THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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 REPLY BRIEF OF APPELLANT

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Appellant Pankaj Patel ("Kaj") individually and derivatively on behalf of Nominal Defendant, VP Enterprises, Inc. ("VP Enterprises") respectfully submits this Reply Brief in Opposition to the Response Brief filed by Krish Patel ("Krish"), Vijay Patel ("Vijay") and P Communications, Inc. ("P Communications").

I. RESPONDENTS' FRAUDLENT CONCEALMENT TOLLS THE STATUTE OF LIMITATIONS.

In the Introduction of his Initial Brief, Kaj stated that a central issue in this appeal is whether fiduciaries may 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. Respondents ignore this issue completely, citing only cases regarding the duty of disclosure of nonfiduciaries. As a result, Respondents avoided discussing the cases of Black v. Simpson, 94 S.C. 312, 77 S.E. 1023 (1913), Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967), Anthony v. Padmar, Inc., 320 S.C. 436, 465 S.E.2d 745 (Ct. App.1995), and Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004).

Respondents' sidestepped the issue by claiming Kaj and VP Enterprises abandoned the Verizon store opportunity after VP Enterprises received the initial rejection letter from Verizon dated February 26, 2008, thereby allegedly ending Respondents' fiduciary duties to VP Enterprises.

To make the claim of abandonment by Kaj and VP Enterprises, Respondents had to ignore the facts showing that Kaj on behalf of VP Enterprises continued to pursue the Verizon opportunity after receipt of the initial rejection letter. For instance, Respondents do not mention that Kaj testified Krish instructed him to focus on Verizon stores following the April 18, 2008 e-mail about possible AT&T dealerships. (R.p. 210, line 21

– p. 211, line 16).[1] Also in the April 15, 2010 e-mail from Kaj to Krish regarding possible store locations in the Columbus/Tryon, North Carolina area, Kaj wrote "I checked Verizon's site as you suggested. . ." (R.p. 1131). Further, Krish and Vijay realized that their taking the Verizon store opportunity from VP Enterprises to P Communications would be a hurtful surprise to Kaj; therefore, when "the time [came] to have that discussion" with Kaj, they crafted a way to disclose only a sliver of information while withholding significant and material facts in order to disguise what they were really doing. (R.p. 523, lines 3-20).

In addition to Kaj's continued pursuit of the Verizon business for VP Enterprises with Krish's outward acquiescence, the evidence is undisputed that Vijay and Krish never resigned as directors and officers of VP Enterprises. As a result, Respondents cannot skirt the issue of a fiduciary's duty of disclosure by claiming that Kaj abandoned VP Enterprise. The only abandonment of VP Enterprises came from Krish and Vijay, not from Kaj.

The appellate courts of this State have consistently held that a fiduciary must fully disclose to its beneficiaries all known information that is significant and material without the slightest misrepresentation or concealment. See, Anthony v. Padmar, Inc., 320 S.C at 449, 465 S.E.2d at 752; Moore v. Moore, 360 S.C. at 252, 599 S.E.2d at 473. However, our state's appellate courts have not opined on whether the general discovery rule requirement of reasonable diligence by a plaintiff allows a fiduciary committing

[1] Krish did not testify with any assuredness on this point, stating only that he probably did not discuss it with Kaj. (R.p. 517, line 21 – p. 518, line 5). Moreover, there are no more e-mails regarding an AT&T venture, which corroborates Kaj's testimony that Krish told him to focus on Verizon. If Krish's version (that he did not respond) were true, one would expect to see follow-up e-mails from Kaj asking for a response to his AT&T e-mail.

fraudulent concealment to provide far less than full disclosure and still obtain protection under the corporate statute of limitations which tolls acts of fraudulent concealment. See, §§ 33-8-300(e) and -420(e). Appellant therefore cited case law from other states that have addressed the issue holding that a fiduciary's partial disclosure is not sufficient to start the running of the statute of limitations (see App. Br at 24, n.8). In particular, Appellant discussed the Massachusetts Supreme Court case of Demoulas v. Demoulas Super Mkts, Inc., 424 Mass. 501, 677 N.E.2d 159 (1997) on pages 28-30 of his opening brief. Again, this case and the whole topic of a fiduciary's duty of full disclosure to start the statute of limitations were completely ignored by Respondents.

Adhering to the duty of full disclosure of significant and material information, the statute of limitations could only have started running against Kaj in May/June 2010 when Krish first revealed that he had been the actual controller and later sole owner of the new Verizon store opened in October 2008 and that he used that opportunity to open four or five additional stores. Prior to that time, Krish concealed significant and material information that he controlled, through a strawman, the ownership of the corporation operating the new Verizon store and then later owned it outright by himself, while using the VP Enterprises business plan to obtain the license.

Respondents claimed Kaj and VP Enterprises knew about Krish's multi-store operations during the 2008 – 2009 time period stating: "During this period, Appellant learned that Krish had opened several more Verizon stores. (Tr. at 100.)" (Resp'ts Br. at 27). The testimony cited, however, is Kaj's description of the May/June 2010 discussions between himself and Krish when he first learned about the multi-store operations. (R.p. 228, line 15 – p. 230, line 23).

