

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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SEP 19 2016

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Edward W. Miller, Circuit Court Judge

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Unpublished Opinion No. 2016-UP-247 (S.C. Ct.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., ..... Petitioner,

v.

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

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**APPENDIX TO  
PETITION FOR WRIT OF CERTIORARI**

**VOLUME IV**

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ATTORNEYS FOR RESPONDENTS

ATTORNEYS FOR PETITIONER

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

---

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

---

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

v.

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

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**APPENDIX TO THE  
RECORD ON APPEAL**

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September 6, 2013

OFFICE OF THE GENERAL COUNSEL

William M. Hogan, Esq.  
The Gilreath Law Firm, P.A.  
PO Box 2147  
Greenville, SC 29602

RE: Pankaj Patel v. Krish Patel and P. Communications, Inc.  
Case No.: 2011-CP-23-7338

Dear Mr. Hogan:

This is in response to your subpoena dated August 5, 2013, to Jeff Smith, an instructor at the University of South Carolina Upstate, seeking education records pertaining to Krish Patel. The requested business plan submitted by Krish Patel is enclosed. We redacted the name of the other student who worked on the assignment.

Krish Patel took the following courses taught by Jeff Smith:

SBAD 225 Fall 2005: Krish Patel's final grade was D+. Course description: Financial Accounting (3) Principles of external financial reporting for business entities, including income measurement and determination of financial position. Prerequisites: SMTH 120 or 121 or 126.

SBAD 471 Spring 2008: Krish Patel's final grade was B. Course description: New Business Enterprise (3) Analysis of business opportunities; planning and establishing a business organization to exploit an opportunity; management of a small business. Prerequisite: SBAD 371.

Please contact me at (803)777-7854 if you have any questions.

Sincerely,

Henry J. White  
Associate General Counsel

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Gilreath Law Firm, P.A.

Enclosure

UNIVERSITY OF SOUTH CAROLINA • COLUMBIA, SOUTH CAROLINA 29208 • 803/777-7854 • FAX 803/777-9500

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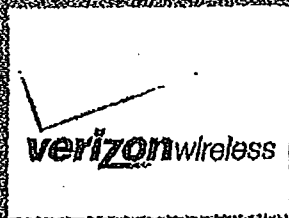
AN AFFIRMATIVE ACTION/Equal Opportunity Institution

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2008

Verizon Wireless Agent Business Plan



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**OWNERS**

Jay Krish Inc.  
408 Ashby Park Lane  
Greenville, SC 29607  
864-275-5605  
864-451-7583  
KrishV.Patel@Hotmail.Com

UBC000003

Pl. Trial Documents 00145 **D**

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## II. Executive Summary

This business model consist of retail authorized Verizon Wireless retail locations. The product being sold is Verizon Wireless service, equipment and accessories; Verizon Wireless has invested more than \$40 billion since the company was formed to increase the coverage and capacity of its national network and to add new services. Verizon Wireless currently serves 65.7 million customers. The voice network reliability test results have consistently shown that the rate of ineffective attempts for the Verizon Wireless national network, in major metropolitan centers and some remote areas, is lower than any other national carrier.

Verizon Wireless owns and operates the nation's most reliable wireless network, serving 65.7 million voice and data customers. Leveraging its greatest asset - its network - Verizon Wireless continues to lead the industry by offering the highest quality products and services while introducing innovative technology solutions.

Verizon Wireless Authorized Agents earn a commission, co-op accruals and account maintenance fees for the activation of customers on Verizon Wireless calling plans according to their agency agreements. Verizon Wireless performs all billing, collections and customer service for the Verizon Wireless customers activated by the Authorized Agent. Authorized Agents identify themselves as authorized agents of Verizon Wireless and use Verizon Wireless trademarks in accordance with their agency agreement. The Verizon Wireless Indirect Channel vision is to have strategic alliances with Authorized Agents by having a finite number of locations that are strategically placed within the market place.

The target market will be anyone of age 6 and up. The cellular industry is an evolving and growing business. The continuing growth will allow our business to expand and make a substantial profit. The focus of this business is to grow into multi retail locations. Multi locations result in a higher net profit. The key to success in this agent program is location, low cost equipment purchases, management and operations. This business could evolve over time becoming a large multi million dollar company. The future of this industry lies in the hands of new technology.

Initial start up capital of each location is projected to be \$50,000 per location. That cost includes inventory, furniture, fixture, rent, salary compensation if needed, pos systems and legal services. Additionally, Verizon Wireless will pay \$12,000 per store opened as start up capital.

A small business loan will be necessary to get start up capital. The company will use real estate as collateral for the loan and personal guarantees. This money allows the business to start up and pay off over a period of time rather than using all personal capital.

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### III. General Company Description

This company is formed by a group of local entrepreneurs. This South Carolina based company will operate Verizon Wireless agent location(s). Location(s) will be exclusive retail location(s) to purchase Verizon Wireless service and equipment.

**Objective:**

- To build the flagship agent store of Verizon Wireless in the district. Through sales, revenues and customer experience.
- To provide training and support for store personal, maintaining excellent moral of all store employees.
- To create the best possible customer experience resulting not only in customer loyalty and increasing sales for the store, but also for Verizon Wireless.
- To hold regular staff meetings that will result in the continued commitment of building one team, which, by working together will make our stores flagship agent stores of the district.

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#### IV. Products and Services

Our locations will have full intent to offer the complete line of products and wireless solutions provided by Verizon Wireless. By using a strategic inventory process control, we will be able to provide all different types of products to our consumers.

##### Service

A team of professional, motivated, positive and knowledgeable staff will be available for our customers.

Every customer will get the perfect customer experience from our sales team. All employees will go through extensive training when hired. The sales team will be intergraded with the communities' business events. All representatives will be trained on out bound and cold calling. Employees will be trained on how to generate small business leads as well as how to establish and create them. Employee will be trained on personal selling skills, customer first and probing models. Mystery shops will be conducted in order to evaluate and promote better performances. Employees will be trained on CDMA technology as well as evdo. As technology changes or improves all employees will be kept up to date.

Verizon Wireless VS. Competitors -- AT&T, T-Mobile, Sprint, Alltel,

The competitive advantage will be taught to be sure our employees providing consumers with accurate information.

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## V. Marketing Plan And Strategy

### Market Penetration

Entry into the market should not be a problem. The first store has extremely high visibility with heavy foot traffic all day long. The most traveled on and highest real estate value road in the Upstate of SC.

### Marketing Strategy

Focusing on the unique service and professionalism. Courteous and knowledgeable sales consultants to provide consumers with all their wireless needs. Backed up by Verizon Wireless, Worry Free Guarantee

- Print media -- local newspapers, magazines and student publications
- Chamber of Commerce brochures
- Direct mail -- subscriber lists, office
- Misc. -- yellow pages, charity events
- Internet Website
- Corporate relations

The marketing effort will be split into 3 phases;

- 1) Opening -- An advanced notice sent out to our personal, business and community contacts.
- 2) Ongoing -- A flexible campaign with personal, business and community contacts, assessed regularly for effectiveness.
- 3) Point of sale -- A well-trained staff can increase the average check as well as enhancing the customer's overall experience. Word-of-mouth referral is very important in building a customer base.

### Target Market

The market for the Verizon Wireless products is anyone age 6 and up. The Upstate, SC market is densely populated and increases to grow. With ICAR research center and

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south financial bank coming into Greenville, it will increase the demand for cellular users.

#### Market Location & Customers

Our first location will be placed on Woodruff Road, the highest traffic count and real estate value in the Upstate of SC.

Local population -- the county of Greenville with a year-round population of 500,000 +-.  
Local businesses -- The Chamber of Commerce lists over 6400 businesses. Companies such as Michelin, BMW, Ford, Jacobs, etc have large offices or corporate headquarters located here.

Venues: BI-Lo Center (16,000), Furman University, Timmons Arena (4,750), Sirmine Stadium (18,000),  
Furman University Paladin Stadium (16,000), Furman University Soccer Stadium (3,000)  
The student -- USC Upstate, the largest growing university in the state. Clemson, Furman, Greenville Tech, Bob Jones, North Greenville College

#### Competitive Strategy

Our locations will offer:

- A professional, perfect customer experience and total wireless solutions.
- Trained individuals, guided by professionals of the business industry.
- changing behaviors to change results
- High employee motivation and good sales attitude

#### Employee Training & Education

Employees will be trained not only in their specific operational duties but in the philosophy and applications of our concept. They will receive extensive information from the management and be kept informed of the latest information on the industry.

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#### **Niche**

Our company will be the one stop solution for the everyday consumer and small business clients. Our management and organization will be trained directly by individuals who have worked for and in this industry for several years. Our advantage will simply offer the total solution and no other agents in the upstate will be able to offer the service that we will.

#### **Promotion**

Our company will focus on building customer relationships and strive to keep high loyalty programs for our repeat clients. We will network within the community to offer our service to individuals and businesses.

Some of the promotional programs will include discounts on accessory items and waived equipment fees.

#### **Pricing**

Our pricing will reflect much of the corporate retail pricing. This will allow our company to stay competitive and make sustainable profits. Offering low prices will not necessarily be our mission but to provide service with the purchase.

#### **Distribution Channels**

Our channels will mostly consist of retail selling and b2b. As our company grows we will establish online purchasing.

#### **Sales Forecast**

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## VI. Operational Plan

Our first store will consist of a director of operations. This person will manage day to day cash controls, inventory and sales tracking. Additionally they will train, develop and coach the sales staff. Sales staff will be conducting cold calls to generate sales leads during slow times. As the company expands, central management will expand as well.

### Production

All equipment will be purchased directly from Verizon Wireless as a vendor. This will ensure the quality and durability of the product. Not only that but it will ensure the sensitivity of time on orders placed. Our inventory control will be conducted by a pos system but will also include cycle counts in opening and closing procedures.

### Location

Our first proposed location will be on east side of Greenville. It is important to qualify a location which has other anchor retail stores surrounding to drive walking traffic. Our locations will be road front within mixed shopping centers and plenty of visibility and parking.

Our locations will be replica of corporate Verizon Wireless retail locations to provide the complete image. It is very important to stay consistent for all locations.

Locations will need to be around 1000 -1500 sq ft. Finding locations around the \$17-\$24 ft will be the criteria to stay within rent budget.

### Legal Environment

An s-corp. will need to be created for the company. Also a retail sales license will be needed to do business in the state and county.

### Personnel

Each location will need a maximum of 3 employees initially. The staff of three will be sales representatives. The individuals will need to be qualified individuals seeking a commission based sales position.

Good computer and verbal skills will be required. All staff will be trained by our company and Verizon Wireless. Using companies like staffing and recruiting agents will help find right individuals.

Pay will be based strictly on commission to keep staff motivated to sell. This is usually standard in this type of business.

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Upper management will be paid on salary plus commission on gross sales.

**Inventory**

Inventory levels will be maintained based on product promotions, vendor discounts and product demand. POS systems will allow the business to coordinate this process efficiently. ROP will be established on business supplies after understanding months of business needs.

**Suppliers**

The key supplier will be Verizon Wireless. This will ensure on time orders and quality warranted product.

**Credit Policies**

This business will not operate on any credits.

**Managing Your Accounts Payable**

The director of operations will control all accounts payable transactions using bank of America's business banking program for ease of use.

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**VII. Management and Organization**

**Professional and Advisory Support**

**Krish V. Patel, CEO & President**  
**Vijay R. Patel, Vice President**

**Corby Phillips, General Manager & Project Development**  
**Krish V. Patel, Director of Sales & Operations**

**Alka V. Patel, Director of Training & Inventory Control**  
**Jay Patel, Director of Marketing**

**S. Allan Hill - Attorney & Professional Business/Legal Support**  
**Mukund Desai - CPA, Consultant**

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**IX. Startup Expenses and Capitalization**

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## Startup Expenses

Verizon Wireless

### Sources of Capital

#### Owners' Investment (name and percent ownership)

Jay Krish Inc. \$ 10,000 (per location)

Total Investment \$ 10,000

#### Bank Loans

BB&T \$ 25,000

Bank of America 25,000

Total Bank Loans \$ 50,000

### Startup Expenses

#### Capital Equipment List

Furniture and Fixtures \$ 8,000

Equipment 7,000

Other 5,000

Total Capital Equipment \$ 18,000

#### Location and Admin Expenses

Rentel \$ 2,700

Utility deposits 50

Legal and accounting fees 500

Prepaid insurance 200

Total Location and Admin Expenses \$ 3,450

#### Opening Inventory

Cellular Equipment \$ 10,000

Accessories 800

Total Inventory \$ 10,800

#### Advertising and Promotional Expenses

Advertising \$ 1,600

Signage 500

Printing 250

Total Advertising/Promotional Expenses \$ 2,250

Reserve for Contingencies \$ 1,600

Working Capital \$ 5,000

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**Summary Statement**

**Sources of Capital**

Owners' and other investments	\$ 10,000
Bank loans	50,000

<b>Total Source of Funds</b>	<b><u>\$ 60,000</u></b>
------------------------------	-------------------------

**Startup Expenses**

Capital equipment	18,000
Location/administration expenses	3,450
Opening inventory	10,800
Advertising/promotional expenses	2,250
Contingency fund	1,500
Working capital	5,000
<b>Total Startup Expenses</b>	<b><u>\$ 41,000</u></b>

**Security and Collateral for Loan Proposal**

<b>Collateral for Loans</b>	<b>Value</b>
Real estate	\$ 200,000

**Owners**  
Jay Krish Inc.

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## Balance Sheet (Projected)

Verizon Wireless

	Beginning as of 06/01/2008	Projected as of 06/01/2009
<b>Assets</b>		
<u>Current Assets</u>		
Cash in bank	\$ 60,000	\$ 66,250
Accounts receivable	-	1,400
Inventory	10,800	8,800
Prepaid expenses	3,460	3,460
Other current assets	5,000	5,000
Total Current Assets	<u>\$ 79,260</u>	<u>\$ 83,910</u>
<u>Fixed Assets</u>		
Machinery & equipment	\$ 7,000	\$ 7,000
Furniture & fixtures	6,000	6,000
Leasehold improvements	1,000	-
(LESS accumulated depreciation on all fixed assets) \$375/month	-	(4,500)
Total Fixed Assets (net of depreciation)	<u>\$ 14,000</u>	<u>\$ 8,500</u>
Other	-	-
Total Other Assets	-	-
<b>TOTAL Assets</b>	<u><u>\$ 93,260</u></u>	<u><u>\$ 92,410</u></u>
<b>Liabilities and Equity</b>		
<u>Current Liabilities</u>		
Accounts payable	\$ 19,000	\$ 19,000
Interest payable (10%)	-	1,800
Taxes payable (6%)	1,140	1,140
Current part, long-term debt	-	-
Other current liabilities	11,660	6,000
Total Current Liabilities	<u>\$ 31,700</u>	<u>\$ 28,040</u>
<u>Long-term Debt</u>		
Bank loans payable	\$ 60,000	\$ 4,000
Other long term debt	1,560	-
Total Long-term Debt	<u>\$ 61,560</u>	<u>\$ 4,000</u>
Total Liabilities	<u><u>\$ 93,260</u></u>	<u><u>\$ 32,040</u></u>
<u>Owners' Equity</u>		
Invested capital	\$ 10,000	\$ 10,000
Retained earnings - beginning	-	60,375
Retained earnings - current	10,000	60,375
Total Owners' Equity	<u>\$ 10,000</u>	<u>\$ 60,375</u>
Total Liabilities & Equity	<u><u>\$ 93,260</u></u>	<u><u>\$ 92,410</u></u>

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Twelve-Month Cash Flow  
Verizon Wireless

