

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Pankaj Patel, Individually and Derivatively on
behalf of Nominal Defendant, VP Enterprises,
Inc.,

Case No. 2011-CP-23-7338

Plaintiff,

vs.

Krish Patel, Vijay Patel, and P
Communications, Inc.,

ORDER

Defendants,

and,

VP Enterprises, Inc.

Nominal Defendant.

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CLERK OF COURT
COURT HOUSE
GREENVILLE, SC

The parties to this action agreed that “the liability and damage issues w[ould] be bifurcated and the liability issues [were] to be tried first.” The liability portion was tried before this Court on July 21 and 22, 2014. Any evidence on damages was to be presented at a later date if Plaintiffs had prevailed during the liability phase of the trial. After hearing testimony from many witnesses and reviewing voluminous documentary evidence, however, this Court finds no liability on the part of Defendants with respect to all of Plaintiff’s causes of action. First, Plaintiff’s claims are time-barred. But, second, even if Plaintiff did not file his claims too late, they are without merit. The duties that Defendants Vijay Patel (“Vijay”) and Krish Patel (“Krish”) owed to Plaintiff Kaj Patel (“Kaj” or “Plaintiff”) extinguished prior to the Defendants’ acts that were allegedly in violation of those duties. Additionally, the agency relationship with Verizon Wireless (“Verizon”) that is at the heart of Plaintiff’s claims against all Defendants,

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including P Communications, Inc. (“P Comm”), is not a “corporate opportunity” such that it is capable of being usurped and giving rise to liability.

Kaj’s complaint alleged that this litigation was being pursued derivatively on behalf of VP Enterprises, Inc. (“VP”). Notwithstanding those allegations, Kaj’s trial presentation focused exclusively upon the impact that Vijay’s and Krish’s conduct had upon his (Kaj’s) individual interest in VP. The law is clear that a “shareholder’s suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder.” *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). The Court finds that Kaj’s focus on the impact to his individual interest in VP is inconsistent with a derivative action, and it indicates to the Court that he did not pursue this litigation for the benefit of VP. Accordingly, the Court concludes that Kaj intended to bring a direct claim and waived his derivative claim allegations. Moreover, under Rule 23(b)(1), South Carolina Rules of Civil Procedure, it is the duty of the Court to ensure that a derivative action is maintained only by a shareholder who fairly and adequately represents the interests of the other shareholders. In this case, VP has only one other member—Vijay—and he is a defendant. Because of this direct conflict, the Court finds that Kaj is not actually pursuing a derivative claim on behalf of VP; but rather a direct action against his fellow shareholder, Vijay, and the other defendants. This factor, as well as the manner in which the matter was tried to this Court, indicates that this case was truly a direct—as opposed to derivative—action.

Alternatively, assuming that Kaj brought a derivative claim and did not waive the same, the Court concludes, as explained *infra*, that VP did not suffer a loss. *Id.* at 49, 557 S.E.2d at 684 (noting that an “action seeking to remedy a loss to the corporation is generally a derivative one”). VP did not suffer a loss because P Comm’s activities were not corporate opportunities of

VP. The absence of any loss to the corporation precludes any recovery on behalf of the corporation—that is, precludes any recovery for Kaj’s claim as a derivative representative of VP.¹

BACKGROUND

Kaj emigrated from India in the early 1980’s to attend Clemson University. He now makes a living as an engineer, but has also engaged in various entrepreneurial endeavors. Kaj has attempted to own and operate a restaurant, a kiosk in the mall, and a granite import company, among other ventures. None of these companies exist today.

Vijay and Krish are father and son, respectively. Although they share a surname with Kaj, they are not related to him. Vijay immigrated to the United States at about the same time as Kaj, but he did not know him at the time. Vijay previously owned and operated retail and service businesses, but he now owns two hotels in the Greenville area. He also works for Defendant P Comm, which is owned by Krish. P Comm has the agency agreement with Verizon which is the subject of this dispute.

Krish was born in 1986. He graduated from Mauldin High School in 2004 and University of South Carolina Upstate in 2008. While in school, he maintained jobs in the retail industry, including a full-time job at a corporate-owned Verizon store from 2004–2007. At trial Krish explained that in approximately late-2006, while working for Verizon, he became interested in owning and operating independent Verizon stores and that—at that time—he took steps to accomplish this goal such as looking for a physical location for a store and approaching potential investors. In October 2007, Krish was asked to resign from Verizon for violating company policy with respect to managing family members’ phone plans. Krish did not benefit

¹ When referring to “Kaj” or “Plaintiff” in this Order, the Court is referring to him in both his individual and derivative capacities.

from this activity, but it was in violation of company policy. Krish thereafter joined his father in the hotel business and, according to his testimony, continued to work on a plan to open Verizon retail locations as an independent agent.

