

2015

Steve Brazell, the Armer Texas Trust (Aka Texas Armer Trust), Et Al, Appellants/Plaintiff, vs. Robert v. Brazell, Et Al. Appellees/ Defendants

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STEVE BRAZELL, THE ARMER
TEXAS TRUST (AKA TEXAS ARMER
TRUST), et al.,

Appellants/Plaintiff,

vs.

ROBERT V. BRAZELL, et al.

Appellees/Defendants.

APPELLANT'S BRIEF

Case No. 20150140-CA

BRIEF OF APPELLANTS

Appeal from the Third District Court, Salt Lake County
District Civil Case No. 130900740

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PARTIES

This action arises through the efforts of the Appellants to recover damages under various theories of recoveries: violation of Utah Uniform Securities Act, Fraudulent Misrepresentation, Fraudulent Inducement and Recession, Promissory Estoppel, Civil Conspiracy, Common Law Fraud, Constructive Trust and Fraudulent Transfer, Derivative Action and Receivership.

In keeping with Utah Rule of Appellate Procedure 24, the Appellants are Steve Brazell ("*S Brazell*"), and the Armer Texas Trust (aka Texas Armer Trust), A.T. Family Investment, LLC (fka Thomas Family Limited Partnership), the Avrin Investment Group, the Beals Family Revocable Trust, Lawrence P. Benkes, Victoria Townsend (fka Victoria Benkes), Suzanne Billingsly, Mark A. and Alexis C. Brausa, Jeffrey D. Brazell, the Brooks Family Trust, Campbell Family Trust, Howard Cooper, Dave Cross, Jose and Juanita Cruz, the Curutchet Family Trust, Scott Day, Howard N. Esbin, June L. Esbin, Ronald Finken, David A. French, Piotr Gorodetsky, Vasily Gorodetsky, Scott and Cindy Hambrecht, Hitman, Inc., Craig S. Kagel, JAKL Industries, Tyler and Lindsey Labrum, Tiffany Lowery, Tom Mack, Jeff and Jennifer Mallas, Gary L. Mills, Peter J. Mclaughlin, Michelle Nieto, Jeffrey Scott Reinecke, Flint Richardson, the Rusch Family Trust, Richard Schlesinger, the CCCM Living Trust, Red Rock Properties Group, Jeff and Tina Rogers, Quinn Smith, S. Kevin Smith, Philip J. Stoddart, Jason Straub, Ray A. Stokes, Anthony Tegano, Mark M. Truncale and Scott Warner ("*Investor Plaintiffs*") and collectively ("*Appellants*").

The Appellees are Robert Brazell ("*R Brazell*"), In Store Broadcasting Network, LLC and In Store Broadcasting Holdings, LLC, IBN Media, LLC, IBN Media, LLC, In Touch LLC and In Touch Media LLC ("*In Store Defendants*"), Talos Partners, LLC ("*Talos*"), Von Whitby ("*Whitby*"), Robert W. Kasten Jr. ("*Kasten*"), Robert E. Riley ("*Riley*"), and Robin Nebels ("*Nebels*") and collectively ("*Appellees*").

JURISDICTION

The Utah Supreme Court has Jurisdiction over this matter pursuant to Utah Code § 78A-3-102(3)(j). The Utah Supreme Court has assigned this matter to this Court of Appeals under § 78A-3-102(4).

STATEMENT OF ISSUES

Issue No. 1: Did The Trial Court Err In Denying Leave To Amend?

The standard of review of a denial to amend pleadings is abuse of discretion.

Kasco Servs. Corp. v. Benson, 831 P.2d 86, 92 (Utah 1992)

Issue No. 2: Did The Trial Court Err In Finding The Proposed Amended Complaint Lacked Particularity Under Utah Rule Civil Procedure 9(b)?

Conclusions of law, by contrast, involve abstract legal questions. They are reviewed under a standard at the other end of the spectrum: de novo. No deference is given to the lower court's analysis of abstract legal questions ... because the lower court has no comparative advantage in resolving legal questions and settled appellate precedent is of crucial importance in establishing a clear, uniform body of law." *In re*

United Effort Plan Trust, 2013 UT 5, ¶ 18, 296 P.3d 742, 748 (citations and quote marks omitted).

Issue No. 3: Did The Trial Court Err In Applying Utah Rule Of Civil Procedure 9(b) To Claims Of Constructive Fraud (Insolvency) Under The Utah Fraudulent Transfer Act?

Conclusions of law, by contrast, involve abstract legal questions. They are reviewed under a standard at the other end of the spectrum: *de novo*. No deference is given to the lower court's analysis of abstract legal questions ... because the lower court has no comparative advantage in resolving legal questions and settled appellate precedent is of crucial importance in establishing a clear, uniform body of law. *In re United Effort Plan Trust*, 2013 UT 5, ¶ 18, 296 P.3d 742, 748 (citations and quote marks omitted).

STATEMENT OF THE CASE

Procedural History

No Trial Date was ever set in this matter.

The Complaint was filed on February 1, 2013. An Amended Complaint was filed on April 1, 2013. Whitby's counsel entered an appearance on May 9, 2013. R Brazell, the IBN Defendants, Talos and Kasten filed an Answer and Counterclaim against S Brazell as well as a Motion for Temporary Restraining Order and Preliminary Injunction of June 14, 2013. An additional appearance of counsel on Whitby's behalf was filed on June 17, 2013. The Appellants filed an Answer to the

Counterclaim on July 5, 2013. Judge John Paul Kennedy recused himself and Judge Andrew Stone was assigned this case on June 17, 2013.

The Appellants moved for expedited discovery including the oral deposition of R Brazell on June 21, 2014. Rather than provide the discovery, the IBN Defendants withdrew their request for injunctive relief on June 24, 2014.

On July 23, 2013, Craig Jacobsen, counsel for the R Brazell, the IBN Defendants, Kasten and Talos, first advised counsel for the Appellants that they were claiming a conflict of interest existed between the Appellants and their counsel.

An Answer was filed by Mark Oleksik on August 12, 2013.

On August 30, 2013, counsel for the Appellants called and wrote Jacobsen regarding a meeting to discuss pre-trial issues on September. Counsel got a rather tepid response to his entreaty. Again, the conflict of interest issue was raised by R Brazell's, the IBN Defendants', Kasten's and Talos' counsel. A Second Amended Complaint was filed on September 3, 2013. A meeting between counsel for Appellants, John Mertens and Donald H. Flanary, and counsel for R Brazell, the IBN Defendants, Kasten and Talos, Craig Jacobsen, was held at Jacobsen's office on September 6, 2013. On September 9, 2013, following up on the September 6, 2013 meeting, Flanary sent Jacobsen a letter that contained a proposed scheduling order for his consideration.

On September 18, 2013, Flanary wrote Jacobsen regarding outstanding discovery and requested he be advised of the deficiencies in the Appellants' initial

disclosures the IBN Defendants were claiming existed. On September 18, 2013, Flanary wrote Jacobsen regarding the status of an agreement on pre-trial matters. On September 30, 2013, Flanary again wrote Jacobsen regarding pre-trial matter and discovery.

Robert V. Brazell's, In Store Broadcasting Network, LLC's, In Store Broadcasting Holdings, LLC's, IBN Media, LLC's, In Touch LLC's, In Touch Media LLC's, Talos Partners, LLC's, and Robert W. Kasten Jr.'s Motion to Amend Counterclaim and add third party was granted November 6, 2013. Daniel P. Kondos filed a Motion to Dismiss for Lack of Personal Jurisdiction on December 12, 2013.

On December 13, 2013, Flanary, wrote Jacobsen confirming a meeting in Salt Lake City to discuss discovery and pretrial issues. On December 14, 2013, Flanary sent draft Confidentiality and Scheduling Orders to Jacobsen and Mark D. Stubbs, counsel for Mark Oleksik for their review. On December 30, 2013, Mr. Flanary sent Jacobsen a later version of the proposed Confidentiality and Scheduling Orders. On January 6, 2014, Flanary wrote Jacobsen regarding the proposed Confidentiality and Scheduling Orders.

Robert Brazell's, In Store Broadcasting Network, LLC's, In Store Broadcasting Holdings, LLC's, IBN Media, LLC's, In Touch, LLC's and In Touch Media, LLC's, Talos Partners, LLC's, and Robert W. Kasten Jr.'s amended counterclaim and third party complaint was filed on January 17, 2014.

On January 23, 2014, Mertens wrote Jacobsen regarding the proposed Confidentiality and Scheduling Orders. The Stipulated Discovery and Scheduling Order was filed on January 31, 2014. It was agreed to by everyone in the lawsuit except Whitby who had not yet answered. Whitby's counsel was served with a copy of the agreement. On February 2, 2014, Mertens wrote Jacobsen again seeking dates to take R Brazell's deposition. On February 7, 2014, Jacobsen wrote Mertens regarding the aforementioned R Brazell deposition. In that communication Jacobsen wrote, "We spent months coming to an agreement on a global discovery order. We intend to follow the order...." On February 17, 2014, Mertens advises Jacobsen the Appellants would like to take R Brazell's deposition the first week in April.

The Motion to Disqualify Attorney Donald H. Flanary, Jr. and The Law Firm of Pia Anderson Dorius & Moss was filed on February 26, 2014. On February 28, 2014, Mertens and Jacobsen exchanged communications regarding the conflict of interest issues. A Third Amended Complaint was filed on March 6, 2014. The Third Amended Complaint was filed without leave of Court because the parties agreed and stipulated that additional parties had to be added by March 6, 2014 in the Stipulated Discovery and Scheduling Order filed with the Court on January 31, 2014. The Court adopted the Scheduling Order at its May 8, 2014 hearing. While R Brazell, the IBN Defendants, Kasten, Talos and Whitby now complain about the filing of the Third Amended Complaint, the language agreed to in the filed order and reaffirmed by Jacobsen as follows:

“Other Parties shall be joined pursuant to Utah Rules of Civil Procedure by March 6, 2014. A motion for leave to add parties is not necessary, provided the parties are added by this date, otherwise leave of Court is required.”

On April 18, 2014, the Appellants filed their Motion for Rule 11 Sanctions. On April 25, 2014, R Brazell, the IBN Defendants, Kasten and Talos filed their Expedited Motion to Continue Preliminary Injunction Hearing Without Date and Stay All Procedural Matters, Except for the Kondos Motion to Dismiss and the Motion to Disqualify.

Beginning in February 2014, the Appellants tried to discover relevant documents about the IBN Defendants’ and Whitby’s conduct from Stubbs, Mark Oleksik’s counsel. These efforts were thwarted by the failure of Jacobsen to respond to Stubbs. It was only after Stubbs wrote Jacobsen on May 1, 2014 threatening to involve the Court that Stubbs got what he needed to produce the document in May 2014.

On May 2, 2014, Mertens and Jacobsen exchanged communications regarding R Brazell’s unilateral decision not to appear at his deposition that was noticed for May 6, 2014.

On May 8, 2014, the Court, after hearing the Parties, ordered: a) The motion to disqualify is denied; b) The Preliminary Injunction hearing is stricken and cannot be reset until IBN Defendants have responded to outstanding discovery requests and

R Brazell appeared for deposition; c) The Plea to the Jurisdiction is continued until Kondos obtains sufficient discovery and he may request an evidentiary hearing; d) The IBN Defendants were ordered to respond to the Rule 11 motion in 10 days; e) The Appellants and the IBN Defendants are ordered to meet and confer on outstanding discovery; and, f) The Parties Stipulated Discovery and Scheduling Order remains in effect and unmodified, without prejudice to the parties' ability to seek a continuance as the discovery process continues.

On May 21, 2014, Jacobsen asked Mertens for more time to respond to the Plaintiffs' Rule 11 Motion. Jacobsen was given the time he requested.

Whitby filed an answer to the Third Amended Complaint on May 29, 2014.

On June 30, 2014, the oral deposition of R Brazell was commenced and ended prior to its completion when he unilaterally terminated the deposition.

A Fourth Amended Complaint was filed on July 3, 2014, without leave of Court because the parties agreed and stipulated that amended pleadings had to be filed by July 3, 2014, in the Stipulated Discovery and Scheduling Order filed with the Court on January 31, 2014. The Court adopted the Scheduling Order at its May 8, 2014 hearing.

Just as with the Third Amended Complaint, R Brazell, the IBN Defendants, Kasten, Talos and Whitby now complain about the filing of the Fourth Amended

Complaint even thought it was timely filed. The language agreed in to in the filed order and reaffirmed by Jacobsen is as follows:

“Amended pleadings shall be filed by July 3, 2014. This included, but was not limited to cross-claims, counterclaims, defenses, affirmative defenses, caused of action, remedies requested, and relief requested. A motion for leave to amend is not necessary.”

The Court held a hearing on the Plaintiffs’ Rule 11 Motion for Sanctions on July 16, 2014.

On July 17, 2014, Mertens and Jacobsen exchanged communications regarding the IBN Defendants’ document production the preceding week.

Whitby filed an answer to the Fourth Amended Complaint on July 18, 2014.

On August 6, 2014, Mertens wrote Jacobsen regarding the IBN Defendants’ document production. On August 7, 2014, Appellants served supplemental disclosures per the Court’s Order.

On September 2, 2014, the Court signed its Order on the Appellants’ Motion for Sanctions. The Court granted the motion in part and denied it in part. The Court denied it as to the Motion to Disqualify. The Court granted it because of its *in terrorem* effect in obtaining leverage against Plaintiffs. The Court found that the Counterclaim as to all the Plaintiffs, except S Brazell, was filed without evidence or without the likelihood of obtaining evidentiary support and dismissed all the Counterclaims except those against S Brazell. The Court reserved the issue of

monetary sanctions. The Court further set up a schedule and for the Appellants and the IBN Defendants to follow in resolving their discovery issues. Finally, the Court admonished R Brazell for his unilateral cancellation of his deposition and denied his motion to stay.

On September 19, 2014, Mertens wrote Jacobsen inquiring as to when the parties could meet and confer regarding the deficiency statement they had exchanged. On October 9, 2014, a Notice of Appearance was filed by Prince Yates & Geldzahler.

The IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice was filed on October 29, 2014. The IBN Defendants' Rule 12(b)(6) Memorandum in Support of Motion to Dismiss with Prejudice was filed on October 29, 2014.

The Declaration of Robert V. Brazell in Support of The IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice was filed on October 29, 2014. Von Whitby's Joinder in The IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice was filed on October 29, 2014.

The IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice was filed on November 21, 2014. The IBN Defendants' Memorandum in Support of Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice was filed on November 21, 2014.

Whitby requested the Court reset the evidentiary hearing on Daniel P.

Kondos 12(b)(2) motion as to personal jurisdiction on November 24, 2014. The Court on November 25, 2014 set the evidentiary hearing on Daniel P. Kondos 12(b)(2) motion as to personal jurisdiction for January 5, 2014 at 1:30 p.m.

Von Whitby's Joinder in the IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice was filed on December 1, 2014. Robert Riley's Joinder in the IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice was filed on December 2, 2014.

The Appellants filed their Motion for Leave to File Amended Complaint and their Fifth Amended Complaint on December 3, 2014. The Appellants filed their Memorandum in Support of Motion for Leave to File Amended Complaint December 3, 2014.

The Appellants filed their Memorandum in Opposition to the IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice on December 3, 2014. The Appellants filed their Memorandum in Opposition to the IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice on December 3, 2014. The Appellants filed Objection and Motion to Exclude the Declaration of Robert V. Brazell in Support of IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice on December 3, 2014. R Brazell, the IBN Defendants, Kasten and Talos filed their Reply to the Plaintiffs' Memorandum in Opposition to the IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice on December 10, 2014. R Brazell, the IBN Defendants, Kasten and Talos filed their Reply to the Plaintiffs'

Memorandum in Opposition to the IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice on December 10, 2014. The Plaintiffs' Notice of Errata Regarding Plaintiffs' Memorandum in Opposition to IBN Defendants' Motion to Dismiss Plaintiffs' First Cause of Action with Prejudice on December 17, 2014. The Appellants filed Objection and Motion to Exclude the Tolling Agreement Made a Part of the IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice on December 17, 2014.

Whitby filed an Opposition to the Plaintiffs' Motion to Amend Complaint on December 17, 2014. The Parties filed a Stipulated Motion for Order Regarding Calendar on December 23, 2014. The Court signed an Order Regarding Calendar on December 26, 2014.

After a number of refusals to appear at deposition and mid-deposition walk-outs, the Deposition of the main defendant, R Brazell, occurred on January 21, 2014, the day before the Trial Court's memorandum decision was entered, and long after it was briefed and argued.

SUMMARY OF ARGUMENTS

The Trial Court Erred In Denying Leave To Amend.

Rule 15(a) provides that "leave shall be freely given when justice so requires." Utah R. Civ. P. 15(a). It is well established that "[R]ule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated," and "[t]his is especially true when the motion to amend is made well in advance of trial." *Nunez v.*

Albo, 53 P.3d 2, 10 (Utah Ct. App. 2002) (quotation and citation omitted). “[T]he fundamental purpose of [Utah’s] liberalized pleading rules is to afford parties ‘the privilege of presenting whatever legitimate contentions they have pertaining to their dispute subject only to the requirement that their adversary have fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.’ *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) (quoting *Cheney v. Rucker*, 381 P.2d 86, 91 (Utah 1963); *Blackham v. Snelgrove*, 280 P.2d 453, 455 (Utah 1955)).

The parties are entitled to “notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required.” *Cheney*, 381 P.2d at 91. “Generally, refusing leave to amend is only justified upon a showing of undue delay, bad faith, or undue prejudice to the opposing party.” *Childers v. Indep. Sch. Dist. No. 1*, 676 F.2d 1338, 1343 (10th Cir. 1982) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)), *Nebraska v. Wyoming*, 515 U.S. 1, 8. (1995).¹ A party can amend its pleading before trial to correct errors and defects in the pleadings. *Schacht v. Brown*, 711 F.2d 1343, 1352 (7th Cir. 1983).

¹ Nearly identical to the Utah Rule, Federal Rule of Civil Procedure 15(a) states that “[t]he court should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). Where the language of the corresponding rule is substantially similar to that of the Utah rule, federal interpretations are persuasive. *Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 24 n. 1, 238 P.3d 1035 (citations omitted).

An opposing party is prejudiced where he or she is forced to adjudicate an issue “for which he or she had no time to prepare.” *Swan Creek Vill. Homeowners Ass'n v. Warner*, 134 P.3d 1122, 1127 (Utah 2006) (quotations and alterations omitted). Importantly, prejudice will only justify denial if it is “undue or substantial prejudice, because almost every amendment of a pleading will result in some practical prejudice to the opposing party.” *Id.*

The Trial Court Erred In Finding The Proposed Amended Complaint Lacked Particularity Under Utah Rule Civil Procedure 9(b)

There are no factual issues to resolve in this portion of the appeal because when considering a Motion to Dismiss, Utah Courts “accept the factual allegations as true and draw all reasonable inferences from those facts in a light most favorable to the Plaintiff.” See e.g., *State v. Apotex Corp.*, 282 P.3d 66, 70 (Utah 2012); *Peck v. State*, 191 P.3d 4 (Utah 2008).

“While [w]e have stressed ... that mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude ... summary judgment, a sufficiently clear and specific description of the facts underlying the [plaintiff's] claim of fraudulent concealment.... will satisfy the requirements of Rule 9(b). Our liberalized pleading rules are designed to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute, subject only to the requirement that their adversary have fair notice of the nature and basis or grounds of the claim and a general indication of

the type of litigation involved.” *Hill v. Allred*, 2001 UT 16, ¶ 14, 28 P.3d 1271, 1275 (citations and quote marks omitted).

**The Trial Court Erred In Applying Utah Rule Of Civil Procedure 9(b) To
Claims Of Constructive Fraud (Insolvency) Under The Utah Fraudulent
Transfer Act**

The applicability of Rule 9(b) to Uniform Fraudulent Transfer Act (UFTA) claims is an issue of first impression in the Utah Courts. The matter has been addressed in the United States District Court of Utah. The Court held that Rule 9(b) did not apply to “constructive” fraud claims under the UFTA. “Though there is some disagreement between the circuits, *see, e.g., Kranz v. Koenig*, 240 F.R.D. 453, 455 (D.Minn.2007) (describing the differing approaches taken by several courts), courts generally apply Rule 9(b)'s requirements to intentional fraudulent transfer claims which turn on the transferor's “an actual intent to hinder, delay, or defraud,” but not to constructive fraudulent transfer claims which turn solely on the sufficiency of the consideration and the transferor's financial condition. *See, e.g., In re Sharp Int'l Corp.*, 403 F.3d 43, 56 (2d Cir.2005) (applying Rule 9(b) to an intentional fraudulent transfer claim because an “actual intent to hinder, delay, or defraud constitutes fraud [and therefore] must be pled with specificity”); *Van-American Ins. Co. v. Schiappa, et al.*, 191 F.R.D. 537, 541–43 (S.D. Ohio 2000); *In re NM Holdings Co., LLC*, 407 B.R. 232, 258 (Bankr.E.D.Mich.2009); *In re Motorwerks, Inc.*, 371 B.R. 281, 295 (Bankr.S.D.Ohio 2007); *In re Plassein Int'l. Corp.*, 352 B.R. 36, 40 (Bankr.D.Del.2006); *In re Commercial Financial Services, Inc.*, 322 B.R. 440, 450

(Bankr.N.D.Okla.2003); In re *White Metal Rolling & Stamping Corp.*, 222 B.R. 417, 428–29 (Bankr.S.D.N.Y.1998). The underlying rationale of these cases is that “there is no reason to require a trustee to plead a defendant's fraud or misconduct with specificity if such fraud or misconduct is not an element of the trustee's fraudulent transfer claim.” *Motorwerks*, 371 B.R. at 295.” *Wing v. Horn*, No. 2:09-CV-00342, 2009 WL 2843342, at *3 (D. Utah Aug. 28, 2009)

ARGUMENTS

The Trial Court Erred In Denying Leave To Amend

Utah R. Civ. P. 15(a) provides “leave shall be freely given when justice so requires.” It is well settled law that “[R]ule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated,” and “[t]his is especially true when the motion to amend is made well in advance of trial.” *Nunez v. Albo*, 53 P.3d 2, 10 (Utah Ct. App. 2002) (quotation and citation omitted). Neither R Brazell, the IBN Defendants, Kasten, Talos, nor Whitby provided the Court with any authority that is contrary to this proposition. As the Court can see, there was never a trial date in this matter and discovery is under way.

