

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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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Unpublished Opinion No. 2016-UP-247 (S.C. Ct. App. filed June 1, 2016)

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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 WRIT OF CERTIORARI**

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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

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

**ATTORNEYS FOR APPELLANT**

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## CERTIFICATE OF COUNSEL

Pursuant to Rule 226(d)(1), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on June 27, 2016 (R.pp. 1761-79) and denied by the Court of Appeals on August 18, 2016. (R.p. 1780).

### INTRODUCTION

This case involves the underlying substantive issue of whether the South Carolina Business Corporation Act and the common law of this state allow a corporate director/officer, such as the individual Respondents, to exploit a corporate opportunity initially denied to the corporation, without fully and fairly disclosing: (1) the reasons for a third party's refusal to deal and (2) the director/officer's plan to take the business opportunity for himself. Of particular relevance are the standard-bearer cases of Energy Res. Corp. v. Porter, 14 Mass. App. Ct. 296, 302, 438 N.E.2d 391, 395 (1982) and Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928).<sup>1</sup>

Before reaching the aforesaid substantive issue, this case also involves the question under the statute of limitations of whether a corporate officer and/or director may supply only a sliver of false and innocuous-sounding information to a shareholder, to whom he owes a fiduciary duty, to start the running of the statute of limitations. In other words, this action concerns whether corporate directors and officers are held to a higher standard of disclosure, that of providing significant and material information to their shareholders, or whether the general discovery rule requirement of reasonable diligence applies to corporate shareholders-beneficiaries, in calculating compliance with the statutes of limitations contained in S.C. Code Ann. §§ 33-8-300(e) and -420(e).

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<sup>1</sup> Meinhard was raised repeatedly by Petitioner Kaj Patel throughout this case, but despite its striking similarities to this case the lower courts and Respondents never addressed it.

The circuit court cited the statute of limitations general discovery rule that a plaintiff is tasked with the “exercise of reasonable diligence” in discovering a defendant’s misconduct without addressing any differing standard applicable to fiduciaries. (Order of 12/31/14 at 15, ¶2, and at 16, ¶ 5, R.pp. 20-21). While the Court of Appeals mentioned in one sentence the fact that Respondents Krish Patel (“Krish”) and Vijay Patel (“Vijay”) may have owed a fiduciary duty to Petitioner Pankaj Patel (“Kaj”),<sup>2</sup> the Court did not address how Respondents’ positions as fiduciaries affected their duty of disclosure to Kaj. Patel v. Patel, Op. No. 2016-UP-247 (S.C. Ct. App. filed June 1, 2016) (R.p. 1760). The Court of Appeals then ignored the impact of the Respondents’ overt deceptions and omissions on the statute of limitations by stating Kaj presented “no evidence ... to suggest [Krish] or Vijay participated in deliberate acts of deception to mislead Pankaj...” (Id.). The Court of Appeals thus ignored the 19 undisputed instances of Respondents’ deception and fraudulent omissions of significant and material facts that, if disclosed at least in part, would have alerted Kaj that Respondents were usurping the business opportunities of the parties’ corporation for themselves.

By ignoring the multitude of deceptions and fraudulent omissions of Respondents, the Court of Appeals in effect rejected Kaj’s argument that a corporate fiduciary’s willful withholding and concealing of highly relevant information are insufficient to start running the statute of limitations. It thereby allowed Respondents as fiduciaries to disclose only a sliver of mostly false information to commence the running of the statute of limitations against Kaj.

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<sup>2</sup> Respondents Vijay and Krish Patel are father and son. Petitioner Kaj Patel is unrelated to Vijay and Krish.

The Court of Appeals also ruled for Respondents on the ground of laches by finding that Kaj'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." (Id.)

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 by a court order to make the plaintiff whole.

Because the Court of Appeals incorrectly ruled against Kaj on the statute of limitations and laches, it did not reach the substantive issues regarding Kaj's claims that Respondents usurped the business opportunities of the parties' corporation.

