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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY
CIRCUIT COURT

The Hon. R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No. 2018-001444

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

v.

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

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**RESPONDENT/APPELLANT ENCORE TECHNOLOGY GROUP, LLC'S PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT**

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Pursuant to SCACR 221, Respondent/Appellant Encore Technology Group, LLC ("Encore") respectfully petitions the Court of Appeals for rehearing of the Court's Opinion No. 5871, filed November 24, 2021, in this matter (the "Opinion"). In reversing the trial court's decision on Election of Remedies and affirming the trial court's decision not to consider Restitution, this Court overlooked or misapprehended undisputed facts in the record and also departed from well-established precedent regarding the deference due jury verdicts and the availability of equitable relief. As a result, this Court determined that Encore was required to elect two of four jury verdicts against Appellant/Respondent Keone Trask ("Trask") and was limited to the damages awarded against Appellant/Respondent Clear Touch Interactive, Inc. ("Clear Touch") (collectively, "Appellants"). These errors warrant rehearing and issuance of a new opinion

affirming the trial court's decision on Election of Remedies and directing the trial court to consider Restitution.

**I. By requiring Encore to elect two of the four remedies awarded by the jury, the Court overlooked or misapprehended that the jury rendered, and the trial court entered judgment on, four different verdicts against Trask that corresponded to Encore's four separate and distinct injuries, and precedent that the Court should not substitute its theory of damages for that of the jury.**

In the Election of Remedies section of the Opinion, the Court states Encore's argument that that the jury intended its different verdicts to compensate for different injuries is "just speculation." The Court overlooked, however, that Encore argued, and the evidence demonstrated, that Encore incurred four separate injuries and that the jury rendered four different verdicts against Trask that corresponded to those four injuries.

Specifically, Encore outlined Trask's multiple wrongs and its four injuries in both its opening statement and closing argument. (Transcript, R. p. 860, l. 19-R. p. 863, l. 5; R. p. 1336, l. 6-p. 1340, l. 14) The evidence, and the jury's verdicts on different causes of action, corresponded to these four injuries as follows:

1. Wages and conference expenses paid to benefit Trask as a Clear Touch employee. Encore paid Trask $402,809 in wages ($335,120) and conference expenses (of which Encore only sought a portion, $67,689) while he was working solely to benefit Clear Touch. (Transcript, Supp. R. p. 112, ll. 2-23; Supp. R. p. 113, l. 21-Supp. R. p. 116, l. 18; Plaintiff's Exhibits 10(G), R. p. 1691 and 10(B), R. p. 1687) The jury awarded Encore a portion of this amount, or $375,733, in actual damages on its cause of action for breach of duty of loyalty against Trask, plus $175,000 in punitive damages. (Verdict, R. p. 1916)

2. Lost profits on products Encore purchased from Clear Touch at marked-up prices. If Trask had disclosed the true identities of the suppliers, Encore could have purchased panels from

them directly instead of through Clear Touch and made an additional $675,361 in net profits. (Transcript, Supp. R. p. 104, l. 24-Supp. R. p. 105, l. 13; Supp. R. p. 189, l. 8-Supp. R. p. 190, l. 6; R. p. 1073, l. 15-R. p. 1074, l. 15; R. p. 1082, l. 4-R. p. 1085, l. 10; Plaintiff's Exhibit 10(C), R. p. 1688) The jury awarded Encore this **exact amount**—$675,361—in actual damages on its cause of action for breach of fiduciary duty against Trask, plus $1,500,000 in punitive damages. (Verdict, R. p. 1917)

3. Lost profits on Clear Touch's sales to Leon County Schools. If Trask had honored the restrictive covenants in his contract and had not misappropriated its trade secrets, Encore could have made $424,945 in profits on sales that Clear Touch made to Encore's customer Leon. (Transcript, Supp. R. p. 101, l. 24-Supp. R. p. 103, l. 10; Supp. R. p. 116, l. 19-Supp. R. p. 117, l. 1; R. p. 1073, l. 15-R. p. 1074, l. 5; R. p. 1085, l. 11-R. p. 1086, l. 25; Plaintiff's Exhibit 10(D), R. p. 1689) The jury awarded Encore this **exact amount**, $424,945, in actual damages on its causes of action for breach of contract against Trask, tortious interference against Clear Touch, and violation of the Trade Secrets Act against both Appellants. (Verdict, R. pp. 1918-1920)