In the proposed amended complaint, the Appellants set out with a high degree of particularity each element of a fraud claim including: 1) who made the statement or representation; 2) to whom the statement or representation was made; 3) when the statement or representation was made; 4) how the statement or representation (the context) was made; 5) how the statement or representation was communicated to the

Appellants; 6) the Appellants or other person to whom the statement or representation was communicated; 7) that the statement or representation was material; 8) that the statement or representation was false when made; 9) that the Appellee who made the statement or representation knew of its falsity at the time it was made; 10) that the Appellants had no knowledge of the falsity of the statement or representation when it was made; 11) that the Appellees or their agents made the statements or representations with the intent to induce the Appellants to invest in In-Store Broadcasting Holding, LLC or delay taking some action on any concerns the Appellants may have had; 12) that the Appellants were within their rights to rely on the statements or representations of the Appellees when they were made; 13) that the particular statements or representations made by the Appellees were actually relied on by the Appellants as truthful; 14) that the statements or representations of the Appellees were made with the intent to hide or conceal the fraudulent and illegal actions of the Appellees from the Appellants; 15) that the statements or representations of the Appellees were made with the intent to hide or conceal the conflicts of interest and self dealing in which the Appellees engaged to the Appellants' detriment; 16) that the conduct and the course of business of the Appellees was a legal cause of harm to the Appellants; and, 17) the actual amount of the damages claimed by each of the Appellants. As to each of these allegations, S Brazell and the Investor Appellants identify the individual Appellant or groups of

Appellants, individual Appellee or groups of Appellees involved in each such allegation.

Additionally, S Brazell and the Investor Plaintiffs set out a claim against R Brazell, the IBN Defendants, Kasten and Whitby under the Uniform Fraudulent Transfer act to which Rule 9(b) is not applicable. It is what is sometimes referred to as a "constructive fraud" claim. This claim revolves around the issue of R Brazell's, the IBN Defendant's, Kasten's and Whitby's conduct at a time when IBN was insolvent. Judge Stone completely ignored this issue. It was also raised in the Fourth Amended Complaint.

"[T]he fundamental purpose of [Utah's] liberalized pleading rules is to afford parties 'the privilege of presenting whatever legitimate contentions they have pertaining to their dispute 'subject only to the requirement that their adversary have 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.' *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) (quoting *Cheney v. Rucker*, 381 P.2d 86, 91 (Utah 1963); *Blackham v. Snelgrove*, 280 P.2d 453, 455 (Utah 1955)). Again, neither the R Brazell, IBN Defendants, Kasten nor Von Whitby provided the Court with any authority that is contrary to this proposition. The proposed amended pleading not only gave fair notice as required under Utah law but it gave particularized notice of the claim of every Plaintiff against each Defendant.

R Brazell, the IBN Defendants, Kasten and Whitby had specific notice of the issues raised and contrary to their allegations, each issue has been fully responded to by the S Brazell and the Investor Plaintiffs. The parties are entitled to "notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required." *Cheney*, 381 P.2d at 91. R Brazell, the IBN Defendants, Kasten and Whitby know the issues, have served discovery on the S Brazell and the Investor Plaintiffs and that discovery has been responded to fully and fairly.

R Brazell, the IBN Defendants, Kasten, Whitby and Nebel had ample time to prepare this matter for trial. R Brazell, the IBN Defendants, Kasten and Whitby completed the written discovery to which they were entitled under the Utah Rules and the rulings of this Court. R Brazell, the IBN Defendants, Kasten and Whitby never sought the Court's intervention as to any pending discovery nor did they put the S Brazell or the Investor Plaintiffs on notice of their intention to do though the meet and confer process. The only deposition requested by R Brazell, the IBN Defendants, Kasten and Whitby was S Brazell and he was tendered for deposition on January 20, 2015 as set out in the stipulation filed with the Court. R Brazell, the IBN Defendants, Kasten and Whitby are hardly in the position to argue any delay, bad faith or undue prejudice as a result of the filing of the proposed amended complaint. "Generally, refusing leave to amend is only justified upon a showing of undue delay, bad faith, or undue prejudice to the opposing party." *Childers v. Indep. Sch. Dist. No. 1*, 676 F.2d 1338, 1343 (10th Cir. 1982) *Foman v. Davis*, 371 U.S. 178, 182 (1962)),

Nebraska v. Wyoming, 515 U.S. 1, 8. (1995). Neither R Brazell, the IBN Defendants, Kasten and Whitby provided the Court with any authority that is contrary to this proposition.

A careful review of the proposed amended complaint reveals that all it did was meet the Utah R. Civ. P. 9 affirmative defense of the failure to state a claim upon which relief can be granted. This defense was raised by the R Brazell, the IBN Defendants, Kasten and Whitby for the first time on October 29, 2014 and timely responded to by the motion for leave to amend and a memorandum opposition to the 12(b)(6) motion. The practical effect of the proposed amended complaint is to correct a defect in the S Brazell' and the Investor Plaintiffs, pleadings raised for the first time on October 29, 2014. A party can amend its pleading before trial to correct errors and defects in the pleadings. *Schacht v. Brown*, 711 F.2d 1343, 1352 (7th Cir. 1983). R Brazell, the IBN Defendants, Kasten and Whitby provided the Court with no authority that is contrary to this proposition.

R Brazell, the IBN Defendants, Kasten, Whitby and Nebel did not claim they would be forced to litigate this matter without time to prepare because such an argument is preposterous. An opposing party is prejudiced where he or she is forced to adjudicate an issue "for which he or she had no time to prepare." *Swan Creek Vill. Homeowners Ass'n v. Warner*, 134 P.3d 1122, 1127 (Utah 2006) (quotations and alterations omitted). Importantly, prejudice will only justify denial if it is "undue or substantial prejudice, because almost every amendment of a pleading will result in

some practical prejudice to the opposing party.” *Id.* R Brazell, the IBN Defendants, Kasten and Whitby were not be hindered in their preparation of this matter. To the contrary, with the proposed amended complaint they got exactly what they were asking for with their motions to dismiss.

S Brazell and the Investor Plaintiffs have met the requirements for leave to amend their pleadings. They set out clearly and succinctly the standard under which the Trial Court should have decided their motion. R Brazell, the IBN Defendants, Kasten, Whitby and Talos failed to point to any failure of the S Brazell and the Investor Plaintiffs to meet the criteria for an amended pleading under Utah R. Civ. P. 15(a). The Trial Court granted the motion for leave.

**Plaintiffs Did Not File Their Third And Fourth Complaints In Violation Of
Utah R. Civ. P. 15(a)**

R Brazell, the IBN Defendants, Kasten, Whitby and Talos misled the Court as to the truth about the filing of the Third and Fourth Amended Complaints. Rule 15 provides:

“Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party....”

As is clear from the record before this Court, The Stipulated Discovery and Scheduling Order was filed on January 31, 2014. That Stipulation, which was signed by the counsel for the R Brazell, IBN Defendants, Kasten, Talos and was served on counsel for Whitby, provides in it relevant parts:

"1. Other parties shall joined pursuant to Utah Rules of by March 6, 2014. A motion for leave to add parties is not necessary, provided parties are added by this date, otherwise leave of court is required.

2. Amended pleadings shall be filed by July 3, 2014. This includes, but is not limited to cross-claims, counter-claims, defenses, affirmative defenses, causes of action, remedies requested, and relief requested. A motion for leave to amend is not necessary.

3. All motions to dismiss, motions for summary judgment, or other dispositive motions, shall be filed by November 3, 2014. Unless leave of court is first obtained, a party may not file more than one motion for summary judgment."

On May 21, 2014 this Court signed an Order that stated in it relevant parts:

"6. The Parties Stipulated Discovery and Scheduling Order remains in effect and unmodified, without prejudice to the parties' ability to seek a continuance of dates as the discovery process continues."

While the Court did not sign the Stipulated Discovery and Scheduling Order filed on January 31, 2014, it adopted it in its May 21, 2014. These are facts that Counsel for Brazell, IBN Defendants, Kasten, Talos and Whitby were aware yet proceeded with their misleading representations to the Trial Court. This is not the first time this has occurred on the part of R Brazell's, the IBN Defendants', Kasten's, Talos', and Whitby's counsel. Plaintiffs' Third Amended Complaint and Fourth Amended Complaint were filed in reliance on the agreement between the parties and the Courts order. R Brazell's, the IBN Defendants'. Kasten's, Talos' and Whitby's contentions that S Brazell's and the Investor Plaintiffs' third and fourth amended complaints were improperly filed have no factual basis. R Brazell, the IBN

Defendants, Kasten's, Talos and Whitby knew this when they made claims to the contrary.

R Brazell, the IBN Defendants, Kasten, Talos and Whitby contended that S Brazell and the Investor Plaintiffs added parties to the lawsuit in the proposed amended complaint. This is incorrect. The third and fourth amended complaints contain all the parties listed in the proposed amended complaint and did not add anyone new.

The only Rule 12(b)(6) motion to dismiss or joinder of such motion filed in the Trial Court which complied with agreed scheduling order and the Trial Court's Order adopting that agreement is the IBN Defendants' Rule 12(b)(6) Motion to Dismiss with Prejudice. All the others motions and joinders were filed out of time and without motion for leave.

The irony of R Brazell's, the IBN Defendants', Kasten's, Talos', Nebel's and Whitby's contentions regarding the timely filing of pleadings is inescapable.

Plaintiffs Have Not Delayed This Matter

Without chronicling the events set out in hereinabove, it is clear that the R Brazell, IBN Defendants, Kasten and Talo have been the source of delay in this matter. The S Brazell and the Investor Plaintiff have been the moving force as to whatever progress has been made in this matter.

For months, S Brazell and the Investor Plaintiffs tried to get a scheduling and discovery order agreed to and in place. When the order was finally in place, R

Brazell, IBN Defendants, Kasten, Talos and Von Whitby ignored it and misled the Court as to its application. R Brazell, IBN Defendants, Kasten, Talos and Von Whitby objected to pleadings that were properly filed in order to obstruct the matter and create delay.

R Brazell, IBN Defendants, Kasten and Talos used a bogus claim of conflict of interest to obstruct this matter for months. They filed a Motion to Disqualify Plaintiffs' counsel that delayed matters and required responses from the Plaintiffs. They filed a motion to stay all proceedings pending a ruling on their motion and refused to respond to discovery while never getting a ruling on their motion. Of course, they lost the motion to disqualify and the motion to stay.

S Brazell and the Investor Plaintiff began trying to take the deposition of the R Brazell in July 2013 and were unsuccessful. They tried again, in April and May 2014, to take depositions and R Brazell unilaterally cancelled that deposition for which he was admonished by the Court. When he finally appeared for his deposition on June 30, 2014, he unilaterally discontinued that deposition before it was completed. He was finally deposed on January 21, 2015 pursuant to an agreement and order of this Court.

Hearings have been cancelled or rescheduled because of R Brazell's, the IBN Defendants', Kasten's and Talos' conduct, i.e.: not appearing for depositions and responding to discovery in a timely manner. R Brazell and the IBN Defendants have been sanctioned under Rule 11 for misconduct in pleading their case.

The Trial Court Erred In Finding The Proposed Amended Complaint Lacked Particularity Under Utah Rule Civil Procedure 9(b)

Steve Brazell's And The Investor Plaintiffs' Proposed Amended Complaint States A Claim Upon Which Relief May Be Granted

S Brazell and the Investor Plaintiffs set forth the “who, what, when, where and how” of R Brazell’s, the IBN Defendants’, Whitby’s, Kasten’s and Talos’ alleged fraud and misconduct. *U.S. ex rel Sikkenga v. Regence Blue-Cross*, 412 F.3d 702, 727 (10th Cir. 2006). The “who, what, when, where and how” test was met in connection with: 1) the offering to S Brazell and the Investor Plaintiffs of In-Store Broadcasting Holding, LLC membership interests through an In-Store Broadcasting Holding, LLC subscription agreement or Robann Ltd. or Robann Media, LLC; 2) merger and financing transactions inside IBN and Talos by Brazell, Whitby and Kasten; and, efforts to induce the Plaintiffs not to act on any concerns they may have had as to the conduct or course of business by Brazell, the IBN Defendants, Whitby, Kasten and Talos. The Plaintiffs do not add any new cause of action nor any new party with the proposed amended complaint that was not in the third or fourth amended complaints.

S Brazell and the Investor Plaintiffs’ proposed amended complaint stated with particularity, each of S Brazell and the Investor Plaintiffs’ fraud based claims with the specificity required by Rule 9(b). In the proposed amended complaint, particularly in paragraphs 20 through 146, S Brazell and the Investor Plaintiffs described in clear and concise language each representation of fact S Brazell and the

Investor Plaintiffs relied on for this action. Further, as to each and every fraud based cause of action set out in the “Claims and Causes of Action” section of the proposed amended complaint, S Brazell and the Investor Plaintiffs identified each paragraph referenced in the “Specific Fact Allegations of Fraud” section that apply to that particular cause of action. In other words, for each element of each of the fraud based causes of action S Brazell and the Investor Plaintiffs identified the specific allegations of fraud that relate to that element.

**The Trial Court Erred In Applying Utah Rule Of Civil Procedure 9(B)
To Claims Of Constructive Fraud (Insolvency) Under The Utah Fraudulent
Transfer Act**

The Trial Court ignored S Brazell’s and the Investor Plaintiffs’ claims under UCA § 25-6-1 *et. seq.* Under the UFTA there are two types of claims. UCA § 25-6-5; UCA § 6-6. Both of these sections contain “intentional” fraudulent transfer claims and “constructive” fraudulent transfer claims. Under the “constructive” fraud claim rubric of the UFTA, fraud or misconduct are not an element of that claim.

In cases involving allegations of fraud or mistake, Rule 9(b) of the Utah Rules of Civil Procedure requires that “the circumstances constituting fraud or mistake shall be stated with particularity.” Complaints alleging fraud must set forth the “time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.” *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006) (quoting *Koch v. Koch Indus.*, 203 F.3d 1202, 1236 (10th Cir. 2000)). The applicability of Rule 9(b) to UFTA claims is an issue of first impression

in the Utah state courts. The issue was resolved in the Central Division of the United States District Court of Utah. *Wing v. Horn*, No. 2:09-CV-00342, 2009 WL 2843342, at *3 (D. Utah Aug. 28, 2009). That Court sitting in Utah held that Rule 9(b) did not apply to UFTA “constructive fraud claims”.

There is some disagreement in the circuits, *see, e.g., Kranz v. Koenig*, 240 F.R.D. 453, 455 (D. Minn. 2007), however the majority of circuits apply Rule 9(b)’s requirements to intentional fraudulent transfer claims that require a finding of the transferor’s “an actual intent to hinder, delay, or defraud.” A majority of the circuits do not apply Rule 9(b) to constructive fraudulent transfer claims which require reasonable equivalent value (sufficient consideration) and the transferor’s financial condition (insolvency). *See, e.g., In re Sharp Int’l Corp.*, 403 F.3d 43, 56 (2d Cir. 2005) (applying Rule 9(b) to an intentional fraudulent transfer claim because an “actual intent to hinder, delay, or defraud constitutes fraud [and therefore] must be pled with specificity”); *Van-American Ins. Co. v. Schiappa, et al.*, 191 F.R.D. 537, 541-43 (S.D.Ohio 2000); *In re NM Holdings Co., LLC*, 407 B.R. 232, 258 (Bankr.E.D.Mich. 2009); *In re Motorwerks, Inc.*, 371 B.R. 281, 295 (Bankr.S.D.Ohio 2007); *In re Plassein Int’l. Corp.*, 352 B.R. 36, 40 (Bankr.D.Del. 2006); *In re Commercial Financial Services, Inc.*, 322 B.R. 440, 450 (Bankr.N.D.Okla. 2003); *In re White Metal Rolling & Stamping Corp.*, 222 B.R. 417, 428-29 (Bankr.S.D.N.Y. 1998). Of course, there is no reason to require a party to plead a defendant’s fraud or

misconduct with specificity if fraud or misconduct is not an element of the fraudulent transfer claim. *Motorwerks*, 371 B.R. at 295.

With respect to the issue of insolvency of the debtor, a general allegation of insolvency provides a defendant fair notice of the plaintiff's contention and renders sufficient information from which a defendant may create discovery requests in order to defend, as in any civil action. A transferee need not "defend its honor" against the accusation that the debtor was or became insolvent when the transferee's knowledge or intent as to the debtor's insolvency is not an element of the fraudulent transfer claim.

CONCLUSION

Based on the foregoing, the Trial Court erred in not granting Appellants leave to amend their complaint, dismissing the Appellants for failing to plead fraud with particularity under Rule 9(b) and in ignoring Appellants UFTA claim in analyzing the Appellees' motion to dismiss.

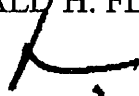
CERTIFICATION

Pursuant to Utah Rule of Appellate Procedure 24(f)(1)(C), the undersigned hereby certifies that according to the word processing software used to create this brief, it contains approximately 7,065 words (excluding tables of contents and authorities and addendum), out of a maximum of 14,000.

Dated: December 16, 2015

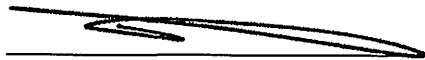
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2015, I served a copy of the forgoing **APPELLANT'S BRIEF** on following parties, by mailing a copy, postage prepaid to the following addresses:

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ADDENDUM

PERTINENT STATUTES

Utah Rules of Civil Procedure

Rule 9. Pleading special matters.

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 12. Defenses and objections.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 15. Amended and supplemental pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 21 days after it is served.

Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Federal Rules of Civil Procedure

Rule 15 Amended and Supplemental Pleadings

(a) **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Utah Fraudulent Transfer Act

25-6-2 Definitions.

In this chapter:

- (2) "Asset" means property of a debtor, but does not include: (a) property to the extent it is encumbered by a valid lien; (b) property to the extent it is generally exempt under nonbankruptcy law; or (c) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.
- (3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.
- (4) "Creditor" means a person who has a claim.
- (5) "Debt" means liability on a claim.
- (6) "Debtor" means a person who is liable on a claim.
- (7) "Insider" includes:

- (a) if the debtor is an individual:
 - (i) a relative of the debtor or of a general partner of the debtor;
 - (ii) a partnership in which the debtor is a general partner;
 - (iii) a general partner in a partnership described in Subsection (7)(a)(ii);
 - (iv) a corporation of which the debtor is a director, officer, or person in control; or
 - (v) a limited liability company of which the debtor is a member or manager;
 - (b) if the debtor is a corporation:
 - (i) a director of the debtor;
 - (ii) an officer of the debtor;
 - (iii) a person in control of the debtor;
 - (iv) a partnership in which the debtor is a general partner;
 - (v) a general partner in a partnership described in Subsection (7)(b)(iv);
 - (vi) a limited liability company of which the debtor is a member or manager; or
 - (vii) a relative of a general partner, director, officer, or person in control of the debtor;
 - (d) if the debtor is a limited liability company:
 - (i) a member or manager of the debtor;
 - (ii) another limited liability company in which the debtor is a member or manager;
 - (iii) a partnership in which the debtor is a general partner;
 - (iv) a general partner in a partnership described in Subsection (7)(d)(iii);
 - (v) a person in control of the debtor; or
 - (vi) a relative of a general partner, member, manager, or person in control of the debtor;
 - (e) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
 - (f) a managing agent of the debtor.
- (9) "Person" means an individual, partnership, limited liability company, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity. (12)
- "Transfer" means every mode, direct or indirect, absolute or conditional, or voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

25-6-3 Insolvency.

- (1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.
- (2) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.
- (3) A partnership is insolvent under Subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's

assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(5) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

25-6-4 Value -- Transfer.

(1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. However, value does not include an unperformed promise made other than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) Under Subsection 25-6-5(1)(b) and Section 25-6-6, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement. (3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

25-6-5 Fraudulent transfer -- Claim arising before or after transfer.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor: (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

25-6-6 Fraudulent transfer -- Claim arising before transfer.

- (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:
- (a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and
 - (b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.
- (2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent.

25-6-8 Remedies of creditors.

- (1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 25-6-9, may obtain:
- (a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
 - (b) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by the Utah Rules of Civil Procedure;
 - (c) subject to applicable principles of equity and in accordance with applicable rules of civil procedure: (i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property; (ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or (iii) any other relief the circumstances may require.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE ARMER TEXAS TRUST (AKA TEXAS ARMER TRUST), A.T. FAMILY INVESTMENT, LLC (F/K/A THOMAS FAMILY LIMITED PARTNERSHIP), THE AVRIN INVESTMENT GROUP, THE BEALS FAMILY REVOCABLE TRUST, LAWRENCE P. BENKES, VICTORIA TOWNSEND (AKA VICTORIA BENKES), SUZANNE BILLINGSLEY, MARK E. AND ALEXIS C. BRAUSA, JEFFREY D. BRAZELL, STEVE BRAZELL, HITMAN, INC., THE CAMPBELL FAMILY TRUST, HOWARD COOPER, JOSE AND JUANITA CRUZ, THE CURUTCHET FAMILY TRUST, HOWARD N. ESBIN, JUNE L. ESBIN, DAVID A. FRENCH, PIOTR GORODETSKY, VASILY GORODETSKY, SCOTT AND CINDY HAMBRECHT, CRAIG S. KAGEL, JAKL INDUSTRIES, TYLER AND LINDSEY LABRUM, TIFFANY LOWERY, GARY L. MILLS, PETER J. MCLAUGHLIN, MICHELLE NIETO, JEFFREY SCOTT REINECKE, FLINT RICHARDSON, THE RUSCH FAMILY TRUST, MARK AND CONNIE SCHELLERUP, THE CCCM LIVING TRUST, RED ROCK PROPERTIES GROUP, S. KEVIN SMITH, PHILIP J. STODDART, RAY A. STOKES MARK M. TRUNCALE and MARK WARNER.

Plaintiffs,

v.

ROBERT V. BRAZELL, IN-STORE BROADCASTING NETWORK, LLC, IN-STORE BROADCASTING HOLDINGS, LLC, IBN MEDIA, LLC, IN-TOUCH, LLC, IN-TOUCH MEDIA, LLC, TALOS PARTNERS, LLC, VON WHITBY, ROBERT W. KASTEN JR., ROBERT E. RILEY, ROBIN NEBEL, ROB WOLF, MARK OLESIK and DOES 1-15.

Defendants.

