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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2022-000144

Encore Technology Group, LLC..... Petitioner-Respondent,

v.

Keone Trask and Clear Touch Interactive, Inc., f/k/a
Clear Touch Interactive, LLC ..... Respondent-Petitioners.

ENCORE TECHNOLOGY GROUP, LLC'S RETURN TO RESPONDENT-PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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QUESTION FOR REVIEW

I. **Where Clear Touch in its 2017 Action raised claims based upon the same facts that it raised and could have asserted as counterclaims in Encore's action, did the Court of Appeals correctly affirm the Circuit Court's grant of summary judgment dismissing the 2017 Action under the doctrine of res judicata?**

STATEMENT OF THE CASE

On September 18, 2015, Encore Technology Group, LLC ("Encore") filed its Complaint against Keone Trask ("Trask") and Clear Touch Interactive, Inc., f/k/a Clear Touch Interactive, LLC ("Clear Touch") (Trask and Clear Touch may be referred to herein collectively as ("Respondents"). (Complaint, R. pp. 82-131) Encore's action included causes of action for breach of duty of loyalty, breach of fiduciary duty, breach of contract, and breach of contract accompanied by a fraudulent act against Trask, for violation of the South Carolina Trade Secrets Act against both Respondents, and for tortious interference with contractual relations against Clear Touch.

Specifically, in February 2013, Encore employed Trask and paid him nearly $200,000 per year to serve as its Chief Business Development Officer and to locate suppliers for interactive touch-screen panels that Encore sells to K-12 schools ("panels"). (Transcript, Supp. R. p. 71, l. 8-Supp. R. p. 72, l. 9; R. p. 968, l. 21-R. p. 969, l. 18; R. p. 1228, l. 19-R. p. 1229, l. 7; Plaintiff's Exhibit 1, R. pp. 1644-1648) Instead of working loyally and solely for Encore, however, Trask surreptitiously formed a side company, Clear Touch, to steal profits, trade secrets, and opportunities from Encore while he was on Encore's payroll. (Transcript, R. p. 1220, l. 16-R. p. 1221, l. 10) Trask engaged in a complex, multi-year scheme of theft, fraud, and deception that caused Encore multiple injuries and actual damages totaling approximately $5.5 million.

Specifically, the evidence demonstrated that Trask:

- Maintained control of Clear Touch's operations throughout his time of employment with Encore (Transcript, R. p. 965, l. 8-R. p. 966, l. 10);

- Did not disclose his involvement in Clear Touch to Encore while he was an employee of Encore (Transcript, R. p. 995, l. 9-R. p. 996, l. 13; R. p. 998, ll. 20-24; R. p. 1034, l. 19-R. p. 1036, l. 22; Plaintiff's Exhibit 8, R. pp. 1682-1684; Plaintiff's Exhibit 83, R. pp. 1861-1864; Final Order and Judgment, R. p. 33);

- Listed his mother—using her maiden name—as owner of Clear Touch to hide his affiliation from Encore while doing all of the work for Clear Touch (Transcript, Supp. R. p. 93, ll. 14-22; Supp. R. p. 98, ll. 15-21; R. p. 961, l. 1-R. p. 962, l. 17; Video Deposition of Kathy Cruse-Krebs, R. p. 1643; Final Order and Judgment, R. p. 33);

- Drafted and induced Encore to sign a Reseller Agreement to purchase panels from Clear Touch by approving it for Encore and having his mother sign for Clear Touch (Transcript, R. p. 970, l. 10-R. p. 974, l. 13; Plaintiff's Exhibit 3, R. pp. 1652-1668; Plaintiff's Exhibit 21, R. pp. 1758-1777; Plaintiff's Exhibit 22, R. p. 1778; Final Order and Judgment, R. p. 33);

- Had the true suppliers of the panels remove their labels and replace them with Clear Touch labels to hide suppliers' identities from Encore (Transcript, Supp. R. p. 93, ll. 23-25; Supp. R. p. 98, ll. 7-14; Supp. R. p. 99, ll. 1-8; R. p. 1000, l. 18-R. p. 1001, l. 25; R. p. 1003, l. 9-R. p. 1005, l. 9; Plaintiff's Exhibit 5, R. p. 1670; Plaintiff's Exhibit 39, R. p. 1805; Plaintiff's Exhibit 40, R. pp. 1806-1808; Plaintiff's Exhibit 43, R. pp. 1810-1813; Final Order and Judgment, R. p. 33);

