THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-001444

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

v.

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

AND

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

v.

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

FINAL BRIEF OF APPELLANTS/RESPONDENTS

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I. STATEMENT OF THE ISSUES ON APPEAL

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

7. Did the trial court err in denying Defendants' Motion Pursuant to the Thirteenth Juror Doctrine because the jury rendered an inconsistent verdict by awarding different damages under two contract claims where Plaintiff could only recover the same actual damages?

8. Did the lower court abuse its discretion by awarding Encore the entirety of its attorneys' fees and costs when they were only recoverable under some of the claims alleged and Encore provided insufficient evidence to establish entitlement to those fees and costs?

9. Did the lower court adopt a Receiver Order permitting violations of South Carolina law?

10. Did the lower court err in granting summary judgment and dismissing CTI's suit against Encore finding the claims asserted were barred *by res judicata* when they were based upon evidence Encore withheld until a few months prior to trial of the original case?

11. Was it an err for the lower court to adopt a Dismissal Order drafted by Encore that included a basis for dismissal never addressed before or ruled upon by the court?

II. STATEMENT OF THE CASE

This matter arose from Keone Trask and CTI's actions in establishing and bringing a new interactive touch screen panel to market. Some of those actions were simple mistakes common in startup ventures, while others were deliberate and duplicitous. Simply put, Trask and CTI did things they should not have done. They took advantage of Trask's employer, Encore Technology Group, by not disclosing Trask's interest in CTI and having Encore act as a reseller of CTI panels which Encore believed was an established brand supplied by a third party rather than its Chief Business Development Officer. A jury greatly punished both Trask and CTI for those wrongful actions and awarded Encore over a million dollars in actual damages and multi-millions in punitive awards. This appeal is not an attempt to undo that punishment, nor aimed at having Trask and CTI escape responsibility. This appeal is meant to rectify the trial court's abuse of the law and its

discretion through which it exacted punishment upon these Defendants well in excess of what the law allows. Trask and CTI's bad acts did not give the lower court carte blanche to heap penalty and excessive punishment upon them, yet it did so time and time again. Through the trial court's errs: the jury's awards were impermissibly increased to over seven million dollars against Trask and nearly two million dollars against CTI; CTI was robbed of an opportunity to pursue its own multi-million dollar claims against Encore of which it was only made aware a few months prior to trial due to Encore's withholding of evidence; and both Trask and CTI were made to labor under the yoke of a Receiver empowered to violate the law through a written order. Trask and CTI should answer for their actions, but what that entails is limited by the law and requires this Court's intervention to ensure those limitations are enforced. The trial court abused its discretion and enacted punishment beyond what the fullest extent of the law allows. This appeal was filed to correct those errors and ensure Defendants are not subjected to retribution over and above what South Carolina law permits.

A. Introduction

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

[1] Trask and Clear Touch are collectively referred to as "Defendants" in this brief.

B. Establishment of CTI and Encore

From 1999 through fall 2012, Keone Trask worked for Computer Software Innovations ("CSI") in a variety of roles, including Chief Technology Officer charged with evaluating different technologies and solutions for the company to consider selling. Around this time, he foresaw a shift in classroom technology away from projectors and whiteboards to interactive touch panels. (R. pp. 1175-1178). On August 24, 2012, Trask established Clear Touch Interactive, LLC as a Nevada entity with the notation that it may one day be a manufacturer or supplier of interactive touch panel technology. (R. p. 1743). Trask set about identifying potential manufacturers and exploring the CTI opportunity. He identified and worked to develop the panel sourcing/supplier opportunity with TSI Touch through the fall of 2012. (R. pp. 1176-1178). Shortly after CTI was established, a new opportunity arose due to the acquisition of CSI by a company called Harris. Harris was only interested in a portion of the CSI business and planned to eliminate the technology reseller and cloud services division. (R. pp. 1176-1190). Trask and other current and former Encore executives saw an opportunity to spin off that division into a new entity, leading to the incorporation of Encore Technology Group, LLC on September 27, 2012. The idea was for Encore to purchase the technology reselling and cloud services division of CSI and continue with that business as a newly minted entity. Trask and others solicited several prospective investors, ultimately resulting in Todd Newnam purchasing all ownership interests in Encore and acquiring the technology reselling and cloud services division of CSI as planned. Operational management and control of CTI was transferred from Trask to his mother Kathy Cruse on or around October 4, 2012, which was reflected by the LLC's Annual List of Managers filing for the period of August 2012 to August 2013. (R. p. 1749).

Due to his experience and expertise in the technology market, Encore hired Trask as its Chief Business Development Officer on or about February 18, 2013. At that time, Trask executed a Non-Disclosure and Non-Solicitation Agreement (the "Agreement") containing multiple provisions meant to restrict his post-employment activities. (R. pp. 1649-1651). The Agreement also contained a "Business Opportunity" provision which obliged Trask to notify and use his "good-faith efforts to" to provide Encore the opportunity to "explore, invest, participate in, or otherwise become affiliated with" ventures similar to or competitive with its business. *Id.*

C. Trask Brings CTI to Encore

In the spring of 2013, Trask brought CTI to Encore as a potential panel supplier. Interactive panels were an emerging technology at this time, with few options on the market. (R. pp. 1294-1303; R. pp. 1293, line 23-p. 1294, line 2)("[W]hen we brought Clear Touch on board, that was the only thing available to us...and it was a great technology."). The company chose to sell CTI panel products and entered a Reseller Agreement on April 24, 2013, making it the exclusive Reseller of CTI products in seven southeastern states (the "Territory"). Under that contract, CTI supplied Encore interactive panels and accessories which it then sold to customers at a markup. As CTI's Reseller, Encore agreed to use its reasonable efforts to advertise, market, and sell CTI products in the Territory for the companies' mutual benefit, as it did and does for all its suppliers. Encore began to market and sell CTI products within its larger suite of product offerings. Encore's business model and strategy was then and is now to be a Value-Added Reseller and a one-stop shop for the public sector's IT needs. (R. p. 907, line 3-p. 908, line 4). As such, Encore offers an array of technology products, with interactive panels accounting for less than 5% of its overall business. (R. p. 905, lines 4-21; R. p. 915, line 12-p. 917, line 8; R. p. 1132, lines 16-19; R. p. 1133, line 23-p. 1134, line 1). Trask did not disclose his interest in or involvement with CTI when he

brought the product to Encore or during his time as its Chief Business Development Officer. He and others at Encore went about their jobs of promoting and selling Encore's entire suite of products, including CTI panels, until he left the company in 2014.

D. Trask Goes Immediately from Encore to CTI

In January 2014 Trask decided to leave Encore and pursue the CTI business full time. On January 15, 2014, Trask notified Encore of his intention to leave the company, effective February 14, 2014. (R. pp. 1191-1193). Around this time, CTI began communicating with Encore from a company email belonging to an Amy Andrews. In fact, Ms. Andrews was Keone Trask's wife, Tamara Trask's, alias. (R. p. 1669). Mrs. Trask used this alias email to communicate with Encore on behalf of CTI starting in the final few months of her husband's employment at Encore and continued to do so after he left the company. On January 21, 2014, CTI was converted from an LLC to a corporation, resulting in a change of operational control from Cruse to Trask. (R. p. 1755). The conversion allowed Trask to pour his life savings of approximately $150,000 from his 401k into CTI. (R. pp. 1194-1196). Encore ultimately terminated Trask on April 25, 2014, and he immediately went to work for CTI. (R. p. 1866).

E. CTI and Encore Continue to Do Business

Encore and CTI continued to do business following Trask's departure. CTI supported Encore's sales activities, provided training, product demonstrations, attended trade shows, and sent lead notifications. In October 2014, CTI sent Encore a Modified Reseller Agreement to allow Encore to sell CTI products in the entire lower 48 states on a non-exclusive basis. (R. pp. 1867-1899). That same month, Trask disclosed his interest in CTI to Encore leadership. (R. p. 1197, line 14 – p. 1199, line 21).[2] Encore continued to sell CTI products for nearly a year after that. Encore

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

also sold competing panel products throughout the country and in the several southeastern states in which they formerly could only sell CTI products under the original Reseller Agreement.

F. CTI Hires Jimmy Higginbotham

Jimmy Higginbotham sold classroom technology products in the Southeast, including to Leon County in Florida. In early 2013, Trask arranged for Higginbotham to interview with Encore for an outside sales representative position. (R. pp. 1038-1040). Encore hired Higginbotham and he sold the suite of classroom technology products it carried, including CTI panels. In the fall of 2014 Encore planned to terminate Higginbotham but wanted to retain Leon County as a customer.[3] Rather than terminate Higginbotham, Encore arranged for him to work for CTI starting in August 2014. (R. pp. 888-889; R. pp. 901-902; R. p. 910, lines 11-22). Higginbotham went to work for CTI as planned and continued to market and sell CTI panels for the company's resellers, including Encore.

G. CTI Hires Leo Gallant

Encore hired Leo Gallant as a classroom solution specialist in early 2013. Gallant also executed a non-compete with Encore. As a classroom solutions specialist, Gallant worked for Trask and with others within Encore to market and sell the company's suite of classroom technology, including CTI panels, by providing product demonstrations, training, and sales support. (R. pp. 1284-1293). Gallant believed the CTI product was superior to Encore's other panel offering (Promethean) and other available panels on the market. (R. p. 1670).

Shortly after Trask's departure from Encore in April 2014, he had Leo Gallant over for dinner. At that time, he asked Gallant to sign an NDA and proceeded to disclose that he was the founder and owner of CTI. (R. pp. 1300-1301). Trask did not offer Gallant a job at that dinner nor

[3] Prior to his termination, Higginbotham signed an NDA with CTI. (R. pp. 1750-54). He testified that Trask did not disclose his historical interest in CTI to him until he worked at CIT. (R. p. 1050, line 10-p. 1051, line 4).

ever encourage him to leave Encore. (R. p. 1301, lines 10-15). After that dinner, Gallant monitored public job postings and CTI's social media in order to keep abreast of openings at the company. (R. p. 1303, line 10- R. p. 1304, line 2). In December 2014, CTI posted an opening for a business development representative position. Gallant responded to the post and chose to leave Encore to take the position at CTI. He informed Encore of his intentions to leave for CTI and started his new job on January 12, 2015. (R. p. 1304, lines 15-19). Encore knew of Gallant's plans and did not object to him leaving the company or working for CTI. (R. p. 1304, lines 15-19).

H. Leon County Sales

Leon County School District is a large district located in Florida. Leon County was Higginbotham's long-time customer who he brought with him to Encore. (R. p. 911, lines 16-22). Leon County was also a customer of West Martin, CTI VP of Sales, before he came to work for the CTI. (R. p. 1280, lines 1-11). Before Encore or CTI made any sales to Leon County, the school district had an advertising campaign in support of a half penny sales tax increase referendum that was publicly advertised as a mechanism to generate revenues for upgrading the district's technology. (R. p. 1281, line 12-p. 1283, line 1). Billboards in the area advertised the campaign and fund-raising thermometers outside of schools tracked the money raised through the referendum which was to be invested in classroom technology. (R. p. 1203, line 4 – p. 1205; R. pp. 1280-1283).

After Trask left Encore in April 2014, Leon County selected CTI as its panel manufacturer and entered an order, through Encore, for 18 units. (R. p. 1818). Leon County's plan was to purchase additional units through December 2014 and continue purchasing for hundreds of rooms in 2015. *Id.* At some point after the initial purchase, Leon County became dissatisfied with Encore as their Reseller and sought to purchase panels directly from CTI. (R. p. 909, line 20-p. 910, line

7). CTI obliged Leon County's request, and made several direct sales to the school district, including sales from April 26, 2014 – April 25, 2015 (term of Trask's non-compete), totaling $344,201, and from April 26, 2015 – October 10, 2015, totaling $205,430. (R. p. 1692).