Fiscal Year Begins Jun-03

	Startup EST	Jun-03	Jul-03	Aug-03	Sep-03	Oct-03	Nov-03	Dec-03	Jan-04	Feb-04	Mar-04	Apr-04	May-04	Total (12m) EST
Cash on hand (beginning of month)	60,000	69,650	61,261	68,688	60,696	79,683	81,603	87,283	107,767	109,693	108,100	110,228	111,872	
<b>CASH RECEIPTS</b>														
Cash Sales	0	29,653	32,670	28,135	24,600	27,133	31,101	45,720	28,016	24,639	28,181	26,832	27,500	359,668
Collection from CR accounts														
Loan/other cash in.														
<b>TOTAL CASH RECEIPTS</b>	0	29,653	32,670	28,135	24,600	27,133	31,101	45,720	28,016	24,639	28,181	26,832	27,500	359,668
Total Cash Available (before cash out)	60,000	99,303	93,931	96,823	85,296	106,816	112,704	133,003	135,783	134,337	136,281	137,060	139,372	359,668
<b>CASH PAID OUT</b>														
When Rental		16	15	16	16	15	15	16	15	16	16	15	15	180
Food and Beverage		78	78	78	76	75	75	78	78	78	78	78	78	900
Gross wages		6,000	6,750	7,500	4,875	5,625	6,375	9,000	5,475	5,100	6,250	5,400	6,625	72,825
Payroll expenses														
Supplies (office & oper.)		130	130	130	130	130	130	130	130	130	130	130	130	1,650
Repairs & maintenance		600	600	600	600	600	600	600	600	600	600	600	600	6,000
Advertising		1,750	1,800	1,750	1,800	1,875	1,825	2,100	1,800	1,700	1,800	1,875	1,750	22,035
Credit Card Fees and Rental		600	600	600	600	600	600	600	600	600	600	600	600	11,620
Accounting & legal		500	350	400	350	275	600	600	550	450	650	475	375	6,775
Rent		2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	35,100
Telephone (cellular)		8,000	8,000	8,000	8,000	8,000	8,000	8,000	8,000	8,000	8,000	8,000	8,000	108,000
Utilities		600	600	600	600	600	600	600	600	600	600	600	600	9,600
Insurance		200	200	200	200	200	200	200	200	200	200	200	200	2,600
Taxes (real estate, etc.)		1,453	1,453	1,453	1,453	1,453	1,453	1,453	1,453	1,453	1,453	1,453	1,453	17,856
Interest		600	600	600	600	600	600	600	600	600	600	600	600	8,000
Post-termination		45	45	45	45	45	45	45	45	45	45	45	45	600
Professional Fees		100	100	100	100	100	100	100	100	100	100	100	100	1,200
Disposable Supplies		350	350	350	350	350	350	350	350	350	350	350	350	4,200
<b>SUBTOTAL</b>	3,450	24,938	25,768	26,438	23,663	24,638	25,738	28,453	24,563	24,168	24,263	24,458	24,613	305,641
Loan principal payment														
<b>TOTAL CASH PAID OUT</b>	3,450	24,938	25,768	26,438	23,663	24,638	25,738	28,453	24,563	24,168	24,263	24,458	24,613	305,641
Cash Position (end of month)	66,550	61,261	63,146	78,656	62,633	82,180	88,603	104,576	110,194	110,660	110,978	112,572	113,372	

ESSENTIAL OPERATING DATA (non-cash flow information)													
Sales Volume (dollars)	29,855	32,870	33,135	26,600	27,135	31,101	45,760	28,920	24,639	28,181	28,632	27,800	359,658
Accounts Receivable	100	130	130	125	275	100	166	135	38	100	100	0	1,466
Bad Debt (end of month)	0	0	0	0	0	0	0	0	0	0	0	0	0
Inventory on hand (com)	10,500	9,800	10,000	12,000	11,800	11,050	10,700	11,000	10,500	10,000	9,800	9,700	8,600
Accounts Payable (com)	-19,000	-17,600	-18,625	-18,225	-17,000	-17,160	-16,800	-16,400	-16,760	-16,200	-15,800	-15,650	-16,000
Depreciation	0	370	370	370	370	370	370	370	370	370	370	370	4,440

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**Opening Day Balance Sheet**  
Verizon Wireless

**Assets**

Current Assets

Cash in Bank	\$ 60,000
Inventory	10,800
Prepaid Expenses	3,450
Other	5,000
<b>Total Current Assets</b>	<u>\$ 79,250</u>

Fixed Assets

Machinery & Equipment	\$ 7,000
Furniture & Fixtures	8,000
Leasehold Improvements	1,000
Real Estate / Buildings	-
Other	-
<b>Total Fixed Assets</b>	<u>\$ 14,000</u>

Other Assets

Other	\$ -
-------	------

**Total Other Assets** \$ -

**Total Assets** \$ 93,250

**Liabilities & Net Worth**

Current Liabilities

Accounts Payable	\$ 19,000
Texas Payable	1,140
Notes Payable (due within 12 months)	-
Current Portion Long-term Debt	-
Other current liabilities	11,600
<b>Total Current Liabilities</b>	<u>\$ 31,700</u>

Long-term Liabilities

Bank Loans Payable (greater than 12 months)	\$ 80,000
Lease: Short-term Portion	-
Notes Payable to Stockholders	-
Other long-term debt	1,550
<b>Total Long-term Liabilities</b>	<u>\$ 81,550</u>

**Total Liabilities** \$ 83,250

**Owners' Equity (Net Worth)** \$ 10,000

**Total Liabilities & Net Worth** \$ 93,250

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**Break Even Analysis**

	profit per item	# sold	monthly total	yearly total
Sales Required	\$150	80	\$ 9,000.00	\$ 108,000.00
New Activation	\$46	10	\$ 460.00	\$ 5,400.00
Renewals	\$12	114	\$ 1,368.00	\$ 16,416.00
Accessories	\$3	7	\$ 21.00	\$ 252.00
Bill Payments				\$ 130,068.00

**Fixed Cost**

	per Month	yearly
Taxes	\$ 1,483.00	\$ 17,586.00
Salary	\$ 4,500.00	\$ 54,000.00
rent	\$ 2,700.00	\$ 32,400.00
utility	\$ 800.00	\$ 9,600.00
Interest	\$ 600.00	\$ 7,200.00
depreciation	\$ 375.00	\$ 4,500.00
Credit Card Fees	\$ 960.00	\$ 11,520.00
		\$ 130,064.00

USC000022

Pl. Trial Documents 00146 W

X. Financial Plan

12-Month Profit and Loss Projection

Four-Year Profit Projection (Optional)

Projected Cash Flow

Opening Day Balance Sheet

Break-Even Analysis

USC000023 X

PL Trial Documents 00146

001592

7/7/08

Vijay R. & Alka Patel

Son - Krish Patel

Comfort INN - Operated by R.G. Hospitality, LLC  
Owned Ron Gadda & Vijay  
(Vijay soon to purchase Ron's Interest)

Land & bldg. owned by <sup>Bought 4/99</sup> Greenville  
Hotel Partners, Inc (S Corp) - Vijay & Alka  
owners

Quality Inn R.G. Properties, LLC operates hotel +  
134 S. Pleasantburg owns bldg. & Land  
Owned by Vijay (40%) Ron Gadda (55%)  
Jason Breda (5%)

Mgt Co J Krish Co, Inc. (S Corp)  
also owns 2 houses

Land for a new hotel VIP Hospitality, LLC Vijay owns 25%  
(Butler rd + 385)

KVP Investments & Operations, LLC  
rents 1 house 25% Krish 25% Vijay 50% others

Verizon stores P- Communications, Inc. 90% Krish  
<10% Corby Phillips  
(silent Partner)

Kaj 002010



Wireless Communications

January 2010

Attention: Patricia Cook, Verizon Wireless Operations/Legal

Subject: P Communications Inc, Ownership Change

Patricia,

- Please make the following changes to P Communications Inc. Keith Galley's 40% ownership has been surrendered to the Corporation. Therefore, 100% of the outstanding stock is under ownership of Krish Patel. Keith Galley will continue as the Director of Sales for the Company.

Sincerely,

Must

Krish Patel - President

Wireless Communications

804-275-5605 ,C.

804-282-8050 ,O.

\_\_\_\_\_  
Krish V. Patel

\_\_\_\_\_  
Keith S. Galley

Date: 1-25-10

Date: 1-25-10

Wireless Communications  
2007 Augusta St Greenville, SC 29605

Defendant# 000619

Pl. Trial Document 00302

## Hot Wire

Twenty-something biz whiz Krish Patel made a good call

By Joe Chetortis

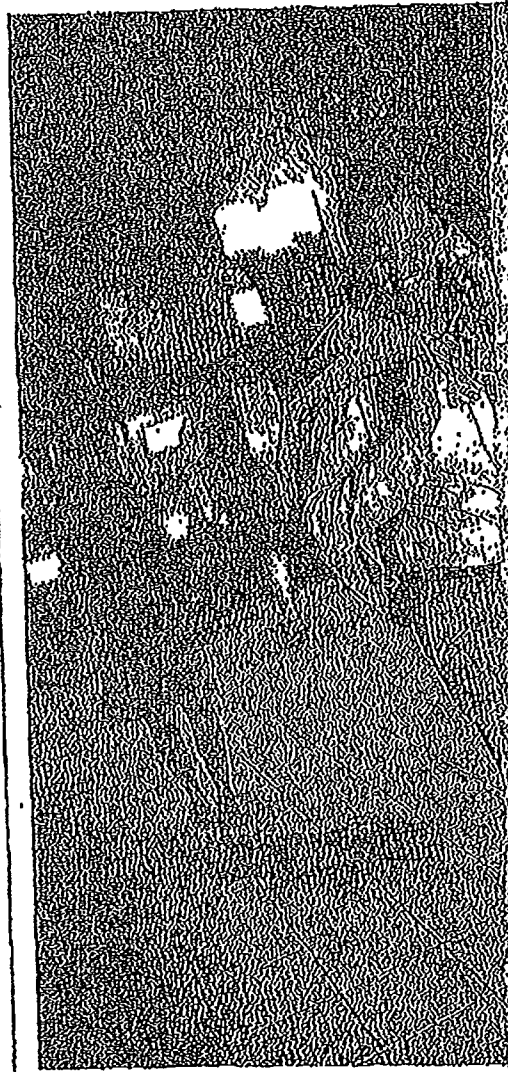
**M**aybe it's because he was born first that Krish Patel doesn't like coming in second. Krish has built what you might call a wireless empire across much of South Carolina and northern Georgia as the president of Wireless Communications, a premium retailer for Verizon Wireless. He is also only 25 years old, and, no, he made his fortune the old-fashioned way—ju earned it.

His drive, determination, and entrepreneurial spirit were clearly handed down from his mother and father who came to the United States from Gujarat, India. "They came with nothing but a dream," says Krish of his parents' spirit to succeed. They owned a liquor store business in Houston, where Krish was born, and a dry-cleaning business in Atlanta, before moving to Greenville, where they opened the very first hotel in Traveler's Rest (a Sleep Inn) and then another in 2000.

While still in middle school, Krish helped out with the housekeeping on the weekends for \$10 or sometimes \$20. After a string of retail jobs (three at one time when he was 16), he started as a customer service representative at Verizon when he was 18, and by his sophomore year of college at University of South Carolina—Upstate, Krish was working full time as both a sales rep and a student.

Sounds like a thing for that age, maybe? Not for Krish. He loved it. "I was working 40 hours a week, going to class full time, and it was incredible." He surpassed his sales quota that first year, reaching 187 percent. By the time he was 21, he decided to open his own Verizon store, launching Wireless Communications in 2008, the year he graduated college (using the business plan he had drafted in one of his college classes). By the end of 2009, he had opened five stores, and the company reached \$3.3 million in sales. He now has 23 stores, with plans to reach 50 by the end of this year, 50 by the end of next.

Patel, who also fluently speaks a dialect

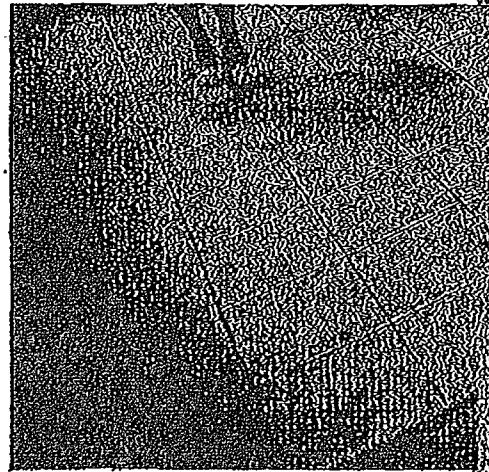


Kaj000001

all times as soon as sales rep and a success.

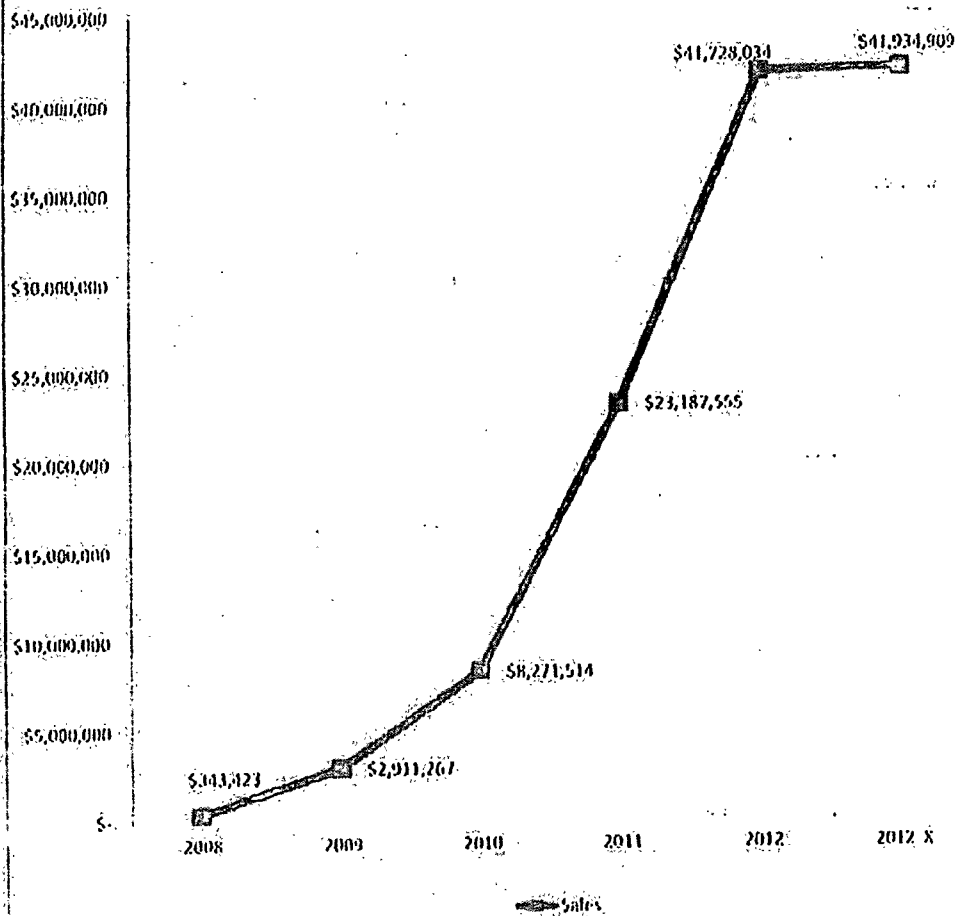
Sounds like a drag for that age, maybe? Not for Krish. He loved it. "I was working 40 hours a week, going to class full time, and it was incredible." He surpassed his sales quota that first year, reaching 137 percent. By the time he was 21, he decided to open his own Verizon store, launching Wireless Communications in 2008, the year he graduated college (using the business plan he had drafted in one of his college classes). By the end of 2009, he had opened five stores, and the company reached \$3.3 million in sales. He now has 23 stores, with plans to reach 30 by the end of this year, 50 by the end of next.