STIPULATED DISCOVERY AND
SCHEDULING ORDER

Case No. 130900740

Judge Stone

STIPULATED DISCOVERY AND SCHEDULING ORDER

The parties having conferred and reached agreement on certain discovery and scheduling matters as set forth below, the Court hereby enters the following Discovery and Scheduling Order pursuant to Utah Rules Civil Procedure 16:

1. Other parties shall be joined pursuant to Utah Rules Civil Procedure by **March 6, 2014**. A motion for leave to add parties is not necessary, provided parties are added by this date, otherwise leave of court is required.
2. Amended pleadings shall be filed by **July 3, 2014**. This includes, but is not limited to cross-claims, counter-claims, defenses, affirmative defenses, causes of action, remedies requested, and relief requested. A motion for leave to amend is not necessary.
3. All motions to dismiss, motions for summary judgment, or other dispositive motions, shall be filed by **November 3, 2014**. Unless leave of court is first obtained, a party may file no more than one motion for summary judgment.
4. Disclosure of expert testimony pursuant to Utah Rules Civil Procedure 26(a)(4) shall be made by the plaintiffs/counter-plaintiffs by **July 15, 2014**, and by the defendants/counter-defendants by **August 15, 2014**. Any rebuttal expert testimony shall be made by **September 1, 2014**. Thereafter, each party shall have until **30 days before the final pretrial conference** to object to any other party's expert witnesses. Such objections shall be made by a motion to strike or limit expert testimony. Either party may request an evidentiary hearing.
5. Any party may serve a set of Interrogatories, Requests for Production and Requests for Admissions on any other party. Interrogatories are limit to 35 per set, not including subparts, unless the subparts reasonably should be construed as a different question. Requests for Production are limited to 125 per set, including any subparts. Requests for Admissions are limited to 75 per set. Any party may take the oral deposition which that party deems necessary upon reasonable notice. Counsel should first confer with counsel for the parties to be deposed in an effort to schedule a mutually acceptable date. Depositions of parties are limited to 8 hours of testimony per party and a cumulative limit for aligned parties of 40 hours of factual testimony. All other depositions including experts are limited to 6 hours. The foregoing discovery must be reasonable. Any party who believes that another party's discovery is unreasonable may petition the Court for relief from such discovery. All discovery shall be commenced in time to be completed by **October 10, 2014**.

A. With respect to written discovery pending as of the date of this order:

- (1) Plaintiffs will respond substantively to defendants' pending discovery by **February 28, 2014**.
 - (2) Plaintiffs' discovery is withdrawn and will be reformulated to comply with the limitations of this Order. Their revised discovery will be reserved and defendants will have 30 days to respond.
 - (3) All currently pending motions to compel are deemed withdrawn, with the parties reserving the right to renew them at a later date if discovery disputes again arise.
6. Disclosures pursuant to Utah Rules of Civil Procedure 26(a)(5) shall be delivered by the parties to the Court by **30 days before the final pretrial conference**.
 7. Any motions in limine shall be filed by **30 days before the final pretrial conference**. Responses to motions in limine shall be filed **7 days of the filing of any motion in limine**.
 8. The parties shall certify the matter ready of trial on **October 2, 2014**.
 9. This case is set for a Final Pretrial Conference and Trial Scheduling on _____, **2014**.

SO ORDERED

Judge Presiding

**THIS IS THE SIGNED ORDER OF THE COURT WHEN SIGNED ELECTRONICALLY BY
THE COURT ON THE FIRST PAGE OF THIS DOCUMENT**

Agreed as to form and substance - January 24, 2014:
/s/ Donald H. Flanary, Jr.

Agreed as to form and substance - January 24, 2014:
/s/ Craig T. Jacobsen

Agreed as to form and substance - January 29, 2014:
/s/ Sean A. Monson

Agreed as to form and substance - January 29, 2014:
/s/ Mark D. Stubbs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31th day of January, 2014, a true and correct copy of the foregoing document was served via the Court's electronic filing system upon the following:

Sean A. Monson
BENNETT TUELLER JOHNSON & DEERE
3165 E. Millrock Drive, Suite 500
Salt Lake City, UT 84121

Craig T. Jacobson
FROERER & MILES
2661 Washington Blvd., Suite 290B
Ogden, UT 84401

Richard D. Burbidge
Carolyn J. LeDuc
BURBIDGE MITCHELL & GROSS
215 S. State Street, Suite 920
Salt Lake City, UT 84111

Mark D. Stubbs
FILLMORE SPENCER, LLC
3301 North University Ave.
Provo, UT 84604

/s/ Michelle Lund

JAN 22 2015

SALT LAKE COUNTY

By

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE ARMER TEXAS TRUST (AKA TEXAS ARMER
TRUST), ET AL,

Plaintiffs,

-VS-

ROBERT V. BRAZELL, IN-STORE BROADCASTING
NETWORK, LLC, IN-STORE BROADCASTING
HOLDING, LLC, IBN MEDIA, LLC, INTOUCH, LLC,
INTOUCH MEDIA, LLC, TALOS PARTNERS, LLC,
VON WHITBY, ROBERT W. KASTEN JR., ROBERT
E. RILEY, ROBIN NEBEL, ROB WOLF, MARK
OLEKSIK, and DOES 1-15,

Defendants.

MEMORANDUM DECISION

Civil No. 130900740

Judge Andrew Stone

This case comes before the court on the motion of Defendants Robert V. Brazell, Robert W. Kasten Jr., In-Store Broadcasting Network, LLC, In-Store Broadcasting Holding, LLC, Talos Partners, LLC, IBN Media, LLC, InTouch Media, LLC and InTouch, LLC (collectively, "IBN Defendants") to dismiss all of Plaintiffs' Causes of Action under Rule 12(b)(6). These Defendants assert that the complaint fails to state a claim under the standards of Rule 9(b) of the Utah Rules of Civil Procedure. Defendant Von Whitby joins their motion. These same IBN Defendants move as well to dismiss the First Cause of Action as time barred. Defendants Von Whitby and Robert Riley join in this motion.

Plaintiffs respond to the 12(b)(6) motion by seeking leave to file a Fifth Amended Complaint.

This case was filed in February, 2013. Plaintiffs amended their original complaint before an answer was filed and later obtained leave to file a Second Amended Complaint. Thereafter, the parties stipulated in January 2014 that amended pleadings could be filed up to July 3, 2014. The Court never approved this stipulation. However, pursuant to that stipulation Plaintiffs filed a Third Amended and a Fourth Amended Complaint within the time agreed in the stipulation. After that time had passed, Defendants made the present motion. Plaintiffs sought leave to file the Fifth Amended Complaint on December 4, 2014.

Thus, the operative Complaint is actually the Second Amended Complaint, the last iteration as to which leave was granted for filing pursuant to the Rules. However, the reality is that Plaintiffs have relied on a stipulation permitting the filing of amendments without leave in filing the Third and Fourth Amended Complaints. The Court, therefore, would ordinarily base its analysis of the adequacy of the pleadings on those later filed papers. However, the filing of the Motion to Amend (pertaining to the proposed Fifth Amended Complaint) necessitates that the Court resolve that motion first—the Court declines to simply evaluate the earlier filed versions and dismiss with prejudice, given the filing of the Motion to Amend.

In so doing, the Court does not accept Plaintiffs' argument that they are entitled to this new amendment because Defendants have not previously objected to the particularity of the previous complaints. Each of the answers filed interposed a defense that the applicable complaint failed to state a cause of action. Rule 9(b) applies from the start, and does not merely contemplate an automatic "do-over" if a defendant raises particularity. Rather, the Court first addresses the Motion to Amend because Plaintiffs acknowledge it contains greater particularity than the earlier versions—thus, if the Fifth Amended Complaint still fails in particularity, consideration of the other complaints becomes unnecessary. On the other hand, if leave to amend is granted, the present Motion is moot with respect to earlier versions of the Complaint.

The Court denies the Motion to Amend. The Complaint is untimely, coming long after both the Court-imposed presumptive deadline for amendment as well as that stipulated to by the parties. Amendment at this point would substantially prejudice defendants as they would now be faced with new factual theories for which they have not had time to prepare. In addition, Plaintiffs offer no justification for not having pleaded their multiple earlier versions of the complaint with the additional facts offered in the Fifth Amended Complaint—all of the facts regarding supposed misrepresentations and Plaintiffs' reliance thereon were plainly available to them from the start. Most significantly, the Court has determined that the proposed amendment would be futile. In so doing, the Court has carefully reviewed the proposed Fifth Amended Complaint and concludes that it still fails to plead a fraud claim as to any specific plaintiff against any specific defendant with the particularity required by Rule 9(b).

The proposed Fifth Amended Complaint is long on narrative and short on specifics with respect to each individual party. It does not explain when any false representation was made to any individual plaintiff, or any plaintiff's specific reliance on that statement. It fails to explain when each plaintiff obtained their respective shares or otherwise relied on statements by defendants. Fraud-based claims are highly individualized, because reliance is an individual decision. Accordingly, stating a particularized claim of fraud requires each plaintiff to allege which representations were made to them, when and how and by whom, and how they each relied on that representation. This permits each of the defendants to defend against the allegation as to each defendant and each plaintiff. The Fifth Amended Complaint does not permit any one defendant to determine which supposed misrepresentation of fact was relied on by which plaintiff in what way, and why each defendant should be charged with that alleged misrepresentation. Rule 9(b) requires that minimal pleading before permitting a party to cry "fraud."

The proposed Fifth Amended Complaint alleges a long course of supposed misrepresentations, mostly occurring in 2006-2007. Nearly all of them are statements of future intent, or opinions as to value. A statement that an investment "is going to be huge" is not a statement of presently existing fact. Statements of intent regarding future investments or their structure are likewise not statements of presently existing fact. If such an intent was not genuinely held at the time of the statement, it might constitute an implied misrepresentation of existing fact, but the Fifth Amended Complaint makes no attempt to allege as much. Likewise a statement that other investments "have been secured" or a statement of intent to put one's own money into the venture is not false at the time merely because it did not ultimately happen. The Fifth Amended Complaint simply glosses over this principle, conclusorily alleging misrepresentations regarding forward-looking statements (and conveniently omitting any actual disclosure documents given to the purchasers). It is not too much to require plaintiffs to allege statements of existing fact, that the facts represented were untrue at the time, and how plaintiffs relied to their detriment on that misrepresentation. The Fifth Amended Complaint does not accomplish this.

This is not a class action. Each plaintiff will have made individual decisions as to buying and holding stock in this case. Each of the defendants played different roles. We are dealing with separate fraud actions pursued by each proposed plaintiff against various defendants. Particularity is required for each of these claims.

Defendant Whitby's joinder in the Motion illustrates this problem. It is impossible to tell from the Fifth Amended Complaint when Whitby supposedly joined Plaintiffs' posited conspiracy, and which plaintiff relied on any representation with which he might possibly be charged. No

allegation is made of any representation actually made by him. As Whitby pointed out in argument, he has factual defenses to make based on when he came to the company, so each plaintiff needs to explain what representation they relied on as to which that they can properly claim Whitby is accountable. But under the proposed Fifth Amended Complaint, he was at the scene of the crime at some point in time, apparently, so he must be liable as well. Rule 9(b) is essential in such a case; Whitby is entitled to the specifics of each plaintiff's claim against him, without being lumped together with every other defendant, defending the lumped-together claims of every plaintiff.

Defendants' Motion with respect to the First Cause of Action also illustrates the inadequacy of the proposed Complaint. That motion articulates a complete defense to the Utah Securities Act claim based on a statute of repose. It is made as a 12(b)(6) claim, but is accompanied by an affidavit establishing that each of the plaintiffs purchased their respective shares well outside the statutory period. Plaintiffs objected to the consideration of that material outside the pleadings. But the point is that the affidavit should not have been necessary—at a minimum, Plaintiffs should have pleaded the dates on which they acquired their shares to establish when they at least initially relied on Defendants' supposed misrepresentations.

The proposed Fifth Amended Complaint, at its core, alleges, for the most part, supposed misrepresentations made by Defendant Rob Brazell to Plaintiff Steve Brazell, which plaintiffs allege were passed along to all of them. A few other supposed misrepresentations are charged to other defendants, though the pleading fails to reveal how these other statements of presently existing fact were false at the time. But taking one example of an actual alleged misrepresentation shows the weakness of the pleading: Plaintiffs allege that Rob Brazell misrepresented his role at prior Overstock.com. In conclusory fashion, the pleading claims that this representation was made to each of plaintiffs and relied on by each of them in investing in In-Store Broadcasting Holding, Inc. Fifth Amended Complaint, ¶128. Rob Brazell is entitled to a pleading establishing at what time his brother, Steve Brazell, believed these representations, and the manner in which he relied on them. He is entitled to require a pleading setting out the same as to each of the proposed plaintiffs. And the same is true with respect to each Defendant—after all, assuming Steve Brazell, (who under the proposed Complaint's allegations, was intimately involved in the promotion of IBN) was duped by this supposed misrepresentation, aren't the other defendants entitled to a pleading that explains how they, unlike Steve Brazell, knew it to be false?

This is more than an exercise in requiring plaintiffs to disclose their theory of fraud. By requiring the "who, what, where, and how" of the alleged fraud, the Rules permit defendants in these actions to formulate their defenses. With adequate particularity, defendants can match the

supposed misrepresentations and allegations of reliance against the disclosures that were made to the plaintiffs. In this case, plaintiffs attempt to allege that they received an interest different than what they were told it was going to be. The obvious question that begs asking is what did they receive at the time of purchase? Did subsequent disclosures bar contrary reliance on previous statements of intent? What were the facts known at the time of reliance? Conclusory allegations do not permit defendants to intelligently formulate these defenses.

At argument, Defendants repeatedly accused Plaintiffs of pursuing this claim as a means of defaming Defendants, pointing to the website challenged in the counterclaim and its use of materials from this litigation. Plaintiffs' motivation in bringing this suit, or one or more of them publishing its details, plays no role in the Court's decision regarding the adequacy of the pleadings here.¹ But Defendants point does highlight the policy behind Rule 9(b); Fraud is a serious matter. Because a charge of fraud has so much potential for the type of collateral damage Defendants claim here, it is subject to heightened standards of pleading and proof. Here, Plaintiffs fail the first hurdle of establishing this serious claim.

As Plaintiffs acknowledge, earlier versions of the Complaint are no better. The Court has analyzed the proposed Fifth Amended Complaint as a logical first step in determining whether to permit amendment. Plaintiffs have been candid that the Fifth Amended Complaint was drafted in response to the Motion to Dismiss, and the Court concludes (having reviewed the earlier versions of the complaint as well) it fails to cure the problems of pleading asserted in that Motion. Accordingly, the Court grants the Defendants' Motions to Dismiss, with prejudice. Six tries at pleading fraud are enough. With discovery now at an end, Plaintiffs' inability to plead with the required particularity does not justify permitting further attempts. This moots the motion concerning the First Cause of Action being time-barred, though the Court acknowledges that, assuming the factual predicates posed by Defendants, the arguments concerning the statute of repose are well-taken.


As to the remaining proposed new claims, Plaintiffs offer no justification for having brought them at this late date, and Defendants would be prejudiced by now having to defend entirely new claims at this late stage in the case's progress. The Court also notes that the new claims lack necessary allegations for both the purported derivative claim and the receivership claim. Accordingly, without regard to futility, the Court denies the Motion to Amend with respect to

¹ Were the Court not satisfied that the amendment should be denied based on timeliness, lack of justification, substantial prejudice to the Defendants, and futility, the Court might be inclined to consider the potential of ulterior purposes for the pursuit of the lawsuit, as that, too, could inform the decision whether to grant leave. *Kelly v. Hard Money Funding*, 87 P.3d 734 at ¶40. (Utah App. 2004).


the new proposed Causes of Action as untimely, without justification and unduly prejudicial to Defendants.

The Motion to Amend is denied. Plaintiffs' various Complaints, all of which lack the particularity required under Rule 9, are dismissed with prejudice as to the moving defendants (IBN Defendants and Whitby). The First Cause of Action is dismissed as to Defendant Riley on the same basis. No further order is necessary.

DATED this 21 day of January 2015.

BY THE COURT


ANDREW H. STONE
Third District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130900740 by the method and on the date specified.

MANUAL EMAIL: JUSTIN B BRADSHAW jbb@princeyeates.com
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MANUAL EMAIL: MICHAEL N ZUNDEL mnz@princeyeates.com

01/22/2015

/s/ MICHELLE ADAMS

Date: _____

Deputy Court Clerk

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Attorneys for Plaintiffs

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

THE ARMER TEXAS TRUST (AKA TEXAS
ARMER TRUST), et al.,

Plaintiffs,

vs.

ROBERT V. BRAZELL; IN-STORE
BROADCASTING NETWORK, LLC; IN-
STORE BROADCASTING HOLDINGS,
LLC; IBN MEDIA, LLC; IN-TOUCH, LLC;
IN-TOUCH MEDIA, LLC; TALOS
PARTNERS, LLC; VON WHITBY;
ROBERT W. KASTEN JR.; ROBERT E.
RILEY; ROBIN NEBEL; ROB WOLF;
MARK OLEKSIK and DOES 1-15.

Defendants.

**FOURTH AMENDED
COMPLAINT**

Case No. 130900740

Judge Andrew H. Stone

JURY TRIAL DEMANDED

ROBERT V. BRAZELL; IN-STORE
BROADCASTING NETWORK, LLC; IN-
STORE BROADCASTING HOLDINGS,
LLC and TALOS PARTNERS, LLC.,

Counterclaimants/
Third-Party Plaintiffs,

vs.

STEVE BRAZELL; JEFFREY D.
BRAZELL; THE ARMER TEXAS TRUST
(AKA TEXAS ARMER TRUST); A.T.
FAMILY INVESTMENT, LLC (F/K/A
THOMAS FAMILY LIMITED
PARTNERSHIP); THE AVRIN
INVESTMENT GROUP; THE BEALS
FAMILY REVOCABLE TRUST;
LAWRENCE P. BENKES; VICTORIA
TOWNSEND (AKA VICTORIA BENKES);
SUZANNE BILLINGSLY; MARK E. AND
ALEXIS C. BRAUSA; HITMAN, INC.; THE
CAMPBELL FAMILY TRUST; HOWARD
COOPER; JOSE AND JUANITA CRUZ;
THE CURUTCHET FAMILY TRUST;
HOWARD N. ESBIN; JUNE L. ESBIN;
DAVID A. FRENCH; PIOTR
GORODETSKY; VASILY GORODETSKY;
SCOTT AND CINDY HAMBRECHT;
CRAIG S. KAGEL; JAKL INDUSTRIES;
TYLER AND LINDSEY LABRUM;
TIFFANY LOWERY; GARY L. MILLS;
PETER J. MCLAUGHLIN; MICHELLE
NIETO; JEFFREY SCOTT REINECKE;
FLINT RICHARDSON; THE RUSCH
FAMILY TRUST, MARK AND CONNIE
SCHELLERUP; THE CCCM LIVING
TRUST; RED ROCK PROPERTIES
GROUP; S. KEVIN SMITH; PHILIP J.
STODDART; RAY A. STOKES; MARK M.
TRUNCALE; QUINN SMITH; RICHARD

SCHLESINGER and MARK WARNER,

Counterclaim
Respondents,

and

DANIEL KONDOS and DOES 1-15,

Third-Party Defendants.

The above-named Plaintiffs, by and through their undersigned attorneys of record, and in accordance with the stipulated scheduling order, allege claims against the Defendants named herein as follows:

THE PARTIES

1. Plaintiffs the Armer Texas Trust (aka Texas Armer Trust), A.T. Family Investment, LLC (fka Thomas Family Limited Partnership), the Avrin Investment Group, the Beals Family Revocable Trust, Lawrence P. Benkes, Victoria Townsend (fka Victoria Benkes), Suzanne Billingsly, Mark A. and Alexis C. Brausa, Jeffrey D. Brazell, Steve Brazell, the Brooks Family Trust Campbell Family Trust, Howard Cooper, Dave Cross, Jose and Juanita Cruz, the Curutchet Family Trust, Scott Day, Howard N. Esbin, June L. Esbin, Ronald Finken, David A. French, Piotr Gorodetsky, Vasily Gorodetsky, Scott and Cindy Hambrecht, Hitman, Inc., Craig S. Kagel, JAKL Industries, Tyler and Lindsey Labrum, Tiffany Lowery, Tom Mack, Jeff and Jennifer Mallas, Gary L. Mills, Peter J. McLaughlin, Michelle Nieto, Jeffrey Scott Reinecke, Flint Richardson, the Rusch Family Trust, Richard Schlesinger, Mark and Connie Schellerup, the CCCM Living Trust, Red Rock Properties Group, Jeff and Tina Rogers, Quinn Smith, S. Kevin

Smith, Philip J. Stoddart, Jason Straub, Ray A. Stokes, Anthony Tegano and Mark M. Truncale and Scott Warner (Collectively "Plaintiffs") are individuals and entities who invested in excess of \$3 million in the relevant IBN entities.

2. Plaintiffs Jeff Brazell, Vasily Gorodetsky and Piotr Gorodetsky are residents of Utah, and the remaining Plaintiffs are residents of other states. Together, plaintiffs invested in excess of \$2 million with or through Defendants.

3. Defendant Robert Brazell ("Brazell") is a resident of Salt Lake City, Utah.

4. Defendants In Store Broadcasting Network, LLC and In Store Broadcasting Holdings, LLC, IBN Media, LLC, IBN Media, LLC, In Touch LLC and In Touch Media LLC (collectively "IBN") are Delaware limited liability companies with their primary offices in Salt Lake City, Utah.

5. Defendant Talos Partners, LLC ("Talos") is a Delaware limited liability company with offices in Salt Lake City, Utah.

6. Defendant Von Whitby ("Whitby") is a resident of Salt Lake City, Utah.

7. Defendant Robert W. Kasten Jr. ("Kasten") was formerly a member of the U.S. Senate representing the State of Wisconsin. He is currently a resident of Washington D.C.

8. Defendant Robert E. Riley ("Riley") is a former board member of Talos Partners, and manager of IBN Media LLC. He is a resident of Park City, Utah.

9. Defendant Robin Nebel was the President and CFO of IBN between 2007 and 2011, and is a resident of San Francisco, California.

