

CAUSE NO. DC-12-05586-G

GEORGE KONDOS and	§	IN THE DISTRICT COURT
DANIEL KONDOS,	§	
Plaintiffs,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
IN-STORE BROADCASTING HOLDING,	§	
LLC, IN-STORE BROADCASTING	§	
NETWORK, LLC, ROBERT V. BRAZELL,	§	
IN TOUCH MEDIA, LLC, TALOS	§	
PARTNERS, LLC, IBN MEDIA, LLC., and	§	
MARK OLEKSIK,	§	
Defendants.	§	134 TH JUDICIAL DISTRICT

PLAINTIFFS' SECOND AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, George Kondos and Daniel Kondos (collectively, "Plaintiffs" or "Kondos") and file this suit against IBN Media, LLC ("IBN Media"), In-Store Broadcasting Holding, LLC ("IB Holding"), In-Store Broadcasting Network, LLC ("IB Network"), Robert V. Brazell ("Brazell"), In Touch Media, LLC ("In Touch"), Talos Partners, LLC ("Talos"), and Mark Oleksik ("Oleksik")(collectively, "Defendants") and would respectfully show the following:

I.
LEVEL THREE DISCOVERY PLAN

1. Plaintiffs respectfully request discovery be conducted under a Level 3 discovery control plan in accordance with Rule 190.3 of the Texas Rules of Civil Procedure.

II.
PARTIES

2. Plaintiff Daniel Kondos is an individual residing in Dallas County, Texas with his principal place of business in Dallas County, Texas.

3. Plaintiff George Kondos is an individual residing in Collin County, Texas with his principal place of business in Dallas County, Texas.

4. Defendant In-Store Broadcasting Holding, LLC is a Delaware limited liability company and may be served with process by serving its registered agent for service, **Corporation Service Company, at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808**. IB Holding may alternatively be served pursuant to Article 2.11 (B) of the Texas Business Corporations Act, by delivering a copy of the Petition and Citation to the Secretary of State of Texas, and the Secretary of State causing the Petition and Citation to be delivered to **Corporation Service Company, at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808**.

5. Defendant In-Store Broadcasting Network, LLC is a Delaware limited liability company and may be served with process by serving its registered agent, **Joel Ballstaedt at 175 S. Main Street, Suite 220 Salt Lake City, Utah 84109**, OR its registered agent, **Corporation Service Company, at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808**. IB Network may alternatively be served pursuant to Article 2.11 (B) of the Texas Business Corporations Act, by delivering a copy of the Petition and Citation to the Secretary of State of Texas, and the Secretary of State causing the Petition and Citation to be delivered to **Joel Ballstaedt at 175 S. Main Street, Suite 220 Salt Lake City, Utah 84109**, OR **Corporation Service Company, at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808**. TEX. BUS. CORP. ACT Art. 2.11 (B).

6. Defendant Robert V. Brazell is an individual and may be served with process at his place of business, **3173 E. Carrigan Canyon Drive, Salt Lake City, Utah 84109**, or his

residence, 1530 S. Indian Hills Drive, Salt Lake City, Utah 84108, or wherever he may be found.

7. Defendant In Touch Media, LLC is a Delaware corporation and may be served with process by serving its registered agent, Robert V. Brazell, and may be served with process at his place of business, **3173 E. Carrigan Canyon Drive, Salt Lake City, Utah 84109**. In Touch Media, LLC, may alternatively be served pursuant to Article 2.11 (B) of the Texas Business Corporations Act, by delivering a copy of the Petition and Citation to the Secretary of State of Texas, and the Secretary of State causing the Petition and Citation to be delivered to Registered agent for In Touch Media, LLC, **Robert V. Brazell, 3173 E. Carrigan Canyon Drive, Salt Lake City, Utah 84109**.