Krish, who also fluently speaks a dialect of Hindi, is not flashy about his success. "The bottom line is that it's never been about the money, it's always been about me being able to do something my parents did, which is to start something from nothing," he says. "The thing that I pride myself on is that I didn't have to take a handout from anyone. I did it on my own, as far as financially." Emotionally, however, Krish is endearingly humble and quickly acknowledges that he's only as good as the people he has surrounded himself with—including VJ Patel, the vice-president of Krish's business, who reports to the boss like his other nearly 200 employees do, but with one distinction—he also calls him "son."



**Walk & Talk:** Krish Patel, 26, is the president and owner of Greenville-based company Wireless Communications, which he has grown to 23 stores, with plans to reach 30 by the end of the year.

P Communications, Inc  
Sales per Form 1120S  
2008 to 2012



# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

- Company Description

Kundo, Inc., a Massachusetts based company, will operate Abonda, a single-unit, medium-sized restaurant serving healthy, contemporary style food. The restaurant will be located at 645 Deacon Street in Cambridge, Massachusetts.

- Mission Statement

The company's goal is that of a multi-faceted success. Our first responsibility is to the financial well-being of the restaurant. We will meet this goal while trying to consider; 1) the effect of our products on the health and well being of our customers (and our staff), 2) the impact that our business practices and choices will have on the environment, and 3) the high quality of attitude, fairness, understanding, and generosity between management, staff, customers, and vendors. Awareness of all these factors and the responsible actions that result will give our efforts a sense of purpose and meaning beyond our basic financial goals.

## Tava Grill, Inc.

- Company Description

Tava Grill, Inc., a South Carolina based company, will operate Tava Grill, a single-unit, small to medium-sized restaurant serving healthy Indian fusion cuisine. **Outside catering will also be operated out of the restaurant.** The restaurant will be located at \_\_\_\_\_ in Greenville, SC.

- Mission Statement

The company's goal is that of a multi-faceted success. Our first responsibility is to the financial well-being of the restaurant. We will meet this goal while trying to consider; 1) **fresh and healthy food.** 2) **Highlight quality food.** 3) **The best service to our customers** and 4) the high quality of attitude, fairness, understanding, and generosity between management, staff, customers, and vendors. Awareness of all these factors and the responsible actions that result will give our efforts a sense of purpose and meaning beyond our basic financial goals.

Items in blue were added

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

- Development and Status

The company was incorporated in September of 1995 and elected sub-chapter S. The founders are Jack Morton and Wilma Mason. Jack is the President and Wilma the Vice President. There is a total of 10,000 shares of common stock issued. Wilma and Jack each own 3,000 and the remainder are retained by the company for future distribution. In addition they have loaned the company \$25,000 of their own money for research and start-up costs.

A suitable site for the first restaurant was found last month and lease negotiations are in final stages. The location will be on Deacon Street, just outside Harvard Square and close to a dense population of the target market. When the lease is signed there will be three months of free rent for construction and in that time the balance of the start-up funds must be raised. With that phase completed, Abonda Restaurant can then open and the operations phase of the project can begin.

## Tava Grill, Inc.

- Development and Status

The company was incorporated in September of 2005 and elected sub-chapter S. The founder is Parul Patel. Parul is the President. The restaurant will be operated and managed by four family members, Parul, Atul, Minal and Jyotin while Pankaj Patel will be the business advisor. Startup capital will be provided by Parul (\$30,000), Atul (\$20,000), and Jyotin (\$10,000). Additional capital requirements of up to \$50,000 have been arranged for at Bank of America and/or BB&T and will be drawn as needed.

A couple of suitable sites for the first restaurant were found last month and once the final location is picked, lease negotiations will be under way. The location will be around the Haywood Mall area and close to a dense population of the target market (Flour, St. Francis, Greenville Hospital System, North Hill Medical, USPS, etc). Depending on the final location, the restaurant will start operating either immediately or by March 2006.

001599

Items in blue were added

2

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

- Future Plans

If the business is meeting its projections by month nine, we will start scouting for a second location and develop plans for the next unit. Our Five year goal is to have 3 resturants in the greater Boston area with a combined annual profit of between \$500,000 and \$1,000,000

- Industry Analysis

Although the restaurant industry is very competative, the lifestyle changes created by modern living continue to fuel its steady growth. More and more people have less time, resources, and ability to cook for themselves. Trends are very important and Abonda is well positioned for the current interest in lighter, healthier foods at moderate to low prices.

## Tava Grill, Inc.

- Future Plans

After the business is meeting its projections by year two, we will start developing a non-full service type of restaurant with a limited menu for deployment as franchise units. Our Five year goal is to have 3 restaurants in the greater Greenville area with a combined annual profit of between \$500,000 and \$1,000,000.

- Industry Analysis

Although the restaurant industry is very competitive, the lifestyle changes created by modern living continue to fuel its steady growth. More and more people have less time, resources, and ability to cook for themselves. Trends are very important and Tava Grill is well positioned in a niche market of Indian fusion cuisine, excellent service and healthy vegetarian and non-vegetarian foods at moderate prices.

001600

Items in blue were added.

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

- The Restaurant Industry Today

The food service business is the third largest industry in the country. It accounts for over \$240 billion annually in sales. The independent restaurant accounts for 15% of that total. The average American spends 15% of his or her income on meals away from home. This number has been increasing for the past seven years. In the past five years the restaurant industry has out-performed the national GNP by 40%. The reasons given by the Folkney Report (November 1994) are 1) lifestyle changes, 2) economic climate, and 3) increase of product variety.

There are 600 new restaurants opening every month and 200 more needed to keep pace with the increasing demand.

## Tava Grill, Inc.

- The Restaurant Industry Today

The food service business is the third largest industry in the country. It accounts for over \$476 billion annually in sales. More than 7 out of 10 eating and drinking places are a single unit (independent) operations. The average American spends \$910 of his or her income in meals away from home. This number has been increasing for seven years.

Items in blue were added

4

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

### • Future Trends and Strategic Options

The predicted growth trend is very positive both in short and long-term projections. Folkney states again that as modern living creates more demands, people will be compelled to eat more meals away from home. The DMR Industrial Report (April 1995) estimates this as high as 30% over the next five years. In 1998 the National Restaurant Association released the Foodservice Industry 2000 report that forecasted how the industry might look in the year 2000. some highlights from the panel's findings:

- "Consumers will spend a greater proportion of their food dollar away from home
- Independent operators and entrepreneurs will be the main source of new restaurant concepts.
- Nutritional concerns will be critical at all types of foodservice operations, and food flavors will be important
- Environmental concerns will receive increased attention."

## Tava Grill, Inc.

- Section omitted from Tava Grill, Inc.

001602

Items in blue were added

5

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

- Products and Related Services

Abonda restaurant will be offering a menu of food and beverages with a distinctive image. There will be three ways to purchase these products; table service at the restaurant; take-out from the restaurant, and delivery to home or office.

- The Menu

The Abonda menu (see appendices) is moderate sized, and moderate-low priced offering a collection of ethnic and american item with a common theme—healthy (low-fat, low cholesterol, natural ingredients), flavorful, and familiar. Our goal is to create the image of light satisfying and still nutritious food. There has been an increased awareness of nutritional and health concerns in recent years and a growing market of people who now eat this style of cooking regularly.

## Tava Grill, Inc.

- Products and Related Services

Tava Grill Restaurant will be offering a menu of food and beverages with a distinctive image. There will be three ways to purchase these products; table service at the restaurant; take-out from the restaurant, and delivery to home or office event/parties

- The Menu

The Tava Grill menu (see appendices) is moderate sized, and moderate priced offering a collection of Indian fusion dishes with a common theme—healthy (low-fat, low cholesterol, natural ingredients), and flavorful. Our goal is to create the image of uniquely satisfying and still nutritious food. **The menu will feature both vegetarian and non-vegetarian foods.** There has been an increased awareness if nutritional and health concerns in recent years and a growing market of people who now eat this style of cooking regularly.

001603

Items in blue were added

6

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

- Production

Food production and assembly will take place in the kitchen of the restaurant. Fresh vegetables, meat and dairy products will be used to create most of the dishes from scratch. The chef will exercise strict standards of sanitation, quality production, and presentation or packaging over the kitchen and service staff.

- Service

There will be three ways a customer can purchase food. They may sit at one of the 54 seats in the dining room and get full service from a waitperson. A separate take-out counter will service those who wish to pick up their food. Most take-out food will be prepared to order with orders coming from either the telephone or fax. Delivery (an indirect form of take-out) will be available at certain times and to a limited area

- Future Opportunities

There is a market segment that prefers to eat this type of cooking at home although they do not have the time to cook. There are already caterers and even mail order companies that provide individuals and families with up to a months supply on pre-prepared meals. This opportunity will be researched and developed on a trial basis. If successful, it could become a major new source of income without creating the need for additional staff or production space.

## Tava Grill, Inc.

- Production

Food production and assembly will take place in the kitchen of the restaurant. Fresh vegetables, meat and dairy products will be used to create all of the dishes from scratch. The chef will exercise strict standards of sanitation, quality production, and presentation or packaging over the kitchen and service staff.

- Service

There will be three ways a customer can purchase food. They may sit down at one of the 75 seats in the dining room and get full service from a waitperson. A separate take-out counter will service those who wish to pick up their food. All of take-out food will be prepared to order with orders coming from either the website, telephone or fax. Delivery (an indirect form of take-out) will be available for planned events and parties.

**Future Opportunities section omitted**

001604

Items in blue were added

7

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

- The Target Market

The market for Abonda's products covers a large area of diverse and densely populated groups. Although it will be located in a downtown urban setting, it is an area where people travel to eat out and one that is also frequented by tourists. It is also an area known for and catering to the demographic group we are targeting.

- Market Location and Customers

The Harvard Square area is one of the most desirable retail locations in New England. The Mass. Chamber of Commerce rates it as the third best retail market in the state. There are more than 400 businesses in a ¼ square mile area with average sales of \$330 per square foot.

The customer base will come from 3 major segments:

Local Population- the city of Cambridge with a year-round population of 145,000 is centrally located in the Boston area and is within 15 min. drive of 8 major cities.

Colleges and Universities- Harvard alone has 6 different schools within walking distance of Deacon Street and a seasonal population of 22,000. In addition 5 more colleges near the square have large student bodies.

Local Businesses- The Cambridge Chamber of Commerce lists over 900 businesses with an average of 12 employees in the Harvard Square area.

## Tava Grill, Inc.

- The Target Market

The market for Tava Grill's products covers a large area of diverse and densely populated groups that would pay for and appreciate the fresh and healthy foods. It is also an area known for and catering to the demographic group we are targeting.

- Market Location and Customers

The Haywood road area is one of the most desirable retail locations in Greenville. The customer base will come from 3 major segments;

Local Population- The county of Greenville with a year-round population of 400,000

Tourism- Between hotels, motels, bed and breakfast rooms and inns, there are over 8,500 rooms available. Last year they were at 92% occupancy.

Local Business- The Chamber of Commerce lists over 6400 business. Companies such as Michelin, BMW, Flour, Jacobs, etc have large offices or corporate headquarters located here

Venus- Bi-Lo Center (16,000), Furman University Timmons Arena (4,750), Sistine Stadium (13,000), Furman University Paladin Stadium (16,000), Furman University Soccer Stadium (3,000)

Hotel Rooms- 8,012 (Greenville County)

001605

Items in blue were added

8

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

The food concept and product image of Abonda will attract 3 different customer profiles;

The Student- More and more young people have developed healthy eating habits. Some also go through a "health food phase" while in college.

The Health Conscious Person of Any Age or Sex- this includes anyone on a restricted or prescribed diet or those who have committed to a healthy diet.

Curious and Open-minded- "If you try it, you will like it." Through marketing, publicity, and word-of-mouth, people will seek out a new experience and learn that nutritious food can be tasty, fun, convenient, and inexpensive.

## Tava Grill, Inc.

The food concept and product image of Tava Grill will attract 3 different customer profiles;

The Student- More and more young people have developed healthy eating habits. Some also go through a "health food phase" while in college.

The Health Conscious Person of Any Age or Sex- this includes anyone who has committed to a healthy diet. **Our unique vegetarian menu will offer a wide variety of foods to select from.**

Curious and Open-minded- "if you try it, you will like it." Through marketing, publicity, and word of mouth, people will seek out a new experience and learn that nutritious food can be tasty, fun, convenient, and inexpensive.

Large Indian and European community- **Communities in Greenville, Anderson and Spartanburg that desire quality Indian cuisine.**

Items in blue were added.

9

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

- Market Trends and The Future

The population and demographics of Harvard square have remained steady for the last 14 years. Tourism has increased 24% over the last 3 years and is predicted to keep growing. Local businesses are increasing at a rate of 18% yearly. The idea of health conscientiousness through nutritional awareness and dietary change has been slowly building for the last 7 years. The extensive government studies and new Food Guide Pyramid have given everyone a new definition of a balanced, healthy diet. This is not a fad but a true dietary trend backed by the scientific and medical community, the media, the government, and endorsed by the big food manufacturers. As the Foodservice 2000 report stated, this trend will be even more important by the turn of the century. As people want to stay home more and cook less our strategy of delivering prepared meals on a weekly or monthly arrangement may be a widespread accepted new way of eating.

## Tava Grill, Inc.

- This section omitted from Tava Grill

001607

Items in blue were added

10

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

- The Competition

There are over two dozen restaurants in the Harvard Square area that sell food at similar prices. Although this presents an obvious challenge in terms of market share, it also indicates the presence of a large, strong potential. The newest competitors have made their success entry based on a innovative concept or novelty. Abonda will offer an innovative product in familiar style at a competitive price. Our aggressive plans of take-out and delivery will also give us an advantage to create a good market share before the competition can adjust or similar concepts appear.

## Tava Grill, Inc.

- The Competition

There are only two Indian restaurants in Greenville, Anderson and Spartanburg. Tava Grill will offer an innovative product in a familiar style at a competitive price. Our aggressive plans of take-out and delivery will also give us an advantage to create a good market share before the competition can adjust or similar concepts appear.

Items in blue were added

11

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

### • Competitors Profile:

Competing with Abonda for the target market are these categories of food providers:

-Independent table service restaurants of similar menu and price structure.

-Chain restaurants of similar menu and price structure

-Commercial food service companies serving students directly

Independent operators include Grendel's Den, Iako, Bombay Club, Iruna and The Border Café. Most are ethnic based and will carry at least two similar menu items. Grendel's and Iruna are long-standing businesses while the others are fairly new. They are all doing very well.

The major chain restaurants are House of Blues, Chilli's and Bertucci's. All are relatively new but well established and profitable. They have big resources of marketing and/or a specialty product or attraction. (House of Blues is also a live music club). Ogden Foods and Cysco both service 24,000 Harvard students but their product is not appealing enough to prevent students from eating out 5-7 meals a week. In addition there are two local catering companies that deliver prepared meals daily to offices.

## Tava Grill, Inc.

### • Competitors Profile

Competing with Tava Grill for the target market are these categories of food providers:

-Independent table service restaurants of similar menu and price structure.

**(Chain restaurants and Commercial Foodservice omitted)**

Independent operators include India Place, and Delhi Palace.

Most are ethnic based and will carry at least two similar menu items. India Palace is a long-standing business while the other are fairly new. They are both doing very well despite their bad location, service and quality of food.

In addition neither company delivers prepared meals daily to offices.

001609

Items in blue were added.

12

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

### • Competitive Strategy

There are three major ways in which we will create an advantage over our competitors;

- product identity, quality, and novelty
- high employee motivation and good sales attitude
- innovative and aggressive service options

Abonda will be the only restaurant among all the competition which focuses the entire menu on healthy, low-fat cooking. Each of the competitors offers at least one "healthy" selection on their menu. Grendel's Den even has an entire section called "On the Lighter Side" but in all cases they are always seen as alternatives to the main style being offered. The target market will perceive Abonda as the destination location for healthy, low-fat cooking.

Once they have tried the restaurant, their experience will be reinforced by friendly, efficient, knowledgeable service. Return and repeat business will be facilitated by accessible take-out and delivery options. At the time of this writing all of the competitors offered take-out but only two (Bertucci's and Chili's).

