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.

INITIAL RESPONSE BRIEF OF RESPONDENT/APPELLANT ENCORE TECHNOLOGY GROUP, LLC

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STATEMENT OF ISSUES ON APPEAL

Appellant-Respondent Keone Trask ("Trask") formed a side company, Appellant-Respondent Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch") (Trask and Clear Touch may be referred to collectively as "Appellants"), and used it to take profits and opportunities from his employer, Respondent-Appellant Encore Technology Group, LLC ("Encore"). Over the course of three years, this scheme succeeded to benefit the Appellants by over $5.5 million. Evidence at trial clearly showed this misconduct and clearly proved the amount of damages. The jury was properly instructed without objection and returned a verdict in accordance with the evidence. The trial court ruled appropriately to avoid duplicative recovery. Appellants' appeal presents the following issues:

I. **Where Appellants' multiple wrongs caused Encore four separate and distinct injuries and Appellants sought no clarification from the jury, did Encore properly elect the four different verdicts corresponding to its four injuries to avoid a double recovery?**

II. **Did the trial court properly consider the arguments, evidence, and jury verdicts in requiring election of remedies instead of assuming – like Appellants – that the jury intended duplicative awards?**

III. **Where Encore's expert's opinion as to the $5.5 million value of the Clear Touch business opportunity was properly admitted and did not prejudice Appellants, did the trial court properly deny Appellants' motion for new trial absolute?**

IV. **Where Appellants took from Encore both profits from certain sales and the Clear Touch business opportunity, did the trial court properly allow Encore's expert to testify as to the value of both and deny Appellants' motion for new trial *nisi remittitur*?**

V. **Where Encore's restrictive covenants protected only its customers about whom Trask had confidential information and its confidentiality provision was limited, did the trial court properly deny Appellants' motion for judgment notwithstanding the verdict on the grounds that the restrictions were overly broad?**

VI. **Where the evidence showed that Appellants misappropriated Encore's trade secrets about Leon County Schools' specific technology preferences and prices it would pay, did the trial court properly deny Appellants' motion for judgment notwithstanding the verdict that they willfully violated the Trade Secrets Act?**

VII. **Where the jury awarded certain damages for breach of contract and additional damages for breach of contract accompanied by a fraudulent act, but Appellants did not question the jury about these verdicts, did the trial court properly deny Appellants' motion for new trial under the Thirteenth Juror Doctrine?**

VIII. **Where the jury awarded Encore damages under several causes of action entitling it to attorneys' fees and costs, did the trial court properly exercise its discretion in awarding Encore reasonable fees and costs through trial but not for fees and costs incurred from October 2017-April 2018 during post-trial proceedings?**

IX. **Should the Court again reject Appellants' challenge to the Receiver Order, which has been stayed by Appellants' deposit of funds with the clerk, on grounds of mootness and that it applied only to Defendant Trask's non-exempt assets?**

X. **Where Clear Touch in a second action raised the same facts that Appellants raised and could have asserted as counterclaims in the first action, did the trial court properly dismiss the second action under the doctrine of res judicata?**

XI. **Where, at the hearing, Encore cited to the trial court and discussed authority that res judicata barred Clear Touch's second action because its claims were compulsory counterclaims in the first action, did the trial court properly rely upon such authority to dismiss Clear Touch's second action?**

STATEMENT OF THE CASE

Encore filed its Complaint against Appellants on September 18, 2015. (Complaint) Encore's action was for Appellants' stealing profits from Encore while Trask was on Encore's payroll and secretly operating Clear Touch as a side company in competition with Encore, and included causes of action for breach of duty of loyalty, breach of fiduciary duty, breach of contract, and breach of contract accompanied by a fraudulent act against Trask, for violation of the South Carolina Trade Secrets Act against both Appellants, and for tortious interference with contractual relations against Clear Touch. After Appellants received multiple continuances, a jury trial occurred over two years later, on September 26-30, 2017.

Shortly before trial, Appellants stipulated as to Trask's liability on Encore's claims for breach of duty of loyalty and breach of fiduciary duty. Plaintiff's Ex. 83. Appellants denied

liability for the other claims. Encore argued the evidence proved that Appellants caused it four distinct injuries and requested actual damages of $5,536,254.

Following the charge,[1] the jury unanimously reached verdicts of $3,377,023 in actual damages and $4,524,890 in punitive damages against Trask, totaling $7,901,913. (Verdict pp.1-6) Specifically, these verdicts found that Trask had (1) 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 in breach of his contract with Encore ($424,945 actual damages[2]), (4) misappropriated trade secrets regarding Leon 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 act ($1,476,039 actual and $2,000,000 punitive damages). (Verdict, pp. 1-6) Although Appellants argue that the actual damages awarded in Verdicts 1, 2, and 3 equal the actual damages awarded in verdict 5—breach of contract accompanied by fraudulent act—it is clear the jury did not simply add those claims because the punitive damages of $1,675,000 awarded for Verdicts 1, 2, and 3 do not total the $2,000,000 awarded for Verdict 5.

Against Clear Touch, the jury rendered 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

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[1] Judge McIntosh charged the jury on the law applicable to Encore's causes of action and damages and Appellants did not object to any portion of the charge. (Trial Tr., 1186:10-1228:3.)

[2] Encore sought $424,945 in lost profits from sales to Leon under multiple theories. Plaintiff's Ex. 10.H.

findings of willful violation of the Trade Secrets Act). (Verdict, pp. 4-5) The jury found for Appellants on two causes of action, defamation and violation of the Unfair Trade Practices Act.

Following the Circuit Court's requirement of election of remedies and the addition of attorneys' fees, costs, and expenses, the Court entered its Final Order and Judgment in favor of Encore as follows: (1) against Trask in the amount of $7,917,468, and (2) against Clear Touch in the amount of $1,715,335. (Final Order and Judgment, p. 35) Although Clear Touch quickly deposited the $1.7 million judgment against it, Trask refused to pay or turn over financial documents, leading the trial court to appoint a receiver. (Receiver Order) Appellants then violated the Receiver Order, transferring funds to a related entity and refusing to provide the receiver with the information and documents he requested, and so were held in contempt. (Order filed Dec. 6, 2018) Only after they were on the verge of criminal contempt did Trask deposit $6,600,769.58 with the Greenville County Clerk of Court (Clerk's Email dated January 3, 2019; Defendants' Hearing Exhibit 4),[3] and over $240,000 for the Receiver's fees and costs. By doing so, Appellants were able to avoid disclosing to Encore the full extent of their finances, which could support an even higher award than given by the jury.[4]

STANDARD OF REVIEW

Although Appellants argue their appeal simply seeks to overturn Judge McIntosh's "abuse" of them, the truth is their arguments ask the Court to invalidate virtually all of the jury's verdicts.

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[3] That deposit left Trask responsible for $849,890 in exemplary damages under the Trade Secrets Act plus post-judgment interest on that amount under the Final Order and Judgment, but Judge McIntosh modified the Final Order and Judgment during this appeal to give Trask credit for Clear Touch's payment of that amount. This post-appeal modification of the Final Order and Judgment is the subject of a separate appeal.

[4] Appellants fail to explain how Trask "pour[ed] his life savings of approximately $150,000" into Clear Touch in 2014, Appellants' Brief at 6, but they were able to deposit funds totaling nearly $8.6 million by January 2019.

In evaluating Appellants' appeal, however, the Court should give substantial deference to the jury's determination of damages. *See Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993) ("The jury's determination of damages ... is entitled to substantial deference."). As the South Carolina Supreme Court has stated:

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

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

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

Further, in evaluating a jury's verdicts, the evidence and all inferences from the evidence must be viewed in the light most favorable to the party that prevailed before the jury, here Encore. *See Elders v. Parker*, 286 S.C. 228, 230, 332 S.E.2d 563, 565 (Ct. App. 1985) ("On appeal of a jury verdict, the evidence and any inferences to be drawn therefrom must be viewed in the light most favorable to the respondent. [The Court's] review is limited to determining if there is any evidence which reasonably tends to support the verdict."). The evidence here amply supports all of the jury's verdicts against Appellants.

ARGUMENT

Statement of Facts

Encore employed Trask and paid him nearly $200,000 per year to serve as its Chief Business Development Officer and to locate suppliers for Encore's interactive touch-screen panels for K-12 schools ("panels"). (Trial Transcript ("Tr."), 100:8-101:9; 302:21-303:18; 852:19-853:7;

Plaintiff's Exhibit ("Ex.") 1) Instead of working loyally and solely for Encore, however, Trask surreptitiously formed a side company, Clear Touch, to steal profits and opportunities from Encore while he was on Encore's payroll. (Tr., 844:16-845:10) The evidence demonstrated that Trask:

- Maintained control of Clear Touch's operations (Tr., 299:8-300:10);
- Did not disclose his involvement in Clear Touch to Encore while he was an employee of Encore (Tr., 329:9-330:13; 332:20-24; 368:19-370:22; Plaintiff's Exs. 8, 83; Final Order and Judgment, p. 33);
- Listed his mother—using her maiden name—as owner of Clear Touch to hide his affiliation while himself doing all of the work for Clear Touch (Tr., 122:14-22; 127:15-21; 295:1-296:17; Video Deposition of Kathy Cruse-Krebs; Final Order and Judgment, p. 33);[5]
- Drafted and induced Encore to sign a Reseller Agreement benefitting Clear Touch by approving it for Encore and having his mother sign for Clear Touch (Tr., 304:10-308:13; Plaintiff's Exs. 3, 21, 22; Final Order and Judgment, p. 33);[6]
- Had the true suppliers of the panels remove their labels and replace them with Clear Touch labels to hide suppliers' identities from Encore (Tr., 122:23-25; 127:7-14; 128:1-8; 334:18-335:25; 337:9-339: 9; Plaintiff's Exs. 5, 39, 40, 43; Final Order and Judgment, p. 33);

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[5] Contrary to the false claim in the Brief of Appellants/Respondents ("Appellants' Brief") at 4, Trask did not transfer his interest in Clear Touch to his mother until April 11, 2013 (Pl. Ex. 14), shortly after he became employed by Encore and just before he induced Encore to sign the Reseller Agreement, described herein.

[6] The Reseller Agreement is dated April 24, 2013 (Pl Ex. 3), 13 days after Trask filed the articles listing his mother as "Managing Member" of Clear Touch. The claims that "Trask brought [Clear Touch] to Encore as a potential supplier" and Encore "chose to sell [Clear Touch] panel products and entered a Reseller Agreement" (Appellants' Brief at 5) are misleading. Trask used his position at Encore to ensure that Clear Touch was Encore's panel supplier.

