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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

APPEAL FROM Greenville County Circuit Court

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2022-000144

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

v.

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

**KEONE TRASK AND CLEAR TOUCH INTERACTIVE, INC.'S
RETURN TO ENCORE TECHNOLOGY, LLC'S
PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. **Did the Court of Appeals Election Decision rightfully rely on the record and proper analytical guideposts rather than Encore's post-trial misrepresentations to determine that the election doctrine required Encore elect its remedies among claims arising out of the same facts for which it sought the same damages at trial?**
2. **Did the Court of Appeals err by looking to the record to determine how Encore presented its case at trial in making the Election Decision or should it have required Defendants carry a fictional evidentiary burden of establishing that the largest verdict awarded encompassed the smaller verdicts for the election doctrine to apply and require Encore elect its remedies amongst those claims?**
3. **Did the Court of Appeals rightfully hold that Encore was not entitled to equitable restitution from Clear Touch when the facts relied upon and damages sought were the same as those under its legal claims upon which the jury rendered verdicts in Encore's favor?**

I. INTRODUCTION

Encore attempts to impute error to the Court of Appeals' holdings by advancing a ludicrous position—that the Court erred by relying upon the established record and other relevant facts to determine what remedies Encore must elect from under the election doctrine instead of relying upon its post-trial misrepresentations adopted by the Circuit Court concerning the manner in which it presented its case at trial. Encore knows it has no choice but to advance that argument in a Trojan Horse of seemingly rational allegations that the Court of Appeal's Opinion is wrought with error, especially in its treatment of and holding on the election issue which resulted in the reduction of Encore's judgment by millions of dollars. Encore now petitions this Court to attempt to succeed in allowing it to recover millions of dollars more than the law permits in the same manner it did with the Circuit Court: By analyzing and determining the election issue upon Encore's revisionist representation of how it presented its case at trial instead of a record that reveals that narrative as undeniably false. Trask and Clear Touch respectfully ask that this Court not allow Encore to challenge the Opinion's Election Decision with the baseless arguments set forth in its Writ.

As recounted in Defendants' other filings, this consolidated appeal arose out of several cases. The election of remedies issue at hand was a product of the first case in which Encore sued Keone Trask ("Trask") and Clear Touch Interactive, Inc. ("CTI") (collectively "Defendants") on eight claims and won on six. The jury returned verdicts for Encore on its claims of breach of duty of loyalty, breach of fiduciary duty, breach of contract, and breach of contract with fraud against Trask individually; tortious interference against CTI; and violation of the Trade Secrets Act ("TSA") against both Trask and CTI. The jury awarded Encore approximately \$7.9 million against Trask and \$1.7 million against CTI. Which verdicts Encore was obligated to elect its remedy from under the election of remedies doctrine was at the center of post-trial motions in the first case, and now Encore's Writ. CTI and Trask sought reversal of the Circuit Court's Final Order that held that Encore needed only elect its remedies among the three claims under which the jury awarded the same \$424,945 in actual damages—breach of contract, TSA, and tortious interference. Petitioners argued that because Encore relied on the same facts to establish liability and sought the same damages under all but one of the claims the jury rendered a verdict under (the exception being the breach of loyalty claim), Encore was obliged to elect its remedy among those claims under the election of remedies doctrine.

Finally, Encore's Writ challenges the Court of Appeals affirmation that it is not entitled to equitable restitution in light of it having and receiving an adequate legal remedy in the form of the jury's multi-million dollar verdict(s). Nothing in Encore's Writ provides a sound legal or factual basis for allowing it to receive more than it already has by providing equitable restitution.

Therefore, Trask and CTI respectfully request the Court deny Encore's Writ.

II. STATEMENT OF THE CASE¹

As an initial matter, Defendants take issue with Encore's representations concerning the relevant facts underlying the issues at hand but do not think it worthwhile to address each inaccuracy in detail. Rather, Defendants believe it worth noting that Encore's reiteration of the case is dedicated to presenting Trask and CTI as bad actors to aid its arguments they be punished beyond what the law allows. That tactic was successful with the Circuit Court, leading to the flawed holdings within the Final Order drafted by Encore and entered without revision. Fortunately, the Court of Appeals rectified the Circuit Court's flawed election holding by looking to the record and applying the actual law rather than allowing Encore to rewrite history and subvert the election doctrine as the Circuit Court did when it adopted the Final Order.

A. **Trial of Encore v. Trask & Clear Touch September 25-29, 2017**

1. *Facts Relied Upon by Encore to Establish Liability at Trial*

The *Encore v. Trask and Clear Touch Interactive, Inc.* case was tried before a jury the week of September 25-29, 2017 with the Honorable R. Lawton McIntosh presiding. At trial, Encore pursued different theories of liability under its claims, but relied upon the same facts – (1) Trask not disclosing to Encore the identity of CTI's suppliers; (2) Trask not informing Encore that he was building a reseller network for CTI; (3) Trask not working with Encore to take advantage of the CTI opportunity; and (4) CTI making direct sales to Leon County. These alleged actions, in some form or fashion, were the underlying bases for Encore's claims of liability upon which it obtained a verdict at trial.

¹ The factual background in this matter is extremely complex and impossible to fit within the current page limits. Defendants direct this Court to the Court of Appeals Opinion for a concise summary of the operative facts in this case. Also, Defendants' Writ of Certiorari to this Court contains factual details relevant to the issues addressed herein, but for the sake of efficiency are not repeated in this Response.

2. *Encore's Claimed Damages as Presented at Trial*

Encore offered Michael Meilinger as its expert economic witness at trial. He testified concerning his calculations of potential damages and submitted Tables and documents he prepared reflecting what Encore claimed as its available damages. (R. pp. 1060-1168). Meilinger presented three alternative damages calculations, each summarized in a Table, and all three were ultimately admitted into evidence as a single page exhibit entitled "Summary of Damages." (R. p. 1692).

Table 1 – Entitled "Direct Costs Incurred by Encore," Table 1 originally included all of Trask's, Gallant's, and Higginbotham's wages and the expenses Encore told Meilinger were attributable to each former employee during their entire employment, which totaled \$712,085. (R. p. 1686).² The Circuit Court ruled that Encore could seek recovery of Higginbotham and Gallant's wages and expenses only from the time each signed an NDA with CTI, resulting in reduction of the damages in Table 1 to \$488,041 - comprised of Trask's wages and portions of Gallant's and Higginbotham's pay and expenses attributed to them selling CTI product. (R. p. 1692; R. p. 1059). These damages, according to Encore and Meilinger, were recoverable for Trask's breach of his duty of loyalty to Encore. (R. p. 1073). The next two categories of claimed damages Encore presented to the jury it claimed were recoverable under each of the remaining causes of action.

Table 2 – The second category of damages Encore presented through its economic expert were various "lost profits" totaling \$1,100,306 and summarized in Table 2. (R. p. 1692). The first three elements of this calculation, noted as "Direct Damages," all came from CTI sales to Encore, totaling \$675,361. The last two, deemed "Lost Profit," were from CTI sales to Leon County, totaling \$424,945. These damages were divided into different time periods. The first was Trask's

² Gallant and Higginbotham were Encore employees who went to work for CTI at different points after Trask left Encore.

employment with Encore (2.13.13-4.25.14); the second, the duration of Trask's non-compete (4.26.14-4.25.15); and the third ran from the end of the non-compete to termination of the Reseller Agreement (4.25.15-10.10.15). (R. p. 1692; R. pp. 1649-1651; R. pp. 1671-1680; R. pp. 1682-1684).

Table 3 – Through Meilinger's testimony, Encore presented its final alternative category of damages in Table 3, totaling \$5,536,254 and comprised of two main elements: (1) all of CTI's normalized profits through the end of 2015 and (2) what Plaintiff claimed was the value of the CTI business as of that date. (R. p. 1692). Table 3 divided the Normalized Profits calculations into four time periods, the first three being those used in Table 2 and the fourth ran from the end of the Reseller Agreement to year end 2015 (10.10.15-12.31.15). *Id.* Meilinger testified that if the jury awarded damages from Table 3, it should not award those from Table 2 because the former calculations subsumed the latter. (R. pp. 1105-1107). At trial, Encore claimed that it suffered the same damages under every cause of action, except under its breach of loyalty claim.

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 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.

(R. p. 1333 - Tr. Trans. 1099:18-23). This is the only cause of action in which Encore presented somewhat separate and distinct elements of damages to the jury.

ii. Cause of Action II – Breach of Fiduciary Duty – Encore said it suffered the same damages for Causes of Action II-VI

Encore told the jury that 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 pretending to act for his employer.