4. Loss of the value of the Clear Touch reseller network business opportunity. Encore argued that, under the "business opportunity" clause of Trask's contract, because Trask built Clear Touch's network of resellers on Encore's time with Encore's resources,[1] Encore should receive the value of Clear Touch, which Encore's expert valued at $5,536,254. The jury awarded Encore $1,476,039 in actual damages on its cause of action for breach of contract accompanied by a fraudulent act against Trask, plus $2,000,000 in punitive damages. (Verdict, R. p. 1921)

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[1] Encore was Clear Touch's first and only customer from the beginning for over a year, during which time Encore paid all of Clear Touch's marketing expenses and bore all the risk. A third-party witness, Dale Viola, explained how Trask signed up resellers at conferences he was supposed to be attending for Encore. (Transcript, R. p. 926, l. 22-R. p. 953, l. 9)

That the jury intended to compensate for each of these four injuries is more than "speculation." Verdicts 2 and 3 were for odd-dollar figures that corresponded exactly to the evidence for those damages. And while the Court concluded "we have no way whatsoever to know that the jury's award of nearly $1.5 million in damages for breach of contract with a fraudulent act does not include the damages mentioned above," we do know that because the punitive damages award – which the Court overlooked – is different for that claim than the other claims.[2] Moreover, the trial judge, who heard the arguments and evidence, concluded that the four different verdicts were intended to compensate for the four different injuries.

Not only did the Court overlook these facts, but it also overlooked the law that: "The Court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors." *Brabham v. S. Asphalt Haulers, Inc.*, 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953). While the Court states, "[n]othing from the jury indicated it intended the awards in this case to be added together," the facts that each verdict is for a different amount of actual damages and the punitive damages for the breach of contract accompanied by a fraudulent act do not equal the others indicates they were intended to compensate for Encore's four separate injuries reflected by the evidence.

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[2] While the Court found "proof" in Encore's closing argument seeking $5.5 million in actual damages that the breach of contract accompanied by a fraudulent act claim included the other two claims, Encore did not seek the same or particular punitive damages for these claims. Moreover, proof of the jury's intent is more accurately derived from the admitted evidence of Encore's injuries and the differing amounts of the jury verdicts than from attorney arguments.

## II. Where Trask's complex, multi-year scheme caused multiple injuries and the total amount of the jury's combined verdicts was less than the total amount of damages shown by the evidence, the Court of Appeals overlooked that it was the Trask's burden to prove that the largest verdict encompassed smaller verdicts for the doctrine of election of remedies to apply.

A defendant can raise the affirmative defense of election of remedies only when a plaintiff has been awarded multiple damages for the same injury. "**Election of remedies** involves a choice between different forms of redress afforded by law **for the same injury** ...." *Taylor v. Medencia,* 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996) (emphasis added). A "plaintiff must elect his remedy 'where two distinct wrongs result only in **a single and the same loss** ...." *Rivers v. Rivers*, 292 S.C. 21, 31, 354 S.E.2d 784, 790 (Ct. App. 1987), *overruled on other grounds by Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992) (holding no election of remedies required of a plaintiff who received damages for alienation of affection and criminal conversation because "[t]he causes of action are distinct, they arose out of separate and distinct facts, and the two alleged wrongs did not result in a single and the same loss.") (emphasis added; internal citations omitted).