## Tava Grill, Inc.

### • Competitive Strategy

There are three major ways in which we will create an advantage over our competitors;

- product identity, quality, and novelty
- high employee motivation and good sales attitude
- innovative and aggressive service options

Tava Grill will be the only restaurant among the competition which focuses the entire menu on fresh healthy cooking. Each of the competitors offers at least one "healthy" selection on their menu. The target market will perceive Tava Grill as the destination location for healthy cooking.

Once they have tried the restaurant, their experience will be reinforced by friendly, efficient, knowledgeable service. Return and repeat business will be facilitated by accessible take-out and delivery options. At the time of this writing all of the competitors offered take-out.

001610

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

### Marketing Plan and Sales Strategy

**Market Penetration**- Entry into the market should not be a problem. The store has high visibility with heavy foot traffic all day long. The local residents and students always support new restaurants and the tourists do not have fixed preferences. In addition, \$10,000 has been budgeted for a pre-opening advertising and public relations campaign.

**Marketing Strategy**-Focusing on the unique aspect of the product theme (healthy, tasty foods) a mix of marketing vehicles will be created to convey our presence, our image and our message.

-Print Media- local newspapers, magazines and student publications

-Broadcast Media- local programming and special interest shows

-Hotel guides, concierge relations, Chamber of Commerce brochures

-Misc- yellow pages, charity events

A public relations firm has been retained to create special events and solicit print and broadcast coverage, especially at the start-up.

The marketing effort will be split into 3 phases:

**Opening**- An advanced notice (press packet) sent out by the PR firm to all media and printed announcement ads in key places. Budget \$10,000

**Ongoing**- A flexible campaign (using the above media), assessed regularly for effectiveness. Budget-\$10,000

**Point of Sale**- A well-trained staff can increase the average check as well as enhancing the customer's overall experience. Word-of-mouth referral is very important in building a customer base.

## Tava Grill, Inc.

### Marketing Plan and Sales Strategy

**Market Penetration**- Entry into the market should not be a problem. The store has high visibility with heavy foot traffic all day long. The local residents always support new restaurants and the tourists do not have fixed preferences. In addition, Both Parul and Pankaj have been involved with the local Indian community since 1985. They have both served on the India Association of Greater Greenville (IAGG) committee at various times.

**Marketing Strategy**- Focusing on the unique aspect of the product theme (healthy, tasty foods) a mix of marketing vehicles will be created to convey our presence, our image, and our message.

-Print Media- local newspapers, magazines and student publications

-Hotel guides, concierge relations, Chamber of Commerce brochures

-Direct mail- subscriber lists, offices for delivery

-Misc- yellow pages, charity events

-Internet Website-

The marketing effort will be split into 3 phases:

**Opening**- An advanced notice sent out to our personal, business and community contacts. We want this to be a low key opening.

**Ongoing**- A flexible campaign with personal, business and community contacts, assessed regularly for effectiveness.

**Point of Sale**- A well-trained staff can increase the average check as well as enhancing the customer's overall experience. Word-of-mouth referral is very important in building customer base.

001611

Items in blue were added

14

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

### Future Plans and Strategic Opportunities

Catering to offices (even outside of our local area) may become a large part of gross sales. At the point a sales agent would be hired to directly market our products for daily delivery or catered functions.

### Operations

Facilities & Offices- The restaurant at 645 Deacon Street is a 2400 Square foot space. It was formerly a restaurant and needs on minor structural modifications. The licenses and codes issues are all in order. New equipment and dining room furnishings will be purchased and installed by the general contractor. Offices of the corporation are presently at Jack Morton's home but will be moved to the restaurant after opening.

Hours of Operation- The restaurant will be open for lunch and dinner 7 days a week. Service will begin at 11:00 am and end at 11:00 pm. The restaurant will be closed Christmas, Thanksgiving and Fourth of July.

Employee Training & Education- Employees will be trained not only in their specific operational duties but in the philosophy and applications of our concept. They will receive extensive information from the chef and be kept informed of the latest information on healthy eating.

Systems & Controls- A big emphasis is being placed on extensive research into the quality and integrity of our products. They will constantly be tested for our own high standards of freshness and purity. Food costs and inventory control will be handled by our computer system and checked daily by management.

Food Production- Most food will be prepared on the premises. The kitchen will be designed for high standards of sanitary efficiency and cleaned daily. Food will be made mostly to order and stored in large coolers in the basement.

Delivery & Catering- Food for delivery may be similar to take-out (prepared to order) or it may be prepared earlier and stocked. Catering will be treated as deliveries.

## Tava Grill, Inc.

### Future Plans and Strategic Opportunities

Catering to offices (even outside of our local area) may become a large part of gross sales. At that point a sales agent would be hired to directly market our products for daily delivery or catered functions.

### Operations

(Facilities & Offices omitted)

Hours of Operation- The restaurant will be open for lunch and dinner 6 days a week. Service will begin at 11:00 am and end at 2:00 pm for lunch and from 5:00 pm to 9:00 pm (11:00 pm on Friday and Saturday nights) for dinner. The restaurant will be closed Christmas, Thanksgiving, and Fourth of July.

Employee Training & Education- Employees will be trained not only in their specific operational duties but in the philosophy and applications of our concept. They will receive extensive information from the chef and be kept informed of the latest information on healthy eating.

Systems & Controls- A big emphasis is being placed on extensive research into the quality and integrity of our products. They will constantly be tested for our own high standards of freshness and purity. Food costs and inventory control will be handled by our computer system and checked daily by management.

Food Production- All the food will be prepared on the premises. The kitchen will be designed for high standards of sanitary efficiency and cleaned daily. All food will be made to order.

Delivery & Catering- Food for delivery may be similar to take-out (prepared to order) or it may be prepared earlier and stocked. Catering will be treated as deliveries.

001612

Items in blue were added

15

# Comparison of Kundo, Inc. Business Plan to Tava Grill, Inc. Business Plan

## Kundo, Inc.

### • Management & Organization

Key Employees & Principals- Jack Morton, President. Jack Morton is also the owner and manager of Grains & Beans, a local natural food wholesaler and retail store. Since 1977 his company has created a high-profile mainstream image for natural foods. In 1992 Grains & Beans opened a small café within the retail store that became so popular and profitable, he decided to expand the concept into a full service restaurant. Jack brings with him a track record of success in the natural foods industry. His management style is innovative and in keeping with the corporate style outlined in the mission statement.

Compensation & Incentives- Abonda will offer competitive wages and salaries to all employees with benefit packages available to key personnel only.

Board of Directors- An impressive board of directors has been assembled that represents some top professional from the area. They will be a great asset to the development of the company.

Consultants & Professional Support Resources- At the present, no outside consults have been retained, excepting the design department at Best Equipment.

Management to be Added- We are presently searching for a general manager and executive chef. These key employees will be well chosen and given incentives for performance and growth.

Management Structure & Style- Jack Morton will be the President and Chief Operating Officer. The general manager and chef will report to him. The assistant manager and sous-chef will report to their respective managers, and all other employees will be subordinate to them.

Ownership- Jack Morton and the stockholders will retain ownership with the possibility of offering stock to key employees if deemed appropriate.

## Tava Grill, Inc.

### • Management & Organization

#### Key Employees & Principals-

-Parul Patel, President

-Atul Patel, Vice President and General Manager

-Minal Patel and Jyotin Patel, Executive chefs, Non-vegetarian and vegetarian respectively

Compensation & Incentives- Tava Grill will offer competitive wages and salaries to all employees with benefit packages available to key personnel only.

Board of Directors- at the present no outside board of directors will be retained

Consultants & Professional Support Resources- At the present, no outside consults have been retained, excepting the design department at Best Equipment.

(Management to be added, Ownership and Management structure and Style omitted)

001613

Items in blue were added

16

# Kundo, Inc. Business Plan v. Tava Grill, Inc. Business Plan

## Kundo, Inc.

### • Long-Term Development & Exit Plan

Goals- Abonda in an innovative concept that targets a new, growing market. We assume that the market will respond, and grow quickly in the next 5 years. Our goals are to create a reputation of quality, consistency and security (safety of food) that will make us the leader of a new style of dining.

Strategies- Our marketing efforts will be concentrated on take-out and delivery, the areas of most promising growth. As the market changes, new products may be added to maintain sales.

Milestones- After the restaurant opens, we will keep a close eye on sales and profit. If we are on target at the end of year 1, we will look to expand to a second unit.

Risk Evaluation- With any new venture, there is risk involved. The success of our project hinges on the strength and acceptance of a fairly new market. After year 1, we expect some copycat competition in the form of other independent units. Chain competition will be much later.

Exit Plan- Ideally, Abonda will expand to five units in the next 10 years. At that time, we will entertain the possibility of a buy-out by a larger restaurant concern or actively seek to sell to a new owner.

## Tava Grill, Inc.

### • Long-Term Development & Exit Plan

Goals- Tava Grill is an innovative concept that targets new, growing market. We assume that the market will respond, and grow quickly in the next 5 years. Our goals are to create a reputation of quality, consistency and security (safety of food) that will make us the leader of a new style of dining.

Strategies- Our marketing efforts will be concentrated on take-out and delivery, the areas of most promising growth. As the market changes, new products may be added to maintain sales.

Milestones- After the restaurant opens, we will keep a close eye on sales and profit. If we are on target at the end on year 1, we will look to expand to a second unit.

Risk Evaluation- With any new venture, there are risk involved. The success of our project hinges on our unique menu, quality, and freshness of our healthy food.

(Omitted last paragraph of this section and Omitted Exit Plan section)

1 A. No, sir.

2 Q. All right. Now, Mr. Gailey -- now, we got  
3 Mr. Gailey in the deal in the end of November of  
4 '08. And you did some paperwork with Verizon  
5 telling them Mr. Gailey had come on. Look at Number  
6 40. It's Amendment Number 1 to the agency  
7 agreement. Is that your signature on there? Look  
8 at Kaj 0091. Is that your signature?

9 A. Yes, sir.

10 Q. All right. Go back and look also at 39. I forgot  
11 to ask you, you became the new registered agent for  
12 P Communications on about December 2nd, 2008.  
13 That's your signature on that form?

14 A. Yes, sir.

15 Q. Okay. Look at Number 41. That's a bill from Allan  
16 Hill. What account was that paid out of, if you  
17 know?

18 A. Probably out of P Communications.

19 Q. Okay. Look at Exhibit Number 42. Is that your  
20 signature on page Defendant's 616?

21 A. Yes, sir.

22 Q. Okay. Now, we get over to the 1st day of January  
23 2009. It looks like Mr. Gailey is going out the  
24 door. What happened with Mr. Gailey? Why did he  
25 decide to get out?

1 A. Him and I had made some arrangements for his future  
2 of the company and his employment and we worked  
3 something out.

4 Q. And what kind of arrangements did y'all make?

5 A. That he would be the director of sales for the  
6 organization and he would be essentially the right  
7 hand to me.

8 Q. And he was going to sell all his stock?

9 A. Yes, sir.

10 Q. Why was that a good deal for him?

11 A. A little more aggressive payout with no risk and no  
12 liability.

13 Q. And what did you pay him for his stock?

14 A. I don't remember.

15 Q. Well, look at Number 43, page 617 says he desires to  
16 sell 40 shares for \$5,000. Is that what he got?

17 A. That looks -- looks to be correct.

18 Q. So he was kind of short-lived as a stockholder,  
19 wasn't he? He came in in November and he's out the  
20 door by the first of the year, correct?

21 A. Yes, sir.

22 Q. And you got the whole shooting match at that point,  
23 correct?

24 A. I then became the sole shareholder of P  
25 Communications. Yes.

**CERTIFICATE OF COUNSEL**

---

The undersigned hereby certifies that the Appendix to the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 19, 2015

*William M. Hogan*

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001617

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

OCT 16 2015

The Honorable Edward W. Miller, Circuit Court Judge  
SC Court of Appeals

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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.

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**FINAL BRIEF OF APPELLANT**

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

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

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

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

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## NATURE OF THE ACTION

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

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

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<sup>1</sup> Kaj is not related to Vijay or Krish despite the same surname. Vijay is Krish's father.

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

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

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

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

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

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

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

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

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

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

#### STATEMENT OF ISSUES ON APPEAL

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

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

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

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

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

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

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

#### STATEMENT OF THE CASE

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

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

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

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

4. Kaj asserted 13 causes of action in his amended complaint: (1) dissolution of VP Enterprises, Inc., (2) violation of standards of conduct for directors under S.C. Code Ann. § 33-8-300 against Vijay, (3) violation of standards of conduct for officers under § 33-8-420 against Vijay and Krish, (4) breach of fiduciary duty against Vijay and Krish, (5) an accounting from all Respondents, (6) breach of fiduciary duty for partnership liability, (7) fraud against Vijay and Krish, (8) constructive fraud against Vijay and Krish, (9) negligent misrepresentation against Vijay and Krish, (10) equitable disgorgement against all Respondents, (11) constructive trust against all Respondents, (12) a violation of the South Carolina Unfair Trade Practices Act, and (13) a declaratory judgment.

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

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

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

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

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

#### STANDARD OF REVIEW

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

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

In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence. They may also decide questions of law with no particular deference to the lower court's findings. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014), reh'g denied (Apr. 2, 2014). Where witness testimony at trial was presented through video deposition, the appellate court is placed in an equal position to judge the witness' credibility.<sup>3</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).

#### STATEMENT OF FACTS AND EVIDENCE

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

##### **A. VP Enterprises Planned and Created**

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

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<sup>3</sup> Kaj will be submitting to the Clerk of Court for the Court of Appeals video discs containing portions of the video depositions played at trial.

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

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

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

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

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

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

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

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

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

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

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

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

**B. Denial of VP Enterprises Application by Verizon**

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

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

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

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

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

### **C. P Communications Secretly Created**

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **D. P Communications' Grand Opening**

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

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

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

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

It is also undisputed, though, what Krish omitted telling Kaj on October 18, 2008.

Krish did not disclose the following:

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

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

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

### **E. P Communications Ownership Changes**

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

### **F. P Communications Uncovered**

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

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

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

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

## ARGUMENT

### I. Statute of Limitations

#### A. Introduction

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

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

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

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

(e) An action against an officer [or director] for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.

S.C. Code Ann. § 33-8-420(e) ("[or director]" and underline added) (see also S.C. Code Ann. § 33-8-300(e) for mirror director liability statute).

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

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

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

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

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

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

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

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

51 Am. Jur. 2d Limitation of Actions § 166 (underline added).<sup>8</sup>

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

<sup>8</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).

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

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

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

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

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

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

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

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

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

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

**Krish commits two acts of perjury to the IRS:**

- Krish Patel misrepresented his position as president of P Communications on the IRS Form 2553 – Sub Chapter S Election, which was signed under penalties of perjury. (R. p. 1037);
- Krish Patel misrepresented on the same form that he acquired the shares on September 1, 2008 when actually the earliest record of any change in ownership of P Communications occurred on November 19, 2008. (R. p. 1037);<sup>9</sup>

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

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

- Krish Patel represented to the Department of Revenue on the Business Tax Application for P Communications that he was the president of the corporation on September 19, 2008 when he was not. (R. p. 554, line 19 – p. 555, line 3; R. p. 1036);
- Krish Patel represented in the Business Tax Application to the Department of Revenue that he owned 46.5% of the shares in P Communications on September 19, 2008 when he in fact owned no shares. (R. p. 1036);

**Krish makes multiple false certifications to BB&T Bank:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **D. Equitable Estoppel Prevents Running of the Statute of Limitations**

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

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

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

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

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

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

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

Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights...The court is vested with wide discretion in determining what is an unreasonable delay.

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

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

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

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

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

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

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

## **II. Breach of Fiduciary Duty**

### **A. Introduction**

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

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

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

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

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

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

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

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

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

Duncan v. Brookview House, Inc., 262 S.C. 449, 456, 205 S.E.2d 707, 710 (1974).<sup>11</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>12</sup> 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).