Citing Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998), Respondents asserted Appellant should have been suspicious about Krish and Vijay after October 2009 when Corby reportedly had not been ousted as the owner by Krish after one year, and that the statute of limitations should have started running then. In reality, Krish ousted Corby Phillips as an owner of P Communications by December 15, 2008 but did not inform Kaj of the change, constituting one of many acts of fraudulent concealment by misrepresentation and omission. (R.p. 1038-39). Moreover, the case of Maher v. Tietex Corp. did not involve a duty of disclosure by a fiduciary. The Maher case was a breach of contract matter between an employer and employee. The fiduciary obligation of perfect good faith and full disclosure was not at issue in Maher.

To create a defense that Respondents supposedly made sufficient disclosures, Respondents describe the conversation between Kaj and Krish on October 18, 2008, after the grand opening of P Communications' first Verizon store, as follows:

> Krish informed Kaj that he had just opened a new independent Verizon store on Pelham Road and that he planned to own the company at some point in the future.

(Resp'ts Br. at 14 – 15).

Respondents, though, did not put that description of the conversation in quotations because that is not what Krish testified he told Kaj. Krish actually testified as follows: "And I continued to tell him that I joined with another individual who obtained a Verizon license and that I, you know, moved on to that opportunity." (R.p.523, lines 23-25). Later 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 a call." (R.p. 541, lines 19-22). Krish never stated in any

testimony at trial or in deposition that he told Kaj on October 18, 2008 he planned to own or already owned the company opening the Verizon store. (cf: Krish dep., R.p. 604, lines 10-24). Krish's statement – that he informed Kaj that he would give him a call if he saw some opportunity arise with a previously established Verizon retail company owned by a third party – is drastically different from a disclosure that Krish actually owned and controlled the company through a strawman and was in the process of taking over ownership for himself. Krish's testimony about the October 2008 meeting provides no indication that Krish disclosed he was starting a Verizon retail company solely for himself to the exclusion of VP Enterprises, in effect usurping the parties' business opportunity. (R.p.219, line 9 – p. 223, line 24 and R.p. 316, line 15 – p. 321, line 5).

Judge Miller made this same mistake in his Order about the substance of Krish's testimony regarding the October 18, 2008 meeting. (R.p. 11 and R.p. 17, ¶ 31).

Even though Krish and Vijay did not reveal that Vijay had a criminal conviction not disclosed on the license application, that Krish had been asked to resign (*i.e.*, fired) by Verizon, that Krish gave the VP Enterprises business plan to P Communications, that Krish had established a new Verizon retail company P Communications, and that Vijay was assisting in opening the new Verizon store, Respondents claimed that Krish was not hiding anything from Kaj. (Resp'ts Br. at 14). Respondents, however, do not cite to a single line of testimony, e-mail or other document where they allegedly disclosed the existence of P Communications to Kaj and VP Enterprises. In fact, Respondents' own accountant referred to the role of Corby Phillips as a "silent Ptnr." (App. R.p. 25). If Respondents were not concealing anything, why were they operating with an admitted strawman or "silent partner"?

II. RESPONDENTS FAIL TO DISPROVE APPELLANT'S FIDUCIARY DUTY CLAIMS ON THE MERITS.

A. Meinhard v. Salmon.

Just like the Lower Court's Order, Respondents failed to mention the renowned case of Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928). Their failure to address it is understandable because the case is fatal to their position whether the Court follows the majority opinion of Justice Cardozo or the dissenting opinion of Justice Andrews. The facts of this case are remarkably similar to Meinhard which this Court has cited in five previous opinions.[2] In Meinhard, Justice Andrews dissented from the prevailing standard employed by Justice Cardozo by stating: "The issue, then, is whether actual fraud, dishonesty, or unfairness is present in the transaction. If so, the purchaser may well be held as a trustee." Id. at 473, 164 N.E. at 550. If the Meinhard court had encountered the same misrepresentations and concealments Respondents committed, the Meinhard decision would have been a unanimous opinion. Because Respondents here, as in Meinhard, breached their duty of loyalty by their non-disclosures and misrepresentations, the imposition of a constructive trust over Respondents' stock in P Communications and the proceeds from the stock is warranted.

B. Respondents Misapprehend Energy Resources Corp. v. Porter and Production Finishing v. Shields.

To avoid the holding of Energy Res. Corp. v. Porter, 14 Mass. App. Ct. 296, 438 N.E.2d 391 (1982), Respondents incorrectly construct the facts of that case. Respondents

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[2] 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).

describe the plaintiff ERCO as a partner with Howard University and not as an independent contracting entity with Howard University. (Resp'ts Br. at 39). That description is factually incorrect. As the opinion states: "Howard was to be the primary applicant and ERCO would be the subcontractor." Energy Res. Corp., 14 Mass. App. Ct. at 298, 438 N.E.2d at 393. The party ERCO was seeking to do business with was Howard University. Near the end of the negotiations for a potential contract, ERCO's president asked Porter, the usurping officer, about the proposal to Howard University. The court described the encounter as follows: "Davis asked Porter about the Howard proposal on a later occasion and, once again, was told, without further elaboration, that ERCO wasn't going to get a subcontract from Howard." Id. at 299. In other words, the opinion makes clear that the party with whom ERCO was seeking a contract was Howard University, not the Department of Energy. Howard, like Verizon, was the general contractor who was contemplating awarding a subcontract with ERCO, the equivalent of VP Enterprises.

