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-23-07338
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.

FINAL BRIEF OF APPELLANT

James R. Gilreath (S.C. Bar No. 02133)
William M. Hogan (S.C. Bar No. 65272)
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue (zip 29601)
P. O. Box 2147
Greenville, SC 29602
Telephone: (864) 242-4727
Fax: (864) 232-4395
jim@gilreathlaw.com
bhogan@gilreathlaw.com

ATTORNEYS FOR APPELLANT

Monty D. Desai (S.C. Bar No. 73967)
Nihar Patel (S.C. Bar No. 74166)
J. Matthew Whitehead (S.C. Bar No. 73803)
THE CAROLINA LAW GROUP, LLC
910 E. Washington Street
Greenville, SC 29601
Telephone: (864) 312-4444
Fax: (864) 312-4447
monty@thecarolinalawgroup.com
nihar@thecarolinalawgroup.com
matt@thecarolinalawgroup.com

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

NATURE OF THE ACTION

This action involves issues arising from three individuals who formed and became officers and promoters of a corporation seeking a new business opportunity. The business opportunity was initially denied to the corporation apparently due to facts known by two of its original promoter/officers and not previously disclosed to the third promoter/officer. Those two promoters/officers, who failed to make a full disclosure to the third promoter/officer, immediately sought and obtained the new business opportunity through another corporation. However the two promoter/officers who obtained the new business opportunity failed to ever fully disclose their actions in ultimately obtaining the business opportunity and more importantly never made a full disclosure to their partner of two material facts which undoubtedly resulted in the initial denial to the corporation formed by the three of them.

Appellant Pankaj Patel ("Kaj") and Respondents Vijay Patel ("Vijay") and Krish Patel ("Krish") [1] jointly agreed to pursue a corporate opportunity through VP Enterprises, Inc. ("VP Enterprises") to operate a chain of Verizon Wireless stores. They were all promotors and officers, and Kaj and Vijay were directors. A license application was made by VP Enterprises to Verizon, but was denied "at this time". At the time of the application, Vijay and Krish failed to disclose two material facts to Kaj which undoubtedly led to the denial by Verizon of VP's application. Undisclosed to Kaj were: (1) the fact that Vijay had a criminal record for shoplifting which he falsely denied on his Verizon application; and (2) the fact that Krish, who had extensive retail experience with Verizon and was listed as the general manager and contact name on the Verizon

[1] Kaj is not related to Vijay or Krish despite the same surname. Vijay is Krish's father.

application materials, had been recently terminated by Verizon for violations of corporate policy involving family accounts.

Following Verizon's denial Kaj immediately inquired of Vijay and Krish why VP Enterprises was denied. Krish and Vijay did not reveal Vijay's criminal history or Krish's firing from Verizon even though those facts were the two most likely reasons for the refusal. With that information withheld from Kaj, the parties agreed to assign Krish the task of discovering the reasons for the denial.

After the application was denied on the first round, Krish within weeks began pursuing a Verizon license by using the name of another individual, who in actuality played almost no role in the application process. Krish assisted his straw man in forming a new corporation, P Communications, Inc. ("P Communications"), which submitted a new license application to Verizon using virtually the same paperwork used by Kaj, Krish and Vijay as promoters for VP Enterprises. Verizon approved P Communications' application, but neither Kaj nor the board of directors of VP Enterprises was ever made aware of these actions, or even the existence of P Communications. Kaj filed suit after he finally became aware of the details involving the new corporation and the straw man. Kaj was never made aware of Vijay's criminal record and Krish's termination from Verizon until after he filed suit.

When P Communications opened its first Verizon Wireless store, Vijay and Krish informed Kaj that Krish had just opened a Verizon Wireless retail store. While the testimony varies on what was said between Krish and Kaj, Krish testified: "And what I actually said was that I'd joined up with another individual who obtained a license, and that if there was an opportunity down the road that I'd give him [Kaj] a call." Krish

failed to disclose to Kaj the full name of his straw man, the name of the new company, the fact P Communications was created with VP Enterprises' business plan, the fact Krish had no intention of calling Kaj later about new opportunities with the Verizon retail business, and the fact Krish had already laid plans to oust his straw man and make himself the new owner. Despite these omissions by Respondents, who held positions as officers and director of VP Enterprises, the Lower Court held the statute of limitations began to run against Kaj at this point.

Within two months of the opening of the first store, Krish's straw man sold his shares back to P Communications, and Krish brought in a new partner to be a co-owner with him in P Communications. Within several months the new co-owner also transferred his shares to Krish, leaving Krish as the sole owner. Respondents did not mention a word to Kaj about these ownership changes, much less offer him an opportunity to participate.

Kaj continued to meet with Krish and Vijay for the next year and a half to discuss business affairs, but Krish and Vijay made no mention of P Communications. Krish meanwhile opened at least four more Verizon retail stores during this time without informing Kaj or VP Enterprises of the existence of P Communications.

In April 2010 Kaj contacted Krish about a possible venue in North Carolina for a Verizon retail store. The two met in Krish's P Communications' office during May and early June 2010 to discuss the Verizon venture. For the first time, Krish revealed to Kaj the names of his company P Communications and Krish's straw man, the involvement of Vijay in the company, and the opening of multiple stores. From that information, Kaj's research uncovered Respondents' wrongful appropriation of VP Enterprises' Verizon business opportunity. Kaj filed suit on November 4, 2011.

A central issue in this appeal is whether fiduciaries can disclose partial truths and limited amounts of information while withholding significant and material information about their misconduct and then seek protection under the statute of limitations from the date of partial disclosure. A corollary issue before the Court is whether the duties owed by a director and officer continue after a corporation receives an initial denial of a prospective business opportunity.

Since the firmness of a refusal to deal by a third party, such as Verizon here, cannot be adequately tested by the diverting corporate officer alone, other jurisdictions have required the reasons for the refusal to deal be fully disclosed to the corporation along with pertinent facts about the new opportunity the diverting officer seeks. Without full disclosure there will be a temptation to officers to refrain from exerting their strongest efforts on behalf of the corporation since, if the deal does not come to fruition, an opportunity of profit will be open to the officers personally.[2] As a result, Respondents' omissions and misrepresentations make Kaj's claims timely and render Respondents liable for the opportunity they misappropriated.

STATEMENT OF ISSUES ON APPEAL

1. Did Respondents fraudulently conceal from Kaj and VP Enterprises their breaches of the duties of loyalty and care thereby tolling the applicable statutes of limitations under S.C. Code Ann. §§ 33-8-300(e) and 33-8-420(e) and precluding the defense of laches?

2. Did Krish and Vijay as officers and director of VP Enterprises continue to owe Kaj and/or VP Enterprises a fiduciary duty or an obligation to act in good faith, with

[2] Kelly v. 74 & 76 W. Tremont Ave. Corp., 4 Misc. 2d 533, 536, 151 N.Y.S.2d 900 (Sup. Ct. 1956).

due care, and in the best interests of the corporation and its shareholders after Verizon Wireless rejected VP Enterprises' application "at this time" for a Verizon retail store license?

3. If so, did Respondents breach such duties to Kaj and VP Enterprises by misappropriating a corporate opportunity of VP Enterprises?

4. Did Kaj properly pursue this case as a derivative action on behalf of VP Enterprises, or alternatively could Kaj bring his claim as an individual action?

5. May Kaj and VP Enterprises seek an accounting, equitable disgorgement and a constructive trust for violations by Krish and Vijay of their duties as officers and director and a declaratory judgment imposing such relief?

STATEMENT OF THE CASE

The history of the proceedings in the Lower Court is as follows:

1. Pankaj Patel, individually and derivatively on behalf of VP Enterprises, commenced this action by filing, on November 4, 2011, a Complaint in the Court of Common Pleas, Thirteenth Judicial Circuit, Greenville County, South Carolina. (R. p. 39).

2. On February 7, 2012 Kaj, individually and derivatively on behalf of VP Enterprises, filed an amended complaint which primarily added additional fact allegations in paragraphs 19 and 45-47 thereof. (R. pp. 84, 88, and 94-95).

3. By order filed June 7, 2012 with the Greenville County Clerk of Court for the Court of Common Pleas, the Supreme Court ordered the case to be assigned to the Business Court Pilot Program of the South Carolina Circuit Courts.

4. Kaj 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 Respondents, (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 Respondents, (11) constructive trust against all Respondents, (12) a violation of the South Carolina Unfair Trade Practices Act, and (13) a declaratory judgment.

5. In post-trial briefing, Kaj dismissed his claims for fraud, constructive fraud, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act.

6. Respondents asserted Kaj's suit was barred under the statutes of limitation and laches. Respondents also asserted that any duties Vijay and Krish owed to Kaj and VP Enterprises extinguished before the acts of misrepresentation and omission that Kaj alleged the individual Respondents committed. Alternatively, Respondents asserted that VP Enterprises had no viable corporate opportunity capable of being usurped.

7. The parties agreed that the liability and damage issues would be bifurcated and the liability issues tried first. The liability portion was tried non-jury before The Honorable Edward W. Miller on July 21 and 22, 2014. Following the parties' post-hearing briefs, the Lower Court entered an Order on December 31, 2014 denying liability

on Kaj's remaining claims. The Lower Court based its ruling on the defenses of Respondents set forth in paragraph 6 above.

8. Kaj received the Lower Court Order by e-mail on December 31, 2014 and by U.S. Mail on January 5, 2015. Kaj served his Notice of Appeal to opposing counsel and the Clerk of the Court of Appeals on January 23, 2015 by U.S. Mail.

STANDARD OF REVIEW

Kaj's claims pursued at trial and on appeal involve a breach of fiduciary duty by Krish and Vijay for their usurpation of a corporate opportunity of VP Enterprises, for conduct that is fraudulent, oppressive, or unfairly prejudicial, and for violation of the statutory duties of directors and officers under S.C. Code Ann. §§ 33-8-300 and -420. These causes of action all sound in equity. A claim for breach of fiduciary duty may be in equity or at law depending on the relief sought. Verenes v. Alvanos, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010). In this case, Kaj seeks remedies of accounting, constructive trust and disgorgement, all of which are equitable claims. The parties agreed to bifurcate the proceedings in this action between liability and remedies due to the complexity of the equitable remedies that could be fashioned and the expense of damage expert testimonies. Thus the primary remedy is equitable, making this matter an equitable action. See Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) ("An action for an accounting sounds in equity."); see also Lollis v. Lollis, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987) ("An action to declare a constructive trust is in equity"); see also Verenes v. Alvanos, 387 S.C. at 17, 690 S.E.2d at 773 (stating disgorgement is an equitable remedy). This case was also filed as a shareholder

derivative suit which is a suit in equity. See Straight v. Goss, 383 S.C. 180, 207-208, 678 S.E.2d 443, 458 (Ct. App. 2009).