VP Enterprises, Inc. – Application Denied

The parties agree that in late 2007, after Krish no longer worked for Verizon, Kaj, Vijay, and Krish began to informally discuss a myriad of potential investment opportunities. The three of them discussed many possibilities including buying a hotel in Charleston, a pine straw company in North Carolina, and several pieces of real estate. While traveling to inspect a potential investment in the fall of 2007, Kaj, Vijay, and Krish discussed the possibility of forming a company that would own and operate Verizon retail stores. The parties disagree as to whose idea this was. The Defendants claim it was Krish's idea, but Kaj claims it was his. The evidence makes clear that, unlike Krish, Kaj had no experience in the wireless communications industry, and certainly no experience with Verizon. Also, Krish had informally pursued the idea before he discussed any investment opportunities or business ventures with Kaj.

In any event, the group agreed to form a company for the purpose of applying for an agency relationship with Verizon. Krish formed VP and listed Kaj and Vijay as its owners. Krish was not listed as an owner because of his young age and because Krish believed it might hurt his chance of getting an agency because he was a former employee. All three agreed that, because of his experience, Krish would run VP's operations. Krish was also tasked with doing all the work necessary to submit VP's application to Verizon. He received only minor assistance from Kaj.

As part of its process, Verizon requires all applicants to submit a business plan. Krish was responsible for drafting VP's business plan. Kaj provided Krish with two business plans

that he said could serve as examples. One plan was for “Tava Grill,” a failed restaurant that Kaj operated, while the second was for “Kundo,” another restaurant. These business plans were nearly identical. Krish—with minor assistance from Kaj—used the two plans as examples and crafted a business plan for VP. The plan was submitted to Verizon with VP’s application on January 28, 2008.

At the time of filing the Complaint, Kaj alleged that he created the “Tava Grill” and “Kundo” business plans that Krish used as examples when drafting the VP business plan. However, during the course of discovery, the Defendants found the “Kundo” business plan. It is offered as a free sample on www.virtualrestaurant.com and, thus, available to anyone with an internet connection. At trial, Kaj admitted that he used the “Kundo” business plan as the basis for his “Tava Grill” business plan and that they were nearly identical, yet he continued to maintain that the ideas and content contained in both these business plans were his property.

VP’s application to Verizon was denied. The evidence uncovered in discovery and presented at trial indicates that Verizon declined VP’s application because a background check conducted on both Kaj and Vijay revealed that they each failed to disclose certain information during the application process. Specifically, Vijay failed to disclose that he had a minor criminal record and Kaj failed to disclose the existence of at least one (if not more) civil suits in which he was a party within the five (5) years prior to submitting the application. The application unambiguously asked the principals of the applicant company to disclose this specific information (*i.e.*, criminal and civil litigation history).

P Communications, Inc.

After Verizon denied VP’s application, Krish continued to pursue the creation of a company that would own and operate independent Verizon retail locations. Krish continued to

believe that if he applied directly, Verizon might not accept the application. He approached an acquaintance, Corby Phillips (“Corby”), and asked if he would form a company and apply for an agency relationship with Verizon. Corby agreed. From the outset, Krish and Corby’s agreement was that Krish would buy Corby’s interest in the to-be-formed company after it was established, assuming Verizon approved its application. After agreeing to these basic terms, Corby formed P Comm and applied for a Verizon agency relationship in April 2008. Verizon approved P Comm’s application soon thereafter.

P Comm opened its first location on Pelham Road in Greenville, South Carolina in October 2008. Krish did all the work—he arranged all the financing, personally guaranteed all the loans, entered into the lease, oversaw all of the up-fitting of the property, acquired all the inventory, hired all the employees, and did anything else necessary to open the location. To celebrate, P Comm held a grand opening party on October 18, 2008. After the party, Krish joined a group of family friends at his parents’ house. Kaj was there. Krish voluntarily informed Kaj that he opened a Verizon store on Pelham Road with Corby and that he planned to own the company at some point in the future. According to Krish, he told Kaj that they could discuss potential opportunities for him and the Verizon business at a later date. Kaj claims, however, that Krish withheld pertinent information from him that would have allowed him to know the full nature of his arrangement with Corby and P Comm. After opening a second location and laying the groundwork for a third, Krish acquired P Comm.

Krish Offers Kaj a Potential Opportunity

Krish continued to discuss potential investment opportunities with Vijay and Kaj. These ideas included the acquisition of hotels, convenience stores, and other real estate. In the spring of 2010, Krish approached Kaj after he (Krish) had found a handful of already-existing,

independently-owned Verizon retail locations in the Columbia, South Carolina area that were for sale. Krish wanted to purchase the stores on his own and hire Kaj to run them. Krish proposed a deal whereby Kaj would be paid as though he was a fifty-percent owner but not have any equity—or risk—associated with the operation. Kaj suggested that he and Krish purchase those stores together, each owning fifty percent. Kaj rejected Krish’s proposal and offer of employment. Krish, through P Comm, acquired the stores.

