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 REPLY BRIEF OF APPELLANTS/RESPONDENTS

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I. INTRODUCTION

As it has throughout this litigation, Encore's advocacy is aimed at portraying Keone Trask and Clear Touch Interactive, Inc. ("Clear Touch") as bad actors unworthy of the appropriate application of the law, and instead deserving of any punishment. Encore is admittedly adept at this task, through its use of misleading or baseless accusations peppered with actual facts and citation to contextless snippets of the record, it succeeded in convincing the trial court to award it more than the law allows. It now implores this Court to do the same. Keone Trask and Clear Touch want only the law to be applied correctly and fairly, as is the business of this tribunal. This is something both Trask and Clear Touch are entitled to regardless of what they did or were accused of doing. It is a simple concept, the application of which is often difficult, but representative of the fundamental concept of the law itself and the legal system through which it is applied and enforced. Encore wants its jury arguments, which were based upon its distortion of the record and facts, to prevail over the law. The lower court allowed that to occur, necessitating appeal and this Court's intervention to correct those missteps to ensure Mr. Trask and Clear Touch are not punished beyond what the law allows.

II. LEGAL ARGUMENT AND AUTHORITIES

Encore Technology Group, LLC v. Clear Touch Interactive, Inc. et al.

A. THE ELECTION OF REMEDIES DOCTRINE REQUIRES ENCORE ELECT ITS AWARD AMONG THE VERDICTS TO PREVENT DUPLICATIVE RECOVERY OF THE SAME DAMAGES

Encore summarily claims it need only elect its remedy under its breach of contract, trade secret misappropriation, and tortious interference claims (Causes of Action III-V) because the jury awarded the exact same damages of $424,945 for each, and can recover under its claims for breach of duty of loyalty, breach of fiduciary duty, trade secret misappropriation, and breach of contract

with fraud (Causes of Action I, II, IV, and VI) because liability for each arose from four distinct wrongs and resulted in four different damages. (Resp. Br. pp. 12-13). As such, according to Encore, the election of remedies doctrine does not require it choose its award for those claims and the trial court correctly allowed it to recover under each. Yet, adopting that position requires ignoring the manner in which Encore presented its case at trial, accepting its post-trial campaign of segregating the facts it relied upon to establish liability under those claims, and distinguishing the harm allegedly resulting from those actions. The lower court erred in accepting that revisionist history, and Encore does not offer a compelling argument that this Court should follow suit.

1. Encore's Post-Trial Efforts to Divorce itself from the Manner in which it Presented its Case at Trial Cannot Allow it to Avoid Electing its Remedies as Needed to Prevent Duplicative Recovery

As detailed in Defendants' Initial Brief, Encore relied upon the same facts to establish liability under Causes of Action II-VI at trial and told the jury that those actions resulted in the "same damages" or those damages were in the "same amount" as one another. (*See* Ap. In. Br. pp. 25-26).[1] Simply put, at trial Encore said these same "wrongs" resulted in the "same harm" or

[1] 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. 1343-1347). 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. pp. 1339-1342). 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 for 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 figure" for COAs III-VI. (R. p. 1343, line 7-p. 1345, line 23 [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).

damage in the "same amount" for each claim, yet maintains in the post-trial phase that each claim under which it seeks to recover (Breach of Loyalty, Breach of Fiduciary Duty, Violation of the South Carolina Trade Secrets Act, and Breach of Contract Accompanied by Fraudulent Act) were in fact based upon distinct acts, or "wrongs," which resulted in separate distinct harms. (Resp. Br. pp. 9-18). To advance that position, Encore equates the Final Order with "evidence" of the record and the decisions of the jury, yet it cannot escape the trial record showing how it presented its case to the jury. To not require Encore elect its remedy amongst these causes of action would result in it receiving the substantial windfall awarded by the trial court through its misapplication of the election of remedies doctrine.