#### **QUESTIONS PRESENTED**

- I. Did the Court of Appeals improperly disregard the evidence at trial in holding that Kaj presented no evidence to suggest Respondents participated in deliberate acts of deception to toll the statute of limitations when Kaj offered a multitude of significant and material deceptions and fraudulent omissions that covered up Respondents' activities in usurping the business opportunities of the parties' corporation?
- II. Did Respondents' misrepresentations and omissions disregarded by the Court of Appeals constitute fraudulent concealment 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?
- III. Did the Court of Appeals err in holding laches barred Kaj's claim because Respondents grew the business without Kaj's participation?
- IV. 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 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?

## STATEMENT OF THE CASE

Kaj Patel, individually and derivatively on behalf of VP Enterprises, commenced this action on November 4, 2011, asserting 13 causes of action related to the Respondents' usurpation of corporate opportunity for taking a prospective Verizon retail store venture for themselves to the exclusion of Kaj. After dismissing several of his legal causes of action at the conclusion of the evidence at trial, Kaj maintained the equitable causes of action related to breach of fiduciary duty, accounting and imposition of a constructive trust. (R.p. 1531, n.1).

The parties in pre-trial proceedings with court approval agreed that the liability and damage issues would be bifurcated and the liability issues tried first. (R.pp. 1455-58). The liability portion was tried non-jury before The Honorable Edward W. Miller on July 21 and 22, 2014. Both sides then submitted post-trial memoranda. On December 31, 2014, the circuit court entered an order holding Kaj's suit was barred under the statutes of limitation and laches. The court also ruled that any duties Vijay and Krish owed to Kaj and VP Enterprises extinguished prior to the acts of misrepresentation and omission that Kaj alleged the individual Respondents committed. In addition, the court held VP Enterprises had no viable corporate opportunity capable of being usurped. (Order of 12/31/14 at 1-2, R.pp. 6-7).

Kaj filed and served a notice of appeal on January 23, 2015 (R.pp. 1563-64). On April 19, 2016, the Court of Appeals heard oral arguments in the case, and on June 1, 2016 the Court of Appeals issued its opinion affirming the order of the circuit court. Patel v. Patel, Op. No. 2016-UP-247, supra (R.pp. 1758-60). Kaj petitioned the Court for

rehearing on June 27, 2016, and on August 18, 2016 the Court of Appeals denied rehearing. Kaj now seeks review of that decision pursuant to Rule 242, SCACR.

### FACTS

This action involves issues arising from three individuals, Petitioner Kaj Patel and Respondents Krish and Vijay Patel, who formed and became officers and promoters of VP Enterprises, Inc. (“VP Enterprises”) seeking a new business opportunity of owning a chain of Verizon Wireless retail stores. The business opportunity was initially denied to VP Enterprises apparently due to facts known by Krish and Vijay, two of the corporation’s original promoter/officers, and not previously disclosed to Kaj, the third promoter/officer. Krish and Vijay, who failed to make a full disclosure to Kaj, immediately sought and obtained the new business opportunity through another corporation, P Communications, Inc. (“P Communications”). However, Krish and Vijay, who obtained the new business opportunity, failed to fully disclose their actions in ultimately obtaining the business opportunity and more importantly never made a full disclosure to Kaj of two material facts which undoubtedly resulted in the initial denial to VP Enterprises.

Kaj, Krish and Vijay were all promoters and officers of VP Enterprises, and Kaj and Vijay were directors. (Order of 12/31/14 at 10, R.p. 15, ¶ 10; R.p. 571, line 24 – p. 572, line 5). A license application was made by VP Enterprises to Verizon, but Verizon denied the application on February 26, 2008 “at this time.” (R.p. 1026).

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 Enterprises’ application. Undisclosed to Kaj were: (1) the fact that Vijay had a criminal record for

shoplifting which he falsely denied on his Verizon application (Order of 12/31/14 at 5, R.p. 10); and (2) the fact that Krish, who was a former Verizon employee with extensive retail experience and was listed as the general manager and contact name on VP Enterprises' application materials to Verizon, had been recently terminated by Verizon for violations of corporate policy involving family accounts. (Order of 12/31/14 at 9, ¶ 5, R.p. 14; R.p. 545, lines 10-14 & p. 572, lines 2-5).