Krish continued to grow P Comm, and attracted attention because of his success at such a young age. A widely-distributed local periodical, *TOWN Carolina* magazine published an article in its October 2011 issue highlighting Krish’s success. Specifically, the author stated “Krish has built what you might call a wireless empire across much of South Carolina and northern Georgia as the President of [P Communications, Inc., d/b/a] Wireless Communications, a premium retailer for Verizon Wireless. He is also only 25 years old, and, no, he made his fortune the old-fashioned way—he earned it.” Jac Chebatoris, *Twenty-something biz whiz Krish Patel made a good call*, *TOWN Carolina*, October 2011 at 40, available at www.towncarolina.com/issues/11-oct/ (last visited Oct. 14, 2014) (hereinafter, the “TOWN Article”). Kaj admits that the October 2011 issue of *TOWN Carolina* magazine was delivered to his home. Soon thereafter, on November 4, 2011, Kaj filed this suit.

Expert Testimony

At trial the Plaintiff presented expert testimony from Professor John Freeman (“Professor Freeman”). Professor Freeman opined that Kaj, Vijay, and Krish were co-promoters of VP and owed one another and VP fiduciary duties arising out of that relationship. These duties, he testified, continued long past Verizon’s denial of VP’s application because, as Kaj testified, Verizon could have changed its mind and approved VP’s application if it was submitted again.

Kaj claims he instructed Krish to talk to the Verizon representatives, identify the deficiencies in their application, and make the appropriate corrections, if possible. Kaj claims Krish did not do as instructed. Professor Freeman testified that, in his opinion, Krish's alleged failure to follow up with Verizon and correct the deficiencies was a violation of the duties he owed Kaj and VP as a co-promoter. Furthermore, based on the existence of duties owed to one another long past the denial of VP's application, Professor Freeman opined that Krish and P Comm usurped a corporate opportunity from Kaj and VP when he helped form P Comm and acquire a Verizon agency relationship. Professor Freeman offered no testimony with respect to the alleged derivative claims.

Defendants presented the testimony of Professor Martin McWilliams ("Professor McWilliams"). Professor McWilliams opined that although Kaj, Vijay, and Krish owed one another and VP various duties at different times, all of those duties were extinguished prior to Krish's work to form P Comm and acquire a Verizon agency relationship. Furthermore, Professor McWilliams testified that the Verizon agency relationship was not a "corporate opportunity" capable of being usurped for two reasons: (1) Verizon has many agency relationships and just because P Comm acquired one does not preclude Kaj, VP, or anyone else from receiving another; and (2) VP's application was denied for "mutual non-disclosure" and the record makes clear that VP's effort was abandoned.

FINDINGS OF FACT

After considering voluminous documentary evidence, the testimony of many witnesses at trial, and making judgments as to their credibility, the Court makes the following findings of fact:

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1. Krish worked for Verizon in a corporate-owned retail store from 2004 to 2007, during which time he acquired significant experience in the wireless retail industry.
2. Krish began to informally investigate owning his own Verizon stores before he ever talked to Kaj about any investment idea, let alone the idea of starting a company to own independent Verizon stores.
3. It was Krish's idea, not Kaj's idea, to open Verizon stores, and Kaj's testimony to the contrary is not credible.
4. Kaj has no experience or expertise in the wireless communications industry.
5. Krish chose not to apply in his own name because of his young age and because he had lost his former position with Verizon. He believed the application had a better chance of being approved if he was not the named applicant.
6. The business plan submitted by VP to Verizon actually states that Krish looked at locations for Verizon stores in September 2007; this is before Krish ever discussed the idea with Kaj. Kaj reviewed this business plan before it was submitted to Verizon.
7. In late 2007, Krish shared with Kaj and Vijay his plans to open Verizon retail stores.
8. Kaj testified he prepared certain spreadsheets in December 2007 used to analyze the idea of Verizon stores. The spreadsheets were of little or no use as they were extremely basic and pertained to running a restaurant.
9. These spreadsheets were associated with the business plan Kaj found on the internet.

10. Kaj and Vijay formed VP. Kaj and Vijay were each fifty-percent owners of the company and served as its directors. Krish owned no stake in VP, but served as an officer of the corporation.
11. Because of Krish's experience with Verizon, he was to be in charge of running the day-to-day operations of VP.
12. Krish, not Kaj, dealt almost exclusively with the representatives from Verizon when the VP application was submitted. Although Krish was not listed and the applicant, Verizon officials knew of his involvement.
13. Krish, with the assistance of a business plan Kaj had found on the internet and modified for a prior restaurant venture, developed and submitted a business plan and application materials to Verizon for the purpose of becoming an agent.
14. Kaj never revealed to Krish that the business plan he gave him was downloaded for free off the internet. Kaj invested nothing in order to obtain the business plan template. In fact, the website www.virtualrestaurant.com, still up at the time of trial, offered the document as a "free sample."
15. The VP business plan submitted to Verizon contained no particularly unique ideas. The business plan submitted to Verizon by VP was very basic and only five pages long.
16. Kaj claimed that those ideas in the business plan that were original to him included non-confidential information, such as the approximate population of Greenville County or that the local Chamber of Commerce listed over 6,000 businesses in the area. Most of the business plan was copied directly from the free sample document Kaj found on www.virtualrestaurant.com.

