THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT

The Hon. R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2019-000530

Jami Powell and Encore Technology Group, LLC,

Of which Encore Technology Group, LLC is the ..... Appellant,

v.

Clear Touch Interactive, Inc. (a Nevada Corporation),
f/k/a Clear Touch Interactive LLC (a Nevada LLC);
Keone Trask and Tamara Trask, ... Respondents.

REPLY BRIEF OF APPELLANT ENCORE TECHNOLOGY GROUP, LLC

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STATEMENT OF FACTS

Appellant Encore Technology Group, LLC ("Encore") rejects Respondents Keone Trask's ("Trask") and Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC's ("Clear Touch") (Trask and Clear Touch may be referred to collectively as the "Respondents") misstatements in their brief ("Respondents' Brief") regarding several facts:

First, Respondents claim Encore has engaged in a "post-trial campaign to destroy Trask and its competitor Clear Touch." Respondents' Brief at 2. Nothing could be further from the truth: Encore simply wants Respondents to pay the full amount awarded to Encore by the Greenville County jury, including the $849,890 in exemplary damages originally awarded against Trask by the Final Order and Judgment before the Circuit Court changed it while it was on appeal.

Like they claimed to the jury, Respondents assert that this award presents a financial hardship for them. At trial, Trask falsely claimed to the jury that he and Clear Touch could "[l]ikely not" continue in business if the jury rendered a "multi-million-dollar verdict." (Trial Transcript ("Tr."), R. p. 364, ll. 15-21) Likewise, Respondents claim to this Court that Trask "pour[ed] his life savings of approximately $150,000" into Clear Touch in 2014, Respondents' Brief at 5, suggesting they are just a small business, but failed to explain how they were able to deposit funds totaling nearly $8.6 million by January 2019. (The answer, of course, is the Respondents stole Encore's trade secrets and surreptitiously built a competing business using Encore's resources while Trask was on Encore's payroll.) Pursuant to South Carolina Rule of Evidence 201, this Court should take judicial notice of the fact that Clear Touch has 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/. Respondents' efforts to mislead the courts regarding their ability to pay should not be countenanced.

Respondents also falsely claim that the Receiver Order "gave the Receiver license to violate various laws related to collecting judgment debts" and perpetrate "illegal acts." Respondents' Brief at 9-10. Respondents fail to disclose, however, that they moved this Court to stay the receivership on these same grounds, but this Court denied their motion. Court of Appeals Order filed September 20, 2018 in Case No. 2018-001444. They also fail to note that the Receiver Order was entered because, before Trask was held in contempt for non-compliance with the Receiver Order and then "found" over $6.6 million to avoid turning over financial documents, he 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, R. p. 39, ¶ 6; Contempt Order filed December 6, 2018, R. pp. 50-53; Clerk's Email dated January 3, 2019, Defendants' Hearing Exhibit #4, R. p. 473) Before he was held in contempt, Trask refused to comply with the Receiver's requests for basic financial information and documents, requiring multiple meetings and hearings to try to obtain his compliance.

Respondents' Brief makes numerous other misstatements of fact.[1] The jury's verdict and Circuit Court's judgment, ruling that both Trask and Clear Touch violated the South Carolina

[1] For example, contrary to the false claim in Respondents' Brief at 4, Trask did not transfer his interest in Clear Touch to his mother in October 2012, but did not do so until after he

Trade Secrets Act (the "SCTSA") "in a willful wanton, or reckless disregard of [Encore's] rights," confirm that Trask and Clear Touch were the bad actors. Respondents' Brief lacks credibility.

STANDARD OF REVIEW

Respondents do not dispute that in this appeal, the Court is to give *de novo* review, with no deference to the lower court's decision. *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 292, 78 S.E.2d 106, 108 (2015); *Hueble v. S.C. Dep't of Natural Res.*, 416 S.C. 220, 228, 785 S.E.2d 461, 465 (2016) (statutory interpretation is a question of law subject to *de novo* review).

ARGUMENT

I. The Circuit Court lacked jurisdiction to modify the Final Order and Judgment while it was on appeal to the Court of Appeals, so that such modification was null and void.

