THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Trial Court Case No.: 2011-CP-23-07388
Appellate Case No.: 2015-000162

Pankaj Patel, individually and derivatively on behalf of
Nominal Defendant, VP Enterprises, Inc.,.....Appellant,

v.

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

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

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2. Did the trial court correctly determine that Respondents did not breach any duties owed to Appellant?

3. Did the trial court correctly determine that Appellant waived his derivative claim because at trial he focused solely on his direct claims?

4. Is Appellant entitled to equitable relief?

STATEMENT OF THE CASE

Pankaj Patel ("Appellant" or "Kaj") filed the underlying action in the Greenville County Court of Common Pleas on November 4, 2011,[1] alleging that Vijay Patel ("Respondent Vijay" or "Vijay") and Krish Patel ("Respondent Krish" or "Krish") (collectively, "Respondents") breached fiduciary duties by usurping a corporate opportunity of VP[2] Enterprises, Inc. ("VP Enterprises"). Appellant sought actual and punitive damages, as well as equitable relief. Vijay and Krish are father and son, respectively. The parties began discussing several investment opportunities in 2007 and formed a company – KVP[3] Investments and Operations, LLC ("KVP") – to pursue a myriad of possibilities. VP Enterprises was established later and was not part of KVP. It was formed by only Kaj and Vijay for the ***sole purpose*** of applying for "agency status"[4] with Verizon Wireless ("Verizon") to own and operate independent retail locations. Krish was never a shareholder owner of VP Enterprises; he was, rather, an officer and an

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[1] Appellant later filed an amended complaint on February 7, 2012. The substance of the amendments is not pertinent to this appeal.

[2] "VP" stands for Vijay and Pankaj. (Tr. at 17.)

[3] "KVP" stands for Krish, Vijay and Pankaj. (Tr. at 17.)

[4] The term "agency status" is taken directly from the Verizon Agency Application. (*See* Pl. Trial Doc. 00118.)

(uncompensated) employee. Kaj also asserted a derivative claim on behalf of VP Enterprises based on the same allegations supporting his direct claim.

Respondents filed an Answer on February 21, 2012, asserting that Kaj's claims were time-barred and denying liability on the merits. The parties participated in mediation, but could not reach a settlement. Arising out of the mediation, however, was an agreement to cease discovery and consent to a bifurcated bench trial. (Dec. 31, 2014 Order (hereinafter "Order") at 1.) On July 21 and 22, 2014 the liability phase of the trial was held before The Honorable Edward W. Miller ("Judge Miller"). Per the parties agreement the "damages" portion of the trial, if necessary, would have been held at a later date. At the close of Kaj's case, Respondents moved for involuntary non-suit pursuant to Rule 41(b), SCRCP.

Judge Miller took the motion under advisement, but clearly indicated that he viewed the statute of limitations defense as having merit.[5] In addition to his doubts as to the timeliness of Appellant's suit, Judge Miller had serious misgivings regarding the merit of Appellant's claims. For example, while Judge Miller noted that Appellant's evidence might establish some moral duty, and indicated "damage done to a friendship," (Transcript of Record (hereinafter "Tr.") at 294), he recognized that any moral duty was "clearly distinguishable from what's legally enforceable." (*Id.* at 294.)

Respondents presented their case, rested, and renewed their motion for involuntary non-suit. Judge Miller asked the parties to submit post-trial briefs. In his post-trial submission, Kaj expressly dismissed all claims except for those that "involve breach of fiduciary duty." (Pl. Opp. at 2.) The clear intent of this maneuver was to obtain

[5] Judge Miller stated, "I'll just tell you, I've got a problem with the statute of limitations." (Tr. at 291.)

a second bite at the apple: Knowing Judge Miller was almost certainly going to grant judgment to Respondents, Kaj dismissed all but his fiduciary duty claims in an attempt to re-position the case as an equitable one, with what he hoped would be a more favorable standard of appellate review.[6]

On December 31, 2014, Judge Miller ruled in favor of Respondents on all claims and made many credibility findings in Respondents' favor. Based upon his view of the evidence and relying on his findings as to credibility, Judge Miller found that all of Kaj's claims were time-barred, that there existed no legal duty between the parties at the time of the complained-of conduct, that – even if there was a legally cognizable duty in existence at a relevant time – the Verizon agency status eventually acquired by P Comm was not a corporate opportunity within the meaning of the law, and that Kaj had abandoned his derivative claims. On January 23, 2015, Kaj served a Notice of Appeal.

STATEMENT OF THE FACTS

The parties in this matter are battling over the fruits of a company envisioned and grown by Krish. Kaj's brief grossly mischaracterizes much of the evidence, and does so in a manner that makes it appear at first glance that his case had merit, which – as Judge Miller ruled – it did not. As is apparent from the record, Kaj knew Krish pursued his desire to own and operate Verizon stores on his own—outside of VP Enterprises—no later than October 18, 2008. It was not until years later, when he found out Krish's business was a success, that Kaj began claiming that Respondents breached fiduciary duties they owed Kaj. The following is a non-exhaustive list of factual

[6] Appellant's counsel should be commended for his savvy lawyering, but—as is explained below—the law is not on his side.

mischaracterizations or unsupportable claims in the Initial Brief of Appellant (hereinafter "App. Br."):

- Krish was "fired" by Verizon and he improperly failed to disclose it to Kaj. (App. Br. at 8.)
- At trial, Kaj claimed the entire business was his idea (Tr. at 130-131.), but now, in his brief, he claims that it was his idea to pursue ***multiple*** Verizon retail locations. (App. Br. at 9.)
- Vijay's and Krish's non-disclosure of pertinent facts to Verizon was "undoubtedly" the cause of Verizon's denial of VP Enterprises' application. (App. Br. at 1.)
- Verizon's letter of February 26, 2008, left the door open for VP Enterprises to acquire agency status with the company. (App. Br. at 13.)
- After VP Enterprises' application was denied, Kaj continued to look for other wireless phone stores "for VP Enterprises." (App. Br. at 14.)
- Krish created P Comm "in secret." (App. Br. at 15.)
- Krish lied when he told Kaj he would contact him down the road if an "opportunity" with P Comm materialized. (App. Br. at 2-3.)

The evidence presented at trial and discussed below makes clear that these claims are false, exaggerated, and/or misleading. Judge Miller saw through Kaj's claims at trial, and this Court should, too.

The Individual Parties

Kaj and Vijay both emigrated from India to the United States in the early 1980s. (Tr. at 31.) They both eventually moved to Greenville, South Carolina ("Greenville") and became friends. (Tr. at 39.) Kaj is an engineer by trade (Tr. at 61.) and – by his own admission – an unsuccessful entrepreneur. (Tr. at 135-39.) Vijay owns two hotels in Greenville. (Tr. at 39.)

Krish is Vijay's son. He was born in Houston, Texas in 1985, and later moved with his family to Greenville. Krish has always been ambitious and had the hard-wiring of an entrepreneur. He has continuously held various jobs since the age of 13. (Tr. at

375.) Upon graduation from Mauldin High School in 2004, he began working as a salesman at a corporate-owned Verizon store in Greenville. *Id.* He held this full-time position from 2004–2007, while also taking a full course load at USC Upstate. (Tr. at 376.)

At trial, Krish testified that in October 2007, he was asked to resign from Verizon because he had handled family members' accounts. (Tr. at 376.) Krish did not profit from or cause harm to Verizon from this activity, but it was, nonetheless, against Verizon policy. (Tr. at 377.) He was not, as Kaj claims, "fired" by Verizon. And he did not, as Kaj also claims, improperly withhold the details of his separation with Verizon. To the contrary, Krish ***voluntarily disclosed*** the details at trial despite the fact that Kaj's attorneys never asked for these particulars during discovery.[7]

Krish Came up With the Idea to Own Verizon Stores

In addition to corporate-owned stores, like the one where Krish worked, Verizon authorizes "local agents" to operate independent Verizon retail locations. (Tr. at 302-03.) Those who wish to open such stores must first apply for approval as an agent by submitting a business plan and then, if that is approved, an application for agency status. (Tr. at 315.) Verizon vets such applications, a process that includes review of financial information and a background check on the applicant's principals. (Tr. at 320.)

While still working as a salesman at a corporate-owned Verizon store, Krish decided he wanted to own and operate independent Verizon stores. When he filed suit,

[7] Appellant makes a great deal out of Krish's termination, going so far as to accuse him of lying about it. (App. Br. at 26.) The truth, however, is that Appellant never asked Krish for the details of his departure from Verizon. Furthermore, Appellant had access to Krish's personnel file and, though his attorneys deposed multiple Verizon witnesses, they elected not to ask them any questions concerning the details of Krish's severance from the company.

Kaj preposterously claimed this was his idea. (2d Am. Cplt. ¶ 16.) At trial, Kaj backed off of this obviously false assertion by acknowledging it was not his idea entirely, but he then claimed it was his idea to open "multiple" locations. (Tr. at 131.) This cannot be true because, according to VP Enterprises' business plan, Krish had already identified several possible locations for independently-owned stores in September 2007. (Tr. at 378.) Kaj admits in his brief that he and Krish first looked at potential locations in December 2007 (App. Br. at 11) – months after Krish scouted multiple locations in September 2007.

