Defendants' reliance on *Uhlig v. Shirley*, Civil Action No. 6:08-cv-01208, 2012 WL 2890178 (D.S.C. Sept. 25, 2012), is misplaced. In *Uhlig*, while the Court did require election among four of six causes of action, it did so only as to causes of action based on "the same facts" – the violation of two provisions of an employment agreement, which formed the only basis for the four claims subject to election. *Id.* at *4. As noted above, this is not the case here, where distinct facts gave rise to Causes of Action II-VI. Encore's case against Defendants was much broader in scope and duration and involved more distinct acts and injuries than *Uhlig.*

Finally, Defendants' argument does not apply to the verdicts against Clear Touch. Encore acknowledges that the $424,945 in actual damages awarded against Clear Touch for its violation of the South Carolina Trade Secrets Act are the same as the actual damages for tortious interference with Encore's contract with Trask and is only being awarded these actual damages once. The foregoing arguments about election among Causes of Action II, III, IV, and VI against Trask have no bearing on the judgment against Clear Touch.

C. Mr. Melinger's testimony does not require overturning the jury's first verdict for breach of duty of loyalty.

Finally, Defendants argue that Mr. Meilinger testified that awarding damages reflected in Plaintiff's Exhibit 10-H, Table 2 (Encore's lost profits on sales to its customers and Leon County Schools of $1,100,306), precluded awarding damages in Table 1 (a portion of the wages of Trask, Higginbotham, Gallant, and trade shows of $488,041). There are numerous problems with Defendants' arguments.

First, Mr. Meilinger did not testify that awarding any damages reflected in Plaintiff's Exhibit 10-H, Table 2 precluded awarding any damages in Table 1. He merely said that "you would not add the second analysis [$1,100,306] to the first analysis [$488,041]." Meilinger Testimony Tr. at 50. The jury did not do this. Instead, they chose to award some damages from the first analysis and some damages from the second analysis, which was the jury's prerogative.

Second, even if Mr. Meilinger had testified as Defendants assert, the jury was not required to accept such testimony in calculating damages. It is within the jury's discretion to determine how much weight to give an expert's testimony. *See State v. Poindexter*, 314 S.C. 490, 494, 431 S.E.2d 254, 256 (1993); *Small v. Pioneer Machinery*, 316 S.C. 479, 488-89, 450 S.E.2d 609, 614-15 (Ct. App. 1994) ("It is not unusual, of course, for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve.... The jury could have either accepted or rejected the expert witness's opinions, depending on its view of the evidence."). The jury did not award all of the damages calculated in Table 1, and was entitled to award as much of Table 2 as it chose.

In sum, except for the award of the Leon County Schools profit of $424,945, Encore is not required to elect remedies.

VIII. Defendants are not entitled to a stay of execution of the judgment.

Defendants request the Court grant a stay of execution of judgment pending post-trial motions and appeal pursuant to Rule 62(d), SCRCP. "Whether to grant such a stay rests in the court's discretion 'on such conditions for the security of the [creditor] as are proper ....'" *See Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 375 S.C. 423, 426, 653 S.E.2d 274, 276 (2007) (citing Rule 62(b)). The policy expressed in . . . Rule 62(b) favors the creditor over the debtor." *Id.*

Defendants note that, pursuant to S.C. Code Ann. § 18-9-130, if the Court grants a stay and requires a bond, the bond must be limited to $1 million from each of Trask and Clear Touch because Trask is an individual and Clear Touch, Defendants argue, employs fewer than fifty persons.

The Court finds that it would be inappropriate to grant Defendants a stay of execution of judgment. Defendants have already had nearly six months since the jury rendered its verdicts. Moreover, the evidence showed that the Defendants engaged in an involved scheme to hide from Encore the truth of Trask's breaches of fiduciary duties, duties of loyalty, and contract. Specifically, 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' true 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, email Encore as "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 so that he could induce them to leave Encore by disclosing his ownership of Clear Touch but prevent them from disclosing same to Encore; and
- Permanently deleted incriminating e-mails.

Based upon this evidence, the jury awarded millions of dollars of punitive damages against Defendants. In short, Defendants simply cannot be expected to fulfill their legal duties. Therefore, the Court finds it would not be appropriate to stay execution of the judgment.

IX. Post-judgment interest accrues until Defendants deposit with the Clerk of Court the full amount of the judgments against them and Encore shall receive interest earned on such amounts.

Defendants request that they be allowed to deposit the full amounts of the judgments against them pursuant to Rule 67, SCRCP, to stop the accrual of post-judgment interest. The Court grants this motion and directs that the Greenville County Clerk of Court accept any payment for the full amount of a judgment against a Defendant made by such Defendant and place it in an escrow account at U.S. Bank, N.A. managed by Brown Advisory, LLC with investments limited to cash or cash equivalents, FDIC-insured instruments, direct obligations of the U.S. Government or its agencies, or high grade, short-term fixed income securities with maturities of two years or less. Post-judgment interest on the judgments shall accrue at 8.50% per annum from the date this Order is filed until the date the deposit is made. Encore shall

receive the pre-deposit interest accrued and the post-deposit interest earned on such amounts that are ultimately paid to Encore.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Encore's motion is granted except for restitution, which is denied, that Defendants' motions are denied except for the motion to deposit the full amount of each judgment in court, and that judgment shall be entered:

(1) in favor of Encore against Keone Trask in the amount of **$7,917,468.40**, and

(2) in favor of Encore against Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC in the amount of **$1,715,335.00.**

IT IS SO ORDERED.

Greenville Common Pleas

Case Caption: Encore Technology Group LLC vs. Keone Trask , defendant, et al

Case Number: 2015CP2305757

Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH