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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

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Appellant Case No. 2018-001444

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

v.

Keone Trask and Clear Touch Interactive, Inc.
f/k/a Clear Touch Interactive, LLC, .....Appellants/Respondents.

AND

Clear Touch Interactive, Inc. f/k/a Clear Touch
Interactive, LLC, .....Appellants/Respondent,

v.

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

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# RECORD ON APPEAL - VOLUME II

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| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
| ENCORE TECHNOLOGY GROUP, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br><br>Defendants. | Case No. 2015-CP-23-05757<br><br>**PLAINTIFF'S MOTION FOR JUDGMENT INCLUDING RESTITUTION, EXEMPLARY DAMAGES, ATTORNEYS' FEES, EXPERT WITNESS FEES, COSTS AND OTHER EXPENSES** |

Plaintiff Encore Technology Group, LLC ("Encore") hereby moves the Court, pursuant to S.C. Code Ann. §§ 39-8-40 and -80, Rule 54, S.C.R.C.P., its Contract, and other applicable law, for judgment against Defendants Keone Trask ("Trask") and Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch"), including awards by the Court of restitution, exemplary damages, attorneys' fees, expert witness fees, costs and other expenses to Encore, as follows:

| | |
|---|---|
| Restitution | $5,536,254 |
| Exemplary Damages | 849,890 |
| Attorneys' Fees | 345,600 |
| Other costs & expenses | 94,900 |

This motion is made upon the following grounds:

In this case, Trask set up and pursued a side company, Clear Touch, while employed by and under a Non-Disclosure and Non-Solicitation Agreement (the "Contract") with Encore. Trask admitted that he breached his duty of loyalty to Encore, for which the jury awarded

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$375,733.40 actual damages and $175,000.00 punitive damages. The actual damages award compensated Encore for Trask's wages, benefits and a portion of conference expenses Encore paid for Trask. Plaintiff's Exhibits 10.B and 10.G.

Trask also admitted that he breached his fiduciary duties to Encore, for which the jury awarded Encore $675,361 actual damages and $1,500,000 punitive damages. The actual damages award compensated Encore for its lost profits on sales to its customers as a result of Trask's not disclosing that Encore could purchase products directly from the true suppliers instead of Clear Touch. Plaintiff's Exhibit 10.C.

The jury also awarded Encore actual damages of $424,945, which compensated Encore for lost profits on sales to Leon County Schools made by Clear Touch. Plaintiff's Exhibit 10.D. The jury awarded these damages on Encore's claim of breach of contract against Trask, Encore's claim of tortious interference against Clear Touch, and violation of the South Carolina Trade Secrets Act by both Defendants. On the latter claim, the jury found that Defendants' conduct in violating the South Carolina Trade Secrets Act was willful, wanton and in reckless disregard of Encore's rights. The jury also awarded Encore punitive damages in the amount of $500,000 against Clear Touch for tortious interference with the Encore-Clear Touch Contract.

Finally, the jury found Trask liable for breach of contract accompanied by a fraudulent act in the amount of $1,476,039 actual damages and awarded $2 million punitive damages. This verdict compensated Encore for a portion of the net profits lost to Clear Touch when Trask breached the "business opportunity" provision of the Contract. Plaintiff's Exhibit 10.E.

Based upon the evidence and foregoing jury verdict, Encore is entitled to judgments against both Defendants, including awards by the Court of restitution, exemplary damages, attorneys' fees, expert witness fees, costs and other expenses, as follows:

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1. **The Court should rule that both Defendants are liable to make restitution to Encore in the amount of $5,536,254 for unjust enrichment**.

a. **Entitlement to Restitution**

Defendants have been unjustly enriched in the amount of the value of Clear Touch, or $5,536,254, and should be required to pay restitution in that amount. The evidence was undisputed that, while he was Encore's employee, Trask built the Clear Touch business using Encore's monetary, personnel, and other resources, with Encore taking all of the risk. If Trask had used Encore's resources to build a rental house and collected rent from its tenants, he would be required to pay Encore restitution in the amount of the rent collected plus the value of the house. Encore's expert testified that Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254. Plaintiff's Exhibit 10.E.

Encore's valuation was based upon very conservative assumptions. For example, using Clear Touch's actual earnings through 2016 and assuming a growth rate of 2% (which was significantly less than historical rates) through 2019, Encore's expert calculated lost profits from the Clear Touch business opportunity of $7,798,632. Plaintiff's Exhibit 10.J (last page). Additionally, Encore's expert based his value upon Clear Touch's earnings from two years ago, which have increased significantly since then, *id.* (Appendix 7 - Clear Touch Capitalization of Earnings), did not account for Encore's loss of the time value of money, and did not take into account Defendants' fraudulent acts and failure to preserve evidence. While Clear Touch hired a business valuation expert, Dr. Charles Alford, who testified at trial, he did not value Clear Touch or offer any different valuation.

Where a defendant has been unjustly enriched, the plaintiff is entitled to restitution. *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473-74, 366 S.E.2d 12, 14-15 (Ct. App. 1988).

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"Restitution is a remedy designed to prevent unjust enrichment." *Sauner v. Pub. Serv. Auth. of S.C.,* 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003); *see also Ellis,* 294 S.C. at 473, 366 S.E.2d at 14 ("Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff.").

"To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." *Sauner,* 354 S.C. at 409, 581 S.E.2d at 167; *see also Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994); *Webb v. First Fed. Savings & Loan Ass'n of Anderson*, 300 S.C. 507, 513, 388 S.E.2d 823, 827 (Ct. App. 1989), *overruled on other grounds by Myrtle Beach Hosp. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000); *Niggel Assocs., Inc. v. Polo's of North Myrtle Beach*, 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1984). The plaintiff must present evidence concerning the amount by which the defendant was unjustly enriched. *Id.* at 533-34, 374 S.E.2d at 509.

Defendants have been unjustly enriched in the amount of the value of Clear Touch, or $5,536,254. Defendants should be required – jointly and severally – to pay restitution in that amount.

b. **Election of Remedies**

Upon the Court's finding that Defendants have been unjustly enriched and ordering them to pay restitution, Plaintiff elects the remedy that will yield the highest judgment from each Defendant. The doctrine of election of remedies, designed to prevent double redress for a single wrong, involves a choice between different forms of redress afforded for the same injury. *GTR Rental, LLC v. DalCanton*, 547 F. Supp. 2d 510, 515 (D.S.C. 2008). The principle has no

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application, however, where separate causes of action, based on different facts, exist. *Id.*; *see also Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995).

In *GTR Rental*, the defendant received jury awards for breach of fiduciary duty, conversion, fraud, violation of the South Carolina Unfair Trade Practices Act, and breach of contract. *Id.* at 514-15. Because the causes of action were based on different elements, and the facts supporting the separate claims occurred "over a lengthy period and involved numerous activities involving [plaintiff's] customers, property, and finances," the Court held that "the complex series of transactions undertaken by Defendants does not comprise a single wrong that would give rise to but one cause of action," thus making election unnecessary. *Id.* at 515.

Similarly, in *Rivers v. Rivers*, 292 S.C. 21, 354 S.E.2d 784 (Ct. App. 1987), *overruled on other grounds by Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992), the Court did not require election of remedies by a plaintiff who received damages for both alienation of affection and criminal conversation. Even though the causes of action were so related that they were described as "twin causes of action" and the losses for which a plaintiff could recover under both causes of action were similar, the Court held that no election was required because "[t]he causes of action are distinct, they arose out of separate and distinct facts, and the two alleged wrongs did not result in a single and the same loss." *Id.* at 29-31, 788-790.

In this case, because each legal causes of action were based on different elements and because the facts supporting the various claims involved numerous activities, "the complex series of transactions undertaken by Defendants does not comprise a single wrong that would give rise to but one cause of action." Therefore, except for the verdicts for the Leon County School profits of $424,945, election between the legal claims should not be required. Upon the

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Court's awarding restitution to Encore, however, election could properly be required. Therefore, adopting a conservative approach that ensures Encore is not receiving double redress for the loss of Leon County School profits, Encore will elect the higher against each Defendant of either (a) the restitution amount determined by the Court, or (b) the amounts based upon the jury verdict as follows:

**Against Defendant Keone Trask**

| **Actual Damages** | **Punitive Damages** | |
|---|---|---|
| $ 375,733.40 | $ 175,000.00 | breach of loyalty (Encore 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 as breach of contract) |
| +1,476,039.00 | +2,000,000.00 | breach of contract accompanied by a fraudulent act (portion of Clear Touch profits) |

$2,952,078.40 + $4,524,890.00 = $7,476,968.40

Plus attorneys' fees (see below) + 345,600.00
Plus costs & expenses (see below) + 94,900.00

**TOTAL LEGAL CLAIMS AGAINST TRASK: $7,917,468.40**

**Against Defendant Clear Touch 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 (see below) + 345,600.00
Plus costs & expenses (see below) + 94,900.00

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**TOTAL LEGAL CLAIMS AGAINST CT:** **$1,715,335.00**

Accordingly, upon the Court's awarding Encore full restitution of $5,536,254, Encore would elect judgment against Trask of $7,917,468.40 and judgment against Clear Touch of $5,536,254.

2. **The Court should enter judgment against both Defendants including an award of $849,890 in exemplary damages**.

Under the South Carolina Trade Secrets Act, "[u]pon a finding of wilful, wanton, or reckless disregard of the plaintiff's rights, the court may award separate exemplary damages in an amount not exceeding twice any award" of actual damages. S.C. Code Ann. § 39-8-40. It is appropriate to award exemplary damages in an amount that is twice the actual damages award where the evidence demonstrates a willful and wanton disregard of the plaintiff's rights. *See Sonoco Products Co. v. Guven,* No. 4:12-CV-00790-BHH, 2015 WL 127990, at *11 (D.S.C. Jan. 8, 2015) (doubling the amount of actual damages to set the award for exemplary damages under the South Carolina Trade Secrets Act).

In this case, the jury found that Defendants' violation of the Trade Secrets Act was willful, wanton, and in reckless disregard of the plaintiff's rights. Therefore, the actual damages of $424,945 should be doubled and awarded as exemplary damages in the amount of $849,890.[1]

3. **The Court should enter judgment against both Defendants including $345,600 in attorneys' fees and $94,900 in expert witness fees, costs and other expenses**.

The Trade Secrets Act provides that if "willful misappropriation exists, the court may award reasonable attorney's fees to the prevailing party." S.C. Code Ann. §§ 39-8-80(3). The

[1] Because the jury awarded $500,000 in punitive damages for Clear Touch's tortious interference with contractual relations on the same actual damages of $424,945, the Court's exemplary damage award should at least equal if not exceed this amount.

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Contract also provides that, in the event Encore "prevails, in whole or in part, in any such action, [Trask] shall be liable to [Encore] for all of its costs and expenses, including, without limitation, reasonable attorney fees and expert witness fees." Plaintiff's Exhibit 2, p. 2 ("General Provisions"). "The law is clear in South Carolina that attorney fees are recoverable when authorized by contract or statute." *Charleston Lumber Co. v. Miller Housing Corp.,* 318 S.C. 471, 483, 458 S.E.2d 431, 438 (Ct. App. 1995).

Encore prevailed at the trial of this action in that the jury awarded it damages for Defendants' breach of contract, breach of contract accompanied by a fraudulent act, tortious interference with contract, and willful violation of the South Carolina Trade Secrets Act. Accordingly, Encore is entitled to attorneys' fees, expert witness fees, and other costs and expenses for the following reasons:

1. As demonstrated by the Affidavit of Gregory J. English filed herewith, Encore's counsel worked on this case for the following number of hours at the following hourly rates:

| **Attorney** | **Hours Worked** | **Rate** | **Total Billing** |
|---|---|---|---|
| Greg English | 491.1 | $ 400.00 | $ 196,440.00 |
| Rita Bolt Barker | 24.2 | $ 380.00 | $ 9,196.00 |
| Rita Bolt Barker | 277.4 | $ 350.00 | $ 98,507.00 |
| Meliah Jefferson | 37.3 | $ 375.00 | $ 13,987.50 |
| Andrew Coburn | 5.3 | $ 400.00 | $ 2,120.00 |
| Chris Schoen | 1.1 | $ 310.00 | $ 341.00 |
| Mark Bakker | 0.6 | $ 400.00 | $ 240.00 |
| Jillene Van Hoy | 24.7 | $ 185.00 | $ 4,569.50 |
| Jillene Van Hoy | 92.4 | $ 200.00 | $ 18,480.00 |
| Denise Eubanks | 0.3 | $ 200.00 | $ 60.00 |
| Lynda Romanstine | 8 | $ 195.00 | $ 1,560.00 |
| Lynda Romanstine | 0.5 | $ 200.00 | $ 100.00 |
| | | **TOTAL:** | **$345,601.00** |

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2. It is for the Court to fix a reasonable amount of attorneys' fees. In determining the amount of reasonable attorneys' fees, the Court must consider: (1) the nature, extent, and difficulty of the legal services rendered; (2) time and labor necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).

3. Based upon the facts of this case and the law concerning awards of attorneys' fees, Encore should receive amount requested above for attorneys' fees, plus costs and associated expenses. The hours devoted to this case and Encore's attorneys' rates justify this award of attorneys' fees, in addition to all costs and expenses. Additionally, as noted in *Blumberg*, several factors other than time and an hourly rate are relevant to an award of attorneys' fees:

(A) The case required a jury trial. Attorneys were required to be in court the entire week of September 25, 2017. In a day when most cases are settled and few cases are tried, this case was more difficult and required more skill to resolve than most.

(B) Because Defendants had lost or destroyed many e-mails and other documents, Encore had to seek relevant documents from third parties through subpoenas. Defendants moved to quash nearly all of these subpoenas, requiring Encore's counsel to attend hearings to obtain denials of Defendants' motions to quash to collect relevant evidence.

(C) The professional standing of Encore's counsel is outlined in the Affidavit of Gregory J. English, Esq. Encore's counsel have litigated numerous other cases involving business disputes, such as *Powell v. Floyd*, Case No. 97-2686, Unpub. Decision at 11-12 (4th Cir. Oct. 12, 1999), and *South Carolina Department of Transportation vs. Jetport Eighty-Five Associates*. *Powell* involved disputes over the value of businesses in Spartanburg County, South

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Carolina and the District Court awarded, and the Fourth Circuit Court of Appeals affirmed, $241,000 in attorneys' fees and costs in 1999. The *Jetport* case involved a condemnation by SCDOT and Judge Cole awarded the full amount of attorneys' fees and costs requested at full hourly rates ($325 per hour for Mr. English in 2008).

(D) As outlined in the Affidavit, Encore's attorneys had other available opportunities to handle work at reasonable fees at higher hourly billing rates than set forth above, but accepted this case with the belief that they would be fairly compensated.

(E) The fee requested is in line with that customarily charged in the locality for similar services. A case such as this – involving a jury trial and court appearances for five (5) days – would be considered undesirable within the legal community.

(F) The Wyche Firm obtained beneficial results for Encore. It obtained favorable verdicts totaling millions in actual and punitive damages. The results obtained were very beneficial for Encore.

4. In addition, Encore incurred, or the Wyche Firm incurred on Encore's behalf, the following expenses and other costs for this litigation:

| | |
|---|---|
| Expert Fees | $57,326.50[2] |
| Trial Exhibit Presentation | 14,418.14 |
| Deposition transcripts | 7,988.08 |
| Out-of-state subpoenas | 5,076.20 |
| Westlaw legal research | 3,662.04 |

[2] Encore's expert, Mike Meilinger, prepared both a preliminary report for mediation and a final report after receiving Defendants' books and records. Because those books and records were prepared on a cash basis, substantial effort was required to convert them to an accrual basis. In addition, Mr. Meilinger was required to review third-party documents Defendants did not produce to complete his assessment of Defendants' financial records.

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| | |
|---|---|
| Witness travel | 1,983.51 |
| Copy costs | 1,281.80 |
| Mediation Fees | 1,004.72 |
| Other costs & expenses | 1,739.90 |
| Lunch expense during trial | + 419.56 |
| **Total**: | **$94,900.45** |

A statement detailing these costs is attached to the Affidavit of Mr. English.

## CONCLUSION

For the foregoing reasons, the Defendants should pay the amounts requested above for restitution, exemplary damages, attorneys' fees, expert witness fees, costs and other expenses for Encore's successful prosecution of this case. Specifically, the Court should enter judgment for the higher of:

A. Restitution in the amount fixed by the Court; or

B. The amounts awarded by the jury, plus exemplary damages, attorneys' fees, expert witness fees, costs and other expenses as follows:

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**Against Defendant Keone Trask**

| **Actual Damages** | **Punitive Damages** | |
|---|---|---|
| $ 375,733.40 | $ 175,000.00 | breach of loyalty (Encore 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 as breach of contract) |
| +1,476,039.00 | +2,000,000.00 | breach of contract accompanied by a fraudulent act (portion of Clear Touch profits) |

$2,952,078.40 + $4,524,890.00 = $7,476,968.40

Plus attorneys' fees (see below) + 345,600.00
Plus costs & expenses (see below) + 94,900.00

**TOTAL LEGAL CLAIMS AGAINST TRASK: $7,917,468.40**

**Against Defendant Clear Touch 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 (see below) + 345,600.00
Plus costs & expenses (see below) + 94,900.00

**TOTAL LEGAL CLAIMS AGAINST CT: $1,715,335.00**

Upon the Court's awarding Encore full restitution of $5,536,254, Encore would elect judgment against Trask of $7,917,468.40 and judgment against Clear Touch of $5,536,254.

Respectfully submitted,

WYCHE, P.A.

By: s/ Gregory J. English
Gregory J. English (SC #65470)

44 East Camperdown Way
Post Office Box 728
Greenville, SC 29602-0728
(864) 242-8200

Attorneys for Plaintiff
Encore Technology Group, LLC

October 9, 2017

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| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
| ENCORE TECHNOLOGY GROUP, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br><br>Defendants. | Case No. 2015-CP-23-05757<br><br>**AFFIDAVIT OF GREGORY J. ENGLISH, ESQ.** |

The Affiant, Gregory J. English, after being duly sworn, states as follows:

1. I have personal knowledge of the facts set forth herein, am over 18 years of age, and am otherwise competent to give this affidavit.

2. I am a shareholder of Wyche, P.A. (the "Wyche Firm"), which represented Plaintiff Encore Technology Group, LLC ("Encore") in the above-referenced case. I was the attorney primarily responsible for managing and directing the work performed by the Wyche Firm on Encore's behalf in this action.

3. Encore prevailed at the trial of this action in that the jury awarded it millions of dollars in actual damages and punitive damages.

4. Attorneys and paralegals of the Wyche Firm worked on this case for the following number of hours at their standard hourly rates:

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| Attorney | Hours Worked | Rate | Total Billing |
|---|---|---|---|
| Greg English | 491.1 | $ 400.00 | $ 196,440.00 |
| Rita Bolt Barker | 24.2 | $ 380.00 | $ 9,196.00 |
| Rita Bolt Barker | 277.4 | $ 350.00 | $ 98,507.00 |
| Meliah Jefferson | 37.3 | $ 375.00 | $ 13,987.50 |
| Andrew Coburn | 5.3 | $ 400.00 | $ 2,120.00 |
| Chris Schoen | 1.1 | $ 310.00 | $ 341.00 |
| Mark Bakker | 0.6 | $ 400.00 | $ 240.00 |
| Jillene Van Hoy (paralegal) | 24.7 | $ 185.00 | $ 4,569.50 |
| Jillene Van Hoy (paralegal) | 92.4 | $ 200.00 | $ 18,480.00 |
| Denise Eubanks (paralegal) | 0.3 | $ 200.00 | $ 60.00 |
| Lyn Romanstine (paralegal) | 8 | $ 195.00 | $ 1,560.00 |
| Lyn Romanstine (paralegal) | 0.5 | $ 200.00 | $ 100.00 |
| | | TOTAL: | $345,601.00 |

A detailed statement showing how this time was spent is attached hereto as Exhibit A. Exhibit A is a true and accurate statement of the time spent by attorneys and paralegals of the Wyche Firm on this case, is kept in the ordinary course of our business, and the entries are made by persons with first-hand knowledge of the information in them at or near the time of the work. During this time period, my standard hourly rate ranged from $415 to $425 per hour and Ms. Barker's was $380 per hour, but we discounted these rates for Encore.

5. In determining the appropriate amount of attorneys' fees for this case, we have considered all relevant factors, including but not limited to the nature, extent and difficulty of the case; the time necessarily devoted to the case; and the results obtained. Based upon all of the relevant considerations, it is our opinion that $345,600 is a reasonable attorneys' fee for Defendants to pay for the Wyche Firm's efforts in this case on behalf of Encore.

6. The two lawyers primarily involved in this action were Ms. Barker and me. Our professional standing is one of the factors for the Court's consideration. To assist the Court in measuring such professional standing, I submit brief excerpts from our respective bios:

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Gregory J. English - Harvard University (J.D., *magna cum laude,* 1992); Murray State University (B.A., *summa cum laude,* 1989); *Harvard Journal of Law and Public Policy* (Editor, 1989-1990; Article Editor, 1990-1991; Executive Editor, 1991-1992). South Carolina Commission on Consumer Affairs, 1995-1997; Greenville County Board of Heath (1997-2003). Visiting Lecturer, Clemson University (2004-2007). Selected for inclusion in *Best Lawyers in America*, Commercial Litigation, from 2007 to the present. Listed in *Chambers USA*, from 2014 to the present. Admitted to the South Carolina bar, 1992.

Rita B. Barker – Harvard University (J.D., 2004); Clemson University (B.A., *summa cum laude*, 2001); *Harvard Women's Law Journal* (Executive Editor, 2002-2003). Visiting Lecturer, Clemson University (2007) and Furman University (2012-2014). Selected for inclusion in *Best Lawyers in America*, from 2012 to the present. Listed in *Chambers USA*, from 2014 to the present. Admitted to the Georgia bar, 2004, and South Carolina bar, 2007.

7. Within our firm, Ms. Barker and I have primarily engaged in litigation with an emphasis on business litigation. My own experience includes work on numerous cases involving business disputes, such as *Powell v. Floyd*, Case No. 97-2686, Unpub. Decision (4th Cir. Oct. 12, 1999), and *South Carolina Department of Transportation vs. Jetport Eighty-Five Associates. Powell* involved disputes over a business in Spartanburg County, South Carolina and the District Court awarded, and the Fourth Circuit Court of Appeal affirmed, $241,000 in attorneys' fees and costs in approximately 1999. The *Jetport* case involved a condemnation by SCDOT and Judge Cole awarded the full amount of attorneys' fees and costs requested at counsels' full hourly rates ($325 per hour for Mr. English in 2008).

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8. A case such as this – involving a jury trial and court appearances for nearly an entire week – would be considered undesirable within the legal community. We had other available opportunities to handle work at reasonable fees based on higher hourly billing rates than set forth above, but we accepted this case and turned our attention to it with the belief that we would be fairly compensated.

9. As to the amount in controversy and the results obtained, the Court can, of course, make this assessment without assistance. We were attempting to obtain a favorable verdict in the face of the Defendants' defenses in a very complicated case. The results obtained – a verdict for millions of dollars in actual and punitive damages, was very beneficial for Encore.

10. In addition, Encore incurred, or the Wyche Firm incurred on Encore's behalf, the following expenses and other costs for this litigation:

| | |
|---|---|
| Expert Fees | $57,326.50 |
| Trial Exhibit Presentation | 14,418.14 |
| Deposition transcripts | 7,988.08 |
| Out-of-state subpoenas | 5,076.20 |
| Westlaw legal research | 3,662.04 |
| Witness travel | 1,983.51 |
| Copy costs | 1,281.80 |
| Mediation Fees | 1,004.72 |
| Other costs & expenses | 1,739.90 |
| Lunch expense during trial | + 419.56 |
| **Total:** | **$94,900.45** |

Detailed statements itemizing these costs and expenses are attached hereto as Exhibit B. Exhibit B is a true and accurate statement of costs and expenses incurred by Encore for this case.

**FURTHER THE AFFIANT SAITH NOT.**

Gregory J. English

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 6th DAY OF OCTOBER, 2017

Sandra J. Crandall
Notary Public for South Carolina
My commission expires: 9/5/23





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# EXHIBIT A

| Fees | Hours | Rate | Total |
|---|---|---|---|
| Greg English | 491.1 | $ 400.00 | $ 196,440.00 |
| Andrew Coburn | 5.3 | $ 425.00 | $ 2,120.00 |
| Rita Bolt Barker | 24.2 | $ 380.00 | $ 9,196.00 |
| Rita Bolt Barker | 277.4 | $ 350.00 | $ 98,507.00 |
| Meliah Jefferson | 37.3 | $ 375.00 | $ 13,987.50 |
| Chris Schoen | 1.1 | $ 310.00 | $ 341.00 |
| Mark Bakker | 0.6 | $ 400.00 | $ 240.00 |
| Jillene Van Hoy | 24.7 | $ 185.00 | $ 4,569.50 |
| Jillene Van Hoy | 92.4 | $ 200.00 | $ 18,480.00 |
| Denise Eubanks | 0.3 | $ 200.00 | $ 60.00 |
| Lynda Romanstine | 8 | $ 195.00 | $ 1,560.00 |
| Lynda Romanstine | 0.5 | $ 200.00 | $ 100.00 |
| | | | **$ 345,601.00** |

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Client: 20677 Encore Technology Group LLC
Matter: 8 vs. Keone Trask, et al

| Matter | Date | Timekeeper | Bill | Hours | Rate | Amount | Narrative |
|---|---|---|---|---|---|---|---|
| 8 | 09/03/2015 | 227 | 178465 | 0.40 | $ 400.00 | $ 160.00 | Phone calls with Mr. Newnam regarding Cleartouch issues and s |
| 8 | 09/08/2015 | 227 | 178465 | 0.50 | $ 400.00 | $ 200.00 | Review and revise notice of termination of Clear Touch. |
| 8 | 09/16/2015 | 227 | 178465 | 0.70 | $ 400.00 | $ 280.00 | Conference call with Messrs. Newman and Knight regarding law |
| 8 | 09/17/2015 | 227 | 178465 | 3.00 | $ 400.00 | $ 1,200.00 | Draft complaint; correspond with Messrs. Newnam and Knight r |
| 8 | 09/18/2015 | 227 | 178465 | 1.70 | $ 400.00 | $ 680.00 | Draft summons; conferences regarding filing and service; phone |
| 8 | 09/22/2015 | 227 | 178465 | 0.50 | $ 400.00 | $ 200.00 | Correspond with Mr. Newnam regarding service of process; phc |
| 8 | 09/29/2015 | 227 | 178465 | 0.90 | $ 400.00 | $ 360.00 | Review documents regarding factoring and return of products; |
| 8 | 09/30/2015 | 227 | 178465 | 0.20 | $ 400.00 | $ 80.00 | Phone call with Mr. Newnam regarding discussions with Factor. |
| 8 | 10/16/2015 | 227 | 178786 | 0.20 | $ 400.00 | $ 80.00 | Phone call with Mr. Newnam regarding status and strategy. |
| 8 | 11/12/2015 | 227 | 179014 | 0.20 | $ 400.00 | $ 80.00 | Phone call with Mr. Newnam regarding return of product. |
| 8 | 11/16/2015 | 227 | 179014 | 0.30 | $ 400.00 | $ 120.00 | Review answers by Clear Touch and Mr. Trask to complaint; lett |
| 8 | 11/17/2015 | 227 | 179014 | 0.30 | $ 400.00 | $ 120.00 | Phone call with Mr. Newnam regarding Trask's answer and next |
| 8 | 12/08/2015 | 227 | 179464 | 1.50 | $ 400.00 | $ 600.00 | Conference call with Messrs. Newnam and Young regarding dar |
| 8 | 12/14/2015 | 227 | 179464 | 0.90 | $ 400.00 | $ 360.00 | Phone call and correspond with Mr. Newnam regarding interro |
| 8 | 03/04/2016 | 227 | 180448 | 1.20 | $ 400.00 | $ 480.00 | Correspond with Mr. Smith regarding confidentiality order and |
| 8 | 04/11/2016 | 227 | 180855 | 0.80 | $ 400.00 | $ 320.00 | Review discovery responses and documents from Mr. Trask; ph |
| 8 | 04/13/2016 | 227 | 180855 | 0.20 | $ 400.00 | $ 80.00 | Correspond with Mr. Newnam regarding defendants' document |
| 8 | 04/15/2016 | 227 | 180855 | 0.10 | $ 400.00 | $ 40.00 | Phone call with Mr. Newnam regarding document production a |
| 8 | 04/21/2016 | 227 | 180855 | 0.50 | $ 400.00 | $ 200.00 | Conference call with Messrs. Newnam and Knight regarding Pla |
| 8 | 04/22/2016 | 227 | 180855 | 0.30 | $ 400.00 | $ 120.00 | Phone call with Mr. Newnam regarding additional claims by Mr |
| 8 | 05/05/2016 | 227 | 181197 | 0.60 | $ 400.00 | $ 240.00 | Conference regarding discovery and strategy; memorandum reg |
| 8 | 05/24/2016 | 227 | 181197 | 0.60 | $ 400.00 | $ 240.00 | Conference regarding expert and discovery; correspond with M |
| 8 | 05/25/2016 | 227 | 181197 | 0.30 | $ 400.00 | $ 120.00 | Phone call with Mr. Newnam regarding case and expert; confer |
| 8 | 05/31/2016 | 227 | 181197 | 2.20 | $ 400.00 | $ 880.00 | Meet with Messrs. Newnam, Young, Melanger, and Barker rega |
| 8 | 06/02/2016 | 227 | 181565 | 4.30 | $ 400.00 | $ 1,720.00 | Review discovery responses and draft deficiency letter; confere |
| 8 | 06/06/2016 | 227 | 181565 | 1.10 | $ 400.00 | $ 440.00 | Phone call with Mr. Newnam regarding discovery and expert; cc |
| 8 | 06/13/2016 | 227 | 181565 | 0.20 | $ 400.00 | $ 80.00 | Phone call with Mr. Newnam regarding strategy. |
| 8 | 06/16/2016 | 227 | 181565 | 0.30 | $ 400.00 | $ 120.00 | Phone call with Messrs. Newnam and Knight regarding ClearTou |
| 8 | 06/29/2016 | 227 | 181565 | 0.70 | $ 400.00 | $ 280.00 | Correspondence with Messrs. Newnam and Smith regarding dis |
| 8 | 07/01/2016 | 227 | 181816 | 0.50 | $ 400.00 | $ 200.00 | Phone calls with Messrs. Newnam and Ms. Barker regarding dis |
| 8 | 07/05/2016 | 227 | 181816 | 1.00 | $ 400.00 | $ 400.00 | Conference call with Messrs. Newnam and Young regarding disc |
| 8 | 07/06/2016 | 227 | 181816 | 1.00 | $ 400.00 | $ 400.00 | Phone call with Messrs. Newnam and Young regarding initial dc |
| 8 | 07/07/2016 | 227 | 181816 | 0.50 | $ 400.00 | $ 200.00 | Phone call with Messrs. Newnam and Young regarding discover |
| 8 | 07/14/2016 | 227 | 181816 | 1.00 | $ 400.00 | $ 400.00 | Review and revise discovery responses; phone calls with Mr. Ne |
| 8 | 07/19/2016 | 227 | 181816 | 0.80 | $ 400.00 | $ 320.00 | Conference regarding response to demand letter from Clear To |
| 8 | 07/21/2016 | 227 | 181816 | 0.80 | $ 400.00 | $ 320.00 | Review letter from Mr. Smith regarding documents; correspond |
| 8 | 07/25/2016 | 227 | 181816 | 1.10 | $ 400.00 | $ 440.00 | Conference call with Messrs. Meillinger and Lively regarding da |



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| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 8 | 07/26/2016 | 227 | 181816 | 0.20 | $ 400.00 | $ 80.00 | Review correspondence from Mr. Young; letter to Mr. Lively reg |
| 8 | 07/28/2016 | 227 | 181816 | 1.40 | $ 400.00 | $ 560.00 | Conference call with Messrs. Newnam, Young, Meillinger, Lively |
| 8 | 08/02/2016 | 227 | 182259 | 0.30 | $ 400.00 | $ 120.00 | Begin review of Trask's supplemental discovery responses. |
| 8 | 08/03/2016 | 227 | 182259 | 2.00 | $ 400.00 | $ 800.00 | Phone call with Mr. Newnam regarding witnesses and discovery |
| 8 | 08/04/2016 | 227 | 182259 | 0.60 | $ 400.00 | $ 240.00 | Conference call with Messrs. Newnam and Young regarding disc |
| 8 | 08/05/2016 | 227 | 182259 | 0.50 | $ 400.00 | $ 200.00 | Conference call with Messrs. Newnam and Young regarding lett |
| 8 | 08/08/2016 | 227 | 182259 | 1.40 | $ 400.00 | $ 560.00 | Review and revise supplemental interrogatory answers and doc |
| 8 | 08/10/2016 | 227 | 182259 | 0.20 | $ 400.00 | $ 80.00 | Phone call with Mr. Newnam regarding Mr. Powell and mediati |
| 8 | 08/15/2016 | 227 | 182259 | 0.40 | $ 400.00 | $ 160.00 | Phone call with Mr. Traxler's office regarding mediation; corresp |
| 8 | 08/17/2016 | 227 | 182259 | 0.20 | $ 400.00 | $ 80.00 | Correspond with Mr. Newnam and mediator regarding mediatic |
| 8 | 08/22/2016 | 227 | 182259 | 0.30 | $ 400.00 | $ 120.00 | Phone call with Mr. Newnam regarding status of case and Lecrc |
| 8 | 08/24/2016 | 227 | 182259 | 0.40 | $ 400.00 | $ 160.00 | Phone call with Mr. Newnam regarding subpoena to Lecroy; rev |
| 8 | 08/25/2016 | 227 | 182259 | 0.70 | $ 400.00 | $ 280.00 | Correspond with Mr. Smith regarding discovery; correspond wit |
| 8 | 08/26/2016 | 227 | 182259 | 1.00 | $ 400.00 | $ 400.00 | Phone call with Mr. Newnam regarding Lecroy subpoena; revise |
| 8 | 08/30/2016 | 227 | 182259 | 0.90 | $ 400.00 | $ 360.00 | Phone calls with Messrs. Newnam and Ms. Pickett regarding sul |
| 8 | 09/01/2016 | 227 | 182600 | 0.60 | $ 400.00 | $ 240.00 | Correspond with Messrs. Newnam, Lively, and Smith regarding |
| 8 | 09/02/2016 | 227 | 182600 | 1.50 | $ 400.00 | $ 600.00 | Conference call with Messrs. Newnam and Young regarding Tra |
| 8 | 09/06/2016 | 227 | 182600 | 0.20 | $ 400.00 | $ 80.00 | Review correspondence regarding Mr. Trask and Clear Touch sa |
| 8 | 09/07/2016 | 227 | 182600 | 0.20 | $ 400.00 | $ 80.00 | Review correspondence from Messrs. Newnam, Young, and Me |
| 8 | 09/13/2016 | 227 | 182600 | 1.60 | $ 400.00 | $ 640.00 | Phone calls with Mr. Newnam regarding CPA and Lecroy docum |
| 8 | 09/14/2016 | 227 | 182600 | 1.80 | $ 400.00 | $ 720.00 | Review financial documents from CPA; conference call with Mr. |
| 8 | 09/15/2016 | 227 | 182600 | 0.60 | $ 400.00 | $ 240.00 | Conference call with Mr. Lively regarding CT data and mediation |
| 8 | 09/16/2016 | 227 | 182600 | 0.60 | $ 400.00 | $ 240.00 | Conference call with Messrs. Newnam, Young, Melinger, and Liv |
| 8 | 09/19/2016 | 227 | 182600 | 2.90 | $ 400.00 | $ 1,160.00 | Conference call with Messrs. Newnam, Young, and Lively regarc |
| 8 | 09/20/2016 | 227 | 182600 | 0.60 | $ 400.00 | $ 240.00 | Conference call with Messrs. Newnam and Young regarding Pov |
| 8 | 09/21/2016 | 227 | 182600 | 0.80 | $ 400.00 | $ 320.00 | Correspond with Mr. Young regarding ClearTouch prices; review |
| 8 | 09/22/2016 | 227 | 182600 | 4.70 | $ 400.00 | $ 1,880.00 | Meet with Messrs. Newnam and Young regarding mediation; at |
| 8 | 09/27/2016 | 227 | 182600 | 0.50 | $ 400.00 | $ 200.00 | Conference call with Messrs. Newnam and Young regarding acti |
| 8 | 09/28/2016 | 227 | 182600 | 1.10 | $ 400.00 | $ 440.00 | Meet with Mr. Powell regarding affidavit; letters to Mr. Newnar |
| 8 | 09/29/2016 | 227 | 182600 | 0.90 | $ 400.00 | $ 360.00 | Phone call with Mr. Newnam regarding Galaxy subpoena and d |
| 8 | 09/30/2016 | 227 | 182600 | 0.40 | $ 400.00 | $ 160.00 | Correspond with Messrs. Newnam and Smith regarding deposit |
| 8 | 10/03/2016 | 227 | 182822 | 0.40 | $ 400.00 | $ 160.00 | Phone call with Mr. Newnam regarding Florida witness; corresp |
| 8 | 10/04/2016 | 227 | 182822 | 1.20 | $ 400.00 | $ 480.00 | Phone call with Mr. Newnam regarding interview of Florida witı |
| 8 | 10/10/2016 | 227 | 182822 | 0.30 | $ 400.00 | $ 120.00 | Correspond with Clerk regarding hearing on motion to compel; |
| 8 | 10/12/2016 | 227 | 182822 | 1.20 | $ 400.00 | $ 480.00 | Phone calls and correspond with Messrs. Newnam and Smith re |
| 8 | 10/17/2016 | 227 | 182822 | 1.80 | $ 400.00 | $ 720.00 | Phone calls with Messrs. Newnam and Higginbotham regarding |
| 8 | 10/24/2016 | 227 | 182822 | 0.70 | $ 400.00 | $ 280.00 | Prepare for motion to compel; gather document excerpts for ju |
| 8 | 10/25/2016 | 227 | 182822 | 0.30 | $ 400.00 | $ 120.00 | Review Trask's motion to compel and discovery responses; phoı |
| 8 | 10/26/2016 | 227 | 182822 | 3.60 | $ 400.00 | $ 1,440.00 | Prepare for hearing on motions to compel; conference call with |
| 8 | 11/02/2016 | 227 | 183075 | 0.90 | $ 400.00 | $ 360.00 | Phone call with Ms. Pickett regarding Galaxy production; corres |
| 8 | 11/03/2016 | 227 | 183075 | 0.60 | $ 400.00 | $ 240.00 | Correspond and phone calls with Messrs. Newnam and Young r |



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|---|---|---|---|---|---|---|---|
| 8 | 11/04/2016 | 227 | 183075 | 1.20 | $ 400.00 | $ 480.00 | Review and revise proposed order; letter to Judge Stilwell regar |
| 8 | 11/07/2016 | 227 | 183075 | 0.70 | $ 400.00 | $ 280.00 | Review Mr. Smith's letter regarding proposed order; revise sam |
| 8 | 11/08/2016 | 227 | 183075 | 0.30 | $ 400.00 | $ 120.00 | Correspond with Mr. Smith and law clerk regarding revision to p |
| 8 | 11/10/2016 | 227 | 183075 | 0.60 | $ 400.00 | $ 240.00 | Phone call with Mr. Newnam regarding Georgia subpoenas and |
| 8 | 11/14/2016 | 227 | 183075 | 1.90 | $ 400.00 | $ 760.00 | Finalize notice of depositions and letter to Mr. Smith regarding |
| 8 | 11/16/2016 | 227 | 183075 | 0.70 | $ 400.00 | $ 280.00 | Correspond with Mr. Smith regarding Mr. Meilinger report and |
| 8 | 11/17/2016 | 227 | 183075 | 1.00 | $ 400.00 | $ 400.00 | Conference call with Messrs. Newnam and Young regarding Wa |
| 8 | 11/18/2016 | 227 | 183075 | 0.40 | $ 400.00 | $ 160.00 | Meet with Mr. Young regarding documents to produce; confere |
| 8 | 11/21/2016 | 227 | 183075 | 1.10 | $ 400.00 | $ 440.00 | Correspond with Mr. Smith regarding subpoenas and depositio |
| 8 | 11/22/2016 | 227 | 183075 | 0.20 | $ 400.00 | $ 80.00 | Correspond with Mr. Smith regarding documents and depositio |
| 8 | 11/23/2016 | 227 | 183075 | 0.80 | $ 400.00 | $ 320.00 | Correspond with Mr. Smith regarding documents; conferences |
| 8 | 11/26/2016 | 227 | 183075 | 3.20 | $ 400.00 | $ 1,280.00 | Review documents for depositions of Ms. Trask, Ms. Gallant, an |
| 8 | 11/28/2016 | 227 | 183075 | 2.60 | $ 400.00 | $ 1,040.00 | Phone calls with Mr. Newnam regarding Defendant's supplemer |
| 8 | 11/29/2016 | 227 | 183075 | 5.20 | $ 400.00 | $ 2,080.00 | Review documents for deposition; prepare outlines for same; c |
| 8 | 11/30/2016 | 227 | 183075 | 7.00 | $ 400.00 | $ 2,800.00 | Meet with Messrs. Newnam and Young regarding depositions; c |
| 8 | 12/01/2016 | 227 | 183423 | 2.30 | $ 400.00 | $ 920.00 | Phone call with Mr. Newnam regarding depositions and additio |
| 8 | 12/02/2016 | 227 | 183423 | 0.70 | $ 400.00 | $ 280.00 | Draft amended notice of deposition and letter to Mr. Smith reg |
| 8 | 12/06/2016 | 227 | 183423 | 0.60 | $ 400.00 | $ 240.00 | Correspond with Messrs. Newnam and Young regarding additio |
| 8 | 12/09/2016 | 227 | 183423 | 0.30 | $ 400.00 | $ 120.00 | Review letter to Mr. Smith and send same; correspond with Mr. |
| 8 | 12/12/2016 | 227 | 183423 | 0.80 | $ 400.00 | $ 320.00 | Phone calls and correspond with Mr. Smith and clerk regarding |
| 8 | 12/13/2016 | 227 | 183423 | 2.80 | $ 400.00 | $ 1,120.00 | Review Leon County documents for depositions; phone call witl |
| 8 | 12/14/2016 | 227 | 183423 | 4.20 | $ 400.00 | $ 1,680.00 | Review Leon County documents; correspond and phone calls w |
| 8 | 12/15/2016 | 227 | 183423 | 6.00 | $ 400.00 | $ 2,400.00 | Meet with Messrs. Newnam and Young regarding depositions o |
| 8 | 12/19/2016 | 227 | 183423 | 0.80 | $ 400.00 | $ 320.00 | Review correspondence from Mr. Smith regarding document pr |
| 8 | 12/20/2016 | 227 | 183423 | 0.20 | $ 400.00 | $ 80.00 | Conferences regarding document production. |
| 8 | 12/21/2016 | 227 | 183423 | 1.00 | $ 400.00 | $ 400.00 | Conferences regarding production to CT; review documents prc |
| 8 | 12/22/2016 | 227 | 183423 | 1.70 | $ 400.00 | $ 680.00 | Research regarding UC Solutions; draft subpoena to same; corr |
| 8 | 12/23/2016 | 227 | 183423 | 0.50 | $ 400.00 | $ 200.00 | Correspond with Mr. Newnam regarding UC Solutions and Ronc |
| 8 | 01/02/2017 | 227 | 183690 | 0.50 | $ 400.00 | $ 200.00 | Review motions to quash and subpoenas; letter to Mr. Newnan |
| 8 | 01/05/2017 | 227 | 183690 | 3.50 | $ 400.00 | $ 1,400.00 | Prepare for hearing on motion to quash subpoenas; attend and |
| 8 | 01/06/2017 | 227 | 183690 | 0.80 | $ 400.00 | $ 320.00 | Conferences regarding CT document production and subpoenae |
| 8 | 01/10/2017 | 227 | 183690 | 2.40 | $ 400.00 | $ 960.00 | Correspond with Mr. Newnam regarding depositions and motio |
| 8 | 01/11/2017 | 227 | 183690 | 0.40 | $ 400.00 | $ 160.00 | Correspond with Mr. Newnam regarding depositions; conferen |
| 8 | 01/12/2017 | 227 | 183690 | 2.30 | $ 400.00 | $ 920.00 | Review supplemental document production by ClearTouch; lett |
| 8 | 01/13/2017 | 227 | 183690 | 0.90 | $ 400.00 | $ 360.00 | Phone call with Mr. Newnam regarding status and timeline; cor |
| 8 | 01/17/2017 | 227 | 183690 | 0.30 | $ 400.00 | $ 120.00 | Correspond with Mr. Smith regarding ClearTouch financial docu |
| 8 | 01/18/2017 | 227 | 183690 | 1.30 | $ 400.00 | $ 520.00 | Review Catchfire documents from Mr. Newnam; conferences re |
| 8 | 01/24/2017 | 227 | 183690 | 1.80 | $ 400.00 | $ 720.00 | Correspond with Mr. Smith regarding discovery; meet with Mes |
| 8 | 01/25/2017 | 227 | 183690 | 1.40 | $ 400.00 | $ 560.00 | Travel to hearing on Trask's motion to quash; argue same; meet |
| 8 | 01/26/2017 | 227 | 183690 | 1.60 | $ 400.00 | $ 640.00 | Meet with Messrs. Newnam, Young, Meilinger, and Lively regar |
| 8 | 01/27/2017 | 227 | 183690 | 0.30 | $ 400.00 | $ 120.00 | Phone call with Mr. Newnam regarding UC Solutions and Ronco |



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|---|---|---|---|---|---|---|---|
| 8 | 01/31/2017 | 227 | 183690 | 0.40 | $ 400.00 | $ 160.00 | Conference call with Messrs. Newnam and Young regarding CT I |
| 8 | 02/01/2017 | 227 | 184103 | 1.40 | $ 400.00 | $ 560.00 | Conference calls with Messrs. Newnam and Young regarding CT |
| 8 | 02/02/2017 | 227 | 184103 | 1.50 | $ 400.00 | $ 600.00 | Review spreadsheet by Ms. Young; phone call with same regard |
| 8 | 02/03/2017 | 227 | 184103 | 0.40 | $ 400.00 | $ 160.00 | Conference regarding documents production; letters to Messrs. |
| 8 | 02/06/2017 | 227 | 184103 | 3.20 | $ 400.00 | $ 1,280.00 | Phone calls with Messrs. Newnam and Young regarding UC Solu |
| 8 | 02/07/2017 | 227 | 184103 | 0.20 | $ 400.00 | $ 80.00 | Correspond with Messrs. Newnam and Lively regarding damage |
| 8 | 02/08/2017 | 227 | 184103 | 1.00 | $ 400.00 | $ 400.00 | Conference call with Messrs. Newnam and Young regarding UC |
| 8 | 02/09/2017 | 227 | 184103 | 0.40 | $ 400.00 | $ 160.00 | Phone call with Mr. Newnam regarding letter to Mr. Smith; revi |
| 8 | 02/10/2017 | 227 | 184103 | 2.00 | $ 400.00 | $ 800.00 | Draft notice of Rule 30(b)(6) deposition to ClearTouch; phone c |
| 8 | 02/13/2017 | 227 | 184103 | 1.90 | $ 400.00 | $ 760.00 | Review deposition exhibits and TSI Touch documents from Clea |
| 8 | 02/14/2017 | 227 | 184103 | 2.00 | $ 400.00 | $ 800.00 | Review Catch Fire and Premier documents for ClearTouch depo |
| 8 | 02/15/2017 | 227 | 184103 | 1.10 | $ 400.00 | $ 440.00 | Review documents from Mr. Newnam; phone call with same re |
| 8 | 02/16/2017 | 227 | 184103 | 1.20 | $ 400.00 | $ 480.00 | Review additional Premier and ClearTouch documents; revise 3 |
| 8 | 02/17/2017 | 227 | 184103 | 3.30 | $ 400.00 | $ 1,320.00 | Review additional comments from Mr. Newnam on CT 30(b)(6) |
| 8 | 02/20/2017 | 227 | 184103 | 0.40 | $ 400.00 | $ 160.00 | Correspond with Messrs. Young and Smith regarding document |
| 8 | 02/21/2017 | 227 | 184103 | 0.50 | $ 400.00 | $ 200.00 | Phone call with Mr. Newnam regarding damages meeting and C |
| 8 | 02/22/2017 | 227 | 184103 | 2.10 | $ 400.00 | $ 840.00 | Correspond with Mr. Lively regarding CT financial documents; c |
| 8 | 02/23/2017 | 227 | 184103 | 3.00 | $ 400.00 | $ 1,200.00 | Phone call with Messrs. Newnam and Young regarding CT offeri |
| 8 | 02/27/2017 | 227 | 184103 | 0.40 | $ 400.00 | $ 160.00 | Review recent correspondence from Messrs. Newnam and Your |
| 8 | 02/28/2017 | 227 | 184103 | 2.20 | $ 400.00 | $ 880.00 | Conference call with Messrs. Newnam, Young, Meilinger, and Li |
| 8 | 03/03/2017 | 227 | 184415 | 1.90 | $ 400.00 | $ 760.00 | Phone call with Mr. Meilinger regarding damages report; review |
| 8 | 03/06/2017 | 227 | 184415 | 0.50 | $ 400.00 | $ 200.00 | Review letter from Mr. Newnam; conference regarding same; le |
| 8 | 03/07/2017 | 227 | 184415 | 1.80 | $ 400.00 | $ 720.00 | Conference call with Messrs. Newnam and Smith regarding trial |
| 8 | 03/10/2017 | 227 | 184415 | 1.50 | $ 400.00 | $ 600.00 | Review motion for continuance; review discovery and correspor |
| 8 | 03/13/2017 | 227 | 184415 | 2.30 | $ 400.00 | $ 920.00 | Phone call with Mr. Newnam regarding response to motion for |
| 8 | 03/14/2017 | 227 | 184415 | 0.20 | $ 400.00 | $ 80.00 | Review and revise 2/13-4/14 profit and loss statement. |
| 8 | 03/17/2017 | 227 | 184415 | 0.20 | $ 400.00 | $ 80.00 | Correspond with Mr. Young regarding P & L exhibits; begin outl |
| 8 | 03/18/2017 | 227 | 184415 | 2.00 | $ 400.00 | $ 800.00 | Prepare outline for direct testimony of Mr. Newnam; letter to s |
| 8 | 03/21/2017 | 227 | 184415 | 1.00 | $ 400.00 | $ 400.00 | Correspond with Mr. Young regarding P&L; prepare same for pr |
| 8 | 03/22/2017 | 227 | 184415 | 1.70 | $ 400.00 | $ 680.00 | Phone call with Mr. Higginbotham regarding flash drive and tes |
| 8 | 03/23/2017 | 227 | 184415 | 1.10 | $ 400.00 | $ 440.00 | Prepare for conference call with Judge regarding continuance; p |
| 8 | 03/24/2017 | 227 | 184415 | 0.40 | $ 400.00 | $ 160.00 | Phone call with Mr. Newnam regarding trial date; correspond w |
| 8 | 03/28/2017 | 227 | 184415 | 0.20 | $ 400.00 | $ 80.00 | Review and revise motion to compel and for sanctions. |
| 8 | 04/03/2017 | 227 | 184713 | 0.20 | $ 400.00 | $ 80.00 | Draft amended notices of deposition and letter to Mr. Smith re |
| 8 | 04/05/2017 | 227 | 184713 | 1.50 | $ 400.00 | $ 600.00 | Correspond with Mr. Wasp regarding UC Solutions and Ronco d |
| 8 | 04/06/2017 | 227 | 184713 | 1.90 | $ 400.00 | $ 760.00 | Phone call with Mr. Newnam regarding motion for sanctions; re |
| 8 | 04/07/2017 | 227 | 184713 | 1.50 | $ 400.00 | $ 600.00 | Correspond and phone call with Messrs. Newnam and Young re |
| 8 | 04/12/2017 | 227 | 184713 | 0.50 | $ 400.00 | $ 200.00 | Review correspondence from Mr. Smith; revise response to sam |
| 8 | 04/13/2017 | 227 | 184713 | 1.50 | $ 400.00 | $ 600.00 | Conference call with Messrs. Newnam and Young regarding res |
| 8 | 04/18/2017 | 227 | 184713 | 0.30 | $ 400.00 | $ 120.00 | Correspond with Messrs. Newnam and Smith regarding privileg |
| 8 | 04/19/2017 | 227 | 184713 | 0.40 | $ 400.00 | $ 160.00 | Conference call with Messrs. Newnam and Young regarding stat |



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|---|---|---|---|---|---|---|---|
| 8 | 04/20/2017 | 227 | 184713 | 0.70 | $ 400.00 | $ 280.00 | Correspond with Mr. Smith regarding privilege log; meet with M |
| 8 | 04/21/2017 | 227 | 184713 | 0.30 | $ 400.00 | $ 120.00 | Phone call with Mr. Higginbotham regarding database, trial, and |
| 8 | 04/26/2017 | 227 | 184713 | 0.70 | $ 400.00 | $ 280.00 | Phone calls with Messrs. Newnam and Picket regarding Galaxy/ |
| 8 | 04/27/2017 | 227 | 184713 | 1.00 | $ 400.00 | $ 400.00 | Review documents from Mr. Higginbotham; letter to Mr. Smith |
| 8 | 05/02/2017 | 227 | 185023 | 0.20 | $ 400.00 | $ 80.00 | Review letter from Mr. Wasp; correspond with Mr. Newnam re |
| 8 | 05/03/2017 | 227 | 185023 | 0.40 | $ 400.00 | $ 160.00 | Correspond with Mr. Wasp regarding Ronco subpoena; confere |
| 8 | 05/04/2017 | 227 | 185023 | 2.20 | $ 400.00 | $ 880.00 | Phone call with Mr. Newnam regarding deposition of ClearTouc |
| 8 | 05/06/2017 | 227 | 185023 | 0.30 | $ 400.00 | $ 120.00 | Review draft privilege log and deposition exhibits; memoranda |
| 8 | 05/08/2017 | 227 | 185023 | 4.50 | $ 400.00 | $ 1,800.00 | Review documents for depositions and privilege log; conference |
| 8 | 05/09/2017 | 227 | 185023 | 7.40 | $ 400.00 | $ 2,960.00 | Meet with Messrs. Newnam and Young regarding deposition of |
| 8 | 05/10/2017 | 227 | 185023 | 3.80 | $ 400.00 | $ 1,520.00 | Meet with Messrs. Newnam and Young regarding Mr. Trask's de |
| 8 | 05/15/2017 | 227 | 185023 | 0.40 | $ 400.00 | $ 160.00 | Correspond with court reporter regarding deposition of Mr. Tra |
| 8 | 05/16/2017 | 227 | 185023 | 0.20 | $ 400.00 | $ 80.00 | Review subpoena to Fifth Third; letter to Messrs. Newnam and |
| 8 | 05/17/2017 | 227 | 185023 | 0.60 | $ 400.00 | $ 240.00 | Phone calls with Mr. Newnam regarding additional documents |
| 8 | 05/18/2017 | 227 | 185023 | 0.60 | $ 400.00 | $ 240.00 | Phone call with Mr. Smith regarding motions to compel hearing |
| 8 | 05/19/2017 | 227 | 185023 | 1.60 | $ 400.00 | $ 640.00 | Review response to motions for sanctions; review documents fc |
| 8 | 05/22/2017 | 227 | 185023 | 4.40 | $ 400.00 | $ 1,760.00 | Prepare for hearing on motion to compel and for sanctions; me |
| 8 | 05/23/2017 | 227 | 185023 | 0.40 | $ 400.00 | $ 160.00 | Conference call with Messrs. Newnam and Young regarding hea |
| 8 | 05/25/2017 | 227 | 185023 | 0.80 | $ 400.00 | $ 320.00 | Phone call with Mr. Young regarding email search; memos regai |
| 8 | 05/26/2017 | 227 | 185023 | 0.40 | $ 400.00 | $ 160.00 | Phone call with Mr. Young regarding supplemental document p |
| 8 | 05/30/2017 | 227 | 185023 | 0.30 | $ 400.00 | $ 120.00 | Phone call with Mr. Young regarding email production; review a |
| 8 | 05/31/2017 | 227 | 185023 | 0.90 | $ 400.00 | $ 360.00 | Revise letter to Mr. Smith; conference call with Messrs. Newnar |
| 8 | 06/03/2017 | 227 | 185287 | 1.40 | $ 400.00 | $ 560.00 | Review and revise proposed order for J. Seals; review motion to |
| 8 | 06/05/2017 | 227 | 185287 | 2.30 | $ 400.00 | $ 920.00 | Correspond and phone call with Mr. Smith regarding document |
| 8 | 06/06/2017 | 227 | 185287 | 1.80 | $ 400.00 | $ 720.00 | Correspond with Mr. Smith regarding document production; re |
| 8 | 06/07/2017 | 227 | 185287 | 2.40 | $ 400.00 | $ 960.00 | Conference calls with Messrs. Newnam and Young regarding re |
| 8 | 06/12/2017 | 227 | 185287 | 0.30 | $ 400.00 | $ 120.00 | Correspond with law clerk regarding continuance; correspond v |
| 8 | 06/13/2017 | 227 | 185287 | 0.60 | $ 400.00 | $ 240.00 | Conference call with Messrs. Newnam and Young regarding resp |
| 8 | 06/14/2017 | 227 | 185287 | 0.20 | $ 400.00 | $ 80.00 | Conference call with Messrs. Newnam and Young regarding doc |
| 8 | 06/16/2017 | 227 | 185287 | 1.70 | $ 400.00 | $ 680.00 | Review schedule for depositions from Mr. Young; correspond w |
| 8 | 06/24/2017 | 227 | 185287 | 1.10 | $ 400.00 | $ 440.00 | Correspond with Messrs. Newnam, Young, and Smith regarding |
| 8 | 06/26/2017 | 227 | 185287 | 1.30 | $ 400.00 | $ 520.00 | Phone call with Mr. Newnam regarding depositions and motion |
| 8 | 06/27/2017 | 227 | 185287 | 1.30 | $ 400.00 | $ 520.00 | Review privilege log attachments for privilege claims; revise resp |
| 8 | 06/28/2017 | 227 | 185287 | 1.00 | $ 400.00 | $ 400.00 | Conference regarding Smith document review software and dep |
| 8 | 06/29/2017 | 227 | 185287 | 0.90 | $ 400.00 | $ 360.00 | Revise letter to Mr. Smith regarding supplemental discovery; co |
| 8 | 06/30/2017 | 227 | 185287 | 1.30 | $ 400.00 | $ 520.00 | Review expert documents produced; revise letter to Mr. Smith r |
| 8 | 07/03/2017 | 227 | 185546 | 0.60 | $ 400.00 | $ 240.00 | Review notices of deposition, including Rule 30(b)(6) notice; let |
| 8 | 07/05/2017 | 227 | 185546 | 1.90 | $ 400.00 | $ 760.00 | Prepare for hearing on Defendant's motion for continuance; arg |
| 8 | 07/07/2017 | 227 | 185546 | 2.30 | $ 400.00 | $ 920.00 | Conference calls with Messrs. Newnam and Young regarding Ru |
| 8 | 07/10/2017 | 227 | 185546 | 1.50 | $ 400.00 | $ 600.00 | Correspond with jury coordinator and Messrs. Newnam, Young, |
| 8 | 07/11/2017 | 227 | 185546 | 2.50 | $ 400.00 | $ 1,000.00 | Correspond with clerk regarding new jury trial date; correspond |



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| 8 | 07/12/2017 | 227 | 185546 | 6.50 | $ 400.00 | $ 2,600.00 | Review documents for Ms. Stengel; meet with same to prepare |
| 8 | 07/13/2017 | 227 | 185546 | 5.40 | $ 400.00 | $ 2,160.00 | Review additional documents from Ms. Stengel; meet with sam |
| 8 | 07/14/2017 | 227 | 185546 | 1.60 | $ 400.00 | $ 640.00 | Conference calls with Messrs. Newnam, Webster, and Pearson |
| 8 | 07/17/2017 | 227 | 185546 | 6.60 | $ 400.00 | $ 2,640.00 | Correspond with Mr. Smith regarding subpoenaed documents; |
| 8 | 07/18/2017 | 227 | 185546 | 8.50 | $ 400.00 | $ 3,400.00 | Meet with Messrs. Newnam and Young regarding depositions; |
| 8 | 07/24/2017 | 227 | 185546 | 0.20 | $ 400.00 | $ 80.00 | Review summary of legal fees, costs, and other expenses; corre |
| 8 | 07/25/2017 | 227 | 185546 | 0.80 | $ 400.00 | $ 320.00 | Conference regarding IT trial assistance; memorandum to Mr. N |
| 8 | 07/27/2017 | 227 | 185546 | 0.50 | $ 400.00 | $ 200.00 | Correspond with Messrs. Newnam, Young, and Lively regarding |
| 8 | 07/28/2017 | 227 | 185546 | 0.50 | $ 400.00 | $ 200.00 | Correspond with Messrs. Newman and Smith re depositions; re |
| 8 | 07/29/2017 | 227 | 185546 | 0.60 | $ 400.00 | $ 240.00 | Review Meilinger report for deposition preparation. |
| 8 | 07/31/2017 | 227 | 185546 | 2.60 | $ 400.00 | $ 1,040.00 | Meet with Messrs. Newman, Meilinger and White to prepare fc |
| 8 | 08/01/2017 | 227 | 185832 | 3.10 | $ 400.00 | $ 1,240.00 | Meet with Messrs. Newnam and Meilinger regarding depositior |
| 8 | 08/03/2017 | 227 | 185832 | 5.20 | $ 400.00 | $ 2,080.00 | Meet with Messrs. Newnam, Young, and Masters to prepare fo |
| 8 | 08/04/2017 | 227 | 185832 | 6.20 | $ 400.00 | $ 2,480.00 | Meet with Messrs. Newnam, Young and Masters regarding dep |
| 8 | 08/05/2017 | 227 | 185832 | 0.30 | $ 400.00 | $ 120.00 | Review and calendar deposition notices; correspond with Mr. N |
| 8 | 08/07/2017 | 227 | 185832 | 2.20 | $ 400.00 | $ 880.00 | Conferences regarding jury charges; memos regarding same; ph |
| 8 | 08/08/2017 | 227 | 185832 | 0.70 | $ 400.00 | $ 280.00 | Conference call with Messrs. Newnam and Higginbotham regar |
| 8 | 08/10/2017 | 227 | 185832 | 1.90 | $ 400.00 | $ 760.00 | Organize discovery documents and pleadings for trial; update tr |
| 8 | 08/11/2017 | 227 | 185832 | 3.50 | $ 400.00 | $ 1,400.00 | Revise trial outlines for Messrs. Newnam and Powell; phone cal |
| 8 | 08/12/2017 | 227 | 185832 | 0.60 | $ 400.00 | $ 240.00 | Draft trial outline for Mr. Higginbotham's trial testimony; memc |
| 8 | 08/14/2017 | 227 | 185832 | 2.00 | $ 400.00 | $ 800.00 | Review third supplemental interrogatory answers; correspond v |
| 8 | 08/15/2017 | 227 | 185832 | 3.20 | $ 400.00 | $ 1,280.00 | Correspond with Mr. Smith and Clerk regarding motion to strike |
| 8 | 08/16/2017 | 227 | 185832 | 0.90 | $ 400.00 | $ 360.00 | Correspond with Mr. Smith and clerk regarding hearing on moti |
| 8 | 08/17/2017 | 227 | 185832 | 4.10 | $ 400.00 | $ 1,640.00 | Correspond with Mr. Smith regarding Dr. Alford documents; rev |
| 8 | 08/18/2017 | 227 | 185832 | 3.80 | $ 400.00 | $ 1,520.00 | Meet with Messrs. Newnam and Knight regarding depositions; |
| 8 | 08/21/2017 | 227 | 185832 | 0.60 | $ 400.00 | $ 240.00 | Phone call with Mr. Higginbotham regarding testimony; corresp |
| 8 | 08/22/2017 | 227 | 185832 | 1.80 | $ 400.00 | $ 720.00 | Draft affidavit for Mr. Newnam; begin review of Trask depositio |
| 8 | 08/23/2017 | 227 | 185832 | 3.50 | $ 400.00 | $ 1,400.00 | Draft affidavit for Mr. Newnam; review exhibits for same; revie |
| 8 | 08/24/2017 | 227 | 185832 | 1.40 | $ 400.00 | $ 560.00 | Review deposition of Mr. Meilinger; revise trial outline for same |
| 8 | 08/25/2017 | 227 | 185832 | 2.80 | $ 400.00 | $ 1,120.00 | Correspond with Messrs. Newnam, Young, Meilinger and Lively |
| 8 | 08/26/2017 | 227 | 185832 | 2.10 | $ 400.00 | $ 840.00 | Dictate notes from Mr. Trask deposition; review Mr. Gallant dep |
| 8 | 08/28/2017 | 227 | 185832 | 2.70 | $ 400.00 | $ 1,080.00 | Review and revise jury charges and verdict form; phone calls wi |
| 8 | 08/29/2017 | 227 | 185832 | 4.40 | $ 400.00 | $ 1,760.00 | Draft affidavit for Mr. Higginbotham; phone calls with same reg |
| 8 | 08/30/2017 | 227 | 185832 | 7.50 | $ 400.00 | $ 3,000.00 | Prepare for depositions of Messrs. Powell and Higginbotham; re |
| 8 | 08/31/2017 | 227 | 185832 | 1.50 | $ 400.00 | $ 600.00 | Phone calls with Messrs. Newnam, Viola and Tusa regarding vid |
| 8 | 09/01/2017 | 227 | | 5.70 | $ 400.00 | $ 2,280.00 | Phone calls and correspond with Messrs. Newnam and Tusa reg |
| 8 | 09/04/2017 | 227 | | 2.80 | $ 400.00 | $ 1,120.00 | Review Defendants' memorandum for summary judgment; rese |
| 8 | 09/05/2017 | 227 | | 2.40 | $ 400.00 | $ 960.00 | Phone call with Mr. Newnam regarding deposition of Mr. Viola |
| 8 | 09/06/2017 | 227 | | 5.30 | $ 400.00 | $ 2,120.00 | Prepare for and attend hearing on motion to strike expert; mee |
| 8 | 09/07/2017 | 227 | | 6.70 | $ 400.00 | $ 2,680.00 | Research for summary judgment hearing; prepare for same; arg |
| 8 | 09/08/2017 | 227 | | 3.10 | $ 400.00 | $ 1,240.00 | Prepare outline for deposition of Mr. Viola; conference calls wit |



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| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 8 | 09/09/2017 | 227 | | 3.80 | $ 400.00 | $ 1,520.00 | Update trial exhibit list; prepare exhibits and notice for Viola de |
| 8 | 09/11/2017 | 227 | | 3.80 | $ 400.00 | $ 1,520.00 | Phone call with Mr. Newnam regarding discovery issues; corres |
| 8 | 09/12/2017 | 227 | | 2.80 | $ 400.00 | $ 1,120.00 | Review Dr. Alford's report; correspond with Messrs. Newnam, Y |
| 8 | 09/13/2017 | 227 | | 2.90 | $ 400.00 | $ 1,160.00 | Draft outline for Ms. Stengel's testimony; phone calls with Mess |
| 8 | 09/14/2017 | 227 | | 7.50 | $ 400.00 | $ 3,000.00 | Meet with Messrs. Newnam, Young, and Stengel to prepare to t |
| 8 | 09/15/2017 | 227 | | 1.00 | $ 400.00 | $ 400.00 | Phone calls with Mr. Newnam regarding settlement strategy an |
| 8 | 09/16/2017 | 227 | | 0.20 | $ 400.00 | $ 80.00 | Revise outline for Mr. Newnam's testimony; letter to same rega |
| 8 | 09/17/2017 | 227 | | 2.70 | $ 400.00 | $ 1,080.00 | Review and revise outline of Mr. Young; revise jury charges verc |
| 8 | 09/18/2017 | 227 | | 3.20 | $ 400.00 | $ 1,280.00 | Review letter from Mr. Smith regarding missing documents; cor |
| 8 | 09/19/2017 | 227 | | 2.70 | $ 400.00 | $ 1,080.00 | Phone calls with Messrs. Newnam and Young regarding email se |
| 8 | 09/20/2017 | 227 | | 3.90 | $ 400.00 | $ 1,560.00 | Revise motion in limine; letter to clerk regarding same; review E |
| 8 | 09/21/2017 | 227 | | 6.00 | $ 400.00 | $ 2,400.00 | Memos; meet with Messrs. Newnam and Young to prepare for |
| 8 | 09/22/2017 | 227 | | 7.80 | $ 400.00 | $ 3,120.00 | Trial prep, including deposition designations; draft opening; cor |
| 8 | 09/23/2017 | 227 | | 8.10 | $ 400.00 | $ 3,240.00 | Trial prep, including jury charges, verdict form; research for sam |
| 8 | 09/24/2017 | 227 | | 3.50 | $ 400.00 | $ 1,400.00 | Trial preparation, including work on opening and review jury lis |
| 8 | 09/25/2017 | 227 | | 10.50 | $ 400.00 | $ 4,200.00 | Trial and preparation. |
| 8 | 09/26/2017 | 227 | | 11.50 | $ 400.00 | $ 4,600.00 | Trial and preparation. |
| 8 | 09/27/2017 | 227 | | 8.80 | $ 400.00 | $ 3,520.00 | Trial and preparation. |
| 8 | 09/28/2017 | 227 | | 13.00 | $ 400.00 | $ 5,200.00 | Trial and preparation, including preparation of closing. |
| 8 | 09/29/2017 | 227 | | 10.00 | $ 400.00 | $ 4,000.00 | Trial. |
| 8 | 09/30/2017 | 227 | | 2.30 | $ 400.00 | $ 920.00 | Memorandum regarding motion for judgment, and award of ex |
| 8 | 10/02/2017 | 227 | | 1.40 | $ 400.00 | $ 560.00 | Phone calls with Messrs. Newnam and Young regarding litigatio |
| | | | | **491.10** | | **$ 196,440.00** | |
| 8 | 09/25/2017 | 233 | | 2.40 | $ 425.00 | $ 1,020.00 | Review deposition testimony. Attend trial. |
| 8 | 09/26/2017 | 233 | | 2.90 | $ 425.00 | $ 1,232.50 | Read deposition testimony at trial. |
| | | | | **5.30** | | **$ 2,252.50** | |
| 8 | 05/05/2016 | 251 | 181197 | 0.00 | $ - | $ - | Conference with Mr. English regarding case tasks |
| 8 | 05/10/2016 | 251 | 181197 | 0.70 | $ 380.00 | $ 266.00 | Review file, discovery responses and discovery requests; confer |
| 8 | 05/17/2016 | 251 | 181197 | 0.00 | $ - | $ - | Identify potential damages experts |
| 8 | 05/18/2016 | 251 | 181197 | 0.80 | $ 380.00 | $ 304.00 | Interview potential damages expert; review potential expert's li |
| 8 | 05/24/2016 | 251 | 181197 | 2.20 | $ 380.00 | $ 836.00 | Conference with Mr. English regarding status of case; draft disc |
| 8 | 05/25/2016 | 251 | 181197 | 0.90 | $ 380.00 | $ 342.00 | Review and revise discovery responses; email correspondence t |
| 8 | 05/26/2016 | 251 | 181197 | 1.60 | $ 380.00 | $ 608.00 | Review Clear Touch's document production; draft discovery def |
| 8 | 05/27/2016 | 251 | 181197 | 1.80 | $ 380.00 | $ 684.00 | Transmit complaint to potential damages expert; review defenc |
| 8 | 05/31/2016 | 251 | 181197 | 2.50 | $ 380.00 | $ 950.00 | Prepare for and attend conference with Mr. Newnam, Mr. Your |
| 8 | 05/31/2016 | 251 | 181197 | 0.50 | $ 380.00 | $ 190.00 | Conference with Mr. Newnam, Mr. Young and Mr. English rega |
| 8 | 06/01/2016 | 251 | 181565 | 0.00 | $ - | $ - | Review Mr. Meilinger's engagement letter; email corresponden |
| 8 | 06/02/2016 | 251 | 181565 | 5.00 | $ 380.00 | $ 1,900.00 | Review and revise correspondence to defense counsel summari |
| 8 | 06/07/2016 | 251 | 181565 | 1.00 | $ 380.00 | $ 380.00 | Review email correspondence from Mr. Young and Mr. English r |



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|---|---|---|---|---|---|---|---|
| 8 | 06/13/2016 | 251 | 181565 | 0.20 | $ 380.00 | $ 76.00 | Telephone conference with Mr. Newnam, Mr. Young and Mr. E |
| 8 | 06/15/2016 | 251 | 181565 | 0.40 | $ 380.00 | $ 152.00 | Conference with Mr. Newnam and Mr. Young regarding relevan |
| 8 | 06/16/2016 | 251 | 181565 | 0.40 | $ 380.00 | $ 152.00 | Review court procedures for submitting scheduling order; emai |
| 8 | 06/22/2016 | 251 | 181565 | 0.40 | $ 380.00 | $ 152.00 | Revise responses to Defendants' discovery requests |
| 8 | 06/23/2016 | 251 | 181565 | 5.00 | $ 380.00 | $ 1,900.00 | Review documents provided by Encore; revise discovery respon |
| 8 | 06/27/2016 | 251 | 181565 | 0.50 | $ 380.00 | $ 190.00 | Review and revise requests to produce |
| 8 | 06/29/2016 | 251 | 181565 | 0.00 | $ - | $ - | Communications with Mr. Newnam and Mr. English regarding d |
| 8 | 06/30/2016 | 251 | 181565 | 0.30 | $ 380.00 | $ 114.00 | Communications with Mr. Meilinger regarding status of case |
| | | | | **24.20** | | **$ 9,196.00** | |
| 8 | 07/01/2016 | 251 | 181816 | 0.30 | $ 350.00 | $ 105.00 | Communications with Mr. Young regarding discovery responses |
| 8 | 07/04/2016 | 251 | 181816 | 0.50 | $ 350.00 | $ 175.00 | Review and revise discovery responses; communications to Mr. |
| 8 | 07/13/2016 | 251 | 181816 | 0.80 | $ 350.00 | $ 280.00 | Review and revise discovery responses |
| 8 | 07/14/2016 | 251 | 181816 | 0.50 | $ 350.00 | $ 175.00 | Finalize and serve discovery responses; review defense counsel' |
| 8 | 07/18/2016 | 251 | 181816 | 0.80 | $ 350.00 | $ 280.00 | Prepare documents for production; review defense counsel's ol |
| 8 | 07/20/2016 | 251 | 181816 | 0.50 | $ 350.00 | $ 175.00 | Communications with Mr. Lively regarding damages evaluation; |
| 8 | 07/21/2016 | 251 | 181816 | 0.10 | $ 350.00 | $ 35.00 | Communications with Mr. Newnam, Mr. Young, Mr. English anc |
| 8 | 07/22/2016 | 251 | 181816 | 1.00 | $ 350.00 | $ 350.00 | Review document production for privileged documents; prepar |
| 8 | 07/25/2016 | 251 | 181816 | 1.10 | $ 350.00 | $ 385.00 | Telephone conference with Mr. Meillinger, Mr. Lively and Mr. E |
| 8 | 07/27/2016 | 251 | 181816 | 0.00 | $ - | $ - | Communications with Mr. Young and Mr. English regarding out |
| 8 | 07/28/2016 | 251 | 181816 | 0.80 | $ 350.00 | $ 280.00 | Communications with Mr. Newnam, Mr. Young, Mr. Meillinger, |
| 8 | 07/29/2016 | 251 | 181816 | 3.50 | $ 350.00 | $ 1,225.00 | Make supplemental document production |
| 8 | 08/02/2016 | 251 | 182259 | 0.00 | $ - | $ - | Communications with Mr. Young and Mr. Newnam regarding st |
| 8 | 08/04/2016 | 251 | 182259 | 2.50 | $ 350.00 | $ 875.00 | Draft response to Mr. Smith's alleged discovery deficiencies; rev |
| 8 | 08/05/2016 | 251 | 182259 | 1.50 | $ 350.00 | $ 525.00 | Supplement discovery responses |
| 8 | 08/08/2016 | 251 | 182259 | 2.50 | $ 350.00 | $ 875.00 | Supplement document production; review, revise and transmit |
| 8 | 08/10/2016 | 251 | 182259 | 0.30 | $ 350.00 | $ 105.00 | Communications with Mr. Young and Mr. Lively regarding dama |
| 8 | 08/26/2016 | 251 | 182259 | 0.00 | $ - | $ - | Communications with Mr. English and Mr. Smith regarding stat |
| 8 | 09/01/2016 | 251 | 182600 | 0.10 | $ - | $ - | Communications with Mr. Smith regarding supplemental docun |
| 8 | 09/02/2016 | 251 | 182600 | 0.10 | $ 350.00 | $ 35.00 | Communications with Mr. English regarding discovery deficienc |
| 8 | 09/07/2016 | 251 | 182600 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. Meilinger regarding damages analysi |
| 8 | 09/12/2016 | 251 | 182600 | 0.40 | $ 350.00 | $ 140.00 | Communications with Mr. Lively regarding documents from Cle |
| 8 | 09/13/2016 | 251 | 182600 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. Lively regarding Clear Touch financial |
| 8 | 09/14/2016 | 251 | 182600 | 1.00 | $ 350.00 | $ 350.00 | Conference with Mr. Newnam, Mr. Young, Mr. Meillinger, Mr. L |
| 8 | 09/15/2016 | 251 | 182600 | 0.70 | $ 350.00 | $ 245.00 | Communications with Mr. Lively and Mr. English regarding Clea |
| 8 | 09/16/2016 | 251 | 182600 | 0.50 | $ 350.00 | $ 175.00 | Communications with Mr. Newnam, Mr. Young, Mr. Meillinger, |
| 8 | 09/19/2016 | 251 | 182600 | 0.40 | $ 350.00 | $ 140.00 | Review final report of Mr. Meilinger; review mediation commur |
| 8 | 09/22/2016 | 251 | 182600 | 4.70 | $ 350.00 | $ 1,645.00 | Prepare for and attend mediation |
| 8 | 09/29/2016 | 251 | 182600 | 2.10 | $ 350.00 | $ 735.00 | Review status of discovery responses; draft motion to compel |
| 8 | 09/30/2016 | 251 | 182600 | 0.30 | $ 350.00 | $ 105.00 | Review and revise motion to compel |
| 8 | 10/11/2016 | 251 | 182822 | 0.00 | $ - | $ - | Communications with Mr. English regarding deposition schedul |



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|---|---|---|---|---|---|---|---|
| 8 | 10/12/2016 | 251 | 182822 | 0.00 | $ - | $ - | Communications with Mr. English regarding deposition schedul |
| 8 | 10/17/2016 | 251 | 182822 | 0.20 | $ 350.00 | $ 70.00 | Review motion to quash Lecroy subpoena; review Trask's motic |
| 8 | 11/02/2016 | 251 | 183075 | 0.00 | $ - | $ - | Communications with Mr. Smith regarding revisions to propose |
| 8 | 11/10/2016 | 251 | 183075 | 0.00 | $ - | $ - | Identify Georgia counsel to serve subpoena |
| 8 | 11/14/2016 | 251 | 183075 | 1.20 | $ 350.00 | $ 420.00 | Identify Georgia attorneys to secure Georgia subpoenas; prepa |
| 8 | 11/15/2016 | 251 | 183075 | 0.00 | $ - | $ - | Review communications from Mr. Smith regarding Mr. Meilinge |
| 8 | 11/16/2016 | 251 | 183075 | 0.70 | $ 350.00 | $ 245.00 | Communications with Georgia attorneys regarding third-party s |
| 8 | 11/17/2016 | 251 | 183075 | 0.50 | $ 350.00 | $ 175.00 | Review subpoena responses from Wake County; communicatio |
| 8 | 11/18/2016 | 251 | 183075 | 1.00 | $ 350.00 | $ 350.00 | Communications with Valdosta attorney regarding Valdosta Cit |
| 8 | 11/21/2016 | 251 | 183075 | 0.30 | $ 350.00 | $ 105.00 | Communications with Mr. English and Ms. Van Hoy regarding d |
| 8 | 11/22/2016 | 251 | 183075 | 0.40 | $ 350.00 | $ 140.00 | Communications with Mr. English and Ms. Van Hoy regarding s |
| 8 | 11/28/2016 | 251 | 183075 | 0.90 | $ 350.00 | $ 315.00 | Communications with Valdosta City Schools attorney regarding |
| 8 | 11/29/2016 | 251 | 183075 | 0.20 | $ 350.00 | $ 70.00 | Communications with Valdosta regarding document productior |
| 8 | 11/30/2016 | 251 | 183075 | 5.00 | $ 350.00 | $ 1,750.00 | Prepare for and attend Mrs. Trask's deposition; review correspc |
| 8 | 12/01/2016 | 251 | 183423 | 1.20 | $ 350.00 | $ 420.00 | Communications with Mr. Smith and Mr. English regarding disc |
| 8 | 12/02/2016 | 251 | 183423 | 2.60 | $ 350.00 | $ 910.00 | Prepare third party subpoenas; communications with Mr. Newr |
| 8 | 12/05/2016 | 251 | 183423 | 0.30 | $ 350.00 | $ 105.00 | Communications with counsel regarding third-party subpoenas; |
| 8 | 12/06/2016 | 251 | 183423 | 0.30 | $ 350.00 | $ 105.00 | Finalize third party subpoenas |
| 8 | 12/12/2016 | 251 | 183423 | 0.20 | $ 350.00 | $ 70.00 | Communications with Ms. Romanstine regarding third-party sul |
| 8 | 12/13/2016 | 251 | 183423 | 0.70 | $ 350.00 | $ 245.00 | Review and revise subpoenas to TSI Touch, Premier and CatchFi |
| 8 | 12/14/2016 | 251 | 183423 | 0.30 | $ 350.00 | $ 105.00 | Communications with CO, PA and Chinese counsel regarding thi |
| 8 | 12/15/2016 | 251 | 183423 | 2.60 | $ 350.00 | $ 910.00 | Attend Ms. Cruse's deposition |
| 8 | 12/16/2016 | 251 | 183423 | 0.20 | $ 350.00 | $ 70.00 | Manage discovery issues |
| 8 | 12/19/2016 | 251 | 183423 | 0.90 | $ 350.00 | $ 315.00 | Correspondence with PA, GA and Chinese counsel regarding ser |
| 8 | 12/20/2016 | 251 | 183423 | 0.30 | $ 350.00 | $ 105.00 | Communications with Mr. Townsend, Mr. English and Mr. Smitl |
| 8 | 12/21/2016 | 251 | 183423 | 0.70 | $ 350.00 | $ 245.00 | Manage supplemental document production; check status of th |
| 8 | 12/22/2016 | 251 | 183423 | 0.70 | $ 350.00 | $ 245.00 | Communications with CO counsel regarding Premier's subpoen |
| 8 | 12/23/2016 | 251 | 183423 | 0.60 | $ 350.00 | $ 210.00 | Communications with CO counsel regarding subpoena response |
| 8 | 12/26/2016 | 251 | 183423 | 0.10 | $ 350.00 | $ 35.00 | Communications with CO and VA counsel regarding third-party |
| 8 | 12/27/2016 | 251 | 183423 | 0.40 | $ 350.00 | $ 140.00 | Communications with Ms. Fox regarding service of subpoena to |
| 8 | 12/28/2016 | 251 | 183423 | 1.30 | $ 350.00 | $ 455.00 | Manage supplemental document production; communications |
| 8 | 12/29/2016 | 251 | 183423 | 0.10 | $ 350.00 | $ 35.00 | Communications with VA counsel regarding UC Solutions subpo |
| 8 | 01/05/2017 | 251 | 183690 | 3.80 | $ 350.00 | $ 1,330.00 | Summarize status of third-party subpoenas; prepare for and att |
| 8 | 01/06/2017 | 251 | 184103 | 0.30 | $ 350.00 | $ 105.00 | Communications with Mr. Brady and Mr. Smith regarding UC Sc |
| 8 | 01/12/2017 | 251 | 183690 | 0.90 | $ 350.00 | $ 315.00 | Evaluate document production; communications with Mr. Livel |
| 8 | 01/17/2017 | 251 | 183690 | 0.20 | $ 350.00 | $ 70.00 | Review documents produced by Premier Trade Solutions; comn |
| 8 | 01/18/2017 | 251 | 183690 | 1.10 | $ 350.00 | $ 385.00 | Communications with Mr. Newnam, Mr. English and Mr. Young |
| 8 | 01/19/2017 | 251 | 183690 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. Meilinger regarding status of matter |
| 8 | 01/23/2017 | 251 | 183690 | 0.00 | $ - | $ - | Communications with Mr. Smith regarding defendants' docume |
| 8 | 01/25/2017 | 251 | 183690 | 1.40 | $ 350.00 | $ 490.00 | Travel to and attend hearing on Trask's motion to quash; confei |
| 8 | 01/26/2017 | 251 | 183690 | 1.50 | $ 350.00 | $ 525.00 | Conference with Mr. Newnam, Mr. Young, Mr. Meilinger, Mr. Li |