Notwithstanding the fact that owning and operating multiple independent Verizon retail locations was clearly Krish's idea, he involved Kaj and Vijay because, in his words, "they were two business owners and I felt like they'd be good individuals to talk to an idea about and see if they could get the business started." (Tr. at 378.) The subject first came up while Kaj and Respondents were traveling to inspect a potential investment opportunity for KVP. (Tr. at 131.) Krish educated Kaj and Vijay as to the possibility of forming a company that would own and operate Verizon retail stores. (Tr. at 43.)

VP Enterprises Formed for Sole Purpose of Owning Verizon Stores

At the time the parties first discussed the matter in late 2007, the group agreed to form a company for the exclusive purpose of applying for an agency relationship with Verizon. (Tr. at 43.) Krish decided that he should not pursue an ownership stake in the company. (Tr. at 44.) He thought the application stood a better chance of being approved if older,[8] more experienced businessmen owned the company that submitted the application. (Tr. at 377.) Thus, Kaj and Vijay formed VP Enterprises. As Kaj himself testified at trial, "The purpose of VP [Enterprises] was to start and operate a chain of

[8] Krish was 22 at the time. (Tr. at 55.)

independent Verizon Wireless stores." (Tr. at 43.) This exclusive purpose of VP Enterprises is underscored by the fact that the individual parties had already formed KVP, which was the company through which they planned to pursue a broad range of other investment opportunities, such as hotels, convenience stores, residential real estate, and a pine-straw businesse. (Tr. at 172-73.)

Kaj and Krish each contributed to the creation of a rudimentary, five-page business plan to be submitted to Verizon. (Pl. Trial Doc. 25-30.) In December 2007, Kaj sent Krish an email attaching two, nearly identical, business plans. One was for "Tava Grill," a failed restaurant opened by Kaj. (Tr. at 138.) The second was for another restaurant, "Abonda." (Pl. Trial Doc. 3.) In his e-mail, Kaj asked Krish to "please keep [these] confidential." *Id.* For much of this litigation, Kaj and his attorneys made a great deal out of the business plans, which they claimed Kaj himself had written. (2d Am. Cplt. ¶¶ 17-20.) Indeed, it was his central argument for much of the case.[9] Respondents' counsel discovered months into the lawsuit that Kaj had downloaded the Abonda business plan from www.virtualrestaurant.com, and then had "written" the Tava Grill plan by swapping the words "Tava Grill" for "Abonda" and making similar, minor changes. (*Compare* Pl. Trial Doc. 4-9 *with* Pl. Trial Doc. 10-16.) Respondents confronted Kaj with this fact during mediation. For obvious reasons, the centrality of the business plan to Appellant's claim quickly diminished. [10]

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[9] As Respondents' counsel pointed out in his opening statement: "The complaint talks about the business plan thirteen times. ***Thirteen different times***. Kaj testified in his deposition about his business plan thirty times. Krish was asked about it by Mr. Gilreath seventy-two times. This case was, 'they stole the business plan.'" (Tr. at 23 (emphasis added).)

[10] During the time of trial, some six years later, the "Abonda" business plan was still free on the internet. It is a very basic sample used as a "come on" to purchase better

At trial and in his brief, Kaj claimed his work consisted of "spreadsheets" used to analyze the business. These spreadsheets were worthless to VP Enterprises because they contained basic data about food costs, linen rental expenses, menu expenses, hospitality tax and other items used in a ***restaurant*** – not a wireless store. (Tr. at 149-54.) Kaj claims he and Krish used these spreadsheets to vet the Verizon idea, but there is no documentary evidence to support his claim. *Id.*

The business plan ultimately submitted to Verizon by VP Enterprises on January 28, 2008, was a modified version of the free internet plan Kaj falsely claimed he created. Most of the changes to the plan were made by Krish. (Tr. at 148.) Krish included in the business plan the fact that he had identified several store locations in September 2007—before ever discussing the venture with Kaj or Vijay. (Tr. at 378.) In fact, as Krish testified at trial, he had been working on the idea since as early as 2006. *Id.* Kaj, Krish, and Vijay collectively agreed because of Krish's experience, Krish would run operations. Kaj and Vijay, after all, were occupied with full-time jobs and knew nothing about the wireless retail industry. All involved knew that Krish would run the stores and assume an ownership position at an appropriate time. Moreover, Verizon was well aware of Krish's involvement; the business plan identifies Krish as "General Manager & Product Development." (Pl. Trial Doc. 30.)

VP Enterprises' Application Denied

On February 26, 2008, Verizon denied VP Enterprises' application. (Pl. Trial Doc. 145.) Although Verizon never explained its denial to Respondents or Kaj, during the course of discovery, a 30(b)(6) designee for Verizon, Patricia Cook, testified "I can tell

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prototype business plans. (*See* Virtual Restaurant, *Restaurant Sample Business Plan Outline*, http://www.virtualrestaurant.com/sample.htm (last visited July 27, 2015).)

you that [VP Enterprises'] application was denied based on nondisclosure." (Verizon 30(b)(6) at 10.)[11] "Nondisclosure," according to Verizon, meant that an individual failed to disclose relevant information on a questionnaire relating to his background. Ms. Cook elaborated, "[w]hen I run a background check on an individual, no information can come back that was not disclosed on the application. ***If they say they've not been involved in any litigation, any criminal offenses or that sort of thing and I find it, that's reason for rejection.***" (*Id.* at 12 (emphasis added).)

Nondisclosure of this sort is precisely why VP Enterprises' application was denied. While Kaj claims VP Enterprises' application was "***undoubtedly***" denied because Vijay failed to disclose relatively minor criminal charges in his background and/or because Krish had resigned from Verizon because he violated company policy (App. Br. at 1), this is in direct contradiction to testimony from 27-year Verizon veteran, Tammy Blew. Ms. Blew testified that the application would be approved or denied based on "a background [check] ***of the principals***" of the applicant company. (Tr. at 313 (emphasis added).) With respect to VP Enterprises, this included Kaj, who admittedly failed to disclose numerous civil suits in his past. (Tr. at 68, 159-64.) Civil suits of the type Kaj failed to disclose were material to Verizon's approval process. Ms. Cook, Verizon's 30(b)(6) designee, who was involved in the application review process, testified that she thought it was Kaj's non-disclosure that led to the denial, not Vijay's minor criminal history. (Tr. at 323.) Hand-written notes on the application produced by Verizon during discovery show that Verizon discovered civil suits Kaj had failed to reveal in his

[11] Because Ms. Cook was unavailable to testify at trial, Respondents designated the entirety of her individual and 30(b)(6) depositions at trial and in the record on appeal.

application. (Pl. Trial Doc. 171.)[12] In short, it is not reasonable to argue—as Kaj does—that it was Respondents' background check that "***undoubtedly***" caused the denial. It is clear that Kaj's failure to make full and complete disclosure to the questions asked that caused Verizon – at least in part – to deny VP Enterprises' application.

The gravity of Kaj's failure to disclose the entirety of his civil litigation history is clear. The application wherein Kaj made only a partial disclosure of his litigation history unambiguously states:

> I HEREBY CERTIFY THE INFORMATION IN THIS DOCUMENT IS TRUE, ACCURATE AND COMPLETE TO THE BEST OF MY KNOWLEDGE. I UNDERSTAND THAT IF ***ANY INFORMATION*** PROVIDED IS DETERMINED TO BE INCORRECT BY VERIZON WIRELESS, THAT MY APPLICATION FOR AGENCY STATUS CAN BE DENIED...

(Pl. Trial Doc. 00121 (emphasis added).) Kaj acknowledges that he read and understood this provision when he signed the application. (Tr. at 157.) He nonetheless claims that it was Respondents' fault that the application was denied. Judge Miller found all evidence indicating that Kaj's non-disclosure of his litigation history contributed to the application's denial was credible. (Order at 11).

Also, not only does the evidence contradict Kaj's claim that he had nothing to do with the denial of VP Enterprises' application, but there is ***no evidence*** in the record that the denial of VP Enterprises' application had anything to do with Krish. Because he was not a principal of VP Enterprises, Verizon did not run a background check on him, and Ms. Blew testified that she knows of nothing other than the financials and background

[12] Kaj reluctantly admitted that he failed to disclose at least four different lawsuits either in the Verizon application or in his Answers to Interrogatories. (Tr. at 157-66.) He also admitted Verizon specifically noted in the application that one of the suits was not disclosed. (Tr. at 158.)

checks ***of the principals*** that Verizon looks at when deciding whether to approve an application. After Ms. Blew testified that a decision on an application was made on the financials and background checks of the principals only, the Court asked: "Okay. Any other criteria you can think of?" She responded, "None that I can think of." (Tr. at 314.) Also, Verizon knew Krish was involved in the VP Enterprises venture—just as it knew Krish was involved with P Comm, whose application was approved. (Tr. at 305-06.) This leaves little doubt that VP Enterprises' denial had nothing to do with Krish. (Tr. at 314.)

