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

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SC Court of Appeals

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

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

v.

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

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# PETITION FOR REHEARING

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Appellant Pankaj Patel ("Kaj") individually and derivatively on behalf of Nominal Defendant, VP Enterprises, Inc. ("VP Enterprises") petitions the Court for rehearing and reconsideration of Unpublished Opinion No. 2016-UP-247 filed June 1, 2016 pursuant to Rule 221(a), SCACR. Appellant asks this Court to reconsider the decision to affirm the Lower Court's Order and hold that this action was timely filed in the Lower Court and find that Respondents breached their fiduciary duty to Appellant. Specifically, this Court held that "Krish was not silent regarding his actions and no evidence was presented to suggest he or Vijay participated in deliberate acts of deception to mislead Pankaj." As set forth more fully below, Krish was completely silent regarding his actions in forming P Communications, and Appellant presented substantial amounts of evidence and undisputed facts showing that Krish and Vijay participated in deliberate acts of deception to mislead Pankaj Patel about the corporate opportunity they usurped from VP Enterprises.

## I. Deliberate Acts of Deception and Material Omissions by Krish and Vijay Patel to Mislead Kaj Patel.

The record in this case shows that Krish and Vijay Patel committed numerous deliberate acts of deception and material omissions to mislead Kaj Patel in order that Kaj would not realize Respondents were usurping the business opportunities of VP Enterprises. Though raised in Appellant's briefs, these numerous actions were respectfully overlooked by this Court in its Order wherein the Court held that "no evidence was presented to suggest [Krish] or Vijay participated in deliberate acts of deception to mislead Pankaj" (Op. at ¶ 1). Nineteen undisputed acts of deception and fraudulent omissions are set forth below.

**A. Deceptive Acts and Fraudulent Misstatements.**

**1. Krish completely misled Kaj on October 18, 2008 about his misappropriation of the Verizon wireless venture.** (Appellant Br. at 18-19 and 25; Appellant Reply Br. at 4).

On October 18, 2008, Kaj Patel met with Vijay and Krish Patel at Vijay Patel's house at a drop-in following a grand opening of the Respondents' first Verizon store. Krish Patel testified at trial what he disclosed to Kaj about the Verizon grand opening he just attended. He stated as follows:

> . . . I joined with *another individual* who *obtained* a Verizon license and that I, you know, moved on to that opportunity.

R. p. 523, lns. 23-25 (emphasis added).

Again, Krish testified at trial:

> 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, lns. 19-22 (emphasis added).

When Krish was asked by his attorney if that was pretty much the end of discussion, Krish responded, "Pretty much." (R. p. 524, lns. 10-11).

*a. Krish misrepresented on October 18, 2008 that it was "another individual" who obtained the Verizon license.*

Krish's trial testimony quoted above is significant because he testified that he informed Kaj on October 18, 2008 that it was "another individual who obtained a Verizon license", not himself.

The point of who obtained the Verizon license is critical. Respondents contend that Kaj "learned the essential fact necessary to his claim – that *Krish* had *obtained*

agency status with Verizon through an entity other than VP Enterprises – no later than October 18, 2008." (Resp'ts Br. at 23) (emphasis added). The quoted trial testimony of Respondent Krish Patel contradicts the essential fact claimed in Respondents' brief. Respondents claimed that Kaj learned from Krish on October 18, 2008 that "Krish had obtained agency status with Verizon." In contrast, Krish testified twice at trial that he told Kaj it was another individual who obtained the Verizon license and he simply joined with the other individual.

The deceptiveness of Krish's untruthful statement, that it was "another individual who obtained a Verizon license", is clear when considered in the light of the facts we now know actually happened. Respondents admitted and explained that:

> Corby had no meaningful role in P Comm[unication]'s operations . . . Krish did all the work to open the first store. He . . . took responsibility for everything else necessary to open the location.

Resp'ts Br. at 14.

Krish's own version, as testified at trial, of what he told Kaj on the night of October 18, 2008 was both deceptive and misleading. In effect, it was Krish who obtained the Verizon license. Certainly a disclosure to Kaj that Krish was the one who obtained the license for the new store would have put Kaj on notice of VP Enterprises' usurpation claim.