In 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. They may also decide questions of law with no particular deference to the lower court's findings. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014), reh'g denied (Apr. 2, 2014). Where witness testimony at trial was presented through video deposition, the appellate court is placed in an equal position to judge the witness' credibility.[3] See Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 296, 569 S.E.2d 371, 376 (Ct. App. 2002).

STATEMENT OF FACTS AND EVIDENCE

The pleadings, documentary evidence and testimony show the undisputed facts as follows:

A. VP Enterprises Planned and Created

During the latter part of 2007 Kaj, Krish and Vijay were co-owners in a real estate company named KVP Investments and Operation, LLC. (R. p. 170, lines 11-22). Krish formerly worked at Verizon Wireless Company from 2004 through October 22, 2007 as a retail customer support/service technician and later as a retail sales representative. (R. pp. 957 and 1104). Krish informed Kaj in late 2007 he "had terminated his employment with Verizon Communications and joined into business with his father Vijay Patel in the hotel and real estate business." (R. p. 121; R. p. 172, lines 12-17, and R. p. 261, lines 4-9). In contrast Krish testified at trial: "I was forced to resign [from Verizon] because of working

[3] Kaj will be submitting to the Clerk of Court for the Court of Appeals video discs containing portions of the video depositions played at trial.

with family accounts and it was against company policy." (R. p. 506, line 22- p. 507, line 1; R. p. 149, lines 16-20). In short, Krish never disclosed to Kaj he was fired from Verizon until the trial of this case. (R. p.172, lines 18-25; R. p. 545, lines 10-14 and R. p. 572, lines 2-5).

From his previous business ventures, Kaj had developed a revenue-and-cost spreadsheet to help analyze whether a business plan would have potential. (R. p. 980). In late 2007, Kaj, Krish and Vijay began discussions about entering into the Verizon wireless phone business as independent agents. (R. p. 508, line 18 – p. 509, line 1; R. p.173, line 13 – p. 175, line 21; R. pp. 87-88). Kaj and Krish then met in late November and/or early December 2007 to run financial projections for a retail store using Kaj's spreadsheet. Krish admitted he and Kaj worked together on the financial projections for VP Enterprises. (R. p. 122, ¶¶23 and 24). Krish had information on the revenues from Verizon account activations and sales of accessories, while Kaj had information on the various business costs to be incurred. (R. pp. 981 – 998). After Kaj and Krish ran the financial projections on his spreadsheet and saw the moderate profit projections for a single store, Kaj, Krish and Vijay agreed to pursue the Verizon franchise business by developing a multi-store operation. (R. p. 173, line 13 – p. 175, line 21and R. p. 178, lines 12-21).

Kaj and Krish then met to develop a business plan to present to Verizon. (R. pp. 121-122, ¶17). Kaj had a business plan he developed for a previous restaurant venture, Tava Grill, that he forwarded to Krish. (R. p. 510, lines 20-21 and R.p. 178, line 24 – p. 179, line 21; R.pp. 958-971). Kaj's Tava Grill business plan included relevant demographic information for the Greenville market. Kaj's Tava Grill business plan was

derived from a business plan he obtained off the internet but which Kaj then added his research on the Greenville, South Carolina business environment. (R. p. 167, line 12 - p. 168, line 7; R.pp. 959-964). On December 5, 2007 Kaj e-mailed these business plans to Krish to use for their new Verizon business venture. (R.p. 958). In the e-mail Kaj instructed Krish regarding his prior Tava Grill business plan: "Please keep confidential and do not distribute." Krish admitted that both Kaj and Krish participated in the drafting of a business plan for VP Enterprises. (R. p. 122; R. p. 510, line 16 – p. 511, line 13).

As part of the parties' business plan, attorney Allan Hill represented Kaj, Krish and Vijay Patel in the incorporation of VP Enterprises and was responsible for drafting all the initial corporate documents. (R. p. 123). Krish was concerned that because he had formerly worked at a Verizon corporate-owned store, Verizon might not allow him to be an owner of independent Verizon stores. (R. pp. 121-122, ¶17). The three then agreed the stock in VP Enterprises would be titled in Kaj and Vijay's names, each owning 50%, but that the 50% titled in Vijay's name would be shared equally between Vijay and Krish. (R.p. 613, line 24 – p. 614, line 10). The corporate records named Kaj as president, Vijay the vice-president, and Krish as secretary-treasurer. (R. pp. 1135, 1137, and 1138; R. p. 568, lines 10-16). In the business plan Kaj was named president and CEO, Vijay the vice-president, and Krish the general manager and project developer. (R. p. 978).

In this venture Kaj would be able to bring access to his $800,000 line of credit, banking relationships and twenty plus years of business experience. Krish had the Verizon sales experience along with the time to manage the day-to-day operations. (R. p. 192, lines 5-22). Krish was also one of the corporation's promoters. (R. p. 571, line 24 – p. 572, line 1; R. p. 609, lines 7-20).

In developing the business plan, Kaj and Krish researched the upstate South Carolina area for potential store locations. Kaj and Krish rode together to examine various locations between December 2007 and May 2008. On one occasion an employee of Verizon named "Andre" rode with Kaj and Krish to inspect some of the locations they were considering for VP Enterprises. (R. p. 122, ¶18; R. p. 186, lines 12-22). Kaj and Krish agreed on 10 potential sites or areas they had located for new stores. Krish admitted Kaj played a role in selecting locations, (though he denies it was significant). (R. p. 122, ¶19). These locations were included in the VP Enterprises business plan. (R. p. 974-75). After Kaj and Krish jointly drafted and finalized the VP Enterprises business plan, Krish e-mailed the business plan to Verizon's Kelley Pearson. (R. p. 972). The VP Enterprises – Verizon business plan closely tracked Kaj's business plan for Tava Grill. (R. pp. 959-64 and 973-78).

After the business plan was submitted to Verizon, Krish Patel arranged with Allan Hill, Esquire, for Mr. Hill to draft the incorporation and organizational documents for VP Enterprises. The Articles of Incorporation for a Statutory Close Corporation were filed January 24, 2008 and listed Krish's home as the registered office. The concurrently drafted Initial Annual Report of Corporations listed Kaj, Vijay and Krish as the directors and principal officers. The Corporate Data sheet listed Kaj and Vijay as directors, Kaj as president, and Vijay as vice-president. Krish was named as Secretary and Treasurer of VP Enterprises which positions he accepted. (R. pp. 999-1005; R. p. 580, lines 1-12; R. p. 121, ¶12). The opening incorporator resolution appointed Kaj and Vijay as directors. (R. p. 1136). The day following the filing of the Articles of Incorporation, VP Enterprises

filed its application for a federal ID number and listed "Verizon Cellular Store" as its principal service. (R. p. 1006).

On January 28, 2008 Vijay and Kaj both submitted their Verizon Agent Applications for VP Enterprises to Verizon. The address on the Verizon Application form was 408 Ashby Park Lane, Greenville, SC, which was Krish's residence. (R.pp. 1008-1021). The application asked, among other things, whether the applicants had been convicted of non-traffic criminal offenses or been involved in any civil litigation in the past 5 years. Kaj reported his involvement in a civil suit in Greenville County Court of Common Pleas that had been settled. (R.p.1020). He did not include a $2,500 magistrate court civil suit originally filed around 2000 or 2001. (R. p. 197, line 19 – p. 198, line 18 and R. p. 248, lines 20-24). Kaj's attorney drafted an amended complaint dated June 30, 2002 and submitted it to the magistrate court on July 2, 2002, which was five and a half years before the Verizon application. No further litigation activity by Kaj occurred in the lawsuit, and it was administratively dismissed for no activity in May 2009. (R. pp. 1422-30). Krish filled out his father's application and answered "no" to the criminal history question which Vijay then signed. (R. p. 1013; R. p. 611, line 20 – p. 612, line 7). Unbeknownst to Kaj, Vijay had actually been convicted of shoplifting on December 14, 2005. (R. pp. 955-56).

While the Verizon agent application was pending, Krish opened a VP Enterprises bank account with Krish being an authorized signatory. On January 29, 2008 Kaj gave Krish a check for $5,000 payable to VP Enterprises which was deposited into the new business account. (R. p. 123, ¶29; R. p. 1007). In early February, VP Enterprises applied to BB&T Bank for a $50,000 line of credit based on Kaj and Vijay as owners. (R. p.

1023). On February 11, 2008 BB&T, through loan officer Mike Pavlick, approved a $50,000 line of credit for VP Enterprises. (R. pp. 1024-25). During this time, Kaj, Krish and Vijay met with Verizon personnel, and Kaj and Krish continued to scout potential locations as Defendants have admitted. (R. p. 123, ¶30).

B. Denial of VP Enterprises Application by Verizon

On February 26, 2008, Verizon sent a letter to VP Enterprises addressed to 408 Ashby Park Lane, Greenville (Krish's home) informing VP Enterprises that Verizon had denied its application "at this time". (R. p. 1026). Verizon gave no explanation for the denial. Shortly thereafter Respondents informed Kaj of the denial letter. Krish testified that Kaj asked why Verizon denied VP Enterprises' application. (R. p. 514, lines 20-21). Kaj testified he specifically asked Vijay and Krish if anybody had any criminal or negative financial history which they both denied. (R.p. 203, line 23 – p. 204, line 14). In addition, the parties agreed that Krish, since he had previously worked at Verizon, would find out why the application was denied so that the parties could try to overcome the reasons for the denial. Krish testified he contacted the few people he knew at Verizon, but he could not get an explanation of why it was denied. (R.p.514, line 22-p.515, line 4).

Krish testified about his efforts on behalf of VP Enterprises stating: "I owed him and my father the duty to do my best to try to make **the first round work**, and I did do that." (R. p. 543, line 18 – p. 544, line 1) (emphasis added). In his Video Deposition he explained his approach towards VP Enterprises going forward: "Your client [Kaj] and my father got denied of a Verizon Wireless application. After that was done, **it was case closed**. I moved on and looked for another opportunity." (R. p. 602, line 24 – p. 603, line 2) (emphasis added).

In the months after receipt of the Verizon denial, Krish did not tell Kaj he was forming a new company to obtain a Verizon license in a different way on his own. (R. p. 1033; R. p. 515, lines 11-19, R. p. 517, line 25 – p. 518, line 5, and R. p. 542, lines 17-20).