(R. p. 1335 - Tr. Trans. 1101:4-25). Encore told the jury these actions were breaches of Trask's fiduciary duties which resulted in \$5.5M of damage:

[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 from 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.

(R. pp. 1337-38 - Tr. Trans. 1103:1-1104:15).

...

[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.

(R. pp. 1339-40 - Tr. Trans. 1105:7-1106:14).

...
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.

(R. p. 1342 - Tr. Trans. 1108:1-7).

Trask’s breaches of his fiduciary duties, Encore told the jury, caused it to suffer the damages reflected in Plaintiff’s Exhibit 10-H (the entirety of the damages sought in the 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.

(R. p. 1342 - Tr. Trans. 1108:19-23). 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 establish liability for every remaining cause of action and explicitly told the jury to put in the same damage figure for each.

iii. Cause of Action III – Breach of Contract – Encore said these were the “same damage amount” as in Cause of Action II

Encore told the jury the damages it suffered for 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.

(R. p. 1345 - Tr. Trans. 1111:16-19)(*emphasis added*).

Those same damages, Encore told the jury, arose from the same actions that made Trask liable under the Breach of Fiduciary duty claim.

[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.³

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.

(R. pp. 1343-45 - Tr. Trans. 1109:7-1111:23).

iv. Cause of Action IV – Violation of S.C. Trade Secrets Act – Encore said it suffered the “same damages” as Causes of Action II & III

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.

³ Hiring Mr. Gallant was never tied to any claimed damages.

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. (R. p. 1346 - Tr. Trans. 1112:6-9)(*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. (R. pp. 1345-46 - Tr. Trans. 1111:20-1112:9)(*emphasis added*).

v. *Cause of Action V – Tortious Interference with Contract – Encore said this was the “same damages figure” as Causes of Action II-IV*

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.

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*. (R. p. 1346 - Tr. Trans. 1112:16-25)(*emphasis added*).

vi. *Cause of Action VI – Breach of Contract with Fraud – Encore said “same amounts” for damages as Causes of Action II-V*

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 timeline. 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*. (R. p. 1347 - Tr. Trans. 1113:2-12)(*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. Encore 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.

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. (R. p. 1343 - Tr. Trans. 1109:3-6).

The Circuit Court's jury charges made the same statement. (R. p. 1461 - Tr. Trans. 1227:5-16).

B. Encore's Post-Trial Misrepresentations Lead to the Final Order⁴

Defendants filed eight post-trial motions, including a Motion for Election of Remedies, seeking to have Encore elect among the remedies awarded to avoid duplicative recovery. (R. pp. 457-92, 556-86). Encore also submitted post-trial filings seeking fees, exemplary damages, for the Circuit Court to allow it to recover under as many claims as possible, and award it equitable relief above the millions awarded by the jury. (R. pp. 493-535). As part of that last effort, in what was a clear attempt to segregate verdicts, Encore submitted its "Requested Judgments in Favor of Encore Technology Group, LLC," which broke down the verdicts it believed it could recover under and gave what it contended was the factual and legal basis for each of those awards. (R. pp. 574-75).

⁴ Defendants' Writ provides relevant details regarding the amount of damages awarded under each cause of action at issue on the election argument, post-trial motions, and the Circuit Court's Final Order. (*See* Trask & CTI Writ pp. 7-9).

Defendants contended that Encore was required to elect its remedy among every cause of action under which the jury awarded a verdict with the exception of the breach of loyalty claim because Encore relied upon the same facts and sought the same damages under its breach of fiduciary duty, breach of contract, trade secret misappropriation, breach of contract with fraud, and tortious interference claims.

The Circuit Court heard post-trial motions with the election issue taking center stage. In response to the Circuit Court's questioning, Encore deviated from its position and presentation at trial and represented that it had in fact presented separate and distinct elements of damages to the jury for its breach of loyalty, breach of fiduciary duty, trade secrets, and breach of contract with fraud claims. (R. pp. 1510-1512; R. p. 1516, lines 3-10; R. pp. 1518-1519). It contended each of those awards was based upon distinct facts and damages, and therefore, the law allowed recovery under each without election. Encore stated that it only need elect to recover under the breach of contract, trade secret misappropriation, and tortious interference with contract claims because the jury awarded the same actual damages of \$424,945 under each. This was the start of Encore's post-trial campaign to misrepresent how it presented its case at trial all in an effort to obtain judgments well above what the election doctrine allows. Those efforts were ultimately successful at the circuit court level, culminating in entry of the Final Order.