I. Encore Learns of Trask's Historical Interest in CTI

Encore continued to sell CTI products into 2015. Events unfolded over the course of the Spring and Summer that year which led to Encore's termination of its reseller relationship with CTI on September 11, 2015, and the filing of the underlying lawsuit a week later. Encore learned as early as January 2015 that CTI was working with other resellers to sell their products in the Territory in which Encore once had exclusivity, and according to its witnesses maintain they still had exclusive rights to sell CTI Products. (R. p. 906, line 5-p. 907, line 2). Despite that contention, the company never demanded CTI stop selling through other resellers in the Territory, and, nothing beyond unsubstantiated conjecture was offered showing Encore objected to this in any manner. *Id.* In reality, Encore continued to sell CTI panels along with its other products, including a competing Promethean panel, through the Spring and Summer of 2015 without addressing or objecting to CTI's business relationships with other resellers who sold to customers in the Territory. The two companies simply continued to work together to market, promote and sell the CTI products as they had done throughout their relationship. The non-compete provisions of Trask's Employment Agreement ended on April 25, 2015. (R. pp. 1649-1651). At the end of July 2015, CTI terminated Jimmy Higginbotham for cause. Soon thereafter, Higginbotham contacted Encore executive Todd Newnam and informed him that Trask had an interest in CTI before and during his tenure at Encore and suggested the company look into it. (R. pp. 903, 912, 1052-1055). Encore took that advice, researched the historical ownership of CTI through public corporate filings, and discovered that Kathy Cruse was Keone Trask's mother. At that point, Encore decided it would end its relationship

with CTI. (R. pp. 912-914). It did not inform CTI of its decision right away. Instead, Encore established a reseller relationship with another panel supplier, ViewSonic, and worked to position them to replace CTI. Encore never attempted to directly source panels. (R. pp. 912-914; R. p.1057, line 10-p.1058, line 16). It did what it always had done until that point and continues to do today – act as a Reseller for another company's interactive panels and accessories. It just switched out CTI panel products for ViewSonic within its suite of technology product offerings.

J. Encore Terminates Reseller Agreement and Files Suit September 2015

On September 11, 2015, Encore notified CTI it was terminating the relationship. (R. p. 1685). A week later Encore filed a complaint containing nine causes of action and claimed damages allegedly arising from Trask not disclosing his relationship with and interest in CTI while an employee of Encore, in violation of various common law and contractual obligations to the company, misappropriation of company trade secrets, and defamatory statements concerning Encore, as alleged in the Complaint. (R. pp. 82-131). Defendants filed Answers asserting various defenses. (R. pp. 132-152). Prior to trial, Trask admitted liability for the Breach of Duty of Loyalty and Breach of Fiduciary Duty claims. (Stip. of Fact & Admission of Liability - R. p. 1912-1915).

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

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

The matter was tried before a jury the week of September 25-29, 2017 with the Honorable R. Lawton McIntosh presiding. At trial, Encore pursued different theories of liability under its claims, but relied upon the same facts – (1) Trask not disclosing to Encore the identity of CTI's suppliers; (2) Trask not informing Encore that he was building a reseller network for CTI; (3) Trask not working with Encore to take advantage of the CTI opportunity; and (4) CTI making

direct sales to Leon County. These alleged actions, in some form or fashion, were the underlying basis for Encore's claims of liability for the claims upon which it obtained a verdict at trial.

2. Encore's Claimed Damages as Presented at Trial

Encore offered Michael Meilinger as its expert economic witness at trial. He testified concerning his calculations of potential damages and submitted Tables and documents he prepared reflecting what Encore claimed as its available damages. (R. pp. 1060-1168). Meilinger presented three alternative damages calculations, each summarized in a Table, and all three were ultimately admitted into evidence as a single page exhibit entitled "Summary of Damages." (R. p. 1692).

Table 1, entitled "Direct Costs Incurred by Encore" originally included all of Trask's, Gallant's, and Higginbotham's wages and the expenses Encore told Meilinger were attributable to each former employee during their entire employment which totaled $712,085. (R. p. 1686). The trial court ruled that Encore could seek recovery of Higginbotham and Gallant's wages and expenses only from the time each signed an NDA with CTI, resulting in reduction of the damages in Table 1 to $488,041 - comprised of Trask's wages and portions of Gallant's and Higginbotham's pay and expenses attributed to them selling CTI product. (R. p. 1692; R. p. 1059). These damages, according to Encore and Meilinger, were recoverable for Trask's breach of his duty of loyalty to Encore. (R. p. 1073). The next two categories of claimed damages Encore presented to the jury it claimed were recoverable under each of the remaining causes of action.

Table 2 - The second category of damages Encore presented through its economic expert were various "lost profits" totaling $1,100,306 and summarized in Table 2. (R. p. 1692). The first three elements of this calculation, noted as "Direct Damages," all came from CTI sales to Encore totaling $675,361. The last two, deemed "Lost Profit", were from CTI sales to Leon County totaling $424,945. These damages were divided into different time periods. The first, was Trask's

employment with Encore (2.13.13-4.25.14); the second, the duration of Trask's non-compete (4.26.14-4.25.15), and the third ran from the end of the non-compete to termination of the Reseller Agreement (4.25.15-10.10.15). (R. p. 1692; R. pp. 1649-1651; R. pp. 1671-1680; R. pp. 1682-1684).

Table 3 - Through Meilinger's testimony, Encore presented its final alternative category of damages in Table 3 totaling $5,536,254 and comprised of two main elements: (1) all of CTI's normalized profits through the end of 2015 and (2) what Plaintiff claimed was the value of the CTI business as of that date. (R. p. 1692). Table 3 divided the Normalized Profits calculations into four time periods, the first three being those used in Table 2 and the fourth tacked onto Table 3 ran from the end of the Reseller Agreement to year end 2015 (10.10.15-12.31.15). *Id.* Meilinger testified that if the jury awarded damages from Table 3, it should not award those from Table 2 because the former calculations subsumed the latter. (R. pp. 1105-1107). At trial Encore claimed that it suffered the same damages under every cause of action, except under its breach of loyalty claim.

L. The Verdict

At the close of trial, all eight of Encore's legal claims were submitted to the jury and its equitable cause of action to the trial court. The jury rendered a verdict in favor of Encore on six of the eight causes of action ("COA"s): **COA I** Breach of Duty of Loyalty (*v. Trask*); **COA II** Breach of Fiduciary Duties (*v. Trask*), **COA III** Breach of Contract (*v. Trask*), **COA IV** Violation of the SC Trade Secrets Act (*v. Trask and CTI*); **COA V** Tortious Interference (*v. CTI*) and **COA VI** Breach of Contract with Fraud (*v. Trask*). (*See* Verdict Form – R. pp. 1916-1923).

M. Post-Trial Motions

On October 9, 2017, Defendants filed eight post-trial motions that included, a Motion for Election of Remedies seeking to have Encore elect among the remedies awarded to avoid duplicative recovery; Motion for New Trial due to admission of certain inappropriate damage testimony and evidence at trial; Motion for New Trial *Nisi* Remittitur, again related to the prejudice caused by admission of certain damage evidence; Motion for Judgment Notwithstanding the Verdict because the restrictive covenants in Trask's Non-Disclosure and Non-Solicitation Agreement were unenforceable as a matter of law, barring recovery for their breach and due to Encore's failure to provide evidence to establish its trade secret claim at trial; Motion Pursuant to the "Thirteenth Juror Doctrine" because the jury's verdict was inconsistent and reflected confusion. (R. pp. 457-492). Encore also submitted post trial filings seeking fees, exemplary damages, and for the court to allow it to recovery under as many claims as possible. (R. pp. 493-535). As part of that last effort, Encore submitted its "Requested Judgments in Favor of Encore Technology Group, LLC," breaking down the verdicts it believed it could recover under and gave what it contended was the factual and legal basis for each of those awards in an attempt to segregate those verdicts. (R. p. 575). The trial court heard post-trial motions on November 11, 2017, with the election of remedies issue receiving the majority of attention. In response to the Court's questioning, Encore deviated from its position and presentation at trial and represented to the Court that it had in fact presented separate and distinct elements of damages to the jury for its breach of loyalty, breach of fiduciary duty, trade secrets, and breach of contract with fraud claims. (R. pp. 1510-1512; R. p. 1516, lines 3-10; R. pp. 1518-1519). Following those hearings, the Court allowed additional submissions to address the myriad of issues before it. Defendants obtained portions of the trial transcript to address Encore's post-trial representations concerning its presentation of its

case, including damages, to the jury at trial. Defendants filed a Response and Opposition to Plaintiff's post-trial motion on November 15, 2017. (R. pp. 536-555). Then, after obtaining hearing transcripts and portions of the trial transcripts needed, Defendants submitted Supplemental Post Trial Filings on March 5, 2018 to further address Encore's post-trial arguments and its presentation of certain testimony and evidence at trial. (R. pp. 556-586).

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

Following those submissions, the Court made its rulings and instructed Encore draft the proposed order and work with CTI to finalize it for submission. Ultimately, Encore submitted a proposed final order to the Court containing a litany of inappropriate and unsupported factual findings and running afoul of the law in a multitude of ways. CTI submitted a redline of the proposed order, along with an accompanying email outlining the primary issues for the trial court's consideration. (R. pp. 639-680). The lower court adopted Encore's proposed order without revision and entered the Final Order on April 2, 2018 (the "Order"). The Order granted all of Encore's post-trial motions except for restitution, denied Defendants' post-trial motions with the exception of granting leave to deposit judgment into Court; and entered judgment in favor of Encore against Trask in the amount of **$7,917,468.40** and against **CTI for $1,715,335.00**. (R. p. 2). The Order specified the components of each judgment and made factual findings as to their basis:

Against Defendant Keone Trask

Actual Damages	**Punitive Damages**	
$ 375,733.40	$ 175,000.00	breach of loyalty (Trask's wages + conference expenses)
675,361.00	1,500,000.00	breach of fiduciary duty (Encore's lost profits from non-disclosure of suppliers)
424,945.00	849,890.00	violation of Trade Secrets Act (Leon County profits–same actual damages as breach of contract)
+1,476,039.00	+2,000,000.00	breach of contract accompanied by a fraudulent act (portion of CTI 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 JUDGMENT AGAINST TRASK:	**$7,917,468.40**

Against Defendant CTI 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 JUDGMENT AGAINST CTI:		**$1,715,335.00**

(R. pp. 10-11). Defendants filed timely Motion(s) to Reconsider on April 12, 2018, which were heard on June 12, 2018, and denied by Order entered July 23, 2018. (R. pp. 37-39). CTI filed a Notice of Appeal of the Final Order that same day.

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

CTI paid the judgment against it into the Court by April 17, 2018. Encore pursued collection on the Trask judgment, including moving for Appointment of a Receiver on May 21, 2019. The Court heard that motion on June 12, 2018, granted the motion and instructed Encore prepare a proposed order. The proposed order submitted to the court contained various provisions empowering the Receiver to violate the law; requiring Trask submit detailed objections to the court. The Trial Court adopted Encore's proposed Receiver Order without revision in July 2018 which was supposed to be for the purpose of identifying and preserving Trask's collectible assets that could be utilized to satisfy the judgment against him. The troublesome provisions of the Receiver Order were quickly and consistently utilized to obtain Trask's assets, whether they could be used to satisfy the judgment or not, and the Receiver's reign proved to be a painful exercise.

Trask filed a timely appeal of the Receiver Order on August 2, 2018. The outstanding balance of the Trask judgment was paid into the Court on January 3, 2019. The lower court stayed the Receiver Order after requiring Trask also deposit into the Court pending appeal the over $250,000 in Receiver fees charged at that time, even though he does not yet owe those fees.

P. Withholding of Evidence Leads to Filing of *CTI v. Encore*, September 12, 2017

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

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

CTI served its first set of discovery requests on April 25, 2016. Encore served written responses to those requests on July 14, 2016 without producing any documents. Following CTI's request, Encore supplemented its written responses and provided a document production on August 8, 2016. CTI attempted to address deficiencies with Encore but had to seek judicial intervention to resolve some issues, including requiring Encore provide a privilege log. Encore also filed a motion to compel. Both were heard in October and resulted in a November 17, 2016 Discovery Order and subsequent supplemental production by both parties.