VP Enterprises' Purpose Thwarted = Company Abandoned

After Verizon denied VP Enterprises' application for agency status, the possibility of achieving its goal of opening independently-owned retail locations vanished. Kaj, nonetheless, asserts on appeal that Verizon kept the possibility alive when, in its letter of February 26, 2008, it stated that VP Enterprises' application was denied "at this time." (App. Br. at 13.) This vastly overstates the importance of that phrase in light of Verizon's testimony. Ms. Blew, the 27 year Verizon veteran, testified at trial that she had never seen an applicant for an agency relationship denied and later approved. (Tr. at 306.) Judge Miller found this credible. (Order at 11, ¶21.)

Kaj also argues, as support for his claim that VP Enterprises was alive and well even after its application was denied, that he instructed Krish to figure out why Verizon denied VP Enterprises' application and that they would get it back on track. However, this assertion is not supported by any documentary evidence. Also, Kaj admitted at trial he signed the application after reading and understanding the following provision in it:

> VERIZON WIRELESS MAY REJECT ANY OR ALL APLICATIONS IN ITS SOLE AND ABSOLUTE DISCRETION, AND ... VERIZON WIRELESS'S ONLY OBLIGATION PURSUANT TO THIS APPLICATION IS TO TELL THE

APPLICANT AFTER FINAL REVIEW WHETHER THE APPLICATION HAS BEEN APPROVED OR DENIED.

(Pl. Trial Doc. 121; *see* Tr. at 156-57.) This admission means that Kaj knew, when Verizon denied VP Enterprises' application, it was under no obligation to tell anyone why it did so. Therefore Kaj's claim that he intended for Krish to "work it out" with Verizon is clearly made-up for self-serving purposes. In truth, it was Krish who – independent of Kaj – asked Verizon why VP Enterprises' application was denied. (Tr. at 384-85.) He received no information in response. *Id.*

Also, the $5,000 Kaj put into VP Enterprises' bank account was, with Kaj's knowledge, transferred to KVP's account and VP Enterprises' account was closed in July 2008. (Tr. at 390.) More than three years later, when he filed the Complaint in November 2011, Kaj first claimed that he thought VP Enterprises was not abandoned. Judge Miller agreed that Kaj's claim that VP Enterprises was not abandoned lacked support and was not credible. (Order at 23, ¶ 28.) In fact, as Judge Miller found, Kaj had "moved on to other ventures." (*Id.*)

Kaj also claims that he continued to look for "other wireless phone stores for VP Enterprises." (App. Br. at 14.) This is another attempt to show that he did not abandon VP Enterprises and therefore Respondents continued to owe him fiduciary duties. This claim is demonstrably false. After VP Enterprises' application was denied in February 2008, Kaj, Vijay, and Krish continued to discuss potential investment opportunities for ***KVP***, including acquisition of hotels, convenience stores, medical office buildings and other real estate. There are many, many emails among the parties between 2008 and 2011, but ***none*** of them mention VP Enterprises. In the summer of 2008, Kaj suggested to Krish that they could purchase a couple of existing wireless retail locations, but they did

not discuss this idea in any significant fashion. Kaj fails to mention that the stores he brought to Krish's attention were not for Verizon, they were existing stores of another carrier for sale on a business broker's website. (Tr. at 176.)

It was not until April 15, 2010 – nearly two years after Kaj was aware Krish had attained Verizon agency status – that Kaj first suggested a Verizon store location to Krish. (Pl. Trial Doc. 304A.) The e-mail Kaj sent Krish in April 2010 suggests a possible site for a store in Tyron, North Carolina. Kaj also stated that if Krish was not interested, he (Kaj) had "a partner" and would do it on his own. (*Id.*) Thus, contrary to Kaj's assertion, the evidence actually demonstrates that Kaj himself had abandoned VP Enterprises after Verizon denied its application.

Krish Continued to Pursue His Goal of Owning and Operating Verizon Stores

Notwithstanding the parties' abandonment of VP Enterprises, Krish did not give up on ***his goal*** of owning and operating independent Verizon retail locations. He approached another established businessman, Corby Phillips ("Corby"), and asked for his help. Krish and Corby's relationship predated the formation of VP Enterprises. Between 2003 and 2005, Corby owned a sandwich shop next door to the Verizon store where Krish worked. (Tr. at 220.) Their relationship continued after Corby sold the restaurant in 2005. Corby had gone into real estate, and facilitated some transactions in which Krish was involved. (Tr. at 221.) In the spring of 2008, after VP Enterprises' application had been denied, Krish asked Corby if he would form a company and apply for agency status with Verizon. Krish hoped Verizon might approve the application of an experienced retailer such as Corby.

Kaj asserts on appeal that Krish created P Comm in secret. (App. Br. at 15.) This is not true, and contradicted by the evidence presented at trial. Krish's actions clearly demonstrate that he was not hiding anything from Kaj. Krish and Corby used Allan Hill to incorporate P Comm. Mr. Hill also formed VP Enterprises and represented Appellant Kaj on other matters, which Krish knew. (Tr. at 110, 171.) In order to obtain a line of credit for P Comm, Krish used the banker that he and Kaj used for VP Enterprises. (Tr. at 389.) These are not the steps of someone attempting to hide his actions.

From the outset, Krish and Corby's agreement was that, if Verizon approved P Comm's agency application, Krish would pay Corby for establishing P Comm and acquiring agency status in exchange for ownership of the company. After agreeing to these basic terms, Corby formed P Comm and applied for Verizon agency status in April 2008. There is no testimonial or documentary evidence suggesting that Krish asked Corby to keep their actions confidential. Verizon approved P Comm's application, and Krish immediately began working on this business in earnest. Corby had no meaningful role in P Comm's operations.

P Comm opened its first location on Pelham Road in Greenville in October 2008. In accordance with his and Corby's agreement, Krish did all the work to open the first store. 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 took responsibility for everything else necessary to open the location. Krish even planned a party for October 18, 2008, to celebrate the grand-opening. After attending this party, Krish went directly to his parent's house to join a group of family friends, ***including Kaj***, who had gathered there. Krish informed Kaj that he had just

opened a new independent Verizon store on Pelham Road and that he planned to own the company at some point in the future.[13] Out of respect for Kaj, Krish told him that he would be willing to discuss potential opportunities for Kaj and P Comm in the future. Kaj claims that this offer was a lie. (App. Br. at 2-3.) This assertion is false. In the many emails sent by Kaj after the party at Krish's home, Kaj never mentioned any of this. This is a strong indication that all of this was made up after-the-fact.

Krish, as he and Corby planned, eventually acquired ownership of P Comm after he opened a second location and laid the groundwork for a third. Corby, in accordance with their arrangement, had virtually no role or responsibility for the stores. At trial, Kaj admitted that not later than October 18, 2008, he knew that Krish worked with a company other than VP Enterprises that had acquired agency status with Verizon and that, through the other company, Krish had opened a Verizon store.

In the spring of 2010, Krish asked Kaj to help him in the acquisition of a handful of existing, independently owned Verizon retail locations in the midlands of South Carolina. Specifically, Krish identified several Verizon locations in Columbia and Florence that were for sale. He contacted Kaj about the opportunity for him to be involved in those stores. (Tr. at 201, 203.) It is also significant that Kaj admits that in 2010 he proposed owning one half of the new midlands stores, ***not*** the existing stores. (Tr. at 202.) Kaj claims that he and Krish would integrate all of the stores later (Tr. at 203) but, again, there are no documents to support this claim. This indicates he never believed that he was entitled to one half of Krish's entire business, as he now claims. Kaj

[13] Kaj admitted that Vijay and Krish voluntarily told him, in October 2008, that Krish had opened a Verizon store and did not try to hide it. (Tr. at 187-188.) For the next 36 months, Kaj e-mailed Krish and Vijay about many other opportunities and ***never*** mentioned the claims made in this case. (Tr. at 190-196.)

suggested that he and Krish purchase those stores together, each owning fifty percent. Krish, however, 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 denies that he ever understood this as an employment offer, but Judge Miller found Krish's testimony on this point more credible. (Order at 12-13.) In any event, Kaj rejected the proposal and abandoned the idea. Krish—through P Comm—acquired the stores. Kaj and Krish never discussed investment in wireless retail again.

Krish continued to grow P Comm, attracting attention because of his success at such a young age. A prominent and widely distributed Upstate periodical, *TOWN* 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 President of [P Communications, 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.

(Pl. Trial Doc. 307 (emphasis added).) Kaj admitted at trial that he read this article when it was published. (Tr. at 115.) Less than a month after he read the *TOWN* Magazine article, he filed this suit.

Expert Testimony

At trial, Kaj presented the expert testimony of Professor John Freeman ("Professor Freeman"), who opined that Kaj, Vijay, and Krish were all "co-participants in the promotion of VP [Enterprises]." (Tr. at 248.) He went on to explain that this type of relationship carried with it the highest form of fiduciary duties, that the incorporation of the company did not alter these duties, and that the company was never abandoned. (Tr.

at 251.) Judge Miller found Professor Freeman's testimony not credible because it was based exclusively on Kaj's self-serving and un-supported version of events. (Order at 14.)