17. Verizon rejected VP's application on February 26, 2008. The letter from Verizon communicating the decision did not disclose the reason(s) for the denial and none of the parties knew why VP's application was denied.
18. At trial a representative from Verizon testified that Kaj's failure to fully and accurately disclose his litigation history contributed to the denial. This testimony is credible.
19. After VP's application was denied, Krish asked Verizon representatives why it was denied. They would not tell him.
20. Once the VP application was denied by Verizon without explanation, it was reasonable for Krish to conclude that he could not pursue the idea with VP, Kaj or Vijay.
21. Verizon's representative also testified at trial that, to her knowledge, Verizon never approved any applicant who reapplied after being rejected. This representative had decades of experience with Verizon and its predecessor company. This testimony is credible.
22. Kaj never made any independent effort to pursue ownership of Verizon stores after the initial application was rejected in February 2008.
23. Once the application was rejected, Kaj abandoned the idea of owning Verizon stores and, instead, pursued other entrepreneurial opportunities with Krish and Vijay, including hotels, houses, and convenience stores.
24. After the VP application was rejected by Verizon, Kaj emailed Krish many times about other possible businesses, including hotels, houses, and convenience stores. In one email on April 18, 2009, Kaj mentioned a link on the internet about AT&T

stores that were for sale. Accordingly, Kaj believed the Verizon idea was abandoned by VP.

25. After VP's application was denied, Krish independently continued to pursue his goal of owning and operating Verizon stores.
26. Krish entered into an arrangement with Corby, pursuant to which Corby formed P Comm for the purpose of submitting an application to Verizon to become a licensed agent.
27. From the beginning and while Corby initially held one-hundred percent (100%) of the shares of P Comm, he agreed to sell Krish his stake in P Comm once the company was up and running.
28. Using a modified version of the business plan created by Krish for VP, P Comm applied to become an agent of Verizon in April 2008. The application was approved.
29. P Comm opened its first Verizon store in October 2008 in Greenville, South Carolina.
30. After hosting a grand opening party for the store on October 18, 2008, Krish visited his parents' home where he spoke to Kaj.
31. On October 18, 2008, Krish voluntarily disclosed to Kaj that he had opened a Verizon store with Corby and that he would one day own the company.
32. Krish made no specific promise to Kaj to involve him in the venture.
33. At no time did Krish represent to Kaj that he would use P Comm to resurrect the failed VP venture, and any testimony to the contrary is not credible and rejected.

34. Kaj knew of Krish's involvement in P Comm and the opening of Verizon stores since at least October 18, 2008.
35. In December 2008, Krish acquired 100% ownership of P Comm.
36. In early 2010, Krish found an opportunity to buy some existing Verizon stores in the Columbia, South Carolina area.
37. After finding the opportunity in Columbia, Krish contacted Kaj and asked if he was interested in becoming involved in the Columbia opportunity.
38. Kaj had no expectation that he would have involvement in stores other than in Columbia. There is no credible testimony to the contrary.
39. After the Columbia possibility was abandoned in mid-2010, Kaj did not mention any specific claim or desire to be involved in P Comm until this suit was filed in November 2011.
40. There was nothing to prevent Kaj from pursuing his own Verizon agency relationship and, indeed, there is credible evidence that anyone can pursue such an opportunity.
41. At trial, a Verizon representative testified that there are over one hundred (100) independently-owned Verizon retail stores in South Carolina alone and that anyone is free to submit an application.
42. From 2009 until the time this suit was filed in November 2011, Kaj, Krish, and Vijay communicated via email regularly. They communicated about pursuing other ventures and about a rental house Kaj and Krish owned together. In none of these emails does Kaj claim or mention that he believed he was entitled to participate in the Verizon stores Krish was running. The only emails mentioning

Verizon are when Krish offered Kaj the possibility of becoming involved in the Columbia stores as an employee.

43. Many of the emails to Kaj from Krish about the house they owned together are from Krish's business email address with P Comm, and Kaj obviously knew Krish was running Verizon stores.
44. Professor McWilliams's testimony is consistent with the evidence in this case and, therefore, credible. Professor Freeman's testimony as to the duties owed by the parties to one-another, however, is only consistent with the self-serving testimony of Kaj.
45. This suit was filed almost immediately after *TOWN Carolina* magazine published an article touting Krish's success and stating he had "made a fortune." (*TOWN Article*, at 40.)
46. Kaj admitted that the *TOWN Carolina* magazine was delivered to his house in October 2011.
47. Kaj filed suit on November 4, 2011.

CONCLUSIONS OF LAW

Plaintiff asserted 13 causes of action in his amended complaint: (1) dissolution of VP Enterprises, Inc., (2) violation of standards of conduct for directors under S.C. Code Ann. § 33-8-300 against Vijay, (3) violation of standards of conduct for officers under § 33-8-420 against Vijay and Krish, (4) breach of fiduciary duty against Vijay and Krish, (5) an accounting from all Defendants, (6) breach of fiduciary duty for partnership liability, (7) fraud against Vijay and Krish, (8) constructive fraud against Vijay and Krish, (9) negligent misrepresentation against Vijay and Krish, (10) equitable disgorgement against all Defendants, (11) constructive trust against all Defendants, (12) a violation of the South Carolina Unfair Trade Practices Act, and

(13) a declaratory judgment. In post-trial briefing, Plaintiff dismissed his claims for fraud, constructive fraud, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act. Accordingly, those particular claims are not addressed by this Order.