Respondents do not dispute that the Final Order and Judgment initially awarded $849,890 in exemplary damages under the SCTSA against each of Trask and Clear Touch. (Final Order and Judgment, R. p. 11, n.3 ("Because the jury determined that both Defendants were liable for

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was employed by Encore on April 11, 2013 (Plaintiff's Ex. 14, R. p. 412), and just before he induced Encore to sign the Reseller Agreement dated April 24, 2013 (Plaintiff's Ex. 3, R. pp. 387-403). 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" (Respondents' Brief at 4) are also misleading. Trask used his position at Encore to ensure that Clear Touch was Encore's panel supplier. Further, Clear Touch was not "one of the few products available," (Respondents' Brief at 4); Trask was purchasing the panels from manufacturers and hiding their identities to prevent Encore from purchasing directly from the true suppliers. (Final Order and Judgment, R. p. 33)

Likewise, the Respondents' 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., R. p. 290, ll. 4-17) In fact, Trask told no one at Encore he wanted to leave and was attending conferences on Encore's payroll and, while at these conferences, signing up potential resellers for Clear Touch in February 2014. (R. p. 295, l. 9-R. p. 301, l. 20)

And contrary to the claim that in "October 2014 ... Trask disclosed his interest in [Clear Touch] to Encore leadership," (Respondents' Brief at 5), Trask only disclosed that recently "he had acquired an interest in Clear Touch." (R. p. 285, ll. 12-20)

misappropriation of Trade Secrets, Defendants are jointly and severally liable to Encore for the actual damages of $424,945, the attorneys' fees of $345,600, and the costs and expenses of $94,900, or a total of $865,445 on this claim. Therefore, payment by one Defendant of this amount on this claim will reduce the other Defendant's liability for this claim. Each Defendant, however, will owe exemplary damages of $849,890 for this claim because each engaged in willful, wanton, and reckless disregard of the Plaintiff's rights.")) Respondents also do not dispute that they appealed the Final Order and Judgment to this Court on July 23, 2018, and therefore this Court had "exclusive jurisdiction over the appeal." Rule 205, SCACR; *Bunkum v. Manor Props.*, 321 S.C. 95, 98-99, 467 S.E.2d 758, 760 (Ct. App. 1996). Additionally, Respondents do not dispute that, after they appealed, the lower court changed its ruling in the Final Order and Judgment that Trask and Clear Touch were each liable for exemplary damages of $849,890, ruling instead that Clear Touch's payment of exemplary damages satisfied Trask's obligation to pay them.

Instead, Respondents argue that "neither Order challenged in this appeal purports to modify the Final Order," they just "contain findings which may be inconsistent with a footnote in the Final Order that the circuit court admitted it did not intend to include and which it thought ran afoul of the law." Respondents' Brief at 17. But because the Final Order and Judgment was on appeal, the Circuit Court had no jurisdiction to make subsequent findings inconsistent with those in the Final Order and Judgment or to deprive Encore of its rights thereunder because it later was persuaded that the prior rulings might run "afoul of the law." Respondents never objected to the subject footnote before they appealed and should not have been allowed a second bite at the apple after they appealed. Respondents cite no legal authority to support their position.

II. The Circuit Court erred in modifying the Final Order and Judgment so that two Defendants had to pay only one award of exemplary damages, even though the jury found that both Defendants had violated the South Carolina Trade Secrets Act with a willful, wanton, or reckless disregard of Encore's rights.

A. The South Carolina Trade Secrets Act unambiguously allows the Circuit Court to award exemplary damages in the amount of twice *any award* and, because there were two separate awards—one against Trask and one against Clear Touch—the Court's initial award of exemplary damages against each of Trask and Clear Touch was proper.

Although they caused the same actual damages, because they were two separate defendants, the jury's verdict resulted in two awards under the SCTSA: one against Trask and one against Clear Touch. Respondents' argument that exemplary damages are limited to double only one of these awards depends upon changing the words of the statute from "any award" to "actual damages."