- Marked up the prices of the panels from the suppliers that Clear Touch charged to Encore (Tr., 128:9-18; 339:10-341:10; Plaintiff's Ex. 44; Final Order and Judgment, p. 33);
- Had Encore pay Clear Touch by sending its checks to a Nevada post office box and then having them forwarded back to South Carolina to hide his affiliation with Clear Touch (Tr., 123: 14-19; 127:22-25; 317: 9-320:2; Final Order and Judgment, p. 34);
- Had his wife, Tamara Trask, work for Clear Touch but present herself to Encore under the false name "Amy Andrews" to hide his affiliation (Tr., 123:1; 312:1-317:8; 325:19-328:17; 769:14-19; Plaintiff's Exs. 4, 26, 27, 29, 33, 34; Final Order and Judgment, p. 34);
- While at conferences Encore was paying for him to attend, worked to develop a reseller network for Clear Touch, initially "baiting" resellers by leading them to believe Encore was the owner of Clear Touch (Tr., 252:4-262:24; 341:11-342:3; Plaintiff's Exs. 48, 78, 79, 80; Final Order and Judgment, p. 34);[7]
- Had Encore employees, Leo Gallant and Jimmy Higginbotham, 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 that ownership to Encore and thereby induce them to work for Clear Touch and its benefit while on Encore's payroll and leave Encore months later to work for Clear Touch (Tr., 123:20-125:15; 321:14-325:18; Plaintiff's Exs. 15, 32; Final Order and Judgment, p. 34); [8] and

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[7] The Appellants' claim that in "January 2014 Trask decided to leave Encore" was directly refuted by Chris Powell, the person Trask claims he told he wanted to resign. (Tr., 241:4-17.) In fact, Trask told no one at Encore he wanted to leave and was attending conferences on Encore's payroll and signing up potential resellers for Clear Touch in February 2014. (Tr., 256:9-262:20.)

[8] Contrary to the claim that in "October 2014 ... Trask disclosed his interest in [Clear Touch] to Encore leadership," (Appellants' Brief at 6), Trask only disclosed that recently "he had acquired an interest in Clear Touch." (Tr., 151:12-20.)

- Permanently deleted incriminating e-mails, both from Encore's server and from Clear Touch (Tr., 364:21-366:19; 619:20-621:9; 632:2-8; 855: 17-858:21; Plaintiff's Exs. 73, 79; Final Order and Judgment, p. 34).[9]

Appellants realized significant ill-gotten profits from their scheme. (Tr., 362:7-364:20; Plaintiff's Exs. 68, 69, 70) Encore's expert opined, based upon the limited discovery that Encore was able to obtain from Clear Touch, that the value of Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254. (Tr., 515:10-519:9; 525:22-527:3; Plaintiff's Exs. 10.E, 10.J).

At trial, Encore outlined Appellants' multiple wrongs and its four injuries in its opening statement. (Tr. 72:19-75:5.) Encore's Chief Executive Officer, Todd Newnam, testified regarding Encore's injuries, Appellants' liability for same, and the calculations of certain damages. (Tr., 93:18-219:25.) Mr. Dale Viola, owner of another business like Encore's, explained the sales process, the profits to be made by buying direct from suppliers, and Trask's solicitation of him to become a Clear Touch reseller while at a conference, which Trask attended as an employee of Encore. (Tr., 245:15-269:6; 283:21-285:9.) Mr. Trask, in his depositions that were read to the jury and in live testimony, admitted numerous aspects of his and Clear Touch's wrongdoing. (Tr., 288:2-370:24; 832:15-892:12.) In a video deposition that must be watched to be believed, Trask's mother, Kathy Cruse-Krebs, further exposed the depths of Appellants' deceptive conduct toward

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[9] During the case, Encore produced over 200,000 pages of discovery by December 2016 and another 10,000 by May 31, 2017. (Summary Judgment Tr. 12:8-25 (26,000 pages in November 2016 and 175,000 pages in December 2016)) Because of an employee misspelling, Encore's multiple, original search terms included "ClearTouch" but not "Clear Touch," which led Encore to produce an additional 10,000 pages on May 31, 2017, after it discovered the misspelling. By contrast, Appellants claimed that most of their emails were "lost" in an email migration performed without backing-up or archiving. (Plaintiff's Ex. 73)

Encore and made clear that she was in no way running Clear Touch. (Tr., 373:2-6; Kathy Cruse-Krebs' Video Deposition.) Mr. Jimmy Higginbotham testified about Clear Touch's hiring him, asking him to copy and bring Encore's customer list, and Appellants' efforts to take Leon's business from Encore. (Tr., 388:17-400:19.) Mr. Michael Meilinger, a CPA and business valuation expert, testified to Encore's damages. (Tr., 482:11-589:25.) Mr. Michael Knight testified to Trask's permanently deleting Clear Touch-related emails on Encore's computer server. (Tr. 619:20-621:22; 632:1-8; 651:5-652:11.) Mr. Young testified that Encore did not divert panels purchased from Leon to another customer, as claimed by Trask. (Tr., 1072:10-1073:16) The following exhibits were admitted in evidence during the foregoing testimony: Plaintiff's Exs. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.B, 10.C, 10.D, 10.E, 10.G, 10.H, 10.I, 10.J, 11, 12, 13, 14, 15, 16, 18, 21, 22, 26, 27, 29, 31, 32, 33, 34, 35, 38, 39, 40, 41, 43, 44, 48, 51, 52, 53, 54, 56, 57, 58, 63, 68, 69, 70, 73, 76, 78, 79, 80, 82, 83, and 84; Defendant's Exs. 29, 30, 31, and 33. In closing arguments, Encore showed how the evidence proved that Appellants caused the four injuries outlined below and requested actual damages of $5,536,254. (Tr., 1085:1-1115:15)

Encore suffered – and the jury found -- four separate and distinct injuries arising from Appellants' methodical course of deceit:

1. Wages and conference expenses paid to benefit Clear Touch employees. Encore paid Trask $402,809 in wages ($335,120) and conference expenses (of which Encore only sought a portion, $67,689). (Tr., 141:2-24; 142:21-145:18; Plaintiff's Ex. 10(G) and 10(B).) The jury awarded Encore a portion of this amount, or $375,733 in actual damages on its cause of action for breach of duty of loyalty against Trask. (Verdict, p. 1)

2. Lost profits on products Encore purchased from Clear Touch at marked-up prices. If Trask had disclosed the true identities of the suppliers, Encore could have purchased panels from

them directly instead of through Clear Touch and made an additional $675,361 in net profits. (Tr., 133:24-134:13; 218:8-219:6; 495:15-496:15; 504:4-507:10; Plaintiff's Ex. 10(C)) The jury awarded Encore this exact amount—$675,361—in actual damages on its cause of action for breach of fiduciary duty against Trask. (Verdict, p. 2)

3. Lost profits on Clear Touch's sales to Leon County Schools. If Trask had honored the restrictive covenants in his contract, Clear Touch had not tortiously interfered with same, and Trask and Clear Touch had not misappropriated its trade secrets, Encore could have made $424,945 in profits on sales that Clear Touch made to Encore's customer, Leon County Schools ("Leon"). (Tr., 130:24-132:10; 145:19-146:1; 495:15-496:5; 507:11-508:25; Plaintiff's Ex. 10(D)) The jury awarded Encore this exact amount—$424,945—in actual damages on its causes of action for breach of contract against Trask, tortious interference against Clear Touch, and violation of the Trade Secrets Act against both Appellants. (Verdict, pp. 3-5)

4. Loss of the value of the Clear Touch business opportunity. Encore argued that, under the "business opportunity" clause of Trask's contract, because Trask built Clear Touch's reseller business on Encore's time with Encore's resources,[10] Encore should receive the value of Clear Touch, which Encore's expert valued at $5,536,254. The jury awarded Encore $1,476,039 in actual damages on its cause of action for breach of contract accompanied by a fraudulent act against Trask. (Verdict, p. 6)

I. Where Appellants' multiple wrongs caused Encore four separate and distinct injuries and Appellants sought no clarification from the jury, Encore properly elected four different verdicts corresponding to its four injuries to avoid a double recovery.

In ruling on Encore's Motion for Judgment Including Restitution, Exemplary Damages, Attorneys' Fees, Expert Witness Fees, Costs and Other Expenses, the trial court determined that

[10] Encore was Clear Touch's first and only customer from the beginning for over a year, during which time Encore paid all of Clear Touch's marketing expenses and bore all the risk.

Encore properly elected remedies consistent with the jury's determination of damages. Specifically, the jury awarded Encore damages and the trial court entered judgment as follows:

Against Defendant Keone Trask

Actual Damages		**Punitive Damages**		
$ 375,733.40		$ 175,000.00		breach of loyalty (portion of 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 as breach of contract)
+1,476,039.00		+2,000,000.00		breach of contract accompanied by a fraudulent act (portion of Clear Touch profits)
$2,952,078.40	+	$4,524,890.00	=	$7,476,968.40
Plus attorneys' fees				+ 345,600.00
Plus costs & expenses				+ 94,900.00
TOTAL AGAINST TRASK:				**$7,917,468.40**

Against Defendant Clear Touch Interactive, Inc.

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

(Final Order and Judgment, p. 10-11)

Rather than viewing the evidence and all inferences from it in the light most favorable to Encore as required by law, Appellants ask the Court to construe the verdicts as contradictory and inconsistent with the evidence, and thereby ask the Court to invade the province of the jury. The Court should decline Appellants' invitation.

A. Appellants' seek a misapplication of the doctrine of election of remedies.

The election of remedies doctrine applies only when a jury clearly renders multiple awards for a single injury. Appellants' argument—that "a Plaintiff must choose which cause of action it elects to utilize as its monetary judgment"—is directly contradicted by the authority they cite in the immediately following sentence: "The issue is one of **election of remedies, not election between causes of action.**" Appellants' Brief at 22, citing *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990) (emphasis added). Appellants continue with the citation of authority that directly undermines their argument: "**Election of remedies** involves a choice between different forms of redress afforded by law **for the same injury** ...." *Taylor v. Medencia,* 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996) (emphasis added). "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) (emphasis added). "[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** ...." *Rivers v. Rivers*, 292 S.C. 21, 31, 354 S.E.2d 784, 790 (Ct. App. 1987), *overruled on other grounds by Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992) (holding no election of remedies required of a plaintiff who received damages for the "twin causes of action" of alienation of affection and criminal conversation because "[t]he causes of action are distinct, they arose out of separate and distinct facts, and the two alleged wrongs did not result in a single and the same loss.") (emphasis added; internal citations omitted).