A. Statute of Limitations and Laches

1. Kaj's legal claims all had, at most, a three-year statute of limitations. However, claims predicated upon a breach of fiduciary duty are codified by statutes that have a two-year limit from the date of discovery. *Clearwater Trust v. Bunting*, 367 S.C. 340, 350-51, 626 S.E.2d 334, 339-40 (2006). In this case, therefore, Kaj's claims had to have been filed within two or three years of discovery. But, even if all of the applicable limitations periods were three years, Kaj's suit was filed too late.
2. Kaj's claims were not brought within either two or three years of their accrual. Accrual of a statute of limitations begins when "the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." *Graham v. Welch, Roberts & Amburn, LLP*, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013) (quoting *True v. Montheith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997)).
3. Krish testified that he explained to Kaj on October 18, 2008 that he joined forces with another person—Corby—to open independently-owned Verizon stores. Kaj claims Krish withheld information from him that would have allowed him to know that he had a claim against the Defendants. Krish's testimony is more credible on this point.

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4. In the Court's view, considering the credibility of the witnesses, Kaj knew or should have known of the existence of the claims he asserts in this matter on or by October 18, 2008, yet he did not file this suit until November 4, 2011.
5. In order for a statutory limitations period to begin to run, a plaintiff need not have a fully-developed legal theory of recovery or have sought the assistance of counsel. *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). All that must occur is that the plaintiff be aware through the "exercise of reasonable diligence" that a claim "might exist." *Id.* The determination of whether a reasonable person knew or should have known of a potential claim is an objective test and does not rely on what Kaj subjectively thought or believed. *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994).
6. Likewise, tolling the statutes of limitation based on claims of fraudulent concealment is not appropriate here. The evidence does not show that any Defendant did anything to prevent Kaj from discovering his injury. South Carolina has recognized fraudulent concealment based on the duty to disclose "inherent in the relationship between physicians and patients." *Maher v. Tietex Corp.*, 331 S.C. 371, 381, 500 S.E.2d 204, 209 (Ct. App. 1998). Indeed, this exception applies specifically because of "the expert knowledge required to ascertain an injury." *McClain v. Jarrard*, 354 S.C. 218, 220, 580 S.E.2d 763, 764 (Ct. App. 2003). Kaj's alleged injury was not hidden from him.
7. Kaj, in his post-trial response to Defendants' Motion for Involuntary Non-Suit, stated that he was pursuing his claims against Krish and Vijay in equity only.

However, even to the extent Kaj seeks only equitable relief, his claims are nevertheless time-barred. “Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or to enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.” *Mazloom v. Mazloom*, 382 S.C. 307, 319, 675 S.E.2d 746, 753 (Ct. App. 2009) *aff’d*, 392 S.C. 403, 709 S.E.2d 661 (2011). Kaj, well aware of his alleged injury, slumbered on his rights for over three years, during which time Krish expended great costs and efforts to expand the business of P Comm. Equity prevents Kaj from stepping in years later to attempt to reap the benefits of Krish’s work.

8. Kaj’s claims of “unclean hands,” so as to prevent the application of laches, do not apply. Kaj testified that Krish led him astray and misrepresented key facts material to his claims. However, even if Krish misrepresented certain facts, none of the misrepresentations were material to Plaintiff’s ability or responsibility to timely bring his claims.
9. Tolling of equitable claims is not appropriate in this case. Kaj presented no credible evidence, testimony or otherwise, that there were barriers or misconduct that prevented him from filing his suit within the prescribed time limits. Equitable tolling of the statute of limitations is an extraordinary remedy that is to be used sparingly. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009). It is intended to prevent unfairness to befall a “diligent plaintiff.” *Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 620 (Ct. App. 2008). Generally, it arises only in cases where “extraordinary circumstances

prevented the plaintiff from filing despite his or her diligence . . . or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass" *Am. Legion Post 15 v. Horry Cnty.*, 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009).

B. Merits of Kaj's Claims

10. As a separate and independent basis for this Court's decision, this Court finds that Kaj's claims each fail on their merits.

Dissolution (Cause of Action 1)

11. In order for this Court to dissolve a corporation, the plaintiff must show deadlock; illegal, fraudulent, oppressive, or unfairly prejudicial action by directors or persons in control; waste or misapplication of corporate assets; abandonment of corporate purpose; or that the duration of the entity as stated in the articles of incorporation has expired. S.C. Code Ann. § 33-14-300(2).
12. However, even where grounds for dissolution exist, a judge may grant a less drastic remedy where appropriate. S.C. Code Ann. § 33-14-310(d). Further, where statutory close corporations are involved, dissolution is only available where all other remedies have failed. S.C. Code Ann. § 33-18-430.
13. In order to proceed with a claim for dissolution, it is therefore axiomatic to show that an entity exists which can be dissolved. For example, it cannot have been previously dissolved through administrative dissolution pursuant to S.C. Code Ann. §§ 33-14-220 *et seq.* VP Enterprises was administratively dissolved in June, 2011.

