
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. 2019-000530

Jami Powell and Encore Technology Group, LLC, Plaintiffs,

Of which Encore Technology Group, LLC is theAppellant,

v.

Clear Touch Interactive, Inc. (a Nevada Corporation)

f/k/a Clear Touch Interactive, LLC (a Nevada LLC);

Keone Trask and Tamara Trask.....Respondents.

RESPONDENTS' FINAL BRIEF

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I. STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court err in determining that Encore is subject to the South Carolina Trade Secrets Act's limitations on the amount of exemplary damages it may recover to evaluate and rule upon Defendants' Motions?
2. Did the circuit court err in applying the unambiguous provisions of the South Carolina Trade Secrets Act to determine the amount of exemplary damages recoverable under the controlling law where the jury returned a single actual damages award against both "Defendants" and responded to one special interrogatory asking if "the Defendants' conduct" willfully violated the Act?
3. Did the circuit court err in determining that Trask's payment of his judgment debt into the Court deprived Encore of standing to continue as a party in the *Powell* matter where its sole interest in case was reliant upon that debt remaining unsecured?

II. STATEMENT OF THE CASE

The central and determinative issue raised by this appeal is whether Encore must follow the law, or be allowed to recover twice the legislatively prescribed amount of exemplary damages for trade secret misappropriation. As detailed below, Respondents, Keone Trask and Clear Touch Interactive, Inc., paid a total of over \$8.3 million-dollars into the Court to secure Encore's judgments against them, and partly to advance hundreds of thousands in Receiver fees not yet owed. Encore claims that Trask remains responsible for \$1,233,143.53; a figure comprised of potential future liabilities that are not part of the judgment and \$845,945 in exemplary damages awarded under the South Carolina Trade Secrets Act ("SCTSA") against Trask and Clear Touch, which the company paid into the Court in April 2018. The circuit court rightly found that the unambiguous provisions of the SCTSA limited Encore's recovery of exemplary damages to two times the actual damage amount awarded at trial for Defendants' violation of the Act, and, as a result, Trask and Clear Touch had deposited the full judgment debts against them into the Court. As a consequence, Encore's post-trial campaign to destroy Trask and its competitor Clear Touch through an over-empowered Receiver and intervention in another lawsuit, was put to an end. Encore asks this Court to reverse the circuit court's decision so it may resume those efforts unless and until Trask deposits over \$1.2 million-dollars he does not owe into the Court. Defendants respectfully request this Court affirm that Encore is subject to the law, and cannot require Trask or Clear Touch to deposit anything further to secure the judgments.

A. Introduction

Respondent, Clear Touch Interactive, Inc. ("Clear Touch" or "CTI") is a supplier of interactive touch panels which it sells to Resellers who then sell the products to end user customers, primarily in the K-12 education market. Respondent, Keone Trask established Clear Touch very

soon before he incorporated Encore.¹ Appellant, Encore Technology Group, LLC (“Encore” or “Plaintiff”) is a Value-Added Reseller for a range of information technology products, including interactive panels, which it markets and sells to K-12 educational customers and others. The underlying action arose out of Keone Trask’s employment with Encore and his relationship and involvement with Clear Touch before, during, and after his tenure with the company.

B. Establishment of Clear Touch and Encore

From 1999 through the fall of 2012, Keone Trask worked for Computer Software Innovations (“CSI”) in a variety of roles, including Chief Technology Officer. Around this time, he foresaw a shift in classroom technology away from projectors and whiteboards and to interactive touch panels. (Supp. R. pp. 12-15 - Tr. Trans. 720-23). On August 24, 2012, Trask established Clear Touch, LLC with the notation that it may one day be a manufacturer or supplier of interactive touch panel technology. (R. p. 411 - Plf. Ex. 11). Trask set about identifying potential manufacturers and exploring the Clear Touch opportunity. He identified and worked to develop the panel sourcing/supplier opportunity with TSI Touch through the fall of 2012. (Supp. R. pp. 13-15 - Tr. Trans. 721-23).

Shortly after Clear Touch was established, a new opportunity arose due to the acquisition of CSI by a company called Harris. Trask and others at CSI learned that Harris was interested in only a portion of the CSI business and planned to eliminate the technology reseller and cloud services division. (Supp. R. pp. 12-27 - Tr. Trans. 721-35). Trask and other current and former Encore executives saw an opportunity to spin off that division into a new entity, leading to the incorporation of Encore Technology Group, LLC on September 27, 2012. The idea was for Encore to purchase the technology reselling and cloud services division of CSI and continue with that

¹ Trask and Clear Touch are collectively referred to as “Defendants” in this brief.

business as a newly minted entity. Trask and others solicited several prospective investors, ultimately resulting in Todd Newnam purchasing all ownership interests in Encore and acquiring the technology reselling and cloud services division of CSI as planned. Operational management and control of Clear Touch was transferred from Trask to his mother Kathy Cruse on or around October 4, 2012, which was reflected by the LLC's Annual List of Managers filing for the period of August 2012 to August 2013. (R. p. 412 - Plf. Exh. 14). Due to his experience and expertise in the technology market, Encore hired Trask as its Chief Business Development Officer on or about February 18, 2013.

C. Trask Brings Clear Touch to Encore

Interactive panels were an emerging technology in the spring of 2013, and there were few options on the market. (R. p. 374, Supp. R. pp. 28-36 - Tr. Trans. 948-57). Trask brought Clear Touch to Encore as a potential panel supplier without disclosing his connection to the company. Encore chose to begin selling Clear Touch interactive panel products and accessories. Following execution of the Reseller Agreement on April 24, 2013, Encore began to market and sell Clear Touch products within its larger suite of product offerings which comprised over 95% of its business. (R. p. 286, lines 4-21 [Tr. Trans. 160:4-21]; R. p. 287, line 12-p. 289, line 8 [Tr. Trans. 198:12-200:8]; R. p. 348, lines 16-19 [Tr. Trans. 554:16-19]; R. p. 349, line 23-p. 350, line 1 [Tr. Trans. 555:23-556:1]). The US interactive panel market was in its infancy during the time at issue, and Clear Touch was one of the few products available. (R. p. 373, line 23-p. 374, line 2 - Tr. Trans. 947:23-948:2). Trask and others at Encore went about their jobs of promoting and selling Encore's entire suite of products, including Clear Touch interactive panels, until Trask left the company.

D. Trask Goes Immediately from Encore to Clear Touch

In January 2014 Trask decided to leave Encore and pursue the Clear Touch business full time. On January 15, 2014, Trask notified Encore of his intention to leave the company, effective February 14, 2014.² (R. pp. 355-357 - Tr. Trans. 764-66). On January 21, 2014, Clear Touch was converted from an LLC to a corporation, resulting in a change of operational control to Trask. (R. pp. 418-419 - Plf. Exh. 16). The conversion was done so that Trask could pour his life savings of approximately \$150,000 from his 401k into the Clear Touch business. (R. pp. 358-360 - Tr. Trans. 767-69). Encore ultimately terminated Trask on April 25, 2014, and he immediately went to work for Clear Touch.

E. Encore Learns of Trask's Historical Interest in Clear Touch

Encore and Clear Touch continued to do business following Trask's departure. Clear Touch supported Encore's sales activities, including providing training, product demonstrations, attendance at trade shows, and lead notifications. In October 2014, Trask disclosed his interest in Clear Touch to Encore leadership. (R. p. 361, line 14-p. 363, line 21 - Tr. Trans. 787:14-789:21).³ Encore continued to sell Clear Touch products for nearly a year after his disclosure. Encore continued to sell Clear Touch products into 2015. Events unfolded over the course of the Spring and Summer that year which led to Encore's termination of its reseller relationship with Clear Touch on September 11, 2015, and the filing of the underlying lawsuit a week later.

² Encore encouraged Trask to stay through the end of March and he ended up staying until late April.

³ Trask informed Encore executive Todd Newnam that he owned Clear Touch at that time. Historical ownership of the business was not addressed during that conversation.

F. Encore Terminates Reseller Agreement and Files Suit September 2015

On September 11, 2015, Encore notified Clear Touch it was terminating the relationship. (R. p. 409 - Plf. Exh. 9). A week later Encore filed a complaint containing nine causes of action; some against Trask individually and others making claims against the Defendants jointly. Encore's claim for Violation of the South Carolina Trade Secrets Act was alleged against both Defendants jointly, and pled for damages under the cause of action stating that "Defendants are liable to Encore and Encore is entitled to all relief available under the South Carolina Trade Secrets Act...including...exemplary damages...." (R. pp. 89-90 - Compl. 9.18.15 ¶¶ 52-57). Defendants filed Answers asserting various defenses. (R. pp. 130-150 - Answer 11.13.15). Prior to trial, Trask admitted liability on the breach of duty of loyalty and breach of fiduciary duty claims. (R. pp. 459-462 - Stip. of Fact and Admission of Liability).

G. Trial in *Encore Tech. v. Trask and Clear Touch* - September 25-29, 2017

A week-long trial was held in September 2017 with the jury rendering a verdict in favor of Encore on six of the eight causes of action submitted to them. (R. pp. 464-471 - Verdict Form). Encore's trade secret claim was pled, pursued, and tried against both Defendants jointly, without any differentiation between their alleged actions in violation of the Act. (R. p. 90 - Encore Compl. ¶ 57; *see also* Ap. Br. p. 3-4.)⁴

At trial, Encore sought \$5.5M in damages it claimed resulted from Defendants' trade secret misappropriation. (R. pp. 377-381 - Tr. Trans. 1108-1112)(Requesting jury award \$5.5M under breach of fiduciary duty claim and then asking it "to use the same damage figure for this claim as you used in the breach of fiduciary duty claims."). An agreed upon Verdict Form was provided to

⁴ "Trask and Clear Touch misappropriated Encore's trade secrets and utilized them to take away business.... Specifically, as an employee of Encore, Trask learned that Leon County Schools in Florida had preferences to purchase specific interactive panels at specific prices, *and along with Clear Touch* utilized these trade secrets to take away the sales from Encore and make them directly to Clear Touch...."

the jury with the SCTSA section asking it to award actual damages if they found for the Plaintiff and answer a special interrogatory relevant to the Court's potential award of exemplary damages under the Act. It read in pertinent part:

As to Plaintiff, Encore Technology Group, LLC's violation of South Carolina Trade Secrets Act claim against Defendants Keone Trask and Clear Touch Inc., we the jury, unanimously find:

____ A. For the Plaintiff in the amount of: _____ (\$ _____ actual damages)

B. Was the Defendants' conduct in violating the South Carolina Trade Secrets Act committed by the Defendants in a willful, wanton, or reckless disregard of Plaintiff's rights?

(R. p. 467 - Verdict Form p. 4)(*emphasis added*). The Parties and Court discussed and agreed upon the wording in the Verdict Form prior to its submission to the jury. In discussing the Verdict Form, Encore states the Court doubles the actual damages upon a willfulness finding - "I think the same is true for the Trade Secrets Act. In other words, the jury makes the willfulness finding, and you double it." (R. p. 375, lines 19-22 - Tr. Trans. 978:19-22). And later recognizes the statute caps punitive damages to twice any award made - "the statute says the Court may award separate exemplary damages in an amount not exceeding - not exceeding twice any award made, so it's sort of a cap." (R. p. 376, lines 3-17 - Tr. Trans. 987:3-17).

The jury found for Encore on its Trade Secrets claim, awarded \$424,945 in actual damages against the Defendants, and answered "Yes" to the special interrogatory. (R. p. 467 - Verdict Form p. 4). In light of the jury's response to this special interrogatory, the Court awarded Encore its attorney's fees and costs of \$440,500 and levied the maximum amount of exemplary damages allowed under the SCTSA against the Defendants of \$849,890 (twice the actual damages awarded by the jury). S.C. Code Ann. § 38-9-40(C). That brought the Trade Secrets verdict against the Defendants to a total of \$1,715,335.00.

Following post-trial filings and arguments, the Court entered a Final Order and Judgment on April 2, 2018 against Keone Trask and Clear Touch, specifically, awarding the following:

Against Defendant Keone Trask

<u>Actual Damages</u>	<u>Punitive Damages</u>	<u>Cause of Action</u>
\$ 375,733.40	\$ 175,000.00	Breach of Loyalty
675,361.00	1,500,000.00	Breach of Fiduciary Duty
424,945.00	849,890.00	Violation of Trade Secrets Act
<u>+1,476,039.00</u>	<u>+2,000,000.00</u>	Breach of Contract Accompanied by a Fraudulent Act
\$2,952,078.40	+ \$4,524,890.00	= \$7,476,968.40
Plus attorneys' fees		+ 345,600.00
Plus costs & expenses		<u>+ 94,900.00</u>
TOTAL JUDGMENT AGAINST TRASK:		<u>\$7,917,468.40</u>

Against Defendant Clear Touch Interactive, Inc.

<u>Actual Damages</u>	<u>Punitive Damages</u>	<u>Cause of Action</u>
\$ 424,945.00	849,890.00	Violation of Trade Secrets Act
	or	
<u>424,945.00</u>	<u>500,000.00</u>	Tortious Interference
\$ 424,945.00	+ \$ 849,890.00	= \$1,274,835.00
Plus attorneys' fees		+ 345,600.00
Plus costs & expenses		<u>+ 94,900.00</u>
TOTAL JUDGMENT AGAINST Clear Touch:		<u>\$1,715,335.00</u>

(R. pp. 10-11 - Final Order p. 10-11). Encore elected to recover under the Trade Secrets Act cause of action against Clear Touch, as the higher total judgment award of the two levied against the corporate Defendant. Thus, the Trade Secrets award of \$1,715,335.00 comprised the entire judgment against Clear Touch and a notable portion of the judgment against Keone Trask.

The Final Order granted Defendants' Motion to pay the respective judgments against them into the Court under Rule 67 pending resolution of any appeal. By April 17, 2018, Clear Touch paid the entire \$1,715,335 judgment against it into the Court under Rule 67.

Defendants filed a timely notice of appeal of the Final Order following post-trial motions on numerous grounds. Encore filed a cross-appeal soon afterward seeking review of the trial court's refusal to award additional damages under equitable causes of action.

H. *Jami Powell v. Clear Touch Interactive, Inc. et al.*, C.A. No. 2017-CP-23-06520

Shortly after trial ended in the *Encore v. Trask and Clear Touch* matter, Jami Powell, spouse of former Encore CEO Chris Powell, filed a shareholder oppression suit against the Trasks and Clear Touch styled *Jami Powell v. Clear Touch Interactive, Inc. et al.*, C.A. No. 2017-CP-23-06520, claiming that she has an interest in the company. (R. pp. 152-162 - Powell Compl.). Powell's suit seeks, among other things, a declaratory judgment that Clear Touch was not properly converted from an LLC to a C-corporation in January of 2014 when Trask put his life savings into the company, and therefore, she claims to have retained an interest she purported to have in the pre-conversion entity. Defendants filed an Answer denying Powell's claims, and continue to defend that case which is pending before the Business Court. (R. pp. 163-174 - Powell Answer).

I. Encore's Post-Trial Actions Claimed to be in Pursuit of the Trask Judgment

Encore's judgment against Keone Trask remained outstanding throughout 2018, prompting it to pursue various avenues it claimed were for the purpose of satisfying the judgment debt.

First, in May 2018, Encore filed a Motion for Appointment of a Receiver, which the circuit court granted. The Receiver Order was entered on July 23, 2018 for the stated purpose of identifying and taking possession of Keone Trask's assets to secure the outstanding judgment debt against him pending resolution of the appeal. (R. pp. 37-49 - Receiver Order).

Second, on July 26, 2018, Encore moved to intervene in the *Powell* matter claiming that, as a judgment creditor, it had an interest in the resolution of the declaratory judgment because it would impact whether Trask's interest in Clear Touch would be available for application to the

judgment debt. (R. pp. 211-213 - Mot. Intervene; R. pp. 227-234 - Hearing Trans. pp. 11-18).⁵ The court agreed and entered an Order granting Encore's Intervener Motion on September 8, 2018, noting their interest in that case arose from the outstanding judgment debt against Trask. (R. p. 66 - Order Granting Mot. Intervene p. 2).

The Receiver began his job in earnest shortly after entry of the Receiver Order in July 2018. As discussed in Clear Touch and Trask's consolidated appeal filings, the Receiver Order gave the Receiver license to violate various laws related to collecting judgment debts.⁶ The Receiver utilized those overreaching aspects of the Receiver Order through the end of 2018, endangering and embattling not just Trask personally, but Clear Touch, its business partners, and others neither owing anything to Encore nor possessing assets that could satisfy Trask's judgment debt. To add insult to injury, as written, the Receiver Order may require Trask pay the fees and costs incurred by the Receiver in perpetrating these illegal acts allowed under the Receiver Order "[i]f the Judgment is affirmed in whole or in part" on appeal. (R. p. 45 - Receiver Order p. 9). As of early February 2019, the Receiver claimed to have incurred over \$200,000 in fees and expenses, and as discussed below, Trask was ordered to advance yet to be owed funds. (See Supp. R. p. 3 - Plf. Memo Opp. Diss. Rec. p. 3).

J. Trask Pays Judgment Debt into the Court

By the end of 2018, it seemed clear that the Receiver's activities and the Plaintiff's independent actions were aimed at using the judgment debt to gain oversight of Clear Touch and eventual possession or control of the company in some form or fashion. On January 3, 2019, Trask

⁵ Conversion of Clear Touch from an LLC to a C-Corp. in January 2014 required ownership of the company to be 100% held by an IRA in order for Trask to invest his retirement savings into the business.

⁶ Defendants filed an appeal of the Final Order and two subsequent appeals, one of the Receiver Order and another arising out of the dismissal of a separate action between the Parties, all of which were consolidated into Appellate Case No. 2018-001444. That matter is currently pending before the Court of Appeals.

paid the outstanding judgment balance against him into the Court by depositing \$6,660,769.58 with the Clerk. (R. p. 473 - Clerk's Email 1.3.19, Def. Hearing Exh. 4). Trask credited Clear Touch's payment of the Trade Secrets damages (\$1,715,335) in calculating his outstanding judgment debt to Encore, as follows:

<u>Actual Damages</u>	<u>Punitive Damages</u>	<u>Cause of Action</u>
\$ 375,733.40	\$ 175,000.00	Breach of Loyalty
675,361.00	1,500,000.00	Breach of Fiduciary Duty
000,000.00 (CT Paid)	000,000.00 (CT Paid)	Violation of Trade Secrets Act
<u>+1,476,039.40</u>	<u>+2,000,000.00</u>	Breach of Contract Accompanied by a Fraudulent Act
\$2,527,133.80	+ \$3,675,000.00	= \$6,202,133.80
Plus Interest Accrued through 1.03.18		+ <u>398,635.78</u>
TOTAL JUDGMENT AGAINST TRASK:		<u>\$6,600,769.58</u>

(R. p. 472 - Def. Hearing Exh. 3-Defendants' Calculation of Judgments). Trask's payment, along with Clear Touch's April 2018 deposit, total \$8,316,104.58 and fully secured Encore's respective judgments against the Defendants pending resolution of the consolidated appeal.

K. Ending the Receivership and Encore's Intervention in *Powell*

Trask's January 3, 2019 deposit of the outstanding judgment against him with the Clerk eliminated the need for the Receiver and resulted in Encore no longer having standing to remain a Co-Plaintiff in the *Powell* matter. Accordingly, on January 8, 2019, Defendants filed a Motion to Dissolve the Receivership and a Motion to Dismiss Encore as an Intervenor Plaintiff in *Powell*. (R. pp. 208-210 - Mot. Dissolve Rec.; R. pp. 214-216 - Mot. Dismiss Inter.). Encore opposed those Motions, claiming the January deposit was short \$1.2M. Resolution of Defendants' Motions turned upon whether Trask accurately calculated the judgment debt he owed Encore under the

controlling law—namely whether he was liable for paying the \$849,890 in punitive damages under the trade secrets claim even though Clear Touch had already paid that amount into the Court.

i. February 7, 2019 Hearing on Defendants' Motions

The circuit court heard arguments on Defendants' Motions in a February 7, 2019 hearing.⁷ Encore claimed Trask miscalculated the judgment debt against him, and a \$1.2 million-dollar shortfall remained. (Supp. R. pp. 1-4 - Plf. Memo. Opp. 2.5.19). That alleged shortfall was comprised of three items: (1) \$849,890 in exemplary damages under the Trade Secret claim (Plaintiff calculated to total \$904,515.38 with interest as of February 7, 2019) that Encore argued Trask owed despite Clear Touch's payment of the Trade Secret verdict into the Court; (2) the Receiver's fees and costs incurred to that point; and (3) the fees and costs charged by Encore's counsel it attributes to post-judgment collection efforts. (Supp. R. pp. 1-2 - Plf. Memos. Opp. at 1-2; R. pp. 218-242 - Hearing Trans. pp. 2-26). The only item bearing upon the judgment debt was the \$849,890 in exemplary damages. The other two components of the alleged shortfall were fees and costs that Trask *may* be responsible for at a later date, but that he did not owe Encore.

Defendants maintained that because liability for the exemplary damages award under the Trade Secrets claim was and must be joint and several under the controlling law, and in light of it being treated as such during trial, Trask was entitled to credit for Clear Touch's payment of those funds into the Court in calculating his judgment debt. (R. pp. 217-229 - Hearing Trans. pp. 1-13). Otherwise, Defendants contended, Encore would be allowed to recover its exemplary damages under the Trade Secrets claim twice, for a total amount of \$1,699,780, in violation of the Act's unambiguous limitation on the amount of recoverable punitive damages to no more than two times

⁷ The Honorable Judge Lawton McIntosh presided over the trial of the original 2015 *Encore v. Clear Touch* case. Following the 2017 trial, all related litigation between these parties, and the *Powell* matter were assigned to the Business Court, with Judge McIntosh as the appointed judge. He entered the Final Order and Judgment and all other Orders mentioned in the Parties' filings. He presided over the February 7, 2019 hearing.

the actual damages awarded, and well-established common law prohibiting recovery of the same punitive damages for a single wrong more than once. (R. pp. 217-229 - Hearing Trans. pp. 1-13); *see* S.C. Code Ann. § 39-8-40; *Smith v. Strickland*, 314 S.C. 192, 197, 442 S.E.2d 207, 210 (Ct. App. 1994). Defendants' also noted that their liability for the Trade Secret claim damages was treated as joint and several at trial. The jury was asked to assess liability and award actual damages against "Defendants" and answer the special interrogatory asking whether the "Defendants' conduct" in violating the Act was perpetrated in willful, wanton, or reckless disregard of Plaintiff's rights. (R. p. 467 - Verdict Form p. 4).

Encore's opposition to adherence to the law relied upon a footnote in the Final Order that states "Each Defendant, however, will owe exemplary damages of \$849,890 for this claim because each engaged in willful, wanton, and reckless disregard of the Plaintiff's rights." (R. p. 11 - Final Order p. 11 fn3). In Encore's view, the footnote being in the Final Order currently on appeal, required Trask pay the full amount of exemplary damages for the trade secrets claim into the Court regardless of whether the controlling law required treating those damages as joint and several amongst the Defendants. Plaintiff further argued that the statutory provisions relied upon by Defendants were ambiguous and urged they should be interpreted as a cap on the amount of exemplary damages recoverable from *each* Defendant, rather than a limitation on the total amount recoverable from *all* Defendants. (R. pp. 233-240 - Hearing Trans. pp. 17-24). Plaintiff rather boldly attempted to convince the circuit court that Defendants' liability for the trade secret punitive damages was not treated as joint and several at trial, most notably by inaccurately claiming the Verdict Form posed two distinct special interrogatories to the jury —"Your Honor will recall the verdict form on this asked for each defendant – did Mr. Trask willfully and deliberately violate the Trade Secret Act? The jury said yes. Did Clear Touch willfully and deliberately violate the Trade

Secret Act?” (R. p. 230 - Hearing Trans. p. 14). The circuit court reviewed the Verdict Form, pointed out that was not the case, and concluded the it reflected a general verdict against the Defendants under the Trade Secrets claim. (R. pp. 232-233 - Hearing Trans. pp. 16-17).

Encore ultimately admitted that if the Plaintiff can recover exemplary damages on the Trade Secrets claim only once, and the Receiver fees and costs and its post-judgment attorney’s fees and costs are not included in calculating the judgment against Trask, then the Defendants paid the judgments against them in full into the Court as of January 3, 2019. (R. p. 239 - Hearing Trans. p. 23). Plaintiff also conceded that its entire interest in the *Powell* matter was predicated upon having a judgment against Trask. (R. p. 249 - Hearing Trans. p. 40). Regardless, Plaintiff persisted in urging the court to require Trask advance the Receiver fees and its own collection fees and costs not yet owed, simply because he may be liable for them in the future. (R. pp. 239-246 - Hearing Trans. pp. 23-30).

During the hearing, the circuit court stated that it did not intend to include the footnote relied upon by Encore to claim Trask was separately liable for the exemplary damages under the Trade Secrets claim, and doing so was a “mistake” because enforcement as Plaintiff urged would violate the controlling law. (R. pp. 229-230 - Hearing Trans. pp. 13-14). It agreed with Defendants that the SCTSA, common law, and manner in which Defendants’ liability for the alleged trade secret misappropriation was treated at trial, mandated it be joint and several. (R. pp. 247-248 - Hearing Trans. pp. 38-39). Therefore, the court concluded that Trask’s calculation of his judgment liability as of January 3, 2019 correctly credited him for Clear Touch’s payment of all the Trade Secret damages, and the Defendants had paid the entirety of the judgments against them into the Court. (R. p. 241 - Hearing Trans. p. 25). The court also agreed with the fact that the post-judgment components of the claimed \$1.2 million-dollar shortfall had no bearing on the judgment

calculation. (R. pp. 221-222 - Hearing Trans. pp. 5-6). Regardless, it conditioned Encore's dismissal from *Powell* and staying of the Receiver upon Trask depositing all of the Receiver fees and costs through February 7, 2019 with the Court. (R. p. 62 [Order Staying Rec. at 9]; R. p. 77 [Order Dis. at 9]). Following the hearing, Trask was able to deposit the approximate \$200,000 in Receiver fees and costs he did not owe in order to obtain the relief sought in Defendants' Motions.

ii. Order Staying Receiver (March 8, 2019)

Following the hearing, the court entered an Order Staying the Receiver because Defendants had paid the judgments against them into the Court in full. It found that the clear and unambiguous language of § 39-8-40(C) capped the amount of exemplary damages a court may award for trade secret misappropriation to no more than twice the actual damages awarded for violating the Act, and "to adhere to that limitation, Defendants' liability for all aspects of the Trade Secrets award must be treated as joint and several." (R. p. 63 - Order Stay Rec. p. 10). The jury awarding \$424,945 in actual damages under the trade secrets claim in this case, the court found, limited the exemplary damages Encore could recover for violation of the SCTSA to a total of \$849,890. (R. pp. 4-9 - Order Stay Rec. pp. 4-9). It concluded that "because [Encore] can recover the \$849,890 in exemplary damages under the Trade Secrets Act from only one Defendant, Encore is not entitled to the monies comprising its claimed \$1.2 million-dollar shortfall and that Defendants properly calculated the judgment against Trask and paid those sums into the Court." (R. p. 58 - Order Staying Rec. at 5). It cited to the common law prohibition on recovering the same damages arising from a single wrong twice and the fact that Defendants' liability for the alleged trade secret misappropriation was treated as joint and several during trial as reflected in the Verdict Form as further support for its ruling. (R. pp. 59-62 - Order Stay Rec. pp. 6-9).

iii. Order Dismissing Encore from Powell (February 27, 2019)

The circuit court also entered an Order Granting Defendants' Motion to Dismiss Encore from *Powell* finding that it had no standing to remain a party due to Trask's deposit of the entire judgment debt. (R. pp. 77 - Powell Order at 9). That Order was based upon the same reasoning and law as the Order Staying the Receiver to find Trask's payment into the Court fully secured the judgment against him. (R. pp. 72-77 - Powell Order at 4-9).

Encore appealed both the Order Staying the Receiver and the Order Granting Defendants' Motion to Dismiss Encore from *Powell* on March 25, 2019. This Court consolidated those appeals into the present appellate case.

III. LEGAL ARGUMENT AND AUTHORITIES

A. DID THE CIRCUIT COURT ERR IN DETERMINING THAT ENCORE IS SUBJECT TO THE SOUTH CAROLINA TRADE SECRETS ACT'S LIMITATION ON THE AMOUNT OF EXEMPLARY DAMAGES IT MAY RECOVER TO EVALUATE AND RULE UPON DEFENDANTS' MOTIONS

Encore's lack of jurisdiction argument relies upon its inaccurate premise that Defendants sought modification of the Final Order through their Motion to Stay the Receiver and Dismiss Encore from *Powell*, and the lower court's rulings at issue in fact modified that Order. (Ap. Br. at 6, 8-10). Plaintiff, however, misconstrues and mischaracterizes Defendants' Motions and the lower court's Orders on them to conclude they are null and void for want of jurisdiction. (Ap. Br. at 8-9).

Encore first misrepresents the relief sought in Defendants' Motions, claiming that "[i]n January 2019, [Defendants] asked the Circuit Court to modify that Final Order and Judgment so that, instead of each Defendant owing exemplary damages for willful violation of the Trade Secrets Act, Clear Touch's payment of exemplary damages would be credited to Trask." (Ap. Br. at 8). Notably, Encore offers no citation to Defendants' Motions or excerpts from the hearing transcript

in support, as neither reflect a request for modification of the Final Order. In reality, Defendants' Motions asked the lower court to dissolve the Receivership and dismiss Encore from *Powell*, because the full amount of the judgments available under and calculated by the controlling law had been paid into the Court. (R. pp. 208-210 [Mot. Dismiss]; R. pp. 214-216 [Motion Rec.]). At the hearing Defendants asked the lower court to grant this relief either by finding that the entire judgment had been deposited with the Court when calculated under the controlling law, or alternatively, utilize its discretionary powers to stay execution of the judgment pending appeal should it find that Encore was adequately secured by the over \$8 million dollars already deposited with the Clerk. (R. pp. 227-228 - Hearing Trans. pp. 11-12).

Encore also misconstrues the lower court's rulings as "modifying" the Final Order and Judgment to argue they should be null and void. (Ap. Br. at 8-9). Plaintiff maintains that the lower court impermissibly modified the Final Order "to eliminate the exemplary damages award as to each of Trask and Clear Touch." (Ap. Br. at 9 *noting* Order Stay Rec. pp. 4-5). The opening paragraph of the only Order cited for this proposition, however, concludes by stating that "[n]othing in this order shall prohibit plaintiff from establishing that the judgments have not been paid in their entirety." (R. p. 54 - Order Stay Rec. p. 1). More to the point, neither Order challenged in this appeal purports to modify the Final Order. Instead, they contain findings which may be inconsistent with a footnote in the Final Order that the circuit court admitted it did not intend to include and which it thought ran afoul of the law. Inconsistency however, does not equate to modification.

Interestingly, Encore explicitly argued for what it characterizes as impermissible modification of an order on appeal during the February hearing. Specifically, Encore urged the circuit court to order Trask to deposit the Receiver fees and costs incurred through the hearing date

as a condition to granting of his Motions, even though the Receiver Order currently on appeal states that he is not responsible for those fees and costs unless and until all or part of the Judgment is affirmed. (R. p. 239-246, Supp. R. p. 5-11, R. p. 247 - Hearing Trans. at 23-38; *see* R. p. 45 - Rec. Order p. 9)(“If the Judgment is affirmed in whole or in part, Plaintiff shall be entitled to reimbursement of such payments from Trask’s assets....”). Thus, Encore’s actions betray its words.

In sum, Defendants petitioned the circuit court to put an end to the Receivership and Encore’s involvement in *Powell* due to the them depositing the totality of the collectable judgment debt as calculated under the controlling law into the Court. The circuit court did not err in applying the law to confirm Defendants’ calculations were accurate, represented the totality of collectible judgment debt, and therefore warranted staying the Receiver and dismissing Encore from a case in which they no longer had an interest. In doing so it did not purport to modify the Final Order, and only recognized that it did not intend to and mistakenly included the footnote upon which Encore argues it may recover double what the law allows. (R. pp. 229-230 - Hearing Trans. pp. 13-14).

B. THE LOWER COURT’S APPLICATION OF UNAMBIGUOUS PROVISIONS OF THE SCTSA TO CALCULATE THE TOTAL JUDGMENT AMOUNT WAS NOT AN ERROR OF LAW WHERE THE JURY RENDERED A SINGLE ACTUAL DAMAGES AWARD AGAINST BOTH “DEFENDANTS”

Encore’s claim that the SCTSA allows it to recover the entire \$849,890 in exemplary damages from both Trask and Clear Touch is premised upon mischaracterization of the jury’s trade secret award and the lower court’s rulings in the challenged Orders. Furthermore, it assumes that the provisions of the SCTSA at issue require interpretation. (Ap. Br. at 11-14). Acceptance of Encore’s position requires ignoring the unambiguous law, the manner in which Defendants’ trade secret liability was treated at trial, and a misreading of the lower court’s rulings.

1. *The jury's trade secret award was joint and several*

Encore insists the jury awarded “two separate awards – one against Trask and one against Clear Touch” under the Trade Secrets claim. (Ap. Br. at 10). It did not. At trial, Defendants’ liability for the alleged trade secret misappropriation was treated as joint and several as reflected by the wording of the Verdict Form. (R. p. 467 - Verdict Form p. 4). That Form asked the jury to determine whether the “Defendants” violated the SCTSA and provided a single line for inserting the actual damage award. *Id.* The jury found for the Plaintiff and wrote in a single actual damages award of \$424,945. The Verdict Form then asked “Was the *Defendants’* conduct in violating the South Carolina Trade Secrets Act committed by the *Defendants* in a willful, wanton, or reckless disregard of Plaintiff’s rights?” *Id.* (*emphasis added*). The jury answered “yes.” Both questions asked the jury to make a finding as to *Defendants’* alleged acts of trade secret misappropriation and had them render the actual damages verdict as one figure against both. Encore agrees that the actual damages award was joint and several, and credited Trask for Clear Touch’s payment of it. (See R. pp. 229-230 [Hearing Trans. pp. 13-14]; Supp. R. p. 3 [Plf. Memo Opp. p. 3]). Yet, somehow Plaintiff insists the jury’s trade secret verdict resulted in two awards, one against Trask and another against Clear Touch, thereby permitting the court to assess separate exemplary damages against each. (Ap. Br. at 11). The objective facts and record show otherwise, and SCSTA thus caps total exemplary recovery based upon the one award joint actual damages award returned by the jury in this case.

2. *Section 39-8-40 of the SCTSA does not allow Encore to recover quadruple the amount of actual damages awarded at trial*

The South Carolina Trade Secrets Act limits the amount of exemplary damages recoverable for willful violation of the Act to no more than two times the actual damages awarded for the misappropriation, stating in pertinent part that:

- (A) A complainant is entitled to recover *actual damages* for misappropriation of trade secrets....
- (B) Damages may include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss....
- (C) Upon a finding of willful, wanton, or reckless disregard of the plaintiff's rights, the court *may award separate exemplary damages in an amount not exceeding twice any award made under subsection (A)*.

S.C. Code Ann. § 39-8-40(*emphasis added*).

Encore challenges the circuit court's application of the Act's damage provision by misstating its holding, claiming it held that exemplary damages for misappropriation are limited to double any award of actual damages, "no matter how many awards of actual damages against multiple defendants there are." (Ap. Br. at 10 *citing* to Order Stay Rec. p. 8 – R. p. 62). The challenged orders did not make that particular finding. Instead, they abide by the unambiguous language of the Act that requires considering the number and amount of each actual damage award granted to determine the statutory cap on the amount of recoverable exemplary damages. That analysis would account for the number of Defendants insofar as different actual damage awards were levied against them individually. If, however as was the case here, only one actual damages award is granted to the "Defendants" then their number has no impact on the amount of exemplary damages recoverable under the Act because it is a single award for which Defendants are jointly liable.

Encore summarily concludes that these statutory provisions "clearly authorize the Court to award separate exemplary damages against each defendant" where "a jury renders a verdict resulting in awards against two defendants." (Ap. Br. at 10). According to the Plaintiff, had the General Assembly intended the circuit court's interpretation, "it would have limited the total exemplary damages to twice 'actual damages' instead of twice 'any award.'" (Ap. Br. at 10).

That's exactly what the General Assembly did. Subsection (C) limits exemplary damages to "an amount not exceeding twice *any award* made under subsection (A)." "Any award" under subsection (A) is and can only be the "actual damages for misappropriation of trade secrets." Here, the trade secret verdict and actual damage award of \$424,945 was returned against "Defendants" jointly, making the total recoverable amount of exemplary damages \$894,890. Thus, the General Assembly did intend the lower court's interpretation, and the one advanced by Encore is betrayed by review of the clear statutory language.

