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 .....Petitioner-Respondent.

v.

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

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

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I. INTRODUCTION

What is most telling in Encore's Return is what it does not say or attempt to explain—how Encore could characterize the May 31st documents as "irrelevant" to the original suit before trial then later tell the court those same materials were in fact relevant to the 2015 action and warranted dismissal of Clear Touch's claims based upon those documents. That failure is self-evident. There is no good faith explanation for Encore's actions in contradicting itself. Encore made whatever representation was expeditious to it at the moment without regard to many things that are necessary for effective good faith litigation including honesty, integrity, and consistency in the representations made to one's opposition and the Court. The purpose of Encore's actions is clear as is the fundamental miscarriage of justice predicated upon it. Encore deemed the May 31st materials as "irrelevant" to the original case to excuse their grossly late production, avoid any meaningful continuation of the trial date that was then set for a date certain, and prevent Clear Touch from pursuing counterclaims based on those materials before the same jury it was to try it claims before. It then threw all duties of candor, reason, and consistency out the window post-trial to get rid of the claims Clear Touch brought in an independent suit based on the May 31st materials by telling the lower court they were inextricably related to the claims and issues in the original suit in direct contradiction of their own prior statements to opposing counsel and the Court. Encore should not have been able to have it both ways and it was an egregious and significant error for the Circuit Court and Court of Appeals to reward Encore's misdeeds and self-contradictory statements. Clear Touch sincerely implores this Court to take up its Writ and ensure that Encore's actions are not rewarded or repeated by it or other litigants; as proliferation of such nefarious litigation tactics is an afront to the process, the Rules governing it, and the duties litigants and their counsel have to the Court and their opposition. Allowing the decision challenged by Clear Touch's

Writ to stand would send a destructive message to the Bar that litigation tactics such as Encore's will not only go unpunished but will be rewarded. That is a dangerous and destructive precedent to set which will have an immediate and significant detrimental impact on how cases are litigated in South Carolina.

II. STATEMENT OF THE CASE

Clear Touch's Writ provides sufficient factual background relevant to the issue at hand, however some assertions in Encore's Return warrant addressing and certain relevant facts call for some elaboration.

First, Clear Touch did receive two continuances of the trial date as Encore states, however, the second continuance is the one relevant to the issues at hand and its length important in evaluating whether it provided adequate time for asserting and litigating the claims Clear Touch first learned of in June 2017. Specifically, the second continuance was received after the May 31st production and only moved the trial date a few additional weeks because Encore argued to the Circuit Court that the late produced materials were "irrelevant" to the original case. (*See* Encore Opp. to 2nd Mot. Cont. - R. pp. 294-95; Encore Ltrs. – R. pp. 1908-1910).

Second, it is important to remember that from filing all the way through trial of the 2015 Action Encore maintained that anything the relevant timeframe for the claims and issues in that case ended on September 10, 2015 after the Reseller Agreement was terminated. (*See e.g.* Encore Ltrs. – R. pp. 1908-1911).

III. LEGAL ARGUMENT & ANALYSIS

A. CLEAR TOUCH'S 2017 CLAIMS ARISING OUT OF ENCORE'S MISAPPROPRIATION OF THE COMPANY'S CONFIDENTIAL AND TRADE SECRET INFORMATION COULD NOT HAVE BEEN FULLY AND FAIRLY LITIGATED IN THE ORIGINAL SUIT DUE TO ENCORE'S WITHHOLDING OF THE EVIDENCE ALERTING ITS OPPOSITION TO THOSE POTENTIAL CAUSES OF ACTION UNTIL JUST MONTHS BEFORE TRIAL

1. **Encore withheld evidence alerting Clear Touch to potential claims it may have against its former business partner arising out of Encore's misappropriation and use of Clear Touch's confidential and trade secret information until a time when disclosure made full and fair litigation of those claims in the original suit impossible**

As detailed in Clear Touch's Writ, on May 31, 2017, weeks after Encore had already fought to have its case go to trial, it provided a 65-page privilege log and an additional 10,000-plus pages of documents in over 4,000 pdf files. (5.31.17 Encore Ltr - R. p. 1910-11). The cover letter accompanying that production claimed that in the over a year and a half since filing the action ***Encore had not searched for the name of the company it sued - "Clear Touch" - when searching for responsive emails and documents***. (*Id*. at 2)(Stating Encore searched for "ClearTouch" but not "Clear Touch" with a space between the words, which is the actual name of the company it sued and how people would commonly write it.).[1] Those materials included documents that, for the first time, alerted Clear Touch of the possibility that it may have claims against Encore, due to its misappropriation and illegal use of the company's confidential and trade secret information to unfairly compete with it in the marketplace. (*See* Sample of 5.31.17 Docs. - R. pp. 831-850). Due to the timing of the production, just a few months before trial of the original case which was already

