THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-23-5757

Appellate Case No. 2018-001444

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

v.

Keone Trask and Clear Touch Interactive, Inc...……...……Appellants/Respondents.

REPLY TO RETURN TO APPELLANTS' MOTION FOR LEAVE TO CORRECT CLERICAL MISTAKE IN FINAL ORDER

Appellants/Respondents, Keone Trask ("Trask") and Clear Touch Interactive, Inc. ("Clear Touch") (*collectively* "Defendants" or "Appellants"), through their undersigned counsel, hereby file this Reply to the Return to Appellants' Motion for Leave to Correct a Clerical Mistake in Final Order filed by Respondents/Appellants Encore Technology Group, LLC.

Encore's Return provides no factual or legal basis warranting denial of the Motion. Instead, it relies upon irrelevant legal arguments, a misstatement of the applicable law, contradictions of its own positions, and a shockingly bold attempt to misconstrue the clear and unambiguous record. Those efforts necessarily fail to offer adequate reason to deny Appellants' motion and should be rejected. All that Encore's Return truly establishes is that it has and will continue to do anything in service of its insatiable greed without regard to whether the facts, law, or even its own previous

statements on the record to the Court support the positions it espouses at the moment.

LEGAL ARGUMENTS AND ANALYSIS

1. The Final Order Contains a "Clerical Mistake"

Encore's Return is dedicated in large part to arguing the legal merits of whether the Trade Secrets Act allows it to recover exemplary damages, amounting to quadruple the actual damages awarded under its misappropriation claim by having Trask and Clear Touch each pay the full $849,890 in exemplary damages, as ordered in the last sentence of footnote 3 ('FN3"). (*See* Return pp. 2-3). The legal merits of whether the Trade Secrets Act allows each Defendant to pay the maximum amount of exemplary damages allowed under the Act (two times the actual damage award) has no bearing on the Motion at hand. The only issue the Court need consider in deciding the Motion is whether Judge McIntosh's inclusion of FN3 in the Final Order constitutes a "clerical mistake" that can be corrected under SCRCP 60(a).[1] The unambiguous record shows that it is and should be allowed to be corrected. Encore's arguments claiming that the Trade Secrets Act allows the recovery ordered by FN3 is nothing more than a transparent attempt to have this Court ignore the clear record that leads to but one conclusion—Judge McIntosh's inclusion of FN3 was a clerical mistake that can be remedied under SCRCP 60(a).

Encore casts fact and reason aside to argue that the mistake Appellants seek leave to correct was not a "clerical mistake" but instead "the result of judicial function; deciding legal liability for exemplary damages under the Trade Secrets Act." (Return p. 4). Tellingly, no explanation or supporting citation for this conclusion is offered in the Return. For Encore's statement to be true, Judge McIntosh would have to have been aware that the proposed Final Order drafted by Encore contained FN3's language, concluded that the Trade Secrets Act permitted such a recovery, and

[1] Those arguments go to the issue(s) presented in Encore's appeal of later Orders in Appellate CA No. 2019-000530. Thus, there is no utility in addressing those arguments in the Return.

decided to keep that language in the Final Order before he entered it in April 2018. That did not happen. The February 2019 post-trial motions hearing transcript, excerpts of which were attached as Exhibit A to Appellants' Motion, indisputably establishes that Judge McIntosh did not even see FN3's last sentence before he entered the Final Order in April 2018, and it was not until February 2019 that he first became aware that language was included.

> "[L]et me start you off with the trade secrets calculation you have. I will tell you right now there is never – ***it is not my intent, regardless of somehow in my misguided way, I overlooked the footnote. But it was never intended, and I don't think it's allowed by the statute, that you be allowed to collect double actuals per party, okay, per corporate entity and the individual. I think they're joint and several***.
> …
>
> [D]o you agree with [the] assessment that it says each one has to pay the punitive aspect individually on this double amount? Because I disagree with that, and ***if I let that get in the order, that's my mistake***."