3. *Interpretation consistent with common law was not required for an Act that explicitly displaced conflicting laws providing civil remedies for trade secret misappropriation*

Encore attempts to argue for error in the lower court's application of the SCTSA by accusing it of failing to interpret the Act "consistent with common law" due to a purported misinterpretation of the holding in *Smith v. Strickland*, 314 S.C. 192, 442 S.E. 2d 207 (Ct. App. 1994) and failing to follow *McGee v. Bruce Hosp., Sys.*, 344 S.C. 466, 543 S.E.2d 286 (2001). (Ap. Br. p. 13). Plaintiff claims the lower court was faced with two ways to interpret the statute and "should not have chosen the one 'in degradation of common law rights' because 'another interpretation is reasonable.'" *Id.*

First, this incorrectly assumes interpretation of the statute was necessary. *Hodges v. Rainey*, 314 S.C. 79, 85 (Ct. App. 2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to interpose another meaning."). Second, *assuming arguendo*, interpretation was needed, the court did not need to consider its impact on common law rights because the SCTSA provides the exclusive and controlling law concerning what one may recover for trade secret misappropriation and explicitly displaced "conflicting tort, restitutionary, and other laws of this State providing civil remedies for misappropriation of a trade secret." S.C. Code 39-8-110. Accordingly, Encore's claim that the court erred by interpreting the statute in "degradation of

common law” is a red herring, as common law has nothing to do with the amount of exemplary damages it may recover for trade secret misappropriation.

Similarly, the argument that the lower court’s interpretation of the SCTSA is inconsistent with the “common law principle that punitive damages are intended to punish all offenders separately” is another digression and attempt to confuse a simple issue. If Encore wished to have exemplary damages imposed upon each Trask and Clear Touch, it could have sought to have the Verdict Form contain separate liability inquires and award determinations for each. It did not, and Defendants’ trade secret liability was therefore treated and joint and several at trial, requiring it continue to be regarded as such in order to adhere to the SCTSA’s limits on the amount of recoverable punitive damages. The fact is Encore pursued its trade secrets claims as a joint liability cause of action from the outset, and only in post-trial has it diverged from that approach.

The lower court’s application of the Act does not prohibit imposition of individual punitive damages as Plaintiff claims. It just found that is not what happened in this case, and therefore, the SCTSA prohibited imposing exemplary damages against Trask and Clear Touch beyond two times the actual award amount. A court’s adherence to legislatively mandated limits on the amount of exemplary damages it may impose cannot be deemed an error of law. Nor can imposition of the highest amount of punitive damages legally permissible be regarded as a failure to effectuate the punitive purpose of those awards as Encore contends. (Ap. Br. p. 13-14). It is literally the most punitive measure the court can take for the particular misdeed. Encore ignores this undeniable conclusion, makes a nonsensical claim that there was a failure to adequately punish Defendants, and urges this Court to find reversible error in the lower court’s refusal to violate the SCTSA and heap double the amount of recoverable exemplary damages upon its adversaries. (Ap. Br. at 10-14). In short, Encore wants this Court to find that Trask and Clear Touch’s alleged act of trade

secret misappropriation was so reprehensible they can be subjected to a greater degree of punishment than established by the legislature; an untenable outcome that requires ignoring the law to give Encore some \$900k more than it is entitled to in addition to the millions already deposited to secure the judgments. Encore has extracted its pound of flesh and then some from the Trasks and Clear Touch, and it cannot deem the trial court's refusal to sanction Plaintiff obtaining more than the law allows an error of law.

C. DID THE CIRCUIT COURT ERR IN DISMISSING ENCORE FROM THE *POWELL* CASE FOLLOWING TRASK'S DEPOSIT OF THE ENTIRE JUDGMENT AGAINST HIM INTO THE COURT

Encore's entire argument that its dismissal from *Powell* was in error is its claim that both Trask and Clear Touch are responsible for paying the full \$849,890 in exemplary damages awarded under the SCTSA, and therefore a portion of his judgment debt remains unsecured, leaving Plaintiff with standing to remain a party. (Ap. Br. at 14-15). It offers nothing new in support and generally repeats the inaccurate claim that Trask and Clear Touch owe separate exemplary damages under the Act. As discussed above, this argument necessarily fails due to the fact that the trade secrets damages – both actual and exemplary – were awarded against the Defendants collectively and the circuit court's adherence to the limitations imposed by the SCTSA upon the amount of exemplary damages a party may recover for misappropriation was not in error.

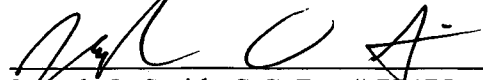
Without the outstanding judgment, Encore has no interest in the outcome of *Powell* and thus, no standing to remain a party to that case. The circuit court rightfully dismissed Encore as a co-plaintiff in that matter due to its lack of standing.

IV. CONCLUSION

For the reasons set forth above, the Circuit Court's Order Dismissing Encore from the *Powell* matter dated February 27, 2019 and the Order Staying the Receivership dated March 8, 2019 should be affirmed.

Respectfully Submitted,

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November 22, 2019

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. 2019-000530

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SC Court of Appeals

Jami Powell and Encore Technology Group, LLC, Plaintiffs,

Of which Encore Technology Group, LLC is theAppellant,

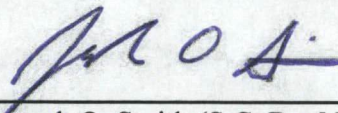
v.

Clear Touch Interactive, Inc. (a Nevada Corporation)
f/k/a Clear Touch Interactive, LLC (a Nevada LLC);
Keone Trask and Tamara Trask.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondents complies with Rules 211(b),
SCACR.

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November 22, 2019