- Marked up the prices of the panels from the suppliers that Clear Touch charged to Encore (Transcript, Supp. p. 99, ll. 9-18; R. p. 1005, l. 10-R. p. 1007, l. 10; Plaintiff's Exhibit 44, R. p. 1814; Final Order and Judgment, R. p. 33);

- Had Encore pay Clear Touch by sending its checks to a Nevada post office box and then had them forwarded back to South Carolina to hide his affiliation with Clear Touch (Transcript, Supp. R. p. 94, ll. 14-19; Supp. R. p. 98, ll. 22-25; R. p. 983, l. 9-R. p. 986, l. 2; Final Order and Judgment, R. p. 34);

- Had his wife, Tamara Trask, work for Clear Touch but present herself to Encore by email under the false name "Amy Andrews" to hide his affiliation (Transcript, Supp. R. p. 94, l. 1; R. p. 978, l. 1-R. p. 983, l. 8; R. p. 991, l. 19-R. p. 994, l. 17; R. p. 1196, ll. 14-19; Plaintiff's Exhibit 4, R. p. 1669; Plaintiff's Exhibit 26, R. p. 1779; Plaintiff's Exhibit 27, R. pp. 1780-1781; Plaintiff's Exhibit 29, R. pp. 1782-1786; Plaintiff's Exhibit 33, R. p. 1797; Plaintiff's Exhibit 34, R. p. 1798; Final Order and Judgment, R. p. 34);

- While at conferences Encore was paying for him to attend, worked to develop a reseller network for Clear Touch, initially "baiting" resellers by leading them to believe Encore was the owner of Clear Touch (Transcript, R. p. 933, l. 4-R. p. 943, l. 24; R. p. 1007, l. 11-R. p. 1008, l. 3; Plaintiff's Exhibit 48, R. p. 1815; Plaintiff's Exhibit 78, R. p. 1847;

Plaintiff's Exhibit 79, R. p. 1848; Plaintiff's Exhibit 80, R. p. 1849-1855; Final Order and Judgment, R. p. 34);

- Had Encore employees, Leo Gallant and Jimmy Higginbotham, sign non-disclosure agreements—including one on the day Trask left Encore—so that he could disclose his ownership of Clear Touch but prevent them from disclosing that ownership to Encore and thereby induce them to work for Clear Touch and its benefit while on Encore's payroll and leave Encore months later to work for Clear Touch (Transcript, Supp. R. p. 94, l. 20-Supp. R. p. 96, l. 15; R. p. 987, l. 14-R. p. 991, l. 18; Plaintiff's Exhibit 15, R. pp. 1750-1754; Plaintiff's Exhibit 32, R. pp. 1792-1796; Final Order and Judgment, R. p. 34); and

- Permanently deleted incriminating e-mails, both from Encore's server and from Clear Touch (Transcript, R. p. 1030, l. 21-R. p. 1032, l. 19; R. p. 1169, l. 20-R. p. 1171, l. 9; R. p. 1172, ll. 2-8; R. p. 1231, l. 17-R. p. 1234, l. 21; Plaintiff's Exhibit 73, R. pp. 1841-1843; Plaintiff's Exhibit 79, R. p. 1848; Final Order and Judgment, R. p. 34).

Respondents realized significant ill-gotten profits from their scheme. (Transcript, R. p. 1028, l. 7-R. p. 1030, l. 20; Plaintiff's Exhibit 68, R. p. 1828-1830; Plaintiff's Exhibit 69, R. p. 1831-1832; Plaintiff's Exhibit 70, R. p. 1833-1840) Encore's expert opined, based upon the limited discovery that Encore was able to obtain from Clear Touch, that the value of Clear Touch's profits through 2015, plus the value of Clear Touch as of December 31, 2015, was $5,536,254. (Transcript, R. p. 1093, l. 10-R. p. 1097, l. 9; R. p. 1103, l. 22-R. p. 1105, l. 3; Plaintiff's Exhibit 10.E, R. p. 1690; Plaintiff's Exhibit 10.J, R. pp. 1694-1742)

After Respondents received multiple continuances, including in response to their Second Motion for Continuance of Trial Date filed on June 6, 2017, R.240-289, a jury trial occurred over two years after Encore filed its action, on September 26-30, 2017.