*b. Krish misrepresented on October 18, 2008 that he joined with a pre-existing Verizon license holder.*

Krish's statement that he joined with someone who "obtained" a Verizon license was further misleading since Krish's statement misinformed Kaj he joined with someone who had a Verizon license. Krish's use of the past tense "obtained" would lead any

reasonable person to believe Krish joined with someone who already possessed a Verizon license.

In actuality, Krish joined up with his strawman Corby Phillips around March 26, 2008 which was within several weeks of Verizon's denial of VP Enterprises' application. (R. p. 351, lines 1-10; R. p. 589, lines 14-17) (Appellant Br. at 15). Corby Phillips did not have a Verizon license at that time. By April 4, 2008 a new Verizon business plan, using nearly all the terms in the VP Enterprises business plan, was completed for Corby Phillips and P Communications, Inc. (R. pp. 1027-1031 and 1140-51) (Appellant Br. at 15). It was not until July 18, 2008 that P Communications obtained its Verizon license. (R. pp. 1040-1086) (Appellant Br. at 17).

It is indisputable that Krish did not join up with someone who already possessed a Verizon license as he misrepresented to Kaj on October 18, 2008. Krish's representation that he had joined with someone who had a Verizon license was false, deceptive and highly material. Instead, a truthful disclosure to Kaj would have specified that Krish took the VP business plan to another individual through whom Krish later obtained a Verizon license, thereby informing Kaj that Krish was usurping VP Enterprises' business opportunity.

2. **Krish misrepresented to Kaj on October 18, 2008 that he intended to call Kaj when a new opportunity arose down the road.** (Appellant Br. at 16-17, 19 and 27).

As described above, Krish represented that he would call Kaj if a new opportunity arose for Kaj in the business started by another individual that he was joining. (R. p. 524, lns. 6-9; R. p. 541, lns. 19-22). In fact, though, Krish was already in the process of

ousting his straw man Corby Phillips in August 2008 as shown in the BB&T loan application by P Communications and in the documents Krish filed with the Department of Revenue in September 2008. (R. pp. 1036-37; R. pp. 1092-95; R. pp. 1097-98). This ownership change was formalized by November 19, 2008. (R. p. 1117). Krish did not call Kaj to participate in this ownership change.

Shortly after ousting Corby Phillips in November 2008 and replacing him with Keith Gailey, Mr. Gailey quickly exited as a shareholder on January 1, 2009. Krish again did not call Kaj at that time about any opportunities with the new venture. (R. pp. 1129-30).

Krish engineered all these ownership changes in his new Verizon venture P Communications without informing Kaj. (R. p. 607, ln. 18 – p. 608, ln. 5). With the planning for the ownership changes occurring both before and after October 18, 2008, it is undeniable that Krish had no intention of calling Kaj about participating in any ownership opportunities in P Communications.

3. **Vijay denied on October 18, 2008 that he had any involvement in the new store opened by P Communications and Krish, even though Vijay helped build out the store.** (R. p. 220, ln. 24 – p. 221, ln. 16; R. p. 615, lns. 12-25). (Appellant Br. at 18, 25 and 27).

A disclosure that Vijay was handling the office up-fitting would have been significant to Kaj. The information would have let him know Krish and Vijay were the ones in full control of the company opening the Verizon store instead of simply being a servant in some other individual's venture. Krish compounded this misrepresentation by

failing to disclose Vijay's involvement in the P Communication venture as well. (R. p. 523, ln. 23 – p. 524, ln. 11).

**B. Respondents' Fraudulent Omissions.**

**1. Krish agreed to be VP Enterprises' contact person with Verizon to reverse Verizon's denial while at the same time secretly setting up a new competing company.** (R. p. 514, ln. 4 – p. 514, ln. 4) (Appellant Br. at 13-14).

If Kaj had known that Krish was secretly forming a new company to apply for a Verizon license in place of VP Enterprises, Kaj would not have agreed to allow Krish to serve as the point person for contacting Verizon on behalf of VP Enterprises. Most importantly, if Krish had informed Kaj in February or March 2008 that he was organizing a new Verizon retail corporation, Kaj would have been on notice that Respondents were usurping VP Enterprises' business opportunity. Krish provided no such information at that time.