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|---|---|---|---|---|---|---|---|
| 8 | 01/27/2017 | 251 | 183690 | 0.40 | $ 350.00 | $ 140.00 | Communications with Mr. Wasp regarding Ronco/UC Solutions |
| 8 | 02/01/2017 | 251 | 184103 | 0.00 | $ - | $ - | Communications with Mr. English regarding status of discovery |
| 8 | 02/02/2017 | 251 | 184103 | 1.30 | $ 350.00 | $ 455.00 | Review privilege log; communications with Mr. Smith and Mr. E |
| 8 | 02/06/2017 | 251 | 184103 | 0.00 | $ - | $ - | Communications with Mr. English regarding Ronco and UC Solu |
| 8 | 02/10/2017 | 251 | 184103 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. Smith regarding discovery issues; rev |
| 8 | 02/15/2017 | 251 | 184103 | 0.00 | $ - | $ - | Communications with Mr. Lively regarding status of damages as |
| 8 | 02/15/2017 | 251 | 184103 | 2.10 | $ 350.00 | $ 735.00 | Draft motion to compel and for sanctions; communications witl |
| 8 | 02/16/2017 | 251 | 184103 | 1.60 | $ 350.00 | $ 560.00 | Draft motion to compel and for sanctions |
| 8 | 02/22/2017 | 251 | 184103 | 1.50 | $ 350.00 | $ 525.00 | Communications with Mr. Newnam, Mr. Young, Mr. Meilinger, |
| 8 | 02/23/2017 | 251 | 184103 | 2.30 | $ 350.00 | $ 805.00 | Review Mr. Meilinger's damages report |
| 8 | 02/28/2017 | 251 | 184103 | 2.10 | $ 350.00 | $ 735.00 | Communications with Mr. Meilinger, Mr. Lively, Mr. Newnam, M |
| 8 | 03/06/2017 | 251 | 184415 | 0.30 | $ 350.00 | $ 105.00 | Communications with Mr. English regarding discovery and trial |
| 8 | 03/07/2017 | 251 | 184415 | 1.30 | $ 350.00 | $ 455.00 | Communications with Mr. Newnam, Mr. Young, Mr. Smith and |
| 8 | 03/08/2017 | 251 | 184415 | 0.70 | $ 350.00 | $ 245.00 | Communications with Mr. Smith, Mr. English and Ms. Van Hoy r |
| 8 | 03/12/2017 | 251 | 184415 | 0.50 | $ 350.00 | $ 175.00 | Review motion for continuance; review and revise response in c |
| 8 | 03/13/2017 | 251 | 184415 | 0.00 | $ - | $ - | Communications with Mr. Smith and Mr. English regarding mot |
| 8 | 03/23/2017 | 251 | 184415 | 0.50 | $ 350.00 | $ 175.00 | Communications with Judge Gravely, Mr. English and Mr. Smith |
| 8 | 04/06/2017 | 251 | 184713 | 0.20 | $ 350.00 | $ 70.00 | Review correspondence from Mr. Smith regarding discovery issı |
| 8 | 04/07/2017 | 251 | 184713 | 1.80 | $ 350.00 | $ 630.00 | Communications with Mr. Newnam, Mr. Young and Mr. English |
| 8 | 04/11/2017 | 251 | 184713 | 0.30 | $ 350.00 | $ 105.00 | Track supplemental document production; communications to |
| 8 | 04/12/2017 | 251 | 184713 | 1.10 | $ 350.00 | $ 385.00 | Coordinate supplemental document production; communicatio |
| 8 | 04/13/2017 | 251 | 184713 | 0.30 | $ 350.00 | $ 105.00 | Prepare supplemental document production |
| 8 | 04/20/2017 | 251 | 184713 | 0.30 | $ 350.00 | $ 105.00 | Communications with Mr. Smith and Mr. English regarding privi |
| 8 | 04/25/2017 | 251 | 184713 | 0.20 | $ 350.00 | $ 70.00 | Review Mr. Higginbotham's document production |
| 8 | 04/26/2017 | 251 | 184713 | 0.20 | $ 350.00 | $ 70.00 | Manage supplemental document production |
| 8 | 04/27/2017 | 251 | 184713 | 0.90 | $ 350.00 | $ 315.00 | Manage supplemental production and discovery issues |
| 8 | 05/04/2017 | 251 | 185023 | 0.40 | $ 350.00 | $ 140.00 | Manage discovery issues and production of privilege log |
| 8 | 05/05/2017 | 251 | 185023 | 0.20 | $ 350.00 | $ 70.00 | Review and revise privilege log |
| 8 | 05/09/2017 | 251 | 185023 | 6.70 | $ 350.00 | $ 2,345.00 | Attend ClearTouch's 30(b)(6) deposition; consult with Mr. Newr |
| 8 | 05/10/2017 | 251 | 185023 | 2.80 | $ 350.00 | $ 980.00 | Attend Mr. Trask's deposition; communications with Mr. Englisl |
| 8 | 05/18/2017 | 251 | 185023 | 0.00 | $ - | $ - | Communications with Mr. Smith regarding status of motions to |
| 8 | 05/19/2017 | 251 | 185023 | 0.20 | $ 350.00 | $ 70.00 | Review defendants' response to motion to compel |
| 8 | 05/22/2017 | 251 | 185023 | 1.80 | $ 350.00 | $ 630.00 | Attend hearing on motion to compel and for sanctions; commu |
| 8 | 05/26/2017 | 251 | 185023 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. English and Ms. Van Hoy regarding st |
| 8 | 05/30/2017 | 251 | 185023 | 0.20 | $ 350.00 | $ 70.00 | Review privilege log; communications with Mr. Young regarding |
| 8 | 05/31/2017 | 251 | 185023 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. English, Mr. Smith and Ms. Van Hoy r |
| 8 | 06/05/2017 | 251 | 185287 | 0.90 | $ 350.00 | $ 315.00 | Communications with Mr. English and Mr. Smith regarding disc |
| 8 | 06/06/2017 | 251 | 185287 | 0.30 | $ 350.00 | $ 105.00 | Communications with Mr. English and Mr. Smith regarding doc |
| 8 | 06/16/2017 | 251 | 185287 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. Smith, Mr. English and Ms. Van Hoy r |
| 8 | 06/26/2017 | 251 | 185287 | 0.20 | $ 350.00 | $ 70.00 | Manage electronic discovery issues |
| 8 | 06/27/2017 | 251 | 185287 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. Smith regarding electronic discovery |



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|---|---|---|---|---|---|---|---|
| 8 | 06/28/2017 | 251 | 185287 | 1.30 | $ 350.00 | $ 455.00 | Communications with Mr. Smith, Ms. Van Hoy and Legal Eagle t |
| 8 | 07/10/2017 | 251 | 185546 | 1.70 | $ 350.00 | $ 595.00 | Review production of expert communications; draft response tc |
| 8 | 07/11/2017 | 251 | 185546 | 0.30 | $ 350.00 | $ 105.00 | Assist Mr. English with retrieval of deposition preparation docu |
| 8 | 07/12/2017 | 251 | 185546 | 4.30 | $ 350.00 | $ 1,505.00 | Review Ms. Stengel's email production for deposition preparati |
| 8 | 07/13/2017 | 251 | 185546 | 0.40 | $ 350.00 | $ 140.00 | Communications with Mr. English regarding deposition schedul |
| 8 | 07/14/2017 | 251 | 185546 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. Smith regarding subpoena response |
| 8 | 07/17/2017 | 251 | 185546 | 0.80 | $ 350.00 | $ 280.00 | Communications with Mr. Smith regarding documents and the : |
| 8 | 07/26/2017 | 251 | 185546 | 0.20 | $ 350.00 | $ 70.00 | Transmit Mr. Meilinger's invoice to Mr. Newnam and Mr. Young |
| 8 | 07/27/2017 | 251 | 185546 | 0.30 | $ 350.00 | $ 105.00 | Communications with Mr. Smith and Ms. Van Hoy regarding Fift |
| 8 | 07/28/2017 | 251 | 185546 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. English regarding trial preparation |
| 8 | 08/03/2017 | 251 | 185832 | 3.80 | $ 350.00 | $ 1,330.00 | Outline issues to discuss with Mr. Masters during deposition pr |
| 8 | 08/04/2017 | 251 | 185832 | 2.80 | $ 350.00 | $ 980.00 | Attend and defend Mr. Masters' portion of Encore's 30(b)(6) de |
| 8 | 08/07/2017 | 251 | 185832 | 0.70 | $ 350.00 | $ 245.00 | Draft direct testimony of Mr. Masters |
| 8 | 08/14/2017 | 251 | 185832 | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. English and Mr. Smith regarding Mr. |
| 8 | 08/17/2017 | 251 | 185832 | 1.10 | $ 350.00 | $ 385.00 | Prepare Mr. Knight for his deposition |
| 8 | 08/18/2017 | 251 | 185832 | 1.60 | $ 350.00 | $ 560.00 | Defend 30(b)(6) deposition of Mr. Knight |
| 8 | 08/21/2017 | 251 | 185832 | 2.20 | $ 350.00 | $ 770.00 | Prepare direct testimony outline for Mr. Masters; prepare direc |
| 8 | 08/22/2017 | 251 | 185832 | 0.20 | $ 350.00 | $ 70.00 | Draft cross-examination for Ms. Trask |
| 8 | 08/23/2017 | 251 | 185832 | 1.70 | $ 350.00 | $ 595.00 | Draft cross-examination outline for Ms. Trask; review and revise |
| 8 | 08/30/2017 | 251 | 185832 | 0.20 | $ 350.00 | $ 70.00 | Review documents related to Mr. Powell |
| 8 | 09/01/2017 | 251 | | 0.20 | $ 350.00 | $ 70.00 | Communications with Mr. English and Mr. Smith regarding AXI : |
| 8 | 09/04/2017 | 251 | | 0.90 | $ 350.00 | $ 315.00 | Review defendants' motion for summary judgment Review and |
| 8 | 09/06/2017 | 251 | | 2.20 | $ 350.00 | $ 770.00 | Communications with Mr. Newnam, Mr. Young and Mr. English |
| 8 | 09/07/2017 | 251 | | 4.80 | $ 350.00 | $ 1,680.00 | Review Ms. Cruse's deposition transcript to designate portions i |
| 8 | 09/08/2017 | 251 | | 1.00 | $ 350.00 | $ 350.00 | Designate portions of Ms. Cruse's deposition testimony; commu |
| 8 | 09/10/2017 | 251 | | 0.20 | $ 350.00 | $ 70.00 | Review Mr. Masters' deposition transcript to prepare him for tr |
| 8 | 09/11/2017 | 251 | | 4.50 | $ 350.00 | $ 1,575.00 | Prepare Mr. Masters for direct examination; revise Mr. Masters |
| 8 | 09/12/2017 | 251 | | 2.00 | $ 350.00 | $ 700.00 | Draft timeline of key events; designate portions of Ms. Cruse-Kr |
| 8 | 09/13/2017 | 251 | | 6.00 | $ 350.00 | $ 2,100.00 | Draft cross examination for Ms. Trask; draft cross examination f |
| 8 | 09/14/2017 | 251 | | 3.90 | $ 350.00 | $ 1,365.00 | Prepare for trial; prepare witnesses for trial; draft response in o |
| 8 | 09/15/2017 | 251 | | 1.70 | $ 350.00 | $ 595.00 | Prepare Mr. Knight for trial testimony; communications with M |
| 8 | 09/16/2017 | 251 | | 2.30 | $ 350.00 | $ 805.00 | Draft brief in opposition to defendants' motion in limine; legal r |
| 8 | 09/17/2017 | 251 | | 2.10 | $ 350.00 | $ 735.00 | Draft brief in opposition to defendants' motion in limine; legal r |
| 8 | 09/18/2017 | 251 | | 3.30 | $ 350.00 | $ 1,155.00 | Prepare for trial; revise direct examinations; revise timelines |
| 8 | 09/19/2017 | 251 | | 3.50 | $ 350.00 | $ 1,225.00 | Draft and revise trial timelines; review and revise motion in limi |
| 8 | 09/20/2017 | 251 | | 2.10 | $ 350.00 | $ 735.00 | Prepare for trial; revise response in opposition to motion in limi |
| 8 | 09/21/2017 | 251 | | 4.10 | $ 350.00 | $ 1,435.00 | Prepare for trial; prepare Ms. Whalen-Stengel for direct examin |
| 8 | 09/22/2017 | 251 | | 0.20 | $ 350.00 | $ 70.00 | Prepare for trial |
| 8 | 09/23/2017 | 251 | | 6.60 | $ 350.00 | $ 2,310.00 | Prepare for trial |
| 8 | 09/24/2017 | 251 | | 5.60 | $ 350.00 | $ 1,960.00 | Prepare for trial |
| 8 | 09/25/2017 | 251 | | 11.20 | $ 350.00 | $ 3,920.00 | Attend trial; prepare for trial |



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|---|---|---|---|---|---|---|---|
| 8 | 09/26/2017 | 251 | | 11.30 | $ 350.00 | $ 3,955.00 | Attend trial; prepare for trial |
| 8 | 09/27/2017 | 251 | | 9.00 | $ 350.00 | $ 3,150.00 | Attend trial; prepare for trial; review and revise jury charges |
| 8 | 09/28/2017 | 251 | | 11.00 | $ 350.00 | $ 3,850.00 | Trial; prepare for trial |
| 8 | 09/29/2017 | 251 | | 9.80 | $ 350.00 | $ 3,430.00 | Attend trial; discuss verdict with Mr. Newnam and Mr. English |
| | | | | **277.40** | | **$ 98,507.00** | |
| 8 | 08/24/2017 | 252 | 185832 | 2.50 | $ 375.00 | $ 937.50 | Draft verdict form. Research for jury charges. |
| 8 | 08/25/2017 | 252 | 185832 | 4.00 | $ 375.00 | $ 1,500.00 | Research for and draft proposed jury charges. |
| 8 | 08/26/2017 | 252 | 185832 | 2.50 | $ 375.00 | $ 937.50 | Research for and draft proposed jury charges. |
| 8 | 08/27/2017 | 252 | 185832 | 1.80 | $ 375.00 | $ 675.00 | Research for and draft proposed jury charges. |
| 8 | 09/05/2017 | 252 | | 5.70 | $ 375.00 | $ 2,137.50 | Research for and draft motion in limine. |
| 8 | 09/07/2017 | 252 | | 3.70 | $ 375.00 | $ 1,387.50 | Complete draft motion in limine. Draft voir dire. |
| 8 | 09/09/2017 | 252 | | 3.20 | $ 375.00 | $ 1,200.00 | Modify jury charges. Research regarding additional jury charges |
| 8 | 09/14/2017 | 252 | | 4.50 | $ 375.00 | $ 1,687.50 | Research for motion for directed verdict. Draft motion for direc |
| 8 | 09/15/2017 | 252 | | 3.80 | $ 375.00 | $ 1,425.00 | Draft motion for directed verdict. Revise and edit jury charges. I |
| 8 | 09/19/2017 | 252 | | 1.60 | $ 375.00 | $ 600.00 | Finalize jury charges. Revised directed verdict motion. |
| 8 | 09/22/2017 | 252 | | 2.20 | $ 375.00 | $ 825.00 | Research regarding punitive damages on claims for breach of fi |
| 8 | 09/27/2017 | 252 | | 1.80 | $ 375.00 | $ 675.00 | Research regarding damages for loss of business opportunity. R |
| | | | | **37.30** | | **$ 13,987.50** | |
| 8 | 09/27/2017 | 260 | | 1.10 | $ 310.00 | $ 341.00 | Legal research for Ms. Barker and Mr. English regarding electior |
| 8 | 11/18/2016 | 339 | 183075 | 3.40 | $ 185.00 | $ 629.00 | Assess documents contained on flash drive; process pst files; co |
| 8 | 11/21/2016 | 339 | 183075 | 4.70 | $ 185.00 | $ 869.50 | Process, organize, bates number and burn documents for prodt |
| 8 | 11/22/2016 | 339 | 183075 | 4.50 | $ 185.00 | $ 832.50 | Continue and complete process, organize, bates number and bt |
| 8 | 11/28/2016 | 339 | 183075 | 2.00 | $ 185.00 | $ 370.00 | Protect and copy files for client, expert, and opposing counsel |
| 8 | 11/30/2016 | 339 | 183423 | 0.50 | $ 185.00 | $ 92.50 | Assist in locating a bates numbered document |
| 8 | 12/12/2016 | 339 | 183423 | 0.80 | $ 185.00 | $ 148.00 | Assess Leon County document production; begin processing pst |
| 8 | 12/13/2016 | 339 | 183423 | 3.10 | $ 185.00 | $ 573.50 | Complete processing of Leon County documents; Add documen |
| 8 | 12/14/2016 | 339 | 183423 | 2.50 | $ 185.00 | $ 462.50 | Convert files to PDF and create index to make them searchable; |
| 8 | 12/16/2016 | 339 | 183423 | 1.00 | $ 185.00 | $ 185.00 | Maker searchable various documents in G Drive; mail and talk v |
| 8 | 12/21/2016 | 339 | 183423 | 1.50 | $ 185.00 | $ 277.50 | Download and save CT production for attorney and client acces |
| 8 | 12/23/2016 | 339 | 183423 | 0.70 | $ 185.00 | $ 129.50 | Begin export process on files; email regarding status |
| | | | | **24.70** | | **$ 4,569.50** | |
| 8 | 01/03/2017 | 339 | 183690 | 0.40 | $ 200.00 | $ 80.00 | Download, save, and OCR documents from CatchFire |
| 8 | 01/05/2017 | 339 | 183690 | 2.10 | $ 200.00 | $ 420.00 | Collect and begin to process document productions from Catch |
| 8 | 01/06/2017 | 339 | 183690 | 3.60 | $ 200.00 | $ 720.00 | Complete processing and place document productions on Share |
| 8 | 01/12/2017 | 339 | 183690 | 0.20 | $ 200.00 | $ 40.00 | Upload files to Sharefile site for expert as requested by R. Barke |
| 8 | 01/18/2017 | 339 | 183690 | 2.30 | $ 200.00 | $ 460.00 | Download, analyze, bates number, prepare, and upload docum |



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|---|---|---|---|---|---|---|---|
| 8 | 01/19/2017 | 339 | 183690 | 0.70 | $ 200.00 | $ 140.00 | Download, inspect, bates number, and mark confidential docun |
| 8 | 02/03/2017 | 339 | 184103 | 1.10 | $ 200.00 | $ 220.00 | Bates number and prepare document for ENC production; uplo. |
| 8 | 02/14/2017 | 339 | 184103 | 1.80 | $ 200.00 | $ 360.00 | Locate documents in various document productions; print clear |
| 8 | 02/16/2017 | 339 | 184103 | 0.40 | $ 200.00 | $ 80.00 | Bates number documents as requested by G. English |
| 8 | 02/17/2017 | 339 | 184103 | 0.90 | $ 200.00 | $ 180.00 | Locate documents produced by Encore; copy to flash drive as re |
| 8 | 02/20/2017 | 339 | 184103 | 0.80 | $ 200.00 | $ 160.00 | Locate key documents as requested by G. English; complete cop |
| 8 | 02/22/2017 | 339 | 184103 | 0.50 | $ 200.00 | $ 100.00 | Add bates numbers to UCS document as requested by G. Englisl |
| 8 | 02/24/2017 | 339 | 184103 | 1.20 | $ 200.00 | $ 240.00 | Locate copies of documents as requested by G. English |
| 8 | 02/28/2017 | 339 | 184415 | 0.40 | $ 200.00 | $ 80.00 | Bates number, stamp, and save documents for production as re |
| 8 | 03/03/2017 | 339 | 184415 | 0.70 | $ 200.00 | $ 140.00 | Bates number documents as requested by G. English; review ca. |
| 8 | 03/13/2017 | 339 | 184415 | 0.60 | $ 200.00 | $ 120.00 | Review Motion for Continuance as requested by G. English |
| 8 | 03/21/2017 | 339 | 184415 | 0.20 | $ 200.00 | $ 40.00 | Add bates stamp to document for production as requested by G |
| 8 | 04/11/2017 | 339 | 184713 | 0.50 | $ 200.00 | $ 100.00 | Import and process emails from R. Young in LAWPD software |
| 8 | 04/12/2017 | 339 | 184713 | 1.50 | $ 200.00 | $ 300.00 | Process documents for upcoming production |
| 8 | 04/13/2017 | 339 | 184713 | 2.60 | $ 200.00 | $ 520.00 | Prepare supplemental production; upload to flash drive; variou: |
| 8 | 04/20/2017 | 339 | 184713 | 0.40 | $ 200.00 | $ 80.00 | Research ability to make privilege log from emails; email R. Bark |
| 8 | 04/25/2017 | 339 | 184713 | 0.30 | $ 200.00 | $ 60.00 | Download, save, and share copy of excel from flash drive |
| 8 | 04/26/2017 | 339 | 184713 | 0.60 | $ 200.00 | $ 120.00 | Gather and process emails and an excel for upcoming productic |
| 8 | 04/27/2017 | 339 | 184713 | 0.50 | $ 200.00 | $ 100.00 | Add bates stamps and CONFIDENTIAL stamp to production; e-m |
| 8 | 05/04/2017 | 339 | 185023 | 1.10 | $ 200.00 | $ 220.00 | Conference with R. Barker regarding privilege log; e-mail with P |
| 8 | 05/05/2017 | 339 | 185023 | 0.90 | $ 200.00 | $ 180.00 | Continue to locate documents as requested by G. English; e-ma |
| 8 | 05/08/2017 | 339 | 185023 | 1.30 | $ 200.00 | $ 260.00 | E-mail to P. Townsend regarding Outlook export; process pst fil |
| 8 | 05/09/2017 | 339 | 185023 | 1.80 | $ 200.00 | $ 360.00 | Locate documents for deposition as requested by G. English anc |
| 8 | 05/19/2017 | 339 | 185023 | 0.40 | $ 200.00 | $ 80.00 | Search for "employment agreement" as requested by G. English |
| 8 | 05/22/2017 | 339 | 185023 | 0.20 | $ 200.00 | $ 40.00 | Review search techniques with G. English; extract needed docu |
| 8 | 05/26/2017 | 339 | 185023 | 1.20 | $ 200.00 | $ 240.00 | Search for emails for proof of production; amend privilege log a |
| 8 | 05/30/2017 | 339 | 185023 | 2.40 | $ 200.00 | $ 480.00 | Finalize hard copy entries for privilege log; e-mail G. English anc |
| 8 | 05/31/2017 | 339 | 185023 | 2.10 | $ 200.00 | $ 420.00 | Complete processing of additional e-mails from R. Young; save |
| 8 | 06/08/2017 | 339 | 185287 | 0.50 | $ 200.00 | $ 100.00 | Convert and bates number Higgenbothom emails for productio |
| 8 | 06/09/2017 | 339 | 185287 | 1.10 | $ 200.00 | $ 220.00 | Download files from opposing counsel; assess and index the file |
| 8 | 06/12/2017 | 339 | 185287 | 1.30 | $ 200.00 | $ 260.00 | Prepare explanation of files opposing counsel needs to send to |
| 8 | 06/13/2017 | 339 | 185287 | 3.20 | $ 200.00 | $ 640.00 | Search PDF documents for information regarding C. Powell for S |
| 8 | 06/14/2017 | 339 | 185287 | 1.80 | $ 200.00 | $ 360.00 | Continue to search for documents related to C. Powell |
| 8 | 06/15/2017 | 339 | 185287 | 2.00 | $ 200.00 | $ 400.00 | Complete the search for documents that need to be produced a |
| 8 | 06/21/2017 | 339 | 185287 | 0.40 | $ 200.00 | $ 80.00 | Assess files sent by opposing counsel for ENC-B production |
| 8 | 06/26/2017 | 339 | 185287 | 0.30 | $ 200.00 | $ 60.00 | Meeting with G. English regarding privilege log and other docur |
| 8 | 06/27/2017 | 339 | 185287 | 0.90 | $ 200.00 | $ 180.00 | Meeting with G. English regarding privilege log and changes nee |
| 8 | 06/28/2017 | 339 | 185287 | 1.20 | $ 200.00 | $ 240.00 | Complete and send G. English Amended Privilege Log; meeting |
| 8 | 06/30/2017 | 339 | 185287 | 1.90 | $ 200.00 | $ 380.00 | Review ENC-B database in Eclipse; compile and provide e-mail v |
| 8 | 07/03/2017 | 339 | 185546 | 2.00 | $ 200.00 | $ 400.00 | Locate, print documents for Encore 30b6 deposition as request |
| 8 | 07/05/2017 | 339 | 185546 | 1.80 | $ 200.00 | $ 360.00 | Save and print documents in preparation for Encore deposition |



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|---|---|---|---|---|---|---|---|
| 8 | 07/06/2017 | 339 | 185546 | 0.40 | $ 200.00 | $ 80.00 | Search for documents to determine if produced or not |
| 8 | 07/17/2017 | 339 | 185546 | 0.60 | $ 200.00 | $ 120.00 | Search for Gwinnett County documents; print documents as rec |
| 8 | 08/28/2017 | 339 | 185832 | 0.90 | $ 200.00 | $ 180.00 | Meeting with G. English regarding trial prep; e-mail conversatio |
| 8 | 08/29/2017 | 339 | 185832 | 3.40 | $ 200.00 | $ 680.00 | Prepare trial exhibits; locate three emails from R. Young as requ |
| 8 | 08/30/2017 | 339 | 185832 | 0.60 | $ 200.00 | $ 120.00 | Search for specific documents as requested by G. English |
| 8 | 08/31/2017 | 339 | 185832 | 3.50 | $ 200.00 | $ 700.00 | Preparing trial exhibits and index for RLM; e-mail G. English reg |
| 8 | 09/01/2017 | 339 | | 4.50 | $ 200.00 | $ 900.00 | Search for NDA documents related to ACT; finalize trial exhibits |
| 8 | 09/05/2017 | 339 | | 2.00 | $ 200.00 | $ 400.00 | Upload trial exhibits for J. Horseman; gather various deposition |
| 8 | 09/07/2017 | 339 | | 0.80 | $ 200.00 | $ 160.00 | Search documents for viola" as requested by G. English; locate c |
| 8 | 09/08/2017 | 339 | | 1.20 | $ 200.00 | $ 240.00 | Communicate with J. Horseman regarding upcoming trial; save |
| 8 | 09/11/2017 | 339 | | 1.00 | $ 200.00 | $ 200.00 | Scan, save, and index new trial exhibits; contact Legal Eagle for |
| 8 | 09/12/2017 | 339 | | 1.40 | $ 200.00 | $ 280.00 | Enter and organize exhibits in TrialDirector in preparation for w |
| 8 | 09/14/2017 | 339 | | 5.10 | $ 200.00 | $ 1,020.00 | Assist with witness preparation as requested by G. English |
| 8 | 09/18/2017 | 339 | | 1.50 | $ 200.00 | $ 300.00 | Download, save, and send D. Viola video and transcripts; search |
| 8 | 09/19/2017 | 339 | | 1.20 | $ 200.00 | $ 240.00 | Prepare exhibit 83 and send to all; bates number additional doc |
| 8 | 09/20/2017 | 339 | | 0.90 | $ 200.00 | $ 180.00 | Prepare deposition transcripts for G. English; |
| 8 | 09/21/2017 | 339 | | 1.80 | $ 200.00 | $ 360.00 | Download, save, and distribute jury lists; prepare binder for opp |
| 8 | 09/22/2017 | 339 | | 2.90 | $ 200.00 | $ 580.00 | Prepare Exhibit 84; update index; assist J. Horseman in setting u |
| 8 | 09/23/2017 | 339 | | 0.50 | $ 200.00 | $ 100.00 | Prepare exhibit 84; e-mail J. Horseman regarding trial exhibits a |
| 8 | 09/24/2017 | 339 | | 0.50 | $ 200.00 | $ 100.00 | Download, save, and send Defendant's Trial exhibits; assist R. B |
| 8 | 09/25/2017 | 339 | | 2.00 | $ 200.00 | $ 400.00 | Trial preparation and assistance |
| 8 | 09/26/2017 | 339 | | 0.90 | $ 200.00 | $ 180.00 | Assist R. Barker in creating new exhibits related to Plaintiff's exp |
| 8 | 09/26/2017 | 339 | | 0.20 | $ 200.00 | $ 40.00 | Update exhibits chart; print documents as requested by R. Bark |
| 8 | 09/27/2017 | 339 | | 0.50 | $ 200.00 | $ 100.00 | Adjust Exhibit 10 and take it to the courthouse |
| | | | | **92.40** | | **$ 18,480.00** | |
| 8 | 08/24/2017 | 470 | 185832 | 0.30 | $ 200.00 | $ 60.00 | Prepare order for certified documents from Nevada Secretary o |
| 8 | 09/17/2015 | T232 | 178465 | 0.60 | $ 400.00 | $ 240.00 | Conference with Mr. English regarding causes of action; follow u |
| 8 | 06/23/2016 | T232 | 181565 | 0.00 | $ - | $ - | Review discovery issue and strategize with Ms. Bolt Barker rega |
| | | | | **0.60** | | **$ 240.00** | |
| 8 | 07/25/2016 | T421 | 181816 | 1.20 | $ 195.00 | $ 234.00 | Redact and bates-number document production |
| 8 | 07/29/2016 | T421 | 181816 | 0.90 | $ 195.00 | $ 175.50 | Redact and bates number additional document production |
| 8 | 08/08/2016 | T421 | 182259 | 0.70 | $ 195.00 | $ 136.50 | Bates number additional document production |
| 8 | 11/18/2016 | T421 | 183075 | 0.00 | $ - | $ - | Conference with Ms. Barker re subpoena |
| 8 | 12/06/2016 | T421 | 183423 | 0.70 | $ 195.00 | $ 136.50 | Draft subpoenas to third parties in Colorado, Pennsylvania and |
| 8 | 12/12/2016 | T421 | 183423 | 1.20 | $ 195.00 | $ 234.00 | Conference with Ms. Barker and counsel in Colorado and Penns |
| 8 | 12/13/2016 | T421 | 183423 | 1.50 | $ 195.00 | $ 292.50 | Bates number document production; finalize foreign subpoenas |
| 8 | 12/14/2016 | T421 | 183423 | 1.40 | $ 195.00 | $ 273.00 | Scan documents responsive to subpoena and save to document |



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| 8 | 01/03/2017 | T421 | 183690 | 0.40 | $ 195.00 | $ 78.00 | Organize subpoenas to third-parties |
| 8 | 01/18/2017 | T421 | 183690 | 0.50 | $ 200.00 | $ 100.00 | Review emails and document productions responsive to subpoe |
| | | | | **8.50** | | **$ 1,660.00** | |
| | | | | | | $ 345,733.50 | |



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# EXHIBIT B

# Encore
## Transactions by Account
### As of December 31, 2015

| Date | Num | Name | Memo | Debit |
|---|---|---|---|---|
| 06/16/2016 | 5033 | Meilinger Consulting, PC | Trask Matter | 5,000.00 |
| 09/14/2016 | ALP-16.320AP | McClure, Ramsay, Dickerson & Esc | Trask Matter | 245.00 |
| 09/30/2016 | 5339 | Meilinger Consulting, PC | Trask Matter | 2,326.50 |
| 10/04/2016 | Encore-Trask | Carter Smith Law Firm | Trask Matter | 1,004.72 |
| 11/17/2016 | 161289/K | Langdale Vallotton, LLP | Trask Matter | 260.00 |
| 11/30/2016 | 5943 | Meilinger Consulting, PC | Trask Matter | 105.00 |
| 12/01/2016 | 2015-CP-23-0575 | Joy E. Shaver Virtual Legal Service | Trask Matter | 523.50 |
| 12/08/2016 | 19947 | EveryWord, Inc. | Trask Matter | 1,103.20 |
| 12/31/2016 | 20073 | EveryWord, Inc. | Trask Matter | 1,704.90 |
| 01/31/2017 | 6593 | Meilinger Consulting, PC | Trask Matter | 1,422.50 |
| 01/31/2017 | 40078009 | Hangley Aronchick Segal Pudlin & S | Trask Matter | 1,585.70 |
| 02/28/2017 | 6696 | Meilinger Consulting, PC | Trask Matter | 12,361.50 |
| 02/28/2017 | 91964791 | McGuire Woods | Trask Matter | 2,985.50 |
| 04/28/2017 | 6830 | Meilinger Consulting, PC | Trask Matter | 3,727.00 |
| 05/31/2017 | 7110 | Meilinger Consulting, PC | Trask Matter | 2,315.00 |
| 06/30/2017 | 7220 | Meilinger Consulting, PC | Trask Matter | 6,655.00 |
| 07/31/2017 | 7297 | Meilinger Consulting, PC | Trask Matter | 3,922.00 |
| 08/31/2017 | 8021 | Meilinger Consulting, PC | Trask Matter | 2,332.50 |
| 09/04/2017 | 3618 | Bishop Reporting Services, LLC | Trask Matter | 215.95 |
| 09/07/2017 | 3637 | Bishop Reporting Services, LLC | Trask Matter | 345.95 |
| 09/08/2017 | 3639 | Bishop Reporting Services, LLC | Trask Matter | 325.85 |
| 09/11/2017 | 3652 | Bishop Reporting Services, LLC | Trask Matter | 1,084.75 |
| 09/11/2017 | 2017-138 | Hart Video, Inc. | Trask Matter | 425.00 |
| 09/18/2017 | 5,636 | United Court Reports, Inc. | Trask Matter | 305.90 |
| 09/25/2017 | 85699 | Legal Eagle | Trask Matter | 172.67 |
| 09/27/2017 | Mileage and Trav | Jimmy Higginbotham | Trask Matter | 177.63 |
| 09/27/2017 | Witness Fee | Jimmy Higginbotham | Trask Matter | 25.00 |
| 09/27/2017 | Flight/Parking | Dale Viola | Trask Matter | 1,566.60 |
| 09/27/2017 | Hotel | Dale Viola | Trask Matter | 189.28 |
| 09/27/2017 | Witness Fee | Dale Viola | Trask Matter | 25.00 |
| 09/30/2017 | 8182 | Meilinger Consulting, PC | Trask Matter | 16,815.00 |
| 09/30/2017 | 7351 | Meilinger Consulting, PC | Trask Matter | 344.50 |
| 10/03/2017 | 1710-026 | Resonant Legal Media, LLC | Trask Matter | 14,418.14 |

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# Encore
## Transactions by Account
### As of December 31, 2015

| Date | Num | Name | Memo | Debit |
|---|---|---|---|---|
| | | TOTAL | | 86,016.74 |

| Summary | |
|---|---|
| Bishop Reporting Services, LLC | 1,972.50 |
| Carter Smith Law Firm | 1,004.72 |
| Dale Viola | 1,780.88 |
| EveryWord, Inc. | 2,808.10 |
| Hangley Aronchick Segal Pudlin & Schiller | 1,585.70 |
| Hart Video, Inc. | 425.00 |
| Jimmy Higginbotham | 202.63 |
| Joy E. Shaver Virtual Legal Services | 523.50 |
| Langdale Vallotton, LLP | 260.00 |
| Legal Eagle | 172.67 |
| McClure, Ramsay, Dickerson & Escoe, LLP | 245.00 |
| McGuire Woods | 2,985.50 |
| Meilinger Consulting, PC | 57,326.50 |
| Resonant Legal Media, LLC | 14,418.14 |
| United Court Reports, Inc. | 305.90 |

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**Costs**

| | | |
|---|---|---|
| Copies | $ | 1,281.80 |
| Federal Express | $ | 39.75 |
| Storage Hosting | $ | 444.80 |
| Postage | $ | 10.64 |
| Research | $ | 3,662.04 |
| Lunches for Trial | $ | 419.56 |
| Parking for Trial | $ | 32.00 |
| Filing Fees | $ | 308.70 |
| Service Fees | $ | 145.00 |
| Deposition Transcripts | $ | 1,953.08 |
| Certified Copies for SOS | $ | 58.00 |
| Binders for Trial | $ | 521.15 |
| Conference Call | $ | 7.19 |
| | **$** | **8,883.71** |

Client: 20677 Encore Technology Group LLC
Matter: 8 vs. Keone Trask, et al

| Matter | Date | ExpCd | Bill | Amount | Narrative |
|---|---|---|---|---|---|
| 8 | 09/18/2015 | CPY | 178465 | $ 42.40 | Copy Charges |
| 8 | 12/14/2015 | CPY | 179464 | $ 3.80 | Copy Charges |
| 8 | 05/22/2016 | CPY | 181197 | $ 15.20 | Copy Charges |
| 8 | 07/14/2016 | CPY | 181816 | $ 7.60 | Copy Charges |
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| 8 | 08/08/2016 | CPY | 182259 | $ 4.00 | Copy Charges |
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| 8 | 09/02/2016 | CPY | 182600 | $ 2.00 | Copy Charges |
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| 8 | 02/17/2017 | CPY | 184103 | $ 1.80 | Copy Charges |
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| 8 | 05/05/2017 | CPY | 185023 | $ 76.20 | Copy Charges |
| 8 | 05/05/2017 | CPY | 185023 | $ 15.60 | Copy Charges |
| 8 | 05/05/2017 | CPY | 185023 | $ 69.00 | Copy Charges |
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| 8 | 09/12/2017 | CPY | | $ 7.20 | Copy Charges |
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| 8 | 09/29/2017 | CPY | | $ 10.40 | Copy Charges |



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|---|---|---|---|---|---|
| | | | $ | 1,281.80 | |
| 8 | 12/27/2016 | FDX | 183423 | $ 20.49 | Federal Express Corporation; Invoice # 5-648-20191; Federal Express sent 12/13/16 to Dylan Steinberg; Hangley Aronchick Segal Pud |
| 8 | 05/05/2017 | FDX | 185023 | $ 19.26 | Federal Express Corporation; Invoice # 5-787-92432; Federal Express sent 4/21/17 to Greg English from James Higginbotham; Duluth |
| | | | $ | 39.75 | |
| 8 | 09/18/2015 | HRD | 178465 | $ 150.00 | Clerk of Court; Invoice # SCrandall; Cost Advanced - Filing Fee for Complaint |
| 8 | 09/18/2015 | HRD | 178465 | $ 30.00 | Greenville County Sheriff's Office; Invoice # SCrandall; Cost Advanced - Service of Summons, Complaint and Civil Action Coversheet c |
| 8 | 10/05/2016 | HRD | 182822 | $ 31.74 | Greenville County Circuit Court; Invoice # SJC; Cost Advanced - Motion to Compel Filing Fee |
| 8 | 01/05/2017 | HRD | 183690 | $ 115.00 | Checkmate, Inc; Invoice # 1153334 & 1151493; Cost Advanced - Service on CatchFire Funding and Premier Trade Solutions |
| 8 | 04/06/2017 | HRD | 184713 | $ 31.74 | Greenville County Circuit Court; Invoice # GJE; Cost Advanced - Filing Fee |
| 8 | 05/15/2017 | HRD | 185023 | $ 31.74 | Greenville County Circuit Court; Invoice # SCrandall; Cost Advanced - Filing Fee |
| 8 | 07/17/2017 | HRD | 185546 | $ 1,735.38 | EveryWord, Inc; Invoice # 12780 and 12781; Cost Advanced - Deposition of Keone Trask and Clear Touch on 5/9 and 5/10/17 |
| 8 | 08/15/2017 | HRD | 185832 | $ 31.74 | Greenville County Clerk of Court; Invoice # GJE; Cost Advanced - Filing Fee |
| 8 | 08/21/2017 | HRD | 185832 | $ 217.70 | Bishop Reporting Services, LLC; Invoice # 3549; Cost Advanced - Deposition of Michael Meilinger |
| 8 | 08/29/2017 | HRD | 185832 | $ 58.00 | Nevada Secretary of State; Invoice # DGE; Cost Advanced - fee for certified copies of filings |
| 8 | 08/30/2017 | HRD | 185832 | $ 15.26 | Legal Eagle Inc; Invoice # 85510; Cost Advanced - Exhibit Stickers |
| 8 | 09/13/2017 | HRD | | $ 505.89 | Legal Eagle Inc; Invoice # 85620; Cost Advanced- Binders for Trial |
| 8 | 09/20/2017 | HRD | | $ 31.74 | Greenville County Circuit Court; Invoice # SJC; Cost Advanced - Filing Fee |
| 8 | 09/25/2017 | HRD | | $ 144.45 | McAlister's Deli; Invoice # SCrandall; Cost Advanced - Lunches for trial on 9/26/17 |
| 8 | 09/25/2017 | HRD | | $ 52.17 | Publix; Invoice # Gift Card; Cost Advanced - Lunches for trial on 9/25/17 |
| 8 | 09/25/2017 | HRD | | $ 7.19 | Soundpath Conferencing; Invoice # 8642428200-091217; Cost Advanced - Conference Call 9/11/17 |
| 8 | 09/26/2017 | HRD | | $ (0.38) | Overpayment for lunch on 9/26/2017 |
| 8 | 09/27/2017 | HRD | | $ 108.00 | Soby's On The Side; Invoice # 0121; Cost Advanced - Lunches for trial on 9/27/17 |
| 8 | 09/27/2017 | HRD | | $ 12.07 | Zoe's Kitchen; Invoice # 10026; Cost Advanced - Lunches for trial on 9/27/17 |
| 8 | 09/28/2017 | HRD | | $ 103.25 | Brick Street Cafe; Invoice # 9; Cost Advanced - Lunch for Trial 9/28/17 |
| 8 | 10/02/2017 | HRD | | $ 32.00 | Greg English; Invoice # GJE; Cost Advanced - Trial Parking Expenses |
| | | | $ | 3,444.68 | |
| 8 | 08/04/2017 | LIT | 185832 | $ 222.40 | doeLegal; Invoice # 16752; ; - Monthly Storage Hosting and 2 additional Eclipse Licenses - July 2017 |
| 8 | 09/26/2017 | LIT | | $ 222.40 | doeLegal; Invoice # 16849 - Monthly Storage Hosting and 2 additional Eclipse Licenses - August 2017 |
| | | | $ | 444.80 | |
| 8 | 07/14/2016 | POS | 181816 | $ 1.57 | Postage and Mailing Expense |
| 8 | 11/04/2016 | POS | 183075 | $ 3.85 | Postage and Mailing Expense |
| 8 | 11/15/2016 | POS | 183075 | $ 0.93 | Postage and Mailing Expense |
| 8 | 11/21/2016 | POS | 183075 | $ 1.15 | Postage and Mailing Expense |
| 8 | 11/22/2016 | POS | 183075 | $ 1.36 | Postage and Mailing Expense |
| 8 | 12/21/2016 | POS | 183423 | $ 1.78 | Postage and Mailing Expense |
| | | | $ | 10.64 | |



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|---|---|---|---|---|---|
| 8 | 08/28/2017 | RES | 185832 | $ 255.05 | Online Legal Research 7/27/17 to 8/26/17 |
| 8 | 09/28/2017 | RES | | $ 756.98 | Online Legal Research - Westlaw 8/27/17 to 9/26/17 |
| 8 | 09/28/2017 | RES | | $ 2,650.01 | Online Legal Research - Westlaw 8/27/17 to 9/26/17 |
| | | | | **$ 3,662.04** | |



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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Encore Technology Group, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Defendants. | ) | C.A. No.: 2015-CP-23-05757<br><br>**DEFENDANTS' RESPONSE AND OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT INCLUDING RESTITUTION, EXEMPLARY DAMAGES, ATTORNEYS' FEES, EXPERT WITNESS FEES, COSTS AND OTHER EXPENSES** |

## I. INTRODUCTION

Defendants Keone Trask (*hereinafter* "Trask") and Clear Touch Interactive, Inc. (*hereinafter* "Clear Touch," and collectively with Trask, "Defendants"), through their undersigned counsel, respectfully file this Response and Opposition to Plaintiff's Motion for Judgment Including Restitution, Exemplary Damages, Attorneys' Fees, Expert Witness Fees, Costs, and Other Expenses (Pl. Mot. Judg.). For the reasons set forth below, and in Defendants' Post-Trial Motions, Defendants respectfully request the Court order Plaintiff to elect its remedy (if it does not grant one of Defendants' post-trial motions rendering the issue moot), deny Plaintiff exemplary damages, deny Plaintiff attorneys' fees, expenses and costs, or in the alternative reduce any award of attorneys' fees and costs.

## II. ELECTION OF REMEDIES

### A. Encore Must Elect a Remedy to Prevent Duplicative Recovery

Encore must elect a remedy in order to prevent duplicative recovery. The Court recognized election of remedies issues were at play in this case immediately following entry of the verdict. This remains the case and Encore cannot avoid this unassailable fact by summarily stating the

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doctrine is inapplicable. Encore's post-trial filing provides no substantive argument to show it should avoid electing its remedy; and instead relies upon general citation to readily distinguishable case law to summarily state the doctrine is inapplicable. That is not enough for Encore to avoid electing its remedy and receive duplicative recovery. Encore's argument against electing its remedy ignores the manner in which it presented its damages to the jury, its own expert's trial testimony concerning those damages, and the fact that not doing so would result in duplicative recovery.

"Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action." *Taylor v. Medencia*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996). "The basic purpose of election of remedies is to prevent double recovery for a single wrong." *Williams v. Riedman*, 339 S.C. 251, 275, 529 S.E.2d 28, 40 (Ct. App. 2000). "[T]he doctrine of election of remedies 'does not require election between distinct causes of action arising out of separate and distinct facts,' but a plaintiff must elect his remedy 'where two distinct wrongs result only in a single and the same loss...if they may not be pursued together without prejudice to defendant.'" *Rivers v. Rivers*, 292 S.C. 21, 31 (Ct. App. 1987) citing 28 C.J.S. *Election of Remedies* § 3 at 1065 (1947). The purpose of the doctrine is prevention of duplicative recovery making its application necessary under the circumstances.

**1. Encore Ignores the Manner in which it Presented its Damages at Trial**

At trial Encore presented Plaintiff's Exhibit 10-H entitled "Summary of Damages" as a representation of all the harm it claimed to have suffered due to Defendants' alleged actions. In presenting that to the jury it did not differentiate the underlying facts or causes of action it claimed gave rise to the damages in specific tables or the items within each. Rather, Pl. Exhibit 10-H was

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presented as a reflection of the harm Encore suffered due to all of Defendants' alleged actions. Encore could have specified that certain causes of action correlated to a particular table, but it chose not to do so. The jury clearly relied upon and utilized Pl. Exhibit 10-H in rendering the verdict. The Plaintiff cannot now claim that distinct actions and specific and separate causes of action relate to different damage items within Pl. Exhibit 10-H when it failed to do so at trial. It chose to present that exhibit as a summation without distinction and enjoyed the benefit of jury not being wed to awarding certain items upon specific and distinctive facts.

**2. Encore Ignores its Own Expert's Testimony**

Encore's argument against electing its remedy also ignores its expert, Michael Meilinger's trial testimony regarding the interplay of the damage Tables in Pl. Exhibit 10-H. As detailed in Defendants' Post-Trial Motions, the Verdict Form clearly shows the jury utilized Tables 1 and 2 from Pl. Exhibit 10-H to render the verdict and Mr. Meilinger testified that the jury awarding damages reflected in Table 2 precluded awarding those in Table 1. (*See* Def. Post-Trial Mot. at 2-4). Encore's post-trial arguments ignore its own expert's testimony on this point and attempt to recover damages he said were not recoverable should the jury award damages from Table 2. (*See* Pl. Mot. Judg. at 4-7 - arguing Plaintiff should recover damages for breach of loyalty and breach of fiduciary duty along with those awarded under breach of contract with fraud which encompass the damages in Table 2). The jury utilized the damage figure from Table 1 to award the $375,733.40 under the Breach of Duty of Loyalty claim (apportionment of compensation Encore sought to recover). Encore seeks to recover those damages along with the damages awarded under the Breach of Fiduciary Duty cause of action and Breach of Contract with Fraud claim. (Pl. Mot. Judg. at 6). The verdicts rendered under those causes of action are comprised of damages from Table 2 in whole or in part respectively. Mr. Meilinger's testimony was clear that recovery of

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Table 2 damages precluded recovery of damages from Table 1. Thus, according to Encore's own expert, it cannot recover the damages awarded for Breach of Loyalty if it receives those given under either the Breach of Fiduciary Duty or Breach of Contract with Fraud causes of action.[1]

A party should not be able to contradict their own expert's trial testimony in order to recover damages he testified it would not be entitled to should the jury award another category of damages.

**3. The Cases Cited by Encore are Distinguishable**

Encore presents little to no substantive argument showing the election of remedies doctrine is inapplicable. Rather, it cites to two distinguishable opinions for general propositions which fail to take in to account the circumstances of each particular case and the one at hand. Consideration of the actual facts and circumstances of the cases Encore relies upon shows that the overly general propositions for which Plaintiff cites them are inapplicable in this case and that it must elect its remedy in order to avoid double recovery.

Encore first cites to *GTR Rental, LLC f/k/a CitiCapital Trailer Rental, Inc., v. DalCanton and Capital City Trailer, LLC* in which the Court held that the Plaintiff did not have to elect its remedy because the case involved a "complex series of transactions undertaken by Defendants" accomplished "over a lengthy period of time." (Pl. Mot. Judg. at 5 citing 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995). Encore offers no explanation or analysis to show *GTR*'s applicability to the matter at hand and why this Court should allow Plaintiff to forego electing its remedy.

[1] Encore also ignores the fact that the jury's Breach of Fiduciary Duty award of $675,361 is comprised of the first three items in Table 2. Those damages were also awarded under the Breach of Contract with Fraud claim; thus, precluding Encore from recovering both.

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

Each of those actions were separate and distinct acts in which DalCanton and Gillion were violating their respective fiduciary duty to their employer, defrauding the plaintiff, taking its property or diverting profits. Those actions gave rise to distinct harms for which the jury awarded damages against each defendant.[2] The seemingly duplicative verdicts on the fiduciary duty, and conversion claims were rendered against two separate individuals who undertook distinct actions

[2] The jury verdict was as follows:

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

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

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

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in causing the harm under those causes of action. Simply put, the harm for those causes of action may have been the same but Gillion and DalCanton undertook different acts to cause it. Importantly, the opinion lacks sufficient detail to determine if the harms were in fact the same.[3] Further, there was no cause of action under which the jury awarded damages by adding up the damages awarded under the other claims as it did in this case.

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

Encore also cites to *Rivers v. Rivers*; a family court case involving claims for alienation of affection and criminal conversion. 292 S.C. 21 (Ct. App. 1987). Encore cites the *Rivers* Court's

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

[4] *See* Def. Post-Trial Mot. at 2-4 including fn3 and 4 showing the calculation for the Breach of Contract with Fraud figure:

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

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conclusion that the Plaintiff did not have to elect its remedy because "[t]he causes of action [were] distinct, they arose out of separate and distinct facts, and the two alleged wrongs did not result in a single and the same loss." (Pl. Mot. Judg. at 5 citing *Rivers*, 292 S.C. at 29-31). Here, the Defendants' alleged wrongs resulted in the same loss which the jury awarded under the Breach of Contract with Fraud claim. Without distinct damages, Encore is required to elect its remedy in order to avoid duplicative recovery and *Rivers* does nothing to change that reality.

**B. Encore Should Not Receive Exemplary Damages**

At trial the jury awarded Encore punitive damages under various causes of action. It also found that Defendants violated the South Carolina Trade Secrets Act ("SCTSA") in willful, wanton, or reckless disregard of Plaintiff's rights. The SCTSA gives the Court discretion to award exemplary damages of up to twice the actual damages awarded for trade secret misappropriation "upon a finding of willful, wanton, or reckless disregard of the plaintiff's rights" S.C. Code Ann. § 39-8-40. Encore argues it should receive exemplary damages in addition to the punitive damages awarded at trial; an outcome contrary to controlling law.

"As with actual damages, a plaintiff can recover damages that are punitive in nature only once, either as expressly-designated punitive damages or as trebled damages [exemplary damages], where their recovery concerns a single wrong." *Smith v. Strickland*, 314 S.C. 192, 442 S.E.2d 207, 210 (Ct. App. 1994). In *Smith* the Court held that the plaintiff could not recover punitive damages under causes of action for fraud or constructive fraud as well as exemplary damages under the South Carolina Unfair Trade Secrets Act claim where the punitive damage awards were given under different causes of action for the same actual harm (economic loss suffered by the Plaintiff).

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Here, the jury awarded damages for the sales to Leon County totaling $424,945 under the following causes of action: (IV) SCTSA v Trask and Clear Touch; (III) Breach of Contract v Trask; and (V) Tortious Interference v Clear Touch; and included those damages total in its $1,476,039.40 award under the Breach of Contract with Fraud claim against Trask. The jury awarded punitive damages against Trask under the Breach of Contract with Fraud claim and against Clear Touch under the Tortious Interference cause of action. The Verdict Form clearly shows the jury awarded the same actual damages (sales to Leon County) under all these causes of action. Therefore, the award of punitive damages against the Defendants for the same actual harm as that awarded under the SCTSA claim – sales to Leon County - precludes Encore from recovering exemplary damages under the Act.

Based upon the actual damages awarded and more importantly in this context, the punitive damages awarded by the jury under the Breach of Contract with Fraud and Tortious Interference claims, the Court awarding exemplary damages to Encore under the SCTSA would not serve the purpose of such awards and result in double recovery for the Plaintiff.

**C. Encore Should Not Receive Equitable Restitution in this Case**

Encore argues it is entitled to restitution in this case under its equitable cause(s) of action. (Pl. Mot. Judg. at 3-4). Plaintiff's argument ignores the fact there is an adequate remedy at law afforded by the jury's verdict.[5] As noted in Defendant's Post-Trial Motions, that verdict compensated Encore for the damages it claimed to have suffered and any award of additional damages under its equitable claims would result in double recovery. Further, the evidence

[5] "Generally, equitable relief is available only where there is no adequate remedy at law ..." *Milliken & Co. v. Morin*, 386S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009)(internal citations omitted). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.*

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provided by Defendants to the Court demonstrates Encore came to the court of equity with unclean hands, thereby barring its ability to recover under any equitable cause of action. (*See* Def. Post-Trial Mots. at 34-35).[6] Therefore, Encore is not entitled to equitable restitution.[7]

## III. ATTORNEYS' FEES AND COSTS

Under South Carolina law, "[a]ttorney's fees are not recoverable unless authorized by contract or statute." *See Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Encore seeks to recover its attorneys' fees under the SCTSA and Trask's Non-Disclosure Agreement.

As an initial matter, Encore has no contractual basis for recovering attorneys' fees and costs under its Non-Disclosure Agreement. The General Provisions clause upon which Encore relies does not address prevailing in an action for breach of the Agreement, but rather succeeding in obtaining an injunction to prevent violation of the covenants within it. That provision reads:

> The parties hereto recognize that irreparable damage will result to the Company in the event of the breach of any of the covenants and assurances made by Employee in this Agreement. The parties therefore agree that the Company shall be entitled, in addition to any other remedies or damages available to it under the South Carolina Trade Secrets Act or other statutory or common law, to obtain injunctive relief without bond in order to restrain the violation of such covenants by Employee. In the event that the Company prevails, in whole or in part, *in any such action*, Employee shall be liable to the Company for all of its costs and expenses, including, without limitation, reasonable attorney fees and expert witness fees.

(Exh. F Def. Post-Trial Mot.)(*emphasis added*). The language of the contract allows Encore to recover attorneys' fees and costs should it prevail "in any such action." The only action noted in that provision is one in which the Company obtains an injunction. Thus, under this Encore drafted document, "any such action" is not referring to an action for breach of contract but one in which the Company obtains an injunction to prevent breach of the covenants. That was not done in this

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[6] *See* Stengel Dep. 76-80, 87-89, 91-103, 112, 118-121 (including all exhibits referenced in these pages); Masters Dep. 35, 39-41, 43, 45-46, 52-55, 55-65 (including all exhibits referenced in these pages).

[7] Should the Court award the $5.5M restitution (damages from Table 3 of Pl. 10-H) Encore seeks for its equitable claims, then according to Mr. Meilinger's testimony, the Plaintiff cannot recover damages from either Table 1 or Table 2 of Pl. Exh. 10-H. Therefore, if the Court awarded Encore the restitution sought, then it would not be entitled to any of the other damages awarded as they are all derived from Tables 1 and 2 of Pl. 10-H.

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case, which renders the provision inapplicable and forecloses Encore's ability to recoup its costs, including expert witness fees.

The SCTSA gives the Court discretion to award reasonable attorneys' fees to the prevailing party in a trade secret case where the misappropriation is found to have been willful. S.C. Code Ann. § 39-8-80("If...willful misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party."). The Act does not provide for awarding costs. The jury found willful misappropriation in this case. Thus, it is within the Court's discretion to determine if attorneys' fees should be awarded at all, and if so, in what amount.

Encore claims it is entitled to attorneys' fees of $345,601 and costs of $94,900.45.[8] The Plaintiff should not be awarded the fees and costs sought because it has failed to carry its burden to provide the Court with evidence showing they are reasonable and appropriate. Alternatively, if the Court determines Encore should be awarded fees and costs, they should be substantially reduced because they are excessive and unreasonable as detailed below.

**A. Encore Failed to Provide Evidence of Reasonable Fees and Costs**

"Where a contract exists, the award of attorneys' fees is left to the discretion of the trial judge...." *Am. Fed. Bank, FSB v. Number One Main Joint Venture*, 321 S.C. 169, 175, 467 S.E.2d 439 (1996). Likewise, the SCTSA gives the Court discretion to determine if reasonable attorneys' fees should be awarded and if so, in what amount. S.C. Code Ann. § 39-8-80.

As the party seeking fees and costs, Encore bears the burden of submitting sufficient proof showing they are reasonable. *See Abbott v. Gore*, 304 S.C. 116, 119, 403 S.E.2d 154, 157 (Ct. App. 1991)("A party who seeks attorneys' fees has the burden to show that request is well-founded and failure to offer any evidence on the issue of attorneys' fees precludes an award."); *Liberty Mut.*

[8] Defendants maintain Encore cannot recover its costs however they have addressed the cost recovery issue from this point as if the Plaintiff can seek to recoup its costs in the event the Court determines that to be the case.

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*Ins. Co., v. Employee Resource Mang., Inc.*, 176 F. Supp. 2d 510, 531 (D.S.C. 2001)(internal citation omitted)("The party seeking recovery of attorneys' fees bears the burden of '[d]ocumenting the appropriate hours expended and hourly rates.'"). Encore has failed to carry its burden to submit sufficient evidence showing that its fees and costs are reasonable.

Specifically, in support of its fee and costs request, Encore submitted the Affidavit of Gregory J. English, Esq. in which he provides a summary breakdown of the hours spent and hourly fees charged by those who worked on the case. Exhibit A is attached to that Affidavit and said to be "[a] detailed statement showing how this time was spent." (English Aff. at 2). Exhibit A however fails spectacularly in this regard.

For each charge, Exhibit A contains columns noting the date, identity of timekeeper, hours, rate, amount of charge, and narrative. The narrative column is supposed to reflect the timekeeper's activities making up the particular charge. Plaintiff's counsel utilized block billing in the narrative column of Exhibit A assigning numerous tasks to single charges. There are some 545 entries in Exhibit A; however, only 20% of them show complete entries in the narrative column. Consequently, 436 of the 545 entries (or 80%) are incomplete and fail to show what activities counsel undertook to generate those 436 charges. Without the vast majority of the information necessary to evaluate the reasonableness of Encore's claimed fees, the Court cannot make a determination on the issue. Further, Encore's failure to submit complete information concerning its fees robs Defendants of the ability to review and challenge unreasonable charges. Even without this information, Defendants are aware of numerous issues with the fees and expenses Encore seeks, which are addressed below. Defendants can only imagine the additional items a complete accounting would reveal.

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It was Encore's burden to provide the Court evidence that the fees and costs it seeks are reasonable. The Plaintiff failed to carry that burden. Therefore, the Court should deny Encore's request for attorneys' fees and costs outright.

In the alternative, Encore's failure to present adequate time records should result in at least an 80% reduction of its fees representing the percentage of incomplete time entries submitted. In *Uhlig, LLC v. Shirley*, the District Court was faced with a similar situation in which Plaintiff's counsel failed to submit time records in a manner which would allow the court to evaluate the reasonableness of time spent on the litigation. 895 F. Supp. 2d 707 (D.S.C. 2012). The District Court reduced the fees sought by 60% noting that "[t]he party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Id.* at 714 citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Encore should be subjected to the same treatment.

**B. Encore's Claimed Fees and Expenses are Unreasonable and Should be Reduced**

Should the Court decide to award Encore fees and/or costs, the amounts sought are unreasonable and should be reduced for the additional reasons set forth below.

**1. Attorneys' Fees Sought are Unreasonable**

Encore seeks a total of $345,601 in attorneys' fees. That amount is unreasonable under the circumstances and should be substantially reduced because Encore:

a. Overcomplicated the matter;

b. Undertook many unnecessary and unreasonable actions including:

   i. Serving 16 subpoenas and using documents and information from only 5;

   ii. Filing unnecessary motions;

   iii. Duplicating actions and activities;

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c. Submitted vague and incomplete time records; and

d. Failed to establish the hourly rates charged were reasonable.

To determine the amount of reasonable attorneys' fees the Court considers the: (1) nature, extent, and difficulty of the legal services rendered; (2) time and labor necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).

***i. Nature, Extent, and Difficulty of Legal Services Rendered***

As detailed below, Encore overcomplicated this matter resulting in a great deal of unnecessary and unreasonable activity. Admittedly, this case was factually complicated and involved numerous causes of action; however, at its core it was a breach of duty of loyalty and non-technical trade secret case. Encore's pursuit of never-ending discovery, amorphous theories of liability, and other litigation tactics morphed this matter into a much more difficult and complex case than necessary and as a result generated scores of unnecessary activity and expense.

***ii. Time and Labor Necessarily Devoted to Case***

The amount of time and labor Encore claims to have dedicated to this case was not necessary under the circumstances.

First, this was not an incredibly lengthy litigation with the majority of activity occurring over the course of 12-14 months. This case was commenced on September 18, 2015 and tried almost exactly two years later the week of September 25, 2017. The actual duration of activity was even less than the two years from filing to trial. Defendants filed Answers on November 13, 2015. There was a lull in activity and Defendants served their first discovery requests in late April 2016. Encore served its first set of discovery requests in July 2016. Written responses and

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document production were exchanged in the fall of 2016 at which point activity in the case became steady up to and including trial. Therefore, the vast majority of activity in this case was done over the course of 12-14 months.

Second, much of the activity Encore undertook in this matter was unnecessary and unreasonable as illustrated by the actions noted below. Encore overcomplicated this matter and utilized litigation to dig into and disrupt Clear Touch's business. It now seeks to have Defendants pay for this unnecessary activity, a request the Court should deny.

***a. Encore issued 16 subpoenas and used responses from only 5 for its case***

Throughout the fall of 2016 Encore subpoenaed sixteen parties, including Clear Touch's accountants, numerous customers and business entities in North Carolina, Georgia, Pennsylvania, Colorado, and Florida, and Clear Touch's new distributor which it was set to commence business with starting January 2017.[9] Encore claimed this was all necessary discovery and expended a great deal of time and expense in dealing with these subpoenas, a fact its own post-trial submissions reference and which is confirmed by the limited information contained in Exhibit A to Mr. English's Affidavit. It had to determine who it wanted to subpoena, enlist foreign counsel to

[9] Encore issued the following subpoenas in this case:

1. Smith & Shine CPAs (9.2.16)– Clear Touch's Accountants
2. Lecroy, Inc. (9.13.16) – Clear Touch Reseller in GA
3. Lecroy, Inc. (9.30.16)
4. Gary Lecroy (9.30.16) – Principal of Lecroy, Inc.
5. Collaboration Solutions, Inc. (11.4.16) – (FL) Reseller
6. Gwinnett County Public Schools (11.4.16) – Customer
7. Leon County Schools (11.4.16) (FL) – Customer
8. Wake County Public School System (11.4.16)(NC) – Customer
9. Winston-Salem/Forsyth County Schools (11.4.16)(NC) – Customer
10. Jimmy Higginbotham (11.15.16)(GA) – Former Encore and Clear Touch Employee
11. Valdosta City School District (11.17.16)(GA) – Customer
12. Catchfire Funding (12.14.16)(CO) – Entity handled IRA investment into Clear Touch
13. Premier Trade Solutions, Inc. (12.14.16)(CO) – Clear Touch Factoring Company
14. TSITouch (12.21.16)(PA) – Former Clear Touch Supplier
15. Ronco Specialized Systems, Inc. (12.27.16)(SC/NY) – Clear Touch Reseller
16. UC Solutions, LLC (12.30.16)(VA) – Clear Touch new distributor starting 1.1.17

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subpoena the vast majority of these out of state entities, process and review responsive documents (totaling at least over 19,000 pages of documents), discuss these items with the client, and address motions to quash filed by Defendants. In the end, Encore only utilized documents gathered from five of the sixteen subpoenas it issued – Higginbotham, TSITouch, Premier Trade Solutions, Catchfire, and Smith & Shin. No documents or information from the eleven other subpoenas was presented or relied upon at trial. The tremendous amount of time and expense Encore expended on these eleven subpoenas was all for not. Defendants already had to pay its own counsel to deal with the onslaught of unnecessary activity related to these subpoenas, including incurring fees for drafting and filing motions to quash and arguing them before the Court.[10] Each time Encore opposed a motion to quash it presented some reason it claimed the subpoena was necessary.[11] As shown by what Encore actually utilized in its case, only a small fraction of that activity was necessary and Defendants should not have to pay for Encore expending unreasonable time and expense on fishing expeditions.

***b. Encore filed unnecessary motions***

Encore submitted unnecessary filings, including staunch oppositions to reasonable requests for continuance of trial following the Plaintiff's unorganized document dump of hundreds of thousands of pages of documents and subsequent late production of over ten thousand pages of responsive documents on May 31, 2017. Most notable among Encore's unnecessary motions was its Second Motion to Compel and for Sanctions. Judge Seals heard that motion and in denying it

[10] Defendants had to file three motions to quash; each of which was heard in separate hearings on 10.20.16, 1.5.17 and 1.25.17.

[11] For example, in opposing Defendants' motion to quash the subpoenas to Ronco and UC Solutions, Encore claimed they needed the documents from these companies reflecting their business arrangement with Clear Touch so its expert could value the lost business opportunity damages. (*See* Def. Resp. and Opp. Pl. 2nd Mot Compl. at 14 and Exh. J – 1.25.17 Trans. 15:14-19). In reality, the expert did not need nor use the documents obtained from UC and Ronco in calculating the lost business opportunity.

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ruled that the items Encore sought had already been sufficiently produced in some form or fashion, did not exist, or were not relevant. (Judge Seals 6.7.17 Order). Encore's needless and aggressive opposition to circumstances of its creation and its filing of unnecessary motions seeking items it had or knew did not exist mandate a denial or vast reduction of the attorneys' fees sought.

***c. Encore undertook duplicative actions and activities***

Defendants know of several instances in which Encore unnecessarily duplicated activity, including having two attorneys (shareholders in the firm) attend depositions that lasted hours and often ran all day, resulting in an effective hourly rate of $750. Plaintiff's counsel are both accomplished, experienced, and excellent attorneys who could handle taking or defending depositions on their own. Defendants should not have to pay for such unnecessary duplicative activity which resulted in an unreasonably high hourly rate of $750. Defendants can only assume more duplicative activity would be revealed by review of complete time entries; however, Encore has failed to submit those to support its fees request.

***d. Block billing and vague descriptions of actions and activities***

The Court in *Uhlig* noted that when a party submits vague time entries under a block billing structure they rob the Court of "an opportunity to make any assessment of the reasonableness of the amount of time spent on a single task; determine whether there was duplication of effort, or evaluate whether the amount of time claimed is otherwise unnecessary or unreasonable." *Uhlig*, 895 F. Supp. 2d at 715. Encore's fee submission is both 80% incomplete and done in the block billing structure. As in *Uhlig*, Encore's supporting documents afford the Court (and Defendants) no meaningful opportunity to truly evaluate the necessity and reasonableness of the actions for which Plaintiff seeks to have its opposition pay.

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### *iii. Fee Customarily Charged in the Locality for Similar Services*

Encore wholly relies on its own counsel's Affidavit to establish the fees charged are reasonable and customary for similar services in Upstate South Carolina. It does not offer, as is the standard practice, a third-party affidavit from an attorney outside the firm confirming it is reasonable and customary to charge the rates Plaintiff's counsel charged in a non-technical trade secret and employment matter. *See Uhlig*, 895 F. Supp. 2d at 717 (Court found rates of $320/hr. for senior partners, $220/hr. for junior partners, and $150/hr. for paralegals were reasonable rates in a non-technical trade secret case where Plaintiff submitted affidavits of two prominent local attorneys attesting such rates were reasonable.).

Defendants also find it unreasonable that Encore's case seemingly was only worked by shareholders in the firm with hourly rates that reflect their status and experience. This resulted in high hourly rates being billed for work typically performed by less seasoned, and thus less expensive, attorneys. Notably, Encore had an attorney with a billing rate of $400 per hour read Mr. Trask's deposition at trial when that task could and should have been accomplished by someone with a much lower hourly fee. Instead, the stand-in for Mr. Trask charged a much as the more senior lead counsel for his time.

A full recounting of Encore's unnecessary activities cannot be done without sufficient documentation showing those actions. Regardless, what is known and illustrated by the items above shows Encore undertook a great deal of unnecessary activity for which Defendants should not have to pay. Therefore, any award of attorneys' fees to Encore should be substantially reduced.

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**2. Costs Sought by Encore are Unreasonable**

Encore seeks $94,900.45 in costs and expenses. That sum is unreasonable and should be denied or substantially reduced under the circumstances.[12]

***i. Fees for Plaintiff's Expert Michael Meilinger***

Encore seeks $57,326.50 for Mr. Meilinger's work on this case. Defendants recognize he prepared a lengthy damages report for the matter but are again hamstrung in truly evaluating the necessity and reasonableness of his activities due to Encore failing to submit any details regarding them. Plaintiff has not provided invoices or detailed time entries showing Mr. Meilinger's activities, leaving the Court and Defendants no way to evaluate their propriety. What Defendants and the Court do know is that Mr. Meilinger sat in trial all week when he needed only appear to testify in Plaintiff's case in chief and briefly on rebuttal to Defendant's expert. Instead of attending trial for a portion of those two days, he was there for five full days. Based on what is known and more-so unknown concerning this expert fee charge, Defendants ask the Court order Encore to bear this cost or greatly reduce it should Defendants be required to pay.

***ii. Third Party IT Vendor for Trial***

Encore also requests the Court order Defendants pay $14,418.14 for "Trial Exhibit Presentation," a cost reflecting what Plaintiff chose to pay to a third-party vendor to prepare its electronic exhibits and run them at trial. As with Mr. Meilinger, Encore has not submitted invoices or any details concerning the activities making up this large expense, leaving Defendants and the Court no basis to assess the reasonableness. That aside, incursion of this large expense was unnecessary seeing as Plaintiff counsel's firm has a full-time litigation IT paralegal who could

[12] Defendants note that the SCTSA only allows for recovery of "reasonable attorneys' fees" and not costs. As argued above, the Non-Disclosure Agreement's language does not provide for recovery of Encore's attorneys' fees and costs under the circumstances. Therefore, Defendants maintain Encore cannot recover any costs whatsoever. However, to the extent the Court determines otherwise, the costs Encore seeks to recovery should be reduced.

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have handled the preparation and presentation of electronic exhibits. In fact, Ms. Van Hoy came to the courtroom prior to trial with the third-party vendor to set up Encore's electronics; yet another duplicative activity for which Defendants should not have to pay. Encore chose to incur this needless expense and Defendants should not have to bear the burden of that choice.

***iii. Out of State Subpoenas***

Encore seeks $5,076.20 for costs associated with its issuance of the numerous out of state subpoenas. As detailed above, the vast majority of the subpoenas Encore issued in this case were unnecessary. Plaintiff used a small fraction of the documents received through subpoena and Defendants should not have to bear the costs Encore incurred in subpoenaing parties from whom they received documents never utilized to prove its case.

***iv. Witness Travel***

Encore seeks $1,983.51 for "witness travel" for which Defendants should not have to pay. The vast majority of this expense stems from Encore flying Dale Viola to trial from Louisiana. This was done after Encore took Mr. Viola's video deposition for trial a week prior; representing a not inconsequential expense itself. There was no need to fly Mr. Viola from Louisiana for trial when Encore had a trial video deposition taken a week earlier it could have shown to the jury. Again, Encore chose to incur this unnecessary expense for which Defendants should not have to pay.

***v. "Other Costs and Expenses"***

Encore seeks to have Defendants pay it $1,739.90 for "other costs & expenses." Without any information as to what these costs were, Defendants cannot be required to pay them.

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## IV. CONCLUSION

For the reasons stated above, Defendants pray that the Court order Plaintiff elect its remedy, deny its requests for exemplary damages, and deny its request for attorneys' fees and costs or in the alternative greatly reduce any fees and costs awarded.

Respectfully Submitted,

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November 15, 2017
Greenville, South Carolina

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Encore Technology Group, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Defendants. | ) | C.A. No.: 2015-CP-23-05757<br><br>**DEFENDANTS' SUPPLEMENTAL POST TRIAL FILINGS** |

## I. INTRODUCTION

Defendants Keone Trask (*hereinafter* "Trask") and Clear Touch Interactive, Inc. (*hereinafter* "Clear Touch," and collectively with Trask, "Defendants"), through their undersigned counsel, respectfully file this Supplemental Post-Trial Memorandum in support of its previous post-trial filings and in opposition to the Plaintiff's post-trial filings to date. This memorandum is submitted to address various issues and arguments raised during the post-trial hearing on November 17, 2017. For the reasons set forth below and in Defendants' other post-trial submissions, they respectfully request the Court:

- Require Encore to elect its remedy between causes of action II-VI because it presented its damages for those claims as identical to the jury at trial;
- Find that Encore cannot recover damages under cause of action I (from Table 1 of Plf. Exh. 10-H) along with those awarded under causes of action II-VI (from Table 2 and/or 3 of Plf. Exh. 10-H) because its own expert testified the latter included the damages from the former;
- Deny, or in the alternative substantially reduce, the attorney's fees and costs Encore seeks because they are only recoverable under three of the many causes of action alleged (may only be recovered under one of those claims) and are unreasonable and excessive; and
- Grant Defendants leave to deposit their respective judgments into the Court pursuant to SCRCP 67 to prevent the accrual of post-judgment interest while this case is resolved.

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## II. ELECTION OF REMEDIES

### A. Encore Must Elect a Remedy under Causes of Action II-VI

"Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action." *Taylor v. Medencia*, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996). "Stated another way, election of remedies is the act of choosing between different remedies allowed by law on the same state of facts." *Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 430 (Ct. App. 1995). "The basic purpose of election of remedies is to prevent double recovery for a single wrong." *Williams v. Riedman*, 339 S.C. 251, 275, 529 S.E.2d 28, 40 (Ct. App. 2000). "When an identical set of facts entitle[s] the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both." *Save Charleston Foundation v. Murray*, 286 S.C. 170, 176, 333 S.E.2d 60, 64 (Ct. App. 1985). "Where a party has asserted only one primary wrong, he is entitled to only one recovery, [h]owever, the principle has no application where two separate causes of action, each based on different facts, exist." *Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 430 (Ct. App. 1995). Here, the doctrine must apply due to the manner in which Encore presented its case at trial.

The jury returned a plaintiff verdict on six of the eight causes of action alleged by Encore:

1) Cause of Action I – Breach of Duty of Loyalty (v. Trask)
2) Cause of Action II – Breach of Fiduciary Duties (v. Trask)
3) Cause of Action III – Breach of Contract (v. Trask)
4) Cause of Action IV – Violation SC Trade Secrets Act (v. Trask and Clear Touch)
5) Cause of Action V – Tortious Interference (v. Clear Touch)
6) Cause of Action VI – Breach of Contract Accompanied by Fraud (v. Trask)

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At trial, Encore relied upon the same facts to establish liability for causes of action II-VI and explicitly told the jury to award it the same damages for those claims. In post-trial submissions and oral argument, Encore has attempted to avoid application of the election doctrine without regard to the manner in which it presented its case at trial, claiming that the damages sought and awarded under breach of fiduciary duty, breach of contract with fraud, and trade secret misappropriation were different, and that they therefore may recover under each. (*See* Exh. A - Plf.'s Requested Judgment). Encore's post-trial stance is that it only need elect remedies between its breach of contract, trade secret misappropriation, and tortious interference claims because the jury returned the same $424,945 verdict for each. It claims the election doctrine is inapplicable to the remaining breach of fiduciary duty and breach of contract with fraud causes of action because the verdicts under these claims were different and none awarded the entire $5.5M sought. Thus, Plaintiff seeks to recover the entirety of the damages awarded under its breach of duty of loyalty, breach of fiduciary duty, trade secret misappropriation, and breach of contract with fraud claims against Mr. Trask, and its trade secret action against Clear Touch. (*See* Exh. A). The election of remedies doctrine prohibits the recovery Encore seeks due to the manner in which it presented its case at trial. Encore must elect its remedies because it relied upon the same facts to establish liability for causes of action II-VI and sought the exact same damages under each claim at trial.

**1. Encore's Post Trial Argument(s)**

During post-trial hearings Encore gave the impression that it in fact presented separate and distinct elements of damages to the jury at trial for its breach of loyalty, breach of fiduciary duty, trade secrets, and breach of contract with fraud claims. The trial transcript showed this was not the case.

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During oral arguments on post-trial motions, the Court appears to have been under the impression that Encore presented separate and distinct elements of damages for each cause of action at trial, including those for breach of fiduciary duty, breach of contract with fraud, and trade secret misappropriation.[2] It sought to confirm its recollection by questioning the Plaintiff on the issue.

> THE COURT: The damages that you put up – am I not right? And you tell me if I'm wrong. If you put up the same damages, although there may be totally different causes of action, you can't get relief for every single cause of action if you use the same damages over and over again. It's the same damages.
>
> MR. ENGLISH: Right. If the jury had given us $5.5M for each cause of action, we would have to elect. We'd only get that once.
>
> (Hearing Trans. 35-36:4)[3]
>
> ...
>
> THE COURT: What were your damages that you put before the jury for breach of fiduciary duty?
>
> MR. ENGLISH: I think those are the profits that Encore lost by not being able to purchase directly from the suppliers.
>
> THE COURT: So that is Table 2?
>
> MR. ENGLISH: I think it comes from Table 2.
>
> THE COURT: $1.1 million, plus 306?
>
> MR. ENGLISH: Right.
>
> (Hearing Trans. 36:7-15).
>
> ...

[2] *See* Hearing Trans. 41:3-10, 43:1-4.

[3] Under Encore's position, it would not have to elect its remedies among its various claims as long as the jury awarded different damages that were below $5.5M under each. By that logic, Encore could recover well over its claimed total damages if the jury awarded $1M for breach of fiduciary duties, $2M for breach of contract, $3M for trade secret misappropriation, $3.5M for tortious interference, $4M for tortious interference, and $5M for breach of contract with fraud.

Encore may claim it can recover damages totaling up to $5.5M without electing because that is what they asked the jury to award. That ignores the fact that they did not ask for separate damages under causes of action II-VI. As detailed below, they requested the jury award it the "same damages" for those claims. This rationale also turns a blind eye to Encore's clear (and correct) message to the jury that each cause of action is separate and the damages are not to be added together: "Let me say that each cause of action is separate. They are not added together. You need to view each cause of action as though it's there by itself." (Closing Trans. 28:2-5).

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THE COURT: Then when you went to the jury, on breach of contract, what were your damages you were seeking?

MR. ENGLISH: Well, they awarded the 424,945 which that was the number that we asked for the Leon County School that –

THE COURT: I mean, excuse me, breach of contract accompanied by fraud.

MR. ENGLISH: We were asking for the 5.5 million for the business, under the business opportunity clause. That's what we asked for.

THE COURT: Okay. And those are the elements you went – ***what I'm trying to say is, when you were asking for different elements of damages before the jury*** --

MR. ENGLISH: ***Yes, sir.***

THE COURT: -- ***for each of these?***

MR. ENGLISH: ***Yes, sir.***

(Hearing Trans. 36:15 to 37:8)(emphasis added).

...

THE COURT: Now, going back over trade secrets, what are they?

MR. ENGLISH: The trade secrets --

THE COURT: What are your elements of damages in those?

MR. ENGLISH: The Leon County School profits. The same as the breach of contract. And that's why – or that's what the jury awarded.

THE COURT: That's not Table 10-H?

MR. ENGLISH: That is – well, it's a part of Table 2.

The Court: Oh, yeah. The 309 and 115?

Mr. English: Yes. Those are the Leon County School profits.

The Court: And that comes up to 424?

Mr. English: Yes, sir.

(Hearing Trans. 37:9-24).

In response to the Court's inquires on this issue, Encore told it what (it contends) the jury did in awarding damages; not how it presented damages to the jury at trial. The latter is the relevant information dictating whether or not the election of remedies doctrine applies to particular causes of action. The trial transcript shows the doctrine applies to every one of Plaintiff's claims with the

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exception of its breach of duty of loyalty cause of action because it sought the same damages for the same actions under all of those claims.

**2. Encore Told the Jury to Award it the Same Damages It Claimed Resulted from the Same Actions for Five of its Six Successful Claims**

The jury returned a verdict for Encore on causes of action I-VI. (*See* Exh. B - Verdict Form). Encore presented Plaintiff's Exhibit 10-H as a summary of its damages claimed in this case. (*See* Exh. C). Those damages were not presented to the jury as separate and distinct damage elements under each cause of action, with the lone exception of breach of duty of loyalty. Rather, Encore asked for the same damages to be awarded for causes of action II-VI. Stated simply, Encore told the jury it suffered and should be awarded the same damages for five of the six claims upon which they prevailed at trial. Encore took this approach because its claimed damages all arose out of the same actions and facts under each of these causes of action. For all of the causes of actions with identical damages, the election of remedies doctrine requires that Encore choose one cause of action under which it will recover those damages.

***i. Cause of Action I - Breach of Duty of Loyalty***

At trial, Encore told the jury it should award it the wages and costs in Table 1 of Plaintiff's Exhibit 10-H because Mr. Trask breached his duties of loyalty.

> So, for the first cause of action, Breach of Duty of Loyalty, we're asking you to check the box A, for plaintiff, in the amount of – and we would ask for this 95 percent figure, $318,365. That is the figure set forth in Plaintiff's Exhibit 10-I. (Closing Trans. 18:18-23).

This is the only cause of action in which Encore presented somewhat separate and distinct elements of damages to the jury.[4]

---

[4] Encore did go on to suggest to the jury it could award the wages and costs from Table 1 under the breach of fiduciary duty claim as well.

> The first element of damages you can consider are the wages Encore paid, the direct costs to Encore. These are set forth in Plaintiff's Exhibit 10-H....[T]he wages there include this $318,000. It also includes the 95 or 90 percent of the wages paid to Mr. Higginbotham and Gallant after they signed

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### *ii. Cause of Action II - Breach of Fiduciary Duty*

In its closing, Encore told the jury Mr. Trask breached his fiduciary duties by failing to (1) disclose the true identity of Clear Touch's suppliers; (2) tell Encore that he was building a reseller network for Clear Touch; (3) work with Encore to take advantage of the Clear Touch opportunity; and (4) by making direct sales to Leon County.