8. Defendant Talos Partners, LLC is a Delaware corporation and may be served with process and may be served with process by serving its registered agent, **Corporation Service Company, at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808**. Talos Partners, LLC may alternatively be served pursuant to Article 2.11 (B) of the Texas Business Corporations Act, by delivering a copy of the Petition and Citation to the Secretary of State of Texas, and the Secretary of State causing the Petition and Citation to be delivered to its registered agent, **Corporation Service Company at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808**.

9. Defendant IBN Media, LLC, is a Delaware Limited Liability Company, and may be served through its Registered Agent, **Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, DE 19808**. IBN Media, LLC, may alternatively be served pursuant to Article 2.11 (B) of the Texas Business Corporations Act, by delivering a copy of the Petition and Citation to the Secretary of State of Texas, and the Secretary of State causing the

Petition and Citation to be delivered to its registered agent, **Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, DE 19808.**

10. Defendant Mark Oleksik is an individual residing in Colorado and may be served with process at **11802 E. Fair Avenue, Greenwood Village, CO 80111-5716**, or wherever he may be found.

III. JURISDICTION AND VENUE

11. Jurisdiction is proper in Texas because the transaction occurred in Texas and the Leasing Facility Agreement was performable in Texas. Venue is proper in Dallas County pursuant to TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1) and (2) because all or a substantial part of the events or omissions giving rise to the claims occurred in Dallas County, Texas and at the time Plaintiffs' causes of action accrued, Defendant Rob Brazell was a resident of Dallas County, Texas.

IV. FACTUAL BACKGROUND

12. In 2007, KCT Leasing LC ("KCT"), an entity owned and/or controlled by George and Dan Kondos, entered into various lease agreements with IB Network whereby IB Network leased equipment from KCT. IB Network provided in-store audio and video advertising for retail stores such as The Kroger Company ("Kroger") and the leased equipment was installed in the stores. IB Network was wholly owned by IB Holding.

13. In addition to KCT's relationship with IB Network, Dan Kondos has had a longstanding business and personal relationship with Rob Brazell, often loaning him money for both personal and business pursuits. From late 2009 through early 2011, Brazell lived in Dan

Kondos's house in Dallas County and essentially ran the Defendants' business from Dallas during that time.

14. As a result of these relationships, in the spring of 2008, Brazell approached Kondos for help. IB Network owed Kroger \$500,000 and did not have the funds to make the payment. Following meetings in Dallas, Kondos agreed to fund the requested \$500,000.00 and the transaction was documented initially by a Memorandum of Understanding and later by a Leasing Facility Agreement, Promissory Notes, Revised Limited Liability Company Agreements, Subscriptions Agreements and Warrants.

15. Pursuant to the terms of the Leasing Facility Agreement, Kondos was to receive the following:

- (1) 6,250,000 Class 2008 Senior Preferred Ownership Interests in IB Holding at \$0.08 each for an aggregate of \$500,000;
- (2) \$500,000 plus 10% interest from IB Holding in the event IB Holding did not return \$500,000 to Kondos within six months; and
- (3) Warrants to purchase 41,500,000 Class K Preferred Interests in IB Holding upon the occurrence of certain designated events.

16. In addition to the stock received by Kondos under the Leasing Facility Agreement, Kondos also holds ownership interests in Talos, an entity in which Brazell owns over 70%. This agreement was documented at a board meeting and is reflected on various ownership spread sheets prepared by Brazell.¹

17. A couple of months ago, Kondos learned that IB Network sold its audio assets as part of an asset sale to POP Radio for \$12,000,000.00. As a result of the sale, distributions were made to various shareholders with the largest, approximately \$4,000,000.00, going to Brazell. When Kondos did not receive any distributions, they began asking questions and investigating

¹ The spreadsheets reflect that George and Dan Kondos each own 4%. Kondos contends that the correct ownership percentage is actually 5%.

Brazell's actions over the previous year. Based on information and documents received from another IB Holding stockholder, Kondos has learned that, unbeknownst to them, Brazell restructured the entities a couple of years ago and put himself in a much better position, to the detriment of the other shareholders and creditors.