Respondents presented the expert testimony of Professor Martin McWilliams ("Professor McWilliams"). Professor McWilliams opined that "the [Respondents] in this case have acted in good faith and not breached their duties – the various fiduciary duties that they owed..." (Tr. at 333.) He described Professor Freeman's opinion as "conflating" the varying duties the individual parties owed one another at different times. (*Id.*) He explained that the parties' duties arising out of VP Enterprises morphed during their course of their relationship. (Tr. at 333-34.) They first owed one another duties as promoters of the venture. (*Id.*) Second, upon incorporation, they owed one another duties defined by statute, which were less than those applicable during the promoter stage. (Tr. at 335-36.) And, third, once Verizon denied VP Enterprises' application the venture was abandoned and the duties extinguished. (Tr. at 342-43.) Professor McWilliams testified that after reviewing the Complaint and listening to trial testimony, he knows of no allegations of wrong doing prior to Verizon's denial of VP Enterprises' application. (Tr. at 339.) Judge Miller found Professor McWilliams' testimony to be based on independent evidence and therefore credible. (Order at 24).

Judge Miller's View of the Facts

On December 31, 2014, Judge Miller ruled in favor of Respondents on all claims and made the following credibility findings in Respondents' favor:

- **Credible:** Testimony from a Verizon witness indicating that Kaj's failure to disclose his litigation history contributed to the denial of VP Enterprises' application (*See* Order at 11, ¶18);
- **Credible:** Testimony from a Verizon employee that, in her nearly three decades with the company, she had never seen an applicant

receive agency status after they had previously been denied (*See* Order at 11, ¶ 21);

- **Credible:** Testimony indicating that, when he and Krish discussed a few stores in Columbia, South Carolina, Kaj had no expectation that he would be involved in any stores other than the few in Columbia (*See* Order at 13, ¶ 38);
- **Credible:** All evidence that anyone – including Kaj – can apply for a Verizon agency status (*See* Order at 13, ¶ 40);
- **Credible:** Krish's testimony regarding what he disclosed to Kaj on October 18, 2008, concerning his opening of a Verizon store with a company other than VP Enterprises (*See* Order at 15, ¶ 3); and
- **Credible:** Respondents' expert – Professor McWilliams – testimony (Order at 14, ¶44.), including testimony that Kaj had abandoned VP Enterprises, which was supported by documentary evidence and not just a particular parties' self-serving testimony (*See* Order at 24, ¶ 29).

Judge Miller also found that the following testimony and evidence presented by Kaj was ***not credible***:

- **Not Credible:** Kaj's claim that it was ***his idea*** to pursue an agency relationship with Verizon through VP Enterprises (*See* Order at 9, ¶ 3);
- **Not Credible:** Kaj's testimony regarding what Krish did, or did not, disclose to him regarding P Comm on October 18, 2008 (*See* Order at 15, ¶ 3);
- **Not Credible:** Testimony asserting that Krish told Kaj he would use P Comm to resurrect VP Enterprises (*See* Order p. 12, ¶ 33);
- **Not Credible:** Kaj's testimony that he directed Krish to find out why Verizon denied VP Enterprises' application (*See* Order at 23, ¶ 28);
- **Not Credible:** Any evidence presented by Kaj to support his claim of fraudulent concealment (*See* Order at 17, ¶ 8-9); and
- **Not Credible:** Testimony of Kaj's expert – Professor Freeman – because it was only consistent with Kaj's self-serving view of the facts (*See* Order at 14, ¶ 44).

Given these findings, it is of little surprise that Kaj's attorneys attempted to re-cast this as an equitable case in order to gain a more favorable standard of review.

ARGUMENT

I. STANDARD OF REVIEW.

After trial, Appellant dismissed all substantive claims except those for breach of fiduciary duty. (Pl. Opp. to 41(b) Motion at 2, n.1.) Although claims for breach of fiduciary duty are usually legal, *see Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005), Appellant claims that the fiduciary duty claims in this case are equitable because the primary relief sought was equitable. *See Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (recognizing that "a breach of fiduciary duty may sound in equity if the relief sought is equitable"). From this premise, Appellant urges this Court to disregard Judge Miller's extensive factual findings because "[i]n an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." (App. Br. at 8.)

Appellant's argument regarding the standard of review fails in two ways. First, the fiduciary duty claims in this case sound in law, not in equity. Accordingly, the Court must uphold Judge Miller's factual findings unless they are "without evidentiary support." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000). Second, even if this were an equity case, the Court would not be free to simply disregard the trial court's factual findings.

A. Appellant's claims for breach of fiduciary duty sound in law, not in equity.

"Characterization of an action as equitable or legal depends on the appellant's main purpose in bringing the action." *Verenes*, 387 S.C. at 16, 690 S.E.2d at 773 (internal quotation marks omitted). "The main purpose of the action should generally be ascertained from the body of the complaint," but "resort may also be had to the prayer for

relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (internal quotation marks omitted).

In this case, both the body of Appellant's Second Amended Complaint and the prayer for relief make clear that Appellant's primary goal in bringing this action was to obtain legal relief in the form of compensatory and punitive damages. The Second Amended Complaint asserted 13 causes of action, which included nine substantive claims: Dissolution/Buyout (count 1); statutory claims against Vijay for violation of duties owed as a director and against Krish for violation of duties owed as an officer (counts 2, 3); common law claims against Vijay and Krish for breach of fiduciary duty as officers of VP Enterprises (count 4), or as partners or joint venturers with Kaj (count 6); fraud (count 7); constructive fraud (count 8); negligent misrepresentation (count 9); and violation of the South Carolina Unfair Trade Practices Act (count 12).[14] After trial, Appellant explicitly abandoned his claims for fraud, constructive fraud, negligent misrepresentation, and violation of the Unfair Trade Practices Act. The trial court rejected Appellant's dissolution claim, reasoning that because VP Enterprises had been administratively dissolved in 2011, no further relief was possible. (Order at 18.) Appellant does not argue that this ruling was in error.

Accordingly, the legal/equitable distinction turns on the nature of the relief Appellant sought for his fiduciary duty claims (counts 2, 3, 4, and 6). In each of these

[14] In the other four counts of the Second Amended Complaint, Appellant also asserted "causes of action" for "Accounting" (count 5); "Equitable Disgorgement" (count 10); "Constructive Trust" (count 11); and "Declaratory Judgment" (count 13). These are all remedies, not substantive claims. Additionally, these four counts all sought essentially the same remedy: P Comm's profits. For example, the declaratory judgment count demanded that Appellant be given "a 50% interest in P Communications," while the constructive trust and equitable disgorgement counts demanded that Appellant be given all of P Comm's "profits and revenues."

claims, Appellant listed "actual and punitive" damages as the first form of relief sought. (2d Am. Cplt. ¶¶ 62, 66, 70, 78.) Consistent with these counts' emphasis on legal relief, the prayer for relief seeks damages:

> WHEREFORE, the Plaintiff, individually, and on behalf of VP Enterprises, Inc., prays:
>
> A. For judgment against the Defendants in favor of VP Enterprises, Inc. for ***actual and punitive damages*** due to the breaches of fiduciary duty by Defendants Vijay Patel and Krish Patel ...;
>
> B. Alternatively, for judgment against Defendants in favor of Kaj Patel for 50% of the ***damages*** to VP Enterprises, Inc. due to the breaches of fiduciary duty by Defendants Vijay Patel and Krish Patel ...

(Am. Cplt. at 25 (emphasis added).) Appellant's request for equitable relief—the relief he now contends was his primary goal in bringing the action—is contained in a single, boilerplate sentence. (*Id.* (asking "[f]or an accounting, constructive trust, disgorgement and such other equitable relief as the Court deems just and proper").) In sum, Appellant's breach of fiduciary duty claims are clearly legal, not equitable. Accordingly, the Court should apply the standard of review for cases at law.

B. Appellant inaccurately states the standard of review in equity cases.

As discussed above, the standard of review for equitable claims does not apply to this appeal. But even if it did, Appellant has stated the standard incorrectly. According to Appellant, appellate courts in equity cases "may find facts in accordance with their own views of the preponderance of the evidence," without regard for the trial court's findings. (App. Br. at 8.) This is not correct. While the appellate court in an equity case is authorized to make its own determination of the facts, "this broad scope [of review] does not relieve the appellant of his burden to show that the trial court erred in its findings." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). Moreover, although

the appellate court ***may*** substitute its findings for those of the trial court, it is never ***required*** to do so. To the contrary, the appellate court must give due respect to "the findings of the trial judge, who was in a better position to determine the credibility of the witnesses." *Id.* This caution is especially important in this case, in which critical factual aspects of Appellant's story are supported ***only*** by his testimony. The absence of documentary evidence supporting Appellant's factual claims makes witness credibility, which this Court cannot judge from the cold record, all the more important. *Accord Crossland v. Crossland*, 408 S.C. 443, 452, 759 S.E.2d 419, 424 (2014) (reiterating the "sound principles underlying the proper review of an equity case," namely, "the superior position of the trial judge to determine credibility and the imposition of a burden on an appellant to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court").

II. APPELLANT'S CLAIMS ARE TIME-BARRED.

The trial court granted judgment to Respondents primarily on the basis that Appellant's claims were time-barred. For the reasons set forth below, this Court should affirm the trial court's findings and conclusions on this point.