The doctrine of election of remedies has no application in cases where, as here, separate causes of action involve different wrongs and different injuries. *GTR Rental, LLC v. DalCanton*, 547 F. Supp. 2d 510, 515 (D.S.C. 2008) (holding that election was unnecessary because the jury awards for breach of fiduciary duty, breach of contract, conversion, fraud, and violation of the South Carolina Unfair Trade Practices Act were based on different elements, and the facts supporting the separate claims occurred "over a lengthy period and involved numerous activities involving [plaintiff's] customers, property, and finances," so that "the complex series of transactions undertaken by defendants does not comprise a single wrong ...."); *see also Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 431-32 (Ct. App. 1995).

Likewise in this case, because Appellants committed multiple wrongs, Encore suffered four distinct injuries, the causes of action were based on different elements, and there were different facts involving numerous activities supporting Encore's various claims, "the complex series of transactions undertaken by defendants does not comprise a single wrong." The fact that the jury awarded different actual damages and different punitive damages on most causes of action shows that Appellants committed multiple wrongs, not a "single wrong," and that Encore suffered multiple injuries, not "a single and the same loss." Therefore, except for the verdicts for the Leon profits of $424,945, election among the legal causes of action should not be required.

B. Encore's attorneys' closing arguments do not justify ignoring four of the jury's six verdicts and altering a fifth.

Appellants argue that Encore must choose one of Causes of Action II-VI because it sought the same damages for those causes of action. This argument fails for several reasons.

First, it is not true. Encore's attorney argued that there were multiple ways that Appellants breached their duties to Encore and each breach could lead to different damages. (Tr., 72:19-75:15

("There are basically four categories of damages I want to discuss and that the evidence will show ...."); 1102:4-6 ("Now what that means, Ladies and Gentlemen, is that you will have a broad range of damages to consider for this cause of action."); 1102:6-1113:12 (covering multiple items of damages the jury could find). Specifically, Encore's attorney argued the jury could award different damages for Encore's four distinct injuries:

1. the wages, benefits, and expenses Encore paid Trask while he was breaching his duty of loyalty. (Tr., 1099:11-20 ("[W]hile he was an employee of Encore, Mr. Trask received salary, bonus, benefits and expenses .... So for the first cause of action, Breach of Duty of Loyalty, we're asking you to check the box A, for plaintiff ....));

2. the profits Encore lost by Trask's not disclosing the identities of the true suppliers of the products in breach of his fiduciary duty. (Tr., 1101:1-8 ("An employer and an employee have that [fiduciary] relationship in a couple of different ways. First of all, an employee could breach it if the employee fails to fully disclose to the employer known information that is significant and material. We know that Mr. Trask did that with regard to the true suppliers of these products.")); Tr., 1103:1-19 ("Now, the second category of damages is Lost Profit, and there are two categories of that.... The first category are the products that Encore sold to its customers that it acquired from Clear Touch at the mark up.... That's the first three categories in Table Number 2. Those categories total $675,361."));

3. the profits Encore lost from Leon by Trask's breach of contract, Clear Touch's tortious interference with same, and Appellants' misappropriating Encore's trade secrets. (Tr., 1095:1-25 ("Then Mr. Trask also used specific information he learned about Leon County Schools to take an opportunity and orders for about 1,000 of these panels .... So he had specific knowledge that he learned at Encore about that that constitutes a trade secret ...."); Tr., 1103:24-1104:8 ("The

second category are those bottom two lines, and those are the sales made to Leon.... [T]he profit amount is $424,945.")); and

4. the lost business opportunity of Clear Touch to which Encore was entitled under the "business opportunity" clause of Trask's contract. (Tr., 1109:11-1110:24 ("Encore claims that Mr. Trask breached his contract in five ways.... The fourth breach is the business opportunity provision. He breached that. He didn't notify them of ... the opportunity to build the reseller network."); 1105:7-1106:14 ("[T]he third calculation ... is the business opportunity calculation.... There are actually two components of this.... One is just for ... the profits that Clear Touch made through the end of 2015, and that figure is $1,636,254.... And then at the end of 2015, what was Clear Touch worth? ... That's where he comes up with the figure of $3,900,000. Those two components add up to the $5.5 million figure that you heard.")).

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

Second, Appellants' argument assumes the jury was bound by Encore's attorneys' arguments. It was not. An attorney's arguments are not evidence. *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are ... not evidence.") (quoting *McManus v. Bank of Greenwood,* 171 S.C. 84, 84, 171 S.E. 473, 475 (1933) ("This court

has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.")). As the trial court charged the jury (Tr., 1175:20-25), the jury was the judge of the facts based upon the evidence, not attorneys' arguments, and it was the jury's prerogative to award different damages for different injuries.

Finally, Encore's attorneys never contended that liability or damages under Causes of Action II-VI were based on a single fact or a single injury, unlike the unpublished federal case relied upon by Appellants, *Uhlig v. Shirley*, Civil Action No. 6:08-cv-01208, 2012 WL 2890178 (D.S.C. July 16, 2012). While in *Uhlig*, the Court did require election among four of six causes of action, it did so only as to causes of action based on "the same facts" – the violation of two provisions of an employment agreement, which formed the only basis for the four claims subject to election. *Id.* at *4. As noted above, this is not the case here, where distinct facts gave rise to Causes of Action II-VI and distinct injuries. Encore's case against Appellants was much broader and involved more distinct acts and injuries over a longer timeframe with more deceit than *Uhlig*.[11]

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

Appellants also argue Mr. Meilinger testified that "if the jury awarded the damages in Table 2, they could not award those in Table 1," and therefore Encore must be required to elect only the jury's verdict for breach of contract accompanied by a fraudulent act, but subtract from it the jury's verdict for breach of duty of loyalty, leaving Encore with only $1,100,306 in actual damages. Appellants Brief at 27, n.7. Again, Appellants' argument fails for multiple reasons.

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[11] Appellants' arguments also do not apply to the verdicts against Clear Touch. Encore acknowledges that the $424,945 in actual damages awarded against Clear Touch for its violation of the South Carolina Trade Secrets Act are the same as the actual damages for Clear Touch's tortious interference with Encore's contract with Trask. The foregoing arguments about election among Causes of Action II, III, IV, and VI against Trask have no bearing on the judgment against Clear Touch.

First, Mr. Meilinger did not testify that awarding any damages reflected in Plaintiff's Exhibit 10-H, Table 2, precluded awarding any damages in Table 1. He merely said that "you would not add the second analysis [$1,100,306] to the first analysis [$488,041]" as part of explaining that he was not adding the first and second set of damages on top of the third set of $5.5 million, which was "the fullest measure of [actual] damages to Encore." (Tr., 527:21-529:24) The jury did not do this. Instead, they chose to award some damages from the first analysis, some damages from the second analysis, and some damages from the third analysis, which fell below the $5.5 million total.

Second, even if Mr. Meilinger had testified as Appellants assert, the jury was not required to accept such testimony in calculating damages. It is within the jury's discretion to determine how much weight to give an expert's testimony. *See State v. Poindexter*, 314 S.C. 490, 494, 431 S.E.2d 254, 256 (1993); *Small v. Pioneer Machinery, Inc.*, 316 S.C. 479, 488-89, 450 S.E.2d 609, 614-15 (Ct. App. 1994) ("It is not unusual, of course, for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve.... The jury could have either accepted or rejected the expert witness's opinions, depending on its view of the evidence."). The jury did not award all of the damages calculated in Table 3, and therefore was entitled to award as much of Table 1 and Table 2 as it chose.

D. Appellants failed to preserve their election of remedies arguments by failing to seek clarification from the jury.

The Court's recent decision in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co.*, 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018), makes clear that, to preserve an argument about election of remedies, Appellants must first ask the jury to clarify any portion of the verdict that is ambiguous or unclear. In *Stoneledge*, a construction defects case, the Appellants objected

because the trial court cumulated, and did not require election among, jury verdicts for negligence ($3,000,000), breach of implied warranty of workmanlike service ($1,000,000), and breach of implied warranty of habitability ($1,000,000). Specifically, like Appellants here, defendant argued "the trial court erred in failing to require the [plaintiff] to elect a remedy because '[a]ll of the damages awarded to the [HOA] by the jury arise from the same set of facts and are not distinct to different causes of action.'" *Id.* at 301, 522. The Court refused to consider defendant's argument because at trial it failed to "request the court ask the jury what its intent was in how it awarded damages. Accordingly, [defendant] is unable to argue on appeal the court's decision was in error." *Id.* (citing *Allegro Inc. v. Scully*, 400 S.C. 33, 49 n.9, 733 S.E.2d 114, 123 n.9 (Ct. App. 2012) ("If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused.")).

In other words, if defendants believe a jury has improperly cumulated verdicts, they must seek clarification from the jury before it is dismissed – not ask the courts to assume the verdicts are improperly cumulated and overturn them. Appellants here failed to request such clarification, and so should not now be heard to speculate how the verdicts might be duplicative.

II. The trial court properly considered the arguments, evidence, and jury verdicts in requiring election of remedies instead of assuming – like Appellants – that the jury intended duplicative awards.

Appellants argue that, in its Final Order and Judgment, the trial court made "inappropriate factual findings" that constituted an "invasion of the province of the jury." Appellants' Brief at 22-23. The trial court did no such thing. Instead, the court's conclusions cited by Appellants were made to uphold the jury verdicts in response to Appellants' post-trial motions to overturn them.

Appellants ignore the law that, when faced with post-trial motions or appeals, courts are supposed to view "the evidence and any inferences to be drawn therefrom ... in the light most favorable to the respondent" and determine "if there is any evidence which reasonably tends to

support the verdict," *Elders*, 286 S.C. at 230, 332 S.E.2d at 565, "sustain verdicts when a logical reason for reconciling them can be found," *Daves*, 355 S.C. at 231, 584 S.E.2d at 430, and affirm a "jury's verdict ... if it is possible to do so and carry into effect the jury's clear intention." *Id.* at 234, 432. That is all Judge McIntosh did. If accepted, Appellants' arguments—which assume that the jury lacked sufficient evidence or intended illogical duplication—would turn this law on its head.