Specifically, S.C. Code Ann. § 39-8-40(C) provides that, "[u]pon a finding of willful, wanton, or reckless disregard of the plaintiff's rights, the court may award **separate** exemplary damages in an amount not exceeding twice **any award** made under subsection (A)." *Id.* (emphasis added).[2] Therefore, in cases where multiple defendants misappropriate the same trade secrets and cause the same actual damages, the statute as written authorizes "separate" exemplary damages against each defendant, because awards of actual damages against multiple defendants are necessarily multiple awards. In other words, where two or more defendants are jointly and severally liable for actual damages, the award against each defendant is necessarily a separate and independent award that can sustain separate awards of exemplary damages.

To operate as Respondents contend, Section 39-8-40 (C) would need to be re-written to make the cap on exemplary damages an amount not exceeding twice "actual damages."

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[2] Encore's counsel quoted this same language, "twice any award," at trial. (Tr., R. p. 376, ll.3-8)

Respondents' Brief underscores their need for this change of language by repeatedly claiming this Section limits exemplary damages to twice "actual damages," even though it does not. Respondents' Brief at 2 ("the SCTSA limited Encore's recovery of exemplary damages to two times the actual damage amount awarded ...."); at 7 ("the maximum amount of exemplary damages allowed under the SCTSA against the Defendants [was] twice the actual damages awarded by the jury"); at 14 ("39-8-40(C) capped the amount of exemplary damages a court may award for trade secret misappropriation to no more than twice the actual damages awarded"); at 19 (the "Act limits the amount of exemplary damages recoverable ... to no more than two times the actual damages awarded ...."); at 20 ("'Any award' ... can only be the 'actual damages ....'"); at 21 ("the SCTSA prohibited imposing exemplary damages against Trask and Clear Touch beyond two times the actual award amount."). The statute simply does not contain the language that Respondents want limiting exemplary damages to twice "actual damages."

Because the jury found that both Trask and Clear Touch had misappropriated Encore's trade secrets and caused Encore actual damages and that both defendants acted with willful, wanton, or reckless disregard of Encore's rights, the jury verdict resulted in two awards, one against Clear Touch and one against Trask. (Verdict Form, R. p. 467)[3] Accordingly, the Circuit

[3] Respondents ask the Court to elevate form over substance by focusing on the fact that the Verdict Form provided a single line for the jury to indicate the amount of actual damages caused by both defendants. Respondents' Brief at 18. There is no question that Encore could have sued Trask and Clear Touch in separate actions and obtained separate verdicts against each. If both juries had found Trask and Clear Touch liable for misappropriation of trade secrets causing Encore the same actual damages, defendants would be jointly and severally liable for those actual damages, but Respondents would then concede that the defendants are each separately liable for double that amount in exemplary damages. The ability of the victim of a trade secrets theft to recover exemplary damages from each perpetrator cannot reasonably depend upon the victim's having to bring separate actions against each thief.

Court properly assessed separate exemplary damages against each of Trask and Clear Touch initially, and should not have changed this ruling after the appeal was filed.

B. The Circuit Court's modified interpretation of the South Carolina Trade Secrets Act must be rejected as contrary to the common law, which provides for separate punitive damages against joint tortfeasors.

In response to the principle that a "statute is not to be construed in derogation of common law rights if another interpretation is reasonable," *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 318 n.5, 433 S.E.2d 875, 884 n.5 (Ct. App. 1992), *adhered to on reh'g* (Apr. 29, 1993); *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004), *aff'd*, 373 S.C. 390, 645 S.E.2d 245 (2007) (internal citations omitted), Respondents argue that the SCTSA is clear and unambiguous and therefore no construction is necessary. As demonstrated above, the SCTSA's limit on exemplary damages is twice "any award," not twice "actual damages," and therefore the initial award of exemplary damages against each of Trask and Clear Touch should have been maintained under the clear language of the statute.