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. (R.p. 203, line 23 – p. 204, line 14). With that information withheld from Kaj, the parties agreed to assign Krish the task of discovering the reasons for the denial. (R.p. 205, line 17 – p. 206, line 5). Krish testified he was unable to find out the reasons for Verizon's rejection. (R.p. 514, line 22 – p. 515, line 4). Verizon never disclosed the specific reasons for the denial prior to or during trial.

After the application was denied on the first round, Krish within weeks began pursuing a Verizon license by using the name of another individual, Corby Phillips, who in actuality played almost no role in the application process. (R.p. 351, lines 1-10; R.p. 589, lines 14-20). Krish assisted Corby Phillips, Krish's straw man, in forming a new corporation, 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. (Order of 12/31/14 at 12, ¶ 28, R.p. 17; R.p. 522, lines 1-18; R.p. 597, line 14 – p. 598, line 12). Krish admitted he did not inform Kaj that he was giving the VP Enterprises business plan to his straw man or that he was setting up a new company for

the purpose of operating a Verizon Wireless store. (R.p. 541, line 23 – p. 543, line 3; R.p. 591, lines 11-25). 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. (R.p. 515, lines 11-19). Kaj filed suit after he finally became aware of the details involving the new corporation and the straw man. (R.p. 217, line 6 – p. 218, line 3).

Kaj was never made aware of Vijay’s criminal record and Krish’s termination from Verizon until after he filed suit. (R.p. 172, lines 12-25 & pp. 198, line 19 – 199, line 5).

When P Communications opened its first Verizon Wireless store around October 18, 2008, 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.” (R.p. 541, lines 19-22). 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. (R.p. 220, line 24 – p. 223, line 24; Order of 12/31/14 at 12, ¶ 28, R.p. 17; R.p. 607, line 18 – p. 608, line 5; R.pp. 1092-95). Despite these omissions by Respondents, who held positions as officers and director of VP Enterprises, the circuit court held the statute of limitations began to run

against Kaj at this point. (Order of 12/31/14 at 16, ¶ 4, R.p. 21). The Court of Appeals affirmed the ruling on the defenses of the statute of limitations and laches.

Within two months of opening the first store, Krish's straw man sold his shares back to P Communications on November 19, 2008, and P Communications issued new shares to a new shareholder Keith Gailey. By January 1, 2009 P Communications, under the control of Krish, bought back Keith Gailey's shares making Krish the sole owner. (R.pp. 1123-24 and 1129-30). Respondents did not mention a word to Kaj about the ownership changes, much less offer him an opportunity to participate. (R.p. 607, line 18 – 608, line 5).

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 or the additional stores it was opening. (R.p. 524, lines 12-17; R.p. 92, ¶ 37; R.p. 124, ¶ 37; R.p. 329, lines 19-22).

In April 2010 Kaj contacted Krish about a possible venue in North Carolina for a Verizon retail store. (R.p. 230, line 14 – p. 231, line 5; R.p. 1131). The two met in Krish's P Communications' office during May and early June 2010 to discuss the Verizon venture. (R.p. 231, line 25 – p. 234, line 3 & p. 329, line 15 – p. 331, line 13). For the first time, Krish revealed to Kaj the names of his company P Communications and his straw man, the involvement of Vijay in the company, and the opening of multiple stores. From that information, Kaj's subsequent research uncovered Respondents' wrongful appropriation of VP Enterprises' Verizon business opportunity. (R.p. 234, line 5 – p. 236, line 15). Kaj filed suit on November 4, 2011. (R.pp. 37-39).

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. The substantive issue in this case is whether the duties owed by a director and officer not to usurp a corporate opportunity continue after a corporation receives an initial denial of a prospective business opportunity from a third party. 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.<sup>3</sup> As a result, Respondents' omissions and misrepresentations make Kaj's claims timely and render Respondents liable for the opportunity they misappropriated.

