THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Greenville County Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5871 (S.C. Ct. App. Filed November 24, 2021)

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

v.

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

KEONE TRASK AND CLEAR TOUCH INTERACTIVE, INC.'S PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 11, 2022.

QUESTIONS PRESENTED

1. **Whether the Court of Appeals erred in affirming the lower court's grant of summary judgment and dismissal of Clear Touch Inc.'s ("CTI" or "Clear Touch") suit against Encore Technology Group, LLC ("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 and deemed "irrelevant" to that action?**

Petitioners are pursuing an issue whose resolution will have a direct, fundamental, and significant impact on the practice of law in South Carolina. The Court of Appeals affirmed the trial court's dismissal of Clear Touch's independent suit against Encore on res judicata grounds, and in doing so committed glaring errors in the application of the res judicata doctrine, failing to consider whether countervailing public policy called for a refusal to apply the doctrine given the circumstances, and relying upon inaccurate factual basis for its ruling. The Court of Appeal's application of the doctrine and refusal to hold that sound public policy warranted it not to be applied to dismiss CTI's action against Encore are errors that raise novel issues of law that have never been decided by this Court. Thus, this Court should grant the petition for a writ of certiorari.

I. INTRODUCTION

This matter is a consolidation of two cases that the Court of Appeals heard with a related third appeal. The Court of Appeals reversed in part, affirmed in part, and remanded the two orders at issue in the consolidated appeal. Those orders arose out of two separate cases.

In the first case, Encore sued Keone Trask ("Trask") and CTI on eight claims and won on six. The jury returned verdicts for Encore on its breach of duty of loyalty, breach of fiduciary duty, breach of contract, and breach of contract with fraud against Trask individually, and tortious

interference against CTI, and violation of the Trade Secrets Act ("TSA") against both Trask and CTI. The jury awarded Encore approximately $7.9 million against Trask and $1.7 million against CTI. What verdicts Encore was obligated to elect its remedy from under the election of remedies doctrine was at the center of post-trial motions in the first case. CTI and Trask sought reversal of the trial court's Final Order that held that Encore needed only elect its remedies among the three claims under which the jury awarded the same $424,945 in actual damages—breach of contract, TSA, and tortious interference. Petitioners argued that because Encore relied on the same facts to establish liability and sought the same damages under all but one of the claims the jury rendered a verdict under (the exception being the breach of loyalty claim), Encore was obliged to elect its remedy among those claims under the election of remedies doctrine.

The Court of Appeals held that Encore's damages for breach of contract with fraud necessarily encompassed its damages for breach of contract, misappropriation of trade secrets, and breach of fiduciary duty, and therefore, the trial court erred in holding Encore need only elect its remedies among the three claims with the same actual damage verdicts (breach of contract, TSA, and tortious interference). The Court of Appeals found that Encore relied upon the same operative facts to establish liability for these claims and sought the same damages for each at trial, making it necessary for them to elect among the remedies awarded under more than the three claims the Final Order held required election. The opinion concluded that Encore would inevitably elect to recover under the breach of contract with fraud claim as the most valuable remedy awarded.

The second case and part of the consolidated appeal arose from CTI's suit against Encore filed a few weeks before trial of the first case and the subsequent dismissal of that action upon res judicata grounds. In that suit, CTI asserted several claims, all of which, with the exception of one, were based upon Encore's misappropriation of CTI's trade secrets and other acts of unfair

competition following the termination of the parties' business relationship. That action was filed as an independent case because CTI was first made aware of Encore's acts of unfair competition when a last-minute production of over 10,000 pages of evidence was made just a few months prior to trial of the original action. Encore represented to its opposition and the trial court on numerous occasions that those materials were "irrelevant" to its case against CTI and had nothing to do with the transactions or occurrences in the original matter. Then, after Encore was able to try its case before a jury that did not hear of its malfeasance and awarded multi-millions in damages (the majority of which came in the form of punitive damage awards), it sought summary judgment on CTI's claims against it upon res judicata grounds deeming those very same materials as inextricably related to the transactions and occurrences underlying the original case. The trial court shockingly and erroneously rewarded Encore's malfeasance and dismissed CTI's action through the Dismissal Order, finding all claims were barred by res judicata. The Court of Appeals erred in affirming that holding without regard to proper application of the doctrine by failing to consider whether countervailing policy grounds warranted, and Petitioners contend, necessitated it not be applied in light of the circumstances leading to CTI's filing of an independent action against Encore, rather than asserting its claims as counterclaims in the original case. It further erred in upholding the Dismissal Order by relying upon inaccurate factual basis to support its ruling.