> First of all, an employee could breach it if the employee fails to fully disclose to the employer knowing information that is significant and material. We know that Mr. Trask did that with regard to the true suppliers of these products. We also know that he failed to disclose that he was out there building this resaler [*sic*] network and that Encore could have done the same thing. The second thing that the fiduciary duty requires is for the employee to work with the employer to take advantage of opportunities and to do things like develop that resaler [*sic*] market. Again, if you listen to the judge's charge, I believe you're going to hear the judge charge you something like this, an employee is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition to the employer. An employee is not permitted to assume two distinct and opposite characters in the same transaction, acting for himself and presenting to act for his employer. (Closing Trans. 20:3-25).

Encore told the jury these actions were breaches of Trask's fiduciary duties which resulted in $5.5M of damage in the form of (1) lost profits (a) on sales of panels purchased from Clear Touch (because it could have purchased directly from the suppliers if Trask disclosed their identity); (b) from Clear Touch's sales to Leon County; and (c) those generated by Clear Touch's other sales all totaling $1,100,306 and (2) the lost Clear Touch business opportunity; something it claimed was worth over $3.9M.

> [T]he second category of damages is Lost Profit, and there are two categories of that....The first category are the products that Encore sold to its customers that it acquired form Clear Touch at the mark up. And the position here is that Encore, if it had known, could have purchased directly from TSI Touch and CBTE [*sic*] at a lower price....Then they would have recognized that additional profit margin on those products....That's the first three categories in Table Number 2. Those categories total $675,361. So if Mr. Trask had just told Encore who the true suppliers were and arranged, while he was an employee, and let Encore buy directly from them, that's how much additional profit Encore would have recognized. The second category are those bottom two lines, and those are the sales made to Leon County schools....[reflecting a] profit amount [of] $424,945....So this $1.1 million figure of lost profit consists of the lost profits of not knowing and purchasing from the true suppliers and not making the sales to Leon County. (Closing Trans. 22 to 23:1-15).
>
> ...

---

the non-disclosure agreement and 50 percent of the net expenses. In other words, so this element of damages just shows what Encore paid in out-of-pocket costs. (Closing Trans. 21:6-21).

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> [T]he third calculation, and this is the business opportunity calculation. This looks at what gives the – what would the value be to Encore if Mr. Trask had disclosed not just the suppliers and let them buy from Leon County, but what would the damages be if he had turned over the resaler [*sic*] network that he was building on Encore's dime and let Encore take advantage of that. There are actually two components of this. One is that, again, Mr. Trask was obligated to notify Encore of the opportunity and, second, he was obligated to work with Encore, but let them develop that opportunity, even if it was at their interests, instead of his, while he was an employee....[These calculations] consists of two components. One is just for – lost profits are the profits that Clear Touch made through the end of 2015, and that figure is 1,636,254. In other words, if Encore had been able to make the same sales that Clear Touch made through the end of 2015, that's the profit that Encore really made. And then at the end of 2015, what was Clear Touch worth? That's the business valuation....That's where he comes up with the figure of $3,900,000. Those two components add up to the $5.5 million figure that you heard. (Closing Trans. 24:7 to 25:13).
>
> ...
>
> Encore sincerely believes if that Mr. Trask had honored his fiduciary duty to disclose the Clear Touch opportunity, Encore would have realized that $5.5million value. (Closing Trans. 27:3-6).

Mr. Trask's breaches of his fiduciary duties, Encore told the jury, caused it to suffer the damages reflected in Plaintiff Exhibit 10-H (the entirety of the damages sought in this case) and asked it to award those damages.

> So, let's jump back to the verdict form. Number 2, for Breach of Fiduciary Duty, we believe that you should find for the plaintiff and you should find for the amount of $5.5 million based on this analysis. (Closing Trans. 27:18-22).

From that point forward, Encore did not separate, distinguish, or differentiate its claimed damages among the remaining causes of action. Rather, it relied upon the same actions it claimed made Trask liable for breach of his fiduciary duties to impose liability for every remaining cause of action and explicitly told the jury to put in the same damage figure as it did under the breach of fiduciary duty claim.

### *iii. Cause of Action III - Breach of Contract*

Encore told the jury the damages it suffered for Mr. Trask's breaches of contract were the same it incurred for the breach of fiduciary duty claim.

> We'd ask you to put the ***same damage amount*** as you put for the Breach of Fiduciary duty. ***We think the damages resulting from both are the same.*** And that makes it simple. (Closing Trans. 30:15-18)(emphasis added).

Those same damages, Encore told the jury, arose from the same actions that made Trask liable for breaches of his fiduciary duties to the company.

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> [T]he third claim is for Breach of Contract…Mr. Trask breached his contract in five ways. First, on page 1, in the confidentiality provision, Mr. Trask had Encore's confidential information about two things: the true identity of the suppliers and the ability to build this resaler [*sic*] network for this – this product. He used Encore's confidential information in violation of this that says he won't use it for himself or disclosure to third parties. That's the first breach of contract we're claiming…
>
> Let's look at the non-solicitation provision…. This is Leon County. Leon County was Encore's customer. Mr. Trask would not have been involved in making those sales to Leon County. That is the second breach of contract.
>
> The third provision is the non-piracy provision on the contract….And he hired Mr. Gallant in breach of this. That's the third breach.[5]
>
> The fourth breach is the business opportunity provision….He breached that. He didn't notify them either of the opportunity to buy from the suppliers or the opportunity to build a resaler [*sic*] network. Then, he's got to – and shall use his good faith efforts to cause the company to have the opportunity to explore, invest in, participate or otherwise become affiliated with the opportunity. He breached that. That's the fourth provision of contract.
>
> The fifth provision is actually not written in the contract…[but is the] implied covenant of good faith and fair dealing. It means you've got to act in good faith and deal fairly with the party on the other side. Mr. Trask breached that. (Closing Trans. 28:11-21 to 30:12).

### *iv. Cause of Action IV - Violation of S.C. Trade Secrets Act*

Encore went on to tell the jury to award the same damages it awarded for the prior two claims for its trade secret misappropriation cause of action.

> And again, we'd ask you to use the ***same damages figure*** for this claim that you used for the breach of fiduciary and breach of contract claim. (Closing Trans. 31:5-8)(emphasis added).

As with the previous two causes of action, Encore relied on the same actions to establish liability under its trade secrets claim.

> The fourth claim is Trade Secrets. Again, the trade secrets are two-fold. The trade secrets, Encore should have known who the suppliers were…And Leon County's desire to purchase these 900 panels was the second trade secret that Mr. Trask misappropriated along with Clear Touch. And again, we'd ask you to use the ***same damages figure*** for this claim that you used for the breach of fiduciary and breach of contract claim. (Closing Trans. 30:19 to 31:8)(emphasis added).

### *v. Cause of Action V – Tortious Interference with Contract*

Encore followed suit for its tortious interference claim against Clear Touch, not setting out any new factual basis for liability and instructing the jury to award the exact damage figure as it had for the causes of action II-IV.

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[5] Hiring Mr. Gallant was never tied to any claimed damages.

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> The next cause of action is Tortuous [*sic*] Interference....[W]hat we're saying is Clear Touch has the same responsibility for causing that contract to be breached that Mr. Trask had. We'd ask for you to check for the plaintiff and use the ***same damage figure that you used in the prior three claims***. (Closing Trans. 31:15-24)(emphasis added).

### *vi. Cause of Action VI – Breach of Contract with Fraud*

Encore maintained its approach for its Breach of Contract with Fraud claim, telling the jury to award the same actual damage amount it entered for causes of action II-V and noted this claim differed from the breach of contract action only in that it allowed consideration of punitive damages.

> The next cause of action is Breach of Contract Accompanied by Fraudulent Act. This, again, applies to Mr. Trask. It says he breached the contract, but it wasn't just a regular breach, it was accompanied by fraudulent acts. And those are all the things I covered in the time line. And because of that, you are also able to consider punitive damages. We'd ask you to enter the ***same amounts that you entered on every other one except for the first one***. (Closing Trans. 32:1-11)(emphasis added).

Encore's presentation of damages for causes of action II-VI was uniform and unequivocal. It asked the jury to award it $5.5M under the breach of fiduciary duties claim and then said to give it the "same amount" or "same damages figure" for each cause of action II-VI. Plaintiff did not tell the jury that if it chose to award something less than the entire $5.5M under the breach of fiduciary duties claim then it could or should award any remaining portions of that total under the other causes of action. In fact, Encore explicitly told the jury the damages were not cumulative under each of the causes of action and said they should refrain from adding them together.

> Now, let me say that you don't add all these together. In other words, if you were to award Encore the $5.5 million for the value of the whole Clear Touch opportunity, that would include the lost profits and would include the wages. Now, the same could be true of the $1.1 million and the $488,000-figure. If you believe that all of these wages would be necessary to generate those profits, then you would just lower the lost profit figure. But if you don't believe all of these wages were appropriate, then you can add some wages to the $1.1 million lost profit figure. (Closing Trans. 25:14-25 – 26:1).
>
> ...
>
> Let me say that each cause of action is separate. They are not added together. You need to view each cause of action as though it's there by itself. (Closing Trans. 28:2-5).

Post-trial Encore attempts to divorce itself from the manner in which it presented its case to the jury and recover under multiple causes of action against each Defendant despite telling the

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jury the damages it suffered for those claims was the exact same. In its closing, Encore told the jury that the damages for causes of action II-VI were the same and expressly instructed them to award the same amount for each. Liability under those claims were based upon the same facts and "simply represent[ed] alternative theories of recovery for the same injury." *Uhlig v. Shirley*, 2012 WL 2890178 at *3 (D.S.C. 2012)("Although the causes of action asserted by Uhlig in this case have differences in the elements required to prevail on each cause of action, there is an overlap in the evidence and factual bases on which Uhlig relied to prove Defendants' liability as to each cause of action. Accordingly, the court finds that it is appropriate to require Uhlig to make an election of remedies.").[6] Therefore, Encore cannot escape application of the election of remedies doctrine due to the manner in which it presented its case to the jury and must decide under which one of the causes of action II-VI it wishes recover.

Encore now is attempting to recover damages from, in its view, all three tables in Exhibit 10-H. Specifically, if the Court accepts Encore's requested judgment it would allow it to recover the entirety of Table 2 (lost profits on products sold to it by Clear Touch $675,361 + Leon County profits 424,945 = $1,100,306) along with portions of Table 1 (Wages and expenses $375,733.40) and Table 3 ($1,476,039.40). (Exh. A - Plf. Req. Judgment).[7] In order to rightfully recover those

[6] The *Uhlig* court was faced with a jury verdict against a former employee and his company for misappropriation of trade secrets, breach of an employment agreement, tortious interference with an employment agreement, breach of fiduciary duty, aiding and abetting the breach of fiduciary duty, and tortious interference with prospective contracts. The jury was required to provide an amount for each cause of action and awarded various sums for each, ranging from $250,000 to $1.5M. The District Court held that plaintiff could recover for trade secret misappropriation and tortious interference with prospective contracts because at trial Plaintiff presented evidence which distinguished those claims from the others and allowed independent recovery under those causes of action, but it had to elect its remedy from the remaining claims. It explained the plaintiff had submitted trade secrets that were separately categorized from information that was merely confidential, and found the common law claim for tortious interference was not cumulative of any other claim made by the plaintiff. On the other hand, the Court concluded the remaining claims were based on the same facts and "simply represent alternative theories of recovery for the same injury." Uhlig, 2012 WL 2890178 at *4. As such, the same evidence supported each of these claims, and consequently, the plaintiff had to elect amongst these claims, thereby reducing its recovery.

[7] Defendants maintain that the jury did not award damages from Table 3 as Encore asserts without any basis, objective or otherwise. *See* Defs. Post-Trial Motion at 2-4; Defs. Resp. & Opp. at 2-4.

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damages, Encore would have had to present them as separate and distinct facts and elements of damages for each of those claims. That did not occur for causes of action II-VI and therefore it must elect its remedy by choosing to recover under one of those claims. Further, the award of those damages should preclude the recovery of the wages and expenses from Table 1 as they are included in the larger damage figures.

**B. Encore's Expert Presented Tables 1, 2, and 3 as "Alternative Calculations" at Trial**

Post-trial filings and oral arguments raised an issue regarding Plaintiff expert Michael Meilinger's trial testimony addressing the interplay of the claimed damaged in Plaintiff Exhibit 10-H. That exhibit contained three tables with damage calculations.[8] Defendants maintained that Mr. Meilinger testified that the damages reflected in Exhibit 10-H's Tables 1, 2, and 3 were alternative damages with each table including the damages from the one(s) before it. Thus, Defendants maintain that the jury awarding damages from Table 2 precluded recovery of those in Table 1 because the former included the damages from the latter. (Def. Post-Trial Mot. at 2-4). Encore disputed that its expert testified as Defendants' recalled.[9] The trial transcript showed that Encore's expert testified that the damage tables presented by the Plaintiff were "alternative calculations" and the recovery of certain damages precluded recouping others.

**Direct Exam by Mr. English**

> Q: Mr. Meilinger, can you explain to the jury how these three different calculations, the direct costs involved and the wages and trade show, the second one for lost profits if Encore had been able to buy directly from the suppliers and the third calculation for the value of Clear Touch relate to each other.

---

[8] As labeled by Encore they were Table 1: Direct Costs Incurred by Encore; Table 2: Profit Lost on Sales Made to Encore and Encore Customers by Clear Touch; *Table 3*: Damages Related to Loss of Business Opportunity. (*See* Exh. C).

[9] "Mr. Meilinger did not testify that awarding damages reflected in Plaintiff's Exhibit 10-H, Table 2 precluded awarding damages in Table 1." (Pl. Resp. to Defs. Post-Trial Mots. at 4).

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A: Well, ***these are alternative calculations***. For example, if Encore had been given the business opportunity, they would have continued to pay Mr. Higginbotham. ***So, you would not take the 488,000 and add it to the $5,536,254***.

***On the second one, again, the damages for the second one are included in the damages for the third one. So, you would not add the $5,536,254 to the 1.1 million***. All the profits that were lost are in this calculation too. It would be – ***it would be double – it would be duplicative if you added those together***.

Q: Let me just clarify that point. ***Are you saying the lost profits in Calculation 2 are included in Number 3?***

A: ***Yes, sir***.

Q: Please keep – then describe how these other calculations relate to each other.

A: ***So the lost profits, the second analysis, you would not add the second analysis to the first analysis***. So basically, the first analysis is a direct cost of the hard costs that Encore invested through only these three employees and Clear Touch. Then the second one is the lost profits that if the vendors had been disclosed to them, this is how much money they would have made just selling the products to their customers. The third one is if the business opportunity had been given to them and they had taken the business opportunity, this is how much it would have been worth to them.

Q: So of these calculations, Mr. Meilinger, what would be the fullest measure of damages to Encore?

A; $5,536,254.

Q: All right. And then if the jury just believes that the entire Clear Touch business was not an opportunity for Encore, but Encore should just get the profits on the – if it had bought directly from the suppliers and made the Leon County sales, what would those lost profits be?

A: $1,100,306.

Q: And then if the jury only awards the wages that were paid to the Clear Touch employees who become – the Encore employees who became Clear Touch employees, what would that figure be?

A: $488,041.

(Meilinger Testimony Trans. 49:8 to 51:11)(emphasis added).

Mr. Meilinger's testimony was clear that the damages in Table 2 included those in Table 1. Thus, the award of the former precludes awarding damages from the latter. The same can be said of awarding damages from Table 3. If the jury had awarded damages from Table 3 (something Encore contends it did under the breach of contract with fraud claim), then according to Encore's expert it should not award damages from the other tables because those damages included those from Table 2.

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In sum, Encore must elect a remedy from causes of action II-VI due to the manner in which it presented its case at trial. It relied on the same facts to establish liability under those claims and told the jury to award it the exact same damages for each of them. Furthermore, in light of its own expert's testimony, it should not be able to recover additional damages from Table 1 under its breach of loyalty claim (cause of action I) because those damages are subsumed in those awarded in whichever cause of action II-VI Encore chooses to recover under.

## III. ATTORNEYS' FEES AND COSTS

### A. The Attorneys' Fees and Costs Sought Must be Greatly Reduced

Defendants maintain that Encore should not recover any costs, as there is no avenue for it to do so. (*See* Def. Resp. Plf. Post-Trial at 9-10). Any fees and costs awarded should be greatly reduced due to only being recoverable under a fraction of the causes of action alleged and because the amounts Encore seeks are excessive and unreasonable as detailed in Defendants' previous filings and below. (*See* Def. Resp. Plf. Post-Trial at 10-19).

First, whatever fee amount the Court finds to be reasonable, it must be significantly reduced because attorneys' fees were available under three out of eight causes of action pursued in this case, and a party may only recover them under one.[10] See *Uhlig*, 895 F. Supp. 2d at 711 *citing to Mary Kay Inc. v. Ayres,* 827 F.Supp.2d 584, 589 (D.S.C.2011) (noting that the plaintiff could not recover attorney's fees pursuant to a contract if the plaintiff elected a remedy other than breach of contract "[b]ecause a party cannot recover twice for the same wrong") (citing *Am. Rice, Inc. v. Producers Rice Mill, Inc.,* 518 F.3d 321, 335 (5th Cir.2008) (finding plaintiff could not simultaneously recover attorney's fees under breach of contract claim and lost profits pursuant to Lanham Act claim). Therefore, at a bare minimum, the attorneys' fees sought should be reduced

[10] Encore's breach of contract claims and its trade secret cause of action allow recovery of attorneys' fees.

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by 87.5% - that percentage representing the seven other claims under which fees are not recovered. That leaves 12.5% of the fees as representative of the percentage of the claims under which Encore may recover its fees. Should the Court award the total fees sought they would be reduced to $43,200 ($345,600 x .125 = $43,200). Whatever costs the Court chooses to award should, at a minimum, be reduced in the same manner resulting in a total of $11,862.56 ($94,900.45 x .125 = $11,862.56) if there is no reduction in the total costs Encore seeks to recover.

Second, Encore's disclosure of complete billing records confirmed the fees and costs it seeks are excessive and unreasonable. With the exception of incompleteness, the maladies in Encore's original attorney fee and cost submissions noted in previous filings remain and have only been confirmed and furthered by disclosure of the complete billing records.[11] For example, review of the complete billing records shows:

- Encore spent approximately 68 hours of time resulting in over $26,000 of fees on tasks related to the 11 subpoenas from which it did not use any information or documents for its case;
- Encore spent $5,076.20 in costs alone on out of state subpoenas, the overwhelming majority of which provided responsive documents and information the Plaintiff did not use;
- Encore had two attorneys in attendance during approximately 24 hours of depositions resulting in an effective $750/hr. billing rate for total of $18,000 in fees;
- Encore spent approximately 34.6 hrs. @ $400/hr. and 10.9 hrs. @ $350/hr. for a total of $17,655 on actions related to unnecessary motions and hearings including motions to quash the unnecessary subpoenas Plaintiff issued and used no documents or information from

[11] The block billing style Plaintiff chose to utilize makes it essentially impossible to accurately assess the necessity and reasonableness of particular tasks, something courts have recognized as a failure to carry the burden to show the fees and costs a party seeks are reasonable and appropriate. *Uhlig*, 895 F. Supp. 2d at 715(Block billing robs the Court of "an opportunity to make any assessment of the reasonableness of the amount of time spent on a single task; determine whether there was duplication of effort, or evaluate whether the amount of time claimed is otherwise unnecessary or unreasonable.").

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and its baseless second motion to compel and for sanctions seeking documents already provided or that did not exist.[12]

- Encore took the video deposition of Dale Viola for trial purposes two weeks before trial and then paid to fly him from Louisiana to Greenville to testify. Encore incurred thousands in fees and costs for the deposition and then spent $1,983.51 to get Mr. Viola to Greenville.

- Encore had two attorneys in attendance during approximately 11.8 hours of hearings resulting in $4,720 ($440/hr. rate) or $4,130 ($530/hr. rate)/effective $750/hr. rate for total of $8,850;

- Encore's expert sat in trial all week when he needed only appear to testify in Plaintiff's case in chief and briefly in rebuttal charging a total of $5,432.50 (20.5 hrs. x. $265/hr.);

- Encore paid a third-party IT vendor $14,418.14 for "Trial Exhibit Presentation" to prepare electronic exhibits and present them at trial when Plaintiff counsel's firm has a full-time litigation paralegal on staff who could and should have performed that work; and

- Encore seeks to have the Court award it $1,739.90 for "other costs and expenses" without any information or explanation as to what those costs and expenses are.

Those items alone total $70,505 in fees and $16,158.04 in costs and are but a few notable instances of unreasonable fees and costs charged which can be discerned from Encore's billing records due to the block billing method it utilized.

Ultimately, it is Encore's burden to show the fees and costs it seeks to recover are reasonable. It has failed to carry that burden in this case.

## IV. DEPOSITING JUDGMENT(S) IN COURT UNDER SCRCP 67

Rule 67 allows a party against whom judgment has been rendered to deposit the sum of that judgment with the court, stating that:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, ***a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing***. Money paid into the court under

[12] These figures do not include the hours Encore spent on reviewing and dealing with all those irrelevant documents and information nor does it take into account the large amount of time Encore spent opposing motions for continuance, the last of which was a direct result of Encore withholding over 10,000 pages of responsive documents;

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> this rule shall be deposited as directed by the court in any bank or institution authorized to receive public funds, and shall be withdrawn only upon the check of the clerk of court in favor of the party to whom the order of the court directs.

S.C. R. Civ. P. 67 (emphasis added). South Carolina courts have long held that "a judgment debtor's deposit of funds into court pursuant to Rule 67 pending his own appeal stops the accrual of interest on the judgment." *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 326, 513 S.E.2d 617, 618 (1999); *see also Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995). "The rationale was that 'such a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available.'" *Id. citing Russo*, 317 S.C. at 442.

Therefore, Defendants respectfully request leave of this Court to deposit the respective judgment(s) against them into the Court pending appeal, to the extent each Defendant is able to do so. Giving Defendants the ability to deposit their respective judgments into court assures Plaintiff recovers those funds to the extent their award is affirmed on appeal, saves Defendants from the accrual of post-judgment interest pending appeal, and guards against the danger of paying a judgment to the Plaintiff that is overturned or modified on appeal and cannot be repaid.

## V. CONCLUSION

For the reasons stated above, Defendants pray that the Court order Plaintiff elect its remedy and deny its request for attorneys' fees and costs or in the alternative greatly reduce any fees and costs awarded.

**(signature page to follow)**

Respectfully Submitted,

**ROE CASSIDY COATES & PRICE, P.A.**

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March 5, 2018
Greenville, South Carolina

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|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Encore Technology Group, LLC, | ) | C.A. No.: 2015-CP-23-05757 |
| Plaintiff, | ) | **DEFENDANTS' SUPPLEMENTAL POST TRIAL FILINGS** |
| v. | ) | |
| Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | |
| Defendants. | ) | |

# EXHIBIT A

# Plaintiff's Requested Judgment Document

ELECTRONICALLY FILED - 2018 Mar 05 2:14 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

ELECTRONICALLY FILED - 2018 Mar 05 2:14 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

## REQUESTED JUDGMENTS IN FAVOR OF ENCORE TECHNOLOGY GROUP, LLC

| Against Defendant Keone Trask | | | | |
|---|---|---|---|---|
| **Claim** | **Actual Damages** | **Punitive Damages** | **Evidence of Damages** | **Notes/Legal Basis** |
| | | | | |
| Breach of Loyalty | $375,733.40 | $175,000.00 | Trask's Wages + Conference Expenses | |
| Breach of Fiduciary Duty | 675,361.00 | 1,500,000.00 | Encore's lost profits from non-disclosure of suppliers | |
| Violation of Trade Secrets Act | 424,945.00 | 849,890.00 | Leon County profits | Same as breach of contract |
| Breach of Contract Accompanied by a Fraudulent Act | 1,476,039.40 | 2,000,000.00 | Portion of Clear Touch business opportunity | |
| **Subtotal** | $2,952,078.80 | $4,524,890.00 | | |
| | | $7,476,968.80 | | |
| Attorneys' Fees | | 345,600.00 | | Contracts/TSA |
| Costs & Expenses | | 94,900.00 | | Contracts/TSA |
| **TOTAL** | | **$7,917,468.80** | | |
| | | | | |
| **Against Defendant Clear Touch Interactive, Inc.** | | | | |
| | | | | |
| **Claim** | **Actual Damages** | **Punitive Damages** | **Evidence of Damages** | **Notes/Legal Basis** |
| Violation of Trade Secrets Act | $424,945.00 | $849,890.00 | Leon County profits | Actual damages same as tortious interference ($500,000.00 punitive damages) |
| **Subtotal** | | $1,274,835.00 | | |
| Attorneys' Fees | | 345,600.00 | | TSA |
| Costs & Expenses | | 94,900.00 | | TSA |
| **TOTAL** | | **$1,715,335.00** | | |
| | | | | |
| Equitable Restitution | | **$5,536,254.00** | Full value of Clear Touch business opportunity | |

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Encore Technology Group, LLC, | ) | C.A. No.: 2015-CP-23-05757 |
| Plaintiff, | ) | **DEFENDANTS' SUPPLEMENTAL POST TRIAL FILINGS** |
| v. | ) | |
| Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | |
| Defendants. | ) | |

# EXHIBIT B

# Executed Verdict Form

ELECTRONICALLY FILED - 2018 Mar 05 2:14 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

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| | |
|---|---|
| **STATE OF SOUTH CAROLINA**<br>**COUNTY OF GREENVILLE** | **IN THE COURT OF COMMON PLEAS**<br>**THIRTEENTH JUDICIAL CIRCUIT** |
| Encore Technology Group, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>Keone Trask and Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC,<br><br>Defendant. | CA No. 2015-CP-23-05757<br><br>VERDICT FORM |

**I. As to Plaintiff Encore Technology Group, LLC's breach of loyalty claim, against Defendants Keone Trask, we the jury, unanimously find:**

__X__ A. For the Plaintiff in the amount of:

THREE-HUNDRED SEVENTY FIVE THOUSAND SEVENHUNDRED THIRTY THREE DOLLARS AND FOURTY CENTS

($ 375,733.40 actual damages)

Note: If you award actual damages you may consider whether to award punitive damages. You may not award punitive damages without an award of actual damages.

__X__ B. For the Plaintiff in the amount of:

ONE-HUNDRED SEVENTY THOUSAND DOLLARS

($ 175,000 punitive damages)

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**II. As to Plaintiff Encore Technology Group, LLC's breach of fiduciary duty claim against Defendant Keone Trask, we the jury, unanimously find:**

__X__ A. For the Plaintiff in the amount of:

SIX-HUNDRED SEVENTY FIVE THOUSAND THREE HUNDRED SIXTY ONE

($ 675,361 actual damages)

Note: If you award actual damages you may consider whether to award punitive damages. You may not award punitive damages without an award of actual damages.

__X__ B. For the Plaintiff in the amount of:

ONE MILLION, FIVE HUNDRED THOUSAND DOLLARS

($ 1,500,000 punitive damages)

_____ C. For the Defendant,

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**III. As to Plaintiff Encore Technology Group, LLC's breach of contract claim against Defendant Keone Trask, we the jury, unanimously find:**

__X__ A. For the Plaintiff in the amount of:

FOUR-HUNDRED TWENTY FOUR THOUSAND, NINE HUNDRED FORTY FIVE DOLLARS

($ 424,945 actual damages)

_____ B. For the Defendant.

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**IV. 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:**

X A. For the Plaintiff in the amount of:

FOUR-HUNDRED TWENTY FOUR THOUSAND, NINE-HUNDRED FORTY FIVE DOLLARS

($ 424,945 actual damages)

Only if you award the Plaintiff actual damages, please answer the question below:

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?

X
YES

NO

_____ C. For the Defendants.

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**V. As to Plaintiff Encore Technology Group, LLC's tortious interference claim against Clear Touch Inc., we the jury, unanimously find:**

X A. For the Plaintiff in the amount of:

FOUR-HUNDRED TWENTY FOUR THOUSAND, NINE-HUNDRED FORTY FIVE

($ 424,945 actual damages)

Note: If you award actual damages you may consider whether to award punitive damages. You may not award punitive damages without an award of actual damages.

X B. For the Plaintiff in the amount of:

FIVE-HUNDRED THOUSAND DOLLARS

($ 500,000 punitive damages)

____ C. For the Defendant.

VI. **As to Plaintiff Encore Technology Group, LLC's breach of contract accompanied by fraudulent act claim against Defendant Keone Trask, we the jury, unanimously find:**

X A. For the Plaintiff in the amount of:

ONE-MILLION FOUR-HUNDRED SEVENTY SIX THOUSAND, THIRTY NINE AND FORTY CENTS

($ 1,476,039.40 actual damages)

Note: If you award actual damages you may consider whether to award punitive damages. You may not award punitive damages without an award of actual damages.

X B. For the Plaintiff in the amount of:

TWO MILLION DOLLARS

($ 2,000,000 punitive damages)

_____ C. For the Defendant.



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VII. **As to Plaintiff Encore Technology Group, LLC's defamation claim against Defendant Keone Trask, we the jury, unanimously find:**

_____ A. For the Plaintiff in the amount of:

_____

($_____ actual damages)

_X_ B. For the Defendant.





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VIII. **As to Plaintiff Encore Technology Group, LLC's Unfair Trade Practices 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)

Only if you award the Plaintiff actual damages, please answer the question below:

B. Were the Defendants Unfair Trade Practices Committed willfully?

_____ YES _____ NO

X C. For the Defendants.

Awarded this 29 day of SEPTEMBER, 2017.

Mykel Stoh

Foreperson of the Jury



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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Encore Technology Group, LLC, | ) | C.A. No.: 2015-CP-23-05757 |
| Plaintiff, | ) | **DEFENDANTS' SUPPLEMENTAL POST TRIAL FILINGS** |
| v. | ) | |
| Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | |
| Defendants. | ) | |

# EXHIBIT C

# Plaintiff's Exhibit 10-H

ELECTRONICALLY FILED - 2018 Mar 23 2:14 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

# SUMMARY OF DAMAGES

| Table 1: Direct Costs Incurred by Encore | |
|---|---|
| Wages, Benefits, and Expense Reimbursements | $ 420,353 |
| Trade Show and Related Costs Paid by Encore for Benefit of Clear Touch | 67,688 |
| ***Total Calculated Damages*** | ***$ 488,041*** |

| Table 2: Profit Lost on Sales Made to Encore and Encore Customers by Clear Touch | |
|---|---|
| Direct Damages on Products Sold to Encore from Clear Touch 2/13/13 – 4/25/14 | *125,730* |
| Direct Damages on Products Sold to Encore from Clear Touch from 4/26/14 – 4/25/15 | *344,201* |
| Direct Damages on Products Sold to Encore from Clear Touch from 4/25/15 – 10/10/2015 | *205,430* |
| Lost Profit on Sales Made to Leon County Schools 4/26/2014 - 4/25/2015 | *309,439* |
| Lost Profit on Sales Made to Leon County Schools 4/26/2015 - 10/10/2015 | *115,506* |
| ***Total Calculated Damages*** | ***$ 1,100,306*** |

| Table 3: Damages Related to Loss of Business Opportunity | |
|---|---|
| Normalized Profit of Clear Touch from 2/13/2013 - 4/25/2014 (employed) | 105,137 |
| Normalized Profit of Clear Touch from 4/26/2014 - 4/25/2015 (non-compete) | 36,179 |
| Normalized Profit of Clear Touch from 4/26/2015 - 10/10/2015 (reseller agreement) | 1,281,829 |
| Normalized Profit of Clear Touch from 10/11/2015 - 12/31/2015 | 213,109 |
| Fair Market Value of Clear Touch Opportunity as of 12/31/2015 | 3,900,000 |
| **Total Damages Related to Lost Business Opportunity** | $ 5,536,254 |

EXHIBIT
Plaintiff's
10-H

ELECTRONICALLY FILED - 2018 Mar 21 10:26 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE CIRCUIT COURT |
| | ) | |
| COUNTY OF GREENVILLE | ) | Case No. 2017-CP-23-05862 |
| | ) | |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | |
| | ) | |
| Plaintiff, | ) | **DEFENDANT ENCORE TECHNOLOGY GROUP'S MOTION TO DISMISS** |
| | ) | |
| v. | ) | |
| | ) | |
| Encore Technology Group, LLC, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

Defendant Encore Technology Group, LLC ("Encore") hereby moves to dismiss the Amended Complaint of Plaintiff Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC against Encore on the pleadings pursuant to Rule 12(c), SCRCP, because the Amended Complaint is barred by the doctrine of *res judicata,* and because the Amended Complaint fails to state facts sufficient to constitute a cause of action against Encore pursuant to Rule 12(b)(6), SCRCP.

Plaintiff's claims against Encore were fully tried before a jury in September 2017, or should have been but were not raised as mandatory counterclaims under Rule 13, SCRCP, in Encore Technology Group, LLC vs. Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC, et al., Case No. 2015-CP-23-05757 (J. McIntosh presiding). Plaintiff's claims against Encore are therefore barred by the doctrine of *res judicata.* The Amended Complaint further fails to state facts sufficient to constitute a cause of action.

Accordingly, Encore respectfully requests that Plaintiff's Amended Complaint against it be dismissed with prejudice pursuant to Rule 12(c), the doctrine of *res judicata,* and Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action.

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Respectfully submitted,

WYCHE, P.A.

By: s/ Gregory J. English

Gregory J. English (SC #65470)
Rita Bolt Barker (SC #77600)
44 East Camperdown Way
Post Office Box 728
Greenville, SC 29602-0728
(864) 242-8200

Attorneys for Defendant

Dated: March 21, 2018

ELECTRONICALLY FILED - 2018 Mar 27 11:43 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF GREENVILLE | ) | |
| | ) | |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No.: 2017-CP-23-05862 |
| | ) | |
| Plaintiff, | ) | **PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS** |
| | ) | |
| v. | ) | |
| | ) | |
| Encore Technology Group, LLC, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

PLEASE TAKE NOTICE that Plaintiff, Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, will move before the presiding judge of the Court of Common Pleas for Greenville County, South Carolina, at a date, time and location to be set by the Court, for an order dismissing Defendant's Counterclaims for Breach of Contract and Breach of Contract Accompanied by Fraudulent Act in this action pursuant to the doctrine of res judicata.

The motion is based on this notice and motion; the pleadings, documents, records, and files in this action; the statutory and case law of the State of South Carolina; any subsequent memoranda of law or other evidence which may be submitted prior to the hearing on this motion; as well as any oral argument and documentary evidence which may be presented at the hearing on this matter.

WHEREFORE, Plaintiff prays that Defendant's Counterclaims for Breach of Contract and Breach of Contract Accompanied by Fraudulent Act be dismissed with prejudice.

(Signature page follows)

Respectfully submitted,

**ROE CASSIDY COATES & PRICE, P.A.**

/s/Joseph O. Smith
Joseph O. Smith, S.C. Bar # 77475
Joshua J. Hudson, S.C. Bar # 100311
1052 North Church Street (29601)
P.O. Box 10529
Greenville, South Carolina 29603
(864)-349-2600 Telephone
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JHudson@roecassidy.com
JSmith@roecassidy.com

***Attorneys for Plaintiff***

Greenville, South Carolina

March 27, 2018



ELECTRONICALLY FILED - 2018 Mar 27 11:43 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

ELECTRONICALLY FILED - 2018 Mar 27 11:46 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF GREENVILLE | ) | |
| | ) | |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No.: 2017-CP-23-05862 |
| | ) | |
| Plaintiff, | ) | **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** |
| | ) | |
| v. | ) | |
| | ) | |
| Encore Technology Group, LLC, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Plaintiff Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC ("Defendant"), by and through its undersigned counsel, moves this Court for an order granting it partial summary judgment on the grounds that there are no genuine disputes as to material facts for a certain counterclaim alleged by Defendant that entitles Plaintiff to judgment as a matter of law as to that cause of action. Specifically, Plaintiff is entitled to judgment as a matter of law as to Defendant's Abuse of Process Counterclaim because:

1. The mere commencement of a civil action cannot amount to an abuse of process; and
2. Defendant has not, and is unable to, show a definite act or threat not authorized by the process, which is required with an abuse of process claim.

Plaintiff makes this Motion pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and it is based on the pleadings filed in this case and other applicable law, whether statutory or common, and requests that this Court consider any affidavits, memoranda, or other filings submitted in support of this Motion and supplemented at the hearing, as well as oral arguments.

Respectfully submitted,

**ROE CASSIDY COATES & PRICE, P.A.**

/s/Joseph O. Smith
Joseph O. Smith, S.C. Bar # 77475
Joshua J. Hudson, S.C. Bar # 100311
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***Attorneys for Plaintiff***

Greenville, South Carolina

March 27, 2018

ELECTRONICALLY FILED - 2018 Mar 27 11:46 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

ELECTRONICALLY FILED - 2018 Apr 12 10:09 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Encore Technology Group, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Defendants. | ) | C.A. No.: 2015-CP-23-05757<br><br>**DEFENDANTS' RULE 59 MOTION FOR RECONSIDERATION** |

Defendants Keone Trask (*hereinafter* "Trask") and Clear Touch Interactive, Inc. (*hereinafter* "Clear Touch," and collectively with Trask, "Defendants"), through their undersigned counsel, respectfully move this Honorable Court, pursuant to Rule 59(e) for reconsideration of this Court's April 2, 2018 Final Order and Judgment (the "Order") for the reasons and upon the grounds set forth below.

## I. ORDER'S HOLDING THAT ENCORE ONLY NEED TO ELECT ITS REMEDIES ON THE BREACH OF CONTRACT AND TORTIOUS INTERFERENCE CLAIMS WAS IN ERR

The Court found that Encore only needed to elect its remedies between the breach of contract and tortious interference causes of action because the jury awarded the same actual damages of $424,945 under these claims and Plaintiff's trade secret cause of action. (Order p. 25). Those damages, according to the Order, were to compensate Encore for its lost sales to Leon County Schools. (Order p. 25). The Court went on to conclude that the election doctrine did not apply to the remaining claims for breach of fiduciary duty, breach of contract accompanied by fraud, and breach of duty of loyalty because liability under those claims relied upon different facts and elements and the jury's awards under them represented distinct damages. The Order's conclusion is flawed because it relies upon erroneous and inappropriate factual findings

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concerning the basis for the jury's awards on these claims; an inaccurate conclusion that the awards under them represent distinct damages; an overly narrow application of the election doctrine; and a mischaracterization of Defendants' argument on the issue. Therefore, Defendants respectfully ask the Court reconsider its holding on the election of remedies issue and require Encore to elect its remedies amongst the causes of action for which the jury returned a verdict in its favor to prevent duplicative recovery of actual damages.

**A. The Order Makes Erroneous and Inappropriate Factual Findings as to the Specific Factual Basis the Jury Relied Upon in Finding Defendants Liable for Certain Claims**

The Order makes numerous findings as to the specific factual basis relied upon by the jury to find Defendants liable under Encore's breach of duty of loyalty, breach of fiduciary duty, breach of contract with fraud, and trade secrets act ("TSA") claims to conclude that the Plaintiff need not elect its remedies amongst those claims because they relied upon different facts. (Order pp. 26-27). Specifically, the Order determines that the jury found (1) Trask breached his fiduciary duties by failing to disclose the identity of Clear Touch's suppliers to Encore so it could purchase direct; (2) Trask violated the Trade Secrets Act by using Encore's trade secret information regarding Leon County Schools' needs for and purchase price of panels; (3) the jury found Trask liable for breach of contract accompanied by fraud based upon his violation of his Non-Disclosure and Non-Solicitation Agreement's "business opportunity clause"; and (4) Clear Touch violated the Trade Secrets Act by using Encore's trade secret information regarding Leon County Schools' needs for and purchase price of panels. (Order pp. 26-27).

First and foremost, the Order making these determinations is an inappropriate invasion of the province of the jury and therefore cannot be utilized to support a finding that the jury relied upon these specific and different facts to find Defendants liable for these particular claims at issue. *Krepps by Krepps v. Ausen*, 324 S.C. 597 (Ct. App. 1996)(Trial judge deciding how the jury

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viewed the facts or substituting its own view of the facts is unlawful usurpation of the jury's function as the finders of fact.). However, even if there were authority that allowed the Court to make such determinations, the Order's findings themselves are flawed.

As a practical matter, the Order fails to cite to its evidentiary basis for making these determinations. It simply states what it claims were the facts relied upon by the jury for these particular causes of action and then concludes that "the evidence demonstrated – and the jury found – separate acts by Defendants [gave] rise to separate injuries and damages." (Order p. 26-27). In reality, there is no way that the Court can make these specific determinations and the lack of citation to the record or explanation of how it arrived at them reveals their fallacy. Furthermore, consideration of how Encore presented its case on these claims undermines the Order's factual findings specifying what the jury relied upon to find Defendants' liable for each cause of action.

For example, the Order claims the jury found Trask liable for breach of his fiduciary duties because he failed to disclose to Encore that it could purchase directly from Clear Touch's suppliers. (Order p. 26). At trial Encore claimed Trask breached his fiduciary duties by failing to (1) disclose the true identity of Clear Touch's suppliers; (2) tell Encore that he was building a reseller network for Clear Touch; (3) work with Encore to take advantage of the Clear Touch opportunity; and (4) by making direct sales to Leon County. (*See* Def. Supp. at 7). Thus, it cannot be said the jury's verdict for this breach of fiduciary duty claim was reliant upon Trask not telling Encore it could purchase directly from Clear Touch's suppliers as the Order asserts. The Order also claims that the jury found Trask liable for breach of contract accompanied by fraud due to his violation of the "business opportunity" clause in his Non-Disclosure and Non-Solicitation Agreement with Encore (the "Agreement"). (Order p. 27). Encore however did not rely solely upon Trask's alleged breach of the business opportunity clause to establish its breach of contract with fraud claim. Rather, it

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relied upon the same actions underlying its breach of contract, trade secret misappropriation, and breach of fiduciary duties causes of action to establish liability under its breach of contract with fraud claim. (*See* Def. Supp. at 8-10).[1] Therefore, neither Encore nor the Court can say the jury's finding on this claim was specifically and only based upon Trask's alleged breach of the Agreement's "business opportunity clause." The same is true for the remaining determinations concerning the factual basis for the jury's verdicts scattered throughout the Order. (*See e.g.* Order pp. 10-11, 15, 26-27, 29-30).

These determinations are *post hoc* findings made to artificially segregate the factual basis for the verdicts at issue in order to conclude that Encore need not elect its remedies amongst these causes of action because the jury relied upon different facts in rendering its verdicts under each. In reality Encore relied upon and presented the same overlapping facts to establish liability for these claims. The means employed by the Order to reach its end required it invade the province of the jury and act as a *post hoc* finder of fact in the absence of any legal authority allowing it to do so, without citation to evidence supporting its determinations, and by turning a blind eye to Encore's presentation of its case at trial. Therefore, the conclusion that these claims relied upon specific and different facts for the jury imputing liability was in err and requires reconsideration.

**B. Order Relies Upon Erroneous Notion that Encore Presented Distinct Damages for each of the Claims Upon which the Court Awarded Damages**

The Order's conclusion on the election issue also relies upon the erroneous notion that Encore presented and the jury awarded distinct damages for its breach of fiduciary duty, breach of contract, trade secret misappropriation, and breach of contract accompanied by fraud causes of

[1] Encore told the jury Mr. Trask breached his fiduciary duties by failing to (1) disclose the true identity of Clear Touch's suppliers; (2) tell Encore that he was building a reseller network for Clear Touch; (3) work with Encore to take advantage of the Clear Touch opportunity; and (4) by making direct sales to Leon County.

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action – the causes of action under which judgment has been entered. The Order employs several inappropriate and flawed methods to reach this conclusion.

First, it intertwines and confuses the damages sought by Encore at trial under these claims to reach a faulty conclusion that Encore sought separate damages under each respective cause of action. (Order pp. 28-29). As detailed in previous filings, Encore did not seek its damages in this fashion at trial. (Def. Supp. at 7-10).

Second, it ignores the manner in which Encore presented its damages to the jury at trial and attempts to trivialize Defendants' position that these claims simply represent alternative theories of recovery for the same injury stating that "Encore's attorneys never contended liability or damages under Causes of Action II-VI were based on a single fact, a single injury, or single damage." (Order p. 31).[2] This ignores the fact that at trial the Plaintiff sought the "same amount" and "same damage figure" for causes of action II-VI and relied upon the same set of facts to establish liability across those various claims. This is the basis for Defendants' position that Encore presented alternative theories of recovery for the same injury; and not that its damages under these causes of action were based upon a "single fact, a single injury, or single damage."

Third, the Order assumes Defendants' position on this issue is reliant upon the jury being bound by Encore's attorney's arguments at trial. (Order p. 31)( "Defendants' argument assumes the jury was bound by Encore's attorneys' arguments, but it was not."). Defendants' argument neither assumed nor relied upon the jury having to accept Encore's counsel's arguments. Rather,

[2] At trial Encore told the jury the actions constituting breaches of Trask's fiduciary duties resulted in $5.5M of damage to it in the form of (1) lost profits (a) on sales of panels purchased from Clear Touch (because it could have purchased directly from the suppliers if Trask disclosed their identity); (b) from Clear Touch's sales to Leon County; and (c) those generated by Clear Touch's other sales all totaling $1,100,306 and (2) the lost Clear Touch business opportunity; something it claimed was worth over $3.9M. (*See* Def. Supp. 7-8). As detailed in Defendant's post trial filings, the Plaintiff's presentation of damages for causes of action II-VI was uniform and unequivocal. It asked the jury to award it $5.5M under the breach of fiduciary duties claim and then said to give it the "same amount" or "same damages figure" for each cause of action II-VI. (*See* Def. Supp. at 7-10).

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Defendants utilized the transcript of Encore's closing statement as evidence of how it presented its damages to the jury. That transcript shows that Encore sought the "same damages" or "exact same damages figure" for causes of action II-VI during trial.

Fourth, the Order's position that the damages awarded were not duplicative ignores the objective evidence that the jury's actual damages award of $1,476,039.40 under the breach of contract accompanied by fraud claim is the exact sum total of its actual damage awards from causes of action I-IV.[3]

Finally, the Order again inappropriately delves into the jurors' minds claiming that they "awarded different actual damage amounts and different punitive damage amounts, clearly intending to treat Defendants' different acts and Encore's different injuries as separate and distinct." (Order pg. 30). The jury's intent is not "clear" as the Order portends and it making such a finding inappropriate. Relying upon such that finding to support a holding on this seminal issue was in err and warrants reconsideration.

**C. Order Relies Upon Overly Narrow View and Application of the Election Doctrine**

The Order's holding on this issue also relies upon an overly narrow application of the election of remedies doctrine without regard to its purpose – the prevention of duplicative recovery. It reasons that the doctrine does not apply to the breach of fiduciary duty, breach of contract with fraud, and trade secret claims because "Encore never contended that liability or damages under Causes of Action II-VI were based on a single fact, a single injury, or single damage." (Order p. 31). Under this approach, the election of remedies doctrine would only apply in cases where a single fact established liability for one cause and resulted in the same injury.[4]

[3] $375,733.40 (breach loyalty) + $675,361 (breach fiduciary) + $424,945 (causes of action III-V) = $1,476,039.40

[4]The Order relies upon distinguishable case law in the *GTR Rental, LLC v. DalCannon*, case to summarily deem this case similar and unfit for application of the election doctrine because "the complex series of transactions undertaken

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Such a stringently simplistic view of the doctrine ignores its purpose and prevents its application where it is needed most – complicated cases with multiple causes of action where the available damages are the same amongst numerous claims but can be awarded under alternative theories of liability. The matter at hand is one of those cases and the Order's requirement that liability under each cause of action must flow from a single fact resulting in a single harm for the doctrine to apply unduly restricts its use and thwarts its purpose of preventing duplicative recovery.

Yet, both the Court and Encore recognize that the election doctrine applies to the breach of contract, trade secrets misappropriation, and tortious interference claims where the jury awarded the same actual damages of $424,945 for each. (Order p. 25-26). Both concede this point despite the fact that liability under the breach of contract claims and the TSA cause of action may be based upon different facts – liability for violating the TSA could be based upon Trask's and/or Clear Touch's alleged misappropriation and use of Encore's claimed trade secret information to sell directly to Leon County whereas the jury's breach of contract verdicts could rest upon him and/or Clear Touch merely selling panels directly to Leon County without the use of Encore's trade secret information. The doctrine applies to those claims because the resulting harm was the same without regard to whether the facts underlying the respective claims were identical. The Order's treatment of the claims upon which it entered judgment (and found Encore need not elect its remedies) puts the additional and overly burdensome requirement that liability under those causes of action must be based upon the same facts for the election doctrine to apply. That is a phantom requirement and cannot serve to prevent application of the doctrine if necessary to prevent duplicative recovery.

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by Defendants does not comprise a single wrong that would give rise but to one cause of action." (Order p. 28 *citing* 547 F. Supp. 2d 510, 515 (D.S.C. 2008). The Order offers no explanation or analysis demonstrating *GTR*'s applicability to the circumstances of this case and merely relies upon the general quotation in an effort to lend credence to its inaccurate position that the election doctrine only applies when liability stems from a single wrong that would give rise to only one cause of action.

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Here, as previously argued and noted above, it is necessary to have Encore elect its remedies among causes of action II-VI because everything the jury awarded in actual damages is encompassed in the breach of contract with fraud verdict.

**D. Mischaracterization and/or Misunderstanding of Defendants' Arguments**

The Order begins its treatment of the election issue by misconstruing Defendants' arguments on the issue claiming that they contend "Encore should have to elect one (other than breach of duty of loyalty) because they committed a 'single wrong' and that Encore 'sought the exact same damages' for the 'same injury.'" (Order p. 25). Defendants' argument was not so narrow. Rather, they argued Encore relied upon the same facts to establish liability for causes of action II-VI and it sought the same damages under those claims – explicitly instructing the jury to award the "exact same" damages for those causes of action. (*See* Def. Supp. Post-Trial at 7-12). Defendants also argued that election was necessary because the facts relied upon to establish liability for breach of contract with fraud were encompassed in Encore's breach of contract, tortious interference, TSA, and breach of fiduciary duty claims, (*See* Def. Post-Trial Mot. at 1-4). The Order misapprehends and greatly overly simplifies Defendants' position. While misapprehension of an argument may be inconsequential in some cases; it is impactful here. The over simplification of Defendants' argument makes it much easier to dismiss because it has been reduced to a weaker and more narrow position. The Order's findings erroneously rely upon rejection of this hobbled position and therefore warrant reconsideration in order to consider the actual arguments made by Defendants concerning the election issue.

In sum, the Order ignores the objective evidence showing the manner in which Encore presented its case at trial, inappropriately delves into the minds of the jurors to make findings as to the particular factual basis for their verdicts on the claims upon which it entered judgment, relies

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upon the erroneous notion that Encore presented separate and distinct damages for each of these causes of action, and takes an overly narrow view of the election doctrine's applicability. Any one of these maladies warrants the Court's reconsideration; and certainly, when taken together call for reevaluation of the Order's holding that Encore need not elect its remedies amongst the claims upon which the Court has entered judgment.

## II. DENYING DEFENDANTS' MOTION FOR NEW TRIAL ABSOLUTE WAS IN ERR

The Order erroneously found that Defendants were not prejudiced by the presentation of Michael Knight's computer search testimony and submission of Table 3 at trial, and therefore are not entitled to a new trial absolute. (Order p. 17). Defendants respectfully request the Court reconsider this finding due to it being reliant upon a misapprehension and mischaracterization of Defendants' arguments in support their motion for a new trial absolute.

### A. Michael Knight Testimony Claiming Trask Destroyed Evidence

The Order misapprehends and mischaracterizes Defendants' arguments related to Michael Knight's testimony before the jury that he performed computer searches of Encore's system two weeks before trial which he claimed showed Trask deleted emails to conclude that testimony did not prejudice the Defendants. The Order's finding relies upon an overgeneralization of Defendants' argument on this issue by claiming they sought a new trial absolute due to "Encore's presentation of evidence that Mr. Trask destroyed one category of e-mails...." (Order p. 18, 20). Defendants' argument was not so simple and the Order's characterization and treatment of it sweeps the detailed underpinnings under the rug to portray a much more innocuous situation. This more mundane factual scenario it finds did not result in any prejudice to the Defendants.[5]

[5] As an initial matter, this portion of the Order (as with others) contains statements that Trask admitted he destroyed evidence or imply such an admission was made. (Order pp. 17, 18, 25, ). Trask did not admit to destroying e-mails or any other evidence, and the Order's statements otherwise are simply inaccurate.

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The Order claims that Defendants were not prejudiced by Knight's testimony because they "were on notice that Encore would introduce evidence of Trask's deletion of e-mails from Encore's servers" and "cannot reasonably assert they were surprised by testimony that Trask destroyed emails." (Order. p. 18). That is not the argument Defendants' made in support of their motion for a new trial absolute. Rather, their argument was much more detailed and focused upon the specific actions and testimony of Encore leading up to Knight's trial testimony. The Order attempts to dismantle Defendants' arguments concerning Encore's actions leading up to Knight's testimony by mischaracterizing the basis for its position.

The Order begins that campaign by accusing Defendants of mischaracterizing Encore 30(b)(6) deponent, Todd Newnam's, testimony responding to questions about what evidence the company had that Trask deleted emails. (Order p. 18-19). That accusation is ironically dependent upon the Order's mischaracterization of that very same testimony. Specifically, the Order states that Defendant's argued "that one of Encore's 30(b)(6) deponents, Todd Newnam, had no evidence of Mr. Trask's deletion of emails, but Defendants mischaracterize that deposition testimony." (Order p. 18). The Order then utilizes small snippets of Newnam's testimony to validate its position.[6] Defendants' post-trial submissions however cited to the complete deposition testimony which accurately reflected Encore's 30(b)(6) deposition testimony when asked what evidence it had Trask destroyed emails. (Def. Post-Trial Mot. at 6-7). Full citation of Mr. Newnam's 30(b)(6) testimony showed that the snippets relied upon in the Order to claim he testified the company had

[6] "Mr. Newnam never said he had 'no evidence' and in fact referred to the evidence he recalled at the time of his deposition to support his allegation. In fact, Defendants admit Mr. Newnam testified during the deposition that 'Mr. Trask purged emails at Encore' and that he 'deleted some information while he was at Encore, previous emails. There are tidbits of emails that we have that show communications that were deleted from our system." (Order p. 18-19).

Defendants also note that the Court has no basis to make this finding regarding what Newnam testified to in his deposition without at least some citation to that testimony. There being none outside incomplete and non-contextual snippets, makes this finding inappropriate.

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evidence Trask deleted emails was based upon "his belief" given he had to subpoena some third parties to get information/documents and he thought there should be more documents produced rather than citing actual evidence of an internal computer search verifying the claim. (Def. Post-Trial Mot. 6-7). It is axiomatic that full citation of the testimony at issue provides the accurate reflection of what was said by Encore's representative under oath than uncited snippets of that testimony interspersed within the findings it is being utilized to support. Therefore, the Order's argument that Newnam's 30(b)(6) testimony put Defendants on notice that Encore planned to present Knight's computer search testimony at trial that he claimed verified Trask deleted emails on the company's system necessarily fails and cannot support the finding that Defendants suffered no prejudice ambushed with this testimony for the first time at trial.

The Order's next attempts to alleviate Encore of responsibility for not disclosing the computer search prior to trial also fails. The Order attempts to excuse Encore's actions by claiming Knight's testimony was offered to lay a foundation for admission of Plaintiff's Exhibit 84-a collection of emails it claimed Trask deleted and which were provided to Defendants "well before trial." (Order p. 19).[7] Plaintiff Exhibit 84 was not admitted into evidence at trial and therefore Knight's testimony about his computer searches was not offered to establish foundation for admission of that exhibit. Rather, the true intent and purpose of this testimony was to ambush Defendants at trial with new testimony/evidence it had never heard and had no way of meaningfully examining or challenging.

Finally, the Order goes on to claim that Defendants' argument concerning the Knight testimony "amounts to a claim that Encore was under an obligation to explain to them each point its witnesses would testify to and the significance of each exhibit." (Order p. 20). Defendants

[7] The emails in Plaintiff's Exhibit 84 were produced on May 31, 2017 and September 19, 2017 – neither time qualifying as "well before trial" beginning on September 25, 2017.

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never made this argument. Rather, Defendants contended that Encore was obligated to come forward with its evidence Trask deleted emails prior to trial under the Rules and in light of the events leading up to Knight's trial testimony. Rule 26(e) requires a party supplement its responses to Interrogatories and requests for production up to the time of trial if they acquire additional responsive information following service of their initial response stating that:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, expect that requests for discovery under Rules, 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, ***shall*** be promptly transmitted to the other party.

S.C. R. Civ. P. 26(e). Defendants' First Set of Interrogatories asked Encore to "[s]et forth with specificity all facts and evidence Plaintiff has to support the allegations of Paragraph 33 of the Complaint which allege Trask accessed 'Encore's computer system without or in excess of authorization,' and 'destroy[ed] Encore property, software, and files.' Specifically identify each and every item of "Encore property, software, and file' Plaintiff claims Trask destroyed." (Exh. A – Plf's Resp. to Def. First Interrs. #21). Encore replied with an objection and stated that "in February or March 2016, former Encore employee Jimmy Higginbotham reported to Encore that Mr. Trask accessed and used Encore's property, software, and files, and Mr. Trask has admitted such use of Encore's resources" and then directed Defendants to "see documents produced in response" to their production requests. (Exh. A). Encore supplemented its responses after its initial production but this response was unchanged. Rule 26(e) required Encore notify Defendants of Knight's computer search prior to trial because it was information directly responsive to Defendants' Interrogatory #21. Encore failed to abide by is obligations under the Rule and therefore should not have been able to present Knight's computer search testimony at trial.

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Encore's failure to disclose Knight's computer search before he took the stand in disregard of its obligation to do so and despite the events detailed in Defendants' Post-Trial Motions leading up to it are the basis for Defendant's Motion for New Trial Absolute. To allow a party to ignore its clear obligations under the Rules and condone this type of behavior incentivizes gamesmanship and the strategic withholding of evidence rather than full and fair disclosure. It creates a system antithetical to the purpose of the Rules and the use of civil litigation as a forum for the fair resolution of disputes. That is the issue at hand, basis for Defendants' motion for new trial absolute, and reason for them respectfully requesting the Court reconsider its ruling on that motion.

**B. Defendants Were Prejudiced by Knight's Computer Search Testimony**

The Order goes on to claim that the Defendants were not prejudiced by Knight's computer search testimony because Plaintiff's Exhibit 84 was not admitted into evidence and "there was significant evidence presented at trial which demonstrated that Trask destroyed emails." (Order p. 20). First, Defendants never contended Plaintiff Exhibit 84 prejudiced them; making its non-admission into evidence inconsequential. Second, the latter statement that significant evidence was presented at trial showing Trask destroyed emails is made without citation to this apparent ample body of proof and contradicted by the undisputed fact that the Court refused to include a spoliation charge in the jury instructions. That refusal contradicts the repeated incorrect assertion that evidence at trial showed Trask destroyed emails and other documents. Thus, neither of these grounds supports the conclusion that Defendants suffered no prejudice from Knight's testimony.

Finally, the Order goes on to misconstrue Defendants' recognition that "Plaintiff had ample evidence to attempt and prove its case as to all its claims, including those with elements of willful or wanton behavior with such things as the Amy Andrews and Kathy Cruse emails" to include something they have vehemently denied from the beginning – evidence Trask deleted emails.

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(Order pp. 20-21). The quote cited is in no way referencing, inclusive of, or admitting Trask deleted emails or destroyed evidence. The point being made was that Encore's conduct related to the Knight testimony was not only unjust and inappropriate but even more offensive given how unnecessary it was to litigate the actual merits of the claims at issue.

Each one of the Order's four sentence conclusion on this issue is problematic and offers no support for the finding that Knight's testimony was not prejudicial. First, the claim no prejudice resulted from Knight's testimony because "Trask knew he deleted these emails" is circular reasoning that fails to support anything. (Order p. 21). Second, the statement that the Court allowed Defendants to delay putting Trask on the stand to testify is inaccurate and, even if true, irrelevant to resolution of the issue at hand. Third, noting that "Trask did not deny that he deleted these emails" on the witness stand requires acceptance of the absurd notion that the absence of a denial amounts to admission. *Id.* Finally, the Order caps its treatment of this issue by inappropriately deeming Knight's testimony "truthful evidence" whose admission cannot constitute legal prejudice. *Id.*

The presentation of Knight's computer search testimony at trial in light of Encore's actions and shirking of its obligations leading up to it are the basis for Defendants' Motion for a New Trial Absolute, and the Order does not provide accurate or appropriate grounds for finding it did not prejudice the Defendants and denying their motion. Therefore, Defendants respectfully request the Court reconsider its ruling on this issue and grant it a New Trial Absolute.

**C. Submission of Table 3 to the Jury Caused Undue Prejudice to Defendants**

Defendants' primary issues with submission of Table 3 at trial were that it contained duplicative damages and was an attempt to have the jury award Encore all of Clear Touch's profits through 2015 and "the value of the Clear Touch opportunity." In other words, it sought to make

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Clear Touch a company that never made any profit and then have it pay $3.9M for its value. Nothing in the Order rectifies those issues or supports the conclusion Defendants suffered no prejudice by the admission of Table 3. Further, the Order's conclusion that admission of Table 3 did not prejudice the Defendants relies upon irrelevant facts and arguments, none of which support that finding.

First, it claims that Defendants were not prejudiced by admission of Table 3 because the jury awarded less than all the damages reflected in it. (Order p. 21). This misses the point and has no bearing on whether or not admission of this evidence prejudiced the Defendants. Whether the jury awarded some, all, or none of the damages in Table 3 is of no consequence. Defendants contend its admission resulted in a prejudicial alteration of the jury's understanding and view of Encore's recoverable damages by setting an artificially high ceiling. That prejudicial impact was suffered at the time of admission and long before final damage awards were determined in the jury room. Therefore, if and how much the jury may have awarded from Table 3 has no bearing on the existence of the prejudice Defendants contend its admission caused.

Recognizing this unassailable truism, the Order attempts to salvage its argument by saying the figure in Table 3 was significantly lower than the $10M valuation contained in a Clear Touch offering memorandum. (Order p. 21). In insolation this statement is true, however context provided by undisputed trial testimony makes it irrelevant to the issue. Mr. Trask testified at trial that the $10M offering memorandum figure was based on nothing more than the amount of money he sought to raise by offering shares of the company; and it was not a valuation of Clear Touch as a business. Thus, the Order's attempt to portray the figures in Table 3 as conservative by comparing them to an aspirational figure within an offering memo does not succeed in that

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endeavor. Such an apples to asteroids comparison serves no meaningful purpose and fails to support the finding that admission of Table 3 did not prejudice the Defendants.

Therefore, Defendants contend it was in err to conclude that admission of the Knight computer search testimony and Table 3 did not result in prejudice to the Defendants and deny their motion for a new trial absolute. As such, Defendants respectfully request the Court reconsider its ruling in this regard and grant them a new trial absolute pursuant to SCRCP 59.

## III. DENIAL OF DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT WAS IN ERR

Defendants contend that their Motion for Relief from Judgment under Rule 60(b) was denied in err because the law and alleged facts relied upon in the Order contradict the Court's holding.[8] Neither the case law cited nor the factual grounds articulated in the Order support its holding on this issue and warrant reconsideration.[9]

First, the Order summarily concludes Encore did not engage in any fraudulent conduct without explanation or supporting citation. It goes on to argue that even if Defendants were surprised by Knight's testimony "a party may not prevail under Rule 60(b)(3), SCRCP, on the basis of fraud where he has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct." (Order p. 25). The Order cites to *Raby Constr., LLP v. Orr*, and *Bowman v. Bowman* to support that statement; however, neither of those cases stand for that particular proposition. In *Orr*, the Court held that a Rule 60(b)(3) movant could not prevail where a party was "on notice" of the relevant issue. 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004). Here, Defendants knew about Encore's accusations and belief that Trask

[8] Defendants believe they appropriately filed their Rule 60(b) motion in previous post-trial filings. However, if the Court finds otherwise, then Defendants renew that Motion and incorporate by reference its filings and arguments in support of it contained in Defendants' Post-Trial Motions.

[9] The Order references its basis for denying Defendants' Motion for New Trial as those supporting its findings that Encore did not perpetrate a fraud on the Court nor were Defendants surprised by Knight's testimony. (Order p. 24-25). Defendants have addressed those arguments above.

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destroyed emails and other evidence but were not aware of Knight's computer search. In *Bowman v. Bowman*, the Court denied a Rule 60(b)(3) motion and referred to "South Carolina's strong policy towards finality of judgments[which] trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial." 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004). Here, Encore's actions made it impossible for Defendants to discover the evidence at issue prior to trial. Defendants availed themselves of all the discovery tools available prior to trial, including taking 30(b)(6) depositions in which the issue of what evidence Encore had that Trask destroyed evidence was squarely addressed and specifically requesting Plaintiff provide all "facts and evidence" of Trask's alleged document destruction in their Interrogatories. The only way for Defendants to have known of Knight's computer searches was by Encore disclosing that information.

The remaining factual basis for the Court's denial of Defendants' Rule 60(b) Motion do not fare any better. The Order again inaccurately claims Trask admitted to deleting emails. It goes on to argue that because Encore repeatedly accused Trask of deleting emails and "provided other evidence that substantiated" those allegations, Defendants' Rule 60(b) motion should be denied. (Order p. 25). Making repeated accusations has no bearing on the issue and should not serve to defeat Defendants' motion. Further, the Order's conclusory statement that Encore provided "substantiating evidence" lacks citation to or mention of any specific evidence supporting it and is contradicted by the undisputed fact that the Court refused to include a spoliation charge in the jury instructions. Therefore, the Order does not provide sufficient legal or factual grounds for its denial of Defendants' Rule 60(b) Motion and as such, Defendants respectfully request it be reconsidered and granted by the Court.

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## IV. DENIAL OF DEFENDANTS' MOTION FOR NEW TRIAL *NISI* REMITTITUR WAS IN ERR

Defendants respectfully disagree with the Court's denial of their Motion for New Trial *Nisi* Remittitur and ask it be reconsidered for the reasons set forth in the original motion and below.

The Order attempts to support its finding that the actual verdict amounts awarded were appropriate and fell "within the range of damages testified to" by citation of and comparison to the $10M figure in the Clear Touch Offering Memorandum. (Order p. 22). As noted above, that figure has nothing to do with the value of Clear Touch but was merely a capital funds raising goal determined by Mr. Trask without any analysis or actual valuation of the company. Therefore, it has no bearing on the appropriateness of the verdicts awarded or damages Encore claimed to have incurred.

Defendants also take issue with the wildly inaccurate footnote in this section which claims Defendants complained the Court allowed testimony that Clear Touch had $17M in revenue in 2016 "but they opened the door and made this evidence relevant by criticizing Mr. Meilinger for not considering their 2016 and subsequent financial information." (Order p. 23 fn7). This statement is simply inaccurate. Defendants did not complain Mr. Meilinger failed to consider Clear Touch's 2016 and subsequent financial information. Defendants' stance was quite the opposite; always maintaining the financial evidence and disclosures should be cut off earlier than Encore wanted. It makes no sense that a company with increasing profits would want the Plaintiff to consider those higher numbers. In reality, Defendants took issue with allowing testimony that Clear Touch received $17M in gross revenues in 2016 instead of or without submission of its net revenues. Absence of the latter created an unfair impression in the jury's minds about the company's profitability. Therefore, Defendants respectfully request the Court reconsider its

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treatment of this Motion, eliminate the inaccurate footnote and make further revisions as it deems necessary.

## V. DENIAL OF DEFENDANTS' JNOV MOTION WAS IN ERR[10]

The Court denied Defendants' Rule 50(b) Motion requesting the Court grant it judgment notwithstanding the jury's verdict on the breach of contract and trade secret claims because Encore's breach of contract actions relied upon unenforceable provisions of the Non-Disclosure and Non-Solicitation Agreement and Plaintiff did not provide sufficient evidence to establish essential elements of its trade secrets claim. Defendants respectfully contend the Court committed an error of law in denying its Rule 50(b) motion and ask that it reconsider its ruling for the reasons detailed below.

### A. Error of Law Finding Restrictive Covenants Enforceable

The Order finds that the restrictive covenants in Trask's Non-Disclosure and Non-Competition Agreement (the "Agreement") with Encore were reasonable and enforceable under the law and therefore could support the breach of contract claims. (Order pp. 12-14). The Order's finding relies upon an improper evaluation of the restrictive covenants at issue and seeming attempts to impose post hoc limitations on their scope and applicability.[11]

As an initial matter, it is notable that the Order does not cite to any of the covenants challenged by Defendants in full; merely quoting small snippets to give an artificial impression that their scope is completely defined by the language cited. (Order pp. 12-14). That omission is

[10] The substantive points of law were raised previously in Defendants' Motion for Partial Summary Judgment and in its Directed Verdict Motions at trial.

[11] The Order initially frames the issue as one concerning whether South Carolina law allows customer-based restrictions as a substitute for a geographical limitation in restrictive covenants. (Order pp. 12-13). That is not the issue nor something with which Defendants quibble. They recognize the law allows customer-based restrictions in non-competes in place of geographical limits.

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telling and sets the stage for the ensuing analysis which, if done properly, would have to consider the entirety of those provisions.

First, the Order claims Trask's argument that "the Non-Solicitation of Customers provision is overly broad because it could be interpreted to reach 'customers with whom he had absolutely no contact' is "not correct" because the Contract requires him to have had access to Encore's "pricing, advertising and/or marketing schemes...for such customer.'" (Order p. 13 citing Pl. Exh. 2 at 2). That conclusion ignores Encore's own testimony that Trask had access to all of its customers pricing, advertising, and marketing schemes due to his role in the company. Thus, as Defendants contended, this provision could be utilized to restrict Trask from dealing with customers with whom he never knew or did any business with while at Encore.

Recognizing this issue, the Order immediately attempts to narrow the reach of the Non-Solicitation of Customers restriction, or at least portray it as more limited, to avoid the undeniable conclusion that it is overbroad. Those attempts fail and cannot support the finding that this restriction is enforceable. First, the Order states that "Trask...failed to identify any Encore customer with whom he had no contact" presumably shifting the burden to Trask to prove a negative – there were many Encore customers with whom he had no contact. (Order p. 13). It was not Trask's burden to establish the reasonableness of Encore's restrictive covenant. Next, the Order reasons the covenant is not overbroad because "[t]he fact is, the only customer at issue was Leon County Schools...." (Order p. 13). This is irrelevant to the proper reasonableness analysis. An unreasonable restrictive covenant is not rendered enforceable simply because a party chose to selectively enforce it. The law calls for the entire language of the provision as written to be subjected to strict scrutiny in order to determine its breadth and whether or not it is a reasonable

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restriction necessary for the protection of legitimate business interests.[12] The Order's treatment is an error of law because it fails to subject the Non-Solicitation of Customers provision to the appropriate legal analysis and relies upon irrelevant factors to find it is enforceable.

The Order next dismisses Trask's argument that the Agreement's Confidentiality provisions are overly broad in a similar fashion. It does so by summarily claiming, without analysis or citation to the actual provision, that it is "akin to" the one "approved by the Supreme Court in *Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012) and finding that it did not unreasonably restrict Trask's ability to earn a living because "[a]ll Encore's Contract required was that Trask not use the confidential information he learned about Leon to sell to it directly, and that is what the jury found he did." (Order p. 14). Review of the provision shows that is it much broader than that and restricted Mr. Trask from doing much more than utilizing confidential information to make sales to one customer. The Order's lack of appropriate legal analysis and attempt to unilaterally narrow the scope of this restrictive covenant to conclude it was reasonable and thus enforceable was in err.

The proper analytical rubric leads to a finding that these restrictive covenants are unreasonably overbroad and as such, unenforceable under the law. Therefore, Defendants respectfully contend that reconsideration of the Order's rulings on this issue is necessary in order to subject these restrictive covenants to the proper legal analysis and determine whether or not they are truly enforceable under the controlling law.

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[12] Covenants not-to-compete are looked upon with disfavor by South Carolina courts, critically examined, and strictly construed against the drafter. *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995). The drafter bears the burden of showing enforceability. *See Delmar Studios v. Kinsey*, 233 S.C. 313, 104 S.E.2d 338 (1958). A covenant not to compete will be upheld only if it is: (1) necessary for the protection of the employer's legitimate business interests; (2) reasonably limited as to time and place; (3) not unduly harsh in hindering the legitimate efforts of the employee to earn a living; (4) in accord with public policy; and (5) supported by valuable consideration. *Rental Uniform Service v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983).

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**B. Error of Law Finding Trask was Not Entitled to JNOV on Breach of Contract with Fraud Claim**

Trask contended that he was entitled to JNOV on Encore's breach of contract with fraud claim because it required the Non-Solicitation and Confidentiality provisions to be enforceable; something their unreasonable overbreadth prevented. The Order rejects his position, not by substantively addressing it, but rather claiming it cannot do so citing to case law stating that "[t]he law…forbids this court assuming to take upon itself the powers, duties, rights, and privileges of a jury. Obviously, the absolute power to change or modify the findings of a jury upon an issue of fact properly submitted to them would, when exercised, amount to the substitution of the trial judge[']s findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury." (Order p. 14)(*citing Camden v. Hilton*, 360 S.C. 164, 173, 600 S.E.2d 88, 92 (Ct. App. 2004)(*internal citations omitted*). Yet, immediately after noting that legal principle the Order violates it by claiming that the jury's verdict on the breach with fraud claim was "just as if not more likely" reliant upon the business opportunity clause. (Order p. 15). Making that finding is contrary to the legal principle quoted immediately before it and a purely speculative statement for which the Order offers no evidentiary support while ignoring the objectively verifiable support for Trask's position (math) which shows that the actual damages awarded for this claim is the sum total of all previous actual damage awards down to the 40 cents from the breach of duty of loyalty verdict. For the Order's assumption that the jury's award on the breach of contract with fraud claim is a percentage of the figures in Table 3 to be true the jury would have to awarded Encore some random percentage of those figures in Table 3, something that no one, including Plaintiff's economic expert or their counsel, ever said, directed, or indicated they could or should do.

Therefore, Defendants respectfully contend that the Order's denial of Trask's JNOV Motion in this respect was in err and warrants reconsideration.

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### C. Order's Finding that Encore Established its Trade Secrets was in Err

Defendants moved for JNOV on the grounds that Encore did not present sufficient evidence at trial upon which the jury could determine it had "trade secrets" that Trask misappropriated and he and Clear Touch used to make the sales to Leon County. (Def. Post Trial Mot. at 27-32). The Order's finding that Encore provided sufficient evidence to show its had trade secrets and support it TSA claim relies upon misapplication of the legal requirements for establishing the existence of a trade secret and misconception of the evidence presented at trial.

The Order claims there was sufficient evidence presented at trial for the jury to find Encore had two trade secrets – its customer list and the knowledge of "Leon County Schools' needs for, preferences for, and plans to purchase interactive displays." (Order p. 16). It states that the Plaintiff put forth evidence showing Trask misappropriated the customer list by having Jimmy Higginbotham bring it to him and then that he and Clear Touch used this trade secret information to make the Leon County sales. (Order p. 16). This finding ignores the undisputed fact that Encore's customer list, admitted into evidence as Plaintiff Exhibit 60, does not contain any information concerning Leon County Schools. (Exh. B - Plf. Ex. 60). Therefore, the jury did not have sufficient evidence to find defendants used Encore's customer list to make the Leon County sales in violation of the TSA because the evidence before it consisted of a document said to be this trade secret without any information concerning Leon County Schools on it. Without something more, the jury and the Court in its Order cannot conclude Defendants used Encore's customer list to make the Leon sales in violation of the TSA.

That leaves the knowledge of Leon County Schools' needs for, preferences for, and plans to purchase interactive displays as the lone "trade secret" upon which the jury could have rendered its misappropriation verdict. Nothing in the Order mentions, much less rectifies Encore's failure

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to provide evidence at trial from which the jury could find this information was in fact secret as required for it qualify as a "trade secret." S.C. Code Ann. § 39-8-20(5). The only evidence Plaintiff offered about Trask's use and disclosure of the fact Leon County Schools planned to upgrade its interactive classroom technology consisted of an email between Trask and his panel supplier after he left Encore. (Exh. C - Pl. Ex. 53). Encore however provided nothing to show this information was secret; leaving the jury with no evidence upon which it could determine it constituted a "trade secret." In fact, Defendants were the only ones who provided any evidence concerning the secrecy of this information through the testimony of West Martin. Mr. Martin, a Tallahassee resident at the time the Leon County half penny bond was up for a vote in 2012, testified there were billboards advertising the bond and noting it was for upgrading the County schools' classroom technology. Thus, the only evidence presented at trial as to this information's secrecy showed it was public knowledge from the time the local government instituted a half penny sales tax in 2012. Encore did not offer any evidence to the contrary beyond simply saying this information was a trade secret.

The Order takes the same approach and simply concludes, without citing any grounds, that Encore gave the jury enough evidence to determine these items were its trade secrets, which Trask took and used to make sales directly from Clear Touch to Leon County. Based upon this erroneous finding, the Order denies Defendants' Motion for JNOV on the TSA claims. Defendants respectfully contend that this finding is contradicted by consideration of the evidence presented at trial, does not constitute appropriate grounds for the denial of their Motion for JNOV on the Trade Secret Act claims, and requires reconsideration of whether Encore provided the jury with sufficient evidence from which it could determine its customer list and the information on Leon's purchase preferences and plans were in fact trade secrets.

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## VI. COURT ERRED IN DENYING DEFENDANTS' MOTION PURSUANT TO THE "THIRTEENTH JUROR DOCTRINE"

The Order denies Defendants' Motion Pursuant to the Thirteenth in short order by summarily stating that "[t]he jury's verdicts do not reveal that they jurors were confused about any issues" [and] their careful consideration of each claim is apparent because they rendered different amounts of actual and punitive damages. (Order p. 24). Defendants respectfully disagree and ask the Court to reconsider this ruling because the evidence shows the jury rendered inconsistent verdicts and was confused about one or more issues it was charged with deciding by admission of Table 3. [13]

The inconsistency is undeniably shown by the differing actual damage awards rendered on the breach of contract and breach of contract with fraud claims. The jury awarded $424,945 in actual damages for the Breach of Contract claim but then somehow went on to award $1,476,039.40 in actual damages under the Breach of Contract with Fraud claim despite the actual damages available being the same for both causes of action. The Order does not address this inconsistency, and Defendants respectfully contend it requires reconciliation to ensure the verdicts are consistent with the applicable law and facts. Ensuring verdicts are consistent with the applicable facts and law is not an improper invasion of the province of the jury but a necessary corrective action entrusted to the Court. There is no viable argument that these two verdicts are consistent and neither the Order nor Plaintiff has offered any. Therefore, Defendants ask the Court reconsider its finding on this issue.

The Order also does not address Defendants' argument for invocation of the thirteenth juror doctrine that submission of Table 3 to the jury resulted in it misunderstanding the type and amount

[13] Defendants have previously detailed the grounds for their position that the verdicts are inconsistent and reflect jury confusion. Def. Post-Trial Mots. at 32-34.

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of damages available to the Plaintiff in this case. As noted above, it gave them the misimpression that Encore could recover over $5.5M in actual damages when, at best, it could recover $3.9M (the "Fair Market Value of Clear Touch Opportunity"). Therefore, Defendants respectfully request the Court reconsider its holding and address this issue.

Based on the foregoing, Defendants respectfully ask that the Court reconsider its denial of Defendants' Motion Pursuant to the Thirteenth Juror Doctrine.

## VII. AWARDING ENCORE ALL ITS FEES AND EXPENSES SOUGHT WAS IN ERR

### A. Order's Conclusion that the Fees Sought by Encore are Reasonable is Flawed

The Order's determination that the $345,601 in attorneys' fees sought by Encore are reasonable and should be awarded in full was in err for several reasons.

First, it fails to take into account the fact that attorneys' fees were only recoverable under three out of the eight causes of action pursued in this case. The Court actually recognized this fact during post trial hearings noting the fees must therefore be reduced accordingly but that reduction did not translate that into the final order. Therefore, Defendants continue to maintain the fees must be proportionally reduced due to only being available under less than half of the claims litigated. Seemingly recognizing this may be an issue, the Order attempts to mitigate the inevitable fee reduction stating that "[a]lthough Encore did not prevail upon two causes of action, any additional fees and costs to present each additional cause of action would only be minimal." (Order p. 9). The Order provides no basis for this claim which is pure speculation with no bearing on the reasonableness of the fees Encore sought.

Second, as in other sections, the Order again makes multiple untrue assertions that Trask "destroyed" emails and "other documents" to argue that Encore incurred the amount of fees it claims because it had to undertake additional acts to obtain necessary evidence; namely in the form

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of issuing third-party subpoenas. (Order p. 6). The unfounded claims of evidence destruction contradicted by the denial of a spoliation charge cannot justify Encore's subpoena campaign.

Third, the Order does not mention the undisputed fact that Encore utilized documents and information from a fraction (5 out of 16) of the third parties it subpoenaed nor account for the many unnecessary acts detailed in Defendants' previous filings; all of which unreasonably inflated fees.

Finally, the Order's finding that Encore's fees were reasonable relies upon factors having no bearing on the issue. Specifically, it points to the fact the Encore has participated in post-trial activities for which it does not seek to recover its fees to support its conclusion that those it sought to recover for work performed through trial were reasonable. (Order p. 9). The extent and expense of post-trial activities has no bearing upon whether the fees for work performed through trial are reasonable. Unreasonable fees do not morph into reasonable ones when more work is performed which is not encompassed in the fees sought to be recovered.

In sum, the Defendants' respectfully request the Court reconsider its ruling on Encore's attorneys' fees because the Order fails to reduce them to account for the fact that the Plaintiff could recover its fees under less than half of the claims pursued and bases the conclusion that the fees awarded are reasonable upon inaccurate statements and factors having no bearing on the issue.

**B. The Order Does Not Provide a Basis for Finding the Costs Awarded were Reasonable**

The Order's only treatment of whether the expenses Encore sought were appropriate is a passing recognition that Defendants challenge their reasonableness and a mischaracterization concerning Plaintiff's need to seek evidence via numerous subpoenas. (Order p. 7-8). It does not mention nor address the numerous issues concerning the expenses raised in Defendants' post-trial filings. (*See* Def. Resp. and Opp. at 18-19; Def. Supp. at 15-16). The Order's single substantive

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sentence dedicated to the expenses attempts to justify them by stating Encore "was forced to seek documents through third parties because Defendants did not produce them and/or claimed to have lost or destroyed them." (Order p. 8). This is at best a partial truth and certainly gives the inaccurate impression that Encore needed to issue 16 subpoenas to everyone from potential customers to Clear Touch's new distributor to obtain relevant documents and information. In reality, Encore used items from less than a third of the entities they subpoenaed in this case. It is difficult to claim the expenses incurred for something are justified and reasonable if you utilize less than a third of what you paid to get. Thus, the only basis deeming Encore's expenses reasonable fails in that endeavor and Defendants respectfully contend that finding warrants reconsideration.

## VIII. THE COURT'S DENIAL OF DEFENDANTS' MOTION TO STAY EXECUTION OF THE JUDGMENT CONTAINS INACCURATE AND INFLAMMATORY STATEMENTS UNNECESSARY TO FULFILL ITS PURPOSE

Defendants do no quibble with the Court's ruling on their Motion to Stay the Execution given the amount of the judgments in proportion to the statutory caps on bonds imposed by S.C. Code Ann. § 18-9-130 for individuals and small business such as Clear Touch with less than 50 employees. They do however respectfully take issue with several portions of the Order addressing this motion and pray the Court see fit to address them because they contain inaccurate statements, imply Clear Touch misrepresented the number of employees it has, and needlessly and without any ascertainable basis attribute nefarious motives or actions to otherwise inane actions. (Order pp. 33-34). For example, in this section the Order states Trask "permanently deleted emails" (a claim contradicted by the Court not giving a spoliation charge) and had Gallant and Higginbotham sign NDAs "so he could induce them to leave Encore" (undisputed testimony at trial was that Encore terminated Higginbotham and Gallant was not induced by Trask to leave Encore). These

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are but two of numerous examples. These items are unnecessary, vitriolic, and will be utilized by Encore and other competitors to unfairly compete with Clear Touch in the marketplace. Should these items remain in the Order, Clear Touch's competitors will believe they have license to defame the company in the marketplace by repeating statements adopted by the Court without retribution or consequence. The potential harm far outweighs the absence of any need for their inclusion. Therefore, Defendants respectfully ask that the Court eliminate the items as reflected in the attached redline Order reflecting Defendants' objections to Plaintiff's proposed order. (Exh. D at 35-36).