A. Appellant did not meet the required two-year limitation for his legal claims.

The South Carolina Business Corporation Act, S.C. Code Ann. §§ 33-8-300, 420(e), codifies the duties of corporate officers and directors. *See Clearwater Trust v. Bunting*, 367 S.C. 340, 350, 626 S.E.2d 334, 339 (2006). Therefore, all of Appellant's fiduciary duty claims "must be brought within the statute's terms," *id.*, including its statute of limitations:

> An action against an officer for failure to perform the duties imposed by this section must be commenced within three years

> after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.

S.C. Code Ann. § 33-8-420(e). Thus, Appellant's claims are time-barred unless filed within two years of the date he knew or should have known about his cause of action. *See Clearwater Trust,* 367 S.C. at 353, 626 S.E.2d at 340.

"South Carolina's statute of limitations requires very little to start the clock." *Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (internal quotation marks omitted). 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. *See Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). Rather, a claim accrues (and the statute of limitations begins to run) the moment "the facts and circumstances" known to the plaintiff would "put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Id.* The determination of whether a reasonable person knew or should have known of a potential claim is an objective test, which does not rely on what the plaintiff subjectively thought or believed. *See Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994).

Appellant claims Respondents breached their fiduciary duties by "divert[ing] a corporate opportunity of VP Enterprises to develop, open, and operate Verizon Wireless stores under the name of VP Enterprises." (2d Am. Cplt. ¶¶ 60, 64.) As Appellant admitted at trial, he learned the central fact necessary to his claim—that Krish had obtained a agency status relationship with Verizon through an entity other than VP

Enterprises—no later than October 18, 2008.[15] (Tr. at 91-92.) It was at that point that a reasonable person in Appellant's position should have known that some claim against Krish might exist. However, Kaj did not file suit until November 4, 2011—well past the two-year limitations period.

Attempting to avoid the time bar, Kaj argues that Krish fraudulently concealed the existence of a claim by failing to reveal certain information. This argument lacks merit.

The fraudulent concealment doctrine is a form of equitable estoppel. *See Wegner v. Pella Corp.*, 2015 WL 2089658, at *3 (D.S.C. May 5, 2015). It applies when the defendant has concealed "the plaintiff's right to bring a cause of action," (*Clearwater Trust*, 367 S.C. at 352, 626 S.E.2d at 340.), and thus is a specific application of the general rule that "a defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit." *Hedgepath v. AT&T*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001). In order to estop a defendant from asserting a statute-of-limitations defense on the basis of fraudulent concealment, the plaintiff must show that (1) the defendant engaged in "[d]eliberate acts of deception ... calculated to conceal" the cause of action from the plaintiff, *Doe v. Bishop of Charleston*, 407 S.C. 128, 140, 754 S.E.2d 494, 500-01 (2014); (2) that the plaintiff relied on the defendant's misrepresentations or omissions; and (3) that the plaintiff "lacked either knowledge, or the means of knowledge, of the true facts," *Maher*, 331 S.C. at 382, 500 S.E.2d at 209.

[15] Appellant actually stated at trial that he knew in August or September of 2008. (Tr. at 187-88.) Although this testimony is helpful to Respondents, this was likely a misstatement. The documentary evidence, and the other testimony, indicates that Appellant learned that Krish had obtained agency status with Verizon on October 18, 2008.

As the Supreme Court explained in *Clearwater Trust*, when an officer's or director's breach of duty has been fraudulently concealed, the plaintiff must file suit "within two years after the time when the cause of action is discovered, or should reasonably have been discovered."[16] *Clearwater Trust*, 367 S.C. at 352-53, 626 S.E.2d at 340 (internal quotation marks omitted). Appellant maintains that Respondent Krish concealed the relevant facts until May or June of 2010, when Kaj finally learned the name of Krish's company (P Communications) and the last name of Krish's partner (Phillips).

Kaj's position cannot be squared with South Carolina precedent applying the fraudulent concealment doctrine. This Court's decision in *Maher v. Tietex Corp.* (331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998)), is particularly relevant. When Tietex hired William Maher in 1985, as a salesman for its newly established tickings division, it promised that 50% of the company's pretax profits would be divided among sales personnel. *Id.* at 375, 500 S.E.2d at 206. In 1989, having never received a bonus, Maher became concerned that the reason the tickings division had never shown a profit (and Maher had never received a bonus) was because Tietex was improperly allocating costs to the tickings division. Company personnel attempted to allay Maher's concerns by assuring Maher that he was moving up in the company and that other, better, bonus plans

[16] According to Appellant, "[i]n cases of fraudulent concealment, neither S.C. Code Ann. § 33-8-420 nor the *Clearwater Trust* court have imposed on plaintiff the duty of reasonable diligence in discovery of a defendant's breach." (App. Br. at 22-23.) This is incorrect. The question in *Clearwater Trust* was which limitations period—the three-year period under the accrual rule, or the two-year period under the discovery rule—applied when a cause of action had been fraudulently concealed. *See Clearwater Trust*, 367 S.C. at 351-52, 626 S.E.2d at 340. The Supreme Court held that the discovery rule's two-year period controlled. The discovery rule, as expressed in the statute and as known at common law, requires a plaintiff to exercise reasonable diligence.

would be available to him in the future. *See id.* at 378-79, 500 S.E.2d at 208. From the outset, Maher viewed these responses as a "song and dance," and he walked away from these conversations "without really getting a satisfactory response to his concerns." *Id.* at 379, 500 S.E.2d at 208. Maher filed suit in 1994. When Tietex raised the statute of limitations as a defense, Maher argued that the company should be estopped from pleading the statute of limitations because it had concealed the true facts from him. This Court disagreed:

> [An] essential element of equitable estoppel requires that the party claiming estoppel lacked either knowledge, or the means of knowledge, of the true facts. Maher testified that he was dissatisfied with Lawson's equivocal answers about the plan in 1989 and 1990, but that after Lawson explained other potential for compensation from advancement, he "walked away."

Id. at 382, 500 S.E.2d at 209-10.

The facts of this case echo the facts of *Maher*. In this case, the evidence shows that Appellant was immediately suspicious of Krish's conduct in opening a Verizon store with Corby's assistance. Appellant testified that when he arrived at Vijay's house for a small gathering on October 18, 2008:

> I'd asked Vijay if Krish was going to be joining us. And he said, yeah, he would be later on, once he gets back from his Verizon grand opening.
>
> And I said, Verizon grand opening? Is this – did he get a job back with them or is this something to do with our ... Verizon plan that we were working on. ***And he immediately clammed up*** and said, well, you know, you're going to have to talk to Krish about this. ...
>
> Krish came in probably later on that evening ....
>
> And I asked him, ... what is going on with this Verizon thing? And I said, ***is this related to what we're doing*** or is this something different? He says, ... I found this guy who already had a Verizon business and a license. And I just recently joined up with him to

> get our foot in the door, since we were having the issue with, you know, not finding out from Verizon why we've been denied.
>
> So I asked him, I said, you know, ***you should have told me about this before.***

(Tr. at 91-92 (emphasis added).) Thus, in this case as in *Maher*, Appellant's own testimony shows that he was immediately suspicious of Krish's actions, and of Krish's explanation for those actions.

Moreover, Appellant testified regarding his continued suspicions of Krish's alleged promise, in October 2008, that it would take "eight to twelve months"—*i.e.*, until June-October 2009—to get Corby out, after which time Appellant would be in. (Tr. at 92.) Appellant was dissatisfied with this assurance, which he disparaged as "some sort of an arrangement that I didn't have details for." (Tr. at 188.) Appellant testified that in the months following their October conversation, he repeatedly asked Krish about when he would be brought into the operation. (Tr. at 95-97; *see* Tr. at 100 ("Q. Can you tell the Court about any conversation that you can recall where you *did not* discuss with Krish the Corby deal? A. No." (emphasis added)).)[17] During this period, Appellant learned that Krish had opened several more Verizon stores. (Tr. at 100.) Like the plaintiff in *Maher*, Appellant was ***never*** satisfied with Krish's promises, and his suspicions only increased over time:

> It was started from, yeah, we can't find anything from Verizon. I'm with Corby now. And it's going to take eight to twelve months to get out.
>
> So that was our plan, wait until eight to ten months, get him out. And then we'll continue. ***So that brought us to ... late 2009.***

[17] There is not one mention of this in the many, many emails Kaj sent Krish and Vijay after October 2008.

> And when that came and went, ***that's when I was getting antsy and saying, hey, you know, are we doing this or not?***

(Tr. at 194-95 (emphasis added).)

In this case, as in *Maher*, Appellant was plainly dissatisfied with Krish's assurances ***from the outset*** – in October 2008. Moreover, Krish never made any attempt to conceal from Appellant that he (Krish) had "pursued a Verizon opportunity by a different method" than VP Enterprises (Tr. at 187), nor did he attempt to hide from Appellant the fact that he had opened other locations. (Tr. at 201.) In short, a reasonable person in Appellant's position should have been known that he might have a claim at least in October 2008, and certainly no later than October 2009, by which time Krish had repeatedly failed to fulfill the alleged promise to bring Appellant in. *Accord Kreutner v. David*, 320 S.C. 283, 286, 465 S.E.2d 88, 90 (1995) (holding plaintiff should have been aware of claim based on attorney's failure to record a mortgage after the attorney "had stonewalled more than *nine requests* for the mortgage" (emphasis in original)).