Petitioners filed a Petition for Rehearing on these issues which was denied by order dated January 11, 2022.

The Court of Appeals erroneously upheld that fundamentally flawed and dangerous ruling that has thus far rewarded both Encore's withholding of damning evidence until a few months prior to trial and Encore's contradictory positions on whether those materials were relevant to the original action it filed against Trask and CTI. What the Court of Appeals failed to acknowledge

was the significant detrimental impact upholding that ruling would have on the practice of law in South Carolina. The Court of Appeals decision on the res judicata issue is manifestly in error and presents novel issues of law ripe for consideration by this Court. This Court should grant the petition for a writ of certiorari, reverse the Court of Appeals erroneous decision on this issue, and clarify the novel issues of law presented. This will both ensure that Encore does not benefit from its gamesmanship and willingness to represent contradictory positions to its opposition and the Court, and that these untoward litigation tactics are not adopted by litigants in South Carolina.

II. STATEMENT OF THE CASE[1]

A. Establishment of CTI and Encore

CTI is a supplier of interactive touch panels which it sells through a network of Resellers who market and sell CTI products to end user customers, primarily in the education market. In 2013, Keone Trask incorporated CTI and Encore soon after. Encore was established as an entity that would acquire a soon to be eliminated technology reseller division of an established company called Computer Software Innovation ("CSI"), which Trask (as well as others who would ultimately be a part of Encore) worked for at the time. CTI was set up as a potential manufacturer/supplier of interactive touch panels. Immediately following its incorporation, Trask started about identifying and attempting to establish relationships with potential panel manufacturers for CTI. The Encore opportunity then came to fruition. Trask and others obtained the necessary capital investment for Encore from Todd Newnam that would allow the new entity

[1] The factual background in this matter is extremely complex and impossible to fit within the current page limits. Petitioners direct this Court to the Court of Appeals Opinion for a concise summary of the operative facts in this case and also encourage review of CTI and Trask's Final Brief for a more detailed synopsis.

to purchase CSI's technology reseller division. Newnam acquired the entire interest in Encore and purchased the CSI division.

Encore started its operation as a Value-Added Reseller ("VAR"), selling a wide range of technology products, mainly to education markets. Encore hired Trask as its Chief Business Development Officer on February 18, 2013. He executed a Non-Disclosure and Non-Solicitation Agreement (the "Agreement") containing multiple provisions meant to restrict his post-employment activities (for one year following his departure) and limit use and disclosure of trade secret and confidential information (for five years and indefinitely, respectively), among other things. (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*.

B. Clear Touch and Encore's Business Relationship

In the Spring of 2013, Trask arranged for Encore to act as a CTI Reseller. He did not disclose his involvement with and ownership interest in CTI at that time or during his tenure with Encore. Encore entered into a Reseller Agreement with CTI on April 24, 2013 and sold its touch panel products to customers throughout the Southeast. Part of Encore's responsibilities as a CTI Reseller was to provide customers quotes and bids for those products. That required CTI to disclose confidential and trade secret information to Encore, including its internal pricing for its panel products. Therefore, before Encore was provided this commercially sensitive information CTI required Encore to execute a Mutual Confidentiality Agreement, which among other things, prohibited disclosure, dissemination, or distribution of CTI's "Confidential Information" and "Confidential Materials" to any third party, and otherwise obliged Encore to use commercially

reasonable efforts to protect that information. (*See* Exh. B to Amended Complaint – R. pp. 195-96). Encore was provided and used CTI's confidential information, including its Reseller Price Lists reflecting the company's confidential reseller pricing, to market, quote, and sell CTI panel products to customers. Every Reseller Price List provided was marked "Confidential" along with other language clearly designating the information as such and directing it not be disclosed to any third party. Through Encore's business relationship with CTI, it was privy to other confidential and trade secret information, including the company's historical pricing, customer preferences, and other customer information, all of which would be valuable to a competitor.