Respondents further tried to distinguish Energy Resources by stating, "...the defendant in that case took action to obtain the corporate opportunity before a decision was made by the third party. . . ." (Resp'ts Br. at 40) (underline added). Again that description of the facts of Energy Resources is incorrect. Porter, as the usurping officer, took action to obtain the corporate opportunity after he was informed by Howard University's Professor Jackson that Howard University did not want to deal with ERCO. The Court described the scenario as follows:

> In early May 1979 during the course of a ride from Washington National Airport to DOE, Jackson advised Porter of a change of heart about working with ERCO.
> * * *

> Cannon and Jackson came up to Cambridge a week later to see Porter at M.I.T. and suggested that, if he were to form his own company, they would be pleased to substitute it for ERCO in the proposal to DOE. Porter agreed to do so.

Id. at 298-99 (underline added).

DOE never refused to do business with ERCO. It was Howard University that refused to deal with ERCO.

In Energy Resources, the usurping officer took no action to form a new corporation to obtain the corporate opportunity until after learning that Howard University, not DOE, refused to deal with ERCO. He then concealed his formation of a new entity to take the venture. Likewise, Krish made the decision to take the Verizon retail corporate opportunity three weeks after Verizon's refusal without telling Kaj and VP Enterprises he had formed a new corporation to do so. As such, Howard University does equal Verizon, ERCO equals VP Enterprises, and Porter equals Krish and Vijay. The seminal case is squarely on all fours with the matter *sub judice*.

Justice Brown's conclusion is equally applicable to this case: "A fiduciary's silence is equivalent to a stranger's lie." Id. at 304, 438 N.E. at 396.

C. Production Finishing v. Shields supports Appellant's position.

In Production Finishing, the fiduciary/officer [Krish equivalent] proposed taking the corporate opportunity for himself after the commencement of the meeting where Ford Corporation [Verizon equivalent] informed the officer/fiduciary that Ford was not going to deal with Production Finishing Corporation. [VP Enterprises equivalent]. The corporate officer/fiduciary did not take action towards usurping the opportunity before learning of the refusal, as mistakenly characterized by Respondent. (Resp'ts Br. at 40). Production Finishing Corp. v. Shields, 158 Mich. App. 479, 483-84, 405 N.W.2d 171,

173 (Ct. App. 1987).

While the officer/fiduciary did not inform his corporation of the third party refusal, unlike Energy Resources and this case, the court pointed out "Shields [officer/fiduciary] did not inform the Production Finishing board of directors . . . that Shields was pursuing the opportunities on his own account." Id. at 484, 405 N.W.2d at 173. As a result, the Michigan Court of Appeals overturned the jury verdict that there was no corporate opportunity, holding that plaintiff as a matter of law is entitled to judgment where a defendant while serving as a corporate officer directs a business opportunity for himself "without full disclosure to the corporation." Id. at 485, 405 N.W. 2d at 173-74.

The same breach of duty highlighted by the court in Production Finishing is present in both Energy Resources and this case. The facts are undisputed that Krish did not tell Kaj or VP Enterprises that he was pursuing the Verizon venture through P Communications or through a company that he controlled or was planning to own. As a result, VP Enterprises kept Krish as the contact person with Verizon which surely no corporation would do if it knew that the assigned officer was seeking the corporate opportunity for himself.

The key point from Energy Resources and Production Finishing is that Krish and Vijay never told VP Enterprises they were seeking for themselves VP Enterprises' business objective which was still open to VP Enterprises per Verizon's denial "at this time." "This lack of candor, by itself, likely constitutes a violation of the corporate opportunity doctrine." Regal-Beloit Corp. v. Drecoll, 955 F. Supp. 849, 861 (N.D. Ill. 1996).

III. SIGNIFICANT FACTUAL ERRORS OF RESPONDENTS.

A. Errors in Respondents' Statement of the Facts.

Respondents made a series of factual inaccuracies some of which must be pointed out to the Court. First, Appellant's counsel would like to correct Respondents' mischaracterization of Kaj as "an unsuccessful entrepreneur" (Resp'ts Br. at 4) implying that Kaj is some sort of shiftless freeloader. Nothing can be further from the truth. Kaj came to the United States from Kenya (not India) with $86 to his name. (R.p. 160, line 6 – p. 161, line 14). Kaj studied computer engineering at Clemson and worked hard to develop a consulting business that he has owned for 21 years. (R.p. 164, line 13 – p. 166, line 8). Like many persistent entrepreneurs, Kaj has had some failures along with his success. As the result of his hard work and frugality, he was able to bring an $800,000 line of credit to VP Enterprises – an important asset to any start-up business. (R.p. 192, lines 17-12).

B. Kaj develops the idea of the multi-store venture for VP Enterprises venture and makes significant contributions to its creation.

Respondents criticize Kaj for backing off the supposedly false assertion that the VP Enterprises model was his idea. While both parties may have thought of the idea, the central point of the enterprise was that all three individuals agreed to pool their resources. While Respondents belittled Kaj for having no prior wireless phone experience as Krish did, he brought other important strengths to the corporation such as an $800,000 line of credit. He also brought the skill set and experience for developing a business plan model and a profit and loss projection system for vetting the proposed venture. As Verizon employee Tammy Blew testified, the business plan is a necessary "first step in the process" of obtaining a Verizon agency. (R.p. 445, line 4). "The business plan shows that

there's been some thought put into" the venture. (R.p. 444, lines 18-19). Without a sound business plan, Verizon would not have approved or moved forward with consideration for granting an agency contract. (R.p. 442, lines 20-25 and R.p. 444, line 15 – p. 445, line 4). Even though Krish claimed to have been the sole person working on the idea since 2006, it is undisputed that by December 2007, Krish had created no business plan nor developed a profit and loss spreadsheet for analyzing the proposed venture. (R.p. 548, line 9 – p.551, line 5; R.p. 958, App. R.pp. 2-24 and App. R.p. 20).