The sole authority cited by Appellants for this argument, *Krepps by Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996), is inapplicable. In that case, the trial court granted an *additur* of $7,500 for a verdict of $0 that conflicted with a verdict of $23,000 in a companion case tried at the same time by the same jury. The Court reversed because the "verdict of zero dollars was inconsistent or incomplete. A verdict for the plaintiff for zero dollars cannot stand. ... Therefore, ... the trial court was required to either resubmit the case to the jury or grant a new trial absolute. We thus reverse the trial court's failure to grant a new trial absolute." *Id.* at 610, 297.

There was no "inconsistent or incomplete" verdict in this case, nor did Judge McIntosh grant an *additur* or *remittitur* or otherwise alter the jury verdicts. As noted above, there was a clear tie between Encore's arguments concerning damages for its four distinct injuries, the evidence supporting the damages for those injuries, the jury charge, and the verdicts themselves. The trial court was not "invading the province of the jury" to uphold, for example, the jury's verdict for breach of fiduciary duty in the amount of $675,361 when (a) the evidence showed that Encore could have purchased panels from suppliers directly instead of through Clear Touch and made this amount in profits if Trask had disclosed the suppliers, (b) Encore argued this to the jury, and (c) the jury awarded this exact amount. The same is true of the $424,945 in profits from sales to Leon. The same result follows where the jury awarded less than the evidence could have supported for

Trask's breach of his duty of loyalty and violation of his contractual duty to provide the Clear Touch business opportunity to Encore.

III. Where Encore's expert's opinion as to the $5.5 million value of the Clear Touch business opportunity was properly admitted and did not prejudice Appellants, the trial court properly denied Appellants' motion for new trial absolute.

Appellants argue they should receive a new trial because the trial court admitted in evidence Table 3 to Plaintiff's Ex. 10.H, which summarized Mr. Meilinger's calculation of the value of the Clear Touch business opportunity. The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012); *American Fed. Bank v. No. 1 Main Joint Venture*, 321 S.C. 169, 174-75, 467 S.E.2d 439, 442 (1996). To the extent any evidence has been improperly admitted, the party seeking relief must also show that he was prejudiced by the admission. *Id.*

The trial court properly admitted Table 3. In allowing it, the Court was relying on well-settled law regarding damages available to Encore for breach of the business opportunity clause in Trask's contract. *See, e.g., Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1997) (purpose of damages for breach of contract is to put the plaintiff in as good a position as he would have been if the contract had been performed). The evidence was undisputed that, while he was Encore's employee, Trask built the Clear Touch business using Encore's monetary, personnel, and other resources, with Encore taking all of the risk. If Trask had used Encore's resources to build a rental house and collected rental income from its tenants, he would be required to pay Encore the amount of the rental income collected through the date of trial plus the value of the house. Mr. Meilinger testified that the value of Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254, so that this amount was properly admitted.

In fact, Mr. Meilinger first testified to these values of Clear Touch without objection by Appellants. (Tr., 509:1-511:23) Only after Mr. Meilinger had so testified did Appellants object, and then their grounds were limited to the argument that it "should be an alternative calculation, not a pile on with the lost profits and everything too." (Tr., 514:22-24) As noted earlier, Mr. Meilinger explained that he was not adding Encore's wages and the lost profits on sales to Encore customers and Leon on top of the $5.5 million, but that the latter was "the fullest measure" of actual damages to Encore." (Tr., 527:21-529:24)

Appellants' objection was overruled and Mr. Meilinger thereafter further testified about this value. During this testimony, Plaintiff's Ex. 10.E—which was the same as Table 3 of Ex. 10.H, showing how the $5.5 million figure was calculated—was admitted without objection by Appellants. (Tr., 515:10-519:5)

Further, Appellants were not prejudiced by the admission of Table 3 for at least two reasons. First, no single jury verdict approached the $5.5 million "fullest measure" of actual damages. The highest verdict for actual damages was $1,476,039 for breach of contract accompanied by a fraudulent act against Trask. (Verdict, p.6) Accordingly, it is impossible for Plaintiff's Exhibit 10.H to have resulted in prejudice to Appellants, especially after Plaintiff's 10.E had been admitted without objection.

Second, Appellants contend that the admission of Table 3 set "an artificially high ceiling." Defendant's Brief at 32. This argument ignores that the valuation of Clear Touch in Table 3 was significantly more conservative than the $10 million valuation Trask placed on Clear Touch in his memorandum to investors shortly after he left Encore. *See* Plaintiff's Ex. 68 (setting forth a $10,000,000 valuation of Clear Touch). Contrary to Appellants' claim that the $10 million figure "has nothing to do with the value of [Clear Touch]," Appellants' Brief at 36, Trask admitted that

it was his valuation of Clear Touch in October 2014. (Tr., 362:7-363:8 (admitting Plaintiff's Ex. 68 is a "valuation of $10 million dollars, that's correct")). In light of Appellants' refusal to disclose their post-2015 finances to Encore, it is likely that Appellants' $10 million valuation was closer to the true value than the $5.5 million value calculated by Mr. Meilinger. In sum, Appellants can show no prejudice from the admission of Table 3 entitling them to a new trial absolute.

IV. Where Appellants took from Encore both profits from certain sales and the Clear Touch business opportunity, the trial court properly allowed Encore's expert to testify as to the value of both and did not err in denying Appellants' motion for new trial *nisi remittitur*.

Appellants also argue they should have been granted a new trial *nisi remittitur*—they do not say to what—because the verdicts were "excessive" and the admission of financial evidence through Encore's expert "resulted in verdicts actuated by passion or prejudice." Appellants' Brief at 34. A new trial or new trial *nisi* should be granted only when the Court finds the amount of the verdict to be excessive. *Proctor v. Dept. of Health & Environmental Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). However, the jury's determination of damages is entitled to substantial deference. *Rush*, 310 S.C. at 379, 426 S.E.2d at 805; *Gastineau v. Murphy*, 323 S.C. 168, 182, 473 S.E.2d 819, 828 (Ct. App. 1996), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998).

Where, as here, the actual damages of the verdict fall within the range of damages testified to, the verdict cannot be disturbed on the ground of excessiveness. *Gastineau*, 323 S.C. at 183, 473 S.E.2d at 828; *Buzhardt v. Cromer*, 272 S.C. 159, 163, 249 S.E.2d 898, 900 (1978). The damages awarded by the jury were within the range of damages presented by Mr. Meilinger. *See* Plaintiff's Ex. 10.H. Furthermore, they were below the $10 million valuation of Clear Touch presented by Appellants to investors shortly after Trask left Encore, and the $7.7 million alterative lost profits damage calculation of Mr. Meilinger. *See* Plaintiff's Ex. 68 (setting forth a $10,000,000

valuation of Clear Touch); Plaintiff's Exhibit 10.J, last page (setting forth lost profits of $7,798,632). Accordingly, the jury's verdicts cannot be viewed as excessive and are entitled to deference.

The same is true of the jury's punitive damages awards. In reviewing punitive damages awards, the Court should evaluate several factors: (1) defendant's degree of culpability, (2) duration of the conduct, (3) defendant's awareness or concealment, (4) the existence of similar past conduct, (5) likelihood the award will deter the defendant or others from like conduct, (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) defendant's ability to pay, and (8) other factors deemed appropriate. *Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991).

Analysis of these factors reveals that the jury's verdicts were well-supported by the evidence presented at trial. There was overwhelming evidence of Appellants' culpability. Indeed, Trask admitted liability on two causes of action giving rise to punitive damages, breach of fiduciary duty and breach of duty of loyalty. The conduct at issue occurred over a multi-year period, and was initiated and actively concealed from Encore by Appellants. Appellants built an extremely profitable and successful business in Clear Touch through their unlawful conduct. Finally, an award of punitive damages will deter Appellants and others from engaging in similar behavior in the future. The jury's awards of punitive damages, like its awards of actual damages, are justified in light of the evidence presented at trial and cannot be viewed as the result of passion or prejudice. With a ratio of actual to punitive damages of far less than 1 to 9 (not even 1 to 2), the punitive damages cannot be said to be excessive. Appellants are not entitled to a new trial *nisi remittitur*.

Appellants complain that the Court admitted Mr. Meilinger's expert report, Plaintiff's Ex. 10.J, which included the fact that Clear Touch had revenue of over $17 million in 2016.

Appellants, however, opened the door and made this report relevant and admissible by repeatedly criticizing Mr. Meilinger for what he had written and not adjusted in his report, and by Trask's falsely claiming to the jury that he and Clear Touch could "[l]ikely not" continue in business if the jury rendered a "multi-million-dollar verdict." (Tr., 832:15-21) This evidence was thus properly admitted to refute Appellants' arguments about the thoroughness of Mr. Meilinger's assessment of damages and their ability to pay a multi-million dollar verdict of actual and punitive damages.

First, Appellants' cross-examination of Mr. Meilinger challenged what he did and did not say in his report. (Tr., 530:23-580:4) Based upon Appellants' focus on the report, the trial judge properly concluded that Appellants opened the door and the jury needed to be able to see the report to evaluate Mr. Meilinger's credibility, "subject to the objection from the defense that he previously raised." (Tr., 580:11-24) That objection, however, was only that the report included the $5.5 million valuation, which Appellants argued "should be an alternative calculation, not a pile on with the lost profits and everything too." (Tr., 514:22-24) Appellants never raised the objection asserted in their brief, that Plaintiff's Ex. 10.J referenced Clear Touch's 2016 revenue on the last page.

Accordingly, by the time Mr. Trask falsely claimed that Appellants would be put out of business by a multi-million dollar verdict—an assertion that has been proven false by Appellants' deposit of over $8.6 million—Plaintiff's Ex. 10.J was already in evidence. The only subsequent objection to what that report contained was to "a legal excerpt in there that quotes case law." (Tr., 580:19-581:3.) There was no objection to Clear Touch's 2016 revenue until Appellants raised the issue for the first time in their Brief. That objection is untimely and invalid.

Moreover, Appellants' have actively sought to defraud the jury and the courts by claiming poverty and refusing to produce documents showing their net worth. Trask admitted that he has

refused to produce Clear Touch's 2016 balance sheet. (Tr., 836:13-19) He then was forced to admit that he had valued Clear Touch to the IRS at $2.269 million in 2015 when its sales were $7.5 million and that sales had more than doubled in 2016 to over $17 million. (Tr., 836:20-843:18; Plaintiff's Ex. 10.J, last page). In sum, Appellants opened the door to having the available financial information presented to the jury by withholding 2016-2017 financial information and falsely claiming that they could not afford a multi-million dollar verdict.[12]

V. Where Encore's restrictive covenants protected only its customers about whom Trask had confidential information and its confidentiality provision was limited, the trial court properly denied Appellants' motion for judgment notwithstanding the verdict on the grounds that the restrictions were overly broad.