## IX. CONCLUSION

For the reasons stated above, Defendants pray that the Court reconsider its rulings noted above and enter an amended final order and judgment accordingly.

Respectfully Submitted,

**ROE CASSIDY COATES & PRICE, P.A.**

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April 12, 2018
Greenville, South Carolina

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Encore Technology Group, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Defendants. | ) | C.A. No.: 2015-CP-23-05757<br><br>**DEFENDANTS' RULE 59 MOTION FOR RECONSIDERATION** |

# Exhibit A

## Plf's Supp. Resps. to Defs. First Interrogatories

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|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
| ENCORE TECHNOLOGY GROUP, LLC,<br>Plaintiff,<br>vs.<br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br>Defendants. | Case No. 2015-CP-23-05757<br>**PLAINTIFF'S SECOND SUPPLEMENTAL RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES** |

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Plaintiff Encore Technology Group, LLC ("Plaintiff" or "Encore") responds to Defendants' First Set of Interrogatories as follows:

1. State the names, addresses, and telephone numbers of all persons known to you to be witnesses concerning the facts of the case and, with respect to each person identified, please provide a summary of the important facts known to or observed by such witness and indicate whether or not written or recorded statements have been taken from each witness.

**RESPONSE:**

1. Todd Newnam: Mr. Newnam is the Chairman and Chief Executive Officer for Encore. Mr. Newnam has knowledge of the relationship and communications between Encore and Defendants. Mr. Newnam can be contacted through Encore's counsel and has given an affidavit in this case.

2. Michael Knight: Mr. Knight is the President and Chief Technology Officer for Encore. Mr. Knight has knowledge of the relationship and communications between Encore and Defendants. Mr. Knight can be contacted through Encore's counsel.

3. David Masters: Mr. Masters is the Vice President of Sales and Marketing for Encore. Mr. Masters has knowledge of the relationship and communications between Encore and Defendants. Mr. Masters can be contacted through Encore's counsel.

4. Russell Young: Mr. Young is the Chief Financial Officer and, on behalf of Encore, executed the Reseller Agreement with Clear Touch Interactive. Mr. Young has

knowledge of the relationship and communications between Encore and Defendants. Mr. Young can be contacted through Encore's counsel.

5. Tammy Summerell: Ms. Summerell is the Human Resources Officer for Encore and executed the Non-Disclosure and Non-Solicitation Agreement and April 25, 2014 Severance Agreement and General Release, each between Encore and Keone Trask. Ms. Summerell has knowledge of the relationship and communications between Encore and Defendants. Ms. Summerell can be contacted through Encore's counsel.

6. Wendy Metcalf: Ms. Metcalf is the Operations and Vendor Coordinator for Encore. Ms. Metcalf was involved in the exchange of the Mutual Confidentiality Agreement and Reseller Agreement between Encore and Clear Touch and has knowledge of the relationship and communications between Encore and Defendants. Ms. Metcalf can be contacted through Encore's counsel.

7. John Dockery: Mr. Dockery is a Sales Account Executive for Encore. Mr. Dockery has knowledge of the relationship and communications between Encore and Defendants. Mr. Dockery can be contacted through Encore's counsel.

8. Matt Fowler: Mr. Fowler is a Sales Account Executive for Encore. Mr. Fowler has knowledge of the relationship and communications between Encore and Defendants. Mr. Fowler can be contacted through Encore's counsel.

9. Matt Semberger: Mr. Semberger is a Sales Account Executive for Encore. Mr. Semberger has knowledge of the relationship and communications between Encore and Defendants. Mr. Semberger can be contacted through Encore's counsel.

10. Danielle Stengel: Ms. Stengel is a Sales Account Executive for Encore. Ms. Stengel has knowledge of the relationship and communications between Encore and Defendants. Ms. Stengel can be contacted through Encore's counsel.

11. Brad Browning: Mr. Browning is a former Sales Account Executive for Encore. Mr. Browning left Encore in September 2014. Mr. Browning's contact information is: 864-414-6502, 103 Boulder Road, Greenville, SC 29607.

12. Jimmy Higginbotham: Mr. Higginbotham is a former Sales Account Executive for Encore and Clear Touch. Mr. Higginbotham left Encore in July 2014. Mr. Higginbotham's contact information is: 850-264-0531, 5111 Craftsman Street, Johns Creek, GA 30097 and has given an affidavit in this case.

13. Patrick Ireland: Mr. Ireland is a former Sales Account Executive for Encore. Mr. Ireland left Encore in November 2015. Mr. Ireland's contact information is: 540-207-3541, 609 Central Avenue, Salem, VA 24153.

14. Chris Powell: Mr. Powell is the former Chief Executive Officer for Encore and, on behalf of Encore, executed the Mutual Confidentiality Agreement between Encore and

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Defendant on April 9, 2013. Mr. Powell left Encore in October 2014 and is presently an independent consultant in the industry and has given an affidavit in this case. Mr. Powell's contact information is: 864-351-8724, 16 Gilder Point Court, Simpsonville, SC 29681.

15. Keone Trask: Mr. Trask, one of the Defendants in this action, is the former Chief Business Development Officer for Encore and is now with Defendant Clear Touch. Mr. Trask left Encore in April 2014. Mr. Trask has knowledge of the relationship and communications between Encore and Defendants. Mr. Trask can presumably be contacted through Defendants' counsel.

16. Kathy Cruse: Ms. Cruse is the Director of Channels for Clear Touch and is believed to be Mr. Trask's mother. Ms. Cruse signed the Mutual Confidentiality Agreement between Encore and Defendant on April 9, 2013, identifying herself as Clear Touch's Managing Member. Ms. Cruse then signed the April 24, 2013 Reseller Agreement between Encore and Clear Touch Interactive, again identifying herself as Clear Touch's Managing Member. Ms. Cruse has knowledge of the relationship and communications between Encore and Defendants. Ms. Cruse can presumably be contacted through Defendants' counsel.

17. Amy Andrews: Ms. Andrews is an employee of Clear Touch. Ms. Andrews has knowledge of the relationship and communications between Encore and Defendants. Ms. Andrews can presumably be contacted through Defendants' counsel.

18. Tamara Trask: Mrs. Trask is the spouse of Keone Trask and VP of Operations at Clear Touch. Ms. Trask has knowledge of the relationship and communications between Encore and Defendants. Ms. Trask can presumably be contacted through Defendants' counsel.

19. Leo Gallant: Mr. Gallant is a former Encore employee Mr. Trask induced to leave Encore and join Clear Touch. Mr. Gallant left Encore in January 2015. Mr. Gallant can presumably be contacted through Defendants' counsel.

20. Dale Viola: 68361 Commercial Way S, Mandeville, LA 70471, c/o Michael Tusa, Esq., (985) 727-7501. Mr. Viola was solicited to be a reseller for Clear Touch by Mr. Keone Trask while Mr. Trask was an Encore employee attending a conference for Encore and has knowledge about this and Mr. Trask's solicitation of other potential resellers as well as the ability to purchase panels directly from CVTE.

21. Any other witnesses listed in Defendants' Responses to Encore's Interrogatories.

To Encore's knowledge, no written or recorded statements have been taken from any of these potential witnesses.

Encore reserves the right to call as witnesses any individual identified by Defendants or who is deposed in this action.

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2. Identify each written document, memorandum, or other writing in your possession, or subject to your custody or control, which pertains to the facts of this case.

**RESPONSE:** Pursuant to Rule 33(c), SCRCP, see documents produced in response to Defendants' First Set of Requests for Production.

3. Identify all photographs, plats, sketches, charts, diagrams, or other prepared documents in your possession or subject to your custody or control which pertain to the facts of this case.

**RESPONSE:** Pursuant to Rule 33(c), SCRCP, see documents produced in response to Defendants' First Set of Requests for Production.

4. List the names and addresses of any expert witnesses you propose to use as a witness at the trial of this case.

**RESPONSE:**

Michael E. Meilinger, CPA
351 Prado Way
Greenville, SC 29607

5. Please state whether you have ever been involved in any lawsuit as either plaintiff, defendant, or witness involving a confidentiality agreement, a non-solicitation agreement, a non-competition agreement, or concerning alleged violations of confidentiality agreements, misappropriation of trade secrets, or tortuous interference with business relations and, if so, please state the nature of the lawsuit, the claims or defenses asserted, and the outcome of the litigation.

**RESPONSE:** Encore objects to this interrogatory on the grounds that it calls for information that is irrelevant to the subject matter involved in the pending action and is not calculated to lead to the discovery of admissible evidence. Subject to and without waiver of these objections, Encore is a plaintiff in the case of Encore Technology Group, LLC v. Eason, et al. See the Complaint in that case, of which Defendants' counsel already has a copy.

6. Identify with particularity and in detail each breach of contract or law you assert, including but not limited to the facts giving rise to the breach, a quote of the relevant portions (and not by mere reference to the entire document) of such contract or law, and your construction thereof.

**RESPONSE:** See Complaint. Mr. Trask breached his duty of loyalty, his fiduciary duties, his Non-Disclosure and Non-Solicitation Agreement and Severance Agreements; violated the SC Trade Secrets Act; was unjustly enriched; committed these breaches accompanied by fraudulent acts; defamed Encore; and violated the Unfair Trade Practices Act by numerous actions, including but not limited to the following:

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(a) Forming and devoting resources to Clear Touch while he was an Encore employee;
(b) Failing to disclose his interest in Clear Touch while executing a Reseller Agreement between Encore and Clear Touch;
(c) Dissuading and preventing Encore from pursuing or learning about competing products and suppliers to Clear Touch;
(d) Causing Encore to bear the sales and marketing expenses and develop the market for Clear Touch products;
(e) Skewing profit margins in favor of Clear Touch to the detriment of Encore;
(f) Selling Clear Touch products directly to Encore's customers;
(g) Entering agreements with other distributors in Encore's markets to compete against Encore;
(h) Encouraging Encore employees to end their employment with Encore and accept employment with Clear Touch;
(i) Offering to pay Encore employees to divert profits on sales of Clear Touch products by Encore from Encore to Clear Touch and/or eliminating Encore from deals altogether and paying Encore employees directly;
(j) Using Encore resources, trade secrets and confidential information to advance Clear Touch's interests;
(k) Disparaging and defaming Encore and its executives, falsely stating to current and prospective Encore customers that Clear Touch terminated its relationship with Encore for bad acts of Encore and its executives and that Encore is exiting the classroom technology business because it is unfit for that business.

Specifically, Mr. Trask violated the following provisions of his Non-Disclosure and Non-Solicitation Agreement: Confidentiality (p. 1), Non-Solicitation of Customers (p. 2), Non-Piracy of Employees (p. 2) and Business Opportunity (p. 2). Mr. Trask violated the following provisions of his Severance Agreement and General Release: Restrictive Covenants Obligation (§ 9), Non-Disparagement (§ 10) and Company Property (§ 12).

Clear Touch violated the SC Trade Secrets Act; was unjustly enriched; tortiously interfered with Encore's agreements with Mr. Trask; defamed Encore; and violated the Unfair Trade Practices Act by numerous actions including the following:

(a) Using Mr. Trask and his knowledge of Encore's trade secrets and confidential information to solicit and sell Clear Touch products to Encore's customers and compete against Encore;
(b) Using and/or disclosing Encore's trade secrets and confidential information to compete unfairly for the business of Encore's customers;
(c) Using Encore's trade secrets and confidential information to solicit and render services to Encore's customers for themselves and third parties; and
(d) Disparaging and defaming Encore and its executives, falsely stating to current and prospective Encore customers that Clear Touch terminated its relationship with Encore for bad acts of Encore and its executives and that Encore is exiting the classroom technology business because it is unfit for that business.

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7. Set forth an itemized statement of and identify all damages, exclusive of pain and suffering, claimed to have been sustained by the party, describing said damages and method of computation in detail, including but not necessarily limited to: the nature of the damage; the amount of lost earnings or profits, if any; and the period for which loss is claimed.

**RESPONSE:** See Complaint ¶ 27 for an overview of the damages Defendants' actions have caused Encore and the Expert Report of Michael E. Meilinger, CPA, dated February 28, 2017, for detailed calculations, which include but are not limited to:

| | | |
|---|---|---|
| Wages: | | |
| Trask | $318;364 | |
| Gallant | $206,966 | |
| Higginbottham | $119,066 | |
| Wages total: | | $644,396 |
| Marketing costs: | | $ 67,689 |
| Lost profits: | | |
| Sales to Encore | $675,361 | |
| Sales to Leon CS | $424,925 | |
| Lost profits total: | | $1,100,306 |
| Lost Clear Touch Opportunity | | $5,536,254 |

8. Identify and describe in detail all measures taken by the party to mitigate its alleged damages in this matter.

**RESPONSE:** Encore has initiated this lawsuit in an effort to mitigate the damages Defendants are causing Encore. Additionally, following the termination of Encore's relationship with Clear Touch, Encore began reselling the same product lines, now supplied by ViewSonic.

9. Identify with particularity and in detail every factual and legal basis, if any, for the position that the Non-Solicitation and Non-Piracy paragraphs of Encore's Non-Disclosure and Non-Solicitation Agreement, and Section 9 of the Severance Agreement are necessary for the protection of the legitimate interests of Plaintiff.

**RESPONSE:** Encore has legitimate interests in protecting its customer lists, employees, goodwill, and other related confidential information and trade secrets. See Non-Disclosure and Non-Solicitation Agreement ("It is understood and agreed that the Company has legitimate business interests in seeking the protections it seeks in this Agreement, including but not limited to the protection of its trade secrets, confidential information, substantial relationships with specific prospective or existing customers or clients, and the restrictions set forth herein are reasonably necessary to protect these legitimate business interests.")

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10. Identify with particularity and in detail, not simply reciting the general categories of documents and information listed in paragraph 8 of the Complaint, each and every one of Plaintiff s "trade secrets" that Defendants have taken possession of and misappropriated as alleged in paragraphs 21-24 and 54-56 of the Complaint. Your response to this Interrogatory should be limited to information, documents, or other items Plaintiff claims are "trade secrets" as that term is defined under the South Carolina Trade Secrets Act, S.C. Code Ann. § 39-8-10 et seq. and not include any other information, documents, or other items Plaintiff claims constitute confidential information or "Company Data."

**RESPONSE:** Encore objects to the improper distinction Defendants attempt to make between what are Encore's protected trade secrets and what has been described as confidential information or "Company Data." Encore also objects to this interrogatory because it seeks information in Defendants' possession. Subject to and without waiving these objections, Defendants have taken possession of and misappropriated various trade secrets, confidential information and company data, including but not limited to information about Leon County School's needs, preferences, and prices for panels, and the following, which was not generally known or ascertainable by the general public, which Mr. Trask acquired during his employment relationship with Encore:

(a) Employee information and contact information;
(b) Products, procedures, equipment and methods used and preferred by Encore's customers;
(c) Manuals and reports;
(d) Customer lists;
(e) Pricing information;
(f) Marketing and business plans and objectives;
(g) Sales commission rates;
(h) Cost information;
(i) Customs, requirements, needs and preferences of Encore's customers ;
(j) Customs, requirements, needs and preference of Encore's vendors;
(k) Information related to existing goods and services;
(l) Shipping information; and
(m) Sales information.

Additionally, Encore incorporates the definitions of "Company Data" and "Trade Secrets" set forth in Mr. Trask's Non-Disclosure and Non-Solicitation Agreement.

11. Detail any and all security measures Encore employs to protect each item listed in response to Interrogatory 10 above.

**RESPONSE:** Encore maintains login identifications and passwords to websites and databases, and employees' access to databases is disabled following termination. Employees such as Mr. Trask execute Non-Disclosure and Non-Solicitation Agreements. Employees acknowledge upon termination that they are not authorized to use such resources. Additionally, Mr. Trask executed the Severance Agreement, which sets forth detailed prohibitions on Mr. Trask's retention of and use of Encore's records, files, lists, data, drawings, documents, equipment and similar items. See Severance Agreement, ¶ 12.

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12. Identify with particularity and in detail not simply reciting the general categories of documents and information listed in paragraph 8 of the Complaint, any and all items constituting Plaintiff s "Company Data" that Defendants have taken possession of and misappropriated as alleged in paragraphs 21-24 of the Complaint.

**RESPONSE:** See Response No. 10.

13. Identify with particularity and in detail each and every business or entity Plaintiff claims were or are its "customers" as that term is defined in Encore's Non-Disclosure and Non-Solicitation Agreement whom Plaintiff contends Trask is prohibited from "soliciting" under the terms of that document.

**RESPONSE:** Encore objects to this interrogatory because it seeks information in Defendants' possession. Given Trask's tenure with Encore and his position as a senior executive with responsibility for business development and sales and marketing, he had significant personal knowledge of Encore's customers and sales and marketing initiatives and used all of that knowledge as well as direct information and resources to benefit himself and Clear Touch. Subject to and without waiving these objections, Defendants solicited at least two of Encore's customers, including Leon County Schools and Wake County Schools, as well as the reseller Lecroy.

14. Identify with particularity and in detail which businesses or entities listed in response to Interrogatory 13 above Plaintiff claims Trask unlawfully "solicited" in violation of Encore's Non-Disclosure and Non-Solicitation Agreement.

**RESPONSE:** See Response No. 13. Encore objects to this interrogatory because it seeks information in Defendants' possession.

15. Set forth with specificity all facts and evidence Plaintiff has to support the allegations in Paragraph 15 of the Complaint alleging that "[w]hile an employee of Encore, Trask...dissuaded and/or prevented Encore from pursuing or learning about competing products and suppliers to Clear Touch."

**RESPONSE:** Encore objects to this interrogatory because it seeks information in Defendants' possession. Subject to and without waiving this objection, Todd Newnam, Russell Young and David Masters had multiple conversations with Mr. Trask about the classroom technology end-market, as well as Encore's strategy and product offerings. Mr. Trask consistently advocated and promoted Clear Touch as the vendor of choice, delayed review and discussion of competitive options, and ignored any suggestions that he should explore and develop other options and opportunities for Encore. For example, when Mr. Trask and Leo Gallant were asked to identify and compare alternatives to Promethean and Clear Touch products, they did not note that the same product that Clear Touch offers was available from other vendors, including ViewSonic, which Encore now uses.

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16. Set forth with specificity all facts and evidence Plaintiff has to support the allegations in Paragraph 16 of the Complaint alleging that Trask skewed profit margins in favor of Clear Touch, including specifying each and every instance of such conduct and the method(s) employed by Trask on each occasion.

**RESPONSE:** Encore objects to this interrogatory because it seeks information in Defendants' possession. Subject to and without waiving this objection, Encore representatives had multiple conversations with Mr. Trask, who was at the time Encore's relationship manager with Clear Touch, about getting additional margin from the supplier as is customary in low margin deals like the ones Encore was arranging for Clear Touch products. Mr. Trask advocated seeding the market with this new product by taking large deals at low margin so that Encore could demonstrate to other prospective customers that the product was deployed and successful. When Encore sought lower prices from Clear Touch to give Encore more margin, Clear Touch denied the requests, because Mr. Trask, in control of Clear Touch, knew that Encore would proceed even without Clear Touch's concessions on lowering prices. An independent third party vendor would have assisted Encore to seed the market more with additional margin and sales and marketing expenditures. Mr. Trask used his position to reverse this industry norm, using Encore resources to promote Clear Touch products.

17. Set forth with specificity all facts and evidence Plaintiff has to support the allegations in Paragraph 18 of the Complaint alleging that "both during and after his employment with Encore, in violation of the 'Non-Solicitation of Customers' section of the Agreement and Section 9 of the Severance Agreement, Trask caused Clear Touch to sell Clear Touch Products to some of Encore's customers directly and also to enter agreements with other distributors in Encore's markets to compete against Encore."

**RESPONSE:** Encore objects to this interrogatory because it seeks information in Defendants' possession. Subject to and without waiving this objection, Encore employees, including John Dockery, Matt Fowler, Matt Semberger, Danielle Stengel, and others, have had numerous conversations with specific customers, including but not limited to Wake County Schools (NC), Gwinnett County Schools (GA), and Greenville County Schools (SC), where the customers informed Encore that Clear Touch had contacted them directly, typically either through Mr. Trask or Mr. Gallant, and was trying to guide them away from Encore to Clear Touch directly or through another reseller. Furthermore, as admitted in his deposition and confirmed by Jimmy Higginbotham, Trask did cause Clear Touch to sell products directly to Leon County Schools.

18. Set forth with specificity all facts and evidence Plaintiff has to support the allegations in Paragraph 19 of the Complaint alleging that "both during and after his employment with Encore, Trask further violated the 'Non-Piracy of Employees' section of the Agreement and Section 9 of the Severance Agreement by encouraging Encore employees to end their employment with Encore and to accept employment with Clear Touch."

**RESPONSE:** Encore objects to this interrogatory because it seeks information in Defendants' possession. Subject to and without waiving this objection, Mr. Trask recruited Leo Gallant from Encore to Clear Touch in violation of the non-solicitation provisions of the

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Severance Agreement. Specifically, the Severance Agreement was dated April 25, 2014 and included a provision prohibiting solicitation of employees for one year. Mr. Trask recruited Mr. Gallant to Clear Touch in late 2014 with a final departure date of January 9, 2015, which was within the prohibited solicitation period.

19. Set forth with specificity all facts and evidence Plaintiff has to support the allegations in Paragraph 20 of the Complaint alleging that "Trask also offered to pay Encore employees to divert profits on sales of Clear Touch Products by Encore from Encore to Clear Touch and/or to cut Encore out of deals altogether and pay the Encore employees directly."

**RESPONSE:** Encore objects to this interrogatory because it seeks information in Defendants' possession. Subject to and without waiving this objection, current and former Encore employees, including Jimmy Higginbottham and Danielle Stengel, have reported that Mr. Trask offered to pay the employees if they were able to negotiate specific deals.

20. Identify each and every "disparaging" and "defamatory" remark Defendants have made concerning Encore and its executives as alleged in Paragraphs 26 and 77 of the Complaint, including specifying the content, date, method, and parties involved in each communication identified.

**RESPONSE:** Encore objects to this interrogatory because it seeks information in Defendants' possession. Subject to and without waiving this objection, as noted above in Response No. 17, Encore employees have had had numerous conversations with specific customers, including but not limited to Wake County Schools (NC), Gwinnett County Schools (GA), and Greenville County Schools (SC), where the customers informed Encore that Clear Touch had contacted them directly, typically either through Mr. Trask or Leo Gallant, and was trying to guide them away from Encore to Clear Touch directly or through another reseller and in the process typically slandered Encore and praised the other supplier. Specifically, the IT Director for Gwinnett County Schools (GA), Greg Lahatte, informed Encore that Mr. Trask and/or Mr. Gallant blamed Encore for a supply issue Clear Touch had experienced and told the customer that it should purchase from an entity other than Encore to avoid such issues in the future. Moreover, several former Encore employees have reported having conversations with Mr. Trask and other Clear Touch representatives, or hearing about such conversations, where these remarks were made as well as the statement to Leon County Schools that Encore had diverted its product to another customer. Matt Semberger received a call from Bridgetech, which had heard from Mr. Trask or Mr. Gallant that Encore was exiting the classroom business.

21. Set forth with specificity all facts and evidence Plaintiff has to support the allegations of Paragraph 33 of the Complaint which allege Trask accessed "Encore's computer system without or in excess of authorization," and "destroy[ed] Encore property, software, and files." Specifically identify each and every item of "Encore property, software, and file" Plaintiff claims Trask destroyed.

**RESPONSE:** Encore objects to this interrogatory because it seeks information in Defendants' possession. Subject to and without waiving this objection, in February or March 2016, former Encore employee Jimmy Higginbotham reported to Encore that Mr. Trask accessed

and used Encore property, software and files, and Mr. Trask has admitted such use of Encore's resources. Pursuant to Rule 33(c), SCRCP, see documents produced in response to Defendants' First Request for Production.

22. Identify each person who provided information or in any manner assisted or contributed to the preparation of your answers to Defendants' First Set of Interrogatories and Defendants' First Requests for Production.

**RESPONSE:** Encore objects to the extent this interrogatory seeks information protected by the attorney-client privilege and/or work product doctrine. Without waiving this objection, Todd Newnam, Michael Knight, Russell Young and David Masters assisted in providing information needed to respond to these requests.

Gregory J. English (65470)
Rita Bolt Barker (77600)

WYCHE, P.A.
44 East Camperdown Way
Post Office Box 728
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Telephone: 864-242-2800
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*Attorneys for Plaintiff*

September 8, 2017

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| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
| ENCORE TECHNOLOGY GROUP, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br><br>Defendants. | Case No. 2015-CP-23-05757<br><br>**CERTIFICATE OF SERVICE** |

This is to certify that I have this date caused to be served on Defendants in this action true and correct copies of the within and foregoing **PLAINTIFF'S SECOND SUPPLEMENTAL RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES** by causing the same to be deposited in the U.S. mail, first class postage prepaid, addressed as follows:

Joseph O. Smith, Esq.
Josh Hudson, Esq.
ROE CASSIDY COATES & PRICE, P.A.
1052 North Church Street
Greenville, SC 29601

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Attorneys for Plaintiff
Encore Technology Group, LLC

September 8, 2017

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| | ) | |
| Encore Technology Group, LLC, | ) | C.A. No.: 2015-CP-23-05757 |
| | ) | |
| Plaintiff, | ) | **DEFENDANTS' RULE 59 MOTION FOR RECONSIDERATION** |
| | ) | |
| v. | ) | |
| | ) | |
| Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | |
| | ) | |
| Defendants. | ) | |

# Exhibit B

## Plaintiff Exhibit 60

| | First Name | Last Name | Status | Company | Phone Number | Ext | Email | Title | Relationship | Type | Entered | Company ID | Territory | Company Type | Company Status |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 687 | | Vacant | Active | Greenville County School District | 8643553100 | | | Principal | | | 05/13/2013 2:43pm | GreenvilleCountySchool | SC1 | Client - Tier1 | Active |
| 4095 | 1 Volt | Associates, Inc | Active | CREDIT CARD BUY | | | bdolan@1volt.com | 1 Volt Accosciates, Inc | | | 06/09/2014 1:52pm | CREDIT CARD BUY | Corporate | Vendor | not-Approved |
| 3960 | Aaron | Ewald | Active | Huron Intermediate School District | 9892693400 | | aewald@huronisd.org | IT Assistant | | | 05/13/2014 10:20am | HuronIntermediateSchool | Encore | Prospect | not-Approved |
| 2649 | Aaron | New | Active | Madison City Schools | 2564648370 | 10252 | janew@madisoncity.k12.al.us | Network Specialist | | | 10/15/2013 9:26am | MadisonCitySchools | AL1 | Client - Tier1 | Active |
| 2809 | Aaron | Thomas | Active | Chester County School District | 8033856122 | | athomas@chester.k12.sc.us | | | | 11/06/2013 11:26am | ChesterCountySchoolDis | SC3 | Client - Tier2 | Active |
| 2831 | Aaron | Bohmer | Active | Spartanburg School District #5 | 8642165157 | | aaron.bohmer@spart5.net | | | | 11/08/2013 3:43pm | SpartanburgSchoolDistriS | SC1 | Client - Tier1 | Active |
| 1044 | Aaron | Slutsky | Active | McDowell County Schools | 8286529862 | | Aaron.Slutsky@mcdowell.k12.nc.us | Technology Director | | | 05/13/2013 2:50pm | McDowellCountySchools | NC1 | Client - Tier2 | Active |
| 315 | Aaron | Ward | Active | Berkeley County School District | 8435725510 | | Warda@bcsdschools.net | Network Support Technician | | | 05/13/2013 2:43pm | BerkeleyCountySchoolDi | SC5 | Client - Tier2 | Active |
| 1858 | Aaron | Lyons | Active | Carolina Datacom, Inc. | 8643342250 | | Aaron.Lyons@carolinadatacom.com | Sales Rep | | | 05/28/2013 2:29pm | CarolinaDatacomInc | Encore | Vendor | Active |
| 2367 | Aaron | Turpin | Active | Hall County Board of Education | 7705341080 | | aaron.turpin@hallco.org | Executive Director of IT | | Approver | 08/28/2013 11:39am | HallCountyBoardOfEduc | GA1 | Client - Tier2 | Active |
| 2334 | Abigail | Fuller | Active | | 8648337026 | | arush@presby.edu | | | | 08/22/2013 3:49pm | | | | |
| 2335 | Abigail | Fuller | Active | Presbyterian College | 8648337026 | | asrush@presby.edu | | | | 08/22/2013 3:53pm | PresbyterianCollege | SC6 | Client - Tier2 | Active |
| 2333 | Abigil | Fuller | Active | | | | afrush@presby.edu | | | | 08/22/2013 3:48pm | | | | |
| 2282 | Abraham | Flores | Active | Johnston Community College | 9192092210 | | arflores@johnstoncc.edu | Network Manager | | | 08/14/2013 1:16pm | Johnston CC | NC3 | Client - Tier2 | Active |
| 3707 | Acccounts | Payable | Active | McDowell Technical Community College | 8286526021 | | accountspayable@mcdowelltech.edu | Jill | | | 04/01/2014 9:58am | McDowellTechnicalCommun | NC2 | Client - Tier2 | Active |
| 3060 | Accounting | | Active | Perceptis | 0 | | accounting@perceptis.com | | | | 12/18/2013 4:15pm | Perceptis | Nat1 | Client - Tier2 | Active |
| 1538 | Accounting | Department | Active | Wake County Public School System | 9194317345 | | acctspay@wcpss.net | Accounting | | | 05/13/2013 2:51pm | WakeCountyPublicSchool | NC2 | Client - Tier2 | Active |
| 2360 | Accounts | Payable | Active | Hagemeyer North America | 8642882525 | | ap@hagemeyerna.com | | | | 08/27/2013 2:25pm | HagemeyerNorthAmerica | SC6 | Client - Tier2 | Active |



CONFIDENTIAL

PLAINTIFF'S EXHIBIT 60

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Encore Technology Group, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Defendants. | ) | C.A. No.: 2015-CP-23-05757<br><br>**DEFENDANTS' RULE 59 MOTION FOR RECONSIDERATION** |

# Exhibit C

## Plaintiff Exhibit 53

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From: **Keone Trask** kt@getcleartouch.com
Subject: RE: RE: Customs Detention
Date: May 14, 2014 at 9:10 PM Asia/Calcutta
To: "'Robin Liang'" liangbin@cvte.cn

Yes - Will update today. We are bringing new CRM system online to assist in managing opportunities. Detail to follow.

BTW – I do not think we told you. Leon County School District, FL has selected Clear Touch Interactive as their panel manufacture... beating Promethean, Smart and Qomo. This was not a formal bid... Encore received a purchase order for 18 units yesterday. These 18 are the beginning of 285 units to be acquired through December. Next year is 600 rooms.

**From:** Robin Liang [mailto:liangbin@cvte.cn]
**Sent:** Wednesday, May 14, 2014 11:29 AM
**To:** kt@getcleartouch.com
**Subject:** Re: RE: Customs Detention

Keone
Let's focus on current projects, make sure we win every bloody battle.
1000pcs is a duable target.
Are you still working on the pipeline list?
Regards

**Robin Liang**|Global Market BU
Guangzhou Shirui Electronics Co., Ltd. | 192 Kezhu Road, Science Park, P.R.China ( 510663) | www.cvte.cn
Mobile: (+86)13922196150 | Skype: robin.liang321 | TEL: +86-20-82260169 | FAX: +86-20-82075579

**From:** Keone Trask
**Date:** 2014-05-14 23:11
**To:** 'Robin Liang'
**Subject:** RE: RE: Customs Detention
Our thought is to use the H Series to battle it out at the lower end – to compete with existing panels as pricing pressure and market share are pursued. The H Series panel has performed well against these competitively and if necessary we can push price down to add further pressure.

Further, we use the V Series to differentiate ourselves in the market... rise above the pricings pressure with the additional integrated features... and request a small premium for it.

Your risk is minimal for the additional H Series Chipsets...

Keone

Clear Touch Interactive

**Keone Trask** / Director of Business Development
864-430-0361/ kt@getcleartouch.com
**Clear Touch Interactive**
561 Keystone Avenue, Suite 821, Reno NV 89503
http://www.getcleartouch.com

PLAINTIFF'S EXHIBIT 53

This e-mail message may contain confidential or legally privileged information and is intended only for the use of the intended recipient(s). Any unauthorized disclosure, dissemination, distribution, copying or the taking of any action in reliance on the information herein is prohibited. E-mails are not secure and cannot be guaranteed to be error free as they can be intercepted, amended, or contain viruses. Anyone who communicates with us by e-mail is deemed to

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Encore Technology Group, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Keone Trask and Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Defendants. | ) | C.A. No.: 2015-CP-23-05757<br><br>**DEFENDANTS' RULE 59 MOTION FOR RECONSIDERATION** |

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# Exhibit D

## Defendants' Redline of Proposed Final Judgement and Order with Accompanying Email

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| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
| ENCORE TECHNOLOGY GROUP, LLC,<br>Plaintiff,<br>vs.<br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br>Defendants. | Case No. 2015-CP-23-05757<br>**FINAL ORDER AND JUDGMENT** |

**THIS MATTER** is before the Court following a week-long trial and jury verdict in favor of Plaintiff Encore Technology Group, LLC ("Encore") against Defendants Keone Trask ("Trask") and Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch") on September 29, 2017. The Court gave the parties 10 days to make post-trial motions concerning the verdict. The following post-trial motions are currently before the Court:

1. Encore's Motion for Judgment including Restitution, Exemplary Damages, Attorneys' Fees, Expert Witness Fees, Costs and Other Expenses, which Defendants ask the Court to deny;
2. Defendants' Motion for Judgment Notwithstanding the Verdict;
3. Defendants' Motion for New Trial Absolute;
4. Defendants' Motion for New Trial *Nisi* Remittur;
5. Defendants' Motion for New Trial pursuant to the Thirteenth Juror Doctrine;
6. Defendants' Motion for Relief from Judgment pursuant to Rule 60(b), SCRCP;
7. Defendants' Motion for Election of Remedies;

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8. Defendants' Motion to Stay Execution of the Judgment; and

9. Defendants' Supplemental Post Trial Filings, filed March 5, 2018, including a motion to deposit the amounts of the judgment in court pursuant to Rule 67, SCRCP.

The parties have filed responses to the others' motions and a hearing was held on November 17, 2017, at which counsel for all parties attended. After considering the matters of record and the arguments of counsel, for the reasons set forth herein, the Court grants Encore's motion except for restitution, denies Defendants' motions except to deposit the amounts of the judgments in court, and directs the entry of judgment in favor of Encore against Trask in the amount of **$7,917,468.40** and in favor of Encore against Clear Touch in the amount of **$1,715,335.00.**

## DISCUSSION

In considering the pending motions, the Court must have due respect for the jury's verdict. As the South Carolina Supreme Court has stated:

> The Court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors. One is entitled to the constitutional privilege of the fair judgment of a jury rather than that of the Court ....

*Brabham v. S. Asphalt Haulers, Inc.*, 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953).

For these reasons, "it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003). Specifically, "[a] jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention." *Id.* at 234, 432 (internal quotations and citations omitted).

The Court may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *See Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 722 (Ct. App. 1996). A trial judge may grant a new trial upon the facts if the judge determines the verdict is contrary to

Commented [A1]: Standard of review.

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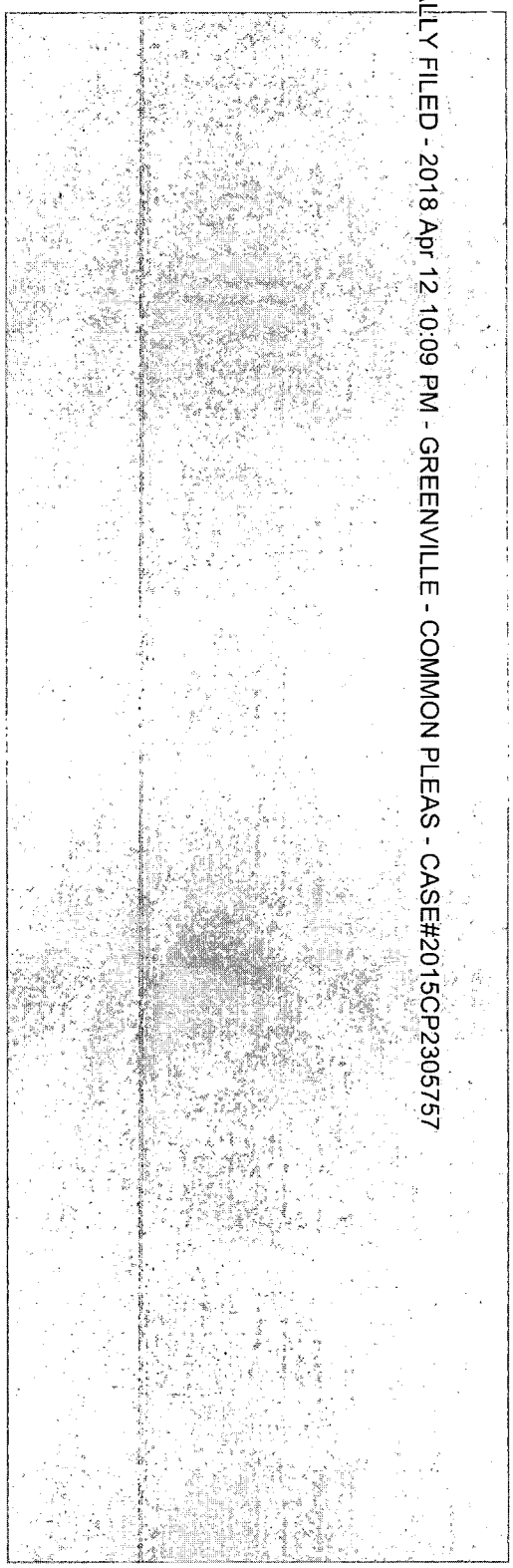

the fair preponderance of the evidence. *Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460 (1978). It is not necessary for the Court to view the evidence in a light most favorable to the opposing party. *See Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 247, 452 S.E.2d 640 (Ct. App. 1994)(stating the trial court may take its own view of the evidence.). Rather, the granting of a new trial under the doctrine is addressed to the discretion of the trial judge. *McIntire v. Mooregard Exterminating, Services, Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003).

In this case, Trask secretly set up and pursued a side company, Clear Touch, to sell interactive panels to Encore at a profit while employed by and under a Non-Disclosure and Non-Solicitation Agreement (the "Contract") with Encore. Trask admitted that he breached his duty of loyalty to Encore, for which the jury awarded $375,733.40 actual damages and $175,000.00 punitive damages. The actual damages award appear to compensate Encore for Trask's wages, benefits and a portion of conference expenses Encore paid for Trask. Plaintiff's Exhibits 10.B and 10.G.

Trask also admitted that he breached his fiduciary duties to Encore, for which the jury awarded Encore $675,361 actual damages and $1,500,000 punitive damages. The actual damages award appear to compensate Encore for its lost profits on sales to its customers as a result of Trask's not disclosing that Encore could purchase products directly from the true suppliers, TSI Touch and CVTE, instead of Clear Touch. Plaintiff's Exhibit 10.C.

The jury also awarded Encore actual damages of $424,945, which appears to compensate Encore for lost profits on sales to Leon County Schools made by Clear Touch. Plaintiff's Exhibit 10.D. The jury awarded these damages on Encore's claim of breach of contract against Trask, claim of tortious interference against Clear Touch, and violation of the South Carolina Trade Secrets Act ~~by~~ against both Defendants. On the latter claim, the jury found that

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Defendants' conduct in violating the South Carolina Trade Secrets Act was willful, wanton and in reckless disregard of Encore's rights. The jury also awarded Encore punitive damages in the amount of $500,000 against Clear Touch for tortious interference with the Encore-Clear Touch Contract.

Finally, the jury found Trask liable for breach of contract accompanied by a fraudulent act in the amount of $1,476,039 actual damages and awarded $2 million punitive damages. ~~This verdict compensated Encore for a portion of the net profits lost to Clear Touch when Trask breached the "business opportunity" provision of the Contract. Plaintiff's Exhibit 10.E.~~

Commented [A2]: This is assuming the basis for this award without any basis at all.

**I. Encore is entitled to judgment amounts consistent with the jury verdicts, plus exemplary damages, attorneys' fees, expert witness fees, costs, and other expenses, but not restitution.**

Based upon the evidence and foregoing jury verdicts, Encore is entitled to judgments against both Defendants, including awards by the Court of exemplary damages, attorneys' fees, expert witness fees, costs and other expenses, as follows:

**A. Exemplary damages under the South Carolina Trade Secrets Act**

Under the South Carolina Trade Secrets Act, "[u]pon a finding of wilful, wanton, or reckless disregard of the plaintiff's rights, the court may award separate exemplary damages in an amount not exceeding twice any award" of actual damages. S.C. Code Ann. § 39-8-40. It is appropriate to award exemplary damages in an amount that is twice the actual damages award where the evidence demonstrates a willful and wanton disregard of the plaintiff's rights. *See Sonoco Products Co. v. Guven,* No. 4:12-CV-00790-BHH, 2015 WL 127990, at *11 (D.S.C. Jan. 8, 2015) (doubling the amount of actual damages to set the award for exemplary damages under the South Carolina Trade Secrets Act).

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In this case, the jury found that Defendants' violation of the Trade Secrets Act was willful, wanton, and in reckless disregard of the plaintiff's rights. The evidence demonstrated that Defendants misappropriated Encore's trade secrets intentionally and used them to take business from the Leon County Schools in the amount of $424,945. ~~In fact, the case of misappropriation was one of the most egregious this Court has ever seen.~~ Therefore, the actual damages of $424,945 should be doubled and awarded as exemplary damages in the amount of $849,890.

**Commented [A3]:** There is no need for this comment. The jury finding is an adequate basis for the Court deciding to award exemplary damages under the statute and represents the applicable standard for doing so.

**B. Attorneys' fees, expert witness fees, costs and other expenses**

The Trade Secrets Act provides that if "willful misappropriation exists, the court may award reasonable attorney's fees to the prevailing party." S.C. Code Ann. §§ 39-8-80(3). The Contract also provides that, in the event Encore "prevails, in whole or in part, in any such action, [Trask] shall be liable to [Encore] for all of its costs and expenses, including, without limitation, reasonable attorney fees and expert witness fees." Plaintiff's Exhibit 2, p. 2 ("General Provisions"). "The law is clear in South Carolina that attorney fees are recoverable when authorized by contract or statute." *Charleston Lumber Co. v. Miller Housing Corp.,* 318 S.C. 471, 483, 458 S.E.2d 431, 438 (Ct. App. 1995).

Encore prevailed at the trial of this action in that the jury awarded it damages for breach of contract, breach of contract accompanied by a fraudulent act, tortious interference with contract, and willful violation of the South Carolina Trade Secrets Act. Accordingly, Encore is entitled to attorneys' fees, expert witness fees, and other costs and expenses.

It is for the Court to fix a reasonable amount of attorneys' fees. In determining the amount of reasonable attorneys' fees, the Court must consider: (1) the nature, extent, and difficulty of the legal services rendered; (2) time and labor necessarily devoted to the case; (3)

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professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).

As demonstrated by the Affidavit of Gregory J. English, Encore's counsel worked on this case for the following number of hours at the following hourly rates:

| **Attorney** | **Hours Worked** | **Rate** | **Total Billing** |
|---|---|---|---|
| Greg English | 491.1 | $ 400.00 | $ 196,440.00 |
| Rita Bolt Barker | 24.2 | $ 380.00 | $ 9,196.00 |
| Rita Bolt Barker | 277.4 | $ 350.00 | $ 98,507.00 |
| Meliah Jefferson | 37.3 | $ 375.00 | $ 13,987.50 |
| Andrew Coburn | 5.3 | $ 400.00 | $ 2,120.00 |
| Chris Schoen | 1.1 | $ 310.00 | $ 341.00 |
| Mark Bakker | 0.6 | $ 400.00 | $ 240.00 |
| Jillene Van Hoy | 24.7 | $ 185.00 | $ 4,569.50 |
| Jillene Van Hoy | 92.4 | $ 200.00 | $ 18,480.00 |
| Denise Eubanks | 0.3 | $ 200.00 | $ 60.00 |
| Lynda Romanstine | 8 | $ 195.00 | $ 1,560.00 |
| Lynda Romanstine | 0.5 | $ 200.00 | $ 100.00 |
| | | **TOTAL:** | **$345,601.00** |

Based upon the facts of this case and the law concerning awards of attorneys' fees, Encore should receive the amount requested above for attorneys' fees, plus costs and associated expenses. The hours devoted to this case and Encore's attorneys' rates justify this award of attorneys' fees, in addition to all costs and expenses. Additionally, as noted in *Blumberg*, several factors other than time and an hourly rate are relevant to an award of attorneys' fees:

The case required a jury trial. Attorneys were required to be in court the entire week of September 25, 2017. In a day when most cases are settled and few cases are tried, this case was more difficult and required more skill to resolve than most.

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~~Because Defendants had lost or destroyed many e-mails and other documents, Encore had to seek relevant documents from third parties through subpoenas. Defendants moved to quash nearly all of these subpoenas, requiring Encore's counsel to attend hearings to obtain denials of Defendants' motions to quash to collect relevant evidence.~~

The professional standing of Encore's counsel is outlined in the Affidavit of Gregory J. English, Esq. Encore's counsel have litigated numerous other cases involving business disputes, such as *Powell v. Floyd*, Case No. 97-2686, Unpub. Decision at 11-12 (4th Cir. Oct. 12, 1999), and *South Carolina Department of Transportation vs. Jetport Eighty-Five Associates*. *Powell* involved disputes over the value of businesses in Spartanburg County, South Carolina and the District Court awarded, and the Fourth Circuit Court of Appeals affirmed, $241,000 in attorneys' fees and costs in 1999. The *Jetport* case involved a condemnation by SCDOT and Judge Cole awarded the full amount of attorneys' fees and costs requested at full hourly rates ($325 per hour for Mr. English in 2008).

As outlined in the Affidavit, Encore's attorneys had other available opportunities to handle work at reasonable fees at higher hourly billing rates than set forth above, but accepted this case with the belief that they would be fairly compensated.

The fee requested is in line with that customarily charged in the locality for similar services. A case such as this – involving a jury trial and court appearances for five (5) days – would be considered undesirable within the legal community.

The Wyche Firm obtained beneficial results for Encore. It obtained favorable verdicts totaling millions in actual and punitive damages. The results obtained were very beneficial for Encore.

**Commented [A4]:** This is a factual misrepresentation. Evidence did not establish Kcone deleted emails (there was no spoliation charge). His affidavit says some emails of Clear Touch's were lost in an email migration. There was no evidence that "other documents" were lost.

There was no evidence Clear Touch "destroyed" emails or other documents."

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In addition, Encore incurred, or the Wyche Firm incurred on Encore's behalf, the following expenses and other costs for this litigation:

| | |
|---|---|
| Expert Fees | $57,326.50[1] |
| Trial Exhibit Presentation | 14,418.14 |
| Deposition transcripts | 7,988.08 |
| Out-of-state subpoenas | 5,076.20 |
| Westlaw legal research | 3,662.04 |
| Witness travel | 1,983.51 |
| Copy costs | 1,281.80 |
| Mediation Fees | 1,004.72 |
| Other costs & expenses | 1,739.90 |
| Lunch expense during trial | + 419.56 |
| **Total:** | **$94,900.45** |

A statement detailing these costs is attached to the Affidavit of Mr. English.

Defendants argue that a substantial portion of the $94,900.45 in costs sought by Encore is unreasonable for a variety of reasons, including because Plaintiff's expert sat in a week-long trial when he only testified in their case in chief and briefly on rebuttal; they used a third-party IT vendor for trial who charged $14,418.14 for their services when Plaintiff counsel's firm has full-time litigation paralegals; they incurred over $5,000 in costs for issuance of numerous out-of-state subpoenas but only used a small fraction of the information and documents received through those

[1] Encore's expert, Mike Meilinger, prepared both a preliminary report for mediation and a final report after receiving Defendants' books and records. Because those books and records were prepared on a cash basis, substantial effort was required to convert them to an accrual basis. In addition, Mr. Meilinger was required to review third-party documents ~~Defendants did not produce~~ to complete his assessment of Defendants' financial records.

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subpoenas for their case; seek nearly $2,000 in unnecessary witness travel costs; and wish to have the Court award $1,739.90 for "other costs and expenses" which are not specified.

Commented [A5]: Defendants challenged the reasonableness of the costs sought. This is a brief breakdown of the grounds.

Defendants argue that at least $70,505.00 in Encore's attorneys' fees are excessive because this amount includes time Encore's attorneys spent seeking documents via third-party subpoenas it contends were irrelevant and fees for two attorneys to attend certain depositions and hearings. Encore, however, claims it was forced to seek documents through third parties because Defendants ~~refused to~~did not produce them and/or claimed to have lost ~~or destroyed~~ them. Defendants' complaint regarding there being two Encore attorneys in attendance at certain depositions and hearings is unpersuasive considering that two attorneys routinely appeared for Defendants.

Commented [A6]: Evidence did not establish Defendants destroyed email or documents. Edits in this paragraph more accurately reflect the circumstances.

Defendants also argue that, because some of Encore's fees are not specifically attributable to causes of action for which attorneys' fees are eligible, they are not recoverable. The case Defendants rely on for this proposition, *Uhlig v. Shirley*, 895 F. Supp. 2d 707 (D.S.C. 2012), actually rejects Defendants' position. Although the *Uhlig* court performed an analysis of whether there was a particular cause of action that permitted an attorneys' fees award, once it determined there was one, it did not subtract attorneys' fees for work on causes of action that did not provide for an attorneys' fees award. *Id.* at n.3. In other words, even under the authority Defendants cite, Encore has prevailed upon a cause of action that provides for attorneys' fees, and once attorneys' fees may be awarded under any cause of action, no apportionment of fees is required.

Defendants argue that, because Encore did not prevail upon two causes of action and must elect between others, it may only recover the fraction of fees represented by the cause of action it elects entitling it to fees divided by the total causes of action. In considering the reasonableness of a fee award, however, the Court should not simply divide the attorneys' fees and costs by the number of causes of action and then award only that fraction. Where a plaintiff recovers on certain

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claims but not others, "[i]n determining what is proportional, courts should not employ a strict 'mathematical approach.' ~~Rather, courts should look at 'the degree of the plaintiff's overall success.'" *Dowling v. Litton Loan Servicing LP*, 320 Fed. Appx. 442, 449 (6th Cir. 2009) (internal citations omitted); *Hensley v. Eckerhart*, 461 U.S. 424, 456 n.11 (1983) (in evaluating an award of statutory attorney's fees, agreeing with the district court's rejection of "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon" and noting "[s]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors;" "[n]or is it necessarily significant that a prevailing plaintiff did not receive all the relief requested.").~~

Here, Encore achieved a successful result despite not prevailing on two of its causes of action, and no proportional adjustment is justified. ~~Although Encore did not prevail upon two causes of action, any additional fees and costs to present each additional cause of action would only be minimal.~~ Additionally, Defendants' multiple post-trial motions have cost Encore additional attorneys' fees that are not being awarded by this Order.

Finally, the *Uhlig* court awarded $1,816,494.28 in attorneys' fees and costs to plaintiff in what the court described as "a straightforward claim against an employee for misappropriation of...trade secrets." *Id.* at 713. ~~In this case, Defendants' loss and/or destruction of documents caused Encore to have to do much more work, with third parties and otherwise, to present the facts to the jury.~~ In light of *Uhlig*'s award of $1,816,494.28 and the ~~additional~~ post-trial work ~~caused by Defendants~~ for which Plaintiff is not seeking its fees and costs ~~since the request for attorneys' fees and costs~~, Encore's request for $345,600.00 in fees and $94,900.00 in costs and expenses is reasonable.

Accordingly, Encore is entitled to judgments against the Defendants as follows:

**Commented [A7]:** This is non-binding authority where applicable binding authority exists. For example see EFC Corp. v. Renaissance on Charleston Harbor, LLC 370 S.C. 612, fn 2 (Ct. App. 2006) (stating the amount of attorney fees should be limited to those actions specifically involving the mechanic's lien under which fees were recoverable)(Internal citation omitted) and 20 C.J.S. Costs § 126 (1990) stating "Where a party is successful on some claims but not others, he may be considered a prevailing party, but is entitled to an award only for fees generated in connection with the successful claims...."

**Commented [A8]:** There is no basis to make this statement, and certainly none presented to the Court for it to make such a finding.

**Commented [A9]:** Same comment on destruction as above.

**Commented [A10]:** Post-trial briefing is customary and necessary in a matter such as this one. The point is still made by noting Encore is not seeking to recover the post-trial fees and costs incurred.

Post-trial work is not factoring into whether the fees sought for the work through trial are reasonable. Unreasonable fees do not become reasonable when more work is performed which is not encompassed in those fees.

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**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)~~ |
| +1,476,039.00 | +2,000,000.00 | breach of contract accompanied by a fraudulent act ~~(portion of Clear Touch profits)~~ |

Commented [A11]: These insertions are the Court making findings as to the basis of the jury awards. Same comment as above re Court not making findings as to the basis for jury's verdicts.

| | | | | |
|---|---|---|---|---|
| $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** |

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**Against Defendant Clear Touch 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)[2] |

$ 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 Clear Touch: $1,715,335.00**[3]

Commented [A12]: Same as previous comment.

**C. Encore is not entitled to a restitution award from Defendants.**

Encore also argues that Defendants have been unjustly enriched in the amount of the value of Clear Touch, appraised at $5,536,254, and should be required to pay restitution in that amount. Specifically, Encore argues that, while he was Encore's employee, Trask built the Clear Touch business using Encore's monetary, personnel, and other resources, with Encore taking all

[2] Encore acknowledges that the $424,945.00 represents its lost profits from the sales to Leon County Schools and that it must elect among its Trade Secrets, Breach of Contract, and Tortious Interference claims for such damages. The Court is awarding Encore the amount under the Trade Secrets Act because it includes the higher amounts for exemplary damages, attorneys' fees, and costs and expenses. Such election would be without prejudice to Encore to claim such damages under its other causes of action if the jury verdict on the Trade Secrets claim were ever overturned or otherwise invalidated.

[3] Because the jury determined that both Defendants were liable for misappropriation of Trade Secrets, Defendants are jointly and severally liable to Encore for the actual damages of $424,945, the attorneys' fees of $345,600, and the costs and expenses of $94,900, or a total of $865,445 on this claim. Therefore, payment by one Defendant of this amount on this claim will reduce the other Defendant's liability for this claim. 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.

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of the risk. Encore's expert testified that Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254. Plaintiff's Exhibit 10.E.

Defendants argue that Encore is not entitled to restitution because "there is an adequate remedy at law afforded by the jury's verdict." The Court agrees and therefore denies Encore's request for restitution. *See Milliken & Co. vs. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009) ("Generally, equitable relief is available only where there is no adequate remedy at law ....").

**II. Defendants are not entitled to judgment notwithstanding the verdict.**

Defendants moved for judgment notwithstanding the verdict under ~~SCRCP~~Rule 50(b), SCRCP. In support of that motion, Defendants argued Encore's breach of contract claims relied upon unenforceable provisions of the Non-Disclosure and Non-Solicitation Agreement and the Plaintiff did not provide sufficient evidence to establish essential elements of its trade secrets claim. The Court disagrees and denies Defendants' motion for JNOV.

**Commented [A13]:** Providing context re Defs' positions

A motion for judgment notwithstanding the verdict, or JNOV, should be denied where the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

**A. The restrictive covenants are enforceable.**

Defendant Trask argues that his Non-Solicitation and Non-Disclosure Agreement is unenforceable as a matter of law because it contains overly broad provisions. South Carolina law expressly allows an employer to protect its existing, former, and prospective customers. "Prohibitions against contacting existing customers can be a valid substitute for a geographic

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limitation." *Wolf v. Colonial Life and Acc. Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217 (Ct. App. 1992).[4] Covenants preventing the solicitation of former customers are enforceable. *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (S.C. Ct. App. 2013) ("[A]n otherwise reasonable limitation on the solicitation of former clients can substitute for a territory restriction."). Likewise, covenants preventing the solicitation of prospective customers are enforceable. *See Vessel Medical, Inc. v. Elliott*, Civil Action No.: 6:15-cv-00330-MGL (D.S.C. September 15, 2015); *Hagemeyer North America Inc. v. Thompson*, C/A No. 2:05-cv-3425, 2006 WL 516733, at *5 (D.S.C. Mar. 1, 2006) (finding reasonable a non-solicitation agreement limited to the employer's customers from a certain period of time who were served by the defendant, with whom he had contact, or whose names or addresses the employer provided to the defendant in furtherance of the employer's business).

Trask argues that the Non-Solicitation of Customers provision, Plaintiff's Ex. 2, at 2, is overly broad because it could be interpreted to reach "customers with whom he had absolutely no contact." That is not correct, because the Contract does require that Trask at least had to have had access to Encore's "pricing, advertising and/or marketing schemes developed ... for such customer." Furthermore, there is no South Carolina law that says protection of such customers is overly broad. ~~Moreover, Trask has failed to identify any Encore customer with whom he had no contact.~~ The fact is, the only customer at issue was Leon County Schools, with whom Trask had direct contact. And even if the subsection (iii) that Trask claims is overly broad were severed—

[4] Trask cites *Collins Music Co. v. Parent*, 288 S.C. 91, 92, 340 S.E.2d 794, 795 (Ct. App. 1986), for the proposition that customer restrictions must be limited to "specific customers," but that case does not so hold. In fact, it upheld a non-solicitation provision on much broader grounds: "The provision merely prohibits pirating of [employer's] customers. It is not a territorial restriction. A restriction which allows the former employee to sell anywhere else, subject only to the employer's protection of his own clients, is valid." *Id.* That is exactly what Encore's Agreement does.

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as would be required by the severance provision of the Contract and *Team IA, Inc. v. Lucas*, 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011)—Trask would still be prohibited from selling to Leon by sub-sections (i) and (ii) of the Contract's Non-Solicitation of Customers provision.

Trask's arguments that the confidentiality provisions of the Contract are overly broad also lack merit. Encore's confidentiality provision is akin to that approved by the Supreme Court in *Milliken & Co. v. Morin*, 399 S.C. 23, 37, 731 S.E.2d 288, 295 (2012), which held that "an employer may restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employment relationship." *Id.* The Court upheld Milliken's confidentiality provision because, "rather than covering general skills and knowledge, it encompasses only important information not generally known to the public which becomes known to the employee through his employment with Milliken." *Id.* Accordingly, the Court held that while "Morin may be restricted from using certain information he learned at Milliken for his own personal advantage, these agreements are designed to strike an appropriate balance between protecting an employer's valuable interest in its proprietary information and permitting an employee to find gainful employment in his chosen field." *Id.* at 38-39.

Encore's Contract is the same. All Encore's Contract required was that Trask not use the confidential information he learned about Leon to sell to it directly, and that is what the jury found he did. This in no way prohibited Trask from using his "general skills and knowledge" to find gainful employment. Consequently, Trask is not entitled to JNOV on the basis of the Non-Disclosure and Non-Solicitation containing overly broad provisions.

**B. Breach of contract accompanied by a fraudulent act.**

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Trask contends that he is entitled to JNOV on the grounds that the breach of contract accompanied by a fraudulent act claim is dependent on the enforceability of the non-solicitation and confidentiality provisions of the Contract. "The law … forbids this court assuming to take upon itself the powers, duties, rights, and privileges of a jury. Obviously, the absolute power to change or modify the findings of a jury upon an issue of fact properly submitted to them would, when exercised, amount to the substitution of the trial judge[']s findings for the verdict of the jury and to the abrogation in such cases of the right of trial by jury." *Camden v. Hilton*, 360 S.C. 164, 173, 600 S.E.2d 88, 92 (Ct. App. 2004) (quoting *Anderson v. Aetna Cas. Sur. Co.*, 175 S.C. 254, 282, 178 S.E. 819, 829 (1934)); *see also Keeter v. Alpine Towers Int'l, Inc.*, 2012 WL 11867308, *11 (S.C. Ct. App. June 27, 2012) ("This court has stated that 'it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.' In fulfilling this duty, we may not substitute our judgment for that of the jury.") (citations omitted).

~~Instead, it is just as if not more likely that the jury relied upon the "business opportunity" clause of the Contract to find Trask guilty of breach of contract accompanied by a fraudulent act.~~ Trask's argument assumes, ~~without support,~~ that the jury did not make an independent assessment of the breach of contract accompanied by a fraudulent act claim. Such an assumption is inappropriate under the law. Accordingly, Trask can find no relief from the jury verdicts on this basis.

**Commented [A14]:** Finding is pure speculation and the Court making it is contrary to what is stated as the law immediately after - "Such an assumption is inappropriate under the law." That being the case, both assumptions are inappropriate.

**Commented [A15]:** Defendants' position is that the main supports this argument.

### C. Trade secrets claim

Defendants argue that Encore failed to provide evidence from which the jury could determine it had "trade secrets" and return a verdict for Encore on its misappropriation claim. The Court disagrees. The South Carolina Trade Secrets Act provides a broad definition of "trade secrets," "misappropriation," and remedies for their misappropriation. S.C. Code Ann. § 39-8-

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20(5) (defining "trade secret" to include broad categories of information, including "a simple fact" that "may be the basis of a marketing or commercial strategy"); -20(2) (defining misappropriation to include "disclosure or use of a trade secret of another without express or implied consent by a person who ... at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was ... acquired ... under circumstances giving rise to a duty to maintain its secrecy or limit its use"); -30(C) ("A person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secret may ... recover damages incurred as a result of the wrongful acts ...."). Specifically, a "trade secret" is information that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code Ann. § 39–8–20(5); *see also Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 296, 471 S.E.2d 721, 724 (Ct.App.1996) ("[I]n determining whether something is a trade secret, one must consider the extent to which the information is known outside of his business and the ease or difficulty with which the information could be properly acquired or duplicated by others.").

The evidence at trial provided adequate basis for the jury to find ~~demonstrated~~ that Encore's customer list and/or the information regarding Leon County's needs for, preferences for, and plans to purchase interactive displays were~~was a~~ trade secrets ~~and, more particularly, that Encore had trade secrets regarding its customer Leon County Schools' needs for, preferences for, and plans to purchase interactive displays. Encore presented evidence at trial from which the jury reasonably found that this information pertaining to Leon's needs, preferences, and plans were~~

**Commented [A16]:** As written this is the Court making a finding of fact regarding the evidence and the basis for the jury verdicts. The analysis is whether there was adequate evidence presented at trial for the jury to find these were trade secrets.

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~~trade secrets.~~ The evidence also was sufficient for the jury to find ~~showed~~ that Trask took those trade secrets with him when he left, that Trask had Jimmy Higginbotham deliver the customer list to him at Clear Touch, and that he and Clear Touch used those trade secrets to ~~take sales away from Encore and~~ sell directly to Leon. Clear Touch Dep. at 149:22-23; 150:3-151:8; 151:19-23; Plaintiff's Exhibits 9, 53, and 58.

Encore presented evidence to support its trade secret claims against Defendants. The jury found in favor of Encore and the Court upholds that verdict.

**III. Defendants are not entitled to a new trial absolute.**

Rule 59, SCRCP, permits the Court to grant a new trial "on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have theretofore been granted in actions at law in the courts of the State...." SCRCP 59(a).

Defendants contend that the manner in which Encore ~~s~~ presented evidence of a computer system search it claimed showed ~~presentation of evidence that~~ Mr. Trask destroyed evidence for the first time at trial ~~one category of e-mails~~ and the submission of Table 3 reflecting certain claimed damages to the jury entitle them to a new trial. The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012); *American Fed. Bank v. No. 1 Main Joint Venture*, 321 S.C. 169, 174-75, 467 S.E.2d 439, 442 (1996). To the extent any evidence has been improperly admitted, the party seeking relief must also show that he was prejudiced by the admission. *Id.* Applying the law, neither of Defendants' grounds justifies a new trial.

**A. The Court's admission of Mr. Knight's testimony confirming that Defendant Trask destroyed one category of e-mails was proper.**

**Commented [A17]:** Same comment as immediately above.

**Commented [A18]:** Edits to reflect Defendants' argument accurately. As originally written, mischaracterizes the argument by over-generalizing as being based upon submission of evidence Encore claims showed Trask destroyed emails. It was more specific – focused on the Michael Knight testimony re his computer search.

**Commented [A19]:** This is the appellate standard of review. Should be deleted and trial court standard inserted.

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At trial, Encore presented evidence it claimed showed that Mr. Trask destroyed relevant evidence, including three different categories of e-mails:

1. E-mails from Mr. Trask's personal "gmail" account that he used while he was an Encore employee, which Encore discovered only after third-party witness Dale Viola came forward and produced such e-mails that he had preserved. Plaintiff's Exhibits 79 and 80;

2. Clear Touch e-mails, which Defendants claim they "lost" in an e-mail "migration," Plaintiff's Exhibit 73, ¶¶ 7-9, and ClearTouch's 30(b)(6) Deposition by Keone Trask, p. 193, l. 17 – p. 194, l. 7 & p. 194, l. 14 – p. 195, l. 9 (read into evidence at trial) (admitting that Clear Touch emails were "lost" during a migration from one email provider to the other, but that no efforts had been made to retrieve those lost emails from its former email service provider, and that Clear Touch had no email preservation policy); and

3. Trask's e-mails on Encore's server sent to or from Trask's Encore e-mail address.

Trask admitted losing and/or no longer having ~~destroying~~ e-mails in the first two categories and never denied deleting e-mails in the third category. Defendants contend, however, that Encore presenting the testimony of its Chief Technology Officer Michael Knight who, for the first time on the stand at trial, revealed he had conducted searches of the company's computer systems two weeks earlier which he claimed confirmed Mr. Trask deleted emails from his Encore account, ~~the presentation of the third category of evidence, via the testimony of Michael Knight,~~ resulted in surprise and unfair prejudice to Defendants, requiring a new trial. The Court, however, properly admitted Mr. Knight's testimony regarding Trask's email deletion and in no way were Defendants prejudiced by this testimony.

**Commented [A20]:** Insertion keeps this from the Court making a factual finding.

**Commented [A21]:** Trask did not admit destroying email or evidence.

**Commented [A22]:** Same comment as above re accurately portraying Defendants' argument on this point – focusing on Michael Knight's testimony on the computer searches and events leading up to it!

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**1. Defendants were on notice that Encore would introduce evidence of Trask's deletion of e-mails from Encore's servers.**

Defendants cannot reasonably assert they were surprised by testimony that Trask destroyed emails. Encore alleged as much in the Complaint. *See* Complaint, ¶ 33 ("Trask intentionally breached his duty of loyalty while he was still employed by Encore by...accessing Encore's computer system without or in excess of authorization [and] misappropriating and/or destroying Encore property, software, and files....") ~~Mr. Trask even admitted that his Encore "emails were deleted" at trial, though he offered no explanation as to how that occurred.~~

Commented [A23]: Trask did not admit he deleted the emails.

Defendants contend that one of Encore's 30(b)(6) deponents, Todd Newnam, stated during his deposition that Encore's "evidence of alleged email destruction was Newnam's belief it occurred and the fact that Plaintiff had to subpoena some third parties to get email communications not produced by Defendants." -Defs. Post-Trial Motions at 6-7. ~~had "no evidence" of Mr. Trask's deletion of emails, but Defendants mischaracterize that deposition testimony.~~[5] Mr. Newnam never said he had "no evidence" and in fact referred to the evidence he recalled at the time of his deposition to support his allegation. In fact, Defendants admit Mr. Newnam testified during the deposition that "Mr. Trask purged emails at Encore" and that he "deleted some information while he was at Encore, previous emails. There are tidbits of emails that we have that show communications that were deleted from our system." Defendants' Post-Trial Motions at 6.

Commented [A24]: Defendants did not say this nor characterize the testimony in this manner. Defendants gave full deposition testimony excerpts.

The edit containing the full quote is an accurate reflection of Defendants' argument.

Encore's presentation of evidence regarding Trask's deletion of emails was also discussed in response to Defendants' motion *in limine* to exclude such references. In evaluating the issue in a pre-trial telephonic hearing, the Court stated that Encore would need to prove that emails were

[5] Defendants' 30(b)(6) deposition notice did not identify Mr. Trask's deletion of emails as a topic, but Matter No. 46 simply referenced "[t]he factual bases for all claims asserted by [Encore] in your Complaint in this case," so did not provide specific notice that he, or any Encore representative, would need to be prepared to discuss this specific topic.

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deleted to present such evidence. Accordingly, Mr. Knight's testimony was presented to establish a foundation for the identification of the emails in Encore's proposed Exhibit 84 that were representative of those emails that Trask deleted.

Plaintiff's Exhibit 84 was not admitted into evidence, but even assuming it had been admitted, Defendants had these documents before trial. Each page of Plaintiff's Exhibit 84 was bates-numbered and produced to Defendants prior to trial either on May 31, 2017 or September 19, 2017~~well before trial~~.

Following the Court's statement during the hearing on the parties' motions *in limine* that, in order for Encore to present evidence that Mr. Trask had deleted email, Encore would need to demonstrate that such deletion had occurred, the Court instructed Encore to make sure it produced any documents it intended to introduce in evidence to support this claim. Because Encore had already produced the documents in Exhibit 84, there was no need for Encore to provide these documents again.[6] Additionally, the parties exchanged electronic copies of exhibits, and then met and reviewed exhibits, including Plaintiff's Exhibit 84, before trial.

Therefore, the Court finds admission of Mr. Knight's testimony concerning his search of Encore's computer system which confirmed Mr. Trask deleted emails from his Encore account two weeks prior did not result in surprise to Defendants necessitating a new trial.

~~Defendants' argument amounts to a claim that Encore was under an obligation to explain to them each point its witnesses would testify to and the significance of each exhibit. Encore had no such obligation, nor did Defendants.~~

**Commented [A25]:** The emails in Plf. Exh. 84 were produced – May 31, 2017 and September 19, 2017. Defendants do not think that qualifies as "well before trial."

**Commented [A26]:** Not the argument Defendants were making. Redline conclusion above reaches same result with appropriate finding based on the actual argument made concerning this issue.

[6] Exhibit 84 was a compilation of representative emails Mr. Knight confirmed were deleted from Encore's email server. Encore produced all but one of these emails nearly four months before trial. Specifically, Encore produced documents Bates labeled 205428, 205222, 205217, 205142, and 204880 on May 30, 2017, and Encore produced document Bates labeled 214870 on September 19, 2017.

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**2. Defendants were not prejudiced by Mr. Knight's testimony.**

~~Not only is Defendants' claim that they were surprised by the evidence regarding Trask's deletion of emails unsupported, but also~~ Defendants were not prejudiced by Mr. Knight's testimony. First, as noted above, Plaintiff's Exhibit 84 was not admitted into evidence and thus could not have prejudiced Defendants in any way. Second, as also noted above, there was no prejudice to Trask from Mr. Knight's testimony because there was significant evidence presented at trial which demonstrated that Trask destroyed emails. In addition to the evidence cited above, Dale Viola presented testimony and exhibits at trial which confirmed that Trask sent emails to Mr. Viola that were never produced by Trask, and Trask admitted on cross-examination that he did not have these e-mails.

Defendants admit as much in their Post-Trial Motions: "Defendants had already admitted liability on two causes of action prior to trial. Plaintiff had ample evidence to attempt and prove its case as to all of its claims, including those with elements of willful or wanton behavior with things such as the Amy Andrews and Kathy Cruse emails." Defendants' Post-Trial Motions at 12 (emphasis added). Because there was already "ample evidence" in the record to prove that Trask engaged in deceptive and fraudulent conduct, including deletion of emails, Mr. Knight's testimony could create no prejudice to Defendants.

~~Finally,~~ Therefore, the Court finds that ~~Defendants were not prejudiced~~ admission of Mr. Knight's testimony concerning his computer search confirming Trask deleted emails on his Encore account ~~because Trask knew that he had deleted these emails. The Court allowed Defendants to delay putting Trask on the stand to testify. Even then, Trask did not deny that he had deleted these emails. Truthful evidence from Mr. Knight~~ does not constitute legal "prejudice" entitling Defendants to a new trial.

**Commented [A27]:** Trask did not admit he deleted emails.

Court should not make a finding regarding the "truthfulness" of a witness's testimony.

Reworded to reach the necessary conclusion.

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**B. The Court's admission of Table 3 was proper and caused no prejudice.**

Defendants allege that the Court's admission of Plaintiff's Exhibit 10-H, Table 3 was improper and prejudiced Defendants because it contained duplicative damage figures (Clear Touch's normalized profits and the fair market value of the "Clear Touch Opportunity") and therefore its submission into evidence created an inflated perception of available damages in the minds of the jury. The Court rejects this argument on both counts.

Commented [A28]: Providing context for Defendants' position.

First, in allowing Encore to present the damages in Table 3, the Court was relying on well-settled law regarding damages available to Encore. *See, e.g., Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1997) (purpose of damages for breach of contract is to put the plaintiff in as good a position as he would have been if the contract had been performed).

The evidence was undisputed that, while he was Encore's employee, Trask built the Clear Touch business using Encore's monetary, personnel, and other resources, with Encore taking all of the risk. If Trask had used Encore's resources to build a rental house and collected rent from its tenants, he would be required to pay Encore the amount of the rent collected plus the value of the house. Encore's expert testified that Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254, so that this amount was properly admitted.

Second, Defendants were not prejudiced by the admission of Table 3. As Defendants acknowledge in their Post-Trial Motions, the jury did not award all of the damages set forth in Table 3. Defendants' Post-Trial Motions at 3 & 13. Accordingly, it is impossible to have resulted in prejudice to Defendants.

Defendants contend, however, that "the sheer admission of Table 3 into evidence and submission of it to the jury created an artificially inflated damages range which unfairly prejudiced its determination of damages." *Id.* at 13. This argument ignores that the valuation of Clear Touch

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in Table 3 was significantly more conservative than the $10 million valuation Defendants placed on Clear Touch in their memorandum to investors shortly after Trask left Encore. *See* Plaintiff's Ex. 68 (setting forth a $10,000,000 valuation of Clear Touch). Accordingly, Defendants have not shown prejudice from the admission of Table 3.

**IV. Defendants are not entitled to a new trial *nisi remittitur*.**

A new trial or new trial *nisi* should be granted only when the Court finds the amount of the verdict to be excessive. *Proctor v. Dept. of Health & Environmental Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). However, the jury's determination of damages is entitled to substantial deference. *Rush*, 310 S.C. at 379, 426 S.E.2d at 805; *Gastineau v. Murphy*, 323 S.C. 168, 182, 473 S.E.2d 819, 828 (Ct. App. 1996), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998).

Additionally, where the amount of the verdict falls within the range of damages testified to, the verdict should not be disturbed on the ground of excessiveness. *Id.* at 183, 828; *Buzhardt v. Cromer*, 272 S.C. 159, 163, 249 S.E.2d 898, 900 (1978). The damages awarded by the jury were within the range of damages presented by Encore's economic damages expert Mike Meilinger. *See* Plaintiff's Ex. 10-H. Furthermore, they were below the $10 million valuation of Clear Touch presented by Defendants to investors shortly after Trask left Encore and the $7.7 million alternative lost profits damage calculation of Mr. Meilinger. *See* Plaintiff's Ex. 68 (setting forth a $10,000,000 valuation of Clear Touch); Plaintiff's Exhibit 10.J, last page (setting forth lost profits of $7,798,632). Accordingly, the jury's verdicts were not excessive and are entitled to deference.

The same is true of the jury's punitive damages awards. In reviewing punitive damages awards, the Court should evaluate several factors, including: (1) defendant's degree of culpability,

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(2) duration of the conduct, (3) defendant's awareness or concealment, (4) the existence of similar past conduct, (5) likelihood the award will deter the defendant or others from like conduct, (6) whether the award is reasonably related to the harm likely to result from such conduct, (7) defendant's ability to pay, and (8) other factors deemed appropriate. *Gamble v. Stevenson*, 305 S.C. 104, 111-12 (1991).

Analysis of these factors reveals that the jury's verdicts were well-supported by the evidence presented at trial. There was overwhelming evidence of Defendants' culpability. Indeed, Trask admitted liability on two causes of action giving rise to punitive damages, breach of fiduciary duty and breach of duty of loyalty. The conduct at issue occurred over a multi-year period, and was initiated and actively concealed from Encore by Defendants both during and after Trask's employment by Encore. Defendants built an extremely profitable and successful business in Clear Touch through their unlawful conduct.[7] Finally, an award of punitive damages will deter Defendants and others from engaging in similar behavior in the future. The jury's awards of punitive damages, like its awards of actual damages, are justified in light of the evidence presented at trial and cannot be viewed as the result of passion or prejudice. With a ratio of actual to punitive damages of far less than 1 to 9, the punitive damages cannot be said to be excessive. Defendants are not entitled to a new trial *nisi remittitur*.

**Commented [A29]:** Defendants did not complain Meilinger failed to consider 2016 financial information.

The issue Defendants raised was submission of evidence to jury that Clear Touch received some 17M in revenues v. amount of actual/net profit.

## V. Defendants are not entitled to invocation of the "thirteenth juror doctrine."

Defendants also seek a new trial under the "thirteenth juror doctrine." The "thirteenth juror doctrine" is a vehicle by which the trial court may grant a new trial absolute when it finds the

[7] ~~Defendants complain that the Court allowed testimony from Mr. Meilinger's report that Clear Touch had revenue of over $17 million in 2016, but they opened the door and made this evidence relevant by criticizing Mr. Meilinger for not considering their 2016 and subsequent financial information. This evidence was thus properly admitted to refute Defendants' arguments about the thoroughness of Mr. Meilinger's assessment of damages.~~

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evidence does not justify the verdict. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). The Court may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *See Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 722 (Ct. App. 1996). To support their request, Defendants argue that "[t]he evidence in this case shows that the jury rendered an inconsistent verdict and was confused as to one or more issues it was charged to decide." Defendants' Post-Trial Motions at 12-13.

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Commented [A30]: Applicable standard.

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The jury's verdicts do not reveal that the jurors were confused about any issues. In fact, the verdicts show that they carefully considered each cause of action, awarding different amounts of actual and punitive damages and even ruling for Defendants on two claims. The jury's verdicts should be given the deference the law requires and upheld.

**VI. Defendants are not entitled to relief from judgment.**

Rule 60(b), SCRCP, permits the Court to grant relief from a final judgment because of (1) mistake, inadvertence, surprise, or excusable neglect... [or] (3) fraud, misrepresentation, or other misconduct of an adverse party." Rule 60 is inapplicable in this context, where no judgment has been entered, Defendants made their arguments at trial, and the Court overruled Defendants' arguments and admitted the testimony in question.

Nevertheless, Defendants contend that they were surprised by Mr. Knight's testimony and that the presentation of such evidence by Encore's counsel constitutes fraud on the Court. Defendants' Post-Trial Motions at 14-15. For the reasons set forth above, the Court finds unpersuasive Defendants arguments that Encore or its counsel engaged in any fraudulent actions or that Defendants were surprised by evidence that Trask permanently deleted emails.

Even if Defendants had been surprised, a party may not prevail under Rule 60(b)(3), SCRCP, on the basis of fraud where ~~he has access to disputed information or~~ has knowledge of

Commented [A31]: Defendants did not have access to the disputed info – Knight's testimony regarding his computer search or the fact he conducted it.

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inaccuracies in an opponent's representations at the time of the alleged misconduct. *Raby Constr., LLP v. Orr*, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004) (holding that a Rule 60(b)(3) movant could not prevail where a party was "on notice" of the relevant issue); *see also Bowman v. Bowman*, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004) (in denying a Rule 60(b)(3) motion, referring to "South Carolina's strong policy towards finality of judgments[, which] trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial"). Moreover, while Encore contends and the Court finds that Encore has done nothing unfair in this case, "lack of fairness is not a ground for relief under Rule 60(b)." *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009).

In this case, Encore repeatedly alleged that Trask deleted emails. ~~Trask admitted to doing so~~ and Encore provided other evidence that substantiates these allegations. Moreover, Trask himself was in the best position to provide the particulars of his deletions to his counsel. For all of these reasons, Defendants' Rule 60(b) motion is denied.

Commented [A32]: Trask did not admit he deleted these emails.

**VII. Other than its claims against Trask for breach of contract and against Clear Touch for tortious interference with contractual relations, Encore should not be required to elect remedies.**

Encore acknowledges that the jury verdicts of $424,945 were to compensate Encore for lost profits on sales to Leon County Schools made by Clear Touch. Plaintiff's Exhibit 10.D. The jury awarded these damages on Encore's claim of breach of contract against Trask, Encore's claim of tortious interference against Clear Touch, and violation of the South Carolina Trade Secrets Act by both Defendants. Accordingly, assuming these damages are coupled with double exemplary damages, attorneys' fees, costs and expenses as set forth above, Encore seeks to recover these actual damages only under the Trade Secrets Act.

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Even regarding the other verdicts, however, Defendants argue that Encore should have to elect one (other than breach of duty of loyalty) because at trial they relied upon the same facts to establish liability and explicitly told the jury to award the same damages for those causes of action. ~~they committed a "single wrong" and that Encore "sought the exact same damages" for the "same injury."~~ Def. Supp. Post-Trial Memo at 3-12. But Encore presented evidence and argued ~~and the jury found~~ that Defendants committed at least five (5) different wrongs causing at least five (5) different injuries and damages. Specifically, the evidence, including but not limited to Plaintiff's Exhibit 10-H ("Summary of Damages"), supported the jury's findings that Defendants committed the following distinct breaches of duty to Encore that caused Encore separate and distinct damages:

~~1. Breach of the duty of loyalty by Trask by spending time setting up his own company, while taking wages and conference expenses from Encore, which the jury found he should forfeit in the amount of $375,733.40.[8] In addition, the jury determined that Trask should pay $175,000 in punitive damages for this breach of the duty of loyalty (Cause of Action I).~~

2. Breach of fiduciary duty by Trask by failing to disclose to Encore that it could purchase products directly from suppliers TSI Touch and CVTE instead of through Clear Touch, which the jury found caused Encore lost profits of $675,361.[9] In addition, the jury determined that Trask should pay $1,500,000 in punitive damages for this breach of fiduciary duty (Cause of Action II).

3. Violation of the South Carolina Trade Secrets Act by using Encore's trade secret information regarding Leon County Schools' need for and purchase price of panels, which caused

**Commented [A33]:** This mischaracterizes Defendants' argument.

Defendants argued that Encore relied on the same facts to establish liability for claims II-VI and sought the same damages under those causes of action.

**Commented [A34]:** This is not a part of the election of remedies argument

~~[8] Summary of Damages, Table 1 (portion only).~~

[9] Summary of Damages, Table 2, lines 1-3.

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Encore lost profits of $424,945.[10] (This also violated Trask's contract with Encore, Cause of Action III). In addition, the jury determined that Trask's violation was a willful, wanton, or reckless disregard of Encore's rights, for which Trask should pay double exemplary damages of $849,890 under the Act (Cause of Action IV).

4. Breach of contract accompanied by a fraudulent act, specifically Trask's violation of the "business opportunity" clause of his Non-Disclosure and Non-Solicitation Agreement with Encore, Plaintiff's Exhibit 2, page 2, seventh paragraph, for which the jury awarded Encore ~~a portion of Clear Touch's profits of~~ $1,476,039.40.[11] In addition, the jury determined that Trask should pay $2,000,000 in punitive damages for this breach of contract accompanied by a fraudulent act (Cause of Action VI).

5. Clear Touch's violation of the South Carolina Trade Secrets Act by using Encore's trade secret information regarding Leon County Schools' need for and purchase price for panels, which caused Encore lost profits of $424,945. (This also tortiously interfered with Trask's contract with Encore, Cause of Action V, for which the jury awarded $500,000 in punitive damages). In addition, the jury determined that Clear Touch's violation was a willful, wanton, or reckless disregard of Encore's rights~~, for which Clear Touch should pay double exemplary damages of $849,890 under the Act~~ (Cause of Action IV).

**A. The doctrine of election of remedies does not apply to the causes of action upon which the Court is entering judgment.**

As shown by the above, the evidence was sufficient for ~~demonstrated and~~ the jury to have found – separate acts by Defendants giving rise to separate injuries and damages. The doctrine of election of remedies has no application where separate causes of action based on different facts

[10] Summary of Damages, Table 2, lines 4-5.
[11] Summary of Damages, Table 3 (portion only).