Following notification of the Verizon rejection, Kaj continued to look for other wireless phone stores for VP Enterprises. Krish verified that after the Verizon denial, he continued looking at other business opportunities with Kaj. (R. p. 517, lines 18-20). On April 18, 2008 Kaj e-mailed Krish information on possibly becoming AT&T independent dealers. While Krish speculated "I probably didn't" respond to Kaj's e-mail, Kaj was more specific about their communications regarding the e-mail. He testified Kaj instructed him to focus on finding Verizon opportunities and that he was still trying to find out the reason for the denial. (R. p. 210, line 21 – p. 211, line 16).

On July 24, 2008 Kaj e-mailed Krish about other wireless stores available for purchase in South Carolina. (R. p. 123, ¶34; R. pp. 1090-91). Respondents showed no real interest in these opportunities. Krish testified he did not respond to Kaj's e-mail and did not inform Kaj that he was trying to work a Verizon deal with a new applicant, Corby Phillips, through another company P Communications. (R. p. 521, lines 7-25). During the spring of 2008 Kaj would meet with Vijay about once or twice a week, and occasionally with Krish to discuss real estate and other business matters. Unknown to Kaj, though, Krish and Vijay were carrying out a different plan to enter into the Verizon Wireless store business -- a plan which did not include VP Enterprises or Kaj at all. As Respondents admitted, but mischaracterized, in their Answer, "Krish decided to pursue his idea on his own". (R. p. 123, ¶35).

C. P Communications Secretly Created

Within several weeks of Verizon's denial of VP Enterprises' application, around March 26, 2008, Krish began discussions with a neighboring businessman named Corby Phillips about Phillips applying to Verizon for a license to open wireless retail stores just as VP Enterprises had done. (R. p. 351, lines 1-10; R. p. 589, lines 14-17). Corby Phillips ran a sandwich shop near the Verizon store where Krish had worked. (R. p. 350, lines 3-5). Krish testified he gave the VP Enterprises business plan to Corby Phillips shortly after Verizon denied the VP Enterprises' application. (R. p. 516, lines 15-17; R. p. 590, lines 12-23). Krish admitted he did not inform Kaj that he was giving the VP Enterprises business plan to Corby Phillips. (R. p. 591, lines 11-25).

By April 4, 2008 a new Verizon business plan was completed for Corby Phillips and P Communications, Inc. (R. pp. 1027-1031). Nearly all the terms in the new Corby Phillips/P Communications plan were identical to the VP Enterprises business plan except the personnel names. (R. pp. 1140-51 where red print shows identical terms). Corby Phillips was listed as the sole owner. (R.p.1027). On April 5, 2008, this offshoot of the VP Enterprises' business plan was submitted to Verizon. (R. p. 1032).

The new Verizon business venture by P Communications was spearheaded by Krish Patel. Prior to April 25, 2008, Krish directed Corby Phillips to Allan Hill to form P Communications. Allan Hill was the same attorney who formed VP Enterprises for Kaj, Vijay and Krish. Corby Phillips testified he had never met Mr. Hill before this time, and Krish introduced him to VP Enterprises' attorney for the purpose of forming P Communications. Mr. Hill was also consulted to draft the contract for the straw man arrangement between Krish and Corby Phillips. (R. p. 354, line 1 – p. 355, line 4).

On April 18, 2008 Kaj e-mailed Krish with information on an AT&T wireless opportunity. Krish testified he did not respond to this e-mail or inform Kaj he was working on a new application with Corby Phillips. He said "it just hadn't occurred to him." (R.p.517, line 21 – p. 518, line 2; R. p. 1033).

On April 28, 2008 attorney Hill effected the filing of Articles of Incorporation for P Communications. The Initial Annual Report of Corporations, the South Carolina Business Tax Application and the federal ID application listed the business purpose as operating "Verizon Wireless Store", just like VP Enterprises. (R. pp. 1034-1035, R. p. 1039; R. p. 355, line 5 – p. 357, line 7). Krish did not inform Kaj he had taken Corby Phillips to VP Enterprises' attorney to set up a new company for the purpose of operating a Verizon Wireless store. (R. p. 541, line 23 – p. 543, line 3).

Corby Phillips was only a straw man listed nominally as the owner of P Communications. (R. p. 522, lines 1-18; R. p. 597, line 14 – p. 598, line 12). On July 2, 2008 Krish e-mailed attorney Hill the terms for an agreement to inscribe Corby Phillips' role as a straw man. Vijay was copied on the e-mail. (R. pp. 1087-88). The July 7, 2008 notes of Respondents' accountant Dan Jones list Corby Phillips as a 10% "silent Ptnr." (App. R. p. 25). Krish told none of this to Kaj. (R. p. 598, line 24 – p. 599, line 5).

Reflecting Corby Phillips' role as a straw man, on August 25, 2008 Krish signed as president of P Communications a promissory note with BB&T Bank and signed a certified resolution to BB&T that he was the duly elected and appointed president of P Communications. (R.pp. 1083 and 1097-98). Corby Phillips was still the president, director and sole shareholder pursuant to the official corporate documents of P Communications. The loan officer Mike Pavlick testified at trial that, at the time Krish

signed the August 2008 loan documents until shortly before trial, he had never heard of Corby Phillips. (R.p.255, lines 1-8, R.p.251, line 19 - p. 253, line 23, R.p.558, lines 4-22).

On July 8, 2008 Krish signed paperwork at Bank of America to transfer $10,000 from the VP Enterprises account to Kaj, Krish and Vijay's separate real estate company by agreement of Krish and Kaj. Krish knew his Verizon venture with Corby Phillips was ongoing, but he failed to mention anything to Kaj about the new deal. (R.p. 521, lines 7-25).

By July 18, 2008 P Communications and Verizon executed their Exclusive Authorized Agency Agreement. (R. pp. 1040-1086). None of this was disclosed to Kaj even though Kaj continued to meet at least weekly with Vijay and sometimes Krish to discuss their real estate company and other business matters. (R. p. 524, lines 12-17; R. p. 124, ¶37).

During this time in the summer and fall of 2008, Krish and Vijay continued with their work on opening their first Verizon independent dealership to be located on Pelham Road, in Greenville, South Carolina, again without informing Kaj. Vijay, using his real estate experience and contacts from his hotel business, provided important assistance to Krish and P Communications in setting up the new store to be operated under the name Wireless Communications. (R. p. 592, line 17 – p. 593, line 14). And similar to what VP Enterprises had done, Krish obtained initial financing from Mike Pavlick at BB&T by October 1, 2008, except that the new loan application listed Krish and a new prospective co-shareholder, Keith Gailey, as the co-borrowers. (R. pp. 1096 and 1100). Prior to opening its first store, P Communications designated Krish as Director of Operations by

company letter to Verizon. (R. p. 1099). On October 1, 2008 Krish opened P Communications' first store. (R. p. 523, lines 3-7).

Krish and Vijay disclosed none of the planning and organizing of P Communications to Kaj. Krish admitted it would have been "the polite thing to do". (R. p. 515, lines 11-19).

D. P Communications' Grand Opening

On October 7, 2008, Krish sent out a mass e-mail to numerous people announcing the grand opening of P Communications' new Verizon store to be held on October 18. (R. pp. 1101-02). This e-mail, though, was not sent to Kaj. As Krish admitted in his trial testimony and his Answer, he made no effort at this time to inform Kaj about his continued efforts to obtain a Verizon store through P Communications or to do any Verizon deal with Kaj. (R. p. 515, lines 12 – 19; R. p. 123, ¶ 35).

On the evening of October 18, 2008, Kaj was invited to Vijay's home. According to Krish's trial testimony, he and Vijay had previously discussed that the night of the grand opening was "the time to have that discussion" with Kaj. (R. p. 523, lines 3-20). The trial testimony of Kaj and Krish about what Krish said that evening varied significantly between Kaj and Krish.[4] (cf: (Kaj) R. p. 219, line 9 – p. 223, line 24 and R. p. 316, line 15 – p. 321, line 5; with (Krish) R. p. 523, line 3 – p. 524, line 11, R. p. 541,

[4] Krish claimed he told Kaj he joined with another individual who obtained a Verizon license and he moved on to that opportunity. Krish further testified: "I told Kaj that if there was an opportunity down the road that I'd certainly – would be happy to contact him." He concluded that was pretty much the end of the discussion. (R. p. 523, line 21 – p. 524, line 11). Kaj testified Krish told him: "I [Krish] 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... [O]nce I get Corby out, because he doesn't have the financial means or capabilities to grow this business like we're looking at...we can get back on our plan... [T]his should take anywhere from eight to twelve months." (R. p. 222, lines 1-18).

line 14 – p. 544, line 8, and R. p. 604, lines 10-24). It is undisputed Krish told Kaj he opened a Verizon store on Pelham Road and joined with another individual who had obtained a Verizon license. (R. p. 317, lines 18-21 and R. p. 523, lines 23-25). The Lower Court found that "[o]n October 18, 2008, Krish voluntarily disclosed to Kaj that he had opened a Verizon store with Corby..." (R. pp. 11 and 17, ¶31).[5]

It is also undisputed, though, what Krish omitted telling Kaj on October 18, 2008. Krish did not disclose the following:

- Krish met with Kaj's lawyer Allan Hill to form P Communications to do what VP Enterprises was going to do (R.p. 541, line 23 – p. 543, line 17);
- Krish gave the VP Enterprises' business plan to the new company which, after changing the names, submitted the plan to Verizon;
- The name of the new company, P Communications;
- The full name of Krish's straw man, Corby Phillips;
- Krish and Vijay did all the work for P Communications (R. p. 528, line 17 – p. 529, line 7);
- Vijay helped Krish to get the first store fitted up and built out for opening as a Verizon retail store (R. p. 615, lines 12-25);
- Krish had already laid plans to oust Corby Phillips and make himself the new owner;
- Krish obtained loans for P Communications from the same loan officer and bank that VP Enterprises used for its line of credit (R. pp. 1022 and 1100);
- The fact Corby Phillips was just a straw man for Krish's new Verizon company;
- Krish had no intention of calling Kaj later about new opportunities with the Verizon retail business.

In sum, Krish did not disclose the fact he actually obtained the Verizon license, not some third party he joined with, and he did so using VP Enterprises' business model.

[5] The Lower Court also found that Krish disclosed to Kaj "...that he planned to own the company at some point in the future." However, there is no evidence in the record to support a finding that Krish made such a disclosure. (R. pp. 11 and 17, ¶31).