2. Encore's Supplemental Productions of Over 200,000 Pages of Documents from November 21, 2016-April 13, 2017

Encore made a series of productions on November 21 and 22, 2016; December 29, 2016; February 3, 2017; and April 13, 2017; totaling over 200,000 pages of documents in over 32,000 separate files. (*See* R. pp. 242-244 for detail). Encore produced approximately **100,000 pages** on November 21 and 22, however, much of this production was in separate pdf files and unusable in

various respects, including not containing attachments to the emails comprising most of the production. To address those issues, on December 29, 2016, Encore served Defendants with a flash drive containing a supplemental production meant to replace the November 22 documents and comprised of over **175,000 pages of new documents** produced in over **32,000 individual files**. Over the course of several weeks, CTI attempted to get the December 29th production in reviewable form to no avail. Due to the sheer volume and manner in which the documents were produced, including lack of any discernable organization, CTI had to upload the documents into specialized review software. That required obtaining the native file formats for all previously produced documents. Accordingly, CTI requested and Encore agreed to provide the documents produced on November 22 and December 29 (ENC 000513-00202522) in native file format. Encore provided what it represented was all of those native file documents. CTI uploaded those files to review software and set about the long review. Given those circumstances, CTI requested Encore consent to a continuance of the trial date. Encore refused, and CTI filed a Motion for Continuance of Trial on March 10, 2017 which Encore fiercely opposed. (R. pp. 235-239). The Court granted CTI's motion, continuing trial and placing it for a date certain the week of August 28, 2017.

CTI continued the time-consuming and costly review of the supplemental production and discovered serious deficiencies which it addressed in an April 6, 2017 letter. Encore sent an April 13, 2017 letter along with additional documents. (R. p. 1908-1909). That correspondence also included a document labeled "Privilege Log" which was a two-page four paragraph document of general objections, among which was Encore's claim that it was withholding all documents from on or after September 11, 2015. (R. pp. 266-267). Continued attempts to obtain a real privilege log were resisted. CTI was forced to file a Second Motion to Compel on April 26, 2017.

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

On May 31, 2017, weeks after the date that Encore had already fought to have the case go to trial, it provided a **65-page privilege log** and an additional **10,000 plus pages** of documents in over **4,000 individual pdf files**. (R. pp. 1910-1911). The cover letter accompanying this production admitted that in the over a year and a half since filing the action ***Encore had not searched for the name of the company they sued - "Clear Touch" - when searching for responsive emails***. (R. p. 1911)(Stating Encore searched for "ClearTouch" but not "Clear Touch" with a space between the words, which is the actual name of the company.). This was the first production that included post September 11, 2015 documents. CTI undertook review of those 10,000 new pages of materials, a difficult and time-consuming task due to the volume and manner of production. Following the May 31st production, the parties worked on resolving outstanding issues related to CTI's 2nd Motion to Compel which needed to be resolved before Defendants could move forward with key depositions, including Encore's 30(b)(6) and damages expert. That process took additional time.

Most importantly, Encore's May 31st production contained documents that for the ***first time*** alerted CTI to the possibility that it may have one or more claims against Encore due to its misappropriation and illegal usage of CTI's confidential and trade secret information to unfairly compete with it in the marketplace. (Collection of Docs. from 5.31.17 Production - R. pp. 769-788). This revelation was in June of 2017, approximately two months prior to the trial date. To make matters worse, Encore informed CTI it would not have availability for any depositions until the last week of June 2017 at the earliest, leaving CTI approximately two months to take numerous depositions it had not been able to proceed with under the circumstances, including the withholding of evidence and a legitimate privilege log until May 31, 2017. It was later discovered that Encore

had not included all documents labeled in the native file format as agreed months prior. These were the files loaded to the review software and reviewed by CTI. The extent of that omission was unknown at the time and more time was expended ascertaining the extent of the omission. Encore defended its omission by claiming the native format of the document CTI discovered was omitted was "paper" and therefore rightfully left out. Encore later claimed that this one document was the only one not in the native files provided; a claim CTI had no reasonable way to confirm. Given the circumstances created by Encore's actions and discovery tactics, an August 2017 trial date was unreasonably burdensome to CTI. Encore would not consent to a continuance and CTI filed a Second Motion for Continuance on June 6, 2017 which was opposed. (R. pp. 240-289). Encore claimed that the May 31st materials were irrelevant and their late production did not warrant continuance. (R. pp. 294-295). The Court gave the parties a few additional weeks and set the trial for the week of September 25, 2017.

Given the circumstances created by Encore's actions, CTI set about preparing for trial of the original action and filed the separate action on September 12, 2017 to pursue its claims it was first made aware of following Encore's May 31, 2017 production. Encore filed an Answer and Counterclaims on November 16, 2017. CTI filed a Reply to the Counterclaims on December 21, 2017, asserting that Encore's counterclaims were barred by *res judicata*, among other things. Encore filed a Motion to Dismiss on March 21, 2018. On March 27, 2018, CTI filed a Motion to Dismiss Encore's contract counterclaims upon *res judicata* grounds because both claims arose out of the same transactions and occurrences involved in the previous action. The same day, CTI filed a Motion for Partial Summary Judgment on Encore's Abuse of Process counterclaim upon the basis that it cannot establish the elements of that cause of action. Ten days prior to the hearing set for the three other motions, Encore filed a Cross-Motion for Summary Judgment.

4. Lower Court Dismisses CTI v. Encore

The lower court heard oral arguments on the Parties' dispositive motions and entered the Dismissal Order on August 20, 2018, disposing of each Parties' claims. (R. pp. 61-64). The Dismissal Order concluded CTI's causes of action based upon Encore's misuse of its confidential information were barred by the doctrine of *res judicata* because, according to the lower court, those claims arose out of the same transaction or occurrence underlying Encore's claims in the original suit and could have been asserted as counterclaims in that case. The Dismissal Order goes on to assert CTI's claims were rightfully dismissed because they were mandatory counterclaims under SCRCP 13, even though this ground was never raised to the lower court, but rather unilaterally inserted into the proposed order by Encore. (R. pp. 62-63). CTI filed a Motion to Reconsider on August 20, 2018, which was denied without a hearing by Order dated September 7, 2018. CTI then filed a timely appeal of the Dismissal Order. By letter dated August 7, 2018, this Court consolidated all three appeals noted above.

III. LEGAL ARGUMENT AND AUTHORITIES

Encore Technology Group, LLC v. CTI Interactive, Inc. et al.

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

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

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

As detailed above, the jury returned verdicts in favor of Encore on six of the eight claims submitted to it at trial. Defendants filed a post-trial motion requesting Encore elect its remedies among the verdicts for Causes of Action II-VI to prevent duplicative recovery due to the manner in which Encore presented its case at trial. (R. pp. 457-460; R. pp. 556-569; R. pp. 536-543). Specifically, Defendants sought election for Causes of Action II-VI because Encore relied upon the same set of facts to establish liability under those causes of action and explicitly sought the same damages for each at trial. *Id.* It was not until post-trial arguments that Encore, when faced with having to elect its remedies, engaged in a campaign of *post-hoc* revisionist arguments attempting to differentiate the facts upon which it relied to establish liability under those claims and represent to the Court that it sought distinct damages for each at trial. (R. pp. 1510-1512; p. 1516, lines 3-10; p. 1518, lines 1-4). The trial court erroneously adopted those arguments and relied upon it to misapply the election of remedies doctrine to the facts and circumstances of this case in the Final Order.

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

The Order's conclusion and application of the election doctrine is flawed because it relies upon erroneous and inappropriate factual findings concerning the basis for the jury's awards on

these claims, an inaccurate conclusion that the awards under them represent distinct damages, an overly narrow application of the election doctrine, and a mischaracterization of Defendants' arguments on the issue. Therefore, the lower court's ruling constitutes an error of law and requires reversal or modification to prevent duplicative recovery.

Under the doctrine of election of remedies, a Plaintiff must choose which cause of action it elects to utilize as its monetary judgment. "The issue is one of election of remedies, not election between causes of action. Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts." *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 13 (Ct. App. 1990). "Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action." *Taylor v. Medencia*, 324 S.C. 200, 218 (1996). "The basic purpose of election of remedies is to prevent double recovery for a single wrong." *Williams v. Riedman*, 339 S.C. 251, 275 (Ct. App. 2000). "[T]he doctrine of election of remedies 'does not require election between distinct causes of action arising out of separate and distinct facts,' but a plaintiff must elect his remedy 'where two distinct wrongs result only in a single and the same loss...if they may not be pursued together without prejudice to defendant.'" *Rivers v. Rivers*, 292 S.C. 21, 31 (Ct. App. 1987)(*internal citations omitted*). The purpose of the doctrine is prevention of duplicative recovery making its application necessary under the circumstances. *Williams*, 339 S.C. at 275.

a. The Order Makes Erroneous and Inappropriate Factual Findings Concerning the Specific Factual Basis for Each Award to Conclude Encore Need Not Elect its Remedy Amongst those Causes of Action

The Order makes numerous findings as to the specific factual basis relied upon by the jury to find Defendants liable under Encore's breach of duty of loyalty, breach of fiduciary duty, breach of contract with fraud, and trade secrets act ("TSA") claims. It uses these *post hoc* findings to

conclude that the Plaintiff need not elect its remedies amongst those claims because they relied upon different facts. (R. pp. 26-28). Specifically, the Order determines that the jury found (1) Trask breached his fiduciary duties by failing to disclose the identity of CTI's suppliers to Encore so it could purchase direct; (2) Trask violated the Trade Secrets Act by using Encore's trade secret information regarding Leon County Schools' needs for and purchase price of panels; (3) Trask was liable for breach of contract accompanied by fraud based upon his violation of his Non-Disclosure and Non-Solicitation Agreement's "business opportunity clause"; and (4) CTI violated the Trade Secrets Act by using Encore's trade secret information regarding Leon County Schools' needs for and purchase price of panels. (R. pp. 26-27).

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

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

consideration of how Encore presented its case on these claims undermines the Order's factual findings specifying what the jury relied upon to find Defendants' liable for each cause of action.

For example, the Order claims the jury found Trask liable for breach of his fiduciary duties because he failed to disclose to Encore that it could purchase directly from CTI's suppliers. (R. p. 26). At trial, Encore claimed Trask breached his fiduciary duties by failing to (1) disclose the true identity of CTI's suppliers; (2) tell Encore that 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. (R. pp. 878-896; R. p. 899, lines 11-18; R. pp. 1334-1342). Thus, it cannot be said the jury's verdict for the breach of fiduciary duty claim was reliant only upon Trask not telling Encore it could purchase directly from CTI's suppliers as the Order asserts. The Order also claims that the jury found Trask liable for breach of contract accompanied by fraud due to his violation of the "business opportunity" clause in his Non-Disclosure and Non-Solicitation Agreement with Encore. (R. p. 27). Encore, however, did not rely solely upon Trask's alleged breach of the business opportunity clause to establish its breach of contract with fraud claim. Rather, it relied upon the same actions underlying its breach of contract, trade secret misappropriation, and breach of fiduciary duties causes of action to establish liability under its breach of contract with fraud claim. (R. pp. 884-896; R. pp. 562-565). Therefore, neither Encore nor the Court can say the jury's finding on this claim was specifically and only based upon Trask's alleged breach of the Agreement's "business opportunity" clause. The same is true for the remaining determinations concerning the factual basis for the jury's verdicts scattered throughout the Order. (*See e.g.* R. pp. 10-11, 15, 26-27, 29-30). These determinations are *post hoc* findings made to artificially segregate the factual basis for the verdicts at issue in order to conclude that Encore need not elect its remedies amongst these causes of action. In reality, Encore relied upon and presented the same overlapping facts to

establish liability for these claims. The means employed by the Order to reach its end required it invade the province of the jury and act as a *post hoc* finder of fact in the absence of any legal authority allowing it to do so, without citation to evidence supporting its determinations, and by turning a blind eye to Encore's presentation of its case at trial. Therefore, the conclusion that these claims relied upon specific and different facts for the jury imputing liability was in err and requires reversal or modification of the lower court's holding on the election of remedies issue.

b. Order's Conclusion that Encore Need Not Elect Among the Remedies Awarded in the Final Order Relies Upon the Inaccurate Notion that Encore Presented Distinct Damages for Each of those Claims at Trial

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

First, the Order intertwines and confuses the damages sought by Encore at trial under these claims to reach a faulty conclusion that Encore sought separate damages under each respective cause of action. (R. pp. 28-29). Encore did not seek its damages in this fashion at trial. Rather, at trial, Encore sought the "exact same" damages for Causes of Action II-VI. Encore took this approach because its claimed damages all arose out of the same actions and facts under each of these causes of action. Thus, Encore was required to elect its remedy amongst them, and the trial court's determination otherwise was an error of law that resulted in duplicative recovery; the prevention of which is the entire purpose of the election doctrine.

