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Case Information

Case Title	THE ARMER TEXAS TRUST, et al. vs. BRAZELL, ROBERT V, et al.
Case Number	130900740
Case Type	Miscellaneous Civil
Judge	JOHN PAUL KENNEDY
Court Name	3RD DISTRICT COURT - SALT LAKE

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FIRST AMENDED COMPLAINT - IBN.pdf	Amended Complaint First
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Mark W. Pugsley (Utah Bar #8253)
Maria Heckel (Utah Bar #10761)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543

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), 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, 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

FIRST AMENDED COMPLAINT

Case No. 130900740

Judge: Kennedy

JURY TRIAL DEMANDED

TRUST, RED ROCK PROPERTIES GROUP, S.
KEVIN SMITH, PHILIP J. STODDART, RAY
A. STOKES, and MARK M. TRUNCALE,

Plaintiffs,

v.

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

Defendants.

The above-named 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, 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, and Mark M. Truncale, (Collectively "Plaintiffs") are individuals and entities who invested approximately \$2 million in IBN Media and or In-Store Broadcasting Network.

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 nearly \$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 (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.

10. Defendant Rob Wolf was at various times the President and CEO of IBN.

11. 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

12. 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.

13. 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.

14. 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

15. 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 at "IBN." Plaintiffs also each received a Confidential Private Offering Term Sheet dated August 31, 2006 in connection with this sale of IBN membership interests.

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

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

18. 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.

19. 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.

20. In order to induce Plaintiffs to invest in IBN 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.

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

22. Subsequently, after signing subscriptions agreements with IBN, Plaintiffs were told by 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 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.

23. 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.

24. Plaintiffs were told that 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, 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.”

25. In fact, Brazell used the combined shares then owned by Robann to position himself to control IBN and to maneuver himself into the position of CEO. Upon information and belief, 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.

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

27. 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.

28. Because he controlled all of the Plaintiffs shares through Robann, and controlled Talos, 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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 Rob, IBN never asserted that Talos had breached the agreement and never terminated the contract. 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.

34. Finally, when the company consummated a transaction with POP Radio – one of the liquidity events that everyone had invested and hoped for – Talos and Brazell were enriched

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.

35. 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.

36. 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.

37. Defendants Brazell, Whitby, Kasten, Riley, Nebel and Wolf 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.

CLAIMS AND CAUSES OF ACTION

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

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

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

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

41. 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.

42. 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.

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

44. 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.

45. 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.

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

47. 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.

48. 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.

49. 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.

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

51. 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)

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

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

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

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

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

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

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

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

60. 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)

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

62. 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.

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

64. 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.

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

66. 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.

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

FOURTH CAUSE OF ACTION
(Promissory Estoppel)

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

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

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

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

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

73. 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.

74. 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)

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

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

77. 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.

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

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

80. 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)

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

82. 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.

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

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

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

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

87. 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.

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

89. 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.

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 \$2,000,000, 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 29th day of March 2013.

RAY QUINNEY & NEBEKER P.C.

/s/ Mark W. Pugsley

Mark W. Pugsley

Maria Heckel

Attorneys for Plaintiffs