In January 2014, Trask left Encore to work full time for CTI. He had just put his entire life savings into CTI and wanted to dedicate his full time and attention to making that business a success. Encore continued to work with CTI and Trask as a Reseller for nearly two years after Trask's departure. During that time CTI sold panels through other Resellers and directly to some customers, including a Leon County school district in Florida. Those sales totaling $424,945 would become relevant to the original suit brought by Encore.

Sometime in mid-2015, Encore learned that Trask established CTI, had an ownership interest in the company, and was involved with its operations during his tenure at Encore. Encore did not inform CTI of this discovery right away. Instead, they took the next several months to quietly arrange to become a Reseller of a competing panel product branded ViewSonic. It would later be discovered that Encore kept and shared CTI's confidential and trade secret information with ViewSonic so that they could unfairly compete against CTI, not only to simply win business, but to punish its former business partner and Trask. Encore never attempted to manufacture or sell its own panel. It was and remains to date a VAR, selling other companies' products, including panels.

On September 10, 2015, Encore abruptly terminated the Reseller Agreement with CTI and sued Trask and the company a week later, asserting eight causes of action: (1) breach of duty of loyalty (v Trask); (2) breach of fiduciary duty (v. Trask); (3) breach of contract (v. Trask); (4) violation of the South Carolina Trade Secrets Act ("TSA") (v. Trask & CTI); (5) Unjust Enrichment/Quantum Meruit (v. Trask & CTI); (6) tortious interference with contract (v. CTI); (7) breach of contract with fraud (v. Trask); and (8) defamation (v. Trask & CTI). (R. pp. 82-131).

C. Trial of Original Suit September 25-29, 2017 and the Facts Relied Upon by Encore to Establish Liability at Trial

The original suit 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 (Florida). These alleged actions, in some form or fashion, were the underlying bases for Encore's liability claims upon which it obtained a verdict at trial.

D. 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. The actual damages awards were as follows:

Against Trask	
Breach of Duty of Loyalty:	$375,733.40
Fiduciary Duty:	$675,361
Breach Contract:	$424,945
TSA:	$424,945
Breach with Fraud:	$1,476,039.40

Against CTI	
TSA:	$424,945
Tortious Interference:	$424,945

(Verdict Form – R. pp. 1916-1923).

Petitioners filed eight post-trial motions, including a Motion for Election of Remedies, seeking to have Encore elect among the remedies awarded to avoid duplicative recovery. Encore also submitted post-trial filings seeking fees, exemplary damages, for the trial court to allow it to recover under as many claims as possible, as well as award it equitable relief above the damages awarded by the jury. As part of that last effort, in what was a clear attempt to segregate verdicts, Encore submitted its "Requested Judgments in Favor of Encore Technology Group, LLC," which broke 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. The trial court heard post-trial motions with the election issue taking center stage. In response to the trial court's questioning, Encore deviated from its position and presentation at trial and represented 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).

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

The trial court made its rulings and instructed Encore to draft a proposed order to circulate and finalize with CTI. Encore submitted a proposed order that perverted, violated, ignored or otherwise ran afoul of the law; contradicted the record; and relied upon a litany of inappropriate and unsupported factual findings to support its faulty holdings. The trial court ignored CTI's copious objections to Encore's proposed order and adopted it *without revision* as the Final Order on April 2, 2018 (the "Order"). (R. pp. 1-36). The Order granted all of Encore's post-trial motions except for restitution, denied Petitioners' 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**. 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)
+1,476,039.40	+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). Petitioners filed timely Motion(s) to Reconsider on April 12, 2018, which were heard and denied on July 23, 2018. Petitioners filed a Notice of Appeal that day.