**Commented [A35]:** Same as comments above re cannot make finding concerning the basis for the jury verdict while simultaneously arguing the parties and Court are prohibited from delving into the minds of the jury as to that basis.

**Commented [A36]:** The Court, using the jury's finding of willful etc., determined Defendants should pay exemplary damages.

**Commented [A37]:** Same comments as above re Court not making finding as to the basis for the jury verdict(s).

Revision reflects appropriate finding under applicable standard rather than Court making determination of basis for verdict.

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exist. *GTR Rental, LLC v. DalCanton*, 547 F. Supp. 2d 510, 515 (D.S.C. 2008) (holding that election was unnecessary because the jury awards for breach of fiduciary duty, conversion, fraud, violation of the South Carolina Unfair Trade Practices Act, and breach of contract were based on different elements, and the facts supporting the separate claims occurred "over a lengthy period and involved numerous activities involving [plaintiff's] customers, property, and finances," so that "the complex series of transactions undertaken by Defendants does not comprise a single wrong that would give rise to but one cause of action."); *see also Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995); *Rivers v. Rivers*, 292 S.C. 21, 29-31, 354 S.E.2d 784, 788-90 (Ct. App. 1987), *overruled on other grounds by Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992) (holding no election of remedies required of a plaintiff who received damages for the "twin causes of action" of both alienation of affection and criminal conversation because "[t]he causes of action are distinct, they arose out of separate and distinct facts, and the two alleged wrongs did not result in a single and the same loss.").

In this case, because the causes of action were based on different elements and because there were different facts supporting the various claims involving numerous activities, "the complex series of transactions undertaken by Defendants does not comprise a single wrong that would give rise to but one cause of action." The fact that the jury awarded different actual damages and different punitive damages shows that Defendants committed multiple wrongs, not a "single wrong." Therefore, except for the verdicts for the Leon County Schools profits of $424,945, which are addressed above to avoid a double recovery, election among the legal claims should not be required.

**B. Encore's attorneys' arguments do not require ignoring four of the jury's six verdicts.**

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Defendants argue that Encore must choose one of "causes of action II-VI because it presented its damages for those claims as identical to the jury at trial." There are several problems with this argument.

First, it is not correct. Encore's attorney argued that there were multiple ways that Trask breached his duties to Encore and each breach could lead to different damages. Closing Transcript – Plaintiff's Closing Argument at 21 ("Now what that means, Ladies and Gentlemen, is that you will have a broad range of damages to consider for this cause of action."); at 21-26 (covering multiple items of damages the jury could find). Specifically, Encore's attorney argued the jury could award Encore:

1. the wages, benefits, and expenses it paid Trask while he was breaching his duty of loyalty. Plaintiff's Closing Argument at 18 ("[W]hile he was an employee of Encore, Mr. Trask received salary, bonus, benefits and expenses .... So for the first cause of action, Breach of Duty of Loyalty, we're asking you to check the box A, for plaintiff ...."); 21 ("The first element of damages you can consider are the wages that Encore paid ....");

Commented [A38]: This is not part of the election of remedies discussion.

2. the profits Encore lost by Trask's breaching his fiduciary duty by not disclosing the identities of the true suppliers of the products. *Id.* at 20 ("An employer and an employee have that [fiduciary] relationship in a couple of different ways. First of all, an employee could breach it if the employee fails to fully disclose to the employer known information that is significant and material. We know that Mr. Trask did that with regard to the true suppliers of these products."); 22 ("Now, the second category of damages is Lost Profit, and there are two categories of that.... The first category are the products that Encore sold to its customers that it acquired from Clear Touch at the mark up.... That's the first three categories in Table Number 2. Those categories total $675,361.");

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3. the profits Encore lost from Leon County Schools by Trask's and Clear Touch's misappropriating Encore's trade secrets. *Id.* at 14 ("Then Mr. Trask also used specific information he learned about Leon County Schools to take an opportunity and orders for about 1000 of these panels .... So he had specific knowledge that he learned at Encore about that that constitutes a trade secret ...."); ~~at 22-23 ("The second category are those bottom two lines, and those are the sales made to Leon County Schools.... [T]he profit amount is $424,945.")~~;

4. the lost business opportunity of Clear Touch that breached the "business opportunity" clause of Trask's contract. *Id.* 28-29 ("Encore claims that Mr. Trask breached his contract in five ways.... The fourth breach is the business opportunity provision. He breached that. He didn't notify them of ... the opportunity to build the reseller network."); ~~at 24-25 ("[T]he third calculation ... is the business opportunity calculation.... There are actually two components of this.... One is just for ... the profits that Clear Touch made through the end of 2015, and that figure is $1,636,254.... And then at the end of 2015, what was Clear Touch worth? ... That's where he comes up with the figure of $3,900,000. Those two components add up to the $5.5 million figure that you heard.")~~; and

5. damages against Clear Touch for tortiously interfering with Encore's contract with Trask. *Id.* at 31 (The next cause of action is Tortious Interference. This is against Clear Touch only ....").

Although Encore's attorney argued that, as an alternative to awarding lower amounts for each injury, the jury could award $5.5 million actual damages for each of Causes of Action II-VI, the jury chose not to do that. Instead, the jury awarded different actual damage amounts and different punitive damage amounts, clearly intending to treat Defendants' different acts and Encore's different injuries as separate and distinct. The verdicts, interpreted in a way that "logical

**Commented [A39]:** This was within discussion of breach of fiduciary duties damages. Inserting it here confuses and misrepresents how it was presented to the jury.

**Commented [A40]:** Same as above – within fiduciary duty damages discussion

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reason for reconciling them can be found," *Daves,* 355 S.C. at 231, 584 S.E.2d at 430, indicate that the jury chose to find that the distinct and different acts set forth above violated the distinct duties set forth above and caused the different injuries and damages set forth above.

Second, Defendants' argument assumes the jury was bound by Encore's attorneys' arguments, but it was not. An attorney's arguments are not evidence. *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are ... not evidence."), *quoting McManus v. Bank of Greenwood,* 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). The jury was the judge of the facts based upon the evidence, not upon attorneys' arguments, and it was the jury's prerogative to award different damages for different injuries like it did.

Third, Encore's attorneys never contended that liability or damages under Causes of Action II-VI were based on a single fact, a single injury, or single damage. Defendants' argument that these claims "simply represent[ ] alternative theories of recovery for the same injury," is inconsistent with the facts presented at trial.

Fourth, Defendants' reliance on *Uhlig v. Shirley*, Civil Action No. 6:08-cv-01208, 2012 WL 2890178 (D.S.C. Sept. 25, 2012), is misplaced. In *Uhlig*, while the Court did require election among four of six causes of action, it did so only as to causes of action based on "the same facts" – the violation of two provisions of an employment agreement, which formed the only basis for the four claims subject to election. *Id.* at *4. As noted above, this is not the case here, where distinct facts gave rise to Causes of Action II-VI. Encore's case against Defendants was much broader in scope and duration and involved more distinct acts and injuries than *Uhlig.*

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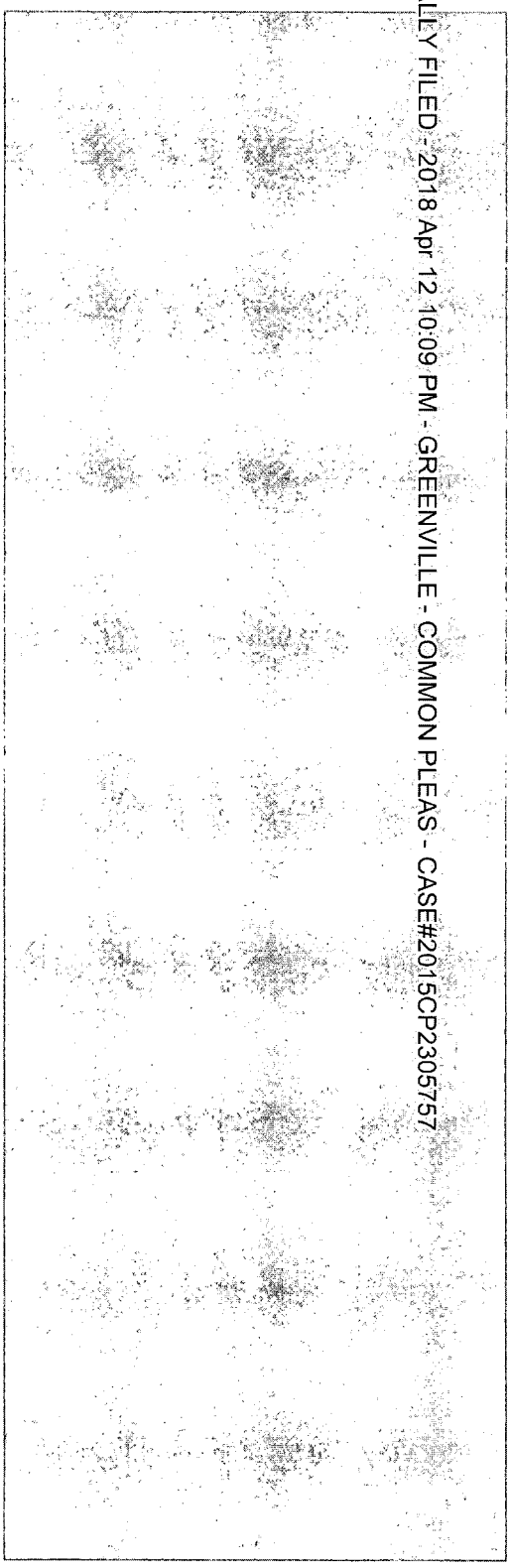

Finally, Defendants' argument does not apply to the verdicts against Clear Touch. Encore acknowledges that the $424,945 in actual damages awarded against Clear Touch for its violation of the South Carolina Trade Secrets Act are the same as the actual damages for tortious interference with Encore's contract with Trask and is only being awarded these actual damages once. The foregoing arguments about election among Causes of Action II, III, IV, and VI against Trask have no bearing on the judgment against Clear Touch.

**C. Mr. Melinger's testimony does not require overturning the jury's first verdict for breach of duty of loyalty.**

Finally, Defendants argue that Mr. Meilinger testified that awarding damages reflected in Plaintiff's Exhibit 10-H, Table 2 (Encore's lost profits on sales to its customers and Leon County Schools of $1,100,306), precluded awarding damages in Table 1 (a portion of the wages of Trask, Higginbotham, Gallant, and trade shows of $488,041). There are numerous problems with Defendants' arguments.

First, Mr. Meilinger did not testify that awarding any damages reflected in Plaintiff's Exhibit 10-H, Table 2 precluded awarding any damages in Table 1. He merely said that "you would not add the second analysis [$1,100,306] to the first analysis [$488,041]." Meilinger Testimony Tr. at 50. The jury did not do this. Instead, they chose to award some damages from the first analysis and some damages from the second analysis, which was the jury's prerogative.

Second, even if Mr. Meilinger had testified as Defendants assert, the jury was not required to accept such testimony in calculating damages. It is within the jury's discretion to determine how much weight to give an expert's testimony. *See State v. Poindexter*, 314 S.C. 490, 494, 431 S.E.2d 254, 256 (1993); *Small v. Pioneer Machinery*, 316 S.C. 479, 488-89, 450 S.E.2d 609, 614-15 (Ct. App. 1994) ("It is not unusual, of course, for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must

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decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve.... The jury could have either accepted or rejected the expert witness's opinions, depending on its view of the evidence."). The jury did not award all of the damages calculated in Table 1, and was entitled to award as much of Table 2 as it chose.

In sum, except for the award of the Leon County Schools profit of $424,945, Encore is not required to elect remedies.

**VIII. Defendants are not entitled to a stay of execution of the judgment.**

Defendants request the Court grant a stay of execution of judgment pending post-trial motions and appeal pursuant to Rule 62(d), SCRCP. "Whether to grant such a stay rests in the court's discretion 'on such conditions for the security of the [creditor] as are proper ....'" *See Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 375 S.C. 423, 426, 653 S.E.2d 274, 276 (2007) (citing Rule 62(b)). The policy expressed in . . . Rule 62(b) favors the creditor over the debtor." *Id.*

Defendants note that, pursuant to S.C. Code Ann. § 18-9-130, if the Court grants a stay and requires a bond, the bond must be limited to $1 million from each of Trask and Clear Touch because Trask is an individual and Clear Touch, ~~Defendants argue,~~ employs fewer than fifty persons.

The Court finds that it would be inappropriate to grant Defendants a stay of execution of judgment given the circumstances of this case and the amount of the judgments rendered compared to the bonds each Defendant would have to post under § 18-9-130. Therefore, the Court denies Defendants' motion to stay the execution under Rule 62(d). ~~Defendants have already had nearly six months since the jury rendered its verdicts. Moreover, the evidence~~

**Commented [A41]:** It's a fact that Clear Touch employs less than 50 people; not an argument.

**Commented [A42]:** There are many issues with the bullet points below. Revision gets to same end without all the problematic and unnecessary items.

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showed that the Defendants engaged in an involved scheme to hide from Encore the truth of Trask's breaches of fiduciary duties, duties of loyalty, and contract. Specifically, Trask:

- Did not disclose his involvement in Clear Touch to Encore while he was an employee of Encore;
- Transferred his ownership in Clear Touch to his mother to hide his affiliation;
- Got Encore to sign a Reseller Agreement and had his mother sign for Clear Touch;
- Had the true suppliers remove their labels from panels and replace them with Clear Touch labels to hide the suppliers' true identities from Encore;
- Marked up the prices of the panels from the suppliers to Encore;
- Had Encore send its checks to a Nevada post office box and forwarded them back to South Carolina;
- Had his wife, Tamara Trask, email Encore as "Amy Andrews";
- While at conferences for Encore, worked to sign resellers for Clear Touch by initially leading them to believe Encore was an owner of Clear Touch;
- Got Encore's employees, Leo Gallant and Jimmy Higginbotham, to sign non-disclosure agreements so that he could induce them to leave Encore by disclosing his ownership of Clear Touch but prevent them from disclosing same to Encore; and
- Permanently deleted incriminating e-mails.

Based upon this evidence, the jury awarded millions of dollars of punitive damages against Defendants. In short, Defendants simply cannot be expected to fulfill their legal duties. Therefore, the Court finds it would not be appropriate to stay execution of the judgment.

**Formatted:** Indent: First line: 0.5", Add space between paragraphs of the same style, No bullets or numbering, Don't adjust space between Latin and Asian text, Don't adjust space between Asian text and numbers, Tab stops: 0.5", Left + 1.5", Left + 2", Left + 2.5", Left + 3", Left + 3.5", Left + 4", Left + 4.5", Left + 5", Left + 5.5", Left + 6", Left

**Commented [A43]:** The practice of "white labeling" was explained.

**Commented [A44]:** Do not think there was evidence of this presented at trial.

**Commented [A45]:** Evidence presented at trial contradicts this statement.

**Commented [A46]:** It was not established Trask did this. No spoliation jury charge was given.

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**IX. Post-judgment interest accrues until Defendants deposit with the Clerk of Court the full amount of the judgments against them and Encore shall receive interest earned on such amounts.**

Defendants request that they be allowed to deposit the full amounts of the judgments against them pursuant to Rule 67, SCRCP, to stop the accrual of post-judgment interest. The Court grants this motion and directs that the Greenville County Clerk of Court accept any payment for the full amount of a judgment against a Defendant made by such Defendant and place it in an escrow account at U.S. Bank, N.A. managed by Brown Advisory, LLC with investments limited to cash or cash equivalents, FDIC-insured instruments, direct obligations of the U.S. Government or its agencies, or high grade, short-term fixed income securities with maturities of two years or less. Post-judgment interest on the judgments shall accrue at 8.50% per annum from the date this Order is filed until the date the deposit is made. Encore shall receive the pre-deposit interest accrued and the post-deposit interest earned on such amounts that are ultimately paid to Encore.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Encore's motion is granted except for restitution, which is denied, that Defendants' motions are denied except for the motion to deny Plaintiff equitable relief and the motion to deposit the full amount of each judgment in court, and that judgment shall be entered:

(1) in favor of Encore against Keone Trask in the amount of **$7,917,468.40**, and

(2) in favor of Encore against Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC in the amount of **$1,715,335.00.**

**IT IS SO ORDERED.**

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## Josh Smith

**From:** Josh Smith
**Sent:** Thursday, March 29, 2018 3:18 PM
**To:** McIntosh, Lawton Secretary (Tammy Jennings); McIntosh, Lawton
**Cc:** Josh Hudson; Ellen Griffin (egriffin@roecassidy.com); Gregory J. English (genglish@wyche.com); Rita Bolt Barker
**Subject:** RE: Encore v Clear Touch 2015-CP-23-05757 - Defendants' Redline of Proposed Final Order
**Attachments:** Final Order and Judgment (Encore vs. Trask) (Defendants' Redline 3.29.18 with Comments) (002).docx

Dear Judge McIntosh,

Attached is the correct redline document. Again, we appreciate the Court taking the time to review our redlines and comments. You also asked for pg. and line references so I have done my best to oblige that request.

**Redlines/Objections/Comments on the following pgs.:**

Pg. 2 (last para.) to - 3 (end of that para.)

Pg. 3 in last para. last line

Pg. 4 in 2nd para.

Pg. 5 in 1st para.

Pg. 7 in first para.

Pg. 8 last para. into pg. 9

Pg. 8 footnote

Pg. 9 in 2 para.

Pg. 10 in first 3 paras.

Pg. 11 -12 in verdict breakdown

Pg. 13 inserted para. under Section II

Pg. 14 last para.

Pg. 15 – last para and sentence before section B

Pg. 16 in 2nd para.

Pg. 17 in last para. to pg. 18 rest of para.

Pg. 18 in 1st para. under Section III

Pg. 19 in 1st para.

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Pg. 19 in #2

Pg. 19 last para.

Pg. 20 in first two paras.

Pg. 21 in 2nd and 4th paras.

Pg. 22 first sentence under #2 and last para.

Pg. 23 in 1st para.

Pg. 25 footnote

Pg. 26 in 1st para. and last para. (which goes on into pg. 27)

Pg. 27 last para. above Section VII

Pg. 28 1st para. and #1

Pg. 29 #s 4 & 5

Pg. 29 last para.

Pg. 31 #1

Pg. 32 #s 3 & 4

Pgs. 35-36

Pg. 37 last para.

Please let me know if you need anything further from the Defendants.

Best Regards,

**Joseph O. "Josh" Smith**
**email jsmith@roecassidy.com**
**direct 864-404-3140**

Roe Cassidy Coates & Price PA

1052 North Church St.
Greenville, S.C. 29601
*p* 864 349 2600 *f* 864 349 0303

**Roe Cassidy Coates & Price, P.A. | Greenville, SC Law Firm**

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**From:** Josh Smith
**Sent:** Thursday, March 29, 2018 2:35 PM
**To:** 'McIntosh, Lawton Secretary (Tammy Jennings)' <lmcintoshsc@sccourts.org>; 'McIntosh, Lawton' <lmcintoshj@sccourts.org>
**Cc:** Josh Hudson <jhudson@roecassidy.com>; Ellen Griffin (egriffin@roecassidy.com) <egriffin@roecassidy.com>; Gregory J. English (genglish@wyche.com) <genglish@wyche.com>; 'Rita Bolt Barker' <rbarker@wyche.com>
**Subject:** RE: Encore v Clear Touch 2015-CP-23-05757 - Defendants' Redline of Proposed Final Order

Dear Judge McIntosh,

It appears we sent an earlier redline version. Greg and I just spoke and I will be sending another redline shortly.

Best Regards,

**Joseph O. "Josh" Smith**
**email jsmith@roecassidy.com**
**direct 864-404-3140**

Roe Cassidy Coates & Price PA

1052 North Church St.
Greenville, S.C. 29601
*p* 864 349 2600 *f* 864 349 0303

**Roe Cassidy Coates & Price, P.A. | Greenville, SC Law Firm**

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**From:** Josh Smith
**Sent:** Thursday, March 29, 2018 2:26 PM



ELECTRONICALLY FILED - 2018 Apr 12 10:09 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

**To:** McIntosh, Lawton Secretary (Tammy Jennings) <lmcintoshsc@sccourts.org>; 'McIntosh, Lawton' <lmcintoshj@sccourts.org>
**Cc:** Josh Hudson <jhudson@roecassidy.com>; Ellen Griffin (egriffin@roecassidy.com) <egriffin@roecassidy.com>; Gregory J. English (genglish@wyche.com) <genglish@wyche.com>; 'Rita Bolt Barker' <rbarker@wyche.com>
**Subject:** Encore v Clear Touch 2015-CP-23-05757 - Defendants' Redline of Proposed Final Order

Dear Judge McIntosh,

We attempted to work with Plaintiff on the final order but were not able to agree on number of issues. Therefore, Defendants are submitting the attached redline word document of Plaintiff's proposed order with comments as to the alterations to Plaintiff's proposal we believe are necessary and appropriate given the applicable law, evidence presented at trial, and submissions to the Court. We appreciate the Court's consideration of the attached.

Best Regards,

**Joseph O. "Josh" Smith**
**email jsmith@roecassidy.com**
**direct 864-404-3140**

Roe Cassidy Coates & Price PA

1052 North Church St.
Greenville, S.C. 29601
*p* 864 349 2600 *f* 864 349 0303

**Roe Cassidy Coates & Price, P.A. | Greenville, SC Law Firm**

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ELECTRONICALLY FILED - 2018 May 21 1:05 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
| ENCORE TECHNOLOGY GROUP, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br><br>Defendants. | Case No. 2015-CP-23-05757<br><br>**PLAINTIFF'S MOTION FOR APPOINTMENT OF RECEIVER** |

**TO: DEFENDANTS and JOSEPH O. SMITH, ESQ., and JOSHUA J. HUDSON, ESQ., THEIR ATTORNEYS**

**YOU WILL PLEASE TAKE NOTICE** that, four (4) days from the filing and service of this motion or as soon thereafter as it may be heard, Plaintiff Encore Technology Group, LLC ("Encore") will move before this Court for an order pursuant to S.C. Code Ann. § 15-65-10 *et seq.*, Rule 66, SCRCP, and applicable South Carolina law, for the appointment of a receiver to take possession of the assets and operations of Defendant Keone Trask ("Trask") in order to (i) carry into effect the Final Order and Judgment entered April 2, 2018, in favor of Encore against Defendant Trask in the amount of $7,917,468.40 (the "Judgment"), (ii) preserve and manage Trask's assets during the pendency of this action and appeal, including but not limited to Trask's rights in and to Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch"), and/or (iii) conduct the orderly sale or other disposition of Trask's assets and pay the proceeds to Encore and other creditors in accordance with their priority, with the costs of such a receivership borne by Trask and added to the existing judgment amount in favor of Encore.

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The relief requested in this motion is more fully set forth in the attached proposed Order Appointing Receiver (**Exhibit A**).

This motion is made on the grounds of S.C. Code Ann. § 15-65-10, which provides:

A receiver may be appointed by a judge of the circuit court, either in or out of court:

...

(2) After judgment, to carry the judgment into effect;

(3) After judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment;

...; and

(5) In such other cases as are provided by law or may be in accordance with the existing practice, except as otherwise provided in this Code.

The following facts ("Facts") support the granting of this motion:

1. The Judgment required Trask to pay $7,917,468.40 to Encore. Trask has failed to pay any portion of this amount. Although the Clerk of Court issued an Execution against Property of Trask on April 13, 2018, it has not been satisfied, in whole or in part. Affidavit of Todd Newnam, **Exhibit B** ("Newnam Affidavit"), at ¶ 3.

2. Trask has filed a motion pursuant to Rule 59, SCRCP, for Reconsideration of the Judgment and, upon information and belief, intends to appeal the Judgment, necessitating the preservation of Trask's property during the pendency of the appeal.

3. The Judgment includes $2,952,078 in actual damages and $4,524,890 in punitive and exemplary damages. In doubling the actual damages under the Trade Secrets Act to award $849,890 in exemplary damages, Judge McIntosh stated "the case of misappropriation was one of the most egregious this Court has ever seen." Judgment at 4.

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4. Defendants moved to stay execution of the Judgment, but Judge McIntosh denied a stay because "the evidence showed that the Defendants engaged in an involved scheme to hide from Encore the truth of Trask's breaches of fiduciary duties, duties of loyalty, and contract. Specifically, Trask:

- Did not disclose his involvement in Clear Touch to Encore while he was an employee of Encore;
- Transferred his ownership in Clear Touch to his mother to hide his affiliation;
- Got Encore to sign a Reseller Agreement and had his mother sign for Clear Touch;
- Had the true suppliers remove their labels from panels and replace them with Clear Touch labels to hide the suppliers' true identities from Encore;
- Marked up the prices of the panels from the suppliers to Encore;
- Had Encore send its checks to a Nevada post office box and forwarded them back to South Carolina;
- Had his wife, Tamara Trask, email Encore as "Amy Andrews";
- While at conferences for Encore, worked to sign resellers for Clear Touch by initially leading them to believe Encore was an owner of Clear Touch;
- Got Encore's employees, Leo Gallant and Jimmy Higginbotham, to sign non-disclosure agreements so that he could induce them to leave Encore by disclosing his ownership of Clear Touch but prevent them from disclosing same to Encore; and
- Permanently deleted incriminating e-mails.

Based upon this evidence, the jury awarded millions of dollars of punitive damages against Defendants. In short, Defendants simply cannot be expected to fulfill their legal duties.

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Therefore, the Court finds it would not be appropriate to stay execution of the judgment." Judgment at 33-34.

5. During the pendency of this case, Trask transferred real estate from his individual ownership into a "family trust." Newnam Affidavit, at ¶ 7.

6. Trask is the President and sole Director of his corporation, Defendant Clear Touch, and exercises ownership and control in ways that will only be clear following discovery. Newnam Affidavit, at ¶ 8.

7. Instead of cooperating in discovery, Trask has moved to quash subpoenas Encore issued pursuant to Rules 34, 45, and 69, SCRCP, to his CPA and Clear Touch's third-party administrator, CatchFire Funding. Trask has also refused to provide to Encore documents requested in post-Judgment discovery. *See* Plaintiff's Requests for Production of Documents to Defendants in Aid of Judgment, **Exhibit C**.

8. Trask has previously admitted to Encore that he owns several rental properties in several counties. Newnam Affidavit, at ¶ 10. The public records of Greenville County and Anderson County, South Carolina, show that Trask is connected with fifteen (15) properties, which appear to be residential rental properties, either individually or through Carolina Home Partners LLC, a company of which Trask is manager. *Id.* The records of Oconee County show that Trask transferred ten (10) duplexes in November 2017, shortly after the jury verdicts in this case were rendered, at a sales price of approximately one-half of what the buyer was able to mortgage the properties for. *Id.* Encore records from when Trask was an employee indicate he had three bank and/or brokerage accounts. *Id.* Only a receiver can effectively preserve the net rental and investment income from these assets and preserve them so that they are available to apply to the Judgment.

9. Plaintiff seeks for the Court to appoint L. Walt Tollison, III, Esq., as receiver for Trask.

This motion is supported by the pleadings, the record, the Judgment, the Execution against Property, the Facts, the Affidavit of Todd Newnam, any other affidavits to be filed, and any testimony or other evidence that may be offered at the hearing.

Respectfully submitted,

WYCHE, P.A.

By: s/ Gregory J. English
Gregory J. English (SC #65470)
Rita Bolt Barker (SC #77600)

44 East Camperdown Way
Post Office Box 728
Greenville, SC 29602-0728
(864) 242-8200

Attorneys for Plaintiff
Encore Technology Group, LLC

May 21, 2018

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# EXHIBIT A

Proposed Order

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| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
| ENCORE TECHNOLOGY GROUP, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br><br>Defendants. | Case No. 2015-CP-23-05757<br><br>**ORDER APPOINTING RECEIVER** |

This matter came before the Court for a hearing upon Defendants' motions to quash subpoenas and the Plaintiff's Motion to Appoint Receiver. The motions were heard by the Court on May 31, 2018. Counsel for all parties were present.

Upon reviewing the record, the evidence, and the applicable law and hearing statements and representations of counsel, I find that Defendants' motions to quash the subpoenas should be denied, and the third parties should produce the requested documents.

I further find that Plaintiff's Motion to Appoint Receiver should be granted and a receiver should be appointed with authority to pursue discovery from Defendants and third parties, require the production of documents and other evidence, and take possession of Defendant Keone Trask's assets and secure them while Trask's appeal is pending, upon threat of contempt and sanctions by this Court for willful failure to cooperate with the receiver.

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## FINDINGS OF FACT

1. On April 2, 2018, the Court entered a Final Order and Judgment in favor of Encore against Defendant Keone Trask ("Trask") in the amount of $7,917,468.40 (the "Judgment").

2. The Judgment required Trask to pay $7,917,468.40 to Encore. Trask has failed to pay any portion of this amount. Although the Clerk of Court issued an Execution against Property of Trask on April 13, 2018, it has not been satisfied, in whole or in part.

3. Trask has filed a motion pursuant to Rule 59, SCRCP, for Reconsideration of the Judgment and intends to appeal the Judgment, necessitating the preservation of Trask's property during the pendency of the appeal.

4. The Judgment includes $2,952,078 in actual damages and $4,524,890 in punitive and exemplary damages. In doubling the actual damages under the Trade Secrets Act to award $849,890 in exemplary damages, Judge McIntosh stated "the case of misappropriation was one of the most egregious this Court has ever seen." Judgment at 4.

5. Defendants moved to stay execution of the Judgment, but Judge McIntosh denied a stay because "the evidence showed that the Defendants engaged in an involved scheme to hide from Encore the truth of Trask's breaches of fiduciary duties, duties of loyalty, and contract.... Defendants simply cannot be expected to fulfill their legal duties. Therefore, the Court finds it would not be appropriate to stay execution of the judgment." Judgment at 33-34. Specifically, the Court found that Trask:

- Did not disclose his involvement in Clear Touch to Encore while he was an employee of Encore;
- Transferred his ownership in Clear Touch to his mother to hide his affiliation;

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- Got Encore to sign a Reseller Agreement and had his mother sign for Clear Touch;
- Had the true suppliers remove their labels from panels and replace them with Clear Touch labels to hide the suppliers' true identities from Encore;
- Marked up the prices of the panels from the suppliers to Encore;
- Had Encore send its checks to a Nevada post office box and forwarded them back to South Carolina;
- Had his wife, Tamara Trask, email Encore as "Amy Andrews";
- While at conferences for Encore, worked to sign resellers for Clear Touch by initially leading them to believe Encore was an owner of Clear Touch;
- Got Encore's employees, Leo Gallant and Jimmy Higginbotham, to sign non-disclosure agreements so that he could induce them to leave Encore by disclosing his ownership of Clear Touch but prevent them from disclosing same to Encore; and
- Permanently deleted incriminating e-mails.

*Id.*

6. During the pendency of this case, Trask transferred real estate from his individual ownership into a "family trust."

7. Trask is the President and sole Director of his corporation, Defendant Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch"), and exercises ownership and control in ways that will only be clear following discovery.

8. Instead of cooperating in discovery, Trask has moved to quash subpoenas Encore issued pursuant to Rules 34, 45, and 69, SCRCP, to his CPA and Clear Touch's third-party administrator, CatchFire Funding. Trask has also refused to provide to Encore documents requested in post-Judgment discovery.

ELECTRONICALLY FILED - 2018 May 21 1:05 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

9. Trask previously admitted to Encore that he owns several rental properties in several counties. The public records of Greenville County and Anderson County, South Carolina, show that Trask is connected with fifteen (15) properties, which appear to be residential rental properties, either individually or through Carolina Home Partners LLC, a company of which Trask is manager. The records of Oconee County show that Trask transferred ten (10) duplexes in November 2017, shortly after the jury verdicts in this case were rendered, at a sales price of approximately one-half of what the buyer was able to mortgage the properties for. Encore records from when Trask was an employee indicate he had three bank and/or brokerage accounts. Only a receiver can effectively preserve the net rental and investment income from these assets and preserve them so that they are available to apply to the Judgment.

10. Plaintiff seeks for the Court to appoint L. Walt Tollison, III, Esq., as receiver for Trask.

## CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are denominated Conclusions of Law to the extent that they constitute the same.

2. The Judgment was granted in favor of Encore and has not been satisfied.

3. A receiver may be appointed after judgment to carry the judgment into effect. *See* S.C. Code Ann. § 15-65-10(2).

4. A receiver may be appointed after judgment to preserve the judgment debtor's property during the pendency of an appeal. *See* S.C. Code Ann. § 15-65-10(3).

5. A receiver may be appointed after judgment when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment. *See* S.C. Code Ann. § 15-65-10(3).

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6. A receiver may be appointed to receive any distributions due to or to become due to the judgment debtor from a limited liability company in which the judgment debtor has a membership interest. *See* S.C. Code Ann. § 33-44-504(a). Likewise, a receiver may receive other payments due a judgment debtor and "stands in the shoes of the debtor with respect to property of the latter," as well as his "contractual relation[s]." *Jeffcoat v. Morris*, 300 S.C. 526, 389 S.E.2d 526 (Ct. App. 1989), *overruled on other grounds by United Carolina Bank v. Caroprop, Ltd.*, 316 S.C. 1, 4 (1994).

7. South Carolina law otherwise allows for the appointment of a Receiver under the facts of this case.

8. The Court concludes that Encore is entitled to the appointment of a receiver in order to ascertain by investigation and to take possession of and secure assets and income of Trask until the appeal is resolved.

NOW, THEREFORE, based upon the foregoing findings of fact and the conclusions of law, IT IS THEREFORE ORDERED that:

1. L. Walt Tollison, III, Esq. ("TOLLISON") is hereby appointed as Receiver to ascertain by investigation and to take possession of and secure assets and income of Trask until their appeal of the Judgment is resolved.

2. Immediately following the entry of this Order, and on an ongoing basis as long as this Order remains in effect, Trask shall surrender and deliver possession to TOLLISON all of the assets, property, and records that he may possess, own or control, directly or indirectly, legally or equitably, including all shares of stock of Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch"), and all assets and records of Clear Touch, and all assets and property that Trask hereafter receives or acquires, directly or indirectly, legally or equitably,

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while the Order is in effect (all of the foregoing herein referred to as the "Property"), with the exception of property that is exempt from execution or levy (for example, the homestead exemption). As to such exempt property, Trask shall not dispose of or encumber such property beyond the statutory amount of the exemption. If such property is already encumbered such that the owner's equity in the property is less than the amount of the exemption, the owner shall not further encumber or dispose of the property.

3. Effective as of and from the date of the entry of this Order, all funds or other property that are received by Trask shall be delivered to the Receiver and deposited with a bank of Receiver's choice or otherwise secured by Receiver pending resolution of Trask's appeal.

4. Trask may request from the Receiver the release of such funds as are required for ordinary living expenses, and the Receiver shall comply with such reasonable requests. Any dispute over such requests shall be brought promptly to the Court.

5. The Receiver will be and hereby is authorized and directed to take immediate possession of Trask's assets and to exercise full control over Trask's assets, provided that Receiver shall not sell or dispose of such assets until further order of this Court, and the Receiver in so doing will have all powers generally available to Receivers under the laws of the State of South Carolina, and will have, among others, the following specific powers:

(a) The power and authority to take possession of property owned or leased by Trask. All parties in possession of any such property are to surrender it to the Receiver upon demand. This property shall include, but not be limited to the following;

i Real Property

ii Goods

iii Inventory

iv Equipment

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v Chattel Paper and Accounts

vi Securities and Instruments, including but not limited to Stocks, Membership Interests, Bonds, and Promissory Notes

vii Investment Property

viii Contracts and other Documents

ix Deposit Accounts

x Commercial Tort Claims

xi Money

xii Letter of Credit Rights

xiii General Intangibles

xiv Supporting Obligations

xv All Cash or Equivalents, Savings Accounts, Brokerage Accounts, any other bank accounts of Trask;

xvi All proceeds and products of above

(b) Gather all books and records of Trask, and subpoena or otherwise require production of books and records of third parties, including but not limited to a list of all aliases Trask has used, a list of all family members and entities with which he is affiliated, and historical records showing any asset transfers or dispositions by Trask, family members, or affiliated entities and all salary, dividend, distribution, and other compensation payments to Trask, his family members, or any entity with which he is affiliated, to determine the existence and amount of all Trask's rights, debts and obligations together with all their assets;

(c) To control all bank, brokerage, and trust accounts owned by or for the benefit of Trask. No other person shall have any authority or control over any funds in the accounts, including but not limited to authority or control to disburse funds;

(d) With respect to any insurance coverage in existence or obtained, the Receiver shall be named as an additional insured on the policies for the period that the Receiver shall be in possession of the property insured;

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(e) The Receiver is hereby authorized to demand and receive any dividends or distributions due to or to become due to Trask from any corporation or limited liability company in which the defendant has a direct or indirect ownership or membership interest, including but not limited to Clear Touch; and any such corporation or limited liability company is hereby directed and enjoined, upon receipt of this Order, to make such distribution(s) only to the Receiver while this Order is in effect.

6. Plaintiff and Receiver shall have no obligation to pay for accrued wages, benefits, and taxes, payroll or other, accrued in advance of the date of this Order, whether currently due or owing.

7. The Receiver will furnish to the Court and to the parties quarterly statements itemizing property that has been secured by Receiver pursuant to this Order. Such report will be filed within thirty (30) days after the end of each calendar quarter, the first such report to be due thirty days after the end of the first quarter this Order is entered and quarterly thereafter. The parties to this litigation will be entitled to inspect the books and records of the Receiver concerning assets held by it pursuant to this Order at reasonable times and with reasonable notice.

8. Without further Order of the Court, the Receiver shall be entitled to payment of professional fees and expenses incurred by the Receiver. While Trask's appeal remains pending, Receiver's fees and expenses shall be paid by Plaintiff. If the Judgment is affirmed in whole or in part, Plaintiff shall be entitled to reimbursement of such payments from Trask's assets in addition to the Judgment and the legal, accounting, and other costs of collecting same. Receiver's professional fees shall be charged at $325 per hour for Receiver's time and at such lesser rates as he ordinarily charges for paralegal time. All photocopies and facsimile charges along with necessary out-of-pocket expenses (including travel and lodging) will be billed at cost.

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All fees and expenses of the Receiver shall be accounted for in the Quarterly Statement of Operations.

9. The Receiver will have such additional powers as are provided by law and as this Court may from time to time direct.

10. No person or entity shall file suit against the Receiver, Plaintiff, or Plaintiff's counsel or take any legal action for actions taken in compliance with this Order. All other proceedings by Trask or any creditor of Trask relating to the Judgment or the Property are enjoined.

11. The Receiver shall have no personal liability in connection with any liabilities, obligations, liens or amounts owed to any creditors or claimants of Trask.

12. The Receiver and his employees, agents, and attorneys shall have no personal liability or obligation and shall have no claim asserted against them in connection with the Receiver's actions under this Order.

13. The Receiver may, in its discretion, notify this Court and the parties to this action that the Receivership is not practical, and upon such notice all duties of the Receiver shall terminate except with regard to liabilities which arise prior to the date of the notice. The Court may then appoint a new Receiver to take any and all such other action as it deems appropriate. Receiver shall turn over all of the assets and records secured pursuant hereto to any successor receiver appointed by the Court and shall file a final accounting with the Court.

14. In the event that Trask fails to immediately turn over the property and other items required by this Order, the appropriate County Sheriff is hereby ordered to take all necessary actions and appropriate force to give full effect to the terms of this Order.

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15. All persons who receive notice of this Order are enjoined from interfering with the powers and duties of the Receiver.

16. All providers of insurance with respect to the Property are prohibited and enjoined from cancelling such insurance policies provided that the Receiver pays the applicable premiums for any prospective exposure going forward under the receivership, and such premiums may be paid from assets secured by the Receiver pursuant to this Order.

17. The receiver is not responsible for filing any federal, state, or local tax returns including those relating to any activities during the receivership, but is entitled to collect any tax refunds payable to Trask.

18. The Receiver and the parties to this case may at any time apply to this Court for instructions or orders and for further powers necessary to enable the Receiver to perform the Receiver's duties properly.

19. IT IS FURTHER ORDERED that pending further Order of this Court, Trask and his respective agents, partners, managers, employees, assignees, heirs, representatives, affiliates or related entities and all other persons acting in concert with them who have actual or constructive knowledge of this Order, and their agents and employees, shall not:

A. Commit Waste:

Trask shall not commit or permit any waste of the Property or any part thereof, or suffer or commit or permit any act on the Property or any part thereof in violation of law, or remove, transfer, encumber or otherwise dispose of any of the Property or the fixtures presently on the Property or any part thereof.

B. Cash or Credit Card Receipts:

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Trask shall not discount or in any other way divert or use any of the monies from the Property, including, but not limited to, rents, cash from sales, or credit card receipts.

C. Interfere with Receiver:

Trask shall not directly or indirectly interfere in any manner with the discharge of the Receiver's duties under this Order or the Receiver's possession of the Property;

D. Transfer or Encumber the Property:

Trask shall not expend, disburse, transfer, assign, sell, convey, devise, pledge, mortgage, create a security interest in, encumber, conceal or in any manner whatsoever deal in or dispose of the whole or any part of the Property, including, but not limited to, the cash, rents inventory, and fixtures without prior Court Order; and

E. Impair Preservation of Property or Plaintiff's Interest:

Trask shall not do any act which will, or which will tend to impair, defeat, divert, prevent or prejudice the preservation of the Property, or the preservation of Plaintiff's interest in the Property. Trask is further enjoined from making any payments or transfers of funds or property to or from any affiliates, insiders, directors, officers, family members, or any other person or entity controlled by or otherwise related to any affiliates, insiders, directors, and/or officers.

**IT IS SO ORDERED.**

# EXHIBIT B

Affidavit of Todd Newnam

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| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
| ENCORE TECHNOLOGY GROUP, LLC,<br>Plaintiff,<br>vs.<br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br>Defendants. | Case No. 2015-CP-23-05757<br>**AFFIDAVIT OF TODD R. NEWNAM RE POST-JUDGMENT MATTERS** |

The undersigned, Todd R. Newnam, after being duly sworn, deposes and states as follows:

1. I am the Chief Executive Officer of Plaintiff Encore Technology Group, LLC ("Encore"), have personal knowledge of the facts set forth herein, except those matters stated upon information and belief, as to which I have information and a good faith belief, am over eighteen years of age and am otherwise competent to give this Affidavit.

2. On April 2, 2018, this Court entered a Final Order and Judgment in favor of Encore against Defendant Keone Trask ("Trask") in the amount of $7,917,468.40 (the "Judgment").

3. The Judgment required Trask to pay $7,917,468.40 to Encore. Trask has failed to pay any portion of this amount. Although the Clerk of Court issued an Execution against Property of Trask on April 13, 2018, it has not been satisfied, in whole or in part.

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4. Trask has filed a motion pursuant to Rule 59, SCRCP, for Reconsideration of the Judgment and, upon information and belief, intends to appeal the Judgment, necessitating the preservation of Trask's property during the pendency of the appeal.

5. The Judgment includes $2,952,078 in actual damages and $4,524,890 in punitive and exemplary damages. In doubling the actual damages under the Trade Secrets Act to award $849,890 in exemplary damages, Judge McIntosh stated "the case of misappropriation was one of the most egregious this Court has ever seen." Judgment at 4.

6. Defendants moved to stay execution of the Judgment, but Judge McIntosh denied a stay because "the evidence showed that the Defendants engaged in an involved scheme to hide from Encore the truth of Trask's breaches of fiduciary duties, duties of loyalty, and contract.... Defendants simply cannot be expected to fulfill their legal duties. Therefore, the Court finds it would not be appropriate to stay execution of the judgment." Judgment at 33-34. Specifically, the Court found that Trask:

- Did not disclose his involvement in Clear Touch to Encore while he was an employee of Encore;
- Transferred his ownership in Clear Touch to his mother to hide his affiliation;
- Got Encore to sign a Reseller Agreement and had his mother sign for Clear Touch;
- Had the true suppliers remove their labels from interactive panels and replace them with Clear Touch labels to hide the suppliers' true identities from Encore;
- Marked up the prices of the panels from the suppliers to Encore;
- Had Encore send its checks to a Nevada post office box and forwarded them back to South Carolina;
- Had his wife, Tamara Trask, email Encore as "Amy Andrews";

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- While at conferences for Encore, worked to sign resellers for Clear Touch by initially leading them to believe Encore was an owner of Clear Touch;
- Got Encore's employees, Leo Gallant and Jimmy Higginbotham, to sign non-disclosure agreements so that he could induce them to leave Encore by disclosing his ownership of Clear Touch but prevent them from disclosing same to Encore; and
- Permanently deleted incriminating e-mails.

Judgment at 33-34.

7. During the pendency of this case, Trask transferred real estate from his individual ownership into a "family trust." *See* Exhibit 1 (Title to Real Estate).

8. Trask is the President and sole Director of his corporation, Defendant Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch"), and exercises ownership and control in ways that will only be clear following discovery.

9. Instead of cooperating in discovery, Trask has moved to quash subpoenas Encore issued pursuant to Rules 34, 45, and 69, SCRCP, to his CPA and Clear Touch's third-party administrator, CatchFire Funding. Trask has also refused to provide to Encore documents requested in post-Judgment discovery.

10. Trask previously admitted to me that he owns several rental properties in several counties. The public records of Greenville County and Anderson County, South Carolina, show that Trask is connected with fifteen (15) properties, which appear to be residential rental properties, either individually or through Carolina Home Partners LLC, a company of which Trask is manager. The records of Oconee County show that Trask transferred approximately ten (10) duplexes in November 2017, shortly after the jury verdicts in this case were rendered, at a sales price of approximately one-half of what the buyer was able to mortgage the properties for.

*See* Exhibit 2 (General Warranty Deed & Mortgage). Encore records from when Trask was an employee indicate he had three bank and/or brokerage accounts. Only a receiver can effectively preserve the net rental and investment income from these assets and preserve them so that they are available to apply to the Judgment.

11. Plaintiff seeks for the Court to appoint L. Walt Tollison, III, Esq., as receiver for Trask.

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**FURTHER AFFIANT SAITH NOT.**

Todd R. Newnam

SWORN to before me this
14 day of May, 2018.

Notary Public for South Carolina
My Commission Expires: 3/30/26

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# EXHIBIT 1
# to Affidavit of Todd Newnam

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2017042571
5 Pgs
DEED Book: DE 2513 Page: 2840 - 2844
May 26, 2017 10:52:30 AM Cons: $10.00
Rec: $11.00 Cnty Tax: EXEMPT State Tax: EXEMPT
E-FILED IN GREENVILLE COUNTY, SC

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Prepared By:

Anderson Law Firm
302 N. Weston St.
Fountain Inn, SC 29644
Telephone: (864) 228-7808

STATE OF SOUTH CAROLINA )
)
COUNTY OF GREENVILLE )

**TITLE TO REAL ESTATE**
**(No title examination)**

KNOW ALL MEN BY THESE PRESENTS, that **Keone Ryan Trask and Tamara B. Trask** (the "Grantor") in consideration of **Ten and 00/100 ($10.00) Dollars** has granted, bargained, sold and released and by these presents does grant, bargain, sell and release unto **Keone Ryan Trask and Tamara Beatrice Trask, Trustees of the Trask Family Trust dated May 12, 2017** (the "Grantee") the following described real property:

PLEASE SEE EXHIBIT 'A' ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE.

This conveyance is made subject to easements and restrictions of record and otherwise affecting the property.

Grantee's Address: 15 Red Tip Ct Simpsonville, SC 29680

TMS: 0567050101800

TOGETHER with all and singular the Rights, Members, Hereditaments and Appurtenances to the Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the premises before mentioned unto the Grantee, his Heirs, Successors and Assigns forever.

And the Grantor(s) does hereby bind themselves and their heirs, to warrant and forever defend all and singular premises unto the Grantee, his/her/their heirs and assigns against themselves and their heirs, and against any person whomsoever lawfully claiming or to claim the same, or any part thereof.

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IN WITNESS WHEREOF, THE GRANTOR has set his/her/their hand(s) and seal(s) this the 12th day of May, 2017.

SIGNED, SEALED AND DELIVERED
IN PRESENCE OF:

Witness 1 _____

_____ (SEAL)
**Keone Ryan Trask**

Notary as Witness 2: _____

_____ (SEAL)
**Tamara B. Trask**

STATE OF SOUTH CAROLINA )
) **ACKNOWLEDGMENT**
COUNTY OF GREENVILLE )

I, a Notary Public of the County and State aforesaid, certify that the above-named Grantor(s) came before me this day and acknowledged the execution of the foregoing instrument.

Witness my hand and official seal, this the 12th day of May, 2017.

_____ (SEAL)
Notary Signature:
My Commission Expires:

GAIL S. ANDERSON
My Commission Expires
NOTARY PUBLIC
06-20-2026
STATE OF SOUTH CAROLINA

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LEGAL DESCRIPTION

ALL THAT CERTAIN PIECE, PARCEL OR LOT OF LAND SITUATE, LYING AND BEING IN THE STATE OF SOUTH CAROLINA, COUNTY OF GREENVILLE, BEING SHOWN AND DESIGNATED AS LOT 54 OF CHANDLER LAKE PHASE I SHEET 2 OF 2, ON PLAT THEREOF PREPARED BY FANT, REICHERT AND FOGELMAN, INC., DATED OCTOBER 16, 2008 AND RECORDED IN THE REGISTER OF DEEDS OFFICE FOR GREENVILLE COUNTY, SC IN PLAT BOOK 1077 AT PAGE 31. REFERENCE IS HEREBY MADE TO SAID PLAT FOR A MORE COMPLETE METES AND BOUNDS DESCRIPTION THEREOF.

THIS BEING THE SAME PROPERTY CONVEYED UNTO KEONE RYAN TRASK AND TAMARA B. TRASK BY DEED OF BK RESIDENTIAL CONSTRUCTION, LLC DATED 10/26/2012 AND RECORDED ON 11/6/2012 IN Deed Book 2414 at Page 3577 in the Greenville County ROD Office.

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STATE OF SOUTH CAROLINA)

**AFFIDAVIT**

COUNTY OF GREENVILLE)

**PERSONALLY** appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information,

2. The property being transferred: TMS # 0567050101800 BY: KEONE RYAN TRASK AND TAMARA B. TRASK TO: KEONE RYAN TRASK AND TAMARA BEATRICE TRASK, TRUSTEES OF THE TRASK FAMILY TRUST DATED MAY 12, 2017

between a corporation, a partnership, or other entity and a stockholder, partner or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.

(c)___X__ exempt from the deed recording fee because:__8_____
(If exempt, please skip items 4-7, and go to item 8 of this affidavit.)

If exempt because transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? N/A

4. Check one of the following if either item 3(a) or item 3(b) above has been checked:

(a)__x__ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of:

(b)_____ The fee is computed on the fair market value of the realty which is _____.

(c)_____ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____.

5. Check Yes_____ or No__X___ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer: If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____.

6. The deed recording fee is computed as follows:

(a) Place the amount listed in item 4 above here:
(b) Place the amount listed in item 5 above here:
(c) Subtract Line 6(b) from Line 6(a) and place results here:

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7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: $ 10

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as the attorney.

9. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

| | |
|---|---|
| | JAMES ANDERSON-ATTORNEY-<br>Responsible Person Connected with the Transaction |

**SWORN** to before me this 5/12/17

Gail S Anderson

Notary Public for SC

My Commission Expires: 6-20-2026

GAIL S ANDERSON
My Commission Expires
NOTARY PUBLIC
06-20-2026
STATE OF SOUTH CAROLINA

2017042571 DE BK 2513 PG 2844 (LAST PAGE) - AUDITOR'S ENDORSEMENT

# EXHIBIT 2
# to Affidavit of Todd Newnam

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FILED OCONEE COUNTY, SC
ANNA K. DAVISON
REGISTER OF DEEDS
2017 NOV 22 P 12:46

Doc ID: 005190280006 Type: DEE
BK 2317 PG 166-171

STATE OF SOUTH CAROLINA )

COUNTY OF OCONEE )

# GENERAL WARRANTY DEED

The designation Grantor and Grantee as used herein shall include the named parties and their heirs, successors and assigns and shall include singular, plural, masculine, feminine or neuter as required by context.

**KNOW ALL MEN BY THESE PRESENTS**, that **Keone R. Trask**, in the State aforesaid, for and in consideration of the sum of SIX HUNDRED THOUSAND AND NO/100 DOLLARS ($600,000.00), the receipt and sufficiency of which is here acknowledged, has granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said:

**The Gilreath Group, LLC**

OCONEE COUNTY
STATE TAX 1560.00
COUNTY TAX 660.00
EXEMPT

All Grantor's right, title and equitable or legal interest in and to:

214 and 216 W. Reedy Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number One (1) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

TMS# 267-00-04-048

This being the same property conveyed unto Keone R. Trask by deed of Home Connections Real Estate, LLC dated March 6, 2006 and recorded March 8, 2006 in Book 1486 at Page 40 in the Register of Deeds Office for Oconee County, South Carolina.

218 and 220 W. Reedy Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Two (2) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

TMS# 267-00-04-049

This being the same property conveyed unto Keone R. Trask by deed of Home Connections Real Estate, LLC dated March 6, 2006 and recorded March 8, 2006 in Book 1486 at Page 43 in the Register of Deeds Office for Oconee County, South Carolina.

222 and 224 W. Ready Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Three (3) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

6576

TMS# 267-00-04-050

This being the same property conveyed unto Keone R. Trask by deed of Home Connections Real Estate,

FOR OFFICE USE ONLY
THIS PROPERTY DESIGNATED AS
MAP SCE SUB BLK LOT PARC TMS
ON OCONEE COUNTY TAX MAPS

OCONEE COUNTY ASSESSOR

10th Bill Carrington
408 E North St.
Greenville, SC 29601

NOV 27 2017

Auditor, Oconee County S.C.

Book 2317 Page 166 Seq: 1

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LLC dated March 6, 2006 and recorded March 8, 2006 in Book 1486 at Page 46 in the Register of Deeds Office for Oconee County, South Carolina.

226 and 228 W. Reedy Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Four (4) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

TMS# 267-00-04-051

This being the same property conveyed unto Keone R. Trask by deed of Home Connections Real Estate, LLC dated March 6, 2006 and recorded March 8, 2006 in Book 1486 at Page 49 in the Register of Deeds Office for Oconee County, South Carolina.

230 and 232 W. Reedy Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Five (5) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

TMS# 267-00-04-52

This being the same property conveyed unto Keone R. Trask by deed of Home Connections Real Estate, LLC dated March 6, 2006 and recorded March 8, 2006 in Book 1486 at Page 52 in the Register of Deeds Office for Oconee County, South Carolina.

Grantee Address: P.O. Box 9386, Greenville, SC 29604

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Grantee, and Grantee's heirs and assigns forever.

**AND GRANTOR DOES** hereby promise, for themselves and Grantor's heirs, successors, assigns, and representatives, to warrant and forever defend the above premises unto the Grantee, Grantee's heirs and assigns, against the Grantor and Grantor's heirs, successors, assigns, and representatives and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

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WITNESS the Hand and Seal of Keone R. Trask this **20th day of November, 2017** and in the Two Hundred Forty-Twond (242nd) year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered
In the presence of:

Witness No. 1

Keone R. Trask

Witness No. 2 (NOTARY)

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

I, Griffin Bell, a Notary Public for the County of Oconee and State of South Carolina, do hereby certify that Keone R. Trask personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the 20th of November, 2017.

Notary Public

My Commission Expires: 4-24-25

(SEAL)

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STATE OF SOUTH CAROLINA )
)
COUNTY OF OCONEE )

# AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

PERSONALLY, appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property is being transferred is located at 214-232 W. Reedy Fork Road, Seneca, SC 29678 bearing Oconee County Tax Map Number 267-00-04-048, 267-00-04-049, 267-00-04-050, 267-00-04-051, 267-00-04-052, , , , and , was transferred by Keone R. Trask to The Gilreath Group, LLC on November 20, 2017.
3. Check one of the following: The DEED is:
   a. ☒ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
   b. ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or a distribution to a trust beneficiary.
   c. ☐ EXEMPT from the deed recording fee because (see information section of affidavit): _____. (If exempt, please skip items 4-7 and go to item 8 of this affidavit.)

   If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty?
   Check Yes ☐ or No ☒
4. Check one of the following if either item 3(a) or item 3(b) above has been checked. (See Information section of this affidavit):
   a. ☒ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $600,000.00.
   b. ☐ The fee is computed on the fair market value of the realty which is $600,000.00.
   c. ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is $600,000.00.
5. Check YES ☐ or NO ☒ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If YES, the amount of the outstanding encumbrance is $_____.
6. The deed recording fee is computed as follows:
   a. Place the amount listed in item 4 above here: $ 600,000.00
   b. Place the amount listed in item 5 above here: $ 0.00
   (If no amount is listed, place zero here.)
   c. Subtract Line 6(b) from Line 6(a) and place the result here: $ 600,000.00
7. The deed recording fee is based on the amount listed on Line 6(c) above and the deed recording fee due is: $_____.
8. As required by Code Section '12-24-70, I state that I am a responsible person who was connected with the transaction as: _____
9. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

FILED OCONEE COUNTY, SC
ANNA K. DAVISON
REGISTER OF DEEDS
2017 NOV 22 P 12:47

Book: 2317 Page: 166 Seq: 4

Responsible Person Connected with the Transaction

Print or Type Name Here

Subscribed and sworn to before me this
20th day of Nov, 2017.

By

Notary Public

STAMP ADDED TO CAPTURE IMAGE

STAMP ADDED TO CAPTURE IMAGE

STAMP ADDED TO CAPTURE IMAGE

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**INFORMATION**

Except as provided in this paragraph, the term "value" means "the consideration paid or to be paid in money or money's worth for the realty." Consideration paid or to be paid in money's worth includes, but is not limited to, other realty, personal property, stocks, bonds, partnership, interest and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, and in the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement, or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are deeds:

(1) transferring realty in which the value of the realty, as defined in Code Section 12-24-30, is equal to or less than one hundred dollars;

(2) transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts;

(3) that are otherwise exempted under the laws and Constitution of this State or of the United States;

(4) transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A);

(5) transferring realty in order to partition realty as long as no consideration is paid for the transfer other then the interests in the realty that are being exchanged in order to partition the realty;

(6) transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39;

(7) that constitute a contract for the sale of timber to be cut;

(8) transferring realty to a corporation, a partnership, or a trust in order to become, or as, a stockholder, partner, or trust beneficiary of the entity provided no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in such stock or interest held be the grantor. However, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee even if the realty is transferred to another corporation, a partnership, or trust;

(9) transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantee's interest in the partnership or trust. A "family partnership" is a partnership whose partners are all members of the same family. A "family trust" is a trust, in which the beneficiaries are all members of the same family. The beneficiaries of a family trust my also include charitable entities. "Family" means the grantor and the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any the above. A "charitable entity" means an entity which may receive deductible contributions under section 170 of the Internal revenue Code as defined in Section 12-6-40(A);

(10) transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation;

(11) transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership; and

(12) that constitute a corrective deed or a quitclaim deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the corrective or quitclaim deed;

(13) transferring realty subject to a mortgage to the mortgagee whether by a deed in lieu of foreclosure executed by the mortgagor or deed executed pursuant to foreclosure proceedings;

(14) transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the deed that establishes the fact that the agent and principal relationship existed at the time of the original purchase as well as for the purpose of purchasing the realty;

(15) transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives, or political subdivisions to a limited liability company which is subject to regulation under the Federal Power Act (16 U.S.C. Section 791(a)) and which is formed to operate or to take functional control of electric transmission assets as defined in the Federal Power Act.

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RECORDATION REQUESTED BY:
First-Citizens Bank & Trust Company
DAC 20
PO Box 26592
Raleigh, NC 27611-6592

FILED OCONEE COUNTY, SC
ANNA K. DAVISON
REGISTER OF DEEDS

Doc ID: 005190590008 Type: MTG
BK 3670 PG 249-256

WHEN RECORDED MAIL TO:
First Citizens Bank
Loan Servicing Department-DAC20
PO Box 26592
Raleigh, NC 27611-6592

2017 NOV 22 P 12:47

SEND TAX NOTICES TO:
THE GILREATH GROUP LLC
11 WACCAMAW CIR
GREENVILLE, SC 29605

SPACE ABOVE THIS LINE IS FOR RECORDER'S USE ONLY

00000000000000000116511202017000000000000001

# MORTGAGE

**MAXIMUM LIEN.** The amount of indebtedness secured by this Mortgage, including the outstanding amount of the Note and all future advances shall at no time exceed the principal amount of $1,107,750.00, plus interest, reasonable attorneys' fees, court costs and the expenses to preserve and protect the Property. Interest under the Note will be deferred, accrued or capitalized, but Lender shall not be required to defer, accrue or capitalize any interest except as provided in the Note.

**THIS MORTGAGE dated November 21, 2017, is made and executed between THE GILREATH GROUP LLC, whose address is 11 WACCAMAW CIR, GREENVILLE, SC 29605 (referred to below as "Grantor") and First-Citizens Bank & Trust Company, whose address is DAC 20, PO Box 26592, Raleigh, NC 27611-6592 (referred to below as "Lender").**

**GRANT OF MORTGAGE.** For valuable consideration, Grantor mortgages, grants, and conveys to Lender all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all water, water rights, watercourses and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, **(the "Real Property") located in OCONEE County, State of South Carolina:**

**See the exhibit or other description document which is attached to this Mortgage and made a part of this Mortgage as if fully set forth herein.**

**The Real Property or its address is commonly known as 216-226 WEST REEDY FORK ROAD, SENECA, SC 29678.**

Grantor presently assigns to Lender all of Grantor's right, title, and interest in and to all present and future leases of the Property and all Rents from the Property. In addition, Grantor grants to Lender a Uniform Commercial Code security interest in the Personal Property and Rents.

**FUTURE ADVANCES.** In addition to the Note, this Mortgage secures all future advances made by Lender to Grantor whether or not the advances are made pursuant to a commitment. Specifically, without limitation, this Mortgage secures, in addition to the amounts specified in the Note, all future amounts Lender in its discretion may loan to Grantor, together with all interest thereon; however, in no event shall such future advances (excluding interest) exceed in the aggregate $1,107,750.00. This Mortgage shall remain an open mortgage of record to secure future advances in accordance with Section 29-3-50, as amended, Code of Laws of South Carolina (1976) even in the event all sums secured by this Mortgage may be fully paid at any one time; however, upon request of Grantor, Lender will cause this Mortgage to be released and cancelled of record upon full payment of all indebtedness then owing, and upon such cancellation of this Mortgage of record, this Mortgage shall become null and void. Such release shall be without charge to Grantor; however, Grantor shall pay all costs of recordation, if any, and all documentary stamps due on the Note evidencing future advances secured by this Mortgage.

**THIS MORTGAGE, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS MORTGAGE. THIS MORTGAGE IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:**

**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Mortgage, Grantor shall pay to Lender all amounts secured by this Mortgage as they become due and shall strictly perform all of Grantor's obligations under this Mortgage.

**POSSESSION AND MAINTENANCE OF THE PROPERTY.** Grantor agrees that Grantor's possession and use of the Property shall be governed by the following provisions:

**Possession and Use.** Until the occurrence of an Event of Default, Grantor may (1) remain in possession and control of the Property; (2) use, operate or manage the Property; and (3) collect the Rents from the Property.

**Duty to Maintain.** Grantor shall maintain the Property in tenantable condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

**Compliance With Environmental Laws.** Grantor represents and warrants to Lender that: (1) During the period of Grantor's ownership of the Property, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance by any person on, under, about or from the Property; (2) Grantor has no knowledge of, or reason to believe that there has been, except as previously disclosed to and acknowledged by Lender in writing, (a) any breach or violation of any Environmental Laws, (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Property by any prior owners or occupants of the Property, or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters; and (3) Except as previously disclosed to and acknowledged by Lender in writing, (a) neither Grantor nor any tenant, contractor, agent or other authorized user of the Property shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from the Property; and (b) any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations and ordinances, including without limitation all Environmental Laws. Grantor authorizes Lender and its agents to enter upon the Property to make such inspections and tests, at Grantor's expense, as Lender may deem appropriate to determine compliance of the Property with this section of the Mortgage. Any inspections or tests made by Lender shall be for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Grantor or to any other person. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Property for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any such laws; and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Mortgage or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release occurring prior to Grantor's ownership or interest in the Property, whether or not the same was or should have been known to Grantor. The provisions of this section of the Mortgage, including the obligation to indemnify and defend, shall survive the payment of the Indebtedness and the satisfaction and reconveyance of the lien of this Mortgage and shall not be affected by Lender's acquisition of any interest in the Property, whether by foreclosure or otherwise.

**Nuisance, Waste.** Grantor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any stripping of or waste on or to

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14.00 - Bell Carrington
(NO 9%) 40 E North St
Greenville, SC 29601

the Property or any portion of the Property. Without limiting the generality of the foregoing, Grantor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), coal, clay, scoria, soil, gravel or rock products without Lender's prior written consent.

**Removal of Improvements.** Grantor shall not demolish or remove any Improvements from the Real Property without Lender's prior written consent. As a condition to the removal of any Improvements, Lender may require Grantor to make arrangements satisfactory to Lender to replace such Improvements with Improvements of at least equal value.

**Lender's Right to Enter.** Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to attend to Lender's interests and to inspect the Real Property for purposes of Grantor's compliance with the terms and conditions of this Mortgage.

**Compliance with Governmental Requirements.** Grantor shall promptly comply with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the use or occupancy of the Property, including without limitation, the Americans With Disabilities Act. Grantor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Grantor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Grantor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

**Duty to Protect.** Grantor agrees neither to abandon or leave unattended the Property. Grantor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

**DUE ON SALE - CONSENT BY LENDER.** Lender may, at Lender's option, declare immediately due and payable all sums secured by this Mortgage upon the sale or transfer, without Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property. A "sale or transfer" means the conveyance of Real Property or any right, title or interest in the Real Property; whether legal, beneficial or equitable; whether voluntary or involuntary; whether by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three (3) years, lease-option contract, or by sale, assignment, or transfer of any beneficial interest in or to any land trust holding title to the Real Property, or by any other method of conveyance of an interest in the Real Property. If any Grantor is a corporation, partnership or limited liability company, transfer also includes any change in ownership of more than twenty-five percent (25%) of the voting stock, partnership interests or limited liability company interests, as the case may be, of such Grantor. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law or by South Carolina law.

**TAXES AND LIENS.** The following provisions relating to the taxes and liens on the Property are part of this Mortgage:

**Payment.** Grantor shall pay when due (and in all events prior to delinquency) all taxes, payroll taxes, special taxes, assessments, water charges and sewer service charges levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Grantor shall maintain the Property free of any liens having priority over or equal to the interest of Lender under this Mortgage, except for those liens specifically agreed to in writing by Lender, and except for the lien of taxes and assessments not due as further specified in the Right to Contest paragraph.

**Right to Contest.** Grantor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Grantor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Grantor has notice of the filing, secure the discharge of the lien, or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and reasonable attorneys' fees, or other charges that could accrue as a result of a foreclosure or sale under the lien. In any contest, Grantor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

**Evidence of Payment.** Grantor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes or assessments and shall authorize the appropriate governmental official to deliver to Lender at any time a written statement of the taxes and assessments against the Property.

**Notice of Construction.** Grantor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property, if any mechanic's lien, materialmen's lien, or other lien could be asserted on account of the work, services, or materials. Grantor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Grantor can and will pay the cost of such improvements.

**PROPERTY DAMAGE INSURANCE.** The following provisions relating to insuring the Property are a part of this Mortgage:

**Maintenance of Insurance.** Grantor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a replacement basis for the full insurable value covering all Improvements on the Real Property in an amount sufficient to avoid application of any coinsurance clause, and with a standard mortgagee clause in favor of Lender. Grantor shall also procure and maintain comprehensive general liability insurance in such coverage amounts as Lender may request with Lender being named as additional insureds in such liability insurance policies. Additionally, Grantor shall maintain such other insurance, including but not limited to hazard, business interruption and boiler insurance as Lender may require. Policies shall be written by such insurance companies and in such form as may be reasonably acceptable to Lender. Grantor shall deliver to Lender certificates of coverage from each insurer containing a stipulation that coverage will not be cancelled or diminished without a minimum of ten (10) days' prior written notice to Lender and not containing any disclaimer of the insurer's liability for failure to give such notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. Should the Real Property be located in an area designated by the Administrator of the Federal Emergency Management Agency as a special flood hazard area, Grantor agrees to obtain and maintain Federal Flood Insurance, if available, within 45 days after notice is given by Lender that the Property is located in a special flood hazard area, for the full unpaid principal balance of the loan and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

**Application of Proceeds.** Grantor shall promptly notify Lender of any loss or damage to the Property. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's security is impaired, Lender may, at Lender's election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the Indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Grantor shall repair or replace the damaged or destroyed Improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration if Grantor is not in default under this Mortgage. Any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Mortgage, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the Indebtedness. If Lender holds any proceeds after payment in full of the Indebtedness, such proceeds shall be paid to Grantor as Grantor's interests may appear.

**Grantor's Report on Insurance.** Upon request of Lender, however not more than once a year, Grantor shall furnish to Lender a report on each existing policy of insurance showing: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the property insured, the then current replacement value of such property, and the manner of determining that value; and (5) the expiration date of the policy. Grantor shall, upon request of Lender, have an independent appraiser satisfactory to Lender determine the cash value replacement cost of the Property.

**LENDER'S EXPENDITURES.** If any action or proceeding is commenced that would materially affect Lender's interest in the Property or if Grantor fails to comply with any provision of this Mortgage or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Mortgage or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Property and paying all costs for insuring, maintaining and preserving the Property. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the Indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Mortgage also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

**WARRANTY; DEFENSE OF TITLE.** The following provisions relating to ownership of the Property are a part of this Mortgage:

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**Title.** Grantor warrants that: (a) Grantor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Mortgage, and (b) Grantor has the full right, power, and authority to execute and deliver this Mortgage to Lender.

**Defense of Title.** Subject to the exception in the paragraph above, Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Lender under this Mortgage, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Grantor will deliver, or cause to be delivered, to Lender such instruments as Lender may request from time to time to permit such participation.

**Compliance With Laws.** Grantor warrants that the Property and Grantor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities.

**Survival of Representations and Warranties.** All representations, warranties, and agreements made by Grantor in this Mortgage shall survive the execution and delivery of this Mortgage, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's Indebtedness shall be paid in full.

**CONDEMNATION.** The following provisions relating to condemnation proceedings are a part of this Mortgage:

**Proceedings.** If any proceeding in condemnation is filed, Grantor shall promptly notify Lender in writing, and Grantor shall promptly take such steps as may be necessary to defend the action and obtain the award. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of its own choice, and Grantor will deliver or cause to be delivered to Lender such instruments and documentation as may be requested by Lender from time to time to permit such participation.

**Application of Net Proceeds.** If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the Indebtedness or the repair or restoration of the Property. The net proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Lender in connection with the condemnation.

**IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES.** The following provisions relating to governmental taxes, fees and charges are a part of this Mortgage:

**Current Taxes, Fees and Charges.** Upon request by Lender, Grantor shall execute such documents in addition to this Mortgage and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Grantor shall reimburse Lender for all taxes, as described below, together with all expenses incurred in recording, perfecting or continuing this Mortgage, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Mortgage.

**Taxes.** The following shall constitute taxes to which this section applies: (1) a specific tax upon this type of Mortgage or upon all or any part of the Indebtedness secured by this Mortgage; (2) a specific tax on Grantor which Grantor is authorized or required to deduct from payments on the Indebtedness secured by this type of Mortgage; (3) a tax on this type of Mortgage chargeable against the Lender or the holder of the Note; and (4) a specific tax on all or any portion of the Indebtedness or on payments of principal and interest made by Grantor.

**Subsequent Taxes.** If any tax to which this section applies is enacted subsequent to the date of this Mortgage, this event shall have the same effect as an Event of Default, and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Grantor either (1) pays the tax before it becomes delinquent, or (2) contests the tax as provided above in the Taxes and Liens section and deposits with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender.

**SECURITY AGREEMENT; FINANCING STATEMENTS.** The following provisions relating to this Mortgage as a security agreement are a part of this Mortgage:

**Security Agreement.** This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

**Security Interest.** Upon request by Lender, Grantor shall take whatever action is requested by Lender to perfect and continue Lender's security interest in the Rents and Personal Property. In addition to recording this Mortgage in the real property records, Lender may, at any time and without further authorization from Grantor, file executed counterparts, copies or reproductions of this Mortgage as a financing statement. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall not remove, sever or detach the Personal Property from the Property. Upon default, Grantor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

**Addresses.** The mailing addresses of Grantor (debtor) and Lender (secured party) from which information concerning the security interest granted by this Mortgage may be obtained (each as required by the Uniform Commercial Code) are as stated on the first page of this Mortgage.

**FURTHER ASSURANCES; ATTORNEY-IN-FACT.** The following provisions relating to further assurances and attorney-in-fact are a part of this Mortgage:

**Further Assurances.** At any time, and from time to time, upon request of Lender, Grantor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designee, and when requested by Lender, cause to be filed, recorded, refiled, or rerecorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve (1) Grantor's obligations under the Note, this Mortgage, and the Related Documents, and (2) the liens and security interests created by this Mortgage as first and prior liens on the Property, whether now owned or hereafter acquired by Grantor. Unless prohibited by law or Lender agrees to the contrary in writing, Grantor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

**Attorney-in-Fact.** If Grantor fails to do any of the things referred to in the preceding paragraph, Lender may do so for and in the name of Grantor and at Grantor's expense. For such purposes, Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to accomplish the matters referred to in the preceding paragraph.

**FULL PERFORMANCE.** If Grantor pays all the Indebtedness, including without limitation all future advances, when due, and otherwise performs all the obligations imposed upon Grantor under this Mortgage, Lender shall execute and deliver to Grantor a suitable satisfaction of this Mortgage and suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and the Personal Property. Grantor will pay, if permitted by applicable law, any reasonable termination fee as determined by Lender from time to time.

**EVENTS OF DEFAULT.** Each of the following, at Lender's option, shall constitute an Event of Default under this Mortgage:

**Payment Default.** Grantor fails to make any payment when due under the Indebtedness.

**Default on Other Payments.** Failure of Grantor within the time required by this Mortgage to make any payment for taxes or insurance, or any other payment necessary to prevent filing of or to effect discharge of any lien.

**Other Defaults.** Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Mortgage or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

**Default in Favor of Third Parties.** Should Grantor default under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Grantor's property or Grantor's ability to repay the Indebtedness or Grantor's ability to perform Grantor's obligations under this Mortgage or any of the Related Documents.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Mortgage or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes

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false or misleading at any time thereafter.

**Defective Collateralization.** This Mortgage or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

**Death or Insolvency.** The dissolution of Grantor's (regardless of whether election to continue is made), any member withdraws from the limited liability company, or any other termination of Grantor's existence as a going business or the death of any member, the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any property securing the Indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Grantor gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Breach of Other Agreement.** Any breach by Grantor under the terms of any other agreement between Grantor and Lender that is not remedied within any grace period provided therein, including without limitation any agreement concerning any indebtedness or other obligation of Grantor to Lender, whether existing now or later.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness.

**Adverse Change.** A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the Indebtedness is impaired.

**RIGHTS AND REMEDIES ON DEFAULT.** Upon the occurrence of an Event of Default and at any time thereafter, Lender, at Lender's option, may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law:

**Accelerate Indebtedness.** Lender shall have the right at its option without notice to Grantor to declare the entire Indebtedness immediately due and payable, including any prepayment penalty that Grantor would be required to pay.

**UCC Remedies.** With respect to all or any part of the Personal Property, Lender shall have all the rights and remedies of a secured party under the Uniform Commercial Code.

**Collect Rents.** Lender shall have the right, without notice to Grantor, to take possession of the Property and, as mortgagee-in-possession, collect the Rents, including amounts past due and unpaid, and apply the net proceeds, over and above Lender's costs, against the Indebtedness. In furtherance of this right, Lender may require any tenant or other user of the Property to make payments of rent or use fees directly to Lender. If the Rents are collected by Lender, then Grantor irrevocably designates Lender as Grantor's attorney-in-fact to endorse instruments received in payment thereof in the name of Grantor and to negotiate the same and collect the proceeds. Payments by tenants or other users to Lender in response to Lender's demand shall satisfy the obligations for which the payments are made, whether or not any proper grounds for the demand existed. Lender may exercise its rights under this subparagraph either in person, by agent, or through a receiver.

**Appoint Receiver.** Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

**Judicial Foreclosure.** Lender may obtain a judicial decree foreclosing Grantor's interest in all or any part of the Property.

**Nonjudicial Sale.** If permitted by applicable law, Lender may foreclose Grantor's interest in all or in any part of the Personal Property or the Real Property by non-judicial sale.

**Deficiency Judgment.** If permitted by applicable law, Lender may obtain a judgment for any deficiency remaining in the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this section.

**Tenancy at Sufferance.** If Grantor remains in possession of the Property after the Property is sold as provided above or Lender otherwise becomes entitled to possession of the Property upon default of Grantor, Grantor shall become a tenant at sufferance of Lender or the purchaser of the Property and shall, at Lender's option, either (1) pay a reasonable rental for the use of the Property, or (2) vacate the Property immediately upon the demand of Lender.

**Other Remedies.** Lender shall have all other rights and remedies provided in this Mortgage or the Note or available at law or in equity.

**Sale of the Property.** To the extent permitted by applicable law, Grantor hereby waives any and all right to have the Property marshalled. In exercising its rights and remedies, Lender shall be free to sell all or any part of the Property together or separately, in one sale or by separate sales. Lender shall be entitled to bid at any public sale on all or any portion of the Property.

**Notice of Sale.** Lender shall give Grantor reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or other intended disposition of the Personal Property is to be made. Reasonable notice shall mean notice given at least ten (10) days before the time of the sale or disposition. Any sale of the Personal Property may be made in conjunction with any sale of the Real Property.

**Election of Remedies.** Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Mortgage, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies. Nothing under this Mortgage or otherwise shall be construed so as to limit or restrict the rights and remedies available to Lender following an Event of Default, or in any way to limit or restrict the rights and ability of Lender to proceed directly against Grantor and/or against any other co-maker, guarantor, surety or endorser and/or to proceed against any other collateral directly or indirectly securing the Indebtedness.

**Attorneys' Fees; Expenses.** If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal. Whether or not any court action is involved, and to the extent not prohibited by law, all reasonable expenses Lender incurs that in Lender's opinion are necessary at any time for the protection of its interest or the enforcement of its rights shall become a part of the Indebtedness payable on demand and shall bear interest at the Note rate from the date of the expenditure until repaid. Expenses covered by this paragraph include, without limitation, however subject to any limits under applicable law, Lender's reasonable attorneys' fees in an amount not less than fifteen percent (15%) of the amount owing on the Indebtedness and Lender's legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services, the cost of searching records, obtaining title reports (including foreclosure reports), surveyors' reports, and appraisal fees and title insurance, to the extent permitted by applicable law. Grantor also will pay any court costs, in addition to all other sums provided by law.

**NOTICES.** Any notice required to be given under this Mortgage, including without limitation any notice of default and any notice of sale shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Mortgage. All copies of notices of foreclosure from the holder of any lien which has priority over this Mortgage shall be sent to Lender's address, as shown near the beginning of this Mortgage. Any party may change its address for notices under this Mortgage by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

**RIGHT TO CURE.** Prior to accelerating the Indebtedness secured by this Instrument, Lender shall give such notice and opportunity to cure as may be required by the Note or Credit Agreement secured by this Instrument. The provisions of this section shall not supersede or limit the application of any controlling provisions of state law concerning notice of default, the right to cure, or the right to reinstate, and nothing in this Instrument shall be deemed a waiver of those provisions; provided, however, that the provisions of the Note or Credit Agreement and any such

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state law requirements shall run concurrently.

**ADDITIONAL COLLATERAL; SECURITY AGREEMENT.** Grantor hereby grants and conveys to Lender a Uniform Commercial Code security interest in the following additional collateral (collectively, the "Additional Collateral"), whether now owned or hereafter acquired by Grantor: (a) all Personal Property, (b) all Rents, (c) all building materials, supplies, inventory, equipment, fixtures, furnishings and/or other goods (but excluding any household goods) intended for use, used, or usable in the construction, repair, renovation, operation or maintenance of improvements constructed or to be constructed on the Real Property, (d) all construction, engineering, and architectural contracts and all plans, drawings and specifications relating to the construction, repair or renovation of improvements on the Real Property, and (e) all attachments, accessories and accessions to any of the foregoing and all replacements of and proceeds from the foregoing. This instrument shall constitute a Security Agreement as to the Additional Collateral, and Lender shall have all of the rights with respect thereto of a secured party under the Uniform Commercial Code as enacted and amended from time to time in the state in which the Real Property is located. Lender is authorized to file at Grantor's expense such financing statements and other filings as Lender shall deem appropriate to perfect and continue Lender's security interest in the Additional Collateral. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall not remove, sever or detach any Additional Collateral from the Real Property, and Grantor shall assemble all Additional Collateral not affixed to the Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three days after receipt of written demand from Lender to the extent permitted by applicable law. The mailing addresses of Grantor (debtor) and Lender (secured party) from which information concerning the security interest granted by this instrument may be obtained (each as required by the Uniform Commercial Code) are as stated on the first page of this Mortgage. This provision is in addition to (and does not supersede) any other provision of this Mortgage granting Lender a security interest in personal property.

**FUTURE ADVANCES AND CHANGES.** This instrument additionally secures future advances and re-advances (both obligatory and optional) made by Lender under the terms of this instrument or pursuant to the Note, Credit Agreement or any of the Related Documents secured hereby, and all parties to this instrument acknowledge that future advances and re-advances are expressly within the contemplation of the parties. The terms of any Note, Credit Agreement or other instrument evidencing the indebtedness or any other obligation secured by this instrument may be changed from time to time by agreement between the holder(s) thereof and the parties obligated thereon as maker(s). Such changes may include, without limitation, the renewal, extension, modification, amendment, refinancing, restatement and/or increase of the obligation. For example, the holder(s) and maker(s) may agree to (a) increase or decrease the interest rate, (b) convert the obligation to or from a closed-end or an open-end obligation, (c) convert the obligation to or from a fixed interest rate obligation or an adjustable interest rate obligation, (d) increase or decrease the payment amount, (e) change the payment schedule, (f) extend or shorten the time during which future advances may be made, (g) advance and/or re-advance loan proceeds, (h) amortize a balloon payment, (i) extend or shorten the maturity date, (j) increase the principal amount, face amount, and/or credit limit of the instrument evidencing the obligation, and/or (k) any combination of the foregoing. To the extent permitted by law, the obligation as so changed from time to time and all future advances and re-advances relating thereto shall be and continue to be secured by this instrument with a priority as of the date this instrument is recorded, regardless of whether any record of such change is filed or recorded or when funds are advanced or re-advanced.

**INFORMATION ABOUT OTHER LIENS.** Lender is authorized to obtain such information about other liens or claims of lien on the Real Property as Lender may reasonably request from the each creditor or other person or entity that has, claims to have, or asserts a lien on the Real Property. The information requested may include, but is not limited to, the nature of the lien or claim of lien, the circumstances under which the lien or claim of lien arose, and the amount required to satisfy the lien or claim of lien. The creditors or other persons or entities that have, claim to have, or assert a lien on the Real Property are authorized and directed to promptly provide to Lender the information requested by Lender. This provision applies whether the lien or claim of lien is superior or subordinate in priority to the lien of this instrument.

**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Mortgage:

**Amendments.** This Mortgage, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Mortgage. No alteration of or amendment to this Mortgage shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

**Annual Reports.** If the Property is used for purposes other than Grantor's residence, Grantor shall furnish to Lender, upon request, a certified statement of net operating income received from the Property during Grantor's previous fiscal year in such form and detail as Lender shall require. "Net operating income" shall mean all cash receipts from the Property less all cash expenditures made in connection with the operation of the Property.

**Caption Headings.** Caption headings in this Mortgage are for convenience purposes only and are not to be used to interpret or define the provisions of this Mortgage.

**Governing Law.** This Mortgage will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of South Carolina without regard to its conflicts of law provisions. This Mortgage has been accepted by Lender in the State of South Carolina.