C. The Final Order Drafted by Encore & Entered Without Revision

Following post-trial submissions and hearings, the Circuit Court made its rulings and instructed Encore to draft a proposed order, circulate it to opposing counsel, and submit a finalized version for entry. Encore submitted a proposed order that perverted, violated, ignored, or otherwise ran afoul of the law; contradicted the record; and relied upon a litany of inappropriate and unsupported factual findings to support its faulty holdings. That included the treatment and holding

on the election issue. The Circuit Court ignored CTI's copious objections to Encore's proposed order and adopted it *without revision* as the Final Order on April 2, 2018. (R. pp. 1-36). The Final Order granted all of Encore's post-trial motions except for restitution, denied Petitioners' post-trial motions with the exception of granting leave to deposit judgment into the court, and entered judgment in favor of Encore against Trask in the amount of \$7,917,468.40 and against CTI for \$1,715,335.00.

The Final Order's treatment and holding on the election issue relied upon Encore's post-trial misrepresentations as to how it presented its case to the jury rather than the record, as well as misapplication of the election doctrine, to conclude Encore could recover millions more than the law allowed. (*See* R. pp. 496-99). Specifically, the Final Order, inappropriately and without citation to the record, inserted the alleged factual bases for the jury's awards on each claim it held Encore could recover under – breach of duty of loyalty, breach of fiduciary duty, trade secret misappropriation, breach of contract with fraud, and tortious interference with contract – and in doing so provided the concocted bases for distinguishing each of those verdicts from one another. (R. pp. 10-11, 25-33). As a result, the Final Order awarded Encore judgments well above what it should have if the Circuit Court had considered the record showing how Encore presented its case to the jury and applied the election doctrine appropriately. Defendants sought to correct these errors on appeal.

D. The Court of Appeals Opinion – Election of Remedies & Restitution

On November 24, 2021, the Court of Appeals issued Opinion No. 5871 (the "Opinion"), finding in relevant part that the Circuit Court erred in confining Encore's election of remedies to just those claims under which the jury awarded the same actual damages (the "Election Decision")

and affirming the lower court's denial of Encore's claim for equitable restitution (the "Equity Decision").

The Court of Appeals determined that the Circuit Court's election decision was reached in error because it relied upon Encore's post-verdict misrepresentations that it had presented at trial different facts and sought separate damages under its breach of fiduciary duties, breach of contract, trade secret, tortious interference, and breach of contract with fraud claims, rather than the clear record reflecting the facts relied upon and damages sought under each of those causes of action were the same. The Court of Appeals stated that "[t]he circuit court's decision on election was controlled by its agreement with Encore's post-verdict argument that Encore had presented the case in a way that asked the jury to use different claims to compensate for different harms...., [however] [t]he record directly refutes the suggestion Encore litigated the case that way." The record, the Court of Appeals noted, showed that for each claim at issue, with the exception of breach of loyalty, Encore relied upon the same facts to establish liability and sought the exact same damages. Thus, the Court of Appeals held that Encore had to elect its remedy among the verdicts awarded under those claims, and not just the three causes of action the Final Order required election under due to the jury awarding the same actual damages of \$424,945 under them.

The Court's election analysis lies at the heart of Encore's challenge to the Election Decision. The Court stated that evaluating whether a party must elect between remedies requires examining at least three things regarding the claims at issue: (1) "Whether there are overlapping elements of damages among [those] multiple claims;" (2) "Whether different facts support the different claims;" and (3) "How the jury was charged with respect to double recovery." Evaluating the election issue with those guideposts led to the Election Decision. Encore takes issue with the Court's refusal to accept its post-trial revisionist representations or adhere to a legal duty it

inaccurately claimed required enforcing separate verdicts if at all possible. The Election Decision concluded that Encore would inevitably elect to recover under the breach of contract with fraud claim as the most valuable remedy awarded. The Court of Appeals' legal and factual bases underlying its Election Decision should be upheld and nothing Encore argues in its Writ warrants this Court's consideration or modification of that decision.

Likewise, the Equity Decision is not in need of review or modification by this Court. The Court of Appeals rightfully determined that the Circuit Court correctly held Encore was not entitled to additional awards in the form of equitable restitution where it had received an adequate legal remedy in the form of multi-million dollar judgments against the Defendants. Encore's Writ offers nothing in fact or law that reveals that determination to have been in error.