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

CTI paid the judgment against it into the trial court on April 17, 2018. Encore pursued collection on the Trask judgment, including moving to have a Receiver appointed to spearhead that process. Against CTI's numerous objections, the trial court entered the Receiver Order,

prepared by Encore, *without revision*. The Receiver Order empowered the Receiver beyond what the law allows in numerous respects. The troublesome provisions of the Receiver Order were instantly and consistently utilized to obtain Trask's and his wife's assets, regardless of whether they could satisfy the judgment or not and otherwise interfere with and delve into the CTI business. The Receiver's reign proved to be a painful exercise, prompting Trask to pay the balance of the judgment against him into the court on January 3, 2019. The trial court ultimately stayed the Receiver Order after Trask deposited over $250,000 in Receiver fees, which he did not and still does not owe, into the court. At that point, CTI and Trask had deposited approximately $8.3 million dollars into the court. Encore was not satisfied and attempted to have the Receiver continue his activities in what became clear was an effort to harm CTI, Trask, and ultimately take the business. However, the trial court stayed the Receiver and halted Encore's efforts to take CTI.

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

The discovery process in the original action was extensive, fraught with issues and the attendant disputes they spawn. Encore's withholding of evidence and litigation tactics 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 which included among other things, requests that Encore produce "all correspondence, internal documents, memos, e-mails and other documents concerning Trask and/or Clear Touch…and/or the case" and provide documents related to its allegations against CTI and Trask. Encore served written responses to those requests on July 14, 2016 without producing a single document. Following CTI's request, Encore supplemented its written responses and provided a document production on August 8, 2016. CTI

attempted to address deficiencies in that supplementation but was forced to seek judicial intervention to force Encore meet its discovery obligations, including requiring they provide a privilege log. On November 17, 2016, the trial court entered a Discovery Order prompting supplemental productions by both parties.

2. Encore's Supplemental Productions 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 Petitioners with a flash drive containing a supplemental production meant to replace the November 22 documents, the latter of which was 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 volume and manner in which the documents were produced, 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 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. The trial 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 review of Encore's supplemental production and addressed serious deficiencies in it via an April 6, 2017 letter. Encore responded in an April 13, 2017 letter and provided additional documents. (*See* 04.6.17 Encore Ltr. R. p. 1908-1909). Notably, in that letter, Encore addressed "Post-September 10, 2015 Documents" stating that:

> Encore terminated its Reseller Agreement with Clear Touch on September 10, 2015, because of Defendants' [*sic*] breaches of their contractual and fiduciary duties to Encore. Those breaches formed the basis of the lawsuit filed on September 18, 2015. Accordingly, we believe that all documents regarding Mr. Trask and Clear Touch dated or created on or after September 11, 2015, were created in anticipation of litigation and trial and therefore are work product. Nevertheless, we have re-reviewed those documents and are producing documents that fall after this date…none of which are relevant to the litigation.

(R. p. 1908). The post September 10, 2015 documents totaled 188 pages of new material. Encore's April 13, 2017 package also included a two-page document labeled "Privilege Log," that consisted of four paragraphs of general objections, among which was Encore's claim that it was withholding all documents from on or after September 11, 2015. (Privilege Log - R. pp. 266-267). Continued attempts to obtain a real privilege log were resisted and CTI was forced to file a Second Motion to Compel on April 26, 2017. A hearing on that motion was set for June 5, 2017.

3. Encore's May 31, 2017 Production of Over 10,000 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. 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***. (*See* 05.31.17 Encore Ltr. 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.). Due to that alleged oversight, Encore for the first time, produced a large number of emails responsive to CTI's discovery requests served a year before stating that "none of them are relevant to this case." *Id*. CTI undertook review of the May 31st 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 Petitioners could move forward with key depositions, including Encore's 30(b)(6) witness and damages expert.

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. (*See* Collection of Docs. from 5.31.17 Production - R. pp. 769-788). This revelation was made in early June 2017 after CTI had the chance to review the 10,000 plus pages of materials. Through the May 31st production CTI learned for the first time that following termination of the Reseller Agreement, Encore had retained CTI's internal pricing sheets, which were disclosed under a Mutual Confidentiality Agreement, and shared that pricing information and other confidential information including CTI's historical quotes to customers and customer preferences with ViewSonic. CTI believed that Encore and ViewSonic illegally utilized this information to directly and unfairly compete against CTI, targeting customers for conversion using this inside information in violation of Encore's contractual obligations and the South Carolina Trade Secrets Act, and were able to win a $12 million deal with Winston-Salem/Forsyth County Schools because of it.