18. As a result of the restructure, Plaintiffs believe IB Holding was merged into a new entity, IBN Media, and IB Network's audio and video businesses were split apart through the creation of another new entity, In Touch, which was formed to take ownership of IB Network's video assets, including the Kroger relationship.² The new entity, IBN Media, is owned primarily by Talos. As a result of the recent POP Radio asset sale, IB Network is now essentially a shell entity. In Touch is still a viable entity and is currently in negotiations to sell its video assets which, if successful, will result in another significant infusion of capital and distribution to IBN Media and Talos's shareholders.

19. Although George and Dan Kondos held Class 2008 Senior Preferred Ownership Interests in IB Holding, they were not notified of the merger transaction and based on the documentation received to date, it does not appear that their interests were properly disclosed or transferred to IBN Media. The merger also triggered various other rights of Kondos under the Leasing Facility Agreement, Notes and Warrants, including the right to exercise and redeem their warrants for additional stock.

² IB Network previously defaulted under the leases it had with KCT and KCT filed suit in Dallas County. The KCT suit was settled on May 14, 2012. Unaware of the pending transaction with POP Radio, KCT settled at a discount. At no point in the lawsuit did IB Holding, a defendant therein, disclose that it had been merged into IBN Media and as part of the settlement IB Network and IB Holding made affirmative representations regarding the ownership and status of the Kroger contract and certain collateral which Plaintiffs now believe were untrue.

V.
CAUSES OF ACTION

20. Plaintiffs hereby incorporate paragraphs 1 through 19 as if fully set forth herein verbatim.

A. Fraud, Fraudulent Inducement and Statutory Fraud Against Defendants Brazell, IB Holding And IBN Media

21. In connection with the Leasing Facility Agreement, Defendants Brazell and IB Holding acknowledged and represented that Kondos "previously purchased an aggregate of 6,250,000 Class 2008 Senior Preferred Interests in IB Holding at \$.08 each for an aggregate of \$500,000." The rights, privileges and preferences were set forth in the Revised Limited Liability Company Agreement attached as Exhibit B to the Leasing Facility Agreement and executed by Kondos and Brazell. Kondos has recently learned that despite the representations made to Kondos during the negotiations and contained in the Leasing Facility Agreement, Brazell and IB Holding apparently had not obtained the required consents and authority prior to offering such interests to Kondos and entering into the Memorandum of Understanding and Leasing Facility Agreement.

22. Brazell and IB Holding misrepresented their authority and failed to disclose to Kondos that the consent of GHP Investors, another investor in IB Holding, had not been obtained. Kondos relied upon such misrepresentations in agreeing to fund the requested \$500,000.00. Such misrepresentations were clearly made by Brazell and IB Holding in order to induce Kondos to fund the requested money and enter into the Leasing Facility Agreement. Despite the executed Leasing Facility Agreement, Subscription Agreements and Revised Limited Liability Company Agreement, Brazell and IB Holding now rely upon the lack of consent by GHP Investors in failing and refusing to recognize Kondos as members of IB Holding. Such acts

and omissions by Brazell and IB Holding constitute common law fraud, fraud in the inducement and statutory fraud in a stock transaction under Tex. Bus. and Com. Code 27.01.

23. The misrepresentations and failures to disclose outlined above have caused Kondos to suffer actual damages within the jurisdictional limits of this Court. As IB Holding and Brazell had actual knowledge of the falsity of their representations and benefitted therefrom, Kondos is also entitled to recover exemplary damages from Brazell and IB Holding pursuant to Tex. Bus. and Com. Code 27.01(d). To the extent IB Holding was merged into IBN Media, IBN Media assumed the obligations of IB Holding under the agreements with Kondos and is responsible to Kondos for the damages sought herein from IB Holding.