10. Defendant Rob Wolf was at various times the President and CEO of IBN, and a resident of Utah.

11. Defendant Mark Oleksik was an officer of IBN and Talos Partners, and is a resident of Colorado.

12. Joel Ballestaedt was an officer, agent, servant or employee of the various defendants, and is a resident of Utah.

13. Defendants Does 1 to 15 are certain known and unknown individuals and/or entities that might have knowledge regarding allegations in the Plaintiff's Complaint and/or might have been involved in the dissemination of false and/or misleading information and the failure to disclose material facts in connection with Plaintiff's purchase of IBN membership interests as alleged herein. Plaintiffs will amend this Complaint if and when and if the names of additional parties are identified through discovery.

JURISDICTION AND VENUE

14. The claims asserted are governed by Utah common law and the Utah Uniform Securities Act, Utah Code § 61-1-1 et seq. Subject matter jurisdiction is vested in this Court pursuant to Utah Code § 78A-5-102, § 78B-3-205 and § 61-1-26.

15. Venue is proper in this Court under Utah Code § 78B-3-305 on the grounds that the principal defendants reside and have offices in Salt Lake County, State of Utah.

16. Venue is also proper in this Court under Utah Code § 78B-3-307 on the grounds that many of the misrepresentations and acts alleged herein were committed in whole or in part in Salt Lake County, State of Utah.

GENERAL ALLEGATIONS

17. In or about 2006 Plaintiffs each executed a Subscription Agreement to purchase membership interests in In Store Broadcasting Holding, LLC. Defendants In Store Broadcasting Network, LLC and In Store Broadcasting Holding, LLC are individually and collectively referred to herein as "IBN." Plaintiffs also each received a Confidential Private Offering Term Sheet dated August 31, 2006 in connection with this sale of IBN membership interests.

18. In connection with their decision to purchase these membership interests Plaintiffs were given presentations both in person and via phone by R. Brazell, who was at various times chairman, CEO and President of IBN. In these presentations R. Brazell told Plaintiffs that there was tremendous upside in IBN. He represented that they had large contracts with major players including Kroger, Walgreens, McDonalds, Duane Reade, Winn-Dixie, Supervalu and others. Brazell represented that he had signed contracts with video advertisers worth \$3.5 million.

19. R. Brazell also represented that IBN had filed "20 new patents in the last 3 years."

20. R. Brazell explained that the company's strategy was to maximize the value of those contracts through a liquidity event; either taking the company public or an outright sale.

21. R. Brazell further told Plaintiffs that it was not a matter of "if, but a matter of when" they would make their money back, and that there was little risk. He claimed that the upside was "billions, not millions". He claimed that they were the only player in the space with no competition. This was not true.

22. In order to induce Plaintiffs to invest in IBN, R. Brazell provided financial statements that showed the company had over \$27 million in assets as of June 2006. He also

showed Plaintiffs a power point presentation that projected the company would have over \$20 million in video orders and \$16 million in audio orders in 2006. This same presentation projected revenues of over \$10 million in 2006. None of these projections proved to be even remotely accurate.

23. Significantly, R. Brazell claimed that he had personally invested over 10 million dollars of his own personal wealth into the company. This also was not true.

24. Subsequently, after signing subscriptions agreements with IBN, Plaintiffs were told by R. Brazell that they were not going to receive IBN shares after all, and that they would instead get membership interests in a new entity called Robann Media, LLC that R. Brazell owned and controlled. Investors were told both verbally and in writing that this was to be an immediate pass-through. This was not true.

25. Plaintiffs were never given any private placement memorandum, subscription agreement or any risk disclosures whatsoever in connection with their Robann investment. The Robann offering was not registered with the State of Utah or with the SEC, and did not qualify for any exemption from registration.

26. Plaintiffs were told that R. Brazell would be managing their investments for them through Robann, and that as a group they would be able to exercise more control over IBN. Specifically, R. Brazell told Plaintiffs that "you will be better off staying in Robann and having me represent your voting rights, because you will be treated just like me."

27. In fact, R. Brazell used the combined shares then owned by Robann to position himself to control IBN and to maneuver himself into a controlling position. Upon information

and belief, R. Brazell represented to IBN board that the Robann-owned shares were all his and did not freely disclose to all board members that in fact the shares were purchased and paid for by Plaintiffs.

28. As of February of 2010 Brazell still controlled all of Plaintiffs investors through Robann. At that point, and contrary to the projections R. Brazell had made, the company began to suffer significant financial difficulties.

29. Defendants told Plaintiffs and other investors that they needed to obtain more operating capital for the company, and that they had found an investment company called Talos Partners ("Talos") to infuse money into the company. But Talos was also owned and controlled by Rob Brazell.

30. Because he controlled all of the Plaintiffs shares through Robann, and controlled Talos, R. Brazell was able to negotiate both sides of a bailout deal with Talos that effectively diluted Plaintiffs shares to nothing. Plaintiffs were not "Treated just like [Rob]," they were effectively shut out of the deal. Moreover, their membership interests were diluted down to next to nothing without Plaintiffs' consent or knowledge.

31. Because Plaintiffs had never received their shares in IBN, and all of their investments were held by Robann, they were not able to vote or otherwise participate in this decision. This was not an arms-length negotiation, and the terms of the transaction were not fair to Plaintiffs.

32. Further, the deal with Talos transferred a liability from IBN for some \$750K that was, at that point, highly unlikely to be paid, to Talos where it was very likely to be paid. This

transaction, although possibly risky for Talos at the time, was not negotiated in good faith or at arms-length.

33. Brazell negotiated a deal with himself to transfer valuable assets about which Rob, by virtue of his position as CEO of IBN had confidential, non-public information. In effect, in entering into this transaction Brazell took advantage of a bad business and investment environment to enter into a transaction that benefitted himself, through Talos, on terms that IBN never would have agreed to with a third party. Moreover, by using the Talos vehicle and manipulating conversion rates for certain classes of stock, Brazell was able to gain preferred ownership interests to the detriment of all other non-Talos investors, including Plaintiffs.

34. In addition, Plaintiffs subsequently discovered that Talos never actually complied with the terms of its agreement with IBN and was in default at least by November of 2010. Specifically, Talos never paid all of the funds to IBN that it was contractually obligated to pay for its ownership interest in IBN.

35. In December of 2010 James Kruse, IBN's attorney, confirmed that Talos was "\$650,000 short" on its obligations to IBN, and this breach was confirmed by Robin Nebel. Nevertheless, because both Talos and IBN were owned and controlled by R. Brazell, IBN never asserted that Talos had breached the agreement and never terminated the contract. R. Brazell and IBN breached their respective duties to Plaintiffs and failed to take advantage of a corporate opportunity that would have benefitted Plaintiffs by reversing the Talos dilution and restoring the value of their shares.

36. Finally, when the company consummated a transaction with POP Radio - one of the liquidity events that everyone had invested and hoped for – Talos and R. Brazell were enriched, receiving in excess of \$4,000,000 while Plaintiffs were left in the cold. Additional liquidity transactions are imminent, but Plaintiffs will again be damaged if the value of their shares is not restored.

37. It was only after this transaction was completed that Plaintiffs realized what had happened with their investment and that they had been defrauded by Talos and IBN and its managers and principals named herein. Had IBN terminated the agreement with Talos for failure of consideration, as it should have done, Plaintiffs would have received far more revenue from the subsequent transactions, including those that are contemplated currently.

38. Plaintiffs only discovered the true facts concerning these transactions after the POP Radio deal closed and during the last few months of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, Defendants actively concealed the true facts from them.

39. Defendants R. Brazell, Whitby, Kasten, Riley, Nebel ,Wolf, Oleksik and Ballestaedt were or are officers, directors and or managers of the Defendant entities and are therefore control persons as defined in Utah Code § 61-1-22(4). In their respective positions as control persons, these defendants directed and controlled, directly or indirectly, the management and actions of the defendant entities and therefore they are personally liable, jointly and severally with and to the same extent as the other defendants.

40. On information and belief, at about the time of the POP transaction R. Brazell orchestrated the transfer of the video assets held by IBN / Talos to the In Touch entities.

CLAIMS AND CAUSES OF ACTION

FIRST CAUSE OF ACTION Violation of Utah Uniform Securities Act

41. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this Complaint as if fully set forth herein.

42. The IBN membership interests that were sold to Plaintiffs constitute "securities" within the meaning of Utah Code § 61-1-13.

43. In connection with the Defendants' offering of securities in IBN membership interests Plaintiffs invested in and received an ownership interest in IBN.

44. In connection with the purchase and sale of these ownership interests, Defendants willfully (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material facts or omitted to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices, and a course of business that operated as a fraud or deceit upon Plaintiffs in connection with their purchase of IBN membership interests.

45. Further, in an effort to induce Plaintiffs to invest yet more money, and/or not to sell their ownership interests, Defendants willfully (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material facts or omitted to state material facts necessary in order to make statements made, in light of the circumstances under which they were

made, not misleading; or (c) engaged in acts, practices, and a course of business that operated as a fraud or deceit upon Plaintiffs in connection with their purchase of IBN membership interests.

46. Plaintiffs suffered damages in that they purchased IBN membership interests in reliance upon the negligent and misleading statements of Defendants as alleged herein.

47. Plaintiffs would not have purchased these interests at the prices they paid, or at all, if they had been aware of the true facts concerning IBN or the conduct of its officers, directors and employees.

48. Plaintiffs only discovered the true facts concerning these transactions in the last few months of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, Defendants actively concealed the true facts from them.

49. Defendants' conduct, as alleged herein, constitutes violations of the Utah Uniform Securities Act, and specifically Utah Code § 61-1-1.

50. At the time Defendants made the representations or omitted to state material fact in connection with Plaintiffs' purchases of IBN membership interests they knew all of the material facts upon which Plaintiffs' claims in this matter are based as alleged herein.

51. Defendants' representations in connection with the offering of IBN membership interests as alleged herein were untrue statements of material facts and/or Defendants omitted to state material facts concerning the sale of these securities to Plaintiffs.

52. As a direct and proximate result of Defendants' violations of the Utah Uniform Securities Act Plaintiffs have been damaged in an amount to be proven at trial, but in no event less than the amounts of their principal investments.

53. Defendants R. Brazell, Whitby, Kasten, Riley, Nebel , Wolf, Oleksik and Ballestaedt are control persons jointly and severally liable for all acts alleged herein pursuant to Utah Code § 61-1-22(1) and (4).

54. Because Defendants' actions as alleged herein were reckless and intentional Plaintiffs are entitled to receive treble damages, costs, and attorney's fees pursuant to Utah Code Ann. § 61-1-22(2).

SECOND CAUSE OF ACTION
Fraudulent Misrepresentation

55. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this Complaint as if fully set forth herein.

56. Defendants made certain representations in connection with the offering of IBN membership interests to Plaintiffs as alleged in detail herein.

57. The Defendants' representations concerned then existing material facts were false, and Defendants knew that their representations were false when made.

58. Alternatively, Defendants' misrepresentations were made recklessly, knowing that they had insufficient knowledge upon which to base such representations.

59. Defendants' false representations were made in order to induce Plaintiffs to purchase IBN membership interests.

60. Plaintiffs reasonably relied on Defendants' false representations, and were unaware of their falsity.

61. In reliance on Defendants' false representations, Plaintiffs purchased over \$2,000,000 of IBN membership interests to their detriment.

62. As a direct and proximate result of Defendants' false representations, Plaintiffs have been damaged in an amount to be proven at trial.

63. Defendants' fraud constitutes willful and malicious conduct with a manifest disregard of, and a knowing and reckless indifference for, the rights of Plaintiffs and, as such, Plaintiffs are entitled to punitive damages in an amount to be proven at trial, but in no event less than \$3,000,000.00.

THIRD CAUSE OF ACTION
Fraudulent Inducement and Rescission

64. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this Complaint as if fully set forth herein.

65. As alleged herein, Defendants made false and misleading statements to Plaintiffs and omitted to state material facts with the specific intent to fraudulently induce Plaintiffs to purchase IBN membership interests.

66. Defendants knew that such statements and omissions were intentionally false and misleading, and involved material facts about the company.

67. Defendants made the statements and omissions with the intent that Plaintiffs would rely on such false and misleading statements and omissions, and agree to purchase IBN membership interests.

68. In making these purchases Plaintiffs relied on the false, misleading and negligent statements and omissions alleged herein.

69. Plaintiffs only discovered the true facts concerning these transactions in the last few months of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, Defendants actively concealed the true facts from them.

70. Based on Defendants' fraudulent inducement, Plaintiffs are entitled to rescind their purchases of IBN membership interests.

FOURTH CAUSE OF ACTION

Promissory Estoppel

71. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this Complaint as if fully set forth herein.

72. Defendants made certain representations and promises in connection with IBN membership interests as set forth above.

73. Plaintiffs acted with prudence and in reasonable reliance upon Defendants' promises and representations in making their decisions to purchase these securities.

74. Defendants knew that Plaintiffs would rely and relied upon their representations and promises in connection with the offering.

75. Defendants knew all material facts surrounding their representations and promises in connection with the offering.

76. Plaintiffs only discovered the true facts concerning these representations in the last few months of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, Defendants actively concealed the true facts from them.

77. As a direct and proximate result of Plaintiffs' reliance on Defendants' promises and representations, Plaintiffs has been damaged in amount to be proven at trial.

FIFTH CAUSE OF ACTION
Civil Conspiracy

78. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this complaint as if fully set forth herein.

79. Defendants, and each of them, knowingly joined and entered into a conspiracy to, among other things, defraud Plaintiffs.

80. Pursuant to the conspiracy Defendants, and each of them, agree to make false and misleading statements to Plaintiffs as alleged herein or to make material omissions, and to engage in conduct with the specific intent to defraud and harm Plaintiffs.

81. Each of the misrepresentations and omissions alleged herein were overt acts undertaken in furtherance of these conspiracies.

82. Plaintiffs relied on the false, misleading and negligent statements and omissions that were part of the conspiracy in purchasing their interests in IBN.

83. As a direct and proximate result of Defendants' conspiratorial acts, Plaintiffs have been damaged in an amount to be proven at trial.

SIXTH CAUSE OF ACTION

Common Law Fraud

84. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this Complaint as if fully set forth herein.

85. As alleged herein, Defendants made representations of fact in connection with the offerings of shares in IBN membership interests, in connection with mergers and financing transactions, and in an effort to induce Plaintiffs not to sell their membership interests.

86. These representations were false, and Defendants knew that these representations were false when made.

87. The false representations were made in order to induce Plaintiffs to invest in IBN membership interests.

88. Plaintiffs reasonably relied on Defendants' false representations, and were unaware of their falsity.

89. In reliance on Defendants' false representations, Plaintiffs purchased IBN membership interests to their detriment and/or they decided not to sell their membership interests.

90. Plaintiffs only discovered the true facts concerning these transactions in the last few months of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, Defendants actively concealed the true facts from them.

91. As a direct and proximate result of Defendants' false representations, Plaintiffs have been damaged in an amount to be proven at trial.

92. Defendants' fraud constitutes willful and malicious conduct with a manifest disregard of, and a knowing and reckless indifference for, the rights of Plaintiffs and, as such, Plaintiffs are entitled to punitive damages in an amount to be proven at trial, but in no event less than \$3,000,000.

SEVENTH CAUSE OF ACTION
Constructive Trust

93. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this Complaint as if fully set forth herein.

94. Defendants Brazell, Whitby, Kasten, Whitby, Talos and IBN have benefitted from the wrongful acts and omissions of the Defendants Brazell, Whitby and Kasten. Any distributions to Brazell, Whitby and Kasten and Talos in violation of Delaware Limited Liability Company Act 18-607 should be returned. As a result, the imposition of a constructive trust over and on the property and money transferred to and / or funds received by the Defendants is the only remedy that will adequately compensate Plaintiffs for the improper and / or fraudulent transfers and the unjust enrichment of such Defendants at Plaintiffs expense.

EIGHTH CAUSE OF ACTION
Fraudulent Transfer

95. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this Complaint as if fully set forth herein.

96. Defendants Brazell, Whitby, Kasten, Whitby, Talos and IBN have engaged in fraudulent transfers under Utah Code Ann. § 25-6-1 et. seq. the Uniform Fraudulent Transfer Act for which the Plaintiffs seek to have the transfers undone.

NINTH CAUSE OF ACTION

Derivative Action

97. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this Complaint as if fully set forth herein.

98. The Plaintiffs bring this claim as a derivative action under Rule 23a of the Utah Rules of Civil Procedure and allege: 1.) IBN could have brought an action to unwind or invalidate the Talos agreement and has not; 2.) the Plaintiffs were members at the time of the transaction complained of or the Plaintiffs' memberships thereafter devolved to the Plaintiffs by operation of law; 3.) this action is not a collusive one to confer jurisdiction on the Court that it would not otherwise have; 4) the Plaintiff's efforts to obtain the desired action include having demanded the relief sought herein in writing and verbally, extensive negotiations, and filing of prior claims in this Court seeking relief; and, 5.) the Defendants' have refused to consider the requested relief now sought from the Court. The Plaintiffs fairly and adequately represent the interests of all members similarly situated in enforcing the rights of IBN.

99. Plaintiffs request the Court order Defendants give notice to all IBN member and lien holders and any other interested party notice of this claim and that notice be ordered by the Court of any proposed dismissal or compromise be given to all members, lien holders and another interested party by the Defendants.

TENTH CAUSE OF ACTION

Request For Receivership

100. Plaintiffs re-allege and incorporate by this reference the preceding paragraphs of this Complaint as if fully set forth herein.

101. The assets of In-Store Broadcasting Network, LLC, In-Store Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch, LLC, In-Touch Media, LLC, Talos Partners, LLC are under the exclusive control of Robert V. Brazell, Von Whitby and Robert W. Kasten.

102. Robert V. Brazell's, Von Whitby's and Robert W. Kasten's management and control of In-Store Broadcasting Network, LLC, In-Store Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch, LLC, In-Touch Media, LLC, Talos Partners, LLC is jeopardizing the Plaintiffs' interests in the Defendant companies.

103. Robert V. Brazell, Von Whitby and Robert W. Kasten have communicated with the Plaintiffs and disseminated false and misleading information to the investors.

104. In-Store Broadcasting Network, LLC, In-Store Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch, LLC, In-Touch Media, LLC, Talos Partners, LLC through Robert V. Brazell, Von Whitby and Robert W. Kasten have failed to account to the investors for revenue, expenses and debt incurred or being incurred even though requested by under Utah statutes and in discovery herein.

105. The appointment of a Receiver is necessary to protect and preserve Plaintiffs' interest in In-Store Broadcasting Network, LLC, In-Store Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch, LLC, In-Touch Media, LLC, Talos Partners, LLC.

106. The Plaintiffs have no other remedy available to protect them from the Defendants continued conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

1. Awarding Plaintiffs compensatory damages in an amount to be proven at trial, but in no event less than \$3,000,000, jointly and severally;
2. Awarding Plaintiffs treble damages under Utah Code Ann. § 61-1-22(2);
3. For an order rescinding the purchases that Plaintiffs made and placing the parties in the position they held with respect to each other immediately prior to the sales described herein;
4. Awarding Plaintiffs pre-judgment and post-judgment interest;
5. Awarding Plaintiffs his attorneys' fees, expert witness fees, and other costs pursuant to Utah Code Ann § 61-1-22(2);
6. Awarding Plaintiffs punitive damages in an amount to be proven at trial but in no event less than \$3,000,000; and
7. Awarding such other relief as this Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

DATED this 3rd day of July, 2014.

DONALD H. FLANARY, JR., PLLC
PIA ANDERSON DORIUS REYNARD & MOSS LLC

/s/ John P. Mertens
Donald H. Flanary, Jr.
Adam L. Hoyt
John P. Mertens
Attorneys for Plaintiffs

VERIFICATION

STATE OF _____)
) :ss
COUNTY OF _____)

Steve Brazell, being duly sworn, deposes and says that he is a Plaintiff in the above action, that he has read the foregoing Paragraph 98 of the Fourth Original Complaint and knows the contents thereof, and that the same is true of his own knowledge.

Steve Brazell

SUBSCRIBED AND SWORN TO before me on this _____ day of _____ 2014, by
Steve Brazell.

NOTARY PUBLIC, State of _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of July 2014, a true and correct copy of the foregoing **FOURTH AMENDED COMPLAINT** was served via the Court's electronic filing system upon the following:

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Attorneys for Plaintiffs

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

THE ARMER TEXAS TRUST (AKA
TEXAS ARMER TRUST), et al.,
Plaintiffs,

vs.

ROBERT V. BRAZELL, et al.,
Defendants.

ROBERT V. BRAZELL, et al.,
Counterclaimants and
Third-Party Plaintiffs,

vs.

STEVE BRAZELL,
Counterclaim
Defendant

DANIEL KONDOS and DOES 1-15,
Third-Party Defendants

**FIFTH AMENDED
COMPLAINT**

Case No. 130900740

Judge Andrew H. Stone

The Plaintiffs by and through their undersigned attorneys of record, allege claims against the Defendants named herein as follows:

THE PARTIES

1. Plaintiffs, the Armer Texas Trust (aka Texas Armer Trust), A.T. Family Investment, LLC (fka Thomas Family Limited Partnership), the Avrin Investment Group, the Beals Family Revocable Trust, Lawrence P. Benkes, Victoria Townsend (fka Victoria Benkes), Suzanne Billingsly, Mark A. and Alexis C. Brausa, Jeffrey D. Brazell, Steve Brazell, the Brooks Family Trust Campbell Family Trust, Howard Cooper, Dave Cross, Jose and Juanita Cruz, the Curutchet Family Trust, Scott Day, Howard N. Esbin, June L. Esbin, Ronald Finken, David A. French, Piotr Gorodetsky, Vasily Gorodetsky, Scott and Cindy Hambrecht, Hitman, Inc., Craig S. Kagel, JAKL Industries, Tyler and Lindsey Labrum, Tiffany Lowery, Tom Mack, Jeff and Jennifer Mallas, Gary L. Mills, Peter J. McLaughlin, Michelle Nieto, Jeffrey Scott Reinecke, Flint Richardson, the Rusch Family Trust, Richard Schlesinger, the CCCM Living Trust, Red Rock Properties Group, Jeff and Tina Rogers, Quinn Smith, S. Kevin Smith, Philip J. Stoddart, Jason Straub, Ray A. Stokes, Anthony Tegano, Mark M. Truncalc and Scott Warner (Collectively "Plaintiffs") are individuals and entities who invested in the certain IBN entities.

2. Plaintiffs, Jeff Brazell, Vasily Gorodetsky and Piotr Gorodetsky are residents of Utah, and the remaining Plaintiffs are residents of other states. Together, the Plaintiffs invested in excess of \$2,124,900.00 with or through Defendants.