The activities evidenced by the May 31st materials were significant, far-reaching, and took place after Encore terminated the Reseller Agreement on September 10, 2015 – a time which Encore deemed irrelevant to its action. These materials provided documented evidence of Encore giving ViewSonic CTI's confidential information, including pricing, historical quotes, and other commercially valuable information to target CTI (and Trask) to convert past customers and outbid their former partner on future projects. (*See e.g*. Collection of Documents from May 31st Production - R. pp. 772-73 [Encore providing ViewSonic past quotes to customer(s) on CTI products], R. p. 779 [email entitled "Beat Keone"], R. p. 781 [email Encore to ViewSonic stating "Let me know if you can be any more aggressive here since you know Clear Touch pricing."] R. p. 786 [Encore using knowledge of CTI confidential information discussing if ViewSonic can do better to "get in the door here and hopefully get Clear Touch out."]). Encore took great and time consuming efforts in a bid to withhold these materials, failing to produce them in response to CTI's requests, and not providing them in months of supplemental productions following an order compelling supplementation. They then claimed the materials were privileged while refusing to provide a privilege log specifying what they were and the grounds for their nonproduction. Next, they begrudgingly produced a document entitled "Privilege Log" without any detail as to what was being withheld and why. Then, a year after CTI served its discovery requests, Encore finally produced the documents, along with a 65-page privilege log approximately two months before the week-long trial of a complex matter that was set for date certain, all in an effort to avoid having to defend their illegal actions before the jury.

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. This left Petitioners approximately two months to take numerous depositions which it had not been able to proceed with due to

circumstances created almost exclusively by Encore's withholding of evidence and refusal to provide a legitimate privilege log until May 31, 2017. Clearly, an August 2017 trial date was unreasonably burdensome to Petitioners. Yet, Encore would not consent to a continuance and therefore CTI filed a Second Motion for Continuance on June 6, 2017. (R. pp. 240-289). Encore opposed that motion claiming that the May 31st materials were *irrelevant* and their late production did not warrant continuance. (Encore Opp. R. pp. 294-295). The trial court gave the parties a few additional weeks and set the trial for the week of September 25, 2017.

From the moment of the May 31, 2017 production, Encore not only downplayed the significance of the withheld documents, it affirmatively, through counsel, stated on the record on multiple occasions that those materials were irrelevant to the original case filed against Trask and CTI in 2015, and that it had provided those documents solely to accommodate Petitioners' multiple requests for them. Encore had one goal; to push its case to trial and avoid any responsibility or consequences for its last-minute production that alerted CTI to its acts of unfair competition.

Given the circumstances created by Encore's actions and relying on its representations that the May 31st materials were unrelated to its case against Petitioners, CTI set about preparing for trial of the original case and filed a separate action against Encore in early September 2017. (Amended Complaint R pp. 165-213). CTI's suit against Encore asserted claims for breach of contract (breach of the Mutual Confidentiality Agreement), trade secret misappropriation, and conversion. [2] Those claims were all based upon Encore's retention and usage of CTI's confidential and trade secret information to unfairly compete with its former business partner. To be clear, these were acts CTI knew nothing of until it reviewed the wrongfully withheld May 31st production

[2] CTI alleged a breach of contract claim, alleging Encore breached the Reseller Agreement during the term of that contract which CTI recognized was a claim subject to dismissal upon res judicata grounds. Discussion of CTI's claims in this Writ is only referencing the three other causes of action asserted in the *CTI v. Encore* matter.

which almost exclusively took place after termination of the Reseller Agreement on September 10, 2015, and were discovered in a production which Encore deemed irrelevant to the original case.