Despite all of this, Appellant contends that his claims are not time-barred because "Krish failed to disclose critical information" necessary to his claim. (App. Br. at 25.) But, the test for whether the limitations period has begun to run is not whether the plaintiff has all (or even many) of the facts; the test is whether the information the plaintiff did have was enough to put him on notice of a potential claim. "A party cannot escape the application of [the discovery] rule by claiming ignorance of existing facts and circumstances, because the law also provides that if such facts and circumstances *could have been known* to the party through the exercise of ordinary care and reasonable diligence, the same result follows. *Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (emphasis in original).

In view of the knowledge Appellant did have in October 2008—*i.e.*, that Krish had opened a Verizon store through P Comm instead of through VP Enterprises—the facts allegedly concealed by Krish are of little moment. First, Appellant claims that Krish's statement that he had "'joined with another individual who obtained a Verizon license' conveys the unmistakable impression that" Krish's partner had used his own business plan, rather than "repackaging" VP Enterprises' plan. According to Appellant, if Corby had used his own business plan, Appellant would not have a claim for usurpation of corporate opportunity. (App. Br. at 25.) This turns the discovery rule on its head: Appellant is essentially arguing that Krish had a duty to disclose facts showing that he (Krish) would not have a *defense* to a claim. The discovery rule, however, does not ask whether the known facts put the plaintiff on notice of a *successful* claim against the defendant; the question is whether the known facts put the plaintiff on notice of the possible *existence* of a claim.

Appellant also claims that Krish should have told him "the names of the new company and the individual supposedly running it."[18] (App. Br. at 25.) This information does not change the picture for purposes of the discovery rule. There is no material difference, in terms of Appellant's ability to perceive the existence of a possible claim against Krish, between what Appellant actually knew—that "Krish opened a Verizon store with somebody named Corby"—and what Appellant claims he should have been told—that "Krish opened a Verizon store with somebody named Corby Phillips, through a company called P Communications." At best, disclosure of this information would have

[18] Notably, however, many of the emails Krish sent Kaj after October 2008 identified the exact name of the entity and him as the Director of Operations for a "Verizon Wireless Retailer." (*E.g.*, Def. Trial Doc. 140.)

made it easier for Appellant to investigate a potential claim against Krish. It does not, however, tell Appellant anything he did not already know about the existence of a possible claim against Krish.[19]

Several of the allegedly concealed facts do not support Appellant's fraudulent concealment argument because they have nothing to do with Appellant's claim for usurpation of corporate opportunity. In order to establish fraudulent concealment, Appellant must show that the facts concealed would have put him on notice of his claim—in other words, the concealed facts must at least be relevant to Appellant's claim for usurpation of corporate opportunity. But, four facts supposedly concealed by Krish are utterly irrelevant to Appellant's usurpation claim: that P Comm used the same attorney as VP Enterprises; that P Comm used the same bank as VP Enterprises; that Krish's new partner was merely a "straw man"; and "the true reason" why Krish quit his job with Verizon.

By Appellant's own admission, Krish informed him on October 18, 2008, that he had opened a Verizon store without Appellant. Without a doubt, Appellant at that moment either knew or through "exercise of reasonable diligence" should have known that he might have a claim against Respondents. However, he did not file his action until November 4, 2011—well outside the two-year window. His claims are barred.

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[19] Moreover, if Appellant needed this information in order to "research the background of this venture," he could simply have asked Krish for Corby's last name, or for the name of the company. Even without Corby's last name, a search for "Corby" in the Secretary of State's online database of registered agents would have revealed that, in October 2008, Corby Phillips was the registered agent for a company called P Communications.

B. If Appellant's fiduciary duty claims are equitable, they are barred by laches.

As discussed above, all of Appellant's fiduciary duty claims are legal, not equitable. Based on his belated re-characterization of his claims as equitable, however, Appellant argues that the statute of limitations does not control and that his claims should not be barred by laches. The trial court ruled that, to the extent Appellant's claims sound in equity, they are barred by laches. This ruling rested on a proper exercise of the trial court's discretion, and it should be affirmed by this court.

"Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004) (internal quotation marks omitted). An action may be barred by laches when the plaintiff, "knowing his rights does not seasonably assert them," and the defendant has, during the delay, detrimentally changed his position, such as by incurring expenses or entering into obligations. *Id.* Application of laches "is highly fact-specific and each case must be judged by its own merits." *Id.* at 216, 603 S.E.2d 602. For this reason, "the determination of whether laches has been established is largely within the discretion of the trial court." *Id.*

The trial court correctly determined that Appellant unreasonably delayed in filing suit. Although not strictly bound by the statute of limitations, a plaintiff in equity cannot simply sleep on his rights. When laches is asserted, a plaintiff in equity must be able to demonstrate that there was "no knowledge of the wrong committed and ***no refusal to embrace [an] opportunity to ascertain facts***." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 599 (Ct. App. 1999) (emphasis added). Appellant cannot make this

showing, because he unquestionably refused to ascertain the facts of his claim after Krish told him, in October 2008, that he (Krish) had opened a Verizon Wireless store through a company other than VP Enterprises.

Appellant's delay was unreasonable even if, as he claims, he had no duty to investigate his claim until June 2010, when Krish told Appellant the names of the business and of his erstwhile partner. Even after he obtained this knowledge, Appellant slept on his rights for another 17 months, until he finally filed suit in November 2011. In the meantime, Krish changed his position by continuing to open multiple Verizon stores. *Compare Arceneaux v. Arrington*, 284 S.C. 500, 503-04, 327 S.E.2d 357, 359 (Ct. App. 1985) (holding claim barred by laches, although plaintiffs filed within two years of obtaining actual knowledge of covenant violation, because plaintiffs were on notice of covenants but took no action when the defendant began construction), *with Gibbs v. Kimbrell*, 311 S.C. 261, 269-70, 428 S.E.2d 725, 730 (Ct. App. 1993) (holding claim not barred when plaintiffs filed suit within five months of defendant beginning construction, even though construction was completed before suit was filed).

The trial court also correctly found that Respondents were prejudiced by Appellant's unreasonable delay. Appellant was on notice of his claim in October 2008, and yet he did nothing while Krish opened store, after store, after store. By the time Appellant finally got around to filing suit in November 2011, Krish had opened numerous stores—and Appellant's complaint demanded all of the revenues from those stores and 50% ownership going forward.

Appellant argues that Krish has "unclean hands" because of his "misrepresentations and lack of disclosures," and thus should not be able to assert laches.

(App. Br. at 33.) The trial court properly rejected this argument on the basis that the claimed misrepresentations[20] were not material to Appellant's "ability or responsibility to timely bring his claims." (Order at 17.) Just as the alleged misrepresentations and nondisclosures do not provide a basis for tolling the statute of limitations, they do not support a finding of unclean hands. Here, nothing material was hidden. Appellant knew or should have known of a potential claim in October of 2008. His only effort to ascertain any further facts came after he realized Krish's success, at which point he suddenly ran to court. By then, it was much too late. If Appellant had any claims against Respondents, he slumbered on them far too long and his claims should be equitably barred.

III. IN ADDITION TO BEING TIME-BARRED, APPELLANT'S FIDUCIARY DUTY CLAIMS ARE MERITLESS.

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., v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012). In this case, Kaj claimed that Respondents violated their fiduciary duties by taking for themselves a business opportunity—namely, the possibility of becoming a Verizon agent and opening Verizon-branded stores—that rightfully belonged to VP Enterprises. The trial court properly granted judgment to Respondents on this claim. First, no fiduciary duty existed at the time Respondents allegedly usurped VP Enterprises' corporate opportunity. Second, regardless of whether a fiduciary duty existed at the relevant time, VP Enterprises had no interest or expectancy in the opportunity of an agency relationship with Verizon, because (1) Verizon had already refused to deal with

[20] Krish denies that he misrepresented, or failed to disclose, anything.

VP Enterprises by denying its application for agency status, and (2) this is not a zero-sum game—the fact that Verizon granted P Comm agency status does not mean that Verizon could not grant agency status to another applicant, whether VP Enterprises or any other company. In fact, the evidence at trial showed that Verizon granted agency status to other applicants after it approved P Comm's application—meaning that P Comm's acquisition of agency status did not deprive VP Enterprises of anything.

A. The Corporate Opportunity Doctrine.

The corporate opportunity doctrine was long ago set forth in an influential decision by the Supreme Court of Delaware. *See Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939). The *Guth* court articulated two aspects of the doctrine, which have become known as the "*Guth* Rule" and the "*Guth* Corollary." *See Rapistan Corp. v. Michaels*, 511 N.W.2d 918, 922-23 (Mich. Ct. App. 1994). The *Guth* Rule provides:

> [I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.

Guth, 5 A.2d at 511. The *Guth* Corollary provides:

> [W]hen a business opportunity comes to a corporate officer or director ***in his individual capacity*** rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has ***no interest or expectancy***, the officer or director is ***entitled to treat the opportunity as his own***, and the corporation has no interest in it.

Id. at 510-11 (emphasis added).

B. Verizon's denial of VP Enterprises' application thwarted VP Enterprises' sole purpose, relieving Krish of any further fiduciary obligations.