[1] It is up to the Court to accept the excuse Encore offered for its tardy production of these materials. Considering the timing of the production (a few months before trial), what it included (a treasure trove of materials reflecting Encore violating the very laws it had accused Clear Touch and Trask of violating) and the fact that these materials contained the search term Encore claimed to have used ("ClearTouch" without a space) along with words that would have been in Encore's search terms used for locating responsive materials in the litigation such as "Keone" that excuse is dubious and frankly shown to be objectively false. (*See* Collection of 5.31.17 Docs. - R. pp. 769-88). Specifically, "ClearTouch" without a space appears sixteen or more times within just a few pages of the May 31st materials. (*See* R. pp. 770, 772-78, 780, 782-83, 787). "Keone" appears as a title to an email. (*See* R. p. 779). Thus, May 31st documents themselves reveal Encore's excuse for their late production as untrue on its face. Yet, this was another instance of Encore saying whatever it thought would benefit it at the moment. When the May 31st production was made Encore knew it had to provide a reason those materials were not produced many months before. They claimed an innocent mistake. The record reveals Encore's representations as false. Regardless, the prejudice to Clear Touch remained the same whether or not Encore intentionally withheld this damning evidence until a time they knew their opposition could not meaningfully use it.

slated to last a week, Encore's opposition to a continuance, including its insistence that the May 31st materials were "irrelevant" to the 2015 Action, and the time needed to fully and fairly litigate what Clear Touch knew were multi-million dollar claims, Clear Touch had no choice but to file a separate suit against Encore. This was not the "strategic decision" Encore portrays it as. Clear Touch had to file a separate matter in order to have time to litigate claims it did not know about because its opposition had withheld evidence until begrudgingly turning it over so close to trial that it could not litigate those claims in the original matter. This was not some tactical advantage to Clear Touch. On the contrary, it was in fact a detriment to the defense of the original case as a jury heard only of the Defendants alleged misdeeds and not Encore's illegal acts.

2. Clear Touch's recognition that one of the four claims in its 2017 action could have been brought as a counterclaim in the original suit does not justify dismissal of the other three causes of action under the doctrine of res judicata

Encore argues that Clear Touch's recognition that one of the four causes of action could have been brought as a counterclaim in the original case is an admission that all four could have been included in the 2015 action, and therefore they all were properly dismissed under the doctrine of res judicata. (Return p. 9). Specifically, Encore contends that Clear Touch acknowledging that its claim for Breach of the Reseller Agreement could have been asserted as a counterclaim in the 2015 matter warranted dismissal under the doctrine subjects its other claims to the same fate. *Id*. That argument fails to account for the fact that the other three claims all arose out of Encore's misappropriation and use of Clear Touch's confidential and trade secret information following termination of the Reseller Agreement in September 2015; something it did not know was happening until after receiving the May 31, 2017 production. The breach of the Reseller Agreement claim, on the other hand, arose out of Encore's violation of that contract's exclusivity provision by its sale of competing panel products, which Clear Touch knew of before the

relationship ended in the fall of 2015. Therefore, Encore is mistaken that "the same logic applies" to the Mutual Confidentiality Agreement as the Reseller Agreement because the former was entered in 2013. (Return p. 9). The time when Clear Touch became aware of the respective violations of those agreements is the key factor in determining whether the respective breach of contract claims for Encore's violation of that agreements were properly dismissed under the res judicata doctrine. Clear Touch acknowledged one was so barred (breach of the Reseller Agreement) but not the others as they were all based upon Encore's misappropriation and usage of Clear Touch's trade secret and confidential information. That acknowledgement did not permit treating all four claims in the same manner, and the lower court erred in doing so when it found they were barred by res judicata. It was, therefore, an error for the Court of Appeals to affirm that ruling and uphold the dismissal of Clear Touch's claims having nothing to do with the Reseller Agreement.

3. The timing of Encore's production on May 31, 2017 required Clear Touch to file a separate lawsuit so that it could fully and fairly litigate potentially significant claims for the illegal misappropriation and use of its confidential and trade secret information

Encore offers baseless arguments in an attempt to legitimize the irrational position that Clear Touch had adequate time to amend its pleadings and litigate its 2017 claims as counterclaims in the original 2015 suit. As noted, Clear Touch first became aware of the potential claims in June 2017, less than four months prior to trial of the original case. This short timeframe is one that only the naïve or inept litigator would believe is adequate for litigating intellectual property theft claims with multi-million-dollar damages. The economic expert work alone would take months to complete; much less have ready to present before a jury that the parties were preparing to try a week-long complex business matter in front of on some nine causes of action already. Encore knew

this, objected fiercely to providing the materials it ultimately produced on May 31st and offered ludicrous justifications for its actions belied by the documents themselves.