At trial, Encore told the jury it should award it the wages and costs in Table 1 of Plaintiff's Exhibit 10-H because Trask breached his duties of loyalty. (R. p. 1333, lines 18-23). This is the

only cause of action in which Encore presented somewhat distinct elements of damages to the jury.[4]

i. Encore said it suffered the same damages for Causes of Action II-VI

COA II – Breach of Fiduciary Duty: 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. (R. p. 1335, lines 4-25; *See also* R. pp. 880-884). 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 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. (R. p. 1337, line 1-p. 1338, line 15; R. p. 1339, line 7-p. 1340, line 14; R. p. 1342, lines 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. (R. p. 1342, lines 4-7, 19-23). From that point, Encore did not distinguish or differentiate its damages among the remaining causes of action. Rather, it relied upon the same actions it claimed made Trask liable the Breach of Fiduciary Duty claim, in one form or combination, to establish liability for every remaining cause of action. It treated its damages in the same manner.

Encore asked the jury to award it $5.5M for the breach of fiduciary duty claim and represented that its damages for the remaining claims were the "same amount" or "same damages

[4] Encore did later suggest to the jury it could award the wages and costs from Table 1 under the breach of fiduciary duty claim as well. (R. p. 1336, lines 6-21).

figure" for COAs III-VI. (*See* R. p. 1343, line 7-p. 1345, line 19 [Breach K];R. p. 1346, lines 6-9 [SCTSA]; R. p. 1346, lines 16-25 [Tort. Inter]; R. p. 1347, lines 2-12 [Breach K Fraud]). The trial court instructed the jury to treat each cause of action independently and "not concern yourself of whether or not there's any double recovery" because "[t]hat will be dealt with by me at the end of this case." (R. p. 1461, lines 5-16).

ii. Encore's economic expert's testimony at trial

Furthermore, the Order's finding that Encore presented distinct damages at trial ignores its economic expert's testimony and presentation of claimed damages summarized in the three tables in Plaintiff's Exhibit 10-H and the jury's use of that evidence to render the verdicts at issue. It is clear from the Verdict Form that the jury used damages from Tables 1 and 2 in Pl. Ex. 10H in awarding damages. For the COA I - Breach of Duty of Loyalty- the jury awarded a percentage of the number in Table 1. (R. p. 1916; R. p. 1692). For COA II - Breach of Fiduciary Duty- the jury awarded $675,361 which is the sum of Direct Damages on Products Sold to Encore from CTI directly from Table 2. (R. p. 1917; R. p. 1692). For COAs II-V, the jury awarded actual damages of $424,945 which again came directly from Table 2 - the Lost Profit on Sales Made to Leon County Schools. (R. p. 1918-1920; R. p. 1692). The actual damages the jury awarded for COA IV - Breach of Contract with Fraud- were the sum of all the actual damages awarded in COAs I-III totaling $1,476,039.40.[5] (R. p. 1921). Meilinger's testimony was clear that if the jury awarded the damages in Table 2, they could not award those in Table 1. (R. p. 1105, line 21-p. 1107, line 24).[6] Thus, the total actual damages the jury awarded without duplication was **$1,100,306**.[7]

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[5] $375,733.40 (breach loyalty) + $675,361 (breach fiduciary) + $424,945 (causes of action III-V) = $1,476,039.40

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

[7] 1,476,039.40 (Br. K w/ Fraud) - $375,733.40 (Br. loyalty - precluded by award of Table 2 damages) = $1,100,306

The actual damages within COA VI are also duplicative. Because the jury added damages from Table 1 to the total from Table 2, which Meilinger testified precluded the award of damages from Table 1, the actual damages for Cause of Action six should have been reduced to $1,100,306. Encore's Breach of Contract with Fraud cause of action arose out of the same actions and occurrences underlying the other claims upon which the Plaintiff prevailed at trial; a fact reflected by the jury adding together the damage awards from those causes of action to arrive at its actual damages figure for the sixth cause of action. Thus, the damages awarded under that claim are the entirety of those available to the Plaintiff, and allowing it to recoup any others, results in duplicative recovery. Therefore, Plaintiff must elect a remedy that awards it no more than $1,100,306 in actual damages and $2,000,000 in punitive damages.

Post-trial, Encore attempted to divorce itself from the manner in which it presented its case to the jury to recover under multiple causes of action it presented as arising from the same facts and causing the "exact same" harm. It should not be able to recover under all of those claims because liability under them was based upon the same facts and "simply represent[ed] alternative theories of recovery for the same injury."[8] The Order's position that the damages awarded were not duplicative ignores the objective evidence that the jury's actual damages award of $1,476,039.40 under the breach of contract accompanied by fraud claim is the exact sum total of its actual damage awards from COAs I-IV down to the exact cent. Finally, the Order inappropriately delves into the jurors' minds, claiming that they "awarded different actual damage amounts and different punitive damage amounts, clearly intending to treat Defendants' different acts and Encore's different injuries as separate and distinct." (R. p. 30). The jury's intent is not

[8] "Although the causes of action asserted by Uhlig in this case have differences in the elements required to prevail on each cause of action, there is an overlap in the evidence and factual bases on which Uhlig relied to prove Defendants' liability as to each cause of action. Accordingly, the court finds that it is appropriate to require Uhlig to make an election of remedies." *Uhlig v. Shirley*, 2012 WL 2890178 at *3 (D.S.C. 2012).

"clear" as the Order portends. The trial court making such findings is inappropriate in the first instance and its reliance upon such findings to support its holdings on this seminal issue warrants reversal or modification.

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

The Order's holding on this issue also relies upon an overly narrow application of the election of remedies doctrine without regard to its purpose. The trial court reasoned that the doctrine did not apply to the breach of fiduciary duty, breach of contract with fraud, and trade secret claims because "Encore never contended that liability or damages under Causes of Action II-VI were based on a single fact, a single injury, or single damage." (R. p. 31). Under this approach, the election of remedies doctrine would only apply in cases where a single fact established liability for one cause of action and resulted in the same injury.[9] Such a stringent view of the doctrine ignores its purpose and prevents its application where it is needed most – complicated cases with multiple claims where the available damages are the same but can be awarded under alternative theories of liability. This is one of those cases, and the Order's restrictive treatment of the election doctrine is unsupported by law and reason. Both the trial court and Encore recognize that the election doctrine applies to the breach of contract, trade secrets misappropriation, and tortious interference claims where the jury awarded the same actual damages of $424,945. (R. pp. 25-26). They concede this point despite the fact that liability under the breach of contract claims and the TSA cause of action may be based upon different facts –

[9]The Order relies upon distinguishable case law in the *GTR Rental, LLC v. DalCannon* case and deems this case similar and unfit for application of the election doctrine because "the complex series of transactions undertaken by Defendants does not comprise a single wrong that would give rise but to one cause of action." (R. p. 28). The Order offers no explanation or analysis demonstrating *GTR*'s applicability to the circumstances. In fact, *GTR* is distinguishable from this matter and does not support the proposition for which it is cited. (*See* R. pp. 539-541)(Full discussion of *GTR* and how it is distinguishable).

liability for violating the TSA could be based upon Trask's and/or CTI's alleged misappropriation and use of Encore's claimed trade secret information to sell directly to Leon County whereas the jury's breach of contract verdicts could rest upon him and/or CTI merely selling panels directly to Leon County without the use of Encore's trade secret information. The doctrine applies to those claims because the resulting harm was the same without regard to whether the facts underlying the respective claims were identical.

In sum, the Order ignores the objective evidence, inappropriately delves into the minds of the jurors, relies upon the erroneous notion that Encore presented separate and distinct damages, and takes an overly narrow view of the election doctrine. Any one of these maladies warrants reversal or modification; and certainly, when taken together, call for it.

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

The grant or denial of a new trial motion rests within the discretion of the trial judge and the decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. *Norton v. Norfolk S. Ry.*, 350 S.C. 473 (2002). The reviewing court must consider the testimony and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, and where evidence conflicts, leave the trial judge's decision to grant a new trial undisturbed. *Vinson v. Hartley*, 324 S.C. 389 (Ct. App. 1996). The Order erroneously found that Defendants were not prejudiced by the submission of Table 3 at trial, and therefore not entitled to a new trial absolute. (R. p. 17).[10]

[10] Defendants have taken out the arguments based upon Encore's actions in submitting Knight's computer search testimony, but refer to Defendant's Post-Trial Motions, Opposition to Plaintiff's Post-Trial Filings, and Supplemental Post-Trial Submission(s) which recount those events and the legal arguments based upon them. (R. pp. 457-492; R. pp. 536-555; R. pp. 556-586).

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

As noted above, Table 3, entitled "Damages Related to Loss of Business Opportunity" was submitted to the jury as an element of Encore's claimed damages reflecting an alleged damage amount of over $5.5M. (R. p. 1692). Encore's economic expert, Michael Meilinger, explained his calculations in Table 3 to the jury, told them it was recoverable, and submitted the exhibit as an accurate reflection of his calculations. (R. p. 1087, lines 5-13; R. pp. 1089-1107). The trial court abused its discretion by allowing this testimony and Table 3 into evidence and caused Defendants to suffer prejudice such that they are entitled to a new trial. The Order erroneously concluded otherwise.