E. P Communications Ownership Changes

Within two weeks of the grand opening, Krish Patel and Keith Gailey submitted to Verizon applications to change the ownership of P Communications and the Verizon license to Krish Patel and Keith Gailey from Corby Phillips, with Krish owning 60% and Gailey 40%. (R. pp. 1103-16). Verizon approved the ownership change, and on November 19, 2008 Corby Phillips, Krish Patel and Keith Gailey submitted a signed change of ownership form to Verizon. (R. p. 1089). By December 15, 2008 all corporate resolutions and Secretary of State filings were completed to divest Corby Phillips from any ownership or involvement in P Communications. Phillips was paid $14,000 cash for the stock transfer. (R. pp. 1118-28; R. p. 362, lines 13-24). Shortly thereafter on January 1, 2009 Krish bought out Keith Gailey's 40% interest. (R. pp. 1129-30). Krish and Gailey belatedly informed Verizon of this ownership change one year later. (App. R. p. 26). All this change in ownership in Krish's Verizon venture was done without informing Kaj. (R. p. 607, line 18 – p. 608, line 5).

F. P Communications Uncovered

On April 15, 2010 Kaj e-mailed Krish about a possible location for a Verizon store and asked if Krish was still interested. (R. p. 1131). Krish and Kaj met three or four times in May/June 2010 to discuss the Verizon store business. After a couple of meetings, Krish informed Kaj he had other locations already opened. (R. p. 329, line 15 – p. 331, line 13).

In these discussions Krish informed Kaj he had bought out Corby Phillips, making Krish the sole owner.[6] (R. p. 231, lines 17-24 and R. p. 535, lines 12-15). During these meetings in May and June 2010, Krish revealed to Kaj the name of his company P Communications, the number of Verizon stores it owned and the staff working there. (R. p. 234, line 5 – p. 235, line 9). While meeting there on June 4, 2010, Kaj saw Vijay in the office and learned that Vijay had also been working with Krish for P Communications. (Id.). After learning this information, Kaj began researching the history of P Communications and Corby Phillips. (R. p. 234, line 11 – p. 236, line 20). Kaj learned from the Secretary of State website that P Communications was formed in April 2008, just a few months after VP Enterprises was formed. What also jumped out to Kaj was the fact Corby Phillips had been replaced as registered agent for P Communications in December 2008. (R. p. 1133; R. p. 235, line 19 – p. 236, line 13). Kaj then e-mailed Krish the following day, June 5, and asked for an immediate meeting. (R. p. 1132).

The two met on Sunday June 6 at Krish's home by his pool. Kaj was upset over what he learned from his search of P Communications. He told Krish that Krish had backstabbed him. (R. p. 238, line 6 – 17 and R. p. 566, line 15 – p. 567, line 10). On June 7, Kaj met Vijay at Vijay's hotel and had the same discussion with him. (R. p. 239, lines 7-18). Krish did not testify about any other date prior to June 6, 2010 that Kaj was upset with Vijay and him about VP Enterprises, P Communications or their planned Verizon venture.

[6] Krish testified he did not recall if he told Kaj whether he bought out Corby Phillips or how much he paid him. (R. p. 567, line 22 – p. 568, line 5).

ARGUMENT

I. Statute of Limitations

A. Introduction

The Lower Court Order ruled as an initial matter that Kaj's complaint was time barred under the applicable statutes of limitations and laches. The Order did not specify which statute of limitations was applicable but cited to the case of Clearwater Trust v. Bunting, 367 S.C. 340, 626 S.E.2d 334 (2006) applying S.C. Code Ann. §§ 33-8-300 and -420. (R. pp. 6 and 20-23). The issue before the Court then is whether the statute of limitations commenced on October 18, 2008 or in May/June 2010.

B. Respondents' fraudulent concealment prevents running of the statute of limitations

1. South Carolina law requires "perfect good faith and full disclosure" by a fiduciary of all significant and material facts to start the running of the statute of limitations

South Carolina has expressly codified the fraudulent concealment principle in breach of fiduciary claims against corporate directors and officers as follows:

> (e) An action against an officer [or director] 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) ("[or director]" and underline added) (see also S.C. Code Ann. § 33-8-300(e) for mirror director liability statute).

A plaintiff may thus bring an action more than three years after the wrongs have been committed if the defendants fraudulently concealed their wrongdoing and the plaintiff brings his action within two years after discovery of that breach. See Clearwater Trust v. Bunting, 367 S.C. 340, 352, 626 S.E.2d 334, 340 (2006) (holding when breach of

duty has been fraudulently concealed, three year outer limit does not apply and two year discovery rule governs). In cases of fraudulent concealment, neither S.C. Code Ann. § 33-8-420 nor the Clearwater Trust court have imposed on a plaintiff the duty of reasonable diligence in discovery of a defendant's breach.

This discovery standard is reflected in S.C. Code Ann. §§ 33-8-300(e) and -420(e). The first sentence of that subsection addressing breaches of duty not accompanied by fraudulent concealment provides an action must be commenced within two years after a cause of action "should reasonably have been discovered". In contrast, the language "should reasonably have been discovered" is omitted from the fraudulent concealment limitation period (the last sentence of §§ 33-8-300(e) and -420(e)).

A director and manager are liable as trustees to a corporation and its stockholders. Black v. Simpson, 94 S.C. 312, 77 S.E. 1023 (1913). The South Carolina Supreme Court has held "that officers and directors of a corporation stand in a fiduciary relationship to the individual stockholders and in every instance must make a full disclosure of all relevant facts..." when addressing matters of shareholder interests. Jacobson v. Yaschik, 249 S.C. 577, 584-85, 155 S.E.2d 601, 605 (1967) (holding director/manager of corporation violated his fiduciary duty to shareholder by failing to disclose prospective purchase offer from third party of corporate stock).

In Jacobson, the Supreme Court explained that a corporate executive's "nondisclosure becomes fraudulent when... the very... transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties." Jacobson v. Yaschik, 249 S.C. at 585, 155 S.E.2d at 605 (underline added).

"Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." Anthony v. Padmar, Inc., 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct.App.1995).[7] This Court has stated a fiduciary's duty of disclosure imposes the "...obligation of *refraining from taking any advantage of one another by the slightest misrepresentation or concealment.*" Moore v. Moore, 360 S.C. 241, 252, 599 S.E.2d 467, 473 (Ct. App. 2004) (emphasis in original).

The general rule that nondisclosure by a fiduciary constitutes fraudulent concealment tolling the statute of limitations has been summarized as follows:

> A duty to disclose, for purposes of the affirmative claim of fraudulent concealment which defers the accrual of a cause of action, can arise in several situations, such as, when there is a fiduciary or confidential relationship; [and] when one voluntarily discloses information, the whole truth must be disclosed; ...

51 Am. Jur. 2d Limitation of Actions § 166 (underline added).[8]

---

[7] Our research indicates all 50 states have recognized the principle that parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material. See, *e.g.*, Lonergan v. EPE Holdings, LLC, 5 A.3d 1008 (Del. Ch. 2010) (general partner owes fiduciary duties that include a duty of full disclosure); Lariscy v. Hill, 159 S.E.2d 443 (Ga. App. 1968) (director in dealing with another stockholder for purchase of his stock is under same duties as other fiduciaries to make full disclosure of all material facts relative to transaction); and Underwood v. Stafford, 155 S.E.2d 211 (N.C. 1967) (officers and directors of corporation are fiduciaries owing duty of full disclosure to those for whom they act).

[8] Other courts have applied the foregoing principle in the context of the statute of limitations, holding that a fiduciary's partial disclosure, as distinguished from the foregoing duty of full disclosure, is not sufficient to start the running of the statute of limitations. See Conservatorship Estate of K.H. v. Continental Ins. Co., 73 P.3d 588 (Alaska 2003); Amtower v. Photon Dynamics, Inc., 71 Cal Rptr. 3d 361 (Ct.App. 2008); Stark v. Advanced Magnetics, Inc, 736 N.E.2d 434 (Mass.App.Ct. 2000); Estate of Watkins v. Hedman, Hileman & Lacosta, 91 P.3d 1264 (Mont. 2004); Southwestern Energy Production Co. v. Berry Helfand, 411 S.W.3d 581 (Tex.App. 2013); Valdez v. Hollenbeck, 410 S.W.3d 1 (Tex.App. 2013), review granted (Jan. 30, 2015).

2. Krish's October 18, 2008 omissions amounted to fraudulent concealment, thus tolling the statute of limitations - "a fiduciary's silence is equivalent to a stranger's lie"

As described on pages 19-20 above, Krish failed to disclose critical information that would have revealed to a reasonable person that Krish had simply re-packaged the VP Enterprises' application with a different ribbon and sent it back in to Verizon. Information showing that Krish simply re-packaged the VP Enterprises plan and application would have revealed to Kaj that a corporate opportunity of VP Enterprises was being usurped. Without those disclosures, Krish's carefully crafted statement "I joined with another individual who obtained a Verizon license" conveys the unmistakable impression that Krish found another venturer who put together his own Verizon plan and company independently of VP Enterprises. (R.p. 523, lines 23-25). If that were the case, Kaj and VP Enterprises would have had no claim for misappropriation of a business opportunity. But that is not what happened, at all.

Providing the names of the new company and the individual supposedly running it would have given Kaj the ability to research the background of this venture. Krish undoubtedly knew Kaj did not know this information since Kaj knew nothing about the existence of the store, yet Krish withheld these names.

Vijay helped Krish prepare the first store for opening as a Verizon retail store, but Vijay did not tell Kaj. (R. p. 615, lines 12-25). A disclosure that Vijay was handling the office up-fitting and that Krish was doing all the other work for P Communications would have been significant to somebody in Kaj's position. The information would have let him know Krish and Vijay were the ones in full control instead of piggy-backing on some other individual's venture.

As shown on the P Communication loan application to BB&T in August 2008, prior to the grand opening, P Communications was already representing to its lender (and lender to VP Enterprises) that Krish and Keith Gailey were the owners and officers of the company. (R. pp. 1092-95). This ownership change was formalized by November 19, 2008. (R. p.1117). At the time of the meeting between Krish and Kaj on October 18, 2008 Krish knew he was ousting Mr. Phillips and becoming the new co-owner, yet he said nothing to Kaj while realizing Kaj had no way of knowing this key fact.