CTI's action against Encore alleged, in relevant part, that in the summer of 2015, Encore learned that Trask had maintained a direct or indirect interest in CTI, including when he was an employee of Encore and throughout the two companies' business relationship. Shortly thereafter, the complaint alleges, Encore decided to terminate its business relationship with CTI. However, prior to notifying CTI of this decision, Encore entered into a business relationship with ViewSonic and undertook a campaign of converting as many CTI purchase orders, quotes, and/or corporate opportunities as it could. During this time and unbeknownst to CTI, the complaint further alleges, Encore utilized CTI's confidential, proprietary, and trade secret information, including but not limited to CTI Reseller Price Lists to which it was privy as a CTI Reseller, and contacted customers with outstanding CTI purchase orders, customers who had been previously quoted CTI products, customers who had ordered CTI products in the past, and customers whom Encore believed would continue to do business or want to do business with CTI, and attempted to convert those orders and/or customers to ViewSonic and prevent them from purchasing CTI product(s). Encore also engaged in a campaign of spreading fear, uncertainty, and doubt as to the safety of CTI products by claiming it lacked certain safety certifications which it claimed ViewSonic had, in order to give actual and prospective customers the false impression that CTI products were unsafe or otherwise posed a safety risk to users and the school children whose teachers would use the product in the classroom.

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. (R. pp. 229-234). 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 could not 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 trial court heard oral arguments on the Parties' dispositive motions and entered the Dismissal Order on August 20, 2018, disposing of each Parties' claims. (Dismissal Order - R. pp. 61-64). The Dismissal Order, which was prepared by Encore and entered *without revision*, concluded CTI's causes of action based upon Encore's misuse of its confidential information were barred by res judicata. According to the trial 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. *Id*. The Dismissal Order goes on to assert CTI's claims were rightfully dismissed because they were mandatory counterclaims under SCRCP 13; this was a ground that was never raised to the trial court, but rather unilaterally inserted into the proposed order by Encore. CTI filed a Motion to Reconsider on August 20, 2018, which was denied without a hearing. CTI then filed a timely appeal of the Dismissal Order.

H. The Court of Appeals Opinion

The Court of Appeals Opinion affirmed the Dismissal Order finding that CTI's claims in its action against Encore were barred by res judicata. The Court of Appeals found that CTI was aware of the information leading it to believe it had claims against Encore prior to trial of the

original action which it could have litigated in that suit as counterclaims but "never moved to amend its answer and never sought a continuance on the grounds that it needed more time to develop counterclaims that would be forthcoming in an amended answer." (Op., p. 13). Thus, the Court of Appeals affirmed the lower court's dismissal of CTI's suit without mention, much less consideration, of whether the circumstances provided countervailing policy considerations that made it an err for the lower court to dismiss CTI's suit upon res judicata grounds. That affirmation was also based upon the inaccurate factual assertion that CTI never moved for a continuance based upon a potential need to amend its pleadings in light of the May 31st production.

III. THE COURT OF APPEALS COMMITTED MULTIPLE ERRORS OF LAW IN AFFIRMING DISMISSAL OF CTI'S ACTION UPON RES JUDICATA GROUNDS

The Court of Appeals affirmed the Dismissal Order, concluding that CTI's independent action against Encore filed prior to the trial of the original matter was barred by res judicata because it could have litigated those claims in the original action. (Op., pp. 13-14). That holding is marred by an erroneous legal analysis and reliant upon inaccurate facts, each of which presents novel issues of law whose consideration of and resolution by this Court is important not only to this case, but the integrity of the litigation process in South Carolina.

A. The Court of Appeals Erred in Concluding that Res Judicata was Rightly Applied to Dismiss CTI's Claims Against Encore

The Court of Appeals did not correctly analyze and determine whether the res judicata doctrine should apply to bar CTI's claims against Encore, committing multiple errors that raise several novel issues of law, which Petitioners respectfully contend should be considered and resolved by this Court.

Res judicata bars litigation of claims that were or could have been adjudicated in a previous action because they arise out of the same transactions or occurrences forming the subject of that

prior suit. *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). 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. at 171, 712 S.E.2d at 414. "[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*. Petitioners contend that their claims against Encore (except for the breach of the Reseller Agreement claim) did not arise out of the same transaction or occurrence that were the subject of Encore's original suit, and therefore, were not rightfully dismissed upon res judicata grounds as the Court of Appeals held. As noted above, CTI's claims against Encore were based upon Encore's misappropriation of its former panel supplier's confidential and trade secret information and providing it to a competitor for use in outbidding CTI and converting customers to ViewSonic. Those acts almost all took place after Encore terminated its relationship with CTI; a timeframe Encore deemed irrelevant to its case. Assuming *arguendo* that res judicata could bar CTI's claims because they arose out of the same transaction or occurrence, it was in err for the Court of Appeals to neglect any consideration of whether the doctrine *should* have been applied under the circumstances. In affirming the Dismissal Order, the Court of Appeals failed to even mention, much less consider, whether the circumstances leading to CTI filing a separate action against Encore presented a scenario under which compelling policy considerations warranted refusing to apply the res judicata doctrine to dismiss CTI's claims.

