
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-001444

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

v.

Keone Trask and Clear Touch Interactive, Inc.
f/k/a Clear Touch Interactive, LLC.....Appellants/Respondents

AND

Clear Touch Interactive, Inc. f/ka Clear Touch
Interactive, LLC.....Appellants/Respondents

v.

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

INITIAL BRIEF OF APPELLANTS/RESPONDENTS

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I. STATEMENT OF THE ISSUES ON APPEAL

1. Was it an error of law for the trial court to require Encore only elect its remedies among causes of action under which the jury awarded the same actual damages or should it have required election in a manner that prevented duplicative recovery?
2. Was it an abuse of the trial court's discretion for it to make post-trial findings concerning the specific factual basis for the jury's verdict on each cause of action under which the court awarded Encore judgment to find Plaintiff need not elect its remedies among those claims?
3. Did the trial court err by allowing Encore's economic expert to present testimony and calculations concerning Encore's claimed damages to the jury before deciding whether all or part of those damages were recoverable under the law?
4. Did the trial court abuse its discretion and cause prejudice to Defendants by allowing Encore to submit expert testimony and calculations prepared by him claiming Encore could recover both Clear Touch's normalized profits through the end of December 31, 2015 and the calculated value of the Clear Touch business because Clear Touch grossed a certain amount of revenue in one year?
5. Did the trial court err in denying Defendants' direct verdict motion and later JNOV on Encore's breach of contract claims by finding that the restrictive covenants upon which liability under those claims relied were enforceable as a matter of law?
6. Did the trial court err in denying Defendants' directed verdict motion and later JNOV on Encore's trade secret misappropriation claims by finding that Encore presented sufficient evidence to establish its trade secrets claims?

7. Should the trial court have granted Defendants' Motion Pursuant to the Thirteenth Juror Doctrine based upon the jury's inconsistent verdict which awarded different actual damages for breach of contract claims where Plaintiff could only recover the same actual damages?
8. Did the lower court abuse its discretion by awarding Encore the entirety of its attorneys' fees and costs when they were only recoverable under some of the claims alleged and Encore provided insufficient evidence to establish entitlement to those fees and costs?
9. Did the lower court adopt a Receiver Order that permitted various violations of South Carolina law?
10. Did the lower court err in granting summary judgment and dismissing Clear Touch's suit against Encore finding the claims asserted were barred *by res judicata* when they were based upon evidence Encore withheld until a few months prior to trial of the original case?
11. Was it an err for the lower court to adopt a Dismissal Order drafted by Encore that included a basis for dismissal never addressed before or ruled upon by the court prior to entry of the Dismissal Order?

II. STATEMENT OF THE CASE

This matter arose from Keone Trask and Clear Touch Interactive, Inc.'s actions in establishing and bringing a new interactive touch screen panel to market. Some of those actions were simple mistakes common with any startup venture, while others were deliberate and duplicitous. Simply put, Trask and Clear Touch did things they should not have done. They took advantage of Trask's employer, Encore Technology Group, by not disclosing Trask's interest in Clear Touch and having Encore act as a reseller of their product; a product Encore believed was both established and supplied by a third party and not its own Chief Business Development officer. A jury greatly punished both Trask and Clear Touch for those wrongful actions and awarded Encore over a million dollars in actual damages and multi-millions in punitive awards.

This appeal is not an attempt to undo the punishment, nor an exercise aimed at having Trask and Clear Touch escape responsibility for their actions. This appeal is meant to rectify the trial court's abuse of the law and its discretion through which it exacted punishment upon these Defendants well in excess of what the law allows. Trask and Clear Touch's bad acts did not give the lower court carte blanche to heap penalty and excessive punishment upon them, yet it did so time and time again. Through the trial court's erroneous rulings: the jury's awards were impermissibly increased to over seven million dollars against Trask and nearly two million dollars against Clear Touch; Clear Touch was robbed of an opportunity to pursue its own multi-million dollar claims against Encore, claims which it was only made aware of a few months prior to trial due to Encore's withholding of evidence alerting them to those claims; and both Trask and Clear Touch were made to labor under the yoke of a Receiver who was empowered to violate the law through a written order. Trask and Clear Touch should and will answer for their actions. What that entails is limited by the law and requires this Court's intervention to ensure those limitations

are properly enforced. The trial court abused its discretion and enacted punishment upon Trask and Clear Touch beyond what the fullest extent of the law allows. This appeal was filed to correct those errors and ensure Defendants are not subjected to retribution over and above what South Carolina law permits.

A. Introduction

Appellant/Respondent Clear Touch Interactive, Inc. (“Clear Touch” or “CTI”) is a supplier of interactive touch panels which it sells to Resellers who then sell the products to end user customers, primarily in the K-12 education market. Appellant/Respondent Keone Trask established Clear Touch very soon before he incorporated Encore.¹ Respondent/Appellant, Encore Technology Group, LLC (“Encore” or “Plaintiff”) is a Value-Added Reseller (“VAR”) for a wide range of information technology products, including interactive panels, which it markets and sells to K-12 educational customers and others. This action arose out of Keone Trask’s employment with Encore and his relationship and involvement with Clear Touch before, during, and after his tenure with the company.

B. Establishment of Clear Touch and Encore

From 1999 through the fall of 2012, Keone Trask worked for Computer Software Innovations (“CSI”) in a variety of roles, including Chief Technology Officer charged with evaluating different technologies and solutions for the company to consider selling. Around this time, he foresaw a shift in classroom technology away from projectors and whiteboards and to interactive touch panels. (Tr. Trans. 720-23). On August 24, 2012, Trask established Clear Touch, LLC as a Nevada entity with the notation that it may one day be a manufacturer or supplier of interactive touch panel technology. (Plf. Ex. 11). Trask set about identifying potential

¹ Trask and Clear Touch are collectively referred to as “Defendants” in this brief.

manufacturers and exploring the Clear Touch opportunity. He identified and worked to develop the panel sourcing/supplier opportunity with TSI Touch through the fall of 2012. (Tr. Trans. 721-23).

Shortly after Clear Touch was established, a new opportunity arose due to the acquisition of CSI by a company called Harris. Trask and others at CSI learned that Harris was interested in only a portion of the CSI business and planned to eliminate the technology reseller and cloud services division. (Tr. Trans. 721-35). Trask and other current and former Encore executives saw an opportunity to spin off that division into a new entity, leading to the incorporation of Encore Technology Group, LLC on September 27, 2012. The idea was for Encore to purchase the technology reselling and cloud services division of CSI and continue with that business as a newly minted entity. Trask and others solicited several prospective investors, ultimately resulting in Todd Newnam purchasing all ownership interests in Encore and acquiring the technology reselling and cloud services division of CSI as planned. Operational management and control of Clear Touch was transferred from Trask to his mother Kathy Cruse on or around October 4, 2012, which was reflected by the LLC's Annual List of Managers filing for the period of August 2012 to August 2013. (Plf. Exh. 14).

Due to his experience and expertise in the technology market, Encore hired Trask as its Chief Business Development Officer on or about February 18, 2013. At that time, Trask executed a Non-Disclosure and Non-Solicitation Agreement (the "Agreement") containing multiple provisions meant to restrict his post-employment activities, including non-solicitation of customers and non-piracy of employees clauses and broad non-disclosure/confidentiality provisions prohibiting use or disclosure of "Company Data and Trade Secrets." (Plf. Exh. 2 at 1-2). The Agreement also contained a "Business Opportunity" provision which stated in part that:

During the term of this Agreement, if Employee becomes aware of any project, investment, venture, business or other opportunity...that is similar to, competitive, with, related to, or in the same filed as Company...then Employee shall so notify Company immediately of such Opportunity and shall use Employee's good-faith efforts to cause the Company to have the opportunity to explore, invest in, participate in, or otherwise become affiliated with such Opportunity.

(Plf. Exh. 2 at 2).

C. Trask Brings Clear Touch to Encore

Interactive panels were an emerging technology in the spring of 2013, and there were few options on the market. (Tr. Trans. 948-57). Trask brought Clear Touch to Encore as a potential panel supplier. The company chose to begin selling Clear Touch interactive panel products and entered a Reseller Agreement on April 24, 2013, which made it the exclusive Reseller of Clear Touch products in seven southeastern states (the "Territory").

Kathy Cruse, as the managing member of Clear Touch, signed the Reseller Agreement, and Encore's CFO Russell Young executed it for the Plaintiff after requesting some revisions. Under the Reseller Agreement, Clear Touch supplied Encore interactive panels and accessories which it in turn sold to end user customers at a markup. In order to facilitate those sales, Encore agreed to use its reasonable efforts to advertise, market, and sell Clear Touch products in the Territory for the mutual benefit of both companies. As a Reseller, Encore necessarily markets and promotes the various products it carries in order to make sales to customers and provide a value to their suppliers. The Reseller Agreement also contained a reciprocal exclusivity provision prohibiting Encore from selling or soliciting sales for any other integrated interactive displays.

Following execution of the Reseller Agreement, Encore began to market and sell Clear Touch products within its larger suite of product offerings, primarily in the K-12 education markets within the Territory. Encore's business model and strategy was then and is now to be a Value-Added Reseller ("VAR") and a one-stop shop for the public sector's IT needs. (Tr. Trans. 165:3-166:4). As such, it offers an array of technology products, with interactive panels accounting for

less than 5% of Encore's overall business. (Tr. Trans. 160:4-21; 198:12-200:8; 554:16-19; 555:23-556:1). The US interactive panel market was in its infancy during the time at issue, and Clear Touch was one of the few products available. (Tr. Trans. 947:23-948:2)(Gallant testimony that "At that time, when we brought Clear Touch on board, that was the only thing available to us, at that time, and it was a great technology.").

Trask did not disclose his interest in or involvement with Clear Touch when he brought the product to Encore or during his time as its Chief Business Development Officer. He and others at Encore went about their jobs of promoting and selling Encore's entire suite of products, including Clear Touch interactive panels, until Trask left the company.

D. Trask Goes Immediately from Encore to Clear Touch

January 2014 was an eventful month for Clear Touch and Trask. Trask decided to leave Encore and pursue the Clear Touch business full time. On January 15, 2014, Trask notified Encore of his intention to leave the company, effective February 14, 2014.² (Tr. Trans. 764-66). Notably, around this time, Clear Touch began communicating with Encore from a company email belonging to an Amy Andrews. In fact, Ms. Andrews was Keone Trask's wife, Tamara Trask's, alias. (*See e.g.* Plf. Exh. 4). Mrs. Trask used this surreptitious alias email to communicate with Encore on behalf of Clear Touch starting in the final few months of Keone Trask's tenure and continued to do so after his departure.

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. (Plf. Exh. 16). The purpose of the conversion was to allow Trask to pour his life savings of approximately \$150,000 from his 401k

² Encore encouraged Trask to stay through the end of March and he ended up staying until late April.

into the Clear Touch business. (Tr. Trans. 767-69). Encore ultimately terminated Trask on April 25, 2014, and he signed a Severance Agreement as part of that separation. (Plf. Exh 6; *See also* Def. Exh. 5). Trask immediately went to work for Clear Touch.

E. Clear Touch and Encore Continue to Do Business

Encore and Clear Touch continued to do business following Trask's departure. Clear Touch supported Encore's sales activities, including providing training, product demonstrations, attendance at trade shows, and lead notifications. In October 2014, Clear Touch sent Encore a Modified Reseller Agreement which would allow Encore to sell Clear Touch products in all the lower 48 states on a non-exclusive basis. (Def. Exh. 17). That same month, Trask disclosed his interest in Clear Touch to Encore leadership. (Tr. Trans. 787:14-789:21).³ Encore continued to sell Clear Touch products for nearly a year after his disclosure. Encore also sold competing panel products throughout the country and in the several southeastern states in which they formerly could only sell Clear Touch products under the original Reseller Agreement.

F. Clear Touch Hires Jimmy Higginbotham

Jimmy Higginbotham sold classroom technology products in the Florida, Georgia, and Alabama areas. In the first part of 2013, Trask arranged for Higginbotham to interview with Encore for an outside sales representative position. (Tr. Trans. 387-89). Mr. Higginbotham sold Encore classroom technology products, including Clear Touch panels, in his sales territory until Encore terminated him in the fall of 2014.⁴ Rather than simply terminate Mr. Higginbotham, Encore arranged for him to work for Clear Touch starting in August 2014. (Tr. Trans. 117-118;

³ Trask informed Encore executive Todd Newnam that he owned Clear Touch at that time. Historical ownership of the business was not addressed during that conversation.

⁴ Prior to his termination, Higginbotham signed a Nondisclosure Agreement with Clear Touch. (Plf. Exh. 15). He testified that Trask did not disclose his historical interest in Clear Touch to him until sometime in September or October 2014 after he came to work for Clear Touch. (Tr. Trans. 399:10-400:4).

146-47; 181:11-22). Mr. Higginbotham started working for Clear Touch on August 1, 2014 and continued to market and sell Clear Touch panels for the company's resellers, including Encore.

G. Clear Touch Hires Leo Gallant

Encore hired Leo Gallant as a classroom solution specialist when the company was established in early 2013. Gallant also executed a non-compete with Encore. As a classroom solutions specialist, Gallant worked for Trask and with others within Encore to market and sell the company's suite of classroom technology, including Clear Touch panels, by providing product demonstrations, training, and sales support. (Tr. Trans. 938-47). Gallant believed the Clear Touch product was superior to Encore's other panel offering (Promethean) and other available panels on the market. (Plf. Exh. 5).

Shortly after Trask's departure from Encore in April 2014, he had Leo Gallant over for dinner at his house. At that time, he asked Gallant to sign an NDA and proceeded to disclose that he was the founder and owner of Clear Touch. (Tr. Trans. 954-55). Trask did not offer Gallant a job at that dinner nor ever encourage him to leave Encore. (Tr. Trans. 955:10-15). Rather, Gallant monitored public job postings and Clear Touch's social media in order to keep abreast of openings at the company. (Tr. Trans. 957:10-958:2). In December 2014, Clear Touch posted an opening for a business development representative position. Gallant responded to the posting and chose to leave Encore to take the position at Clear Touch. He informed Encore of his intentions to leave for Clear Touch and started his new job on January 12, 2015. (Tr. Trans. 958:15-19). Encore knew of Mr. Gallant's plans and did not object to him leaving the company or working for Clear Touch. (Tr. Trans. 958:15-19).

H. Leon County Sales

Leon County School District is a large district located in Florida. Leon County was Higginbotham's long-time customer who he brought with him to Encore when his employment began there. (Tr. Trans. 184:16-22). Leon County was also a customer of West Martin, Clear Touch VP of Sales, before he came to work for the company. (Tr. Trans. 929:1-11).

Before Encore or Clear Touch made any sales to Leon County, the school district had an advertising campaign in support of a half penny sales tax increase referendum that was publicly advertised as revenues it intended to use to upgrade the district's technology. (Tr. Trans. 930:12-932:1). There were billboards in the area and fund-raising thermometers outside of schools which tracked the money raised for investment in the district's schools, including its classroom technology. (Tr. Trans. 802:4-804; 929-32).

After Trask left Encore in April 2014, Leon County selected Clear Touch as its panel manufacturer and entered an order, through Encore, for 18 units. (Plf. Exh. 53). Leon County's plan was to purchase additional units through December 2014 and continue purchasing for hundreds of rooms in 2015. (Plf. Exh. 53). A few panel accessories were provided to Leon at no cost as part of a pilot initiative. (Plf. Exh. 58).

At some point after the initial purchase, Leon County became dissatisfied with Encore as their Reseller and sought to purchase panels directly from Clear Touch. (Tr. Trans. 180:20-181:7). Clear Touch obliged Leon County's request, and made several direct sales to the school district, including sales from April 26, 2014 – April 25, 2015 (term of Trask's non-compete), totaling \$344,201, and from April 26, 2015 to October 10, 2015, totaling \$205,430. (Plf. Exh. 10H).

I. Encore Learns of Trask's Historical Interest in Clear Touch

Encore continued to sell Clear Touch products into 2015. Events unfolded over the course of the Spring and Summer that year which led to Encore's termination of its reseller relationship with Clear Touch on September 11, 2015, and the filing of the underlying lawsuit a week later.

Encore learned as early as January 2015 that Clear Touch was working with other resellers to sell their products in the Territory in which Encore once had exclusivity, and according to its witnesses maintain they still had exclusive rights to sell Clear Touch Products. (Tr. Trans. 164:5-165:2).⁵ However, the company never sent Clear Touch a cease and desist letter or any communication directing them to stop selling through other resellers in the Territory and no evidence was provided showing Encore objected to this in any manner beyond presuming its VP of Sales may have had a conversation with Clear Touch about it. *Id.* Rather, Encore continued to sell Clear Touch panels along with its other products, including a competing Promethean panel, through the Spring and Summer of 2015 without addressing or objecting to Clear Touch's business relationships with other resellers that serviced customers in the Territory. At this time, the two companies worked together to market, promote and sell the Clear Touch products as they had done throughout their relationship. The non-compete provisions of Trask's Employment Agreement ended on April 25, 2015.

At the end of July 2015, Clear Touch terminated Jimmy Higginbotham for cause. Soon thereafter, Higginbotham contacted Encore executive Todd Newnam and informed him that Trask had an interest in Clear Touch before and during his tenure at Encore and suggested the company look into it. (Tr. Trans. 152; 193; 412-15). Encore took that advice, researched the historical ownership of Clear Touch through public corporate filings, and discovered that Kathy Cruse was

⁵ Encore testified it knew Clear Touch was selling in the Territory between 4 to 7 or 8 months before it terminated the relationship in September 2015.

Keone Trask's mother. At that point, Encore decided it would end its relationship with Clear Touch. (Tr. Trans. 193-94). It did not inform Clear Touch of its decision right away. Instead, Encore established a reseller relationship with another panel supplier, ViewSonic, and worked to position them to replace Clear Touch.

Encore never attempted to directly source panels. (Tr. Trans. 193-95; 450:10-451:16). It did what it always had done until that point and continues to do today – be a VAR for a third party's interactive panels and accessories. In this case, ViewSonic.

J. Encore Terminates Reseller Agreement and Files Suit September 2015

On September 11, 2015, Encore notified Clear Touch it was terminating the relationship. (Plf. Exh. 9). A week later Encore filed a complaint containing nine causes of action styled as “Breach of Duty of Loyalty by Trask,” “Breach of Fiduciary Duties by Trask,” “Breach of Contract against Trask,” “Violation of SC Trade Secrets Act against all Defendants,” “Unjust Enrichment/Accounting/Constructive Trust/Disgorgement/Restitution against all Defendants,” “Tortious Interference against Clear Touch,” “Breach of Contract Accompanied by Fraudulent Act against Trask,” “Defamation,” and “Unfair Trade Practices.” Plaintiff claimed damages allegedly arising from Trask not disclosing his relationship with and interest in Clear Touch while an employee of Encore, in violation of various common law and contractual obligations to the company, misappropriation of company trade secrets and company data, and defamatory statements concerning Encore, as alleged in the Complaint. (Complaint 9.18.15). Defendants filed Answers asserting various defenses. (Answers 11.13.15). Prior to trial, Trask admitted liability on the breach of duty of loyalty and breach of fiduciary duty claims. (Stip. of Fact and Admission of Liability).

K. Trial of Original Suit September 25-29, 2017

The matter was tried before a jury the week of September 25-29, 2017 with the Honorable R. Lawton McIntosh presiding.

1. Facts Relied Upon by Encore to Establish Liability at Trial

At trial, Encore pursued different theories of liability under its claims, but all relying upon the same facts – (1) Trask not disclosing to Encore the identity of Clear Touch’s suppliers; (2) Trask not informing Encore that he was building a reseller network for Clear Touch; (3) Trask not working with Encore to take advantage of the Clear Touch opportunity; and (4) Clear Touch making direct sales to Leon County. These alleged actions, in some form or fashion, were the underlying basis for Encore’s claims of liability for the various causes of action under which it obtained a verdict at trial.

2. Encore’s Claimed Damages as Presented at Trial

Encore offered Michael Meilinger as its expert economic witness at trial. Mr. Meilinger gave live testimony and was allowed to submit summaries of his calculations of what Encore claimed were its available damages under the claims alleged. (Tr. Trans. p. 482-590). Meilinger presented three alternative calculations, each summarized in a Table and ultimately allowed to be submitted to the jury as a single page exhibit entitled “Summary of Damages.” (Plf. Exh. 10H).

Table 1 originally included all of Trask’s, Gallant’s, and Higginbotham’s wages and the expenses Encore told Meilinger were attributable to each former employee during their entire respective tenures with the company which totaled \$712,085. (Plf. Exh. 10). The trial court ruled that Encore could seek recovery of Higginbotham and Gallant’s wages and expenses only from the time each signed an NDA with Clear Touch, resulting in alteration of this damage category, which was then presented to the jury as seen below:

Wages, Benefits, and Expense Reimbursement	\$420,352
Trade Show and Related Costs Paid by Encore for Benefit of Clear Touch	67,689
<i>Total Calculated Damages</i>	\$488,041

(Plf. Exh. 10H; Tr. Trans. 236-40; 476). These damages, according to Encore and Meilinger, were recoverable for Trask’s breach of his duty of loyalty to Encore. (Tr. Trans. 495). The next two categories of claimed damages Encore presented to the jury at trial it claimed were recoverable under each of the remaining causes of action.