<sup>13</sup> See R. p. 379, line 23 – p. 380, line 11 and R. p. 383, lines 12-22.

468, 164 N.E. at 548. Their fiduciary obligations are not to be watered down “by the ‘disintegrating erosion’ of particular exceptions.” *Id.* at 464, 164 N.E. at 546.

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

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

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

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

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<sup>14</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”).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**D. VP Enterprises did not abandon the Verizon Wireless opportunity**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**III. Appellant entitled to an accounting**

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

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

for an accounting where there is deadlock, grounds for dissolution, or conduct otherwise “illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner” perpetrated by directors or persons in control. S.C. Code Ann. §§ 33-18-400(a)(1), 410(a)(5). As explained above, the conduct of Respondents was an illegal and prejudicial breach of their fiduciary duties to VP Enterprises and Kaj. VP Enterprises derivatively maintains a chose in action against Respondents. The benefits of that chose in action will need to be accounted for, which the court may carry out. S.C. Code Ann. § 33-18-410 cmt.1 (“A court should have broad discretion to fashion the most appropriate remedy to resolve the dispute.”)

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

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

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

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

### CONCLUSION

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

Respectfully submitted,

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October 15, 2015  
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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

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

v.

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

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## STATEMENT OF ISSUES ON APPEAL

1. Did the trial court correctly determine that Appellant's claims were time-barred by the applicable statutes of limitations or laches?
2. Did the trial court correctly determine that Respondents did not breach any duties owed to Appellant?
3. Did the trial court correctly determine that Appellant waived his derivative claim because at trial he focused solely on his direct claims?
4. Is Appellant entitled to equitable relief?

## STATEMENT OF THE CASE

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

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

<sup>2</sup> "VP" stands for Vijay and Pankaj. (R. 147.)

<sup>3</sup> "KVP" stands for Krish, Vijay and Pankaj. (R. 147.)

<sup>4</sup> The term "agency status" is taken directly from the Verizon Agency Application. (R. 1015.)

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

Respondents filed an Answer on February 21, 2012, asserting that Kaj's claims were time-barred and denying liability on the merits. The parties participated in mediation, but could not reach a settlement. Arising out of the mediation, however, was an agreement to cease discovery and consent to a bifurcated bench trial. (R. 6.) On July 21 and 22, 2014 the liability phase of the trial was held before The Honorable Edward W. Miller ("Judge Miller"). Per the parties agreement the "damages" portion of the trial, if necessary, would have been held at a later date. At the close of Kaj's case, Respondents moved for involuntary non-suit pursuant to Rule 41(b), SCRCP.

Judge Miller took the motion under advisement, but clearly indicated that he viewed the statute of limitations defense as having merit.<sup>5</sup> In addition to his doubts as to the timeliness of Appellant's suit, Judge Miller had serious misgivings regarding the merit of Appellant's claims. For example, while Judge Miller noted that Appellant's evidence might establish some moral duty, and indicated "damage done to a friendship," (R. 424), he recognized that any moral duty was "clearly distinguishable from what's legally enforceable." (*Id.* at 294.)

Respondents presented their case, rested, and renewed their motion for involuntary non-suit. Judge Miller asked the parties to submit post-trial briefs. In his post-trial submission, Kaj expressly dismissed all claims except for those that "involve breach of fiduciary duty." (R. 1531.) The clear intent of this maneuver was to obtain a second bite at the apple: knowing Judge Miller was almost certainly going to grant

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<sup>5</sup> Judge Miller stated, "I'll just tell you, I've got a problem with the statute of limitations." (R. 421.)

judgment to Respondents, Kaj dismissed all but his fiduciary duty claims in an attempt to re-position the case as an equitable one, with what he hoped would be a more favorable standard of appellate review.<sup>6</sup>

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

#### STATEMENT OF THE FACTS

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

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

- Krish was “fired” by Verizon and he improperly failed to disclose it to Kaj. (App. Br. at 8.)
- At trial, Kaj claimed the entire business was his idea (R. 260-261.), but now, in his brief, he claims that it was his idea to pursue *multiple* Verizon retail locations. (App. Br. at 9.)
- Vijay’s and Krish’s non-disclosure of pertinent facts to Verizon was “undoubtedly” the cause of Verizon’s denial of VP Enterprises’ application. (App. Br. at 1.)
- Verizon’s letter of February 26, 2008, left the door open for VP Enterprises to acquire agency status with the company. (App. Br. at 13.)
- After VP Enterprises’ application was denied, Kaj continued to look for other wireless phone stores “for VP Enterprises.” (App. Br. at 14.)
- Krish created P Comm “in secret.” (App. Br. at 15.)
- Krish lied when he told Kaj he would contact him down the road if an “opportunity” with P Comm materialized. (App. Br. at 2-3.)

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

#### *The Individual Parties*

Kaj and Vijay both emigrated from India to the United States in the early 1980s. (R. 161.) They both eventually moved to Greenville, South Carolina (“Greenville”) and became friends. (R. 169) Kaj is an engineer by trade (R. 191.) and – by his own admission – an unsuccessful entrepreneur. (R. 265-269.) Vijay owns two hotels in Greenville. (R. 169.)

Krish is Vijay’s son. He was born in Houston, Texas in 1985, and later moved with his family to Greenville. Krish has always been ambitious and had the hard-wiring of an entrepreneur. He has continuously held various jobs since the age of 13. (R. 505.) Upon graduation from Mauldin High School in 2004, he began working as a salesman at a corporate-owned Verizon store in Greenville. *Id.* He held this full-time position from

2004–2007, while also taking a full course load at USC Upstate. (R. 506.)

At trial, Krish testified that in October 2007, he was asked to resign from Verizon because he had handled family members' accounts. (R. 506-507.) Krish did not profit from or cause harm to Verizon from this activity, but it was, nonetheless, against Verizon policy. (R. 507.) He was not, as Kaj claims, "fired" by Verizon. And he did not, as Kaj also claims, improperly withhold the details of his separation with Verizon. To the contrary, Krish *voluntarily disclosed* the details at trial despite the fact that Kaj's attorneys never asked for these particulars during discovery.<sup>7</sup>

*Krish Came up With the Idea to Own Verizon Stores*

In addition to corporate-owned stores, like the one where Krish worked, Verizon authorizes local agents to operate independent Verizon retail locations. (R. 432-433) Those who wish to open such stores must first apply for approval as an agent by submitting a business plan and then, if that is approved, an application for agency status. (R. 445.) Verizon vets such applications, a process that includes review of financial information and a background check on the applicant's principals. (R. 450.)

While still working as a salesman at a corporate-owned Verizon store, Krish decided he wanted to own and operate independent Verizon stores. When he filed suit, Kaj preposterously claimed this was his idea. (R. 88.) At trial, Kaj backed off of this obviously false assertion by acknowledging it was not his idea entirely, but he then claimed it was his idea to open "multiple" locations. (R. 261.) This cannot be true

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

because, according to VP Enterprises' business plan, Krish had already identified several possible locations for independently-owned stores in September 2007. (R. 508.) Kaj admits in his brief that he and Krish first looked at potential locations in December 2007 (App. Br. at 11) – months after Krish scouted multiple locations in September 2007.

Notwithstanding the fact that owning and operating multiple independent Verizon retail locations was clearly Krish's idea, he involved Kaj and Vijay because, in his words, "they were two business owners and I felt like they'd be good individuals to talk to an idea about and see if they could get the business started." (R. 508.) The subject first came up while Kaj and Respondents were traveling to inspect a potential investment opportunity for KVP. (R. 261.) Krish educated Kaj and Vijay as to the possibility of forming a company that would own and operate Verizon retail stores. (R. 173-174.)

*VP Enterprises Formed for Sole Purpose of Owning Verizon Stores*

At the time the parties first discussed the matter in late 2007, the group agreed to form a company for the exclusive purpose of applying for an agency relationship with Verizon. (R. 173.) Krish decided that he should not pursue an ownership stake in the company. (R. 174.) He thought the application stood a better chance of being approved if older,<sup>8</sup> more experienced businessmen owned the company that submitted the application. (R. 508.) Thus, Kaj and Vijay formed VP Enterprises. As Kaj himself testified at trial, "The purpose of VP [Enterprises] was to start and operate a chain of independent Verizon Wireless stores." (R. 173.) This exclusive purpose of VP Enterprises is underscored by the fact that the individual parties had already formed KVP, which was the company through which they planned to pursue a broad range of other

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<sup>8</sup> Krish was 22 at the time. (R. 185.)

investment opportunities, such as hotels, convenience stores, residential real estate, and a pine-straw business. (R. 302-303.)

Kaj and Krish each contributed to the creation of a rudimentary, five-page business plan to be submitted to Verizon. In December 2007, Kaj sent Krish an email attaching two, nearly identical, business plans. One was for “Tava Grill,” a failed restaurant opened by Kaj. (R. 268.) The second was for another restaurant, “Abonda.” (R. 958.) In his e-mail, Kaj asked Krish to “please keep [these] confidential.” *Id.* For much of this litigation, Kaj and his attorneys made a great deal out of the business plans, which they claimed Kaj himself had written. (R. 88-89.) Indeed, it was his central argument for much of the case.<sup>9</sup> Respondents’ counsel discovered months into the lawsuit that Kaj had downloaded the Abonda business plan from [www.virtualrestaurant.com](http://www.virtualrestaurant.com), and then had “written” the Tava Grill plan by swapping the words “Tava Grill” for “Abonda” and making similar, minor changes. (*Compare* R. 959-964 with R. 965-971.) Respondents confronted Kaj with this fact during mediation. For obvious reasons, the centrality of the business plan to Appellant’s claim quickly diminished.<sup>10</sup>

At trial and in his brief, Kaj claimed his work consisted of “spreadsheets” used to analyze the business. These spreadsheets were worthless to VP Enterprises because they contained basic data about food costs, linen rental expenses, menu expenses, hospitality

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<sup>9</sup> As Respondents’ counsel pointed out in his opening statement: “The complaint talks about the business plan thirteen times. *Thirteen different times.* Kaj testified in his deposition about his business plan thirty times. Krish was asked about it by Mr. Gilreath seventy-two times. This case was, ‘they stole the business plan.’” (R. 153 (emphasis added).)

<sup>10</sup> During the time of trial, some six years later, the “Abonda” business plan was still free on the internet. It is a very basic sample used as a “come on” to purchase better prototype business plans. See Virtual Restaurant, *Restaurant Sample Business Plan Outline*, <http://www.virtualrestaurant.com/sample.htm> (last visited October 14, 2015).

tax and other items used in a *restaurant* – not a wireless store. (R. 279-284.) Kaj claims he and Krish used these spreadsheets to vet the Verizon idea, but there is no documentary evidence to support his claim. *Id.*

The business plan ultimately submitted to Verizon by VP Enterprises on January 28, 2008, was a modified version of the free internet plan Kaj falsely claimed he created. Most of the changes to the plan were made by Krish. (R. 278.) Krish included in the business plan the fact that he had identified several store locations in September 2007—before ever discussing the venture with Kaj or Vijay. (R. 508.) In fact, as Krish testified at trial, he had been working on the idea since as early as 2006. *Id.* Kaj, Krish, and Vijay collectively agreed because of Krish’s experience, Krish would run operations. Kaj and Vijay, after all, were occupied with full-time jobs and knew nothing about the wireless retail industry. All involved knew that Krish would run the stores and assume an ownership position at an appropriate time. Moreover, Verizon was well aware of Krish’s involvement; the business plan identifies Krish as “General Manager & Product Development.” (R. 979.)

*VP Enterprises’ Application Denied*

On February 26, 2008, Verizon denied VP Enterprises’ application. (R. 1026.) Although Verizon never explained its denial to Respondents or Kaj, during the course of discovery, a 30(b)(6) designee for Verizon, Patricia Cook, testified “I can tell you that [VP Enterprises’] application was denied based on nondisclosure.” (R. 884.)<sup>11</sup> “Nondisclosure,” according to Verizon, meant that an individual failed to disclose relevant information on a questionnaire relating to his background. Ms. Cook elaborated,

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

“[w]hen I run a background check on an individual, no information can come back that was not disclosed on the application. *If they say they’ve not been involved in any litigation, any criminal offenses or that sort of thing and I find it, that’s reason for rejection.*” (*Id.* at 12 (emphasis added).)

Nondisclosure of this sort is precisely why VP Enterprises’ application was denied. While Kaj claims VP Enterprises’ application was “*undoubtedly*” denied because Vijay failed to disclose relatively minor criminal charges in his background and/or because Krish had resigned from Verizon because he violated company policy (App. Br. at 1), this is in direct contradiction to testimony from 27-year Verizon veteran, Tammy Blew. Ms. Blew testified that the application would be approved or denied based on “a background [check] *of the principals*” of the applicant company. (R.443 (emphasis added).) With respect to VP Enterprises, this included Kaj, who admittedly failed to disclose numerous civil suits in his past. (R. 198, 289-294.) Civil suits of the type Kaj failed to disclose were material to Verizon’s approval process. Ms. Cook, Verizon’s 30(b)(6) designee, who was involved in the application review process, testified that she thought it was Kaj’s non-disclosure that led to the denial, not Vijay’s minor criminal history. (R. 453.) Hand-written notes on the application produced by Verizon during discovery show that Verizon discovered civil suits Kaj had failed to reveal in his application. (R. 1019.)<sup>12</sup> In short, it is not reasonable to argue—as Kaj does—that it was Respondents’ background check that “*undoubtedly*” caused the denial. It is clear that Kaj’s failure to make full and complete disclosure to the questions asked that caused

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<sup>12</sup> Kaj reluctantly admitted that he failed to disclose at least four different lawsuits either in the Verizon application or in his Answers to Interrogatories. (R. 287-296.) He also admitted Verizon specifically noted in the application that one of the suits was not disclosed. (R. 288.)

Verizon -- at least in part -- to deny VP Enterprises' application.

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

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

(R. 1018 (emphasis added).) Kaj acknowledges that he read and understood this provision when he signed the application. (R. 287.) He nonetheless claims that it was Respondents' fault that the application was denied. Judge Miller found all evidence indicating that Kaj's non-disclosure of his litigation history contributed to the application's denial was credible. (R. 16.)

Also, not only does the evidence contradict Kaj's claim that he had nothing to do with the denial of VP Enterprises' application, but there is *no evidence* in the record that the denial of VP Enterprises' application had anything to do with Krish. Because he was not a principal of VP Enterprises, Verizon did not run a background check on him, and Ms. Blew testified that she knows of nothing other than the financials and background checks *of the principals* that Verizon looks at when deciding whether to approve an application. After Ms. Blew testified that a decision on an application was made on the financials and background checks of the principals only, the Court asked: "Okay. Any other criteria you can think of?" She responded, "None that I can think of." (R. 443.) Also, Verizon knew Krish was involved in the VP Enterprises venture—just as it knew

Krish was involved with P Comm, whose application was approved. (R. 435-436.) This leaves little doubt that VP Enterprises' denial had nothing to do with Krish. (R. 445-446.)

*VP Enterprises' Purpose Thwarted = Company Abandoned*

After Verizon denied VP Enterprises' application for agency status, the possibility of achieving its goal of opening independently-owned retail locations vanished. Kaj, nonetheless, asserts on appeal that Verizon kept the possibility alive when, in its letter of February 26, 2008, it stated that VP Enterprises' application was denied "at this time." (App. Br. at 13.) This vastly overstates the importance of that phrase in light of Verizon's testimony. Ms. Blew, the 27-year Verizon veteran, testified at trial that she had never seen an applicant for an agency relationship denied and later approved. (R. 436.) Judge Miller found this credible. (R. 16.)

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

VERIZON WIRELESS MAY REJECT ANY OR ALL APPLICATIONS IN ITS SOLE AND ABSOLUTE DISCRETION, AND ... VERIZON WIRELESS'S ONLY OBLIGATION PURSUANT TO THIS APPLICATION IS TO TELL THE APPLICANT AFTER FINAL REVIEW WHETHER THE APPLICATION HAS BEEN APPROVED OR DENIED.