#### **SCOPE 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,

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<sup>3</sup> Kelly v. 74 & 76 W. Tremont Ave. Corp., 4 Misc. 2d 533, 536, 151 N.Y.S.2d 900 (Sup. Ct. 1956).

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. 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.<sup>4</sup> See Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 296, 569 S.E.2d 371, 376 (Ct. App. 2002).

## ARGUMENTS

- V. The Court of Appeals improperly disregarded the evidence offered at trial in holding that Kaj presented no evidence to suggest Respondents participated in deliberate acts of deception to toll the statute of limitations.**

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<sup>4</sup> Kaj submitted to the Clerk of Court for the Court of Appeals video discs containing portions of the video depositions played at trial.

In his briefs and Petition for Rehearing, Kaj pointed out in the record 19 deliberate acts of deception and material omissions by Krish and Vijay that if truthfully revealed would have alerted Kaj that Respondents were usurping the business opportunities of VP Enterprises. Though raised in Kaj's briefs, these numerous actions were overlooked by the Court of Appeals 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." Patel v. Patel, Op. No. 2016-UP-247, supra, at ¶ 1 (R.p. 1760). Sixteen of the 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.**

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

... 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 (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, lines 19-22 (emphasis added).

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

Krish's own version, as testified at trial, of what he told Kaj on the night of October 18, 2008 was deceptive, misleading and highly material. First, it was Krish who did all the work to obtain the Verizon license, not "another individual." (R.p. 522, lines 1-18; R.p. 1694). Second, Krish's statement that he joined with someone who "obtained" a Verizon license misinformed Kaj he joined with someone who had 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 and well before P Communications obtained its license on July 18, 2008. (R.p. 351, lines 1-10; R.p. 589, lines 14-20); (R.pp. 1040-1086).

Instead, a fair and truthful disclosure to Kaj would have specified that Krish took the VP Enterprises 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.** As described above, Krish was planning for the ownership changes to replace Corby Phillips both before and after October 18, 2008, making it undeniable that Krish had no intention of calling Kaj about participating in any ownership opportunities in P Communications when he made that misrepresentation on October 18, 2008.

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, line 24 – p. 221, line 16; R.p. 615, lines 12-25). A disclosure that Vijay was handling the office up-fitting would have let Kaj 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.

**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. 205, line 17 – p. 206, line 5; R.p. 514, line 4 – p. 514, line 4).

**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, line 21 – p. 518, line 5; R.p. 1033; R.p. 515, lines 11 – 19; R.p. 541, line 23 – p. 542, line 20). 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, lines 1-18; R.p. 597, line 14 – p. 598, line 12; R.p. 521, lines 19-25).

**4. Krish did not inform Kaj on or before October 18, 2008 that he gave the VP Enterprises business plan to his straw man Corby Phillips to set up a competing company.** (R.p. 591, lines 11-25; R.p. 524, lines 6-11).

**5. When Kaj emailed Krish on April 18, 2008 about potential AT&T store purchases for VP Enterprises, Krish did not respond at all or tell Kaj that he was working on a new venture.** (R.p. 517, line 21 – p. 518, line 5; R.p. 1033).

**6. 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, lines 7-25).

7. **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, line 1 – p. 355, line 4; R.pp. 1087 – 1088; R.p. 1593; R.p. 598, line 24 – p. 599, line 5).

8. **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, lines 12-17; R.p. 124, ¶ 37).

9. **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, lines 10-13).

10. **Krish did not disclose to Kaj on October 18, 2008 the name of Krish's new corporation, P Communications.** (R.p. 223, lines 20-24).

11. **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).

12. **Krish did not disclose to Kaj on October 18, 2008 Vijay's involvement in opening P Communication's first store.** (R.p. 523, line 23 – p. 524, line 11).

13. **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, despite the assertions of Respondents and erroneous finding of the circuit court to the contrary.** (*Compare* Order of 12/31/14 at R.p. 11 and p. 17, ¶ 31 and

Resp'ts Br. at 14, R.p. 1694 *with* R.p. 523, line 23 – p. 524, line 11; R.p. 541, lines 19-22; Appellant Br. at 19 n.5, R.p. 1643 and Appellant Reply Br. at 5, R.p. 1736).