The second category of damages Encore presented through its economic expert were various “lost profits” summarized in Table 2, as reflected below:

Direct Damages on Products Sold to Encore from Clear Touch 2/13/13 – 4/25/14	125,730
Direct Damages on Products Sold to Encore from Clear Touch 4/26/14 – 4/25/15	334,201
Direct Damages on Products Sold to Encore from Clear Touch 4/25/15 – 10/10/2015	205,430
Lost Profit on Sales Made to Leon County Schools 4/26/2014 - 4/25/2015	309,439
Lost Profit on Sales Made to Leon County Schools 4/26/2015 - 10/10/2015	115,506
<i>Total Calculated Damages</i>	\$1,100,306

(Plf. Exh. 10H). The first three elements of this calculation, “Direct Damages,” all came from sales Clear Touch made to Encore and the last two from sales to Leon County, all divided into different time periods. The first time period (2.13.13-4.25.14) was Trask’s employment with Encore. (Plf. Exhs. 2 & 6). The second time period (4.26.14-4.25.15), covered the duration of Trask’s non-compete. (Plf. Exh. 2). The third (4.25.15-10.10.15) went from the end of Trask’s non-compete to the termination of the Reseller Agreement and business relationship between Encore and Clear Touch. (Plf. Exh. 8).

Finally, through Meilinger’s testimony, Encore presented its final alternative category of damages, seeking to recover all of Clear Touch’s normalized profits (as Meilinger calculated) through the end of 2015 and what it claimed was the value of the Clear Touch business as of December 31, 2015. This final and largest alternative category of damages was summarized in Table 3 as reflected below:

Normalized Profit of Clear Touch from 2/13/2013 – 4/25/2014 (employed)	105,137
Normalized Profit of Clear Touch from 4/26/2014 – 4/25/2015 (non-compete)	36,179
Normalized Profit of Clear Touch from 4/26/2015 – 4/25/14 (reseller agreement)	1,281,829
Normalized Profit of Clear Touch from 10/11/2015 – 12/31/2015	213,109
Fair Market Value of Clear Touch Opportunity as of 12/31/2015	3,900,000
Total Value of Lost Clear Touch Business Opportunity	\$5,536, 254

(Plf. Exh. 10H). Meilinger testified that if the jury awarded damages from Table 3, it should not award those from Table 2 because the former calculations subsumed the latter. (Tr. Trans. 527-29).

As outlined in more detail below, Encore presented its case to the jury claiming that it suffered the same damages under every cause of action, with the exception of its breach of loyalty claim. (*See infra*. pgs. 32-39).

L. The Verdict

At the close of trial, all eight of Encore’s legal claims were submitted to the jury and its equitable cause of action to the trial court. The jury rendered a verdict in favor of Encore on six of the eight causes of action as follows:

<u>Cause of Action</u>	<u>Actual Damages</u>	<u>Punitive Damages</u>
I – Breach Duty of Loyalty (<i>v. Trask</i>)	\$375,733.40	\$175,000
II – Breach of Fiduciary Duties (<i>v. Trask</i>)	\$675,361	\$1,500,000

III –	Breach of Contract (<i>v. Trask</i>)	\$424,945	N/A
IV –	Violation SC Trade Secrets Act (<i>v. Trask and Clear Touch</i>)	\$424,945	\$849,890 ⁶
V –	Tortious Interference (<i>v. Clear Touch</i>)	\$424,945	\$500,000
VI –	Breach of Contract Accompanied by Fraud (<i>v. Trask</i>).	\$1,476,039.40	\$2,000,000

(See Verdict Form).

M. Post-Trial Motions

On October 9, 2017, Defendants filed post-trial motions that included (1) Motion for Election of Remedies seeking to have Encore elect among the remedies awarded to avoid duplicative recovery; (2) Motion for New Trial Absolute due to admission of certain inappropriate damage testimony and evidence at trial and for Encore’s ambush with testimony claiming to show Trask destroyed evidence; (3) Motion for Relief from Judgment due to the same ambush testimony constituting a fraud, misrepresentation, or other misconduct under SCRPC 60(b); (4) Motion for New Trial *Nisi* Remittitur, again related to the prejudice caused by admission of certain damage evidence and ambush testimony claiming Trask destroyed evidence which resulted in excessive punitive damages awards; (5) Motion for Judgment Notwithstanding the Verdict because the restrictive covenants in Trask’s Non-Disclosure and Non-Solicitation Agreement were unenforceable as a matter of law, barring recovery for their breach and due to Encore’s failure to provide evidence to establish its trade secret claim at trial; (6) Motion Pursuant to the “Thirteenth Juror Doctrine” because the jury’s verdict was inconsistent and reflected confusion; (7) Motion to Stay Execution; and (8) Motion to Deny Plaintiff Equitable Relief. (Def. Post-Trial Mots.).

⁶ The jury answered “Yes” to the special interrogatory on the Verdict Form asking “Was the Defendants’ conduct in violating the South Carolina Trade Secrets Act committed by Defendants in a willful, wanton, or reckless disregard for Plaintiff’s rights?” The Court then chose to award the full amount of available exemplary damages under the Trade Secrets Act. S.C. Code Ann. § 39-8-30.

That same day Encore filed a Motion for Judgment, including Restitution, Exemplary Damages, Attorney's Fees, Expert Witness Fees, and Other Expenses. (Plf. Motion Judg.). Part of Encore's post-trial submissions included "Requested Judgments in Favor of Encore Technology Group, LLC," in which it broke down the verdicts it believed it was entitled to receive and gave what it contended was the factual and legal basis for those awards in an attempt to segregate those verdicts. (*See* Exh. C to Def. Supp. Post-Trial Filings).

Hearings on post-trial motions were held on November 11, 2017. Application of the election of remedies doctrine was a large focus during that hearing. In response to the Court's questioning, Encore deviated from its position and presentation at trial and represented to the Court that it had in fact presented separate and distinct elements of damages to the jury at trial for its breach of loyalty, breach of fiduciary duty, trade secrets, and breach of contract with fraud claims. (11.11.17 Trans. 35-37; 41:3-10; 43:1-4). In response to the Court's inquiries on this issue, Encore told the Court what (it contended) the jury did in awarding damages, not how it presented damages to the jury at trial. *Id.*

Following those hearings, the Court allowed additional submissions to address the myriad of issues before it, including allowing Defendants to obtain portions of the trial transcript to address Encore's post-trial representations concerning how it presented its case before the jury. Defendants filed a Response and Opposition to Plaintiff's post-trial motion on November 15, 2017. (Def. Resp. Opp. Plf. Motion Judg.). Then, after obtaining hearing transcripts and portions of the trial transcripts needed, Defendants submitted Supplemental Post Trial Filings on March 5, 2018 to address Encore's post-trial arguments made in the November hearing and its presentation of certain testimony and evidence at trial relevant to the post-trial motions before the court. (Def. Supp. Post-Trial Filings).

N. The Final Order and Judgment Entered April 2, 2018

Following those submissions, the Court made its rulings and instructed Encore to draft the proposed final order and work with Clear Touch to finalize it for submission to the Court. Ultimately, Encore submitted a proposed final order to the Court containing a litany of inappropriate and unsupported factual findings and running afoul of the applicable law in a multitude of ways. Clear Touch submitted a redline of the proposed order, along with an accompanying email outlining them for the trial court’s consideration. (Def. Mot. Recon. Exh. D). The lower court adopted Encore’s proposed order without revision and entered the Final Order on April 2, 2018.

The Final Order and Judgment (the “Order”) granted Encore’s post-trial motions except for restitution, denied all of Defendants’ motions with the exception of granting them leave to deposit the judgments into the Court; and entered judgment in favor of Encore against Trask in the amount of \$7,917,468.40 and against Clear Touch for \$1,715,335.00. (Order p. 2). The Order specified the components of each verdict and made factual findings as to the basis of each award as shown below:

Against Defendant Keone Trask

<u>Actual Damages</u>	<u>Punitive Damages</u>	
\$ 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)
<u>+1,476,039.00</u>	<u>+2,000,000.00</u>	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		+ <u>94,900.00</u>
TOTAL JUDGMENT AGAINST TRASK:		<u>\$7,917,468.40</u>

Against Defendant Clear Touch Interactive, Inc.

<u>Actual Damages</u>	<u>Punitive Damages</u>	
\$ 424,945.00	849,890.00	violation of Trade Secrets Act (Leon County profits)
	or	
<u>424,945.00</u>	<u>500,000.00</u>	tortious interference (\$424,945.00 in actual damages same as Leon County profits)
\$ 424,945.00	+ \$ 849,890.00 =	\$1,274,835.00
Plus attorneys' fees		+ 345,600.00
Plus costs & expenses		+ <u>94,900.00</u>
TOTAL JUDGMENT AGAINST Clear Touch:		<u>\$1,715,335.00</u>

(Order p. 10-11).

Defendants filed timely Motion(s) to Reconsider on April 12, 2018, which were heard by the lower court on June 12, 2018, and denied by entry of an Order on July 23, 2018. (Order Denying Mot. Recon. 7.23.18). Clear Touch filed a Notice of Appeal of the Final Order that same day. Encore then filed a cross appeal of the Final Order on July 26, 2018.

O. Payments of the Judgments into Court and Entry of the Receiver Order

Following entry of the Final Order, Clear Touch paid the judgment against it into the Court under SCRCP 67 by April 17, 2018. Encore pursued various avenues of collection on the Trask judgment, including by filing a Motion for Appointment of a Receiver on May 21, 2019. The Court took up the Receiver Motion during the June 12, 2018 hearing and granted Encore's Motion, entering an Order Appointing a Receiver on July 23, 2018 (the "Receiver Order") for the purpose of identifying and preserving Trask's assets which could be utilized to satisfy the judgment against him pending resolution of the appeal (of the Final Order). Trask filed a timely appeal of the Receiver Order on August 2, 2018. Trask paid the outstanding balance of the judgment against him into the Court on January 3, 2019.

P. Withholding of Evidence Leads to Filing of *Clear Touch v. Encore*, Sept. 12, 2017

The discovery process in the original action was long, extensive, and fraught with issues and the attendant disputes they spawn. Encore's withholding of evidence and litigation tactics in the course of that case necessitated the filing of a separate action by Clear Touch on September 12, 2017, so that its claims asserted in that case could be fully and fairly litigated. The relevant timeline of those events is detailed below.

1. Initial Discovery Requests and Production(s), April 25, 2016

Clear Touch served its first set of discovery requests on April 25, 2016. Encore served written responses to those requests on July 14, 2016 without producing any actual documents and instead said responsive documents would be made available. On July 15, 2016, Clear Touch sent Encore a detailed letter outlining the deficiencies in its discovery responses, and requested it supplement its written responses and provide a supplemental document production to rectify the many shortcomings. Encore provided supplemental written responses and a document production on August 8, 2016, which failed to rectify most of the deficiencies outlined in Clear Touch's July 15th letter and were non-responsive or insufficiently responsive to the discovery requests. Clear Touch filed a motion to compel seeking several categories of information and documents, including requesting Encore provide a privilege log. Encore also filed a motion to compel for several items. Those motions resulted in a November 17, 2016 Discovery Order and subsequent supplemental production by both parties.

2. Encore's Supplemental Productions of Over 200,000 Pages of Documents from November 21-April 13, 2017

Encore made a series of productions on November 21 and 22, 2016; December 29, 2016; February 3, 2017; and April 13, 2017; totaling over 200,000 pages of documents in over 32,000 separate files as outlined below:

- In response to the Discovery Order, on **November 21, 2016**, Encore produced documents labeled ENC 00000510 to ENC 00027245 (26,735 pages of documents).
- Then on **November 22, 2016**, Encore produced additional documents ENC 00027246 to ENC 59470 and ENC 00059471 to ENC 95581. This production was in excess of an additional **68,000 pages of documents**. Much of it was in separate pdf files and unusable in numerous respects, including not containing attachments to the emails which comprised the majority of the production.
- To address these issues, on **December 29, 2016**, Encore produced a flash drive containing a supplemental production with documents labeled ENC 00027246 through ENC 00202344 to replace previously produced ENC 00027246 through ENC 00095581. This production included over **175,000 new pages of documents** never before produced to Clear Touch. Those documents were produced in over **32,000 individual files**. Clear Touch attempted to get the December 29th production in reviewable form, format or platform, to no avail due to the manner in which documents were produced.

Due to the sheer volume and manner in which the documents were produced, including lack of any discernable organization, Clear Touch had to upload the documents into specialized review software in order to review those files. In order to do this, Clear Touch requested and Encore agreed to provide documents bates stamped “ENC 000513- 00202522” in native file format. Encore provided what was supposed to be all the documents encompassed in that bates range in native format. Those documents were uploaded to specialized review software in order for them to be in a reviewable format.

Given those circumstances, Clear Touch requested Encore consent to a continuance of the trial date. Encore refused, which necessitated the filing of Clear Touch’s first Motion for

Continuance of Trial on March 10, 2017. Encore fiercely opposed that Motion. The Court granted Clear Touch's motion, continuing trial and placing it for a date certain the week of August 28, 2017.

Clear Touch continued the time-consuming and costly review of the supplemental production and discovered serious deficiencies which it addressed in an April 6, 2017 letter. Encore sent an April 13, 2017 letter along with some additional documents. (4.13.17 Encore Ltr.). That correspondence also included a document labeled "Privilege Log" which was comprised of four paragraphs of general objections to broad categories of documents, among which was Encore's claim that it was withholding all documents prepared by, for, or sent to or from Encore's employees or representatives from on or after September 11, 2015 under the work product and "common interest" doctrines. (CTI 2nd Mot. Con. Exh. E p. 1). Continued attempts to obtain an actual privilege log from Encore were fiercely resisted.

Clear Touch was forced to file a Second Motion to Compel on April 26, 2017, seeking amongst other things, documents from on or after September 11, 2015. A hearing on Clear Touch's Second Motion to Compel was set for June 5, 2017.

3. Encore's May 31, 2017 Production of Over 10,000 More Pages of Withheld Documents Reveal Potential Claims

On May 31, 2017, weeks after Encore had already fought to have the case go to trial, it provided a 65-page privilege log and an additional 10,000 plus pages of documents in over 4,000 individual pdf files. (5.13.17 Encore Ltr.). The cover letter accompanying that late production admitted that in the over a year and a half since filing that action *Encore had not searched for the name of the company they sued - "Clear Touch" - when searching for responsive emails.* (CTI 2nd Mot. Cont. Exh. G at 2)(Stating Encore had searched for "ClearTouch" but not "Clear Touch" with the space between the words, which is the actual name of the company.). This was the first

production that included post September 11, 2015 documents. Clear Touch undertook review of those 10,000 new pages of materials, a process which was difficult and time-consuming due to the volume and manner of production.

After receiving the May 31st letter, privilege log and supplemental production, the parties continued to work to rectify issues related to Clear Touch's Second Motion to Compel through email correspondence and in a phone call the morning of June 5th. In that call, they agreed to forego the hearing as they believed an agreement on those issues had been reached. Resolution of those issues took some time and impaired Clear Touch's ability to move forward with defending the case, by, among other things, hindering the taking of several depositions, including a corporate 30(b)(6) deposition covering over 30 issues, and that of Encore's expert.

The May 31st production contained documents that for the first time alerted Clear Touch to the possibility that it may have one or more claims against Encore due to its misappropriation and illegal usage of the company's confidential and trade secret information to unfairly compete with it in the marketplace. (CTI Memo Supp. Partial SJM Exh. C – Collection of Docs. From 5.31.17 Production).⁷ This revelation was in June of 2017, approximately two months prior to the trial date of what was already a complex business case. To make matters worse, Encore informed Clear Touch it would not have availability for any depositions until the last week of June 2017 at the earliest, leaving Clear Touch approximately two months to take numerous depositions it had not been able to proceed with under the circumstances created by Encore's discovery tactics, including withholding of evidence and not producing a legitimate privilege log until May 31, 2017, and prepare a complex case for a week-long trial.

⁷ The pricing has been redacted from the filed copy of this exhibit due to the confidential and sensitive nature of that information.

Furthermore, following the Parties' morning call on June 5th, it was revealed that Encore had not included all documents labeled "ENC 000513 - 00202522" in the native file format as agreed months prior. These were the files loaded to the review software and reviewed by Clear Touch. The extent of that omission was unknown at the time. It took further exchanges between the parties, during which time Encore defended its omission by claiming the native format of the document Clear Touch discovered was omitted was "paper" and therefore rightfully left out. Encore later claimed that this single document Clear Touch happened to discover was omitted was the only document not in the files provided. There was no reasonable way to confirm Encore's claim.

From the moment of the May 31, 2017 production, Encore did not take its withholding of evidence seriously and downplayed its significance in order to push the case to trial. Given the circumstances created by Encore's actions and discovery tactics, an August 2017 trial date was unreasonably burdensome to Clear Touch. Despite that, Encore would not consent to a continuance and Clear Touch was forced to file a Second Motion for Continuance on June 6, 2017. (CTI 2nd Mot. Cont.). Encore fiercely opposed that Motion as well, claiming that the documents produced on May 31st were irrelevant and their late production therefore did not warrant continuance of the trial date. (Encore Resp. Opp. 2nd Mot. Cont. p. 5-6). A conference call was held to address Clear Touch's Motion, during which Encore again deemed the documents irrelevant to the original case. The Court gave the parties a few additional weeks and set the trial for the week of September 25, 2017.

Given the circumstances created by Encore's actions, Clear Touch set about preparing for trial of the original action and filed the separate action on September 12, 2017. This was the only way Clear Touch could have a full and fair opportunity to seek redress for Encore's unlawful

actions. The extent and resulting damage of these actions could not possibly be adequately ascertained before the September trial date. To do so, Clear Touch would have to amend its pleadings to include counterclaims based upon different facts and events all occurring after what Encore deemed the relevant timeframe, issue discovery requests related to those events, identify and depose additional witnesses involved in or related to Encore's illegal unfair competitive actions, and establish the extent of damage caused by those acts likely by use of an economic expert. Such a feat is undeniably impossible in under four months, but much less so when that time is dedicated to preparing to try a week-long case in a complex matter filed two years prior to trial. Encore knew this, created the untenable situation, and necessitated Clear Touch file the separate action to protect itself and ensure Encore would have to answer for its illegal activities.

Encore was able to try the previous action before a jury who never heard of its unlawful acts and ultimately obtained a favorable verdict against Trask and Clear Touch.

In response to Clear Touch's Complaint, Encore filed an Answer and Counterclaims on November 16, 2017 asserting counterclaims for (1) Breach of Contract; (2) Breach of Contract Accompanied by Fraud; and (3) Abuse of Process. The first two counterclaims were based upon Clear Touch's alleged breach(es) of the Reseller Agreement, with Encore copying and pasting the allegations from the previous action between the parties as the purported facts supporting those claims. (Ans. at ¶¶ 65-93). The Abuse of Process counterclaim was based upon Clear Touch filing this action. Clear Touch filed a Reply to the Counterclaims on December 21, 2017, asserting that Encore's counterclaims were barred by res judicata, among other things.

Clear Touch served its first set of discovery requests on February 16, 2018. (CTI 2nd Mot. Cont. Exh. D). Those requests included requests for documents and information concerning Encore's bidding of opportunities well after it ended its relationship with Clear Touch, including

the bids, quotes, purchase orders, and invoices related to a large 2017 sale to Winston Salem. (*See Id. e.g.* at RFP # 20). The deadline for Encore responding to those requests passed without any response. On March 21, 2018, Encore filed a Motion to Dismiss. The next day Encore requested an extension on its response deadline of 30 days after that motion was resolved. Clear Touch granted that request.

On March 27, 2018, Clear Touch filed a Motion to Dismiss Encore's contract counterclaims upon *res judicata* grounds because they are both claims arising out of the same transactions and occurrences involved in the previous action it could and should have brought then. The same day, Clear Touch filed a Motion for Partial Summary Judgment on Encore's Abuse of Process counterclaim upon the basis that it cannot establish the elements of that cause of action; namely, that it is unable to show a definite act or threat not authorized by the process as required to sustain that claim. Four months later, and ten days prior to the hearing set for the three previously filed Motions, Encore filed what it titled a Cross-Motion for Summary Judgment asserting that Clear Touch has "no evidence to support its Amended Complaint," and its claims are barred by the statute of limitations and *res judicata*.

4. Lower Court Dismisses Clear Touch v. Encore

The lower court heard oral arguments on the Parties' dispositive motions on July 30, 2018. The court entered the Dismissal Order on August 20, 2018, disposing of each Parties' claims. The Dismissal Order concluded Clear Touch's claims based upon Encore's misuse of its confidential information were barred by the doctrine of *res judicata*. (Dis. Order). That holding was grounded in the court's determination that Clear Touch's claims for misuse of its confidential information arose out of the same transaction or occurrence underlying the causes of action alleged by Encore in the original suit and could have been asserted as counterclaims in that case. (Dis. Order). The

court goes on to justify its holding by finding, without explanation or citation to supporting evidence, that Clear Touch had sufficient time to amend its pleadings to assert these claims as counterclaims in the original suit, and that it failed to make a motion to amend or seek a continuance, even though a continuance motion was in fact filed based upon Encore's withholding of crucial evidence until just months prior to trial. (Dis. Order p. 2). Finally, the Dismissal Order asserts Clear Touch's claims were rightfully dismissed because they were mandatory counterclaims under SCRCP 13, even though that ground was never raised to the lower court, and instead unilaterally inserted into the proposed order by Encore. (Dis. Order p. 2-3).