Another vital piece of information that would have informed someone in Kaj's position that VP Enterprises' business opportunity was being hijacked would have been a truthful disclosure that Krish had given the VP Enterprises business plan, that Kaj and Krish created, to the new company. That piece of information would obviously have been a dead giveaway Krish was usurping VP Enterprises' business opportunity. It is unquestionable that Kaj would have had no way of learning that Krish had made such a blatant misappropriation unless Krish told him of that fact, which Krish did not do.

Krish did not inform Kaj he sent Mr. Phillips to VP Enterprises' own attorney within three months of forming VP Enterprises. Nor did he tell Kaj this new company he joined with was using VP Enterprises' same loan officer and bank. These are further details that would have alerted anyone that Respondents were using VP Enterprises' business model.

Finally, Krish did not admit to Kaj that the "other individual he joined with" was simply Krish's straw man for the re-packaging of VP Enterprises' prospective business venture. This information would have informed Kaj that Krish was obtaining the Verizon license for himself using VP Enterprises' business plan.

In addition to the omissions, Krish affirmatively misrepresented to Kaj the true reason Krish's job at Verizon ended. This misrepresentation was made a second and third time to Kaj in Krish's answers to paragraph 16 of both the original and amended complaint. Vijay also willfully misrepresented he had no criminal record. Further, Krish represented he would contact Kaj if another opportunity came available. Krish knew that representation was false when he made it because he had already signed a false bank loan application in August 2008 claiming he and Keith Gailey were the shareholders. When Keith Gailey exited as a shareholder on January 1, 2009, Krish did not call Kaj then either. Also, Kaj testified without contradiction that Vijay denied on October 18, 2008 having any involvement in Krish's activities with P Communications. (R.p. 220, line 24 – p.221, line 16). In contrast, Krish testified Vijay was in fact aware of Krish's activities by June 2008. (R.p.547, line 13 – p.548, line 3). As noted earlier, Vijay testified in his video deposition he helped Krish with the build out of the first store which opened in 2008.

Misrepresentations were a common operating procedure for Respondents. The evidence shows Krish hatched a fraudulent scheme that included additional misrepresentations as follows:

Krish commits two acts of perjury to the IRS:

- Krish Patel misrepresented his position as president of P Communications on the IRS Form 2553 – Sub Chapter S Election, which was signed under penalties of perjury. (R. p. 1037);

- Krish Patel misrepresented on the same form that he acquired the shares on September 1, 2008 when actually the earliest record of any change in ownership of P Communications occurred on November 19, 2008. (R. p. 1037);[9]

[9] Corby Phillips did not authorize Krish Patel to lie on any Department of Revenue or IRS documents and did not authorize Krish to serve as president of P Communications. (R. p. 358, line 18 – p. 360, line 1; R. p. 361, lines 3-17; R. p. 365, lines 1-9; R. p. 559, lines 3-9).

Krish makes two false certifications to the S.C. Department of Revenue:

- Krish Patel represented to the Department of Revenue on the Business Tax Application for P Communications that he was the president of the corporation on September 19, 2008 when he was not. (R. p. 554, line 19 – p. 555, line 3; R. p. 1036);

- Krish Patel represented in the Business Tax Application to the Department of Revenue that he owned 46.5% of the shares in P Communications on September 19, 2008 when he in fact owned no shares. (R. p. 1036);

Krish makes multiple false certifications to BB&T Bank:

- Krish Patel represented (1) he was president of P Communications to BB&T Bank in order to obtain a loan on August 25, 2008, and (2) that the board of directors of P Communications duly adopted at a meeting of that date that he was authorized to obtain the loan by the board. (R. p.558, line 4 – p. 559, line 9; R. p. 1097).

In Demoulas v. Demoulas Super Mkts, Inc., the Massachusetts Supreme Court held fraudulent concealment tolls the statute of limitations, in an action for misappropriation of a corporate opportunity by directors and officers of a corporation, until such time as the defendants repudiated their fiduciary obligations. Demoulas v. Demoulas Super Mkts, Inc., 424 Mass. 501, 518-21, 677 N.E.2d 159, 173-76 (1997). The court cited the previously held requirement for fiduciaries that an oral repudiation of fiduciary obligations must be "open, definite, and *made to or brought to the attention*" of the other party. Id. at 519, 677 N.E.2d at 173. (emphasis in original).

Krish's "disclosure" to Kaj on October 18, 2008 was made orally and not in writing. Krish testified he and Vijay planned in advance "to have that discussion" with Kaj. Yet they put nothing in writing, and Krish spoke it with no witnesses present. Krish's oral "disclosure" or repudiation was far from open or definite, and certainly was not made in a manner that unambiguously brought to Kaj's attention their usurpation of VP Enterprises' business opportunity.

The "disclosure" Krish made that date lacked the clarity due from a fiduciary. The difference in the reactions of Kaj from October 18, 2008 compared to June 4, 2010, where Krish admitted Kaj was visibly upset, demonstrates the initial "disclosure" was not open and definite.

As secretary, treasurer and general manager of VP Enterprises, Krish had a fiduciary duty of "full disclosure" in "perfect good faith" without the "slightest concealment". His statements as a fiduciary to VP Enterprises and Kaj on October 18, 2008, and on through April 2010, fell woefully short of the standard of full disclosure. As such, the statute of limitations was tolled until May/June 2010.

Vijay and Kaj met weekly after October 2008 through May 2010. During this time P Communications opened an additional four stores for a total of five stores by May 2010. Respondents alleged they told Kaj everything about the status of the Verizon venture between August 2008 and May 2010. (R. p. 124, ¶ 37). Vijay knew about Krish's work through P Communications, but the testimony shows he never said anything to Kaj about any of these store openings. (R. p. 219, linen 23 – p. 220, line 23; R. p. 616, line 12 – p. 617, line 4). Moreover, a conversation with Vijay is equivalent to a conversation with Krish since Vijay testified they were partners in Vijay's 50% interest in VP Enterprises. (R. p. 613, line 24 – p. 614, line 10).

The Lower Court incorrectly cited the general discovery rule requirement that a plaintiff is tasked with "the exercise of reasonable diligence" in discovering a defendant's misconduct. (R. pp. 20-21, ¶¶ 2 and 6). However, directors and officers as fiduciaries are held to a higher disclosure standard of providing actual knowledge to their shareholders since shareholders are not required to make an independent investigation of their own

fiduciaries. Demoulas v. Demoulas Super Mkts, Inc., 677 N.E.2d 159, 173-74 (Mass. 1997). As a result Kaj was not under a duty to investigate his fiduciary's minimal disclosure to see if Krish was breaching his fiduciary duties to VP Enterprises.[10]

Because of Respondents' fraudulent concealment of material and significant information, Kaj did not gain actual knowledge of Respondents' breaches of their officer duties until May/June 2010. It is at that point the limitations period began to run.

In the concluding words of the Appeals Court of Massachusetts: "a fiduciary's silence is equivalent to a stranger's lie." Energy Res. Corp. v. Porter, 14 Mass.App.Ct. 296, 304, 438 N.E. 2d 391, 396 (1982).

C. Respondents' fraudulent concealment continued until June 4, 2010

According to Kaj's testimony, Krish's representations about the status of Corby Phillips continued until the spring of 2010, specifically June 4, 2010. On or around that date, Krish revealed to Kaj the name of P Communications and Corby Phillips for the first time. Respondents also informed Kaj of Vijay's involvement with P Communications. In those disclosures Krish did not admit he had misappropriated VP Enterprises' opportunities, but the disclosures did reveal enough information to allow Kaj to investigate the entity that Krish claimed had partnered with Corby Phillips.

During his ensuing investigation, Kaj discovered facts from the Secretary of State's website which, combined with the circumstances of Vijay's involvement in P Communications, informed Kaj that the rights of VP Enterprises may have been violated. Kaj's investigation of the Secretary of State's website showed a date of incorporation for P Communications of April 24, 2008 that was not entirely inconsistent with the formation

[10] Regardless of whether the "reasonable diligence" or actual notice standard applies, Kaj discovered his cause of action in May/June 2010 as explained in Section I, C below.

by an existing Verizon licensee but was suspiciously close to the grand opening date of October 18, 2008. Also the date of December 4, 2008, shown on the Secretary of State's records as when the registered agent changed from Corby Phillips to Krish Patel, did not conclusively confirm that Corby Phillips had been removed as a shareholder in 2008, but it did raise strong doubts to Kaj in June 2010 as to the truthfulness of Krish and Vijay about the Verizon venture. That investigation then led to the personal meetings on the three days following June 4, 2010 between Kaj and Krish and Kaj and Vijay.

The disclosures made by Krish Patel in the spring of 2010 did not state he had used Corby Phillips as a straw man and P Communications as a mechanism to usurp the Verizon opportunity for himself. Instead, Kaj was able to take the information on the name of the new corporation and its straw man Corby Phillips to research the records and figure out that Krish Patel and Vijay Patel had likely backstabbed him by excluding him from the Verizon store business.

Even if the fraudulent concealment statutes of §§ 33-8-300 and -420 require a plaintiff to exercise reasonable diligence towards his fiduciary, Kaj is still within the statute of limitations. The facts and circumstances disclosed to Kaj in May/June of 2010 that led him to investigate Respondents' corporate activities are what the South Carolina discovery rule envisions as the commencement date for statutes of limitations, not the fraudulent representations of Respondents in October 2008.

D. Equitable Estoppel Prevents Running of the Statute of Limitations

Under South Carolina case law, the doctrine of equitable estoppel may prevent a defendant's resort to the statute of limitations where a defendant has acted in such a manner as to induce the plaintiff to delay in timely filing a cause of action. See Hooper v.

Ebenezer Senior Servs & Rehab. Ctr., 377 S.C. 217, 239-40, 659 S.E.2d 213, 225 (Ct.App. 2008)(reversed on other grounds). The South Carolina Court of Appeals described the elements of equitable estoppel as follows:

> ...To establish equitable estoppel, the party claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts.

Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009) (internal citation omitted).

The same facts described for fraudulent concealment apply to meet all the elements of equitable estoppel. Thus, the statute of limitations does not bar Kaj's case.

E. Respondents do not have clean hands and are not entitled to the defense of laches.

As noted in the Standard of Review above, all Kaj's remaining claims sound in equity. The statute of limitations does not apply to actions in equity. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005). The doctrine of laches, however, may bar equitable causes of action as untimely. Chambers of S.C., Inc. v. Cnty. Council for Lee Cnty., 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993).

> 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 enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights...The court is vested with wide discretion in determining what is an unreasonable delay.

Chambers of S.C, Inc. v. Cnty. Council for Lee Cnty., 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993).