**No Waiver by Lender.** Lender shall not be deemed to have waived any rights under this Mortgage unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Mortgage shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Mortgage. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Mortgage, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

**Severability.** If a court of competent jurisdiction finds any provision of this Mortgage to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Mortgage. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Mortgage shall not affect the legality, validity or enforceability of any other provision of this Mortgage.

**Merger.** There shall be no merger of the interest or estate created by this Mortgage with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

**Successors and Assigns.** Subject to any limitations stated in this Mortgage on transfer of Grantor's interest, this Mortgage shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Mortgage and the Indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Mortgage or liability under the Indebtedness.

**Time is of the Essence.** Time is of the essence in the performance of this Mortgage.

**Waive Jury.** All parties to this Mortgage hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

**Waiver of Homestead Exemption.** Grantor hereby releases and waives all rights and benefits of the homestead exemption laws of the State of South Carolina as to all Indebtedness secured by this Mortgage.

**DEFINITIONS.** The following capitalized words and terms shall have the following meanings when used in this Mortgage. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Mortgage shall have the meanings attributed to such terms in the Uniform Commercial Code:

**Borrower.** The word "Borrower" means THE GILREATH GROUP LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

**Default.** The word "Default" means the Default set forth in this Mortgage in the section titled "Default".

**Environmental Laws.** The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto.

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**Event of Default.** The words "Event of Default" mean any of the events of default set forth in this Mortgage in the events of default section of this Mortgage.

**Grantor.** The word "Grantor" means THE GILREATH GROUP LLC.

**Guarantor.** The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness.

**Guaranty.** The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

**Hazardous Substances.** The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

**Improvements.** The word "Improvements" means all existing and future improvements, buildings, structures, mobile homes affixed on the Real Property, facilities, additions, replacements and other construction on the Real Property.

**Indebtedness.** The word "Indebtedness" means all principal, earned interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Lender to enforce Grantor's obligations under this Mortgage, together with interest on such amounts as provided in this Mortgage. Specifically, without limitation, Indebtedness includes the future advances set forth in the Future Advances provision of this Mortgage, together with all interest thereon.

**Lender.** The word "Lender" means First-Citizens Bank & Trust Company, its successors and assigns.

**Mortgage.** The word "Mortgage" means this Mortgage between Grantor and Lender.

**Note.** The word "Note" means the promissory note dated November 21, 2017, **in the original principal amount of $1,107,750.00** from Grantor to Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the promissory note or agreement. The maturity date of this Mortgage is November 21, 2024.

**Personal Property.** The words "Personal Property" mean all equipment, fixtures, and other articles of personal property now or hereafter owned by Grantor, and now or hereafter attached or affixed to the Real Property; together with all accessions, parts, and additions to, all replacements of, and all substitutions for, any of such property; and together with all proceeds (including without limitation all insurance proceeds and refunds of premiums) from any sale or other disposition of the Property.

**Property.** The word "Property" means collectively the Real Property and the Personal Property.

**Real Property.** The words "Real Property" mean the real property, interests and rights, as further described in this Mortgage.

**Related Documents.** The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

**Rents.** The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

**GRANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS MORTGAGE, AND GRANTOR AGREES TO ITS TERMS.**

**NOTICE CONCERNING APPRAISAL WAIVER.** The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVE(S) AND RELINQUISH(ES) THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

**GRANTOR:**

THE GILREATH GROUP LLC

By: _____
JAMES M GILREATH, Member/Manager of THE GILREATH GROUP LLC

Signed, acknowledged and delivered in the presence of:

X _____
Witness

X _____
Witness

## LIMITED LIABILITY COMPANY ACKNOWLEDGMENT

STATE OF South Carolina )
) ACKNOWLEDGMENT
COUNTY OF _____ )

The foregoing instrument was acknowledged before me this November 21, 2017 by JAMES M GILREATH, Member/Manager of THE GILREATH GROUP LLC, a South Carolina limited liability company, on behalf of the limited liability company.

_____ (SEAL)
Print Name Gillian Bell
Notary Public in and for the State of South Carolina
My commission expires 4-24-25

(AFFIX NOTARY SEAL HERE)

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PR-813

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FILED OCONEE COUNTY, SC
ANNA K. DAVISON
REGISTER OF DEEDS

2017 NOV 22 P 12:47

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EXHIBIT A

214 and 216 W. Reedy Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number One (1) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

TMS# 267-00-04-048

218 and 220 W. Reedy Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Two (2) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

TMS# 267-00-04-049

222 and 224 W. Ready Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Three (3) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

TMS# 267-00-04-050

226 and 228 W. Reedy Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Four (4) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

TMS# 267-00-04-051

230 and 232 W. Reedy Fork Road -

All that certain piece, parcel or lot of land lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Five (5) of REEDY FORK PLACE on a plat prepared by Gary L. Eades, PLS #19013, dated January 16, 2006 and recorded in Plat Book B120 at Page 10, records of Oconee County, South Carolina, reference to which is invited for a more complete and accurate description.

TMS# 267-00-04-52

This being the same property conveyed unto the Gilreath Group, LLC by deed of Keone R. Trask dated November 21, 2017 and recorded simultaneously with this mortgage in the Register of Deeds Office for Greenville County, South Carolina.

See deed 2317 P& 166

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# EXHIBIT C

Plaintiff's Requests for Production of Documents
to Defendants in Aid of Judgment

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| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
| ENCORE TECHNOLOGY GROUP, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br><br>Defendants. | Case No. 2015-CP-23-05757<br><br>**PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS IN AID OF JUDGMENT** |

**TO: DEFENDANTS and JOSEPH O. SMITH, ESQ. and JOSH HUDSON, ESQ., THEIR ATTORNEYS**

Pursuant to Rules 34 and 69 of the South Carolina Rules of Civil Procedure, Plaintiff Encore Technology Group, LLC hereby requests that Defendants Keone Trask ("Trask") and Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch") (each a "Defendant" and collectively, "Defendants") produce the documents and things identified below for examination, inspection and copying at the offices of the undersigned counsel for Plaintiff, or some other mutually convenient place agreed to by the parties, within **30 days** after the date of service of these requests. These requests are continuing, and Defendant is obliged to supplement its responses to produce all documents responsive to these requests, including such documents as become available to Defendant or of which Defendant becomes aware after its responses hereto are served.

## INSTRUCTIONS AND DEFINITIONS

A. In responding to these requests, produce all documents which are in the custody, possession, or control of Defendant, including documents which are in the

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custody, possession, or control of Defendant's attorneys, investigators for Defendant's attorneys, independent accountants, bookkeepers, financial advisors, agents, or any person acting on behalf of or in concert with Defendant or with any of these persons, and not merely documents from Defendant's own files or records.

B. If Defendant cannot respond to any of the following requests in full, respond to the extent possible, specifying the reasons why Defendant is unable to respond in full, and provide whatever information Defendant has concerning the documents or portions of documents not provided, including the source or sources from which the documents or portions thereof may be obtained.

C. If documents requested are not reasonably available to Defendant in precisely the form requested, or for the particular date or period specified, but could be produced in a modified form and/or for a slightly different date or period, then Defendant is requested to respond to that request in such modified form or for such different date or period.

D. If any document that is responsive to a request is no longer complete or has been altered, state in what respect the document is incomplete or altered and explain the reasons therefor. If any such document is no longer in existence or no longer in Defendant's possession, custody or control, state the disposition which was made of the document, the reasons for such disposition, the date of the disposition, the identity of the person(s) ordering, authorizing and supervising such disposition and the person performing such disposition, the substance or contents of the document disposed of, and the identity of all persons having knowledge of the contents thereof.

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E. If any document or portion thereof is or will be withheld because of a claim of privilege or work product:

(1) state the basis on which the privilege is or will be claimed;

(2) state the author of the document;

(3) identify each person to whom the document indicates the original or a copy thereof was sent, and any others who at any time possessed the document;

(4) state the date of the document; and

(5) state the general subject matter of the document or portion thereof for which the privilege is claimed.

F. The term "document" includes all written, printed, typed, recorded, transcribed, punched, taped or graphic matter of every type and description, **including hard-copy documents, electronically stored information and documents, and emails**, however and by whomever prepared, produced, reproduced, disseminated or made, in the actual or constructive possession, custody or control of Defendant, including but not limited to all writings, letters, emails, text messages, minutes, bulletins, correspondence, telegrams, telexes, memoranda, notes, instructions, sketches, blueprints, renderings, literature, work assignments, notebooks, diaries, calendars, records, agreements, contracts, notes or notations of telephone or personal conversations or conferences, messages, inter-office or intra-office communications, microfilm, circulars, pamphlets, studies, notices, summaries, reports, books, invoices, graphs, photographs, slides, moving pictures, videotapes, film negatives, drafts, checks, credit card vouchers, statements of account, receipts, data sheets, data compilations, computer data sheets and compilations, CAD drawings and data, computer data in any form, work sheets, statistics, speeches or

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other writings, tape recordings, phonograph records, data compilations from which information can be obtained or can be translated through detection devices into reasonably useable form, or any other tangible thing which records information in any way. The term "document" shall include the original and any copies which differ in any manner whatsoever from the original (whether different from the original because of notes made on such copy or otherwise), and any drafts thereof. For purposes of this definition, a document is within the possession or control of Defendant if it is within the possession or control of any of Defendant's attorneys, investigators for Defendant's attorneys, independent accountants, financial advisors, capital sources, banks, suppliers, agents, or any person acting on behalf of or in concert with Defendant or with any of these persons, or otherwise under its possession or control.

G. "Person" means and includes, without limiting the generality of its meaning, any natural person; corporate or business entity; firm; partnership; association; group; governmental body, agency or subdivision; committee; commission; or other organization or entity.

H. The terms "concern," "concerning," "relate to," and "relating to" include referring to, alluding to, responding to, relating to, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, reflecting, analyzing, constituting, evidencing, or in any way relevant to the specified subject within the meaning of Rule 26 of the South Carolina Rules of Civil Procedure.

I. "Communicate," "communication," or "communications" includes any written or oral communication of all kinds including, but not limited to, letters, faxes,

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emails, text messages, telegrams, exchanges of written or recorded information, face to face meetings, and telephone conversations.

J. As used here, the singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronouns so used, and vice versa. The use of any tense of any verb shall be considered to include also within its meaning all other tenses of the verb so used.

K. The term "or" is used in its inclusive sense (*i.e.*, "and/or"). For example, if Defendant is asked to produce all documents which relate to "a or b," then in response produce all documents which relate to "a," all documents which relate to "b," and all documents which relate to "a and b."

L. "Each," "any," and "all" are both singular and plural.

M. "You" and "Your" refer to Defendants Trask and Clear Touch (each may be referred to herein as "Defendant") and their employees, representatives, and agents.

N. "Trask" includes Defendant Trask, Tamara Trask, and any trust managed by and/or benefitting Trask or any member of his family, including but not limited to Trask Family Trust.

**DOCUMENTS REQUESTED**

Please produce the following documents:

1. An electronic copy of all data stored for use with Quicken, Quickbooks, Peachtree and/or other accounting software concerning Trask created on or after January 1, 2013;

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2. Financial statements concerning Trask and Clear Touch dated or created on or after January 1, 2013, including but not limited to profit and loss statements, balance sheets, journals, ledgers, accounting statements and reports;

3. Tax returns -- federal and state – concerning Trask and Clear Touch for tax years during and after January 1, 2013;

4. All financial statements concerning Trask submitted to any bank since January 1, 2013.

5. Bank statements concerning Trask, including but not limited to checking account statements, passbooks, savings account statements, certificates of deposit, etc. dated or created on or after January 1, 2013;

6. Broker account statements concerning Trask dated or created on or after January 1, 2013 for accounts of which the party, his spouse, or his child is a trustee, owner or beneficiary;

7. Deeds to all properties owned by Trask since January 1, 2013, whether or not currently owned;

8. Leases concerning Trask;

9. Notes, mortgages and deeds of trust concerning Trask to and from other parties or third parties;

10. Notes receiveable and accounts receiveable concerning Trask from other parties or third parties;

11. Payment schedules concerning Trask to and from other parties or third parties, including but not limited to Clear Touch, CVTE, or other Clear Touch suppliers or related entities;

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12. Receipts and returned checks concerning Trask for payments on leases, notes, and any other indebtedness since January 1, 2013;

13. Checks for purchases by or for Trask in excess of $1,000 since January 1, 2013;

14. Receipts for purchases or sales by or for Trask of $1,000 or more since January 1, 2013;

15. Any other documents showing payments or transfers to or from individuals or other entities concerning Trask in excess of $1,000, including but not limited to checks, receipts, wire transfers, money orders, cashiers checks, etc., since January 1, 2013;

16. Closing documents on any sale or purchase concerning Trask since January 1, 2013;

17. Wage statements, including but not limited to W-2s and 1099s, concerning Trask since January 1, 2013;

18. Records of ownership, rental, mortgage, security, or use of real or personal property or changes thereto, including but not limited to certificates of title for motor vehicles and boats, inventory lists, etc. concerning Trask since January 1, 2013;

19. Documents prepared for a bank or lender, including but not limited to credit applications, loan applications, written appraisals, financial statements, and lists of assets concerning Trask dated or created on or after January 1, 2013;

20. All records of stock, membership, or other ownership in any corporation, general partnership, limited partnership, or limited liability company or changes thereto concerning Trask since January 1, 2013;

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21. All records of stocks, bonds, debentures, bank accounts, CDs, loans, and other financial accounts owned by Trask currently or at any time or changes thereto since January 1, 2013;

22. Business licenses and permits concerning Trask since January 1, 2013;

23. Appraisals of property owned by Trask since January 1, 2013;

24. Trust agreements concerning Trask; and

25. Records of all financial accounts owned by Trask since January 1, 2013, including but not limited to retirement accounts and all communications regarding same.

26. Lists and/or contact information of all current and former (since January 1, 2013) bookkeepers, tax preparers, accountants, and financial advisors for Trask, Trask Family Trust, Clear Touch, and/or any entity affiliated with them.

Gregory J. English (65470)
Rita B. Barker (77600)
WYCHE, P.A.
44 East Camperdown Way
Post Office Box 728
Greenville, South Carolina 29602-0728
Telephone: 864-242-2800
Telefax: 864-235-8900
*Attorneys for Plaintiff*

April 13, 2018

ELECTRONICALLY FILED - 2018 May 21 1:05 PM - GREENVILLE - COMMON PLEAS - CASE#2015CP2305757

| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE | IN THE COURT OF COMMON PLEAS |
|---|---|
| ENCORE TECHNOLOGY GROUP, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>KEONE TRASK and CLEAR TOUCH INTERACTIVE, INC., f/k/a CLEAR TOUCH INTERACTIVE, LLC,<br><br>Defendants. | Case No. 2015-CP-23-05757<br><br>**CERTIFICATE OF SERVICE** |

This is to certify that I have this date caused to be served on Defendants in this action true and correct copies of the within and foregoing **PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS IN AID OF JUDGMENT** and **SUBPOENAS** by causing the same to be hand delivered to the following:

Joseph O. Smith, Esq.
Josh Hudson, Esq.
ROE CASSIDY COATES & PRICE, P.A.
1052 North Church Street
Greenville, SC 29601

Gregory J. English (65470)
Rita Bolt Barker (77600)

WYCHE, P.A.
44 East Camperdown Way
Post Office Box 728
Greenville, South Carolina 29602-0728
Telephone: 864-242-2800
Telefax: 864-235-8900

Attorneys for Plaintiff
Encore Technology Group, LLC

April 13, 2018

ELECTRONICALLY FILED - 2018 Jul 20 2:16 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE CIRCUIT COURT |
| | ) | |
| COUNTY OF GREENVILLE | ) | Case No. 2017-CP-23-05862 |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | |
| Plaintiff, | ) | **DEFENDANT ENCORE TECHNOLOGY GROUP, LLC'S CROSS-MOTION FOR SUMMARY JUDGMENT** |
| v. | ) | |
| Encore Technology Group, LLC, | ) | |
| Defendant. | ) | |

Defendant Encore Technology Group, LLC ("Encore") hereby moves for summary judgment dismissing the Amended Complaint of Plaintiff Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch"), against Encore pursuant to Rule 56, SCRCP, on the grounds that there is no genuine issue of material fact and Encore is entitled to judgment as a matter of law because:

1. The Amended Complaint is barred by the doctrine of *res judicata*;
2. The Amended Complaint is barred by the statute of limitations; and
3. Clear Touch has no evidence supporting its Amended Complaint.

This motion is based upon the Affidavit of Todd R. Newnam filed herewith, the pleadings, the deposition testimony, other affidavits, and the other matters of record in this action and Case No. 2015-CP-23-05757 between these parties.

Respectfully submitted,

WYCHE, P.A.

By: s/ Gregory J. English

Gregory J. English (SC #65470)
Rita Bolt Barker (SC #77600)
44 East Camperdown Way
Post Office Box 728
Greenville, SC 29602-0728
(864) 242-8200

Attorneys for Defendant

Dated: July 20, 2018





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ELECTRONICALLY FILED - 2018 Jul 20 2:25 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE CIRCUIT COURT |
| | ) | |
| COUNTY OF GREENVILLE | ) | Case No. 2017-CP-23-05862 |
| | ) | |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | |
| | ) | |
| Plaintiff, | ) | **AFFIDAVIT OF TODD R. NEWNAM** |
| | ) | |
| v. | ) | |
| | ) | |
| Encore Technology Group, LLC, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

The undersigned, Todd R. Newnam, after being duly sworn, deposes and states as follows:

1. I am the Chief Executive Officer of Plaintiff Encore Technology Group, LLC ("Encore"), have personal knowledge of the facts set forth herein, except those matters stated upon information and belief, as to which I have information and a good faith belief, am over eighteen years of age and am otherwise competent to give this Affidavit.

2. Plaintiff Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC's ("Clear Touch") claims against Encore in this case arose out of the transaction and occurrence that was the subject matter of Encore's claims against Clear Touch in Encore Technology Group, LLC vs. Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC, et al., Case No. 2015-CP-23-05757 (J. McIntosh presiding) (the "Prior Action"), which was fully tried before a jury in September 2017.

3. Specifically, Clear Touch's claims in this case are based upon:

   a. a Mutual Confidentiality Agreement dated April 9, 2013, which was Clear Touch's Exhibit 20 in the Prior Action (Exhibit A);

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b. a Reseller Agreement dated April 23, 2013, which was Encore's Exhibit 3 in the Prior Action (Exhibit B), and which, in Sections 11.1 ("Confidential Information") and 17.8, "supersede[d] all previously ... agreements ... regarding its subject matter," which included the Mutual Confidentiality Agreement; and

c. alleged trade secrets and confidential information ostensibly protected by the foregoing agreements.

4. In the Prior Action, counsel for Clear Touch deposed me and other Encore employees extensively about the foregoing Mutual Confidentiality Agreement, Reseller Agreement, and Clear Touch's alleged trade secrets and confidential information.

5. In the Prior Action, Clear Touch argued that Encore's breaches of the foregoing Mutual Confidentiality Agreement and Reseller Agreement, and misappropriation of Clear Touch's alleged trade secrets and confidential information, constituted "unclean hands" that precluded an award in favor of Encore against Clear Touch. *See, e.g.,* Defendants' Post Trial Motions dated October 9, 2017, at 35 ("The deposition testimony of Daniele Stengel and the exhibits accompanying it show that Encore has unlawfully retained Clear Touch's **trade secrets** in the form of **confidential reseller price lists** and utilized that information to unfairly compete in the marketplace ....").

6. In the Prior Action, despite Clear Touch's arguments, on September 29, 2017, the jury returned a verdict in favor of Encore and against Clear Touch. On April 2, 2018, this Court entered a Final Order and Judgment in favor of Encore against Clear Touch in the amount of $1,715,335 (the "Judgment").

7. In the Prior Action, Clear Touch stipulated that Keone Trask, who was the principal director and officer of Clear Touch while he was an employee of Encore, facilitated Encore's entering the foregoing Reseller Agreement with Clear Touch, did not disclose his interest in Clear Touch to Encore before the parties entered into the Reseller Agreement or

during his employment with Encore, and that he breached his duty of loyalty and fiduciary duties to Encore.

8. In the Prior Action, Clear Touch admitted it knew that Encore had "other panel manufacturers," and therefore rejected Encore's exclusivity rights, by September 3, 2014, over three (3) years before this action was filed. See Exhibit C. In fact, Defendant Trask admitted he knew that Encore was selling competing "Promethean products from the outset" of his employment in February 2013.

**FURTHER AFFIANT SAITH NOT.**

Todd R. Newnam

SWORN to before me this
16th day of July, 2018.

Notary Public for South Carolina
My Commission Expires: 9/5/23





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# EXHIBIT A

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# MUTUAL CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (this "Agreement") is made and entered into as of the date written below (the "Effective Date") by and between the undersigned parties (collectively, the "Parties"). The Parties are or will potentially be engaged in discussions in contemplation or furtherance of entering into a business relationship between them, and, in the course of such discussions, have disclosed or may disclose to one another certain Confidential Information (as defined below). This Agreement is being entered into by the Parties to memorialize their agreement and understanding regarding the confidential and proprietary nature of the Confidential Information. In consideration of the disclosure of Confidential Information by the Parties to one another, and the mutual covenants and promises set forth below, the parties hereby agree as follows:

1. DEFINITIONS. (A) "Disclosing Party" means a party that discloses any of its Confidential Information to the other party under this Agreement.

(B) "Receiving Party" means a party that receives any Confidential Information from the other party under this Agreement.

(C) "Confidential Information" means any and all confidential, proprietary, and trade secret (as defined by the South Carolina Trade Secrets Act) information of the Disclosing Party of a technical, non-technical, business or other nature (including, without limitation, software, hardware, computer programs, technology, data, prototypes, concepts, processes, materials, products, services, designs, methodologies, business plans, pricing, finances, marketing plans, customers, vendors, prospects or other affairs), that is disclosed to the Receiving Party. Confidential Information shall not include information: (i) which is or becomes known publicly through no fault of the Receiving Party; (ii) learned by the Receiving Party from a third party entitled to disclose it; (iii) already known to the Receiving Party before receipt from the Disclosing Party as shown by the Receiving Party's prior records; or (iv) independently developed by the Receiving Party, as shown by the Receiving Party's records, without the use of Confidential Information.

(D) "Confidential Materials" means any software, hardware, memory storage device, diskette, tape, writing prototype, concept, document, or other tangible item that contains any Confidential Information, whether in printed, handwritten, coded, magnetic, electronic, optical, visual, audible, or other form and whether delivered by the Disclosing Party to the Receiving Party or otherwise made available for the Receiving Party's review.

2. RESTRICTIONS. (A) Confidential Information and Confidential Materials are made available to the Receiving Party solely for the purpose of evaluating a potential business relationship with the Disclosing Party. The Receiving Party will not use, disclose, disseminate or distribute to any third party any Confidential Information or Confidential Materials of the Disclosing Party without the prior written consent of the Disclosing Party. At the request of the Disclosing Party, to the extent commercially practicable, the Receiving Party will promptly return to the Disclosing Party, or, at the Disclosing Party's sole option, destroy all Confidential Information and Confidential Materials (including all copies thereof) of the Disclosing Party in the Receiving Party's possession, and will certify in writing to the Disclosing Party that the Receiving Party has returned or destroyed all such items. After such request, the Receiving Party will make no further use of the Confidential Information and Confidential Materials of the Disclosing Party.

(B) The Receiving Party will use commercially reasonable efforts to protect any Confidential Information and Confidential Materials of the Disclosing Party from any unauthorized use, disclosure, copying, dissemination or distribution. Without limiting the foregoing, the Receiving Party will: (i) make Confidential Information and Confidential Materials of the Disclosing Party available only to those of the Receiving Party's employees and agents who have a need to know the same for the purpose specified in Paragraph 2(A), and who have previously agreed in writing to be bound consistent with the provisions of this Agreement; and (ii) not reverse engineer, decompile or disassemble any Confidential Materials of the Disclosing Party

(C) Notwithstanding anything to the contrary in Paragraphs 2(A) and 2(B), the Receiving Party may disclose or produce any Confidential Information or Confidential Materials of the Disclosing Party if and to the extent required by any court order or governmental action, provided that to the extent permitted by law the Receiving Party gives the Disclosing Party reasonable advance written notice of the same.

(D) All Confidential Information and Confidential Materials of the Disclosing Party are and shall remain the property the Disclosing Party. No right or license, either expressed or implied, under any property right, including patents, patent applications, trademarks, service marks, copyrights, and trade secrets, is granted to the Receiving Party or any other party hereunder, nor is any sale or offer for sale of any kind being made by the Disclosing Party to the Receiving Party hereunder.

(E) In addition to the covenants contained in this Agreement, the Receiving Party will comply with any and all applicable laws relating to the use, disclosure, copying, dissemination and distribution of any Confidential Information or Confidential Materials of the Disclosing Party

3. MISCELLANEOUS. All Confidential Information and Confidential Materials are made available under this Agreement "AS IS", with all defects, errors, and deficiencies, and without any representation or warranty as to completeness or accuracy. This Agreement relates to Confidential Information and Confidential Materials, that is disclosed to the Receiving Party during the period beginning with the Effective Date, and ending two years thereafter, unless such period of effectiveness is extended by the mutual agreement of the parties, in writing. In the case this Agreement is entered into in connection or support of an agreement with a party for transacting business as a customer or vendor of CSI, the Agreement term shall end two years following the termination of the agreement for transacting business. The parties' respective obligations under this Agreement with respect to any Confidential Information and Confidential Materials will be effective during such period and will survive following such period for so long as such information and materials remain Confidential Information and Confidential Materials as defined in Paragraph 1. If any provision in this Agreement is held invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions shall nevertheless continue in full force and effect without being impaired or invalidated in any way. A party's failure to insist on compliance or enforcement of any provision of this Agreement shall not affect the validity or enforceability or constitute a waiver of any rights or remedies such party may have hereunder This Agreement will in all respects be governed by and construed in accordance with the laws of the State of South Carolina, without reference to its conflicts of law rules. The parties agree that any action arising under or in connection with this Agreement will be brought in the state or federal courts located in Greenville County, South Carolina, and the parties hereby parties agree to submit themselves to the exclusive jurisdiction of said courts. This Agreement contains the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior oral or written agreements or understandings between the parties relating to such subject matter. This Agreement may not be modified or amended except by a written instrument duly executed by both parties.

AGREED AND ACCEPTED this 9 day of April, 2013.

ENCORE TECHNOLOGY GROUP, ~~LLC~~

Signature: _____

Name: Chris Powell

Title: CEO

Company Name: Clear Touch Interactive

Signature: Kathy Cruse

Name: Kathy Cruse

Title: Managing Member

CONFIDENTIAL

DEFENDANT'S EXHIBIT NO. 20

ENC 00095583

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# EXHIBIT B

ELECTRONICALLY FILED - 2018 Jul 20 2:25 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

Clear Touch interactive

# RESELLER AGREEMENT

This Reseller Agreement (the "Agreement") is effective April 24, 2013,

**BETWEEN:** **Clear Touch Interactive** (the "Company"), a company organized and existing under the laws of the state of Nevada, with its head office located at:

561 Keystone Avenue
Suite 821
Reno, NV 89503

**AND:** **Encore Technology Group** (the "Reseller"), a company organized and existing under the laws of the state of South Carolina, with its head office located at:

900 East Main Street
Suite T
Easley, SC 29640

## 1. APPOINTMENT

### 1.1 Appointment

Company appoints Reseller and Reseller accepts appointment as an exclusive reseller to market, sell, lease and install Company products ("Products") within the Territory stated in Exhibit A to consumers.

### 1.2 Products Covered

Company Products means the products agreed to between the parties from time to time with any exclusions, additions or discounts Company may make.

### 1.3 Sub-Resellers

Reseller shall not, without Company's prior written approval, appoint sub-resellers, resellers or agents ("Sub-resellers") to market, sell, or lease Company Products. Reseller shall be liable for the acts and omissions of any such Sub-resellers. Should Reseller resell Products to any Sub-reseller, and Products are further resold, the final end-user may not receive manufacture warranty or technical support.

### 1.4 Sales Outside Territory

Reseller shall in no way market, distribute, export, sell, lease or install Company Products outside the Territory without Company's prior written approval. Company will not ship on any Purchase Orders ("P.O.s") issued by Reseller outside the Territory.

Ex. 3

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# EXHIBIT C

ELECTRONICALLY FILED - 2018 Jul 20 2:25 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

## Greg English

**From:** Keone Trask <kt@getcleartouch.com>
**Sent:** Wednesday, September 03, 2014 4:21 PM
**To:** David Masters; Russell Young
**Subject:** Notice of Contract Change
**Attachments:** Clear Touch - Encore Reseller Agreement.pdf

David / Russell -

Please accept this email as official notification of contract change. In review of the existing contract between Clear Touch Interactive and Encore Technology Group it was observed that several key areas are no longer applicable.

The attached Proposed Reseller Agreement address these areas and extends opportuntiies.

Upon execution of the new agreement the existing agreement will be null and void.

This email serves as 30 notice of contract change required by the previous agreement.

Key Areas:

- Exclusivity (no longer applicable - you now have other panel manufactures)
- Territories (expanded to continental United States - to align with TIPS contract)
- Pricing (reflects changes in partner status and ordering vs. quantities)
- Payment Terms
- Credit Lines

Please let me know if you have any other questions or comments.

Keone

Clear Touch

Keone Trask / Director of Business Development
864-430-0361/ kt@getcleartouch.com

Clear Touch Interactive
561 Keystone Avenue, Suite 821, Reno NV 89503
http://www.getcleartouch.com

This e-mail message may contain confidential or legally privileged information and is intended only for the use of the intended recipient(s). Any unauthorized disclosure, dissemination, distribution, copying or the taking of any action in reliance on the information herein is prohibited. E-mails are not secure and cannot be guaranteed to be error free as they can be intercepted, amended, or contain viruses. Anyone who communicates with us by e-mail is deemed to have accepted these risks. Clear Touch Interactive is not responsible for errors or omissions in this message and denies any responsibility for any damage arising from the use of e-mail. Any opinion and other statement contained in this message and any attachment are solely those of the author and do not necessarily represent those of the company

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF GREENVILLE | ) | |
| | ) | |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No.: 2017-CP-23-05862 |
| | ) | |
| Plaintiff, | ) | **MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** |
| v. | ) | |
| Encore Technology Group, LLC, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

The Plaintiff, Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, (*hereinafter* "Plaintiff" or "Clear Touch"), submits this Memorandum in Opposition of Defendant's Cross-Motion for Summary Judgment because Plaintiff's claims are: (1) timely filed under the applicable statute of limitations; (2) not barred by the doctrine of *res judicata*; and (3) supported by sufficient evidence. Therefore, Clear Touch's claims may proceed and genuine issues of material fact exist warranting denial of Defendant's motion for judgment as a matter of law.

## I. INTRODUCTION

This matter was commenced by the filing of a Summons and Complaint on September 12, 2017, with an Amended Complaint filed the following day, alleging causes of action against Encore for (1) Breach of Contract – Mutual Confidentiality Agreement; (2) Breach of Contract – Reseller Agreement; (3) Trade Secret Misappropriation; and (4) Conversion. With the exception of the Breach of Reseller Agreement claim, all these causes of action arose out of Encore's misappropriation of Clear Touch's confidential and trade secret information and use of it to unfairly compete in the marketplace following its decision to break ties with the company. Specifically, Encore retained and utilized Clear Touch's confidential and trade secret information,

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mainly in the form of its pricing lists, to unfairly compete with it in the interactive panel supply business, including by sharing it with a competing supplier and using it to underbid Clear Touch and convert opportunities from the company following its decision to end its business relationship with the Plaintiff. Such unlawful practices Clear Touch believes continue to date.

## II. FACTUAL AND PROCEDURAL HISTORY

### A. The Previous Action

On September 18, 2015 Encore filed an action against Clear Touch and Keone Trask alleging numerous causes of action, all arising out of Trask not disclosing his relationship with Clear Touch while an employee of Encore in violation of various common law and contractual obligations to the company, misappropriation of company trade secrets and company data, and defamatory statements concerning Encore, as alleged in the Complaint. Those alleged illegal acts led Encore to decide to terminate its relationship with Clear Touch in the Summer of 2015 and start carrying ViewSonic interactive panels. It provided formal notification of the termination to Clear Touch on September 11, 2015 and filed suit about a week later. That case was litigated for two years culminating, in a week-long trial in September 2017.

In that previous matter, the parties engaged in extensive discovery leading up to trial. Encore's withholding of evidence and litigation tactics in the course of that case necessitated the filing of this matter as a separate action. The relevant timeline of those events is as follows:

***Initial Discovery Requests and Production(s)***

- Clear Touch served its first set of discovery requests on April 25, 2016.
- Encore served written responses to those requests on July 14, 2016 without producing any actual documents and instead said responsive documents would be made available.

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- On July 15, 2016 Clear Touch sent Encore a detailed letter outlining the deficiencies in its discovery responses, and requested it supplement its written responses and provide a supplemental document production to rectify the many shortcomings.

- Encore provided supplemental written responses and a document production on August 8, 2016 which failed to rectify many, if not most, of the deficiencies outlined in Clear Touch's July 15th letter and were non-responsive or insufficiently responsive to the discovery requests.

- Clear Touch filed a motion to compel seeking several categories of information and documents, including requesting Encore provide a privilege log. Encore also filed a motion to compel for several items.

- Those motions resulted in the Court issuing a November 17, 2016 Discovery Order.

- Each party made a series of productions following issuance of the Discovery Order.

***Encore's Supplemental Productions***

- 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.

a. In response to the Discovery Order, on November 21, 2016, Encore produced a CD containing responsive documents ENC 00000510 to ENC 00027245 (26,735 pages of documents).

b. Then on November 22, 2016, Encore produced two additional CDs containing documents ENC 00027246 to ENC 59470 and ENC 00059471 to ENC 95581 (CD 2). This production was in excess of an additional 68,000 pages of documents.

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c. Much of this extensive production was in separate pdf files and unusable in numerous respects, including not containing attachments to the emails which comprised the majority of the production.

d. To address these issues, on December 29, 2016, Encore served Clear Touch with a flash drive containing a supplemental production with documents Bates numbered ENC 00027246 through ENC 00202344 to replace previously produced ENC 00027246 through ENC 00095581. This production included over 175,000 new pages of documents never before produced to Clear Touch. In addition, the documents were produced in over 32,000 individual files.

e. Clear Touch attempted to get the December 29th production in a form, format or platform that made it manageable and reviewable. Those efforts were futile given the manner in which documents were produced.

- Due to the sheer volume and manner in which the documents were produced, including lack of any discernable organization, Clear Touch had to upload the documents into specialized review software in order to review those files.

- In order to do this, Clear Touch requested and Encore agreed to provide documents bates stamped "ENC 000513- 00202522" in native file format. Encore provided what was supposed to be all the documents encompassed in that bates range in native format. Those documents were uploaded to specialized review software in order for them to be in a reviewable format.

- Given those circumstances, Clear Touch requested Encore consent to a continuance of the trial date. Encore refused and necessitated the filing of Clear Touch's first Motion for Continuance of Trial on March 10, 2017.

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- Encore fiercely opposed that Motion.

- The Court granted Clear Touch's motion, continuing trial and placing it for a date certain the week of August 28, 2017.

- Clear Touch continued the time-consuming and costly review of the supplemental production and discovered serious deficiencies which it addressed in an April 6, 2017 letter.

- In response, Encore sent an April 13, 2017 letter along with some additional documents. (Exh. A - 4.13.17 Encore Ltr.). That correspondence also included a document labeled "Privilege Log" which was comprised of four paragraphs of general objections to broad categories of documents. Continued attempts to obtain an actual privilege log from Encore were fiercely resisted.

- Clear Touch was forced to file a Second Motion to Compel on April 26, 2017, seeking amongst other things, an actual privilege log from Encore. A hearing on Clear Touch's Second Motion to Compel was set for Monday, June 5, 2017.

***The May 31, 2018 Production***

- On May 31, 2017, weeks after 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. (Exh. B - 5.13.17 Encore Ltr.). The cover letter accompanying that late production admitted that in the over a year and a half since filing that action ***Encore had not searched for the name of the company they sued - "Clear Touch" - when searching for responsive emails***. (Exh. B at 2)(Stating Encore had searched for "ClearTouch" but not "Clear Touch" with the space between the words which is the actual name of the company.).

- Clear Touch undertook review of those 10,000 new pages of materials; a process which was difficult and time-consuming due to the volume and manner of production.

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- After receiving the May 31st letter, privilege log and supplemental production, the parties continued to work to rectify issues related to Clear Touch's Second Motion to Compel through email correspondence and in a phone call the morning of June 5th. In that call, they agreed to forego the hearing as they believed an agreement on those issues had been reached. Resolution of those issues took some time and impaired Clear Touch's ability to move forward with defending the case, by, among other things, hindering the taking of several depositions, including a corporate 30(b)(6) deposition covering over 30 issues, and that of Encore's expert.

- The May 31st production contained documents that for the first time alerted Clear Touch to the possibility that it may have one or more claims against Encore due to its misappropriation and illegal usage of the company's confidential and trade secret information to unfairly compete with it in the marketplace. (Exh. C – Collection of Docs. From 5.31.17 Production).[1] This revelation was in June of 2017; approximately two months prior to the trial date of what was already a complex business case related to Mr. Trask's and Clear Touch's alleged actions preceding Encore's decision to terminate the relationship.

- To make matters worse, Encore informed Clear Touch it would not have availability for any depositions until the last week of June 2017 at the earliest, leaving Clear Touch approximately two months to take numerous depositions it had not been able to proceed with under the circumstances created by Encore's discovery tactics, including withholding of evidence and not producing a real privilege log until May 31, 2017, and prepare a complex case for a week-long trial.

- Furthermore, following the Parties' morning call on June 5th, it was revealed that Encore had not included all documents labeled "ENC 000513 - 00202522" in the native file format

[1] The pricing has been redacted from the filed copy of this exhibit due to the confidential and sensitive nature of that information. Unredacted copies will be provided to the Court at the hearing on these motions.

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as agreed. These were the files loaded to the review software and reviewed by Clear Touch. The extent of that omission was unknown at the time. It took further exchanges between the parties during which time Encore defended its omission by claiming the native format of the document Clear Touch discovered was omitted was "paper" and therefore rightfully left out. Encore later claimed that this single document Clear Touch happened to discover was omitted was the only document not in the files provided.

- From the moment of the May 31, 2017 production, Encore did not take its withholding of evidence seriously and attempted to downplay its significance in order to push the case to trial.

- Given the circumstances created by Encore's actions and discovery tactics, an August 2017 trial date was unreasonably burdensome to Clear Touch. Despite that, Encore would not consent to a continuance of the trial date and Clear Touch was forced to file a Second Motion for Continuance on June 6, 2017. Encore fiercely opposed that Motion as well, claiming that the documents produced on May 31st were irrelevant to the case and their late production therefore did not warrant continuance of the trial date. The Court gave the parties a few additional weeks and set the trial for the week of September 25, 2017.

**B. The Present Action**

Given the circumstances created by Encore's actions, Clear Touch set about preparing for trial of the original action and filed the instant case on September 12, 2017. This was the only way Clear Touch could have a full and fair opportunity to seek redress for Encore's unlawful actions. The extent and resulting damage of these actions could not possibly be adequately ascertained before the September trial date. To do so, Clear Touch would have to amend its pleadings to include counterclaims based upon different facts and events all occurring after what Encore

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deemed the relevant timeframe, issue discovery requests related to those events, identify and depose additional witnesses involved in or related to Encore's illegal unfair competitive actions, and establish the extent of damage caused by those acts likely by use of an economic expert. Such a feat is undeniably impossible in under four months; much less when that time is dedicated to preparing to try a week-long case in a complex matter filed two years prior to trial. Encore knew this, created the untenable situation, and necessitated Clear Touch file this action to protect itself and ensure Encore would have to answer for its illegal activities.

Encore was able to try the previous action before a jury who never heard of its unlawful acts and ultimately obtained a favorable verdict against Trask and Clear Touch.

***Response(s) and Motions***

In response to Clear Touch's Complaint, Encore filed an Answer and Counterclaims on November 16, 2017 asserting counterclaims for (1) Breach of Contract; (2) Breach of Contract Accompanied by Fraud; and (3) Abuse of Process. The first two counterclaims are based upon Clear Touch's alleged breach(es) of the Reseller Agreement, with Encore copying and pasting the allegations from the previous action between the parties as the purported facts supporting those claims. (*See* Ans. at ¶ 65-93). The Abuse of Process counterclaim is based upon Clear Touch filing this action. Clear Touch filed an Answer to the Counterclaims on December 21, 2017, asserting that Encore's counterclaims were barred by res judicata, among other things.

Clear Touch served its first set of discovery requests on February 16, 2018. (Exh. D). Those requests included requests for documents and information concerning Encore's bidding of opportunities well after it ended its relationship with Clear Touch, including the bids, quotes, purchase orders, and invoices related to a large 2017 sale to Winston Salem. (*See e.g.* Exh. D at RFP # 20). The deadline for Encore responding to those requests passed without any response.

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On March 21, 2018, Encore filed a Motion to Dismiss. The next day Encore requested an extension on its response deadline of 30 days after that motion was resolved. Clear Touch granted that request.

On March 27, 2018, Clear Touch filed a Motion to Dismiss Encore's contract counterclaims upon res judicata grounds because they are both claims arising out of the same transactions and occurrences involved in the previous action it could and should have brought in that case but chose not to do so. The same day, Clear Touch filed a Motion for Partial Summary Judgment on Encore's Abuse of Process counterclaim upon the basis that it cannot establish the elements of that cause of action; namely that it is unable to show a definite act or threat not authorized by the process as required to sustain that claim.

Four months later, and ten days prior to the hearing set for the three previously filed Motions, Encore filed what it titled a Cross-Motion for Summary Judgment asserting that Clear Touch has "no evidence to support its Amended Complaint," and its claims are barred by the statute of limitations and res judicata. Encore's Cross-Motion for Summary Judgment should be denied under the facts and applicable law.

## III. APPLICABLE LAW

Summary judgment is proper when there is no genuine issue of material fact and the nonmoving party is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); *M&M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S.E.2d 262 (S.C. App. 2008); *see also Bruce v. Durney,* 341 S.C. 563, 534 S.E.2d 720 (Ct.App.2000) (holding a motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as a matter of law). The court must view the evidence and all reasonable inferences

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that may be drawn from it, in a light most favorable to the nonmoving party. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 644 S.E.2d 58 (2007). Finally, "[a] party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but must 'set forth specific facts showing that there is a genuine issue for trial.'" *Id* at 526. Once the moving party carries its initial burden, the "opposing party must…'do more than simply show that there is some metaphysical doubt as to the material facts 'but 'must come forward with specific facts showing there is a *genuine issue for trial.*'" *Baughman v. Amer. Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)(internal citations omitted)*(*emphasis in original*).

**A. Clear Touch's Claims are Not Barred by *Res Judicata***

"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 the prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). "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." *Id.*

"Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct.App.1997). In *Beall v. Doe*, the Court distinguished the two concepts as follows:

> The doctrines of *res judicata* and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.

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281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 190 n. 1 (Ct. App. 1984) (citations and quotation marks omitted).

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citation and quotation marks omitted). "The doctrine [of res judicata] flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action." *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct.App.2007)(citation omitted); *see also S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248, 551 S.E.2d 274, 278 (Ct.App.2001) ("'The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action.'" (*quoting First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945))).

"The doctrine of collateral estoppel, or issue preclusion, on the other hand, rests generally on equitable principles." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct.App.1995) (*citing Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)). In *Watson*, the South Carolina Supreme Court contrasted the origin of the doctrine of collateral estoppel with the origin of res judicata:

> Estoppel rests generally on equitable principles, which res judicata does not, but upon the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and interest *reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation[ ] )[.] ... *Res judicata* is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

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205 S.C. at 221–22, 31 S.E.2d at 319–20 (citations omitted); *see also First Nat'l Bank of Greenville*, 207 S.C. at 24, 35 S.E.2d at 56–57 (*citing Watson*) (contrasting the origins of *res judicata* and collateral estoppel).

Encore argues that Clear Touch's claims are barred by the doctrine of *res judicata* because they arise out of the same transaction or occurrence that was the subject of a prior action between the parties and could have been asserted in that previous case. Encore's contentions are inaccurate and fail to take into account the fact that its own actions necessitated the filing of this action because they robbed Clear Touch of the ability to fully and fairly litigate the causes of action asserted in this case.

***1. Clear Touch's Claims Do Not Arise Out of the Same Transaction or Occurrence***

Clear Touch's claims in this case do not arise out of the same transaction or occurrence underlying those alleged by Encore in the previous action and therefore are not barred by res judicata.

"*What factual groupings constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically*, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *South Carolina Public Interest Found. v. Greenville County*, 401 S.C. 377, 388, 737 S.E.2d 502, 508 (Ct. App. 2013)(*emphasis in original*)(internal citations omitted).

Encore's misappropriation of Clear Touch's trade secrets and use of that information to unfairly compete with it in the marketplace forms the basis of three out of the four claims asserted in this case – (Breach of Contract – Mutual Confidentiality Agreement; Violation of the SCTSA;

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and Conversion). Those claims and facts underlying them are distinct transactions and occurrences in both a factual and temporal sense from those in the previous action.

First, the current claims rely on Encore's misappropriation of Clear Touch's trade secrets to unfairly compete with it in the marketplace, including by sharing that information with its competitor and using it to bid sales/jobs. The facts underlying those claims are therefore distinct from those Encore relied upon to establish liability for its causes of action in the prior suit, which by its own words were "Defendants' [Clear Touch's and Trask's] breaches of their contractual and fiduciary duties to Encore." (Exhs. A & B). Second, those actions (underlying Encore's claims in the previous matter) all occurred prior to the relationship being terminated in September 2015. (*See* Exhs. A & B). The facts and occurrences underlying Clear Touch's claims in this case however involve acts which occurred following the termination of the parties' business relationship in September 2015, a time which Encore deemed irrelevant to that litigation. (*See* Exhs. A & B). Therefore, the claims at issue are based upon facts distinct from those underlying the claims in Encore's previous case and as such they are not barred by the doctrine of res judicata.

***2. Encore's Actions Prevented Clear Touch from Being Able to Assert its Claims in the Prior Case by Robbing it of a Full and Fair Opportunity to Litigate***

As detailed above, Encore's actions, including withholding of evidence in the previous matter prevented Clear Touch from pursuing its claims as counterclaims in that case. *Venture Engineering, Inc. v. Tishman Const. Corp. of South Carolina*, 360 S.C. 156 (Ct. App. 2004)(Essential element of res judicata is adjudication of the issue in the former suit and doctrine prevents relitigation of claims that were or could have been raised in that action.). Therefore, res judicata cannot bar the company from seeking redress for Encore's unlawful actions in this case.

In *Judy v. Judy*, the South Carolina Supreme Court addressed the question of whether a claim should have been raised in a prior action stating:

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> 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. 160, 171, 712 S.E.2d 408, 414 (2011). The Court went on to explain that term "cause of action" for *res judicata* purposes: "[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.* (citations and quotation marks omitted). "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 Public Int Found. v. Greenville County*, 401 S.C. 377, 390 (Ct. App. 2013)(internal citations omitted). As noted above, the present claims do not arise out of the same transaction or occurrence as those underlying Encore's causes of action in the previous matter and therefore need not have been brought in that case. This is not to mention that Encore itself deemed these matters "irrelevant" to the prior case on two separate occasions. (*See* Exhs. A & B).

Furthermore, assuming arguendo *res judicata* applies to Clear Touch's claims, there are obvious and compelling policy reasons for the Court to decline to apply the doctrine because Encore's actions robbed Clear Touch of a full and fair opportunity to litigate the issues forming the basis of its claims. *See SC Pub. Int. Found* at fn9 (Noting 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

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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.") *see also Nandwani v. Queens Inn Motel*, 2012 WL 10844387 at *11-12 (Ct. App. 2012)(Unreported). The purpose of res judicata (the prevention of relitigation 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 for its claims. The current situation is of the latter variety because Encore's actions robbed Clear Touch of a full and fair opportunity to litigate the misappropriation of its trade secrets.

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 should make Encore face the consequences of its own actions. To do otherwise would encourage 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.

**C. Clear Touch has Sufficient Evidence for its Claims to Proceed**

Encore summarily claims that Clear Touch has "no evidence supporting its Amended Complaint." This is not the case.

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A party overcomes a motion for summary judgment by submission of a "mere scintilla of evidence" in support of its claims. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330 (2009). Clear Touch has evidence to support the causes of action asserted in this case as reflected by the collection of a sampling of some of the documents included in the May 31, 2017 production. (Exh. C). As those documents reflect, Encore has retained and used Clear Touch's pricing information to compete with it in the market. The extent of that unlawful activity is unknown at this time but there certainly is sufficient evidence presented to overcome summary judgment under the low and deferential State standard.

**B. Clear Touch's Claims are Not Barred by the Statute of Limitations**

Clear Touch does not know how Encore can argue its claims are barred by the statute of limitations given the timeline of events; yet it has made such a claim in its Motion.

Generally, in South Carolina, a plaintiff has three years from the time he knew or should have known he had a cause of action to bring suit. S.C. Code Ann. §§ 15-3-530, 535; *Maher v. Tietex Corp.*, 500 S.E.2d 204 (S.C. Ct. App. 1998) ("Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach or could or should have discovered the breach through the exercise of reasonable diligence."). A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist. *Benton v. Roger C. Peace Hosp.*, 443 S.E.2d 537 (S.C. 1994). The statute begins to run from this point – the date upon which plaintiff discovers the injury – and not when Plaintiff learns the identity of all the alleged wrongdoers. *Tollison v. B&J Machinery Co., Inc.*, 812 F. Supp. 618, 619-20 (D.S.C. 1993).

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Clear Touch knew or reasonably should have known through the exercise of reasonable diligence that it had potential claims against Encore after receiving and having the chance to review the May 31, 2017 production. It filed suit less than four months later; well within any applicable statute of limitations.

## IV. CONCLUSION

Based on the foregoing, no genuine issues of material fact exist and Encore is not entitled to judgment as a matter of law. S.C. R. Civ. Pro. 56.

Respectfully submitted,

**ROE CASSIDY COATES & PRICE, P.A.**

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July 29, 2018

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE<br><br>Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Encore Technology Group, LLC,<br><br>Defendant. | ) | IN THE COURT OF COMMON PLEAS<br>THIRTEENTH JUDICIAL CIRCUIT<br><br>C.A. No.: 2017-CP-23-05862<br><br>**MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** |

# EXHIBIT A

## April 13, 2017 Letter from Encore

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April 13, 2017

BY FIRST CLASS MAIL AND BY E-MAIL

Joseph O. Smith, Esq.
ROE CASSIDY COATES & PRICE, P.A.
1052 North Church Street
Greenville, SC 29601

*Re: Encore Technology Group, LLC v. Trask, et al.*, Case No. 2015-CP-23-05757

Dear Josh:

In response to your letter dated April 6, 2017, we hereby serve upon you Plaintiff's Privilege Log. Contrary to the assertions in your letter, Encore has produced all responsive, non-privileged documents to you.

Notwithstanding the foregoing, solely to attempt to avoid additional discovery disputes, Encore is producing the following documents via Sharefile:

1. Post-September 10, 2015, documents regarding Mr. Trask and Clear Touch. As you know, Encore terminated its Reseller Agreement with Clear Touch on September 10, 2015, because of Defendants' breaches of their contractual and fiduciary duties to Encore. Those breaches formed the basis of the lawsuit filed on September 18, 2015. Accordingly, we believed 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 as ENC 00203249–203437, none of which is relevant to the litigation.

2. Expert materials. All responsive written materials have been produced. The other information you reference was shared orally with the expert. Of course, you may inquire about this information when you depose him. Although we do not believe they are responsive, we are producing the cover and scheduling messages with the expert and re-producing the substantive documents that were attached as ENC 00203438-204370.

3. Encore financial documents. You request four additional categories of documents:

a. Revised Excel spreadsheet. Encore produced to you an Excel spreadsheet as it existed in the ordinary course of business in both PDF and native formats. Because you

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have the document in native format, you could hide any columns that you do not want to use in questioning the witnesses. Although it has no obligation to create a new document for you, Encore has attempted to create a new, abbreviated version of this spreadsheet based upon your prior e-mail on the subject, which is produced as described in Section 3.d below.

b. Encore's Profit and Loss Statement from May 2014-December 2016. The Discovery Order directed Encore to produce financial documents "pertaining only to the interactive video panel components of its business and documents supporting its damage claims concerning such business." Encore has done this. The broader Profit and Loss Statement you request from May 2014-December 2016 goes beyond this requirement and is after your client left Encore's employ, so is neither responsive nor relevant.

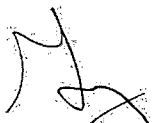
c. Encore's Line of Credit documents. Encore has already produced all documents reviewed by its expert regarding its line of credit. Nevertheless, Encore is producing documents ENC 00203219–203248, which provide additional information about its line of credit.

d. Interactive Video Financials for December 2016. This information was not in existence when the Discovery Order was entered and Encore made its production of these financials. Encore is producing documents ENC 00202557–203218 to include December 2016.

In your e-mail dated April 12, 2017, you also requested any documents from July – September 2015 discussing or pertaining to Encore's termination of the Reseller Agreement. The only such documents are privileged attorney-client communications and therefore there is nothing else to produce.

With the foregoing, Encore has exceeded its obligations in satisfying your requests.

Sincerely,



Gregory J. English

864.242.8247
genglish@wyche.com

GJE/sc

cc: Mr. Todd Newnam (by-email)

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE<br><br>Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Encore Technology Group, LLC,<br><br>Defendant. | ) | IN THE COURT OF COMMON PLEAS<br>THIRTEENTH JUDICIAL CIRCUIT<br><br>C.A. No.: 2017-CP-23-05862<br><br>**MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** |

# EXHIBIT B

## May 31, 2017 Letter from Encore

ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

W Y C H E

Attorneys at Law

May 31, 2017

BY HAND DELIVERY AND BY E-MAIL

Joseph O. Smith, Esq.
ROE CASSIDY COATES & PRICE, P.A.
1052 North Church Street
Greenville, SC 29601

*Re:* *Encore Technology Group, LLC v. Trask, et al.*, Case No. 2015-CP-23-05757

Dear Josh:

We were surprised by Defendants' Second Motion to Compel filed on May 15, 2017, which inaccurately stated that "Defendants have attempted to resolve these issues with the Plaintiff in good faith." To the contrary, following our letter dated April 13, 2017, the only remaining issue you raised with us concerned the Privilege Log, which Rita was actively trying to resolve with you by telephone.

Defendants, however, filed a Second Motion to Compel that raises three issues:

1. Plaintiff's Response to Defendants' Request 14: Defendants expressly made these same arguments in their first motion to compel and they were denied. *See* Discovery Order filed November 17, 2016, at 4 ("The balance of Defendants' Motion to Compel is denied ...."). In addition to not consulting with us about this, it is improper to seek to re-litigate this issue.

2. Privilege Log: As you know, we offered repeatedly to amend the privilege log to try to satisfy your concerns regarding it. Enclosed is our Amended Privilege Log, which we believe should satisfy you completely.

3. Post-September 10, 2015, documents regarding Mr. Trask and Clear Touch. As you know, Encore terminated its Reseller Agreement with Clear Touch on September 10, 2015, because of Defendants' breaches of their contractual and fiduciary duties to Encore. Those breaches formed the basis of the lawsuit filed on September 18, 2015. Accordingly, we believed 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, solely to resolve the issue, we have amended the Privilege Log and are producing documents that fall after this date.

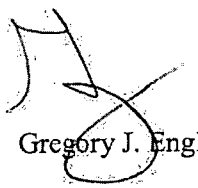
W Y C H E
PROFESSIONAL ASSOCIATION
44 East Camperdown Way, Greenville, SC 29601- 3512
p: 864.242.8200 | f: 864.235.8900
www.wyche.com

You will note that the documents produced on the enclosed flash drive include additional email communications beyond those produced on April 13, 2017 as ENC 00203249–204370. Following your conversations with Rita regarding the privilege log, Encore re-conducted its email search in an effort to ensure that all documents had been produced. Upon manually reviewing this search, Encore discovered the search terms inadvertently excluded certain emails, although none of them are relevant to this case.

Specifically, Encore discovered that, although its IT Department used "ClearTouch" in earlier searches, the spaced version "Clear Touch" was inadvertently left off. In this latest review, Encore also discovered that, when it endeavored to reduce the production of duplicate emails for the April 13, 2017 search (following your earlier protestations of duplications in Encore's prior productions), in some cases the effort to de-duplicate had deleted initial emails that were part of a multi-thread chain but were in an attached rather than string format. Encore has remedied these issues. Again, we do not believe that these additional emails are relevant to this case, but are producing them herewith as ENC 00204371-00214720.

Please confirm that the foregoing satisfies your requests.

Sincerely,



Gregory J. English

864.242.8247
genglish@wyche.com

GJE/sc

cc: Mr. Todd Newnam (by-email)



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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE<br><br>Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Encore Technology Group, LLC,<br><br>Defendant. | ) | IN THE COURT OF COMMON PLEAS<br>THIRTEENTH JUDICIAL CIRCUIT<br><br>C.A. No.: 2017-CP-23-05862<br><br>**MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** |

# EXHIBIT C

## Collection of Documents from 5.31.17 Production

ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Wednesday, February 3, 2016 1:10 PM
**To:** Matt Fowler <mfowler@encoretg.com>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** RE: Request for Quote - Spartanburg SD #5 - ViewSonic
**Attach:** Quote015877v2 - (2) ViewSonic 65In ITV, Int PC, Fixed Std, Install 2-3-16.pdf; Quote016290v1 - (2) ViewSonic 70in ITV, Int PC, Fixed Std, Install 2-3-16.pdf

Matt,

Good afternoon! I updated the existing Quote015877 for the ViewSonic 65". It was for Qty 2 and I kept at that quantity. I created a new quote for the ViewSonic 70" Qty 2.

Let me know if you want anything changed on these.

Thanks!

**From:** Matt Fowler
**Sent:** Wednesday, February 03, 2016 12:06 PM
**To:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** FW: Request for Quote - Spartanburg SD #5 - ViewSonic

Joy,

I looked at the Direct pricing from ClearTouch that we had from a while back. Unless they've changed their pricing, which I don't see how they could too much, below is what it looks like: that is 16 points margin besides the PC which is 14.8. I know we have to think about shipping as well, but didn't ClearTouch charge shipping?

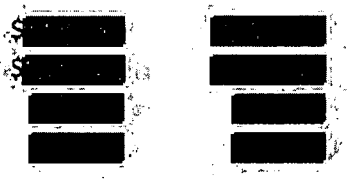
Let me know what you think. If you are good with it, we can update the existing quote in CW to include the 70" option as well.

**Clear Touch**

| | |
|---|---|
| CTI-5065H+UH10 | $[redacted] |
| CTI-5070H+UH10 | [redacted] |
| CTI-5000X-PC85 | [redacted] |
| CTI-5000X-STND | $[redacted] |

**ViewSonic**

CDE6560T
CDE7060T
LB-STND-003
NMP710-P8



From: Dendy Wakefield [mailto:DendyW@synnex.com]
Sent: Wednesday, February 03, 2016 10:53 AM
To: Joy Snelgrove <jsnelgrove@encoretg.com>; sales5509 <sales5509@synnex.com>
Cc: Matt Fowler <mfowler@encoretg.com>
Subject: RE: Request for Quote - Spartanburg SD #5 - ViewSonic

SYNNEX CORPORATION

## QUOTE ORDER INFORMATION
### As of 2/3/16

| Reseller Account | PO/Quote# | Pricing |
|---|---|---|
| 157440 | WQ62867473 | Vendor SPA(VS) |

**Bill-to**
ENCORE TECHNOLOGY GROUP, LLC
2000 WADE HAMPTON BLVD, SUITE 210
GREENVILLE, SC 29615
**Terms**
1/2% 10 NET 30(EE)

**Ship-to**
ENCORE TECHNOLOGY GROUP, LLC
2000 WADE HAMPTON BLVD, SUITE 210
GREENVILLE, SC 29615
**Reseller**
ENCORE TECHNOLOGY GROUP, LLC
2000 WADE HAMPTON BLVD, SUITE 210
GREENVILLE, SC 29615

**Quote Description**

| Show Rebate | SKU SYNNEX P/N | Mfg. P/N | UPC# | Description | MSRP | Availability | Reseller Price | Qty | Ext. Price |
|---|---|---|---|---|---|---|---|---|---|
| | 4357443 | CDE6560T | 766907801316 | VIEWSONIC 65 (64.5 viewable) 10-point interactive display, 1920x1080p resolution and 7H hard anti-glare screen | $5,599.00 | Vendor Drop Ship | $2,630.00 includes ($1,015.00) rebate expiring 3/31/16 | 40 | $105,200.00 |
| | 4214522 | CDE7060T | 766907801514 | VIEWSONIC 70 (69.5 viewable) | $7,299.00 | Vendor Drop Ship | $3,150.00 includes | 40 | $126,000.00 |

ENC 00213390



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ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Wednesday, September 16, 2015 1:09 PM
**To:** jason.webster@viewsonic.com
**Cc:** Matt Fowler; Joy Snelgrove
**Subject:** Spartanburg School District 7 - Opportunity - Quote Request

Jason,

Good afternoon! Another customer that we have provided quotes for ClearTouch is:

Spartanburg School District #7
610 Dupre Drive
Spartanburg, SC 29307

They have purchased a couple of ClearTouch 70" panels. We have provided quotes for:

CTI-5070H+UH10 Need to be at or less than $[redacted]
CTI-5065H+UH10 Need to be at or less than $[redacted]
CTI-5055H+UH10 need to be at or less than $[redacted]
PC Module Need to be at or less than $[redacted] (no operating system)
Microsoft Windows 8.1 32 bit software need to be at or less than $[redacted]
Fixed Stand Need to be at or less than $[redacted]
Convertible Stand Need to be at or less than $[redacted]

Thank you for your assistance.

Joy Snelgrove
Account Manager
Encore Technology Group
Direct: (864) 326-3624
Fax: (864) 990-1173
Office: (888) 983-6267

Email Disclaimer

This message contains confidential information and is intended only for the individual(s) addressed in the message. If you are not the named addressee, you should not disseminate, distribute, or copy this e-mail. If you are not the intended recipient, you are notified that disclosing, distributing, or copying this e-mail is strictly prohibited.

Encore Technology Group

ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Matt Fowler <mfowler@encoretg.com>
**Sent:** Tuesday, September 15, 2015 2:42 PM
**To:** Jason Webster (jason.webster@viewsonic.com)
**Cc:** Joy Snelgrove; David Masters
**Subject:** Anderson School District 1 - Opportunity - Quote Request

Hey Jason,

Anderson School District 1
Williamston, SC

They have purchased a couple ClearTouch panels in the past from us. I've had the conversation with them and in the process of getting some dates of availability for a virtual demo of your product. Will be in touch very soon for that.

We currently have quotes on 65" and 70" panels. This was more of an optional quote; quantities of 15 each. They were looking at 1 or 2 per school for now. In the process of converting them over completely from SMART. So this is a good opportunity for many more panels down the road.

If I give you our current part numbers, can you convert please? Also, I wasn't sure if you have a solution for a convertible stand. That's what we were quoting. If you have that, it would be great. If not, please let me know and quote regular stand. Will you also include shipping costs?

| Product | Quantity | |
|---|---|---|
| 5065H+UH10 | 15 | Need to be at or less than $[redacted] |
| PC Module | 15 | Need to be at or less than [redacted] (No Operating System) |
| Convertible Stand | 15 | Need to be at or less than $[redacted] if you have convertible stand. |
| 5070H+UH10 | 15 | Need to be at or less than $[redacted] |
| PC Module | 15 | |
| Convertible Stand | 15 | |

Thank you and look forward to working with you.

Matt Fowler
Account Executive
Encore Technology Group
Direct: (864) 326-3231
Fax: (864) 990-1187
Office: (888) 983-6267

Email Disclaimer

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**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Wednesday, September 16, 2015 1:02 PM
**To:** jason.webster@viewsonic.com
**Cc:** Matt Fowler; Joy Snelgrove
**Subject:** Spartanburg School District 5 - Opportunity - Quote Request

Jason,

Good afternoon! Another customer that we have provided quotes for ClearTouch is:

Spartanburg School District #5
100 North Danzler Road
Duncan, SC 29334

They have not purchased ClearTouch 70" panels but we have provided quotes for:

CTI-5070H+UH10 Need to be at or less than $[redacted]
PC Module Need to be at or less than $[redacted] (no operating system)
Microsoft Windows 8.1 32 bit software need to be at or less than $[redacted]
Fixed Stand Need to be at or less than $[redacted]
Convertible Stand Need to be at or less than $[redacted]

Thank you for your assistance.

ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Wednesday, September 16, 2015 12:59 PM
**To:** jason.webster@viewsonic.com
**Cc:** Matt Fowler; Joy Snelgrove
**Subject:** Spartanburg School District 2 - Opportunity - Quote Request

Jason,

Good afternoon! Another customer that we have provided quotes to various schools in the District is:

Spartanburg School District #2
3231 Old Furnace Road
Chesnee, SC

They have purchased ClearTouch 70" panels at one of their high schools for a new wing last year and one this year. They have a lot of old Promethean boards and projectors that need to be replaced. Over the past 6 months we have provided quote to several school locations for the following:

CTI-5070H+UH10 Need to be at or less than $[redacted]
PC Module Need to be at or less than $[redacted] (no operating system)
Microsoft Windows 8.1 32 bit software need to be at or less than $[redacted]
Fixed Stand Need to be at or less than $[redacted]
Convertible Stand Need to be at or less than $[redacted]

Thank you for your assistance.

How does Monday the 28th, Wednesday the 30th or Thursday the 1st look for you guys?

Thank you,

---

**From:** Matt Fowler
**Sent:** Tuesday, September 15, 2015 2:42 PM
**To:** Jason Webster (jason.webster@viewsonic.com) <jason.webster@viewsonic.com>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>; David Masters <dmasters@encoretg.com>
**Subject:** Anderson School District 1--Opportunity--Quote Request

Hey Jason,

Anderson School District 1
Williamston, SC

They have purchased a couple ClearTouch panels in the past from us. I've had the conversation with them and in the process of getting some dates of availability for a virtual demo of your product. Will be in touch very soon for that.

We currently have quotes on 65" and 70" panels. This was more of an optional quote; quantities of 15 each. They were looking at 1 or 2 per school for now. In the process of converting them over completely from SMART. So this is a good opportunity for many more panels down the road.

If I give you our current part numbers, can you convert please? Also, I wasn't sure if you have a solution for a convertible stand. That's what we were quoting. If you have that, it would be great. If not, please let me know and quote regular stand. Will you also include shipping costs?

| Product | Quantity | |
|---|---|---|
| 5065H+UH10 | 15 | Need to be at or less than $[redacted] |
| PC Module | 15 | Need to be at or less than $[redacted] (No Operating System) |
| Convertible Stand | 15 | Need to be at or less than $[redacted] if you have convertible stand. |
| 5070H+UH10 | 15 | Need to be at or less than $[redacted] |
| PC Module | 15 | |
| Convertible Stand | 15 | |

Thank you and look forward to working with you,

Matt Fowler
Account Executive
Encore Technology Group
Direct: (864) 326-3231
Fax: (864) 990-1187

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Cleartouch Encore Direct Prices State of SC Contract

| Brand | Cleartouch | ViewSonic Channel SPA | Mark up |
|---|---|---|---|
| Model | 5070H+UH10 | CDE7060T +WMK-047 | 5% |
| Panel Price | [redacted] | [redacted] | [redacted] |
| PC Module | [redacted] | [redacted] | [redacted] |
| Windows | [redacted] | [redacted] | [redacted] |
| Fixed Stand | [redacted] | [redacted] | [redacted] |
| Convertible stand | [redacted] | [redacted] | [redacted] |
| Shipping | [redacted] | [redacted] | [redacted] |

Cleartouch Encore Direct Prices

| Brand | Cleartouch | ViewSonic Channel SPA | Mark up |
|---|---|---|---|
| Model | 5065H+UH10 | CDE6560T +WMK-047 | 5% |
| Panel Price | [redacted] | [redacted] | [redacted] |
| PC Module | [redacted] | [redacted] | [redacted] |
| Windows | [redacted] | [redacted] | [redacted] |
| Fixed Stand | [redacted] | [redacted] | [redacted] |
| Convertible stand | [redacted] | [redacted] | [redacted] |
| Shipping | [redacted] | [redacted] | [redacted] |

ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Megan White <mwhite@encoretg.com>
**Sent:** Wednesday, November 11, 2015 12:44 PM
**To:** Danielle Stengel <dstengel@encoretg.com>
**Bcc:** Megan White <mwhite@encoretg.com>
**Subject:** RE: Follow up
**Attach:** Quote015421v1 - (17 ) ViewSonic with Cart, Computer, & Camera.pdf; Quote015431v1 - (17) ViewSonic with Cart & Computer.pdf; Quote015432v1 - (17) ViewSonic With Cart & Camera.pdf

---

Let me know if you're good with this!

Unit prices now:
70in - $[redacted]
Display Stand - $[redacted]
Computer - $[redacted]

Previous ClearTouch:
70in - $[redacted]
Stand - $[redacted]
Computer - $[redacted]

---

**From:** Danielle Stengel
**Sent:** Tuesday, November 10, 2015 11:27 AM
**To:** Megan White <mwhite@encoretg.com>
**Subject:** Fwd: Follow up

Can you please quote?

*Danielle Stengel*
*Account Executive*
*Dstengel@encoretg.com*
*704.280.1489*

-------- Original message --------
From: "Horton, Heather L" <hlhorton@wsfcs.k12.nc.us>
Date: 11/10/2015 11:21 AM (GMT-05:00)
To: Danielle Stengel <dstengel@encoretg.com>
Subject: RE: Follow up

**From:** Danielle Stengel <dstengel@encoretg.com>
**Sent:** Tuesday, May 24, 2016 9:42 PM
**To:** Jason Webster <Jason.Webster@viewsonic.com>
**Subject:** Want to beat keone
**Attach:** 9c8c6926fcc8af7d04fafeabfdb14300.pdf

Take a look at this bid

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ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Matt Fowler <mfowler@encoretg.com>
**Sent:** Tuesday, June 7, 2016 10:38 PM
**To:** Joy Snelgrove <jsnelgrove@encoretg.com>; Nichole Liles <nliles@encoretg.com>; Matt Semberger <msemberger@encoretg.com>
**Subject:** RE: Reidville Elementary School Interactive Panel RFP DUE 6/17
**Attach:** Interactive Panel RFP.pdf

Joy,

I'm not positive if this really needs to go through presales. We have already prepared pricing in the past from Quote 016290 for ViewSonic. This RFP does say no other brands but Clear Touch allowed. I think we should submit anyway and make sure our pricing is better than what Clear Touch will offer, which I think we are already there. Some details are below but the RFP is very short. We can send written/filled out RFP to Barry Reese via email. Due date is 6/17.

District Five Schools is seeking written quotes for ClearTouch Interactive panels to be delivered and installed in portable classrooms at Reidville Elementary School. The District is seeking prices for a one-time purchase. A purchase order issued Reidville Elementary School will constitute a contract between the parties.
Specifications:
Your written quote must be for the following equipment.
No other brands or models will be considered.
? Four (4) units:
? ClearTouch Interactive Panel, CTI – 5070H
? Mobile Stand – CTI – 5000X - FIXM
? Any necessary hardware, cabling and connectors
? ActivInspire software license
? Complete onsite delivery and installation
? Onsite training (3 days) for school level technicians
? Standard warranty on parts, equipment, and installation
? Local representative for quick service response time

Opportunity Name: Reidville Elementary School Interactive Panel RFP DUE 6/17
Opportunity Description: 6/7/16 Fowler- RFP attached to docs.
Opportunity Company: Spartanburg School District #5
Opportunity Contact: Barry Reese
Opportunity Phone: (864) 949-7628

To: Danielle Stengel <dstengel@encoretg.com>
Cc: Megan White <mwhite@encoretg.com>
Subject: Re: CMS BId

I will get with my bid desk. Remember, they charged $200 for shipping.

Thank you,

Ben Pearson
Territory Manager - Southeast
ViewSonic Corporation
904.568.9151

On Nov 2, 2016, at 10:47 AM, Danielle Stengel <dstengel@encoretg.com> wrote:

<image001.gif>
Actually, Megan just pointed out that Winston has better pricing already over CMS but that still has us over Clear Touch.

Let me know if you can be any more aggressive here since you know Clear touch pricing.

*Danielle Stengel*
*Account Executive*
*dstengel@encoretg.com*
*704.280.1489*

*Megan White*
*Inside Sales Representative*
*mwhite@encoretg.com*
*864.326.3604*

---

**From:** Danielle Stengel
**Sent:** Wednesday, November 2, 2016 10:45 AM
**To:** Ben Pearson <Ben.Pearson@viewsonic.com>
**Cc:** Megan White <mwhite@encoretg.com>
**Subject:** FW: CMS Bid

Can we get same pricing for Winston?

We are higher than Bridgetek/Clear Touch for 70 and if they choose 65, I would like to have all pricing lined up and compare and then not present till RFP.

Let me know.

*Danielle Stengel*
*Account Executive*
*dstengel@encoretg.com*
*704.280.1489*

*Megan White*







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ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Rogers, James <James.Rogers@spartanburg2.k12.sc.us>
**Sent:** Tuesday, January 19, 2016 12:17 PM
**To:** Joy Snelgrove
**Subject:** RE: Chesnee High School

Thank you for the follow up. I assume the functionality of the ViewSonic is the same as the ClearTouch so a demo would not be necessary unless there is a significant difference. We look forward to receiving the updated quote.

Thanks,

**Jimmy Rogers**
Social Studies Teacher

Chesnee High School
795 S. Alabama Avenue
Chesnee, SC 29323
864.461.7318 ext. 4552

**From:** Joy Snelgrove [mailto:jsnelgrove@encoretg.com]
**Sent:** Tuesday, January 19, 2016 10:06 AM
**To:** Rogers, James
**Cc:** Joy Snelgrove; Matt Fowler
**Subject:** FW: Chesnee High School

Mr. Rogers,

Good morning and Happy New Year! We appreciate the opportunity to assist you!

Encore is no longer working with ClearTouch due to the long lead time for product delivery. Encore management did some research and found that the manufacturer of ClearTouch which is CVTE (Chinese company): http://www.cvte.com/product/commercial/ also manufactures the same product under the brand name ViewSonic. ViewSonic is a much larger company that utilizes distribution for stocking and quick shipments and their physical headquarters is in California.

Example US-based Company that resells CVTE Displays with custom bezel and Seewo Software: http://www.viewsonic.com/us/commercial-displays.html

Viewsonic also provides the interactive products for Accuweather:

http://www.avnetwork.com/av-technology/0002/accuweathers-4k-strategy/96018

We have requested pricing for their 70" Interactive Panel and will provide you a quote comparable to the other 8 classrooms that Chesnee High School has purchased.

If you would like we can arrange for a demonstration of the ViewSonic. If you have any questions please let us know. Have a great afternoon!

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**From:** John Dockery <jdockery@encoretg.com>
**Sent:** Tuesday, September 15, 2015 2:17 PM
**To:** Matt Whiteside <matt.whiteside@ashevillecityschools.net>
**Cc:** John Dockery <jdockery@encoretg.com>
**Subject:** ViewSonic 70" Panel Quote
**Attach:** ViewSonic Panel.pdf; Quote014713v1 - 70in ViewSonic Displays.pdf

Matt,

Please see the attached quote for the 70" panel. This is $[redacted] less than the ClearTouch.

http://www.viewsonic.com/us/cde7060t.html

Thanks,

**John Dockery**
**Account Executive**
**Encore Technology Group**
**jdockery@encoretg.com**
**Tel: 864-979-4984**
**www.encoretg.com**

John Dockery
Account Executive
Encore Technology Group
Direct: (803) 807-2727
Fax: (864) 990-1190
Office: (888) 983-6267

**Email Disclaimer**

This message contains confidential information and is intended only for the individual(s) addressed in the message. If you are not the named addressee, you should not disseminate, distribute, or copy this e-mail. If you are not the intended recipient, you are notified that disclosing, distributing, or copying this e-mail is strictly prohibited.

**Encore Technology Group**

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**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Tuesday, September 15, 2015 4:36 PM
**To:** Matt Fowler <mfowler@encoretg.com>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** Spartanburg SD 2 - Carlisle Foster's Grove ES FW: Updated Quote for Room 200
**Attach:** Quote012964v2 - Carlisle-Foster's Grove ES - Cleartouch 70in H+ ITV Wall mounted 6-3-15 jrs.pdf; Spartanburg SD 2 - Carlisle-Foster's Grove ES - ClearTouch Interactive Panel Scope of Work 6-3-15 jrs.pdf

Another one to convert to Viewsonic

---

**From:** Joy Snelgrove
**Sent:** Friday, June 19, 2015 8:27 AM
**To:** 'Wall, Carolyn' <Carolyn.Wall@spartanburg2.k12.sc.us>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** FW: Updated Quote for Room 200

Carolyn,

Good morning! I hope that all is well!

I wanted to follow-up on the attached quote for the Cleartouch Interactive TV. Did you have any questions or need anything further?

Have a great Friday!

**From:** Joy Snelgrove
**Sent:** Thursday, June 04, 2015 9:18 AM
**To:** 'Wall, Carolyn'
**Cc:** Matt Fowler; Matt Semberger; Joy Snelgrove
**Subject:** Updated Quote for Room 200

Carolyn,

Good morning! Thank you for the opportunity to assist you!

Attached is the updated quote for Room 200 based on the walkthrough performed by Matt Semberger. Also attached is a scope of work for the installation of the project. Please be sure to sign page 8 and send back the entire agreement with your purchase order when you are ready to proceed. We will get the scope signed on our end and send back the signed entire agreement to you.

Please keep in mind that the Clear Touch has a 12-14 week lead time. If you have any questions please

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**From:** Tony Gallman <tgallman@encoretg.com>
**Sent:** Wednesday, September 16, 2015 6:54 AM
**To:** Danielle Stengel
**Cc:** Outside Sales; David Masters; Matt Fowler; Inside Sales
**Subject:** RE: ViewSonic--Pricing Question

What is Jason contact info

*Sent from my Verizon Wireless 4G LTE DROID*
On Sep 15, 2015 12:43 PM, Danielle Stengel <dstengel@encoretg.com> wrote:
3499.00 is price to disti on 70"

He said this was not their bottom line number should this come to a case where they need to be more competitive if pricing was already presented from Clear Touch standpoint and lower but that needs to be registered and communicated.

I do not have for the 65 and 84 yet but Jason is sending me everything today with accessories added as well for a 3700 classroom opp I have.

I will send to everyone when I get.

**From:** David Masters
**Sent:** Tuesday, September 15, 2015 12:34 PM
**To:** Matt Fowler <mfowler@encoretg.com>
**Cc:** Inside Sales <insidesales@encoretg.com>; Outside Sales <outsidesales@encoretg.com>
**Subject:** Re: ViewSonic--Pricing Question

Our costs need to be in line with the registered price of Cleartouch

On Sep 15, 2015, at 12:32 PM, Matt Fowler <mfowler@encoretg.com> wrote:

> Team,
>
> Wanted to see what kind of pricing we are requesting from Jason Webster on 65,70 and 84 inch panels? I'm just trying to make sure we are not all over the board upon asking. He told me on the phone to let him know on opportunities as to where we would like to be from a price point, but I thought if we are all around the same with our requests that could be good.
>
> Just let me know your thoughts please.
>
> Thank you,
>
> Matt Fowler
> Account Executive
> Encore Technology Group
> Direct: (864) 326-3231
> Fax: (864) 990-1187
> Office: (888) 983-6267

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**From:** Megan White <mwhite@encoretg.com>
**Sent:** Wednesday, August 31, 2016 3:15 PM
**To:** Ben Pearson
**Cc:** Danielle Stengel
**Subject:** RE: Wake County Schools
**Attachments:** image001.png

Hi Ben,

Danielle may have reached out to you again about this one today but I wanted to send an email too. Any additional discount you can give us on this account based on the below?

Thanks

---

**From:** Danielle Stengel
**Sent:** Tuesday, August 30, 2016 11:22 AM
**To:** Ben Pearson <Ben.Pearson@viewsonic.com>
**Cc:** Megan White <mwhite@encoretg.com>
**Subject:** FW: Wake County Schools

Good morning. Need help on Wake. If we go in at 8 points per unit we are just at what ConnectView is doing with Clear Touch. Once e-procurement fees are applied through PO process, we will be at 6.25 and our install costs to customer do not even cover travel time.

Can ViewSonic do any better to get in the door here and hopefully get Clear Touch out?

I am sure you agree that most are making more margin on panels and I am not being greedy but we really have to then discuss this with our CEO and Manager to agree as well at this mark up and I feel quite certain it will be challenged especially since we have had more than a few go backs lately which puts us in a hole.

Let me know.

Thanks,

Danielle Stengel
Account Executive
dstengel@encoretg.com
704.280.1489

Megan White
Inside Sales Representative
mwhite@encoretg.com
864-326-3604

**From:** Megan White
**Sent:** Tuesday, August 30, 2016 11:01 AM

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**From:** Joy Snelgrove </O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=03CEFF398FE34957A7F30012EC4FEC75>
**Sent:** Tuesday, April 19, 2016 1:45 PM
**To:** Brown, Sherri <Sherri.Brown@spartanburg2.k12.sc.us>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>; Matt Fowler <mfowler@encoretg.com>
**Subject:** RE: Quote 102964
**Attach:** Quote017323v1 - Carlisle Foster's Grove ES - Viewsonic 70in ITV Wall Mounted 4-18-16.pdf; Quote012964v2 - Carlisle-Foster's Grove ES - Cleartouch 70in H+ ITV Wall mounted 6-3-15 jrs.pdf

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Sherri,

Good afternoon! Thank you for the opportunity to assist you!

You had requested an updated quote for ClearTouch interactive TV on Quote012964v2 from last year. The attached new quote017323v1 is for ViewSonic which has product available in a much shorter timeframe than what we have been getting through ClearTouch.

The manufacturer of interactive displays and software (EasiNote) is CVTE and a CVTE-owned entity that sells displays directly and develops the EasiNote Software is Seewo. With that said Encore is now partnered with ViewSonic which is a US-based company that resells CVTE displays with custom bezel and Seewo software.

We would be happy to arrange for ViewSonic to provide an on-site demonstration of the product so that you can see that the product is the same features and capabilities.

The attached quote is for the ViewSonic 70" ITV, the wall mount which is required but at $0.00. The quote also includes the integrated PC (network media player) which is pre-installed with Microsoft Windows 8. The quote also has shipping and then the other components from the prior quote. As you will see the overall total for the new quote017323v1 is $ [redacted]. The previous quote012964v2 overall total was $ [redacted].

If you have any questions please let me know. Have a wonderful afternoon!

---

**From:** Brown, Sherri [mailto:Sherri.Brown@spartanburg2.k12.sc.us]
**Sent:** Tuesday, April 12, 2016 11:17 AM
**To:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** Quote 102964

Joy, could you please verify or rewrite the above quote for a Cleartouch 70" h+ ITV Wall Mounted

Sherri E. Brown

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**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Friday, December 18, 2015 5:01 PM
**To:** Wendy Metcalf; Jennifer Stone; John Pressley; John Ulmer; Megan White; Sheldon Pettigrew
**Subject:** RE: [BULK] Contact US Request from Dena Wade

I've taken care of this - sent Viewsonic to Amanda Dobson.

**From:** Wendy Metcalf
**Sent:** Thursday, December 17, 2015 2:39 PM
**To:** Jennifer Stone <jstone@encoretg.com>; John Pressley <jpressley@encoretg.com>; John Ulmer <julmer@encoretg.com>; Joy Snelgrove <jsnelgrove@encoretg.com>; Megan White <mwhite@encoretg.com>; Sheldon Pettigrew <spettigrew@encoretg.com>
**Subject:** FW: [BULK] Contact US Request from Dena Wade

From the website.