As Kaj testified at trial, VP Enterprises' sole purpose "was to start and operate a chain of independent Verizon Wireless stores." (Tr. at 43.) Verizon's denial of VP Enterprises' application for agency status made accomplishment of this purpose impossible. The evidence shows that after the denial, Kaj, Vijay, and Krish abandoned VP Enterprises and concentrated their efforts pursuing other ventures through KVP.[21] From that point on, none of the parties owed any fiduciary duty to each other or to VP Enterprises. *Accord Engenium Solutions, Inc. v. Symphonic Techs., Inc.*, 924 F. Supp. 2d 757, 793 (S.D. Tex. 2013) ("A corporation's financial inability to take advantage of the corporate opportunity or ***abandonment of the business opportunity*** are defenses to a charge of usurpation of corporate opportunity." (emphasis added)).

At trial, Appellant claimed that he instructed Krish to find out why VP's application had been denied and remedy the issue. Appellant first testified about this at trial; he never said anything to this effect during his deposition. Appellant's trial testimony is also unsupported by any documentary evidence. Although Appellant regularly communicated with Respondents via email in the weeks and months after VP Enterprises' application was denied—*i.e.*, during the period when, according to Appellant's trial testimony, Krish was supposed to be investigating the denial—there is not a single email touching on any such investigation. Further, the application form makes clear that Verizon has "absolute discretion" to grant or deny any application, and

[21] In fact, after the application was denied VP Enterprises ***did nothing*** and the company was administratively dissolved by the South Carolina Secretary of State on June 22, 2011.

that "Verizon Wireless' only obligation pursuant to this application is to tell the applicant after final review whether the application has been approved or denied." (Tr. at 157.) Krish testified that, consistent with Verizon's policy, his contacts at Verizon would not give him any information when he asked why VP Enterprises' application had been denied. (Tr. at 384-85.) This evidence led Judge Miller to conclude, "[Appellant's] testimony that he directed Krish to continue to pursue the Verizon agency relationship on behalf of VP [Enterprises] is not credible, as it is not supported by any other evidence. In fact, the evidence presented at trial indicates that [Appellant] had moved on to other ventures." (Order at 23, ¶ 28.)

C. Krish could not usurp a corporate opportunity that did not exist.

"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 Ct. App. 2002). Appellant argues that Respondents usurped a corporate opportunity from VP Enterprises—and thus breached their fiduciary duties—by obtaining a Verizon agency relationship through P Comm, instead of through VP Enterprises. To prove that the Verizon agency relationship was a corporate opportunity belonging to VP Enterprises, Kaj must show either that VP Enterprises had "an interest, actual or in expectancy, in the" relationship, or, alternatively, that Krish "hinder[ed] or defeat[ed] the plans and purposes of" VP Enterprises. *Nw. Terra Cotta Corp. v. Wilson*, 219 N.E.2d 860, 864 (Ill. Ct. App. 1966). Kaj cannot make either showing because (1) Verizon denied VP Enterprises' application for an agency relationship, and thus VP had no interest or expectancy in the relationship acquired by P Comm; and (2) Verizon's approval of P Comm's application did not preclude the possibility of Verizon granting

other applications—as it, in fact, did—and thus did not hinder or defeat VP Enterprises.

1. VP Enterprises had no interest or expectation in an agency relationship after Verizon denied its application.

A plaintiff cannot prove the existence of a corporate opportunity merely by pointing to something the corporation would *like* to have; a corporate opportunity exists only if the corporation has "a ***legitimate*** interest or expectancy in … a particular business or opportunity." *Engenium Solutions*, 924 F. Supp. 2d at 793 (emphasis added); *see* BLACK'S LAW DICT. 560 (6th ed. 1991) (defining "interest" as "a right, claim, title, or legal share in something"). "A business opportunity arises from a beachhead consisting of a legal or equitable interest or an expectancy growing out of a pre-existing right or relationship." *MAU, Inc. v. Human Techs., Inc.*, 619 S.E.2d 394, 397 (Ga. Ct. App. 2005) (internal quotation marks omitted). The "interest or reasonable expectancy" test "focuses on whether the corporation could realistically expect to seize and develop the opportunity." *Shapiro v. Greenfield*, 764 A.2d 270, 278 (Md. Ct. Spec. App. 2000); 18B Am. Jur. 2d *Corporations* § 1536 ("[T]he absence of an expectancy will render the corporate opportunity principle inapplicable.").

Once Verizon denied VP Enterprises' application on February 26, 2008, VP Enterprises no longer had any legitimate interest or expectancy in obtaining agency status. Ms. Blew, who manages Verizon's local agents in South Carolina, could not recall "a single instance when an individual's name was on an application and that person was denied and they reapplied and it was accepted." (Tr. at 306.) There is no evidence that any of the parties thought that re-application would be successful. Beyond asking Krish to see if he could find out why VP Enterprises' application was denied—which, as Krish testified, he could not—there is no evidence that the parties discussed either possible

shortcomings in their application, or the possibility of revising and resubmitting the application. The evidence shows, rather, that after the denial the parties focused their time and energy on the business operations of KVP, efforts which included draining the funds from VP Enterprises' bank account so they could be used for KVP's business.[22] In short, all of the evidence shows that once its application was denied, VP Enterprises no longer had any reasonable expectation of becoming a local agent for Verizon.

Kaj cites *Energy Resources Corp. v. Porter*, 438 N.E.2d 391 (Mass. Ct. App. 1982), to support his argument that Verizon's denial of VP's application did not constitute a refusal to deal. Although Kaj claims that the facts of *Energy Resources* are "remarkably similar" to the facts of this case (App. Br. at 40), that is not so. The parties in *Energy Resources* were the plaintiff company, ERCO, and the defendant, James Porter. While employed as ERCO's vice president, Porter and some colleagues at Howard University (Jackson and Cannon) agreed that ERCO and Howard would jointly apply to the Department of Energy (DOE) for a research grant. Jackson and Cannon believed the DOE would be more likely to approve the grant if the primary applicant were a minority institution like Howard, which is an historically black college. Accordingly, the draft grant proposal listed Howard University as the applicant and ERCO as a subcontractor. Jackson began to have second thoughts about working with ERCO, a white-owned company, and eventually proposed that Porter leave ERCO and form his own company, which Jackson would then substitute for ERCO on the grant application. Ultimately, that

[22] Appellant and Vijay opened the account with $10,000 ($5,000 each). This money was transferred, with Appellant's knowledge, in July 2008 leaving no money in the VP Enterprise account.

is what happened: after DOE approved the grant application, Porter quit his job and formed a new company, which was then substituted for ERCO.

According to Appellant, ERCO = VP Enterprises, Porter = Krish, and Howard University = Verizon. That cannot be correct, because ERCO and Howard University started out as ***partners***—something VP Enterprises and Verizon never were. Rather, Verizon's role in this case is analogous to ***DOE's*** role in *Energy Resources—i.e.*, as the entity from which the parties jointly sought a benefit. In *Energy Resources*, Howard University refused to deal with ERCO, its ***co-applicant***, and cut ERCO out of the deal after DOE approved the grant application. In this case, Kaj, Krish, and Vijay were united in submitting VP Enterprises' application to Verizon—there was no dissension in the ranks, as there had been in *Energy Resources*. The refusal to deal in this case came from Verizon, which denied VP's application. *Energy Resources* might be helpful to Kaj if Verizon had granted VP's application and Krish had then substituted P Comm for VP, but those are not the facts of this case.

In addition to *Energy Resources*, Kaj relies on *Production Finishing Corp. v. Shields*, 405 N.W.2d 171 (Mich. Ct. App. 1987) (per curiam). However, there are two critical factual differences between *Energy Resources* and *Production Finishing*, on the one hand, and this case, on the other. First, in both *Energy Resources* and *Production Finishing*, the defendant usurped a corporate opportunity that was presented to him in his capacity as an officer of the company. *See Energy Resources*, 438 N.E.2d at 392-93; *Production Finishing*, 405 N.W.2d at 172. In this case, by contrast, the opportunity came to Krish in his personal capacity: Krish had known Corby since 2003, and had done business with him over the years, completely independent of Krish's business dealings

with Kaj and Vijay. Second, in both *Energy Resources* and *Production Finishing*, the defendant took action to obtain the corporate opportunity before a decision was made by the third party, and *without telling the plaintiff corporation that its opportunity was in jeopardy. See Energy Resources*, 438 N.E.2d at 393 (co-applicant had a change of heart about working with ERCO, but instead of relaying this information the defendant agreed to form his own company); *see also Production Finishing*, 405 N.W.2d at 173 (third party expressed reluctance to give business to plaintiff company; instead of informing his employer, the defendant made his own offer for the business). Again, this case is different. In this case, Krish took no action until after Verizon had denied VP Enterprises' application, and Appellant certainly knew that the application had been denied, *i.e.*, that Verizon had refused to deal with VP.