14. Nevertheless, in order to proceed with a so-called “oppression case” and establish entitlement to dissolution, a plaintiff must show one of many factors outlined by *Kiriakides v. Atlas Food Sys. & Servs., Inc.* Specifically,

A host of factors is identified . . . including, but not limited to, dividend withholding, eliminating minority shareholders from directorate and excluding them from employment, siphoning off corporate earnings via high compensation, leases and loans favorable to majority shareholders, failure to enforce contracts for the benefit of the corporation, appropriation or [sic] corporate assets, contracts or credit for personal use, usurping corporate opportunities, transactions between a parent corporation and a subsidiary, withholding information from minority shareholders.

343 S.C. 587, 605 n.28, 541 S.E.2d 257, 267 n.28 (2001).

15. Kaj’s only articulated basis for dissolution comes from an alleged usurpation of corporate opportunities. However, as fully discussed below, there is no corporate opportunity to usurp in this case. Kaj acknowledges that VP’s application to serve as an agent of Verizon was rejected. VP, therefore, had neither the ability nor the expectation of pursuing any such opportunity. And, even if it did, it still could have pursued an agency relationship after P. Comm acquired its relationship with Verizon.

**Breach of Fiduciary Duty
(Causes of Action 2, 3, and 4)**

16. Kaj alleged statutory and common law claims for breach of fiduciary duty. Each fails as a matter of law. In order to prevail on a claim for breach of fiduciary duty, a plaintiff must show:

- (1) the existence of a fiduciary duty,
- (2) a breach of that duty owed to the plaintiff by the defendant, and

(3) damages proximately resulting from the wrongful conduct of the defendant.

RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012) (citation omitted).

17. The common law breach of fiduciary duty has been codified and subsumed by statute (*see Clearwater Trust*, 367 S.C. at 349-50, 626 S.E.2d at 339) meaning, in this case, the fourth cause of action asserted by Plaintiff is subsumed by the second and third causes of action, which invoke relevant statutes. Under these applicable statutes, directors and officers of a corporation must act “(1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders.” S.C. Code Ann. §§ 33-8-300(a), 420(a).
18. The existence or non-existence of a fiduciary relationship is a question for this Court. *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). Here, the parties owed one another varying duties at different times. However, Kaj has not shown that Defendants breached any of these duties.
19. Prior to incorporation of VP, Krish, Kaj, and Vijay all acted as promoters for the organization. “A promoter of a corporate entity is a person who acts to organize the entity by preparing it to transact business and establishing it.” *Hansen v. Fields Co., LLC*, 2011-190886, 763 S.E.2d 31, 34 n.5, 2014 WL 4087772, at **3 n.5 (S.C. Aug. 20, 2014) (citing *Bivens v. Watkins*, 313 S.C. 228, 233 n. 5, 437 S.E.2d 132, 135 n. 5 (Ct. App. 1993)). Prior to incorporation, promoters share a

fiduciary duty to the corporation and to one another similar to that of partners. *Bivens*, 313 S.C. at 232 n.4, 437 S.E.2d at 135 & nn. 4-5. However, once “the corporation has been established and an independent board of directors takes charge,” the parties cease acting as promoters. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 188, 89 N.E. 193, 206 (1909) *aff’d*, 225 U.S. 111, 32 S. Ct. 641, 56 L. Ed. 1009 (1912); *Pub. Inv. Ltd. v. Bandeirante Corp.*, 740 F.2d 1222, 1235 n.72 (D.C. Cir. 1984); 18 Am.Jur.2d Corporations §§ 104, 107.

20. Once VP was fully formed, Krish, Kaj, and Vijay were no longer promoters and took on their respective roles as officers and directors. Officers and directors have statutory and common law fiduciary responsibility to carry out their duties (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders. S.C. Code Ann. §§ 33-8-300(a), 420(a).
21. Kaj has not demonstrated any actions by the Defendants that constitute a breach of fiduciary duty as promoters or as officers and directors.
22. Kaj relies on his allegation that the Defendants usurped a corporate opportunity from him and VP. However, no such opportunity existed in this case.
23. “To establish a breach of fiduciary duty by usurping a corporate opportunity, the corporation must prove that an officer or director misappropriated a business opportunity that properly belongs to the corporation.” *Landon v. S & H Mktg. Grp., Inc.*, 82 S.W.3d 666, 681 (Tex. App. 2002) (citation omitted).