3. Defendant Robert Brazell ("Brazell") is a former and present officer, manager and employee of In-Store Broadcasting Network, LLC and In-Store

Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch LLC, In-Touch Media LLC and Talos Partners, LLC. He is a resident of Salt Lake City, Utah.¹

4. Defendants In-Store Broadcasting Network, LLC and In-Store Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch LLC and In-Touch Media LLC (collectively “IBN”) are Delaware limited liability companies with their primary offices in Salt Lake City, Utah.

5. Defendant Talos Partners, LLC (“Talos”) is a Delaware limited liability company with an office in Salt Lake City, Utah.

6. Defendant Von Whitby (“Whitby”) is a former and present officer, manager and employee of certain IBN entities and Talos. He is a resident of Salt Lake City, Utah.

7. Defendant Robert W. Kasten, Jr. (“Kasten”) is a former and present officer, manager and employee of certain IBN entities and Talos. He was a member of the U.S. Senate representing the State of Wisconsin. He is currently a resident of Washington D.C.

8. Defendant Robert E. Riley (“Riley”) is a former board member of Talos Partners, and manager of IBN Media LLC. He is a resident of Park City, Utah.

9. Defendant Robin Nebel (“Nebel”) was the President and CFO of IBN between 2007 and 2011. She is a resident of San Francisco, California.

10. Defendant Rob Wolf (“Wolf”) was at various times the President and CEO of IBN. He is a resident of Utah.

¹ Plaintiffs have information and believe Brazell is the owner of a partnership interest and the general partner in Robann Ltd. Brazell was the incorporator of Robann Media, LLC and its managing member.

11. Joel Ballestaedt ("Ballestaedt") was an officer, agent, servant or employee of the various defendants. He is a resident of Utah.

12. Defendants Does 1 to 15 are certain known and unknown individuals and/or entities that might have knowledge regarding allegations in the Plaintiffs' Complaint and/or might have been involved in the dissemination of false and/or misleading information and the failure to disclose material facts in connection with Plaintiff's purchase of IBN membership interests as alleged herein. Plaintiffs will amend this Complaint if and when and if the names of additional parties are identified through discovery.

JURISDICTION AND VENUE

13. The claims asserted are governed by Utah common law, the Utah Uniform Securities Act, Utah Code § 61-1-1 et seq., the Utah Revised Limited Liability Company Act § 48-2c-1 et seq., the U.F.T.A, Utah Code § 25-6-1 et seq., Utah Rule of Civil Procedure 23A, and the Delaware Limited Liability Company § 18-607.

14. Subject matter jurisdiction is vested in this Court pursuant to Utah Code § 78A-5-102, § 78B-3-205 and § 61-1-26.

15. Venue is proper in this Court under Utah Code § 78B-3-305 on the grounds that the principal defendants reside and have offices in Salt Lake County, State of Utah.

16. Venue is also proper in this Court under Utah Code § 78B-3-307 on the grounds that many of the misrepresentations and acts alleged herein were committed in whole or in part in Salt Lake County, State of Utah.

GENERAL ALLEGATIONS

17. Brazell, Whitby, Kasten, Nebel, Wolf, Riley, and Ballestaedt were or are officers, directors or managers of the Defendant entities and are therefore control persons as defined in Utah Code § 61-1-22(4) at the relevant times as referenced with particularity herein below.² In their respective positions as control persons, these Defendants managed and controlled, directly or indirectly, the management and actions of the Defendant entities and therefore they are personally liable, jointly and severally with and to the same extent as the other defendants.

18. Every IBN membership interest, every Robann Ltd. interest, and every Robann Media, LLC interest promoted, offered, or sold to Plaintiffs as referenced herein below with particularity constituted “securities” within the meaning of Utah Code § 61-1-13.

19. Brazell’s and IBN’s pattern of dishonest, fraudulent and illegal conduct began in June 2006 and continued unabated, without any break, hiatus or deviation until June of 2012. This pattern and course of business mandates the application of the continuous tort or continuous wrongdoing doctrine to the facts of this case as set out with particularity herein below.

SPECIFIC FACT ALLEGATIONS OF FRAUD

20. In January of 2004, Steve Brazell’s (“Steve”) company, Hitman, Inc., began providing marketing, branding and design services to IBN. Brazell was the CEO of IBN. This business relationship was ongoing, and in February of 2006, Steve was

² Brazell was or is an officer, director, partner and or manager of Robann Ltd. and Robann Media, LLC and is therefore a control person as defined in Utah Code § 61-1-22(4) at the relevant times referenced with particularity in this pleading.

approached by Brazell to consider an investment in IBN. Although Steve owned a handful of publically traded stocks, he had never invested in a private offering, and leaned heavily on his brother for advice. About the proposed investment, Brazell told Steve "it was going to be huge," and "that it was not a matter of if, but a matter of when." This was a false and material representation made to induce his brother to put money into In-Store Broadcasting Holding, LLC. In reliance on Brazell's representations, without knowledge of their falsity, Steve, within his rights, invested in In-Store Broadcasting Holding, LLC.

21. When Steve asked how much he should invest, Brazell suggested Steve put in "everything you can without putting your retirement at risk." Steve discussed the opportunity with his friend and business associate Scott Day ("Day"), and on February 22, 2006 they decided to invest \$25,000.00 each through Hitman, Inc., as "insiders," for a total of \$50,000.00.

22. During the last week of July and first week of August 2006, Steve and Day vacationed with Brazell in southern Utah. During this time, they discussed current and upcoming business opportunities. Brazell was increasingly enthusiastic about IBN.

23. IBN was a media company providing audio ads for shoppers in the retail sector, but was planning on expanding into video. Brazell was raising money to fund the video growth of IBN.

24. On July 11, 2006, shortly after returning from the vacation, Day sent an email to Brazell thanking him for his hospitality and continued a discussion Brazell had

started on the vacation about “putting together an investment group to buy the \$5million block of outstanding stock...”

25. Brazell responded the same day discussing details of the “opportunity” and stated that the current valuation of the company “is \$125 million on half and \$250 million on the second half,” and that “the company should be worth five to ten times this amount within 24 months.” Brazell responded again to Day on July 18, 2006 with a second email further discussing the details of the “opportunity”. These were knowingly false and material representations of fact, made by Brazell to induce Steve and Day to introduce the opportunity to potential investors. In reliance on Brazell’s representations, Steve continued to invest in In-Store Broadcasting Holding, LLC and Steve and Day began introducing the opportunity to potential investors, providing the information (provided them by Brazell) to the Plaintiffs throughout the course of the fraud.

26. With Brazell’s blessing and encouragement, and under his guidance and control, Steve and Day contacted potential investors including the Plaintiffs to raise the \$5,000.000.00.³ On July 19, 2006, Steve sent an email to Brazell asking if he could

³ Unless otherwise noted Plaintiffs mean the Armer Texas Trust (aka Texas Armer Trust), A.T. Family Investment, LLC (fka Thomas Family Limited Partnership), the Avrin Investment Group, the Beals Family Revocable Trust, Lawrence P. Benkes, Victoria Townsend (fka Victoria Benkes), Suzanne Billingsly, Mark A. and Alexis C. Brausa, Jeffrey D. Brazell, Steve Brazell, the Brooks Family Trust Campbell Family Trust, Howard Cooper, Dave Cross, Jose and Juanita Cruz, the Curutchet Family Trust, Scott Day, Howard N. Esbin, June L. Esbin, Ronald Finken, David A. French, Piotr Gorodetsky, Vasily Gorodetsky, Scott and Cindy Hambrecht, Hitman, Inc., Craig S. Kagel, JAKL Industries, Tyler and Lindsey Labrum, Tiffany Lowery, Tom Mack, Jeff and Jennifer Mallas, Gary L. Mills, Peter J. McLaughlin, Michelle Nieto, Jeffrey Scott Reinecke, Flint Richardson, the Rusch Family Trust, Richard Schlesinger, the CCCM Living Trust, Red Rock Properties Group, Jeff and Tina Rogers, Quinn Smith, S. Kevin Smith, Philip J. Stoddart, Jason Straub, Ray A. Stokes, Anthony Tegano, Mark M. Truncale and Scott Warner all of whom invested through the 2006 In-Store Broadcasting

forward an IBN power point presentation (PPT) to the investor group. Brazell responded, "Sure, use that one or I have the UBS presentation I'll send." Brazell continued to exercise control and provide direction, input and support. On July 19, 2006, Brazell provided industry news articles to Steve and Day to distribute to potential investors. Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

27. As investors began to show interest, Brazell responded to Day on July 24, 2006 in an email that Brazell would "continue to forward you information that I think might be helpful..." and also forwarded a Non-Disclosure Agreement for potential investors to sign. Providing further information for investors, on August 3, 2006, Brazell forwarded his biography and "The Opportunity" for distribution.

28. During this July 2006 period, to further induce Steve, Day and the Plaintiffs, Brazell made claims in regard to his roles at Overstock.com, including that he was the "company's President and CEO." Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. On April 30, 2014, the current, and then CEO at Overstock.com, Patrick Byrnes, provided a 6-page declaration disputing Brazell's claims and stated, "In October of 1999, we launched Overstock.com.

Holding, LLC subscription agreements and the Beals Family Trust, Tiffany Lowery, Jeffrey Scott Reinkecke and Richard Schlesinger who made their investments in In-Store Broadcasting Holding, LLC through Robann Ltd. or Robann Media, LLC in June and July 2007.

Brazell was not an employee of the company when we launched, had no position in the company, had no legal relationship other than shareholder, and was not welcome on the premises.” Brazell also led the Plaintiffs to believe that he had expertise taking companies from the start-up phase through successful Initial Public Offerings (IPOs), even though the truth was that Brazell was fired by Patrick Byrnes from Overstock.com three years before their IPO and played no role in the process. Brazell’s false statements about his role at Overstock.com have received widespread publicity to the point that his purported connection to Overstock.com has appeared on television and on many internet websites. Throughout the course of Brazell’s continuing fraud, his representations in regard to his role at Overstock.com were communicated to each of the Plaintiffs.⁴ These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

29. On August 3, 2006, Brazell claimed in a document sent to Steve and Day, to be “securing an additional \$100 million investment” from OchZiff Capital “for the purposes of providing the necessary capital to fully install audio and video assets,” that IBN had “over 17,000 retail locations under long-term contract for providing all of their in-store media.” Brazell also stated that the IBN stock “is a secure preferred security. It is

⁴ Brazell to this day continues to fraudulently assert that he was the founder of Overstock.com.

secured in that it has a liquidation right in 24 months and in the fact that it is the first money out.” And, that the company would “be worth 5 to 10 times its current value within twenty four months.” Brazell went so far as to claim in that same document, that “if, in fact, the company pursues a public offering within this time period, that value could be substantially higher and as a media firm, might receive a multiple as high as 40 times earnings.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

30. On August 10, 2006, Brazell sent to Steve and Day a second biography and “The Opportunity” document stating, “Rob in particular has committed to purchase \$10mm of this offering himself,” and that “He has allowed a few investors to purchase any amount of this \$10mm in increments of \$50k, with a maximum of \$5mm, all at 39 cents per share. This stock is fully secured and all previous offerings of stock will be subordinate.” And, “Rob Brazell currently owns in excess of 30% of the outstanding stock and will purchase any amount this offering that is not otherwise purchased by a small group of investors.” Brazell went on to state in this same document that “...the company will be worth at least ten times its current value in the very near future...” and “to find maximum value for their shareholders which will likely dictate a public offering in the next twelve months.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. Brazell did not have \$10,000.000.00 to

purchase this offering, nor did he ever invest \$10,000,000.00. OchZiff Capital did not invest \$100mm. The shares were not sold in increments of \$50,000.00 at 39 cents per share. The company was never worth ten times its value from 2006, nor was there a public offering in the next twelve months, or ever. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

31. On August 11, 2006, Brazell sent an email regarding a Terms Sheet to Day and Steve. Brazell emailed again on August 24, 2006 with more details and a “general feel for the deal.” Brazell writes, “I will have docs soon. In terms of heads up. Here is a general feel for the deal: 1.) Investors will purchase secure preferred stock for between .19 and .29 cent. 2) On the first \$12 million will be secured.” (Brazell discusses current secured equity.) “4.) This is an insider round. But, an insider is able to bring in outsider money equal to his existing equity ownership value and receive a warrant for every dollar or capital he brings in. Thus, I could probably assign you and Scott approximately .25-.20 cents of warrant coverage for every dollar you bring in. A warrant would carry no immediate tax event for you. So, if you raise \$10 million you would receive \$2 million in warrants at today’s value. If we get lucky and increase the value by ten times, your equity would be worth \$20 million. The investors take actual stock with all the security and guarantees; you get your warrants, nothing cute or fancy. Just a simple, clean transaction.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and

material representations of fact. They were made by Brazell to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC. "The Deal" would ultimately be nothing like what Brazell described. Brazell would keep 75% of all the warrants and Day and Steve would receive 12.5% each. Investors would not take actual stock. It was anything but a simple, clean transaction.

32. On August 28, 2006, Brazell sent an email to Steve and Day that the "deal has been approved by the owners." Two days later on August 30, 2006 the first draft of the "Investor Package" is received from Jim Kruse, ("Kruse") IBN's legal counsel. The same day, Brazell sent his first draft of the letter to Day and Steve to forward to potential investors with the aforementioned documents.

33. On August 31, 2006, Brazell sent the first Private Placement Memorandum (PPM) for investors. The PPM was for subscription to "In-Store Broadcasting Holding, LLC" member units. On the same day, Brazell sent an email to Steve and Day that said, "I just got back. I have not read these. It needs my personal letter I sent you to go with this. Now your real work begins. If anything jumps out we could wait one more day. Otherwise, go with it."

34. The next day, September 1, 2006, Steve and Day began forwarding the "Investor Packages" provided to them by Brazell to the Plaintiffs. Over time, all of the Plaintiffs were given these documents. Each of the packages included: 1) a cover letter drafted entirely by Brazell instructing the Plaintiffs what to do in connection with the investment and referencing all the attachments; 2) a letter dated August 30, 2006 from

Robann Ltd. and Brazell as its general partner; 3) a subscription agreement for In-Store Broadcasting Holding LLC offered in reliance on exemptions from registration provided in Section 4(2) of the Securities Act and Rule 506 of Regulation D promulgated thereunder and preemption from the registration or qualification requirements (other than notice filing and fee provisions) of applicable state laws under the National Securities Improvement Act of 1996; and, 4) a private offering term sheet for In-Store Broadcasting Holding LLC. These documents drafted entirely by Brazell instructed the recipients to review the documents, sign and date the subscription agreement and make a check for the subscription of the In-Store Broadcasting Holding, LLC shares to Robann Ltd. Finally the letter states, "Your subscription agreement and check will be submitted to the Robann Ltd. trust and share certificates will pass directly to you in your name. You should receive your share certificates within two weeks of submission." These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

35. The subscription agreement in the Investor Package was to subscribe to shares in In-Store Broadcasting Holding, LLC. The agreement set out in detail the terms under which the securities were being offered and terms and conditions of the agreement between In-Store Broadcasting Holding, LLC and the Plaintiffs.⁵

⁵ These Plaintiffs included the Armer Texas Trust (aka Texas Armer Trust), A.T. Family Investment, LLC (fka Thomas Family Limited Partnership), the Avrin Investment Group, Lawrence P. Benkes, Victoria Townsend (fka Victoria Benkes), Suzanne Billingsly, Mark A. and Alexis C. Brausa, Jeffrey D. Brazell, Steve Brazell, the Brooks Family Trust Campbell Family Trust, Howard Cooper, Dave Cross, Jose and Juanita Cruz, the

36. On September 5, 2006, Brazell sent an email to Steve cautioning him about larger investments. Brazell wrote, "Be very cautious how you proceed to represent or solicit the IBN opportunity. If you start soliciting larger investments you will most certainly run into bankers and brokers that do this for a living. We have a contracted banker in UBS. I intend to fully honor that commitment and contract. I have made an exception to talk to Bear Sterns. This is the very thing I was concerned about. If you have people capable of writing those checks I will talk to them. But, everyone knows someone that knows someone and suddenly the PPM is flying around the Internet and showing up at Investment Banks and back to UBS, etc..." Though it was not clear at the time, in retrospect, Brazell was concerned he was violating his existing agreements with IBN bankers, who at the same time were under contract to raise money for IBN.

37. During this September 2006 period, as potential investors began to review the documentation, questions arose. Neither Steve nor Day had the inside company information to answer the questions and relied 100% on Brazell to respond. Steve and Day forwarded questions via email to Brazell, he responded, and they forwarded the responses to the Plaintiffs. This process continued throughout the entire fraud.

38. On September 6, 2006, Brazell responded to a question about "Why is Great Hill taking money off the table?..." Brazell wrote, "We have out performed all our budget targets excepting a minimal short fall in sales. That said, revenue has outpaced

Curutchet Family Trust, Scott Day, Howard N. Esbin, June L. Esbin, Ronald Finken, David A. French, Piotr Gorodetsky, Vasily Gorodetsky, Scott and Cindy Hambrecht, Hitman, Inc., Craig S. Kagel, JAKL Industries, Tyler and Lindsey Labrum, Tom Mack, Jeff and Jennifer Mallas, Gary L. Mills, Peter J. McLaughlin, Michelle Nieto, Flint Richardson, the Rusch Family Trust, the CCCM Living Trust, Red Rock Properties Group, Jeff and Tina Rogers, Quinn Smith, S. Kevin Smith, Philip J. Stoddart, Jason Straub, Ray A. Stokes, Anthony Tegano, Mark M. Truncale and Scott Warner.

budget.” This was not true. At the end of 2006, liabilities had blown up to \$12,300,000.00 against revenues of only \$10,900,000.00 with a net income of negative (\$10,400,000.00). During Brazell’s tenure as CEO, liabilities would skyrocket from \$2,500,000.00 to over \$18,600,000.00. And, in regard to a question about booked orders versus planned for orders he responded, “We have approximately \$10 million of video orders already booked for 2007.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

39. In the IBN PowerPoint (PPT) document also distributed to the Plaintiffs, Brazell represented that the company expected to have \$85,000,000.00 in video orders in 2007 and \$75,000,000.00 in total video revenues. Both numbers were grossly exaggerated and untrue. In 2007, total revenues barely topped \$10,000,000.00. The PPT further projected almost 2,500 stores would be installed with video screens by the end of 2007. This was grossly exaggerated and untrue. The following year, on February 12, 2008, Brazell would admit in an email to the Board of Directors that their sales projections and assumptions were incorrect writing, “...I am concerned and disappointed with a massive disconnect between sales orders generating revenue and cash...” Additionally, Brazell claimed in the PPT that there were 24 patents filed. As of November 16, 2014 a search on the USPTO website under In-Store Broadcasting or IBN companies, only one patent can be found; number 7,945,636, and only five additional

applications filed. Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

40. On September 7, 2006, Brazell invited another of his brothers, Jeffrey D. Brazell, to invest and sent him the investment package. Jeffrey D. Brazell ultimately invested \$15,000.00 based on the foregoing representations. Around this same time, Brazell invited his father-in-law Piotr Gorodetsky and brother-in-law Vasily Gorodetsky to invest. Piotr invested \$100,000.00 and Vasily invested \$24,000.00 based on the same representations. These were knowingly false and material representations of fact. They were made by Brazell to induce these Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual reliance on these material representations each of these Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

41. On September 20, 2006, IBN's legal counsel, Kruse, began to raise concerns in regard to the legality of the current securities offering. He wrote, "To really go beyond the close circle of members and their associates to strangers without any company or industry knowledge would require a much larger undertaking. I understand that at this point the focus is on members, their immediate family business associates, and perhaps their close business associates, etc., all of whom will be accredited--sort of first and second degrees of separation, but no cold calls." Despite Kruse's statements, both

Kruse and Brazell knew the current securities offering was being made to investors outside of "...members, their immediate family business associates..." in other words, strangers.

42. In late September and early October 2006, Kruse and Brazell realizing the jeopardy they had put themselves in, began a cynical course of damage control. On October 2, 2006, Brazell formed a limited liability company known as Robann Media, LLC, even though, Brazell had already represented to the Plaintiffs in the August 1, 2006 "Investor Package," he would be running the transaction through Robann Limited Ltd.

The Kruse and Brazell damage control ruse continued with the creation of an operating agreement for Robann Media, LLC. Brazell then began sending out Robann Media Memoranda of Understanding and Operating Agreements to the Plaintiffs. It had become clear to Brazell and Kruse, that Brazell should not and could not sell shares directly to outsiders and that his personal trust entity and account should not be involved. Yet, Brazell continued to pursue investors and go after the Plaintiffs for money.

43. On November 4, 2006, Brazell wrote, "...If there are any stragglers large or small I've got one last chance. GHP [Great Hill Partners an investment firm] offered me up to another \$1.5 million then they will fill the rest. Let me know." Brazell's 'hurry-up or you will miss your opportunity' sales job further falsely misled the Plaintiffs.

44. To try and negate the illegality of the "outsider" investment, Brazell and Kruse proposed giving investors ownership in the new and different entity—Robann Media, LLC instead of In-Store Broadcasting Holding, LLC as stated in the PPM, and the entity from whom investors had purchased their shares. On October 26, 2006, Steve

wrote an email to Brazell and Kruse stating, "There may be a misunderstanding in regard to share certificates. All investors should be receiving IBN shares as promised NOT Robann, Media shares. Please confirm with Jim. Make sure no Robann shares are sent to investors, this would create a problem. Robann was to be a pass-through only." These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

45. Kruse responded, "No, we cannot issue IBN certificates to these strangers. These investors own securities in Robann Media, which represents an indirect interest in IBN true, but not a direct interest at this point. Otherwise, there would be an issue about where the options are going, and it would complicate the offering styled so far as to existing members and their affiliates. Robann Media meets this test the offering styled so far as to existing members and their affiliates. Robann Media meets this test because Rob is a manager of Robann Media." The original securities solicitation took place on September 1, 2006 to Plaintiffs, and Robann Media, LLC was not even created until over a month after that solicitation.

