THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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.

RESPONDENT/APPELLANT ENCORE TECHNOLOGY GROUP, LLC'S INITIAL BRIEF

Gregory J. English
Rita Bolt Barker
WYCHE, P.A.

200 East Camperdown Way
Greenville, South Carolina 29601
Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200

Attorneys for Respondent/Appellant Encore Technology Group, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 4

ARGUMENT 4

I. THE CIRCUIT COURT ERRED IN HOLDING THAT ENCORE WAS NOT ENTITLED TO RESTITUTION FROM CLEAR TOUCH. 5

A. ENCORE SHOULD HAVE BEEN AWARDED THE VALUE OF CLEAR TOUCH UNDER ITS UNJUST ENRICHMENT CLAIM. 5

B. THE CIRCUIT COURT'S REFUSAL TO CONSIDER RESTITUTION WAS BASED ON THE INCORRECT CONCLUSION THAT ENCORE HAD AN ADEQUATE REMEDY AT LAW. 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Chisolm v. Pryor, 207 S.C. 54, 35 S.E.2d 21 (1945) 8

Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 440 S.E.2d 129 (1994) 5

Dema v. Tenet Physician Services-Hilton Head, Inc., 383 S.C. 115, 678 S.E.2d 430 (2009) 5

Doe v. Clark, 318 S.C. 274, 457 S.E.2d 336 (1995) 4

Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 366 S.E.2d 12 (Ct. App. 1988) 6

Franke Assocs. by Simmons v. Russell, 295 S.C. 327, 368 S.E.2d 462 (1988) 6

Jasdip Properties SC, LLC v. Estate of Stewart Richardson, 395 S.C. 633, 720 S.E.2d 485 (Ct. Ap. 2011) 6, 7

Laurin v. DeCarolis Constr. Co., 363 N.E.2d 675 (Mass. 1977) 7

May v. Muroff, 483 So.2d 772 (Fla. Dist. Ct. App. 1986) 8

Myrtle Beach Hosp. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000) 6

Niggel Assocs., Inc. v. Polo's of North Myrtle Beach, 296 S.C. 530, 374 S.E.2d 507 (Ct. App. 1984) 6

PCS Nitrogen, Inc. v. Ross Dev. Corp., 126 F. Supp. 3d 611 (D.S.C. 2015) 8

Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001) 4

Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 379 S.E.2d 119 (1989) 8

Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 581 S.E.2d 161 (2003) 5, 6

Webb v. First Fed. Savings & Loan Ass'n of Anderson, 300 S.C. 507, 388 S.E.2d 823 (Ct. App. 1989) 5

Other Authorities

Restatement of the Law – Restitution § 39 7

S.C. Jurisprudence, Unjust Enrichment & Restitution § 6 5

STATEMENT OF ISSUE ON APPEAL

In light of Defendant Clear Touch Interactive, Inc.'s ("Clear Touch") immense unjust enrichment, did the Circuit Court err in holding that Plaintiff Encore Technology Group, LLC ("Encore") was not entitled to restitution from Clear Touch?

STATEMENT OF THE CASE

Encore paid Defendant Keone Trask ("Trask") nearly $200,000 per year to serve as its director of product development and locate suppliers for Encore's products, including interactive panels for K-12 schools. (Transcript, p. 100, l.8-p. 101, l.9; p. 302, l.21-p. 303, l.18; p. 852, ll. 19-24; p. 853, ll. 4-7; Plaintiff's Exhibit 1) Instead of working solely for Encore, Trask formed a side company, Clear Touch, to divert profits from Encore while he was on Encore's payroll. (Transcript, p. 844, l.16-p. 845, l.10) Evidence at trial demonstrated that Trask:

- Maintained control of Clear Touch's operations (Transcript, p. 299, l.8-p. 300, l.10);
- Did not disclose his involvement in Clear Touch to Encore while he was an employee of Encore (Transcript, p. 329, l.9-p. 330, l.13; p. 332, ll.20-24; p. 368, l.19-p. 370, l.22; Plaintiff's Exhibits 8, 83; Final Order and Judgment, p. 33);
- Listed his mother—who used her maiden name—as owner of Clear Touch to hide his affiliation while doing all of the work for Clear Touch (Transcript, p. 122, ll.14-22; p. 127, ll.15-21; p. 295, l.1-p. 296, l.17; Final Order and Judgment, p. 33);
- Got Encore to sign a Reseller Agreement benefitting Clear Touch and had his mother sign for Clear Touch (Transcript, p. 304, l.10-p. 308, l.13; Plaintiff's Exhibits 3, 21, 22; Final Order and Judgment, p. 33);
- Had the true suppliers remove their labels from panels and replace them with Clear Touch labels to hide the suppliers' identities from Encore (Transcript, p. 122, ll.23-25; p. 127,

ll.7-14; p. 128, ll.1-8; p. 334, l.18-p. 335, l.25; p. 337, l.9-p. 339, l. 9; Plaintiff's Exhibits 5, 39, 40, 43; Final Order and Judgment, p. 33);