Clear Touch filed a Motion to Reconsider on August 20, 2018, which was denied without a hearing by Order dated September 7, 2018. Clear Touch then filed a timely appeal of the Dismissal Order.

By letter dated August 7, 2018, this Court consolidated all three appeals.

III. LEGAL ARGUMENT AND AUTHORITIES

Encore Technology Group, LLC v. Clear Touch Interactive, Inc. et al.

A. ORDER'S HOLDING THAT ENCORE ONLY NEED TO ELECT ITS REMEDIES ON THE BREACH OF CONTRACT AND TORTIOUS INTERFERENCE CLAIMS WAS IN ERR

1. Standard of Review

On appeal from a case tried before a jury in an action at law, the appellate court has the authority to correct errors of law. *Townes Assoc. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Here, the trial court's holding concerning and application of the election of remedies doctrine constitutes an error of law requiring reversal or modification by this Court.

2. Trial Court's Application of the Election of Remedies Doctrine was an Error of Law that Failed to Prevent Encore from Receiving Duplicative Recovery

As detailed above, the jury returned verdicts in favor of Encore on six of the eight claims submitted to it at trial:

<u>Cause of Action</u>	<u>Actual Damages</u>	<u>Punitive Damages</u>
I – Breach Duty of Loyalty (v. <i>Trask</i>)	\$375,733.40	\$175,000
II – Breach of Fiduciary Duties (v. <i>Trask</i>)	\$675,361	\$1,500,000
III – Breach of Contract (v. <i>Trask</i>)	\$424,945	N/A
IV – Violation SC Trade Secrets Act (v. <i>Trask and Clear Touch</i>)	\$424,945	\$849,890 ⁸
V – Tortious Interference (v. <i>Clear Touch</i>)	\$424,945	\$500,000
VI – Breach of Contract Accompanied by Fraud (v. <i>Trask</i>).	\$1,476,039.40	\$2,000,000

(Verdict Form). Defendants filed a post-trial motion requesting Encore elect its remedies among the verdicts for Causes of Action II-VI to prevent duplicative recovery due to the manner in which Encore presented its case at trial. (Def. Post-Trial Mot. at 1-4; Def. Supp. Post-Trial at 1-14; Def. Opp. to Plf. Post-Trial Mot. at 1-8). Specifically, Defendants sought election for Causes of Action II-VI because Encore relied upon the same set of facts to establish liability under those causes of action and explicitly sought the same damages for each at trial. *Id.*; *See also infra*. pgs. 32-39. It was not until post-trial arguments that Encore, when faced with having to elect its remedies, engaged in a campaign of *post-hoc* revisionist arguments attempting to differentiate the facts upon which it relied to establish liability under those claims and represent to the Court that it sought distinct damages for each at trial. (*See* Trans. 11.17.17 p. 35-37; 41:3-10; 3:1-4). The trial court’s

⁸ The jury answered “Yes” to the special interrogatory on the Verdict Form asking “Was the Defendants’ conduct in violating the South Carolina Trade Secrets Act committed by Defendants in a willful, wanton, or reckless disregard for Plaintiff’s rights?” The Court then chose to award the full amount of available exemplary damages under the Trade Secrets Act. S.C. Code Ann. § 39-8-30.

Order erroneously adopted those arguments and relied upon it to misapply the election of remedies doctrine to the facts and circumstances of this case.

The trial court found that Encore only needed to elect its remedies between the breach of contract and tortious interference causes of action because the jury awarded the same actual damages of \$424,945 under these claims and Plaintiff's trade secret cause of action. (Order p. 25). Those damages, according to the Order, were to compensate Encore for its lost sales to Leon County Schools. (Order p. 25). The Court went on to conclude that the election doctrine did not apply to the remaining claims for breach of fiduciary duty, breach of contract accompanied by fraud, and breach of duty of loyalty because liability under those claims relied upon different facts and elements and the jury's awards under them represented distinct damages. (Order pp. 25-28).

The Order's conclusion and application of the election doctrine is flawed because it relies upon erroneous and inappropriate factual findings concerning the basis for the jury's awards on these claims, an inaccurate conclusion that the awards under them represent distinct damages, an overly narrow application of the election doctrine, and a mischaracterization of Defendants' argument on the issue. Therefore, the lower court's ruling constitutes an error of law and requires reversal or modification to prevent duplicative recovery of actual damages.

Under the doctrine of election of remedies, a Plaintiff must choose which cause of action it elects to utilize as its monetary judgment. "The issue is one of election of remedies, not election between causes of action. Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts." *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990). "Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action." *Taylor v. Medencia*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996). "The

basic purpose of election of remedies is to prevent double recovery for a single wrong.” *Williams v. Riedman*, 339 S.C. 251, 275, 529 S.E.2d 28, 40 (Ct. App. 2000). “[T]he doctrine of election of remedies ‘does not require election between distinct causes of action arising out of separate and distinct facts,’ but a plaintiff must elect his remedy ‘where two distinct wrongs result only in a single and the same loss...if they may not be pursued together without prejudice to defendant.’” *Rivers v. Rivers*, 292 S.C. 21, 31 (Ct. App. 1987) *citing* 28 C.J.S. ELECTION OF REMEDIES § 3 at 1065 (1947). The purpose of the doctrine is prevention of duplicative recovery making its application necessary under the circumstances. *Williams*, 339 S.C. at 275.

a. The Order Makes Erroneous and Inappropriate Factual Findings as to the Specific Factual Basis the Jury Relied Upon in Finding Defendants Liable for Certain Claims to Conclude Encore Need Not Elect its Remedy Amongst those Causes of Action

The Order makes numerous findings as to the specific factual basis relied upon by the jury to find Defendants liable under Encore’s breach of duty of loyalty, breach of fiduciary duty, breach of contract with fraud, and trade secrets act (“TSA”) claims. It uses these *post hoc* findings to conclude that the Plaintiff need not elect its remedies amongst those claims because they relied upon different facts. (Order pp. 26-27). Specifically, the Order determines that the jury found (1) Trask breached his fiduciary duties by failing to disclose the identity of Clear Touch’s suppliers to Encore so it could purchase direct; (2) Trask violated the Trade Secrets Act by using Encore’s trade secret information regarding Leon County Schools’ needs for and purchase price of panels; (3) Trask was liable for breach of contract accompanied by fraud based upon his violation of his Non-Disclosure and Non-Solicitation Agreement’s “business opportunity clause”; and (4) Clear Touch violated the Trade Secrets Act by using Encore’s trade secret information regarding Leon County Schools’ needs for and purchase price of panels. (Order pp. 26-27).

First and foremost, the Order making these determinations is an inappropriate invasion of the province of the jury and therefore cannot be utilized to support a finding that the jury relied upon these specific and different facts to find Defendants liable for these particular claims at issue. *Krepps by Krepps v. Ausen*, 324 S.C. 597 (Ct. App. 1996)(Trial judge deciding how the jury viewed the facts or substituting its own view of the facts is unlawful usurpation of the jury's function as the finders of fact.). However, even if there were authority that allowed the trial court to make such determinations, the Order's findings themselves are flawed.

As a practical matter, the Order fails to cite to its evidentiary basis for making these determinations. It simply states what it claims were the facts relied upon by the jury for these particular causes of action and then concludes that "the evidence demonstrated – and the jury found – separate acts by Defendants [gave] rise to separate injuries and damages." (Order pp. 26-27). In reality, there is no way that the Court can make these specific determinations and the lack of citation to the record or explanation of how it arrived at them reveals their fallacy. Furthermore, consideration of how Encore presented its case on these claims undermines the Order's factual findings specifying what the jury relied upon to find Defendants' liable for each cause of action.

For example, the Order claims the jury found Trask liable for breach of his fiduciary duties because he failed to disclose to Encore that it could purchase directly from Clear Touch's suppliers. (Order p. 26). At trial, Encore claimed Trask breached his fiduciary duties by failing to (1) disclose the true identity of Clear Touch's suppliers; (2) tell Encore that he was building a reseller network for Clear Touch; (3) work with Encore to take advantage of the Clear Touch opportunity; and (4) by making direct sales to Leon County. (Tr. Trans. 109-125; 131:11-18; 1100-08). Thus, it cannot be said the jury's verdict for this breach of fiduciary duty claim was reliant only upon Trask not telling Encore it could purchase directly from Clear Touch's suppliers as the Order asserts. The

Order also claims that the jury found Trask liable for breach of contract accompanied by fraud due to his violation of the “business opportunity” clause in his Non-Disclosure and Non-Solicitation Agreement with Encore (the “Agreement”). (Order p. 27). Encore, however, did not rely solely upon Trask’s alleged breach of the business opportunity clause to establish its breach of contract with fraud claim. Rather, it relied upon the same actions underlying its breach of contract, trade secret misappropriation, and breach of fiduciary duties causes of action to establish liability under its breach of contract with fraud claim. (See Trial Trans. 113-25; Def. Supp. at 8-10). Therefore, neither Encore nor the Court can say the jury’s finding on this claim was specifically and only based upon Trask’s alleged breach of the Agreement’s “business opportunity” clause. The same is true for the remaining determinations concerning the factual basis for the jury’s verdicts scattered throughout the Order. (See *e.g.* Order pp. 10-11, 15, 26-27, 29-30).

These determinations are *post hoc* findings made to artificially segregate the factual basis for the verdicts at issue in order to conclude that Encore need not elect its remedies amongst these causes of action. In reality, Encore relied upon and presented the same overlapping facts to establish liability for these claims. The means employed by the Order to reach its end required it invade the province of the jury and act as a *post hoc* finder of fact in the absence of any legal authority allowing it to do so, without citation to evidence supporting its determinations, and by turning a blind eye to Encore’s presentation of its case at trial. Therefore, the conclusion that these claims relied upon specific and different facts for the jury imputing liability was in error and requires reversal or modification of the lower court’s holding on the election of remedies issue.

b. Order Relies Upon Erroneous Notion that Encore Presented Distinct Damages for each of the Claims Upon which the Court Awarded Damages in Order to Find Encore Can Recover Damages Under those Causes of Action

The Order's conclusion on the election issue also relies upon the erroneous notion that Encore presented and the jury awarded distinct damages for its breach of fiduciary duty, breach of contract, trade secret misappropriation, and breach of contract accompanied by fraud causes of action – the causes of action under which judgment was entered. The Order employs several inappropriate and flawed methods to reach this conclusion.

First, the Order intertwines and confuses the damages sought by Encore at trial under these claims to reach a faulty conclusion that Encore sought separate damages under each respective cause of action. (Order pp. 28-29). Encore did not seek its damages in this fashion at trial. Rather, at trial, Encore sought the “exact same” damages for Causes of Action II-VI. Stated differently, Encore told the jury it suffered and should be awarded the same damages for five of the six claims upon which they prevailed at trial. Encore took this approach because its claimed damages all arose out of the same actions and facts under each of these causes of action. For all of the causes of actions with identical damages, the election of remedies doctrine requires that Encore choose one cause of action under which it may recover those damages.

i. Cause of Action I - Breach of Duty of Loyalty

At trial, Encore told the jury it should award it the wages and costs in Table 1 of Plaintiff's Exhibit 10-H because Trask breached his duties of loyalty.

So, for the first cause of action, Breach of Duty of Loyalty, we're asking you to check the box A, for plaintiff, in the amount of – and we would ask for this 95 percent figure, \$318,365. That is the figure set forth in Plaintiff's Exhibit 10-I.

(Tr. Trans. 1099:18-23). This is the only cause of action in which Encore presented somewhat separate and distinct elements of damages to the jury.⁹

⁹ Encore did go on to suggest to the jury it could award the wages and costs from Table 1 under the breach of fiduciary duty claim as well.

The first element of damages you can consider are the wages Encore paid, the direct costs to Encore. These are set forth in Plaintiff's Exhibit 10-H....[T]he wages there include this \$318,000. It also

ii. Cause of Action II - Breach of Fiduciary Duty – Encore said it suffered the same damages for Causes of Action III-VI

Encore told the jury Mr. Trask breached his fiduciary duties by failing to (1) disclose the true identity of Clear Touch's suppliers; (2) tell Encore that he was building a reseller network for (Tr. Trans. 1102:6-21). Clear Touch; (3) work with Encore to take advantage of the Clear Touch opportunity; and (4) by making direct sales to Leon County.

First of all, an employee could breach it if the employee fails to fully disclose to the employer knowing information that is significant and material. We know that Mr. Trask did that with regard to the true suppliers of these products. We also know that he failed to disclose that he was out there building this resaler [*sic*] network and that Encore could have done the same thing. The second thing that the fiduciary duty requires is for the employee to work with the employer to take advantage of opportunities and to do things like develop that resaler [*sic*] market. Again, if you listen to the judge's charge, I believe you're going to hear the judge charge you something like this, an employee is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition to the employer. An employee is not permitted to assume two distinct and opposite characters in the same transaction, acting for himself and pretending to act for his employer.

(Tr. Trans. 1101:4-25; *See also* 109-13). Encore told the jury these actions were breaches of Trask's fiduciary duties which resulted in \$5.5M of damage in the form of (1) lost profits (a) on sales of panels purchased from Clear Touch (because it could have purchased directly from the suppliers if Trask disclosed their identity), (b) from Clear Touch's sales to Leon County, and (c) those generated by Clear Touch's other sales all totaling \$1,100,306; and (2) the lost Clear Touch business opportunity, something it claimed was worth over \$3.9M.

[T]he 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. And the position here is that Encore, if it had known, could have purchased directly from TSI Touch and CBTE [*sic*] at a lower price....Then they would have recognized that additional profit margin on those products....That's the first three categories in Table Number 2. Those categories total \$675,361. So if Mr. Trask had just told Encore who the true suppliers were and arranged, while he was an employee, and let Encore buy directly from them, that's how much additional profit Encore would have recognized. The second category are those bottom two lines, and those are the sales made to Leon County schools....[reflecting a] profit amount [of]

includes the 95 or 90 percent of the wages paid to Mr. Higginbotham and Gallant after they signed the non-disclosure agreement and 50 percent of the net expenses. In other words, so this element of damages just shows what Encore paid in out-of-pocket costs.

\$424,945....So this \$1.1 million figure of lost profit consists of the lost profits of not knowing and purchasing from the true suppliers and not making the sales to Leon County.

(Tr. Trans. 1103:1-1104:15).

...

[T]he third calculation, and this is the business opportunity calculation. This looks at what gives the – what would the value be to Encore if Mr. Trask had disclosed not just the suppliers and let them buy from Leon County, but what would the damages be if he had turned over the resaler [*sic*] network that he was building on Encore's dime and let Encore take advantage of that. There are actually two components of this. One is that, again, Mr. Trask was obligated to notify Encore of the opportunity and, second, he was obligated to work with Encore, but let them develop that opportunity, even if it was at their interests, instead of his, while he was an employee....[These calculations] consists of two components. One is just for – lost profits are the profits that Clear Touch made through the end of 2015, and that figure is 1,636,254. In other words, if Encore had been able to make the same sales that Clear Touch made through the end of 2015, that's the profit that Encore really made. And then at the end of 2015, what was Clear Touch worth? That's the business valuation....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.

(Tr. Trans. 1105:7-1106:14).

...

Encore sincerely believes if that Mr. Trask had honored his fiduciary duty to disclose the Clear Touch opportunity, Encore would have realized that \$5.5million value.

(Tr. Trans. 1108:1-7).

Mr. Trask's breaches of his fiduciary duties, Encore told the jury, caused it to suffer the damages reflected in Plaintiff's Exhibit 10-H (the entirety of the damages sought in this case) and asked it to award those damages.

So, let's jump back to the verdict form. Number 2, for Breach of Fiduciary Duty, we believe that you should find for the plaintiff and you should find for the amount of \$5.5 million based on this analysis.

(Tr. Trans. 1108:19-23). From that point forward, Encore did not separate, distinguish, or differentiate its claimed damages among the remaining causes of action. Rather, it relied upon the same actions it claimed made Trask liable for breach of his fiduciary duties to establish liability for every remaining cause of action and explicitly told the jury to put in the same damage figure as it did under the breach of fiduciary duty claim.

iii. Cause of Action III - Breach of Contract – Encore said these were the “same damage amount” as in Cause of Action II

Encore told the jury the damages it suffered for Mr. Trask's breaches of contract were the same it incurred for the breach of fiduciary duty claim.

We'd ask you to put the *same damage amount* as you put for the Breach of Fiduciary duty. *We think the damages resulting from both are the same.* And that makes it simple. (Tr. Trans. 111:16-19)(*emphasis added*).

Those same damages, Encore told the jury, arose from the same actions that made Trask liable for breaches of his fiduciary duties to the company.

[T]he third claim is for Breach of Contract...Mr. Trask breached his contract in five ways. First, on page 1, in the confidentiality provision, Mr. Trask had Encore's confidential information about two things: the true identity of the suppliers and the ability to build this resaler [*sic*] network for this – this product. He used Encore's confidential information in violation of this that says he won't use it for himself or disclosure to third parties. That's the first breach of contract we're claiming...

Let's look at the non-solicitation provision.... This is Leon County. Leon County was Encore's customer. Mr. Trask would not have been involved in making those sales to Leon County. That is the second breach of contract.

The third provision is the non-piracy provision on the contract....And he hired Mr. Gallant in breach of this. That's the third breach.¹⁰

The fourth breach is the business opportunity provision....He breached that. He didn't notify them either of the opportunity to buy from the suppliers or the opportunity to build a resaler [*sic*] network. Then, he's got to – and shall use his good faith efforts to cause the company to have the opportunity to explore, invest in, participate or otherwise become affiliated with the opportunity. He breached that. That's the fourth provision of contract.

The fifth provision is actually not written in the contract...[but is the] implied covenant of good faith and fair dealing. It means you've got to act in good faith and deal fairly with the party on the other side. Mr. Trask breached that.

(Tr. Trans. 1109:7-1111:23).

**iv. Cause of Action IV - Violation of S.C. Trade Secrets Act –
Encore said it suffered the “same damages” as Causes of Action
II & III**

Encore went on to tell the jury to award the same damages it awarded for the prior two claims for its trade secret misappropriation cause of action.

And again, we'd ask you to use the *same damages figure* for this claim that you used for the breach of fiduciary and breach of contract claim. (Tr. Trans. 1112:6-9)(*emphasis added*).

¹⁰ Hiring Mr. Gallant was never tied to any claimed damages.

As with the previous two causes of action, Encore relied on the same actions to establish liability under its trade secrets claim.

The fourth claim is Trade Secrets. Again, the trade secrets are two-fold. The trade secrets, Encore should have known who the suppliers were...And Leon County's desire to purchase these 900 panels was the second trade secret that Mr. Trask misappropriated along with Clear Touch. And again, we'd ask you to use the *same damages figure* for this claim that you used for the breach of fiduciary and breach of contract claim. (Tr. Trans. 1111:20-1112:9)(*emphasis added*).

v. Cause of Action V – Tortious Interference with Contract – Encore said this was the “same damages figure” as Causes of Action II-IV

Encore followed suit for its tortious interference claim against Clear Touch, not setting out any new factual basis for liability and instructing the jury to award the exact damage figure as it had for the causes of action II-IV.

The next cause of action is Tortious [*sic*] Interference....[W]hat we're saying is Clear Touch has the same responsibility for causing that contract to be breached that Mr. Trask had. We'd ask for you to check for the plaintiff and use the *same damage figure that you used in the prior three claims*. (Tr. Trans. 1112:16-25)(*emphasis added*).

vi. Cause of Action VI – Breach of Contract with Fraud – Encore said “same amounts” for damages as Causes of Action II-V

Encore maintained its approach for its Breach of Contract with Fraud claim, telling the jury to award the same actual damage amount it entered for causes of action II-V and noted this claim differed from the breach of contract action only in that it allowed consideration of punitive damages.

The next cause of action is Breach of Contract Accompanied by Fraudulent Act. This, again, applies to Mr. Trask. It says he breached the contract, but it wasn't just a regular breach, it was accompanied by fraudulent acts. And those are all the things I covered in the time line. And because of that, you are also able to consider punitive damages. We'd ask you to enter the *same amounts that you entered on every other one except for the first one*. (Tr. Trans. 1113:2-12)(*emphasis added*).

Encore's presentation of damages for causes of action II-VI was uniform and unequivocal. It asked the jury to award it \$5.5M under the breach of fiduciary duties claim and then said to give it the “same amount” or “same damages figure” for each cause of action II-VI. Plaintiff did not tell the jury that if it chose to award something less than the entire \$5.5M under the breach of

fiduciary duties claim then it could or should award any remaining portions of that total under the other causes of action. In fact, Encore explicitly told the jury the damages were not cumulative under each of the causes of action and said they should refrain from adding them together.

Now, let me say that you don't add all these together. In other words, if you were to award Encore the \$5.5 million for the value of the whole Clear Touch opportunity, that would include the lost profits and would include the wages. Now, the same could be true of the \$1.1 million and the \$488,000-figure. If you believe that all of these wages would be necessary to generate those profits, then you would just lower the lost profit figure. But if you don't believe all of these wages were appropriate, then you can add some wages to the \$1.1 million lost profit figure. (Tr. Trans. 1106:15-1107:2).