46. Steve responded to Kruse, "Please DO NOT send any Robann Media share certificates out. This was an important point with investors - they were to receive shares in IBN. If we cannot resolve, I will have to make an announcement and let investors opt out..." Brazell responded to Kruse, "As discussed a few minutes ago. Let's

you and I get together tomorrow and discuss.”⁶

47. On November 1, 2006, Kruse sent the revised drafts of the Robann Media Agreement. Steve responded on November 2, 2006, “Jim and Rob, after re-reading the documents and discussing with Scott, we recognize that this is the antithesis of what we had discussed with friends and associates. Many had asked the direct question in regard to whether or not they were investing in Robann Media and our response was “No, it will be an immediate pass-through. You will receive shares in IBN” as we were told. This makes us look uninformed at best and flat-out dishonest at worst. Rob, if this is the way it must be, then I think you should let them know that Scott and I were unaware of the regulation that caused this change and give everyone the opportunity to get their money sent back immediately via FedEx...” Brazell responded, “OK.” But, the Plaintiffs were never given the opportunity to opt out, or get their money back.

48. Although both Brazell and Kruse made written and oral claims that the shares would “be an immediate pass-through,” they were not. The Plaintiffs were never given their shares in In-Store Broadcasting Holding, LLC and were held in Robann Media LLC for almost 4 years, to the substantial personal gain of Brazell and detriment of investors. These were knowingly false and material representations of fact. They were made by Brazell and his counsel Kruse to induce the Plaintiffs to invest in In-Store

⁶ By this point, Brazell and Kruse had developed the scam to move each Plaintiff’s interest into Robann Media, LLC. Kruse and his firm, began a course of conduct that amounted to aiding and abetting securities fraud. Kruses’s conduct was supportive of Brazell’s continuous wrong-doing through the sale of the IBN’s audio assets to POP. On July 9, 2012, Brazell would describe Kruse’s conduct in the POP transaction as “deplorable.” Kruse and Brazell, developed devices, schemes, and artifices to defraud the plaintiffs, hide, conceal, and disguise the Defendants’ fraud until the summer of 2012 when Brazell, Whitby, and Kasten cashed out.

Broadcasting Holding, LLC. In actual reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

49. It was not until June 2012, that the Plaintiffs first learned that they had been defrauded when they received checks reflecting their ownership interest in an entity that did not even exist when they subscribed to In-Store Broadcasting Holding, LLC directly or through Robann Ltd. or Robann Media, LLC.

50. Brazell convinced Steve that he would get the Plaintiffs their In-Store Broadcasting Holding, LLC member units and that IBN was still a “huge win, with very little risk”, and on October 3, 2006 Steve wrote another check in the amount of \$50,000.00. Steve wrote yet another check on November 12, 2006 in the amount of \$40,000.00, and still another on December 4, 2006 in the amount of \$5,000.00. And, when IBN was unable to pay their bill to Hitman, Inc., Steve converted \$27,400.00 in outstanding debt to stock. Through his business Hitman, Inc., Steve invested \$172,400.00.

51. By October 31, 2006, Steve and Day had introduced investors that had given Brazell \$1,947,000.00. Despite multiple attempts over the next five years by Steve, Day, and the Plaintiffs to have In-Store Broadcasting Holdings, LLC shares distributed, Brazell kept them all in Robann Media, LLC to his substantial personal gain and to the detriment of the Plaintiffs. Holding the investors' shares and accompanying warrants in Robann Media, LLC, made Brazell the largest single owner of In-Store Broadcasting Holdings, LLC by far, giving him unchecked voting power and control of the company.

52. On November 10, 2006, Brazell, as the duly authorized officer of In-Store

Broadcasting Holding, LLC, accepted the Subscription Agreements from the Plaintiffs. This acceptance evidenced the Plaintiffs' money was taken by Brazell and that he bound In-Store Broadcasting Holdings LLC to the terms of the Subscription Agreements he accepted.⁷ Brazell later claimed in an email that he accepted the checks, made copies of the checks, deposited the checks, wrote a check to IBN, then forwarded everything to Kruse. It appears Brazell deposited the funds for the In-Store Broadcasting Holdings LLC, Subscription Agreements in Robann Ltd, his personal family trust account.

53. Among other things, the Subscription Agreements specifically provided: 1) the subscription agreement is to be registered on the books of In-Store Broadcasting LLC in the name of the undersigned at the company's principal office; 2) the subscription agreement is the entire agreement between the parties as to the purchase of the member units covered; and, 3) once the subscriber's payment is transferred to the operating account of the company the member unit certificates will be delivered to the subscriber. None of this was done as required by the subscription agreement. These were knowingly false and material representations of fact. They were made by Brazell and his counsel Kruse to induce the Plaintiffs to invest in In-Store Broadcasting Holding, LLC. In actual

⁷ These Plaintiffs included the Armer Texas Trust (aka Texas Armer Trust), A.T. Family Investment, LLC (fka Thomas Family Limited Partnership), the Avrin Investment Group, Lawrence P. Benkes, Victoria Townsend (fka Victoria Benkes), Suzanne Billingsly, Mark A. and Alexis C. Brausa, Jeffrey D. Brazell, Steve Brazell, the Brooks Family Trust Campbell Family Trust, Howard Cooper, Dave Cross, Jose and Juanita Cruz, the Curutchet Family Trust, Scott Day, Howard N. Esbin, June L. Esbin, Ronald Finken, David A. French, Piotr Gorodetsky, Vasily Gorodetsky, Scott and Cindy Hambrecht, Hitman, Inc., Craig S. Kagel, JAKL Industries, Tyler and Lindsey Labrum, Tom Mack, Jeff and Jennifer Mallas, Gary L. Mills, Peter J. McLaughlin, Michelle Nieto, Flint Richardson, the Rusch Family Trust, the CCCM Living Trust, Red Rock Properties Group, Jeff and Tina Rogers, Quinn Smith, S. Kevin Smith, Philip J. Stoddart, Jason Straub, Ray A. Stokes, Anthony Tegano, Mark M. Truncala and Scott Warner.

reliance on these material representations each of the Plaintiffs, without knowledge of the falsity of the representations and within their rights, invested in In-Store Broadcasting Holding, LLC.

54. The Plaintiffs relied on Brazell's representations in the September 1, 2006 Investment Package. The Plaintiffs acted in accord with Brazell's instructions in the September 1, 2006 Investment Package. The Plaintiffs never received the certificates for the securities they purchased from In-Store Broadcasting Holding LLC.⁸⁹

55. While continuing to grapple with the proper issuance of the securities the Plaintiffs had purchased, Brazell told the Plaintiffs it was better for them to stay in Robann Media, LLC and keep their shares under his control. On June 10, 2007, Brazell wrote "...The letter from Kruse will assure them that they own the interests in IBN and that Robann Media will continue to hold them for the time being. The benefit to them is obvious in that I was able to make lucrative demands this round." Brazell stated to investors on several occasions that the benefit of staying in Robann was because investors "would be treated just like me." Investors were not treated just like Brazell. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

⁸ This is true for those Plaintiffs that invested through the In-Store Broadcasting Holding, LLC, subscription, the Robann Media, LLC, subscription, and for Plaintiff Richard Schlesinger.

⁹ The Plaintiffs first discovered that they had been defrauded in June of 2012, when they were sent checks from an entity they never knew existed.

56. Brazell induced the Plaintiffs to invest the following amounts: Armer Texas Trust (aka Texas Armer Trust) \$20,000.00, A.T. Family Investment, LLC (fka Thomas Family Limited Partnership) \$100,000.00, the Avrin Investment Group \$85,000.00, the Beals Family Revocable Trust \$100,000.00, Lawrence P. and Victoria Benkes \$14,000.00, Suzanne Billingsly \$51,000.00, Jeffrey D. Brazell 15,000.00, Steve Brazell and Hitman, Inc., \$172,400.00, the Brooks Family Trust, \$10,000.00, the Campbell Family Trust \$25,000.00, Howard Cooper \$5,000.00, Dave Cross \$10,000.00, Jose and Juanita Cruz \$60,000.00, the Curutchet Family Trust \$10,000.00, Howard N. Esbin \$137,500.00, June L. Esbin \$137,500.00, Ronald Finken \$25,000.00, David A. French \$35,000.00, Piotr Gorodetsky \$100,000.00, Vasily Gorodetsky \$24,000.00, Scott and Cindy Hambrecht \$20,000.00, Craig S. Kagel \$20,000.00, Tiffany Lowery \$5,000.00, Tom Mack \$25,000.00, Jeff and Jennifer Mallas \$50,000.00, Gary L. Mills \$100,000.00, Peter J. McLaughlin \$15,000.00, Michelle Nieto \$3,000.00, Jeffrey Scott Reinecke \$20,000.00, Jeff and Tina Rogers \$50,000.00, the Rusch Family Trust \$15,000.00, the CCCM Living Trust \$82,000.00, Red Rock Properties Group \$63,000.00, Quinn Smith \$18,000.00, S. Kevin Smith \$146,500.00, Philip J. Stoddart \$7,000.00, Jason Staub \$50,000.00, Ray A. Stokes \$40,000.00, Anthony Tegano \$50,000.00 Mark M. Truncale \$35,000.00, Scott Warner \$24,000, and Richard Schlesinger \$150,000.00¹⁰

57. By November 17, 2006, Brazell was still trying to take money from investors. He wrote, "Steve, at some point we lose credibility but, we determined today to allow another \$1 million in this round. Don't go to existing participants. I assume we

¹⁰ The Beals Family Trust, Tiffany Lowery, Jeffrey Scott Reincke and Richard Schlesinger made their investments in In-Store Broadcasting Holding, LLC through Robann Ltd. or Robann Media, LLC in June and July 2007.

have already exhausted your circle but, I thought I would let you know.”

58. By the end of December 2006, Steve asked Brazell if there is any news that can be shared with the group and what the timing for distribution of warrants would be. Brazell responded on December 20, 2006, “I can do a call in January. I don’t know if we can issue warrants to anyone yet. I doubt it.”

59. When Plaintiffs invested in the first round, their shares came with warrants. All warrants were forfeited by investors and went into Robann Media, LLC under Brazell’s control. Brazell would seek to keep these warrants under his control for as long as possible. In later rounds, the Plaintiffs who invested were to receive 80% of the warrants, but Brazell would end up keeping these warrants under his control as well. On May 23, 2007, Brazell wrote, “The control we have now is that the security is the senior preferred in the company. Nothing can be invested without Robann approval. By this we have control...” The truth was that only Brazell had control. At a critical decision point two years in the future Brazell would state, “Technically no one needs “consent” from Robann Media owners. I am going to ask for it as a courtesy...”

60. In February of 2007, Steve wrote Brazell asking for news and wanted to send “at least one email per month” as updates. Brazell responded, “We should see a press release on the Ahold contract this week. We should also see a release on the TopSource contract (6800 stores). We had a record audio sales month in January. We received a \$2.1 million order yesterday from Warner Brothers...” and in regard to how many stores does IBN install per week? Brazell told Steve “We are still installing audio on a regular basis. I don’t have a daily number. I would guess 3000-4000 in 2007. Video

will average about 300 per month at pace. We begin building up pace with multiple teams in February...We have a Safeway pilot going up this month. We have Ralphs in March. Frys in May. Fred Meyer in May..." Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

61. On March 5, 2007, Brazell wrote, "No additional details. Tell them the company looks better than ever. We have some very big announcements. We have to keep it quiet for now." Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. Brazell continued to placate investors through knowing and intentionally false and exaggerated statements.

62. On April 5, 2007, Brazell wrote, "Some huge news coming but I can't discuss." No huge news ever came.

63. On April 30, 2007, Brazell responds to multiple questions from Steve including: 1) What is the status on Robann shares? "As soon as I know the structure of the new deal I will make a proposal to current Robann owners. The offer will include a choice. Either they will get their money back or they will have an option to own new preferred shares in the new company. As you recall the Robann Media offering included warrants with the shares/units. The warrants will likely become worthless in the new transaction. We have a few options I will discuss with you by phone." and 2) When will

we be able to distribute actual shares to members? "We will likely not distribute shares in IBN. There will likely be a new company and the new company will purchase assets from the existing company."¹¹ Brazell never intended to give the Plaintiffs the shares they had originally agreed to purchase in In-Store Broadcasting Holding, LLC. Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs.

64. By May of 2007, the Robann issues had still not been buttoned up. On May 22, 2007, Brazell wrote, "Steve, you're making this complicated. I have asked Jim to hold back on another Robann offering going forward. It was a huge issue for me and still keeps me awake some nights. Let's get the docs on this one done and leave it."

65. In June of 2007, Brazell continued to skirt security laws and seek more money from any source he could find even though it was another "internal round." On June 8, 2007, Brazell wrote, "OK Documents coming out next week. The challenge you will have with new investors is that there is almost no company information in this disclosure given that it is another internal round. You may have to send another presentation around like before. If we have interest I'll ask Jim Kruse to create some additional information." He continued, "I think you can tell investors that this is an insider round that they would get access to with appropriate protocol and legal documentation. You might be able to begin with the introduction from the last offering. It can't go out as part of the offering though." Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs.

66. In June of 2007, Brazell noted, "We will send out a letter to the Robann Media members by Wednesday of this week. The news is all good. They have already

¹¹ By this time, Brazell was trying to re-trade the deal he had made with the Plaintiffs.

seen a 5X increase in their investment...The letter from Kruse will assure them that they own the interests in IBN and that Robann Media will continue to hold them for them for the time being. The benefit is obvious in that I was able to make lucrative demands in this round.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. Brazell would continue to make lucrative demands for himself, while misleading investors to keep their shares under his control in Robann Media. This was a knowingly false and material statement of fact. It was made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

67. During this same time Kruse prepared new fund raising documents. On June 15, 2007, Brazell writes, “Jim, I’m fine with this with a few modifications. First, I am now opposed to the reverse split only because it gives me one more thing to explain. It makes people nervous. We will do this post hoc. Let’s focus on the positive math and how they now own two times as much of the company as they did before.”

68. Brazell continued to seek more money from Plaintiffs in June 2007. He wrote, “We plan to close the round by next Wednesday. Are you nudging the Robann Media owners?”¹² During virtually every contact with the Plaintiffs, Brazell would pump up the opportunities and downplay or even avoid discussing risk factors, while setting tight investment deadlines. Investors felt highly pressured to keep giving Brazell money.

¹² Brazell was seeking more investment from the In-Store Broadcasting Holding, LLC, subscribers.

69. On June 26, 2007, Day wrote Brazell, "Steve and I have gotten a number of panic calls today after people received their PPM packages. Their concern is that they are feeling some pressure from us to send in cash pretty quickly. That in conjunction with the risk factors that didn't come up on our conference call has got people a bit concerned..." Day then listed four main concerns; "1.) \$3.5mm loss (\$872k per mo.) for first 4 months in 07. How does the company get to \$600-700k profitability? 2.) Convergent Media invoice default situation. 3.) Convergent Media invoice for \$10 mm 4.) Payables issue..." Brazell responded, "We get up to EBITDA in the \$600-800k range later in the year once the 89 stores (stores in Houston) are built out and \$1 million per month in video revenue starts flowing." This never happened. Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

70. In July of 2007, Brazell made an announcement that IBN had secured \$23,000,000.00 in lease financing, providing the opportunity to install up to 500 additional stores in the near future without raising additional capital or increasing dilution. This turned out to be completely false. He provided a PPM Supplement dated July 3, 2007 under In-Store Broadcasting Holding, LLC that he requests all Plaintiffs sign. Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. Still, almost a year after taking Plaintiff's money, they have still

not been able to solve the Robann Media, LLC problem. Brazell wrote on July 7, 2007 “Scott, Steve, When the dust settles in the next two weeks let’s get Kruse to complete all the Robann Media documentation.” This never happened. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

71. During the same month Steve, Day, and another Plaintiff, Mark Brausa, made introductions to investors in California known as the “Capistrano Group.” Brazell agreed to compensate those involved in making introductions with warrants. In an ongoing pattern for Brazell, once again, he tried to hide the truth. On July 13, 2007, Brazell wrote, “The Capistrano group added \$250,000 (not \$500,000). I want Kruse to document a warrant finders fee for you so that I can get it ratified by the board. What percentage in warrants did we agree to? What are the names to whom the warrants will go? In what percentages? Any way to keep Steve’s name out of it and you guys distribute among yourselves?” This is yet another attempt by Brazell to keep the truth from his Board of Directors and Managers by “trying to keep Steve’s name out of it.” Members of the Board of Directors and/or Managers have expressed that Brazell had also kept the truth from them in regard to the Plaintiff’s investment, leading them to believe that Brazell had made the investment with his own personal funds from Robann Media.

72. On December 22, 2009, Brazell would make this statement about his CFO, Robin Nebel, “Please remember that Robin has no obligation or responsibility to communicate to Robann Media owners. She doesn’t know who they are. She doesn’t

have a record of them.”¹³ Yet, with regard to each Plaintiff for which Brazell accepted a subscription agreement, that agreement required their ownership interest to be recorded in the records of the company.¹⁴

73. Again, Brazell admits that the Robann Media situation is problematic and he is not comfortable bringing in large outside investors through the entity. After Day responded with the warrant numbers Brazell had requested, Brazell wrote, “Scott, this is a problem. We will need to talk. Did I agree to a 15% number previously? I thought you guys had a deal with me for Robann Media and we talked about a much lower number for Mark for bringing in outsiders because we did not feel comfortable pushing them through Robann Media...”

74. During the same month Steve contacted Ballestaedt, IBN’s Controller to discuss the Hitman, Inc., investment totals and converting the Hitman, Inc., outstanding balance into shares. Brazell responded to all on the string, “Will you follow up on this. Every little bit helps.”

75. As Plaintiffs continued to invest, Brazell continued to push money through his trust. On July 20, 2007, Brazell told one of the Plaintiffs, Richard Schlesinger, the offer is still being sold as “an insider opportunity” and checks were to be made to Robann, Ltd. During this same transaction, Ed Winfield, the individual making the introduction to Richard Schlesinger, sends an email stating, “Richard asked me where

¹³ Brazell was not only referring to the Beals Family Trust, Tiffany Lowery, Jeffery Scott Reinecke, and Richard Schlesinger, but also the In-Store Broadcasting Holding, LLC subscribers.

¹⁴ As to the Beals Family Trust, Tiffany Lowery, Jeffery Scott Reinecke, and Richard Schlesinger, Brazell had a duty to disclose to In-Store Broadcasting Holding, LLC, who the Robann Media LLC investors were.

does it have the share price. I told him that he was buying units in Robann at \$1000 and in turn Robann was getting shares at \$.04 and warrants that would be assigned to Richard.” Brazell responded, “Correct, The price is \$.04. Only 20% of the warrants are assigned to Robann Media; 80% pass to Richard.” In a follow up email to Schlesinger, he is told “Robann will be distributing shares of IBN to you directly in an estimated 120 days.” Again, those shares and warrants were never distributed.¹⁵

76. It was not until July 20, 2007, that Kruse finally prepared and sent an “outsider” package containing a Robann Media PPM. During the continued period of money raising, the Plaintiffs were slow to receive paperwork. In an email exchange with Barry Scholl from Kruse’s office, Barry suggested that paperwork not be sent to the Plaintiffs until the round is closed. Steve responded, “Ok. I’m getting a lot of emails from the Robann Investors – they have not received any paperwork and their checks were cashed some time ago. I need a definitive date that I can announce that paperwork will arrive.”

77. By late summer of 2007, multiple parties had become involved in making introductions to potential investors, and Kruse was becoming more concerned about obvious securities violations coming to light. He wrote, “All: To be a finder, one can only identify prospective investors and make introductions, but not participate in substantive presentations of the investment, comment on the value proposition, or basically participate in any of the conversations between the seller and the investor. If one crosses the line into substantive involvement in the sale, the person is required to be registered as

¹⁵ The Beals Family Trust, Tiffany Lowery, Jeffrey Scott Reincke and Richard Schlesinger made their investments in June and July 2007, but never received their shares in In-Store Broadcasting Holding, LLC.

a securities broker/salesman, which is usually to be avoided unless the person is really in the business. The participation of an unlicensed broker in the transaction gives the investor a private right of action for rescission of the investment that can be brought against both the company and the broker for the full amount of the investment. It also exposes everyone in the transaction to regulatory enforcement actions, both for being or using an unlicensed broker and for an inaccurate Form D, which is required to list the "brokers" used in the offering. This is a favorite area of regulatory concern. This is a serious compliance issue."¹⁶ Brazell wrote, "This from Jim Kruse. We have done a good job navigating this but wanted to remind you of the regulations."

78. By the fall of 2007, Kruse was still trying to balance the numbers on the Plaintiffs' investment totals. He noted that Brazell had sold \$139,000.00 directly to investors, all of which are Plaintiffs in this lawsuit. Kruse also wrote that in regard to the Plaintiffs' investment, "It looks like the books are out of balance by \$102,500."

79. By September 2007, paperwork has still not been sent to the Plaintiffs. Kruse finally sent an email for distribution to Brazell admitting that ownership has been confusing, and that Brazell had made it clear that the IBN interests and warrants would continue to be held in the name of Robann Media, LLC and not distributed to members at this time. He stated, "I do not expect that there would be a well-founded expectation by the Robann investors that they will be seeing any IBN paperwork in the foreseeable future." This was the antithesis of what the Plaintiffs had promised both verbally and in writing when the Plaintiffs had purchased the In-Store Broadcasting Holding, LLC shares

¹⁶ From Kruse's own keyboard comes the gravamen of this lawsuit. The Plaintiffs are in fact seeking rescission and the return of their money.

one-year prior, and in violation of the In-Store Broadcasting Holding, LLC Private Placement Memorandum. Further, the same was true for those that purchased their interests in June 2007, as documented in writing by Brazell in his email in regard to Richard Schlesinger's investment.

80. Still in October of 2007, Defendants were unable to reconcile the Plaintiffs subscriptions and investment dollars. On October 1, 2007, Kruse wrote to Nebel and Ballestaedt, "I am getting a lot of pressure to resolve the Robann subscriptions, etc. Do we really know how much money was received through Robann and from whom?"