Shortly before trial, Respondents stipulated to Trask's liability on Encore's claims for breach of duty of loyalty and breach of fiduciary duty. (Plaintiff's Exhibit 83, R. pp. 1861-1864) Respondents denied liability for the other claims. Encore argued the evidence proved that Respondents caused it four distinct injuries and requested actual damages of $5,536,254.

Following the charge, the jury unanimously reached verdicts of $3,377,023 in actual damages and $4,524,890 in punitive damages against Trask, totaling $7,901,913. (Verdict, R. pp. 1916-1921) Specifically, these verdicts found that Trask had (1) breached his duty of loyalty to Encore ($375,733 actual and $175,000 punitive damages), (2) breached his fiduciary duty to Encore ($675,361 actual and $1,500,000 punitive damages), (3) diverted profits from Leon County Schools ("Leon") in breach of his contract with Encore ($424,945 actual damages[1]), (4) misappropriated trade secrets regarding Leon from Encore in violation of the South Carolina Trade Secrets Act ($424,945 actual damages and $849,890 in exemplary damages (based upon the jury's findings of willful violation of the Trade Secrets Act)), and (5) breached his contract accompanied by fraudulent act ($1,476,039 actual and $2,000,000 punitive damages). (Verdict, R. pp. 1916-1921)

Against Clear Touch, the jury rendered two awards: (1) one for tortious interference with Encore's contractual relations in the amount of $424,945 in actual damages and $500,000 in punitive damages, and (2) the other for violation of the South Carolina Trade Secrets Act in the amount of $424,945 in actual damages and $849,890 in exemplary damages (based upon the jury's findings of willful violation of the Trade Secrets Act). (Verdict, R. pp. 1919-1920)

Following the Circuit Court's requirement of election of remedies and the addition of attorneys' fees, costs, and expenses, the Court entered its Final Order and Judgment in favor of Encore as follows: (1) against Trask in the amount of $7,917,468, and (2) against Clear Touch in the amount of $1,715,335. (Final Order and Judgment, R. p. 35)

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[1] Encore sought $424,945 in lost profits from sales to Leon under multiple theories. (Plaintiff's Exhibit 10.H, R. p. 1692)

On the eve of trial, in September 2017, Clear Touch filed a new complaint against Encore asserting four causes of action: (1) breach of contract (Mutual Confidentiality Agreement, which was Defendant's Exhibit 20, R. 1900, in Encore's trial); (2) breach of contract (Reseller Agreement, which was Plaintiff's Exhibit 3, R. 1652, in Encore's trial); (3) violation of the SC Trade Secrets Act; and (4) conversion (the "2017 Action"). (Clear Touch Amended Complaint, R. pp. 165-213) In its answer, as an alternative to its res judicata defense, Encore asserted counterclaims against Clear Touch, including (1) breach of contract (Reseller Agreement), (2) breach of contract accompanied by a fraudulent act, and (3) abuse of process. (Encore Answer and Counterclaims, R. pp. 214-228) Clear Touch and Encore then filed cross-motions for summary judgment. (Motions for Summary Judgment, R. pp. 591-592, 735-745) The Circuit Court granted both cross-motions for summary judgment, dismissing all causes of action under the doctrine of res judicata. (Order Dismissing Action, R. pp. 61-64)

On November 24, 2021, the Court of Appeals issued Opinion No. 5871 in this matter (the "Opinion"). In affirming the Circuit Court's summary judgment dismissing the 2017 Action, the Court of Appeals correctly ruled that the 2017 Action was barred by the doctrine of res judicata. The Opinion noted that "Clear Touch conceded its claims could have been litigated in the primary case," "does not dispute that it was well-aware before trial of information leading it to believe it had claims against Encore," and "used the same factual basis -- alleged unfair competition by Encore -- as a defense to Encore's motion for restitution." Opinion at 13. Accordingly, the Court held that res judicata applied to Clear Touch's claims because they arose out of the same transaction or occurrence covered by Encore's action and Clear Touch was obligated to raise all such claims in Encore's suit.