However, "[d]elay alone in the assertion of a right, without injury to the adversary, does not constitute laches." Gibbs v. Kimbrell, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct.App.1993); see also Mazloom v. Mazloom, 382 S.C. 307, 319-20, 675 S.E.2d 746, 752-53 (Ct. App. 2009).

"It is well established that a party pleading an affirmative defense has the burden of proving it." Cole v. S.C. Elec. & Gas, Inc., 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct.App. 2003). Laches is an affirmative defense. Rule 8(c), SCRCP. Therefore, Respondents have the burden of proving the elements of laches.

The Lower Court's Order makes no specific findings of how laches would be applicable. There is no finding Respondents incurred any expenses or entered into obligations it would not have otherwise incurred had Kaj asserted his claims earlier. The Lower Court stated "Krish expended great costs and efforts to expand the business of P Comm." (R. pp. 21-22, ¶ 7). There is no evidence, though, Krish would not have undertaken these efforts if the lawsuit had been filed in 2010 instead. The evidence shows Krish still continued to grow the commission revenues of P Communications after this suit was filed on November 4, 2011. (R. p. 1139). In this case Kaj filed his suit three years and two weeks after October 18, 2008 and one year and five months after June 4, 2010. Respondents have failed to demonstrate how they have been prejudiced by any delay on Kaj's behalf.

Kaj asserted before the Lower Court that Respondents are not entitled to assert the equitable defense of laches because of "unclean hands", specifically their misrepresentations and lack of disclosures.

The Lower Court held "none of the misrepresentations [of Krish] were material to [Appellant's] ability or responsibility to timely bring his claims." (R. p. 22, ¶ 8). However, the Lower Court Order, though, gave no explanation of what representations it was referring to. Even more significantly, the Order makes no reference to the numerous material omissions which, when withheld by a fiduciary, constitute fraudulent representations. See Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (holding defendant precluded from asserting laches due to failure to inform plaintiff of material marital assets).

Respondents acted with unclean hands in making untruthful statements to Kaj and failing to inform him of material events highly relevant to their Verizon venture. With no prejudice shown from Kaj's November 4, 2011 filing date, Respondents are not entitled to the defense of laches.

II. Breach of Fiduciary Duty

A. Introduction

The Lower Court ruled alternatively that Kaj's claims of breach of fiduciary duty failed as a matter of law. (R. p. 24, ¶ 16). The Lower Court held Kaj demonstrated no actions by Respondents constituting a breach of fiduciary duty as promoters, officers or directors. (R. p.26, ¶ 21). The Lower Court ruled VP Enterprises possessed no business opportunity capable of being usurped. (Id. at ¶ 22).

The Lower Court identified three bases for finding no business opportunity was usurped. First, VP Enterprises lost any expectancy in the Verizon opportunity once Verizon rejected VP Enterprises' application. Where a corporation is unable to avail itself of an opportunity, its executives are free to exploit it. (R. p. 27, ¶¶ 24-25). Second, the

Lower Court found that VP Enterprises and Kaj abandoned the Verizon venture after the Verizon rejection letter, thereby freeing Krish and Kaj to pursue the opportunity on their own. (R. pp. 28-29, ¶¶ 27-29). Third, the Lower Court opined that a claim of usurpation of business opportunity must involve an opportunity that is unique and particular. (R. p. 29, ¶30).

The first basis is legally and factually incorrect. The right to exploit an unavailable opportunity is dependent on full and fair disclosure. Also the fact Krish and P Communication were able to exploit the opportunity with only a minor tweak shows the opportunity was readily available.

The second basis -- that VP Enterprises abandoned the Verizon venture -- is factually inaccurate. The evidence conclusively shows Kaj and VP Enterprises never abandoned the prospective Verizon venture until after Respondents misappropriated it.

The third basis -- that a business opportunity must be unique -- is legally wrong. Uniqueness is not a requirement of the claim of usurpation of a business opportunity.

B. South Carolina law prohibits usurpation of a business opportunity by a corporation's officers and directors

South Carolina law holds promoters, directors and officers to a fiduciary duty of loyalty, candor and good faith which requires the fiduciary to abstain from appropriating a corporation's business opportunities for himself. The South Carolina Supreme Court enunciated the duties of a corporation's promoters as follows:

> The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries.

Duncan v. Brookview House, Inc., 262 S.C. 449, 456, 205 S.E.2d 707, 710 (1974).[11]

It is the duty of directors and officers to refrain from misappropriating corporate opportunities for their own benefit. The Supreme Court has held in the case of a director/manager buying stock from his corporation's shareholders:

> It was a breach of his trust to all of the stockholders to use any means to acquire for himself the corporate property, except in the open after giving to the stockholders, fully and candidly, all material information he possessed...

Jacobson v. Yaschik, 249 S.C. at 584, 155 S.E.2d at 605 (quoting Black v. Simpson, 94 S.C. 312, 77 S.E. 1023 (1913)).

This prohibition on a fiduciary's usurpation of business opportunities stems from the well-known case of Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) where Justice Cardozo famously stated:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Meinhard, 249 N.Y. at 464, 164 N.E. at 546 (citations omitted) (emphasis added).

Meinhard has been cited explicitly five times by our state's Court of Appeals.[12] It was not mentioned once by the Lower Court even though Kaj's counsel presented an in-

[11] The Supreme Court defined promoters as "persons who plan or organize a corporation." Bivens v. Watkins, 313 S.C. 228, 233, 437 S.E.2d 132, 135 n.5.

depth comparison of this case to Meinhard in post-hearing briefing. (R. pp. 1548-53; R. p. 157, lines 6-24 and R. p. 383, lines 12-22). A thorough evaluation of Meinhard highlights the depth of Respondents' breaches of fiduciary duty to Kaj.

Just as the defendant did in Meinhard, Krish breathed not a word to Kaj of the new venture he was undertaking until he had already obtained an agreement with Verizon, had set up the new corporation, and already opened the first store. And in fact, he hid from Kaj the bare facts that Kaj would need to discover that Krish had diverted the corporation and venture to himself until after five stores had been opened in June 2010.

The Meinhard court pointed out the defendant obtained the chance to enjoy the opportunity that came his way by virtue of his agency relationship with the joint venture. He therefore owed it to his co-venturer to include him in the subsequent enterprise. Meinhard at 465, 164 N.E. at 547. In our case, the opportunity came to Krish Patel from the business plan, spreadsheets, and site location work he and Kaj developed during the formation of VP Enterprises. By virtue of his agency, Krish owed an obligation to Kaj and VP Enterprises to include them in the subsequent venture.

In describing the standard of loyalty owed by a co-adventurer, Justice Cardozo in Meinhard stated "the standard of loyalty for those in trust relations is without the fixed divisions of a graduated scale." Id. at 466, 164 N.E. at 547. Just as Kaj's expert John Freeman testified[13], the duties of Krish and Vijay were "relentless and supreme." Id. at

---

[12] See McCarter v. Willis, 299 S.C. 198, 200, 383 S.E.2d 252, 253 (Ct.App. 1989); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 597, 538 S.E.2d 15, 24 (Ct.App. 2000); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 478, 581 S.E.2d 496, 506 (Ct.App. 2003); Ramage v. Ramage, 283 S.C. 239, 246, 322 S.E.2d 22, 27 (Ct.App. 1984); and Kiriakides v. Atlas Food Sys. & Servs., Inc., 338 S.C. 572, 588, 527 S.E.2d 371, 379 (Ct.App. 2000).

[13] See R. p. 379, line 23 – p. 380, line 11 and R. p. 383, lines 12-22.

468, 164 N.E. at 548. Their fiduciary obligations are not to be watered down "by the 'disintegrating erosion' of particular exceptions." Id. at 464, 164 N.E. at 546.

Applying the unbending and inveterate rule against diversion of corporate opportunities by fiduciaries, this Court has held that misappropriation of a business opportunity continues even after the co-venturers have terminated their business. Beck v. Clarkson, 300 S.C. 293, 303, 387 S.E.2d 681, 686-87 (Ct. App. 1989) (expressing general view "that the trust or fiduciary relation between partners and or their partnership, as to the firm business and assets, continues after dissolution").

South Carolina has codified three broad duties owed by corporate directors and officers to the corporation and its shareholders: namely, the duties of good faith, due care and loyalty. S.C. Code Ann. § 33-8-300.[14]

An agent's duties of loyalty and fidelity prohibit the agent from usurping the corporate opportunities of the principal for the agent's own benefit. Lowndes Prods., Inc. v. Brower, 259 S.C. 322, 333, 191 S.E.2d 761, 767 (1972).

"The duty of loyalty is enforced by imposing upon officers the burden of: (1) disclosing corporate opportunities to the company, and (2) obtaining its consent to exploit them." Office of Strategic Servs., Inc. v. Sadeghian, 528 F. App'x 336, 343 (4th Cir. 2013) (applying Virginia law).

When a corporation is unable to avail itself of an opportunity, its agents such as employees, officers and directors are free to exploit it. Energy Res. Corp. v. Porter, 14 Mass.App.Ct. 296, 300, 438 N.E.2d 391, 394 (1982). However, "before a director or

[14] See S.C. Code Ann. § 33-8-420, Cmt. ("non-director officer with discretionary authority must meet the same standards of conduct required of directors under...Section 33-8-300").

officer invokes a refusal to deal as the reason for diverting a corporate opportunity, there must be an unambiguous disclosure of that refusal to the corporation, together with a fair statement of the reasons for that refusal." 18B Am. Jur. 2d Corporations § 1551 (2014).

C. A corporate opportunity for VP Enterprises in the Verizon business continued to exist as a matter of law making Respondents' usurpation wrongful.

The Lower Court concluded there was no corporate opportunity capable of being misappropriated because Verizon had refused to deal with VP Enterprises when Verizon rejected its application. (R. pp. 26-28, ¶¶ 22-26). However, the Lower Court is incorrect in holding the refusal to deal defense is available to Respondents.

"A corporate opportunity is defined as a 'proposed activity [that] is reasonably incident to the corporation's present or prospective business and ... in which the corporation has the capacity to engage.' " Anest v. Audino, 332 Ill.App.3d 468, 478 773 N.E.2d 202, 210-11 (2002).

There is no question that VP Enterprises' prospective and avowed business purpose was to operate Verizon retail stores as indicated on its Initial Annual Report. With Kaj's $800,000 line of credit, VP Enterprises had access to financial resources to carry out its intended Verizon retail business. No one debates that development of a chain of Verizon stores was squarely within VP Enterprises' prospective corporate activity.