81. Brazell admitted that investment dollars were sent to him, he cashed the checks then cut checks to IBN. On October 4, 2007, Brazell wrote to Kruse, "...If someone sent me a check, I copied it, deposited it, wrote a check to IBN, and sent all the paper work to Jim Kruse." In other words, Brazell took the Plaintiff's money, put it in his personal Robann Ltd., account, then on behalf of In-Store Broadcasting Holding, LLC, accepted subscription agreements in the name of the Plaintiffs, then bought shares in In-Store Broadcasting Holding, LLC, in the name of a third party (either Robann Ltd., or Robann Medial LLC), with a check from his personal Robann account without disclosing any of this to the Board of Directors, Managers, or officers of In-Store Broadcasting Holding, LLC, or the Plaintiffs.¹⁷

82. On October 19, 2007, Brazell provides an investor update. He writes, "We began installing shelf screens last week. We are ahead of schedule. We installed and trained each week doubling capacity each week as we go. We have seven stores up and running. Eight more next week. Then, ten stores every week this year (excepting some

¹⁷ This is securities fraud, aided and abetted by Kruse.

holiday breaks), then up to 25 stores per week by the end of January.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. This information was untrue. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

83. By the end of November 2007, Brazell wrote to Steve that he expected to take the company public and again stated why Brazell should keep control of Robann’s units. “I was with Wachovia Securities all day today. We have decided to file an S-1 for a public offering. This means that at best we will go out next November and more likely in February of 2009. It is always possible that someone come in to buy us before that...The PPM goes out today. Robann Media investors should cheer as the new price is .125 cents meaning that they tripled their investment plus warrants. We can arrange a call for later next month. I will suggest that given the process of IPO and potential sale that the Robann does not distribute units yet as I used this power to block a potential premature sale.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on

Brazell's representations.

84. The Capistrano Group was prepared to invest again, but this time Brazell did not want to pay any finder's fees, and again admits that the first round of fund raising was problematic. He wrote, "I don't want to have to reel this back in. It has been a mess and cost me with my board. I can't have this one come back to bite."

85. In January 2008, Steve wrote Brazell in regard to a phone conversation with IBN Controller Ballestaedt, still trying to resolve outstanding warrant issues. Brazell responds, "Joel is not familiar with the Robann deal and we don't want him to bc. Jim Kruse will handle the Robann warrants. He is waiting on Joel. We have our challenges with Joel. He is slow." Ballestaedt was IBN's Controller and should have been intimately familiar with every investment deal.

86. In mid-January 2008, Steve requested Brazell have a conference call with the Plaintiffs to provide updates. Brazell responds, "Let's put it off a couple weeks. Some very good things are happening and I will have good visibility by then." These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

87. On February 12, 2008, Brazell writes an email to the Board of Directors admitting that many of their sales projections and assumptions were incorrect. Brazell writes, "...I am concerned and disappointed with a massive disconnect between sales orders generating revenue and cash... We assumed that 100 stores would begin to

generate as much as \$1 million in revenue and cash as we began to draw down the existing orders. This has proven much slower in materializing than we thought it would...Our continued delays in the network roll-out during the past 2.5 years have proven to be a difficult obstacle for sales to say the least...We have \$1 million in AR very past due..." Brazell goes on to discuss eleven points with additional challenges and failed assumptions. He never provides this same critical information to the Plaintiffs. Brazell withheld this information to delay the Plaintiffs taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

88. Almost a year and a half after the initial investment by the Plaintiffs, Brazell had still not distributed any of the shares or warrants out of Robann Media, LLC or Robann Ltd. On February 25, 2008, Steve wrote in regard to the warrants due Steve and Day, "We don't have any documentation at all – just a very long string of emails with mismatched totals."

89. At this same time Brazell sent out the new Subscription Agreement for In-Store Broadcasting Holdings, LLC. As new investors began to show interest, Steve asked, "Do you have a new subscription agreement or is the one you sent me the other day for the large investor sufficient?" Brazell responded, "The one I sent the other day is sufficient."

90. On March 5, 2008, Brazell conducted a conference call making statements about progress and growth, and expressing a desire to communicate more now that the company was getting closer to various end zones. In regard to Brazell's statement about

ongoing regular communication one investor wrote, "I appreciate (Brazell's) desire for more communication...It also gives him a chance to collectively reset expectations if needed each month or so." Unfortunately, Brazell reduced communications and failed to set proper expectations for the Plaintiffs.

91. On March 6, 2008, Brazell responds to questions from Steve with claims that were either not true or grossly exaggerated. For example, when questioned about whether advertising revenues were less given the credit crisis at the time, Brazell responded, "No, sales continue to be strong." This was not true. Revenues declined from \$10,200,000.00 in 2007 to only \$8,400,000.00 in 2008, a drop of almost \$2 000,000.00. Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

92. Brazell stated on March 7, 2008 "We were profitable in December. We expect to lose approximately \$300,000.00 per month until June when we have enough stores installed (200) to generate more revenue. We have \$11,000,000.00 in orders we are running against our 100 stores. We have \$13,000.000.00 in additional proposals out. The faster we install stores and the more stores we have the faster the revenue grows." Brazell's statements were either false or grossly exaggerated to induce new investment, and to hide the truth and perpetuate Brazell's continuous and unabated attempt to hide his dishonest, fraudulent and illegal course of conduct. Under Brazell's direction, Steve and

Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

93. In 2007, IBN's net income was negative (\$9,000,000.00) on revenues of \$10,200,000.00. In 2008 IBN's net income was negative (\$11,100,000.00) on revenues of only \$8,400,000.00. During the first 8 years of Brazell's tenure as CEO, the net income went from negative (\$3,300,000.00) in 2003 to a negative (\$25,400,000.00) in 2009. Despite company revenues of over \$54,000,000.00 and investment of over \$47,300,000.00 for a total of \$101,300,000.00, Brazell had managed to bring the company to insolvency and the edge of bankruptcy by the end of 2009.

94. In April 2008, Steve contacted Brazell and asked him to place a call to some of the larger investors. Steve wrote, "Regular communication from someone at IBN with investors (especially larger ones) would go a long way..." Brazell responded, "...PR is the least of our worries or concerns now however. We don't have a lot to report."

95. In May 2008, Steve asked Brazell if he is still trying to secure legacy debt funding? Brazell responded, "No. We have received one term sheet. We will receive another by Monday. We may receive a third on Tuesday. We will gut it out until June 15th close."

96. By mid-May 2008, Brazell and Kruse had still not finalized the Robann interest agreements with Steve and Day.

97. In mid-June 2008, Steve asked about an investor update. Brazell responded, "Yes, there will be a call toward the end of the month..."

98. On June 30, 2008, Steve wrote, "Seems like a simple investor communication every 30 days would go a long way. In your March conference call you announced that you expected to have another call in 30 days..." Brazell responded, "...I can't give any investor any news at all right now. I understand that people would like to know lots of things. I continue to provide far more than is legally required. I will provide more when I can." These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

99. On August 11, 2008, Steve wrote, "Maybe we can schedule a call even if you don't have an announcement. Even just bring everyone up to speed..." Brazell responded, "We will have an announcement. Let me get through the week." These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

100. On August 21, 2008, Mark Brausa an investor close to the Capistrano Group reported, "They [the Capistrano Group investors] are so irate with Rob and IBN about the complete lack of communication that they are talking about legal action..." and

“...how he [Dennis Narlinger] has written off his investment and feels like he gave money to a couple of Columbians who disappeared into the jungle...” On August 22, 2008 Brazell wrote, “We had a good call with the Capistrano boys; including Dennis [Narlinger]. They were very happy.” These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

101. By mid-October 2008, Steve again asked about updates. Brazell responded, “Maybe by the end of the month. There is really nothing to say yet. We are still working on a couple deals.” These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

102. On November 10, 2008, Brazell addressed the Plaintiffs via a phone conference. He remained upbeat and positive on IBN. Brazell needed to raise more money and continued to target existing investors in the new round. Investor concern was growing as was their need for up-to-date information. Steve expressed this to Brazell and he responds on November 18, 2008, “Steve we will be fine. I have seen this 100 times. Don’t worry. The PPM will go out tomorrow or Thursday. I will do conference calls. Wait until you see the investor letter.” These were knowingly false and material

representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

103. During this time, Brazell had also been trying to raise money from various private equity firms. One responds, "Here's the deal: Founders, common and prior investors are wiped out (this company belonged to your debt holders months ago). New industry standard option pool put in place Bob Tillman should be retained. You and your team are over your head and have a credibility gap (\$3mm of liabilities became \$10mm became 22?) Sorry, but this is hard stuff and your clean up will not be clean enough. All bridge money converts along side Rho. You stop calling your model self-funding. Pardon the tough love, but its time to get real. You have a great opportunity. I hope can help build it."

104. On November 14, 2008 Steve Gormley from Great Hill Partners resigned from the Board of IBN.¹⁸ Over the course of the fraud, 3 additional key board members would ultimately resign.

105. On November 21, 2008, Nebel, the Chief Financial Officer of IBN sent a letter to IBN interest holders, but not to the Plaintiffs. That letter stated "The company is insolvent..." She goes on to say "If the reorganization cannot be completed in two weeks the Company will file for bankruptcy..."

¹⁸ Great Hill Partners was the largest single investor in the IBN scam with an investment of \$21,000,000.00. Ultimately Great Hill Partners to escape Brazell sold its interest back to IBN for pennies on the dollar.

106. Toward the end of Nebel's November 21, 2008 letter she stated, "An investment group in which Robert Brazell is a principle has indicated interest in investing in this round of financing if there are available interests after all existing owners are given an opportunity to invest." That investment group was Talos.

107. On November 25, 2008, Brazell sent an email to all Robann Media, IBN Interest Owners headlined, "URGENT AND CONFIDENTIAL." He stated that, "The Company is insolvent as outlined in the Private Placement Memorandum that you will receive in the next few days. Its liabilities far exceed its assets." And, that the company was proposing reorganization.

108. Brazell represented in this email that "...he and his two investment entities Robann Ltd. and Robann Media will take an equal distribution to every other investor..." Brazell wanted to appear that he was treating everyone equally, when in fact his personal trust Robann Ltd. was moved into Talos with all of Brazell's ownership. Brazell further stated "...all your Robann Media interests will be converted into IBN common interests. Brazell told the Plaintiffs that he had made no commitment to invest in this round. What he failed to tell the Plaintiffs was that they would be virtually wiped out when they were converted to IBN common interests, and that although Brazell had made no commitment, his company Talos had. Ultimately, Brazell would end up diluting the Plaintiff's ownership in the company from approximately 16.7% to an estimated 0.001%. Brazell would end up with almost 80% of IBN through his company, Talos.

109. The Plaintiffs were led to believe, based on information they had obtained that if Brazell could not raise the money that he had made up his mind to personally put additional capital into IBN in late November 2008, and that the Plaintiffs each and all

would be treated like Brazell. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

110. On December 31, 2008, Steve and Day sent another update to the Plaintiffs under Brazell's instruction. IBN said that they had "very strong months in November and December that put them back in the black as projected." And, that "IBN is operating in day-to-day business mode and is waiting to receive all outstanding documents before they can completely subscribe this round with any of the larger interested parties." This was not true. Revenues had plummeted in 2008 by almost \$2,000,000.00. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

111. By January 5, 2009, the numbers had changed. In another email update the Plaintiffs were told, "If you have not and do plan on investing, please wait. IBN is finalizing new numbers this week for this round."

112. On April 2, 2009, another update was sent and the Plaintiffs were told, "...Strong sales in December through March are keeping the company in the black or

near black.” Again, this was not true. In 2009, liabilities had ballooned to over \$18,600,000.00 with revenue of only \$10,600,000.00. Net income was a negative (25,400,000.00). And that, “[Brazell] had orchestrated a bridge loan to take care of some of the critical accounts payable and expected to finalize funding in April.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

113. The Plaintiffs are also told that, “IBN will have the financial means to execute on their business plan, meet commitments and take advantage of market opportunities.” And, the Plaintiffs “should be receiving direct shares from IBN at the close of this round.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

114. In a letter dated April 29, 2009 from Brazell, the Chairman and Managing Member of Talos Partners to Nebel, Brazell stated, “Talos Partners has agreed to fund In-store Broadcasting Network upon terms articulated in the Private Placement Memorandum dated November 21, 2008, and amended and extended April 13, 2009.

There shall be no contingencies associated with the funding excluding the representations made regarding current creditors. Funding shall take place as follows: \$2,000,000.00 on or before May 18, 2009, \$2,000,000.00 on or before June 15, 2009, \$1,000,000.00....”¹⁹

These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

115. On May 21, 2009, the Plaintiffs are updated and told that IBN had launched their new web site, and that “Sales continue to be strong,” and a new announcement would be forthcoming in regard to a big win for the national sales team. And, that with “Muzak in Chapter 11 IBN continues to bolster it’s roster of prominent clients and increase market share.” They are also told that “Funding is imminent” and upon closing the Plaintiffs will have IBN stock. Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

116. On August 10, 2009, the Plaintiffs received an update letter from Steve under the direction of Brazell, (Steve noted that he had not reconnected with Brazell “since yesterday”). The Plaintiffs were told “we will be receiving a formal update via a letter or email from IBN through their counsel Jim Kruse.” And ...“it will lay out the

¹⁹ Talos defaulted on its agreement, but nothing was done to protect the Plaintiffs who were owners of In-Store Broadcasting Holding, LLC.

investment from Brazell's private equity firm and potentially include information on what that means to us in regard to shareholder value moving forward." The Plaintiffs were told that "...IBN continues to post strong sales numbers, and that there may be opportunities on the horizon that could bode well for investors if IBN can finally resolve debt issues and continue to grow their balance sheet." These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

117. On September 30, 2009, Steve sent an email to the investment group stating, "As all of you, I'm waiting for information in regard to the finalization of the IBN/Talos/Prisa deal. I am anxious to understand what it means to each of us as investors and how it affects our value as shareholders." And, that he did not have any new details. He stated that he was told by Brazell that some vendors are receiving payments and the "new Yogurt Channels are going on-line. Good signs." Under Brazell's direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

118. On October 26, 2009, Brazell wrote, "We continue to work hard through very hostile economic times. We plan to send out a communication document this week or next. We are still finalizing several related transactions and we want to send one clear,

complete document. In sum, I am hopeful (though not certain) that the transactions, relationships, and structures that we are contemplating will have approximately the same or close to the same equity outcome while providing a better upside scenario.” Under Brazell’s direction, Steve and Day forwarded this information provided by Brazell to the Plaintiffs. These were knowingly false and material representations of fact. They were made by Brazell to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

119. On December 21, 2009, IBN through Nebel wrote, “Dear IBN Interest Holder, IBN finally has an offer for funding that we would like to close by the end of this year. A Private Placement Memorandum has been mailed to you and should be delivered to you the middle of this week. In order to complete the funding, we need your consent. Please review the documents and sign the ballot and proxy, which should be the second page in the document package, and return it to us either via email, fax or mail by the end of the year. If you have any questions about the transaction, please call or email me. Happy holidays and thank you for your continued support of IBN.” This was not true, and they did not receive all of the Plaintiff’s consent.

120. The same day, Steve responded to Ballestaedt and Nebel and wrote, “IBN’s lack of information and updates has created substantial angst in our investment group at best and animosity at worst. IBN has lost investor trust. I will expect the current PPM will have the most recent financials. Does it also contain 2010 projections? Please forward any information relevant but not contained in the PPM to me (including 2010

projections if not contained in the PPM) either via email or via USPS to PO Box 370648, Las Vegas, NV 89137. I have promised a complete review with a competent legal and accounting team with a full report to our investment group BEFORE signing any documentation from IBN. I trust the entire group will be looking forward to that review and having additional questions answered before signing and returning any documentation. I understand that we may also request a full audit if deemed necessary. The sooner we are in receipt of the information the sooner we can get started with our review. Based on the Holiday schedule, I cannot determine if the review will be completed before the end of the year. You are remiss in your assumption that you have continued support from investors when you fail to communicate relevant and timely information...”

121. Brazell responded via email on December 22, 2009. The key points include: 1) “Please remember that Robin [Nebel] has no obligation or responsibility to communicate to Robann Media owners. She doesn’t know who they are. She doesn’t have a record of them.”; 2) “Technically no one needs “consent” from Robann Media owners. I am going to ask for it as a courtesy and in an effort to communicate with the members.”; 3) The economics are almost identical to the failed PPM last year. This is generous to the owners; to say the least.”; 4) “Rob Wolf and I made huge concessions.”; 5) “None of the employees will receive any payment to their loans (from salaries and wages they contributed); and, 6) “IBN is a breath away from going out of business.”

122. As of December 2009, Brazell had stated that the CFO of In-Store Broadcasting Holding, LLC, the company in or from which the Plaintiffs had bought their interests did not even know who the Plaintiffs were, nor that the Plaintiffs were even

investors. Further, Brazell stated that the CFO of In-Store Broadcasting Holding, LLC had no obligation to provide the Plaintiffs any information.

123. On December 24, 2009, Brazell sent Steve an email that stated, "Attached are three documents. Please distribute them to the Robann Media members that you know. We sent them to many others already."

124. On December 26, 2009, Steve forwarded the information to the group and provided Brazell's and Kruse's telephone numbers for direct contact with questions. On December 27, 2009, the information was sent again from Steve with a note, "Sorry. Once again per a legal request."

125. On December 30, 2009, Steve sent a request to Kruse and Nebel stating, "as discussed on Monday's call we were all expecting a response in regard to the Robann member's dilution yesterday, but have not heard from anyone. What I am simply requesting is to know exactly what one dollar of investment in Robann will be worth when converted over to IBN common stock in this new transaction." Now, almost five months after the closing of the new deal, Plaintiffs still have not received their shares, nor do they even know the value. Brazell withheld this information to hinder the Plaintiffs ability gather the information needed to determine their status, thus delay the Plaintiffs taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

126. On April 27, 2010, Steve sent an email to Kruse asking "...please advise when Robann will be dissolved and members will receive their shares direct in IBN..."

Steve received no response from Kruse.

127. Beginning in January 2010, Brazell, Whitby, and Kasten, in conjunction with Talos “reorganized” the IBN entities in what some have described as a reverse merger. The Plaintiffs are informed and believe that Brazell owned, or owns at least 75% of Talos. On January 12, 2010, Brazell formed an entity known as IBN Media, LLC which came to own 100% of In-Store Broadcasting Holding, LLC, the entity in which the Plaintiffs held signed subscription agreements accepted by In-Store Broadcasting Holding, LLC, or Robann Ltd., or Robann Media LLC, through its duly authorized officer Brazell.²⁰ The Plaintiffs believe that Talos owns an estimated 80% of IBN Media, LLC and that Brazell owns an estimated 75% of Talos.

128. On December 2, 2010, Brazell, Whitby, and Kasten, formed an entity known as In-Touch, LLC. Plaintiffs have information that cause them to believe Brazell, Whitby, and Kasten, used this “insider” knowledge along with funds from Talos to acquire additional ownership in IBN and aggressively dilute the Plaintiffs. The Plaintiffs have information that cause them to believe that because Brazell, Whitby and Kasten were officers and managers of each of the entities involved in the transaction, that it was fraught with conflict of interest and self-dealing. On February 25, 2014, Brazell, Whitby and Kasten (the IBN Media LLC Board of Managers), would admit in writing in the “IBN Media LLC Consent Solicitation” document that there was a conflict of interest. They write, “The terms of the foregoing organization of IBN Media LLC, the capital

²⁰ According to Brazell the Beals Family Trust, Tiffany Lowery, Jeffrey Scott Reinkecke and Richard Schlesinger hold their investments in In-Store Broadcasting Holding, LLC though Robann Ltd. or Robann Media, LLC.

contribution to be provided by Talos, and the number of Units to be issued to Talos were negotiated by the boards of managers of both entities, which were the same persons. Accordingly, all such persons were subject to conflicts of interest.”

129. Plaintiffs believe that sometime after the formation of In-Touch, LLC that Brazell, Whitby, Kasten and Talos took the video business of In-Store Broadcasting Holding LLC and transferred those assets into In-Touch, LLC. Plaintiffs believe that Brazell, Whitby, Kasten and Talos took the audio business of In-Store Broadcasting Holding LLC and transferred those assets into In-Store Broadcasting Network, LLC.

130. With the acquisition of the In-Store Broadcasting Holding, LLC by IBN Media, LLC the value of the interests that the Plaintiffs had paid for were substantially diluted. It was after this aggressive dilution brought about by the actions of Brazell, Whitby, Kasten, IBN Media, LLC and Talos that the Plaintiffs finally received any interest from any IBN entity controlled, managed and operated by Brazel, Whitby and Kasten. The problem was that the Defendants were not only 4 years late, but that Brazell, Whitby and Kasten did not even deliver the securities the Plaintiffs had purchased. This was securities fraud.

131. On May 3, 2010, the Plaintiffs began to receive interests from IBN, although not in In-Store Broadcasting Holding, LLC, but in a completely different entity, IBN Media, LLC. The Plaintiffs originally signed PPMs in In-Store Broadcasting Holding, LLC, or Robann Ltd., or Robann Media, LLC (for shares in In-Store Broadcasting Holding, LLC) but were held hostage in Brazell’s holding companies Robann Ltd. or Robann Media, LLC for over 4 years, before ultimately receiving shares

in a completely new and different company; an entity that was created for the sole and exclusive purposes of unlawfully diluting the Plaintiffs and enriching Brazell, Whitby, and Kasten.

132. On May 3, 2010, under the direction of Brazell and Wolf, Steve sent an email to the Plaintiffs stating, "First, as you should be aware, you either have or will be receiving your shares in IBN Media, LLC, you will no longer be members of Robann, LLC. As a former Manager of Robann, LLC, it was important that I try and provide you as much information as possible. Now, as members of IBN, Media, LLC, Rob Wolf, the new CEO will be communicating with you directly. I had a nice conversation with Rob Wolf today and am confident he will provide relevant and timely information. It is important that you now direct your questions to Rob Wolf - I am simply an investor like you and do not represent IBN Media, LLC, in any way. One of the big questions is - what are my new shares in IBN Media, LLC, valued at today? The only yardstick for valuation is the recent Talos investment. Rob Wolf has asked that this and ALL other questions be directed to him. His assistant will amass any questions then he will address all of them to all shareholders..." These were knowingly false and material representations of fact.

They were made by Brazell and Wolf to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

133. Through the summer 2010, the Plaintiffs still did not have an understanding of what had happened to their investment.

134. After little communication from IBN, a plaintiff, Kevin Smith, left a

message for Rob Wolf on December 2, 2010. Rob Wolf responds saying that his timing was “fortuitous” as Brazell had just told him that he wanted to have a shareholder call on the 20th or 21st of the month. No such call occurred. This was a knowingly false and material representation of fact. It was made to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell’s representations.

135. The Plaintiffs now have reason to believe that Brazell, Whitby, Kasten and Talos had defaulted on their agreement to fund In-Store Broadcasting Holding, LLC in April 2009, via emails from Kruse and Nebel. On December 9, 2010 an email is written to Nebel asking, “Is Talos current on its payments to IBN?” She replied, “No.” When Kruse is asked, “[Do] you believe Talos, has fulfilled its responsibility to IBN for funding? Kruse replies, “Opinions vary. On on cash basis, I believe Talos is about \$650,000 short, but RVB believes that Talos is “excused” from funding because of IBN’s failure of performance.”²¹ Although both IBN’s CFO and legal counsel believed that Talos was in default of their agreement, due to a conflict of interest and self-dealing, Brazell, Whitby, and Kasten, ignored their duties to the Plaintiffs and did not unwind the transaction or put Talos into default.