4. Encore's attempt to deflect blame for its withholding of evidence in its possession and control does not offer valid justification for allowing it to escape responsibility for its gamesmanship and liability for its illegal acts

In its Return, Encore attacks the notion that a policy exception is warranted to ensure that Clear Touch is not robbed of an opportunity to pursue its misappropriation claims by presenting nonsensical and irrational arguments. Encore argues that Clear Touch "admit[ed] it was provided sufficient discovery to assert its claims at least…four months before trial" and that "the real reason it did not move to amend its answer to add counterclaims was a strategic decision." (Return p. 11-12 *citing* R. p. 1600, lines 24-25; R. p. 1608, lines 10-15; p. 1638, line 23-p. 1639, line 12). Neither Encore's implied argument that Clear Touch must prove a negative, nor its mischaracterization of its statements at the summary judgment hearing should justify it being allowed to commit illegal acts, benefit from them, and avoid liability by strategically withholding evidence alerting its victim to potential claims.

First, the documents in the May 31, 2017, production that alerted Clear Touch to its misappropriation claims were in the possession and control of Encore. This certainly makes it difficult for Clear Touch to know about the contents of materials it did not know existed, much less possess, and which should have been produced by Encore in response to discovery requests served over a year prior.

Second, Clear Touch did not admit it had sufficient discovery to pursue its claims by May 31, 2017, as Encore asserts. In reality, Clear Touch informed the lower court at the summary judgment hearing that it was June 2017 when it was first aware of any potential claims based on Encore's retention and usage of its pricing information in violation of the Trade Secrets Act and

the Mutual Confidentiality Agreement because it received the 10,000 pages of documents in over 4,000 separate files on May 31, 2017. (7.30.18 Hearing Trans. - R. p. 1600, line 22-p. 1610, line 23). Clear Touch certainly was not fully informed as to whether it had viable claims based on Encore's illegal acts it was learning about for the first time in June 2017, and more importantly, could not vet those claims and prepare them for trial in less than four months following that initial discovery. The economic expert work alone would not be complete in such a short timeframe, and the litigation process is not made to move multi-million dollar claims from start to finish in a quarter.

Third, Encore claims the "real reason [Clear Touch] did not move to amend its answer to add counterclaims was a strategic decision not to try its claims with Encore's." (Return p. 12; *see also* pp. 14-15). This implies that Clear Touch had sufficient information concerning its claims, adequate time to amend to add them as counterclaims in the original action, fully prepare them for trial in a few months, and made the decision to file a separate action as a benefit to the company. Nothing could be further from the truth. Encore's withholding of this evidence, aggressive push to trial by deeming those materials "irrelevant" to the case numerous times in writing and before the court in opposing any continuance, created the untenable situation that forced Clear Touch to file its misappropriation claims separately. In fact, as Clear Touch said during the summary judgment hearings and in submissions to the Circuit Court, it would have preferred its claims be adjudicated in the same trial as Encore's. (7.30.18 Hearing Trans. - R. p. 1623, line 21-p. 1624, line 13). That way, Encore would not have the benefit of the binary – we are good and the Defendants evil – narrative that played centerstage throughout the week-long trial of its claims against Trask and Clear Touch. The fact is Clear Touch could not risk partial litigation of what it saw as a significant case based on Encore's use of its proprietary trade secret information to secure

sales it was competing with Clear Touch to win, including a large sale in North Carolina worth approximately ten million dollars.

Finally, Clear Touch did in fact present evidence it was first made aware of its misappropriation claims upon its review of the May 31, 2017 production. That included producing to the lower court a sampling of several emails from that production which showed Encore providing its new panel provider, ViewSonic, with Clear Touch pricing information that it was contractually and statutorily obliged to return and not use following the termination of the Reseller Agreement in September 2015. (*See* Sample of 5.31.1 Production Docs submitted to Circuit Court as Exhibit C to pre-dismissal filing - R. pp. 831-850). For the first time in June 2017, Clear Touch learned Encore had kept its pricing information and given it to ViewSonic to not just unlawfully compete against its former panel supplier, but specifically target them in the market, well into 2016. (*Id*. *eg*. at Email Subject "Want to Beat Keone" - R. p. 841; *see also* R. pp. 842-843)(Encore emails discussing pricing for bid stating "make sure our pricing is better than what Clear Touch will offer…" and "Let me know if you can be any more aggressive here since you know Clear Touch pricing.").