The trial court has a gatekeeping duty to ensure expert testimony is necessary for resolution of a factual issue, the expert is qualified, and "[f]inally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446 (2010). "Expert evidence can be both powerful and misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). "Regardless, the proponent of the [expert] testimony must establish its admissibility by a preponderance of proof." *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001). The lower court failed to fulfill its gatekeeping duties at trial when it allowed Meilinger to testify concerning the calculations in Table 3 and Encore to examine him concerning those figures in the jury's presence before deciding whether the evidence was properly admissible. (R. p. 1087, lines 5-13; R. pp. 1089-1107). Defendants' objected to admission of Table 3 on numerous grounds, both prior to and during trial, including because it was largely speculative, based on grandiose assumptions that Encore would directly source panels (alter its VAR business model to become a supplier for a product making up less than 5% of its business), and lacked verifiable factual basis. (R. pp. 320-339; R. pp. 1080-

1081). Those grounds alone warranted exclusion. The seminal objection to submission of Table 3 was the fact that it contained duplicative damages; the recovery of one which should preclude the recovery of the other, and thus presentation of those figures together gave an inflated perception of Encore's recoverable damages to the jury. (R. pp. 1089-1107; R. pp. 1161-1165). At trial, the Court allowed Meilinger to testify concerning Table 3 before the jury and admitted it into evidence over objection. (R. pp. 1087-1107). Then, with the jury no longer present, the Court questioned Meilinger, addressing the issue at the heart of Defendants' objections to Table 3 – it was telling the jury that Encore could recover duplicative damages in the form of CTI's normalized profits and the value of the business. (R. pp. 1161-1165; R. p. 1692). The Court was right, yet the damage was done. The jury only heard Mellinger's testimony and did not receive the benefit of a clear unbiased explanation of the duplicative nature of the damages in Table 3. The trial court ultimately allowed Table 3 into evidence. It was the centerpiece of Encore's closing argument and the visual legitimatization of Plaintiff's repeated request that the jury award it the damages reflected on Table 3. (R. pp. 1342-1347). The Order relies upon irrelevant facts and arguments as the basis for its conclusion Defendants were not prejudiced, none of which in fact support that finding.

a. The Fact the Jury Awarded Less than $5.5M in Damages Has No Bearing on Whether Admission of Table 3 Prejudiced the Defendants by Inflating the Jury's Perception of Encore's Recoverable Damages

First, the Order claims that Defendants were not prejudiced by admission of Table 3 because the jury awarded less than all the damages reflected in it. (R. p. 21). This misses the point and has no bearing on whether or not admission of this exhibit prejudiced Defendants. Whether the jury awarded some, all, or none of the damages in Table 3 is of no consequence. Defendants contended its admission resulted in a prejudicial alteration of the jury's understanding and view of Encore's recoverable damages by setting an artificially high ceiling. This was especially

prejudicial because that artificially inflated damages amount was conveyed through the testimony of and an exhibit prepared by Encore's economic expert. *See Watson*, 389 S.C. at 449("Trial courts should be cautious in conferring an expert label upon a witness because juries may accord excessive or undue weight to 'expert' testimony."). That prejudicial impact was suffered when Meilinger was allowed to testify and present Table 3 to the jury; long before final damage awards were determined in the jury room. Therefore, if and how much the jury may have awarded from Table 3 has no bearing on the existence of the prejudice Defendants contend its admission caused. Recognizing this unassailable truism, the Order attempts to salvage its argument by saying the figure in Table 3 was significantly lower than the $10M valuation contained in a CTI offering memorandum. (R. p. 21). A true statement in insolation, made irrelevant when considered in the context of undisputed trial testimony. Trask testified at trial that the $10M offering memorandum figure was based on nothing more than the amount of money he sought to raise by offering shares of the company, and it was not a valuation of CTI as a business. (R. pp. 1200-1202). Thus, the Order's attempt to portray the figures in Table 3 as conservative by comparing them to an aspirational figure within an offering memo does not succeed in that endeavor. Such an apples to asteroids comparison serves no meaningful purpose and fails to support the finding that admission of Table 3 did not prejudice the Defendants.

b. The Trial Court Admitted the Evidence Because of CTI's Revenues

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

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

(R. p. 1529, lines 5-10). At trial, the court recognized that submission of Table 3 would allow Encore to put duplicative, and thus unrecoverable in some degree, damage evidence before the jury. (R. pp. 1161-1165). It then admitted that evidentiary decision was based upon the amount of CTI's gross revenues, rather than the Rules of Evidence and other controlling law as to what Encore could recover under its claims. (R. p. 1529, lines 5-10). This was an abuse of the trial court's discretion and a failure of its gatekeeping function, which is imperative to ensure that testimony and evidence is only allowed to be heard by or submitted to the jury when its admission has a probative value outweighing any prejudice it may cause. SCRE 403. This is especially important when assessing whether to admit expert testimony or evidence, as our Courts have recognized such testimony or evidence can be rather powerful. *See Watson*, 389 S.C. at 449. Admission of any evidence must be controlled by the Rules of Evidence and laws of this State; not a business's revenue and the trial court's view that it amounts to some fundamental unfairness. The latter has no bearing on admissibility of evidence at trial and the lower court's decision ran afoul of the former.

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

The trial court has the power to grant a new trial or a new trial *nisi* when it finds the amount of the verdict to be excessive. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320 (Ct. App. 2006). Defendants must show compelling reasons to justify invading the jury's province. *Id.* "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Id.* (*citation omitted*). Here, compelling reasons existed to invade the jury's province due to the submission of certain testimony that resulted in verdicts actuated by passion or prejudice. The lower court, however,

concluded that the verdicts awarded were supported by the evidence and accordingly denied Defendants' Motion for New Trial *Nisi Remittitur*. (R. pp. 22-23). This finding was in err as it is unsupported by the evidence and affected by errors of law.

1. The Lower Court's Analysis of the *Gamble* Factors Was an Error of Law

The South Carolina Supreme Court in *Gamble v. Stevenson*, 305 S.C. 104 (1991), identified eight considerations that trial courts should apply in conducting post-judgment due process review of any punitive damages award. The Order's treatment of those factors ignores the prejudicial impact of certain testimony and evidence presented at trial to conclude the jury's punitive damage awards were not excessive or the result of passion or prejudice.

First and foremost, the allowance of CTI's 2016 gross revenues into testimony and exhibits presented to the jury was an error of law and prejudicial to the Defendants. (R. pp. 1210-1214; R. pp. 1694-1742). At trial, Plaintiff questioned Trask concerning CTI's 2016 gross revenues which were approximately $17.6M, intimating that the company and he had sufficient funds to pay a large award. The trial court erred in allowing that testimony, and in doing so, stirred undue prejudice towards the Defendants. "In assessing punitive damages, 'the wealth of a defendant is a relevant factor' in determining the defendant's ability to pay, but ***only*** evidence of ***net worth*** and extrapolations from net worth may be introduced on the issue." *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420 (2012)(*internal citations omitted*). In addition, such evidence must be handled cautiously, since "the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses...." *Branham v. Ford Motor Co.*, 390 S.C. 203, 239–40 (2010). By allowing the jury to hear that CTI had a gross revenue of over $17M in 2016, the court allowed the jury to render excessive punitive damages verdicts with the fictitious notion that those revenues reflected or were indicative of CTI's actual (net) profits.

(R. pp. 1210-1214). Revenue has no relation to the net worth of CTI or Trask when costs are not considered. That is why allowing a jury to hear testimony or evidence of a corporation's gross revenues without accounting for costs is *per se* improper, as the South Carolina Supreme Court stated, "informing the jury of a corporation's net operating revenue is improper under *Branham*, and the prejudicial effect of doing so is self-evident." *Sulton*, 400 S.C. at 420-21. "Putting this huge sum of money into the minds of the jury, reflecting the company's net income but accounting for none of its expenses and obligations, was almost certainly misleading and very likely to have stirred any jury bias against big businesses." *Id.* at 421. The same thing happened in this case, and the prejudicial effect of allowing testimony of CTI's 2016 gross revenue was "self-evident" in the jury's punitive damage awards. The Order fails to account for this and erroneously concludes the punitive damage awards "cannot be viewed as the result of passion or prejudice." (R. p. 23). Further, an award of such a large punitive damages amount does not serve the purpose of punitive verdicts when the *Gamble* factors are considered. Namely, deterrence of similar actions in the future will not be achieved as the actions for which Defendants were held liable were taken under specific circumstances that will almost certainly never be repeated. Trask and Encore parted ways years ago. Most notably, the large actual damages are substantial enough on their own to achieve the goals of punishment and deterrence.

The lower court, however, found that analysis of the *Gamble* factors revealed that the jury's verdicts "were well-supported by the evidence at trial." (R. p. 23). It does not discuss nor consider the impact of testimony regarding CTI's revenues, and in fact notes that "Defendants built an extremely profitable and successful business in Clear Touch through their unlawful conduct." *Id.* The admission of testimony regarding CTI's 2016 gross revenues impermissibly tainted the minds of the jurors and resulted in punitive damage awards affected by prejudice.

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

The Order attempts to support its finding that the actual verdict amounts awarded were appropriate and fell "within the range of damages testified to" by citation of and comparison to the $10M figure in the CTI Offering Memorandum. (R. p. 22). That figure, however, has nothing to do with the value of CTI, and was merely a capital fund raising goal set by Trask without any actual valuation of the company. As such, it is irrelevant to the evaluation of whether the jury's awards were excessive and citation to and comparison with it a useless endeavor.

The Order also contains a wildly inaccurate footnote that claims Defendants complained the trial court allowed testimony that CTI had $17M in revenue in 2016 "but they opened the door and made this evidence relevant by criticizing Meilinger for not considering their 2016 and subsequent financial information." (R. p. 23 fn7). This statement is simply inaccurate. Defendants did not complain that Meilinger failed to consider CTI's 2016 financials. Defendants' stance was quite the opposite, always maintaining the financial evidence and disclosures should be cut off earlier than Encore wanted. (R. p. 904; R. pp. 1009-1014, 1074-1080, 1089-1093; *see also* R. pp. 320-347). It makes no sense that a company with increasing profits would want the Plaintiff to consider higher revenue and profit figures in calculating its damages or present that information to the jury. Defendants took issue with allowing testimony that CTI received $17M in gross revenues in 2016 instead of or without submission of its net revenues. Absence of the latter created an unfair impression in the jury's minds about the company's profitability. Therefore, the Order fails to provide sufficient grounds for denial of the Motion for New Trial *Nisi* Remittitur and should be reversed.

D. DENIAL OF DEFENDANTS' JNOV MOTION WAS IN ERR

On appeal from a directed verdict, the reviewing court must view the evidence in a light most favorable to the non-moving party. *Miller v. Ferrell Gas, L.P.*, 392 S.C. 295, 709 S.E.2d 616 (2011). If any of the evidence may be reasonably construed as creating a question of fact, the motion must be denied and the matter submitted to the jury. *Id.* "However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury...[and]...when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." *Hanahan v. Simpson*, 326 S.C. 140, 149 (1997) *superseded by statute on other grounds*. "A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation." *Id.* The appellate court "must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts" and therefore, it "must determine the elements of the action alleged and whether any evidence existed of each element." *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446 (1989). Thus, the appellate court will reverse the trial court's denial of directed verdict only when no evidence supports the ruling or the decision is controlled by an error of law. *Austin v. Stokes-Craven Hold. Corp.*, 387 S.C. 22 (2010). The trial court's denial of Defendants' Motion for JNOV was controlled by an error of law and, in part, reliant upon the faulty conclusion that Encore provided sufficient evidence for each element of its trade secrets claim.

1. Error of Law Finding the Restrictive Covenants are Enforceable

Trask was subject to a Non-Solicitation and Non-Disclosure Agreement (the "Agreement") which contained several restrictive covenants including a non-solicitation (non-compete) clause and non-disclosure provisions (confidentiality clauses). (R. pp. 1649-1651). The non-compete ran for one year following Trask's separation from the company and relied upon a hierarchy of

customer-based restrictions, the most expansive of which applied to Trask, and prohibited him from directly or indirectly soliciting Encore's actual or prospective "Customers" for a year following his departure. (R. p. 1650). The confidentiality provisions sought to prevent Trask from disclosing or using any of Encore's "trade secrets" in perpetuity or "Company Data" not qualifying as a trade secret for five years from his departure date. (R. p. 1649). Defendants' Motion for JNOV was first based upon the impermissible overbreadth of these restrictive covenants, which render them unenforceable as a matter of law, and consequently, unfit basis for any verdicts reliant upon their enforceability. (R. pp. 474-482). The Order's determination that these covenants are reasonably limited and enforceable to deny Defendants' JNOV Motion was controlled by an error of law and warrants reversal. The jury found that Trask was liable for $424,945 in actual damages under the Breach of Contract claim. (R. p. 1918). That figure is the total amount of lost profit Encore claimed to have suffered as a result of CTI's direct sales to Leon County and came straight from Table 2. (R. p. 1692). Consequently, the only possible basis for this verdict and damages award is the jury finding that CTI's direct sales to Leon breached the non-compete and/or the non-disclosure provisions of the Agreement.[11] (R. p. 1649-1650). Because those restrictive covenants are unenforceable as a matter of law, the verdict and damages award reliant upon them cannot stand.