**From:** Encore [mailto:webadmin@encoretg.com]
**Sent:** Thursday, December 17, 2015 2:38 PM
**To:** Info <info@encoretg.com>; Chris Schmidt <cschmidt@encoretg.com>
**Subject:** [BULK] Contact US Request from Dena Wade

**Your Email** :- dena.wade@spart5.net
**Your First Name** :- Dena
**Your Last Name** :- Wade
**Your Phone** :- 864-949-2350
**Comments/Questions** :- "I am looking for a quote for 2 Clear touch television panels. these are for libraries, so at least 65 inch - onboard PC please. Thank you Dena Wade"
http://www.encoretg.com/contact-us

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE<br><br>Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Encore Technology Group, LLC,<br><br>Defendant. | ) | IN THE COURT OF COMMON PLEAS<br>THIRTEENTH JUDICIAL CIRCUIT<br><br>C.A. No.: 2017-CP-23-05862<br><br>**MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** |

# EXHIBIT D

## Clear Touch's 2.16.18 Discovery Reqeusts

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No. 2017-CP-23-05862 |
| Plaintiff, | ) | **PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION TO DEFENDANT** |
| v. | ) | |
| Encore Technology Group, LLC | ) | |
| Defendants. | ) | |

**TO: GREGORY J. ENGLISH, AND RITA BOLT BARKER, ATTORNEYS FOR DEFENDANT**

Plaintiff Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, requests Defendant Encore Technology Group, LLC (*hereinafter* "Encore" or "Defendant") respond to the following Requests for Production and provide the documents requested within the time allotted under said Rule.

**DEFINITIONS AND INSTRUCTIONS**

1. This request for documents is addressed to Defendant, its agents or attorneys, or any of them. If the requested documents are known by Defendant to exist but are not in the possession of Plaintiff, its agents or attorneys or any of them, it is requested that Plaintiff so indicate or produce such documents that show the name of the person or entity in whose custody such documents are.

2. "You" or "your" shall refer to Defendant, its counsel and any consultants, experts, investigators, agents or other persons acting on its behalf.

3. "Complaint" shall mean the Complaint filed by Plaintiff in this action.

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4. "Person" shall mean and include a natural person, individual, partnership, firm, corporation or any kind of business or legal entity, its agents or employees.

5. The term "document" is used herein with its customary broad meaning and whether printed or reproduced by any process, or written, and/or produced by hand, and whether or not claimed to be privileged or otherwise excludable from discovery, namely: Notes, email, correspondence, communications of any nature, telegrams, memoranda, notebooks of any character, summaries or records of personal conversations, diaries, routing slips or memoranda, reports, publications, photographs, minutes or records of meetings, transcripts or oral testimony or statements, reports and/or summaries of interviews, reports and/or summaries of investigations, agreements and contracts, including all modifications and/or revisions thereof, reports and/or summaries of negotiations, court papers, brochures, pamphlets, press releases, drafts of, revisions of drafts of, translations of any document, tape recordings, records, and dictation belts. Any document with any marks on any sheet or side thereof, including by way of illustration only and not by way of limitation, initials, stamped indicia, any comment or any notation of any character and not a part of the original text, or any reproduction thereof, is to be considered a separate document for purposes of this request.

6. As used, "concerning" or "relate to" or "evidence" means refers to, reflects upon, concerns, provides evidence for, or is in any way logically or factually connected with the matters discussed.

7. If any documents responsive to any request have been lost, mutilated or destroyed, so state and identify each such document, and state to which request(s) the document would have been responsive.

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8. If there are no documents in your possession, custody or control which are responsive to a particular request, so state and identify such request.

9. When referring to a document, "identify" means that you shall set forth the general nature of the document, the author or the originator, each addressee, all individuals designated on the document to receive a copy or otherwise hereto have received a copy, date, title and general subject matter, the present custodian of each copy thereof and last known address of each such custodian.

10. If any documents falling within any description contained in any of the following requests is withheld under claim of privilege, Defendant shall serve upon the undersigned attorneys for Plaintiff a written list of the withheld documents, including the following information as to each such item: (1) its date; (2) the name(s) of the person(s) or other entity(ies) who or which drafted, authored or prepared it; (3) its title; (4) the name(s) of the person(s) or other entity(ies) to whom it was addressed; (5) the name(s) of each person or entity to whom the item or any copy or reproduction thereof was ever directed, addressed, sent, delivered, mailed, given or in any other manner disclosed; and (6) a statement of the ground or grounds on which each such document is considered to be privileged from production.

11. Plaintiff hereby adopts and incorporates herein by reference all definitions set forth in Plaintiff's First Set of Interrogatories to Defendant served contemporaneously herewith.

These requests are continuing in nature. Pursuant to S.C. R. Civ. P. Rule 26, Defendant has a duty to supplement its responses to these requests.

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## REQUESTS

1. Any and all books, record, reports, photographs, moving pictures, drawings, charts, maps, diagrams, models or other documentary materials or tangible objects or exhibits which Defendant intends to rely upon to support any claim or defense and/or which Defendant intends to offer into evidence as exhibits at the time of trial or any other hearing or deposition.

2. Copies of any and all recorded statements related to this matter, including any statements or affidavits, or drafts thereof, from any witnesses to the facts of this case.

3. All documents related to any of the claims contained in Plaintiff's Complaint or Defendant's Counterclaims.

4. All documents Plaintiff asked Defendant to identify in, or which are identified, mentioned, or referred to in answering, the Plaintiff's First Set of Interrogatories.

5. All documents relied upon in responding to the Plaintiff's First Set of Interrogatories.

6. All non-privileged notes or correspondence by, to, or from any party concerning the subject matter of this lawsuit.

7. All documents concerning the damages claimed by the Defendant under its Counterclaims.

8. Any and all documents (a) reviewed, considered, and/or relied upon by each and every expert or consultant the party intends to call as an expert witness at trial in connection with this case, or (b) that embody, reflect, refer to or summarize reports or memoranda prepared for the party to this litigation by any person the party experts to call as an expert witness or utilize as a consultant regardless of whether or not they will offer testimony at any point.

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9. Any and all expert's or consultant's reports, whether draft or final, pertaining to this litigation.

10. Any records, documents or reports received or produced pursuant to a subpoena or FOIA request or otherwise from or by any person or entity relating to the subject matter of this lawsuit, including but not limited to, the claims or allegations of any party. Please note that this request is continuing and applies to any subpoenas issued pursuant to Rule 45 SCRCP or other requests made during this litigation.

11. All documents relating in any way to the matters alleged in the complaint, the answer and counterclaims, or the subject matter of this action, including but not limited to:

a. All announcements, correspondence, communications, proposals, purchase orders, contracts, and other documentation sent between (i) Encore and (ii) any of Plaintiff's current or former customers, clients, or vendors concerning Plaintiff;

b. All confidentiality, nondisclosure, non-solicitation, and/or noncompetition agreements entered into between Defendant and any of its employees since 2013; and

c. All complaints filed by Defendant against current or former employees and orders, decrees, or judgments resolving such complaints;

12. Any and all documents relating to any advertising, sales, or marketing efforts made towards your potential or actual customers since January 1, 2015, by you or any person, company, or entity owned or controlled by or otherwise affiliated with you, your agents, distributors, suppliers, manufacturers, and dealers.

13. All documents related to any contracts with, sales to, shipments to, sales efforts made to, communications with, and other dealings with Plaintiff or your actual or potential

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customers, clients, distributors, dealers, suppliers, manufacturers or sales agents since January 1, 2015.

14. All documents concerning any payments or other means of compensation, including but not limited to exchanges of goods and services and discounts your received due to your business dealings with Clear Touch from January 1, 2015 to present.

15. Any and all documents, including but not limited to balance sheets, profit and loss statements, and federal and state tax returns and related documentation that reflects or relates to Encore's business from January 1, 2014 to present. Your response should include but is not limited to monthly and year end profit and loss statements and balance sheets.

16. Any and all documents, including but not limited to, bids, purchase orders, contracts, invoices, spreadsheets, and any documents related thereto which reflect the activities or otherwise relate to Encore's interactive panel technology business with its customers, vendors, or suppliers from January 1, 2015 to present.

17. All written agreements or contracts between Encore and Clear Touch.

18. All files, information, documents, customer lists, pricing books or catalogues, items and things that relate to Clear Touch or its suppliers, customers, or prospective customers from January 1, 2014 to present.

19. All documents or tangible things in your possession that in any way relate or refer to Plaintiff's business, products, practices, services, operations, pricing, customers or method of doing business.

20. All documents, including communications of any kind, related to the Winston Salem sale consummated in 2017, including but not limited to all drafts and final versions of all bids, RFPs, RFQs, purchase orders, and invoices related to that sale. Your response should include

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documents relfecting the type and amount of product sold to Winston Salem, the costs of such product(s) to Encore, the sales price of that product, and the gross and net profits realized by Encore.

21. All of Encore's bids or RFPs related to interactive panel technology, including every draft and final version of those documents, from May 1, 2015 to present, and any and all documents related to those bids or RFPs.

22. Any and all communications and documents from January 1, 2015 to present related to or discussing Clear Touch pricing, Clear Touch Price List(s), the termination of Encore's relationship with Clear Touch, and/or Clear Touch's UL certification.

23. Any and all communications and documents from January 1, 2015 to present related, referencing or discussing Keone Trask and/or Tamara Trask.

24. Any and all price lists for interactive panel technology utilized by Encore or that is in its possession.

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.

Joseph O. Smith, S.C. Bar # 77475
Joshua J. Hudson, S.C. Bar # 100311
1052 North Church Street
Greenville, S.C. 29601
(864)-349-2600
(864)-349-0303 fax
JSmith@roecassidy.com
JHudson@roecassidy.com
***Attorneys for the Plaintiff***

February 16, 2018
Greenville, South Carolina

ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No. 2017-CP-23-05862 |
| Plaintiff, | ) | |
| v. | ) | **CERTIFICATE OF SERVICE** |
| Encore Technology Group, LLC | ) | |
| Defendants. | ) | |

THIS IS TO HEREBY CERTIFY that the undersigned individual has served a copy of ***Plaintiff's First Set of Interrogatories and First Set of Requests for Production to Defendant*** by placing same in the U.S. Mail, properly addressed, and with the correct amount of postage as follows:

Gregory J. English, Esquire
Rita Bolt Barker, Esquire
WYCHE P.A.
Post Office Box 728
Greenville, SC 29602-0728

ROE CASSIDY COATES & PRICE, P.A.

Carole M. Pegler
Legal Administrative Assistant to
William A. Coates and V. Clark Price

Greenville, South Carolina

February 16, 2018

ELECTRONICALLY FILED - 2018 Jul 29 10:53 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No. 2017-CP-23-05862 |
| Plaintiff, | ) | **PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT** |
| v. | ) | |
| Encore Technology Group, LLC, | ) | |
| Defendant. | ) | |

**TO: GREGORY J. ENGLISH, AND RITA BOLT BARKER, ATTORNEYS FOR DEFENDANT:**

You are hereby notified to answer under oath, pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, the following interrogatories and to serve your answers to these interrogatories upon the undersigned attorneys for the Plaintiff Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC (*hereinafter* "Plaintiff") within the time allotted under said Rule.

## DEFINITIONS AND INSTRUCTIONS

1. "You" ("your") shall refer to the Defendant, its counsel and any consultants, experts, investigators, agents or other persons acting on Defendant's behalf.

2. "Complaint" shall mean the Complaint filed by Plaintiff in this action.

3. "Document" refers to and includes, but is not limited to, all writings of any kind, including the original and all non-identical copies (whether different from the original by reason of notations made on such copies or otherwise) of all letters, e-mails, telegrams, memoranda, reports, forms, studies, calendar or diary entries, pamphlets, notes, charts, diagrams, plans, tabulations, proposals, minutes and records of meetings, conferences and telephone or other communications, and every other type of data compilation, including all forms of machine or

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computer storage or retrieval in the possession, custody or control of Defendant or his representatives, agents, or attorneys, whether tentative, preliminary or final.

4. "Persons" refers to and includes a corporation, partnership, joint venture, proprietorship, firm, company, unincorporated association, individual, association of individuals, or any other such entity.

5. "Individual" means a natural person.

6. "Identify" means:

a. When used with reference to a document, state:

i. The type of document (letter, memorandum, report, tape, printout, etc.);

ii. The name of the individual who drafted or prepared the document;

iii. The present or last known location of the document or other identity of the individual who has custody of the document; and

iv. Such other information sufficient to enable Plaintiff to identify the document, such as the addressee(s), the approximate length in pages, persons who received copies, and a synopsis of its contents.

b. When used with reference to a person, state its:

i. Name;

ii. Organizational status (i.e., corporation, partnership, etc.);

iii. Business address; and

iv. Other similar identifying information, with the exception that if the person to be identified is an individual then identify as in subparagraph (c).

c. When used with reference to an individual, state his or her:

i. Name;

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ii. Last known residence address;

iii. Business address;

iv. Job title or position; and

v. Other similar identifying information.

d. When used with reference to a communication:

i. If written, identify the document as in subparagraph (a); and

ii. If oral, state the date of the communication and the individuals who sent, received and otherwise had knowledge of the communication, and state the substance thereof.

7. In lieu of identifying particular documents or communications, such documents or communications may be attached to the answer to those interrogatories requesting identification of those documents or communications.

8. Wherever appropriate in these interrogatories:

a. the singular form of a word shall be interpreted as plural;

b. the masculine form of a word shall be interpreted as feminine;

c. "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these interrogatories any information which might otherwise be construed to be outside their scope; and

d. "relation to" means consist of, refer to, reflect, or be in any way legally, logically, or factually connected with the matter discussed.

9. With respect to any document for which a privilege is being asserted, identify such document by stating:

a. The name, title and job or position of document's author;

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b. The name, title and job or position of document's sender;

c. The name, title and job or position of every person who received or saw the document or any of its copies;

d. The date of the document;

e. The physical description of the document, including size, length, typed or handwritten, etc.;

f. A brief description of the document's subject matter;

g. The basis for the privilege asserted; and

h. The name, title and job or position of all persons on whose behalf the privilege is asserted.

10. With respect to any conversation for which a privilege is being asserted, identify by stating:

a. When the conversation occurred;

b. Where the conversation occurred;

c. The name, title and job or position of each person who was present at or during the conversation whether or not such conversation was in person or by telephone;

d. A brief description of the conversation's subject matter; and

e. The name, title and job or position of all persons on whose behalf the privilege is asserted.

11. Unless otherwise indicated, these interrogatories are to be answered with respect to the time period from the date of the incident until the date of the answering of these interrogatories.

12. In answering these interrogatories, furnish all information available to you, including information in the possession of your attorneys, employees, agents, investigators and all

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persons acting in your behalf and not merely such information known of your own personal knowledge. If you cannot answer the interrogatories in full after exercising due diligence to secure the information, so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you possess concerning the unanswered portions.

13. These interrogatories which follow are to be considered as continuing, and you are requested to provide, by way of supplementary answers thereto, such additional information as you or any other person acting on your behalf may hereafter obtain which will augment or otherwise modify your answers given to the interrogatories below. Such supplementary responses are to be served upon plaintiff within 30 days after receipt of such information pursuant to SCRCP 26.

14. The term "persons" means and includes, without limiting the generality of its meaning, any natural person; corporate or business entity; firm, partnership, or association; group; governmental body, agency, or subdivision; committee; commission; or other organization or entity.

15. The term "document" has the broadest meaning accorded to it by Rule 33 of the South Carolina Rules of Civil Procedure. The term "document" includes all written, printed, electronic, typed, recorded, transcribed, punched, taped, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, in that actual or constructive possession, custody or control of you, including, but not limited to, all writings, letters, minutes, bulletins, correspondence, telegrams, telexes, memoranda, notes, instructions, literature, work assignments, notebooks, diaries, calendars, records, agreements, contracts, notations of telephone or personal conversations or conferences, messages, interoffice

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or intraoffice communications, microfilm, circulars, pamphlets, studies, notices, summaries, reports, books, checks, credit card vouchers, statements of account, receipts, invoices, graphs, photographs, drafts, data sheets, data compilations, computer data sheets, computer data compilations, work sheets, statistics, speeches or other writings, audio and video recordings, phonograph records, data compilations from which information can be obtained or can be translated through detection devices into reasonable usable form, or any other tangible thing which records information in any way. The term "document" shall include the original and any copies which differ in any manner whatsoever from the original (whether different from the original because of notes made on such copy or otherwise) and any drafts thereof. For purposes of this definition, a document is within the possession or control of you if it is within the possession or control of any of your attorneys, investigators for your attorneys, independent accountants, directors, trustees, or any person acting on behalf of or in concert with you or with any of these persons, or otherwise under their possession or control.

16. The terms "relate to," "relating to," and "concerning" include referring to, alluding to, responding to, relating to, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, reflecting, analyzing, constituting, or in any way relevant to the specified subject within the meaning of Rule 26 of South Carolina Rules of Civil Procedure.

17. "Communication" includes any written, electronic or oral communication.

18. As used here, the singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronouns so used and vice versa. The male gender form of a pronoun shall also include the female gender form of the pronoun and vice versa. The use of any tense of any verb shall be considered to include also within its meaning all other tenses of the verb so used.

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19. "And" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

**INTERROGATORIES**

1. State the names, addresses, and telephone numbers of all persons known to you to be witnesses concerning the facts of the case and, with respect to each person identified, please provide a summary of the important facts known to or observed by such witness and indicate whether or not written or recorded statements have been taken from each witness.

2. Identify each written document, memorandum, or other writing in your possession, or subject to your custody or control, which pertains to the facts of this case.

3. Identify all photographs, plats, sketches, charts, diagrams, or other prepared documents in your possession or subject to your custody or control which pertain to the facts of this case.

4. List the names, addresses, and telephone numbers of any expert witnesses whom the Plaintiff proposes to use as a witness at the trial of this case, and, as to each expert so identified, state:

   a. The specific area of expertise in which Plaintiff contends the person identified is competent to testify;

   b. Each and every fact which qualifies the person identified as an expert;

   c. Each and every specific opinion(s) such person holds in each area of expertise which is relevant to this matter;

   d. Each and every fact upon which the person identified bases each of his opinions; and,

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e. Each and every theory, premise, contention, or thing, other than a fact which will be established in testimony, upon which such witness bases his opinion.

5. Please state whether you have ever been involved in any lawsuit as either plaintiff, defendant, or witness involving a confidentiality agreement, a non-solicitation agreement, a non-competition agreement, or concerning alleged violations of confidentiality agreements, misappropriation of trade secrets, or tortuous interference with business relations and, if so, please state the nature of the lawsuit, the claims or defenses asserted, and the outcome of the litigation.

6. Identify with particularity and in detail each breach of contract or law you assert, including but not limited to the facts giving rise to the breach, a quote of the relevant portions (and not by mere reference to the entire document) of such contract or law, and your construction thereof.

7. Set forth an itemized statement of and identify all damages, exclusive of pain and suffering, claimed to have been sustained by the party, describing said damages and method of computation in detail, including but not necessarily limited to: the nature of the damage; the amount of lost earnings or profits, if any; and the period for which loss is claimed.

8. Identify and describe in detail all measures taken by the party to mitigate its alleged damages in this matter.

9. Identify each and every Encore employee and third-party agent, including but not limited to agents of Encore's suppliers, involved in any manner in Encore's interactive panel sales efforts to Winston-Salem from 2014 to present, including every employee and third-party agent who participated in any way in the sales and bid efforts which resulted in Winston Salem's large purchase of interactive panel technology from Encore in 2017. For each person identified:

a. Provide their full name, job title, and company affiliation;

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b. Detail the dates and nature of their activities related to Winston Sale; and

c. Identify any documents utilized or relied upon by them in any way to market, bid, and/or otherwise sell to Winston Salem.

10. List each and every customer or entity to whom Encore sold interactive panel technology from January 1, 2014 to present. For each customer or entity identified, specify

a. the date of each sale;

b. the type and quantity of products sold; and

c. the gross and net profits Encore received from each sale.

11. List each and every customer or entity to whom Encore sent any document or communication concerning Clear Touch's UL certification. For each customer or entity listed, specify the date of such communication(s), the identity of the sender, the identity of the specific recipient(s), the method of communication, and the content of each communication.

12. List each and every customer, individual, or entity to whom Encore sent any document or communication concerning Clear Touch's Pricing or Price List(s) from April 1, 2015 to present. For each customer, individual, or entity listed, specify the date of such communication(s), the identity of the sender, the identity of the specific recipient(s), the method of communication, and the content of each communication.

13. Identify each person who provided information or in any manner assisted or contributed to the preparation of your answers to Plaintiff's First Set of Interrogatories and Plaintiff's First Requests for Production.

**(signature page to follow)**

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.

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February 16, 2018
Greenville, South Carolina



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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No. 2017-CP-23-05862 |
| Plaintiff, | ) | |
| v. | ) | **CERTIFICATE OF SERVICE** |
| Encore Technology Group, LLC | ) | |
| Defendants. | ) | |

THIS IS TO HEREBY CERTIFY that the undersigned individual has served a copy of ***Plaintiff's First Set of Interrogatories and First Set of Requests for Production to Defendant*** by placing same in the U.S. Mail, properly addressed, and with the correct amount of postage as follows:

Gregory J. English, Esquire
Rita Bolt Barker, Esquire
WYCHE P.A.
Post Office Box 728
Greenville, SC 29602-0728

ROE CASSIDY COATES & PRICE, P.A.

Carole M. Pegler
Legal Administrative Assistant to
William A. Coates and V. Clark Price

Greenville, South Carolina

February 16, 2018

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF GREENVILLE | ) | |
| | ) | |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No.: 2017-CP-23-05862 |
| | ) | |
| Plaintiff, | ) | **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** |
| | ) | |
| v. | ) | |
| | ) | |
| Encore Technology Group, LLC, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

The Plaintiff, Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, (*hereinafter* "Plaintiff" or "Clear Touch"), submits this Memorandum in Support of its Motion for Partial Summary Judgment seeking dismissal of Defendant, Encore Technology Group, LLC's Abuse of Process Counterclaim. Clear Touch is entitled to judgment as a matter of law on this counterclaim because : (1) the mere commencement of a civil action cannot amount to an abuse of process; and (2) the Defendant has not, and is unable to, show a definite act or threat not authorized by the process, a necessary showing required to sustain an Abuse of Process claim.

## I. INTRODUCTION

This matter was commenced by the filing of a Summons and Complaint on September 12, 2017, with an Amended Complaint filed the following day, alleging causes of action against Encore for (1) Breach of Contract – Mutual Confidentiality Agreement; (2) Breach of Contract – Reseller Agreement; (3) Trade Secret Misappropriation; and (4) Conversion. With the exception of the Breach of Reseller Agreement claim, all these causes of action arose out of Encore's misappropriation of Clear Touch's confidential and trade secret information and use of it to unfairly compete in the marketplace following its decision to break ties with the company.

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Specifically, Encore retained and utilized Clear Touch's confidential and trade secret information, mainly in the form of its pricing lists, to unfairly compete with it in the interactive panel supply business, including by sharing it with a competing supplier and using it to underbid Clear Touch and convert opportunities from the company following its decision to end its business relationship with the Plaintiff. Such unlawful practices Clear Touch believes continue to date.

## II. FACTUAL AND PROCEDURAL HISTORY

### A. The Previous Action

On September 18, 2015 Encore filed an action against Clear Touch and Keone Trask alleging numerous causes of action, all arising out of Trask not disclosing his relationship with Clear Touch while an employee of Encore in violation of various common law and contractual obligations to the company, misappropriation of company trade secrets and company data, and defamatory statements concerning Encore, as alleged in the Complaint. Those alleged illegal acts led Encore to decide to terminate its relationship with Clear Touch in the Summer of 2015 and start carrying ViewSonic interactive panels. It provided formal notification of the termination to Clear Touch on September 11, 2015 and filed suit about a week later. That case was litigated for two years culminating, in a week-long trial in September 2017.

In that previous matter, the parties engaged in extensive discovery leading up to trial. Encore's withholding of evidence and litigation tactics in the course of that case necessitated the filing of this matter as a separate action. The relevant timeline of those events is as follows:

***Initial Discovery Requests and Production(s)***

- Clear Touch served its first set of discovery requests on April 25, 2016.
- Encore served written responses to those requests on July 14, 2016 without producing any actual documents and instead said responsive documents would be made available.

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- On July 15, 2016 Clear Touch sent Encore a detailed letter outlining the deficiencies in its discovery responses, and requested it supplement its written responses and provide a supplemental document production to rectify the many shortcomings.

- Encore provided supplemental written responses and a document production on August 8, 2016 which failed to rectify many, if not most, of the deficiencies outlined in Clear Touch's July 15th letter and were non-responsive or insufficiently responsive to the discovery requests.

- Clear Touch filed a motion to compel seeking several categories of information and documents, including requesting Encore provide a privilege log. Encore also filed a motion to compel for several items.

- Those motions resulted in the Court issuing a November 17, 2016 Discovery Order.

- Each party made a series of productions following issuance of the Discovery Order.

***Encore's Supplemental Productions***

- 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.

  a. In response to the Discovery Order, on November 21, 2016, Encore produced a CD containing responsive documents ENC 00000510 to ENC 00027245 (26,735 pages of documents).

  b. Then on November 22, 2016, Encore produced two additional CDs containing documents ENC 00027246 to ENC 59470 and ENC 00059471 to ENC 95581 (CD 2). This production was in excess of an additional 68,000 pages of documents.

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c. Much of this extensive production was in separate pdf files and unusable in numerous respects, including not containing attachments to the emails which comprised the majority of the production.

d. To address these issues, on December 29, 2016, Encore served Clear Touch with a flash drive containing a supplemental production with documents Bates numbered ENC 00027246 through ENC 00202344 to replace previously produced ENC 00027246 through ENC 00095581. This production included over 175,000 new pages of documents never before produced to Clear Touch. In addition, the documents were produced in over 32,000 individual files.

e. Clear Touch attempted to get the December 29th production in a form, format or platform that made it manageable and reviewable. Those efforts were futile given the manner in which documents were produced.

- Due to the sheer volume and manner in which the documents were produced, including lack of any discernable organization, Clear Touch had to upload the documents into specialized review software in order to review those files.

- In order to do this, Clear Touch requested and Encore agreed to provide documents bates stamped "ENC 000513- 00202522" in native file format. Encore provided what was supposed to be all the documents encompassed in that bates range in native format. Those documents were uploaded to specialized review software in order for them to be in a reviewable format.

- Given those circumstances, Clear Touch requested Encore consent to a continuance of the trial date. Encore refused and necessitated the filing of Clear Touch's first Motion for Continuance of Trial on March 10, 2017.

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- Encore fiercely opposed that Motion.

- The Court granted Clear Touch's motion, continuing trial and placing it for a date certain the week of August 28, 2017.

- Clear Touch continued the time-consuming and costly review of the supplemental production and discovered serious deficiencies which it addressed in an April 6, 2017 letter.

- In response, Encore sent an April 13, 2017 letter along with some additional documents. (Exh. A - 4.13.17 Encore Ltr.). That correspondence also included a document labeled "Privilege Log" which was comprised of four paragraphs of general objections to broad categories of documents. Continued attempts to obtain an actual privilege log from Encore were fiercely resisted.

- Clear Touch was forced to file a Second Motion to Compel on April 26, 2017, seeking amongst other things, an actual privilege log from Encore. A hearing on Clear Touch's Second Motion to Compel was set for Monday, June 5, 2017.

***The May 31, 2018 Production***

- On May 31, 2017, weeks after 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. (Exh. B - 5.13.17 Encore Ltr.). The cover letter accompanying that late production admitted that in the over a year and a half since filing that action ***Encore had not searched for the name of the company they sued - "Clear Touch" - when searching for responsive emails***. (Exh. B at 2)(Stating Encore had searched for "ClearTouch" but not "Clear Touch" with the space between the words which is the actual name of the company.).

- Clear Touch undertook review of those 10,000 new pages of materials; a process which was difficult and time-consuming due to the volume and manner of production.

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- After receiving the May 31st letter, privilege log and supplemental production, the parties continued to work to rectify issues related to Clear Touch's Second Motion to Compel through email correspondence and in a phone call the morning of June 5th. In that call, they agreed to forego the hearing as they believed an agreement on those issues had been reached. Resolution of those issues took some time and impaired Clear Touch's ability to move forward with defending the case, by, among other things, hindering the taking of several depositions, including a corporate 30(b)(6) deposition covering over 30 issues, and that of Encore's expert.

- The May 31st production contained documents that for the first time alerted Clear Touch to the possibility that it may have one or more claims against Encore due to its misappropriation and illegal usage of the company's confidential and trade secret information to unfairly compete with it in the marketplace. (Exh. C – Collection of Docs. From 5.31.17 Production).[1] This revelation was in June of 2017; approximately two months prior to the trial date of what was already a complex business case related to Mr. Trask's and Clear Touch's alleged actions preceding Encore's decision to terminate the relationship.

- To make matters worse, Encore informed Clear Touch it would not have availability for any depositions until the last week of June 2017 at the earliest, leaving Clear Touch approximately two months to take numerous depositions it had not been able to proceed with under the circumstances created by Encore's discovery tactics, including withholding of evidence and not producing a real privilege log until May 31, 2017, and prepare a complex case for a week-long trial.

- Furthermore, following the Parties' morning call on June 5th, it was revealed that Encore had not included all documents labeled "ENC 000513 - 00202522" in the native file format

[1] The pricing has been redacted from the filed copy of this exhibit due to the confidential and sensitive nature of that information. Unredacted copies will be provided to the Court at the hearing on these motions.

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as agreed. These were the files loaded to the review software and reviewed by Clear Touch. The extent of that omission was unknown at the time. It took further exchanges between the parties during which time Encore defended its omission by claiming the native format of the document Clear Touch discovered was omitted was "paper" and therefore rightfully left out. Encore later claimed that this single document Clear Touch happened to discover was omitted was the only document not in the files provided.

- From the moment of the May 31, 2017 production, Encore did not take its withholding of evidence seriously and attempted to downplay its significance in order to push the case to trial.

- Given the circumstances created by Encore's actions and discovery tactics, an August 2017 trial date was unreasonably burdensome to Clear Touch. Despite that, Encore would not consent to a continuance of the trial date and Clear Touch was forced to file a Second Motion for Continuance on June 6, 2017. Encore fiercely opposed that Motion as well, claiming that the documents produced on May 31st were irrelevant to the case and their late production therefore did not warrant continuance of the trial date. The Court gave the parties a few additional weeks and set the trial for the week of September 25, 2017.

**B. The Present Action**

Given the circumstances created by Encore's actions, Clear Touch set about preparing for trial of the original action and filed the instant case on September 12, 2017. This was the only way Clear Touch could have a full and fair opportunity to seek redress for Encore's unlawful actions. The extent and resulting damage of these actions could not possibly be adequately ascertained before the September trial date. To do so, Clear Touch would have to amend its pleadings to include counterclaims based upon different facts and events all occurring after what Encore

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deemed the relevant timeframe, issue discovery requests related to those events, identify and depose additional witnesses involved in or related to Encore's illegal unfair competitive actions, and establish the extent of damage caused by those acts likely by use of an economic expert. Such a feat is undeniably impossible in under four months; much less when that time is dedicated to preparing to try a week-long case in a complex matter filed two years prior to trial. Encore knew this, created the untenable situation, and necessitated Clear Touch file this action to protect itself and ensure Encore would have to answer for its illegal activities.

Encore was able to try the previous action before a jury who never heard of its unlawful acts and ultimately obtained a favorable verdict against Trask and Clear Touch.

***Response(s) and Motions***

In response to Clear Touch's Complaint, Encore filed an Answer and Counterclaims on November 16, 2017 asserting counterclaims for (1) Breach of Contract; (2) Breach of Contract Accompanied by Fraud; and (3) Abuse of Process. The first two counterclaims are based upon Clear Touch's alleged breach(es) of the Reseller Agreement, with Encore copying and pasting the allegations from the previous action between the parties as the purported facts supporting those claims. (*See* Ans. at ¶ 65-93). The Abuse of Process counterclaim is based upon Clear Touch filing this action. Clear Touch filed an Answer to the Counterclaims on December 21, 2017, asserting that Encore's counterclaims were barred by res judicata, among other things.

Clear Touch served its first set of discovery requests on February 16, 2018. Those requests included requests for documents and information concerning Encore's bidding of opportunities well after it ended its relationship with Clear Touch, including the bids, quotes, purchase orders, and invoices related to a large 2017 sale to Winston Salem. The deadline for Encore responding to those requests passed without any response. On March 21, 2018, Encore filed a Motion to

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Dismiss. The next day Encore requested an extension on its response deadline of 30 days after that motion was resolved. Clear Touch granted that request.

On March 27, 2018, Clear Touch filed a Motion to Dismiss Encore's contract counterclaims upon res judicata grounds because they are both claims arising out of the same transactions and occurrences involved in the previous action it could and should have brought in that case but chose not to do so. The same day, Clear Touch filed a Motion for Partial Summary Judgment on Encore's Abuse of Process counterclaim upon the basis that it cannot establish the elements of that cause of action; namely that it is unable to show a definite act or threat not authorized by the process as required to sustain that claim.

## III. APPLICABLE LAW

Summary judgment is proper when there is no genuine issue of material fact and the nonmoving party is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); *M&M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S.E.2d 262 (S.C. App. 2008); *see also Bruce v. Durney,* 341 S.C. 563, 534 S.E.2d 720 (Ct.App.2000) (holding a motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as a matter of law). The court must view the evidence and all reasonable inferences that may be drawn from it, in a light most favorable to the nonmoving party. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 644 S.E.2d 58 (2007). While the court is bound to view the evidence in a light favorable to the non-movant, it must also abide by the "affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial." *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 525 (4th Cir. 2003). Finally, "[a] party opposing a properly supported motion for summary judgment 'may not rest upon the mere

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allegations or denials of [his] pleadings,' but must 'set forth specific facts showing that there is a genuine issue for trial.'" *Id* at 526. Once the moving party carries its initial burden, the "opposing party must...'do more than simply show that there is some metaphysical doubt as to the material facts 'but 'must come forward with specific facts showing there is a *genuine issue for trial.*'" *Baughman v. Amer. Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)(internal citations omitted)(emphasis in original)*. When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (S.C. App. 1997).

**A. Encore Cannot Sustain its Abuse of Process Counterclaim**

Encore has not and cannot establish the essential elements of its abuse of process counterclaim; entitling Clear Touch to judgment as a matter of law on this spurious counterclaim.

A party alleging abuse of process must establish two essential elements: (1) an "ulterior purpose," and (2) a "willful act in the use of the process not proper in the conduct of the proceeding." *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 125, 136, 492 S.E.2d 103, 107 (1997). The claim "provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by that procedure." *Food Lion, Inc. v. United Food & Commercial Workers Intern. Union*, 351 S.C. 65, 69, 567 S.E.2d 251 (Ct. App. 2002).

***1. First Element – Ulterior Purpose***

As for the first element, "[a]n ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." *First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct. App. 1994). "There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad

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intentions." *Anderson's Requests to Charge § 2-2 Abuse of Process – Elements*; *Hainer v. American Medical Intern., Inc.*, 328 S.C. 128, 136 (1997).

> The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance of any formal use of the process itself, which constitutes the tort. The commencement of a civil action by the service of a summons…cannot amount to the tort known as abuse of process, which is the malicious misuse or perversion of the process for an end not lawfully warranted by it.

*Id.* Here, Clear Touch filed a legitimate Complaint seeking to recover for the damages caused by Encore's unlawful actions, and the alleged ulterior purpose claimed by Encore in its pleadings, is without merit on its face, and even if meritorious cannot support its abuse of process counterclaim.

Encore claims Clear Touch's "ulterior purpose" in filing this action was to gain objectives not legitimate in the use of the process, specifically attempting to get Encore "to settle the Prior Action on terms favorable to Plaintiff and Trask." (Ans. and CC ¶ 95).

First, there are no allegations, other than by pure inference, and certainly a total absence of evidence that Clear Touch's purpose was to utilize the filing of this action to broker a favorable settlement of the prior case. "An allegation of an ulterior purpose or 'bad motive,' standing alone, is insufficient to assert a claim for abuse of process." *Food Lion Inc. v. United Food and Commercial Workers Intern Union*, 351 S.C. 65, 74 (2002); *Hainer*, 328 S.C. at 136(explaining that no liability for the tort exists "where the defendant has done nothing more than carry out the process to its authorized conclusions, even though with bad intentions."); *see First Union*, 317 S.C. at 75("Because First Union simply carried the attached process to its authorized conclusion, its actions as a matter of law do not constitute abuse of process."); Prosser & *Keeton on Torts 897* § 121 at 897 (5th Ed. 1984)("[E]ven a pure spite motive is not sufficient where process is used only

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to accomplish the result for which it was created."). Contrary to Encore's bald accusations otherwise, Clear Touch's purpose in filing this was to obtain justice and compensation for Encore's misappropriation of its trade secrets and other unlawful acts having a detrimental impact on the Plaintiff and its business. This is the very purpose of our civil court system and the filing of this action cannot satisfy the ulterior purpose element necessary for Encore to sustain its claims. If Encore's accusation was true, then Clear Touch would have either attempted to assert these claims as counterclaims in the previous suit or not taken steps to progress this litigation following trial in the other matter. In reality, this action was filed on September 12, 2017 before trial started in the previous action to ensure Clear Touch was not susceptible to an argument its claims were waived. As detailed above, that was necessary due to Encore's actions including withholding evidence and other litigation tactics in the prior action. Clear Touch has since invested time and money in pursuing this case, including serving discovery in February 2017. The filing of dispositive motions has stalled the discovery process, which when those motions are resolved, Clear Touch fully intends to pursue. Encore's paltry attempts to satisfy this element of its abuse of process counterclaim are pure supposition from a myopic viewpoint, lacking adequate grounds and contradicted by the undeniable objective facts.

Second, Encore's allegations of Clear Touch's ulterior purpose or "bad motive" were true, then Clear Touch would not have pursued this matter following trial in the prior action. Instead, Clear Touch would have attempted to amend its pleadings to allege the claims asserted as counterclaims and at least be able to present evidence of Encore's unlawful actions to the jury. Rather than do that, Clear Touch was forced to file a new action in order to have adequate time to develop its claims and litigate them properly. It was Encore's deliberate acts, withholding of evidence, and gamesmanship that created that situation. It has already benefited from those actions

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by not having the jury hear evidence of its own trade secret misappropriation and illegal activities during trial. The audacity of Encore filing a counterclaim accusing Clear Touch of abusing the process under these circumstances is shocking, offensive, and the height of hypocrisy.

**2. Second Element – "Willful Act" Not Authorized by the Process**

As for the second or "willful act" element, the South Carolina Supreme Court has stated that "[s]ome definite act…not authorized by the process or aimed at an object not legitimate in the use of the process is required." *Hainer*, 328 S.C. at 136. Thus, this element is comprised of "three components: 1) a 'willful' or overt act 2) 'in the use of the process' 3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective." *Food Lion, Inc., v. United Food & Comm. Workers Intern. Union*, 351 S.C. 65, 71 (2002). Encore fails to allege and cannot show this essential element because Clear Touch's institution and pursuit of this action was and is a lawful use of the process for its essential purpose of resolving civil disputes and recovering damages for another's unlawful conduct. Again, outside recitation of the claims' elements, Encore makes no allegation of specific willful conduct; much less present evidence of it.

Encore's pleadings are merely a recitation of this second necessary element, summarily claiming that "[b]y unjustifiably filing the [*sic*] this action against Encore, Plaintiff committed willful acts in the use of the process not proper in the conduct of the proceeding, aimed at an object [*sic*] not legitimate in the use of the process, and for the primary purpose of achieving a collateral aim." (Ans. and CC ¶ 97). Those "willful acts in the use of the process not proper in the conduct of the proceeding" are never identified by Encore and rest on the premise the present action was "unjustifiably" filed. Encore's pleadings are bald allegations of an ulterior motive from which it wishes the Court to infer Clear Touch undertook some willful act that was improper in the conduct

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of the proceeding. The Courts have held such an inference cannot be made and an abuse of process claim proceed based on such accusations:

> Food Lion's argument is premised on its belief that alleging the Union undertook the acts "for collateral purposes" sufficiently alleges the improper nature of the acts. We disagree. An allegation of an ulterior purpose or "bad motive," standing alone, is insufficient to assert a claim for abuse of process. *Hainer,* 328 S.C. at 136, 492 S.E.2d at 107.
>
> ...
>
> Furthermore, although an ulterior purpose may be inferred from an improper willful act, "the inference is not reversible and it is not possible to infer [improper] acts from the existence of an improper motive alone." *Keeton, supra,* § 121 at 899; *see* 72 C.J.S. § 107 at 696 ("Misapplication [of the process] will not be inferred from a wrongful purpose."). Hence, to sustain a claim for the tort, a party must allege facts sufficient to show not only that the lawsuit was brought for an ulterior purpose, i.e., for collateral reasons, but that willful acts were taken through which the process was misapplied or abused. *See Huggins,* 249 S.C. at 214, 153 S.E.2d at 697 ("The abuse, the perversion, of the process ... is the foundation of the cause of action...."); *Kirchner,* 229 Ill.Dec. 171, 691 N.E.2d at 116-17 ("The mere use of the legal process ... does not constitute abuse of process. 'Some act must be alleged whereby there has been a misuse or perversion of the ***75** process of the court.' ") (citations omitted). To hold otherwise would vitiate the requirement of having to allege both elements of the tort-an " ulterior purpose" and an improper "willful act"-because a bald allegation that various acts were undertaken for collateral purposes would, in effect, be simply alleging an ulterior purpose.

*Food Lion*, 351 S.C. at 74-75.

Most prominently, Encore must show that this alleged improper collateral objective was the ***sole or paramount reason*** for Clear Touch filing this action. *Food Lion*, 351 S.C. at 75("[L]iability [for abuse of process] exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the collateral objective was its sole or paramount reason for acting."). Clear Touch denies that its filing of this action was motivated by malice or for an illegitimate collateral purpose. Even if the Court views the allegations in a light most favorable to Encore as the non-moving party, it has not alleged nor offered anything to show Clear Touch's ***sole or paramount objective*** in filing suit was for the fulfilment of an improper

collateral objective, assuming that negotiating a favorable settlement to the prior action qualifies as such an improper objective. Thus, Clear Touch's filing of this action in which it seeks to recover for Encore's unlawful actions simply cannot serve as an adequate basis for Defendant's abuse of process counterclaim because the "willful act in the use of the process" is lacking.

Encore's claim that Clear Touch had an improper motive in filing this action – to broker a favorable settlement of the prior action – is a ridiculous, baseless, and unsupportable accusation that could not be farther from the truth. Clear Touch's pleadings and exhibits to complaint show a viable and legitimate claim potentially worth a substantial amount of damages. Simply stating otherwise cannot afford Encore judgment as a matter of law.

The irony and hypocrisy of Encore asserting this counterclaim cannot be overstated. It was Encore's withholding of vital evidence, late production of it in a ten thousand plus page document dump less than four months prior to trial, unreasonable and aggressive opposition to Clear Touch's request that the trial date be continued to allow development of its claims, and other untoward litigation tactics which lead to Clear Touch having to file this action. For it to counterclaim for Abuse of Process is the height of hypocrisy and should not be rewarded. Encore must face consequences for its actions.

## IV. CONCLUSION

Based on the foregoing, no genuine issues of material fact exist and therefore the court should properly grant summary judgment in favor of the Plaintiff on Defendant's Abuse of Process counterclaim as a matter of law. S.C. R. Civ. Pro. 56.

(signature page to follow)



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Respectfully submitted,

**ROE CASSIDY COATES & PRICE, P.A.**

/s/Joseph O. Smith
Joseph O. Smith, S.C. Bar # 77475
Joshua J. Hudson, S.C. Bar # 100311
1052 North Church Street (29601)
P.O. Box 10529
Greenville, South Carolina 29603
(864)-349-2600 Telephone
(864)-349-0303 fax
JHudson@roecassidy.com
JSmith@roecassidy.com

***Attorneys for Plaintiff***

Greenville, South Carolina

July 29, 2018

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF GREENVILLE | ) | |
| | ) | |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No.: 2017-CP-23-05862 |
| | ) | |
| Plaintiff, | ) | **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** |
| | ) | |
| v. | ) | |
| | ) | |
| Encore Technology Group, LLC, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

# Exhibit A

April 13, 2017 Letter from Encore

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April 13, 2017

BY FIRST CLASS MAIL AND BY E-MAIL

Joseph O. Smith, Esq.
ROE CASSIDY COATES & PRICE, P.A.
1052 North Church Street
Greenville, SC 29601

*Re:* *Encore Technology Group, LLC v. Trask, et al.*, Case No. 2015-CP-23-05757

Dear Josh:

In response to your letter dated April 6, 2017, we hereby serve upon you Plaintiff's Privilege Log. Contrary to the assertions in your letter, Encore has produced all responsive, non-privileged documents to you.

Notwithstanding the foregoing, solely to attempt to avoid additional discovery disputes, Encore is producing the following documents via Sharefile:

1. Post-September 10, 2015, documents regarding Mr. Trask and Clear Touch. As you know, Encore terminated its Reseller Agreement with Clear Touch on September 10, 2015, because of Defendants' breaches of their contractual and fiduciary duties to Encore. Those breaches formed the basis of the lawsuit filed on September 18, 2015. Accordingly, we believed 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 as ENC 00203249–203437, none of which is relevant to the litigation.

2. Expert materials. All responsive written materials have been produced. The other information you reference was shared orally with the expert. Of course, you may inquire about this information when you depose him. Although we do not believe they are responsive, we are producing the cover and scheduling messages with the expert and re-producing the substantive documents that were attached as ENC 00203438-204370.

3. Encore financial documents. You request four additional categories of documents:

a. Revised Excel spreadsheet. Encore produced to you an Excel spreadsheet as it existed in the ordinary course of business in both PDF and native formats. Because you

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have the document in native format, you could hide any columns that you do not want to use in questioning the witnesses. Although it has no obligation to create a new document for you, Encore has attempted to create a new, abbreviated version of this spreadsheet based upon your prior e-mail on the subject, which is produced as described in Section 3.d below.

b. Encore's Profit and Loss Statement from May 2014-December 2016. The Discovery Order directed Encore to produce financial documents "pertaining only to the interactive video panel components of its business and documents supporting its damage claims concerning such business." Encore has done this. The broader Profit and Loss Statement you request from May 2014-December 2016 goes beyond this requirement and is after your client left Encore's employ, so is neither responsive nor relevant.

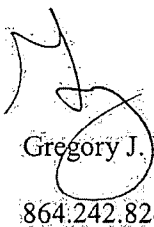
c. Encore's Line of Credit documents. Encore has already produced all documents reviewed by its expert regarding its line of credit. Nevertheless, Encore is producing documents ENC 00203219–203248, which provide additional information about its line of credit.

d. Interactive Video Financials for December 2016. This information was not in existence when the Discovery Order was entered and Encore made its production of these financials. Encore is producing documents ENC 00202557–203218 to include December 2016.

In your e-mail dated April 12, 2017, you also requested any documents from July – September 2015 discussing or pertaining to Encore's termination of the Reseller Agreement. The only such documents are privileged attorney-client communications and therefore there is nothing else to produce.

With the foregoing, Encore has exceeded its obligations in satisfying your requests.

Sincerely,



Gregory J. English

864.242.8247
genglish@wyche.com

GJE/sc

cc: Mr. Todd Newnam (by-email)

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | THIRTEENTH JUDICIAL CIRCUIT |
| COUNTY OF GREENVILLE | ) | |
| | ) | |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No.: 2017-CP-23-05862 |
| | ) | |
| Plaintiff, | ) | **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** |
| v. | ) | |
| Encore Technology Group, LLC, | ) | |
| Defendant. | ) | |

# Exhibit B

May 31, 2017 Letter from Encore

ELECTRONICALLY FILED - 2018 Jul 29 12:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862



May 31, 2017

BY HAND DELIVERY AND BY E-MAIL

Joseph O. Smith, Esq.
ROE CASSIDY COATES & PRICE, P.A.
1052 North Church Street
Greenville, SC 29601

*Re:* *Encore Technology Group, LLC v. Trask, et al.*, Case No. 2015-CP-23-05757

Dear Josh:

We were surprised by Defendants' Second Motion to Compel filed on May 15, 2017, which inaccurately stated that "Defendants have attempted to resolve these issues with the Plaintiff in good faith." To the contrary, following our letter dated April 13, 2017, the only remaining issue you raised with us concerned the Privilege Log, which Rita was actively trying to resolve with you by telephone.

Defendants, however, filed a Second Motion to Compel that raises three issues:

1. Plaintiff's Response to Defendants' Request 14: Defendants expressly made these same arguments in their first motion to compel and they were denied. *See* Discovery Order filed November 17, 2016, at 4 ("The balance of Defendants' Motion to Compel is denied ...."). In addition to not consulting with us about this, it is improper to seek to re-litigate this issue.

2. Privilege Log: As you know, we offered repeatedly to amend the privilege log to try to satisfy your concerns regarding it. Enclosed is our Amended Privilege Log, which we believe should satisfy you completely.

3. Post-September 10, 2015, documents regarding Mr. Trask and Clear Touch. As you know, Encore terminated its Reseller Agreement with Clear Touch on September 10, 2015, because of Defendants' breaches of their contractual and fiduciary duties to Encore. Those breaches formed the basis of the lawsuit filed on September 18, 2015. Accordingly, we believed 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, solely to resolve the issue, we have amended the Privilege Log and are producing documents that fall after this date.

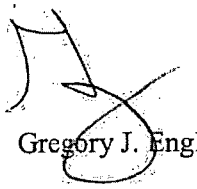
W Y C H E
PROFESSIONAL ASSOCIATION
44 East Camperdown Way, Greenville, SC 29601- 3512
p: 864.242.8200 | f: 864.235.8900
www.wyche.com

You will note that the documents produced on the enclosed flash drive include additional email communications beyond those produced on April 13, 2017 as ENC 00203249–204370. Following your conversations with Rita regarding the privilege log, Encore re-conducted its email search in an effort to ensure that all documents had been produced. Upon manually reviewing this search, Encore discovered the search terms inadvertently excluded certain emails, although none of them are relevant to this case.

Specifically, Encore discovered that, although its IT Department used "ClearTouch" in earlier searches, the spaced version "Clear Touch" was inadvertently left off. In this latest review, Encore also discovered that, when it endeavored to reduce the production of duplicate emails for the April 13, 2017 search (following your earlier protestations of duplications in Encore's prior productions), in some cases the effort to de-duplicate had deleted initial emails that were part of a multi-thread chain but were in an attached rather than string format. Encore has remedied these issues. Again, we do not believe that these additional emails are relevant to this case, but are producing them herewith as ENC 00204371-00214720.

Please confirm that the foregoing satisfies your requests.

Sincerely,



Gregory J. English

864.242.8247
genglish@wyche.com

GJE/sc

cc: Mr. Todd Newnam (by-email)



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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GREENVILLE<br><br>Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC,<br><br>Plaintiff,<br><br>v.<br><br>Encore Technology Group, LLC,<br><br>Defendant. | ) | IN THE COURT OF COMMON PLEAS<br>THIRTEENTH JUDICIAL CIRCUIT<br><br>C.A. No.: 2017-CP-23-05862<br><br>**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** |

# Exhibit C

Collection of Documents from May 31, 2017 Production

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ELECTRONICALLY FILED - 2018 Jul 29 12:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Wednesday, February 3, 2016 1:10 PM
**To:** Matt Fowler <mfowler@encoretg.com>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** RE: Request for Quote - Spartanburg SD #5 - ViewSonic
**Attach:** Quote015877v2 - (2) ViewSonic 65In ITV, Int PC, Fixed Std, Install 2-3-16.pdf; Quote016290v1 - (2) ViewSonic 70in ITV, Int PC, Fixed Std, Install 2-3-16.pdf

Matt,

Good afternoon! I updated the existing Quote015877 for the ViewSonic 65". It was for Qty 2 and I kept at that quantity. I created a new quote for the ViewSonic 70" Qty 2.

Let me know if you want anything changed on these.

Thanks!

**From:** Matt Fowler
**Sent:** Wednesday, February 03, 2016 12:06 PM
**To:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** FW: Request for Quote - Spartanburg SD #5 - ViewSonic

Joy,

I looked at the Direct pricing from ClearTouch that we had from a while back. Unless they've changed their pricing; which I don't see how they could too much; below is what it looks like: that is 16 points margin besides the PC which is 14.8. I know we have to think about shipping as well, but didn't ClearTouch charge shipping?

Let me know what you think. If you are good with it, we can update the existing quote in CW to include the 70" option as well.

**Clear Touch**

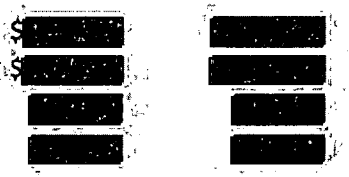
CTI-5065H+UH10 $[redacted]
CTI-5070H+UH10 [redacted]

CTI-5000X-PC85 [redacted]
CTI-5000X-STND $[redacted]

**ViewSonic**

ENC 00213390

CDE6560T
CDE7060T
LB-STND-003
NMP710-P8



From: Dendy Wakefield [mailto:DendyW@synnex.com]
Sent: Wednesday, February 03, 2016 10:53 AM
To: Joy Snelgrove <jsnelgrove@encoretg.com>; sales5509 <sales5509@synnex.com>
Cc: Matt Fowler <mfowler@encoretg.com>
Subject: RE: Request for Quote - Spartanburg SD #5 - ViewSonic

**QUOTE ORDER INFORMATION**
**As of 2/3/16**

| Reseller Account | PO/Quote# | Pricing |
|---|---|---|
| 157440 | WQ62867473 | Vendor SPA(VS) |

**Bill-to**
ENCORE TECHNOLOGY GROUP, LLC
2000 WADE HAMPTON BLVD, SUITE 210
GREENVILLE, SC 29615
**Terms**
1/2% 10 NET 30(EE)

**Ship-to**
ENCORE TECHNOLOGY GROUP, LLC
2000 WADE HAMPTON BLVD, SUITE 210
GREENVILLE, SC 29615
**Reseller**
ENCORE TECHNOLOGY GROUP, LLC
2000 WADE HAMPTON BLVD, SUITE 210
GREENVILLE, SC 29615

**Quote Description**

| Show Rebate | SKU SYNNEX P/N | Mfg. P/N | UPC# | Description | MSRP | Availability | Reseller Price | Qty | Ext. Price |
|---|---|---|---|---|---|---|---|---|---|
| | 4357443 | CDE6560T | 766907801316 | VIEWSONIC 65 (64.5 viewable) 10-point interactive display, 1920x1080p resolution and 7H hard anti-glare screen | $5,599.00 | Vendor Drop Ship | $2,630.00 includes ($1,015.00) rebate expiring 3/31/16 | 40 | $105,200.00 |
| | 4214522 | CDE7060T | 766907801514 | VIEWSONIC 70 (69.5 viewable) | $7,299.00 | Vendor Drop Ship | $3,150.00 includes | 40 | $126,000.00 |

ENC 00213390



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**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Wednesday, September 16, 2015 1:09 PM
**To:** jason.webster@viewsonic.com
**Cc:** Matt Fowler; Joy Snelgrove
**Subject:** Spartanburg School District 7 - Opportunity - Quote Request

Jason,

Good afternoon! Another customer that we have provided quotes for ClearTouch is:

Spartanburg School District #7
610 Dupre Drive
Spartanburg, SC 29307

They have purchased a couple of ClearTouch 70" panels. We have provided quotes for:

CTI-5070H+UH10 Need to be at or less than $[redacted]
CTI-5065H+UH10 Need to be at or less than $[redacted]
CTI-5055H+UH10 need to be at or less than $[redacted]
PC Module Need to be at or less than $[redacted] (no operating system)
Microsoft Windows 8.1 32 bit software need to be at or less than $[redacted]
Fixed Stand Need to be at or less than $[redacted]
Convertible Stand Need to be at or less than $[redacted]

Thank you for your assistance.

Joy Snelgrove
Account Manager
Encore Technology Group
Direct: (864) 326-3624
Fax: (864) 990-1173
Office: (888) 983-6267

Email Disclaimer

This message contains confidential information and is intended only for the individual(s) addressed in the message. If you are not the named addressee, you should not disseminate, distribute, or copy this e-mail. If you are not the intended recipient, you are notified that disclosing, distributing, or copying this e-mail is strictly prohibited.

Encore Technology Group

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**From:** Matt Fowler <mfowler@encoretg.com>
**Sent:** Tuesday, September 15, 2015 2:42 PM
**To:** Jason Webster (jason.webster@viewsonic.com)
**Cc:** Joy Snelgrove; David Masters
**Subject:** Anderson School District 1 - Opportunity - Quote Request

Hey Jason,

Anderson School District 1
Williamston, SC

They have purchased a couple ClearTouch panels in the past from us. I've had the conversation with them and in the process of getting some dates of availability for a virtual demo of your product. Will be in touch very soon for that.

We currently have quotes on 65" and 70" panels. This was more of an optional quote; quantities of 15 each. They were looking at 1 or 2 per school for now. In the process of converting them over completely from SMART. So this is a good opportunity for many more panels down the road.

If I give you our current part numbers, can you convert please? Also, I wasn't sure if you have a solution for a convertible stand. That's what we were quoting. If you have that, it would be great. If not, please let me know and quote regular stand. Will you also include shipping costs?

| Product | Quantity | |
|---|---|---|
| 5065H+UH10 | 15 | Need to be at or less than $[redacted] |
| PC Module | 15 | Need to be at or less than [redacted] (No Operating System) |
| Convertible Stand | 15 | Need to be at or less than $[redacted] if you have convertible stand. |
| 5070H+UH10 | 15 | Need to be at or less than $[redacted] |
| PC Module | 15 | |
| Convertible Stand | 15 | |

Thank you and look forward to working with you,

Matt Fowler
Account Executive
Encore Technology Group
Direct: (864) 326-3231
Fax: (864) 990-1187
Office: (888) 983-6267

Email Disclaimer

This message contains confidential information and is intended only for the individual(s) addressed in the message. If you are not the named addressee, you should not disseminate, distribute, or copy this e-mail. If you are not the intended recipient, you are notified that disclosing, distributing or copying this e-mail is strictly prohibited.

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**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Wednesday, September 16, 2015 1:02 PM
**To:** jason.webster@viewsonic.com
**Cc:** Matt Fowler; Joy Snelgrove
**Subject:** Spartanburg School District 5 - Opportunity - Quote Request

Jason,

Good afternoon! Another customer that we have provided quotes for ClearTouch is:

Spartanburg School District #5
100 North Danzler Road
Duncan, SC 29334

They have not purchased ClearTouch 70" panels but we have provided quotes for:

CTI-5070H+UH10 Need to be at or less than $[redacted]
PC Module Need to be at or less than $[redacted] (no operating system)
Microsoft Windows 8.1 32 bit software need to be at or less than $[redacted].
Fixed Stand Need to be at or less than $[redacted]
Convertible Stand Need to be at or less than $[redacted]

Thank you for your assistance.

ELECTRONICALLY FILED - 2018 Jul 29 12:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Wednesday, September 16, 2015 12:59 PM
**To:** jason.webster@viewsonic.com
**Cc:** Matt Fowler; Joy Snelgrove
**Subject:** Spartanburg School District 2 - Opportunity - Quote Request

Jason,

Good afternoon! Another customer that we have provided quotes to various schools in the District is:

Spartanburg School District #2
3231 Old Furnace Road
Chesnee, SC

They have purchased ClearTouch 70" panels at one of their high schools for a new wing last year and one this year. They have a lot of old Promethean boards and projectors that need to be replaced. Over the past 6 months we have provided quote to several school locations for the following:

CTI-5070H+UH10 Need to be at or less than $[redacted]
PC Module Need to be at or less than $[redacted] (no operating system)
Microsoft Windows 8.1 32 bit software need to be at or less than $[redacted]
Fixed Stand Need to be at or less than $[redacted]
Convertible Stand Need to be at or less than $[redacted]

Thank you for your assistance.

How does Monday the 28th, Wednesday the 30th or Thursday the 1st look for you guys?

Thank you,

---

**From:** Matt Fowler
**Sent:** Tuesday, September 15, 2015 2:42 PM
**To:** Jason Webster (jason.webster@viewsonic.com) <jason.webster@viewsonic.com>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>; David Masters <dmasters@encoretg.com>
**Subject:** Anderson School District 1--Opportunity--Quote Request

Hey Jason,

Anderson School District 1
Williamston, SC

They have purchased a couple ClearTouch panels in the past from us. I've had the conversation with them and in the process of getting some dates of availability for a virtual demo of your product. Will be in touch very soon for that.

We currently have quotes on 65" and 70" panels. This was more of an optional quote; quantities of 15 each. They were looking at 1 or 2 per school for now. In the process of converting them over completely from SMART. So this is a good opportunity for many more panels down the road.

If I give you our current part numbers, can you convert please? Also, I wasn't sure if you have a solution for a convertible stand. That's what we were quoting. If you have that, it would be great. If not, please let me know and quote regular stand. Will you also include shipping costs?

| Product | Quantity | |
|---|---|---|
| 5065H+UH10 | 15 | Need to be at or less than $[redacted] |
| PC Module | 15 | Need to be at or less than $[redacted] (No Operating System) |
| Convertible Stand | 15 | Need to be at or less than $[redacted] if you have convertible stand. |
| 5070H+UH10 | 15 | Need to be at or less than $[redacted] |
| PC Module | 15 | |
| Convertible Stand | 15 | |

Thank you and look forward to working with you,

Matt Fowler
Account Executive
Encore Technology Group
Direct: (864) 326-3231
Fax: (864) 990-1187

ENC 00211238



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Cleartouch Encore Direct Prices State of SC Contract

| Brand | Cleartouch | ViewSonic Channel SPA | Mark up |
|---|---|---|---|
| Model | 5070H+UH10 | CDE7060T +WMK-047 | 5% |
| Panel Price | [redacted] | [redacted] | [redacted] |
| PC Module | [redacted] | [redacted] | [redacted] |
| Windows | [redacted] | [redacted] | [redacted] |
| Fixed Stand | [redacted] | [redacted] | [redacted] |
| Convertible stand | [redacted] | [redacted] | [redacted] |
| Shipping | [redacted] | [redacted] | [redacted] |

Cleartouch Encore Direct Prices

| Brand | Cleartouch | ViewSonic Channel SPA | Mark up |
|---|---|---|---|
| Model | 5065H+UH10 | CDE6560T +WMK-047 | 5% |
| Panel Price | [redacted] | [redacted] | [redacted] |
| PC Module | [redacted] | [redacted] | [redacted] |
| Windows | [redacted] | [redacted] | [redacted] |
| Fixed Stand | [redacted] | [redacted] | [redacted] |
| Convertible stand | [redacted] | [redacted] | [redacted] |
| Shipping | [redacted] | [redacted] | [redacted] |

**From:** Megan White <mwhite@encoretg.com>
**Sent:** Wednesday, November 11, 2015 12:44 PM
**To:** Danielle Stengel <dstengel@encoretg.com>
**Bcc:** Megan White <mwhite@encoretg.com>
**Subject:** RE: Follow up
**Attach:** Quote015421v1 - (17 ) ViewSonic with Cart, Computer, & Camera.pdf; Quote015431v1 - (17) ViewSonic with Cart & Computer.pdf; Quote015432v1 - (17) ViewSonic With Cart & Camera.pdf

---

Let me know if you're good with this!

Unit prices now:
70in - $[redacted]
Display Stand - $[redacted]
Computer - $[redacted]

Previous ClearTouch:
70in - $[redacted]
Stand - $[redacted]
Computer - $[redacted]

---

**From:** Danielle Stengel
**Sent:** Tuesday, November 10, 2015 11:27 AM
**To:** Megan White <mwhite@encoretg.com>
**Subject:** Fwd: Follow up

Can you please quote?

*Danielle Stengel*
*Account Executive*
*Dstengel@encoretg.com*
*704.280.1489*

-------- Original message --------
From: "Horton, Heather L" <hlhorton@wsfcs.k12.nc.us>
Date: 11/10/2015 11:21 AM (GMT-05:00)
To: Danielle Stengel <dstengel@encoretg.com>
Subject: RE: Follow up



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**From:** Danielle Stengel <dstengel@encoretg.com>
**Sent:** Tuesday, May 24, 2016 9:42 PM
**To:** Jason Webster <Jason.Webster@viewsonic.com>
**Subject:** Want to beat keone
**Attach:** 9c8c6926fcc8af7d04fafeabfdb14300.pdf

Take a look at this bid

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ELECTRONICALLY FILED - 2018 Jul 29 12:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2305862

**From:** Matt Fowler <mfowler@encoretg.com>
**Sent:** Tuesday, June 7, 2016 10:38 PM
**To:** Joy Snelgrove <jsnelgrove@encoretg.com>; Nichole Liles <nliles@encoretg.com>; Matt Semberger <msemberger@encoretg.com>
**Subject:** RE: Reidville Elementary School Interactive Panel RFP DUE 6/17
**Attach:** Interactive Panel RFP.pdf

Joy,

I'm not positive if this really needs to go through presales. We have already prepared pricing in the past from Quote 016290 for ViewSonic. This RFP does say no other brands but Clear Touch allowed. I think we should submit anyway and make sure our pricing is better than what Clear Touch will offer; which I think we are already there. Some details are below but the RFP is very short. We can send written/filled out RFP to Barry Reese via email. Due date is 6/17.

District Five Schools is seeking written quotes for ClearTouch Interactive panels to be delivered and installed in portable classrooms at Reidville Elementary School. The District is seeking prices for a one-time purchase. A purchase order issued Reidville Elementary School will constitute a contract between the parties.
Specifications:
Your written quote must be for the following equipment.
No other brands or models will be considered.
? Four (4) units:
? ClearTouch Interactive Panel, CTI – 5070H
? Mobile Stand – CTI – 5000X - FIXM
? Any necessary hardware, cabling and connectors
? ActivInspire software license
? Complete onsite delivery and installation
? Onsite training (3 days) for school level technicians
? Standard warranty on parts, equipment, and installation
? Local representative for quick service response time

Opportunity Name: Reidville Elementary School Interactive Panel RFP DUE 6/17
Opportunity Description: 6/7/16 Fowler--RFP attached to docs.
Opportunity Company: Spartanburg School District #5
Opportunity Contact: Barry Reese
Opportunity Phone: (864) 949-7628

ENC 00214214

To: Danielle Stengel <dstengel@encoretg.com>
Cc: Megan White <mwhite@encoretg.com>
Subject: Re: CMS BId

I will get with my bid desk. Remember, they charged $200 for shipping.

Thank you,

Ben Pearson
Territory Manager - Southeast
ViewSonic Corporation
904.568.9151

On Nov 2, 2016, at 10:47 AM, Danielle Stengel <dstengel@encoretg.com> wrote:

<image001.gif>
Actually, Megan just pointed out that Winston has better pricing already over CMS but that still has us over Clear Touch.

Let me know if you can be any more aggressive here since you know Clear touch pricing.

*Danielle Stengel*
*Account Executive*
*dstengel@encoretg.com*
*704.280.1489*

*Megan White*
*Inside Sales Representative*
*mwhite@encoretg.com*
*864.326.3604*

---

**From:** Danielle Stengel
**Sent:** Wednesday, November 2, 2016 10:45 AM
**To:** Ben Pearson <Ben.Pearson@viewsonic.com>
**Cc:** Megan White <mwhite@encoretg.com>
**Subject:** FW: CMS Bid

Can we get same pricing for Winston?

We are higher than Bridgetek/Clear Touch for 70 and if they choose 65, I would like to have all pricing lined up and compare and then not present till RFP.

Let me know.

*Danielle Stengel*
*Account Executive*
*dstengel@encoretg.com*
*704.280.1489*

*Megan White*







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**From:** Rogers, James <James.Rogers@spartanburg2.k12.sc.us>
**Sent:** Tuesday, January 19, 2016 12:17 PM
**To:** Joy Snelgrove
**Subject:** RE: Chesnee High School

Thank you for the follow up. I assume the functionality of the ViewSonic is the same as the ClearTouch so a demo would not be necessary unless there is a significant difference. We look forward to receiving the updated quote.

Thanks,

**Jimmy Rogers**
Social Studies Teacher

Chesnee High School
795 S. Alabama Avenue
Chesnee, SC 29323
864.461.7318 ext. 4552

**From:** Joy Snelgrove [mailto:jsnelgrove@encoretg.com]
**Sent:** Tuesday, January 19, 2016 10:06 AM
**To:** Rogers, James
**Cc:** Joy Snelgrove; Matt Fowler
**Subject:** FW: Chesnee High School

Mr. Rogers,

Good morning and Happy New Year! We appreciate the opportunity to assist you!

Encore is no longer working with ClearTouch due to the long lead time for product delivery. Encore management did some research and found that the manufacturer of ClearTouch which is CVTE (Chinese company): http://www.cvte.com/product/commercial/ also manufactures the same product under the brand name ViewSonic. ViewSonic is a much larger company that utilizes distribution for stocking and quick shipments and their physical headquarters is in California.

Example US-based Company that resells CVTE Displays with custom bezel and Seewo Software: http://www.viewsonic.com/us/commercial-displays.html

Viewsonic also provides the interactive products for Accuweather:

http://www.avnetwork.com/av-technology/0002/accuweathers-4k-strategy/96018

We have requested pricing for their 70" Interactive Panel and will provide you a quote comparable to the other 8 classrooms that Chesnee High School has purchased.

If you would like we can arrange for a demonstration of the ViewSonic. If you have any questions please let us know. Have a great afternoon!

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**From:** John Dockery <jdockery@encoretg.com>
**Sent:** Tuesday, September 15, 2015 2:17 PM
**To:** Matt Whiteside <matt.whiteside@ashevillecityschools.net>
**Cc:** John Dockery <jdockery@encoretg.com>
**Subject:** ViewSonic 70" Panel Quote
**Attach:** ViewSonic Panel.pdf; Quote014713v1 - 70in ViewSonic Displays.pdf

Matt,

Please see the attached quote for the 70" panel. This is $[redacted] less than the ClearTouch.

http://www.viewsonic.com/us/cde7060t.html

Thanks,

**John Dockery**
**Account Executive**
**Encore Technology Group**
**jdockery@encoretg.com**
**Tel: 864-979-4984**
**www.encoretg.com**

John Dockery
Account Executive
Encore Technology Group
Direct: (803) 807-2727
Fax: (864) 990-1190
Office: (888) 983-6267

**Email Disclaimer**

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**Encore Technology Group**

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**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Tuesday, September 15, 2015 4:36 PM
**To:** Matt Fowler <mfowler@encoretg.com>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** Spartanburg SD 2 - Carlisle Foster's Grove ES FW: Updated Quote for Room 200
**Attach:** Quote012964v2 - Carlisle-Foster's Grove ES - Cleartouch 70in H+ ITV Wall mounted 6-3-15 jrs.pdf; Spartanburg SD 2 - Carlisle-Foster's Grove ES - ClearTouch Interactive Panel Scope of Work 6-3-15 jrs.pdf

Another one to convert to Viewsonic

---

**From:** Joy Snelgrove
**Sent:** Friday, June 19, 2015 8:27 AM
**To:** 'Wall, Carolyn' <Carolyn.Wall@spartanburg2.k12.sc.us>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** FW: Updated Quote for Room 200

Carolyn,

Good morning! I hope that all is well!

I wanted to follow-up on the attached quote for the Cleartouch Interactive TV. Did you have any questions or need anything further?

Have a great Friday!

**From:** Joy Snelgrove
**Sent:** Thursday, June 04, 2015 9:18 AM
**To:** 'Wall, Carolyn'
**Cc:** Matt Fowler; Matt Semberger; Joy Snelgrove
**Subject:** Updated Quote for Room 200

Carolyn,

Good morning! Thank you for the opportunity to assist you!

Attached is the updated quote for Room 200 based on the walkthrough performed by Matt Semberger. Also attached is a scope of work for the installation of the project. Please be sure to sign page 8 and send back the entire agreement with your purchase order when you are ready to proceed. We will get the scope signed on our end and send back the signed entire agreement to you.

Please keep in mind that the Clear Touch has a 12-14 week lead time. If you have any questions please

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**From:** Tony Gallman <tgallman@encoretg.com>
**Sent:** Wednesday, September 16, 2015 6:54 AM
**To:** Danielle Stengel
**Cc:** Outside Sales; David Masters; Matt Fowler; Inside Sales
**Subject:** RE: ViewSonic--Pricing Question

What is Jason contact info

*Sent from my Verizon Wireless 4G LTE DROID*
On Sep 15, 2015 12:43 PM, Danielle Stengel <dstengel@encoretg.com> wrote:
3499.00 is price to disti on 70"

He said this was not their bottom line number should this come to a case where they need to be more competitive if pricing was already presented from Clear Touch standpoint and lower but that needs to be registered and communicated.

I do not have for the 65 and 84 yet but Jason is sending me everything today with accessories added as well for a 3700 classroom opp I have.

I will send to everyone when I get.

**From:** David Masters
**Sent:** Tuesday, September 15, 2015 12:34 PM
**To:** Matt Fowler <mfowler@encoretg.com>
**Cc:** Inside Sales <insidesales@encoretg.com>; Outside Sales <outsidesales@encoretg.com>
**Subject:** Re: ViewSonic--Pricing Question

Our costs need to be in line with the registered price of Cleartouch

On Sep 15, 2015, at 12:32 PM, Matt Fowler <mfowler@encoretg.com> wrote:

> Team,
>
> Wanted to see what kind of pricing we are requesting from Jason Webster on 65,70 and 84 inch panels? I'm just trying to make sure we are not all over the board upon asking. He told me on the phone to let him know on opportunities as to where we would like to be from a price point, but I thought if we are all around the same with our requests that could be good.
>
> Just let me know your thoughts please.
>
> Thank you,
>
> Matt Fowler
> Account Executive
> Encore Technology Group
> Direct: (864) 326-3231
> Fax: (864) 990-1187
> Office: (888) 983-6267

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**From:** Megan White <mwhite@encoretg.com>
**Sent:** Wednesday, August 31, 2016 3:15 PM
**To:** Ben Pearson
**Cc:** Danielle Stengel
**Subject:** RE: Wake County Schools
**Attachments:** image001.png

Hi Ben,

Danielle may have reached out to you again about this one today but I wanted to send an email too. Any additional discount you can give us on this account based on the below?

Thanks

---

**From:** Danielle Stengel
**Sent:** Tuesday, August 30, 2016 11:22 AM
**To:** Ben Pearson <Ben.Pearson@viewsonic.com>
**Cc:** Megan White <mwhite@encoretg.com>
**Subject:** FW: Wake County Schools

Good morning. Need help on Wake. If we go in at 8 points per unit we are just at what ConnectView is doing with Clear Touch. Once e-procurement fees are applied through PO process, we will be at 6.25 and our install costs to customer do not even cover travel time.

Can ViewSonic do any better to get in the door here and hopefully get Clear Touch out?

I am sure you agree that most are making more margin on panels and I am not being greedy but we really have to then discuss this with our CEO and Manager to agree as well at this mark up and I feel quite certain it will be challenged especially since we have had more than a few go backs lately which puts us in a hole.

Let me know.

Thanks

Danielle Stengel
Account Executive
dstengel@encoretg.com
704.280.1489

Megan White
Inside Sales Representative
mwhite@encoretg.com
864-326-3604

**From:** Megan White
**Sent:** Tuesday, August 30, 2016 11:01 AM

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**From:** Joy Snelgrove </O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=03CEFF398FE34957A7F30012EC4FEC75>
**Sent:** Tuesday, April 19, 2016 1:45 PM
**To:** Brown, Sherri <Sherri.Brown@spartanburg2.k12.sc.us>
**Cc:** Joy Snelgrove <jsnelgrove@encoretg.com>; Matt Fowler <mfowler@encoretg.com>
**Subject:** RE: Quote 102964
**Attach:** Quote017323v1 - Carlisle Foster's Grove ES - Viewsonic 70in ITV Wall Mounted 4-18-16.pdf; Quote012964v2 - Carlisle-Foster's Grove ES - Cleartouch 70in H+ ITV Wall mounted 6-3-15 jrs.pdf

---

Sherri,

Good afternoon! Thank you for the opportunity to assist you!

You had requested an updated quote for ClearTouch interactive TV on Quote012964v2 from last year. The attached new quote017323v1 is for ViewSonic which has product available in a much shorter timeframe than what we have been getting through ClearTouch.

The manufacturer of interactive displays and software (EasiNote) is CVTE and a CVTE-owned entity that sells displays directly and develops the EasiNote Software is Seewo. With that said Encore is now partnered with ViewSonic which is a US-based company that resells CVTE displays with custom bezel and Seewo software.

We would be happy to arrange for ViewSonic to provide an on-site demonstration of the product so that you can see that the product is the same features and capabilities.

The attached quote is for the ViewSonic 70" ITV, the wall mount which is required but at $0.00. The quote also includes the integrated PC (network media player) which is pre-installed with Microsoft Windows 8. The quote also has shipping and then the other components from the prior quote. As you will see the overall total for the new quote017323v1 is $ [redacted]. The previous quote012964v2 overall total was $ [redacted].

If you have any questions please let me know. Have a wonderful afternoon!

---

**From:** Brown, Sherri [mailto:Sherri.Brown@spartanburg2.k12.sc.us]
**Sent:** Tuesday, April 12, 2016 11:17 AM
**To:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Subject:** Quote 102964

Joy, could you please verify or rewrite the above quote for a Cleartouch 70" h+ ITV Wall Mounted

Sherri E. Brown

ENC 00214022

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**From:** Joy Snelgrove <jsnelgrove@encoretg.com>
**Sent:** Friday, December 18, 2015 5:01 PM
**To:** Wendy Metcalf; Jennifer Stone; John Pressley; John Ulmer; Megan White; Sheldon Pettigrew
**Subject:** RE: [BULK] Contact US Request from Dena Wade

I've taken care of this - sent Viewsonic to Amanda Dobson.

**From:** Wendy Metcalf
**Sent:** Thursday, December 17, 2015 2:39 PM
**To:** Jennifer Stone <jstone@encoretg.com>; John Pressley <jpressley@encoretg.com>; John Ulmer <julmer@encoretg.com>; Joy Snelgrove <jsnelgrove@encoretg.com>; Megan White <mwhite@encoretg.com>; Sheldon Pettigrew <spettigrew@encoretg.com>
**Subject:** FW: [BULK] Contact US Request from Dena Wade

From the website.

**From:** Encore [mailto:webadmin@encoretg.com]
**Sent:** Thursday, December 17, 2015 2:38 PM
**To:** Info <info@encoretg.com>; Chris Schmidt <cschmidt@encoretg.com>
**Subject:** [BULK] Contact US Request from Dena Wade

**Your Email** :- dena.wade@spart5.net
**Your First Name** :- Dena
**Your Last Name** :- Wade
**Your Phone** :- 864-949-2350
**Comments/Questions** :- "I am looking for a quote for 2 Clear touch television panels. these are for libraries, so at least 65 inch - onboard PC please. Thank you Dena Wade"
http://www.encoretg.com/contact-us

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | THIRTEENTH JUDICIAL CIRCUIT |
| Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, | ) | C.A. No.: 2017-CP-23-05862 |
| Plaintiff, | ) | **PLAINTIFF'S RULE 59 MOTION FOR RECONSIDERATION** |
| v. | ) | |
| Encore Technology Group, LLC, | ) | |
| Defendant. | ) | |

Plaintiff Clear Touch Interactive, Inc. f/k/a Clear Touch Interactive, LLC, (*hereinafter* "Clear Touch"), through its undersigned counsel, respectfully moves this Honorable Court, pursuant to Rule 59(e), for reconsideration of this Court's August 10, 2018 Order Dismissing Case (the "Order") for the reasons and upon the grounds set forth below.

## I. ORDER'S HOLDING THAT CLEAR TOUCH'S CLAIMS ARE BARRED BY RES JUDICATA WAS IN ERR

The Court found that Clear Touch was provided sufficient discovery to enable it to assert claims based upon Defendant Encore Technology Group, LLC's (*hereinafter* "Encore") alleged misuse and disclosure of Clear Touch's confidential information by May 31, 2017.

"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 the prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). "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." *Id.*

"Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye v.*

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*Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct.App.1997). In *Beall v. Doe*, the Court distinguished the two concepts as follows:

> The doctrines of *res judicata* and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.

281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 190 n. 1 (Ct. App. 1984) (citations and quotation marks omitted).

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citation and quotation marks omitted). "The doctrine [of res judicata] flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action." *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct.App.2007)(citation omitted); *see also S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248, 551 S.E.2d 274, 278 (Ct.App.2001) ("'The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action.'" (*quoting First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945))).

"The doctrine of collateral estoppel, or issue preclusion, on the other hand, rests generally on equitable principles." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct.App.1995) (*citing Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)). In *Watson*, the South Carolina Supreme Court contrasted the origin of the doctrine of collateral estoppel with the origin of res judicata:

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> Estoppel rests generally on equitable principles, which res judicata does not, but upon the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and interest *reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation[ ] )[.] ... *Res judicata* is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

205 S.C. at 221–22, 31 S.E.2d at 319–20 (citations omitted); *see also First Nat'l Bank of Greenville*, 207 S.C. at 24, 35 S.E.2d at 56–57 (*citing Watson*) (contrasting the origins of *res judicata* and collateral estoppel).

The Order holds that Clear Touch's claims are barred by the doctrine of *res judicata* because they arise out of the same transaction or occurrence that was the subject of a prior action between the parties and could have been asserted in that previous case. This holding is inaccurate and fails to consider the fact that Encore's own actions necessitated the filing of this action because they robbed Clear Touch of the ability to fully and fairly litigate the causes of action asserted in this case.

***A. Clear Touch's Claims Do Not Arise Out of the Same Transaction or Occurrence***

Clear Touch's claims in this case do not arise out of the same transaction or occurrence underlying those alleged by Encore in the previous action and therefore are not barred by res judicata.

"*What factual groupings constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically*, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *South Carolina Public Interest Found. v. Greenville County*, 401 S.C. 377, 388, 737 S.E.2d 502, 508 (Ct. App. 2013)(*emphasis in original*)(internal citations omitted).

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Encore's misappropriation of Clear Touch's trade secrets and use of that information to unfairly compete with it in the marketplace forms the basis of three out of the four claims asserted in this case – (Breach of Contract – Mutual Confidentiality Agreement; Violation of the SCTSA; and Conversion). Those claims and facts underlying them are distinct transactions and occurrences in both a factual and temporal sense from those in the previous action.

First, the current claims rely on Encore's misappropriation of Clear Touch's trade secrets to unfairly compete with it in the marketplace, including by sharing that information with its competitor and using it to bid sales/jobs. The facts underlying those claims are therefore distinct from those Encore relied upon to establish liability for its causes of action in the prior suit, which by its own words were "Defendants' [Clear Touch's and Trask's] breaches of their contractual and fiduciary duties to Encore." (Exhibits A & B). Second, those actions (underlying Encore's claims in the previous matter) all occurred prior to the relationship being terminated in September 2015. (*See* Exhs. A & B). The facts and occurrences underlying Clear Touch's claims in this case however involve acts which occurred following the termination of the parties' business relationship in September 2015, a time which Encore deemed irrelevant to that litigation. (*See* Exhs. A & B). Therefore, the claims at issue are based upon facts distinct from those underlying the claims in Encore's previous case and as such they are not barred by the doctrine of res judicata.

### *B. Encore's Actions Prevented Clear Touch from Being Able to Assert its Claims in the Prior Case by Robbing it of a Full and Fair Opportunity to Litigate*

Encore's actions, including withholding of evidence in the previous matter, prevented Clear Touch from pursuing its claims as counterclaims in that case. *Venture Engineering, Inc. v. Tishman Const. Corp. of South Carolina*, 360 S.C. 156 (Ct. App. 2004)(Essential element of res judicata is adjudication of the issue in the former suit and doctrine prevents relitigation of claims

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that were or could have been raised in that action.). Therefore, res judicata cannot bar Clear Touch from seeking redress for Encore's unlawful actions in this case.

In *Judy v. Judy*, the South Carolina Supreme Court addressed the question of whether a claim should have been raised in a prior action stating:

> 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. 160, 171, 712 S.E.2d 408, 414 (2011). The Court went on to explain that term "cause of action" for *res judicata* purposes: "[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.* (citations and quotation marks omitted). "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 Public Int Found. v. Greenville County*, 401 S.C. 377, 390 (Ct. App. 2013)(internal citations omitted). As noted above, the present claims do not arise out of the same transaction or occurrence as those underlying Encore's causes of action in the previous matter and therefore need not have been brought in that case. This is not to mention that Encore itself deemed these matters "irrelevant" to the prior case on two separate occasions. (*See* Exhs. A & B).