- Marked up the prices of panels from the suppliers that Clear Touch charged to Encore (Transcript, p. 128, ll.9-18; p. 339, l.10-p. 341, l.10; Plaintiff's Exhibit 44; Final Order and Judgment, p. 33);
- Had Encore send its checks to Clear Touch to a Nevada post office box and forwarded them back to South Carolina (Transcript, p. 123, ll. 14-19; p. 127, ll.22-25; p. 317, l. 9-p. 320, l.2; Final Order and Judgment, p. 34);
- Had his wife, Tamara Trask, work for Clear Touch but pose to Encore under the false name "Amy Andrews" (Transcript, p. 123, l.1; p. 312, l.1-p. 317, l.8; p. 325, l.19-p. 328, l.17; p. 769, ll.14-19; Plaintiff's Exhibits 4, 26, 27, 29, 33, 34; Final Order and Judgment, p. 34);
- While at conferences for Encore, worked to sign resellers for Clear Touch by initially leading them to believe Encore was an owner of Clear Touch (Transcript, p. 252, l.4-p. 262, l.24; p. 341, l.11-p. 342, l.3; Plaintiff's Exhibits 48, 78, 79, 80; Final Order and Judgment, p. 34);
- Got Encore's employees, Leo Gallant and Jimmy Higginbotham, to sign non-disclosure agreements—including one on the day Trask left Encore—so that he could disclose his ownership of Clear Touch but prevent them from disclosing same to Encore and thereby induce them to work for Clear Touch and its benefit while on Encore's payroll and leave Encore months later (Transcript, p. 123, l.20-p. 125, l.15; p. 321, l.14-p. 325, l.18; Plaintiff's Exhibits 15, 32; Final Order and Judgment, p. 34); and

- Permanently deleted incriminating e-mails (Transcript, p. 364, l.21-p. 366, l.19; p. 619, l.20-p. 621, l.9; p. 632, ll.2-8; p. 855, l. 17-p. 858, l.21; Plaintiff's Exhibits 73, 79; Final Order and Judgment, p. 34).

This scheme allowed Clear Touch to become a profitable and successful business. (Trial Transcript, p. 362, l.7-p. 364, l.20; Plaintiff's Exhibits 68, 69, 70) Encore's expert opined, based upon the discovery that Encore was able to obtain from Clear Touch, that Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254. (Trial Transcript, p. 515, l.10-p. 519, l.9; p. 525, l. 22-p. 527, l.3; Plaintiff's Exhibits 10.E, 10.J)

Encore filed its Complaint on September 18, 2015, asserting, among others, causes of action against Clear Touch for tortious interference with contractual relations, misappropriation of trade secrets, and unjust enrichment. Complaint, pp. 10-12. At the conclusion of trial that occurred September 26-30, 2017, the jury entered verdicts totaling $7,901,913 against Trask, including $3,377,023 in actual damages and $4,524,890 in punitive damages. (Verdict Form) Specifically, these verdicts found that (1) Trask had breached his duty of loyalty to Encore ($375,733 actual and $175,000 punitive damages), (2) breached his fiduciary duty to Encore ($675,361 actual and $1,500,000 punitive damages), (3) diverted profits from Leon County Schools in breach of his contract with Encore ($424,945 actual damages[1]), (4) misappropriated trade secrets regarding Leon County Schools from Encore in violation of the South Carolina Trade Secrets Act ($424,945 actual damages and $849,890 in exemplary damages (based upon the jury's findings of willful violation of the Trade Secrets Act)), and (5) breached his contract accompanied by fraudulent acts ($1,476,039 actual and $2,000,000 punitive damages). (Verdict Form)

[1] Encore sought $424,945 in lost profits from sales to Leon County Schools, Florida under multiple theories. Plaintiff's Exhibits 10.H.