136. On March 29, 2012, Ballestaedt provided an update to plaintiff James Armer that stated, “Yes I confirmed with Rob Brazell that he is planning on giving an update, but don’t have the date yet...” No update occurred. This was a knowingly false

²¹ The Managers of the relevant IBN entities and Talos at this point in time were the same. This was not an arms-length transaction.

and material representation of fact. It was made to induce the Plaintiffs to delay taking action on any potential concern they might have had. The Plaintiffs relied on these representations without knowledge of the falsity of the representations and were within their rights to rely on Brazell's representations.

137. On May 31, 2012, news broke that Gladstone Capital Corporation invested \$12,000,000.00 in In-Store Audio Network. Steve shared the news with the Plaintiffs, but states, "...I do not know what this means for us as investors."

138. On June 1, 2012, the Plaintiffs became aware that the liquidity event they had all been waiting for had occurred. Steve wrote an email to Gladstone stating, "Please be notified that an investment group that funded over \$1,947,000 into In-Store Broadcasting Network in 2006 will aggressively pursue Gladstone, Talos, Rob Brazell, POP Radio, In-Store Audio Network, and any and all connected individuals or entities to re-secure our investment. We claim an interest in any In-Store Broadcasting transaction and will file a lawsuit to support our claims."²²

139. On June 4, 2012, Kruse responded with, "IBN Media acknowledges the investment of your group that represents membership in IBN Media. IBN Media is pleased that after years of very difficult operations that left it with about \$28 million in past due obligations to creditors, some of which had reduced their claims to judgments, it has been able to sell its audio assets and operations to POP Radio for \$12.0 million in cash. This transaction is the result of vigorous arm's length negotiations between the parties and was unanimously approved by the board of managers of IBN Media. The net

²² Gladstone Capital Corporation was the investment banking house that funded the POP Radio transaction, the liquidity event referenced in ¶137.

proceeds received have been used to pay, typically with a deep discount, approximately \$11 million in creditor claims, leaving \$5.3 million for an initial distribution to members. The resolution of additional creditor claims and the collection of closing date accounts receivable should permit an additional distribution. This distribution is being made to all members pro rata in accordance with their interest in IBN Media. IBN Media was able to retain its in-store video project, which has additional value that may generate further returns to IBN Media's members. IBN Media is now completing an explanatory letter to all members that will accompany the initial distribution in the next few days. Please feel free to contact Rob (917-325-3400) or have your attorney call me if you wish to discuss what has happened and what is happening."

140. Jon S. Liland from Sheehan Phinney Bass & Green (representatives of Gladstone) responded to Kruse shortly thereafter and expresses concerns that IBN is making premature distributions. He writes, "I read your email from earlier this afternoon with some concern. As you know, Section 5.4 of the March 9, 2012 agreement between IBN and POP reads as follows: "Seller shall pay all of its obligations when due and shall not dissolve, wind-up, liquidate or make any distribution of the proceeds received pursuant to this Agreement until Seller's payment, or adequate provision for the payment, of all of the Excluded Liabilities." "Excluded Liabilities" includes all liabilities of IBN other than those assumed by POP, including both direct and contingent liabilities, and known and unknown liabilities. It appears that any distribution of proceeds to IBN's members at this point would be in violation of Section 5.4. To begin with, under the APA, IBN has contingent liability to POP for misrepresentations and other breaches of the APA of up to \$5 million, which runs for eighteen months following closing- has

adequate provision been made for this contingent liability? One of the purposes of Section 5.4 is to ensure that the indemnification protection POP negotiated for is not worthless because IBN has distributed all of its assets following closing. Furthermore, have all creditors listed in APA Schedules 5.9(a) and (b) been paid, with releases? Have all other IBN creditors been paid, and all contingencies addressed? Your email appears to indicate that there remain \$17 million in unpaid past due balances (\$28M minus \$11M in resolved past due amounts), so this seems very doubtful. How will these obligations be paid? Please advise. Beyond the terms of the APA, the proposed distributions also appear to violate § 18-607 of the Delaware LLC statute. You should be aware that Delaware law permits direct recovery by creditors, including POP, of distributions made to LLC members under these circumstances.”²³ Although Brazell, Whitby, Kasten, and Kruse were fully aware that multiple liabilities still existed; including the Plaintiff’s claims, they quickly liquidated the funds.

141. On June 3, 2012, IBN released a press release titled, “POP Radio Acquires In-Store Broadcasting Network (IBN) Combined Entity Rebranded as The In-Store Audio Network.

142. On June 4, 2012, Steve sent an email to Kruse asking about distributions and urging him not to make any payments until there was resolution of the Plaintiff’s

²³ Brazell, Whitby, and Kasten went forward with a distribution from the POP transaction in June of 2012, in the face of Steve’s concern about the distribution expressed in writing to Gladstone, Brazell, Whitby, Kasten and Kruse. Even further, Brazell, Whitby and Kasten proceeded with the distribution in the face of Gladstone’s counsel’s statement that any such distribution would be in direct violation of section 5.4 of the POP Asset Purchase Agreement. Brazell, Whitby, and Kasten paid themselves at least \$4,077,468.00 out of the POP transaction.

concerns. Steve wrote, "Have any distributions been paid from the POP deal to shareholders, management, owners, employees, vendors, or other? If so, how much were they paid and when? Please provide a detailed breakdown. If not, please provide the breakdown of proposed payouts. I also urge you not to make any payments at this time, or if payments have been made, not to make any additional payments. We are not interested in contacting Rob Brazell. We have found information disseminated by him to be less than accurate."

143. Shortly after June 6, 2012, Steve received a check from In-Store Broadcasting Network LLC for \$3,369.09, his return on his \$172,400.00 investment. Other Plaintiffs received checks around the same time. On average, the Plaintiffs had lost over 97% of their investment. Many of the Plaintiffs, including Steve, did not cash their checks. Brazell later stated that there was no money in the account to cover those checks, resulting in a complete and total loss for these Plaintiffs.

144. Brazell had effectively reduced the Plaintiff's ownership in the company that the Plaintiffs had purchased interests in, from approximately 16.7% to an estimated 0.001%. Managers, executives and other key defendants, including Brazell, Whitby, and Kasten received millions as a return on their investment, and hundreds of thousands paid as "management fees" from the POP transaction, wiping the Plaintiffs out. Now that the dust had settled, Plaintiffs came to the realization that while they had lost almost everything, Brazell, Whitby, Kasten, and other insiders, had pocketed over \$4,000,000.00.

145. On July 9, 2012, Brazell would turn on Kruse. He wrote in an email,

“Sadly. I wonder who’s side Kruse is on...I would like some pressure to have him forgive any bills he has accrued since the POP deal. The Oleksik deal is awful. The way he handled POP is deplorable. Extracting \$1 million in fees by hiding my fees and Talos’ fees in the POP legacy creditor debt list is underhanded. He has handled Mark and Robert Riley terribly. He has handled you and George terribly.”

146. On June 19, 2012, Steve contacted attorney Mark Pugsley. On July 21, 2012, the Plaintiffs, through Pugsley, entered into a tolling agreement with the Defendants that tolled the statute of limitation until January 31, 2013.

CLAIMS AND CAUSES OF ACTION

FIRST CAUSE OF ACTION (Violation of Utah Uniform Securities Act)

147. Plaintiffs rely on ¶’s 20-146 for the particular facts supporting this cause of action.

148. The In-Store Broadcasting Holding, LLC and Robann Ltd. and Robann Media, LLC membership interests that were sold to Plaintiffs constitute “securities” within the meaning of Utah Code § 61-1-13 as plead in ¶’s 20, 21, 34, 35, 52, 53, 54 and 56.

149. In connection with the offering of securities in In-Store Broadcasting Holding, LLC and Robann Ltd., and Robann Media, LLC, Plaintiffs invested in, and expected to receive, an ownership interest in In-Store Broadcasting Holding, LLC, and they did not, as plead in ¶’s 20, 21, 34, 35, 52, 53, 54, 56, 59, 125, 126, 130 and 131.

150. In connection with the purchase and sale of these ownership interests, throughout the course of dealings between the Plaintiffs and Defendants, Defendants Brazell, IBN (through its officers, managers, and employees), Talos IBN (through its officers, managers, and employees), Whitby and Kasten, willfully (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material facts or omitted to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices, and a course of business that operated as a fraud or deceit upon Plaintiffs in connection with their purchase of IBN membership interests, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

151. Further, in an effort to induce Plaintiffs to invest yet more money, and/or delay taking action on any potential concern that might develop regarding their ownership interest, Defendants willfully (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material facts or omitted to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices, and a course of business that operated as a fraud or deceit upon Plaintiffs in connection with their purchase of IBN membership interests, as plead in ¶'s 41-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

152. Plaintiffs suffered damages in that they purchased IBN membership interests in reliance upon the negligent and misleading statements of Defendants as alleged herein in ¶'s 56.

153. Plaintiffs would not have purchased these interests at the prices they paid, or at all, if they had been aware of the true facts concerning IBN or the conduct of its officers, directors and employees, as plead in ¶'s 20-145.

154. Plaintiffs only discovered the true facts concerning these transactions in June of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, the Defendants actively concealed the true facts from the Plaintiffs, as plead in ¶'s 19, 41-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

155. Defendants' conduct, as alleged herein, constitutes violations of the Utah Uniform Securities Act, and specifically Utah Code § 61-1-1, as plead in ¶'s 148-154.

156. At the time Defendants made the representations or omitted to state material fact in connection with Plaintiffs' purchases of IBN membership interests they knew all of the material facts upon which Plaintiffs' claims in this matter are based, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

157. Defendants' representations in connection with the offering of IBN membership interests as alleged herein were untrue statements of material facts and/or Defendants omitted to state material facts concerning the sale of these securities to Plaintiffs, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

158. As a direct and proximate result of Defendants' violations of the Utah Uniform Securities Act Plaintiffs have been damaged in the amount of \$2,124,900.00 to be proven at trial, but in no event less than the amounts of their principal investments.

159. Defendants Brazell, Whitby, Kasten, Riley, Nebel, Wolf and Ballestaedt are or were control persons jointly and severally liable for all acts alleged herein pursuant to Utah Code § 61-1-22(1) and (4).

160. Because Defendants' actions as alleged herein were reckless and intentional Plaintiffs are entitled to receive treble damages, costs, and attorney's fees pursuant to Utah Code Ann. § 61-1-22(2).

SECOND CAUSE OF ACTION **(Fraudulent Misrepresentation)**

161. Plaintiffs rely on ¶'s 20-146 for the particular facts supporting this cause of action.

162. Defendants made certain representations in connection with the offering of IBN membership interests to Plaintiffs as plead in ¶'s 20, 21, 34, 35, 52, 53, 54, 56, 59, 125, 126, 130 and 131.

163. The Defendants' representations concerned then existing material facts were false, and Defendants knew that their representations were false when made, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

164. Alternatively, Defendants' misrepresentations were made recklessly, knowing that they had insufficient knowledge upon which to base such representations, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

165. Defendants' false representations were made in order to induce Plaintiffs to purchase IBN membership interests, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

166. Plaintiffs reasonably relied on Defendants' false representations, and were unaware of their falsity.

167. Plaintiffs only discovered the true facts concerning these transactions in June of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, the Defendants actively concealed the true facts from the Plaintiffs, as plead in ¶'s 19, 41-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86,

87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

168. In reliance on Defendants' false representations, Plaintiffs purchased over \$2,124,900.00 of IBN membership interests to their detriment.

169. As a direct and proximate result of Defendants' false representations, Plaintiffs have been damaged in the amount of \$2,124,900.00 to be proven at trial, but in no event less than the amounts of their principal investments.

170. Defendants' fraud constitutes willful and malicious conduct with a manifest disregard of, and a knowing and reckless indifference for, the rights of Plaintiffs and, as such, Plaintiffs are entitled to punitive damages in an amount to be proven at trial, but in no event less than \$6,374,700.00.

THIRD CAUSE OF ACTION
(Fraudulent Inducement and Rescission)

171. Plaintiffs rely on ¶'s 20-146 for the particular facts supporting this cause of action.

172. As alleged herein, Defendants made false and misleading statements to Plaintiffs and omitted to state material facts with the specific intent to fraudulently induce Plaintiffs to purchase IBN membership interests, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

173. Defendants knew that such statements and omissions were intentionally false and misleading, and involved material facts about the company, as plead in ¶'s 20-

22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

174. Defendants made the statements and omissions with the intent that Plaintiffs would rely on such false and misleading statements and omissions, and agree to purchase IBN membership interests, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

175. In making these purchases, Plaintiffs relied on the false, misleading and negligent statements and omissions alleged herein.

176. Plaintiffs only discovered the true facts concerning these transactions in the last few months of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, Defendants actively concealed the true facts from them, as plead in ¶'s 19, 41-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

177. Based on Defendants' fraudulent inducement, Plaintiffs are entitled to rescind their purchases of IBN membership interests.

FOURTH CAUSE OF ACTION **(Promissory Estoppel)**

178. Plaintiffs rely on ¶'s 20-146 for the particular facts supporting this cause of action.

179. Defendants made representations and promises in connection with IBN membership interests as set forth with particularity above, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

180. Plaintiffs acted with prudence and in reasonable reliance upon Defendants' promises and representations in making their decisions to purchase these securities. In addition to the paragraphs set out in ¶'s 46, 49, 53, 74, 76, 78, 79 and 178.

181. Defendants knew that Plaintiffs would rely and relied upon their representations and promises in connection with the offering, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

182. Defendants knew all material facts surrounding their representations and promises in connection with the offering, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

183. Plaintiffs only discovered the true facts concerning these transactions in June of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, the Defendants actively concealed the true facts from the Plaintiffs, as plead in ¶'s 19, 41-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

184. As a direct and proximate result of Plaintiffs' reliance on Defendants' promises and representations, Plaintiffs have been damaged in the amount of \$2,124,900.00.

FIFTH CAUSE OF ACTION
Civil Conspiracy

185. Plaintiffs rely on ¶'s 20-146 for the particular facts supporting this cause of action.

186. Defendants Brazell, Whitby, and Kasten, and each of them, knowingly joined and entered into a conspiracy to, among other things, defraud Plaintiffs, as plead in ¶'s 127-145.

187. Pursuant to the conspiracy Defendants, and each of them, agree to make false and misleading statements to Plaintiffs as alleged herein or to make material omissions, and to engage in conduct with the specific intent to defraud and harm Plaintiffs, as plead in ¶'s 127-145.

188. Each of the misrepresentations and omissions alleged herein were overt acts undertaken in furtherance of these conspiracies, as plead in ¶'s 127-145.

189. Plaintiffs relied on the false, misleading and negligent statements and omissions that were part of the conspiracy in purchasing their interests in IBN.

190. As a direct and proximate result of Defendants' conspiratorial acts, Plaintiffs have been damaged in the amount of \$2,124,900.00.

SIXTH CAUSE OF ACTION
(Common-Law Fraud)

191. Plaintiffs rely on ¶'s 20-146 for the particular facts supporting this cause of action.

192. As alleged herein, Defendants made representations of fact in connection with the offerings of shares in IBN membership interests, in connection with mergers and financing transactions, and in an effort to induce Plaintiffs not to sell their membership interests, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

193. These representations were false, and Defendants knew that these representations were false when made, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

194. The false representations were made in order to induce Plaintiffs to invest in IBN membership interests, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

195. Plaintiffs reasonably relied on Defendants' false representations, and were unaware of their falsity, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-

73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

196. In reliance on Defendants' false representations, Plaintiffs purchased IBN membership interests to their detriment and/or delayed taking action regarding any concern they might have regarding their membership interests, as plead in ¶'s 20-22, 25-34, 36, 38-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

197. Plaintiffs only discovered the true facts concerning these transactions in June of 2012 when they retained counsel and began investigating the facts relating to their investment. Prior to that time, the Defendants actively concealed the true facts from the Plaintiffs, as plead in ¶'s 19, 41-44, 47, 48, 50-52, 54, 55, 57-73, 75, 77, 81-83, 86, 87, 90-92, 95, 97-99, 102, 105-110, 112-116, 118, 119, 121, 122, 127-131, 134-136, 138-140, and 143-145.

198. As a direct and proximate result of Defendants' false representations, Plaintiffs have been damaged in the amount of \$2,124,900.00.

199. Defendants' fraud constitutes willful and malicious conduct with a manifest disregard of, and a knowing and reckless indifference for, the rights of Plaintiffs and, as such, Plaintiffs are entitled to punitive damages in an amount to be proven at trial, but in no event less than \$6,374,700.00.

SEVENTH CAUSE OF ACTION

Constructive Trust

200. Plaintiffs rely on ¶'s 20-146 for the particular facts supporting this cause of action.

201. Defendants Brazell, Whitby, Kasten, Whitby, Talos and IBN have benefitted from the wrongful acts and omissions of the Defendants Brazell, Whitby and Kasten. Any distributions to Brazell, Whitby and Kasten and Talos in violation of Delaware Limited Liability Company Act 18-607 should be returned. As a result, the imposition of a constructive trust over and on the property and money transferred to and / or funds received by the Defendants is the only remedy that will adequately compensate Plaintiffs for the improper and / or fraudulent transfers and the unjust enrichment of such Defendants at Plaintiffs expense, as plead in ¶'s 127-145.

EIGHTH CAUSE OF ACTION
(Fraudulent Transfer)

202. Plaintiffs rely on ¶'s 20-146 for the particular facts supporting this cause of action.

203. Defendants Brazell, Whitby, Kasten, Whitby, Talos and IBN have engaged in fraudulent transfers under Utah Code Ann. § 25-6-1 et seq. the Uniform Fraudulent Transfer Act for which the Plaintiffs seek to have the transfers undone, as plead in ¶'s 93, 103, 105, 107 and 127-145.

NINTH CAUSE OF ACTION
(Derivative Action)

204. While the Plaintiffs rely on ¶'s 20-146 for the particular facts supporting this cause of action, the Plaintiffs would further direct the court to ¶'s 127-145.

205. The Plaintiffs bring this claim as a derivative action under Rule 23a of the Utah Rules of Civil Procedure and allege: 1) IBN could have brought an action to unwind or invalidate the Talos agreement and has not; 2) the Plaintiffs were members at the time of the transaction complained of or the Plaintiffs' memberships thereafter devolved to the Plaintiffs by operation of law; 3) this action is not a collusive one to confer jurisdiction on the Court that it would not otherwise have; 4) the Plaintiff's efforts to obtain the desired action include having demanded the relief sought herein in writing and verbally, extensive negotiations, and filing of prior claims in this Court seeking relief; and, 5.) the Defendants' have refused to consider the requested relief now sought from the Court. The Plaintiffs fairly and adequately represent the interests of all members similarly situated in enforcing the rights of IBN.

206. Plaintiffs request the Court order Defendants give notice to all IBN member and lien holders and any other interested party notice of this claim and that notice be ordered by the Court of any proposed dismissal or compromise be given to all members, lien holders and another interested party by the Defendants.

TENTH CAUSE OF ACTION
(Request for Receivership)

207. Plaintiffs rely on ¶'s 20-146 for the particular facts supporting this cause of action.

208. The assets of In-Store Broadcasting Network, LLC, In-Store Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch, LLC, In-Touch Media, LLC, Talos Partners, LLC are under the exclusive control of Robert V. Brazell, Von Whitby and Robert W. Kasten.

209. Robert V. Brazell's, Von Whitby's and Robert W. Kasten's management and control of In-Store Broadcasting Network, LLC, In-Store Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch, LLC, In-Touch Media, LLC, Talos Partners, LLC is jeopardizing the Plaintiffs' interests in the Defendant companies.

210. Robert V. Brazell, Von Whitby and Robert W. Kasten have communicated with the Plaintiffs and disseminated false and misleading information to the Plaintiffs.

211. In-Store Broadcasting Network, LLC, In-Store Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch, LLC, In-Touch Media, LLC, Talos Partners, LLC through Robert V. Brazell, Von Whitby and Robert W. Kasten have failed to account to the the Plaintiffs for revenue, expenses and debt incurred or being incurred even though requested by under Utah statutes and in discovery herein.

212. The appointment of a Receiver is necessary to protect and preserve Plaintiffs' interest in In-Store Broadcasting Network, LLC, In-Store Broadcasting Holdings, LLC, IBN Media, LLC, In-Touch, LLC, In-Touch Media, LLC, Talos Partners, LLC.

213. The Plaintiffs have no other remedy available to protect them from the Defendants continued conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

1. Awarding Plaintiffs compensatory damages in an amount to be proven at trial, but in no event less than \$2,124,900.00, jointly and severally;
2. Awarding Plaintiffs treble damages under Utah Code Ann. § 61-1-22(2);
3. For an order rescinding the purchases that Plaintiffs made and placing the parties in the position they held with respect to each other immediately prior to the sales described herein;
4. Awarding Plaintiffs pre-judgment and post-judgment interest;
5. Awarding Plaintiffs his attorneys' fees, expert witness fees, and other costs pursuant to Utah Code Ann § 61-1-22(2);
6. Awarding Plaintiffs punitive damages in an amount to be proven at trial but in no event less than \$6,374,700.00; and
7. Awarding such other relief as this Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

DATED this ____ day of _____, 2014.

DONALD H. FLANARY, JR., PLLC
PIA ANDERSON DORIUS REYNARD & MOSS
LLC

/s/ John P. Mertens
Donald H. Flanary, Jr.
Adam L. Hoyt
John P. Mertens
Attorneys for Plaintiffs

VERIFICATION

STATE OF UTAH)
) :ss
COUNTY OF SALT LAKE)

Steve Brazell, being duly sworn, deposes and says that he is a Plaintiff in the above action, that he has read the foregoing Paragraphs 208 - 2013 of the Fifth Original Complaint and knows the contents thereof, and that the same is true of his own knowledge.

Steve Brazell

SUBSCRIBED AND SWORN TO before me on this _____ day of _____
2014, by Steve Brazell.

NOTARY PUBLIC, State of Utah

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ____ day of _____ 2014,
a true and correct copy of the foregoing Fifth Amended Complaint was served via the
Court's electronic filing system upon the following:

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