To be enforceable in South Carolina, restrictive covenants must be, among other things, narrowly tailored for the protection of legitimate business interests. *Milliken & Co. v. Morin*, 399 S.C. 23, 31 (2012)(*internal citation omitted*). The reasonableness of a particular restriction, whether geographic, temporal or otherwise, often determines the enforceability of a restrictive

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

covenant. *Somerset v. Reyner*, 233 S.C. 324, 330 (1958)(an unreasonable territorial restraint precludes need for further inquiry to find the restrictive covenant unenforceable). "[A] restriction against competition must be narrowly drawn to protect the legitimate interests of the employer." *Faces Boutique, Ltd.*, 318 S.C. 39, 42 (Ct. App. 1995). The restrictive covenants at issue exceed the bounds of reasonableness and reach beyond legitimate protection of Encore's business interest.

First, the non-compete provision attempts to prevent Trask from "directly or indirectly" soliciting, influencing, contacting, selling to, servicing, or dealing with "Customers" of Encore for a year following his departure. (R. p. 1650). The overbreadth of this restriction comes from Encore's definition of "Customer," to include any actual or prospective Customer of Encore "about whom [Trask] had access to the pricing, advertising and/or marketing schemes developed by [him] or [Encore] for such customer." *Id.* Because of his position in Encore Trask had access to the pricing, advertising, and marketing schemes for all of its Customers. (R. p. 883, line18-p. 884, line 1). Encore's definition of "Customer" is not confined to those 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. The amorphous "Customer" definition allows Encore to claim Trask was prohibited from doing business with nearly any entity. That fluidity renders this covenant unenforceable. *Collins Music Co. v. Parent*, 288 S.C. 91 (Ct. App. 1986)(Customer restriction must be limited to specific customers); *Standard Register v. Kerringan*, 238 S.C. 54 (1961)(Territorial restriction reasonably limited if restrained to employee's area of responsibility.); *Poynter Invs., Inc. v. Century Builder of Piedmont, Inc.*, 387 S.C. 583 (2010)(lack reasonable territorial restriction renders non-compete enforcement).

Likewise, the confidentiality provisions are also overbroad and unenforceable as a matter of law. The Agreement's definitions of "Company Data" and "Trade Secrets" casts an impermissibly wide net and encompasses nearly anything Encore wishes it to. The Agreement contains a laundry list of items Encore deems confidential with qualifying clauses making it clear those items *may include but are not limited* to what is specified in the document. (R. p. 1649). The broad and fluid definitions of "Trade Secrets" and "Company Data" provide Encore an impermissible amount of leeway to make *post hoc* determinations of what these items include and claim that a former employee breached their confidentiality obligations. That breadth and flexibility of scope makes the confidentiality provisions unenforceable as a matter of law. Furthermore, because these provisions have the effect of a non-compete by substantially restricting Trask's competitive activities, they are subject to the same strict scrutiny applied to those anti-competitive agreements. *See Muckenfuss*, 322 S.C. at 293-94(Covenant Not to Divulge Trade Secrets provision subject to non-compete scrutiny); *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 730 (D.S.C. 2007)(Holding non-disclosure covenant to non-compete standard).

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

The Order concludes that the restrictive covenants are reasonable, enforceable, and therefore, able to support the breach of contract claims. (R. pp. 12-14). That finding relies upon an improper evaluation of those covenants and seemingly attempts to impose *post hoc* limitations on their scope to deem them reasonable and deny Defendants' Motion for JNOV. *Id.* First, the Order claims Trask's argument that "the Non-Solicitation of Customers provision is overly broad because it could be interpreted to reach 'customers with whom he had absolutely no contact' is "not correct" because the Agree requires him to have had access to Encore's "pricing, advertising and/or marketing schemes...for such customer.'" (R. p. 13). That conclusion ignores the

undisputed fact that Trask had access to all Encore customer pricing, advertising, and marketing schemes due to his role in the company. (R. p. 1231, lines 7-10). Thus, as Defendants contended, this provision could be utilized to restrict Trask from dealing with customers with whom he never knew nor did any business with while at Encore. Recognizing this issue, the Order attempts to narrow the reach of the non-compete, or at least portray it as more limited, to avoid concluding it is overbroad. (R. pp. 12-14). Those efforts cannot salvage unenforceable restrictive covenants and support denial of Defendants' JNOV.

The Order continues its quest to support its finding that the non-compete is narrowly tailored and enforceable through irrelevant and inconsequential arguments. It claims that the covenant is not overbroad due to the definition of "Customer" as Defendants argue because "Trask...failed to identify any Encore customer with whom he had no contact." (R. p. 13). Trask's participation in that exercise is irrelevant to the non-compete' s enforceability. The Order goes on to note Encore's decision to selectively enforce the non-compete reflects its reasonably limited scope: "The fact is, the only customer at issue was Leon County Schools...." (R. p. 13). An unreasonable restrictive covenant is not rendered enforceable because a party chose to selectively enforce it, and that decision has no bearing on the reasonableness analysis. The entire language of a restrictive covenant as written must be subjected to strict scrutiny to determine its breadth and evaluate whether it is a reasonable restriction necessary for the protection of legitimate business interests. *Rental Uniform Service v. Dudley*, 278 S.C. 674 (1983). The Order's treatment is an error of law because it fails to subject the Non-Solicitation of Customers provision to the appropriate legal analysis and relies upon irrelevant factors to find it is enforceable.

The Order next dismisses Trask's argument that the Agreement's Confidentiality provisions are overly broad in a similar fashion. It does so by summarily claiming, without analysis

or citation to the actual provision, that it is "akin to" the one "approved by the Supreme Court in *Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012)" and finding that it did not unreasonably restrict Trask's ability to earn a living because "[a]ll Encore's Contract required was that Trask not use the confidential information he learned about Leon to sell to it directly, and that is what the jury found he did." (R. p. 14). Review of the provision shows that is it much broader than that and restricted Trask from doing more than utilizing confidential information to make sales to one customer. (*See* R. pp. 1649-1650). The Order's lack of appropriate legal analysis and attempt to unilaterally narrow the scope of this restrictive covenant was in err. The proper analytical rubric leads to a finding that these restrictive covenants are unreasonably overbroad, and, as such, unenforceable. Therefore, Trask is entitled to JNOV on the breach of contract claim due to the jury's verdict and damages award being reliant upon his alleged breach of unenforceable contract provisions.

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

Trask contended that he was entitled to JNOV on Encore's breach of contract with fraud claim because it required the Non-Solicitation and Confidentiality provisions to be enforceable; something their unreasonable overbreadth prevented. The Order rejects his position, not by substantively addressing it, but rather claiming it cannot do so by citing to case law stating that "[t]he law…forbids this court assuming to take upon itself the powers, duties, rights, and privileges of a jury. Obviously, the absolute power to change or modify the findings of a jury upon an issue of fact properly submitted to them would, when exercised, amount to the substitution of the trial judge[']s findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury." (R. p. 14)(*internal citations omitted*). Yet, immediately after noting that legal principle, the Order violates it by claiming that the jury's verdict on the breach with fraud claim was "just as

if not more likely" reliant upon violation of the business opportunity clause. (R. p. 15). Making that finding is contrary to the legal principle quoted immediately before it and is a purely speculative statement for which the Order offers no evidentiary support. Therefore, Defendants respectfully contend that the Order's denial of Trask's JNOV Motion in this respect was in err and warrants reversal.

3. Trial Court Erred in Finding that Encore Established its Trade Secrets

The jury returned a verdict against both Defendants for violation of the SCTSA and awarded $424,945 in actual damages for that claim. (R. p. 1919). As with the contract cause of action, that figure came from Table 2 and encompassed the proceeds from CTI's direct sales to Leon County. To properly render this verdict the jury must have been provided with evidence from which it could reasonably determine that the information at issue was in fact a "trade secret" which Defendants misappropriated to facilitate the Leon County sales. Encore, however failed to provide that evidence and therefore Defendants are entitled to JNOV on the SCTSA verdict. Defendants moved for JNOV on the grounds that Encore did not present sufficient evidence at trial upon which the jury could determine it had "trade secrets" that Trask misappropriated, and he and CTI used to make the sales to Leon County.

a. Encore Failed to Establish the Knowledge of Leon County's Intention to Purchase Panels were "Trade Secrets"

The SCTSA defines "trade secret" to include information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public...and is the subject of reasonable efforts...to maintain its secrecy." S.C. Code § 39-8-20(5). "The first determination which must be made in a trade secrets case, therefore, is whether, in fact, there was a trade secret to be misappropriated." *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 725 (D.S.C. 2007). "The threshold issue in any trade secrets

case is not where there was a confidential relationship or a breach of contract or some other kind of misappropriation, but whether there was a trade secret to be misappropriated." *Muckenfuss*, 322 S.C. at 295. "The burden of proving the existence of a trade secret falls, of course, upon the plaintiff...." [and] to carry it Encore had "to describe the subject matter of its alleged trade secrets in sufficient detail to establish each element of a trade secret." *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 329 (1972); *Vessel Medical, Inc. v. Elliott*, 2015 WL 5437173 at * 7 (D.S.C. 2015). A plaintiff's failure to carry that burden and identify its allegedly misappropriated trade secrets with particularity prevents Defendants from being able to mount a full and fair defense against a misappropriation claim. It "must be done to allow the finder of fact to distinguish that which is legitimately a trade secret from other information that is simply confidential but not a trade secret, or is publicly available information." *Id.* Encore failed to carry that burden and the lower court's conclusion otherwise constitutes an error of law.

At trial, Encore provided varying claims of what alleged trade secrets it claimed Defendants misappropriated. (R. p. 899, line 19-p.900, line 10)(Encore CEO claiming Leon County intent to purchase, contacts, pricing, and costs misappropriated trade secrets);(R. pp. 1043-1049)(Testimony Encore Customer List offered as a trade secret). Ultimately, Encore decided its SCTSA claim was based on two alleged "trade secrets" – the identify of CTI's suppliers and the knowledge that Leon County was upgrading its interactive classroom technology. (R. p. 1345, line 20-p. 1346, line 2). Encore, however, did not provide the evidence for the jury to find these items were "trade secrets." First, Encore provided the testimony of Jimmy Higginbotham who claimed Trask instructed him to copy and bring Encore's customer list with him when he transitioned companies. (R. p. 1043). Encore also identified but did not admit what it claimed was that customer list. (R. p. 1824). That document contained no mention of Leon County and was not admitted into

evidence. Plaintiff failed to provide any evidence this list was in fact a trade secret, without which, the jury did not have an adequate evidentiary basis to find the customer list was in fact a trade secret. Consequently, the lower court's finding to the contrary was in err. (R. p. 16). Second, the only evidence Plaintiff offered to purportedly show that the knowledge Leon County was upgrading its interactive classroom technology was an email between Trask and his panel supplier after he left Encore. (R. p. 1818). In it Trask is merely informing his supplier that CTI was selected as Leon's panel supplier and that it intended to purchase more. Encore again provided nothing to show this information was secret; leaving the jury with no evidence upon which it could determine it constituted a trade secret. In fact, Defendants were the only ones who provided any evidence concerning the secrecy of this information. (*See* R. pp. 1269-1283). Thus, the only evidence presented at trial as to this information's secrecy showed it was public knowledge. Encore did not offer any evidence to the contrary beyond simply saying this information was a trade secret. Without more, the jury was not presented with evidence upon which it could determine the fact Leon County intended to upgrade its classroom technology was a trade secret. Finally, Encore offered nothing to show that the identity of CTI's suppliers was a trade secret. On the contrary, Trask testified that he found those suppliers through his own research and that they attended industry trade shows actively courting partners. (R. p. 1206, line 2-p.1207, line 17). Nothing Encore presented to the jury showed that this information was secret and inaccessible by the public for that matter. Accordingly, Encore's SCTSA claim fails as a matter of law because the identity of CTI's suppliers does not constitute a "trade secret" and Plaintiff failed to carry its burden at trial to present evidence sufficient for the jury to find otherwise.