**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. The causes of action relate to (1) Respondents' deceitful failures to disclose information vital to Kaj 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 to 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 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).

The Court of Appeals correctly pointed 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) ... "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) ...

Patel v. Patel, Op. No. 2016-UP-247, supra, at ¶ 1 (R.pp. 1759-60) (emphasis in original).

However, the Court of Appeals 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...

Id. at 1760.

The Court of Appeals overlooked or failed to base its opinion on the 19 instances of deception and fraudulent omissions most of which are set forth in Argument I, Parts 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. 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. Since Respondents were corporate fiduciaries of VP Enterprises, their misrepresentations and material omissions, set forth in Argument I, constituted fraudulent concealment of 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.**

**A. Introduction**

The Court of Appeals affirmed the circuit court ruling 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 footnoted to S.C. Code Ann. § 33-8-420. Patel v. Patel, Op. No. 2016-UP-247, supra, at n.2 (R.p. 1759). 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).

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). This 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, this 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). The Court of Appeals 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 throughout the country, that nondisclosure of significant and material facts 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).<sup>5</sup>

**2. Krish's October 18, 2008 omissions amounted to fraudulent concealment, thus tolling the statute of limitations.**

As described above, Krish failed to disclose on or before October 18, 2008 critical information that would have revealed to a reasonable person that Krish had simply re-packaged the VP Enterprises business plan and Verizon application with a different ribbon and sent it back in to Verizon.

According to Kaj's testimony, on or around June 4, 2010, 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. The facts and circumstances disclosed to Kaj in

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<sup>5</sup> 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).

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.

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.

**III. The Court of Appeals erred by holding laches barred Kaj's claim because Respondents grew the business without Kaj's participation.**

The Court in its Opinion found that Kaj'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." Patel v. Patel, Op. No. 2016-UP-247, supra, at ¶ 2 (R.p. 1760).

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 Kaj'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. (R.p. 1139). 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.

**IV. Krish and Vijay as officers and director of VP Enterprises continued to owe Kaj and/or VP Enterprises a fiduciary duty or an obligation to act in good faith, with due care, and in the best interests of the corporation and its shareholders after Verizon Wireless rejected VP Enterprises' license application "at this time."**

**A. Introduction**

The circuit court ruled alternatively that VP Enterprises possessed no business opportunity capable of being usurped. (Order of 12/31/14 at 21, ¶ 22, R.p. 26). The circuit court held that VP Enterprises lost any expectancy in the Verizon opportunity once Verizon rejected VP Enterprises' application. The court concluded that where a corporation is unable to avail itself of an opportunity, its executives are free to exploit it. (Order of 12/31/14 at 22, ¶¶ 24-25, R.p. 27).

This ruling is legally and factually incorrect. The right to exploit an unavailable opportunity is dependent on full and fair disclosure so the corporation can test the firmness of the rejection. Also the fact Krish and P Communication were able to exploit the opportunity and obtain the Verizon license with only a minor tweak to the VP Enterprises application shows the opportunity was readily available.

The Court of Appeals did not address the usurpation of corporate opportunity claim, affirming only the time-based defenses.

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

In South Carolina it is the duty of directors and officers to refrain from misappropriating corporate opportunities for their own benefit. This 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)).

Applying this Court's long-standing rule against diversion of corporate opportunities by fiduciaries, the Court of Appeals 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).

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.<sup>6</sup>

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).

Generally, when a corporation is unable to avail itself of an opportunity, its agents are free to exploit it. "However, before a director or 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

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<sup>6</sup> 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").

for that refusal.” 18B Am. Jur. 2d Corporations § 1551 (2014) (citing Energy Res. Corp. v. Porter, 14 Mass. App. Ct. at 302, 438 N.E.2d at 395).

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

The circuit 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. (Order of 12/31/14 at 21-23, ¶¶ 22-26, R.pp. 26-28). However, the circuit court was incorrect in holding the refusal to deal defense is available to Respondents.