Encore and Appellants agree that (1) the jury's verdicts for $424,945 in actual damages for breach of contract against Trask and tortious interference with contractual relations against Clear Touch were to compensate Encore for its lost profits on the Leon sales, and (2) those verdicts could be sustained by breach of either of two provisions in Trask's Non-Disclosure and Non-Solicitation Agreement (Plaintiff's Ex. 2): (a) the "non-solicitation of customers" provision (*id.*, p. 2), or (b) the "confidentiality" provision (*id.*, p. 1) Appellants claim they should have received judgment notwithstanding these verdicts ("JNOV") because they argue these contractual provisions were unenforceable as a matter of law. Appellants' Brief at 39.

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[12] Pursuant to South Carolina Rule of Evidence 201, this Court should take judicial notice of the fact that Clear Touch has voluntarily and publicly reported its 2016-2018 revenue to be ranked as one of the "Fastest Growing Private Upstate Companies," with 2018 revenue of $44.8 million and 3-year growth of 496%. Upstate Business Journal, Vol. 9, Issue 17, dated August 30, 2019, at 5, available at https://upstatebusinessjournal.com/local-companies-that-made-inc-s-5000-fastest-growing-privately-held-u-s-companies/. Because Clear Touch claims it wants a new jury trial, such voluntarily reporting to gain such publicity within Greenville County belies its claim that this information is inherently prejudicial.

A. The non-solicitation of customers provision is enforceable.

Appellants argue that Trask's non-solicitation agreement is unenforceable as a matter of law because it "is not confined to those [customers] with whom Trask had contact with, knowledge of, or which were located in areas where he conducted business, and instead restricts his ability to do business with customers that he does not know and did not work with at Encore." Appellants' Brief at 40. Appellants' argument fail for four independent legal and factual reasons.

First, contrary to Appellants' position, South Carolina law expressly allows an employer to protect all of its customers. "Prohibitions against contacting existing customers can be a valid substitute for a geographic limitation." *Wolf v. Colonial Life and Acc. Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 222 (Ct. App. 1992).[13] Covenants preventing the solicitation of former customers are also enforceable under the South Carolina law. *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (S.C. Ct. App. 2013) ("[A]n otherwise reasonable limitation on the solicitation of former clients can substitute for a territory restriction."). Likewise, covenants preventing the solicitation of prospective customers are enforceable under South Carolina law. *See Vessel Medical, Inc. v. Elliott*, Civil Action No.: 6:15-cv-00330-MGL, 2015 WL 5437173, at *5 (D.S.C. September 15, 2015); *Hagemeyer North America Inc. v. Thompson*, C/A No. 2:05-cv-3425, 2006 WL 516733, at *5 (D.S.C. Mar. 1, 2006) (finding reasonable a non-solicitation agreement limited to the employer's customers from a certain period of time who were served by the defendant, with whom he had contact, or whose names or addresses the employer provided to

[13] Appellants incorrectly cite *Collins Music Co. v. Parent*, 288 S.C. 91, 92, 340 S.E.2d 794, 795 (Ct. App. 1986), for the proposition that customer restrictions must be limited to "specific customers," but that case says no such thing. In fact, it upheld a non-solicitation provision on much broader grounds: "The provision merely prohibits pirating of [employer's] customers. It is not a territorial restriction. A restriction which allows the former employee to sell anywhere else, subject only to the employer's protection of his own clients, is valid." *Id.* That is exactly what Encore's Agreement does. The other cases cited by Appellants are equally unsupportive of their argument.

the defendant in furtherance of the employer's business). There is no requirement in South Carolina law that a non-solicitation provision be limited to only those customers with whom an employee works.

Second, Appellants' suggestion that Encore's non-solicitation provision covers all of its customers is not true. Instead, the Agreement has three limitations on the definition of "Customer," the third of which required that Trask have access to Encore's "pricing, advertising and/or marketing schemes developed ... for such customer." (Plaintiff's Ex. 2, p. 2, "Customer" definition (iii)) Thus, Encore's restriction is more limited than required by South Carolina law.

Third, although Trask argues that he had access to Encore's "pricing, advertising and/or marketing schemes developed" for all customers, including some with whom he had no contact, there is no such evidence in the record. Instead, the testimony to which Appellants cite merely establishes that Encore entrusted to Trask customer preferences, requirements, and pricing information about Leon (Tr., 112:16-113:5), and that Trask had access to the supplier and customer prices on the Clear Touch products that Encore was buying and selling to its customers. (Tr., 855:3-16) Appellants, however, failed to identify at trial a single Encore customer "whom he never knew or did any business with." Appellants' Brief at 41. In fact, the only customer at issue in the trial was Leon, with whom Trask had direct contact.

Finally, even if the subsection (iii) were overly broad, the result would not be to invalidate the entire non-solicitation provision, but rather to sever that provision under the severance clause of the Agreement and South Carolina law. Plaintiff's Ex. 2, at p. 3, second paragraph; *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245-46, 717 S.E.2d 103, 107 (Ct. App. 2011). Trask would still be prohibited from selling to Leon by sub-sections (i) and (ii) of the Agreement (Plaintiff's Ex. 2, at

p. 2) (also protecting customers that Trask solicited himself or supervised other employees in soliciting).

For these four independent reasons, Appellants' challenge to the non-solicitation provision fails as a matter of fact and law.

B. The confidentiality provision is enforceable.

Appellants also argue—as they must to avoid the "two issue" rule—that the confidentiality provision of the Agreement is overly broad because it includes a list of examples of documents and information, such as "customer preferences, customer requirements,...pricing information, concessions and prior bids" (Plaintiff's Ex. 2, at p. 1), that may be considered confidential. Appellants' Brief at 40. This argument also lack merit.

Encore's confidentiality provision is akin to that approved by the Supreme Court in *Milliken & Co. v. Morin*, 399 S.C. 23, 731 S.E.2d 288 (2012), which held that "an employer may restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employment relationship." *Id.* at 37, 295. The Court upheld Milliken's confidentiality provision because, "rather than covering general skills and knowledge, it encompasses only important information not generally known to the public which becomes known to the employee through his employment with Milliken." *Id.* Accordingly, the Court held that while "Morin may be restricted from using certain information he learned at Milliken for his own personal advantage, these agreements are designed to strike an appropriate balance between protecting an employer's valuable interest in its proprietary information and permitting an employee to find gainful employment in his chosen field." *Id.* at 38-39.

Encore's Agreement is the same. Like Milliken's, Encore's Agreement defines trade secrets with reference to the South Carolina Trade Secrets Act, and then provides more limited

protection for "Company Data" that is "related to the services or other business of [Encore] that is not generally known by or readily ascertainable by the public." (Plaintiff's Ex. 2, p. 1) All Encore's contract required was that Trask not "use, misappropriate, or divulge to any third party" the confidential "Company Data" for five years. This in no way prohibited Trask from using his "general skills and knowledge" to find gainful employment. Consequently, Trask is not entitled to JNOV.

VI. Where the evidence showed that Appellants misappropriated Encore's trade secrets about Leon County School's specific technology preferences and prices it would pay, the trial court properly denied Appellants' motion for judgment notwithstanding the verdict that they willfully violated the Trade Secrets Act.

Encore and Appellants also agree that the jury's verdicts for $424,945 in actual damages for violation of the Trade Secrets Act against Trask and Clear Touch were to compensate Encore for its lost profits on the Leon sales. Appellants argue that they are entitled to JNOV on these verdicts because Encore failed to provide sufficient evidence that it had trade secrets regarding Leon, that Appellants misappropriated such trade secrets, and that Appellants used those trade secrets. Appellants' Brief at 44. "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). A motion for judgment notwithstanding the verdict should be denied where the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994).

The South Carolina Trade Secrets Act provides a broad definition of "trade secrets," "misappropriation," and remedies for their misappropriation. S.C. Code Ann. § 39-8-20(5) (defining "trade secret" to include broad categories of information, including "a simple fact" that "may be the basis of a marketing or commercial strategy"); -20(2) (defining misappropriation to include "disclosure or use of a trade secret of another without express or implied consent by a

person who ... at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was ... acquired ... under circumstances giving rise to a duty to maintain its secrecy or limit its use"); -30(C) ("A person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secret may ... recover damages incurred as a result of the wrongful acts ...."). Specifically, a "trade secret" is information that:

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

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

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

The jury's trade secret verdict against Appellants—rendered after the jury was charged this law—was certainly reasonable in light of the evidence presented and its reasonable inferences. First, Appellants mischaracterize Encore's trade secret as general "knowledge that Leon County was upgrading its interactive classroom technology." Defendant's Brief at 45. Instead, Encore presented evidence that it had trade secrets which were much more specific, i.e., Leon's preferences to purchase particular Clear Touch panels, the number of panels it required, and the prices at which Encore was willing to sell and Leon was willing to buy those panels, all of which Trask acquired while he was an employee of Encore. (Tr., 112:8-114:22; 131:19-10; 310:9-311:25; 331:4-10; Plaintiffs' Exs. 53, 58) Encore made efforts to maintain the secrecy of this

information by having employees with access to it, Trask and Higginbotham, sign Non-Disclosure Agreements. (Plaintiff's Ex. 2; Tr., 357:4-9).

The evidence also demonstrated that Appellants misappropriated and used these trade secrets to take Leon's business from Encore to Clear Touch after Trask left Encore. Specifically, even though Leon was a customer of Encore, Clear Touch sold about $1 million in panels to it after Trask and Higginbotham left Encore. (Tr., 331:4-10; Plaintiff's Ex. 9). Trask admitted he knew when he left Encore in May 2014 that Encore had received a purchase order for 18 Clear Touch panels that would lead to sales of 885 panels over the following months. (Tr., 355:10-356:22; Plaintiff's Ex. 53). When Higginbotham left Encore in August 2014 to go work for Clear Touch, Trask had him bring Encore's customer list to him. (Tr., 392:13-393:11) Trask then admitted to Higginbotham he had told Leon that Encore had diverted panels purchased by Leon to another Encore customer, leading Leon to seek to move its business from Encore to Clear Touch. (Tr., 397:2-398:11; Plaintiff's Ex. 33) That claim was false. (Tr., 1072:10-1073:15) Thereafter, even though he knew that he and Higginbotham had non-disclosure and non-compete agreements with Encore, Appellants had Clear Touch start selling directly to Leon, taking the sales from Encore. (Tr., 357:4-359:3; 875:22-882:4). Those sales began by November 2014. (Tr., 361:2-24; Plaintiff's Ex. 63)

In sum, the evidence and the inferences to be drawn from it show that Appellants misappropriated Encore's trade secrets and used them to move Leon's business from Encore to Clear Touch. The jury correctly found in favor of Encore regarding Appellants' violation of the Trade Secrets Act and the Court should uphold that verdict.