The Order omits these failures, and erroneously concludes Encore provided sufficient evidence for the jury to find for it on the SCTSA claim. (R. pp. 15-16).

b. Encore Failed to Establish Defendants Misappropriated its Alleged Trade Secrets

Assuming *arguendo*, that Encore had carried its burden and shown the items were trade secrets, it failed to offer sufficient evidence that Defendants misappropriated them. At trial, Encore offered nothing to show that Defendants actually possessed the information it claims was misappropriated, without which it cannot succeed on its SCTSA claim. *See Dove Data Prod., Inc. v. DeVeaux*, No. 2008-UP-202, 2008 WL 9841167, at *7 (Ct. App. 2008)("The trial court found no specific evidence [Defendant] was physically in possession of the information or that he misappropriated the information."). All it offered was Higginbotham's testimony that claimed Trask instructed him to copy and bring him the Encore customer list. Assuming that Trask made that request, there was no evidence concerning what he did with it. Higginbotham admitted he had no idea what Trask did with the list he claims to have provided to him. (R. p. 1056, lines 3-21).

c. Encore Failed to Establish Defendants Used its Alleged Trade Secrets

To sustain a TSA claim, a Plaintiff must offer sufficient evidence for the jury to find that Defendants used or disclosed its trade secrets. S.C. Code § 39-8-30(b). Again, assuming *arguendo*, that Encore had trade secrets, it offered nothing to establish Defendants used this information. At trial, there was no evidence or testimony offered even claiming Trask or CTI used the customer list, much less anything establishing their use of it. Likewise, Encore did not offer testimony or evidence showing that Trask or CTI used the information concerning Leon County's plans to purchase more panels to effectuate the sales at issue. The evidence at trial showed that Leon became dissatisfied with Encore and approached CTI about buying direct. The Plaintiff claimed this was precipitated by Trask's alleged defamatory statement to Leon. (R. p. 1047, line 18-p. 1049, line 23). The jury found for Trask on the defamation claim. (R. p. 1922). Without offering any evidence or testimony showing that Trask or CTI used either the customer list or

knowledge that Leon County intended to purchase additional panels, Encore failed to establish an essential element of its trade secret claim – use or disclosure of the alleged trade secret. Accordingly, Encore's SCTSA claims fail as a matter of law. *See Muckenfuss*, 322 S.C. at 297(err denying Directed Verdict and JNOV motions because no evidence presented that Defendants used or disclosed trade secrets).

Despite these evidentiary failures, the Order claims there was sufficient evidence presented at trial for the jury to find Encore had two trade secrets – its customer list and the knowledge of "Leon County Schools' needs for, preferences for, and plans to purchase interactive displays." (R. p. 16). It states that the Plaintiff put forth evidence showing Trask misappropriated the customer list by having Jimmy Higginbotham bring it to him and then that he and CTI used this trade secret information to make the Leon County sales. (R. p. 16). This finding ignores the undisputed fact that the jury was provided nothing concerning what was on the customer list. It was not admitted into evidence and Higginbotham's testimony did not address its contents. Encore offered nothing for the jury to determine that the list contained any information about Leon County or that the information in that list was secret. (R. pp. 1043-1044). In fact, that customer list did not have any information concerning Leon County, but more importantly, was not admitted into evidence at trial. (R. p. 1824). Higginbotham openly admitted that he had no idea what Trask did with the customer list he claims to have given him. (R. p. 1056, lines 3-21). Therefore, the jury did not have sufficient evidence to find defendants used Encore's customer list to make the Leon County sales in violation of the SCTSA. Without something more, the jury and the Court in its Order cannot conclude Defendants used that customer list to make the Leon sales in violation of SCTSA.

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

its misappropriation verdict. Nothing in the Order mentions, much less rectifies Encore's failure to provide evidence at trial from which the jury could find this information was in fact secret as required for it to qualify as a "trade secret." S.C. Code § 39-8-20(5). The only evidence Encore offered related to Leon County's plans to upgrade its classroom technology consisted of an email between Trask and his panel supplier after he left Encore informing them it was chosen to supply the district through a PO received by Encore and of anticipated future sales. (R. p. 1818). Encore provided nothing showing this information was secret, leaving the jury no evidence upon which it could determine whether it constituted a "trade secret." In fact, the only evidence presented at trial on this issue was that Leon County's intention to upgrade its classroom technology was public knowledge from the time a half penny sales tax was instituted in 2012 following a public campaign for passage of that referendum.

The Order summarily concludes that Encore gave the jury enough evidence to determine these items were trade secrets, that Trask took, and then used to make sales directly to Leon County. (R. p. 16). Based upon this erroneous finding, the Order denies Defendants' Motion for JNOV on the TSA claims. That finding is contradicted by consideration of the evidence presented at trial, and warrants granting Defendants JNOV on the SCTSA claims.

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

The Order denies Defendants' Motion Pursuant to the Thirteenth in short order concluding that the verdicts "do not reveal" confusion and the jury's careful consideration of each claim is apparent because they rendered different amounts of actual and punitive damages. (R. p. 24). The jury, however, did return inconsistent verdicts by doing precisely what the lower court cites as evidence of consistency – awarding different actual damages under the two contract claims. The Court may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *See*

Vinson v. Hartley, 324 S.C. 389, 404 (Ct. App. 1996). A trial judge may grant a new trial upon the facts if the judge determines the verdict is contrary to the fair preponderance of the evidence. *Dent v. Redd*, 270 S.C. 585, 586 (1978). It is not necessary for the Court to view the evidence in a light most favorable to the opposing party. *Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 247 (Ct. App. 1994)(stating the trial court may take its own view of the evidence.). Rather, the granting of a new trial under the doctrine is addressed to the discretion of the trial judge. *McIntire v. Mooregard Exterminating, Serv., Inc.*, 353 S.C. 629 (Ct. App. 2003).

The jury found for the Plaintiff on its Breach of Contract claim and awarded $424,945 in actual damages but then went on to award $1,476,039.40 in actual damages under the Breach of Contract with Fraud claim despite the actual damages available being the same for both causes of action. (R. pp. 1918, 1921). Under a breach of contract claim, a Plaintiff may recover damages naturally resulting from Defendant's breach. *Fuller v. East. Fire & Caus. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). The actual damages available under the breach of contract accompanied by fraud claim are the same; the only difference being that it allows recovery of punitive damages. *Perry v. Green*, 313 S.C. 250, 252-53 (Ct. App. 1993)("The trial judge *sua sponte* recognized that the breach of contract and the breach of contract accompanied by a fraudulent act causes of action necessarily arose out of the same transaction and therefore would allow for only one recovery of actual damages."). The law required the jury award the same amount of actual damages for both contract claims. The Court accurately charged the jury on the applicable law however, its inconsistent verdicts reflect confusion as to what Plaintiff may recover under the breach of contract

causes of action. The Order does not address this inconsistency, and its conclusion that none exists to deny the Thirteenth Juror Motion, therefore, was an error of law and abuse of discretion.[12]

F. AWARDING ENCORE ALL ITS FEES AND EXPENSES SOUGHT WAS IN ERR

1. Order's Conclusion that the Fees Sought by Encore are Reasonable is Flawed

First, the Order fails to take into account the fact that attorneys' fees were only recoverable under three of the eight causes of action. The Court acknowledged this fact during post-trial hearings and noted that the attorneys' fees requested must be reduced accordingly. (R. p. 1520, lines 14-20). That reduction was not reflected in the proposed order submitted by Encore and the trial court erred by entering that order without revision. Recognizing this issue, the Order attempts to mitigate the inevitable reduction stating that "[a]lthough Encore did not prevail upon two causes of action, any additional fees and costs to present each additional cause of action would only be minimal." (R. p. 9). No basis exists for this claim nor is one provided. Baseless speculation cannot avoid the reduction in the fee award that must occur. Second, the Order again makes the untrue assertion that Trask destroyed evidence to argue the fees awarded were reasonable because Encore had to obtain evidence from other sources, namely through third-party subpoenas. (R. p. 6). The unfounded claims of evidence destruction are contradicted by the denial of a spoliation charge and cannot justify Encore's subpoena campaign. Third, the Order does not mention the undisputed fact that Encore utilized a fraction of the subpoenaed materials (5 out of 16) nor account for the other mitigating actions warranting fee reduction. (*See* R. pp. 547-552). Finally, 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. (R. p. 9).

[12] The Order also does not address Defendants' argument for invocation of the thirteenth juror doctrine that submission of Table 3 to the jury resulted in it misunderstanding the type and amount of damages available to the Plaintiff in this case. (R. p. 23; *See also* R. pp. 489-490).

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

The Order's consideration of the expenses Encore sought consists of a passing recognition that Defendants challenge their reasonableness and a mischaracterization concerning Plaintiff's need to seek evidence via numerous subpoenas. (R. pp. 7-8). It does not mention nor address the numerous issues concerning the expenses raised in Defendants' post-trial filings. (*See* R. pp. 553-554; R. pp. 570-571). The Order's single substantive sentence dedicated to expenses attempts to justify them by stating Encore "was forced to seek documents through third parties because Defendants did not produce them and/or claimed to have lost or destroyed them." (R. p. 8). This is at best a partial truth and certainly gives the inaccurate impression that Encore needed to issue 16 subpoenas throughout the country to customers, CTI's distributor, and others to obtain relevant evidence. In reality, Encore used items from less than a third of the entities they subpoenaed. It is difficult to claim the expenses incurred in subpoenaing 15 plus entities was justified when responses from less than a third of those subpoenas was utilized. Thus, the Order's attempt to justify awarding Encore its costs fails in that endeavor and warrants reversal or modification of that award.

G. THE RECEIVER ORDER ALLOWED NUMEROUS VIOLATIONS OF SOUTH CAROLINA LAW AND WILL REQUIRE TRASK PAY THE RECEIVER'S FEES AND COSTS

The Receiver Order entered was an unedited version of a proposed order submitted by Encore to which Defendants objects due to the various provisions reaching beyond the bounds of the law. (*See* R. pp. 1925-1941). The Receiver Order, as entered, empowered the Receiver to violate the law, and subject Trask, his family, business, and his wife's business to undo harassment. The innumerable objectionable portions in the Receiver Order are troublesome, but, for sake of efficiency, the most egregious sections are addressed below.

Page 5, ¶ 8 allowed the Receiver to "take possession of and secure assets and income of [Defendant] Trask...." (R. p. 44). Through this provision, the Receiver possessed and controlled Trask's "income" including his "earnings...for his personal services" that are exempt from levy or use to satisfy the judgment against him under S.C. Code § 15-39-410("The judge may order any property of the judgment debtor, not exempt from execution...to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services cannot be so applied."). The State's courts and legislature include a person's wages as "earnings of the debtor for his personal services." *Jarrott v. S.C. Empt Sec. Comm'n,*, 290 S.C. 533, 536 (1986); S.C. Code § 41-27-380. The law of this State places one's wages under the umbrella of earnings for personal services, along with other compensation such as commission payments and bonuses and protects those earnings from garnishment. The Receiver Order allowed the Receiver to violate that prohibition and he in fact garnished Trask's wages, commission payments, and bonuses for months. Page 6, ¶ 2 allowed the Receiver to possess all of Trask's interest CTI, despite the company being 100% owned by an IRA of which Trask is a beneficiary and the prohibition on use of such assets to satisfy a judgment debt. (R. p. 45); *See* S.C. Code § 15-41-30(A)(13)(exempts from attachment, levy, and sale a debtor's right to receive IRA accounts.). This includes assets in or owned by the IRA that owns CTI. Pages 6-7, ¶ 4 allowed the Receiver to possess and control Trask's exempt income by empowering him to garnish and control Trask's commission and bonus payments and cap Trask's accumulation of these exempt payments, all in violation of the laws noted above. (R. pp. 45-46). The case law cited in this paragraph to justify the illegal garnishment of Trask's addressed passive income (i.e., investment income) and was therefore inapplicable to commission and bonus payments to which it was offered to apply. *In re Davis,* 1999 WL 33486078, *3 (Bankr. D.S.C. May 28, 1999). Wage, commissions, and bonuses are not passive

income but rather payments received by the debtor for his personal services and therefore not subject to levy or attachment as the Receiver Order allows. All of these provisions gave the Receiver license to violate the various laws noted above; not only to unlawfully intrude upon Trask, but also impermissibly invade the lives of his family, business, CTI's business partners, and others connected to Trask. Yet worse, the Receiver Order requires that Trask pay for the Receiver's fees and costs should any portion of this appeal be affirmed. The Receiver Order requires reversal or modification to ensure Trask does not pay for the impermissible invasion of every aspect of his life.