The seminal case on the refusal to deal defense is Energy Res. Corp. v. Porter, supra, which is remarkably similar to this case on its facts. In that case the Massachusetts Appeals Court rejected the disfavored refusal to deal defense 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. Id. at 300, 438 N.E.2d at 394. 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).

In this case, Krish and Vijay never gave Kaj a fair statement of the reasons for Verizon’s refusal of VP Enterprises’ application. If the possible reasons for Verizon’s denial had been disclosed to Kaj, the parties could have explored alternate arrangements

to obtain the Verizon license. Krish and Vijay were able to do so by bringing in third party Corby Phillips to help them obtain the license.

Just as the circuit 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. (Order of 12/31/14 at 11, ¶ 21, R.p. 16). 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. at 300, 438 N.E.2d at 394.

The circuit 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). Moreover the circuit court’s finding was based on one witness who was below the decision-making level. (R.p. 437, lines 2-5 and R.p. 439, line 11).

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) (finding breach of fiduciary duty and usurpation of corporate opportunity because of corporate officer’s failure to disclose material facts about business opportunity he misappropriated from corporation despite a third-party’s initial refusal to deal with the corporation); Production Finishing Corp. v. Shields, 158 Mich. App. 479, 405 N.W.2d 171, 175 (1987) (holding as a matter of law plaintiff corporation was entitled

to judgment where officer did not fully disclose refusal to deal and that he was pursuing new business for his own newly-formed company).

The testimonies at trial demonstrate that, once the Verizon application was denied, Krish felt no obligation to exert any more efforts on behalf of VP Enterprises, stating he tried “to make the first round work... After that was done, it was case closed. I moved on and looked for another opportunity.” (R.p. 543, line 18 – p. 544, line 1; R.p. 602, line 24 – p. 603, line 2) (emphasis added). He then fell to the temptation to pursue the opportunity for profit for himself personally. This is exactly the misconduct the courts would not tolerate in Kelly v. 74 & 76 W. Tremont Ave. Corp, supra, and in the landmark case of Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928). This Court should grant this Petition and disallow such self-serving conduct in South Carolina.

#### CONCLUSION

For the reasons stated, Kaj, individually and on behalf of VP Enterprises, Inc., asks this Court to grant this Petition, review the Court of Appeals’ decision, permit briefing and argument, reverse the Court of Appeals and the Court of Common Pleas, find that Respondents Krish Patel and Vijay Patel breached their fiduciary duties as a matter of law, and remand to the lower courts with the direction to proceed with the imposition of a constructive trust for Respondents’ shares of stock in P Communications, Inc. or the proceeds 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](mailto:bhogan@gilreathlaw.com)  
[jim@gilreathlaw.com](mailto: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](mailto:monty@thecarolinalawgroup.com)  
[nihar@thecarolinalawgroup.com](mailto:nihar@thecarolinalawgroup.com)  
[matt@thecarolinalawgroup.com](mailto:matt@thecarolinalawgroup.com)

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

September 16, 2016  
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

SEP 19 2016  
SC Court of Appeals

The Honorable Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2016-UP-247 (S.C. Ct. App. filed June 1, 2016)

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 **Petition for Writ of Certiorari and Appendix** 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

Respectfully submitted,



---

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](mailto:jim@gilreathlaw.com)  
[bhogan@gilreathlaw.com](mailto:bhogan@gilreathlaw.com)

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

September 16, 2016  
Greenville, South Carolina.

THE GILREATH LAW FIRM, P.A.