First, Encore drafted the Final Order which, inappropriately and without explanation or citation to the record, inserted the alleged factual basis for the jury's awards on each claim at issue and consequently the basis for distinguishing each of the four awards from one another. (Final Order - R. pp. 3, 10-11, 25-33). Encore succeeded in convincing the trial court to adopt the Final Order with the inappropriate findings. (Resp. Br. pp. 10-17). Encore now relies upon the document it authored to argue against election by treating its unsupported "factual findings" as valid reflections of the jury's determinations, and record in general, in favor of the actual record. It is trying to divorce itself from how it told the jury Defendants were liable for Causes of Action II-VI and what harm was suffered as a result of those actions under each claim. Encore should not be permitted to succeed in that endeavor. In fact, Encore's hefty reliance on the Final Order to support its argument against election reflects its invalidity, as well as Plaintiff's inability to combat portions of the record presented by Defendants which accurately reflect how the case was presented to the jury at trial. The record must control resolution of the election issue, and the Final Order cannot shield Encore from it.

Second, Encore uses the Final Order as a means to lump together the jury's findings and awards with those of the trial court to argue the *jury* awarded distinct damages upon different facts for Causes of Action II-VI. (*See* Resp. Br. p. 10-11)(About the verdict breakdown, Encore states that "[s]pecifically, the jury awarded Encore damages and the trial court entered judgment as follows:"). In reality, the jury was instructed to and did render verdicts on each claim in isolation. (Trial Trans. - R. p. 1461, lines 5-16; Verdict Form - R. pp. 1916-1921). The trial court, through its adoption of the Final Order, was the one that attributed specific and distinct factual bases for each award within the overall judgments and, as a result, distinguished the respective damages awarded under the claims at issue. (Final Order - R. pp. 3, 10-11, 25-32). It was the trial court that decided Encore was entitled to recover under the four causes of action at issue without electing its remedy. *Id.* at 10-11. The jury had nothing to do with that decision. They merely found for the Plaintiff on Causes of Action I-VI on a Verdict Form that did not reflect the factual basis for their decisions, instead only asking if Defendant(s) were liable for the particular claim, and if so, the amount of damages Plaintiff suffered as a result. (Verdict Form - R. pp. 1916-1921).

Third, there was no ambiguity in what the jury did. They awarded the sum total of the actual damages they found flowed from the alleged wrongs underlying Causes of Action I-VI under the breach of contract with fraud verdict. (*See* Verdict Form - R. p. 1921). That conclusion is supported by simple math and the record. The breach of contract with fraud claim encompassed each of the "wrongs" underlying the other claims upon which the jury returned a verdict in Encore's favor in some form or fashion, and is the sum of the actual damages awarded under Causes of Action I-V, down to the forty cents:

$375,733.40 (breach loyalty) + $675,361 (breach fiduciary) + $424,945 (causes of action III-V) = $1,476,039.40 (Verdict Form - R. pp. 1916-1921).

Encore denies this inevitable conclusion by initially claiming that no one can say where the jury got that number, or if it is representative of the total damages they intended to award, because doing so invades the province of the jury. (Resp. Br. pp. 10, 17, 19-20). Yet, Encore goes on to declare that the award came from a percentage of the lost business opportunity figure in Table 3. (*See e.g.* Resp. Br. p. 17)("Instead, they chose to award some damages from the first analysis, some damages from the second analysis, and some damages from the third analysis..."). Nothing supports the latter assertion other than Encore's desire for it to be true so it can receive a windfall in excess of one million dollars by being allowed to recover the same damages more than once. The election doctrine prohibits that outcome, and Encore's own unsupported conjecture as to the calculation of and basis for the breach of contract with fraud award cannot avoid its application.

Finally, accepting Encore's repeated assertions that the jury "clearly" intended to render four distinct damages arising from four different "wrongs" requires not only adoption of that baseless position and ignoring how it presented its case at trial, but also rejection of objective evidence to the contrary and misapplication of the law Encore cites as requiring that its view prevail. (*See* Resp. Br. p. 15)("The verdicts, interpreted in a way that 'logical reason for reconciling them can be found,' 355 S.C. at 231, 584 S.E.2d at 430, indicate that the jury chose to find that the distinct and different acts set forth above violated the distinct legal duties charged by the trial judge and caused Encore the different injuries and damages set forth above.") There is no logical reason for reconciling the verdicts at issue, as doing so requires reliance upon *post hoc* factual findings in a Final Order that is unsupported by the record, rather than the trial record and simple math. Encore knows that it has to distinguish the breach of contract with fraud award to prevail on the election argument. Lacking anything other than the Final Order it drafted to support

