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

**APPEAL FROM GREENVILLE COUNTY**
**Circuit Court**

**The Honorable R. Lawton McIntosh, Circuit Court Judge**

**Appellate Case No. 2018-001444**

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

v.

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

# APPELLANT/RESPONDENTS' INITIAL BRIEF

ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith, Esq.
Joshua J. Hudson, Esq.
1052 N. Church St.
Greenville, SC 29601
Phone: (864) 349-2600
Fax: (864) 349-0303
**Attorneys for Appellants/Respondents**

October 7, 2019

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## I. STATEMENT OF THE ISSUES ON APPEAL

1. Was the trial court correct in denying Encore equitable relief when Encore sought the same damages based upon the same facts under its legal claims submitted to the jury and upon which it returned verdicts in Plaintiff's favor?

2. Is Encore barred from recovering under both its breach of contract claims and its quantum meruit claim when the tasks Plaintiff sought compensation for under the equitable cause of action were encompassed within the terms of the Non-Disclosure and Non-Solicitation Agreement between Trask and Encore?

## II. STATEMENT OF THE CASE[1]

### A. Introduction

Encore's cross appeal in this matter is a ludicrous endeavor aimed at having this Court allow it to recover some five times the amount the jury determined it was entitled to under its legal causes of action despite the black letter law that prohibits equitable recovery when an adequate remedy at law exists. It also wishes to overcome the well-established bar to recovering under both a quantum meruit theory and a contract claim when the tasks the Plaintiff sought compensation for in equity are encompassed in the terms of the contract. Nothing offered in Encore's brief warrants departure from the black letter law its adoption would require. No matter what Clear Touch did, or was alleged to have done, Encore's ability to receive equitable relief is subject to legal limitations barring such an award under the circumstances. Encore's cross appeal seeks a substantial equitable award that would be duplicative of the legal remedies provided it by the jury.

[1] Clear Touch incorporates by reference and directs the Court to the detailed Statement of the Case in Trask and Clear Touch's Amended Initial Brief filed on June 27, 2019. Defendants do not think it necessary to recount the entirety of that history for the narrow issue presented by Encore's cross appeal.

That award is not allowed by the law and rightfully denied by the trial court; a decision that Clear Touch respectfully asks this Court to affirm.

### B. Encore Relied upon the Same Factual Basis for its Legal Causes of Action and Equitable Claim

The Complaint alleged nine causes of action, one of which was an equitable claim entitled "Unjust Enrichment/Accounting/Constructive Trust/Disgorgement/Restitution." (Compl. ¶¶ 58-62). Encore claimed Trask and Clear Touch were unjustly enriched by their alleged misappropriation and use of Plaintiff's trade secret and confidential information and by breaching Trask's Non-Disclosure and Non-Solicitation Agreement (the "Agreement"). *Id.* Specifically, Encore claimed Trask and Encore received profits that should have gone to it and were able to build a valuable business on Plaintiff's dime because Trask breached the Business Opportunity provision of his Agreement by not bringing the Clear Touch opportunity to his then employer. (Compl. ¶¶ 58-62). Encore advanced several of its legal causes of action upon the same grounds, including its Violation of the South Carolina Trade Secrets Act (SCTSA) against both Defendants, its Tortious Interference claims against Clear Touch, and its Breach of Contract Accompanied by Fraudulent Intent causes of action against Trask. (Compl. paras. ¶¶ 52-57, 63-70, 71-75).

### C. Basis for Liability and Damages Sought at Trial

At trial, Encore relied upon those alleged misdeeds to establish liability under the SCTSA against both Defendants, the Tortious Interference claim against Clear Touch, and the Breach of Contract Accompanied by Fraudulent Act cause of action against Trask. (*See* 6.27.19 Amend. Initial Br. p. 23-26;[2] Tr. Trans. 1109:7-1111:23 [Breach Contract]; 1112:6-9 [SCTSA]; 1112:16-

[2] Encore told the jury Trask breached his fiduciary duties by failing to (1) disclose the true identity of CTI's suppliers; (2) tell Encore he was building a reseller network for CTI; (3) work with Encore to take advantage of the CTI opportunity; and (4) by making direct sales to Leon County. (Tr. T. 1101:4-25; See also 109-13). Encore told the jury these actions were breaches of Trask's fiduciary duties which resulted in $5.5M of damage in the form of (1) lost profits (a) on sales of panels purchased from CTI (because it could have purchased directly from the suppliers if Trask

25 [Tort. Inter. Contract]; 1113:2-12 [Breach of Contract with Fraudulent Intent]). It relied upon those same actions to seek equitable relief under its Unjust Enrichment cause of action.