A successful corporation takes more than just one skill set but requires a pooling of diverse talents and resources. See, Michael B. Dorff, *Does the One Hand Wash the Other? Testing the Managerial Power and Optimal Contracting Theories of Executive Compensation*, 30 J. Corp. L. 255, 297 (2005). It is the pooling of talents that gives the corporation its strength. Failing to recognize the importance of combining diverse strengths and assets for a successful corporation, Respondents claimed there could be no misappropriation of a corporate opportunity because Kaj could have opened a Verizon store by himself. (Resp'ts Br. at 37-38 and 40). Kaj acknowledges he had no Verizon or other wireless phone sales experience; however, he brought other assets to the table as stated above, including his capital support. That was the purpose of forming VP Enterprises. (R.p. 341, lines 9-13). But instead of continuing to agree to pool talents and resources into one organization, namely VP Enterprises, Krish chose instead to pull his contribution (time and sales experience) away from VP Enterprises and divert them to P Communications. Once Krish obtained a business plan model and a profit and loss template from Kaj along with an alternate source of funding, he jettisoned Kaj to keep the benefits of the venture for himself.

C. Kaj's explanation on the creation of the business plan is accurate and supports the credibility of his testimony.

Respondents, in showing the weakness and desperation of their case, tried to attribute to Kaj a claim he never made and then discredit the non-existing position. Specifically, Respondents argue that Kaj asserted he created a business plan model for a restaurant called "Abonda" (Resp'ts Br. at 7), or "Kundo" as it was referred to in the trial documents. (App. R.pp. 30-46).[3] To make that assertion, Respondents had to insert the bracketed word "[these]" into a quotation of a key e-mail of Kaj in order to change the e-mail's meaning. Respondents quote Kaj on a December 5, 2005 e-mail as follows: "In his e-mail Kaj asked Krish to 'please keep [these] confidential.' " (Resp'ts Br. at 7).

Kaj's actual e-mail stated:

> Attached are two business plans, one of which is for Tava Grill and has some stats of Greenville that might be useful. Please keep confidential and do not distribute…

(R.p. 958).

Kaj in the e-mail is referring to the Tava Grill plan which he patterned after a business plan model he obtained on the internet but then tailored it for his specific uses in the Greenville, South Carolina market. Kaj's claim of confidentiality is only for the Tava Grill plan, which he mentions by name, and not the generic Kundo model, whose name is not mentioned in the e-mail. Kaj, however, never claimed in this litigation, and specifically denied, that he created the internet model. Kaj unequivocally testified it was only the Tava Grill plan, not the Kundo model, that he asked Krish to keep confidential. (R.p. 270, lines 11-21and R.p. 274, lines 5-8; see also R.p. 167, line 12 – p. 168, line 15; see also App. R.p. 30-46 for comparison between Kundo, Inc. business plan and Kaj's

[3] It was also referred to as "Kunda" in the trial transcript, *e.g.*, R.p. 270, lines 11-14.

Tava Grill plan with items added by Kaj in blue font).

Respondent's addition of "[these]" to the actual text of Kaj's e-mail about the confidentiality of the Tava Grill plan changes the scope of Kaj's confidentiality claim from just the Tava Grill plan to two business plans. The insertion, in effect, discredits Kaj for a claim he has never made.

The Lower Court also attributes to Kaj this same non-existent position – *i.e.*, that he claimed both plans were his property. (R.p. 10). This description of Kaj's testimony has no evidence in the record and provides an unsupported foundation on which to judge the credibility of Kaj's testimony.

D. Respondents distort Kaj's accurate disclosure of civil litigation made in good faith.

Respondents proceed next to mischaracterize the testimony and evidence regarding the effect of prior criminal convictions and civil litigation on the VP Enterprises application process. (Resp'ts Br. 8-11). Respondents declare at one point that Kaj "admittedly failed to disclose numerous civil suits in his past" (Resp'ts Br. at 9) and that "Kaj reluctantly admitted that he failed to disclose at least four different lawsuits either in the Verizon application or in his answers to interrogatories." (Resp'ts Br. at 10, n. 12). This characterization has no foundation in fact. At issue is only one magistrate court lawsuit Kaj filed around 2000 which was a $2,500 claim, about seven years prior to the filing of the business application with Verizon. (R. p. 197, line 1 – p. 198, line 18, R.p. 292, lines 15-16, R.p. 295, line 16). The Verizon application asked for civil litigation that the applicants, Kaj and Vijay, were involved in within the past five years. (R.p.1020). Kaj's magistrate court case never proceeded past the pleading stage and was simply stricken for inactivity from the docket years later in 2009. (R.pp. 1422-33).

Because Kaj never proceeded with the case at any time during the five year period prior to the Verizon business application, he did not believe that the 2000 magistrate court case came within the ambit of the Verizon litigation questionnaire. (R.p.198, lines 14-18).