its stance that the jury's $1,476,039.40 breach of contract with fraud award represents a portion of the loss of business opportunity damages from Table 3, Encore hopes that repetition of that unsupported position trumps evidence to the contrary. On the other hand, simple and irrefutable math shows that the $1,476,039.40 in actual damages awarded by the jury for breach of contract with fraud is the sum total of all the other actual damage awards from Causes of Action I-V, down to the forty cents. (Verdict Form - R. pp. 1916-1921). Logic dictates the record of how Encore presented its case at trial and objective evidence prevail over advocacy reliant upon an unsupported Final Order.

2. Factual Complexity Does Not Allow Encore to Avoid Electing its Remedies

Encore's argument to ignore how it presented its case at trial and claim Defendants advocate "misapplication" of the election doctrine consists of both conclusory claims and distinguishable case law. Encore presents little to no substantive argument showing the election of remedies doctrine is inapplicable. Rather, it cites to distinguishable opinions for general propositions which fail to take into account the circumstances of each particular case and the one at hand. Most notably, Encore relies upon a passing citation to *GTR Rental, LLC f/k/a CitiCapital Trailer Rental, Inc., v. DalCanton and Capital City Trailer, LLC*, 547 F. Supp. 2d 510, 515 (D.S.C. 2008) to argue against electing its remedies. (Resp. Br. p. 13). Consideration of the actual facts and circumstances of *GTR* shows that the overly general proposition for which Encore cites it is inapplicable in this case and that the Plaintiff must elect its remedy to avoid duplicative recovery.

In *GTR*, the Court held that the plaintiff did not have to elect its remedy because the case involved a "complex series of transactions undertaken by defendants" accomplished "over a lengthy period of time." (Resp. Br. p. 13 *citing* 547 F. Supp. 2d 510, 515 (D.S.C. 2008)). No explanation or analysis is offered to demonstrate *GTR*'s applicability to the matter at hand and why

the lower court was correct in relying upon this case to allow Encore to forego electing its remedies. (Resp. Br. p. 13). Encore wishes the Court to presume that because Mr. Trask's and Clear Touch's actions could be viewed as similarly complex acts carried out over a lengthy period of time, the election doctrine is inapplicable. It does not, and the key inquiry is whether distinct acts resulted in separate damages which were awarded as such at trial. In *GTR* that happened. Here it did not.

In *GTR*, the plaintiff GTR Rental, LLC (f/k/a CitiCapital Trailer Rental, Inc.) was a trailer leasing company in St. Louis which sued three defendants – DalCanton (VP of CitiCapital's trailer leasing division); Gillion (Regional Sales Manager of CitiCapital); and one corporate entity, Capital City Trailer, LLC (an entity established by Gillion while employed by CitiCapital). The evidence at trial established these defendants undertook a series of actions which harmed the plaintiff. 547 F. Supp. 2d at 514. Specifically, the evidence showed Gillion, acting for Capital City, would submit falsified credit approval requests to DalCanton, who was acting for CitiCapital. *Id.* at 515. DalCanton would then approve the credit requests and lease CitiCapital trailers to Capital City at below market rates, which Capital City would then sublease to CitiCapital's existing customers at market rates. *Id.* On various occasions, Capital City would not pay CitiCapital on the sham leases. *Id.* Evidence showed Gillion and DalCanton provided false assurances to customers that the two companies were sister entities. *Id.* It also established that Capital City would sell CitiCapital's trailers to third parties and keep the profits. Additionally, the plaintiff showed that Capital City instructed CitiCapital customers to remit payments directly to it rather than the plaintiff. *Id.* at 519.