ARGUMENT

I. Where Clear Touch in the 2017 Action asserted claims based upon the same facts that it raised and could have asserted as counterclaims in Encore's action, the Court of Appeals correctly affirmed the Circuit Court's grant of summary judgment dismissing the 2017 Action under the doctrine of res judicata.

A. The Court of Appeals correctly applied the doctrine of res judicata.

1. Clear Touch's claims in the 2017 Action were mandatory counterclaims in Encore's action because there was a "logical relationship" between the claims and therefore they were part of the same transaction and occurrence.

"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.'" *Roddey v. Wal-Mart Stores East, L.P.*, 422 S.C. 344, 348-49, 811 S.E.2d 785, 787 (2018) (quoting *Hilton Head Ctr. of S. Carolina, Inc. v. Pub. Serv. Comm'n of S. Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "Under the doctrine of res judicata, a final judgment on the merits in a prior action will bar the parties in a second action as to matters litigated and matters which might have been litigated." *Jaynes v. County of Fairfield*, 303 S.C. 434, 438, 401 S.E.2d 183, 185 (Ct. App. 1991).

In the case of Clear Touch, the issue is whether its claims in the 2017 Action were compulsory counterclaims that arose out of a "transaction or occurrence" that was a subject of Encore's action. Rule 13(a), SCRCP ("Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim ...."); *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("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.").

A counterclaim arises out of the same "transaction or occurrence" and is compulsory if there is a "logical relationship" between the claims and the counterclaims. *Jaynes,* 303 S.C. at 438 n.1, 401 S.E.2d at 185 n.1 (citing *N.C. Federal Savings & Loan Assoc. v. DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903 (1989)). In *Jaynes*, the Court held that, "[d]espite the Jaynes' argument that they were misled by the description of the road in the county's 1986 action," they "could have by answer or counterclaim asserted their claim of ownership ... and thereby put in issue the question of title to the road." 303 S.C. at 438, 401 S.E.2d at 185. The Court therefore held that the trial judge "properly ruled that the Jaynes are barred by the doctrine of res judicata from asserting title to the road running through their property," because "the county's complaint in the 1986 action fairly asserted a set of facts which created a logical relationship between the road described in the county's complaint and the road which the Jaynes claim is on their own property." *Id.*

Similarly here, there was a "logical relationship" between Encore's claims and Clear Touch's claims in the 2017 Action for several reasons. First, Encore's claims and Clear Touch's claims arose out of the same contracts and relationships that were at issue in Encore's action. Defendants' Exhibit 20 for Encore's trial was the same Mutual Confidentiality Agreement on which Clear Touch relied for its first breach of contract claim. Plaintiff's Exhibit 3 in Encore's action was the same Reseller Agreement on which Clear Touch relied for its second breach of contract claim. Defendants' Exhibit 17 in Encore's action showed that Clear Touch knew by September 3, 2014—over a year before Encore filed its action—that Encore was doing business

with "other panel manufacturers," R. p. 745, about which Clear Touch complained in the 2017 Action.[2]

Second, in Encore's action, Respondents sought in discovery and obtained from Encore documents they used in depositions, and then used the same facts that formed the basis of Clear Touch's 2017 Action to assert an "unclean hands" defense. Specifically, after reviewing documents Encore produced on May 31, 2017, Respondents took the depositions of Encore employees Daniele Stengel and David Masters in mid-July 2017, two and a half months before trial. Based upon those depositions, Respondents argued that Encore's alleged misappropriation and conversion of Clear Touch trade secrets and price lists precluded Encore's recovery under the doctrine of unclean hands. *See, e.g.,* Respondents' Post Trial Motions dated October 9, 2017, R. p. 491 ("… Encore has … unclean hands. 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 …. Likewise, David Masters' deposition testimony and the exhibits thereto provide further evidence of Encore's inequitable and illegal acts ….").

Third, all of Clear Touch's claims in the 2017 Action are directly related to Encore's claim in its case that Clear Touch was a business opportunity that belonged to Encore and should not have been a separate business with "secrets" from or competing against Encore. Encore's theory of its case directly challenged Clear Touch's right to have its own contracts and trade secrets, where Trask started and developed Clear Touch while he was Encore's employee on its

[2] Moreover, as Encore's Chief Business Development Officer in charge of locating suppliers for panels and thereafter as a supplier of panels, with "insiders" loyal to him at Encore, Trask knew exactly what Encore was doing with other suppliers.

payroll and was supposed to be obtaining all trade secrets, contracts, and profits for Encore, not diverting them to himself and his side company.