24. A corporate opportunity is something that a company has an “interest or reasonable expectancy” in. *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 272-73, 5 A.2d 503, 511 (1939); *see also Aqua-Culture Technologies, Ltd. v. Holly*, 677 So. 2d 171, 183 (Miss. 1996). If a company is unable to undertake an opportunity, then it is not, by definition, a corporate opportunity. *Straight v. Goss*, 383 S.C. 180, 209-10, 678 S.E.2d 443, 454, 460 (Ct. App. 2009). Once Verizon rejected VP’s bid to become an agent, VP lost any expectancy in the opportunity and was unable to undertake it. From that point on, as Professor McWilliams testified, the business purpose of VP was thwarted and the parties owed one another no particular duties, at least insofar as related to pursuing opportunities with Verizon.
25. Where, as in this case, “a corporation is unable to avail itself of an opportunity, its employee, officer or director is free to exploit it.” *Beane v. Beane*, 856 F. Supp. 2d 280, 311 (D.N.H. 2012) (citations omitted); *Energy Res. Corp., Inc. v. Porter*, 14 Mass. App. Ct. 296, 300, 438 N.E.2d 391, 394 (1982); *See also, Looney v. M-Squared, Inc.*, 262 Ga. App. 499, 502, 586 S.E.2d 44, 48 (2003); *A. Teixeira & Co., Inc. v. Texeira*, 699 A.2d 1383, 1388 (R.I. 1997); *Field v. Allyn*, 457 A.2d 1089, 1099 (Del. Ch. 1983); *Fliegler v. Lawrence*, 361 A.2d 218, 220 (Del. 1976); *A. C. Petters Co., Inc. v. St. Cloud Enterprises, Inc.*, 301 Minn. 261, 266, 222 N.W.2d 83, 86 (1974); *Schildberg Rock Products Co. v. Brooks*, 258 Iowa 759, 769, 140 N.W.2d 132, 138 (1966); *Solimine v. Hollander*, 128 N.J. Eq. 228, 247, 16 A.2d 203, 215 (Ch. 1940); 18B Am.Jur.2d Corporations §§ 1542, 1544, 1551.

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26. Where a third-party refuses to allow a company to use its product, and the company is unable to pursue that market, employees of that company are freely able to pursue that “outside opportunity” for their own gain. *See Sci. Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 963-64 (Del. 1980); 18B Am.Jur.2d Corporations § 1551. “An opportunity may be embraced by a director as his own without accountability to the corporation if the corporation sought without success to obtain it.” *Nw. Terra Cotta Corp. v. Wilson*, 74 Ill. App. 2d 38, 47, 219 N.E.2d 860, 864 (Ill. App. Ct. 1966) (citing 19 Am.Jur.2d, Corporations, § 1313); *see also Puritan Med. Ctr., Inc. v. Cashman*, 413 Mass. 167, 178, 596 N.E.2d 1004, 1011 (1992). Here, Verizon refused to do business with VP and left Krish free to pursue the opportunity on his own.
27. Likewise, if a company abandons what may have once been a corporate opportunity, then it cannot succeed in a claim against an employee that chooses to pursue it. *See Landon*, 82 S.W.3d at 681; *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 47, 382 A.2d 564, 573 (1978); 18B Am.Jur.2d Corporations § 1551. Once Verizon rejected VP, the evidence indicates that VP was abandoned and its sole corporate purpose had been thwarted. Krish was therefore free to endeavor to work with Verizon on his own.
28. Kaj’s testimony that he directed Krish to continue to pursue the Verizon agency relationship on behalf of VP is not credible, as it is not supported by any other evidence. In fact, the evidence presented at trial indicates that Kaj had moved on to other ventures.

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29. Professor McWilliams's testimony regarding the abandonment of VP by Kaj and the Defendants is credible and based on documentary evidence. Professor Freeman's testimony on this topic is, therefore, disregarded because it is not based on supporting evidence other than Kaj's self-serving testimony.
30. Furthermore, notwithstanding Verizon's denial of VP's application, in the view of this Court, the agency relationship with Verizon was not a "corporate opportunity" within the meaning of the law. Corporate opportunities are business prospects that are unique and particular, including things such as the:

- **Purchase/sale of share of unique stock.** See *Kohls v. Duthie*, 791 A.2d 772 (Del. Ch. 2000); *Yiannatsis v. Stephanis by Sterianou*, 653 A.2d 275 (Del. 1995); *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961 (Del. Ch. 2003).
- **Purchase of a unique company related to an ongoing enterprise.** See *Rapistan Corp. v. Michaels*, 511 N.W.2d 918 (Mich. Ct. App. 1994).
- **Purchase of unique corporate assets.** See *Collie v. Becknell*, 762 P.2d 727 (Colo. App. 1988).
- **Purchase of unique real estate.** See *Carolina Park Assocs. LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876 (2012); *DiMaggio v. Rosario*, 950 N.E.2d 1272 (Ind. Ct. App. 2011); *Babb v. Estate of Watson*, No. 2008-UP-247, 2008 WL 9841508 (Ct. App. May 2, 2008); *Straight*, 383 S.C. 180, 678 S.E.2d 443; *Ne. Harbor Golf Club, Inc. v. Harris*, 725 A.2d 1018 (Me. 1999).
- **Acquisition of a unique and exclusive contract.** See *Klinicki v. Lundgren*, 695 P.2d 906 (Or. 1985).

Here, an agency relationship with Verizon was not a unique business opportunity such as these. Even after P Comm entered into its agency agreement with Verizon, anyone, including Kaj and VP, could submit an application to acquire one. Therefore, because Kaj and/or VP could have done this, the agency relationship P Comm entered into with Verizon was not a corporate opportunity.