(R. 1018; see R. 286-287.) This admission means that Kaj knew, when Verizon denied VP Enterprises' application, it was under no obligation to tell anyone why it did so. Therefore Kaj's claim that he intended for Krish to "work it out" with Verizon is clearly made-up for self-serving purposes. In truth, it was Krish who – independent of Kaj –

asked Verizon why VP Enterprises' application was denied. (R. 514-515.) He received no information in response. (*Id.*)

Also, the \$5,000 Kaj put into VP Enterprises' bank account was, with Kaj's knowledge, transferred to KVP's account and VP Enterprises' account was closed in July 2008. (R. 520.) More than three years later, when he filed the Complaint in November 2011, Kaj first claimed that he thought VP Enterprises was not abandoned. Judge Miller agreed that Kaj's claim that VP Enterprises was not abandoned lacked support and was not credible. (R. 28.) In fact, as Judge Miller found, Kaj had "moved on to other ventures." (*Id.*)

Kaj also claims that he continued to look for "other wireless phone stores for VP Enterprises." (App. Br. at 14.) This is another attempt to show that he did not abandon VP Enterprises and therefore Respondents continued to owe him fiduciary duties. This claim is demonstrably false. After VP Enterprises' application was denied in February 2008, Kaj, Vijay, and Krish continued to discuss potential investment opportunities for *KVP*, including acquisition of hotels, convenience stores, medical office buildings and other real estate. There are many, many emails among the parties between 2008 and 2011, but *none* of them mention VP Enterprises. In the summer of 2008, Kaj suggested to Krish that they could purchase a couple of existing wireless retail locations, but they did not discuss this idea in any significant fashion. Kaj fails to mention that the stores he brought to Krish's attention were not for Verizon, they were existing stores of another carrier for sale on a business broker's website. (R. 306.)

It was not until April 15, 2010 – nearly two years after Kaj was aware Krish had attained Verizon agency status – that Kaj first suggested a Verizon store location to

Krish. (R. 1131.) The e-mail Kaj sent Krish in April 2010 suggests a possible site for a store in Tyron, North Carolina. Kaj also stated that if Krish was not interested, he (Kaj) had “a partner” and would do it on his own. (*Id.*) Thus, contrary to Kaj’s assertion, the evidence actually demonstrates that Kaj himself had abandoned VP Enterprises after Verizon denied its application.

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

Notwithstanding the parties’ abandonment of VP Enterprises, Krish did not give up on *his goal* of owning and operating independent Verizon retail locations. He approached another established businessman, Corby Phillips (“Corby”), and asked for his help. Krish and Corby’s relationship predated the formation of VP Enterprises. Between 2003 and 2005, Corby owned a sandwich shop next door to the Verizon store where Krish worked. (R. 350.) Their relationship continued after Corby sold the restaurant in 2005. Corby had gone into real estate, and facilitated some transactions in which Krish was involved. (R. 351.) In the spring of 2008, after VP Enterprises’ application had been denied, Krish asked Corby if he would form a company and apply for agency status with Verizon. Krish hoped Verizon might approve the application of an experienced retailer such as Corby.

Kaj asserts on appeal that Krish created P Comm in secret. (App. Br. at 15.) This is not true, and contradicted by the evidence presented at trial. Krish’s actions clearly demonstrate that he was not hiding anything from Kaj. Krish and Corby used Allan Hill to incorporate P Comm. Mr. Hill also formed VP Enterprises and represented Appellant Kaj on other matters, which Krish knew. (R. 240, 301.) In order to obtain a line of credit

for P Comm, Krish used the banker that he and Kaj used for VP Enterprises. (R. 519.) These are not the steps of someone attempting to hide his actions.

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

P Comm opened its first location on Pelham Road in Greenville in October 2008. In accordance with his and Corby's agreement, Krish did all the work to open the first store. He arranged all the financing, personally guaranteed all the loans, entered into the lease, oversaw all of the up-fitting of the property, acquired all the inventory, hired all the employees, and took responsibility for everything else necessary to open the location. Krish even planned a party for October 18, 2008, to celebrate the grand-opening. After attending this party, Krish went directly to his parents' house to join a group of family friends, *including Kaj*, who had gathered there. Krish informed Kaj that he had just opened a new independent Verizon store on Pelham Road and that he planned to own the company at some point in the future.<sup>13</sup> Out of respect for Kaj, Krish told him that he would be willing to discuss potential opportunities for Kaj and P Comm in the future. Kaj

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<sup>13</sup> Kaj admitted that Vijay and Krish voluntarily told him, in October 2008, that Krish had opened a Verizon store and did not try to hide it. (R. 317-318.) For the next 36 months, Kaj e-mailed Krish and Vijay about many other opportunities and *never* mentioned the claims made in this case. (R. 320-326.)

claims that this offer was a lie. (App. Br. at 2-3.) This assertion is false. In the many emails sent by Kaj after the party at Krish's parents' home, Kaj never mentioned any of this. This is a strong indication that all of this was made up after-the-fact.

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

In the spring of 2010, Krish asked Kaj to help him in the acquisition of a handful of existing, independently owned Verizon retail locations in the midlands of South Carolina. Specifically, Krish identified several Verizon locations in Columbia and Florence that were for sale. He contacted Kaj about the opportunity for him to be involved in those stores. (R. 331, 333). It is also significant that Kaj admits that in 2010 he proposed owning one half of the new midlands stores, *not* the existing stores. (R. 332.) Kaj claims that he and Krish would integrate all of the stores later (R. 333) but, again, there are no documents to support this claim. This indicates he never believed that he was entitled to one half of Krish's entire business, as he now claims. Kaj suggested that he and Krish purchase those stores together, each owning fifty percent. Krish, however, wanted to purchase the stores on his own and hire Kaj to run them. Krish proposed a deal whereby Kaj would be paid as though he was a fifty-percent owner but not have any equity—or risk—associated with the operation. Kaj denies that he ever understood this as an employment offer, but Judge Miller found Krish's testimony on this point more

credible. (R. 17-18.) In any event, Kaj rejected the proposal and abandoned the idea. Krish—through P Comm—acquired the stores. Kaj and Krish never discussed investment in wireless retail again.

Krish continued to grow P Comm, attracting attention because of his success at such a young age. A prominent and widely distributed Upstate periodical, *TOWN* magazine, published an article in its October 2011 issue highlighting Krish's success. Specifically, the author stated:

Krish has built what you might call *a wireless empire* across much of South Carolina and northern Georgia as President of [P Communications, d/b/a] Wireless Communications, a premium retailer for Verizon Wireless. He is also only 25 years old, and, no, *he made his fortune* the old fashioned way – he earned it.

(R. 1134 (emphasis added).) Kaj admitted at trial that he read this article when it was published. (R. 245.) Less than a month after he read the *TOWN* Magazine article, he filed this suit.

#### Expert Testimony

At trial, Kaj presented the expert testimony of Professor John Freeman (“Professor Freeman”), who opined that Kaj, Vijay, and Krish were all “co-participants in the promotion of VP [Enterprises].” (R. 378.) He went on to explain that this type of relationship carried with it the highest form of fiduciary duties, that the incorporation of the company did not alter these duties, and that the company was never abandoned. (R. 381.) Judge Miller found Professor Freeman’s testimony not credible because it was based exclusively on Kaj’s self-serving and un-supported version of events. (R. 19.)

Respondents presented the expert testimony of Professor Martin McWilliams (“Professor McWilliams”). Professor McWilliams opined that “the [Respondents] in this case have acted in good faith and not breached their duties – the various fiduciary duties

that they owed..." (R. 463.) He described Professor Freeman's opinion as "conflating" the varying duties the individual parties owed one another at different times. (*Id.*) He explained that the parties' duties arising out of VP Enterprises morphed during their course of their relationship. (R. 463-464.) They first owed one another duties as promoters of the venture. (R. 465.) Second, upon incorporation, they owed one another duties defined by statute, which were less than those applicable during the promoter stage. (R. 465-466.) And, third, once Verizon denied VP Enterprises' application the venture was abandoned and the duties extinguished. (R. 472-473.) Professor McWilliams testified that after reviewing the Complaint and listening to trial testimony, he knows of no allegations of wrongdoing prior to Verizon's denial of VP Enterprises' application. (R. 469.) Judge Miller found Professor McWilliams' testimony to be based on independent evidence and therefore credible. (R. 29.)

*Judge Miller's View of the Facts*

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

- **Credible:** Testimony from a Verizon witness indicating that Kaj's failure to disclose his litigation history contributed to the denial of VP Enterprises' application (R. 16);
- **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 (R. 16);
- **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 (R. 18);
- **Credible:** All evidence that anyone – including Kaj – can apply for a Verizon agency status (R. 18);

- **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 (R. 20); and
- **Credible:** Respondents' expert – Professor McWilliams – testimony, including testimony that Kaj had abandoned VP Enterprises, which was supported by documentary evidence and not just a particular parties' self-serving testimony (R. 29).

Judge Miller also found that the following testimony and evidence presented by Kaj was

*not credible:*

- **Not Credible:** Kaj's claim that it was *his idea* to pursue an agency relationship with Verizon through VP Enterprises (R. 14);
- **Not Credible:** Kaj's testimony regarding what Krish did, or did not, disclose to him regarding P Comm on October 18, 2008 (R. 20);
- **Not Credible:** Testimony asserting that Krish told Kaj he would use P Comm to resurrect VP Enterprises (R. 17);
- **Not Credible:** Kaj's testimony that he directed Krish to find out why Verizon denied VP Enterprises' application (R. 28);
- **Not Credible:** Any evidence presented by Kaj to support his claim of fraudulent concealment (R. 22); and
- **Not Credible:** Testimony of Kaj's expert – Professor Freeman – because it was only consistent with Kaj's self-serving view of the facts (R. 19).

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

## ARGUMENT

### I. STANDARD OF REVIEW.

After trial, Appellant dismissed all substantive claims except those for breach of fiduciary duty. (R. 1531.) Although claims for breach of fiduciary duty are usually legal, *see Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005), Appellant claims that the fiduciary duty claims in this case are equitable because the primary relief sought was equitable. *See Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010)

(recognizing that “a breach of fiduciary duty may sound in equity if the relief sought is equitable”). From this premise, Appellant urges this Court to disregard Judge Miller’s extensive factual findings because “[i]n an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence.” (App. Br. at 8.)

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

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

“Characterization of an action as equitable or legal depends on the appellant’s main purpose in bringing the action.” *Verenes*, 387 S.C. at 16, 690 S.E.2d at 773 (internal quotation marks omitted). “The main purpose of the action should generally be ascertained from the body of the complaint,” but “resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action.” *Id.* (internal quotation marks omitted).

In this case, both the body of Appellant’s Second Amended Complaint and the prayer for relief make clear that Appellant’s primary goal in bringing this action was to obtain legal relief in the form of compensatory and punitive damages. The Second Amended Complaint asserted 13 causes of action, which included nine substantive claims: Dissolution/Buyout (count 1); statutory claims against Vijay for violation of

duties owed as a director and against Krish for violation of duties owed as an officer (counts 2, 3); common law claims against Vijay and Krish for breach of fiduciary duty as officers of VP Enterprises (count 4), or as partners or joint venturers with Kaj (count 6); fraud (count 7); constructive fraud (count 8); negligent misrepresentation (count 9); and violation of the South Carolina Unfair Trade Practices Act (count 12).<sup>14</sup> After trial, Appellant explicitly abandoned his claims for fraud, constructive fraud, negligent misrepresentation, and violation of the Unfair Trade Practices Act. The trial court rejected Appellant's dissolution claim, reasoning that because VP Enterprises had been administratively dissolved in 2011, no further relief was possible. (R. 23.) Appellant does not argue that this ruling was in error.

Accordingly, the legal/equitable distinction turns on the nature of the relief Appellant sought for his fiduciary duty claims (counts 2, 3, 4, and 6). In each of these claims, Appellant listed "actual and punitive" damages as the first form of relief sought. (R. 99-101, 103.) Consistent with these counts' emphasis on legal relief, the prayer for relief seeks damages:

WHEREFORE, the Plaintiff, individually, and on behalf of VP Enterprises, Inc., prays:

A. For judgment against the Defendants in favor of VP Enterprises, Inc. for *actual and punitive damages* due to the breaches of fiduciary duty by Defendants Vijay Patel and Krish Patel ...;

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

B. Alternatively, for judgment against Defendants in favor of Kaj Patel for 50% of the *damages* to VP Enterprises, Inc. due to the breaches of fiduciary duty by Defendants Vijay Patel and Krish Patel ...

(R. 108 (emphasis added).) Appellant's request for equitable relief—the relief he now contends was his primary goal in bringing the action—is contained in a single, boilerplate sentence. (*Id.* (asking “[f]or an accounting, constructive trust, disgorgement and such other equitable relief as the Court deems just and proper”).) In sum, Appellant's breach of fiduciary duty claims are clearly legal, not equitable. Accordingly, the Court should apply the standard of review for cases at law.

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

As discussed above, the standard of review for equitable claims does not apply to this appeal. But even if it did, Appellant has stated the standard incorrectly. According to Appellant, appellate courts in equity cases “may find facts in accordance with their own views of the preponderance of the evidence,” without regard for the trial court's findings. (App. Br. at 8.) This is not correct. While the appellate court in an equity case is authorized to make its own determination of the facts, “this broad scope [of review] does not relieve the appellant of his burden to show that the trial court erred in its findings.” *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). Moreover, although the appellate court *may* substitute its findings for those of the trial court, it is never *required* to do so. To the contrary, the appellate court must give due respect to “the findings of the trial judge, who was in a better position to determine the credibility of the witnesses.” *Id.* This caution is especially important in this case, in which critical factual aspects of Appellant's story are supported *only* by his testimony. The absence of documentary evidence supporting Appellant's factual claims makes witness credibility,

which this Court cannot judge from the cold record, all the more important. *Accord Crossland v. Crossland*, 408 S.C. 443, 452, 759 S.E.2d 419, 424 (2014) (reiterating the “sound principles underlying the proper review of an equity case,” namely, “the superior position of the trial judge to determine credibility and the imposition of a burden on an appellant to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court”).

## II. APPELLANT’S CLAIMS ARE TIME-BARRED.

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

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

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

An action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently.

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

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

Appellant claims Respondents breached their fiduciary duties by “divert[ing] a corporate opportunity of VP Enterprises to develop, open, and operate Verizon Wireless stores under the name of VP Enterprises.” (R. 98-100.) As Appellant admitted at trial, he learned the central 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.<sup>15</sup> (R. 221-222.) It was at that point that a reasonable person in Appellant’s position should have known that some claim against Krish might exist. However, Kaj did not file suit until November 4, 2011—well past the two-year limitations period.

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<sup>15</sup> Appellant actually stated at trial that he knew in August or September of 2008. (R. 317-318.) Although this testimony is helpful to Respondents, this was likely a misstatement. The documentary evidence, and the other testimony, indicates that Appellant learned that Krish had obtained agency status with Verizon on October 18, 2008.

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

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

As the Supreme Court explained in *Clearwater Trust*, when an officer’s or director’s breach of duty has been fraudulently concealed, the plaintiff must file suit “within two years after the time when the cause of action is discovered, or should reasonably have been discovered.”<sup>16</sup> *Clearwater Trust*, 367 S.C. at 352-53, 626 S.E.2d at

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<sup>16</sup> According to Appellant, “[i]n cases of fraudulent concealment, neither S.C. Code Ann. § 33-8-420 nor the *Clearwater Trust* court have imposed on plaintiff the duty of reasonable diligence in discovery of a defendant’s breach.” (App. Br. at 22-23.) This is incorrect. The question in *Clearwater Trust* was which limitations period—the three-year period under the accrual rule, or the two-year period under the discovery rule—applied

340 (internal quotation marks omitted). Appellant maintains that Respondent Krish concealed the relevant facts until May or June of 2010, when Kaj finally learned the name of Krish's company (P Communications) and the last name of Krish's partner (Phillips).