Against Clear Touch, however, the jury rendered only two awards: (1) one for tortious interference with Encore's contractual relations in the amount of $424,945 in actual damages and $500,000 in punitive damages, and (2) the other for violation of the South Carolina Trade Secrets Act in the amount of $424,945 in actual damages and $849,890 in exemplary damages (based upon the jury's findings of willful violation of the Trade Secrets Act). Ten days after the verdict, Encore filed and served its Motion for Judgment Including Restitution, in which it asked the Circuit Court to order Clear Touch to pay restitution to Encore in the amount of Clear Touch's value, or $5,536,254. Plaintiff's Motion for Judgment including Restitution, pp. 1-4.

Following the Circuit Court's election of remedies and the addition of attorneys' fees, costs, and expenses, the Court entered its Final Order and Judgment as follows: (1) in favor of Encore against Trask in the amount of $7,917,468, and (2) in favor of Encore against Clear Touch in the amount of $1,715,335. Final Order and Judgment, p. 35. The Court held that Encore was not entitled to restitution simply because it thought "there is an adequate remedy at law afforded by the jury's verdict." Final Order and Judgment, p. 12.

STANDARD OF REVIEW

In an appeal on an equitable claim, the Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001); *Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995).

ARGUMENT

Defendants have been unjustly enriched in the amount of the value of Clear Touch, or $5,536,254, and should be required to pay restitution in that amount. Contrary to the finding by the Circuit Court, Encore did not have an adequate remedy at law against Clear Touch. Clear Touch was built with Encore's resources—employees, trade secrets, and money—and as a result

was able to generate not only profits that Encore was able to discover through December 31, 2015,[2] but also future profits that could not be and were not adequately captured in the jury award of damages at law. Accordingly, the Circuit Court should have awarded the value of Clear Touch to Encore from Clear Touch.[3]

I. The Circuit Court erred in holding that Encore was not entitled to restitution from Clear Touch.

A. Encore should have been awarded the value of Clear Touch under Encore's unjust enrichment claim.

A party has been unjustly enriched "when it has and retains benefits or money which in justice and equity belong to another." *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). "Unjust enrichment is the principle that justice and equity require the compensation of one who bestowed a benefit on another, because without such recovery the beneficiary would be allowed a windfall and the benefactor would suffer a loss. When an imbalance occurs between a benefactor and a beneficiary, the goal is the restoration of an equilibrium between their states." S.C. Jurisprudence, Unjust Enrichment & Restitution § 6.

"To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003); *see also Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994); *Webb v. First Fed. Savings & Loan Ass'n of Anderson*, 300 S.C. 507, 513, 388

---

[2] During discovery, Clear Touch objected and refused to produce financial information and documents after December 31, 2015, to hide how successful it was. With such additional information, the valuation of Clear Touch likely would have been much higher.

[3] Encore acknowledges that such an award could be subject to election of remedies.

S.E.2d 823, 827 (Ct. App. 1989), *overruled on other grounds by Myrtle Beach Hosp. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000); *Niggel Assocs., Inc. v. Polo's of North Myrtle Beach*, 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1984). The plaintiff must present evidence concerning the amount by which the defendant was unjustly enriched. *Id.* at 533-34, 374 S.E.2d at 509.

Where a defendant has been unjustly enriched, the plaintiff is entitled to restitution. *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473-74, 366 S.E.2d 12, 14-15 (Ct. App. 1988). "Restitution is a remedy designed to prevent unjust enrichment." *Sauner,* 354 S.C. at 409, 581 S.E.2d at 167; *see also Ellis,* 294 S.C. at 473, 366 S.E.2d at 14 ("Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff.").

An unjust enrichment claim is an equitable alternative to a breach of contract claim. "A breach of contract claim and quantum meruit claim can be alternative rather than inconsistent remedies." *Franke Assocs. by Simmons v. Russell,* 295 S.C. 327, 332, 368 S.E.2d 462, 465 (1988). "Where a jury finds that neither party breached an agreement, a plaintiff can still recover under the theory of restitution." *Jasdip Properties SC, LLC v. Estate of Stewart Richardson*, 395 S.C. 633, 720 S.E.2d 485 (Ct. Ap. 2011).