**Accounting
(Cause of Action 5)**

31. There is no basis for seeking an accounting from the Defendants. First, Kaj has not demonstrated liability for any cause of action that would enable him to procure an accounting to establish a measure of damages. Secondly, while partners and shareholders may sometimes obtain an accounting, neither situation is applicable here.
32. "A court should have broad discretion to fashion the most appropriate remedy to resolve the dispute." S.C. Code Ann. § 33-18-410 cmt.1. Therefore, even where the prerequisites for an accounting may be met, this Court may determine the remedy unsuitable.
33. Partners may claim an accounting only:
- (1) if he is wrongfully excluded from the partnership business or possession of its property by his copartners;
 - (2) if the right exists under the terms of any agreement;
 - (3) as provided by § 33-41-540; or
 - (4) whenever other circumstances render it just and reasonable.

S.C. Code Ann. § 33-41-550.² As an initial matter, however, it stands to reason that a party must first show the existence of a partnership in order to claim partner's accounting rights. 59A Am.Jur.2d Partnership § 15 ("A partnership and a corporation are two different and distinct entities."); *see also Martinez v. Posner, Martinez, & Padgett*, 385 So. 2d 525, 528 (La. Ct. App. 1980). Here,

² § 540 provides "Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property." S.C. Code Ann. § 33-41-540(1).

however, there was never a partnership for Kaj to claim entitlement to an accounting. There is no credible evidence to contradict this finding.

34. Similarly, shareholders of a statutory close corporation may petition for an accounting where there is deadlock, grounds for dissolution, or conduct otherwise “illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner” perpetrated by directors or persons in control. S.C. Code Ann. §§ 33-18-400, 410(a)(5). Thus, in order to petition the court for an accounting, it stands to reason that the claimant must show two things: first, the claimant must be shareholder; second, the claimant must show grounds for dissolution or other misfeasance by directors or control persons. Insofar as Kaj seeks an accounting as a shareholder of VP, his claim is untenable because that corporation no longer exists and there is nothing to account. Moreover, Kaj provides no basis for his claim for an accounting of P Comm. He is neither a partner nor a shareholder of that company.

**Breach of Fiduciary Duty for Partnership Liability
(Cause of Action 6)**

35. Partners are held to a high level of fiduciary duty with one another. *See Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 597, 538 S.E.2d 15, 24 (Ct. App. 2000) (citing 59A Am.Jur.2d Partnership § 420 (1987)).
36. There is, however, no partnership in this case. There is no credible evidence to support a different finding.
37. Therefore, Kaj is unable to support a showing of a violation of partnership fiduciary duties where no such entity ever existed.

**Equitable Disgorgement
(Cause of Action 10)**

38. Because Kaj is unable to show that Defendants are liable under any of the claims pled, he is not entitled to equitable disgorgement. Disgorgement is an equitable remedy, not a cause of action. Essentially, disgorgement acts like restitution, seeking to remove assets from parties that are obtained by ill-gotten means and result in unjust enrichment. See *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 229 (2002). Because disgorgement is merely a remedy once liability is established, claimants must first demonstrate entitlement thereto. See *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010). Plaintiff has failed to demonstrate any liability in this case.

**Constructive Trust
(Cause of Action 11)**

39. A constructive trust is a remedy, not a cause of action. Therefore, in order to demonstrate entitlement thereto, a claimant must first establish liability. Because Kaj is unable to show that Defendants are liable under any of the claims plead, he is not entitled to a constructive trust. "A constructive trust results when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Gordon v. Busbee*, 397 S.C. 119, 141, 723 S.E.2d 822, 834 (Ct. App. 2012) (citing *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002)).

**Declaratory Judgment
(Cause of Action 13)**

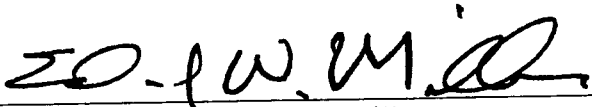
40. As discussed throughout this Order, Kaj is unable to show that Defendants are liable under any of the claims pled. It follows, then, that Kaj is not entitled to a declaratory judgment. Where a justiciable case or controversy exists, a plaintiff may seek to have the court declare “rights, status, and other legal relations.” *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 83, 742 S.E.2d 371, 375 (2013); S.C. Code Ann. § 15-53-20; *see also* S.C. Code Ann. § 15-53-40 (“A contract may be construed either before or after there has been a breach thereof.”). However, nothing under the Declaratory Judgment Act removes or otherwise alters a plaintiff’s obligation to prove his or her legal case. *See Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (citations omitted) (“A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.”).
41. Alternatively, to the extent Kaj is entitled to a declaratory judgment, this Court hereby declares that none of the duties owed by the Defendants to Kaj were violated and he is not entitled to any of the relief he seeks.

CONCLUSION AND JUDGMENT

For the reasons stated herein, this Court finds in favor of Defendants on all counts and hereby enters a judgment accordingly.

[Signature Page to Follow]




The Honorable Edward W. Miller
Judge, Thirteenth Judicial Circuit

December 30, 2014
Greenville, South Carolina

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