B. Breach of Fiduciary Duty Against Brazell And Oleksik

24. Kondos contends that it is a member of IB Holding and/or IBN Media. Brazell and Oleksik were officers and/or directors of IB Holding and/or IBN Media. As such, they, along with the other members of the board, owed a fiduciary duty to Kondos. Despite the terms of the Leasing Facility Agreement, Subscription Agreements and Revised Limited Liability Company Agreement, IB Holding's Board of Directors, including but not limited to Brazell and Oleksik, have wholly ignored their fiduciary obligations to Kondos. In late 2009, IB Holding sent out packets to all of its members regarding a proposed merger into IBN Media. Kondos was not included among the distributees and was never informed of the proposed or actual merger. Without acknowledging the validity of any alleged merger and expressly reserving the right to challenge same, to the extent the merger is found valid, the Agreement and Plan of Merger circulated by IB Holding provided that IB Holding membership interests would be converted to interests in IBN Media. Accordingly, to the extent the merger occurred, Kondos, as interest holders in IB Holding, now own interests in IBN Media and were entitled to their proportionate share of distributions made by IBN Media following the POP Radio transaction.

25. As Kondos is just now learning of the acts and omissions engaged in by IB Holding and its Board of Directors over the past several years, the breath of violations is unknown at this time. At a minimum, Brazell and Oleksik, in their capacities as members of the Board of Directors, have breached their fiduciary duties to Kondos by failing to disclose to Kondos the planned merger and by failing to distribute funds to Kondos following the POP Radio transaction. Such breaches have caused Kondos to suffer damages within the jurisdictional limits of this Court.

C. Breach of Contract Against IB Holding

26. Paragraph 1(c) of the Leasing Facility Agreement provides:

As an incentive to D & G Kondos, in the event that IB Holding does not return to D & G Kondos an amount equal to their \$500,000 purchase price for the Class 2008 Senior Preferred Interests on or before the six month anniversary of the above effective date of this Agreement, IB Holding shall pay to D & G Kondos, as their respective interests appear, at the time of repaying an amount equal to the \$500,000 purchase price for the above Class 2008 Senior Preferred Interests, an additional amount equal to 10% simple interest per annum from the date of the Agreement until such \$500,000 and all accrued interest are paid in full.

IB Holding has failed to make any payment to Kondos pursuant to the terms of this provision and is now in breach thereof.

27. In addition to the foregoing, IB Holding has committed other breaches of the Leasing Facility Agreement, including but not limited to the following:

- (1) IB Holding has breached Paragraph 1(e) of the Leasing Facility Agreement by failing to deliver to Kondos certified copies of the written consents of the board of managers and interest holders as required therein;
- (2) Kondos has not yet had an opportunity to conduct full discovery but fears that IB Holding has breached Paragraph 1(d) of the Leasing Facility Agreement by increasing the number of interest holders without obtaining Kondos's consent; and
- (3) IB Holding has breached the representations and warranties set forth in Paragraph 7(b) and (c).

28. The foregoing breaches have caused Kondos to suffer damages within the jurisdictional limits of this Court. To the extent IB Holding has been merged into IBN Media, IBN Media has stepped into the shoes and assumed the obligations of IB Holding under the Leasing Facility Agreement and is liable to Kondos for any breaches thereof and any sums due thereunder.

D. Breach of Contract and Breach of Fiduciary Duty Against Talos and Brazell

29. From late 2009 to early 2011, Brazell was living and working in Dallas, Texas. During that time, Talos was using Kondos's office at 1595 North Central, Richardson, Dallas County, Texas as its principal office, listing such on its website and installing a Talos sign at the entry. During this time, Dan Kondos was also assisting Brazell with efforts to raise capital, grow the business and general business advice. In exchange for such, Brazell, as the majority owner, and officer and director of Talos, agreed to give Dan and George Kondos each a 5% ownership interest in Talos. Although Brazell now claims that the interest is only 4% each, it is undisputed that George and Dan Kondos hold an ownership interest (either 4 or 5% each) in Talos.