Although Trask had a contract with Encore that he breached, Clear Touch had no contract for which Encore claimed breach and sought damages.[4] Instead, the evidence presented at trial was undisputed that, while Trask was Encore's employee, he built the Clear Touch business using

[4] Encore did not claim in the trial that Clear Touch breached the Reseller Agreement, just that entry of the Reseller Agreement by Trask without full disclosure breached his duties to Encore. Because Encore did not know that Trask was diverting to Clear Touch, and that Clear Touch was benefitting from, Encore's money, personnel, trade secrets, and other resources, Encore was deprived of the opportunity to negotiate a contract with Clear Touch that fully compensated Encore for Clear Touch's use of such resources.

Encore's monetary, personnel, and other resources, with Encore taking all of the risk. This scheme allowed Clear Touch to become a profitable and successful business. Encore's expert testified that Clear Touch's profits through 2015, plus the present value of Clear Touch's future profits as of December 31, 2015, was $5,536,254. (Plaintiff's Exhibit 10.E)

Encore's valuation was based upon extremely conservative assumptions. For example, using Clear Touch's actual earnings through 2016 and assuming a growth rate of 2% (which was significantly less than historical rates) through 2019, Encore's expert calculated lost profits from the Clear Touch business opportunity of $7,798,632. (Plaintiff's Exhibit 10.J (last page)) Additionally, Encore's expert based his value upon Clear Touch's earnings from two years prior, which increased significantly since then, *id.* (Appendix 7 - Clear Touch Capitalization of Earnings), did not account for Encore's loss of the time value of money, and did not take into account Defendants' fraudulent acts and failure to preserve evidence. Only the theory of unjust enrichment and the remedy of restitution could allow Encore to recover the full amount that Clear Touch should pay.

B. The Circuit Court's refusal to consider restitution was based on the incorrect conclusion that Encore had an adequate remedy at law.

The total award of $1,274,835 against Clear Touch for its tortious interference with contractual relations and violation of the Trade Secrets Act did not provide Encore an adequate remedy. To determine whether a remedy is adequate, the Court should evaluate whether the injury is irreparable without restitution. "Injury is irreparable if plaintiff cannot use damages to replace the specific thing he lost." Restatement of the Law – Restitution § 39.

This principle of replacing what a plaintiff has lost is akin to the disgorgement remedy, which can be used to "deprive the defendant of a profit wrongfully made, a profit which the plaintiff was entitled to make." *Id.* (*citing Laurin v. DeCarolis Constr. Co.*, 363 N.E.2d 675, 679

(Mass. 1977); *May v. Muroff*, 483 So.2d 772 (Fla. Dist. Ct. App. 1986) (holding that, where vendor's unauthorized removal of gravel prior to closing yielded $240,000 but reduced the value of the land by only $120,000, purchaser should recover the value of the lost profits of $240,000).

"An 'adequate' remedy at law is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 126 F. Supp. 3d 611, 645 (D.S.C. 2015) (applying the definition of "adequate remedy at law" under South Carolina law). Stated another way, "the remedy at law must be adequate, and must attain the full end and justice of the case. It is not enough that there is some remedy at law...." *Chisolm v. Pryor*, 207 S.C. 54, 60, 35 S.E.2d 21, 24 (1945).

In this case, while there was some remedy at law, it was not complete and did not attain the full end and justice of the case. The evidence presented at trial showed that while Trask was Encore's employee, he built the Clear Touch business using Encore's monetary, personnel, and other resources, with Encore taking all of the risk, allowing Clear Touch to become a profitable and successful business and robbing Encore of the opportunities—both past and future—that Clear Touch was able to pursue. In other words, Encore built Clear Touch but did not receive the benefits from the business it unwittingly built. The causes of action at law available to Encore—requiring proof of tortious interference with specific contracts or misappropriation of specific trade secrets, which resulted in a verdict for actual damages of $424,945 in lost profits from one customer, Leon County Schools—provided no way for the jury to award the full value of Clear Touch to Encore. *See* Trial Transcript (Jury Charge for Tortious Interference), pp. 1203-04 ("[O]ne who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract is subject

to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."); *id.* (Jury Charge for Misappropriation of Trade Secrets), pp. 1202-03 ("A person aggrieved by 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 ....")