III. THE COURT OF APPEALS DID NOT ERR IN ITS ELECTION DECISION

A. The Court of Appeals Election Decision rightfully relied on the record and proper analytical guideposts rather than Encore's post-trial misrepresentations to determine that the election doctrine required Encore elect its remedies among claims arising out of the same facts for which it sought the same damages at trial

Encore takes issue with the Court of Appeals' election analysis and resulting holding by claiming it erred by failing to accept its post-trial representations concerning how it presented its case at trial, overlooked the fact that the jury awarded different punitive damage amounts under the claims at issue, and refused to adopt and rely upon the Final Order's inappropriate factual findings that the awards in dispute arose out of different facts and were intended to compensate Encore for separate injuries. Had the Court not committed these alleged errors, Encore contends, it would have affirmed the Circuit Court's holding that it need only elect its remedy among the three causes of action where the jury awarded the exact same \$424,945 in actual damages – breach of contract (v. Trask), trade secret misappropriation (v. Trask and CTI), and tortious interference (v. CTI)—because the other awards arose out of distinct facts and were intended to compensate

Encore for different injuries. In reality, Encore's arguments for err in the Court's Election Decision are unsupported by the record, law, and reason.

Encore accuses the Court of "substitute[ing] its own theory of how damages should be awarded" in violation of the claimed legal principle that courts must respect the jury's verdict "in fact as well as in pretense" by not interfering or substituting its own judgment for that of the jury's. (Writ p. 9). That did not occur in this case and none of the arguments advanced to demonstrate otherwise succeed in that endeavor. In reality, each purported err Encore claims impacted the Election Decision are smokescreens for its true complaint – that the Court of Appeals refused to accept its false post-trial claims that at trial it had relied upon separate facts to seek and obtain different damages (arising from distinct harms) on each of the claims at issue. The Court, however, relied upon the appropriate analytical guideposts to reach its Election Decision and Encore provides nothing to justify allowing it to recover millions above what the election doctrine allows.

Encore attacks the Court's conclusion that it is "just speculation" that the jury entered the verdicts at issue based upon different facts and intended they compensate separate injuries as Encore argues. That conclusion, Encore contends "overlooked...that Encore argued, and the evidence demonstrated" those awards were in fact entered upon different facts and were intended by the jury to compensate Encore for separate injuries. Neither Encore's post-trial arguments nor the "evidence" cited to make that argument provide the legal or factual basis warranting this Court's review and reversal of the Election Decision.

First, the "evidence" Encore is referring to is merely the fact that the jury awarded different punitive damages under the breach of contract with fraud claim than it did under the other claims at issue. (*See* Writ p. 10). That fact, Encore contends, shows that the Court of Appeals wrongly concluded that there is no way to know that the jury's award of nearly \$1.5 million in damages for

the breach of contract with fraud claim does not include the \$675,361 awarded for breach of fiduciary duty and the \$424,945 awarded under the breach of contract, trade secret, and tortious interference claims because “the punitive damages award – which the Court of Appeals overlooked – is different for that claim than the other claims.” (Writ p. 10). That fact does not indicate, much less establish, that the jury intended to award separate actual damages on each of those claims to compensate Encore for distinct injuries. Punitive damages awards are the jury’s subjective determination of how much money is sufficient to punish past and deter future illegal behavior. Actual damage awards are objective calculations made upon specific evidence that are meant to compensate for particular harms suffered by the Plaintiff. Variation in the former, therefore, provides no, or at best very minimal, insight into a jury’s thinking behind and intention in entering the latter. Regardless of its value in that regard, Encore’s argument lacks any legal or rational grounds warranting reversal of the Court’s Election Decision.

Encore next attempts to imply that the Court of Appeals should have deferred to and accepted the Circuit Court’s election ruling because the “trial judge, who heard the arguments and evidence, concluded that the four different verdicts were intended to compensate for the four different injuries.” (Writ p. 11). No legal citation is offered to support this position. This is assuredly because it relies upon the inaccurate assumption that the Circuit Court could make these factual findings in the first instance to imply the Court of Appeals erred by failing to adopt and rely upon them in making its Election Decision. Neither it nor the Circuit Court could or should have made determinations concerning the jury’s factual bases for and intentions in entering the actual damage awards at issue. It cannot be stressed enough that Encore drafted the Final Order containing these inappropriate findings and the Circuit Court entered it without revision. (R. pp. 1-36). The Court of Appeals correctly rejected Encore’s invitation to adopt and rely upon factual

findings that never should have been made by the Circuit Court in the first place. This does not even take into account that those findings are contradicted by the clear record showing how Encore presented its case at trial.