JAMES R. GILREATH\*  
jim@gilreathlaw.com

\*ALSO ADMITTED TO PRACTICE IN NC

WILLIAM M. HOGAN  
bhogan@gilreathlaw.com

110 LAVINIA AVENUE (29601)  
P. O. BOX 2147  
GREENVILLE, SC 29602  
www.gilreathlaw.com

September 16, 2016

TELEPHONE (864) 242-4727  
FACSIMILE (864) 232-4395

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SEP 19 2016

SC Court of Appeals

VIA EXPRESS MAIL

Honorable Daniel E. Shearouse  
Clerk of Court, Supreme Court of South Carolina  
Supreme Court Building  
1231 Gervais Street  
Columbia, South Carolina 29201

RE: *Pankaj Patel, individually and derivatively on behalf of Nominal Defendant, VP Enterprises, Inc. v. Krish Patel, Vijay Patel, and P Communications, Inc.*  
Unpublished Opinion No. 2016-UP-247 (S.C. Ct. App. filed June 1, 2016)

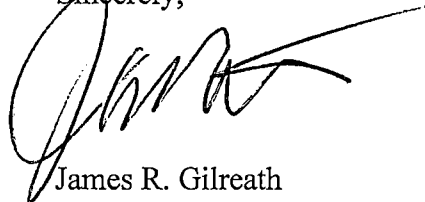
Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the Petition for a Writ of Certiorari in this case, together with two copies of the Appendix, one being bound and the other being unbound. I have also enclosed a Proof of Service of the Petition on counsel for the Respondents and a check in the amount of \$100 for filing the Petition. I am sending a copy of the Petition for a Writ of Certiorari and Proof of Service to the South Carolina Court of Appeals for filing. Please return a file stamped copy of the Petition for a Writ of Certiorari and Proof of Service to me in the enclosed envelope.

By copy of this letter to opposing counsel, I am serving them with the same.

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

Sincerely,



James R. Gilreath

WMH/kmk  
Enclosures

cc: The Honorable Jenny A. Kitchings (w/enclosures)  
Monty Desai, Esquire (w/enclosures)  
Nihar Patel, Esquire (w/enclosures)  
J. Matthew Whitehead (w/enclosures)

Honorable Daniel E. Shearouse

Page 2

September 16, 2016

Thomas L. Stephenson (w/enclosures)

Andrew A. Mathias (w/enclosures)

Kirsten E. Small (w/enclosures)

THE GILREATH LAW FIRM, P.A.

JAMES R. GILREATH\*  
jim@gilreathlaw.com

\*ALSO ADMITTED TO PRACTICE IN NC

WILLIAM M. HOGAN  
bhogan@gilreathlaw.com

110 LAVINIA AVENUE (29601)  
P. O. BOX 2147  
GREENVILLE, SC 29602  
www.gilreathlaw.com

TELEPHONE (864) 242-4727  
FACSIMILE (864) 232-4395

September 16, 2016

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SC Court of Appeals

VIA EXPRESS MAIL

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 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

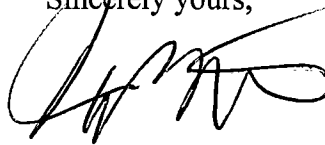
Dear Ms. Kitchings:

Enclosed please find two copies of the Appellant's Petition for Writ of Certiorari and Proof of Service being filed with the South Carolina Supreme Court. Please file these 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.

With best regards, I remain.

Sincerely yours,



James R. Gilreath

JRG/kmk

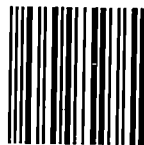
Enclosures

cc: Monty Desai, Esquire (w/enclosures)  
Nihar Patel, Esquire (w/enclosures)  
J. Matthew Whitehead (w/enclosures)  
Thomas L. Stephenson (w/enclosures)  
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<input checked="" type="checkbox"/> Flat Rate	Sunday/Holiday Premium Fee \$	Total Postage & Fees <b>\$ 22.95</b>
	Acceptance Employee Initials <b>HF</b>	

**DELIVERY (POSTAL SERVICE USE ONLY)**

Delivery Attempt (MM/DD/YY)	Time <input type="checkbox"/> AM <input type="checkbox"/> PM	Employee Signature
Delivery Attempt (MM/DD/YY)	Time <input type="checkbox"/> AM <input type="checkbox"/> PM	Employee Signature

LABEL 11-B, JANUARY 2014

PSN 7690-02-000-9996

3-ADDRESSEE COPY

WRITE FIRMLY TO MAKE ALL COPIES LEGIBLE.