"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. In *Harnett v. Billman*, the 4th Circuit, also citing the Restatement as this Court did in *Judy*, recognized that res judicata should not be applied in cases in which fraud, concealment, or misrepresentation caused the plaintiff to fail to include its claim(s) in a former action. 800 F.2d 1308, 1312-1314 (4th Cir. 1986). The Court of Appeals failure to consider the compelling policy reasons to reverse the Dismissal Order was in err and presents novel issues of law ripe for consideration by this Court.

First and foremost, it is sound policy to not dismiss CTI's claims on res judicata grounds when Encore's actions robbed it of a full and fair opportunity to litigate the issues forming the basis of its claims in the original case. *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 Court of Appeals 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.

Second, this type of scenario is why courts have recognized that res judicata should not bar a party's claims when their failure to include them in a prior action was due to fraud, concealment, or misrepresentation. *Harnett v. Billman*, 800 F.2d 1308 (4th Cir. 1986). Here, there was both concealment and misrepresentation by Encore. Concealment need not necessarily be deliberate because the impact on the opposition remains the same regardless of the party's intent. Whether Encore deliberately withheld the May 31st documents, or they were produced at such a late stage in the litigation due to the purported oversight, is of no consequence because it left CTI in the same position. CTI was left with no real choice but to file an independent action against Encore when it did not know of the potential claims until just a few months before trial, and Encore had time and time again deemed those documents and the actions they reflected as "irrelevant" to the original case. Certainly, even if the Court were to find that the circumstances of this case do not fall within one of the established exceptions to the application of the res judicata doctrine, it would make good law to establish that a party cannot benefit from making representations to its opposition and the Courts that are diametrically opposed to one another. Petitioners contend that counsel's Duty

of Candor requires advocates refrain from such practices. However, Encore produced over 10,000 pages of documents it should have provided long before its intensive and time-consuming efforts to withhold those materials upon less than adequate grounds. After providing those materials on the eve of a hearing to compel, Encore deemed them irrelevant to the actions underlying the original case to oppose continuation of the trial. Then, suddenly and conveniently for Encore after trial, when faced with having to answer for their actions evidenced by those materials, they represented them as inextricably connected to the transactions and occurrences underlying the original case. Encore cannot have it both ways and the Court of Appeals failure to consider the compelling policy of ensuring litigants do not engage in, much less benefit from, such actions in deciding the res judicata issue was in err.

Third, the Court of Appeals conclusion that because CTI used Encore's acts of unfair competition to support an equitable defense in the original case, it was obliged to also assert all claims related to those actions, was in err and presents a novel issue of law—whether use of facts to support an equitable defense forecloses pursuit of claims based upon some or all of those facts in a subsequent or independent action. (*See* Op., p. 13). The Court of Appeals held that "[f]inally (and in our view, critically), Clear Touch used the same factual basis – alleged unfair competition by Encore—as a defense to Encore's motion for restitution [and][o]nce Clear Touch raised unfair competition, it was obligated to raise all claims related to that unfair competition." (Op., p. 13). The Court of Appeals cites no law supporting that notion nor provides any explanation of why the law of res judicata is in accord with this conclusion. Instead, it simply concludes that it was incumbent upon CTI to assert its claims based upon Encore's acts of unfair competition as counterclaims in the original case because CTI relied upon those same actions to support its unclean hands defense in that matter. That holding is erroneously made in a vacuum without the

necessary considerations of whether countervailing policy considerations warranted refusal to apply the doctrine under the circumstances. That would include consideration of whose actions caused those circumstances to come to fruition, what led to CTI filing an independent suit, or whether CTI had the full and fair opportunity to litigate its claims against Encore in the original action under the circumstances. Taking any of those considerations into account calls for this Court's review and reversal of the Court of Appeals' Opinion on the res judicata issue. This particular basis underlying the res judicata ruling also presents the novel issue of whether a party is obliged to assert claims in a prior suit if they rely upon any of the same facts to support an affirmative defense in that action. Petitioners contend that using evidence to support an affirmative defense alone should not necessarily bar asserting claims in a separate matter, and it was an err for the Court of Appeals to make that ruling without legal support or consideration of how and why CTI used evidence from the May 31st production to support a defense in the original suit but was left to pursue claims based upon that evidence in a separate action.