...

Let me say that each cause of action is separate. They are not added together. You need to view each cause of action as though it's there by itself. (Tr. Trans. 1109:3-6).

The trial court's jury charges made the same statement. (Tr. Trans. 1227:5-16).

vii. Encore's Economic Expert's Testimony at Trial

Furthermore, the Order's finding that Encore presented distinct damages at trial ignores its own economic expert's testimony and presentation of claimed damages summarized in the three tables in Plaintiff's Exhibit 10-H and the jury's use of that evidence to render the verdicts at issue. Specifically, Encore presented Plaintiff's Exhibit 10-H, entitled "Summary of Damages," with the three alternative damages charts put together by its economic expert, Michael Meilinger. (Plf. Exh. 10H; Tr. Trans. 527:21-529:24).

It is clear from the Verdict Form that the jury used actual damages from Tables 1 and 2 of Mr. Meilinger's report reflected in Plaintiff's Exhibit 10-H in awarding damages. For the first cause of action, Breach of Duty of Loyalty, the jury awarded what is indisputably a percentage of the number Meilinger set forth in Table 1 – Direct Costs Incurred by Encore - reflecting percentages of Trask's, Gallant's, and Higginbotham's compensation. (Verdict Form at 1; Plf. Exh.

10H).¹¹ There is no dispute that the Breach of Duty of Loyalty damage figure had to come from Table 1. *Id.* For the second cause of action, Breach of Fiduciary Duty, the jury awarded the Direct Damages on Products Sold to Encore from Clear Touch from 2/13/13 - 10/10/2015, directly from Table 2, totaling \$675,361. (Verdict Form at 2; Plf. Exh. 10H). For the third, fourth, and fifth causes of action, the actual damages awarded were identical and came directly from Table 2 - the Lost Profit on Sales Made to Leon County Schools from 4/26/14 through 10/10/15, totaling \$424,945. (Verdict Form at 3-5; Plf. 10H). The actual damages the jury awarded in the sixth cause of action, Breach of Contract with Fraud, were the sum of all the actual damages awarded in causes of action one, two, and three, for a total of \$1,476,039.40.¹² (Verdict Form at 6). Meilinger's testimony was clear that if the jury awarded the damages in Table 2, they could not award those in Table 1. (Tr. Trans. 527:21-529:24).¹³ Consequently, the total actual damages the jury awarded without duplication or windfall was \$1,100,306.¹⁴

Notwithstanding the election of cause of action six, the actual damages within cause of action six are also duplicative. Because the jury added damages from Table 1 to the total from Table 2, which Meilinger testified precluded the award of damages from Table 1, the actual damages for cause of action six should have been reduced to \$1,100,306. Also, as a practical matter, Encore's recovery of the damages from Table 2 – Lost Profits on Sales by Clear Touch to Encore and Leon County – would necessarily preclude recovery of the expenses incurred to

¹¹ As they were instructed by the Court, the jury considered the evidence and apportioned what it believed was an appropriate percentage to the figures in Table 1 which was somewhat less than the 95%, 90%, and 95% claimed by Encore.

¹² \$375,733.40 (breach loyalty) + \$675,361 (breach fiduciary) + \$424,945 (causes of action III-V) = \$1,476,039.40

¹³ Likewise, if the jury had awarded damages from Table 3, then it would be precluded from awarding those in Tables 1 and 2, according to Plaintiff's expert. This jury, however, did not award damages from Table 3.

¹⁴ 1,476,039.40 (Breach Contract with Fraud) - \$375,733.40 (Breach loyalty – precluded by award of Table 2 damages) = \$1,100,306

generate those sales which were Trask's, Gallant's, and Higginbotham's pay and expenses reflected in Table 1 (and reduced by the jury's apportionment determination). Therefore, recovery of the lost profits (Table 2) precludes Encore's recovery of the wages and expenses in Table 1. To allow both would result in a double recovery, with Encore getting profits from sales without incurring the expense it claims was necessary to make them.

Encore's Breach of Contract with Fraud cause of action arose out of the same actions and occurrences underlying the other claims upon which the Plaintiff prevailed at trial; a fact reflected by the jury adding together the damage awards from those causes of action to arrive at its actual damages figure for the sixth cause of action. Thus, the damages awarded under that claim are the entirety of those available to the Plaintiff, and allowing it to recoup any others, results in duplicative recovery. Therefore, Plaintiff must elect a remedy that awards it no more than \$1,100,306 in actual damages and \$2,000,000 in punitive damages.

Post-trial, Encore attempted to divorce itself from the manner in which it presented its case to the jury and recover under multiple causes of action against each Defendant. Liability under those claims were based upon the same facts and "simply represent[ed] alternative theories of recovery for the same injury." *Uhlig v. Shirley*, 2012 WL 2890178 at *3 (D.S.C. 2012) ("Although the causes of action asserted by Uhlig in this case have differences in the elements required to prevail on each cause of action, there is an overlap in the evidence and factual bases on which Uhlig relied to prove Defendants' liability as to each cause of action. Accordingly, the court finds that it is appropriate to require Uhlig to make an election of remedies.")¹⁵ Therefore, Encore

¹⁵ The *Uhlig* court was faced with a jury verdict against a former employee and his company for misappropriation of trade secrets, breach of an employment agreement, tortious interference with an employment agreement, breach of fiduciary duty, aiding and abetting the breach of fiduciary duty, and tortious interference with prospective contracts. The jury was required to provide an amount for each cause of action and awarded various sums for each, ranging from \$250,000 to \$1.5M. The District Court held that plaintiff could recover for trade secret misappropriation and tortious interference with prospective contracts because at trial Plaintiff presented evidence which distinguished those claims from the others and allowed independent recovery under those causes of action, but it had to elect its remedy from the

should not have been able to escape application of the election of remedies doctrine due to the manner in which it presented its case to the jury and should have been required to decide which one of the causes of action II-VI it wished to recover its damages. The Order's finding otherwise was in error.

Second, the Order reaches its conclusion on the election issue by trivializing Defendants' position that Encore's claims under causes of action I-VI simply represent alternative theories of recovery for the same injury, stating that "Encore's attorneys never contended liability or damages under Causes of Action II-VI were based on a single fact, a single injury, or single damage." (Order p. 31).¹⁶ This ignores the fact that at trial the Plaintiff sought the "same amount" and "same damage figure" for causes of action II-VI and relied upon the same set of facts to establish liability across those various claims. This was the basis for Defendants' position that Encore presented alternative theories of recovery for the same injury, and not that its damages under these causes of action were based upon a "single fact, a single injury, or single damage" as the Order inaccurately states in its effort to ignore the manner in which Encore presented its case at trial.

Third, the Order assumes Defendants' position on this issue is reliant upon the jury being bound by Encore's attorney's arguments at trial. (Order p. 31) ("Defendants' argument assumes the jury was bound by Encore's attorneys' arguments, but it was not."). Defendants' argument

remaining claims. It explained the plaintiff had submitted trade secrets that were separately categorized from information that was merely confidential, and found the common law claim for tortious interference was not cumulative of any other claim made by the plaintiff. On the other hand, the Court concluded the remaining claims were based on the same facts and "simply represent alternative theories of recovery for the same injury." Uhlig, 2012 WL 2890178 at *4. As such, the same evidence supported each of these claims, and consequently, the plaintiff had to elect amongst these claims, thereby reducing its recovery.

¹⁶ At trial, Encore told the jury the actions constituting breaches of Trask's fiduciary duties resulted in \$5.5M of damage to it in the form of (1) lost profits (a) on sales of panels purchased from Clear Touch (because it could have purchased directly from the suppliers if Trask disclosed their identity); (b) from Clear Touch's sales to Leon County; and (c) those generated by Clear Touch's other sales all totaling \$1,100,306 and (2) the lost Clear Touch business opportunity; something it claimed was worth over \$3.9M. (See Def. Supp. Post Trial Filings pp. 7-8).

neither assumed nor relied upon the jury having to accept Encore's counsel's arguments. Rather, Defendants utilized the transcript of Encore's closing statement as evidence of how it presented its damages to the jury. That transcript shows that Encore sought the "same damages" or "exact same damages figure" for causes of action II-VI during trial.

Fourth, the Order's position that the damages awarded were not duplicative ignores the objective evidence that the jury's actual damages award of \$1,476,039.40 under the breach of contract accompanied by fraud claim is the exact sum total of its actual damage awards from causes of action I-IV down to the exact cent: \$375,733.40 (breach loyalty) + \$675,361 (breach fiduciary) + \$424,945 (causes of action III-V) = \$1,476,039.40.

Finally, the Order again inappropriately delves into the jurors' minds, claiming that they "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." (Order p. 30). The jury's intent is not "clear," as the Order portends and the trial court making such a finding inappropriate. Relying upon such that finding to support a holding on this seminal issue was in error and warrants reversal or modification.

c. The Order Relies Upon an Overly Narrow View and Application of the Election of Remedies Doctrine to Allow Encore to Recover Duplicative Damages

The Order's holding on this issue also relies upon an overly narrow application of the election of remedies doctrine without regard to its purpose – the prevention of duplicative recovery. The trial court reasoned that the doctrine did not apply to the breach of fiduciary duty, breach of contract with fraud, and trade secret claims because "Encore never contended that liability or damages under Causes of Action II-VI were based on a single fact, a single injury, or single damage." (Order p. 31). Under this approach, the election of remedies doctrine would only

apply in cases where a single fact established liability for one cause of action and resulted in the same injury.¹⁷ Such a stringently simplistic view of the doctrine ignores its purpose and prevents its application where it is needed most – complicated cases with multiple causes of action where the available damages are the same amongst numerous claims but can be awarded under alternative theories of liability. The matter at hand is one of those cases, and the Order’s requirement that liability under each cause of action must flow from a single fact resulting in a single harm for the doctrine to apply unduly restricts its use and thwarts its purpose of preventing duplicative recovery.

Yet, both the Court and Encore recognize that the election doctrine applies to the breach of contract, trade secrets misappropriation, and tortious interference claims where the jury awarded the same actual damages of \$424,945 for each. (Order p. 25-26). Both concede this point despite the fact that liability under the breach of contract claims and the TSA cause of action may be based upon different facts – liability for violating the TSA could be based upon Trask’s and/or Clear Touch’s alleged misappropriation and use of Encore’s claimed trade secret information to sell directly to Leon County whereas the jury’s breach of contract verdicts could rest upon him and/or Clear Touch merely selling panels directly to Leon County without the use of Encore’s trade secret information. The doctrine applies to those claims because the resulting harm was the same without regard to whether the facts underlying the respective claims were identical. The Order’s treatment of the claims upon which it entered judgment (and found Encore need not elect its remedies) puts the additional and overly burdensome requirement that liability under those causes of action must be based upon the same facts for the election doctrine to apply. That is a phantom requirement

¹⁷The Order relies upon distinguishable case law in the *GTR Rental, LLC v. DalCannon* case to summarily deem this case similar and unfit for application of the election doctrine because “the complex series of transactions undertaken by Defendants does not comprise a single wrong that would give rise but to one cause of action.” (Order p. 28 citing 547 F. Supp. 2d 510, 515 (D.S.C. 2008)). The Order offers no explanation or analysis demonstrating *GTR*’s applicability to the circumstances of this case and merely relies upon the general quotation in an effort to lend credence to its inaccurate position that the election doctrine only applies when liability stems from a single wrong that would give rise to only one cause of action.

and cannot serve to prevent application of the doctrine if necessary, to prevent duplicative recovery. Here, as argued and noted above, it is necessary to have Encore elect its remedies among causes of action II-VI because everything the jury awarded in actual damages is encompassed in the breach of contract with fraud verdict.

3. The Order is Reliant Upon Mischaracterization and Misunderstanding of Defendants' Arguments

The Order begins its treatment of the election issue by misconstruing Defendants' arguments on it, claiming that they contended "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.'" (Order p. 25). Defendants' argument was not so narrow. Rather, they argued Encore relied upon the same set of facts to establish liability for causes of action II-VI and it sought the same damages under those claims – explicitly instructing the jury to award the "exact same" damages for those causes of action. (*See supra*. pgs. 32-39). Defendants also argued that election was necessary because the facts relied upon to establish liability for breach of contract with fraud were encompassed in Encore's breach of contract, tortious interference, TSA, and breach of fiduciary duty claims, (*See* Def. Post-Trial Mot. at 1-4). The Order misapprehends and greatly overly simplifies Defendants' position. While misapprehension of an argument may be inconsequential in some cases, it was impactful in this one. The over simplification of Defendants' argument made it much easier to dismiss because it was reduced to a weaker and more narrow position. The Order's findings erroneously rely upon rejection of this hobbled position and therefore warrant reversal or modification to ensure appropriate application of the doctrine in light of the parties' actual positions and facts and circumstances of the case.

In sum, the Order ignores the objective evidence showing the manner in which Encore presented its case at trial, inappropriately delves into the minds of the jurors to make findings as

to the particular factual basis for their verdicts on the claims upon which it entered judgment, relies upon the erroneous notion that Encore presented separate and distinct damages for each of these causes of action, and takes an overly narrow view of the election doctrine's applicability. Any one of these maladies warrants reversal or modification; and certainly, when taken together, call for it.

B. DENYING DEFENDANTS' MOTION FOR NEW TRIAL ABSOLUTE WAS IN ERR

1. Standard of Review

The grant or denial of a new trial motion rests within the discretion of the trial judge and the decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. *Norton v. Norfolk S. Ry.*, 350 S.C. 473, 567 S.E.2d 851 (2002); *Youmans ex rel. Estate of Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008). Therefore, an appellate court is limited on appeal to evaluating whether evidence supports the trial court's decision. *Youmans*, 380 S.C. 263, 670 S.E.2d 1. In reviewing the denial of a motion for a new trial, the reviewing court must consider the testimony and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). Where the evidence conflicts, the reviewing court will not disturb the trial judge's decision to grant a new trial. *Norton*, 350 S.C. at 473, 567 S.E.2d at 851.

The Order erroneously found that Defendants were not prejudiced by the presentation of Michael Knight's computer search testimony and submission of Table 3 at trial, and therefore were not entitled to a new trial absolute. (Order p. 17). Admission of Table 3 damages was controlled by an error of law and amounted to an abuse of the trial court's discretion. Likewise, Michael Knight's ambush testimony resulted in undue prejudice to the Defendants and the lower court's

finding otherwise was reliance upon a misapprehension and mischaracterization of Defendants' argument in support of their Motion for a New Trial Absolute.

2. Submission of Table 3 to the Jury Caused Undue Prejudice to Defendants

As noted above, Table 3, entitled "Damages Related to Loss of Business Opportunity" was allowed to be submitted to the jury as an element of Encore's claimed damages at trial reflecting an alleged damage amount of over \$5.5M. (Plf. Exh. 10H). Encore's economic expert, Michael Meilinger, testified before the jury concerning the calculation in Table 3, told them it was recoverable, and submitted the exhibit as an accurate reflection of his calculations. (Tr. Trans. 509:5-13, 511-29). The trial court's allowance of this testimony and submission of Table 3 was an abuse of its discretion which prejudiced the Defendants and warranted a new trial. The Final Order, however, erroneously concluded otherwise.

The trial court has a gatekeeping duty to ensure expert testimony is necessary for resolution of a factual issue, the expert is qualified, and "[f]inally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Watson*, 389 S.C. at 446. The Fourth Circuit has identified that "'court[s] must recognize that due to the difficulty of evaluating their testimony, expert witnesses have the potential to be both powerful and quite misleading.' Regardless, 'the proponent of the [expert] testimony must establish its admissibility by a preponderance of proof.'" *Shameka Green, Plaintiff, v. The Bradley Co. & HMU, LLC, Defendants. The Bradley Co., Third-Party Plaintiff*, No. 3:15-CV-02581-JMC, 2017 WL 4012298, at *4 (D.S.C. Sept. 12, 2017) (citations omitted). The lower court failed to fulfill its gatekeeping duties at trial. It allowed Meilinger to testify concerning the calculations in Table 3 and Encore to admit it all in front of the jury before deciding whether it was admissible. (Tr. Trans. 509:5-13; 511-29). Ultimately, the lower court decided it was not going to preclude Table 3 not based upon the Rules of Evidence or

applicable law controlling what Encore could recover under its claims, but because it found out Clear Touch had generated approximately \$22M in gross revenues one year. (Trans. 11.17.17 at 54:5-10). Admission of this evidence gave the jury an artificially inflated perception of what Encore could recover by millions of dollars and unquestionably prejudiced Defendants as a result. That, Defendants contended, warranted a new trial, and the Order's denial of that motion was in error.

Defendants' objected to admission of Table 3 on numerous grounds, both prior to and during trial, including because it was largely speculative, based on grandiose assumptions that Encore would directly source panels (alter its VAR business model to become a supplier for a product making up less than 5% of its business), and lacked verifiable factual basis.¹⁸ (See Def. Mot. Limine; Tr. Trans. 502-503). Those grounds alone, Defendants contended, warranted its exclusion. The seminal objection at trial concerning Table 3 was that it contained duplicative damages; the recovery of one which should preclude the recovery of the other, and thus gave an inflated perception of Encore's recoverable damages. (Tr. Trans. 511-29, 583-87).

At trial, the Court allowed Meilinger to testify concerning Table 3 before the jury and admitted it into evidence subject to Defendants' objections. (Tr. Trans. 509-29). Then, with the jury no longer present, the Court questioned Meilinger, addressing the seminal issue with Table 3

¹⁸ See Def. Mot. in Limine at 6 - In a number of cases around the country, courts have excluded economic and/or damages expert testimony when the underlying facts and data do not support the expert's conclusions. See, e.g., *Target Market Pub., Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1142-45, 48 Fed. R. Evid. Serv. 1109 (7th Cir. 1998) (expert testimony of lost profits excluded because conclusion was based on assumption that company would have penetrated certain markets); *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21-22, 43 Fed. R. Evid. Serv. 521 (2d Cir. 1996) (damages testimony should have been excluded at trial level because the facts relied on by the expert did not support the conclusions and were therefore "speculative assumptions"); *Otis v. Doctor's Associates, Inc.*, 1998 WL 673595 (N.D. Ill. 1998) (damages expert testimony excluded because the expert based lost profits calculations on speculation and mere assumptions); *Sun Ins. Marketing Network, Inc. v. AIG Life Ins. Co.*, 254 F. Supp. 2d 1239 (M.D. Fla. 2003) (business valuation testimony of a forensic accountant excluded in part because the opinion was based on assumptions not supported by objective facts).

– it was telling the jury that Encore could recover duplicative damages in the form of Clear Touch’s normalized profits and the value of the business. (Tr. Trans. 583-87). At that point, however, the testimony was already heard by the jury and Table 3 submitted. Ultimately, the trial court allowed submission of Table 3 to the jury and it was the centerpiece of Encore’s closing argument, with the Plaintiff telling the jury it should award \$5.5M in actual damages. (See Tr. Trans. 1108-1113).

Defendants’ primary issues with submission of Table 3 at trial were that it contained duplicative damages and was an attempt to have the jury award Encore all of Clear Touch’s profits through 2015 and “the value of the Clear Touch opportunity.” In other words, it sought to make Clear Touch a company that never made any profit and then have it pay \$3.9M for its value. (See Tr. Trans. 583-87). Nothing in the Order rectifies those issues or supports the conclusion that Defendants suffered no prejudice by the admission of Table 3. Further, the Order’s conclusion that admission of Table 3 did not prejudice the Defendants relies upon irrelevant facts and arguments, none of which support that finding.

a. The Fact the Jury Awarded Less than \$5.5M is Irrelevant to whether Defendants’ were Prejudiced by Admission of Table 3

First, the Order claims that Defendants were not prejudiced by admission of Table 3 because the jury awarded less than all the damages reflected in it. (Order p. 21). This misses the point and has no bearing on whether or not admission of this evidence prejudiced the Defendants. Whether the jury awarded some, all, or none of the damages in Table 3 is of no consequence. Defendants contended its admission resulted in a prejudicial alteration of the jury’s understanding and view of Encore’s recoverable damages by setting an artificially high ceiling. This was especially prejudicial because that artificially inflated damages amount was conveyed through the testimony of and an exhibit prepared by Encore’s economic expert. See *Watson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E.2d 169, 176 (2010) (“Trial courts should be cautious in conferring

an expert label upon a witness because juries may accord excessive or undue weight to ‘expert’ testimony.”). That prejudicial impact was suffered when Meilinger was allowed to testify and present Table 3 to the jury and long before final damage awards were determined in the jury room. Therefore, if and how much the jury may have awarded from Table 3 has no bearing on the existence of the prejudice Defendants contend its admission caused.

Recognizing this unassailable truism, the Order attempts to salvage its argument by saying the figure in Table 3 was significantly lower than the \$10M valuation contained in a Clear Touch offering memorandum. (Order p. 21). In isolation, this statement is true. However, context provided by undisputed trial testimony makes it irrelevant to the issue. Trask testified at trial that the \$10M offering memorandum figure was based on nothing more than the amount of money he sought to raise by offering shares of the company, and it was not a valuation of Clear Touch as a business. (Tr. Trans. 791-93). Thus, the Order’s attempt to portray the figures in Table 3 as conservative by comparing them to an aspirational figure within an offering memo does not succeed in that endeavor. Such an apples to asteroids comparison serves no meaningful purpose and fails to support the finding that admission of Table 3 did not prejudice the Defendants.

b. The Trial Court Admitted the Evidence Because of Clear Touch’s Revenues

Most egregiously was the admitted basis for the lower court’s admission of this evidence. During post-trial arguments the Court admitted it allowed submission of Encore’s claimed damages, notably Table 3, because it heard that Clear Touch grossed a large amount of money in one year:

THE COURT: And, quite frankly, I was of the opinion I wasn’t going to let it in. And then I heard that Clear Touch grossed over \$22 million in one year. You know, that’s not appropriate for them to go out there taking their business and making that kind of money. So I let it come in, rightfully or wrongfully.