In sum, Encore was the gatekeeper of the evidence that led to Clear Touch's discovery of its misappropriation claims. It claimed it did not search for the name of the company it sued in 2015 and provided this evidence for the first time on May 31, 2017 – a time after which it had already pushed to have the original case tried, and what was less than four months before the case went before a jury. Under the circumstances created by Encore's actions, Clear Touch did the only thing it could to ensure it had the opportunity to fully and fairly litigate its claims. The Circuit Court erred in robbing Clear Touch of that opportunity and rewarding Encore for its actions. The Court of Appeals erred in affirming that decision. The perverse and dangerous incentive that will

be created by upholding that decision will substantially impair the discovery process and litigation as a whole. With that type of sword at a practitioner's disposal, it is frightening to imagine how nearly useless and intolerable the discovery process could and would become.

B. INVOCATION OF A PUBLIC POLICY EXCEPTION TO THE RES JUDICATA DOCTRINE IS WARRANTED TO PREVENT ENCORE FROM BENEFITING FROM ITS SELF-SERVING CONTRADICTORY CHARACTERIZATIONS OF THE MAY 31ST MATERIALS

As detailed in Clear Touch's Writ and herein, Encore took fundamentally opposed positions concerning the relevancy of the May 31st materials to the original action pre-trial versus post-trial. Before trial Encore deemed those documents as "irrelevant" and unrelated to the transactions and occurrences underlying the original case. (Encore Ltrs. – R. pp. 1908-1910; Encore Opp. 2nd Mot. Continuance - R. pp. 290-317). Those statements were made to accomplish two specific purposes: (1) to excuse Encore's late production of the materials until just a few months before trial; and (2) to oppose continuance of the trial date or, at a minimum, ensure it was continued for the least amount of time possible. That way Encore was not accountable for withholding the evidence and ensured the jury hearing its claims remained unaware of its own illegal actions that were very similar to the ones it was accusing Defendants of committing. Those goals were realized, and Encore obtained seven figure verdicts against the Defendants. Post-trial, however, Encore's needs were not served by the May 31st materials being considered unrelated to the original case. Instead, to get rid of Clear Touch's three misappropriation claims filed in the independent suit on res judicata grounds and avoid answering for its own illegal acts, in the post-trial phase Encore had to convince the Circuit Court that the documents were the complete opposite of what it had maintained them to be in multiple written and oral statements to opposing counsel and the Circuit Court. Therefore, without regard to its prior representations and in direct contradiction of those statements, Encore brazenly claimed the May 31st documents were relevant

to the original case in support of its arguments for dismissing Clear Touch's misappropriation claims based upon them. This served the overarching goal behind Encore's self-contradicting characterizations of the materials—avoiding having to answer for its illegal misappropriation of Clear Touch's trade secrets. The Circuit Court allowed Encore to achieve that goal through means that should be and are prohibited in the litigation process by the estoppel doctrine and sound public policy. It was an err for the Court of Appeals to affirm that decision.

The Supreme Court has long recognized "where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Zedner v. United States*, 547 U.S. 489, 504 (2006) *quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895). It went on to say that:

> Although this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position….A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. Here, each of those factors is met.

Encore's pre-trial position concerning the relevancy of the May 31st materials to the original case was undeniably inconsistent with its post-trial representations. Second, Encore succeeded in persuading the lower court to accept its pre-trial position, resulting in only a very brief continuance of the trial date well short of what would be necessary to fully and fairly litigate Clear Touch's misappropriation claims. Third, Encore both derived an unfair advantage and imposed an unfair detriment on Clear Touch by taking the inconsistent positions at hand. It enjoyed the advantage of trying its case to a jury that never heard of its misdeeds that were similar in nature

to those it was accusing Defendants of committing. That was naturally a significant disadvantage to Clear Touch and Trask in defending those claims; resulting in seven figure verdicts against them consisting largely of punitive damages. Then, by taking a contrary position post-trial, Encore was able to avoid answering for its illegal actions and prevent Clear Touch from pursuing what it believes are multi-million-dollar claims.

Therefore, to the extent this Court were to agree that res judicata bars Clear Touch's pursuit of its misappropriation claims, good public policy as reflected in and incapsulated by the estoppel doctrine justifies, and Defendants contend requires, enforcement and establishment of an exception to the application of the doctrine in circumstances such as the ones at hand. Otherwise, Encore will not only avoid liability for its illegal actions it will be rewarded for its withholding of evidence and self-contradictory representations to its opposition and the Court.