Importantly, the equitable damages Encore sought at trial were the same as those it asked the jury to award under the legal claims noted above, among others. Those damages totaling approximately $5.5M represented the totality of the harm Encore alleged to have incurred, and reflected what Plaintiff's expert testified was the sum of Clear Touch's ill-gotten profits and the value of the business through the end of 2015. (Tr. Trans. pp. 525-29; Plf. Exh. 10H).

**D. The Verdicts Against Clear Touch and Trask Bearing on Equitable Relief**

At the close of trial, all eight of Encore's legal claims were submitted to the jury and its equitable cause of action to the trial court. The jury rendered a verdict in favor of Encore on six of the eight causes of action. Two of the verdicts were against Clear Touch: (1) Tortious Interference with Contract for a total of $924,945 ($424,945 actual damages + $500,000 punitive damages) and (2) Violation of the South Carolina Trade Secrets Act for a total of $1,715,335 ($424,945 actual damages + $849,900 punitive damages + $345,600 attorneys' fees + $94,000 costs). (*See* Verdict Form ).[3] Following post-trial motions, Encore elected its remedy against

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disclosed their identity), (b) from CTI's sales to Leon County, and (c) those generated by CTI's other sales all totaling $1,100,306; and (2) the lost CTI business opportunity, something it claimed was worth over $3.9M. (Tr. T. 1103:1-1104:15; 1105:7-1106:14; 1108:1-7). Encore told the jury that if "Trask had honored his fiduciary duty to disclose the Clear Touch opportunity, Encore would have realized that $5.5 million value" which was the entirety of the damages sought in the case, and asked it to award those damages: "[F]or Breach of Fiduciary Duty, we believe that you should find for the plaintiff and you should find for the amount of $5.5 million based on this analysis." (Tr. T. 1108:4-7, 19-23). From that point forward, Encore did not separate, distinguish, or differentiate its claimed damages among the remaining causes of action. Rather, it relied upon the same actions it claimed made Trask liable for breach of his fiduciary duties, in one form or combination, to establish liability for every remaining cause of action upon which it obtained a verdict and explicitly told the jury to put in the same damage figure as it did under the breach of fiduciary duty claim.

[3] The Trade Secret claim was pled against both Defendants jointly, and the jury rendered the verdict as such. (*See* Verdict Form p. 4).

Clear Touch by choosing to recover under the SCTSA claim as the larger total of the two verdicts rendered against the company.

Important to resolution of the issue presented by Encore's cross appeal is the breach of contract with fraudulent intent verdict rendered against Trask. Encore sought $5.5M under that claim for Trask's alleged breach of the "Business Opportunity" provision of his Agreement because he failed to bring the Clear Touch opportunity to his employer. That, Encore contended, entitled it to Clear Touch's profits and the value of the business through 2015. (*See* 11.17.17 Hearing Trans. pp. 43-44(Encore asked the jury to award $5.5M for breach of contract with fraud for alleged breach of business opportunity provision of contract); Tr. Trans. 1103:1-1104:15; 1105:7-1106:14; 1108:1-7, 1108:4-7, 19-23, 1109:7-1111:23, 1112:6-9, 1112:16-25, 1113:2-12(Encore asking the jury to award the "same damages" of $5.5M for causes of action II-VI which included all contract claims and SCTSA). That $5.5M sum represented the totality of damages sought at trial, including all of Clear Touch's profits and the value of the business through the end of 2015. (Tr. Trans. 1108:4-7, 19-23). Encore did not seek any additional or future profits at trial. The jury returned a verdict of $1,476,039 in actual damages under the breach of contract with fraudulent intent claim. (*See* Verdict Form p. 6).[4] That figure, according to the Final Order drafted by Encore and adopted by the Court, and Encore itself at trial and in post-trial proceedings, was what the jury decided it was entitled to out of the $5.5M sought under that claim. (*See* Final Order p. 3("[T]he jury found Trask liable for breach of contract accompanied by fraudulent act in the amount of $1,476,039 actual damages and awarded $2 million in punitive damages. This verdict appears to compensate Encore for a portion of the net profits lost to Clear Touch when Trask breached the 'business opportunity' provision of the Contract."); *See* also Final Order p. 10