In fact, Clear Touch admitted at the hearing on the cross-motions for summary judgment that its claims under the Reseller Agreement were and could have been litigated in the prior action and therefore its breach of contract claim under the Reseller Agreement should be dismissed under the doctrine of res judicata. (Transcript of Record of Hearing held on July 30, 2018 ("Summary Judgment Transcript"), R. p. 1616, ll. 15-19 ("the reseller agreement was at issue in the last case. We've both filed motions for dismissal on res judicata on that. I think we both conceded that position …."); R. p. 1636, ll. 19-21 ("[W]e recognize … that res judicata applies to the one claim based on the resell agreement.")). *See also* Petition at 15, n.2. The same logic applies to the Mutual Confidentiality Agreement (Defendant's Exhibit 20, R. p. 1900), because it was entered April 9, 2013, and superseded on April 24, 2013, by the Reseller Agreement, which had its own confidentiality provision. (Plaintiff's Exhibit 3, R. p. 1659, § 11 ("CONFIDENTIALITY"), R. p. 1664, § 17.8 ("This Agreement … supersedes all previous … agreements, oral or written, regarding its subject matter.")) And because the trade secrets and conversion claims were based upon information exchanged under and governed by the Reseller Agreement, those claims were also "logically related" to the Reseller Agreement, which Clear Touch admits was litigated in Encore's first action.

2. Respondents are not entitled to a special exception from the doctrine of res judicata because they obtained a small percentage of documents four months before trial.

Apparently recognizing that the 2017 Action was based upon the same transaction and occurrence as Encore's action, Respondents contend that the application of res judicata to bar their claims against Encore was improper because of "compelling policy considerations."

Petition at 19. While South Carolina courts have suggested that there may be narrow circumstances where the doctrine of res judicata should not be applied, no such circumstances are presented here.

As an initial matter, South Carolina courts have no well-developed public policy exception to the application of res judicata. Respondents rely primarily on *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011), which refers generally to the Restatement (Second) of Judgments § 26 commentary that there may be "exceptional cases" when res judicata would be inappropriate. The *Judy* Court, however, considered a wholly distinguishable scenario expressly set forth in the Restatement—whether the court where petitioner could have raised his barred claims had jurisdiction to hear the claims. In determining that the lower court could have exercised jurisdiction over the petitioner's claims, the court upheld the application of res judicata.

Respondents also cite *South Carolina Public Interest Found. v. Greenville County*, 401 S.C. 377, 737 S.E.2d 502 (Ct. App. 2013), and *Harnett v. Billman*, 800 F.2d 1308 (4th Cir. 1986), in support of their position, but both cases found no applicable exceptions in the Restatement and upheld the application of res judicata. Notably, in *South Carolina Public Interest Found. v. Greenville County*, in upholding the application of res judicata, the Court noted the compelling public policy reasons to do so, stating that "the doctrine of res judicata itself is a doctrine founded upon the objective of preserving and protecting the public interest…that flows from the principle that public interest requires an end to litigation." 401 S.C. at 391, 737 S.E.2d at 509.

Even assuming South Carolina law had well-developed jurisprudence on any "public policy exception" to res judicata, the facts do not support its application here for several reasons.

First, Respondents do not cite any specific exception set forth in the Restatement (Second) of Judgments § 26, instead stating generally that Encore "robbed [Respondents] of a full and fair opportunity to litigate the issues forming the basis of its claims," accusing Encore of "withhold[ing] evidence until a few months prior to trial." Petition at 20. This is a complete mischaracterization of the pre-trial discovery issues in the case and unsupported by the Record. [3]

In fact, Encore did not intentionally withhold any evidence, and Respondents admit in their Petition that they had the evidence they contend supported their claims against Encore several months before trial. Petition at 12 ("Encore's May 31, 2017 Production of … Documents Reveal Potential Claims"). Specifically, Clear Touch admits it was provided documents to assert its claims at least by May 31, 2017—four months before trial—but never did. (Summary Judgment Transcript, R. p. 1600, ll. 24-25; R. p. 1608, ll. 10-15)[4] Respondents used these