Encore's nefarious tactics also nullify its legal arguments that Clear Touch's misappropriation claims were rightly dismissed on res judicata grounds. In its Return, Encore argues that there was "a 'logical relationship' between Encore's claims and Clear Touch's claims in the 2017 Action for several reasons." (Return p. 7). First, Encore asserts, both its and Clear Touch's claims arose out of the same contracts and relationships at issue in Encore's 2015 action. *Id*. That ignores the fact that Encore withheld the May 31st materials by deeming anything that occurred after September 10, 2015 as irrelevant to its case against Clear Touch and Trask. (*See e.g.,* Encore Ltrs. – R. pp. 1908-1911). The majority of the May 31st materials were dated after and reflected actions occurring after September 10, 2015. Yet, Encore again ignores its own pre-trial position, and attempts to support its res judicata argument by contradicting itself. Encore should have to answer for this discrepancy. Instead, it ignores it in the hopes this Court will as well.

Encore next points to the fact Clear Touch used some of the May 31st discovery materials in depositions and relied upon them in asserting its unclean hands defense. (Return p. 8). Utilizing these materials and the facts discovered in a deposition for an equitable defense is a far cry from having a fair opportunity to assert, prepare, and try affirmative legal claims in an already complex matter. Encore, like the Court of Appeals, cites to no law in support of its position that requires turning a blind eye to the circumstances created by Encore's own inexcusable actions. Actions, it notably, makes no attempt to explain or justify.

Third, Encore makes a nonsensical assertion that "Clear Touch's claims in the 2017 action are directly related to Encore's claim[s] 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." (Return p. 8). Encore cannot nullify its illegal actions through this circular argument that Clear Touch was and is its company, and, therefore, its proprietary trade secret information was Encore's. Clear Touch was and is not Encore's company. Furthermore, Encore did not seek ownership of Clear Touch in its action. Rather, it sought the value of what it claimed to have lost through not having the opportunity to pursue the Clear Touch business. Those are fundamentally different things and Encore cannot claim Clear Touch had no trade secrets because it pursued damages based on the contention the company should have, but did not, belong to it.

Finally, the notion that Clear Touch is not entitled to a public policy exception from the res judicata doctrine because the May 31st document production was "small percentage of documents" produced by Encore in the 2015 Action is ludicrous on its face. (*See* Return pp. 9-14). The percentage of Encore's overall document production in the original case represented by the May 31st materials has no bearing on whether the res judicata doctrine should have been applied to

dismiss Clear Touch's misappropriation claims or if sound public policy dictates otherwise. Producing a large amount of materials before begrudgingly providing a comparatively smaller collection of damning evidence at the eleventh hour does not mitigate or nullify the prejudicial impact of that tardy production on Clear Touch or Encore's subsequent actions which exploited and exacerbated that injustice. Good public policy calls for holding Encore to account rather than glibly dismissing their misdeeds.

IV. CONCLUSION

For the reasons set forth above, the Court of Appeals affirmation of the Circuit Court's Dismissal Order entered August 10, 2018, dismissing Clear Touch's claims related to Encore's misappropriation of its trade secrets should be reversed.

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Greenville, South Carolina

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM Greenville County Circuit Court

The Honorable 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 ..... Respondent-Petitioners.

PROOF OF SERVICE

The undersigned hereby certifies that on March 24, 2022, he served the foregoing Reply to Encore Technology Group, LLC's Return to Keone Trask and Clear Touch Interactive, Inc.'s Petition for a Writ of Certiorari by emailing a copy to the persons below listed for opposing council on AIS pursuant to SCACR 262 as amended by the Supreme Court's August 25, 2021 Order, addressed as follows.

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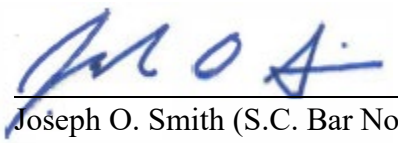

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COURT	Supreme Court of South Carolina
APPELLATE CASE NO.	2022-000144
PETITIONER-RESPONDENT	Encore Technology Group, LLC
RESPONDENT-PETITIONERS	Keone Trask and Clear Touch Interactive, Inc.
DOCUMENT TITLE	1. Reply to Encore's Return to Keone Trask & Clear Touch Interactive, Inc.'s Petition for a Writ of Certiorari; and 2. Proof of Service.
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Should you have any questions or issues, please do not hesitate to contact us.

Thank you,

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