Election of remedies is a "defense" that a defendant may raise "at any stage of the case," *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 15, 397 S.E.2d 774, 777 (S.C. App. 1990), but this defense has no application in cases where a defendant causes multiple injuries and cannot establish that the jury awarded multiple damages for the same injury. Trask has not established, and cannot establish, that any of the four verdicts at issue were for the same injury. This is especially true where, as here, the actual damages of the verdict fall within the range of damages testified to. *Gastineau v. Murphy*, 323 S.C. 168, 183, 473 S.E.2d 819, 828 (Ct. App.

1996), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998); *Buzhardt v. Cromer*, 272 S.C. 159, 163, 249 S.E.2d 898, 900 (1978).[3]

In this respect, this case is like *GTR Rental, LLC v. DalCanton*, 547 F. Supp. 2d 510, 515 (D.S.C. 2008), which the Court overlooked. As in *GTR Rental*, Trask's actions occurred "over a lengthy period and involved numerous activities involving [plaintiff's] customers, property, and finances," so that "the complex series of transactions undertaken by defendants does not comprise a single wrong." Where a defendant such as Trask has committed multiple wrongs resulting in multiple injuries, he should not receive a presumption that one verdict encompasses others, especially where he has been found to have committed fraudulent acts and willfully and intentionally destroyed evidence. (Final Order and Judgment, R. p. 33-34)

Instead, such a defendant should be required to prove that the jury intended one verdict to include others. Because Trask cannot do so, the Court should allow Encore to collect all four verdicts upon which the trial court entered judgment. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co.*, 425 S.C. 276, 301, 821 S.E.2d 509, 522 (Ct. App. 2018) (rejecting defendant's election argument in part because it failed to "request the court ask the jury what its intent was in how it awarded damages. Accordingly, [defendant] is unable to argue on appeal the court's decision was in error.").

In sum, as a defendant asserting an affirmative defense and having been found by the jury to have committed multiple wrongs causing multiple injuries, Trask should have had the burden of proving that the breach of contract accompanied by a fraudulent act included damages awarded by other verdicts. The Court's failure to require Trask to bear this burden contravened

[3] The total actual damages of the four verdicts awarded by the jury were within the range of damages presented by Encore. *See* Plaintiff's Exhibit 10.H, R. p. 1692.

established law that the evidence and all inferences from the evidence must be viewed in the light most favorable to the party that prevailed before the jury. *See Elders v. Parker*, 286 S.C. 228, 230, 332 S.E.2d 563, 565 (Ct. App. 1985) ("On appeal of a jury verdict, the evidence and any inferences to be drawn therefrom must be viewed in the light most favorable to the respondent. [The Court's] review is limited to determining if there is any evidence which reasonably tends to support the verdict.").

## III. Where the legal remedies available to Encore did not provide for Clear Touch to disgorge its full value, the Court of Appeals overlooked precedent requiring the trial court to order restitution from Clear Touch.

In finding that Encore had an adequate remedy at law against Clear Touch, the Court overlooked that such remedy must be "as certain, practical, complete and efficient ... as the remedy in equity." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); *see also Milliken & Co. v. Morin,* 386 S.C. 1, 685 S.E.2d 828 (Ct. App. 2009), *aff'd as modified,* 399 S.C. 23, 731 S.E.2d 288 (2012).[4] Moreover, "the remedy at law must ... attain the full end and justice of the case. It is not enough that there is some remedy at law...." *Chisolm v. Pryor*, 207 S.C. 54, 60, 35 S.E.2d 21, 24 (1945). The legal causes of action available to Encore against Clear Touch did not provide a remedy as "complete and efficient" as the equitable remedy of restitution for unjust enrichment.