**2. Krish did not disclose to Kaj on or prior to October 18, 2008 that he had formed a new company to obtain a Verizon license on his own and apart from Kaj and VP Enterprises.** (R. p. 517, ln. 21 – p. 518, ln. 5; R. p. 1033; R. p. 515, lns. 11 – 19; R. p. 542, lns. 17-20) (Appellant Br. at 14-15). Krish maintained his silence, about starting a nearly identical Verizon retail company, well past October 18, 2008 until May 2010.

**3. Krish did not disclose on or before October 18, 2008 that he was using a straw man Corby Phillips to set up a new competing Verizon venture.** (R. p. 522, lns. 1-18; R. p. 597, ln. 14 – p. 598, ln. 12; R. p. 521, lns. 19-25) (Appellant Br. at 16).

4. **Krish did not inform Kaj on or before October 18, 2008 that he had taken his straw man Corby Phillips to VP Enterprises' attorney to set up a new company for the purpose of operating a Verizon Wireless store.** (R. p. 541, ln. 23 – p. 543, ln. 3) (Appellant Br. at 15-16).

5. **Krish admitted that he did not inform Kaj on or before October 18, 2008 that he was giving the VP Enterprises business plan to his straw man Corby Phillips to set up a competing company.** (R. p. 591, lns. 11-25) (Appellant Br. at 15-16 and 19).

6. **Krish did not disclose to Kaj on or before October 18, 2008 that he obtained loans for P Communications from the same loan officer at the same bank that VP Enterprises used for its line of credit.** (R. pp.1022 and 1100) (Appellant Br. at 16 and 19).

7. **When Kaj emailed Krish on April 18, 2008 about potential AT&T store purchases for VP Enterprises, Kris did not respond at all or tell Kaj that he was working on a new venture.** (R. p. 517, ln. 21 – p. 518, ln. 5) (Appellant Br. at 14).

8. **When Kaj emailed Krish on July 24, 2008 about a separate potential wireless store purchase from Sunbelt Networks, Krish again did not respond to tell Kaj that he was working on a new venture.** (R. p. 521, lns. 7-25) (Appellant Br. at 14).

9. **Krish did not disclose to Kaj on or before October 18, 2008 that Krish directed VP Enterprises' own attorney, around July 2, 2008, to draft a P Communications ownership contract between Krish and his straw man Corby Phillips, whom Krish's C.P.A. referred to as a "silent partner."** (R. p. 354, ln. 1 – p.

355, ln. 4; R. pp. 1087 – 1088; app. R. p. 25; R. p. 598, ln. 24 – p. 599, ln. 5) (Appellant Br. at 15-16).

**10. Krish did not disclose to Kaj on or before October 18, 2008 that P Communications entered into an Exclusive Authorized Agency Agreement with Verizon on July 18, 2008.** (R. pp. 1040 – 1086; R. p. 524, lns. 12-17; R. p. 124, ¶ 37) (Appellant Br. at 17).

**11. Krish did not disclose to Kaj on October 18, 2008 the last name of Krish's straw man, Corby Phillips, but only supplied the first name of "Corby".** (R. p. 223, lns. 10-13) (Appellant Br. at 15-16 and 19).

**12. Krish did not disclose to Kaj on October 18, 2008 the name of Krish's new corporation, P Communications.** (R. p. 223, lns. 20-24) (Appellant Br. at 15-16).

**13. Kris did not disclose to Kaj on October 18, 2008 the fact that P Communications was created with VP Enterprises' business plan.** (R. p. 591, lns. 11-25; R. p. 524, lns. 6-11) (Appellant Br. at 15, 19 and 25).

**14. Krish failed to disclose to Kaj on October 18, 2008 that he already had plans in progress to oust his straw man Corby Phillips as the owner and make himself the owner.** (R. pp. 1092-98 and 1117) (Appellant Br. at 20 and 26).

**15. Krish did not disclose to Kaj on October 18, 2008 Vijay's involvement in opening P Communication's first store.** (R. p. 523, ln. 23 – p. 524, ln. 11) (Appellant Br. at 18-19 and 25).