Kaj's position cannot be squared with South Carolina precedent applying the fraudulent concealment doctrine. This Court's decision in *Maher v. Tietex Corp.* (331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998)), is particularly relevant. When Tietex hired William Maher in 1985, as a salesman for its newly established tickings division, it promised that 50% of the company's pretax profits would be divided among sales personnel. *Id.* at 375, 500 S.E.2d at 206. In 1989, having never received a bonus, Maher became concerned that the reason the tickings division had never shown a profit (and Maher had never received a bonus) was because Tietex was improperly allocating costs to the tickings division. Company personnel attempted to allay Maher's concerns by assuring Maher that he was moving up in the company and that other, better, bonus plans would be available to him in the future. *See id.* at 378-79, 500 S.E.2d at 208. From the outset, Maher viewed these responses as a "song and dance," and he walked away from these conversations "without really getting a satisfactory response to his concerns." *Id.* at 379, 500 S.E.2d at 208. Maher filed suit in 1994. When Tietex raised the statute of limitations as a defense, Maher argued that the company should be estopped from pleading the statute of limitations because it had concealed the true facts from him. This Court disagreed:

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when a cause of action had been fraudulently concealed. *See Clearwater Trust*, 367 S.C. at 351-52, 626 S.E.2d at 340. The Supreme Court held that the discovery rule's two-year period controlled. The discovery rule, as expressed in the statute and as known at common law, requires a plaintiff to exercise reasonable diligence.

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

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

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

I'd asked Vijay if Krish was going to be joining us. And he said, yeah, he would be later on, once he gets back from his Verizon grand opening.

And I said, Verizon grand opening? Is this – did he get a job back with them or is this something to do with our ... Verizon plan that we were working on? *And he immediately clammed up* and said, well, you know, you're going to have to talk to Krish about this. ...

Krish came in probably later on that evening ....

And I asked him, ... what is going on with this Verizon thing? And I said, *is this related to what we're doing* or is this something different? He says, ... I found this guy who already had a Verizon business and a license. And I just recently joined up with him to get our foot in the door, since we were having the issue with, you know, not finding out from Verizon why we've been denied.

So I asked him, I said, you know, *you should have told me about this before.*

(R. 221-222 (emphasis added).) Thus, in this case as in *Maher*, Appellant's own testimony shows that he was immediately suspicious of Krish's actions, and of Krish's explanation for those actions.

Moreover, Appellant testified regarding his continued suspicions of Krish's alleged promise, in October 2008, that it would take "eight to twelve months"—*i.e.*, until

June-October 2009—to get Corby out, after which time Appellant would be in. (R. 222.) Appellant was dissatisfied with this assurance, which he disparaged as “some sort of an arrangement that I didn’t have details for.” (R. 318.) Appellant testified that in the months following their October conversation, he repeatedly asked Krish about when he would be brought into the operation. (R. 225-227; *see* R. 230. (“Q. Can you tell the Court about any conversation that you can recall where you *did not* discuss with Krish the Corby deal? A. No.” (emphasis added)).<sup>17</sup> During this period, Appellant learned that Krish had opened several more Verizon stores. (R. 230.) Like the plaintiff in *Maher*, Appellant was *never* satisfied with Krish’s promises, and his suspicions only increased over time:

[I]t was started from, yeah, we can’t find anything from Verizon. I’m with Corby now. And it’s going to take eight to twelve months to get out.

So that was our plan, wait until eight to ten months, get him out. And then we’ll continue. *So that brought us to ... late 2009.*

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

(R. 324-325 (emphasis added).)

In this case, as in *Maher*, Appellant was plainly dissatisfied with Krish’s assurances *from the outset* – in October 2008. Moreover, Krish never made any attempt to conceal from Appellant that he (Krish) had “pursued a Verizon opportunity by a different method” than VP Enterprises (R. 317), nor did he attempt to hide from Appellant the fact that he had opened other locations. (R. 331.) In short, a reasonable person in Appellant’s position should have been known that he might have a claim at

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<sup>17</sup> There is not one mention of this in the many, many emails Kaj sent Krish and Vijay after October 2008.

least in October 2008, and certainly no later than October 2009, by which time Krish had repeatedly failed to fulfill the alleged promise to bring Appellant in. *Accord Kreutner v. David*, 320 S.C. 283, 286, 465 S.E.2d 88, 90 (1995) (holding plaintiff should have been aware of claim based on attorney's failure to record a mortgage after the attorney "had stonewalled more than *nine requests* for the mortgage" (emphasis in original)).

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

In view of the knowledge Appellant did have in October 2008—*i.e.*, that Krish had opened a Verizon store through P Comm instead of through VP Enterprises—the facts allegedly concealed by Krish are of little moment. First, Appellant claims that Krish's statement that he had "joined with another individual who obtained a Verizon license" conveys the unmistakable impression that Krish's partner had used his own business plan, rather than "repackaging" VP Enterprises' plan. According to Appellant, if Corby had used his own business plan, Appellant would not have a claim for usurpation of corporate opportunity. (App. Br. at 25.) This turns the discovery rule on its head:

Appellant is essentially arguing that Krish had a duty to disclose facts showing that he (Krish) would not have a *defense* to a claim. The discovery rule, however, does not ask whether the known facts put the plaintiff on notice of a *successful* claim against the defendant; the question is whether the known facts put the plaintiff on notice of the possible *existence* of a claim.

Appellant also claims that Krish should have told him “the names of the new company and the individual supposedly running it.”<sup>18</sup> (App. Br. at 25.) This information does not change the picture for purposes of the discovery rule. There is no material difference, in terms of Appellant’s ability to perceive the existence of a possible claim against Krish, between what Appellant actually knew—that “Krish opened a Verizon store with somebody named Corby”—and what Appellant claims he should have been told—that “Krish opened a Verizon store with somebody named Corby Phillips, through a company called P Communications.” At best, disclosure of this information would have made it easier for Appellant to investigate a potential claim against Krish. It does not, however, tell Appellant anything he did not already know about the existence of a possible claim against Krish.<sup>19</sup>

Several of the allegedly concealed facts do not support Appellant’s fraudulent concealment argument because they have nothing to do with Appellant’s claim for

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<sup>18</sup> Notably, however, many of the emails Krish sent Kaj after October 2008 identified the exact name of the entity and him as the Director of Operations for a “Verizon Wireless Retailer.” (*E.g.*, R. 1291.)

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

usurpation of corporate opportunity. In order to establish fraudulent concealment, Appellant must show that the facts concealed would have put him on notice of his claim—in other words, the concealed facts must at least be relevant to Appellant’s claim for usurpation of corporate opportunity. But, four facts supposedly concealed by Krish are utterly irrelevant to Appellant’s usurpation claim: that P Comm used the same attorney as VP Enterprises; that P Comm used the same bank as VP Enterprises; that Krish’s new partner was merely a “straw man”; and “the true reason” why Krish quit his job with Verizon.

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

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

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

“Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004) (internal

quotation marks omitted). An action may be barred by laches when the plaintiff, “knowing his rights does not seasonably assert them,” and the defendant has, during the delay, detrimentally changed his position, such as by incurring expenses or entering into obligations. *Id.* Application of laches “is highly fact-specific and each case must be judged by its own merits.” *Id.* at 216, 603 S.E.2d 602. For this reason, “the determination of whether laches has been established is largely within the discretion of the trial court.” *Id.*

The trial court correctly determined that Appellant unreasonably delayed in filing suit. Although not strictly bound by the statute of limitations, a plaintiff in equity cannot simply sleep on his rights. When laches is asserted, a plaintiff in equity must be able to demonstrate that there was “no knowledge of the wrong committed and *no refusal to embrace [an] opportunity to ascertain facts.*” *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 599 (Ct. App. 1999) (emphasis added). Appellant cannot make this showing, because he unquestionably refused to ascertain the facts of his claim after Krish told him, in October 2008, that he (Krish) had opened a Verizon Wireless store through a company other than VP Enterprises.

Appellant’s delay was unreasonable even if, as he claims, he had no duty to investigate his claim until June 2010, when Krish told Appellant the names of the business and of his erstwhile partner. Even after he obtained this knowledge, Appellant slept on his rights for another 17 months, until he finally filed suit in November 2011. In the meantime, Krish changed his position by continuing to open multiple Verizon stores. *Compare Arceneaux v. Arrington*, 284 S.C. 500, 503-04, 327 S.E.2d 357, 359 (Ct. App. 1985) (holding claim barred by laches, although plaintiffs filed within two years of

obtaining actual knowledge of covenant violation, because plaintiffs were on notice of covenants but took no action when the defendant began construction), *with Gibbs v. Kimbrell*, 311 S.C. 261, 269-70, 428 S.E.2d 725, 730 (Ct. App. 1993) (holding claim not barred when plaintiffs filed suit within five months of defendant beginning construction, even though construction was completed before suit was filed).

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

Appellant argues that Krish has “unclean hands” because of his “misrepresentations and lack of disclosures,” and thus should not be able to assert laches. (App. Br. at 33.) The trial court properly rejected this argument on the basis that the claimed misrepresentations<sup>20</sup> were not material to Appellant's “ability or responsibility to timely bring his claims.” (R. 22.) Just as the alleged misrepresentations and non-disclosures do not provide a basis for tolling the statute of limitations, they do not support a finding of unclean hands. Here, nothing material was hidden. Appellant knew or should have known of a potential claim in October of 2008. His only effort to ascertain any further facts came after he realized Krish's success, at which point he suddenly ran to court. By then, it was much too late. If Appellant had any claims against Respondents, he slumbered on them far too long and his claims should be equitably barred.

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<sup>20</sup> Krish denies that he misrepresented, or failed to disclose, anything.

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

In order to prevail on a claim for breach of fiduciary duty, a plaintiff must show: (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. *RFT Mgmt. Co., v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012). In this case, Kaj claimed that Respondents violated their fiduciary duties by taking for themselves a business opportunity—namely, the possibility of becoming a Verizon agent and opening Verizon-branded stores—that rightfully belonged to VP Enterprises. The trial court properly granted judgment to Respondents on this claim. First, no fiduciary duty existed at the time Respondents allegedly usurped VP Enterprises' corporate opportunity. Second, regardless of whether a fiduciary duty existed at the relevant time, VP Enterprises had no interest or expectancy in the opportunity of an agency relationship with Verizon, because (1) Verizon had already refused to deal with VP Enterprises by denying its application for agency status, and (2) this is not a zero-sum game—the fact that Verizon granted P Comm agency status does not mean that Verizon could not grant agency status to another applicant, whether VP Enterprises or any other company. In fact, the evidence at trial showed that Verizon granted agency status to other applicants after it approved P Comm's application—meaning that P Comm's acquisition of agency status did not deprive VP Enterprises of anything.

#### A. The Corporate Opportunity Doctrine.

The corporate opportunity doctrine was long ago set forth in an influential decision by the Supreme Court of Delaware. *See Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939). The *Guth* court articulated two aspects of the doctrine, which have become known

as the “Guth Rule” and the “Guth Corollary.” See *Rapistan Corp. v. Michaels*, 511 N.W.2d 918, 922-23 (Mich. Ct. App. 1994). The *Guth* Rule provides:

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

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

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

*Id.* at 510-11 (emphasis added).

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

As Kaj testified at trial, VP Enterprises’ sole purpose “was to start and operate a chain of independent Verizon Wireless stores.” (R. 173.) Verizon’s denial of VP Enterprises’ application for agency status made accomplishment of this purpose impossible. The evidence shows that after the denial, Kaj, Vijay, and Krish abandoned VP Enterprises and concentrated their efforts pursuing other ventures through KVP.<sup>21</sup> From that point on, none of the parties owed any fiduciary duty to each other or to VP Enterprises. *Accord Engenium Solutions, Inc. v. Symphonic Techs., Inc.*, 924 F. Supp. 2d

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

757, 793 (S.D. Tex. 2013) (“A corporation’s financial inability to take advantage of the corporate opportunity or *abandonment of the business opportunity* are defenses to a charge of usurpation of corporate opportunity.” (emphasis added)).

At trial, Appellant claimed that he instructed Krish to find out why VP’s application had been denied and remedy the issue. Appellant first testified about this at trial; he never said anything to this effect during his deposition. Appellant’s trial testimony is also unsupported by any documentary evidence. Although Appellant regularly communicated with Respondents via email in the weeks and months after VP Enterprises’ application was denied—*i.e.*, during the period when, according to Appellant’s trial testimony, Krish was supposed to be investigating the denial—there is not a single email touching on any such investigation. Further, the application form makes clear that Verizon has “absolute discretion” to grant or deny any application, and that “Verizon Wireless’ only obligation pursuant to this application is to tell the applicant after final review whether the application has been approved or denied.” (R. 287.) Krish testified that, consistent with Verizon’s policy, his contacts at Verizon would not give him any information when he asked why VP Enterprises’ application had been denied. (R. 514-515.) This evidence led Judge Miller to conclude, “[Appellant’s] testimony that he directed Krish to continue to pursue the Verizon agency relationship on behalf of VP [Enterprises] is not credible, as it is not supported by any other evidence. In fact, the evidence presented at trial indicates that [Appellant] had moved on to other ventures.” (R. 28.)

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

“To establish a breach of fiduciary duty by usurping a corporate opportunity, the corporation must prove that an officer or director misappropriated a business opportunity

that properly belongs to the corporation.” *Landon v. S & H Mktg. Grp., Inc.*, 82 S.W.3d 666, 681 (Tex Ct. App. 2002). Appellant argues that Respondents usurped a corporate opportunity from VP Enterprises—and thus breached their fiduciary duties—by obtaining a Verizon agency relationship through P Comm, instead of through VP Enterprises. To prove that the Verizon agency relationship was a corporate opportunity belonging to VP Enterprises, Kaj must show either that VP Enterprises had “an interest, actual or in expectancy, in the” relationship, or, alternatively, that Krish “hinder[ed] or defeat[ed] the plans and purposes of” VP Enterprises. *Nw. Terra Cotta Corp. v. Wilson*, 219 N.E.2d 860, 864 (Ill. Ct. App. 1966). Kaj cannot make either showing because (1) Verizon denied VP Enterprises’ application for an agency relationship, and thus VP had no interest or expectancy in the relationship acquired by P Comm; and (2) Verizon’s approval of P Comm’s application did not preclude the possibility of Verizon granting other applications—as it, in fact, did—and thus did not hinder or defeat VP Enterprises.

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

A plaintiff cannot prove the existence of a corporate opportunity merely by pointing to something the corporation would *like* to have; a corporate opportunity exists only if the corporation has “a *legitimate* interest or expectancy in ... a particular business or opportunity.” *Engenium Solutions*, 924 F. Supp. 2d at 793 (emphasis added); see BLACK’S LAW DICT. 560 (6th ed. 1991) (defining “interest” as “a right, claim, title, or legal share in something”). “A business opportunity arises from a beachhead consisting of a legal or equitable interest or an expectancy growing out of a pre-existing right or relationship.” *MAU, Inc. v. Human Techs., Inc.*, 619 S.E.2d 394, 397 (Ga. Ct. App. 2005) (internal quotation marks omitted). The “interest or reasonable expectancy” test “focuses

on whether the corporation could realistically expect to seize and develop the opportunity.” *Shapiro v. Greenfield*, 764 A.2d 270, 278 (Md. Ct. Spec. App. 2000); 18B Am. Jur. 2d *Corporations* § 1536 (“[T]he absence of an expectancy will render the corporate opportunity principle inapplicable.”).

Once Verizon denied VP Enterprises’ application on February 26, 2008, VP Enterprises no longer had any legitimate interest or expectancy in obtaining agency status. Ms. Blew, who manages Verizon’s local agents in South Carolina, could not recall “a single instance when an individual’s name was on an application and that person was denied and they reapplied and it was accepted.” (R. 436.) There is no evidence that any of the parties thought that re-application would be successful. Beyond asking Krish to see if he could find out why VP Enterprises’ application was denied—which, as Krish testified, he could not—there is no evidence that the parties discussed either possible shortcomings in their application, or the possibility of revising and resubmitting the application. The evidence shows, rather, that after the denial the parties focused their time and energy on the business operations of KVP, efforts which included draining the funds from VP Enterprises’ bank account so they could be used for KVP’s business.<sup>22</sup> In short, all of the evidence shows that once its application was denied, VP Enterprises no longer had any reasonable expectation of becoming a local agent for Verizon.