Each of those actions were separate and distinct acts in which DalCanton and Gillion were violating their respective fiduciary duties to their employer, defrauding the plaintiff, taking its

property, or diverting profits. Those actions gave rise to distinct harms for which the jury awarded damages against each defendant. *Id.* at 515.[2] The seemingly duplicative verdicts on the fiduciary duty and conversion claims were rendered against two separate individuals who undertook distinct actions in causing the harm under those causes of action. Simply put, the harm for those causes of action may have been the same, but Gillion and DalCanton undertook different acts to cause it. Importantly, the opinion lacks sufficient detail to determine if the harms were in fact the same.[3] Further, there was no cause of action under which the jury awarded damages by adding up the damages awarded under the other claims as it did in this case.

All these are key differences in the *GTR* case and the matter at hand. Most importantly, here, the jury's award under the breach of contract with fraud claim encompassed all of the actual damages awarded under the other causes of action and are therefore undeniably duplicative of the awards under those other claims.[4] That award is the entirety of Encore's losses and it cannot now claim a damages figure comprised of all the other damage awards is separate and distinct. Encore cannot escape this fact by citing to *GTR*'s general statement that a series of acts undertaken by two individuals and a company constitute separate wrongs, negating the need for the plaintiff to elect its remedy. Regardless of whether or not the actions underlying certain claims were distinctive, to

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[2] The jury verdict was as follows:

DalCanton – Fiduciary Duty $88,450; Conversion $205, 803; Fraud $46,544; UTPA $71,544.

Gillion – Fiduciary Duty $88,450; Conversion $205,803; Fraud $3,000; UTPA $46,544; Breach K $116,125.

Capital City - Conversion $10; Fraud $10; UTPA $10.

[3] The *GTR* opinion does not reveal how the plaintiff presented its damages to the jury, which actions of the individual defendants resulted in the harms alleged and awarded, whether it differentiated what actions gave rise to which claims, and how each lead to the damages sought under that particular cause of action. Lacking that detail makes *GTR* inapplicable to the case at hand in light of the manner in which Encore presented its damages at trial and its impact on applicability of the doctrine.

[4] $375,733.40 (breach loyalty) + $675,361 (breach fiduciary) + $424,945 (causes of action III-V) = $1,476,039.40.

avoid electing a remedy, those actions must have resulted in distinct harms to the plaintiff. "[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 v. Riedman*, 339 S.C. 251, 275 (Ct. App. 2000). That crucial distinct harm element is lacking in this case and requires Encore elect its remedy to avoid duplicative recovery.

Like the Final Order, Encore's brief has no explanation as to how this matter is like *GTR*, other than the superficial commonality that both were factually complex with numerous causes of action advanced by the plaintiff. (Resp. Br. pp. 12-13). Factual complexity and multiple claims alone do not allow a plaintiff to avoid application of the election doctrine. In fact, these types of cases are the very ones for which the application of the doctrine is most necessary.

3. Defendants Preserved their Election of Remedies Argument for Review by Timely Raising the Issue to and Getting a Ruling from the Trial Court

Encore argues that Defendants failed to preserve their election of remedies arguments because they did not seek clarification from the jury concerning the verdicts at issue. (Resp. Br. pp. 17-18). That argument relies upon misrepresentation of the law and the presumption that the jury's verdicts were ambiguous and required clarification.

i. Stoneledge does not stand for the proposition Encore claims

Encore maintains that this Court's 2018 decision in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co.*, "makes clear that to preserve an argument about election of remedies, Defendants must first ask the jury to clarify any portion of the verdict that is ambiguous or

unclear." (Resp. Br. p. 17 *citing* 425 S.C. 276, 821 S.E.2d 509 *certiorari granted* Aug. 6, 2019). The *Stoneledge* case, however, does not stand for the proposition Encore represents.