This becomes clear by comparing the jury charges for the legal claims against Clear Touch with the remedy of restitution allowed in equity. As the Circuit Court charged the jury, Encore could recover from Clear Touch for violation of the Trade Secrets Act only damages "incurred as

[4] This Court's holding in *Milliken* is distinguishable from this case because Milliken was seeking actual damages and injunctive relief from its employee under his same contract. The Court held that the actual damages awarded under that contract constituted an adequate substitute for injunctive relief, which does not apply here because Encore sought restitution instead of injunctive relief.

a result of the wrongful acts … **pertaining to the trade secrets.**" (Transcript, R. p. 1436, ll. 1-7) (emphasis added). The "trade secrets" Clear Touch misappropriated concerned only $424,945 in profits from certain sales to Leon County Schools. (Verdict Form, R. p. 1919) Likewise, Encore could recover from Clear Touch for tortious interference with a contract only "the pecuniary loss resulting … from the failure of the third person to perform the contract." (Transcript, R. p. 1438, ll. 1-9) Again, the jury focused solely on the lost profits from Leon County Schools, because it awarded Encore the same $424,945 on this legal claim. (Verdict Form, R. p. 1920)

By contrast, the equitable remedy of restitution for unjust enrichment is completely different than the legal remedy of – and measurement for -- damages for misappropriation of trade secrets or tortious interference with a contract. Specifically, restitution for unjust enrichment "permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988). Stated differently, the remedy of restitution requires a defendant to disgorge "benefits or money which in justice and equity belong to another." *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009); *see also Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003) (noting the element that "it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value"); *Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994); *Webb v. First Fed. Savings & Loan Ass'n of Anderson*, 300 S.C. 507, 513, 388 S.E.2d 823, 827 (Ct. App. 1989), *overruled on other grounds by Myrtle Beach Hosp. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000); *Niggel Assocs., Inc. v. Polo's of North Myrtle Beach*, 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1984).

Beyond the $424,945 in profits Clear Touch received from the sales to Leon County Schools, the evidence presented at trial was undisputed that Clear Touch's entire business was built using Encore's monetary, personnel, and other resources, with Encore taking all of the risk. This scheme allowed Clear Touch to become a profitable and successful business worth at least $5,536,254 as of December 31, 2015. (Plaintiff's Exhibit 10.E, R. p. 1690; Plaintiff's Exhibit 10.J, R. pp. 1694-1742) Even with exemplary damages of nearly $850,000, the judgment against Clear Touch was nearly $4 million, or 70%, less than the value of Clear Touch in 2015. This disparity between the judgment awarded and the value Clear Touch gained from Encore shows that the legal remedy is not adequate, because it is not "complete" and does not "attain the full end and justice of the case." It was therefore error for the Circuit Court to fail to recognize that it would be inequitable for Clear Touch to retain this value, apart from any legal damages Encore proved for misappropriation of trade secrets or tortious interference with a contract.

## CONCLUSION

For the foregoing reasons, the Court should issue a new opinion affirming the trial court's decision on Election of Remedies and directing the trial court to consider Restitution.

Respectfully submitted,

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APPEAL FROM GREENVILLE COUNTY
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The Hon. R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No. 2018-001444

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**PROOF OF SERVICE**

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I, Gregory J. English, of Wyche, P.A., attorneys for the Respondent/Appellant Encore Technology Group, LLC in the within action, do hereby certify that I have this date served upon opposing counsel the foregoing **RESPONDENT/APPELLANT ENCORE TECHNOLOGY GROUP, LLC's PETITION FOR REHEARING** by Email and by First Class Mail, addressed to the following:

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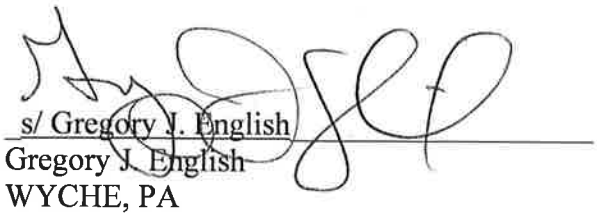

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## Greg English

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**Subject:** FW: SC Court of Appeals : Encore Technology Group, LLC v. Keone Trask and Clear Touch (2018-001444)
**Attachments:** Petition for Rehearing.pdf

Josh and Josh,

We hereby serve upon you Respondent/Appellant Encore Technology Group, LLC's Petition for Rehearing in this matter.

Sincerely, Greg

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Dear Counsel,

Attached in this email is correspondence from the Court of Appeals.

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