VII. Where the jury awarded certain damages for breach of contract and additional damages for breach of contract accompanied by a fraudulent act, and Appellants did not question the jury about these verdicts, the trial court properly denied Appellants' motion for new trial under the Thirteenth Juror Doctrine.

Appellants argue that the trial court "abused its discretion in denying Appellants' motion pursuant to the 'thirteenth juror doctrine'." Appellants' Brief at 49. The "thirteenth juror doctrine" is a vehicle by which the trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. *Bailey v. Peacock*, 318 S.C. 13, 14-15, 455 S.E.2d 690, 692 (1995). To support their request, Appellants make the conclusory argument that "[t]he jury...return[ed] inconsistent verdicts by...awarding different actual damages under the two contract claims" – the claims for breach of contract and breach of contract accompanied by a fraudulent act. Appellants' Brief at 49.

The jury's verdicts were not inconsistent. In fact, the verdicts show that the jurors carefully considered each cause of action, awarding different amounts of actual and punitive damages and even ruling for Appellants on two claims. The jury's verdicts should be given the deference the law requires.

To the extent the breach of contract and breach of contract accompanied by a fraudulent act verdicts appear inconsistent in any way, "a logical reason for reconciling them can be found." Specifically, the jury could have found that Encore's loss of the Leon profits was the result of a simple breach of contract, Verdict, p. 3, including breach of the non-disclosure and/or the non-compete sections of Plaintiff's Ex. 2. By contrast, the jury also could have found that Trask committed other breaches of contract, such as breach of the business opportunity clause, accompanied by a fraudulent act, such as going to conferences paid for by Encore and building a reseller network for Clear Touch instead of Encore, and awarded $1,476,039 actual and $2,000,000 punitive damages for those breaches. (Verdict, p. 6.) The business opportunity clause provided:

> During the term of this Agreement, if [Trask] becomes aware of any project, investment, venture, business or other opportunity (any of the preceding, collectively referred to as an 'Opportunity') that is similar to, competitive with, related to, or in the same field as [Encore], or any project, investment, venture, or business of [Encore], then [Trask] shall so notify [Encore] immediately of such Opportunity and shall use [Trask]'s good-faith efforts to cause [Encore] to have the opportunity to explore, invest in, or otherwise become affiliated with such Opportunity.

(Plaintiff's Ex. 2, p. 2)[14] This provision was separate and distinct from the confidentiality and non-compete provisions, and it was the jury's prerogative to find that breach of this provision was accompanied by a fraudulent act but other breaches of contract were not.

Appellants cite *Perry v. Green*, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993), to support their argument, but this case is inapposite. In *Perry*, the trial court combined an actual damages verdict on a breach of contract claim with a punitive damages verdict on a breach of contract accompanied by a fraudulent act claim because they "necessarily arose out of the same transaction" and that ruling was not appealed. *Id.* at 252-53, 151. This case is different, where the evidence showed that Appellants were engaged in multiple transactions that violated various contractual provisions. Moreover, *Perry* did not require a new trial on the theory that the verdicts were inconsistent, as Appellants argue.

Finally, as with their election argument, Appellants should not be heard to complain now about ambiguity concerning the verdict. Appellants failed to "request the court ask the jury what its intent was in how it awarded damages." *Stoneledge*, 425 S.C. at 301, 821 S.E.2d at 522;

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[14] Contrary to Appellants' misleading suggestion that they satisfied this provision by entering the Reseller Agreement with Encore, Appellants' Brief at 5, the Reseller Agreement wrongfully allowed Clear Touch to skim substantial profits from Encore by inserting itself between Encore and the true suppliers of the panels, which Encore could have purchased at much lower prices if Trask had simply disclosed the true suppliers to Encore.

Allegro, 400 S.C. at 49 n.9, 733 S.E.2d at 123 n.9. Appellants are not entitled to a new trial based upon the assumption—and nothing more—that the jury made inconsistent or duplicative awards.

VIII. Where the jury awarded Encore damages under several causes of action entitling it to attorneys' fees and costs, the trial court properly exercised its discretion in awarding Encore reasonable fees and costs through trial but not for fees and costs incurred from October 2017-April 2018 during post-trial proceedings.

Appellants argue that the trial court's award of Encore's attorneys' fees and expenses was unreasonable because it did not award less than Encore's actual fees and costs through trial. Defendant's Brief at 50-51. "[T]he award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). In awarding attorney's fees, the court should consider the following factors: '(1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained.'" *Id.* at 494, 660; *see also First Sav. Bank, FSB v. Capital Investors*, 318 S.C. 555, 557, 459 S.E.2d 307, 308 (1995).

Encore's attorneys' fees and costs were reasonable. Encore's attorneys' affidavits fully documented its fees and costs. (Affidavit of Gregory J. English, Esq. filed Oct. 9, 2017; Reply Affidavit of Gregory J. English, Esq., filed Nov. 15, 2017) The Final Order and Judgment fully considered all relevant factors in making an award that was also reasonable.

Without challenging the overall reasonable of the amount of the award—and without citing any legal authority to support their position—Appellants assert that the trial court's award of attorneys' fees and costs was unreasonable because Encore's fees are not specifically attributable to causes of action for which attorneys' fees are available. According to Appellants, because "the Order fails to take into account the fact that attorneys' fees were only recoverable under three of

the eight causes of action...the attorneys' fees requested must be reduced accordingly." Appellants' Brief at 50.

The trial court was not required to discount its award because some of Encore's causes of action permitted recovery of attorneys' fees and costs and others did not. When a party can recover attorneys' fees under one cause of action, it is entirely appropriate to award the entire amount of fees without reduction, even though some of the party's claims may not provide for fees. *See Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) ("We hold when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding."); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010) (holding because "it would be difficult to dissect...counsel's fee affidavit to ascertain how much time was spent on this particular claim given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud," an award of the attorneys' fee "claim in its entirety would be consistent with the precedent of this Court.") Here, Encore's claims—both those providing for attorneys' fees and those that do not—required counsel to pursue and present the same witnesses and trial exhibits. It would thus be impossible to dissect and inequitable to reduce Encore's attorneys' fees and costs on the basis that some causes of action do not permit the recovery of attorneys' fees and costs.

To the extent Appellants are arguing that the Court should divide the attorneys' fees and costs by the number of successful causes of action and then award only that fraction, there is no support for this position either. Where a plaintiff recovers on certain claims but not others, "[i]n

determining what is proportional, courts should not employ a strict 'mathematical approach.' Rather, courts should look at 'the degree of the plaintiff's overall success.'" *Dowling v. Litton Loan Servicing LP*, 320 Fed. Appx. 442, 449 (6th Cir. 2009) (internal citations omitted); *Hensley v. Eckerhart*, 461 U.S. 424, 435 n.11 (1983) (in evaluating an award of statutory attorney's fees, agreeing with the district court's rejection of "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon" and noting "[s]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors," "[n]or is it necessarily significant that a prevailing plaintiff did not receive all the relief requested."); *see also Uhlig v. Shirley*, 895 F. Supp. 2d 707, 711 n.3 (D.S.C. 2012) (holding that once attorneys' fees may be awarded under any cause of action, no apportionment of fees is required). Here, Encore achieved a successful result despite not prevailing on two of its causes of action, and no proportional adjustment is justified.

Appellants also attempt to support their argument that Encore's fees and costs cannot be reasonable because "[t]he unfounded claims of evidence destruction are contradicted by the denial of a spoliation charge and cannot justify Encore's subpoena campaign," and "Encore utilized a fraction of the subpoenaed materials (5 out of 16)." Appellants' Brief at 51. It is undisputed that Encore was forced to seek documents through third parties because Appellants refused to produce them and/or claimed to have lost or destroyed them. The fact that the jury was not given a spoliation charge does not alter the fact that Encore had to pursue evidence from third parties. Additionally, whether Encore utilized every document it received from subpoenas it sent is immaterial. Because apportionment of attorneys' fees by cause of actions is not appropriate, it follows that apportionment based upon the evidence collected and used at trial is also inappropriate. *See generally Plyler v. Evatt*, 902 F.2d 273, 280-81 (4th Cir. 1990) (upholding an

award of attorneys' fees for the unsuccessful pursuit of interlocutory relief); *see also Dowling*, 320 Fed. Appx. at 449; *Hensley*, 461 U.S. at 456 n.11; *Uhlig*, 895 F. Supp. 2d at 707, n.3.

Finally, Appellants assert that "the Order's finding that Encore's fees were reasonable relies upon factors having no bearing on the issue, including the fact that Encore participated in post-trial activities." Appellants' Brief at 51. While it is true that Encore incurred significant fees in handling post-trial motions, the Court did not award Encore's attorneys' fees and costs for this work. Final Order and Judgment at 9 ("Defendants' multiple post-trial motions have cost Encore additional attorneys' fees that are not being awarded by this Order.") (emphasis added). Appellants' protest that the Court should not have considered Encore's work on post-trial motions in awarding attorneys' fees and costs—when it expressly did not award fees and costs for such activities—is illogical.

It is evident from the trial transcript that this case was complex, and that Encore prevailed, entitling it to a reasonable attorneys' fee award. The trial court's award of $345,600.00 in fees and $94,900.00 is clearly reasonable, and Appellants' challenges do nothing to undermine the overall reasonableness of the award. *See Uhlig*, 895 F. Supp. 2d at 713 (awarding $1,816,494.28 in attorneys' fees and costs to plaintiff in what the court described as "a straightforward claim against an employee for misappropriation of...trade secrets").

IX. This Court should again reject Appellants' challenge to the Receiver Order, which has been stayed by Appellants' deposit of funds with the clerk, on grounds of mootness and that it applied only to Defendant Trask's non-exempt assets.