Stoneledge was a construction defect case in which the HOA plaintiff sought damages against several development entities, including one named Marick, under negligence, breach of implied warranty of workmanlike service, breach of implied warranty of habitability, and breach of fiduciary duty claims. *Id.* 425 S.C. at 286, 821 S.E.2d at 513-14. At trial, the HOA requested the jury return a verdict for $6,309,197 for the full amount required to bring the damaged buildings up to the quality at which they were marketed. *Id.* After deliberations, the jury returned a verdict in favor of the HOA for a total of $5,000,000: $3,000,000 on the negligence cause of action against Marick and Bostic, $1,000,000 on the breach of implied warranty cause of action against Marick and Bostic, and $1,000,000 for the breach of implied warranty cause of action against Marick. *Id.* Immediately after the jury returned the verdict, the HOA asked the trial court if the damages were meant to be cumulative. *Id.* 425 S.C. at 300, 821 S.E.2d at 521-22. The trial court stated they were cumulative. *Id.* Marick did not object to the trial court's ruling that the damages would be cumulative or ask that the judge inquire as to the jury's intent behind the multiple awards. *Id.* Thus, this Court found that "Marick's failure to object to this ruling render[ed] its election of remedies argument unpreserved." *Id.* 425 S.C. at 301, 821 S.E.2d at 522. It more fully explained that:

> The trial court ruled that the damages the jury awarded for each of the causes of action would be added together, and that the HOA was entitled to damages for each of those causes of action. Marick failed to object to the court's decision **or** request the court ask the jury what its intent was in how it awarded damages. Accordingly, Marick is unable to argue on appeal the court's decision was in error.

Id. (**emphasis added**).

On brief, Encore inaccurately states that this Court found that the Appellant's election argument in *Stoneledge* was not preserved for review "because at trial it failed to 'request the court ask the jury what its intent was in how it awarded damages.'" (Resp. Br. p. 18). The *Stoneledge* Court found that Marick failed to preserve the election issue for appeal, however, because he did not object to the trial court's decision that the award was cumulative ***or*** seek clarification from the jury as to its intent. Doing one or the other would have adequately preserved the issue for appeal, as it would have been raised to and ruled upon by the lower court. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000)(Appellate court will generally not address an issue unless it is raised to and ruled upon by the trial court.).

Here, Defendants raised the election issue to the lower court in post-trial motions as its headliner motion on page one and timely objected to its ruling on the issue in the Final Order. (*See* Def. Post-Trial Motions - R. pp. 457-460; Def. Resp. and Opp. To Plf.'s Post-Trial Motion(s) - R. pp. 536-543; Def. Supp. Post-Trial Filings - R. pp. 556-569; Def. Mot. Recon. - R. pp. 593-601). Requesting the trial court ask the jury about the verdicts at issue was not necessary to preserve the election of remedies argument for appeal. All Defendants needed to do was raise the issue to the trial court and obtain a ruling on it. Defendants timely raised and thoroughly addressed the election issue before the lower court, obtained a ruling from it, and thus preserved the issue for appellate review.

Encore's argument on this issue also assumes that the Defendants believed the jury "improperly cumulated verdicts" and rendered ambiguous awards. (Resp. Br. p. 18). Neither is true. Defendants do not view the verdicts as "improperly cumulated" or ambiguous. Thus, they had no desire or need to request the trial court seek clarification from the jury concerning their verdicts. What Defendants took issue with, and have appealed, is the trial court's rulings on the

election of remedies issue. That ruling, Defendants contend, impermissibly allows Encore duplicative recovery.[5] They did not need to ask the trial court to seek clarification from the jury to preserve their challenge to that ruling for review by this Court, and Encore's misrepresentation of the holding in *Stoneledge* does not establish otherwise.

In sum, Encore asks that this Court allow it to recover under multiple claims which, at trial, relied upon the same facts to establish liability and for which Encore sought the "same damages." It invites this tribunal to affirm the lower court's Final Order on the election of remedies issue which necessarily finds support only in its own words, rather than the record. To uphold that ruling, the Court must ignore the objective evidence showing the manner in which Encore presented its case at trial, adopt its post-trial revision of those events, and disregard the irrefutable fact that the breach of contract with fraud verdict is the sum of all the other actual damages awards to the penny.