(*See* Exhibit A to Motion – Feb. 7, 2019; R. pp. 229-230 in related Appellate CA No. 2019-000530)(***emphasis added***).[2] Rather, FN3 was mistakenly included in the Final Order because, according to Judge McIntosh, he overlooked it. That unassailable fact makes it impossible for Judge McIntosh's inclusion of FN3 to have been anything other than a "clerical mistake" as that term has been routinely defined by the Court. *See Sartin v. McNair Law Firm, PA*, 756 F.3d 259, 265 (D.S.C. 2014)(mistakes that cannot be corrected pursuant to Rule 60(a) are instances in which "the court changes its mind, either because it made a legal or factual mistake in making its original determination" or, "on second thought" it decided to exercise its discretion differently); see also *Landry v. Landry*, 430 S.C. 153, 161, 843 S.E.2d 491, 495 (2020)(defining mistakes that can and

[2] Encore attempts to cast doubt on Judge McIntosh's unequivocal statements that he did not know FN3 was in the Final Order when he entered it by noting that the lower court agreed the jury found that the Defendants willfully violated the Trade Secrets Act. (*See* Return p. 2 citing Feb. 2019 Trans. pp. 236-37). While that is true, it has absolutely no bearing on the Motion or what the evidence Appellants submitted in support shows.

cannot be corrected under Rule 60(a) the same as the District Court). Judge McIntosh did not make a legal determination or otherwise exercise judicial discretion to decide whether FN3 should be included in the Final Order before he entered it in April 2018. Therefore, his later recognition that it should not have been part of the Final Order and that he never intended to include it was not the result of him changing his mind because he made a legal or factual mistake in his original determination, or because on second thought he decided to exercise discretion in a manner different from the way it was exercised in the original determination. There was no original determination, exercise of judicial discretion, or consideration of the facts or law concerning whether FN3 should have been part of the Final Order, without which, Judge McIntosh's later statement that it should not have been included could not be the result of a change in his legal reasoning or exercise of judicial discretion. Rather, FN3 found its way into the Final Order because Judge McIntosh overlooked it and entered the Final Order as drafted by Encore without revision. It was not until nearly a year later that he first became aware of FN3's existence and its inclusion in the Final Order. He then made it clear he overlooked FN3, was unaware it was in the Final Order, and never intended to order that Encore recover quadruple the amount of actual trade secrets damages. This is the very type of mistake that Rule 60(a) is meant to correct.

2. Appellants' Timely Filed the Motion

Encore relies upon the time limitations for filing a motion under SCRCP 60(b) to inaccurately claim Appellants' Motion made pursuant to SCRCP 60(a) was untimely filed. (Return p. 3). SCRCP 60(b) articulates five specific grounds upon which a party may seek relief from final judgment, including "mistake [and] "inadvertence" and requires a party file a motion under that subsection "within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." S.C. R. Civ. P. 60(b). Those time

limitations are not applicable to SCRCP 60(a) motions which are confined to seeking correction of "clerical mistakes." In fact, SCRCP 60(a) provides that a judge that leaves the bench retains jurisdiction to correct clerical mistakes in their orders. Rightfully, there is no time limitation on a party's ability to seek correction of clerical mistakes within an order so that they are not burdened with monetary or other obligations different than what the judge meant to impose. That includes when, as here, the lower court mistakenly entered the Final Order with one sentence at the end of a footnote on page 11 of a 35-page order that imposed an additional $849,890 in exemplary damages it never meant to order in the first place.

Encore also argues Appellants' Motion should be denied because they purportedly failed to preserve "any objections to the Ruling on grounds of mistake" and did not "preserve their argument the Ruling was a mistaken." (Return p. 3). Appellants disagree. Regardless, preservation of substantive challenges to the ruling within FN3 are irrelevant to the present Motion. All that needs to be determined to resolve the Motion is whether the mistake Appellants seek leave to correct is a "clerical mistake." Judge McIntosh's unambiguous statements can only lead to the conclusion that his inclusion of FN3 in the Final Order was a clerical mistake which Rule 60(a) allows him to correct with permission from this Court. Encore knows this and attempts to portray the Motion as something it is not—a factual or legal challenge to FN3. (*See* Return p. 3)("Appellants have failed to preserve…any argument that the Ruling *contains a factual or legal mistake*."). It is not and Encore's preservation argument is a red herring.