30. Following the POP Radio transaction, Brazell received approximately \$4,000,000 from Talos. To the extent Talos had funds available for distribution to its interest holders, Kondos was entitled to its proportionate share of such distribution. Talos and Brazell's failure to properly distribute the funds constitutes a breach of the agreement with Kondos as well as a breach of the fiduciary duties owed by Brazell, as a member of the Board of Directors, to Kondos, as interest holders. Such breaches have caused Kondos to suffer damages within the jurisdictional limits of this Court.

E. Constructive Trust

31. Plaintiffs have learned that Defendant Brazell, acting on behalf of Defendants IB Network and/or IB Holding, transferred assets of IB Network and/or IB Holding to In Touch,

IBN Media and/or Talos, all entities owned and controlled in whole or in part by Brazell. In addition, IBN Media, which according to Brazell is now owned 70-80% by Talos, another entity owned and controlled in whole or in part by Brazell, recently distributed \$4,900,000 to its shareholders as a result of the POP Radio transaction. At the time the Leasing Facility Agreement and related documents were signed, IB Network was wholly owned by IB Holding and Plaintiffs were never informed of any intended or actual merger of IB Holding into IBN Media or any transfer of IB Network's assets to In Touch. Defendant Brazell and IB Network's actions have essentially stripped Plaintiffs of the value of their ownership interests in IB Holding. Brazell on the other hand has received approximately \$4,000,000.00 from Talos as a result of funds Talos received from IBN Media as a result of the sale of IB Network's assets. Upon information and belief, Defendant Oleksik participated in and approved these transactions and received financial benefit there from.

32. Defendants Talos, IB Network, IB Holding, IBN Media, In Touch, Oleksik and Brazell have benefitted from the wrongful acts and omissions of Defendants Brazell and IB Holding. As a result, the imposition of a constructive trust over and on the property transferred to and/or funds received by Talos, IB Network, IB Holding, In Touch, IBN Media, Oleksik and Brazell is the only remedy that will adequately compensate Plaintiffs for the unjust enrichment of such Defendants at Plaintiffs' expense.

VI. **CONDITIONS PRECEDENT**

33. All conditions precedent to recovery as set forth herein have occurred or have been waived by Defendants.

VII.
ATTORNEYS' FEES

34. According to the terms of the Leasing Facility Agreement, IB Holding promised to pay attorneys' fees in the event Plaintiffs should require the services of an attorney to enforce the terms and conditions thereof. In addition, Plaintiffs are entitled to recover attorneys' fees from IB Holding and Brazell under Tex. Bus. and Com. Code 27.01. As a result of the Defendants' actions and omissions, as described in the foregoing paragraphs, Plaintiffs have found it necessary to employ the undersigned attorney to bring this suit. Plaintiffs are entitled to recover their reasonable and necessary attorneys' fees.

VIII.
CONCLUSION

WHEREFORE, Plaintiffs requests that Defendants be cited to appear and answer, and that on final trial, Plaintiffs have:

1. Judgment against Defendants Brazell, Oleksik, IB Holding and IBN Media for all actual, consequential and incidental damages;
2. Imposition of a constructive trust over the funds and property received by Talos, IB Network, IB Holding, In Touch, IBN Media, Oleksik and Brazell in the amount of Plaintiffs' damages;
3. Exemplary damages against Defendants Brazell, IB Holding and IBN Media;
4. Reasonable and necessary attorneys' fees as sought herein;
5. Expert expenses against Defendants Brazell, IB Holding and IBN Media;
6. Pre and post judgment interest at the highest lawful rate until paid;
7. Costs of court; and
8. Such other and further relief, at law or in equity, to which Plaintiffs may be justly entitled.

Respectfully submitted,

BELLINGER, DeWOLF & SUBERG, L.L.P.

By:  _____

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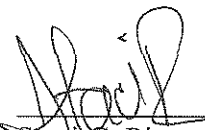
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**ATTORNEY FOR PLAINTIFFS,
GEORGE KONDOS AND DANIEL KONDOS**

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document to be served on the following counsel via email, facsimile, first class or certified mail, return receipt requested, on this the 10th day of September, 2012.

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Staci C. Pimar