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B. CLEAR TOUCH'S 2017 CLAIMS ARISING OUT OF ENCORE'S MISAPPROPRIATION OF THE COMPANY'S CONFIDENTIAL AND TRADE SECRET INFORMATION COULD NOT HAVE BEEN FULLY AND FAIRLEY LITIGATED IN THE ORIGINAL SUIT DUE TO ENCORE'S WITHHOLDING OF THE EVIDENCE ALERTING ITS OPPOSITION TO THOSE POTENTIAL CAUSES OF ACTION

1. Encore withheld evidence alerting Clear Touch to potential claims it may have against its former business partner arising out of Encore's misappropriation and use of Clear Touch's confidential and trade secret information until a time when disclosure made full and fair litigation of those claims in the original suit impossible

As detailed in Defendants' Initial Brief, on May 31, 2017, weeks after Encore had already fought to have its case go to trial, it provided a 65-page privilege log and an additional 10,000-plus pages of documents in over 4,000 pdf files. (5.31.17 Encore Ltr - R. p. 1910). The cover

[5] In its instructions to the jury prior to deliberations, the trial court told them to treat each cause of action in isolation; not considering the awards given under any other claims because the court would sort it out later. (R. p. 1461, lines 5-16). Immediately after the verdict was rendered, the trial court, and parties, acknowledged election was necessary. (R. p. 1475, lines 3-17).

letter accompanying that 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 it sued - "Clear Touch" - when searching for responsive emails***. (*Id.* at 2). Those materials included documents that, for the first time, alerted Clear Touch of the possibility that it may have claims against Encore, due to its misappropriation and illegal use of the company's confidential and trade secret information to unfairly compete with it in the marketplace. (5.31.17 Sample of Production Items - R. pp. 831-850). Due to the timing of the production, just a few months before trial of the original case which was already slated for a week-long trial, Encore's opposition to a continuance, and the time needed to fully and fairly litigate what Clear Touch knew were multi-million dollar claims, Clear Touch had no choice but to file a separate suit against Encore.

2. Clear Touch's recognition that one of the four claims in its 2017 action could have been brought as a counterclaim in the original suit does not justify dismissal of the other three causes of action under the doctrine of *res judicata*

Encore argues that Clear Touch's recognition that one of the four causes of action could have been brought as a counterclaim in the original case is an admission that all four could have been included in the 2015 case, and therefore they all were properly dismissed under the doctrine of res judicata. (Resp. Br. p. 44). Specifically, Encore contends that Clear Touch acknowledging that its claim for Breach of the Reseller Agreement could have been asserted as a counterclaim in the 2015 matter, thus warranting dismissal under the doctrine, subjects its other claims to the same fate. *Id.* That argument fails to account for the fact that the other three claims all arose out of Encore's misappropriation and use of Clear Touch's confidential and trade secret information following termination of the Reseller Agreement in September, 2015; something it did not know was happening until after receiving the May 31, 2017 production. The breach of the Reseller Agreement claim, on the other hand, arose out of Encore's violation of the contract's exclusivity

provision by its sale of competing panel products, which Clear Touch knew of before the relationship ended in the fall of 2015. Therefore, Encore is mistaken that "the same logic" applies to the Mutual Confidentiality Agreement as the Reseller Agreement because the former was entered in 2013. (Resp. Br. p. 44). The time when Clear Touch became aware of the respective violations of those agreements is the key factor in determining whether those claims were properly dismissed under the *res judicata* doctrine. Clear Touch acknowledged one was so barred, but not the others. That acknowledgement did not permit treating all four claims in the same manner, and the lower court erred in doing so when it found they were barred by *res judicata*.

3. The timing of Encore's production on May 31, 2017 required Clear Touch to file a separate lawsuit so that it could fully and fairly litigate potentially significant claims for the illegal misappropriation and use of its confidential and trade secret information

Encore offers baseless arguments in an attempt to legitimize the irrational position that Clear Touch had adequate time to amend its pleadings and litigate its 2017 claims as counterclaims in the original 2015 suit. As noted, Clear Touch first became aware of the potential claims in June, 2017, less than four months prior to trial of the original case. This short timeframe is one that only the naïve or inept litigator would believe is adequate for litigating intellectual property theft claims with multi-million-dollar damages.