Respondent's defense is that the intended Verizon retail business ceased being a corporate opportunity when Verizon refused VP Enterprises' application "at this time." The Lower Court noted a Verizon representative testified that to her knowledge Verizon never approved any applicant who reapplied after being rejected. (R. p. 16, ¶21). This same witness, though, testified she was not involved in the decision of license approvals

as that was above her position in the company. (R. p. 437, lines 2-5 and R. p. 439, line 11).

The seminal case on the refusal to deal defense is Energy Res. Corp. v. Porter, supra, which is remarkably similar on its facts. In that case, the officer-defendant on behalf of his corporation presented a new venture to a third party. The third party refused to deal with the officer's corporation but agreed to do business with the officer through a newly formed corporation. The officer-defendant informed the corporation that it was not going to be awarded the contract. He then left the corporation and secretively set up a new company which proceeded with the venture with the third party. The officer-defendant never told the corporation the reasons why the third party refused to deal with the corporation, nor did he tell the corporation he was creating a new company to take the opportunity for himself.

In the corporation's suit for misappropriation of a corporate opportunity, the officer claimed the opportunity was unavailable to the corporation because the third party refused to deal with the corporation. The court rejected that defense noting the refusal to deal defense has not been favored when there has been a failure of full disclosure. The court stated "[w]ithout full disclosure it is too difficult to verify the unwillingness to deal and too easy for the executive to induce the unwillingness." Energy Res. Corp. v. Porter, 14 Mass.App.Ct. at 300-301, 438 N.E.2d at 394. The court pointed out that with full disclosure there could have been various alternatives the corporation might have undertaken to overcome the concerns of the third party. Instead the officer "acted secretively and ... masked his true reason for leaving." Id. at 302, 438 N.E.2d at 395. The court concluded stating:

> ...[B]efore a person invokes a refusal to deal as a reason for diverting a corporate opportunity he must unambiguously disclose that refusal to the corporation to which he owes a duty, together with a fair statement of the reasons for that refusal.

Id. at 14 Mass.App.Ct. at 302, 438 N.E.2d at 395 (emphasis added).

The justification for imposing these duties on directors and officers has been explained as follows:

> If fiduciaries are permitted to justify their conduct on the theory that...the corporation could not make the purchase as proposed, and that the fiduciaries should therefore be permitted to assume a position in which their individual interests might be in conflict with those of the corporation, "there will be a temptation to refrain from exerting their strongest efforts on behalf of the corporation since, if it does not meet the obligations, an opportunity of profit will be open to them personally."

Kelly v. 74 & 76 W. Tremont Ave. Corp., 4 Misc. 2d 533, 536, 151 N.Y.S.2d 900 (Sup. Ct. 1956) (quoting Irving Trust Co. v. Deutsch, 73 F. 2d 121, 124 (2d Cir. 1934)).

In this case, Krish and Vijay never gave Kaj a fair statement of the reasons for Verizon's refusal of VP Enterprises' application. Krish testified he asked Verizon but received no answer. Krish and Vijay, however, knew the two most likely reasons for the rejection – Vijay's criminal record and Krish's firing from Verizon. Not a word, though, was said to Kaj about either of these. Krish may claim he was not a shareholder on the application; therefore, his status is irrelevant. But he knew his being the general manager could be a factor for the denial. Corby Phillips testified Krish seemed worried about that when they put together the P Communications application and plan and therefore submitted them without Krish's name on them. (R. p. 354, lines 1-8).

If those possible reasons for denial had been disclosed to Kaj, the parties could have explored alternate arrangements to obtain the Verizon license. Instead of tasking Krish as being the eyes and ears of VP Enterprises towards Verizon since he had been

fired by Verizon, Kaj could have been given that role. Verizon may have been more forthcoming about the denial with a shareholder making inquiries and may have allowed Kaj to clear up any misconceptions Verizon had about his Magistrate Court lawsuit.[15] Also, an alternative ownership arrangement could have been explored such as using Krish, Vijay's wife or Kaj's wife as the owners. These are but two of many possibilities that could have been proposed. If the rejection were based on a misunderstanding by Verizon regarding either applicant's background, such misunderstanding could have possibly been corrected to the satisfaction of Verizon. Instead, Krish and Vijay masked their true agenda and never told Kaj the truth about the circumstances of VP Enterprises' Verizon application. Critically they also remained silent about their setting up a new corporation with a straw man to take the Verizon business for Krish.

Just as the Lower Court did in this case, the trial court in Energy Res. Corp. found that "no amount of persuasion could alter" the third party's decision to reject the plaintiff corporation's request to enter into a business relationship with it. The Massachusetts Appeals Court rejected that reasoning since the inalterability of the third party's resolve can by no means be certain since the corporate officer never afforded the plaintiff corporation a chance to test it. Energy Res. Corp. v. Porter, 14 Mass.App.Ct. 296 at 300, 438 N.E.2d at 394.

The Lower Court made this same mistake by assuming Verizon's refusal was inalterable even though its rejection letter contained the qualifying language "we are unable to proceed with an Authorized Agency Agreement at this time." (R. p. 1026).

---

[15] Kaj's expert Professor John Freeman testified he considered the $2500 Magistrate Court lawsuit to be small compared to Vijay's criminal conviction for shoplifting in overcoming Verizon's initial denial. (R.p. 406, lines 3-4).

Moreover the Lower Court's finding was based on one witness who was below the decision-making level.

The general rule, mandating full disclosure to the corporation regarding the refusal to deal, has also been applied to require complete disclosure by the officer of his plans to take the new business opportunity. Regal-Beloit Corp. v. Drecoll, 955 F. Supp. 849, 861 (N.D. Ill. 1996). In its finding of a breach of fiduciary duty and usurpation of a corporate opportunity despite a third-party's initial refusal to deal, the court explained:

> This lack of candor, by itself, likely constitutes a violation of the corporate opportunity doctrine * * * "[I]f financial disabilities or third-party refusals to deal with the corporation are accepted as tests, the inevitable result will be to permit the diversion. This is true because courts must resolve the legal issues on the basis of a set of facts largely within the control of the diverter." * * * "To permit the destruction of a corporate fiduciary's duty to disclose the material facts of any given transaction within the line of his corporation's business by such means necessarily will operate to encourage dishonesty and infidelity on the part of the fiduciary in self-dealing."

Regal-Beloit Corp. v. Drecoll, 955 F. Supp. 849, 863 (N.D. Ill. 1996) (quoting Production Finishing Corp. v. Shields, 158 Mich.App. 479, 405 N.W.2d 171, 175 (1987) and Imperial Group (Texas), Inc. v. Scholnick, 709 S.W.2d 358, 367 (Tex.Ct.App. 1986).

Similarly, the Michigan Court of Appeals rejected the refusal to deal defense in a case against a corporate officer and the new corporation he formed to take the new business opportunity. Production Finishing Corp. v. Shields, 158 Mich.App. 479, 405 N.W.2d 171 (1987). In that case Ford Motor Company, the third party, rejected the plaintiff corporation's purchase offer of Ford's polishing unit out of concern the plaintiff would have a polishing monopoly in the area. Defendant officer then submitted a proposal to Ford without informing the plaintiff corporation until after he resigned. The

trial evidence included testimony of at least three Ford employees, one of whom testified that even if the plaintiff corporation made a more attractive offer, Ford would not have dealt with the plaintiff. The court held that as a matter of law the plaintiff corporation was entitled to a judgment where the officer did not fully disclose the refusal and that he was pursuing the new business for his own company.

Krish acknowledged "it was probably the polite thing" to tell Kaj about running off with the Verizon retail opportunity for himself. Remarkably, Krish denied he owed any obligation of disclosure as an officer to VP Enterprises by stating: "I didn't have any responsibility to tell him [Kaj] how Corby got set up." (R. p. 544, lines 6-8).

At trial Krish was asked what duty as an officer did he owe Kaj. He responded: "I owed him and my father the duty to do my best to try to make **the first round work**, and I did do that." (R. p. 543, line 18 – p. 544, line 1) (emphasis added). In his video deposition he testified: "Your client [Kaj] and my father got denied of a Verizon Wireless application. After that was done, it was case closed. I moved on and looked for another opportunity." (R. p. 602, line 24 – p. 604, line 2) (emphasis added).

Those testimonies demonstrate that, once the application was denied, Krish felt no obligation to exert any more efforts on behalf of VP Enterprises. He then fell to the temptation to pursue the opportunity for profit for himself personally. This is exactly the misconduct the courts in Kelly v. 74 & 76 W. Tremont Ave. Corp, supra, and Meinhard, supra, would not tolerate.

The central point in all the refusal-to-deal cases is that the diverting officer must make a full disclosure of all material facts so the corporation will know the officer is making all reasonable efforts on behalf of the company. Full disclosure includes the

most basic fact the officer is seeking the corporate opportunity. Only with this duty of full disclosure can the inalterability of the third party's refusal be fully explored. Here, Krish failed to make these fundamental disclosures to Kaj and VP Enterprises, and Verizon's denial went untested.

The assertion by Defendants of a refusal-to-deal defense when they made no disclosure of taking the Verizon opportunity would be an attempt "to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions." Meinhard v. Salmon, 164 N.E. at 546. The level of conduct required of fiduciaries should not consciously be lowered to that sought by Respondents.

D. VP Enterprises did not abandon the Verizon Wireless opportunity

1. Kaj on behalf of VP Enterprises continued pursuit of prospective wireless retail business

The evidence indisputably shows Kaj and VP Enterprises did not abandon the prospect for a wireless retail business after Verizon's initial denial letter declining the application "at this time." Kaj sent e-mails to Krish on April 18, 2008, July 24, 2008 and April 15, 2010 informing Krish of possible wireless retail opportunities.

While Kaj may not have used the words "VP Enterprises, Inc." in those e-mails, it is axiomatic that corporations work through individuals. There is nothing in the context of the e-mails suggesting he is pursuing these opportunities only for himself personally or outside of VP Enterprises. Otherwise he would not be asking Krish to join in.

Krish and Vijay understood very well on October 18, 2008 Kaj was still strongly interested in finding a way to develop the retail wireless business for their company. Krish testified at trial he did not respond to Kaj's July 24, 2008 e-mail because "I didn't want to insult [Kaj] in any way." (R. p. 521, lines 7-25). Krish thereby acknowledged

that a revelation to Kaj about Krish and Vijay's P Communications activities would be hurtful to Kaj. Krish recognized Kaj had not abandoned VP Enterprises at that point.