Furthermore, assuming arguendo *res judicata* applies to Clear Touch's claims, there are obvious and compelling policy reasons for the Court to decline to apply the doctrine because

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Encore's actions robbed Clear Touch of a full and fair opportunity to litigate the issues forming the basis of its claims. *See SC Pub. Int. Found* at fn9 (Noting 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.") *see also Nandwani v. Queens Inn Motel*, 2012 WL 10844387 at *11-12 (Ct. App. 2012)(Unreported). The purpose of res judicata (the prevention of relitigation 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 for its claims. The current situation is of the latter variety because Encore's actions robbed Clear Touch of a full and fair opportunity to litigate the misappropriation of its trade secrets.

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 should make Encore face the consequences of its own actions. To do otherwise would encourage the withholding of incriminating evidence in contravention of the Rules and

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entire purpose of the civil litigation process, not only without fear of repercussion but with the prospect of benefiting from such tactics.

Finally, it should be noted that the Order states that Clear Touch did not seek to amend its pleadings in the prior action or seek an additional continuance based upon allegedly newly discovered information. That is simply not true. Given the circumstances created by Encore's actions and discovery tactics, Clear Touch was fully aware that an August 2017 trial date was unreasonably burdensome just to address the claims in the prior action. Nevertheless, Encore would not consent to a continuance of the trial date and Clear Touch was forced to file a Second Motion for Continuance on June 6, 2017. The Motion specifically stated that the May 31, 2017 production indicated the potential need for Clear Touch to amend its pleadings to add in a counterclaim against Encore not previously known due to Encore's withholding of the many relevant documents. (Exhibit C). Encore fiercely opposed that Motion as it did the first, claiming that the documents produced on May 31st were *irrelevant* to the case and their late production therefore did not warrant continuance of the trial date. The Court gave the parties a few additional weeks and set the trial for the week of September 25, 2017. Based on Encore's representations regarding the irrelevance of that evidence to the prior action, Clear Touch was completely justified in filing these claims as a separate action without the concern of a res judicata claim.

Therefore, Plaintiff respectfully asks the Court reconsider its holding on the res judicata issue.

## II. THE ORDER ADDRESSING MANDATORY COUNTERCLAIMS UNDER RULE 13 WAS IN ERR

The Court held that Clear Touch's present claims were mandatory counterclaims under Rule 13. However, mandatory counterclaims were never addressed during the Court's Hearing on the Parties' cross-motions for summary judgment, nor did the Court make any such ruling in its

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Form 4 Order (July 31, 2018) filed prior to the Order Dismissing Case at issue. Just as a party cannot use a Rule 59(e) motion to raise an issue which could have been presented to the court during the motion hearing (*see Richardson v. Fairfield Cty. ex rel. Fairfield Cty. Council*, No. 2006-UP-263, 2006 WL 7286041, at *4 (S.C. Ct. App. May 24, 2006) and *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995)), a party cannot add language to a proposed order that was not addressed prior thereto.

In its Form 4 Order, the Court laid out its substantive ruling and asked Encore's Counsel to prepare a formal order. Encore's Counsel added in the mandatory counterclaim language. Counsel for Clear Touch asked that this language be stricken, but Encore's Counsel declined and submitted same to the Court. The Court subsequently adopted the Order despite Clear Touch Counsel's objections. Neither mandatory counterclaims nor Rule 13 were ever mentioned at the hearing or in the Court's rulings so Clear Touch submits that it is not appropriate for Encore to insert that substantive ground into a proposed order and seek to have the Court adopt it.

## CONCLUSION

For the reasons stated above, Plaintiff prays that the Court reconsider its rulings noted above.

(Signature page follows)

Respectfully Submitted,

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product that they had ordered and sent it to another Encore customer. That was false. In other words, Mr. Trask defamed Encore and poisoned the relationship between Encore and Leon County Schools.

As a result, Leon County stopped buying panels from Encore and started buying them from Clear Touch, about $1 million worth of panels. That caused Encore to lose about $425,000 in profit. And that was despite an expressed provision in Mr. Trask's contract that he would not, for a year.

Then, Mr. Trask hired Mr. Gallant that I referred to earlier that he got to sign an NDA in April. He hired him in January of 2015. Again, a violation of an expressed provision of his contract that says you won't hire employees away from Encore for a year. He did that.

All of this, Ladies and Gentlemen, has caused Encore significant damages. There are basically four categories of damages I want to discuss and that the evidence will show. The first category is wages. Encore, in the time that Mr. Trask was there, paid him over $300,000 in salary, bonuses, benefits and

expenses, and he paid Mr. Gallant and Mr. Higginbotham for these conferences another -- over another $400,000.

If Mr. Trask would have just disclosed right up front and said, "Hey. I own Clear Touch. I'm going to be working to promote Clear Touch and I'm going to use Mr. Gallant and Mr. Higginbotham to help me promote my company Clear Touch," Encore could have said, "Okay. Well, go do Clear Touch. We're not going to pay you to promote your company." But he didn't do that. He hid that fact. That cost -- caused direct costs to Encore of the wages and conference expenses.

Second category of damages is, by hiding the true suppliers of these panels, Mr. Trask prevented Encore from buying these panels at the true cost. If Mr. Trask had gone to Encore and said, "Look. I found a supplier of the panel. The supplier is TSItouch, and then later CVTE," Encore could have bought directly from them at a lower cost. Instead, Mr. Trask inserted his company Clear Touch in between, marked up the prices, and the evidence is, he made about $675,000 in profits, additional

profits, by doing that that he deprived and took from Encore what they could have bought, if he had just disclosed the identity of the true suppliers.

The third category of damages, I've already described a little bit, is Leon County Schools. If Mr. Trask had just honored his confidentiality and non-compete provisions, Encore would have made those sales to Leon County Schools and another $425,000 in profits.

Finally, the fourth category of damages involved what is called a business opportunity clause of the contract. The business opportunity clause required Mr. Trask to do two things when he was with Encore: number one, to disclose all business opportunities to Encore; and then, number two, to work with Encore to enable it to take advantage of those opportunities. That's what Encore was paying him to do. That's what he agreed to do.

Instead, the evidence will show that he built this company, Clear Touch, that is today worth over $5.5 million. If Mr. Trask had honored that business opportunity clause and his fiduciary duties and duties of loyalty,

Encore would have realized that value. Instead, Mr. Trask tricked Encore into taking all the risks, paying virtually all the start-up costs of Clear Touch and, then, keeping it for himself.

Ladies and Gentlemen, it will be for you -- as the Judge said, you all are the judges of the facts. It's going to be up to you to judge and decide what is a verdict and amount of damages that fully compensates Encore for Mr. Trask and Clear Touch's deceitful and fraudulent acts and for their violation of their contractual and other duties. We thank you for your time and attention to this important matter.

**THE COURT:** Mr. Smith, the defense ready?

**MR. SMITH:** Yes, Your Honor.

Afternoon, Ladies and Gentlemen. You've heard a whole lot. Let me introduce my team first, real quick. Y'all met us earlier. Again, my name is Josh Smith. I work for Roe Cassidy Coates & Price here in Greenville. With me is one of my partners, Josh Hudson. Seated to his left, Mr. Keone Trask, who is the defendant in this matter. Then, you see Mr. Trask's wife,

forum in which to make money. I ask that you render a fair verdict against my clients. At the end of this case, I'm going to come and actually tell you, once the evidence is actually in, what we believe a fair verdict is, based on what's presented to you. I ask that you do what's right by my clients, by a Greenville-based company that's a mom-and-pop's shop that's employing 28 people. That's all. I appreciate y'all's time. I look forward to trying the case in front of you. Again, we'll talk at the end. Thank you.

**THE COURT:** Call your first witness, please.

**MR. ENGLISH:** We'll call Mr. Todd Newnam.

**THE CLERK:** Place your left hand on the Bible and raise your right hand.

**TODD NEWNAM**

having first been duly sworn, testifies as follows:

**THE CLERK:** State your name for the record.

**THE WITNESS:** Todd Robert Newnam.

**THE CLERK:** Thank you. Please be seated.

**DIRECT EXAMINATION**

**BY MR. ENGLISH:**

**Q** Good afternoon, Mr. Newnam. Would you tell the jury your full name.

**A** Todd Robert Newnam.

**Q** How old are you, Mr. Newnam?

**A** I'm 46.

**Q** Are you married?

**A** I am, yes.

**Q** To whom?

**A** Angela Newnam, my wife in the back.

**Q** Y'all have any children?

**A** We do. We have a daughter who is 17, a daughter who is 15, and a son who is 12.

**Q** Are you looking at colleges for the 17-year-old?

**A** Actively. Yeah, she's a senior.

**Q** Are you active in any civic groups or organizations?

**A** I am in a number of them, but my primary one that I'm involved in is the Boys Scouts of America. I was an Eagle Scout, growing up. I started a Cub Scout pack for my son. Today, I'm an active scoutmaster in that group.

I'm on the board of the Western North Carolina Council. This summer, I led 40 boys from Western North Carolina to Greenville up to the

National Jamboree in West Virginia. So I'm very active.

**Q** Now, Mr. Newnam, where were you born?

**A** I was born in Falls Church, Virginia.

**Q** Where did you go to college?

**A** Davidson College, which is right outside of Charlotte.

**Q** And then did you go to business school after that?

**A** I did. I went to Harter Business School.

**Q** And what did you do after that?

**A** I went to work in Charlotte, North Carolina, for an investment banking group that did mergers and acquisitions and advisory work.

**Q** And how long did you do that?

**A** I was there for four years.

**Q** Explain to the jury what sort of work you did for the investment banking firm.

**A** Sure. Principally, I was a southside agent for private equity firms and companies that wanted to sell businesses. My job was to go in and understand the companies, what their strategies were, what their opportunities were, what the risks were, what their financial performance was; and then help craft that into a marketing document and approach potential

buyers; and then sell those companies to those buyers.

**Q** What did you do after that?

**A** After that, I actually left and went to one of our firms called The Carlyle Group. And I stepped from being a southside agent to a principal. My job there was to do -- similarly, to find companies for us to buy for our investors. We raised money from pension funds and large entities. Our job was to find companies, buy them, sit on the board for 5 or 10 years, and then divest them and try to make money for our investors. In the course of that, I would do due diligence, financial and legal and otherwise, and lead teams that did those kinds of work.

**Q** Is that what we call a private equity firm?

**A** Yes, private equity firm.

**Q** And how long did you do that?

**A** I was there a little over 11 years.

**Q** In your work, was it your job to value businesses?

**A** Yes.

**Q** After you left The Carlyle Group, what did you do?

**A** After leaving there, my wife and I decided we wanted to move to Western North Carolina and I endeavored to buy a small company to run on my own. My parents had been -- my dad was a small contractor. He and my mom had started a company, and run it. I always had the American dream of owning my own small business to run.

**Q** Now let's talk about Encore Technology. First, explain to the jury what CSI was.

**A** CSI was a small, publicly traded company in Easley, South Carolina. It had, essentially, two parts to it. One was accounting software for schools, essentially, QuickBooks. Then it had this reseller technology division, what you're hearing about today.

**Q** And what happened to CSI?

**A** CSI was acquired by a company called Harris Corporation and they only wanted the software component of the business. And they wanted to either shut down or sell off the technology reselling division.

**Q** And so what was Encore formed to do?

**A** Encore was formed to buy the assets and hire the employees and take on the customers and supplier of arrangements of the CSI technology division.

Q And who originally formed Encore?

A That would -- Mr. Trask -- Keone started Encore, formed the shell corporation -- it wasn't anything other than a piece of paper -- with the intent of trying to buy the assets of CSI.

Q So who did you talk to about acquiring Encore and the assets of CSI?

A So I -- in the course of my looking at dozens of businesses in the area and trying to find something to buy, I eventually was introduced, through a contact of Keone, to a gentleman named Chris Powell and to a gentleman named Michael Knight. We had lunch one Saturday in Spartanburg. The three of them gave me the pitch for saving the jobs and the opportunity for the company and how they could grow it and manage it effectively to make it a profitable, interesting business.

Q And what did Mr. Trask tell you?

A Mr. Trask told me it would be a great investment opportunity and that I should come down and meet the people and do the diligence, and should acquire the company.

Q At that time, did Mr. Trask disclose to you that he had another business named Clear Touch?

A He did not.

Q Did he disclose to you that Clear Touch would compete against Encore for profits?

A He did not disclose that.

Q Based upon what you were told, what did you end up doing?

A Based on what I told -- what I was told and then doing some diligence and getting another team, I decided to make the investment, so I acquired Encore -- Encore and the assets from CSI to form the business that it is today.

Q And when was that?

A That was in February of 2013.

Q Let me refer you in the exhibit book to what we've marked as Plaintiff's Exhibit Number 1, and this is already in evidence. We'll put it up on the screen. Let me refer you to Section 2. Can you read that first sentence? And tell me, who is the "Executive" in this agreement?

A The "Executive" is Keone Trask.

Q And who is the "Company"?

A The "Company" is Encore Technology Group, LLC.

Q Okay. So can you read the sentence?

A Sure. Under Number 2, "Duties. The Executive will serve as the chief business

development officer of the Company and shall have such duties of an executive nature as the Manager of the Company, the 'Manager,' shall reasonably determine from time to time. The Executive will report to the Manager."

**Q** Who was the "Manager"?

**A** Me. I'm the Manager.

**Q** What were Mr. Trask's duties as Chief business development officer of Encore?

**A** He had three or four main duties. One, he was responsible, at the time, for all of our sales and marketing force. Number two, he was responsible for building out our marketing brand for Encore. Number three, he was responsible for setting our trade show plans and cadences. And four, he had responsibility for the technology, what we call the Classroom Technology Group, which is the part of our business that does things that the kids see and touch. So it would be, principally, the visual systems that are out there, but it takes the form of projectors and touchscreen panels and a variety of other products. He had responsibility for those.

**Q** Was it his responsibility to find a supplier for touchscreen panels?

**A** Yes, that was his responsibility.

Q Now, let me refer you down to page -- to Section 3. Let's get all three of (a), (b), and (c). What was the -- under 3(a), how much did you pay Mr. Trask as a base salary?

A $175,000, which was an increase from his previous base.

Q In addition to that, did you also pay him a bonus when he joined Encore?

A I did. I paid him a $25,000 bonus.

Q And then what sort of benefits did Mr. Trask receive?

A He had large stipend and expense account. Then he also had health insurance, which we provide some other dental and vision and 401K and other kinds of benefits like that.

Q And when, what sort of expenses did Mr. Trask get reimbursed?

A We reimbursed him for travel expenses, monies he would spend to go to trade shows, travel and hotel rooms, meals and entertainment things when he was out, supposedly, marketing Encore and current business expenses.

Q Who, at Encore, was in charge of signing up Encore for trade secrets?

A Mr. Trask. That was his principal

responsibility.

**Q** Now, let me refer you to -- before we do that, why did you pay Mr. Trask so much?

**A** I paid -- he was one of my three most senior executives and had been in the industry a long time and was one of the company leaders; and I thought he was a very strong sales and marketing executive. I also here -- it's not in here. But when I bought Encore, I did offer up for Mr. Trask and others to invest with me. They all decided not to do it and said they didn't have any money to do it.

**Q** Now Mr. Newnam, let me -- let's discuss this reseller agreement. Let me refer you to what we've marked as Plaintiff's Exhibit 3, which is in evidence. Who is this reseller agreement between?

**A** This is an agreement between Clear Touch Interactive and Encore Technology Group.

**Q** Above that, the date too. What's the date of this agreement?

**A** April 24th of 2013. It's about six or seven weeks after I bought the company.

**Q** All right. And if you will look down now, in Section 1.1, Appointment, can you read that sentence? First, tell us who the "Company" is in this agreement?

**A** So in this agreement, the Company is Clear Touch.

**Q** Who is the "Reseller"?

**A** The Reseller is Encore.

**Q** So read this sentence please.

**A** It says, "The Company appoints Reseller and Reseller accepts appointment as an exclusive reseller to market, sell, lease and install Company products within the Territory stated in Exhibit A to consumers."

**Q** Now let's look at "the Territory stated in Exhibit A" on Page 14. Was this supposed to be Encore's exclusive territory?

**A** Yes.

**Q** And these are seven southeast states; is that right?

**A** Yes.

**Q** Now, whose job was it to negotiate this agreement for Encore?

**A** This was Mr. Trask -- this is Mr. Trask's responsibility to negotiate this agreement for us.

**Q** Now look on Page 13. Under Company, who signed for the company?

**A** Kathy Cruse signed for the company.

**Q** At the time, did you know who Ms. Kathy

Cruse was?

**A** I did not.

**Q** Do you know now?

**A** I do now.

**Q** Who is she?

**A** This is Keone's mother.

**Q** All right. Let me refer you to what we marked as Plaintiff's Exhibit Number 4. Is this an e-mail that Encore received from Clear Touch?

**A** Yes.

**Q** What's the date? When did Encore receive this?

**A** It says January 15th of 2014.

**MR. ENGLISH:** Your Honor, we'd ask that Plaintiff's Exhibit Number 4 be admitted into evidence.

**THE COURT:** Any objection?

**MR. SMITH:** Yes, Your Honor, we --

**THE COURT:** Just one second.

Mr. Foreman, would you take the jury to the jury room please.

(Jury exits at approximately 2:44 p.m.)

**THE COURT:** All right. What's the basis of your objection?

**MR. SMITH:** Yes, Your Honor. We -- and I'd

point you to, I think, Plaintiff's Exhibit 83. We stipulated to certain facts and admitted liability. One of the facts we stipulated to is that Ms. Trask used an alias named Andrews to communicate with Encore from a Clear Touch address. There's a series of -- there's a lot of these type e-mails in here. The same with -- Kathy Cruse and Amy Andrews, it's the same deal. We think it's simply duplicative of a fact we've admitted and it's only being admitted to inflame the passion of the jury and it's duplicative.

**THE COURT:** They are seeking punitive damages, aren't they?

**MR. SMITH:** They are.

**THE COURT:** I'm going to overrule your objection. All right. Anything further?

**MR. SMITH:** No, Your Honor. Thank you.

**THE COURT:** All right. Would you bring the jury back in, please?

**MR. SMITH:** Your Honor, before the jury comes back in, instead of objecting every single time these type e-mails come up, for the purpose of the record, I just want to say we do object. I understand the Court's ruling, but we do object to the series of e-mails of Amy Andrews

and Kathy Cruse.

**THE COURT:** Absolutely. It's a standing objection. Any e-mail from Ms. Andrews or Ms. Cruse, correct?

**MR. SMITH:** From and to, yes, Your Honor, that's correct.

**THE COURT:** All right.

**MR. SMITH:** So I don't have to object every time, I appreciate that.

**THE COURT:** Very good.

(Jury enters at approximately 2:47 p.m.)

**MR. ENGLISH:** Thank you, Judge. We'd move Plaintiff's Exhibit Number 4 into evidence.

**THE COURT:** It's admitted.

(Plaintiff's Exhibit 4 is admitted into the record.)

**BY MR. ENGLISH:**

**Q** Let's enlarge this. Mr. Newnam, can you read the text of this e-mail?

**A** Yes.

"Pam and Krissy,

"Hello. I just wanted to take a moment to introduce myself. My name is Amy Andrews and I am new with Clear Touch Interactive, working with Kathy Cruse. Going forward, I will be the one handling

purchase orders and invoicing and am here to help manage any questions or issues that may arise. I look forward to working with you.

"Amy Andrews, Clear Touch Interactive."

**Q** Did you know at the time who Amy Andrews was?

**A** I did not.

**Q** Do you know now?

**A** I do.

**Q** Who is she?

**A** This is actually Tamara Trask, Keone's wife.

**Q** Mr. Newnam, did there come a time when you questioned Clear Touch's supplying these interactive panels?

**A** Yes.

**Q** When was that?

**A** In the -- in the March -- time frame of January 14. We were having a lot of issues getting supply. We were being asked to make some large prepayments. I was going to -- had some concerns with Clear Touch. I wanted to find out what other options there would be to buy these panels from.

**Q** And who did you ask to look into these other options for panels?

**A** I asked Keone to tell me what other options were out there and to help me understand the pros and cons of the offer.

**Q** Now, you heard statements earlier that Mr. Trask wanted to leave in January, but you -- Encore asked him to stay into April. Did you ever ask Mr. Trask to stay?

**A** Never. Nor did any of my other senior managers, Michael, David, Russell. That is not a true thing.

**Q** Let me show you what we marked as Plaintiff's Exhibit Number 5. This is already in evidence. What is this document?

**A** This is a document that Keone prepared with Leo Gallant. Leo Gallant e-mailed it and worked -- Keone and Leo worked on this agreement -- on this list together. This is, essentially, the answer that I was trying to ask of where else can we get this product from. Here, each of the columns are some of the providers. The two legacy, very large providers were Promethean and SMART. QOMO and Sharp -- everyone knows Sharp, like Sharp TVs -- and BenQ and then Clear Touch on the left. When you read all the inputs here, plus the communications associated with this document, plus all the verbal communications, Keone,

basically, was re-recommending himself.

What is noticeably absent from this analysis is the actual suppliers of this product, which were TSItouch and CVTE. At the bottom, you will see, for the estimated cost to the customers, they say not only do we have the best performing product, we have the cheapest offering. And what I will tell you is, what he did not highlight for me is that I could have bought this directly from those other two suppliers for much cheaper.

**Q** Is there any reason why Encore could not have purchased directly from TSItouch or CVTE?

**A** Absolutely not. We, 100 percent, absolutely, could have bought directly from them. We have e-mails between he and TSItouch, where all he did was say, "Please put the Clear Touch label on there."

**MR. SMITH:** Objection, Your Honor, to him testifying to things that aren't in evidence yet.

**THE COURT:** I sustain that objection.

**THE WITNESS:** There is nothing that would have prevented us from buying directly from the suppliers. We did not need Clear Touch.

**BY MR. ENGLISH:**

**Q** . Now let's talk about the severance agreement you entered when Mr. Trask did leave. Let me refer you to what we marked as Plaintiff's Exhibit Number 6. What's the date of this severance agreement?

**A** This is April 25th of 2014.

**Q** Is this when Encore asked Mr. Trask to leave?

**A** Yes.

**Q** Why did Encore ask Mr. Trask to leave in April of 2014?

**A** I asked Mr. Trask to leave because for the previous year, I couldn't really figure out what he was working on or what he was doing other than promoting Clear Touch. The value to me was not justified in paying him what I was paying him to do. When I asked him to take on other projects and do things, he essentially didn't do them. So I made the decision to terminate him.

**Q** Now if you'll look in Section 2, under the Severance Benefits, how much in severance did Encore pay to Mr. Trask?

**A** We paid him $6,730.77, which was two weeks pay.

**Q** And then looking down in Section 2(B), how

much did you pay Mr. Trask at the end for accrued but unused paid time off?

**A** In Section A, it's --

**Q** Section A, yeah, 2(A).

**A** -- yeah, another $13,124.98.

**Q** Now let me refer you to Page 5 of this agreement in Section 9, at the top. Would you read this section to the jury?

**A** Yes. "Nothing in this Agreement shall void, abrogate or lessen any otherwise existing obligation of the Employee to the Company to keep confidential any trade secret or confidential information belonging to the Company or refrain from any competition from the Company or solicitation of the Company's employees or customers, including but not limited to the obligations contained in statutory or common law, or those contained in the employee's Non-Disclosure and Non-Solicitation Agreement or referenced in other written agreements with the Company."

**Q** All right. That reference to the employee's Non-Disclosure and Non-Solicitation Agreement, is that agreement what we marked as Plaintiff's Exhibit Number 2?

**A** It is. And that provision says that it

still is in force.

**Q** And based on the severance agreement, how long was the non-competition provision in force?

**A** It was for one year from the date of him leaving Encore.

**Q** So that would have gone until when?

**A** Until April 25th of 2015.

**Q** Now let's look at that Non-Disclosure/Non-Solicitation Agreement. First, let's look at the company data and trade secret paragraph. Let's go down through that little "ii."

**A** Yes.

**Q** I think we're going to have to go down a little bit before where we've got it. Yeah, right there.

Can you read to jury, under "ii," what the trade secret and company data include?

**A** It would include "sales and customer data, whether or not reduced to writing, including but not limited to customer lists, customer preferences, customer requirements, customer contracts, customer contacts, pricing information, concessions and prior bid."

**Q** Did Encore entrust that sort of sales and customer data to Mr. Trask?

**A** Absolutely.

**Q** Who was the customer that's at issue in this case that Encore entrusted to Mr. Trask?

**A** The customer at issue is Leon County Schools out of Tallahassee, Florida.

**Q** All right. Now. Let's go down to the next paragraph of this, the confidentiality paragraph. Let me ask you to read the first two sentences of that.

**A** Sure. "Except as may be necessary to perform Employee's duties for the Company, Employee shall hold Trade Secrets in confidence and shall not use, misappropriate, or divulge to any third party at any time Trade Secrets of the Company, during or after the employment with the Company ends. For Company Data that is not considered a Trade Secret, Employer agrees to hold Company Data in confidence and shall not use, misappropriate or divulge Company Data to any Person at any time during the course of the Employee's employment with the Company, or its predecessors -- meaning, CSI -- and for a period of five years after the employment ends with the Company."

**Q** Did Encore have trade secret and confidential information about Leon County Schools?

**A** Absolutely. We had already sold them about

15 panels. We had knowledge of how they were planning on rolling out and continuing to buy more and deploy those panels in the field.

**Q** And what panels did Encore learn that Leon County was planning to buy?

**A** They were planning to buy TS -- Clear Touch panels from us.

**Q** And was that information learned while Mr. Trask was an employee of Encore?

**A** Absolutely.

**Q** Does Encore claim that Mr. Trask breached this confidentiality provision of the agreement?

**A** He -- yes.

**Q** How?

**A** He used the information that he had to market directly to Leon County Schools.

**Q** What information about Leon County did he use to market directly to them?

**A** He knew what they were willing to pay for the panels. He knew what their plan was in terms of roll out. He knew what their -- what their interest was in the product.

**Q** All right. Now let's turn to the second page of this agreement. Let's pick up the Non-Solicitation of Customer through (b).

**A** Would you like me to read it?

**Q** Yes.

**A** "Employee covenants and agrees that during the period of Employee's employment with the Company, and for a period of one year thereafter, the Restricted Period, Employee will not, for Employee or on behalf of any person, directly or indirectly, solicit, influence, contact, sell to, service, or deal with, collectively Solicit, any Customer, as defined below, of the Company or provide information or assistance to any third party that would enable or help such third party to Solicit a Customer of the Company for the purposes of:

"A, providing services or products to such Customer that are in the same as or competitive with the services or products that are provided to such Customer in competition, directly or indirectly, with the Company."

**Q** And B?

**A** And B is "diverting or attempt to divert from the Company the business of the Customer of the Company, including but not limited to any actions that cause such Customer to reduce the level or amount of services provided by Company to such Customer."

**Q** And does Encore claim that Mr. Trask breached this provision of the non-solicitation section of his contract?

**A** Absolutely. This provision is designed that when you're paying someone and they're working for you, for them not to be able to step out the door the next day, after you've invested time and money and resources to get these customers, for them to be able to solicit and take them to competition with you.

**Q** And what's the period that this lasted?

**A** This would have gone from April 2014 to April of 2015, one year after he was terminated.

**Q** And was Encore selling to Leon County Schools before -- while Mr. Trask was at Encore?

**A** Yes, they were an Encore customer.

**Q** What happened after Mr. Trask left?

**A** After Mr. Trask left, he said negative things about Encore to the customer in an effort to induce them to purchase directly from him. Then he sold directly to the customer.

**Q** After Mr. Trask left, did Leon County continue to purchase panels from Encore?

**A** No. Well, I think they bought a few for the first month or so after Keone left, but then all

of their big orders came after.

**Q** Now let's look at the next section, the Non-Piracy of Employees and let's pick up through A, just A of that section.

**A** Sure.

**Q** Can you read through A of that section?

**A** Yes. "Employee convenants and agrees that during the period -- the Restricted Period, which is the one year after he leaves, Employee will not, for Employee or on behalf of any person, directly or indirectly:

"A, consult, attempt to hire, or encourage any present employee of the Company to end his or her employment with the Company to accept employment with any third party that competes, directly or indirectly, with the Company."

**Q** Now, are you claiming that Mr. Trask breached this provision concerning Mr. Higginbotham?

**A** I am not claiming that he breached this provision with Jimmy Higginbotham.

**Q** Are you claiming that Mr. Trask did breach this?

**A** Mr. Trask breached this, yes, with Mr. Gallant.

**Q** Okay. Let me show you what we've marked as

Plaintiff's Exhibit Number 13. This is in evidence. What is this document?

**A** This is a letter from Keone Trask, who at the time has got the title Director of Business Development at Clear Touch, to Mr. Gallant in December of 2014, approximately eight months after he left me, offering Leo Gallant employment with Clear Touch Interactive.

**Q** And was this during the one-year period?

**A** Yes.

**Q** And does Encore claim that this is a breach of that non-piracy provision?

**A** Yes.

**Q** All right. Now let's look at the last section we're going to look at of the contract, back on Plaintiff's Exhibit Number 2. Exhibit 2, Page 2 in the "Business Opportunity" section. Can you read that section to the jury?

**A** Yes. "During the term of this agreement, if Employee becomes aware of any project, investment, venture, business or other opportunity -- any of the preceding, collectively referred to as a, quote, Opportunity -- that is similar to, competitive with, related to, or in the same field as the Company, or any project, investment, venture, or business of the

Company, then Employee shall notify the Company immediately of such Opportunity and shall use Employee's good-faith efforts to cause Company to have the opportunity to explore, invest in, participate in, or otherwise become affiliated with such Opportunity."

**Q** What was the intent behind this provision?

**A** The intent of this provision is that if you're out working for the company, you come across opportunities that are interesting to the company, you're supposed to do two things: Immediately notify the company about it; and two, use your good faith effort to work for the company for it to secure the best deal for itself.

**Q** Does Encore claim that Mr. Trask breached this provision of his contract?

**A** Yes.

**Q** Why?

**A** He breached this in two fundamental ways: First, he knew we had the opportunity to buy these products directly from TSItouch and CVTE. And he not only didn't tell us about it, he inserted himself in between and purchased and marked the products up making three to four times the amount of money that we made --

**MR. SMITH:** Objection, Your Honor. Getting into facts that aren't in evidence about the amount of money he made.

**THE COURT:** All right.

**THE WITNESS:** Then, the second thing that he didn't do is Keone knew, by virtue of what was out there, that he had the opportunity to not only sell these products directly to our customers, but that he wanted to build a reseller network, i.e., he wanted to sign up more resellers, like Encore. He did not tell us about that business opportunity. Either one, buying directly or, two, that we could have built a broader business beyond just what we have today.

**BY MR. ENGLISH:**

**Q** If Mr. Trask had disclosed that opportunity to build the reseller network, would Encore have pursued it?

**A** Absolutely. In fact, in the course of -- in the course of Keone's development of Clear Touch, he did that exactly with two other resellers just like me. He not only sold through them, but he also started distribution arms with them because he didn't have the ability to finance the business, and I could

have done all of that at Encore. If I had known what he knew and he had told me, this is what we would have done.

**Q** Did Mr. Trask have these opportunities before he became employed by Encore?

**A** Mr. Trask learned a lot while he was employed by Encore. He learned all about the products. The demo unit wasn't even delivered to him until April of 2013, after it was employed by me. We paid for the demo unit.

**Q** And where was the demo unit shipped?

**A** The demo unit was shipped to Easley, South Carolina, where we were before we moved our headquarters here to Greenville.

**Q** And who analyzed the prototype or demo unit?

**A** Principally, Keone brought it in. Leo was our main tester and measurer of the product. Then Michael Knight did come take a look at it and ask Keone where we got it. He said, oh, this is the Clear Touch product that we should sell.

**Q** Were all those people Encore employees?

**A** They were all Encore employees, yes.

**Q** And what about the reseller opportunity?

**A** The reseller opportunity, Mr. Trask

learned of while he was with us as well. In January of 2014, I had very specific evidence and the gentleman who will testify that he met with Keone while we were paying for a trade show in Texas, that he came to tell him about wanting to use Encore to build out Clear Touch and then sign up additional resellers and build a business that he wanted to take advantage of himself.

**Q** So for all these reasons, are you claiming or is Encore claiming that Mr. Trask breached the Non-Disclosure and Non-Solicitation Agreement we have marked as Exhibit 2?

**A** Yes.

**Q** Now, does Encore claim that Mr. Trask's breaches of this contract were accompanied by fraudulent acts?

**A** Yes.

**Q** What?

**A** There were a number of fraudulent acts. It was a quite a broad and deep, deceptive scheme on Keone's part. First of all, he put the names of the LLC in his mother's maiden name to hide that fact. Number two, he took the labels off of, essentially, the TSItouch product and put the Clear Touch label on it, so we wouldn't know who were the real suppliers.

Three, he used fake e-mail addresses: Amy Andrews; I think he used Kathy Cruse when he was communicating with himself at Encore.

Then, he also used titles to try to make it look like when he moved over to Clear Touch the first time -- when he first joined the company, he used the title chief business development officer in an effort to hide from us that he was the sole employee at the time. After he left, he had his wife continue to e-mail us under the name of Amy Andrews, asking for Keone's information, in an effort to make it look like she didn't know that he left the company, even though it was his wife and she knew.

Then he had us mail payments to Nevada. He had those payments -- all that was really in Nevada was a PO box. And we would mail checks to them, and they would basically forward them back to their home here in South Carolina while he was taking the margin from us and we were paying for the product.

**Q** Now let me refer you to what we have marked as Plaintiff's Exhibit 15. This is already in evidence. What is this?

**A** This is a non-disclosure agreement that Keone executed with Jimmy Higginbotham, three days after he left Encore.

Q So what day did Mr. Trask leave Encore?
A He left Encore April 25 of 2014.
Q And was Mr. Higginbotham an employee of Encore at the time?
A Yes.
Q Did you know that Clear Touch was entering a non-disclosure agreement with your employee three days after Mr. Trask left?
A No. I also didn't know that Mr. Trask tried to have other customers -- he had TSItouch enter a non-disclosure agreement so they wouldn't talk to us. He also had other valued resellers enter non-disclosure agreements prior to his departure at Encore.
Q Does Encore believe those constitute fraudulent acts?
A I believe those constitute fraudulent acts, as well. He was trying to hide what he was doing the whole time.
Q Let me show you what we've marked as Plaintiff's Exhibit 32. Is this the non-disclosure agreement that Mr. Trask signed with Leo Gallant on April 25th, 2014?
A Yes. This was the day that Keone left Encore and, that night, Leo Gallant -- had him sign

this non-disclosure agreement and then told him all about Clear Touch, that he owned it and has plans for it, the day he left.

**Q** Does Encore also consider this a fraudulent act?

**A** This is absolutely a fraudulent act.

**Q** If we could look at the last page of this exhibit, the signatures, on April 14, 2014, the day you let Mr. Trask go, did you know that he and his wife were directors of Clear Touch Interactive, Inc.?

**A** I did not.

**Q** Did you know that they were getting your employee to sign a non-disclosure agreement with them?

**A** I did not.

**Q** What about Mr. Trask's e-mails? Does Encore claim fraudulent acts in connection with those?

**A** Yes, in three ways. First, Mr. Keone personally deleted a lot of e-mails from Encore before he left --

**MR. SMITH:** Objection, there's no evidence of that.

**THE WITNESS:** Yes, there is.

**THE COURT:** No, sir. Do not respond.

back in.

(Jury enters at approximately 3:17 p.m.)

**THE COURT:** Please be seated.

Mr. English?

**MR. ENGLISH:** Thank you, Your Honor.

**BY MR. ENGLISH:**

**Q** Mr. Newnam, with regard to the omission of the suppliers, TSItouch and CVTE from that list of suppliers on Plaintiff's Exhibit 5, does Encore claim that that is a fraudulent act?

**A** Yes, Mr. Keone did not take the opportunity to tell me then that they were the suppliers of the product and I could have bought from them.

**Q** Does Encore claim that the defendants engaged in unfair or deceptive acts or practices?

**A** Yes.

**Q** Okay. What?

**A** First, he used all the fake e-mails that he used to communicate with us. He had put the LLC in his mother's maiden name, in an effort to deceive us. They also had to send the payments to Nevada, as I said before. That got forwarded back to their South Carolina address, and they used a number of different titles to hide their involvement.

Q What about the labels?

A The labels, they asked TSItouch, specifically, don't include any TSItouch labels on the products; replace it with our Clear Touch stuff on shipping product -- on the shipping labels, on the shipping packaging, as well as on the devices themselves. It was essentially just a -- heat-shrunk logo.

Q And then how many sales of panels did Clear Touch make to Encore?

A Several million dollars-plus.

Q And how did this affect Encore?

A In a number of ways. First of all, you're asking -- versus us buying directly?

Q Yes.

A Yes. So essentially, when we sold a panel, we made anywhere from maybe $250 to $450 per panel, generally. Keone was making $1500 a panel.

Q How did this affect -- the fact that Encore was buying through Clear Touch instead of directly -- directly from the suppliers, how did this affect the public?

A In addition to us not making much margin on the products and bearing all the sales expenses, how it hurt the public is it reduced our ability to

with Mr. Trask?

**A** Yes.

**Q** How?

**A** So Mr. Trask -- you got to remember, we're splitting both sides of the fence, both sides of the deal. He, in his role as the owner of Clear Touch, induced himself as a manager of my business to pick Clear Touch as the supplier to Encore, as opposed to picking the ability for us to buy it directly from TSItouch or CVTE.

**Q** Now, you are also claiming that these things that you testify to constitute breaches of Mr. Trask's fiduciary duties to Encore?

**A** Yes.

**Q** Are you claiming that these things you testified to constitute breaches of his duties of loyalty to Encore?

**A** Yes.

**Q** Are you claiming that Mr. Trask misappropriated any of Encore's trade secrets?

**A** Yes.

**Q** Which ones?

**A** Mr. Trask had a number of Encore trade secrets. He knew what our customer -- who our customer base was. He knew what many of the customers

were intending to purchase over the next number of years. He knew about specific customer contacts, pricing vehicles, our costs from competitive suppliers at Promethean. He had a lot of information as a senior executive and having done this for a while. He had misappropriated all of that.

**Q** And did he also have that information about Leon County Schools?

**A** He absolutely had that information about Leon County Schools.

**Q** Let me refer you to what we marked as Plaintiff's Exhibit Number 10.

**A** Yes.

**Q** Just describe, in general categories, not in numbers, but in general, how Mr. Trask's breaches of the agreements and the defendants' breaches of their duties affected Encore's business.

**A** Sure. So the -- we have basically three categories of ways of thinking about damages: The first are the direct costs incurred by us. Basically, we're claiming the ways and benefits and expense reimbursements for just three employees, the ones that, ultimately, went to work for Clear Touch. While they were working for me, they were basically working to build Keone's business, not working for Encore.

**A** We lost about $425,000 of profit.

**Q** Now --

**A** And in addition to that, there's about $40,000 here of sales commissions that would have gone to my sales force that he took.

**Q** Have you subtracted those out?

**A** I have subtracted that out. It's not damage to Encore, but it did come out of my sales force's pocket.

**Q** And then did Mr. Higginbotham -- when -- explain to the jury the circumstances under which Mr. Higginbotham left Encore.

**A** So in the Keone -- after Keone left and had gone to Clear Touch, Mr. Higginbotham was still a sales representative for us. He, essentially, was spending all his time pushing Clear Touch. This is really what he was successful in selling. Given the amount of money that I was paying and what I understood to be the opportunities, it didn't make sense for us to keep Mr. Higginbotham, so we were making the decision to let him go.

David Masters, my head of sales, I asked him to call Keone and talk to him and see if he would be interested in taking Jimmy on. He's been very successful selling your product. It doesn't make

sense for him to work for us, but if he can go to work for you, he can continue to support us in a market. We'll keep our customers and pipeline and continue to support, you know, what Encore has done, but allow Jimmy to, you know, provide you more value.

**Q** So is Encore claiming that Clear Touch's hiring Mr. Higginbotham violated Mr. Trask's agreement?

**A** We are not claiming that that violates his agreement at all. In fact, actually, when we had the conversation with him about letting him go, Keone said, "I can't afford to bring him on right now. Can you hold him for another six weeks?" and we agreed to do that to keep a good customer/supplier relationship with Clear Touch and keep Jimmy happy.

**Q** Now, did Mr. Higginbotham have a non-compete, just like Mr. Trask?

**A** Mr. Higginbotham did have a non-compete.

**Q** And what time period did that last?

**A** That would have gone from when he left us in July of '14 to July of '15.

**Q** Now let's talk about the lost business opportunity. If Mr. Trask had disclosed the opportunity to sell Clear Touch panels to other resellers, what would Encore have done?

**Q** How did you discover that Clear Touch was really run by Mr. Trask from the beginning?

**A** So in August of 2015, I got a phone call from Jimmy Higginbotham, who had left us the prior year. He called and said, hey, --

**MR. SMITH:** Objection. Hearsay.

**THE COURT:** Sustained.

**BY MR. ENGLISH:**

**Q** Mr. Newnam, don't say what Mr. Higginbotham said.

**A** Yeah.

**Q** But after that phone call, what did you do?

**A** I called my law firm and asked them to do some research for me.

**Q** Let me show you what we marked as Plaintiff's Exhibit Number 8. This is already in evidence. Based on your research in 2015, what did you do?

**A** So after I got the research, I learned that Keone had owned this business from the very beginning. I made the decision to terminate him, because I did not want to work with someone who is that unethical and deceitful.

**Q** And so what is Plaintiff's Exhibit

would have been effective October 10th, 2015.

**Q** Now let me show you what we've marked as Plaintiff's Exhibit Number 9. What is this document?

**A** This is a Clear Touch financial statement that shows their revenue by customer from February of -- 13, 2013 through October 10th of 2015, which is the termination of the reseller agreement.

**MR. ENGLISH:** And Your Honor, we'd ask that Plaintiff's Exhibit Number 9 be admitted into evidence.

**THE COURT:** Any objection?

**MR. SMITH:** Yes, Your Honor. This is going to -- into the reseller agreement. That is not part of this case. It was not plead as a breach of the reseller agreement. There's no differentiation here between different time periods. This just goes from the day Mr. Trask was employed to the end of the reseller agreement, so offering this as an element of damages is inappropriate. It's not pled that my clients breached the reseller agreement.

**THE COURT:** I overrule that objection. Go ahead.

(Plaintiff's Exhibit 9 is admitted into the record.)

A Our bank.
Q Because it was performing so poorly?
A Yes.
Q How much of the business did you testify during your deposition that the panels, interactive panels, made up of Encore's business?
A Within the classroom technology business, it was roughly 20 to 30 percent of our business, historically. The panels, as a new product, I testified were about five percent of our business because it was a new and growing technology. The overall business is 25 percent to 30 percent.
Q Mr. Newnam, does the panel business represent about five percent of Encore's business at the time?
A At the time, as a new technology being introduced into the market, it was a small piece of the business, yes. But it grew, as evidenced by Exhibit 9 that we saw.
Q So that's a yes?
A Yes.
Q You claim that Encore would have taken advantage of the Clear Touch opportunity, right?
A Yes.
Q And you also claim that Encore could have

seven.

**Q** Do you how many resellers my client worked with in 2015?

**A** Over a dozen.

**Q** Do you recall, in your deposition, you testifying that you knew, as early as four to five, six, seven months prior to terminating the relationship with Clear Touch, that they were working with other resellers?

**A** Yes.

**Q** And do you recall you saying you did nothing about it at the time?

**A** You're asking me about the time frame, six months before we terminated the reseller agreement, that I knew that other resellers were out there? Yes. At the time, I understood there were resellers outside of our market and a couple that were tangentially in it. I did not throw a fit.

**Q** So you didn't address this with my client at all?

**A** Mr. Masters probably spoke to Keone about this. In the normal course of business relationship, there's always ups and downs. I had already invested, at this point, a couple of years in developing this opportunity from Mr. Trask. It doesn't make sense for

me to terminate just because he puts other resellers around the country in the business.

**Q** And Encore, from its inception, you remember testifying, was a value-added reseller, right?

**A** Yes.

**Q** That's what you are today, right?

**A** Yes.

**Q** That's what you always have been, correct?

**A** Yes.

**Q** And y'all have never made what I call a hard product, a panel or anything of that nature, other than -- let me rephrase my question maybe better. Okay. Encore has made some software itself, correct?

**A** Yes.

**Q** But you've never manufactured the hard product that you went out and sold on the market?

**A** We don't run any factories and manufacture product, no; nor does Clear Touch.

**Q** Mr. Newnam?

**A** Yes.

**Q** Encore doesn't make anything besides software, right?

**A** We purchase goods from suppliers and we

resell them to our customers.

**Q** And that's your business model, is a reseller, correct?

**A** Yes.

**Q** And so are you in competition with other resellers?

**A** Yes.

**Q** And you want the jury to believe that they -- your competitors would do business with you?

**A** If I had my own panel and was making it and trying to sell to them, the same way that Galaxy and UC Solutions, which are exactly that same business, do, yes, I think they would have.

**Q** Do you know of any other resellers that have their own panels?

**A** Yes.

**Q** Do you know if they sell to other resellers?

**A** I do not know if they do or not.

**Q** So Encore doesn't work with other resellers; never has, correct?

**A** We do -- have worked with other resellers before in certain markets where we will share deals or if there's a particular contractual vehicle required, we will work with them in tandem, yes.

at Leon County was not happy with Encore?

**A** Based off what he understood from your client, yes.

**Q** Okay. Well, let's -- now, why did Encore get this affidavit?

**A** Why did we get the affidavit?

**Q** Yes.

**A** I think it was time -- I don't recall exactly, but I know it's been a long legal process where Clear Touch has protested pretty much everything we've requested and done. And so, honestly, I think we probably prepared this in conjunction with some part of the process. I don't recall exactly why.

**Q** Didn't y'all submit this in support of an opposition motion?

**MR. ENGLISH:** Objection. Irrelevant.

**THE COURT:** Sustained.

**BY MR. SMITH:**

**Q** Does it not clearly say that Mike Fraser with Leon County was upset with Encore and reached out to Clear Touch to ask about purchasing from Clear Touch directly?

**A** It says, yes, that.

**Q** According to Jimmy Higginbotham, Leon

County didn't want to work with you anymore.

**A** Mr. Higginbotham, yes. Mr. Higginbotham said -- but he further says, "Trask further told me that Clear Touch would sell directly to Leon and he would directly be involved in such sales."

**Q** I believe you answered my question, "yes"?

**A** Yes.

**Q** And you want the jury to give you money from sales to a customer that doesn't want to do business with you?

**A** When Jimmy left to go to Clear Touch and we facilitated that transition in an effort to work together and grow the business. And when I kept Jimmy on for an additional six months, six weeks because Keone asked me to, the clear understanding is that we were keeping our pipeline. If we have worked with any vendor where we were 90-plus percent of their revenue and we had a customer issue, they would have worked for us -- they would have worked with us for us to make money off that customer. Keone chose to take it to himself directly because he was greedy. Does that answer?

**Q** You have no idea what other vendors would do, you're just speculating again, aren't you, Mr. Newnam?

what's been marked as Defendant's 31. And do you recognize this e-mail, Mr. Trask -- Mr. Newnam?

**A** Yes.

**Q** It's another one from our friend Jimmy Higginbotham, isn't it?

**A** It is, yes.

**Q** And it's yet, another e-mail about another potential place where you can get money from my client; isn't that right?

**A** Yes.

**Q** So you're relying on Mr. Higginbotham, a disgruntled employee, sending you information about my client's assets to tell you my client said something bad to Leon County?

**A** No. Jimmy sending me this information has nothing to do with that. Jimmy telling me what he heard and putting it in an affidavit, so what he's done is found some products or just to find out that they have a real estate portfolio, which they had already told me about. I don't see the conflict --

**Q** Didn't mean to interrupt you.

**A** -- sure. I don't see a conflict between those two things.

**Q** And you testified earlier Mr. Higginbotham had a non-compete, right?

product?

**A** Yes.

**Q** Then Mr. -- when did Mr. Higginbotham contact you?

**A** In August of 2015.

**Q** Then, at that time, after you did the diligence, you discussed with their law firm, tell me what Encore did to try to become a manufacturer of panel products.

**A** At the time, I didn't understand the opportunity that was out there to buy. Mr. Trask hadn't told me about it. At the time we made the decision to terminate with him, we moved to one of his competitors that we were aware of in the market.

**Q** Encore positioned -- you signed to take Clear Touch's place, right?

**A** Yes.

**Q** And you signed -- was it, again, going to have the same type of relationship that Clear Touch had with Encore, as far as it's manufacture and supply of panel products; is that right?

**A** ViewSonic is a very large distributor. They have a wide range of products. Yes, we were working with them.

**Q** Did anyone at Encore look into becoming a

manufacturer of panel products at that time?

**A** We did not.

**Q** So y'all kept on with the same business model you've had?

**A** I wouldn't call it "kept on with the same business model." I wasn't aware that we could have done that. I think that there were manufacturers out there that may have come and spoken with us, but I think Mr. Trask probably, at least, talked to CVTE about not talking to us directly, and they were talking to other vendors, just like us.

**Q** You don't know that, do you?

**A** I don't know that.

**Q** You're just speculating?

**A** CVTE didn't answer our subpoena, so I don't have the e-mails. There's not e-mail communications from Mr. Trask.

**Q** You don't know that at all; you're just saying that?

**A** Yes.

**Q** Do you recall when I asked you in your deposition why you filed this lawsuit?

**A** Yes.

**Q** Do you recall telling me the primary reason for filing the suits, that you found out Mr. Trask

had an ownership interest in Clear Touch before and during his employment with Encore?

**A** Something along those lines, yes.

**Q** So it wasn't a pure business decision, was it?

**A** No, actually us terminating and moving on to other suppliers was tumultuous to my business. After you spent a couple of years trying to build a product line represented in the market and hurt my relationship with Promethean, which was the other manufacturer we represented at the time, for me to make this decision actually hurt my business. But I made the decision because I'm not going to work with someone who's dishonest and deceitful.

**Q** Clear Touch provided you good products that the customers wanted?

**A** The customer -- the products were very good products.

**Q** I believe y'all replaced it with ViewSonic because it's made in the same factory; is that correct?

**A** It's essentially exactly the same product.

**Q** One second. I want to look at my notes.

**A** Sure.

**Q** Look at Plaintiff's -- up there, Mr. Newnam

push for us to try to get out into the market as a new technology. What I said was many of our employees probably spent 20 or 30 percent of their time trying to benefit, trying to sell Clear Touch. But I was not including that activity in my claim.

**Q** Why would you have 20 or 30 percent -- how big was your sales force, first of all?

**A** 12 or 14 outside salespeople who were supposed to call on customers. And then maybe another four to six inside salespeople who were basically people that support that sales activity.

**Q** Why would you have 30 percent of your sales force working on something that's five percent of your overall business?

**A** Well, first of all, I didn't say 30 percent of the sales force. I said 20 to 30 percent of their time. And what you have to remember is the reason it was only five percent of our business is because it was a new product line. And so when it comes out, it takes time to grow. So we had a demo unit in April of 2013, and then we didn't sell our first product until late that year or early the next year. It takes a long time to build this pipeline, which we invested heavily in.

So they were out there. And so in the

course of them talking to the IT directors at the school systems, it takes a long time to get those sales and build that pipeline. So the fact that my sales was only five percent is not indicative of how much time they were spending to get here and develop it.

When you go to a trade show, what's in that booth is essentially classroom technology businesses. No one wants to look at a server. They want to see a board. And there's teachers and IT directors and principals walking around. And that's what we were doing is trying to sell to them.

**Q** Do you recall testifying that as of your business model today, it's still not five percent of your overall business?

**A** That's probably right.

**Q** So that answer you just gave, the growth and the pipeline, the amount and portion of the business that -- that your business represented about panels has remained unchanged, hasn't it?

**A** Sure. But as we went through in that other exhibit, a lot of those sales went to Keone at Clear Touch. Leon County, other sellers, other resellers came into my market. He put competitors into my market. When I had the exclusive territory, he put

them in and helped take sales away from us. And we weren't making as much money on this product because we were buying it from Clear Touch and we didn't have the margins and the sale force. We were out pushing it, but I wish it -- I wish it was -- I wish all of my business were growing faster and better. Clearly, there was a lot of growth in this market. It just didn't go to Encore; it went over to Clear Touch.

**Q** You said you had the exclusive market. Didn't y'all sell Promethean panels, as well?

**A** We did.

**Q** And you started selling that when?

**A** In -- we've been representing Promethean for 15 or 20 years at CSI and then Encore. I don't remember when their panel first came to market. But I want to say as they came in, it was in late 2014, probably.

**Q** You started selling them about when it came out in late 2014; is that fair?

**A** We intended to sell a Promethean panel the entire time. Promethean was one of our -- probably our second-largest vendor over the previous two or three years. So we were going to continue to sell Promethean products, yes.

**Q** Will you flip to Plaintiff's 3 for me,

## EXHIBITS PAGE

| NO. | DESCRIPTION | ID | EV |
|---|---|---|---|
| | **DEFENSE EXHIBITS** (con't) | | |
| D-23 | (Not offered) | -- | -- |
| D-24 | (Not offered) | -- | -- |
| D-25 | (Not offered) | -- | -- |
| D-26 | E-mail - FAEDS | 14 | |
| D-27 | (Not offered) | -- | -- |
| D-28 | (Not offered) | -- | -- |
| D-29 | E-mail - Link | 14 | 53 |
| D-30 | E-mail - Property | 14 | 53 |
| D-31 | E-mail - Property | 14 | 53 |
| D-32 | E-mail - Response | 14 | 53 |
| D-33 | Affidavit | 14 | 53 |
| D-34 | E-mail - Comparison | 14 | 643 |
| D-35 | (Not offered) | -- | -- |
| D-36 | (Not offered) | -- | -- |
| D-37 | Sums Paid | 14 | 814 |
| D-38 | Interactive Sales | 14 | 816 |
| | **COURT EXHIBITS** | | |
| C-1 | Deposition | 1241 | |
| C-2 | Jury Note | 1241 | |

**P R O C E E D I N G S**

(Proceedings resume on the 26th day of September, 2017 at approximately 9:10 a.m.)

**THE COURT:** Mr. English, anything from the plaintiff before we get started?

**MR. ENGLISH:** No, Your Honor.

**THE COURT:** Mr. Smith?

**MR. SMITH:** No, Your Honor. We put an exhibit notebook up there for you. That's about it.

**THE COURT:** I appreciate that.

Would you bring the jury in please?

(Jury enters at approximately 9:10 a.m.)

**THE COURT:** All right. Good morning, Ladies and Gentlemen. I hope you had a nice evening. Before we get started, let me ask if anybody has read or seen anything about this case during the break or if you've spoken with anyone about this case? If so, raise your hand.

(No audible response.)

Thank you so much. Very good.

Mr. English, are you ready to proceed with the next witness?

**MR. ENGLISH:** Yes, Your Honor.

**THE COURT:** Would you call them please,

sir?

**MR. ENGLISH:** The plaintiff calls Chris Powell.

**THE CLERK:** Place your left hand on the Bible and raise your right hand.

**CHRIS POWELL**

having first been duly sworn, testifies as follows:

**THE CLERK:** State your name please.

**THE WITNESS:** Chris Powell.

**THE CLERK:** Thank you. Please be seated.

**DIRECT EXAMINATION**

**BY MR. ENGLISH:**

**Q** Good morning, Mr. Powell. Can you tell the jury how old you are?

**A** I am 39.

**Q** Okay. Are you married?

**A** Yes.

**Q** And to whom?

**A** Jamie Powell.

**Q** Y'all have children?

**A** Yes.

**Q** How many?

**A** Three.

**Q** All right. Where do y'all live?

**A** In Simpsonville.

**Q** Where were you born?

**A** Greer, South Carolina.

**Q** Now, where do you work?

**A** I work for myself. I'm an independent consultant.

**Q** How long have you done that?

**A** Since 2014, so a little over three years now.

**Q** Now, was there a time at which you worked for Computer Innovation Solutions -- Computer Solutions Innovations, or CSI?

**A** Yes, Computer Software Innovations, yes.

**Q** Okay. Thank you. When was that?

**A** Started in January of '07 through 2012.

**Q** What happened to CSI?

**A** CSI was acquired via a hostile takeover from a company out of Canada in 2012.

**Q** And what did that company -- what part of CSI did that company want?

**A** They only wanted the software division. They were a software company. We were a software and a technology company. So they only wanted the software side of the business when they purchased it.

**Q** And so what -- what happened to the technology products division of CSI?

**A** Once they acquired us, they really didn't want anything to do with it so they were trying to figure out either to spin us off or to get rid of us. Through the transition, they slowly started downsizing us, and they ended up selling us -- selling that portion of the company through the help of Todd.

**Q** Now, when you say "downsizing," were lay-offs going on?

**A** Yeah, so right around Christmas or Thanksgiving time frame, they made me cut about million dollars worth of employees, just to kind of right-size the SGNA.

**Q** So what was Encore formed to do?

**A** Encore was formed to save that -- I got fired a lot of times in that couple of months over the Christmas break, trying to save people's jobs. Encore was created to purchase the technology division and save all those jobs. I think, eventually, they would have just dissolved it or gotten rid of it.

**Q** And who ended up buying Encore and the technology products division for CSI?

**A** Todd.

**Q** Now, were you employed by Encore?

**A** Yes.

**Q** What time period?

**A** I think we started in February of 2013 through -- I left there in August of 2015.

**Q** Of 2015 or 2014?

**A** 2014. Sorry.

**Q** And what did you do for Encore?

**A** I was the CEO.

**Q** Now, before you were employed by Encore, did you have any involvement with Clear Touch?

**A** Yes, we actually created the initial company back in 2012.

**Q** And when you say "we," who created Clear Touch?

**A** Keone, Tamara, me and my wife.

**Q** And what was your understanding of Clear Touch at that time?

**A** That was our backup plan. Like I said, we were going through a lot of turmoil and laying off a lot of people, so it was our backup plan if Encore didn't happen.

**Q** When you were hired by Encore, did you keep your interest in Clear Touch?

**A** No, no. I really could have cared less. We just saved 120 jobs. That was my baby, so...

**Q** What did you understand that you and Mr. Trask were going to do with your interest in Clear Touch?

**A** Sell off our interest and just work for Encore. That was the goal. We had been threatened to be fired many times over the years. I was just glad to be a part of the family again.

**Q** Did you understand that your interest would be transferred to Mr. Trask's mother?

**A** No.

**Q** What did you understand needed to happen if you ever wanted to resume interest in Clear Touch?

**A** Just buy back in, just like any other company.

**Q** During the time that you and Mr. Trask were employed by Encore, did you monitor Mr. Trask's involvement with Clear Touch?

**A** No.

**Q** Why did you agree to abandon your interest in Clear Touch upon becoming employed by Encore?

**A** Like I said, it was my baby. You know, I'd been there probably -- I'd been there since I was -- whenever we got bought out, they were basically -- they wanted to cut my family loose. Luckily, through finding Todd, we were able to buy that technology

division. To me, that was -- I was hoping to be there 20 years. Obviously, I didn't last 20 years, but they saved my family, so...

**Q** Let me show you what we've marked as Plaintiff's Exhibit Number 6 in the big notebook in front of you. You'll see, at the top, this is a severance agreement that has an effective date of April 25th, 2014.

**A** Uh-huh.

**Q** Do you understand that's when Mr. Trask left Encore?

**A** Yes.

**Q** Did Mr. Trask ever express to you that he wanted to leave before this date?

**A** Not that I remember. And if he had, Todd made it pretty apparent that he would be willing to separate ways prior to then.

**Q** Mr. Powell, that's all the questions I have. Please answer any questions Mr. Smith has for you.

**A** Yes, sir.

**THE COURT:** Cross-examination.

**MR. SMITH:** Thank you, Your Honor.

**CROSS-EXAMINATION**

**BY MR. SMITH:**

Q Was that true?
A Yes.
Q Thank you, Mr. Powell.
**THE COURT:** May this witness be excused?
**MR. ENGLISH:** Yes, Your Honor.
**MR. SMITH:** Yes, Your Honor.
**THE COURT:** Thank you, sir.
**THE WITNESS:** Thank you, Your Honor.
**THE COURT:** Call your next witness, please, sir.
**MR. ENGLISH:** At this time, the plaintiff calls Mr. Dale Viola.
**THE CLERK:** Place your left hand on the Bible and raise your right hand.

**DALE VIOLA**

having first been duly sworn, testifies as follows:

**THE CLERK:** State your name please.
**THE WITNESS:** Dale Viola.
**THE CLERK:** Thank you. Please be seated.

**DIRECT EXAMINATION**

**BY MR. ENGLISH:**

Q Good morning, Mr. Viola. If we could start by you telling the jury how old you are.
A I'm 56.
Q Where do you live?

**A** I live in Covington, Louisiana.

**Q** And where do you work?

**A** I work for AXI Education Solutions, which is a Promethean education-oriented company in Louisiana.

**Q** So you live and work in Louisiana?

**A** Yes, I do.

**Q** And you said Promethean. Does Promethean make panels like the Clear Touch or the CVTE panel?

**A** Promethean is one of the two largest in the world. Promethean and SMART technologies have shared this market since it's inception.

**Q** How long have you worked at AXI?

**A** I left Promethean from running their North American and Caribbean business in 2007. I managed AXI Education Solutions since January of 2008.

**Q** What does AXI do?

**A** AXI stands for -- not last in the phone book -- but AXI is an education technology company that focuses on training teachers, providing the tools that teachers need in the classroom and the curriculum and other related educational tools. We're an education company first, technology second.

**Q** What products does AXI sell?

**A** Our primary line has always been a

Promethean family. We've always focused on interactive technologies that kids -- that engage kids, help teachers bridge into these kids' minds with technology versus pens and pencils, which are not their favorite thing.

**Q** Do those products include the interactive panels?

**A** Yes. It started out with interactive whiteboards with projectors, but the projectors kept burning out. So in about 2012 or so, we started looking and doing a lot of research to bringing in panels.

**Q** So in the -- describe for the jury when that transition from projectors to panels started to occur.

**A** The panel transition for the leaders started in Europe in 2011 -- 2010 to 2011. They were farther along with the projectors, which burn out, like any other lightbulb. It was slow coming into the United States because of the way we fund schools. They only buy during certain time periods. They'll buy a little bit. Then they have to test it and make it a little bit bigger project. Then school boards get on board and do a lot. So our first year -- we started out with panels in 2012, we sold zero,

although not for lack of trying. Then, the next year, I think we sold less than 50. That was 2015. '14 -- '15, we started to sell a few. And then this year, we sold several thousand.

**Q** Now, let's talk about CVTE. Are you familiar with that company?

**A** Yes, I am.

**Q** What does that CVTE stand for?

**A** Took me forever to get that, Chinese Video Television Electronics. They're one of the largest three manufacturers of any kind of display, TVs. They do Westinghouse; Insignia; all these models; RCA. They make those products for those brands.

**Q** Does CVTE make these interactive panels for classrooms?

**A** Yes, they do. They're the -- they have one-third market share in China and Asia. They have their own brand there. They don't sell it in the United States, but they're very prolific. They're one of the three in the world that actually do this.

**Q** And what business has AXI done with CVTE?

**A** Beginning, I think, back in 2013, we began to work with their engineers and their product group, which we met at the International Society of Technology and Education Show. I think it was in

Austin or San Antonio. We began a relationship trying -- of looking at their products. My team liked them. My teaching and learning consultants liked the way it worked. But they had a lot of non-education features.

We began to work with them on their software development and their engineering development to come up with a product that would work in the United States. It would get us to the features that kids wanted and teachers wanted, but also had got to the price point that the rest of us could afford it.

**Q** Was AXI able to purchase directly from CVTE?

**A** Absolutely. CVTE was actively pursuing partners. They talked to myself. They talked to ProComputing, which is one of the largest groups in the central United States. They talked to --

**MR. SMITH:** Objection, Your Honor, about the witness testifying to what someone said to a third party.

**THE COURT:** I sustain that.

**BY MR. ENGLISH:**

**Q** Mr. Viola, when did AXI start purchasing directly from -- these panels directly from CVTE?

**A** In 2013.

Q Now, let me refer you to what we've marked as Plaintiff's Exhibit 76.

A I'm sorry, sir. Which one?

Q Plaintiff's 76. You're in the right book, but it's towards the back.

A Very thick book.

Q Yeah.

A Yes, sir.

Q Okay. You'll see that top e-mail is to you from Jim Williamson. Who is Jim Williamson?

A Jim Williamson is a member of our buying consortium of Promethean partners from across the United States. He is the owner and president of ACT, which is a company that does our work in Nevada, Oregon, California, Idaho and Alaska.

Q Is ACT also a reseller of these panels?

A Yes, they are.

Q Now, if you'll look down in the third sentence, there's a reference to Keone. Is that Mr. Trask?

A Yes.

Q And look -- explain to the jury what TCEA is.

A TCEA is the largest technology computing education association conference in the central

United States. It's primarily Texas, but it's all surrounding states. Most of the vendors who come there are coming to meet and try and find new products and to find what the cutting edge things are going on in schools in Texas, so we would know what to bring back to our states.

**Q** And how did -- this reference to Keone suggests that you already knew him, as of January of 2014. How did you -- how did you first meet Mr. Trask?

**A** In 2006, I managed the relationship with CSI, which was the Promethean partner in the Carolinas, prior to them being purchased by the other two companies. I knew Keone as being head of this sales group.

**Q** And then when did you first talk to Mr. Trask about the Clear Touch panel?

**A** Well, this -- we were in the process of bringing -- doing our own due diligence and trying to find a manufacturer, trying to choose between CVTE and Korean manufacturers, and we were making a lot of progress, as our group. Keone sent the e-mail to Jimmy, which was in January of 2014, and asking if we would like to -- starting with Jimmy, but also the rest of us, we'd like to start working with Clear

Touch, instead of going out and finding -- continuing to develop our own brand, which is what we were doing at the time.

**Q** Now, let me show you what we've marked as Plaintiff's Number 78.

**A** 78.

**Q** If you will look down at the bottom of this e-mail chain, there's a reference to, "I will arrive at TCEA by February 6th and hopefully have dinner with you, Mike, and Keone." So when in 2014 did the TCEA conference occur?

**A** February 6th, 7th and 8th, I believe.

**Q** Now, did you communicate with Mr. Trask about the TCEA conference before you attended it?

**A** Yes, we had some conversations regarding that, I think, around the 25th, 26th, somewhere around there of ---

**Q** Which month?

**A** --- January. Of January.

**Q** And that's 2014?

**A** Correct. That time, we discussed what Clear Touch was, whether -- where was it? What was Encore's involvement in it? All the questions you want to ask if you're getting ready to make a huge business decision. And at that point, we said we really need

to see our panel, our display versus the one you've already purchased from CVTE.

**Q** Let me show you what we've marked as Plaintiff's Number 79.

**A** 79.

**Q** So is this an e-mail from Mr. Trask to you on January 25th, 2014?

**A** Yes. It's from Keone, his Gmail account, to my personal account.

**Q** And the lead-in sentence says, "It's a pleasure to introduce you to Kathy Cruse with Clear Touch Interactive." Mr. Trask explained to you why he wanted to introduce you to Kathy Cruse?

**A** Only that she was a person who was involved with Clear Touch and she's the one who did the non-disclosures and the partner agreements.

**Q** At this time, who, did you understand, Mr. Trask was employed by?

**A** Encore.

**Q** At this time, did Mr. Trask disclose to you that he had any interest in Clear Touch?

**A** No.

**Q** Let me show you what we marked as Plaintiff's Exhibit Number 80. (Pause.)

Now, let's look at the bottom e-mail here.

Is this an e-mail to you from Kathy Cruse at Clear Touch on January 25th, 2014?

**A** Now, the e-mail was to Keone. It didn't have my name on that one. But then the forward, that had -- forgot to send the non-disclosure, did have my name on it.

**Q** So you did get this e-mail?

**A** I did.

**Q** It says, "Clear Touch -- while Clear Touch Interactive does not have a formal reseller program, we have established a few partners." Who did you understand were Clear Touch's partners at this time?

**A** Really, the only one that I knew of or anybody -- that we knew of on the Promethean Advisory Council was Encore. We actually thought that Clear Touch and Encore was one and the same.

**Q** And then what did Ms. Kathy Cruse send you with this e-mail?

**A** She sent me a standard non-disclosure agreement that you get before you start talking pricing and details of somebody else's business.

**Q** And in that last sentence, it references the non-disclosure agreement. What was the purpose of sending you the non-disclosure agreement?

**A** So we can start talking pricing and terms

and planning. If you're going to spend millions of dollars with a company, you want to make sure that you have all the information.

**Q** Was that for your company trying to be a reseller of Clear Touch?

**A** Yes, they wanted us to cease what we were doing and become -- join forces with Clear Touch. This was being pushed by the manufacturer. He knew the size of our organization and the financial -- that it wasn't going to be adequate for a small group to be able to do that on a very large scale fast enough.

**Q** And let's go back three pages in this.

**A** Which one?

**Q** 80.

**A** Back to 80?

**Q** No, you're in the right exhibit. Just turn back two pages.

**A** Okay. I'm in 80.

**Q** Just turn --

**A** Oh, okay. This way. Yes.

**Q** So what is -- what document was attached to the e-mail?

**A** It's a non-disclosure and protective agreement to govern confidentiality and proprietary

data.

**Q** What did you do with that non-disclosure agreement?

**A** I thought that I signed it. Apparently, I could not find a copy of anything but the blank one. Once I forwarded it to you and the attorneys, I was told that there wasn't a signed copy, that Mr. Trask didn't have one either.

**Q** Did you meet with Mr. Trask at the TCEA conference in February of 2014?

**A** Yes. That was the purpose of all of us going. We met on the floor at the Encore booth, looked at the Clear Touch products, looked at -- you know, talked to Leo Gallant. He was really the person who was doing a lot of the showing of it. We talked about what was being -- some of the larger deals that they had in the works in Florida and some other places. And we agreed that -- you know, on the floor, it's real difficult to have a conversation with teachers walking up -- that we would meet later and talk more about business.

**Q** Now, at this Encore both -- this was an Encore booth; is that right?

**A** Correct.

**Q** And who was there for Encore?

**A** I seem to recall it was Keone, Leo Gallant, who I also knew, and a lady that I had not run into before, really nice, April.

**Q** Now, did you have a subsequent meeting off of the trade show grounds with Mr. Trask and Mr. Gallant?

**A** Yes. We went and -- our group was there to meet with vendors. We were there to try and find partners. So we set up at a place called the Buffalo Billiards sports bar. Different manufacturers came there and met with us. That would be Jimmy Williams from ACT, Mike from ProComputing, and a few others that came in. We just had hors d'oeuvres and drank -- watched what was going on and we had business conversations. So after -- I think, after dinner, Keone and Robin Liang, the head of CVTE's global division, came up.

**Q** Do you know if Ms. Trask, Mr. Keone Trask's wife, was there?

**A** It's quite possible, but I've seen her so many times. They're usually together, but I don't recall exactly.

**Q** At this meeting, what did Mr. Trask say that he was doing?

**A** Well, at the meeting, he was saying that

everything that they were doing with Encore was working great, that they had got a lot more traction, that -- we had been very cautious about, in our group, concerning how fast we went, because our major manufacturer, Promethean, first, said they weren't getting into this market. Then they saw the success we were starting to have and the wisdom of what we were trying to do, so they came back and said, "Wait, wait, wait, we're going to do this." They weren't quite there yet. So we were still pursuing that.

What we were talking to Keone about was joining forces, that we wouldn't continue to pursue our brand with CVTE. We would stay with CVTE, but that would be primarily under the Clear Touch brand. They needed -- well, I needed $2 million just to run my state. If you look at that, you know, nationally, you need a lot of money, a lot of money. So a couple of million dollars from us, a couple of million dollars from Mike, a couple of million dollars from Jimmy, would have been a good foundation, in addition to what we thought that Encore had put in. It was Encore's business.

**Q** At this meeting, did Mr. Trask reveal his connection with Clear Touch?

**A** Not in the initial conversations. The

initial conversations that we had, you know, involved the whole group having, you know, hors d'oeuvres and wings, I believe, and, you know, some beer. He's talking to the whole group about the sales virtues of coming on board with Encore, coming on board with Clear Touch, of -- having a very well-put-together marketing plan.

**Q** After this, was there a later meeting with Mr. Trask?

**A** Yes, we got a chance to sit over to the side. It's a very loud place. So just a few chairs over, we're having a conversation regarding directly how we're going to get this money. I mean, how much money is Encore going to put into it? Are they that committed? Because at this time, I'd already put out, oh, easily, a quarter of a million dollars, just doing the research and set-up of what it would take doing evaluations, going back to -- back and forth to China, so it's not a small amount of money. If we were going to do that, I wanted to know where the money came from.

**Q** And what did -- how did Mr. Trask respond to that concern?

**A** Well, my question was: Is Encore behind this? Is Encore going to put the money up for this?

How certain are they? I did not know anybody, Todd or anybody with Encore, because I -- my relationships had been with the previous thing. Other than Chris, who testified before, I didn't think I knew anybody.

**Q** And so how did Mr. Trask respond to your concern?

**A** He said that Encore was behind it and he had a piece of it. It was involved. My question to him was, "If they're doing all this, why are you pushing it so hard?"

And he said, "Well, I'm going to have a piece of it."

**Q** And then, after that, did Mr. Trask disclose to you what his connect -- true connection with Clear Touch was?

**A** Yeah, later, you know, after -- this had been going on for several hours. And later, we had another conversation with just he, myself and the manufacturer off to one side. Robin sat here, Keone there, and myself was leaned over. We had the conversation about, look, I kept hammering the money. I wanted to know where the money was coming from.

He said that this is -- "I have investors. I'll get investors. This is my baby. It's my retirement plan. I want to make this work, just like

you want to make your company work."

Now, we had finally gotten to the brass tacks of where it was. My question was, again: "Where's the money coming from?"

He says, "I can borrow the money. I can mortgage my house," which I counseled him not to do. That's really hard to have everything you own in it. Keone is a very intelligent guy. He's very determined. I just was concerned about that. When he said that, and we had that conversation, the following day, I had a conversation with the manufacturer and said without the money, you know, he's got to get the money from somewhere.

**Q** But you understood, after that conversation, that Mr. Trask owned Clear Touch?

**A** Yes, I did.

**Q** And was Mr. Trask trying to get your company to be a reseller for Clear Touch?

**A** Yes. He was trying to -- we have the Education Resource Group, which is seven companies that do what we do from around the country. We cover most of the United States. We do not compete with each other. We have non-disclosures with each other. We share financials. We share products. In this case, our rule is, we were trying to find a product that we

could each sell at least a million dollars of. That's about what it takes to begin to pay for it, doing it with your sales team. That was the pitch. If we went with Clear Touch, that meant that our primary manufacturer, Promethean, would be left out. They would have nowhere to go if we all committed to going to Clear Touch, which would have been a great coup.

**Q** And in addition to your company, was Mr. Trask trying to get other resellers to be resellers for Clear Touch?

**A** Well, the only ones that I'm aware, at that time, were the ones that were at the meeting. And that -- together, we went from Louisiana, all the way to Alaska.

**Q** And who were those other resellers?

**A** That was AXI; ProComputing, which is primarily the state of Texas; and then ACT, Classroom Technologies -- I can't remember what the A stands for -- out of Seattle, which had California; Oregon; Idaho; some other little states in there; and Alaska.

**Q** Now, at this trade show at Encore's booth, were any panels displayed other than the Clear Touch panel?

**A** Not that I recall.

**Q** And tell the jury a little bit about what

it takes or how long it takes to sell these panels to a school, to a customer.

**A** Like anything, schools are conservative. The teachers are conservative. They don't want to change. They don't want to do it. Because the kids are forcing the change with their phones and everything, they would look at new technology, but it had to be something that was easy for them to use. So usually, what would happen is that we took them out and we seeded them.

For us -- I can only speak to us -- we put 75 in classrooms all across the state. We went in and trained those teachers. We talked to them. Sometimes they bought them, but at a severely discounted price.

We tried to get somebody -- find an evangelist, somebody who's going to really want the technology and make it work. We called them the rockstars. They could teach with a rock. Give them something like this and they were great. They would go through -- they would begin to model it for their other teachers.

And then the school district, maybe in the following funding year, would come back and say, okay -- which was always -- most of the purchasing takes place, let's say, May, June, July and August is

primary funding. Sometimes a little bit in September. But that's the big hump. So they would have to wait for that big hump to come back around because that was when their marketing -- I'm sorry -- their budget came about.

So we would then spend, October, November, December, January, February, March, trying to get them now to plan, in their new budget to make big purchases in this budget -- this budget year. Usually, that meant maybe a school, maybe a class -- a few classrooms, a wing. Then, hopefully, the following year, they decided that all is working; and in the interest of equity, it works, the teachers know it, now we want to give it to every kid. Then we go do it -- maybe do it district-wide or school-wide. It's a big expenditure.

**Q** In addition to the expenditure, how long does it take to go from introducing a customer to a panel to them eventually buying?

**A** We start in 2012 with BenQ, which is one of the manufacturers at that time, Chinese manufacturer -- Taiwan. We pushed it, pushed it, pushed. Sold zero. I gave away a few, but we sold zero. The next year, I want to say we sold less than 20. Next year, less than 50. Now we sell them in the thousands. It

was a five-year process.

**Q** Did you discuss any potential customers with Mr. Trask?

**A** Well, we talked about where they were getting traction, I mean, that they had a lot of success. We talked about, again, I can't remember all the accounts in the Carolinas. There were some in Florida, in Tallahassee. There were some other ones that we talked about that they were -- they traditionally had been Promethean accounts. I was somewhat familiar with them.

**Q** Did -- what was the school in Tallahassee, Florida?

**A** Well, the largest there is Leon County.

**Q** Did you discuss Leon County with Mr. Trask?

**A** Yes, we did.

**Q** Do you remember what Mr. Trask said about Leon County?

**A** Just very promising. Had a lot of good vibes. They liked the product.

**Q** Now, is AXI a value-added reseller?

**A** Yes. Technically, on our contracts, we're called a value-added reseller.

**Q** And is AXI still able to purchase panels directly from CVTE?

**A** Absolutely. We purchase from CVTE and two other manufacturers.

**Q** Is that the same company that Clear Touch purchases from?

**A** Yes, absolutely. They do about nine brands in the United States, plus quite a few white label brands.

**Q** How does being able to purchase directly from CVTE affect the price?

**A** It's -- well, it affects two things. It affects the price and that you are able to get it at a large volume discount. I was paying around $3000 a penal, selling them for 5. Eating all the marketing cost and things, in the ones we ate. So you want to be dealing directly with the manufacturer if you are a major VAR, because anybody in between is taking out margin that you could be paying, you know, your family, your reps in bonuses and pay raises, your technicians. The first year or two of this, they're not making any money. They're just putting in time on the idea that they're going to make money, if this takes off. So it gives you a lot of advantage.

**Q** And how does purchasing directly from a manufacturer, like CVTE, affect shipment and shipment costs?

**A** Well, purchasing direct, you have to order -- initially, they gave us a little bit of a break. I think we had to order 50 or so, but really 100 is the magic number. You order the product. You pay half of it down, so at $3500 a unit, we would have had to pay $175,000 the day we ordered it. Then the day it was finished, they sent you a little note and said, "Now wire us money."

Your stuff is now sitting in a dock in China. It's your responsibility. A ship now is going to put that out there. In another six to eight weeks, it would get to us. So, in that time period, we put out $350,000 or more, depending on what else they ordered with it. Then it may be 8 to 12 weeks before we actually had that product where we could actually sell it to someone. Once we sold it to them and installed it, we had another 54 days before we got paid.

**Q** Is there an advantage in terms of shipping and cost if they were to purchase directly from CVTE?

**A** Oh, absolutely. The containers had a flat rate shipping on them. When they put 100 on that container, that container got off, put it on the truck, delivered to your door. There's no additional cost of transportation and re-delivery. A panel like

that, at that time, weighed in essence of 200 pounds. Each panel would -- if you ship one or two or three at a time, it's $200 to $300 a piece versus a truckload showing up for $3000 for a 100. The math is $30 versus 300.

**Q** Then, is the price at which you're selling to school districts, is there a key price point?

**A** Magic number is under $5000. It has to do with the way the federal government allocates funds. Most of the money that's used in technology in the schools doesn't come from your local district tax dollars, unless they have a special tax election. Most of it comes from what they call TitleOne. That money has thresholds that are put on it. Anything above $5000 can't just be signed off by one person in the administration of a school -- a school district. It has to have two. So every district wants everything to be under $5000. That includes: the unit, delivery, costs, installation, because it's easier to purchase that way.

**Q** And so, how does being able to purchase directly from a manufacturer, like CVTE affect your ability to meet that price point?

**A** At that time, it was the only way to do it. It was the only way to get the margins, because if

you bought it from somebody else, they were giving you, maybe 10 points a margin, whereas doing it the other way, we were getting 50.

**Q** Thank you, Mr. Viola. Please answer any questions Mr. Smith has for you.

**A** Thank you.

**THE COURT:** Cross-examination.

**CROSS-EXAMINATION**

**BY MR. SMITH:**

**Q** Good morning, Mr. Viola.

**A** Good morning.

**Q** You said, originally, you're from Louisiana, right?

**A** Yes, hurricane central. Well, it used to be.

**Q** Isn't everything hurricane central lately?

**A** That's what my son says. He's with FEMA.

**Q** So how long did it take you to get here?

**A** About seven hours.

**Q** A couple of weeks ago, you already offered up a videotaped deposition, didn't you?

**A** Yes, that was requested by you guys.

**Q** Are you saying I requested it?

**A** Lawyers.

**Q** Did Encore request you take a videotaped

engineers. I know that even if it went bad with -- one of these companies went under, I know the manufacturer. I can get parts. I can -- if necessary, I can start importing the same thing, same product under my name at any given moment. I didn't really want to. That's a hassle. What Chris was offering was, "Hey, I'm going to inventory it. I'll work with you on terms."

We have a good presence. Like I said, they are a very well-put-together education marketing message. They didn't have any real presence in my state. That meant, if I could find a company that I could do a million dollars worth of business with, it was worth engaging. Primarily, all this comes down to that the manufacture rep that I helped put all this together for the North American market is a very close friend of mine; and he asked me to.

**Q** Thank you, Mr. Viola.

**REDIRECT EXAMINATION**

**BY MR. ENGLISH:**

**Q** Mr. Viola, why did you come forward in this case?

**A** I came forward because I grew up in six foster homes. People took care of me, a lot of people didn't. When I adopted my kids -- they're eight and

nine -- they were going through a lot of, like I said, really hard things. We asked them to do some things. They had to go in and testify against some things that were wrong. I coached them. I walked them through it. I gave them their confidence. I held their hands. I went through all of that.

So when this came up and I'm discussing it with my wife at dinner saying I didn't want to get involved and everything, my daughter who testified against her father beating with a two-by-six said, "Dad, you can do it. I'll be there."

I knew when I made that phone call, it wouldn't end in a deposition in a chair. It would end in here. I made that decision. I'm not being paid to do this.

I'm going to leave and I'm going back to CVTE in the morning. We're going to have another discussion about, you know, two of their other brands, and I'm going to do business in the way I said I was going to do business. But the key thing is it's not fair to all the people who hauled that product around, went and showed it to all these people, made no commission on it, didn't get any bonuses on it, built something that they knew two years down the road that they would begin to sell and

make some money on it, then poof, it belonged to somebody else.

Those people, that family -- I have over 30 employees. That's 180 people in my family. It's not just those -- the people who work for -- it's all their family, it's their college, it's their kid. Like my daughter said, "Dad, it's the right thing to do."

**Q** Thank you, Mr. Viola.

**THE COURT:** May this witness be excused?

**MR. ENGLISH:** Yes, Your Honor.

**MR. SMITH:** Yes, Your Honor.

**THE COURT:** Thank you, sir.

Call your next witness.

**MR. ENGLISH:** Your Honor, may we have a five-minute break?

**THE COURT:** Yes, sir.

**MR. ENGLISH:** Thank you.

**THE COURT:** Ladies and Gentlemen, let's take about a five- or ten-minute break. Mr. Foreman, if you need anything, please let the bailiff know.

(Jury exits at approximately 10:12 a.m.)

(The Court goes off the record at approximately 10:12 a.m.)