(Trans. 11.17.17 p. 54:5-10). The trial court recognized during trial that submission of Table 3 was allowing Encore to put duplicative, and thus unrecoverable damage evidence before the jury. (Tr. Trans. 583-87). It then plainly admitted it allowed submission of that evidence based upon Clear Touch's gross revenues, rather than the Rules of Evidence and other controlling law as to what Encore could recover under its claims. (Trans. 11.17.17 p. 54:5-10). This was an abuse of the trial court's discretion and a failure of its gatekeeping function, which is imperative to ensure that testimony and evidence is only allowed to be heard by or submitted to the jury which has a probative value outweighing any prejudice it may cause. SCRE 403. This is especially important when assessing whether to admit expert testimony or evidence, as our Courts have recognized such testimony or evidence can be rather powerful. *See Watson*, 389 S.C. at 449. Admission of any evidence must be controlled by the Rules of Evidence and laws of this State, and not a business's revenue and the trial court's personal view that it amounts to some fundamental unfairness. The former has no bearing on admissibility of evidence at trial and the lower court's decision ran afoul of the latter.

3. Knight Testimony Claiming Trask Destroyed Evidence Prejudiced Defendants

Encore called its Chief Technology Officer, Michael Knight, as a witness at trial. During his direct exam, Encore elicited testimony from Knight concerning a computer search he performed approximately two weeks before trial, which was done, according to him, to verify and show that Trask deleted emails from his Encore account. (Tr. Trans. 617-32). This was part of Encore's efforts to accuse Trask of destroying incriminating evidence and obtain a spoliation charge. The issue, however, was that Encore never informed Defendants of this email search and chose to ambush them with live testimony in front of the jury at trial. At this point, Defendants had exhausted all available discovery tools to find out what information and evidence Encore had

to support its accusations of document destruction. Clear Touch had requested Encore specify all evidence it had of alleged document destruction by Trask in its written discovery requests and again addressed the same issue with Plaintiff's 30(b)(6) deponent. Despite that, Encore ignored its obligations to inform its opponent of Knight's search and planned to reveal it before the jury when nothing could be done to prepare for nor address it in any manner, much less a meaningful one. The trial court allowed the testimony, but refused to give the jury a spoliation charge. (Tr. Trans.650-60; 987:18-988:5; 1169-1228). Defendants post-trial Motion for New Trial Absolute was based, in part, on admission of this prejudicial testimony. (See Def. Post-Trial Mot.at 5-14). The Order attempted to downplay the significance of Knight's testimony and excuse Encore's withholding of evidence.

The Order misapprehends and mischaracterizes Defendants' arguments related to Michael Knight's testimony. The Order's finding relies upon an overgeneralization of Defendants' argument on this issue by claiming they sought a new trial absolute due to "Encore's presentation of evidence that Mr. Trask destroyed one category of e-mails..." (Order p. 18, 20). Defendants' argument was not so simple, and the Order's characterization and treatment of it sweeps the details under the rug to portray a much more innocuous situation. This more mundane factual scenario it finds did not result in any prejudice to the Defendants.¹⁹

The Order claims that Defendants were not prejudiced by Knight's testimony because they "were on notice that Encore would introduce evidence of Trask's deletion of e-mails from Encore's servers" and "cannot reasonably assert they were surprised by testimony that Trask destroyed emails." (Order. p. 18). That is not the argument Defendants' made in support of their motion for

¹⁹ As an initial matter, this portion of the Order (as with others) contains statements that Trask admitted he destroyed evidence or imply such an admission was made. (Order pp. 17, 18, 25). Trask did not admit to destroying e-mails or any other evidence, and the Order's statements otherwise are simply inaccurate.

a new trial absolute. Rather, their argument was much more detailed and focused upon the specific actions and testimony of Encore leading up to Knight's trial testimony. (*See* Def. Post-Trial Mot. at 5-12). The Order attempts to dismantle Defendants' arguments concerning Encore's actions leading up to Knight's testimony by mischaracterizing the basis for its position.

The Order begins that campaign by accusing Defendants of mischaracterizing Encore 30(b)(6) deponent, Todd Newnam's, testimony responding to questions about what evidence the company had that Trask deleted emails. (Order pp. 18-19). That accusation is ironically dependent upon the Order's mischaracterization of that very same testimony. Specifically, the Order states that Defendant's argued "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." (Order p. 18). The Order then utilizes small snippets of Newnam's testimony to validate its position.²⁰ Defendants' post-trial submissions, however, cited to the complete deposition testimony, which accurately reflected Encore's 30(b)(6) sworn statements when asked what evidence it had that Trask destroyed emails. (Def. Post-Trial Mot. at 6-7). Full citation of Encore's 30(b)(6) testimony showed that the snippets relied upon in the Order was based upon Newnam's "belief," given that he had to subpoena some third parties to get information/documents and he thought there should be more documents produced. No actual evidence of an internal computer search verifying the claim was ever produced. (Def. Post-Trial Mot. at 6-7). It is axiomatic that full citation of the testimony at issue provides the accurate reflection of what was said. Therefore,

²⁰ "Mr. Newnam never said he had 'no evidence' and in fact referred to the evidence he 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.'" (Order pp. 18-19). Defendants also note that the Court has no basis to make this finding regarding what Newnam testified to in his deposition without at least some citation to that testimony. There being none outside incomplete and non-contextual snippets, makes this finding inappropriate.

the Order's argument that Newnam's 30(b)(6) testimony put Defendants on notice that Encore planned to present Knight's computer search testimony at trial necessarily fails and cannot support the finding that Defendants suffered no prejudice being ambushed with this testimony for the first time at trial.

The Order's next attempt to alleviate Encore of responsibility for not disclosing the computer search prior to trial also fails. The Order attempts to excuse Encore's actions by claiming Knight's testimony was offered to lay a foundation for admission of Plaintiff's Exhibit 84, which was a collection of emails it claimed Trask deleted and which were provided to Defendants "well before trial." (Order p. 19).²¹ Plaintiff's Exhibit 84 was not admitted into evidence at trial and therefore Knight's testimony about his computer searches was not offered to establish foundation for admission of that exhibit. Rather, the true intent and purpose of this testimony was to ambush Defendants at trial with new testimony/evidence it had never heard and had no way of meaningfully examining or challenging.

Finally, the Order goes on to claim that Defendants' argument concerning the Knight testimony "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." (Order p. 20). Defendants never made this argument. Rather, Defendants contended that Encore was obligated to come forward with its evidence that Trask deleted emails prior to trial under the Rules and in light of the events leading up to Knight's trial testimony. Rule 26(e) requires a party supplement its responses to interrogatories and requests for production up to the time of trial if they acquire additional responsive information following service of their initial response, stating that:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include

²¹ The emails in Plaintiff's Exhibit 84 labeled in its Trial Exhibit List as "Emails Sent to Keone Trask at Encore" were produced on May 31, 2017 and September 19, 2017. The trial began September 25, 2017.

information thereafter acquired, except that requests for discovery under Rules, 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, *shall* be promptly transmitted to the other party.

S.C. R. Civ. P. 26(e). Defendants' First Set of Interrogatories asked Encore to "[s]et forth with specificity all facts and evidence Plaintiff has to support the allegations of Paragraph 33 of the Complaint which allege Trask accessed 'Encore's computer system without or in excess of authorization,' and 'destroy[ed] Encore property, software, and files.' Specifically identify each and every item of "Encore property, software, and file' Plaintiff claims Trask destroyed." (Plf's Resp. to Def. First Interrs. #21). Encore replied with an objection and stated that "in February or March 2016, former Encore employee Jimmy Higginbotham reported to Encore that Mr. Trask accessed and used Encore's property, software, and files, and Mr. Trask has admitted such use of Encore's resources" and then directed Defendants to "see documents produced in response" to their production requests. *Id.* Encore supplemented its responses after its initial production but this response was unchanged. Rule 26(e) required Encore notify Defendants of Knight's computer search prior to trial because it was information directly responsive to Defendants' Interrogatory #21. Encore failed to abide by its obligations under the Rule and therefore should not have been able to present Knight's computer search testimony at trial.

Encore's failure to disclose Knight's computer search before he took the stand is the basis for Defendant's Motion for New Trial Absolute. To allow a party to ignore its clear obligations under the Rules and condone this type of behavior incentivizes gamesmanship and the strategic withholding of evidence rather than full and fair disclosure. It creates a system antithetical to the purpose of the Rules and the use of civil litigation as a forum for the fair resolution of disputes. The Order disregards and misapprehends that argument and the evidence upon which it rests.

The Order goes on to claim that the Defendants were not prejudiced by Knight's computer search testimony because Plaintiff's Exhibit 84 was not admitted into evidence and "there was significant evidence presented at trial which demonstrated that Trask destroyed emails." (Order p. 20). First, Defendants never contended Plaintiff's Exhibit 84 prejudiced them, making its non-admission into evidence inconsequential. Second, the latter statement that significant evidence was presented at trial showing Trask destroyed emails is made without citation and contradicted by the undisputed fact that the Court refused to include a spoliation charge in the jury instructions. (Tr. Trans. 987:18-988:5; 1169-1228). Thus, neither of these grounds supports the conclusion that Defendants suffered no prejudice from Knight's testimony.

Finally, the Order goes on to misconstrue Defendants' recognition that "Plaintiff had ample evidence to attempt and prove its case as to all its claims, including those with elements of willful or wanton behavior with such things as the Amy Andrews and Kathy Cruse emails" to include something they have vehemently denied from the beginning – evidence Trask deleted emails. (Order pp. 20-21). The quote cited is in no way referencing, inclusive of, or admitting Trask deleted emails or destroyed evidence. The point being made was that Encore's conduct related to the Knight testimony was not only unjust and inappropriate but even more offensive given how unnecessary it was to litigate the actual merits of the claims at issue.

Each one of the Order's four sentences in conclusion on this issue is problematic and offers no support for the finding that Knight's testimony was not prejudicial. First, the claim no prejudice resulted from Knight's testimony because "Trask knew he deleted these emails" is circular reasoning that fails to support anything. (Order p. 21). Second, the statement that the Court allowed Defendants to delay putting Trask on the stand to testify is inaccurate and, even if true, irrelevant to resolution of the issue at hand. Third, noting that "Trask did not deny that he deleted

these emails” on the witness stand requires acceptance of the absurd notion that the absence of a denial amounts to admission. *Id.* Finally, the Order caps its treatment of this issue by inappropriately deeming Knight’s testimony “truthful evidence” whose admission cannot constitute legal prejudice. *Id.*

The presentation of Knight’s computer search testimony at trial in light of Encore’s actions and shirking of its obligations leading up to it were the basis for Defendants’ Motion for a New Trial Absolute, and the Order does not provide accurate or appropriate grounds for finding it did not prejudice the Defendants and denying their motion.

Therefore, Defendants contend it was in error to conclude that admission of the Knight computer search testimony and Table 3 did not result in prejudice to the Defendants and deny their motion for a new trial absolute.

C. DENIAL OF DEFENDANTS’ MOTION FOR RELIEF FROM JUDGMENT WAS IN ERROR

1. Standard of Review

“The power to open, modify or vacate a judgment is possessed solely by the court that rendered the judgment.” *Coleman v. Dunlap*, 306 S.C. 491, 413 S.E.2d 15 (1992). Therefore, motions for relief under Rule 60(b) are within the trial court’s discretion, and the appellate court will not reverse the trial court absent an abuse of discretion. *BB&T v. Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006).

2. The Trial Court Abused its Discretion in Denying Defendant’s Motion for Relief Due to the Fraud Perpetrated

SCRPC 60(b) allows the court to grant a party relief from a final judgment “for the following reasons: (1) mistake, inadvertence, *surprise*, or excusable neglect...[or due to] (3) *fraud*,

*misrepresentation, or other misconduct of an adverse party.” (emphasis added).*²² For the reasons detailed above concerning Plaintiff’s actions related to the Knight testimony, Defendants respectfully move this Court pursuant to SCRCP 60(b) to grant them relief from the final judgment. Plaintiff’s actions as detailed above resulted in prejudicial surprise at trial and constitute fraud, misrepresentation, and/or misconduct warranting the Court granting Defendants relief from the judgment pursuant to SCRCP 60(b).²³

Fraud upon the court is a narrow and invidious species of fraud that subverts the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. *Perry v. Heirs of Law of Gadsden*, 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003). The court grants relief for extrinsic but not intrinsic fraud on the theory that intrinsic deceptions should be discovered during the litigation itself, and to permit such relief would undermine the stability of all judgments; the essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud. *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009). For purposes of requirement that fraud must be extrinsic to support granting relief from judgment on basis of fraud, fraud is “extrinsic” when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007).

Defendants contend that their Motion for Relief from Judgment under Rule 60(b) was denied in error because the law and alleged facts relied upon in the Order contradict the Court’s

²² SCRCP 60(b) allows the Court to provide Defendants relief from the judgment in a form other than by new trial as argued for under Rule 59; empowering it to provide alternative relief in the form it deems appropriate.

²³ The term “fraud” is one utilized by the Rule and the case law cited. It is not one Defendants necessarily wished to utilize however it is how the courts have characterized actions warranting relief under SCRCP 60(b).

holding. Neither the case law cited nor the factual grounds articulated in the Order support its holding on this issue and amount to an abuse of the trial court's discretion warranting reversal. (Order p. 24-25).²⁴

First, the Order summarily concludes Encore did not engage in any fraudulent conduct, without explanation or supporting citation. (Order p. 24). It goes on to hold that even if Defendants were surprised by Knight's testimony, "a party may not prevail under Rule 60(b)(3), SCRPC, 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." (Order p. 25). The Order cites to *Raby Constr., LLP v. Orr*, and *Bowman v. Bowman* to support that statement; however, neither of those cases stand for that particular proposition. In *Orr*, the Court held that a Rule 60(b)(3) movant could not prevail where a party was "on notice" of the relevant issue. 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004). Here, Defendants knew about Encore's accusations and belief that Trask destroyed emails and other evidence, but were not aware of Knight's computer search. In *Bowman v. Bowman*, the Court denied a Rule 60(b)(3) motion and referred 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." 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004). Here, Encore's actions made it impossible for Defendants to discover the evidence at issue prior to trial. Defendants availed themselves of all the discovery tools available prior to trial, including taking 30(b)(6) depositions in which the issue of what evidence Encore had that Trask destroyed evidence was squarely addressed, and specifically requesting Plaintiff provide all "facts and evidence" of Trask's alleged document destruction in

²⁴ The Order references its basis for denying Defendants' Motion for New Trial as those supporting its findings that Encore did not perpetrate a fraud on the Court nor were Defendants surprised by Knight's testimony. (Order pp. 24-25). Defendants have addressed those arguments above.

their Interrogatories. The only way for Defendants to have known of Knight's computer searches was by Encore disclosing that information.

The remaining factual bases for the Court's denial of Defendants' Rule 60(b) Motion do not fare any better. The Order again inaccurately claims Trask admitted to deleting emails. (Order p. 25). It goes on to argue that because Encore repeatedly accused Trask of deleting emails and "provided other evidence that substantiated" those allegations, Defendants' Rule 60(b) motion should be denied. (Order p. 25). Making repeated accusations has no bearing on the issue and should not serve to defeat Defendants' motion. Further, the Order's conclusory statement that Encore provided "substantiating evidence" lacks citation to or mention of any specific evidence supporting it and is contradicted by the undisputed fact that the Court refused to include a spoliation charge in the jury instructions. (Tr. Trans. 1169-1228). Therefore, the Order does not provide sufficient legal or factual grounds for its denial of Defendants' Rule 60(b) Motion and as such, the lower court's ruling constitutes an abuse of its discretion that requires reversal.

D. DENIAL OF DEFENDANTS' MOTION FOR NEW TRIAL *NISI* REMITTITUR WAS IN ERR

1. Standard of Review

The grant or denial of a new trial motion rests within the discretion of the trial judge and the decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. *Norton v. Norfolk S. Ry.*, 350 S.C. 473, 567 S.E.2d 851 (2002). Therefore, an appellate court is limited on appeal to evaluating whether evidence supports the trial court's decision. *Youmans ex rel Estate of Elmore v. S.C. Dep't Trans.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008). In reviewing the denial of a motion for a new trial, the reviewing court must consider the testimony and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Vinson v. Hartley*,

324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). Where the evidence conflicts, the reviewing court will not disturb the trial judge's decision to grant a new trial. *Norton*, 350 S.C. at 473.

2. Defendants' Motion for New Trial *Nisi Remittitur*

The trial court has the power to grant a new trial or a new trial *nisi* when it finds the amount of the verdict to be excessive. *Proctor v. Dep't of Health & Env'tl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). Defendants must show compelling reasons to justify invading the jury's province. *Id.* "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Id.* (citation omitted). For punitive damage awards to stand, they must be constitutional; a requirement the courts have evaluated by inquiring whether such awards comport with due process. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose." *BMW of North America v. Gore*, 116 S.Ct. 1589, 1598 (U.S. 1996).

First and foremost, the trial judge is obligated to review a jury's punitive damages award to ensure it was not the result of passion or prejudice. S.C. Code Ann. § 15-32-520(F) ("If punitive damages are awarded, the trial court shall review the jury's decision, considering all relevant evidence, including the factors identified in subsection (E), to ensure that the award was not excessive or the result of passion or prejudice.").²⁵ Submission of Knight's surprise testimony

²⁵ S.C. Code Ann. § 15-32-520(E) lists a set of 11 factors for a jury to consider in determining whether to award punitive damages, and the amount of such damages if awarded.

regarding alleged document destruction resulted in a jury determining the propriety and amount of a punitive damages award incited by undue prejudice and passion.

The South Carolina Supreme Court, in *Gamble v. Stevenson*, 305 S.C. 104 (1991), identified eight considerations that trial courts should apply in conducting post-judgment due process review of any punitive damages award.²⁶

Here, Plaintiff attempted to question Defendants on the 2016 revenue of Clear Touch, intimating that Clear Touch had sufficient funds to pay a large jury award.

In assessing punitive damages, “the wealth of a defendant is a relevant factor” in determining the defendant's ability to pay, but only evidence of net worth and extrapolations from net worth may be introduced on the issue. *Branham v. Ford Motor Co.*, 390 S.C. 203, 239–40, 701 S.E.2d 5, 24–25 (2010). In addition, such evidence must be handled cautiously, since “the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.” *Id.* at 239, 701 S.E.2d at 24 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994)).

Sulton v. HealthSouth Corp., 400 S.C. 412, 420 (2012). By allowing the jury to hear that Clear Touch had a revenue of over \$17,000,000 in 2016, the jury was able to act on passion and prejudice to award its excessive punitive damages verdict with the fictitious notion that those revenues reflected or were indicative of Clear Touch's actual profits. (Tr. Trans. 834-38). Revenue has no relation to the net worth of Clear Touch or Keone Trask when costs to generate that revenue are not considered. “Putting this huge sum of money into the minds of the jury, reflecting the company's net income but accounting for none of its expenses and obligations, was almost

²⁶ (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 finally, (8) ... “other factors” deemed appropriate. *Id.* at 111–12.

certainly misleading and very likely to have stirred any jury bias against big businesses.” *Id.* at 421.

Further, an award of such a large punitive damages amount does not serve the purpose of such awards when the *Gamble* factors are considered. First, a large punitive damages award in this situation will not likely deter any future behavior of the kind undertaken by Trask (and/or Clear Touch). Trask’s actions were taken under specific circumstances in an effort to not reveal his interest in his then-employer’s supplier of panel products. Trask has long since parted ways with Encore and now runs Clear Touch. He is not going to be presented the opportunity to undertake the actions underlying this suit again, making deterrence unnecessary. Finally, the large actual damages awarded are substantial enough on their own to achieve the goals of punishment and deterrence.

3. The Order Relies Upon Irrelevant Evidence and Inaccurate Statements in Denying Defendants’ Motion for New Trial *Nisi Remittitur*

The Order attempts to support its finding that the actual verdict amounts awarded were appropriate and fell “within the range of damages testified to” by citation of and comparison to the \$10M figure in the Clear Touch Offering Memorandum. (Order p. 22). As noted above, that figure has nothing to do with the value of Clear Touch, but was merely a capital funds raising goal determined by Mr. Trask without any analysis or actual valuation of the company. Therefore, it has no bearing on the appropriateness of the verdicts awarded or damages Encore claimed to have incurred.