B. The Court of Appeal's Res Judicata Ruling is Made Upon an Inaccurate Factual Basis

The Opinion's affirmation of the Dismissal Order also relies upon the inaccurate factual assertion that CTI never moved for a continuance upon the grounds that it may need to amend its answer in light of the late disclosed evidence. Specifically, the Order states:

> The record is clear that Clear Touch never moved to amend its answer and never sought a continuance on the grounds that it needed more time to develop counterclaims that would be forthcoming in an amended answer. The point is made more salient by the fact that Clear Touch sought several continuances but never claimed it needed a continuance because it needed to amend its answer.

(Op., p. 13). That is not an accurate statement of the facts as established by the record.

CTI filed a Second Motion for Continuance of the trial date a mere six days after CTI received the 10,000 plus pages of additional discovery documents that first alerted it to possible

claims it may have against Encore. (R. pp. 240-289). In that motion, CTI stated that it was seeking a continuance of the trial date for multiple reasons, including because the documents produced by Encore on May 31, 2017, indicated that additional discovery was necessary so that Petitioners could potentially amend their Answer to add in counterclaims based upon those documents. That Second Motion for Continuance of the Trial Date stated that:

> [Encore's] May 31st supplemental production …*also indicate the potential need for [CTI and Trask] to amend their pleadings to add in a counterclaim against [Encore] not previously known due to [Encore's] withholding of these many relevant documents*.

(R. p. 245 at ¶31 –2nd Motion for Continuance of Trial Date)(*emphasis added*).

Thus, the Order's holding on the res judicata issue is premised upon an inaccurate factual assertion which is belied by the clear record, warranting issuance of the writ sought by this filing and reversal.

IV. CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari and reverse the Court of Appeals decision on the res judicata issue under which it affirmed the trial court's Dismissal Order.

[signature page to follow]

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February 10, 2022
Greenville, South Carolina

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Feb 10 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM Greenville County Circuit Court
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Supreme Court Case No.
Appellate Case No. 2018-001444
Case No. 2015-CP-23-5757

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

v.

Keone Trask and Clear Touch Interactive, Inc...……...……Petitioners.

PROOF OF SERVICE

The undersigned hereby certifies that on February 10, 2022, he served the foregoing Petition for a Writ of Certiorari by emailing and mailing a copy to the persons below listed for opposing council on AIS pursuant to SCACR 262 as amended by the Supreme Court's August 25, 2021 Order, addressed as follows.

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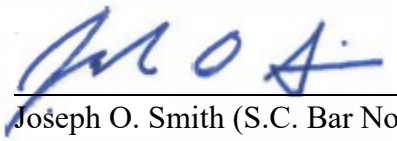

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February 10, 2022
Greenville, South Carolina

From:	Alison Strother
To:	genglish@wyche.com; Rita Bolt Barker
Cc:	Josh Smith; Josh Hudson
Subject:	SERVICE OF DOCUMENT: Encore Technology Group, LLC v. Clear Touch Interactive, et al. (Appellate Case No. 2018-001444)
Date:	Thursday, February 10, 2022 11:03:32 PM
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COURT	Court of Appeals
APPELLATE CASE NO.	2018-001444
RESPONDENT/APPELLANT	Encore Technology Group, LLC
APPELLANTS/RESPONDENTS	Keone Trask and Clear Touch Interactive, et al.
DOCUMENT TITLE	1. Keone Trask and Clear Touch Interactive, Inc.'s Petition for a Writ of Certiorari; and 2. Proof of Service
ATTORNEY NAME	Joseph O. Smith
ATTORNEY TELEPHONE	864-908-3912

Should you have any questions or issues, please do not hesitate to contact us.

Thank you,

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