Appellants appeal the Order Appointing Receiver entered July 23, 2018 (the "Receiver Order"), even though it has been stayed after Appellants deposited over $8.3 million with the Clerk of Court. (Order Staying Receivership filed March 8, 2019.) The Court should deny consideration this appeal on grounds of mootness. *Perry*, 313 S.C. at 257, 437 S.E.2d at 154 (holding the "Court will not pass on moot and academic questions").

Before this appeal, Appellants moved this Court to stay the receivership on the same grounds now raised, but this Court denied their motion. Court of Appeals Order filed September 20, 2018. If it entertains the questions, the Court should also reject Appellants' challenges to the Receiver Order at this stage.

The Receiver Order was entered because, before he was held in contempt and then "found" over $6.6 million to avoid turning over financial documents, Trask claimed to have no assets, refused to provide Encore with discovery about his assets, and during the pendency of this case was involved in two transfers of assets, including a transfer of real estate from his individual ownership into the "Trask Family Trust" of which he and his wife are the trustees. Receiver Order at 3, ¶ 6. Yet Appellants claim, without basis, that the Receiver Order "empowered the Receiver to violate law, [and] subject Trask, his family, business, and his wife's business to undo [sic] harassment." Appellants' Brief at 52. Such claims are pure hyperbole.

Specifically, Appellants claim the Receiver Order allowed the Receiver to "take possession of and secure assets and income of [Defendant] Trask ... including his 'earnings for personal services ....'". Appellants' Brief at 52. Contrary to Appellants' arguments, however, it provided only for the monitoring and preservation of Trask's non-exempt assets. *See* Receiver Order at 6, ¶ 3 ("all funds or other property that are received by Trask, **except for Exempt Property**, shall be delivered to the Receiver and deposited with a bank of Receiver's choice or otherwise secured by Receiver pending resolution of Trask's appeal."); at 7, ¶ 5 ("The Receiver will be and hereby is authorized and directed to take immediate possession of Trask's assets and to exercise full control over Trask's assets, **except for Exempt Property**, provided that Receiver shall not sell or dispose of such assets until further order of this Court.") (emphasis added).

The Receiver Order exempted, not controlled or garnished, Trask's wages. In recognition of the exemption for "earnings of the debtor for his personal services," S.C. Code Ann. § 15-39-410, the Receiver Order expressly exempted from the Receiver's control $200,000 per year in Trask's earnings from Clear Touch. Receiver Order at 6. Although Trask complained that "the basis for calculating the amount of it is questionable," Motion to Stay Receiver at 12, n.4, he never says what his earnings are. In fact, his counsel represented to the undersigned that Trask's salary from Clear Touch is $200,000 per year.[15]

The statutory exemption for "earnings for personal services" does not include commissions or bonuses based upon a business's performance as opposed to the debtor's personal services. *See In re Davis,* 1999 WL 33486078, at *3 (Bankr. D.S.C. May 28, 1999) ("'[E]arnings for personal services' are to be distinguished from the proceeds of a business carried on by the debtor; the legislative intent being to protect the fruit of someone's labor for the benefit of his family, rather than income derived from passive sources, such as investment income or return on capital."); *Mathews v. Mathews,* 207 S.C. 170, 178, 35 S.E.2d 157, 160 (1945) (applying the predecessor of S.C. Code Ann. § 15-39-410 and indicating that "earnings of the debtor for his personal services" are limited to wages and ordinary salaries necessary for the use of a family supported wholly or partly by his labor); *In re Strong*, No. Civ. A. 94-75489, 1995 WL 1930448, at *3 (Bankr. D.S.C. April 14, 1995) (rejecting a debtor's argument that S.C. Code § 15-39-410 entitled him to receive real estate commissions).

Appellants contend Trask's commission payments or bonuses are "earnings of the debtor for his personal services." This is not accurate. The *Davis* court engaged in a thorough analysis

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

of the meaning of the term "earnings...for personal services," noting the "distinction between wages and salaries as compared to commissions and fees due to ... ***small business owners***." *Id.* at *4 (emphasis added). The court further noted that "profits and business earnings are outside the meaning of wages and salary," the latter category "needed to support the wage earner and his family on a week-to-week, month-to-month basis," thus justifying an exemption for these specific funds. *Id.*[16]

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

Finally, Appellants complain that the Receiver Order allowed the Receiver to "possess all of Trask's interest in [Clear Touch], despite the company being 100% owned by an IRA of which Trask is a beneficiary ...." Appellants' Brief at 52. The Receiver Order, however, provided only for the Receiver to preserve "**all assets of Trask** in Clear Touch." Receiver Order at 5, ¶ 2 (emphasis added). In other words, the Receiver Order expressly distinguished between Clear Touch's assets and Trask's assets and only allowed the Receiver to preserve the latter.

Furthermore, Appellants have never offered any substantiation that Trask converted Clear Touch from an LLC to a corporation and then transferred his ownership of Clear Touch to an

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[16] The one case Appellants cite to support their far-reaching interpretation of what funds fall within the category of "earnings...for personal services" is inapposite because it does not interpret S.C. Code Ann. § 15-39-410. Rather, *Jarrott v. S.C. Employment Sec. Comm'n*, 290 S.C. 533, 351 S.E.2d 859 (1986), interpreted a statutory scheme inapplicable to this case, a statute governing unemployment benefits. *Id.* at 536, 860-61.

exempt IRA. Even if he did, the Receiver Order did not allow the Receiver to sell such equity, so Appellants' argument is irrelevant. Instead, the Receiver was only given standard discovery concerning Clear Touch, *i.e.*, access to "records of Clear Touch that relate to **or may lead to** the discovery of assets, property, and income of Trask." Receiver Order at 5, ¶ 2 (emphasis added). The Receiver was properly allowed to examine the books and records of Trask and Clear Touch to ascertain whether such claims are true and whether the IRA really is a qualified individual retirement account under the Internal Revenue Code as required for the exemption.[17]

Appellants' appeal of the Receiver Order is moot and, in any event, their arguments about it are groundless. Appellants are simply seeking a way to argue for a refund of some of the receiver fees they deposited. They should be denied, because it was Appellants who drove up those fees by refusing to comply with the Receiver's requests for information and documents, seeking to quash the receiver's subpoenas, and transferring funds to related entities, resulting in their being held in contempt of court. (Order filed Dec. 6, 2018, pp. 2-4) Appellants could have avoided all of the receiver fees by providing Encore with post-judgment discovery or depositing the funds sooner, instead of trying to hide their ability to pay.

X. Where Clear Touch in a second action raised the same facts that Appellants raised and could have asserted as counterclaims in the first action, the trial court properly dismissed the second action under the doctrine of *res judicata*.

On the eve of trial, Clear Touch filed a new complaint against Encore asserting four causes of action: (1) breach of contract (Mutual Confidentiality Agreement, which was Defendant's Ex. 20 in Encore's trial); (2) breach of contract (Reseller Agreement, which was Plaintiff's Ex. 3 in Encore's action); (3) violation of the SC Trade Secrets Act; and (4) conversion (the "2017

[17] Appellants' claim that Trask "pour[ed] his life savings of approximately $150,000" into Clear Touch in 2014, Appellants' Brief at 6, but deposit of funds totaling nearly $8.6 million to avoid financial disclose to Encore or the receiver, indicate the judge gave the receiver an appropriate level of discovery.

Action"). (Clear Touch Amended Complaint) In its answer, Encore asserted counterclaims against Clear Touch, including (1) breach of contract (Reseller Agreement), (2) breach of contract accompanied by a fraudulent act, and (3) abuse of process. (Encore Answer and Counterclaims) Clear Touch and Encore filed cross-motions for summary judgment. (Motions for Summary Judgment) The Circuit Court granted both cross-motions for summary judgment, dismissing all causes of action under the doctrine of res judicata. (Order Dismissing Action)

"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.**'" *Roddey v. Wal-Mart Stores East, L.P.*, 422 S.C. 344, 348-49, 811 S.E.2d 785, 787 (S.C. 2018) (quoting *Hilton Head Ctr. of S. Carolina, Inc. v. Pub. Serv. Comm'n of S. Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)) (emphasis added). "Under the doctrine of res judicata, a final judgment on the merits in a prior action will bar the parties in a second action as to matters litigated **and matters which might have been litigated.**" *Jaynes v. County of Fairfield*, 303 S.C. 434, 438, 401 S.E.2d 183, 185 (Ct. App. 1991) (emphasis added).

In the case of Clear Touch, the issue is whether its claims in the 2017 Action were compulsory counterclaims that arose out of a "transaction or occurrence" that was a subject of Encore's action. Rule 13(a), S.C.R.C.P. ("Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim ...."); *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("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.").

A counterclaim arises out of the same "transaction or occurrence" and is compulsory if there is a "logical relationship" between the claims and the counterclaims. *Jaynes,* 303 S.C. at 438 n.1, 401 S.E.2d at 185 n.1 (citing *N.C. Federal Savings & Loan Assoc. v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989)). In *Jaynes*, the Court held that, "[d]espite the Jaynes' argument that they were misled by the description of the road in the county's 1986 action," they "could have by answer or counterclaim asserted their claim of ownership ... and thereby put in issue the question of title to the road." 303 S.C. at 438, 401 S.E.2d at 185. The Court therefore held that the trial judge "properly ruled that the Jaynes are barred by the doctrine of res judicata from asserting title to the road running through their property," because "the county's complaint in the 1986 action fairly asserted a set of facts which created a logical relationship between the road described in the county's complaint and the road which the Jaynes claim is on their own property." *Id.*

Similarly here, there clearly was a "logical relationship" between Encore's claims and Clear Touch's claims in the 2017 Action. Defendant's Ex. 20 for Encore's trial was the same Mutual Confidentiality Agreement on which Clear Touch relied for its first breach of contract claim. Plaintiff's Ex. 3 in Encore's action was the same Reseller Agreement on which Clear Touch relied for its second breach of contract claim. Defendant's Ex. 17 in Encore's action showed that Clear Touch knew by September 3, 2014—over a year before Encore filed its action—that Encore was doing business with "other panel manufacturers," about which Clear Touch complained in the 2017 Action. In Encore's action, Appellants obtained discovery concerning, and asserted an "unclean hands" defense based upon, the same facts that formed the basis of Clear Touch's 2017 Action, including alleged misappropriation and conversion of Clear Touch trade secrets and price lists. Appellants' Post Trial Motions dated October 9, 2017, at 35 ("... Encore has ... unclean hands. The deposition testimony of Daniele Stengel and the exhibits accompanying it show that

Encore has unlawfully retained Clear Touch's trade secrets in the form of confidential reseller price lists .... Likewise, David Masters' deposition testimony and the exhibits thereto provide further evidence of Encore's inequitable and illegal acts ...."). And all of Clear Touch's claims are directly related to Encore's claim in its case that Clear Touch was a business opportunity that belonged to Encore, and should not have been a separate business with "secrets" from or the ability to compete against Encore.