Defendants also take issue with the wildly inaccurate footnote in this section which claims Defendants complained the trial court allowed testimony that Clear Touch had \$17M in revenue 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.” (Order p. 23 fn7). This

statement is simply inaccurate. Defendants did not complain Mr. Meilinger failed to consider Clear Touch's 2016 and subsequent financial information. Defendants' stance was quite the opposite, always maintaining the financial evidence and disclosures should be cut off earlier than Encore wanted. (Tr. Trans.155; 343-48; 496-502; 511-15; *see also* Def. Mot. Limine). It makes no sense that a company with increasing profits would want the Plaintiff to consider those higher numbers. In reality, Defendants took issue with allowing testimony that Clear Touch received \$17M in gross revenues in 2016 instead of or without submission of its net revenues. Absence of the latter created an unfair impression in the jury's minds about the company's profitability.

Therefore, the Order fails to provide accurate or sufficient grounds for denial of Defendants' Motion for New Trial *Nisi* Remittitur and should be reversed.

E. DENIAL OF DEFENDANTS' JNOV MOTION WAS IN ERR

1. Standard of Review

On appeal from a directed verdict, the reviewing court must view the evidence in a light most favorable to the non-moving party. *Miller v. FerrellGas*, L.P., 392 S.C. 295, 709 S.E.2d 616 (2011). When viewed as such, if any of the evidence may be reasonably construed as creating a question of fact, the motion must be denied and the matter submitted to the jury. *Id.* "However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. We have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation." *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) superseded by statute on other grounds (internal citations omitted). In sum, the appellate court "must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in

his favor” and therefore, the appellate court “must determine the elements of the action alleged and whether any evidence existed of each element.” *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989)(internal citations omitted).

Thus, the appellate court will reverse the trial court only when there is no evidence to support the ruling below or the trial court’s decision is controlled by an error of law. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). Similarly, an appellate court will not overturn a jury verdict if there is any evidence supporting the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 336 S.E.2d 408 (Ct. App. 2000).

The Court denied Defendants’ Rule 50(b) Motion requesting the Court grant it judgment notwithstanding the jury’s verdict on the breach of contract and trade secret claims despite the fact that Encore’s breach of contract actions relied upon unenforceable provisions of the Non-Disclosure and Non-Solicitation Agreement and Plaintiff did not provide sufficient evidence to establish essential elements of its trade secrets claim. Defendants respectfully contend the Court committed an error of law in denying its Rule 50(b) motion and ask that it be reversed.

2. Error of Law Finding Restrictive Covenants Enforceable

Defendants’ Rule 50(b) Motion was first based upon its position that the restrictive covenants in Trask’s Non-Disclosure and Non-Solicitation Agreement (the “Agreement”) were impermissibly overbroad, making them unenforceable under the law, and as such, the lower court should grant judgment notwithstanding the verdict upon the causes of action reliant upon these provisions’ enforceability. (Def. Post-Trial Mot. at 18-25). Specifically, the jury found that Trask breached his Non-Solicitation and Non-Disclosure Agreement (the “Agreement”) with Encore and awarded \$424,945 in actual damages for that breach. (Verdict Form). That number is taken directly from Table 2 of Pl. Ex. 10-H - the Lost Profits on Sales Made to Leon County from 4.26.14

– 4.25.15 and from 4.26.15 - 10.10.15. (Plf. Ex. 10H). The jury’s finding and the damages awarded under this cause of action could only be based upon it determining Trask breached the non-solicitation of customers clause (non-compete) and/or the confidentiality (non-disclosure) provisions of the Agreement by making sales directly to Leon County.²⁷ The Agreement’s non-solicitation provision and confidentiality clauses are unenforceable as a matter of law and warranted the Court ordering judgment notwithstanding the verdict on Plaintiff’s breach of contract claims.

a. The Order’s Improper Evaluation of the Restrictive Covenants

The Order finds that the restrictive covenants in Trask’s Non-Disclosure and Non-Competition Agreement (the “Agreement”) with Encore were reasonable and enforceable under the law and therefore could support the breach of contract claims. (Order pp. 12-14). The Order’s finding relies upon an improper evaluation of the restrictive covenants at issue and seemingly attempts to impose *post hoc* limitations on their scope and applicability.²⁸

As an initial matter, it is notable that the Order does not cite to any of the covenants challenged by Defendants in full; it merely quotes small snippets to give an artificial impression that their scope is completely defined by the language cited. (Order pp. 12-14). That omission is telling and sets the stage for the ensuing analysis which, if done properly, would have to consider the entirety of those provisions.

First, the Order claims Trask’s argument that “the Non-Solicitation of Customers provision is overly broad because it could be interpreted to reach ‘customers with whom he had absolutely

²⁷ Breach of the confidentiality provisions would be a necessary finding at a minimum to award profits from sales to Leon County from 4.26.15 – 10.10.15 because Trask’s non-compete expired on April 25, 2015.

²⁸ The Order initially frames the issue as one concerning whether South Carolina law allows customer-based restrictions as a substitute for a geographical limitation in restrictive covenants. (Order pp. 12-13). That is not the issue nor something with which Defendants quibble. They recognize the law allows customer-based restrictions in non-competes in place of geographical limits.

no contact' is "not correct" because the Contract requires him to have had access to Encore's "pricing, advertising and/or marketing schemes...for such customer." (Order p. 13 *citing* Pl. Ex. 2 at 2). That conclusion ignores all parties' recognition that Trask had access to all of its customers pricing, advertising, and marketing schemes due to his role in the company. (Tr. Trans.855:7-10). Thus, as Defendants contended, this provision could be utilized to restrict Trask from dealing with customers with whom he never knew or did any business with while at Encore.

Recognizing this issue, the Order immediately attempts to narrow the reach of the Non-Solicitation of Customers restriction, or at least portray it as more limited, to avoid the undeniable conclusion that it is overbroad. (Order pp. 12-14). Those attempts fail and cannot support the finding that this restriction is enforceable.

First, the Order states that "Trask...failed to identify any Encore customer with whom he had no contact," presumably shifting the burden to Trask to prove a negative – there were many Encore customers with whom he had no contact. (Order p. 13). It was not Trask's burden to establish the reasonableness of Encore's restrictive covenant. Next, the Order reasons the covenant is not overbroad because "[t]he fact is, the only customer at issue was Leon County Schools..." (Order p. 13). This is irrelevant to the proper "reasonableness" analysis. An unreasonable restrictive covenant is not rendered enforceable simply because a party chose to selectively enforce it. The law calls for the entire language of the provision as written to be subjected to strict scrutiny in order to determine its breadth and whether or not it is a reasonable restriction necessary for the protection of legitimate business interests. The Order's treatment is an error of law because it fails to subject the Non-Solicitation of Customers provision to the appropriate legal analysis and relies upon irrelevant factors to find it is enforceable.

The Order next dismisses Trask's argument that the Agreement's Confidentiality provisions are overly broad in a similar fashion. It does so by summarily claiming, without analysis or citation to the actual provision, that it is "akin to" the one "approved by the Supreme Court in *Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012) and finding that it did not unreasonably restrict Trask's ability to earn a living because "[a]ll 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." (Order p. 14). Review of the provision shows that it is much broader than that and restricted Mr. Trask from doing much more than utilizing confidential information to make sales to one customer. (*See* Plf. Ex. 2 at 1-2). The Order's lack of appropriate legal analysis and attempt to unilaterally narrow the scope of this restrictive covenant to conclude it was reasonable and thus enforceable was in error.

The proper analytical rubric leads to a finding that these restrictive covenants are unreasonably overbroad and as such, unenforceable under the law.

Covenants not-to-compete are looked upon with disfavor by South Carolina courts, critically examined, and strictly construed against the drafter. *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995). The drafter bears the burden of showing enforceability. *See Delmar Studios v. Kinsey*, 233 S.C. 313, 104 S.E.2d 338 (1958). A covenant not to compete will be upheld only if it is: (1) necessary for the protection of the employer's legitimate business interests; (2) reasonably limited as to time and place; (3) not unduly harsh in hindering the legitimate efforts of the employee to earn a living; (4) in accord with public policy; and (5) supported by valuable consideration. *Rental Uniform Service v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983).

i. The Agreement's restrictive covenants are impermissibly overbroad

The Agreement's non-solicitation of customers and confidentiality provisions ("restrictive covenants") are impermissibly overbroad and therefore unenforceable. To be enforceable in South Carolina, restrictive covenants must be, among other things, narrowly tailored for the protection of legitimate business interests. *Milliken & Co. v. Morin*, 399 S.C. 23, 31, 731 S.E.2d 288, 292 (2012)(internal citation omitted). The reasonableness of the particular restriction, whether geographic, temporal or otherwise, can often be determinative of the enforceability of a covenant not-to-compete. *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958)("If the territorial scope of the restraint is unreasonable, no inquiry need be made as to the presence or absence of other necessary requirements."); *Stringer v. Herron*, 309 S.C. 529, 532, 424 S.E.2d 547, 548 (1992) citing *Standard Register Co. v. Kerrington*, 238 S.C. 54, 119 S.E.2d 533 (1961). Freedom from such unnecessary encumbrances forms the bedrock of a free market economic system and therefore "a restriction against competition must be narrowly drawn to protect the legitimate interests of the employer." *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 42 (Ct. App. 1995)(Held covenant prohibiting worker from directly or indirectly owning, managing, or operating any business in direct competition with former employer's type of business overbroad and unenforceable)(internal citations omitted). The Agreement's restrictive covenants exceed the bounds of reasonableness and legitimate protection of Plaintiff's business interest and are therefore unenforceable.

ii. The Agreement's non-solicitation of customers clause is overbroad

First, the non-solicitation of customers provision attempts to prevent Trask from "directly or indirectly" soliciting, influencing, contacting, selling to, servicing, or dealing with Customers of Encore. The Agreement relied upon a customer (rather than geographic) based restriction to

define its scope. Due to Encore's overbroad definition of "Customer," the non-solicitation provision's reach is outside the recognized realm of reasonableness. Specifically, the paragraph entitled "Non-Solicitation of Customers" states that the Employee may not:

[D]irectly or indirectly solicit, influence, contact, sell to, service, or deal ("Solicit") with any Customer (as defined below) of the Company (or provide information or assistance to any third party that would enable or help such third party Solicit a Customer of the Company) for the purpose of:

- (a) providing services or products to such Customer that are the same as or competitive with the services or products that are provided to such Customer in competition (directly or indirectly) with the Company; or
- (b) diverting or attempting to divert from the Company the business of the Customer of the Company, including but not limited to any actions that cause such Customer to reduce the level or amount of services (or other business or products) provided by Company to such Customer.

"Customer" shall be limited to *any actual or prospective customer* of the Company:

- i. that Employee Solicited during Employee's employment with the Company; or
- ii. that employees of the Company supervised by Employee Solicited during Employee's employment with the Company;
- iii. *about whom Employee had access to the pricing, advertising and/or marketing schemes developed by Employee or the Company for such customer.*

(Plf. Ex. 2 at 2)(*emphasis added*).

According to Encore, (iii) applied to Trask because he had access to the pricing, advertising, and marketing schemes for all Encore customers. (Tr. Trans. 112:18-113:1). Encore's definition of "Customer" does not limit it to customers with whom Trask had contact with, knowledge of, or that were located in the territory in which he conducted business. Pursuant to Encore's definition of "Customer," Trask could not do business with any Encore customers, past, present, or future, regardless of whether he had any contact with or knowledge of them during his employment, no matter where they were located, when they conducted business with Encore, or what products they purchased. With such a broad definition, Encore would be able to claim Trask was prohibited from dealing with almost any entity; and it is irrelevant they sought enforcement concerning just one at trial.

Appropriately drafted non-compete clauses do not allow such fluidity in determining the scope of the restriction nor allow *post hoc* definition by the drafter employer. Encore's broad definition of "Customer" expands the reach of the non-solicitation provision well beyond the legitimate and recognized scope of customer-based restrictions to include areas in which Trask never did business and customers with whom he had absolutely no contact with while at Encore. *Collins Music Co. v. Parent*, 288 S.C. 91 (Ct. App. 1986)(Customer restriction must be limited to specific customers); *Standard Register v. Kerrigan*, 238 S.C. 54 (1961)(Territorial restriction reasonably limited if restrained to employee's area of responsibility.). This overbroad customer restriction renders the non-solicitation provision unenforceable as such restrictive covenants must rise and fall upon their own terms. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010)(The lack of any reasonable territorial restriction is fatal to its enforcement and overbroad territorial restriction could not be "blue penciled" by the court).²⁹

iii. The Agreement's confidentiality provisions are overbroad

Second, the Agreement's confidentiality provisions are also overbroad and unenforceable as a matter of law. The Agreement contains an all-inclusive kitchen sink definition of what constitutes "Company Data and Trade Secrets."

The Company has a propriety interest in, and its business is one that requires secrecy concerning "Trade Secrets" and "Company Data." *Trade Secrets* are limited to Company Information *including, but not limited to*, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code 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 Company efforts that are reasonable under the circumstances to maintain its secrecy, and any Company Information that could otherwise come under the definition of Trade Secret under South Carolina Code § 39-8-20. *Company Data* is defined as Company Information related to the services or other business of the Company that is not generally known by or readily ascertainable to the public that is not considered a Trade Secret. Trade Secrets

²⁹ In *Poynter*, the South Carolina Supreme Court explicitly ruled that the judiciary may not reform or modify non-compete provisions to make their scope reasonable and thereby enforceable. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 16 (2010)("The restrictions in non-compete clause(s) cannot be rewritten by a court or limited by the parties' agreement, but must stand on their own terms....").

and Company Data *may include, without limitation*, (i) inventions, discoveries, copyrights, intellectual property improvements, know-how, methods, technical information, data, process technology, plans, drawings, blueprints, manufacturing processes, laboratory procedures, methods employed or sold by the Company; (ii) sales and customer data (whether or not reduced to writing), including but not limited to customer lists, customer preferences, customer requirements, customer contracts, customer contacts, pricing information, concessions and prior bids; (iii) marketing information, including but not limited to business strategy, plans, research development, expansion or construction plans; (iv) business plans, including but not limited to capital projects, departmental budgets and expenses; (v) financial information, including but not limited to revenue and billing projects; (vi) computer programs (or any portions or logic comprising such programs and/or source codes), internal security codes and passwords; (vii) manufacturing and vendor contracts and agreements; (viii) research and development efforts; (ix) product or service cost or pricing; (x) personnel allocation or organizational structure; and (xi) non-public information concerning the legal or financial affairs of Company. Trade Secrets and Company Data include, *without limitation*, documents, records, tapes, files, media, and any other medium of communicating information and information Employees acquired while employed with Company.

(Plf. Ex. 2 at 1). “Company Data” and “Trade Secrets” under the terms of the Agreement can encompass nearly anything and everything Encore wishes it to, whether real, imaginary, or anticipated. The Agreement contains a laundry list of items Encore deems confidential with multiple qualifying clauses making it clear those items *may include but are not limited* to what is set out in the document. The broad and amorphous definitions of “Trade Secrets” and “Company Data” provide Encore an impermissible amount of leeway to make *post hoc* determinations of what constitutes Company Data and/or Trade Secrets and claim that a former employee breached their obligations to keep that information confidential or refrain from using it.

The Agreement’s confidentiality provision prohibits Trask from using, misappropriating, or divulging Encore’s Trade Secrets in perpetuity and requires he refrain from doing the same with any Company Data not considered a trade secret for five years after his employment. (Exh. F at 1). The clear intention and effect of these provisions is to restrict Trask’s post-employment competitive activities by prohibiting him from taking part in any business similar or related to Encore’s rather than to simply restrict dissemination of the company’s proprietary information. Thus, the practical effect of enforcing the confidentiality provisions is that of a covenant-not-to-

compete. See *Carolina Chemical Equip., Inc., v. Muckenfuss*, 322 S.C. 289, 293-94, 471 S.E.2d 721, 723 (S.C. App. 1996)(Regardless of the label “Covenant Not to Divulge Trade Secrets” “this section would substantially restrict Muckenfuss’ competitive employment activities. Because it basically has the effect of a covenant not to compete, we must subject it to the same scrutiny as a covenant not to compete.”). Therefore, the confidentiality provisions of the Agreement should be subjected to the same stringent scrutiny as a non-compete. *Id.*; *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 730 (D.S.C. 2007)(“For all intents and purposes, such a broadly written non-disclosure covenant not only forbids Bell from divulging trade secrets, but also forbids Bell from engaging in any employment similar to his employment with Nucor. For this reason, South Carolina courts would hold the non-disclosure covenant here to the same heightened standard as any post-employment non-compete covenant.”).

The Court’s ruling in *Milliken & Co. v. Morin* does not change this conclusion. In *Milliken & Co. v. Morin*, the Court upheld a confidentiality provision which contained a much more succinct and narrow definition of “Confidential Information,” defining it as “all competitively sensitive information of importance to and kept in confidence by Milliken, which becomes known to [the Employee] through [their] employment with Milliken and which does not fall within the definition of Trade Secret above,” and held no time restriction was necessary for its enforceability. 399 S.C. 23, 27 (2012). Recently, the Court of Appeals found a non-disclosure which had the effect of a non-compete was unenforceable due to the lack of a time restriction, recognizing the holding in *Milliken* but making clear that even though nondisclosure/confidentiality provisions may relate to nondisclosure of a company’s confidential information, they are not free from strict scrutiny when they have the effect of a non-compete. *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 631, 799 S.E.2d 318, 323 (Ct. App. 2017)(“Although these paragraphs related ostensibly

to nondisclosure of TQL's Confidential Information and, thus, may not have required a reasonable time restriction under *Milliken* and section 39-8-30(D), the paragraphs were so broad they effectively became a noncompete provision and required a reasonable time restriction.”). Here, the five-year prohibition on use or disclosure of the broadly defined “Company Data” results in an undue and overly burdensome restriction on Trask’s ability to use his own general skills, knowledge, and ability acquired from a long career in the technology business, including during his time at Encore. An employer cannot lay claim to their employees’ job skills and knowledge of the industry in perpetuity. *See Muckenfuss*, 322 S.C. at 294, 471 S.E.2d at 724 (“When an employee leaves a job, he is entitled to take the skills and general knowledge he has either acquired or increased during his employment with him.”). As the Court of Appeals has recognized, “One who has worked in a particular field cannot be compelled to erase from his mind all of the general skills, knowledge and expertise acquired through his experience. These skills are valuable to such employee in the market place for his services. Restraints cannot be lightly placed upon his right to compete in the area of his greatest worth.” *Id. citing ILG Industries v. Scott*, 499 Ill. 2d 88, 273 N.E.2d 393, 396 (1971). Furthermore, it lacks a territorial restriction – a necessary element for an enforceable non-compete – making it unenforceable as a matter of law.

The definition of “Company Data” and “Trade Secrets” and restrictive provisions based upon it are vastly overbroad, unnecessary for the protection of Plaintiff’s legitimate business interest, and thus fatal to their enforcement. In *Muckenfuss*, the court was confronted with a similarly broad definition of “trade secrets” that it found did “not identify any specific trade secret, rather, it defin[ed] trade secrets so broadly that virtually all of the information Muckenfuss acquired during his employment would fall within the definition.” 322 S.C. at 296.³⁰ The court

³⁰ The provision in Muckenfuss’ agreement read:

reasoned, “therefore, the contract provision here is unenforceable as a matter of law.” *Id.* Similarly, in *Nucor Corp. v. Bell*, the District Court found a post-employment confidentiality agreement unenforceable due to the overly expansive definition of “confidential information.” 482 F. Supp. 2d 714, 730 (2007).³¹ Encore’s definition of “Company Data” and “Trade Secrets” is likewise unreasonably overbroad and thus unenforceable as a matter of law.

In addition, the Court in *Muckenfuss* recognized that “[a]n employer has no legitimate commercial interest in prohibiting competition in itself.” *Muckenfuss*, 322 S.C. at 294, 471 S.E.2d at 721-24. By enforcing the overly inclusive confidentiality restrictions of the Agreement, Encore sought to prevent Trask and by extension Clear Touch from competing with them in the free market rather than simply seeking to protect its proprietary information. The law tolerates a small degree of protectionism that is reasonable and narrowly tailored; however, it does not allow enforcement of oppressive restraints on the free market that support monopolistic endeavors.

The Order utterly fails to recognize, much less undertake, the appropriate legal analysis on this issue and its conclusion on it therefore amounts to an error of law.

3. Error of Law Finding Trask was Not Entitled to JNOV on Breach of Contract with Fraud Claim

[Muckenfuss] agrees to not divulge any trade secrets of the Corporation. Trade secrets means any knowledge or information concerning any process, product, or customer of the Corporation and more generally any knowledge or information concerning any aspect of the business of the Corporation which could, if divulged to a direct or indirect competitor, adversely affect the business of the Corporation, its prospects or competitive position. Seller shall not use for his own benefit any trade secret of the Corporation in any manner whatsoever.

³¹ The Court in *Bell* surmised and quoted the pertinent aspects of Defendant’s agreement:

The Third Confidentiality Agreement, which requires that Bell refrain from disclosing Nucor’s confidential information within twenty years after the termination of his employment with Nucor (the “nondisclosure covenant”), defines “confidential information” as “all Inventions and all other business, technical and financial information [Bell] develop[s], learn[s] or obtain[s] during the term of [his] employment that relate to (i) the Company and its business, (ii) the technological process for the production of flat steel products through thin strip casting, and (iii) all confidential information now or hereafter owned by Castrip, LLC.”