The Court of Appeals looked to the appropriate guideposts in analyzing the election issue – the record, the elements of the claims at issue, and the jury charges – to make the legal determinations necessary for resolution of that issue. It correctly refused to accept Encore’s post-trial misrepresentations concerning how it presented its case at trial, as well as the Circuit Court’s memorialization of that narrative in the Final Order, in its evaluation of the election issue. Encore’s claim is advanced without any legal or factual basis warranting this Court’s review and reversal of the challenged holding. The Court of Appeals Election Decision was undertaken and reliant upon appropriate factors and the purported flaws Encore argues sullied that process are unmoored to law or fact.

The Court of Appeals rightly relied upon the clear record in this case to find that Encore relied upon the same set of facts and sought the same damages under the claims at issue to conclude that the election doctrine required Encore elect among those remedies. The true basis for Encore’s challenge is the preposterous notion that it was an err for the Court to refuse to accept and rely upon Encore’s post-trial misrepresentations concerning how it presented its case at trial and the Final Order it drafted which enshrined that revisionist history to evaluate the election issue. Knowing the absurdity of that stance, Encore attempts to avoid its first issue being framed in this manner by masquerading its challenge as anything but what it truly is – an argument that its unsupported post-trial version of events should have been accepted and relied upon by the Court

of Appeals to affirm the Circuit Court’s election holding. This Court should not allow such a challenge to the well-reasoned decision of the Court of Appeals on the election issue.⁵

B. The Court of Appeals did not err by looking to the record to determine how Encore presented its case at trial in making the Election Decision rather than requiring Defendants carry a fictional evidentiary burden of establishing that the largest verdict awarded encompassed the smaller verdicts as a condition precedent for applying the election doctrine and requiring Encore elect its remedies amongst those claims

Encore attempts to argue that the Defendants failed to carry a fictional evidentiary burden necessary for the election doctrine to apply. It argues that “[b]ecause the jury found Trask to have committed multiple wrongs causing multiple injuries, the Court of Appeals should have required proof that the breach of contract accompanied by fraudulent act included damages awarded by other verdicts instead of assuming it did.” (Writ. p. 13). No law is cited to support this position. Regardless, it is upended by the failure of the condition precedent Encore claims triggers imposition of this evidentiary burden – the jury finding Trask committed multiple wrongs causing multiple injuries. The record shows that did not happen.

The jury did not find Trask committed “multiple wrongs causing multiple injuries” as Encore represents. Rather, the Final Order drafted by Encore and entered by the Circuit Court

⁵ Defendants must address FN4 in Encore’s Writ for two reasons. First, Clear Touch did appeal the election ruling on the judgment against it in the Final Order. Encore’s claim to the contrary is incorrect. (See Trask & CTI Final Brief pp. 20-29). Second, Encore requests that this Court issue an advisory opinion by ruling that the Opinion does not eliminate Clear Touch’s liability for the Trade Secret Act judgment (including exemplary damages) “in order to avoid another multi-year round of appeals.” The Court of Appeals did not make a ruling on this issue; it deemed it moot due to the Election Decision. Therefore, it cannot be properly put before and decided upon by this Court at this time. *Sandamo Weston, Inc. v. Nat’l Sur. Corp.*, 307 S.C. 143, 414 S.E.2d 127, 130 (1992)(“This court will not issue advisory opinions and cannot alter precedent on questions presented in the abstract.”). The only issue that could be decided by this Court concerning the Court of Appeals treatment of this issue is whether the Election Decision rendered it moot. It did. Defendants respectfully ask the Court not accept Encore’s invitation to issue an advisory opinion on an issue that was not ruled upon by the Court of Appeals in the Opinion sought to be reviewed.

without revision stated that “[t]he fact that the jury awarded different actual damages and different punitive damages shows that Defendants committed multiple wrongs....” (*See R.* p. 28). Encore relies on this single sentence to misrepresent both the extent of the finding and the party who made it. This is yet another instance in which Encore attempts to rely on the false narratives spun in the Final Order to evade the record. The Court of Appeals correctly concluded the record was the most accurate reflection of how Encore pursued these claims at trial.