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H. THE LOWER COURT ERRED IN HOLDING CTI'S CLAIMS ARISING OUT OF EVIDENCE ENCORE WITHHELD UNTIL MONTHS PRIOR TO TRIAL WERE BARRED BY RES JUDICATA

Appellate courts utilize the same standard of review as the trial court to review the grant of summary judgment. *Knight v. Austin*, 369 S.C. 518 (2012). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the light most favorable to the non-moving party. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643 (2008). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. SCRCP 56(c). However, "[w]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Ellis v. Davidson*, 358 S.C. 509 (Ct. App. 2004). On the other hand, summary judgment is inappropriate in cases where further inquiry into the facts is necessary "to clarify the application of the law." *Clegg*, 377 S.C. at 653. "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Nelson v. Charles. Cnt P. & R. Comm'n*, 362 S.C. 1, 5 (Ct. App. 2004).

1. CTI's Claims Were Not Barred by *Res Judicata*

The Court found that Encore's production of materials a few months prior to trial in the original matter gave CTI adequate time to assert and litigate claims it was first made aware of upon review of those May 31st production materials, and, therefore, it held that *res judicata* barred pursuit of CTI's causes of action in a subsequent suit because it determined they arose out of the same transaction or occurrence as the causes of action asserted by Encore in the original matter. (R. pp. 61-63). This finding is affected by several significant errors.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of the prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172 (2011). "Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Id.* The Dismissal Order holds that CTI's claims are barred by the doctrine of *res judicata* because they arise out of the same transaction or occurrence that was the subject of a prior action between the parties and could have been asserted in that previous case. (R. pp. 61-63). This holding is factually inaccurate and fails to consider that Encore's withholding of evidence and opposition to a continuance necessitated CTI file its claims in a separate action to ensure it had the full and fair opportunity to litigate potential multi-million-dollar causes of action. The lower court implicitly advocates the alternative; trying complex claims three months after filing them while defending nine other actions filed over two years ago.

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

CTI's claims did not arise out of the same transaction or occurrence underlying those alleged by Encore in the previous action and therefore are not barred by *res judicata*. "*What factual groupings constitutes a 'transaction', and what groupings constitute a 'series', are to be*

determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *South Carolina Pub Int Fnd.*, 401 S.C. at 388 (Ct. App. 2013)(*emphasis in original*). Encore's misappropriation of CTI's trade secrets and use of that information to unfairly compete with it in the marketplace formed the basis of three out of the four claims asserted in the 2017 *CTI v. Encore* case. Those claims and facts underlying them are distinct transactions and occurrences in both a factual and temporal sense from those in the original action. First, the claims in the 2017 matter rely on Encore's misappropriation of CTI's trade secrets to unfairly compete with it in the marketplace, including by sharing that information with its competitor and using it to bid sales/jobs. (*See* R. pp. 165-176 – 1st, 3rd and 4th COAs). The facts underlying those claims are therefore distinct from those Encore relied upon to establish liability in the prior suit, which by its own words were "Defendants' [CTI's and Trask's] breaches of their contractual and fiduciary duties to Encore." (R. pp. 1908, 1910). Second, the actions underlying Encore's claims in the previous matter all occurred prior to the business relationship's termination in September 2015. The acts forming the basis of CTI's 2017 claims, however, took place after September 2015, which is a time period Encore deemed "irrelevant" to the original litigation. (*See* R. p. 1908 ¶1; R. p. 1911). Therefore, CTI's 2017 claims based upon different facts and actions occurring after those underlying the original suit are not barred by the doctrine of *res judicata* as the trial court concluded in err.

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

Encore's actions, including withholding of evidence in the previous matter, prevented CTI from pursuing its claims as counterclaims in that case. *Venture Eng'g, Inc. v. Tishman Constr.*

Corp. of South Carolina, 360 S.C. 156 (Ct. App. 2004)(*res judicata* requires adjudication of the issue in the former suit.). Therefore, *res judicata* cannot bar CTI from pursuing its claims against Encore because the issues were not adjudicated in the original action and it has not had a full and fair opportunity to seek redress for Encore's unlawful actions. In *Judy v. Judy*, the South Carolina Supreme Court addressed the question of whether a claim should have been raised in a prior action:

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

393 S.C. 160, 171, 712 S.E.2d 408, 414 (2011). "[F]or purposes of res judicata, "cause of action" is not the form of action in which a claim is asserted but, rather the cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon." *Id.* "Our supreme court's recent discussion of *res judicata* in *Judy* acknowledged that there are certain circumstances in which the policy underlying the doctrine of res judicata is outweighed by a more compelling policy; there, the court looked to the Restatement (Second) of Judgments § 26 for guidance on those circumstances in which courts should decline to apply res judicata." *South Carolina Pub Int Found.*, 401 S.C. at 390.

As noted above, CTI's claims in the newer case do not arise out of the same transaction or occurrence as those underlying Encore's causes of action in the previous matter, and therefore, did not need to have been brought as counterclaims in that case. Encore itself deemed these matters "irrelevant" to the prior case on three separate occasions – each time deflecting the significance of its May 31st production to push its case to trial. (*See* R. pp. 1908 ¶1; R. p. 1911).[13] When Encore sought to have CTI's claims dismissed on *res judicata* grounds, the once "irrelevant" materials

[13] Encore's letter accompanying its May 31, 2017 production closes with "Again, we do not believe that these additional emails are relevant to the case...." (R. p. 1911).

bearing no relationship to the original claims became inextricably intertwined with the facts underlying those original causes of action. That inconsistency arguably warrants reversal, and if not, the law does.

i. Countervailing policy considerations warranted denial of Encore's summary judgement

Furthermore, assuming *arguendo*, *res judicata* applies to CTI's claims, there are compelling policy reasons to reverse the Dismissal Order because Encore's actions robbed CTI of a full and fair opportunity to litigate the issues forming the basis of its claims. *See SC Pub. Int. Found* at fn9 (whether a party had a "full and fair opportunity" to litigate an issue in a previous action bears on whether it may be estopped from asserting claims based on that issue in a later action against the same or another party. "A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue."). *Id.*; *see also Nandwani v. Queens Inn Mot.*, 2012 WL 10844387 at *11-12 (Ct. App. 2012)(Unreported).

The purpose of *res judicata* (the prevention of re-litigation of claims already litigated or that could have been litigated in a previous suit) is fulfilled when a party has a full and fair chance to adjudicate its claims in a prior action. That purpose is not realized when one party's actions prevent the other from bringing claims in the previous suit and force a separate action to seek redress. It is fundamentally unfair to allow a party to withhold evidence until a few months prior to trial, claim it was irrelevant to that proceeding, have the benefit of presenting its case to a jury without jurors hearing about its own unlawful acts, and then avoid answering for them in another suit by claiming its opposition should have brought a counterclaim based on the withheld evidence. It is an afront to the administration of justice and the entire litigation process to reward such tactics

and the lower court erred in not having Encore face the consequences of its own actions. This decision encourages the withholding of incriminating evidence in contravention of the Rules and entire purpose of the civil litigation process, not only without fear of repercussion but with the prospect of benefiting from such tactics.

Finally, it should be noted that the Dismissal Order inaccurately states that CTI did not seek to amend its pleadings in the prior action or an additional continuance based upon the newly discovered information. (R. p. 62). That is simply not true. (*See* R. pp. 240-289). Given the circumstances, CTI knew it could not prepare its new claims and defense of the original action by the August 2017 trial date. Encore would not consent to a continuance forcing CTI to file a Second Motion for Continuance on June 6, 2017. *Id.* Encore vehemently opposed that Motion, claiming that the May 31st documents were *irrelevant* to the case and their late production therefore did not warrant continuance of the trial date. The Court gave the parties a few additional weeks and set the trial for the week of September 25, 2017. Based on Encore's representations regarding the irrelevance of that evidence to the prior action, the short time before trial of the original matter, and the different factual basis underlying its claims, CTI took the prudent and justified course of filing its claims as a separate action that should not have been susceptible to dismissal under *res judicata*.

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

The Dismissal Order also cites SCRCP 13 as an additional ground for its holding claiming CTI's claims should be dismissed because they were mandatory counterclaims. (R. pp. 62-63). However, mandatory counterclaims were never addressed during the hearing on the Parties' cross-motions, nor did the lower court make any such ruling in its Form 4 Orders filed prior to the

Dismissal Order. Encore unilaterally inserted this ground into the proposed order which was erroneously adopted without revision by the lower court. Just as a party cannot use a Rule 59(e) motion to raise an issue which could have been presented to the court during the motion hearing, a party cannot add language to a proposed order that was never addressed prior to the court making its ruling. *See Richardson v. Fairfield Cty.*, No. 2006-UP-263, 2006 WL 7286041, at *4 (S.C. Ct. App. May 24, 2006); *Patterson v. Reid*, 318 S.C. 183, 185 (Ct. App. 1995).

In its Form 4 Order, the Court laid out its substantive ruling and asked Encore's Counsel to prepare a more formal order. (R. pp. 53-55). Its subsequent Amended Form 4 Order followed suit, outlining a slightly modified basis for the court's ruling and again requested Encore counsel draft a proposed final order. (R. pp. 57-59). Neither Form 4 order mentioned mandatory counterclaims or Rule 13. The absence of this reference in both orders made sense seeing as Encore did not raise it as a substantive basis for its summary judgment motion prior to or during the hearing, or at any point before the court ruled on the motion. (*See* R. pp. 735-745; R. pp. 1592-1597, 1630-1634). Encore added in the mandatory counterclaim language to the proposed order saying the "ruling [was] implied" and inclusion of this additional legal basis "could be important to upholding the order on appeal." (R. p. 1947; *see also* R. p. 1942). CTI asked the language be stricken, but Encore declined and submitted the proposed order to the court for entry. (R. pp. 1944-1949). The Court adopted the proposed Dismissal Order without revision. (R. pp. 61-64). Neither mandatory counterclaims nor Rule 13 were mentioned by Encore at the hearing or in the Court's rulings. Consequently, it should not have been inserted into the proposed order in the first instance, much less adopted by the court. Encore acknowledged the issue was not raised to the Court and decided to unilaterally insert this entirely new ground for the Court's decision into an order claiming that it was "implied by its rulings." Allowing such a practice guarantees its proliferation,

the negative consequences of which are numerous. Encore did not shy away from revealing its motivation – insertion of the additional ground "could be important to upholding the order on any appeal." (R. p. 1947). Appeals are meant to evaluate whether the lower court erred in reaching a decision based upon the evidence and arguments presented by the parties and relied upon in reaching that holding. Unilateral insertion of additional legal grounds in a proposed order after the lower court has made its ruling and detailed its basis for it both robs the opposition's ability to challenge the legal argument and results in the higher court of review being one of first impression. Indeed, the long-established jurisprudence of issue preservation applies, or at least is instructive, in this instance. *I'On, L.L.C. v. Town of Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). The Appellate Court should treat unilaterally inserted grounds for a ruling such as this one as an unpreserved issue that does not warrant this Court's consideration due to the manner in which it came before it. The trial court's adoption of the proposed order including it was an abuse of its discretion. Thus, the lower court's dismissal of CTI's claims was not made on this basis and it should not and cannot serve to uphold the Dismissal Order.

IV. CONCLUSION

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

Respectfully Submitted,

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March 27, 2020
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-001444

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

v.

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

AND

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

v.

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

CERTIFICATE OF COUNSEL

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

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