What is undisputed is that Kaj disclosed a lawsuit he initially filed in 2005 and then refiled in 2008 against Applied Engineering Solutions, Inc., in keeping with Verizon's disclosure request. The two filings were all part of one claim against the same defendants. (R.p.294, lines 7-19). Respondents' cross-examination about "your lawsuit against . . . A[pplied] Engineering", "... a lawsuit filed in '05. And ... another lawsuit filed in '08" all refer to the same fully disclosed lawsuit Kaj filed against Applied Engineering Solutions, Inc. (R.p. 294, lines 4-11). They do not comprise three different undisclosed litigations as claimed by Respondents.[4] Significantly, Verizon never indicated any problem with the way Kaj disclosed the Applied Engineering litigation.

To bolster their concocted story that Kaj participated in numerous undisclosed civil suits causing the rejection of the Verizon application, Respondents also pointed to part of the record containing testimony about a lawsuit filed by a credit card company against a different Pankaj Patel who lived in North Carolina which was inadvertently served on Kaj. (R.p. 293, lines 1-11; see also Resp'ts Br. at 10 citing R.pp. 287-296 for assertion of four different lawsuits by Kaj).

At issue is only the seven year old, $2,500 magistrate court lawsuit whose only

[4] Respondents' counsel had possession of both the 2005 and 2008 complaints against Applied Engineering in the courtroom during trial, but did not introduce them into evidence or present them to the Lower Court. (R.p. 293, lines 12-21). If the court records on the two cases had been introduced, it could have been seen that the two filings were part of the same claim. See Nelson v. Coleman Co., 249 S.C. 652, 61-62, 155 S.E.2d 917, 922 (1967)(where a party fails to produce testimony of an available material witness, it may be inferred such testimony would be adverse to him).

known activity occurred outside the five year disclosure window requested by Verizon. As Professor Freeman testified, this issue is small compared to Vijay's criminal conviction for shoplifting. (R.p. 406, lines 3-4).

Respondents claim that "non-disclosure of this sort" is why the VP Enterprises' application was denied. (Resp'ts Br. at 9). However, a thorough review of the Verizon testimony shows that Kaj's seven year old magistrate court suit or any other litigation was never identified by Verizon as the cause of the VP Enterprises rejection. Verizon's Rule 30(b)(6), SCRCP, witness, designated to testify why Verizon rejected VP Enterprises' license application, attempted the following explanation:

Q. All right. Well, what – what did you find that led Verizon to reject this application? What was not disclosed and on – and who – and which person? We've got two people on there: Kaj Patel and Vijay Patel. Let's start with Vijay. What was not disclosed or mis-disclosed or misrepresented as far as Vijay Patel was concerned?

A. As – what I remember and what I saw on the background check, was a shoplifting charge. I don't know what the results were of that shoplifting charge. And then I believe there was a – an open container charge.

As far as the other – the other gentleman, I recall that – I believe that both of them had something on their background check, but I – I can't recall exactly what it was.

* * * * *

Q. ...And – and – so my question is: Was there a problem with both individuals or with one individual? ... Do you know?

A. No, sir.

Verizon 30(b)(6) Dep., P. Cook , R.p. 886, line 23- p. 887, line 8 and R.p. 888, lines 15-20, July 23, 2013.

At trial, which occurred one year after the Rule 30(b)(6) deposition of Verizon, no Verizon witness could point to anything in Kaj's background that contributed to the denial. The only Verizon employee to testify, Tammy Blew, was specifically asked: "Do

you know why VP was denied?" She answered: "I do not", since the decision was above her job level. (R.p.437, lines 2-5).

In contrast, the Lower Court Order stated: "At trial a representative from Verizon testified that Kaj's failure to fully and accurately disclose his litigation history contributed to the denial. This testimony is credible." (R.p. 16, ¶18). In actuality, there is no such testimony. This finding is wholly unsupported by the record.

A critical take-away from the refusal-to-deal cases, such as Energy Resources, Production Finishing, and Regal-Beloit and others, is that any misunderstanding between Kaj and Verizon about the reporting of civil litigation on the license application could have been easily cleared up with a discussion among Vijay, Krish, Kaj and Verizon personnel. Instead, Krish and Vijay withheld from Kaj the glaring problems in their backgrounds and continued to proceed with Krish as the point man in the application process. As the aforementioned courts have emphasized, full disclosure among fiduciaries could have led to arrangements being made with the third party (Verizon) that allowed the application to proceed toward approval. The concealments by Vijay and Krish prevented Verizon's initial denial from ever being tested. That is why, as a matter of law, Respondents' refusal-to-deal defense should be rejected and the Court's order overturned.

IV. JUDGE MILLER'S VIEWS OF THE FACTS AS RECITED BY RESPONDENTS ARE ALL INDISPUTEABLY CONTRADICTED BY THE EVIDENCE.

Respondents lay out 12 bullet points in their brief that supposedly support the Lower Court's Order and discredit Kaj. (Resp'ts Br. 17-18). All 12 points are wrong.

> "• **Credible**: Testimony from a Verizon witness indicating that Kaj's failure to disclose his litigation history contributed to the denial of VP Enterprises' application (*See* Order at [R. p. 16], ¶18)". (Resp'ts Br. 17).

The provision of the Lower Court's Order cited by Respondents above specified: "At trial a representative from Verizon testified that Kaj's failure to fully and accurately disclose his litigation history contributed to the denial." (R.p. 16, ¶18). As stated above, the Verizon witness at trial testified she did not know why VP Enterprises' application was denied. In fact, no Verizon witness could specify any problem with Kaj's litigation disclosures. At best for Respondents, the Verizon Rule 30(b)(6) deposition witness stated she thought there might have been some issue with Kaj's application but had no firm recollection or any specific information on what the issue could have been.[5] The Lower Court's finding on this issue has no support in the record.