That Encore should recover the value of Clear Touch is clear from the following analogy: If Trask had used Encore's resources to build a rental house and collected rent from its tenants, Encore would be entitled to collect not only the amount of the rent discovered to the date of trial, but also the value of the house. In the same way, because Trask used Encore's resources to build Clear Touch, which collected profits from Encore's customers, Encore should collect the amount of Clear Touch's historic profits discovered to the date of trial (*i.e.*, the "rent") plus the discounted value of Clear Touch's future profits (*i.e.*, the value of the "house"). Encore's expert testified that Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254, and this amount should have been considered by the Circuit Court as restitution to be awarded to Encore.

This case presents the precise type of activity—Clear Touch's unjust enrichment—that restitution is designed to correct. It is evident that the jury award against Clear Touch, for $1,274,835 (including $424,945 in actual damages and $849,890 in exemplary damages), was inadequate to account for the profits Clear Touch made and continues to make to this day. Even making the conservative assumptions Encore made regarding the value of Clear Touch, the judgment against Clear Touch is nearly $4 million, or 70% less, than the value of Clear Touch in 2015. Such a disparity between the judgment awarded against Clear Touch and the profit Clear

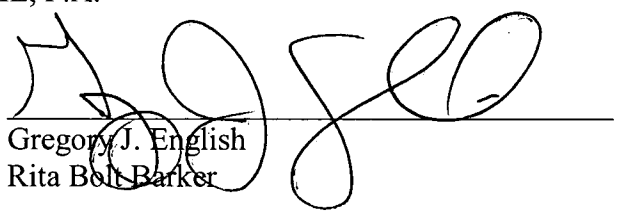
Touch gained from its unlawful scheme cannot be deemed adequate because it does not allow Encore to recover the full value of Clear Touch.

CONCLUSION

In light of Clear Touch's immense unjust enrichment, the Circuit Court erred in holding that Encore had an adequate remedy at law. The Circuit Court should have held that Encore was entitled to restitution from Clear Touch on Encore's unjust enrichment claim and awarded the value of Clear Touch, or $5,536,254.

Respectfully submitted,

WYCHE, P.A.

BY: 

Gregory J. English
Rita Bolt Barker

200 East Camperdown Way
Greenville, South Carolina 29601
Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200

Attorneys for Respondent/Appellant Encore Technology Group, LLC

March 13, 2019

Other Counsel of Record:

Joseph Owen Smith
Joshua Jennings Hudson
Roe Cassidy Coates & Price PA
Post Office Box 10529
Greenville, SC 29603

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2018-001444

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

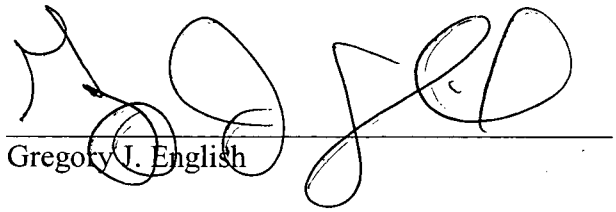
v.

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

PROOF OF SERVICE

I, Gregory J. English, of Wyche, P.A., attorneys for the Respondent/Appellant in the within action, do hereby certify that I have this date served upon opposing counsel the foregoing **RESPONDENT/APPELLANT ENCORE TECHNOLOGY GROUP, LLC'S INITIAL BRIEF** by first class mail, addressed to the following:

Joseph Owen Smith
Joshua Jennings Hudson
Roe Cassidy Coates & Price PA
Post Office Box 10529
Greenville, SC 29603



Gregory J. English

WYCHE, PA
200 East Camperdown Way
Greenville, South Carolina 29601
Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200

Attorneys for Respondent/Appellant Encore Technology Group, LLC

March 13, 2019

W Y C H E

Attorneys at Law

March 13, 2019

BY FIRST CLASS MAIL

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

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

Dear Ms. Kitchings:

Enclosed please find an original and a copy of the Initial Brief and Designation of Matter of Respondent/Appellant, Encore Technology Group, LLC, in the above-captioned matter, along with the Proof of Service. Please return file-stamped copies of these documents to us in the self-addressed, stamped envelope provided.

Thank you for your assistance.

Best regards,

Gregory J. English

(864) 242-8247
genglish@wyche.com

Enclosures

cc: Joseph O. Smith, Esq.
Joshua J. Hudson, Esq.

NEOPOST FIRST-CLASS MAIL
03/13/2019
US POSTAGE $002.20⁰

ZIP 29601
041M11287596

WYCHE
Attorneys at Law
44 East Camperdown Way
Greenville, SC 29601-3512

RECEIVED
MAR 15 2019
SC Court of Appeals

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