Second, Encore provides no citation showing where or explanation how the Court made the purported assumption that the breach of contract with fraud included damages from the other claims. Review of the Opinion shows it did not. It reached that conclusion based on consideration of the elements of the claims, the jury instructions given at trial concerning them, and the trial transcript showing how Encore presented these claims to the jury.

Accepting Encore’s argument requires ignoring the record, which the Court rightly found established Encore asserted the same facts in support of the claims at issue. This, of course, is in direct contradiction to their post-trial arguments that it asked the jury to render the respective verdicts on different facts and award damages to compensate it for separate injuries. Knowing this to be the case, Encore attempts to claim the Court erred by not viewing the evidence in a light most favorable to it as the Respondent. (*Writ* p. 13). The evidence as established in the record and relied upon by the Court of Appeals, however, definitively shows that Encore relied on the same facts to seek the same damages under these claims. The Court of Appeals looked to the record to determine that the Circuit Court mistakenly accepted Encore’s post-trial misrepresentations. Encore is not arguing for deferential interpretation of the record, but instead wishes to convince this Court that the Court of Appeals should have accepted Encore’s post-trial version of events in favor of a record establishing those arguments as patently false.

C. The Court of Appeals rightfully held that Encore was not entitled to equitable restitution from Clear Touch because the facts Encore relied upon and damages it sought were the same as those under its legal claims upon which the jury rendered verdicts in Encore’s favor

“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.*; *see also Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323 (Ct. App. 2011); *Santee Cooper Resort Inc., v. S.C. Pub. Serv. Comm’n*, 298 S.C. 179 (1989); *EllisDon Constr., Inc., v. Clemson Univ.*, 391 S.C. 552 (2011). Here, the Court of Appeals correctly affirmed the Circuit Court’s finding that Encore had an adequate remedy at law which it realized when the jury was awarded it large verdicts under its legal claims, making equitable relief unavailable.

Encore argues that the Court erred in refusing to grant it equitable relief of some \$5.5M against Clear Touch, a figure representing what its economic expert testified represented Clear Touch’s profits and the value of the business through December 31, 2015. (R. pp. 1103-1107; R. p. 1692).⁶ Plaintiff claimed it was entitled to those damages due to Clear Touch’s and Trask’s ill-gotten gains stemming from Trask’s breach of the Business Opportunity provision of his Non-Disclosure and Non-Solicitation Agreement, as well as Defendants’ misappropriation and use of trade secret and confidential information in violation of other clauses within that same contract and the SCTSA. Those \$5.5M in damages were all the damages Encore sought at trial, including

⁶ Notably, in its Writ, Encore claims that the Court erred in not awarding it restitution against Clear Touch alone. However, in its Motion for Restitution filed below, it sought restitution against **both** Trask and Clear Touch concluding that “Defendants have been unjustly enriched in the amount of value of Clear Touch, or \$5,536,254. Defendants should be required—**jointly and severally**—to pay restitution in that amount.” (Plf. Mot. Rest. P. 4 – R. p. 496)(*emphasis added*).

under its equitable claim and seven of the eight legal claims submitted to the jury. As noted above, the jury returned verdicts in Plaintiff's favor on six of those legal claims, including actual damages of \$424,945 against Clear Touch under both the tortious interference with contract and violation of the SCTSA, and \$1,476,039 against Trask for breach of contract with fraudulent intent. (R. pp. 1919-1921). That \$1.4M figure, according to the Final Order drafted by Encore and adopted by the Circuit Court, and Encore itself at trial and in post-trial proceedings, was what the jury decided Plaintiff was entitled to out of the \$5.5M sought for breach of the Business Opportunity provision, and all of the legal causes of action, with the exception of the breach of duty of loyalty claim. (R. pp. 3, 10). Those damages being the entirety of what Encore sought at law and in equity it claimed resulted from the same alleged misconduct, therefore, rightly led the Court to find that those jury verdicts provided an adequate legal remedy and prohibited recovery of equitable relief. The verdict compensated Encore for the damages it claimed to have suffered and any additional award under its equitable claims would result in double recovery. Encore itself, post-trial, recognized that this was not a permissible outcome and that it was asking the Court to second guess the jury's determinations as to the appropriate amount of damages:

MR. ENGLISH: I would agree that we cannot recover the same damages for both. But I think the Court could have its own view under the theory of unjust enrichment as to what is the amount that would make the plaintiff – that the defendant should have to give up, a different view than the jury. And so the plaintiff could elect that over one, or maybe, you know, some of the other.