> "• **Credible**: Testimony from a Verizon employee that, in her nearly three decades with the company, she had never seen an applicant receive agency status after they had previously been denied (*See* Order at [R.p 16], ¶21) ". (Resp'ts Br. 17-18).

As the Michigan Court of Appeals stated in Production Finishing v. Shields, supra, it does not matter if three employees of the third party testified definitively that the third party's refusal to deal was inalterable when the defendant did not fully disclose the taking of the business opportunity. The appellate court overturned the jury's defense verdict despite testimony that the third party's rejection was inalterable since the non-disclosures of the defendant prevented the third party's refusal from being tested. The Lower Court in this case made the same mistake by relying on the testimony of Tammy Blew, a Verizon employee not involved in the decision making process, that she had not seen an application reversed. Since the usurpation was not fully disclosed, VP

[5] Patricia Cook, the Verizon designee, stated in her individual deposition that only one of the two applicants had a problem with disclosures of criminal or civil litigation history. (Cook Dep. R.p. 666, lines 2-13 and R.p. 667, lines 23-25). She later confirmed in her Rule 30(b)(6) deposition Vijay had a criminal conviction for shoplifting and an open container charge as stated above. (Verizon 30(b)(6) Dep., P. Cook , July 23, 2013, R.p. 886, line 23 – p. 887, line 8 and R.p. 888, lines 15-20).

Enterprises never had the opportunity to fully test Verizon's refusal.

> "• **Credible**: Testimony indicating that, when he and Krish discussed a few stores in Columbia, South Carolina, Kaj had no expectation that he would be involved in any stores other than the few in Columbia (*See* Order at [R. p. 18], ¶38)". (Resp'ts Br. 18).

In contrast, Kaj testified that in May/June 2010, he and Krish specifically talked about how they would integrate the ownership of the current stores, that were supposedly being bought from Corby Phillips, with the new stores to be purchased in the Columbia area. The discussions included Kaj paying Krish for part of the cost of buying out Corby Phillips in order to put the VP Enterprises plan back on track. (R.p. 230, line 19 – p. 233, line 1).

> "• **Credible**: All evidence that anyone - including Kaj - can apply for a Verizon agency status (*See* Order at [R. p. 18], ¶ 40)". (Resp'ts Br. 18).

First, this point is irrelevant because Kaj, Vijay and Krish chose to operate jointly through a corporate entity thereby pooling their resources. (R.p. 341, lines 9-12). Second, the store locations had to be approved by Verizon which would prevent agents from locating stores in the same proximity as existing Verizon stores and the Respondents took the best locations early on in the Greenville market. (R.pp. 149-150, 433 and 443-445).

> "• **Credible**: Krish' s testimony regarding what he disclosed to Kaj on October 18, 2008, concerning his opening of a Verizon store with a company other than VP Enterprises (*See* Order at [R. p. 20], ¶ 3)". (Resp'ts Br. 18).

As explained previously, nowhere in the record of this case does Krish or anyone else testify that Krish told Kaj on October 18, 2008 or at any other time prior to May/June 2010 that Krish was planning to take ownership in Corby's company opening the initial Verizon store. The statement to that effect recited in the Order is nowhere found in any testimony.

> "• **Credible**: Respondents' expert - Professor McWilliams – testimony (Order at

[R. p. 19],¶ 44.), including testimony that Kaj had abandoned VP Enterprises, which was supported by documentary evidence and not just a particular parties' self-serving testimony (*See* Order at [R. p. 29, ¶ 29)". (Resp'ts Br. 18).

Kaj testified that in April 2008, when he sent an e-mail to Krish about the possible purchase of AT&T stores, Krish instructed him to focus instead on Verizon opportunities for VP Enterprises. Consistent with Kaj's testimony, after the April 18, 2008 e-mail, there are no more e-mails concerning the AT&T stores, thus corroborating Kaj's testimony that he and Krish discussed his April 18, 2008 e-mail. (R.p. 210, line 21 – p. 211, line 16). This shows that Kaj maintained his focus exclusively on Verizon opportunities. Later, in the April 15, 2010 e-mail exchanged between Kaj and Krish, Kaj reiterated that he would check the Verizon site about the Columbus/Tryon, North Carolina locations as Krish had suggested. Kaj had not abandoned the VP Enterprises venture for Verizon stores.

"• **Not Credible**: Kaj's claim that it was ***his idea*** to pursue an agency relationship with Verizon through VP Enterprises (*See* Order at [R. p. 14], ¶ 3)". (Resp'ts Br. 18).

Simply because Krish may have had the idea at some point prior to the initial VP Enterprises discussions does not mean Kaj did not come up with the same idea as well. Krish certainly did not develop the idea fully by himself. It is uncontroverted that Krish had drafted no business plan or performed a profit and loss analysis on the potential opportunity prior to his discussions with Kaj in late 2007.

"• **Not Credible**: Kaj's testimony regarding what Krish did, or did not, disclose to him regarding P Comm on October 18, 2008 (*See* Order at [R. p. 20],¶ 3)". (Resp'ts Br. 18).

As discussed in the fifth bullet point above, there is no evidence in the record to support the Court's finding that Krish supposedly disclosed to Kaj on October 18, 2008 that he was planning to take over ownership of the company that was opening the new

store so that Krish could appropriate the opportunity for himself.