If, however, the Court finds the language ambiguous, it should adopt the construction consistent with common law, not in derogation of it.[4] Respondents do not dispute the common law that, where defendants are jointly and severally liable for actual damages, they are each still separately liable for punitive damages. *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 471-72 n.3, 545 S.E.2d 286, 288-89 n.3 (2001) ("Punitive damages awarded against one tortfeasor do not constitute double recovery with respect to a judgment against another tortfeasor since the purpose of punitive awards is to punish a particular offender rather than to compensate the victim

[4] Respondents' reference to S.C. Code Ann. § 39-8-110(A) ("this chapter displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret") is inapplicable, because Encore is not seeking remedies other than the exemplary damages provided by the SCTSA. Encore raises the common law of punitive damages in support of its interpretation of the SCTSA. Respondents cite no law supporting their interpretation.

for its injury."); *see also Beerman v. Toro Mfg. Corp.*, 615 P.2d 749, 755 (Hawaii Ct. App. 1980); *Medearis v. Miller*, 306 N.W.2d 200, 204 (N.D. 1981); *Burgess v. Porterfield*, 469 S.E.2d 114, 119 (W. Va. 1996).

Respondents, however, citing *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207 (Ct. App. 1994), argue that the common law prohibits "recovery of the same punitive damages for a single wrong more than once." Respondents' Brief at 12. That proposition and case, however, are inapplicable because the case involved only election among multiple remedies for one injury. Specifically, *Smith v. Strickland* held only that plaintiffs prevailing on four causes of action for the same injury, the same actual damages, and punitive damages under three of the causes of action, had to elect an award of actual damages under one cause of action, and could not add the punitive damages awards from three causes of action for each defendant. The Court did not address the issue in *McGee* and here—whether each defendant could be required to pay punitive damages separately when they were jointly and severally liable for the same actual damages. Following *McGee,* the common law is clear that each defendant is responsible to pay punitive damages separately, even though jointly and severally liable for actual damages.

Respondents attempt to conflate the issues of joint and several liability for actual and punitive damages, arguing that, because they were jointly and severally liable for actual damages, liability for punitive damages must also be joint and several under "controlling law." Respondents' Brief at 18 ("Defendants' liability for the alleged trade secret misappropriation was treated as joint and several ...."); at 12 ("liability for the exemplary damages award under the Trade Secrets claim was and must be joint and several under the controlling law"); at 13 ("controlling law required treating [exemplary] damages as joint and several amongst the Defendants"). Respondents, however, cite no such "controlling law" in support of this position

other than *Smith v. Strickland*, which as noted above does not stand for the proposition that liability for punitive damages is joint and several. In fact, *McGee* makes clear this is not the law, but instead liability for punitive damages is separate, even when liability for actual damages is joint and several.

In sum, because it misinterpreted *Smith* and failed to follow *McGee*, the Circuit Court failed to interpret the SCTSA consistent with common law, which was error.

III. The Circuit Court erred in dismissing Encore from the Powell Case, after previously finding that Encore had a right to intervene, based upon the Circuit Court's improper modification of the Final Order and Judgment.

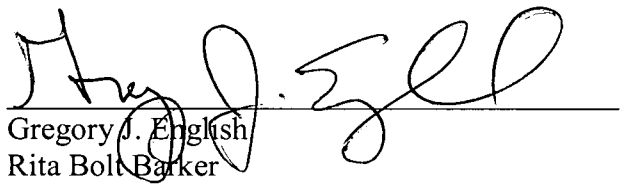
Encore and Respondents agree that Encore's standing to intervene in the Powell Case depends upon whether Trask owes a separate award of exemplary damages under the SCTSA. Because both Trask and Clear Touch owe separate exemplary damages, and Trask has not deposited his exemplary damages, the judgment has not been fully secured and Encore has standing in the Powell Case to protect its interest in the shortfall between what Trask owes and what he has deposited. The Circuit Court's order dismissing Encore from the Powell Case should therefore also be reversed.

CONCLUSION

For the foregoing reasons and the reasons stated in Encore's Appellant's Brief, the Order Staying Receivership and the Order Granting Defendants' Motion to Dismiss Encore from the Powell Case should both be reversed.

Respectfully submitted,

WYCHE, P.A.

BY: 

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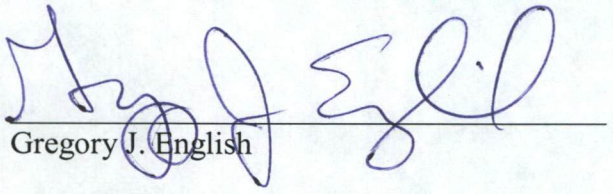
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.



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