[4] This was one of several verdicts against Trask under which Encore recovered, the sum total of which came to $7,917,468.40.

(verdict breakdown itemizing breach of contract with fraud verdict as a "portion of Clear Touch profits").

### E. The Final Order and Judgment Entered April 2, 2018

The Final Order and Judgment granted Encore's post-trial motions except for restitution, denied all of Defendants' motions with the exception of granting them leave to deposit the judgments into the Court; and entered judgment in favor of Encore against Trask in the amount of $7,917,468.40 and against Clear Touch for $1,715,335.00.[5] (Final Order p. 2).

The trial court held that Encore was not entitled to the $5.5M sought under its unjust enrichment claim because an adequate remedy at law existed and had been afforded it by the jury under its legal claims. (Final Order pp. 11-12).

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

## III. LEGAL ARGUMENT AND AUTHORITIES

### A. STANDARD OF REVIEW

Encore is incorrect about the applicable standard of review. The issue presented by Encore's cross appeal is one concerning the application of law as it relates to a party's entitlement to equitable relief. Therefore, it must be reviewed as a question at law. "A legal question embedded in an equity case receives review as in law." APPELLATE PROCEDURE IN SOUTH CAROLINA, Jean Hoefer Toal, Amelia Waring Walker, Margaret E. Baker, 3rd Edition, pp. 230-31 (2016) *citing*

[5] Clear Touch's deposit represented the entirety of the Trade Secrets verdict along with Encore's attorneys' fees and costs (also in their entirety).

*Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003). "Even when a case is tried in equity, if it is truly a law case, appellate courts must apply the scope of review utilized in law cases." *Id.* "The parties may expressly or implicitly agree to treat an equity case as a law case with submission of the issues of fact to a jury." *Id. citing Horn v. Davis Elec. Constructors, Inc.*, 302 S.C. 484, 395 S.E.2d 724 (Ct. App. 1990). On appeal from a case tried before a jury in an action at law, the appellate court only has the authority to correct errors of law. *Townes Assocs. Ltd., v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Here, however, the equitable claims were not tried before either the jury or judge. Rather, the trial judge determined that the law barred Encore from the equitable relief it sought because adequate remedies at law were available, and in fact provided by the jury's verdicts. (Final Order pp. 11-12). That was a legal decision, which may be reversed only upon finding that it resulted from erroneous application of controlling law. It did not and should be affirmed.

Regardless of the standard of review applied, Encore fails to offer any adequate factual or legal basis for this Court to reverse the trial court's decision to deny equitable relief.

**B. THE TRIAL COURT CORRECTLY DENIED ENCORE EQUITABLE RELIEF WHERE THE SAME DAMAGES PREDICATED UPON THE SAME FACTS WERE SOUGHT UNDER ITS LEGAL CLAIMS AND UPON WHICH THE JURY RETURNED VERDICTS IN PLAINTIFF'S FAVOR**

"Generally, equitable relief is available only where there is no adequate remedy at law ..." *Milliken & Co. v. Morin*, 386S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009)(*internal citations omitted*). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.*; *see also Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323 (Ct. App. 2011); *Santee Cooper Resort Inc., v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179 (1989); *EllisDon Constr., Inc., v. Clemson University*, 391 S.C. 552 (2011).

Here, the trial court correctly found that an adequate remedy at law existed and was awarded to Encore by the jury under Plaintiff's legal claims, and, therefore, equitable relief unavailable.