> "• **Not Credible**: Testimony asserting that Krish told Kaj he would use P Comm to resurrect VP Enterprises (*See* Order [R. p. 17], ¶ 33)". (Resp'ts Br. 18).

The Order states: "At no time did Krish represent to Kaj that he would use P Comm to resurrect the failed VP venture, and any testimony to the contrary is not credible and rejected." (R.p. 17, ¶ 33). The Order provides no basis in fact or in law for rejecting Kaj's credibility on this issue. *cf.*, South Carolina Dep't of Soc. Servs. v. Cummings, 345 S.C. 288, 298, 547 S.E.2d 506, 511-12 (Ct. App. 2001) (appellate court gave deference to the lower court finding on "credibility" where the judge analyzed the facts and relevant precedents "with specificity"). Since the Lower Court's previous findings on Kaj's credibility, such as his statements about the Kundo business plan and the October 18, 2008 meeting, are unsupported by the record, this credibility finding without any supporting specificity lacks a proper foundation.

> "• **Not Credible**: Kaj's testimony that he directed Krish to find out why Verizon denied VP Enterprises' application (*See* Order at [R. p. 28], ¶ 28)". (Resp'ts Br. 18).

The Lower Court found Kaj's testimony, that he directed Krish to continue pursuing the Verizon agency relationship on behalf of VP Enterprises, was not credible. As justification, the Lower Court stated "the evidence presented at trial indicates that Kaj had moved onto other ventures." Id. As explained above, the written evidence shows at least three occasions where Kaj e-mailed Krish about wireless phone retail opportunities after the receipt of Verizon's denial letter. (see R.pp. 1033, 1090-91, and 1131).

> • **Not Credible**: Any evidence presented by Kaj to support his claim of fraudulent concealment (*See* Order at [R. p. 22], ¶ 8-9)". (Resp'ts Br. 18).

There is no evidence in the record that shows where Krish or Vijay informed Kaj about any aspect of their work to pursue the Verizon Wireless opportunity after February

26, 2008 except for the lone conversation on October 18, 2008 in which Krish omitted basically every conceivable significant and material fact from the disclosure except for the opening of a store by a partially-named third party. Further, Krish admitted: (1) he did not tell Kaj of the formation of P Communications (R.p. 541, line 23 – p. 542, line 20); (2) he did not tell Kaj about opening a Verizon retail store with Corby Phillips (R.p. 547, lines 10-17; R.p. 598, line 24 – p. 599, line 5); (3) he did not tell Kaj he gave the VP Enterprises business plan to Corby Phillips (R. pp. 548, line 16 – p. 549, line 6, R.p. 591, lines 11-16 and R.p. 606, lines 16-23); (4) he did not tell Kaj that Vijay was helping Krish with up-fitting the new Verizon store (R.p.593, lines 15-25); (5) he did not tell Kaj he owned or planned to own the new company and store opened on October 18, 2008 (R.p. 523, line 21 – p. 524, line 11; R.p. 529, lines 20-21; R.p. 541, lines 19-22); (6) he did not tell Kaj until May/June 2010 that he removed Corby Phillips as an owner in 2008 (R.p. 225, line 16 – p. 227, line 7)[6]; and (7) after removing Corby Phillips and his successor Keith Gailey as owners of P Communications in 2008 and January 1, 2009, Krish did nothing with Kaj to include him in the business (App. R. p. 47, line 22 – p. 48, line 3 and R.p. 607, line 18 – p. 608, line 5).

Fraudulent concealment abounds undisputed in the trial record.

> "• **Not Credible**: Testimony of Kaj's expert - Professor Freeman -because it was only consistent with Kaj's self-serving view of the facts (*See* Order at [R. p. 19], ¶ 44)." (Resp'ts Br. 18).

Professor Freeman did not base his view of the facts on a party that had committed fraudulent concealment as a fiduciary and made blatant misrepresentations on documents to the Department of Revenue, the IRS and BB&T Bank. Avoiding reliance

[6] Krish never contradicted Kaj's testimony at trial on this point.

on the fabricated testimony and statements of Krish was reasonable for any expert.

Respondents assert that the disclosure of the name "Corby" and the fact that "Corby" had a Verizon license was all that was needed to start the running of the statute of limitations or invoke laches. (Resp'ts Br. at 30, n. 19). Providing the name "Corby," however, would have told Kaj nothing about Krish's plan to usurp VP Enterprises' corporate opportunity or led to such information. Even if Kaj had researched the name "Corby" on the Secretary of State website in October 2008, all it would have shown are companies in which somebody named Corby served as registered agent at that time. That information would have told Kaj nothing about who the owners were, or any other aspect of the operations of the business that would indicate that Krish and Vijay were usurping the business opportunities of VP Enterprises. A Secretary of State website search showing all existing companies with "Corby" as registered agent would only serve to corroborate Krish's story that he joined with an existing company.

V. APPELLANT'S FIDUCIARY DUTY CLAIMS ARE WELL ESTABLISHED AS A MATTER OF LAW AND FACT.

As discussed above, Kaj did not abandon the Verizon retail store opportunity through VP Enterprises as he communicated potential opportunities to Krish in April and July 2008 and again in April 2010.