Kaj cites *Energy Resources Corp. v. Porter*, 438 N.E.2d 391 (Mass. Ct. App. 1982), to support his argument that Verizon’s denial of VP’s application did not constitute a refusal to deal. Although Kaj claims that the facts of *Energy Resources* are

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<sup>22</sup> Appellant and Vijay opened the account with \$10,000 (\$5,000 each). This money was transferred, with Appellant’s knowledge, in July 2008 leaving no money in the VP Enterprise account.

“remarkably similar” to the facts of this case (App. Br. at 40), that is not so. The parties in *Energy Resources* were the plaintiff company, ERCO, and the defendant, James Porter. While employed as ERCO’s vice president, Porter and some colleagues at Howard University (Jackson and Cannon) agreed that ERCO and Howard would jointly apply to the Department of Energy (DOE) for a research grant. Jackson and Cannon believed the DOE would be more likely to approve the grant if the primary applicant were a minority institution like Howard, which is an historically black college. Accordingly, the draft grant proposal listed Howard University as the applicant and ERCO as a subcontractor. Jackson began to have second thoughts about working with ERCO, a white-owned company, and eventually proposed that Porter leave ERCO and form his own company, which Jackson would then substitute for ERCO on the grant application. Ultimately, that is what happened: after DOE approved the grant application, Porter quit his job and formed a new company, which was then substituted for ERCO.

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

Verizon had granted VP's application and Krish had then substituted P Comm for VP, but those are not the facts of this case.

In addition to *Energy Resources*, Kaj relies on *Production Finishing Corp. v. Shields*, 405 N.W.2d 171 (Mich. Ct. App. 1987) (per curiam). However, there are two critical factual differences between *Energy Resources* and *Production Finishing*, on the one hand, and this case, on the other. First, in both *Energy Resources* and *Production Finishing*, the defendant usurped a corporate opportunity that was presented to him in his capacity as an officer of the company. See *Energy Resources*, 438 N.E.2d at 392-93; *Production Finishing*, 405 N.W.2d at 172. In this case, by contrast, the opportunity came to Krish in his personal capacity: Krish had known Corby since 2003, and had done business with him over the years, completely independent of Krish's business dealings with Kaj and Vijay. Second, in both *Energy Resources* and *Production Finishing*, the defendant took action to obtain the corporate opportunity before a decision was made by the third party, and *without telling the plaintiff corporation that its opportunity was in jeopardy*. See *Energy Resources*, 438 N.E.2d at 393 (co-applicant had a change of heart about working with ERCO, but instead of relaying this information the defendant agreed to form his own company); see also *Production Finishing*, 405 N.W.2d at 173 (third party expressed reluctance to give business to plaintiff company; instead of informing his employer, the defendant made his own offer for the business). Again, this case is different. In this case, Krish took no action until after Verizon had denied VP Enterprises' application, and Appellant certainly knew that the application had been denied, *i.e.*, that Verizon had refused to deal with VP.

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

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

Verizon agency status reflects that Verizon has given permission for a company to sell Verizon's products and services. As Verizon district manager Ms. Blew testified at trial, anyone is eligible to apply. (R. 433.) Ms. Blew also testified that since 2008, 130 Verizon stores had opened in South Carolina. The evidence thus shows that P Comm's acquisition of agency status could not have hindered VP's corporate purpose, because the opportunity to obtain agency status remained open.

Attempting to overcome these facts, Kaj argues that a corporate opportunity "does not have to be unique," so long as it is within the corporation's purpose. (App. Br. at 47.) The cases Kaj cites in support of this claim, however, all involved unique opportunities. *See Cent. Ry. Signal Co. v. Longden*, 194 F.2d 310 (7th Cir. 1952) (opportunity to manufacture 20 mm anti-aircraft shells; no indication that more than one contract was available); *Se. Consultants, Inc. v. McCrary Eng'g Corp.*, 273 S.E.2d 112, 116 (Ga. 1980) (opportunity for specific planning contract); *Hill v. Se. Floor Covering Co.*, 596

So.2d 874 (Miss. 1992) (opportunity for specific asbestos encapsulation project).<sup>23</sup> In contrast, courts have refused to apply the corporate opportunity doctrine when the alleged opportunity was not unique. *See, e.g., In re Repository Techs., Inc.*, 363 B.R. 868, 893 (N.D. Ill. 2007) (rejecting corporate opportunity doctrine when the opportunity to take assignment of a loan was “open to anyone”); *Cooper Linse Hallman Capital Mgmt.*, 856 N.E.2d at 590 (holding defendants did not usurp corporate opportunity by offering an investment that could be offered by anyone). This case is the same: P Comm’s success in obtaining agency status did not preclude VP, or anyone else, from also obtaining agency status.

#### **IV. APPELLANT WAIVED HIS DERIVATIVE CLAIMS.**

The trial court ruled that Appellant waived his derivative claims when, at trial, he “focused exclusively upon the impact that Vijay’s and Krish’s conduct had upon his ([Appellant’s]) individual interest in VP [Enterprises].” (R. 7.) Also, arising out of the Court’s duty “to ensure that a derivative action is maintained only by a shareholder who fairly and adequately represents the interests of the other shareholders,” the trial court ruled that Kaj was not a proper derivative representative because he brought this action against VP Enterprises’ only other shareholder, Vijay. The trial court’s logic is sound and supported by the record, therefore this Court should affirm.

Appellant argues that he did not abandon the derivative claim for two reasons: (1) the caption of the matter indicates that it is a derivative action, and (2) he and his counsel occasionally referenced “taking action on behalf of VP Enterprises” at trial. (App. Br. at

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

46.) This argument is weak. The case caption shows only that Appellant originally pled this case as a derivative action; it says nothing at all about what happened to the derivative claim thereafter. And, the few times Appellant and his attorney mentioned injury to VP Enterprises, they were simply explaining the facts as they saw them, not supporting any claim by the company against Respondents. For instance, one exchange relied upon by Appellant simply explains why VP Enterprises used Allan Hill as its attorney: "Q. How did VP [Enterprises], and you and Krish decide to get Allan Hill? A. We'd agreed that we'd use Allan Hill." (App. Br. at 46, citing R. 240.)

Additionally—and tellingly—Appellant does not address the trial court's ruling that he was not a proper derivative representative. (R. 7.) This point is, therefore, conceded. Even if it is not, it is abundantly clear that the trial court was correct. "[A] derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." S.C. R. Civ. P. 23(b)(1). As the trial court ruled, because the only two shareholders of VP Enterprises—Kaj and Vijay—are, respectively, the Plaintiff/Appellant and a Defendant/Respondent in this action, Appellant could not fairly and adequately represent the interests of "the shareholders" as a group. "Because of this direct conflict," Judge Miller opined, "[Appellant] is not actually pursuing a derivative claim on behalf of VP [Enterprises]; but rather a direct action against his fellow shareholder, Vijay, and the other defendants[/Respondents]." (R. 7.) This Court should affirm.

**V. APPELLANT IS NOT ENTITLED TO ANY EQUITABLE REMEDIES.**

Appellant argues that he is entitled to the equitable remedies of an accounting, equitable disgorgement, and imposition of a constructive trust. (App. Br. at 48-50.)

Appellant claims he is entitled to these remedies because “Respondents ... breach[ed] ... their fiduciary duties to VP Enterprises and [Appellant].” (*Id.* at 49.) However, because Appellant cannot establish liability on his claims, he is necessarily not entitled to equitable relief.

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

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

This Court may affirm for any grounds appearing in the record. S.C. App. Ct. R. 220(c) (“The appellate court may affirm any ruling, order of judgment upon any ground(s) appearing in the Record on Appeal.”). The trial of this matter was bifurcated by agreement of the parties and approval of the trial court. (R. 6.) After trial of the liability phase, the trial court granted judgment to the Respondents for the reasons set forth in the Order. The trial court did not, however, address Appellant’s failure to present evidence of damages. This failure is fatal to Appellant’s claims and apparent from the Record on Appeal. It is, therefore, an additional sustaining ground on appeal.


To establish Respondents’ liability for breach of fiduciary duty, Appellant was required to prove “(1) the existence of a fiduciary duty, (2) breach of that duty ..., and (3) *damages* proximately resulting from the wrongful conduct of the defendant.” *RFT Mgmt. Co.*, 399 S.C. at 335-36, 732 S.E.2d at 173 (emphasis added). Appellant had to prove each of these elements even though liability was tried separately from damages—in other

words, Kaj had to present evidence that he sustained *some* damage during the liability phase of the trial, even though he did not have to prove a precise amount at that time. *See George C. Miller Brick Co. v. Stark Ceramics, Inc.*, 801 N.Y.S.2d 120 (Sup. Ct. 2005); *LNC Investments, Inc. v. First Fid. Bank*, 2000 WL 422399 (S.D.N.Y. Apr. 12, 2000); *Hannex Corp. v. GMI, Inc.*, 140 F.3d 194, 203 (2d Cir. 1998); *Viking Produce, Inc. v. Northstar Produce, LLC*, 2012 WL 171391 (Minn. Ct. App. Jan. 23, 2012). Kaj failed to present any evidence of damages during the liability phase, even though it was a necessary element of his claim. Therefore, in addition to the other grounds for affirmance, this Court should affirm the Judge Miller's Order finding no liability on the basis that Kaj failed to present any evidence of damages, which is an essential element of his claim.

#### CONCLUSION

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

Respectfully submitted,

  
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Dated: October 15, 2015

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

---

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

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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.

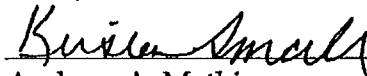
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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that the Final Brief of Respondents complies  
with Rule 211(b), SCACR.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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Pankaj Patel, individually and derivatively on behalf of Nominal Defendant, VP  
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Krish Patel, Vijay Patel, and P Communications, Inc., .....Respondents.

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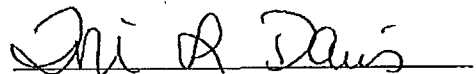
**PROOF OF SERVICE**

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The undersigned does hereby certify, this 15<sup>th</sup> day of October, 2015, that service of the FINAL BRIEF OF RESPONDENTS was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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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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OCT 16 2015

SC Court of Appeals

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.

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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' FRAUDULENT 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).<sup>1</sup> 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

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<sup>1</sup> 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 Maheer 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 Maheer v. Tietex Corp. did not involve a duty of disclosure by a fiduciary. The Maheer 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 Maheer.

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.<sup>2</sup> 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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<sup>2</sup> 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. Dreccoll, 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).<sup>3</sup> 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 11-21 and 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

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<sup>3</sup> 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[pp]lied 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.<sup>4</sup> 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

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<sup>4</sup> 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), SCRCF, 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.<sup>5</sup> 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

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<sup>5</sup> 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)<sup>6</sup>; 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

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<sup>6</sup> 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 (1<sup>st</sup> Dist. 2006) and Nw. Terra Cotta Corp. v. Wilson, 74 Ill.App.2d 38, 219 N.E.2d 860 (1<sup>st</sup> 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 (7<sup>th</sup> 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.<sup>7</sup>

**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

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<sup>7</sup> 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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**ATTORNEYS FOR PLAINTIFF**

October 15, 2015  
Greenville, South Carolina.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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

v.

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

Appellate Case No. 2015-000162

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Appeal From Greenville County  
Edward W. Miller, Circuit Court Judge

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Unpublished Opinion No. 2016-UP-247  
Heard April 19, 2016 – Filed June 1, 2016

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**AFFIRMED**

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James R. Gilreath and William Mitchell Hogan, of The  
Gilreath Law Firm, P.A., and Monty D. Desai, Nihar  
Manhar Patel, and John Matthew Whitehead, of The  
Carolina Law Group, all of Greenville, for Appellants.

William W. Wilkins, Kirsten Elena Small, and Andrew  
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for Respondents.

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**PER CURIAM:** Pankaj Patel, individually and as a shareholder of V.P. Enterprises, Inc. (collectively, Appellants), sued former business associates, Krish Patel, Vijay Patel, and P Communications, Inc. (collectively, Respondents), alleging various causes of action relating to the parties' efforts to obtain an authorized agent agreement with Verizon Wireless. Appellants contend Krish violated certain duties by working with another individual to obtain an agency agreement after V.P. Enterprises' application had been rejected. The circuit court ruled Appellants' legal claims were barred by the statute of limitations and any equitable claims were barred by the doctrine of laches. We affirm.<sup>1</sup>

1. Appellants contend the statute of limitations was tolled by Respondents' fraudulent concealment of details regarding his work with another individual to obtain an authorized agent agreement. We disagree.<sup>2</sup> On appeal of an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless no evidence reasonably supports them, and questions regarding credibility are exclusively for the trial court. *See Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009). "*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,

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<sup>1</sup> Because the statute of limitations and laches issues are dispositive of this case, we decline to address Appellants' remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (indicating when an issue is dispositive of an appeal the court need not address remaining issues).

<sup>2</sup> "An action against an officer for failure to perform the duties imposed by this section must be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered, or should reasonably have been discovered, whichever sooner occurs. This limitations period does not apply to breaches of duty which have been concealed fraudulently." S.C. Code Ann. § 33-8-420(e) (2006).

752 (Ct. App. 1995) (emphases added). 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. Additionally, the circuit court found Krish's testimony to be more credible than Pankaj's.

2. Appellants contend the doctrine of laches did not bar any equitable claims. They maintain any delay in filing suit was not unreasonable because Krish and Vijay concealed their actions. We disagree. "Our duty in equity cases to review challenged findings of fact as well as matters of law does not require that we disregard the findings below or that we ignore the fact that the trial judge, who saw and heard the witnesses, was in better position than we are to evaluate their credibility; nor does it relieve appellant of the burden of convincing this court that the trial judge erred in his findings of fact." *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011) (quoting *Inabinet v. Inabinet*, 236 S.C. 52, 55-56, 113 S.E.2d 66, 67 (1960)). "Laches is an equitable doctrine defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) (quoting *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). "In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant." *Id.* In this case, as previously discussed, ample evidence in the record supports the circuit court's finding Appellants knew or should have known of a potential claim against Respondents on October 18, 2008. Furthermore, evidence supports the circuit court's conclusion the 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. Based on all of the foregoing, the judgment of the circuit court is

**AFFIRMED.**

**HUFF, A.C.J., and KONDUROS and GEATHERS, JJ., concur.**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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

RECEIVED  
JUN 9 2016  
SC Court of Appeals

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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ATTORNEYS FOR APPELLANT

June 24, 2016  
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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

RECEIVED  
JUN 2 2015  
SC Court of Appeals

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 REHEARING** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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VP Enterprises, Inc.

June 24, 2016  
Greenville, South Carolina.

# The South Carolina Court of Appeals

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

v.

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

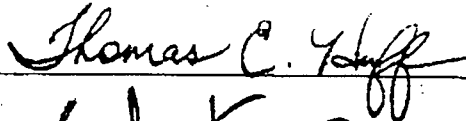
Appellate Case No. 2015-000162

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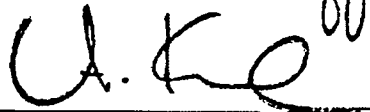
## ORDER

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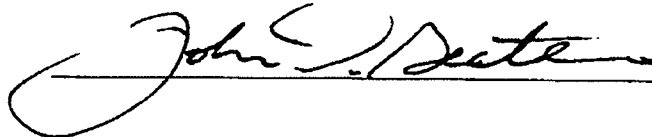
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

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Monty D. Desai, Esquire

**FILED**

August 18, 2016 27

001780

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The Honorable Edward W. Miller