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[3] It is the height of hypocrisy for Respondents to complain about Encore's document production when a Greenville County jury awarded millions of dollars in punitive damages against them in part because they destroyed and "lost" evidence. Final Order and Judgment, R. p. 34. Trask – a former Chief Technology Officer for a publicly-traded company – claimed that he made no back-up for emails regarding Encore and then "lost" them when he changed email services, but such claims were not credible, especially when he admitted that Clear Touch emails were deleted. *See* Transcript, R. p. 1030, l. 21-R. p. 1032, l. 19; R. p. 1169, l. 20-R. p. 1171, l. 9; R. p. 1172, ll. 2-8; R. p. 1231, l. 17-R. p. 1234, l. 21; Plaintiff's Exhibit 73, R. pp. 1841-1843; Plaintiff's Exhibit 79, R. p. 1848. Whether inadvertent or by design, Respondents' deleting and "losing" emails forced Encore to subpoena such documents from third parties. While this should not have burdened Respondents, they filed four motions to quash these subpoenas, all of which were denied. In fact, it was only because third-party Good Samaritans, such as Dale Viola, came forward that Encore obtained many of Respondents' documents revealing the extent of their fraudulent schemes.

[4] In fact, Clear Touch admitted it had over 200,000 pages of discovery from Encore by December 2016. (Summary Judgment Transcript, R. p. 1603, ll. 8-25 (26,000 pages in November 2016 and 175,000 pages in December 2016)) Because of an employee oversight, Encore's multiple, original search terms included "ClearTouch" – which captured emails to and from the "ClearTouch" email accounts – but not "Clear Touch" (even though that name appeared throughout the production), which led Encore to produce an additional 10,000 pages on May 31, 2017, after it discovered the variation. Of those, 1,765 were pre-September 2015 documents, and only 798 documents were dated after that date, with many duplicates. Clear Touch has

documents to take depositions in mid-July 2017—two and a half months before trial—including the depositions of Ms. Stengel and Mr. Masters, which Respondents used at trial and in support of their "unclean hands" defense.[5] Clear Touch requested and was granted a continuance of the trial, but never moved to amend its answer to assert its claims as counterclaims. If Clear Touch needed time to pursue compulsory counterclaims, it should have moved to amend its answer to include them.[6]

Second, the truth is that Respondents did not lack time, but made a choice not to assert counterclaims. Clear Touch admitted at the hearing the real reason it did not move to amend its answer to add counterclaims was a strategic decision not to try its claims with Encore's:

> [T]here was a lot of internal discussion about what to do with this, Your Honor. And we – it's definitely something that kept me up many nights thinking about what – what's the right thing to do here **for the best interest of Clear Touch**. And the decision had to be made, **do you take a major risk of putting potentially a multimillion dollar claim on an extreme fast track that is already attached to a week-long trial and other stuff** .... Or do you file a separate action? .... And I had to choose the second option.

(Summary Judgment Transcript, R. p. 1638, l. 23-R. p. 1639, l. 12 (emphasis added)) Clear Touch chose not to pursue its claims in Encore's case because that jury would undoubtedly hear about its egregious conduct towards Encore. Clear Touch knew there was no way this jury—

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presented no evidence, however, that these additional pages led to discovery of any facts that were not known through the 2016 productions or earlier. As a high level officer of Encore from day one, and a supplier of panels thereafter, Trask knew exactly what Encore was doing.

[5] Contrary to Respondents' arguments that Encore delayed depositions, Encore offered approximately 15 different days for depositions from late June to early August 2017, and had offered multiple dates before then.

[6] Although Clear Touch criticizes Encore for initially objecting to discovery of documents dated or created after the Reseller Agreement was terminated in September 2015, because of Clear Touch's insistence that they were relevant, Encore relented and did produce the post-September 2015 documents. Moreover, Encore's initial objection was understandable because Clear Touch never asserted counterclaims about post-September 2015 events, which Clear Touch admitted at the hearing. (Summary Judgment Transcript, R. p. 1638, ll. 10-17 ("Based on the state of the pleadings, [Clear Touch's claim] wasn't in there for [Encore] to know about.")

which awarded millions of dollars in punitive damages against Respondents—would find in its favor on its baseless counterclaims. Having made this strategic choice to not assert counterclaims, they cannot now rely on this Court's application of a public policy exception to reinstate claims they chose not to make when they had the opportunity to do so.