Krish also testified: "Actually, my dad and I had spoken before and, you know, that was the time to have that discussion" with Kaj. (R. p. 523, lines 19-20). If Kaj had abandoned the retail wireless idea, then why did they need to have a discussion with him about their being in the Verizon Wireless business?

In addition, Krish and Vijay never resigned as officers. (R.p.568, lines 10-16). VP Enterprises continued its corporate existence until its administrative dissolution in 2011. Instead, it was Krish who abandoned VP Enterprises within three weeks of its initial denial in favor of a new company he could control and own 100%.

2. **Kaj did not abandon VP Enterprises' claims in this litigation and maintained a derivative claim**

The Lower Court held that despite the case caption Kaj did not pursue this litigation derivatively for the benefit of VP Enterprises. (R. p. 7). However, Kaj's Pre-Trial Brief states on the first page in the footnote "Kaj Patel has brought this action individually and derivatively as a stockholder in VP Enterprises, Inc. on behalf of VP Enterprises, Inc. ..." (R. pp. 1459, n. 1). That definitive statement of derivative intent is entirely consistent with the case caption and pleadings. (R. p. 84, ¶ 1).

In addition, Kaj and his counsel made repeated references throughout the trial to taking action on behalf of VP Enterprises. (R. p. 220, line 25 – p. 221, line 1; R. p. 228, lines 18-22; R. p.230, line 24 – p. 231, line 2; R. p. 232, line 8 – p. 233, line 13; R.p. 240, lines 20-21; R. p. 305, lines 15-23; R. p. 310, line 19 – p. 311, line 11; R. p. 326, lines 15-19; R.p.341, lines 9-12; and R. p.548, line 23 – p.549, line 6; see also R. p.222, lines 1-18 for discussion of "our plan" in reference to VP Enterprises' business plan for Verizon).

Regardless of Kaj's styling and advocating this case derivatively, South Carolina statutory corporate law expressly states directors and officers owe duties directly to shareholders who may bring direct actions. See S.C. Code Ann. §§ 33-8-300 and -420; see also Rivers v. Wachovia Corp., 665 F.3d 610, 617-18 (4th Cir. 2011) (citing Jacobson v. Yaschik, *supra,* discussing lack of derivative requirement under South Carolina law where corporation's officers and directors owe fiduciary duty to minority stockholder to make full disclosure of all relevant facts when purchasing shares from the stockholder).

E. Corporate opportunity does not have to be unique as long as it fits into prospective field of business

The Lower Court held that a corporate opportunity must be unique. (R. p. 29, ¶30). While an opportunity may certainly be a unique venture, there is no requirement that it be so. "...[I]n an action for usurpation of corporate opportunity, the dominant inquiry in determining if [a] corporate opportunity exists is whether [the] opportunity at issue falls within the corporation's avowed business purpose." 18B Am. Jur. 2d Corporations § 1544 (citing Ostrowski v. Avery, 243 Conn. 355, 703 A.2d 117 (1997)). A usurpation of an opportunity can involve a myriad of goods and services. Central Ry. Signal Co. v. Longden, 194 F.2d 310 (7th Cir. 1952) (liability found for usurpation of dock loading services); Se. Consultants, Inc. v. McCrary Eng'g, 246 Ga. 503, 273 S.E.2d 112 (1980) (liability for usurping water and sewer services); Hill v. Se. Floor Covering Co., 596 So. 2d 874 (Miss. 1992) (appropriation of flooring business held to be usurpation of corporate opportunity).

There is no exception for officers and directors of corporations in the wireless phone business from the requirements of the duty of loyalty and candor.

F. The same fiduciary duty of loyalty and candor applies to promoters and officers

The Lower Court held Krish and Vijay owed Kaj and VP Enterprises "various duties at different times", indicating a lower fiduciary standard for officers than for promoters. (Order, pp. 8 and 20) (R. p. 13 and R. p. 25). However, the South Carolina Reporters' Comments to S.C. Code Ann. §33-8-300 specify the fiduciary duties of directors and officers to the corporation and shareholders continue under the statute by stating: "The purpose here is to make clear that the fiduciary duty of directors runs to the shareholders, and prevents them from making use of their favored position to take advantage of shareholder interests." S.C. Code Ann. § 33-8-300, S.C. Rprt's cmt. (underline added).[16]

Krish and Vijay initially owed fiduciary duties to Kaj and/or VP Enterprises as promoters. Once the corporation was fully formed, they continued to owe the same fiduciary duties to Kaj and VP Enterprises since they assumed the positions of director and officers. Under South Carolina law, the change in status of Krish and Vijay from promoters to officers and director did not diminish their fiduciary duties of loyalty, good faith and candor.

III. Appellant entitled to an accounting

The Lower Court held there was no basis for seeking an accounting from Respondents. (R. p. 30, ¶ 31). Shareholders of a statutory close corporation may petition

[16] The Official Comment of the Committee on Corporate Laws of the American Bar Association to the Model Act's version of § 33-8-300 states that the term "fiduciary" was not included for directors (and officers) to avoid confusion with the fiduciary duties of the law of trust. S.C. Code Ann. § 33-8-300, cmt. 1. However, the South Carolina statute differs from the Model Act by adding that executive duties flow to shareholders in addition to the corporation.

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(a)(1), 410(a)(5). As explained above, the conduct of Respondents was an illegal and prejudicial breach of their fiduciary duties to VP Enterprises and Kaj. VP Enterprises derivatively maintains a chose in action against Respondents. The benefits of that chose in action will need to be accounted for, which the court may carry out. S.C. Code Ann. § 33-18-410 cmt.1 ("A court should have broad discretion to fashion the most appropriate remedy to resolve the dispute.")

VP Enterprises and Kaj have sought a constructive trust on the assets of P Communications and its stock owned by Krish and/or Vijay in their Eleventh Cause of Action. (R. pp. 106 – 108, ¶¶ 107-08 and Prayer ¶ C). An action to impose a constructive trust against copartners is permissible with or without an action at law for damages. J. William Callison & Maureen A. Sullivan, Partnership Law & Practice § 13:4 (2014). With a finding that Krish and Vijay breached their fiduciary duties, an accounting of their ill-gotten gains is proper.

IV. Equitable Disgorgement and Constructive Trust are Appropriate Remedies; Declaratory Judgment for Kaj is Proper

The Lower Court ruled the remedies of equitable disgorgement and constructive trust are not available because Kaj has not established liability by Respondents. (R. p. 32, ¶¶ 38-39). Since Respondents have breached their fiduciary duties to VP Enterprises and Kaj as a matter of law as set forth above, Kaj and VP Enterprises are entitled to the imposition of these remedies to correct the wrongs undertaken by Respondents.

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." Lozada v. S.C. Law Enforcement Div., 395 S.C. 509, 511, 719 S.E.2d 258, 259 (2011). Here the relief sought is equitable, making the review of Kaj's request for a declaratory relief equitable. For the substantive reasons stated above, Kaj's claim for declaratory judgment entitling him to a constructive trust, an accounting and equitable disgorgement is proper.

CONCLUSION

Kaj, individually and derivatively on behalf of VP Enterprises, Inc., asks this Court for a finding of a breach of fiduciary duty by Krish and Vijay as a matter of law. This Court should also direct the Lower Court on remand to proceed with the imposition of a constructive trust attaching to Respondents' shares of stock in P Communications. Given the lengths of deception to which Respondents have resorted in this case, Kaj is fearful of what may happen if a constructive trust is not imposed immediately by this Court. Kaj further requests that this Court direct the Lower Court to proceed immediately with an accounting of Respondents' gains and an equitable disgorgement thereof.

Respectfully submitted,

THE GILREATH LAW FIRM, P.A.

By: _____

James R. Gilreath (S.C. Bar No. 02133)
William M. Hogan (S.C. Bar No. 65272)
110 Lavinia Avenue (zip 29601)
P.O. Box 2147
Greenville, SC 29602
Telephone: (864) 242-4727
Fax: (864) 232-4395
bhogan@gilreathlaw.com
jim@gilreathlaw.com

and

Monty D. Desai (S.C. Bar No. 73967)
Nihar Patel (S.C. Bar No. 74166)
J. Matthew Whitehead (S.C. Bar No. 73803)
THE CAROLINA LAW GROUP
910 E. Washington Street
Greenville, SC 29601
Telephone: (864) 312-4444
Fax: (864) 312-4447
monty@thecarolinalawgroup.com
nihar@thecarolinalawgroup.com
matt@thecarolinalawgroup.com

Attorneys for Appellants Pankaj Patel, individually and derivatively on behalf of Nominal Defendant, VP Enterprises, Inc.

October 15, 2015
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 16 2015
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Trial Case No.: 2011-CP-23-07338
Appellate Case No. 2015-000162

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant and the Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

William M. Hogan (S.C. Bar No. 65272)
James R. Gilreath (S.C. Bar No. 02133)
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue (zip 29601)
P.O. Box 2147
Greenville, SC 29602
Telephone: (864) 242-4727
Fax: (864) 232-4395

jim@gilreathlaw.com
ATTORNEYS FOR APPELLANT

October 16, 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 Case No.: 2011-CP-23-07338
Appellate Case No. 2015-000162

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

v.

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

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondents in the foregoing matter with a copy of the foregoing **FINAL BRIEF OF APPELLANT, FINAL REPLY BRIEF OF APPELLANT, RECORD ON APPEAL, AND A COPY OF THE DVD OF PLAINTIFF'S EXHIBIT - VIDEO DEPOSITION EXCERPTS OF KRISH AND VIJAY PATEL - RECEIVED FROM THE OFFICE OF THE CLERK OF COURT OF GREENVILLE COUNTY** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

Thomas L. Stephenson, Esquire
STEPHENSON & MURPHY, LLC
207 Whitsett Street
Greenville SC 29601

Andrew A. Mathias, Esquire
Kirsten E. Small, Esquire
NEXSEN PRUET, LLC
Post Office Drawer 10648
Greenville, SC 29603

William M. Hogan

William M. Hogan (S.C. Bar #65272)

James R. Gilreath (S.C. Bar #02133)
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue (zip 29601)
P.O. Box 2147
Greenville, SC 29602
Telephone: (864) 242-4727
Fax: (864) 232-4395
jim@gilreathlaw.com
bhogan@gilreathlaw.com

Attorney for Appellants Pankaj Patel, individually and derivatively on behalf of Nominal Defendant, VP Enterprises, Inc.

October 16, 2015
Greenville, South Carolina.