Encore argues that the trial court erred in refusing to grant it equitable relief of some $5.5M against Clear Touch; a figure representing what its economic expert testified represented Clear Touch's profits and the value of the business through December 31, 2015. (Pl. Cross Br. at 9; Tr. Trans. 525-29; Pl. Exh. 10H).[6] Plaintiff claimed it was entitled to those damages due to Clear Touch's and Trask's ill-gotten gains stemming from Trask's breach of the Business Opportunity provision of his Non-Disclosure and Non-Solicitation Agreement and Defendants' misappropriation and use of trade secret and confidential information in violation of other clauses within that same contract and the SCTSA. Those $5.5M in damages were all the damages Encore sought at trial, including under its equitable claim and seven of the eight legal claims submitted to the jury. As noted above, the jury returned verdicts in Plaintiff's favor on six of those legal claims, including actual damages of $424,945 against Clear Touch under both the Tortious Interference with Contract and Violation of the SCTSA, and $1,476,039 against Trask for breach of contract with fraudulent intent. (Verdict Form pp. 4-6). That $1.4M figure, according to the Final Order drafted by Encore and adopted by the Court, and Encore itself at trial and in post-trial proceedings, was what the jury decided Plaintiff was entitled to out of the $5.5M sought for breach of the Business Opportunity provision of the Agreement and all of the legal causes of action with the exception of the breach of duty of loyalty claim.[7] (*See* Final Order pp. 3, 10). Those damages

[6] Notably, in its cross appeal, Encore claims that the lower court erred in not awarding it restitution against Clear Touch alone. However, in its Motion for Restitution filed below, it sought restitution against ***both*** Trask and Clear Touch concluding that "Defendants have been unjustly enriched in the amount of value of Clear Touch, or $5,536,254. Defendants should be required—***jointly and severally***—to pay restitution in that amount." (Plf. Mot. Rest. P. 4)(***emphasis added***).

[7] Trask and Clear Touch contend in their Initial Brief in the main portion of this case that the $1.4M reflected the jury adding up the sum of all actual damages awarded under causes of action I, II, and III, thus requiring encore elect among the remedies provided under those claims. (Amend. Initial Brief 6.27.19 pp.20-29). Encore's position allowed

being the entirety of what Encore sought at law and in equity it claimed resulted from the same alleged misconduct, therefore, rightly led the trial court to find that those jury verdicts provided an adequate legal remedy and consequently prohibited Encore's recovery of equitable relief. As noted in Defendant's Post-Trial Motions, that verdict compensated Encore for the damages it claimed to have suffered and any award of additional damages under its equitable claims would result in double recovery. Something, Encore itself recognized was not a permissible outcome and that it was asking the trial court to second guess the jury's determinations as to the appropriate amount of damages:

> MR. ENGLISH: I would agree that we cannot recover the same damages for both. But I think the Court could have its down view under the theory of unjust enrichment as to what is the amount that would make the plaintiff – that the defendant should have to give up, a different view than the jury. And so the plaintiff could elect that over one, or maybe, you know, some of the other.

(11.17.17 Hearing Trans. p. 4, ln 23 to p. 5, ln. 5). Encore presents nothing in its cross appeal compelling departure from the black letter law.

Moreover, Encore pled that it was entitled to actual damages in the form of disgorgement of profits and restitution. (Compl. ¶ 62). In its cross appeal, it seeks actual damages in the form of the value of the Clear Touch business and profits through 2015 – both of which are actual damages. Actual damages are not an equitable remedy. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000), *aff'd as modified and remanded*, 343 S.C. 587, 541 S.E.2d 257 (2001). At common law, a proceeding in which a judgment for money is sought sounds in law. *Cooper v. Poston*, 326 S.C. 46, 48, 483 S.E.2d 750 (1997). Encore's pleading of actual damages and petition for them post-trial and on appeal demonstrates it is not entitled to the equitable relief it claims the lower court erred in refusing to give it.

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it to avoid election, and it cannot deviate in its cross appeal in order to seek reversal of the trial court's decision to deny equitable relief.