**16. Krish did not disclose to Kaj on October 18, 2008 that he intended to own the company through which Corby Phillips ostensibly obtained the Verizon**

**license.** (R. pp. 523, ln. 23 – 524, ln. 11; R. p. 541, lns. 19-22) (Appellant Br. at 19 n.5; Appellant Reply Br. at 5).

Respondents in their brief stated that Krish disclosed to Kaj on October 18, 2008 that at some point in the future he planned to own the company that was opening the new Verizon store. (Resp'ts Br. at 14). However, Krish never testified at trial or in deposition that he ever told Kaj he planned to own the company that "[he]'d joined". The Lower Court made the same mistake in its Order by stating that Krish informed Kaj on October 18, 2008 "that he planned to own the company." (R. p. 11 and R. p. 17, ¶ 31). If Krish had made such a disclosure, that he intended to take ownership of another individual's venture, such information would have at least informed Kaj that Krish was contemplating usurping the VP Enterprises' opportunities. But Krish did not even tell Kaj that much. Respondents made no statement to Kaj they intended to take ownership of this other individual's venture.

**C. Analysis.**

This case is not a straightforward breach of contract matter. The causes of action are based on Respondents' violations of the standards of conduct for officers and directors under S.C. Code Ann. §§ 33-8-300 and -420 along with equitable remedies of accounting, disgorgement and constructive trust. (Appellant Br. at 6, ¶¶ 4-5). The causes of action relate to (1) Respondents' deceitful failures to disclose information vital to both Appellant and Verizon during the initial joint effort to secure the Verizon license for VP Enterprises (failure to disclose Vijay's criminal conviction for shoplifting and Krish's firing from Verizon), and (2) then another series of secret acts in which Respondents took what the parties developed during the initial application without the slightest disclosure to

Kaj to circumvent their joint efforts and secure the Verizon business relationship for themselves.

In analyzing any case under the statute of limitations, the analysis is about what objective facts would put a person of reasonable ability on notice to think they would have a cause of action against another party. Usually there is not deceit involved and no attempt by a defendant to secret information and take advantage of a plaintiff. In most cases applying the discovery rule, the difficulty is in delayed awareness of an injury or delayed awareness of some medical or other technical information that is not readily knowable.

However, when the causes of action themselves are for deceitful acts and omissions, the very purpose of the defendants is to prevent a plaintiff from ever finding out about the deceitful acts and omissions. A plaintiff not only has the challenge of a reasonable person trying to grasp what another party has done but also has the challenge of a reasonable person who is being deliberately prevented from discovering that a cause of action exists.

The corporate statute of limitations itself recognizes this distinction when it states: "This limitations period does not apply to breaches of duty which have been concealed fraudulently." S.C. Code Ann. § 33-8-420(e) (2006).

This Court correctly points out: "*Deliberate acts of deception* by a defendant calculated to conceal from a potential plaintiff that he has a cause of action toll the statute of limitations." Doe v. Bishop of Charleston, 407 S.C. 128, 140, 754 S.E.2d 494, 500-01 (2014) (emphasis 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) (emphases added).

However, this Court erred when it stated "In this case, ample evidence in the record supports the circuit court's ruling Krish's discussion with Pankaj on October 18, 2008, regarding the opening of the Verizon Wireless store on Pelham Road put Pankaj on notice of a potential claim. Even if Krish owed a fiduciary duty to Pankaj at that time, Krish was not silent regarding his actions and no evidence was presented to suggest he or Vijay participated in deliberate acts of deception to mislead Pankaj." (Op. at ¶ 1).

The Court overlooked or failed to base its opinion on the 19 undisputed instances of deception and fraudulent omissions set forth in Parts I. A and B above.

A truthful disclosure of the above misstatements and omissions would have been significant information from fiduciaries such as Krish and Vijay that they were usurping a corporate opportunity of VP Enterprises. Instead, Krish supplied only a sliver of false and innocuous-sounding information to Kaj to whom he owed a fiduciary duty. Respondents' willful withholding and concealing of highly relevant information is insufficient to start running the statute of limitations against Kaj on October 18, 2008.

## II. Laches is not applicable to this case.

As set forth in Part I above, Respondents omitted voluminous amounts of highly relevant information on October 18, 2008 about the corporate opportunity they were usurping. Therefore, Appellant did not know, nor could have known, of a potential claim against Respondents on October 18, 2008.