2. P Comm's acquisition of agency status had no effect on VP's ability to obtain agency status.

The corporate opportunity doctrine does not apply when the defendant's conduct does not preclude the corporation from continuing its pursuit of its business goals. *See, e.g., Nw. Terra Cotta*, 219 N.E.2d at 864. Logically, then, if the defendant's conduct does not affect the corporation's ability to pursue an opportunity, no tort has been committed. *See, e.g., Cooper Linse Hallman Capital Mgmt., Inc. v. Hallman*, 856 N.E.2d 585, 590 (Ill. Ct. App. 2006) (holding that defendants did not usurp corporate opportunity by offering the same kind of investment fund as the plaintiff company, because "more than one company may offer that form of investment" and "plaintiff offered no evidence that it cannot also capitalize on its success with" that type of fund).

Verizon agency status reflects that Verizon has given permission for a company to sell Verizon's products and services. As Verizon district manager Ms. Blew testified at

trial, anyone is eligible to apply. (Tr. at 303.) Ms. Blew also testified that since 2008, 130 Verizon stores had opened in South Carolina. The evidence thus shows that P Comm's acquisition of agency status could not have hindered VP's corporate purpose, because the opportunity to obtain agency status remained open.

Attempting to overcome these facts, Kaj argues that a corporate opportunity "does not have to be unique," so long as it is within the corporation's purpose. (App. Br. at 47.) The cases Kaj cites in support of this claim, however, all involved unique opportunities. *See Cent. Ry. Signal Co. v. Longden*, 194 F.2d 310 (7th Cir. 1952) (opportunity to manufacture 20 mm anti-aircraft shells; no indication that more than one contract was available); *Se. Consultants, Inc. v. McCrary Eng'g Corp.*, 273 S.E.2d 112, 116 (Ga. 1980) (opportunity for specific planning contract); *Hill v. Se. Floor Covering Co.*, 596 So.2d 874 (Miss. 1992) (opportunity for specific asbestos encapsulation project).[23] In contrast, courts have refused to apply the corporate opportunity doctrine when the alleged opportunity was not unique. *See, e.g.*, *In re Repository Techs., Inc.*, 363 B.R. 868, 893 (N.D. Ill. 2007) (rejecting corporate opportunity doctrine when the opportunity to take assignment of a loan was "open to anyone"); *Cooper Linse Hallman Capital Mgmt.*, 856 N.E.2d at 590 (holding defendants did not usurp corporate opportunity by offering an investment that could be offered by anyone). This case is the same: P Comm's success in obtaining agency status did not preclude VP, or anyone else, from also obtaining agency status.

[23] Additionally, in all of these cases the defendant usurped a corporate opportunity that was actually available to the plaintiff company, and which came to the defendant in his capacity as an officer of the plaintiff company—facts which are not present in this case.

IV. APPELLANT WAIVED HIS DERIVATIVE CLAIMS.

The trial court ruled that Appellant waived his derivative claims when, at trial, he "focused exclusively upon the impact that Vijay's and Krish's conduct had upon his ([Appellant's]) individual interest in VP [Enterprises]." (Order at 2.) Also, arising out of the Court's duty "to ensure that a derivative action is maintained only by a shareholder who fairly and adequately represents the interests of the other shareholders," the trial court ruled that Kaj was not a proper derivative representative because he brought this action against VP Enterprises' only other shareholder, Vijay. The trial court's logic is sound and supported by the record, therefore this Court should affirm.

Appellant argues that he did not abandon the derivative claim for two reasons: (1) the caption of the matter indicates that it is a derivative action, and (2) he and his counsel occasionally referenced "taking action on behalf of VP Enterprises" at trial. (App. Br. at 46.) This argument is weak. The case caption shows only that Appellant originally pled this case as a derivative action; it says nothing at all about what happened to the derivative claim thereafter. And, the few times Appellant and his attorney mentioned injury to VP Enterprises, they were simply explaining the facts as they saw them, not supporting any claim by the company against Respondents. For instance, one exchange relied upon by Appellant simply explains why VP Enterprises used Allan Hill as its attorney: "Q. How did VP [Enterprises], and you and Krish decide to get Allan Hill? A. We'd agreed that we'd use Allan Hill." (App. Br. at 46, citing Tr. at 110.)

Additionally—and tellingly—Appellant does not address the trial court's ruling that he was not a proper derivative representative. (*See* Order at 2.) This point is, therefore, conceded. Even if it is not, it is abundantly clear that the trial court was correct. "[A] derivative action may not be maintained if it appears that the plaintiff does not fairly

and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." S.C. R. Civ. P. 23(b)(1). As the trial court ruled, because the only two shareholders of VP Enterprises—Kaj and Vijay—are, respectively, the Plaintiff/Appellant and a Defendant/Respondent in this action, Appellant could not fairly and adequately represent the interests of "the shareholders" as a group. "Because of this direct conflict," Judge Miller opined, "[Appellant] is not actually pursuing a derivative claim on behalf of VP [Enterprises]; but rather a direct action against his fellow shareholder, Vijay, and the other defendants[/Respondents]." (Order at 2.) This Court should affirm.

V. APPELLANT IS NOT ENTITLED TO ANY EQUITABLE REMEDIES.

Appellant argues that he is entitled to the equitable remedies of an accounting, equitable disgorgement, and imposition of a constructive trust. (App. Br. at 48-50.) Appellant claims he is entitled to these remedies because "Respondents ... breach[ed] ... their fiduciary duties to VP Enterprises and [Appellant]." (*Id.* at 49.) However, because Appellant cannot establish liability on his claims, he is necessarily not entitled to equitable relief.

Further, with respect to Appellant's claim for an accounting, the trial court correctly found that there were no grounds for an accounting of VP Enterprises—in no small part because VP Enterprises was administratively dissolved in 2011—and that Appellant cannot seek an accounting from P Comm because he has never been a shareholder of that company. *See* S.C. Code Ann. §§ 33-18-400, -410(a)(5).

VI. APPELLANT FAILED TO PROVE DAMAGES, A NECESSARY ELEMENT OF HIS FIDUCIARY DUTY CLAIMS.

This Court may affirm for any grounds appearing in the record. S.C. App. Ct. R. 220(c) ("The appellate court may affirm any ruling, order of judgment upon any ground(s) appearing in the Record on Appeal."). The trial of this matter was bifurcated by agreement of the parties and approval of the trial court. (Order at 1.) After trial of the liability phase, the trial court granted judgment to the Respondents for the reasons set forth in the Order. The trial court did not, however, address Appellant's failure to present evidence of damages. This failure is fatal to Appellant's claims and apparent from the Record on Appeal. It is, therefore, an additional sustaining ground on appeal.

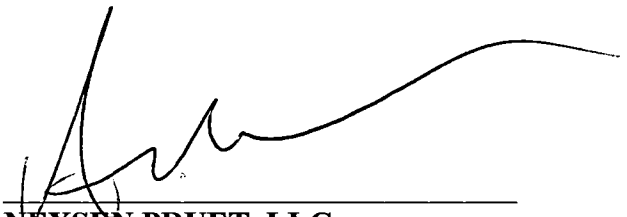
To establish Respondents' liability for breach of fiduciary duty, Appellant was required to prove "(1) the existence of a fiduciary duty, (2) breach of that duty ..., and (3) ***damages*** proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co.*, 399 S.C. at 335-36, 732 S.E.2d at 173 (emphasis added). Appellant had to prove each of these elements even though liability was tried separately from damages—in other words, Kaj had to present evidence that he sustained ***some*** damage during the liability phase of the trial, even though he did not have to prove a precise amount at that time. *See George C. Miller Brick Co. v. Stark Ceramics, Inc.*, 801 N.Y.S.2d 120 (Sup. Ct. 2005); *LNC Investments, Inc. v. First Fid. Bank*, 2000 WL 422399 (S.D.N.Y. Apr. 12, 2000); *Hannex Corp. v. GMI, Inc.*, 140 F.3d 194, 203 (2d Cir. 1998); *Viking Produce, Inc. v. Northstar Produce, LLC*, 2012 WL 171391 (Minn. Ct. App. Jan. 23, 2012). Kaj failed to present any evidence of damages during the liability phase, even though it was a necessary element of his claim. Therefore, in addition to the other grounds for affirmance, this Court should affirm the Judge Miller's Order finding no liability on the

basis that Kaj failed to present any evidence of damages, which is an essential element of his claim.

CONCLUSION

For the reasons set forth above, Respondents ask this Court to affirm the judgment of the trial court.

Respectfully submitted,



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Dated: July 27, 2015

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Trial Court Case No.: 2011-CP-23-07388
Appellate Case No.: 2015-000162

Pankaj Patel, individually and derivatively on behalf of Nominal Defendant, VP Enterprises, Inc., ...Appellant,

v.

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

PROOF OF SERVICE

The undersigned does hereby certify, this 27 day of July, 2015, that service of the RESPONDENTS' INITIAL BRIEF was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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July 27, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
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Re: ***Pankaj Patel, individually and derivatively on behalf of Nominal Defendant, VP Enterprises, Inc. v. Krish Patel, Vijay Patel and P Communications, Inc.***
Appellate Case No. 2015-000162

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of Respondents' Initial Brief and Designation of Matter to be Included in the Record of Appeal along with Proof Service in the above matter. Please return a clocked-in copy to me via the enclosed self-addressed, stamped envelope.

By way of copy, I am serving counsel of record with the same. Thank you for your assistance.

Very truly yours,

Andrew A. Mathias

Enclosures
cc: (w/enclosures)
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