(R. p. 1479, line 23-p. 1480, line 5). Encore presents nothing in its Writ compelling departure from the black letter law.

Moreover, Encore pled that it was entitled to actual damages in the form of disgorgement of profits and restitution. (R. p. 92). In its cross appeal, it sought actual damages in the form of the value of the Clear Touch business and profits through 2015 – both of which are actual damages.

Actual damages are not an equitable remedy. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000), *aff'd as modified and remanded*, 343 S.C. 587, 541 S.E.2d 257 (2001). At common law, a proceeding in which a judgment for money is sought sounds in law. *Cooper v. Poston*, 326 S.C. 46, 48, 483 S.E.2d 750 (1997). Encore's pleading of actual damages and petition for them post-trial and on appeal demonstrates it is not entitled to the equitable relief it claims the Court erred in refusing to give it.

Encore claims the jury verdict was inadequate as it did not capture Clear Touch's future profits. Encore recognizes that it did not present any evidence of Clear Touch's future profits as an aspect of its damages at trial, either to the jury or Circuit Court, a shortcoming it attempts to blame on the Defendants. Regardless, Encore chose what it presented as its damages at trial. It cannot now argue that the Court erred in refusing to award it damages for which it presented no evidence and claimed no entitlement to in the proceedings below. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)(*internal citations omitted*)("To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy. The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation."). Encore claimed entitlement to Clear Touch's profits and the value of the business through the end of 2015 at trial. That represents the entirety of damages it could conceivably recover under all of its claims, legal and equitable. The jury decided the amount they awarded to Encore for the claimed consequences of the Defendants' actions underlying its legal claims out of that \$5.5M. Those same actions provided the basis for Defendants' equitable liability. The jury's verdicts are not rendered inadequate simply because they did not give Encore everything it claimed resulted from the Defendants' misconduct underlying Plaintiff's legal claims. Encore's failure to convince the jury to award it every dollar requested under its legal

causes of action does not entitle the Plaintiff to recover the difference in equity. Therefore, the Court did not err in holding that Encore is not entitled to equitable restitution.

The Circuit Court was in a superior position to determine whether or not the remedies awarded by the jury against Clear Touch were adequate. It found them to be, and rightly refused to allow Encore duplicative and additional recovery of the damages it sought from and was awarded by the jury under its legal claims. Clear Touch contends this was the appropriate application of the controlling law and does not constitute reversible error.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Encore's Writ attempting to challenge the issues discussed above.

[signature page to follow]

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Inc.**

March 14, 2022

Greenville, South Carolina

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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

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

Appellate Case No. 2022-000144

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

v.

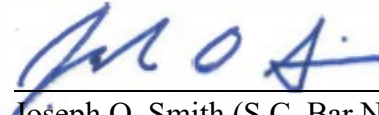
Keone Trask and Clear Touch Interactive, Inc.....Petitioners.

PROOF OF SERVICE

The undersigned hereby certifies that on March 14, 2022, he served the foregoing Petitioners' Return to Encore Technology, LLC's Petition for a Writ of Certiorari by emailing and mailing a copy to the persons below listed for opposing council on AIS pursuant to SCACR 262 as amended by the Supreme Court's August 25, 2021 Order, addressed as follows.

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March 14, 2022
Greenville, South Carolina

From: [Alison Strother](#)
To: genglish@wyche.com; rbarker@wyche.com
Cc: [Josh Smith](#); [Josh Hudson](#)
Subject: SERVICE OF DOCUMENTS: Encore Technology Group, LLC v. Clear Touch Interactive, et al. (Appellate Case No. 2022-000144)
Date: Monday, March 14, 2022 4:36:04 PM
Attachments: [Petitioners" Return to Encore"s Petition for a Writ of Certiorari \(Consolidated Appeals\).pdf](#)
[03.14.22 Proof of Service - Petitioners" Return to Encore"s Petition for a Writ of Certiorari.pdf](#)

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COURT	Supreme Court of South Carolina
APPELLATE CASE NO.	2022-000144
APPELLANT	Encore Technology Group, LLC
PETITIONERS	Keone Trask and Clear Touch Interactive, Inc.
DOCUMENT TITLE	1. Petitioners' Return to Appellant's Petition for a Writ of Certiorari; and 2. Proof of Service
ATTORNEY NAME	Joseph O. Smith
ATTORNEY TELEPHONE	864-908-3912

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

Thank you,



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