The Court in its Opinion found that Appellant's "delay in pursuing a cause of action resulted in Krish continuing to work and grow P Communications into a successful

enterprise without contribution from Pankaj. Krish is therefore prejudiced if Pankaj is permitted to seek damages arising from P Communications's success." (Op. at ¶ 2).

If this were a correct principle of law, then every time a defendant deceives a plaintiff and becomes successful without including the plaintiff, the deceiving defendant would be able to claim he or she has been prejudiced if the court requires the defendant to make the plaintiff whole.

Furthermore, there is no evidence that Krish would not have undertaken his efforts to grow P Communications if Appellant's lawsuit had instead been filed in 2010, or even earlier. The evidence shows Krish continued to grow the commission revenues of P Communications by large amounts after the suit was filed on November 4, 2011. The monthly commission revenues of P Communications grew from slightly over $1,500,000 in October 2011 right before suit was filed to over $3,500,000 per month in December 2012. While the company grew from its inception to the date the lawsuit was filed, Krish continued to grow the company after the lawsuit was filed by significant amounts that were even larger than the amount of growth before the lawsuit was filed. The evidence does not support the claim that Respondents were somehow prejudiced by the suit being filed in November 2011 as opposed to an earlier date.

Respondents claim in their brief that Appellant's delay in filing suit from June 2010 until November 2011 was an unreasonable delay of 17 months. (Resp'ts Br. at 31). However, the delay from June 2010 to November 2011 of 17 months is less than the two-year statute of limitations provided in S.C Code Ann. §§ 33-8-300(e) and –420(e). Laches is not applicable to an issue of timeliness when it is less than the specified statute of limitations. Twelfth RMA Partners v. Nat'l Safe Corp., 335 S.C. 635, 641, 518 S.E.2d

44, 47 (Ct. App. 1999) ("... Laches within the period of the statute of limitations is no defense at law").

## CONCLUSION

Because the Court of Appeals erred in dismissing the case under the statute of limitations and laches, it follows that it erred in not reaching the remaining substantive issues of whether Respondents usurped a corporate opportunity of VP Enterprises and thereby violated the standards of conduct of directors and officers under S.C. Code Ann. §§ 33-8-300 and -420 and breached their fiduciary duties to Kaj and VP Enterprises, Inc. Appellant incorporates the materials and arguments set forth in Parts II – IV of his Final Brief and Parts II – VII of his Reply Brief. As discussed in detail therein, the highly relevant, landmark case of Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928), calling for the utmost honor among business partners when facing a corporate opportunity, is directly applicable to this matter. Though Meinhard v. Salmon was never mentioned by the Lower Court or by Respondents in their Brief, its principles should be applied herein as this Court has done in five prior cases. (see Appellant Br. at 37 n.12). Since "a fiduciary's' silence is equivalent to a stranger's lie", the fraudulent omissions and statements of Respondents constitute a clear breach of their fiduciary duties to Kaj. Energy Resources v. Porter, 14 Mass. App. Ct. 296, 304, 438 N.E.2d 391, 396 (1982).

For the foregoing reasons, Appellant requests that this Court grant this Petition for Rehearing and Reconsideration.

Respectfully submitted,

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June 24, 2016
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
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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 **PETITION FOR REHEARING** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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SC Court of Appeals

June 24, 2016

**VIA FEDERAL EXPRESS**

The Honorable Jenny Abbott Kitchings
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1200 Senate Street
Columbia, SC 29201

RE: *Pankaj Patel, individually and derivatively on behalf of Nominal Defendant, VP Enterprises, Inc. v. Krish Patel, Vijay Patel, and P Communications, Inc.*
Appellate Case No.: 2015-000162

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Appellant's Petition for Rehearing and a Proof of Service regarding the above referenced case. Also enclosed is a check in the amount of $25 for the filing fee.

Please file the originals and return a filed-clocked copy to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance in this matter. If you have any questions or need anything further, please let me know.

Sincerely,

William M. Hogan

William M. Hogan

WMH/kmk
Enclosures
cc: Monty Desai, Esquire (w/enclosures)
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