Furthermore, if preservation were relevant to this Motion, it is telling that Encore cites to no law to support its argument that an alleged failure to preserve an issue for substantive consideration on appeal warrants denial of a SCRCP 60(a) Motion filed to allow correction of an order containing something the trial judge said he never meant to include in it. That is because

there is none.

3. Encore Will Not Suffer any Prejudice by Correction of the Mistake

Encore's attempt to argue that allowing correction of the clerical mistake would result in unfair prejudice is nonsensical and directly contradicts its own earlier statements to the lower court and this Court concerning which verdicts it must elect to recover from under the election of remedies doctrine. (Return p. 5). Encore claims that if the last sentence of FN3 had not been in the Final Order as Judge McIntosh intended then it could have elected to recover the trade secrets verdict against Trask and the tortious interference verdict against Clear Touch, resulting in "a recovery to Encore that was $500,000 higher than now argued by Appellants." (Return p. 5).

First, that misses the point of the Motion and ignores the fact Judge McIntosh never meant to enter the Final Order with FN3. One cannot be prejudiced by being denied something to which they were never meant to be awarded.

Second, if Encore could elect to recover the trade secrets verdict against Trask and the tortious interference verdict against Clear Touch, they would have done so in the first place because it would have increased the amount of the overall judgment. In fact, in that scenario, Encore still gets more than if it were allowed to recover the exemplary damages under the trade secrets claim against both Trask and Clear Touch.

Finally, Encore's statement is simply wrong and ignores the fact that it could not elect to recover under both the trade secrets claim and the tortious interference cause of action because the jury awarded the same actual damages of $424,945 under each. (R. pp. 1918-1920 - Verdict Form). Encore knows this and in fact made numerous statements to the lower court and this Court that it had to elect among the verdicts wherein the jury awarded the same $424,945 in actual damages. Multiple times Encore stated that "except for the verdicts for the Leon profits of $424,945, election

among the legal causes of action should not be required." (Final Resp. Br. p. 14; R. pp. 497 – Encore Post-Trial Motion(s)). In arguing post-trial motions Encore's counsel said to the lower court that "we concede the $424,945 awards are the Leon County school's profits, and we agree we can't recover that number multiple times." (R. p. 1490-1491). This is yet another instance of Encore saying whatever it believes is beneficial to it at the moment without regard to the law or its own earlier representations to the Court. Try as it might, Encore cannot manufacture prejudice by posing a hypothetical election scenario they know and have said many times is not allowed under the law.

CONCLUSION

Leave to correct the clerical mistake of FN3's inclusion in the Final Order is allowed under SCRCP 60(a) and necessary under the circumstances. Appellants respectfully contend that Judge McIntosh should be given the opportunity to correct the Final Order so it includes only what he always intended it to rule and nothing more.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I have served the Reply to Return to Appellants' Motion for Leave to Correct Clerical Mistake on the above-named Respondent/Appellant by emailing a copy of the Motion to the email addresses listed for opposing council on AIS pursuant to SCACR 262 as amended by the Supreme Court's August 25, 2021 Order on October 6, 2021, addressed to counsel of record as follows.

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October 6, 2021
Greenville, South Carolina

Alison Strother

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APPELLATE CASE NO.	2018-001444
RESPONDENT/APPELLANT	Encore Technology Group, LLC
APPELLANTS/RESPONDENTS	Keone Trask and Clear Touch Interactive, et al.
DOCUMENT TITLE	Reply to Return to Appellants' Motion for Leave to Correct Clerical Mistake in Final Order
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Should you have any questions or issues, please do not hesitate to contact us.

Thank you,

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