Finally, Clear Touch failed to present affidavits or any other evidence either to support its baseless claims, to establish that they arose after the date of Encore's complaint, or to establish that it did not know about them in time to assert them as counterclaims. "Rule 56 (c) mandates the entry of summary judgment" when "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

In *Baughman*, this Court elaborated:

> Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing' – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case." The moving party need not "support its motion with affidavits or other similar materials *negating* the opponent's claim."
>
> Once [a] moving party carries its initial burden, **opposing party** must, under Rule 56(e) "do more than simply show that there is some metaphysical doubt as to the material facts" but "**must come forward with 'specific facts showing that there is a *genuine issue for trial*.'**" Indeed, Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings.

Id. at 115, 545 (citations omitted; emphasis added).

Under Rule 56(e), S.C.R.C.P., "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be **admissible in evidence**, and shall show affirmatively that the affiant is competent to testify to matters stated therein." (emphasis added).

If the party opposing summary judgment fails to demonstrate, with admissible evidence, that a genuine issue for trial exists, the moving party is entitled to summary judgment. *Id.*

Here, Clear Touch failed to present any such evidence in opposing summary judgment. Instead, it relied exclusively upon arguments of counsel, which of course are not evidence. *Bowers,* 304 S.C. at 68, 403 S.E.2d at 129 ("Arguments of counsel are ... not evidence.") (quoting *McManus,* 171 S.C. at 89, 171 S.E. at 475) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.")). Clear Touch likely chose not to submit an affidavit because Trask, who was Encore's Chief Business Development Officer for nearly 15 months, knew exactly what Encore was doing from the outset, and Clear Touch continued as Encore's supplier thereafter, so Respondents could not truthfully establish that they lacked knowledge of what Encore was doing.

In sum, Clear Touch's claims were compulsory counterclaims that were logically related to the claims in Encore's action. Clear Touch sought and obtained discovery for those claims and used the same documents and facts to take depositions and assert an unclean hands defense in Encore's action. Clear Touch could have asserted those claims in Encore's action, but strategically chose not to do so. Further, Clear Touch failed to meet its burden of presenting admissible evidence to oppose summary judgment. For these reasons, Encore's Motion for Summary Judgment was properly granted.[7]

B. The Court of Appeals did not base its decision upon a factual mistake.

Respondents also argue that the Court of Appeals relied upon an "inaccurate factual assertion that [Clear Touch] never moved for a continuance upon the grounds that it may need to

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[7] If the Court were to overturn the Order of Dismissal and allow Clear Touch to pursue a new action, it should also allow Encore to assert its counterclaims in such action.

amend its answer in light of the late disclosed evidence." Petition at 23. The Court of Appeals, however, correctly noted that "Clear Touch never moved to amend its answer," and further stated that it "never sought a continuance on the grounds that it needed more time to develop counterclaims that would be forthcoming in an amended answer" or "claimed it needed a continuance because it needed to amend its answer." Opinion at 13. All of those statements were correct.

Respondents' counter-argument is that, in paragraph 31 of 38, on page 6 of 8 of their Second Motion for Continuance of Trial Date filed June 6, 2017, they made one mention of a "potential need" to amend their pleadings "to add in a counterclaim." *Id.*, R. 245. Respondents fail to note that their motion was partially granted and that they received a second continuance of the trial date from August to September 25, 2017. As the Court of Appeals correctly observed, however, following the second continuance and with full knowledge of the documents and having taken depositions based on those documents, Respondents never actually moved to amend their answer to assert counterclaims, never stated that they did need to amend their answer, and never stated that they did, in fact, need more time to develop counterclaims. That is because Respondents strategically chose not to pursue counterclaims in Encore's action. Accordingly, the Opinion is correct and not predicated upon a factual error.[8]

[8] Instead, it is Respondents' Petition that is full of misstatements of fact, misleading assertions, and mischaracterizations of Encore and the process in an effort to distract and mislead the Court, which Encore will address in detail if the Court desires to consider Respondents' arguments further.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition, allowing to stand the Court of Appeals' Opinion affirming the Order of Dismissal of Clear Touch's 2017 Action.

Respectfully submitted,

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