On brief, Encore claims the jury verdict was inadequate as it did not capture Clear Touch's future profits. (Pl. Cross Br. p. 5). Encore recognizes that it did not present any evidence of Clear Touch's future profits as an aspect of its damages at trial, either to the jury or lower court, a shortcoming it attempts to blame on the Defendants. *Id.* fn2.[8] Regardless, Encore chose what it presented as its damages at trial, and cannot now argue that the lower court erred in refusing to award it damages for which it presented no evidence and claimed no entitlement to in the proceedings below. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)(*internal citations omitted*)("To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy. The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation."). Encore claimed entitlement to Clear Touch's profits and the value of the business through the end of 2015 at trial. That represents the entirety of damages it could conceivably recover under all of its claims, legal and equitable. The jury decided the amount out of that $5.5M Encore was entitled to recover for the claimed consequences of the Defendants' actions underlying its legal claims. Those same actions provided the basis for Defendants' equitable liability. The jury's verdicts are not rendered inadequate simply because they did not give Encore everything it claimed resulted from the Defendants' misconduct underlying Plaintiff's legal claims. Encore's failure to convince the jury to award it every dollar requested under its legal causes of action does not entitle the Plaintiff to recover the difference in equity. Therefore, the trial court did not err in holding that Encore is not entitled to equitable restitution.

The trial court was in a superior position to determine whether or not the remedies awarded by the jury against Clear Touch were adequate. It found them to be, and rightly refused to allow

[8] Defendants deny they were responsible for what Encore chose to present as its damages at trial.

Encore duplicative and additional recovery of the damages it sought from and was awarded by the jury under its legal claims. Clear Touch contends this was the appropriate application of the controlling law and does not constitute reversable error.

### C. Additional Sustaining Grounds: Encore Was Not Entitled to Equitable Relief Because the Tasks for Which Plaintiff Sought Equitable Compensation Were Encompassed within the Terms of an Express Contract

Additional sustaining grounds warrant affirmation of the trial court's denial of equitable relief because the tasks upon which Encore sought such relief were encompassed in the Non-Disclosure and Non-Solicitation Agreement, which was not rescinded, and in fact formed the basis of Encore's contract claims.[9]

"If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit."[10] *Williams Carpet Contractors, Inc., v. Skelly*, 400 S.C. 320 (Ct. App. 2012) *citing Swanson v. Stratos*, 350 S.C. 116, 122, 564 S.E.2d 117, 120 (Ct. App. 2002). "Case law bars *recovering* under both theories." *Skelly*. 400 S.C. at 329(*emphasis in original*). Encore petitioned the trial court to recover under both theories, and was rightly denied that opportunity.

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[9] "A respondent...may raise...any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It could also violate the principle that a court usually should refrain from deciding unnecessary questions." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). This basis for affirming the lower court may not actually be an additional sustaining ground seeing as the trial court specifically referenced the Skelly case during post-trial arguments as a basis for his denial of Encore's request for equitable relief. (11.17.17 Hearing Trans. p. 4, ln. 12-22).

[10] "[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *Skelly*, 400 S.C. at 325 citing *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct.App.2004) (citations and internal quotation marks omitted) (alteration by court). "The terms 'restitution' and 'unjust enrichment' are modern designations for the older doctrine of quasi-contracts." *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct.App.1988).

Specifically, Encore's unjust enrichment claim sought to recover damages for Clear Touch's and Trask's alleged misappropriation of its trade secrets and confidential information and breach of the business opportunity provision and other clauses of the Agreement by taking the Clear Touch business opportunity for themselves. (*See* Compl. paras. 58-62). Both of those alleged misdeeds (or "tasks") are encompassed in the Agreement, which was not rescinded, and upon which Encore sought and obtained verdicts under its legal claims at trial. (*See* Agreement p. 1-2)(Provisions prohibiting misappropriation and use of Encore trade secrets and Confidential Information and the Business Opportunity clause Encore claimed required Trask present the Clear Touch opportunity to the company.). As such, the trial court's determination that Encore was not entitled to equitable relief is further supported by the well-establish bar to recovering under both theories.