In fact, although Appellants' Brief is silent on this point, Clear Touch admitted at the hearing on the cross-motions for summary judgment that its claims under the Reseller Agreement were and could have been litigated in the prior action and therefore its breach of contract claim under the Reseller Agreement should be dismissed under the doctrine of res judicata. (Transcript of Record of Hearing held on July 30, 2018 ("Summary Judgment Tr."), 25:15-19 ("the reseller agreement was at issue in the last case. We've both filed motions for dismissal on res judicata on that. I think we both conceded that position ...."); 45:19-21 ("[W]e recognize ... that res judicata applies to the one claim based on the resell agreement.")). The same logic applies to the Mutual Confidentiality Agreement, Defendant's Ex. 20, because it was entered April 9, 2013, and superseded on April 24, 2013, by the Reseller Agreement, which had its own confidentiality provision. (Plaintiff's Ex. 3, at 8, § 11 ("CONFIDENTIALITY"); at 13, § 17.8 ("This Agreement ... supersedes all previous ... agreements, oral or written, regarding its subject matter.")). And, because the trade secrets and conversion claims were based upon information exchanged under and governed by the Reseller Agreement, those claims were also "logically related" to the Reseller Agreement, which Clear Touch admits was litigated in the Encore's first action.

Appellants argue that, even if res judicata applies, the Court should make a policy exception for them because they claim—without any evidence in the record—that Encore

prevented them from they discovering Clear Touch's claims in time to fully litigate them in the first action. This argument fails for at least three reasons.

First, Clear Touch admits it was provided sufficient discovery to assert its claims at least by May 31, 2017—four months before trial—but never did. (Summary Judgment Tr. 9:24-25; 17:10-15.)[18] Appellants used this discovery to take depositions, all of which occurred after May 31, 2017, including the depositions of Ms. Stengel and Mr. Masters, which Appellants argued supported their "unclean hands" defense. Clear Touch requested and was granted a continuance of the trial, but never moved to amend its answer to assert its claims as counterclaims. Although Clear Touch criticizes Encore for objecting that discovery of documents dated or created after the Reseller Agreement was terminated in September 2015 was irrelevant, despite its objection Encore did produce post-September 2015 documents. Moreover, Encore's objection was well-founded because Clear Touch never included in its pleadings claims about post-September 2015 events, which Clear Touch admitted at the hearing. (Summary Judgment Tr. 47:10-17 ("Based on the state of the pleadings, [Clear Touch's claim] wasn't in there for [Encore] to know about.") If Clear Touch needed time to pursue compulsory counterclaims, it should have moved to amend its answer to include them.

Second, Clear Touch admitted at the hearing the real reason it did not move to amend its answer to add counterclaims was a strategic decision not to try its claims with Encore's:

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[18] In fact, Clear Touch admitted it had over 200,000 pages of discovery from Encore by December 2016. Summary Judgment Tr. 12:8-25 (26,000 pages in November 2016 and 175,000 pages in December 2016). Because of an employee misspelling, Encore's multiple, original search terms included "ClearTouch" but not "Clear Touch," which led Encore to produce an additional 10,000 pages on May 31, 2017, after it discovered the misspelling. Clear Touch has presented no evidence, however, that these additional pages led to discovery of any facts that were not known through the 2016 productions or earlier. As a high level officer of Encore from day one, and a supplier of panels thereafter, Trask knew exactly what Encore was doing.

> [T]here was a lot of internal discussion about what to do with this, Your Honor. And we – it's definitely something that kept me up many nights thinking about what – what's the right thing to do here **for the best interest of Clear Touch**. And the decision had to be made, **do you take a major risk of putting potentially a multimillion dollar claim on an extreme fast track that is already attached to a week-long trial and other stuff** .... Or do you file a separate action? .... And I had to choose the second option.

Summary Judgment Tr. 47:23-48:12 (emphasis added). Clear Touch chose not to pursue its claims in Encore's case because that jury would undoubtedly hear about its egregious conduct towards Encore. Clear Touch knew there was no way this jury—which awarded millions of dollars in punitive damages against Appellants—would find in its favor on its baseless counterclaims. So it made a strategic choice to wait and try to bring those claims in a separate case, where it could try to exclude evidence about its wrongdoing against Encore. The law does not allow such a splitting of related claims.

Finally, Clear Touch failed to present affidavits or any other evidence either to support its baseless claims, to establish that they arose after the date of Encore's complaint, or to establish that it did not know about them in time to assert them as counterclaims. "Rule 56(c) mandates the entry of summary judgment" when "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

In *Baughman*, the South Carolina Supreme Court elaborated:

> Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing' – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case." The moving party need not "support its motion with affidavits or other similar materials *negating* the opponent's claim."
>
> Once [a] moving party carries its initial burden, **opposing party** must, under Rule 56(e) "do more than simply show that there is some metaphysical doubt as to the material facts" but "**must come forward with 'specific facts showing that there**

> **is a *genuine issue for trial.*'"** Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings.

Id. at 115, 545 (citations omitted; emphasis added).

Under Rule 56(e), S.C.R.C.P., "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be **admissible in evidence**, and shall show affirmatively that the affiant is competent to testify to matters stated therein." (emphasis added). If the party opposing summary judgment fails to demonstrate, with admissible evidence, that a genuine issue for trial exists, the moving party is entitled to summary judgment. *Id.*

Here, Clear Touch failed to present any such evidence in opposing summary judgment. Instead, it relied exclusively upon arguments of counsel, which of course are not evidence. *Bowers,* 304 S.C. at 68, 403 S.E.2d at 129 ("Arguments of counsel are ... not evidence.") (quoting *McManus,* 171 S.C. at 89, 171 S.E. at 475) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.")). Clear Touch likely chose not to submit an affidavit because Trask, who was Encore's Chief Business Development Officer for nearly 15 months, knew exactly what Encore was doing from the outset, and Clear Touch continued as Encore's supplier thereafter, so Appellants could not truthfully establish that they lacked knowledge of what Encore was doing.

In sum, Clear Touch's claims were compulsory counterclaims that were logically related to the claims in Encore's action. Clear Touch could have asserted them in Encore's action, but strategically chose not to do so. Further, Clear Touch failed to meet its burden of presenting admissible evidence to oppose summary judgment. For these reasons, Encore's Motion for Summary Judgment was properly granted.[19]

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[19] If the Court were to overturn the Order of Dismissal and allow Clear Touch to pursue a new action, it should also allow Encore to assert its counterclaims in such action.

XI. Where, at the hearing, Encore cited to the trial court and discussed authority that res judicata barred Clear Touch's second action because its claims were compulsory counterclaims in the first action, the trial court properly relied upon such authority to dismiss Clear Touch's second action.

Appellants argue that whether Clear Touch's claims were compulsory "counterclaims were never addressed during the hearing ...." Appellants' Brief at 59. Like the rest of their appeal, Appellants' claims are false and misleading.

At the hearing, Encore expressly argued that the Circuit Court should follow this Court's decision *Jaynes, supra,* and that the "test [is] whether there's a logical relationship between the claim and the counterclaim in the first suit. Here that test is met ...." Summary Judgment Tr., 5:18-6:4. In response, Appellants' counsel argued "in the case Mr. English passed up, the [Jaynes v.] County of Fairfield, that's ... a test of whether or not a claim is a compulsory counterclaim, not res judicata." *Id.* 8:14-17. Of course, the question of whether a claim in a second action should have been raised as a compulsory counterclaim in a prior action is the same question as whether res judicata applies. Appellants' argument that the issue of compulsory counterclaims was "never addressed during the hearing" is absolutely false.

Appellants also complain that the Circuit Court cited to *Jaynes* and Rule 13, S.C.R.C.P., to support the Order of Dismissal even though it did not do so in the Form 4 order. The Form 4 order directed Encore's counsel to prepare the formal order and therefore was not in any way final. *See Metts v. Mims*, 384 S.C. 491, 499, 682 S.E.2d 813, 817 (S.C. 2009); *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) (a decree leaving some further act to be done by the court is not final); *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002) (a form order is a final order only if the circuit court indicates that nothing else remains to be done after it is signed). A Form 4 order directing preparation of a more formal order does not

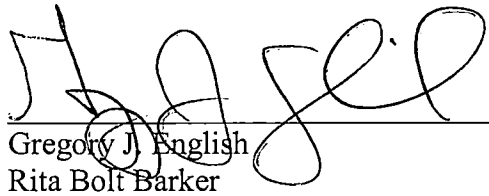
preclude the Circuit Court from citing all in the formal order legal authority that supports its decision.

CONCLUSION

For the foregoing reasons, the Court should (1) affirm the Final Order and Judgment of the Circuit Court and hold that judgment was properly entered in favor of Encore against Trask in the amount of $7,917,468, and against Clear Touch in the amount of $1,715,335, plus any amount found appropriate by this Court on Encore's cross-appeal; (2) affirm the Receiver Order; and (3) affirm the Order of Dismissal of Clear Touch's 2017 Action.

Respectfully submitted,

WYCHE, P.A.

BY: 

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September 23, 2019

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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 **INITIAL RESPONSE BRIEF OF RESPONDENT/APPELLANT ENCORE TECHNOLOGY GROUP, LLC** by first class mail, addressed to the following:

Joseph Owen Smith
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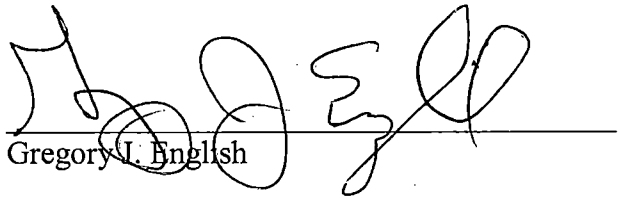

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September 23, 2019

W Y C H E

Attorneys at Law

September 23, 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, Inc., 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 Response Brief and Response Designation of Matter for Record on Appeal by 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. (by mail)
Joshua J. Hudson, Esq. (by mail)
Mr. Todd Newnam (by email)

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