4. Encore's attempt to deflect blame for its withholding of evidence in its possession and control does not offer valid justification for allowing it to escape responsibility for its gamesmanship and liability for its illegal acts

On brief, Encore attacks the notion that a policy exception is warranted to ensure that Clear Touch is not robbed of an opportunity to pursue its misappropriation claims by arguing that Defendants claim "without any evidence in the record—that Encore prevented them from they [*sic*] discovering Clear Touch's claims in time to fully litigate them in the first action." (Resp. Br. pp. 44-45). Encore argues that Clear Touch "admit[ed] it was provided sufficient discovery to

assert its claims at least...four months before trial" and that "the real reason it did not move to amend its answer to add counterclaims was a strategic decision." (Resp. Br. p. 45 *citing* R. p. 1600, lines 24-25; R. p. 1608, lines 10-15; p. 1638, line 23-p. 1639, line 12). Neither Encore's implied argument that Clear Touch must prove a negative, nor its mischaracterization of its statements at the summary judgment hearing should justify it being allowed to commit illegal acts, benefit from them, and avoid liability by strategically withholding evidence alerting its victim to potential claims.

First, the documents in the May 31, 2017 production that alerted Clear Touch to its misappropriation claims were in the possession and control of Encore. This certainly makes it difficult for Clear Touch to know about the contents of materials it did not know existed, much less possess, and which should have been produced by Encore in response to discovery requests served over a year prior.

Second, Clear Touch did not admit it had sufficient discovery to pursue its claims by May 31, 2017, as Encore asserts. In reality, Clear Touch informed the lower court at that hearing that it was June, at the earliest, when it was first aware of a potential misappropriation claim because it received the 10,000 pages of documents in over 4,000 separate files on May 31, 2017. (7.30.18 Hearing Trans. - R. p. 1600, line 22-p. 1610, line 23). Clear Touch certainly was not fully informed as to whether it had viable claims, and more importantly, could not vet those claims and prepare them for trial in less than four months. The economic expert work alone would not be complete in such a short timeframe, and litigation is not made to move multi-million dollar claims from start to finish in a quarter.

Third, Encore claims the "real reason [Clear Touch] did not move to amend its answer to add counterclaims was a strategic decision not to try its claims with Encore's." (Resp. Br. pp. 45-

46). This implies that Clear Touch had sufficient information concerning its claims, adequate time to amend to add them as counterclaims in the original action, fully prepare them for trial in a few months, and made a decision to file a separate action as a benefit to the company. Nothing could be further from the truth. Encore's withholding of this evidence, aggressive push to trial by deeming those materials "irrelevant" to the case numerous times in writing and before the court in opposing any continuance, created the untenable situation that forced Clear Touch to file its misappropriation claims separately. In fact, as Clear Touch said during the summary judgment hearings and in submissions to the court, it would have preferred its claims be adjudicated in the same trial as Encore's. (7.30.18 Hearing Trans. - R. p. 1623, line 21-p. 1624, line 13). That way, Encore would not have the benefit of the binary – we are good and the Defendants evil – narrative that played centerstage throughout the week-long trial. The fact is Clear Touch could not risk partial litigation of what it saw as a more than ten-million-dollar case, based on Encore's use of its proprietary trade secret information to secure a large sale in North Carolina.

Finally, Clear Touch did in fact present evidence it was first made aware of its misappropriation claims upon its review of the May 31, 2017 production. That included producing to the lower court a sampling of several emails from that production which showed Encore providing its new panel provider, ViewSonic, with Clear Touch pricing information that it was contractually and statutorily obliged to return and not use, following the termination of the Reseller Agreement in September 2015. (5.31.17 Sample of Production Items - R. pp. 831-850). Yet, for the first time, Clear Touch learned Encore had kept its pricing information and given it to ViewSonic to not just unlawfully compete against its former panel supplier, but specifically target them in the market, well into 2016. (*Id. eg.* at Email Subject "Want to Beat Keone" - R. p. 841; *see also* R. pp. 842-843).

In sum, Encore was the gatekeeper of the evidence that led to Clear Touch's discovery of its misappropriation claims. It did not search for the name of the company it sued in 2015 and provided this evidence for the first time on May 31, 2017 – a time after which it had already pushed to have the original case tried, and what was less than four months before the case went before a jury. Under the circumstances created by Encore's actions, Clear Touch did the only thing it could to ensure it had the opportunity to fully and fairly litigate its claims. The lower court erred in robbing Clear Touch of that opportunity and rewarding Encore for its actions. The perverse and dangerous incentive that will be created by upholding that decision will substantially impair the discovery process. With that type of sword at a practitioner's disposal, it is frightening to imagine how nearly useless and intolerable the discovery process could become.