## IV. CONCLUSION

For the reasons set forth above, the holding within the Circuit Court's Final Order and Judgement entered April 2, 2018 denying Encore's Motion for Restitution should be affirmed.

**(Signature page to follow)**

Respectfully Submitted,

**ROE CASSIDY COATES & PRICE, P.A.**

Joseph O. Smith, S.C. Bar # 77475
Joshua J. Hudson, S.C. Bar # 100311
1052 North Church Street
Greenville, South Carolina 29601
(864) 349-2600
(864)-349-0303 (fax)
JSmith@roecassidy.com
JHudson@roecassidy.com
*Attorneys for Appellants/Respondents*
*Clear Touch Interactive, Inc. and Keone Trask*

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## CERTIFICATE OF COUNSEL

The undersigned certifies that Appellants/Respondents' Initial Brief complies with Rule 208, SCACR.

ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith (S.C. Bar No. 77475)
Joshua J. Hudson (S.C. Bar No. 100311)
1052 N. Church St.
Greenville, SC 29601
Phone: (864) 349-2600
Fax: (864) 349-0303
jsmith@roecassidy.com
jhudson@roecassidy.com
**Attorneys for Appellants/Respondents**

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f/k/a Clear Touch Interactive, LLC.....Appellants/Respondents

## PROOF OF SERVICE

I certify that I have served Appellants/Respondents' Initial Brief and Designation of Matter on the Respondent/Appellant Encore Technology Group, LLC by depositing a copy of it in the United States Mail, postage prepaid, on October 7, 2019, addressed to counsel of record as follows.

Gregory J. English, Esq.
Rita Bolt Barker, Esq.
WYCHE, P.A.
Post Office Box 728
Greenville, SC, 29602
**Attorneys for Respondent/Appellant**

ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith (S.C. Bar No. 77475)
Joshua J. Hudson (S.C. Bar No. 100311)
1052 N. Church St.
Greenville, SC 29601
Phone: (864) 349-2600
Fax: (864) 349-0303
jsmith@roecassidy.com
jhudson@roecassidy.com
**Attorneys for Appellants/Respondents**

October 7, 2019
Greenville, South Carolina

roecassidy
ATTORNEYS AT LAW

JOSEPH O. "JOSH" SMITH
(864) 404-3140
JSMITH@ROECASSIDY.COM

October 7, 2019



**VIA FED-EX: 7765 4841 7362**
Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

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

Dear Madam Clerk:

Enclosed please find the original and one copy of Appellants/Respondents' Initial Reply Brief and Designation of Matter to be included in the Record on Appeal. Additionally, please find the Proof of Service and Certificate of Counsel verifying that the same was served via USPS on counsel for Respondent/Appellant.

Please file both in your office and return a clocked copy to me in the enclosed self-addressed, stamped envelope provided herein.

With highest regards, I am

Sincerely,

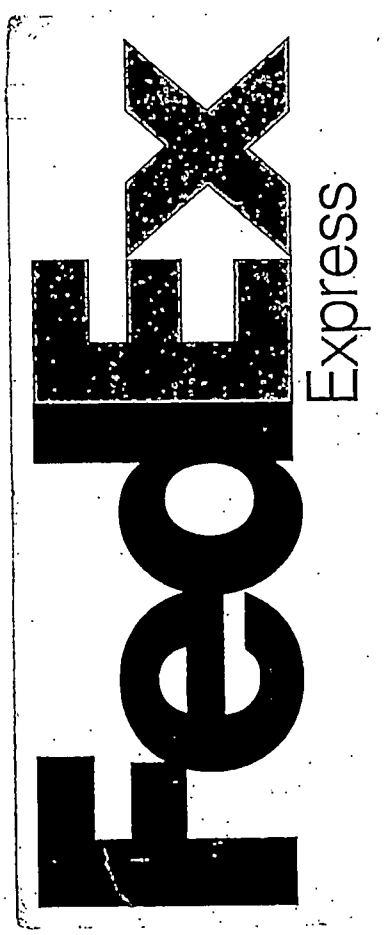
ROE CASSIDY COATES & PRICE PA

Joseph O. Smith

JOS/ads

Enclosures (*as stated*)

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

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