Trask contended that he was entitled to JNOV on Encore's breach of contract with fraud claim because it required the Non-Solicitation and Confidentiality provisions to be enforceable; something their unreasonable overbreadth prevented. (See Def. Post-Trial Mot. at 18-26). The Order rejects his position, not by substantively addressing it, but rather claiming it cannot do so, citing to case law stating that "[t]he 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." (Order p. 14)(citing *Camden v. Hilton*, 360 S.C. 164, 173, 600 S.E.2d 88, 92 (Ct. App. 2004)(*internal citations omitted*)). Yet, immediately after noting that legal principle, the Order violates it by claiming that the jury's verdict on the breach with fraud claim was "just as if not more likely" reliant upon the business opportunity clause. (Order p. 15). Making that finding is contrary to the legal principle quoted immediately before it and is a purely speculative statement for which the Order offers no evidentiary support. All this while ignoring the objectively verifiable support for Trask's position (math) which shows that the actual damages awarded for this claim is the sum total of all previous actual damage awards, down to the 40 cents from the breach of duty of loyalty verdict. For the Order's assumption that the jury's award on the breach of contract with fraud claim is a percentage of the figures in Table 3 to be true, the jury would have to have awarded Encore some random percentage of those figures in Table 3, which is something that no one, including Plaintiff's economic expert or their counsel, ever said, directed, or indicated they could or should do.

Therefore, Defendants respectfully contend that the Order's denial of Trask's JNOV Motion in this respect was in error and warrants reversal.

4. Order's Finding that Encore Established its Trade Secrets was an Error of Law

Defendants moved for JNOV on the grounds that Encore did not present sufficient evidence at trial upon which the jury could determine it had "trade secrets" that Trask misappropriated and he and Clear Touch used to make the sales to Leon County. (*See* Def. Post Trial Mot. at 27-32). The Order's finding that Encore provided sufficient evidence to show it had trade secrets and support its TSA claim relies upon misapplication of the legal requirements for establishing the existence of a trade secret and misconception of the evidence presented at trial.

a. Encore failed to establish the knowledge of Leon County's intention to purchase panels were "trade secrets"

As defined under the SCTSA, "trade secret" means:

- (a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code 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). "The first determination which must be made in a trade secrets case, therefore, is whether, in fact, there was a trade secret to be misappropriated." *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 725 (D.S.C. 2007). "The threshold issue in any trade secrets case is not where there was a confidential relationship or a breach of contract or some other kind of misappropriation, but whether there was a trade secret to be misappropriated." *Carolina Chemical Equip. Co., Inc., v. Muckenfuss*, 322 S.C. 289, 295, 471 S.E.2d 721, 725 (Ct. App. 1996); *Lowndes Prods. V. Brower*, 259 S.C. 322, 191 S.E.2d 761 (1972). "The burden of proving the existence of a trade secret falls, of course, upon the plaintiff." *Lowndes Products, Inc. v. Brower*, 259 S.C. 322, 329 (1972); *Trandes Corp. v. Guy F. Atkinson Co.*, 669 F.2d 655, 661 (4th Cir. 1993)(A Plaintiff

alleging trade secret misappropriation bears the burden of producing evidence that the items claimed to have been misappropriated meet the definition of a trade secret.).

Here, Encore had the burden to present sufficiently detailed evidence to establish that the items it claims were misappropriated were in fact “trade secrets” as defined under the Act. In order to carry that burden, the Plaintiff had an obligation “to describe the subject matter of its alleged trade secrets in sufficient detail to establish each element of a trade secret.” *Vessel Medical, Inc. v. Elliott*, 2015 WL 5437173 at * 7 (D.S.C. 2015) citing *Trandes Corp. v. Guy F. Atkinson, Co.*, 996 F.2d 655, 661-62 (4th Cir. 1993). A plaintiff cannot simply make a general claim that its trade secrets were misappropriated; rather it must identify, with sufficient particularity, each trade secret it claims was misappropriated. *MicroStrategy Inv. v. Business Objects, S.A.*, 331 F. Supp. 2d 396 (E.D. Virginia 2004) (“It is not enough to claim generally that trade secrets were stolen. A plaintiff must identify, with particularity, each trade secret it claims was misappropriated.”). A plaintiff’s failure to carry that burden and identify its allegedly misappropriated trade secrets with particularity prevents Defendants from being able to mount a full and fair defense against a misappropriation claim; and does not allow the finder of fact to distinguish between a legitimate trade secret and other information that is simply confidential but not a trade secret, or publicly available information. *Id.* (“This must be done to allow the finder of fact to distinguish that which is legitimately a trade secret from other information that is simply confidential but not a trade secret, or is publicly available information.”).

Encore failed to carry the evidentiary burden necessary to establish the information it claims was misappropriated constitute trade secrets. At trial Encore offered up two items it claims constituted trade secrets which it alleged Defendants misappropriated – an Encore customer list and the knowledge that Leon County was upgrading its interactive classroom technology. At trial,

Encore did not provide the evidence necessary for the jury to find these items were in fact “trade secrets.”

First, Encore provided the testimony of Jimmy Higginbotham in which he claimed Trask instructed him to copy and bring to him Encore’s customer list when he transitioned companies. (Tr. Trans. 392). Encore also identified but did not admit what it claimed was that customer list (Plf. Exh. 60), which did not contain anything regarding Leon County and was not admitted into evidence at trial. Plaintiff failed to provide any evidence this list was in fact a trade secret as defined under the Act. It did not offer testimony or evidence concerning how it was made, by whom, any security measures taken to keep it secret, or other pertinent information necessary to determine if something is in fact a trade secret. Without that information, the jury did not have an adequate evidentiary basis to find the customer list was in fact a trade secret. Consequently, the lower court had no such grounds to conclude there was adequate evidence presented for the jury to make such a finding.

Second, the only evidence Plaintiff offered to show that the knowledge Leon County was upgrading its interactive classroom technology was an email between Trask and his panel supplier after he left Encore informing them that Clear Touch had been selected as the district’s panel supplier and that it intended to purchase more. (Pl. Exh. 53). As with the customer list, Encore provided nothing to show this information was secret; leaving the jury with no evidence upon which it could determine it constituted a trade secret. In fact, Defendants were the only ones who provided any evidence concerning the secrecy of this information. West Martin, a Tallahassee resident at the time the Leon County half penny bond was up for a vote in 2012, testified there were billboards advertising the bond and noting it was for upgrading the County schools’ classroom technology. (Tr. Trans. 918-32). Thus, the only evidence presented at trial as to this

information's secrecy showed it was public knowledge from the time the local government instituted a half penny sales tax in 2012. Encore did not offer any evidence to the contrary beyond simply saying this information was a trade secret. Without more, the jury was not presented with evidence upon which it could determine this information was a trade secret.

Encore failed to carry its evidentiary burden to show these items were in fact trade secrets. That failure resulted in a jury deciding a trade secret claim without the evidence necessary to make the threshold determination of whether these items were in fact "trade secrets." Without such information, its finding that Defendants misappropriated Plaintiff's trade secrets lacks evidentiary foundation and cannot stand. The Order's finding otherwise was in error and should be reversed.

b. Encore failed to establish Defendants misappropriated its alleged trade secrets

Assuming *arguendo*, that Encore had carried its burden at trial and shown the items were trade secrets, it failed to offer sufficient evidence that Defendants misappropriated them.

At trial, Encore offered nothing to show that Defendants actually physically possessed the information it claims was misappropriated, without which it cannot succeed on its SCTSA claim. *See Dove Data Prod., Inc. v. DeVeaux*, No. 2008-UP-202, 2008 WL 9841167, at *7 (S.C. Ct. App. Mar. 24, 2008) ("The trial court found no specific evidence [Defendant] was physically in possession of the information or that he misappropriated the information."). All it offered was Jimmy Higginbotham's testimony in which he claimed Trask instructed him to copy and bring him an Encore customer list. Even assuming that Trask did instruct Higginbotham to bring a customer list from Encore's server, there is no evidence concerning what he did with it. In fact, Higginbotham admitted he had no idea what Trask did with the list he claims to have provided to him. (Trial Trans. 422:3-21).

c. Encore failed to establish defendants used its alleged trade secrets

To sustain a TSA claim, a Plaintiff must offer sufficient evidence that Defendants used or disclosed its trade secrets:

Every employee who is informed of or should reasonably have known from the circumstances of the existence of any employer's trade secret has a duty to refrain from *using or disclosing* the trade secret without the employer's permission independently of and in addition to any written contract of employment, secrecy agreement, noncompete agreement, nondisclosure agreement, or other agreement between the employer and the employee [and] [a] person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secrets may bring a civil action to recover damages incurred *as a result of the wrongful acts* and to enjoin its appropriation, disclosure, use, or wrongful acts pertaining to the trade secrets.

S.C. Code Ann. § 39-8-30(b).

Again, assuming *arguendo*, that Encore had trade secrets, it offered nothing to establish Defendants used this information. At trial, there was no evidence or testimony offered even claiming Trask or Clear Touch used the customer list in any way, much less evidence proving it happened. Likewise, Encore did not offer testimony or evidence Trask or Clear Touch used the information concerning Leon County's plans to purchase more panels to effectuate the sales at issue. The evidence at trial showed that Leon became dissatisfied with Encore and approached Clear Touch about buying direct. The Plaintiff claimed this was precipitated by Trask's alleged defamatory statement to Leon. (Tr. Trans. 396:18-398:23). The jury found for Defendants on the defamation claim. (Verdict Form at 7). Without offering any evidence or testimony showing that Trask or Clear Touch used either the customer list or knowledge that Leon County intended to purchase additional panels, Encore failed to establish an essential element of its trade secret claim – use or disclosure of the trade secret. Without evidence showing Trask or Clear Touch actually used or disclosed Encore's alleged trade secret information, its TSA claim fails as a matter of law. *See Muckenfuss*, 322 S.C. 289, 297 (Trial court erred in failing to grant Defendants' motions for directed verdict and JNOV because no evidence was presented they used or disclosed any trade secret of the Plaintiff).

Encore failed to carry its burden by not providing evidence upon which a reasonable jury could determine the items at issue were trade secrets and that Defendants used or disclosed them to make the Leon County sales. These substantial evidentiary shortcomings warranted the Court granting judgment notwithstanding the verdict on Plaintiff's trade secret claim.

Despite these evidentiary failures, the Order claims there was sufficient evidence presented at trial for the jury to find Encore had two trade secrets – its customer list and the knowledge of “Leon County Schools’ needs for, preferences for, and plans to purchase interactive displays.” (Order p. 16). It states that the Plaintiff put forth evidence showing Trask misappropriated the customer list by having Jimmy Higginbotham bring it to him and then that he and Clear Touch used this trade secret information to make the Leon County sales. (Order p. 16). This finding ignores the undisputed fact that nothing was presented at trial showing what was contained in this customer list Mr. Higginbotham claimed he gave to Trask. Higginbotham’s testimony does not address what was on this list. He offered nothing to establish that the information included information regarding Leon County or that anything contained in it was in fact secret. (Tr. Trans. 392-93). That customer list, identified as Plf. Exh. 60, did not have any information concerning Leon County in the first place, but more importantly, was not admitted into evidence at trial. Higginbotham then went on to flatly admit he had no idea what Trask did with the customer list he claims to have given him. (Tr. Trans. 422:3-21). Therefore, the jury did not have sufficient evidence to find defendants used Encore’s customer list to make the Leon County sales in violation of the SCTSA. Without something more, the jury and the Court in its Order cannot conclude Defendants used Encore’s customer list to make the Leon sales in violation of the TSA.

That leaves the knowledge of Leon County Schools’ needs for, preferences for, and plans to purchase interactive displays as the lone “trade secret” upon which the jury could have rendered

its misappropriation verdict. Nothing in the Order mentions, much less rectifies Encore's failure to provide evidence at trial from which the jury could find this information was in fact secret as required for it to qualify as a "trade secret." S.C. Code Ann. § 39-8-20(5). The only evidence Plaintiff offered about Trask's use and disclosure of the fact Leon County Schools planned to upgrade its interactive classroom technology consisted of an email between Trask and his panel supplier after he left Encore. (Pl. Ex. 53). Encore, however, provided nothing to show this information was secret. This left the jury with no evidence upon which it could determine it constituted a "trade secret." In fact, the only evidence presented at trial as to this information's secrecy showed it was public knowledge from the time the local government instituted a half penny sales tax in 2012.

The Order takes the same approach and simply concludes, without citing any grounds, that Encore gave the jury enough evidence to determine these items were its trade secrets, which Trask took and used to make sales directly from Clear Touch to Leon County. Based upon this erroneous finding, the Order denies Defendants' Motion for JNOV on the TSA claims. Defendants contend that this finding is contradicted by consideration of the evidence presented at trial, does not constitute appropriate grounds for the denial of their Motion for JNOV on the Trade Secret Act claims, and requires reversal.

F. TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANTS' MOTION PURSUANT TO THE "THIRTEENTH JUROR DOCTRINE"

The Order denies Defendants' Motion Pursuant to the Thirteenth in short order by summarily stating that "[t]he jury's verdicts do not reveal that they jurors were confused about any issues" [and] their careful consideration of each claim is apparent because they rendered different amounts of actual and punitive damages. (Order p. 24). The evidence and verdicts rendered by

the jury however reflects an inconsistent verdict and confusion as to one or more issues they were charged to decide.

The Court may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *See Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 722 (Ct. App. 1996). A trial judge may grant a new trial upon the facts if the judge determines the verdict is contrary to the fair preponderance of the evidence. *Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460 (1978). It is not necessary for the Court to view the evidence in a light most favorable to the opposing party. *See Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 247, 452 S.E.2d 640 (Ct. App. 1994)(stating the trial court may take its own view of the evidence.). Rather, the granting of a new trial under the doctrine is addressed to the discretion of the trial judge. *McIntire v. Mooregard Exterminating, Services, Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003). The 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.

The Verdict Form shows that the jury rendered an inconsistent verdict on the two breach of contract claims. (Verdict Form at 3 and 6). It found for the Plaintiff on its Breach of Contract claim and awarded \$424,945 in actual damages but then somehow went on to award \$1,476,039.40 in actual damages under the Breach of Contract with Fraud claim despite the actual damages available being the same for both causes of action. (Verdict Form at 6). Under a breach of contract claim, a Plaintiff may recover damages naturally resulting from Defendant's breach. *Fuller v. Eastern Fire and Caus. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). The actual damages available under the breach of contract accompanied by fraud claim are the same; the only difference being that it allows recovery of punitive damages. *Perry v. Green*, 313 S.C. 250, 252-53 (Ct. App. 1993)(“The trial judge *sua sponte* recognized that the breach of contract and the

breach of contract accompanied by a fraudulent act causes of action necessarily arose out of the same transaction and therefore would allow for only one recovery of actual damages.”). Adherence to the applicable law required the jury award the same amount of actual damages for both the Breach of Contract and Breach of Contract with Fraud claims. The Court accurately charged the jury on the applicable law however, its inconsistent verdict reflects that they misunderstood and were confused as to what Plaintiff may recover under the breach of contract causes of action.

The Order does not address this inconsistency, and its conclusion that none exists therefore was in error and an abuse of the lower court’s discretion in denying Defendants’ Motion Pursuant to the Thirteenth Juror Doctrine.

The Order also does not address Defendants’ argument for invocation of the thirteenth juror doctrine that submission of Table 3 to the jury resulted in its misunderstanding the type and amount of damages available to the Plaintiff in this case. (Order p. 23-24; *See* Def. Post-Trial Mot. at 33-34). As noted above, it gave them the misimpression that Encore could recover over \$5.5M in actual damages when, at best, it could recover \$3.9M (the “Fair Market Value of Clear Touch Opportunity”).

Based on the foregoing, Defendants respectfully contend the lower court abused its discretion in denying their Motion Pursuant to the Thirteenth Juror Doctrine.

G. AWARDING ENCORE ALL ITS FEES AND EXPENSES SOUGHT WAS IN ERROR

1. Standard of Review

The award of costs by the trial court will not be disturbed absent an abuse of discretion. *Peterson v. Nat’l R.R. Passenger Corp.*, 365 S.C. 391, 618 S.E.2d 903 (2005). “We find the law well settled that an award of attorney’s fees pursuant to statute is governed by an abuse of

discretion standard.” *Williamson v. Middleton*, 374 S.C. 419, 426, 649 S.E.2d 57, 61 (Ct. App. 2007)(reversed on other grounds).

The Order’s determination that the \$345,601 in attorneys’ fees sought by Encore are reasonable and should be awarded in full was in err for several reasons and was an abuse of the lower court’s discretion.

2. Order’s Conclusion that the Fees Sought by Encore are Reasonable is Flawed

The Order’s determination that the \$345,601 in attorneys’ fees sought by Encore are reasonable and should be awarded in full was in err and abuse of the court’s discretion in making such awards for several reasons.

First, it fails to take into account the fact that attorneys’ fees were only recoverable under three out of the eight causes of action pursued in this case. The Court actually recognized this fact during post trial hearings noting the fees must therefore be reduced accordingly. (Trans. 11.17.17 p. 45:14-20). Despite this acknowledgment, that reduction did not translate into the final order. Therefore, as the trial court itself recognized and the law dictates, Encore’s attorney’s fees must be proportionally reduced due to only being available under less than half of the claims litigated. (*See* Def. Resp. Opp. at 9-19). Seemingly recognizing this may be an issue, the Order attempts to mitigate the inevitable fee reduction stating that “[a]lthough 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.” (Order p. 9). The Order provides no basis for this claim, which is pure speculation with no bearing on the reasonableness of the fees Encore sought.

Second, as in other sections, the Order again makes multiple untrue assertions that Trask “destroyed” emails and “other documents” to argue that Encore incurred the amount of fees it claims because it had to undertake additional acts to obtain necessary evidence, namely in the form

of issuing third-party subpoenas. (Order p. 6). The unfounded claims of evidence destruction contradicted by the denial of a spoliation charge cannot justify Encore's subpoena campaign.

Third, the Order does not mention the undisputed fact that Encore utilized documents and information from a fraction (5 out of 16) of the third parties it subpoenaed nor account for the many unnecessary acts detailed in Defendants' previous filings, all of which unreasonably inflated fees. (*See* Def. Resp. Opp. at 14-15).

Finally, the Order's finding that Encore's fees were reasonable relies upon factors having no bearing on the issue. Specifically, it points to the fact that Encore has participated in post-trial activities for which it did not seek to recover its fees to support its conclusion that those it sought to recover for work performed through trial were reasonable. (Order p. 9). The extent and expense of post-trial activities has no bearing upon whether the fees for work performed through trial are reasonable. Unreasonable fees do not morph into reasonable ones when more work is performed which is not encompassed in the fees sought to be recovered.

In sum, the Order fails in various respects to provide an adequate basis for awarding Encore the entirety of its attorneys' fees that were recoverable under a portion of the claims it pursued in this case. This warrants modification or reversal.

3. The Order Does Not Provide a Basis for Finding the Costs Awarded were Reasonable

The Order's only treatment of whether the expenses Encore sought were appropriate is a passing recognition that Defendants challenge their reasonableness and a mischaracterization concerning Plaintiff's need to seek evidence via numerous subpoenas. (Order pp. 7-8). It does not mention nor address the numerous issues concerning the expenses raised in Defendants' post-trial filings. (*See* Def. Resp. and Opp. at 18-19; Def. Supp. Post Trial Filings at 15-16). The Order's single substantive sentence dedicated to the expenses attempts to justify them by stating

Encore “was forced to seek documents through third parties because Defendants did not produce them and/or claimed to have lost or destroyed them.” (Order p. 8). This is at best a partial truth and certainly gives the inaccurate impression that Encore needed to issue 16 subpoenas to everyone from potential customers to Clear Touch’s new distributor to obtain relevant documents and information. In reality, Encore used items from less than a third of the entities they subpoenaed in this case. It is difficult to claim the expenses incurred for something are justified and reasonable if you utilize less than a third of what you paid to get. Thus, the only basis deeming Encore’s expenses reasonable fails in that endeavor and Defendants respectfully contend that finding warrants reversal or modification.

H. THE RECEIVER ORDER ALLOWED NUMEROUS VIOLATIONS OF SOUTH CAROLINA LAW

1. The Receiver Order Empowered the Receiver to Violate Various Laws and Will Require Trask Pay for Them if any Portion of this Appeal is Affirmed

On July 23, 2018, the Court entered an Order Appointing Receiver (the “Receiver Order”) upon Plaintiff’s motion for same. The Order was improvidently granted and entered in its entirety from Plaintiff’s proposal, despite numerous requests for changes to same from Defendant. The Order, as entered, allowed the Receiver to violate South Carolina statutes and subjected Defendant to undo harassment. While there are innumerable objectionable portions of the Receiver Order, for purposes of efficiency and in light of the recent staying of the Receiver, Defendants will note the most egregious sections.³²

Page 5, paragraph 8 allowed the receiver to “take possession of and secure assets and income of [Defendant] Trask....” Under this, the Receiver possessed and controlled Trask’s

³² The Receiver Order has now been stayed following Defendants depositing the full amount of the judgments against them into the Court. (See Order Staying Receiver). As a condition to implementation of that order, the lower court required Trask to deposit nearly a quarter million dollars as an advanced deposit of the Receiver’s fees and costs incurred through February 7, 2019. (See Order Staying Receiver pp. 9-10).