C. ENCORE MISREPRESENTS THE RECORD TO CLAIM IT ARGUED CLEAR TOUCH'S CAUSES OF ACTION SHOULD BE DISMISSED BECAUSE THEY WERE COMPULSORY COUNTERCLAIMS UNDER RULE 13

Encore does not offer any valid justification or explanation for its decision to put additional grounds in the Dismissal Order which were not raised to the Court nor expressed by the circuit judge as a basis for his decision. Instead, Encore seeks to justify its actions by misrepresenting the record to falsely claim it raised the issue of compulsory counterclaims below. (Resp. Br. pp. 48-49). The record shows it did not.

Encore claims it raised Rule 13 and compulsory counterclaims as a basis for dismissing Clear Touch's claims at the hearing on the parties' cross motions for summary judgment when it "expressly argued that the Circuit Court should follow this Court's decision in *Jaynes*, *supra*, and that the 'test [is] whether there's a logical relationship between the claim and the counterclaim in the first suit.' Here that test is met...." (Resp. Br. p. 48 *citing* R. p. 1596, line 8-p. 1597, line 4). Encore was not discussing compulsory counterclaims, but instead arguing that Clear Touch's

claims should be dismissed under the doctrine of *res judicata*, as a more complete quotation makes clear.

> *And then I've also -- I've handed up the Jaynes v. County of Fairfield case by the Court of Appeals. And it notes that on page 2 and that under the doctrine of res judicata, final judgment on merits in a prior action will bar the parties in the second action as to matters litigated and matters to which might have been litigated. And in the footnote, one, it notes that the test of whether there's a logical relationship between the claim and the counterclaim in the first suit, so is there a logical relationship?*
>
> *Here that test is met because as we note in Mr. Newnam's affidavit and as Your Honor has judicial notice, the very contracts that form the basis of Clear Touch's claim were exhibits in the - the first trial. They were Clear Touch's Exhibit 20 and Encore's Exhibit 3.*
>
> *So we think on either a motion to dismiss or a summary judgment, the plaintiff's lawsuit should be dismissed on grounds of res judicata.*

(R. p. 1596, line 19-p. 1597, line 12). Clear Touch counsel pointed out that the footnote referenced by Encore was a test of whether a claim is a compulsory counterclaim and not one for determining application of *res judicata*. (R. p. 1599, lines 14-17). Opposing counsel pointing out their adversary's inaccurate representation of case law is not the same as raising the issue in support of one's own motion. Encore's argument also belies its own acknowledgment that it did not raise the issue to the court and instead took it upon itself to insert an entirely new ground for the Court's decision into an order claiming that it was "implied by its rulings" and it "could be important to upholding the order on any appeal." (8.2.18 Email English to Court - R. p. 1947). It's other arguments on this issue are equally unconvincing.

Finally, Encore argues that its decision to put an additional ground it did not raise in an order was permissible because the lower court asked its counsel to prepare a formal order. (Resp. Br. pp. 48-49). It is commonplace for counsel that prevails on a motion to be tasked with drafting a formal order for submission to the circuit court. It would set a dangerous precedent to allow

drafting counsel to unilaterally insert new grounds they did not raise before the court to bolster the ruling in their client's favor. Doing so robs opposing counsel of the opportunity to address the issue before the court, does not accurately reflect the judge's ruling, and turns this Court into one of first impression rather than review. None of those outcomes are palatable or conducive to the administration of justice.

III. 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 in the specific respects noted in Appellant/Respondent Keone Trask and Clear Touch's filings; the Receiver Order entered July 23, 2018 reversed or modified; and the Dismissal Order entered August 10, 2018 dismissing Clear Touch'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 Reply Brief of Appellants/Respondents complies with Rule 211, SCACR.

(Signature on following page)

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