Respondents contend that there can be no claim for usurpation of a corporate opportunity because Kaj could have opened a Verizon store for himself. Respondents cite the cases of Cooper Linse Hallman Capital Mgmt., Inc. v. Hallman, 368 Ill.App.3d 353, 856 N.E.2d 585 (1st Dist. 2006) and Nw. Terra Cotta Corp. v. Wilson, 74 Ill.App.2d 38, 219 N.E.2d 860 (1st Dist. 1966). Those cases are inapposite. In Nw. Terra Cotta Corp., the plaintiff company (VP Enterprises equivalent) declined to purchase stock from

a third party (Verizon equivalent) at the price the third party requested. Id. at 48, 219 N.E.2d at 865. In other words, it was the VP Enterprises equivalent who refused to deal with the third party.

In Cooper Linse, the matter involved two employees of an investment firm who left their employer to start a competing company. In finding no breach of fiduciary duty, the court emphasized that the two employees "did not solicit business for their new corporation or begin competing with plaintiff until after they had resigned." Id. at 361-62, 856 N.E.2d at 592 (underline added). Krish and Vijay, however, never resigned their positions as officers and director of VP Enterprises.

The Cooper Linse court distinguished at great length the case of Foodcomm Int'l v. Barry, 328 F.3d 300 (7th Cir. 2003) which found fiduciary misconduct on facts much more similar to the case *sub judice*. In Foodcomm, the plaintiff company Foodcomm (VP Enterprises equivalent) lost the business of one of its largest customers (Verizon equivalent). Foodcomm asked an employee (Krish equivalent) who performed duties of a corporate officer to "smooth things over" with the former customer (*i.e.*, be the contact person with the Verizon equivalent). Instead of smoothing things over, the defendant employees contacted the customer to see if it would be interested in their services through a new company. The defendant employees presented the customer with a business plan for their new company which plan they created on the plaintiff's computers. They also did not inform the plaintiff they were forming a new competing company. The court found a breach of fiduciary duty was supported by the facts that the defendant employees did not inform Foodcomm of their intention to form a rival company and that they used Foodcomm's equipment to write the business plan. Id. at 304. These facts are strikingly

similar to this case, except that Krish went another step further in that he secretly used the plaintiff's own business plan itself to usurp the business.

VI. APPELLANT PROPERLY PURSUED HIS DERIVATIVE CLAIMS ON BEHALF OF VP ENTERPRISES.

Respondents state that a derivative action by a shareholder in a corporation with only two shareholders fails because one shareholder owning fifty percent of the company cannot have standing for the remaining shareholders as a class (Resp'ts Br. 42-43). Adopting this view would mean that two-shareholder corporations with equal ownership of shares could never bring a derivative action.

Kaj cited a number of examples from the transcript showing where he pursued his claims derivatively on behalf of VP Enterprises. Respondents quote from the shortest of the eleven cites provided. A review of the more extensive cites shows unequivocal statements and testimony of Kaj's claim on behalf of VP Enterprises. (See, *e.g.*, R.p. 230, line 24 – p. 231, line 2) ("So I said, you know, when we do this we are going to have to get this Verizon -- VP plan back on track or we're going to have to figure out, you know, how to integrate that into our overall VP business."); see also R.p. 232, line 22 – p. 233, line 5.[7]

VII. RESPONDENTS' ACTIONS DAMAGED KAJ AND VP ENTERPRISES THUS SUPPORTING APPELLANT'S FIDUCIARY DUTY CLAIMS.

Respondents state Appellant never established the presence of damages and that the Lower Court found the same. (Resp'ts Br. at 44). As described earlier, this case, by

[7] Q. Now, what do you mean when you say integrate it with our Verizon plan? A. So we're at the point where Corby's out. We've got the foot in the door and, you know, we can now be – we're now where we can continue with the plan we had to start --- Q. So what plan are you talking about? A. The Verizon plan, I mean, sorry, the VP plan. Q. The VP plan? A. The VP plan.

agreement of the parties and with the Lower Court's approval during a pretrial scheduling conference, was bifurcated into a bench trial on liability first with a subsequent trial to be held on the issue of damages if liability was established. (See Order at p. 1(R.p. 6); see also Letter of Andrew Mathias to Lower Court (Mar. 3, 2014) and Joint Agreement of Dec. 3, 2013 at R.p. 1455-58). Damages, therefore, were not an issue in the first stage of the litigation.

Regardless of the trial format, it is patently obvious VP Enterprises incurred damages as a result of Respondents' actions. The record shows that P Communications, by the end of 2009, reached $3.3 Million in sales. During 2011, P Communications operated at least 23 stores. By 2012, P Communications recorded $41,934,909 in sales. (App. R.pp. 28-29, and R.p. 1139). In contrast, VP Enterprises had no business or money other than the $10,000 contributed by the shareholders. (R. p. 311, lines 19-20). This extraordinary difference in the business activity of the two enterprises seeking the same business opportunity reflects the damages Respondents inflicted upon VP Enterprises.

CONCLUSION

There is no genuine confusion about timeliness of this action in light of the fraudulent concealment perpetrated by Krish and Vijay and their failure to disclose significant and material information in perfect good faith as fiduciaries. The facts and the law as explained herein establish that Respondents breached their fiduciary duties to Appellant and that Appellant is entitled to a constructive trust over the Respondents' shares of stock in P Communications or the proceeds thereof.

Respectfully submitted,

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October 15, 2015
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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.

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October 16, 2015
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
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The Honorable Edward W. Miller, Circuit Court Judge

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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:

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