“income” which included his “earnings...for his personal services” that are exempt from levy or use to satisfy the judgment against him under S.C. Code § 15-39-410. S.C. Code § 15-39-410 states, “The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services cannot be so applied.” Our courts and legislature include a person’s wages as “earnings of the debtor for his personal services.” *See Jarrott v. S.C. Employment Sec. Comm’n*, 290 S.C. 533, 536 (1986); *Garrett v. Mutual Ben. Life Ins. Co. of N.J.*, 239 S.C. 574, 578 (1962); *Toner v. S.C. Employment Sec. Comm’n*, 2005 WL 7083464 at * 3-4 (Bankr. D.S.C. 1999); S.C. Code § 41-27-380. All these authorities put wages under the umbrella of earnings for personal services, along with other compensation outside normal wages such as commission payments and bonuses. Despite that clear prohibition, the Receiver Order allowed the Receiver to garnish Trask’s wages in the form of commission payments and bonuses; each of which qualify as “earnings of the debtor for his personal services.”

Page 6, Paragraph 2 allowed the Receiver to possess all assets of Trask in Defendant Clear Touch. Clear Touch is 100% owned by an IRA of which Trask is a beneficiary. Due to the ownership structure and applicable law, Clear Touch assets should not have been controlled by the Receiver or utilized to satisfy the judgment against Trask. South Carolina law exempts from attachment, levy, and sale under any intermediate or final process issued by a court

The debtor’s right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code. ... The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate payee, or otherwise.

S.C. Code § 15-41-30(A)(13). This includes any assets in or owned by the IRA that owns Clear Touch and of which Trask is a beneficiary. Clear Touch had paid the judgment against it in full into the Court prior to the Receiver being appointed and therefore the Receiver had no legal grounds to possess or control the company's assets.

Pages 6-7, Paragraph 4 allowed the Receiver to possess and control Trask's exempt income by empowering him to possess and control commission and bonus payments and cap Trask's accumulation of such exempt payments for his personal services, all in violation of S.C. Code § 15-39-410, as outlined above. The case law cited in this paragraph (*In re Davis*, 1999 WL 33486078, *3 (Bankr. D.S.C. May 28, 1999) and *Mathews v. Mathews*, 207 S.C. 170, 35 S.E.2d 157 (1945)) addressed passive income (i.e., investment income) and was therefore inapplicable to commission and bonus payments to which it was offered to apply. The latter payments are not passive income but rather payments received by the debtor for his personal services and therefore not subject to levy or attachment in order to satisfy the judgment pursuant to S.C. Code § 15-39-410.

All of these provisions gave the Receiver license to violate the various laws noted above; not only to unlawfully intrude upon Mr. Trask, but also impermissibly invade third parties, including Clear Touch's distributors, any family member of Trask the Receiver wished to harass, and other third-party businesses owing nothing to Encore. To add insult to injury, as written, the Receiver Order may ultimately require that Trask pay for the fees and costs incurred by the Receiver for perpetrating illegal acts allowed under the order. Therefore, the Receiver Order requires reversal or modification to address these issues.

I. THE LOWER COURT ERRED IN HOLDING CLEAR TOUCH’S CLAIMS ARISING OUT OF EVIDENCE ENCORE WITHHELD UNTIL MONTHS PRIOR TO TRIAL WERE BARRED BY *RES JUDICATA*

1. Standard of Review

Appellate courts utilize the same standard of review as the trial court to review the grant of summary judgment. *Knight v. Austin*, 369 S.C. 518, 72 S.E.2d 802 (2012); *see also* SCRPC 56(c). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the light most favorable to the non-moving party. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 687 S.E.2d 321 (2009). However, “[w]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). On the other hand, summary judgment is inappropriate in cases where further inquiry into the facts is necessary “to clarify the application of the law.” *Clegg*, 377 S.C. at 653; *Nelson v. Charleston Cnty. Parks & Rec. Comm’n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004)(“Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.”).

2. Clear Touch’s Claims Were Not Barred by *Res Judicata*

The Court found that Clear Touch was provided sufficient discovery to enable it to assert claims based upon Encore’s alleged misuse and disclosure of Clear Touch’s confidential information by May 31, 2017, and, therefore, it held that they are barred from being pursued in a

subsequent separate action under the doctrine of *res judicata* because those claims arose out of the same transaction or occurrence as the causes of action asserted by Encore in the original matter. (Dis. Order p.1-2).

“Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of the prior action between those parties.” *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). “Under the doctrine of *res judicata*, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” *Id.*

“Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding.” *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct.App.1997). In *Beall v. Doe*, the Court distinguished the two concepts as follows:

The doctrines of *res judicata* and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.

281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 190 n. 1 (Ct. App. 1984) (citations and quotation marks omitted).

“Res judicata’s fundamental purpose is to ensure that no one should be twice sued for the same cause of action.” *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citation and quotation marks omitted). “The doctrine [of *res judicata*] flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action.” *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct.App.2007)(citation

omitted); *see also* S.C. *Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248, 551 S.E.2d 274, 278 (Ct.App.2001) (“The doctrine of *res adjudicata* (or *res judicata*) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action.” (quoting *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945))).

“The doctrine of collateral estoppel, or issue preclusion, on the other hand, rests generally on equitable principles.” *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct.App.1995) (citing *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)). In *Watson*, the South Carolina Supreme Court contrasted the origin of the doctrine of collateral estoppel with the origin of *res judicata*:

Estoppel rests generally on equitable principles, which *res judicata* does not, but upon the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and interest *reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation[])[.] ... *Res judicata* is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

205 S.C. at 221–22, 31 S.E.2d at 319–20 (citations omitted); *see also* *First Nat'l Bank of Greenville*, 207 S.C. at 24, 35 S.E.2d at 56–57 (citing *Watson*) (contrasting the origins of *res judicata* and collateral estoppel).

The Dismissal Order holds that Clear Touch's claims are barred by the doctrine of *res judicata* because they arise out of the same transaction or occurrence that was the subject of a prior action between the parties and could have been asserted in that previous case. (Dis. Order p. 1-2). This holding is inaccurate and fails to consider the fact that Encore's own actions necessitated the filing of this action because they robbed Clear Touch of the ability to fully and fairly litigate the causes of action asserted in this case.

a. Clear Touch's Claims Do Not Arise Out of the Same Transaction or Occurrence

Clear Touch's claims in this case do not arise out of the same transaction or occurrence underlying those alleged by Encore in the previous action and therefore are not barred by *res judicata*.

“What factual groupings constitutes a ‘transaction’, and what groupings constitute a ‘series’, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” *South Carolina Public Interest Found. v. Greenville County*, 401 S.C. 377, 388, 737 S.E.2d 502, 508 (Ct. App. 2013)(*emphasis in original*)(internal citations omitted).

Encore's misappropriation of Clear Touch's trade secrets and use of that information to unfairly compete with it in the marketplace formed the basis of three out of the four claims asserted in the underlying *CTI v. Encore* case – (Breach of Contract – Mutual Confidentiality Agreement; Violation of the SCTSA; and Conversion). Those claims and facts underlying them are distinct transactions and occurrences in both a factual and temporal sense from those in the original action.

First, the claims in the 2017 matter rely on Encore's misappropriation of Clear Touch's trade secrets to unfairly compete with it in the marketplace, including by sharing that information with its competitor and using it to bid sales/jobs. (*See* Amend. Compl.). The facts underlying those claims are therefore distinct from those Encore relied upon to establish liability for its causes of action in the prior suit, which by its own words were “Defendants’ [Clear Touch's and Trask's] breaches of their contractual and fiduciary duties to Encore.” (Encore Ltrs. 4.13.17 & 5.31.17). Second, those actions (underlying Encore's claims in the previous matter) all occurred prior to the relationship being terminated in September 2015. *Id.* The facts and occurrences underlying Clear

Touch's claims in this later filed case, however, involve acts which occurred following the termination of the parties' business relationship in September 2015, a time which Encore deemed irrelevant to that litigation. (See Encore Ltrs. 4.13.17 & 5.31.17). Therefore, the claims at issue are based upon facts distinct from those underlying the claims in Encore's previous case and as such they are not barred by the doctrine of *res judicata*.

b. Encore's Actions Prevented Clear Touch from Being Able to Assert its Claims in the Prior Case by Robbing it of a Full and Fair Opportunity to Litigate

Encore's actions, including withholding of evidence in the previous matter, prevented Clear Touch from pursuing its claims as counterclaims in that case. *Venture Engineering, Inc. v. Tishman Const. Corp. of South Carolina*, 360 S.C. 156 (Ct. App. 2004)(Essential element of *res judicata* is adjudication of the issue in the former suit and the doctrine prevents relitigation of claims that were or could have been raised in that action.). Therefore, *res judicata* cannot bar Clear Touch from seeking redress for Encore's unlawful actions in this case.

In *Judy v. Judy*, the South Carolina Supreme Court addressed the question of whether a claim should have been raised in a prior action stating:

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of *res judicata*, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."

393 S.C. 160, 171, 712 S.E.2d 408, 414 (2011). The Court went on to explain that term "cause of action" for *res judicata* purposes: "[F]or purposes of *res judicata*, "cause of action" is not the form of action in which a claim is asserted but, rather the cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon." *Id.* (citations and quotation marks omitted). "Our supreme court's recent discussion of *res judicata* in *Judy* acknowledged that there are certain circumstances in which the policy underlying the

doctrine of res judicata is outweighed by a more compelling policy; there, the court looked to the Restatement (Second) of Judgments § 26 for guidance on those circumstances in which courts should decline to apply res judicata.” *South Carolina Public Int Found. v. Greenville County*, 401 S.C. 377, 390 (Ct. App. 2013)(internal citations omitted).

As noted above, Clear Touch’s claims in this case do not arise out of the same transaction or occurrence as those underlying Encore’s causes of action in the previous matter and therefore need not have been brought in that case. This is not to mention that Encore itself deemed these matters “irrelevant” to the prior case on three separate occasions – twice in written correspondence, and once in opposing Clear Touch’s Second Motion for Continuance following the May 31, 2017 production. (See Encore Ltrs. 4.13.17 p. 1 & 5.31.17).³³

3. Countervailing Policy Considerations Warranted Denial of Encore’s Summary Judgement

Furthermore, assuming, arguendo, *res judicata* applies to Clear Touch’s claims, there are obvious and compelling policy reasons for the Court to decline to apply the doctrine because Encore’s actions robbed Clear Touch of a full and fair opportunity to litigate the issues forming the basis of its claims. *See SC Pub. Int. Found* at fn9 (Noting whether a party had a “full and fair opportunity” to litigate an issue in a previous action bears on whether it may be estopped from asserting claims based on that issue in a later action against the same or another party). “A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.”) *see also Nandwani v. Queens Inn Motel*, 2012 WL 10844387

³³ Encore closes the letter accompanying its May 31, 2017 production noting that the emails produced after it searched for the name of the company it sued were not relevant to the case; “Again, we do not believe that these additional emails are relevant to the case....”

at *11-12 (Ct. App. 2012)(Unreported). The purpose of *res judicata* (the prevention of relitigation of claims already litigated or that could have been litigated in a previous suit) is fulfilled when a party has a full and fair chance to adjudicate its claims in a prior action. That purpose is not realized when one party's actions prevent the other from bringing claims in the previous suit and force a separate action to seek redress for its claims. The situation at issue is of the latter variety because Encore's actions robbed Clear Touch of a full and fair opportunity to litigate the misappropriation of its trade secrets.

It is fundamentally unfair to allow a party to withhold evidence until a few months prior to trial, claim it was irrelevant to that proceeding, have the benefit of presenting its case to a jury without jurors hearing about its own unlawful acts, and then avoid answering for them in another suit by claiming its opposition should have brought a counterclaim based on the withheld evidence. It is an affront to the administration of justice and the entire litigation process to reward such tactics and the lower court erred in not having Encore face the consequences of its own actions. This decision encourages the withholding of incriminating evidence in contravention of the Rules and entire purpose of the civil litigation process, not only without fear of repercussion but with the prospect of benefiting from such tactics.

Finally, it should be noted that the Dismissal Order states that Clear Touch did not seek to amend its pleadings in the prior action or seek an additional continuance based upon allegedly newly discovered information. (Dis. Order p. 2). That is simply not true. (*See* 2nd Mot. Cont.). Given the circumstances created by Encore's actions and discovery tactics, Clear Touch was fully aware that an August 2017 trial date was unreasonably burdensome just to address the claims in the prior action. Nevertheless, Encore would not consent to a continuance of the trial date and Clear Touch was forced to file a Second Motion for Continuance on June 6, 2017. (2nd Mot. Cont.).

The Motion specifically stated that the May 31, 2017 production indicated the potential need for Clear Touch to amend its pleadings to add in a counterclaim against Encore not previously known due to Encore's withholding of the many relevant documents. (2nd Mot. Cont.). Encore fiercely opposed that Motion as it did the first, claiming that the documents produced on May 31st were *irrelevant* to the case and their late production therefore did not warrant continuance of the trial date. The Court gave the parties a few additional weeks and set the trial for the week of September 25, 2017. Based on Encore's representations regarding the irrelevance of that evidence to the prior action, Clear Touch was completely justified in filing these claims as a separate action without the concern of a *res judicata* defense or dispositive motion.

Therefore, Plaintiff respectfully asks this Court reverse the Dismissal Order's disposition of Clear Touch's claims and allow it to seek redress against Encore for its unlawful actions.

J. THE DISMISSAL ORDER CANNOT BE UPHOLD UPON A GROUND THAT WAS UNILATERALLY INSERTED INTO A PROPOSED ORDER BUT NOT RAISED BEFORE THE COURT MADE ITS RULING

The Dismissal Order also cites Rule 13 as an additional ground for its holding claiming Clear Touch's claims should be dismissed because they were mandatory counterclaims under that Rule. (Dis. Order p. 2-3). However, mandatory counterclaims were never addressed during the Court's Hearing on the Parties' cross-motions for summary judgment, nor did the Court make any such ruling in its Form 4 Order (July 31, 2018) filed prior to the Order Dismissing Case at issue. (See Form 4 Order 7.31.18; Amend Form 4 Order 8.1.18). This ground was unilaterally inserted in the proposed order by Encore and erroneously adopted by the Court. Just as a party cannot use a Rule 59(e) motion to raise an issue which could have been presented to the court during the motion hearing, a party cannot add language to a proposed order that was not addressed prior to the court making its ruling. See *Richardson v. Fairfield Cty. ex rel. Fairfield Cty. Council*, No.

2006-UP-263, 2006 WL 7286041, at *4 (S.C. Ct. App. May 24, 2006); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995).

In its Form 4 Order, the Court laid out its substantive ruling and asked Encore's Counsel to prepare a more formal order. (Form 4 Order 7.31.18). Its subsequent Amended Form 4 Order followed suit, outlining a slightly modified basis for the court's ruling and again requested Encore counsel draft a proposed final order. (Amend Form 4 Order). Neither Form 4 order mentioned mandatory counterclaims or Rule 13. (*See* Form 4 and Amend. Form 4 Orders). The absence of this reference in both orders made sense seeing as Encore did not raise it as a substantive basis for its motion prior to or during the hearing or at any point before the court ruled on the motion. (*See* Encore Mot. SJM; Trans. 7.30.18). Encore added in the mandatory counterclaim language to the proposed order saying the "ruling [was] implied" and inclusion of this additional legal basis it did not raise to the court "could be important to upholding the order on appeal." (8.2.18 Email English to Court). Clear Touch asked that this language be stricken, but Encore declined and submitted the proposed order to the court for entry. (8.2.18 Email English to Court). The Court subsequently adopted the proposed Dismissal Order with the unilaterally inserted mandatory counterclaim/Rule 13 grounds in it. (Dis. Order p. 2).

Neither mandatory counterclaims nor Rule 13 were mentioned by Encore at the hearing or in the Court's rulings. Consequently, Clear Touch submits that it is not appropriate for Encore to insert that substantive ground into a proposed order and seek to have the Court adopt it. Encore acknowledged that it was not raised to the Court and instead took it upon itself to insert an entirely new ground for the Court's decision into an order claiming that it was "implied by its rulings." Allowing such a practice guarantees its proliferation and undeniably robs the opposing party of any opportunity to address the issue before and outside of appeal. Encore was so bold as to tell

the court that it included this additional ground in the order because it “could be important to upholding the order on any appeal.” (8.2.18 Email English to Court). Appeals are meant to evaluate whether the lower court erred in reaching a decision based upon the evidence and arguments presented by the parties and relied upon in reaching that holding. Unilateral insertion of additional legal grounds in an order after the lower court has made its ruling and detailed its basis for it both robs the opposition’s ability to challenge the legal argument and results in the higher court of review being one of first impression. Indeed, the long-established jurisprudence of issue preservation applies, or at least is instructive, in this instance. *I’On, L.L.C. v. Town of Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)(issue must be raised to and ruled upon by the lower court to preserve it for appellate review). The Appellate Court will refuse to take up an issue not raised to and ruled upon the lower court, and likewise should not consider a legal basis not set forth by a party but instead inserted into a proposed order on its own accord because it “may be important in upholding the order on appeal.” Encore should not have inserted this new ground and the trial court’s adoption of the proposed order including it was an abuse of its discretion.

Thus, the lower court’s dismissal of Clear Touch’s claims was not made on this basis and it should not and cannot serve to uphold the Dismissal Order.

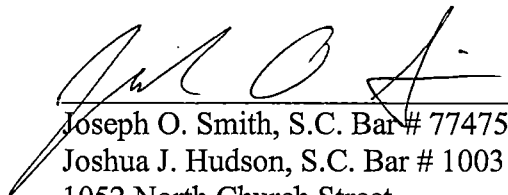
IV. CONCLUSION

For the reasons set forth above, the Circuit Court’s Final Order and Judgement entered April 2, 2018 should be reversed and/or modified in the specific respects noted above; the Receiver Order entered July 23, 2018 reversed or modified; and the Dismissal Order entered August 10, 2018 dismissing Clear Touch’s claims related to Encore’s misappropriation of its trade secrets reversed.

(signature page to follow)

Respectfully Submitted,

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Clear Touch Interactive, Inc. and Keone Trask

March 13, 2019

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-001444

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

v.

Keone Trask and Clear Touch Interactive, Inc.
f/k/a Clear Touch Interactive, LLC.....Appellants/Respondents

AND

Clear Touch Interactive, Inc. f/ka Clear Touch
Interactive, LLC.....Appellants/Respondents

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellants/Respondents complies with Rule 211(b),
SCACR.

(Signature on following page)

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MAR 14 2019

SC Court of Appeals

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March 13, 2019

Greenville, South Carolina

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Circuit Court**

The Honorable R. Lawton McIntosh, Circuit Court Judge

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Keone Trask and Clear Touch Interactive, Inc.
f/k/a Clear Touch Interactive, LLC.....Appellants/Respondents

AND

Clear Touch Interactive, Inc. f/ka Clear Touch
Interactive, LLC.....Appellants/Respondents

v.

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

PROOF OF SERVICE

I certify that I have served the Appellants/Respondents' Initial Brief and Designation of Matter on the Respondent/Appellant Encore Technology Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on March 13, 2019, addressed to counsel of record as follows.

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Greenville, SC, 29602
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MAR 14 2019

SC Court of Appeals

(Signature page to follow)

ROE CASSIDY COATES & PRICE, P.A.

Handwritten signatures of Joseph O. Smith and Joshua J. Hudson, written in black ink above a horizontal line.

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March 13, 2019

VIA FEDEX

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

**Re: *Encore Technology Group LLC v. Keone Trask and Clear Touch Interactive, Inc.,
f/k/a Clear Touch Interactive, LLC***
Appellate Case No. 2018-001444
RCCP No. 2626.0001A

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MAR 14 2019

Dear Madam Clerk:

SC Court of Appeals

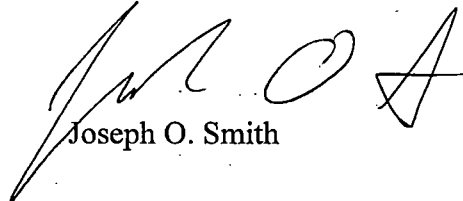
Enclosed please find the original and one copy of the Initial Brief of Appellants/Respondents and Designation of Matter to be included in Record on Appeal. Due to the Court's consolidation of three separate appeals, we filed a Motion for Extension of Time and Length to File Initial Brief on January 8, 2019. The Court entered an Order on January 14, 2019. stating Appellants/Respondents must file a proposed brief and designation of matter before it would consider the motion to exceed the page limit. Enclosed is the proposed brief.

Please file both in your office and return the filed copy to me in the envelope provided herein. By copy of this letter, we are serving counsel for Respondents/Appellants with a copy of same.

With highest regards, I am

Sincerely,

ROE CASSIDY COATES & PRICE PA



Joseph O. Smith

JOS/ads

cc: Gregory English, Esq.
Rita Barker, Esq.

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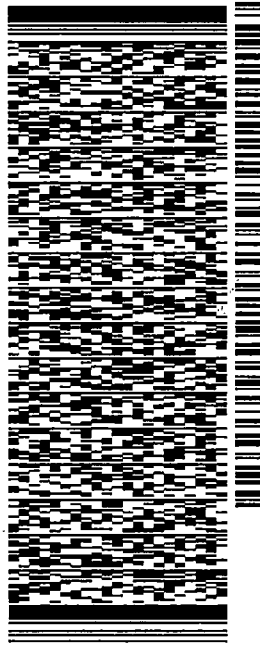
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