

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN BRUMMER

Index No. [redacted]

Plaintiff(s),

Summons

-against-

RED RABBIT, LLC and RHYS W. POWELL

Date Index No. Purchased: July 25, 2012

Defendant(s).

To the above named Defendant(s)

Red Rabbit, LLC
1751 Park Ave.
New York, NY 10035

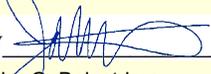
You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is CPLR § 503 and CPLR § 509
which is Plaintiff and both Defendants reside and do business in this jurisdiction.

Dated: New York, NY

July 25, 2012

Balestriere Fariello

by 

John G. Balestriere

Attorneys for Plaintiff

John Brummer
225 Broadway, Suite 2900
New York, NY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN BRUMMER

Plaintiff(s),

-against-

RED RABBIT, LLC and RHYS W. POWELL

Defendant(s).

Index No. [REDACTED]

Summons

Date Index No. Purchased: July 25, 2012

To the above named Defendant(s)

Rhys W. Powell
128 West 130th Street, 1st Floor
New York, NY 10027

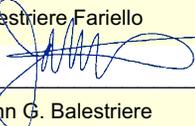
You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is CPLR § 503 and CPLR § 509
which is Plaintiff and both Defendants reside and do business in this jurisdiction.

Dated: New York, NY

July 25, 2012

Balestriere, Fariello

by 

John G. Balestriere

Attorneys for Plaintiff

John Brummer
225 Broadway, Suite 2900
New York, NY

John G. Balestriere
Jillian L. McNeil
BALESTRIERE FARIELLO
225 Broadway, Suite 2900
New York, NY 10007
Telephone: (212) 374-5401
Facsimile: (212) 208-2613
john.balestriere@balestriere.net
Attorneys for Plaintiff

**NEW YORK SUPREME COURT
COUNTY OF NEW YORK**

JOHN BRUMMER,

Plaintiff,

- against -

**RED RABBIT, LLC and RHYS W.
POWELL,**

Defendants.

Index No.:

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff John Brummer (“Plaintiff” or “Brummer”), for his Complaint against Defendants Red Rabbit, LLC (“Defendant Red Rabbit” or “Red Rabbit” or “the Company”) and Rhys W. Powell (“Defendant Powell” or “Powell,” collectively “Defendants”) respectfully alleges as follows upon information and belief, except as to allegations concerning Plaintiff, which are made upon personal knowledge, unless otherwise indicated herein, and based on the investigation conducted by and through his counsel:

PRELIMINARY STATEMENT

1. Plaintiff Brummer was defrauded once by Defendants Powell and Red Rabbit, a company that created a niche market delivering healthy breakfasts, lunches, and snacks to schools in the New York metro area, and then a second time by Powell. First, in 2005 (“the Fraudulent Inducement”), Powell, the president and founder of Red Rabbit, and Red Rabbit exaggerated the Company’s projected annual revenues in the Company’s investor materials (“Investor Materials”) in order to induce Brummer to invest in the Company. Brummer was and remains a physician with the necessary credentials and network to provide credence for the quality and healthiness which Red Rabbit asserts its meals provide school students in New York. Brummer became Red Rabbit’s very first investor and medical liaison, investing over \$25,000 in Red Rabbit in both equity and debt, making his investment and spending his time based on Defendants’ assertions. Brummer did not and could not have recognized the misleading projections by Powell and Red Rabbit until May 2012 when Red Rabbit’s annual financial report for 2011 was released.

2. But the fraud is not limited simply to deceit to get Brummer to invest in the first place. Powell deceived Brummer into exiting the Company just as his share was becoming extremely valuable. In 2010 (“the Fraudulent Concealment”), after Powell and Red Rabbit had benefitted from Brummer’s investments for almost five years, Powell omitted to disclose to Brummer the Company’s discussions with wealthy new investors in taking over a significant portion of the equity of Red Rabbit. Powell specifically omitted to disclose this material information regarding the venture capitalists in order to push Brummer out of Red Rabbit on the cheap so that Powell could profit from the new investment at Brummer’s expense.

3. At that time, Powell had been negotiating with two venture capitalist investors—Serious Change, LP (“Serious Change”) and the Mitchell D. Kapor Trust (“the Kapor Trust,” collectively “the VCs”)—who were planning on injecting hundreds of thousands of dollars in investments into Red Rabbit in the near future. Powell wanted Brummer’s membership interest (the shares of a limited liability company (“Membership Interest”)) so that he, Serious Change, and the Kapor Trust would reap more financial benefit from the VCs’ major influx of capital into Red Rabbit, all while deceiving Brummer and pushing him to the side.

4. In order to induce his proposed buyout transaction with Brummer (“the Fraudulent Buyout”), Powell concealed from Brummer that the VCs were planning on investing in Red Rabbit. This concealment by Powell induced Brummer to sell 86% of his Membership Interest (6% of the Company) in Red Rabbit for far less than it was actually worth, perhaps with the encouragement, or worse, of the VCs themselves.

Brummer would not have reduced his Membership Interest had he known of the VCs' forthcoming investment.

5. By approaching Brummer and requesting that he sell 86% of Brummer's Membership Interest in Red Rabbit without ever relaying any information whatsoever regarding the VCs, Powell breached his fiduciary duty to Brummer while also committing fraud and violating New York General Business Law. This misconduct here has cost Brummer hundreds of thousands of dollars.

6. For five years, from 2005-2010, Brummer was a 7% owner of Red Rabbit and remained a dedicated investor in the Company even though Red Rabbit struggled to acquire its first 10 school clients during this same time period. In this same time span, Powell was able to exploit Brummer's participation in Red Rabbit, gaining physician and nutritionist respect and earning investor interest he never would have but for Brummer's physician credentials and Brummer's network of doctors and nutritionists (*See, e.g.*, Email with Testimonial from Nutritionist, dated December 23, 2005, attached hereto as Exhibit 1). Brummer's networking with physicians and nutritionists allowed for testimonials such as, "[T]he meals at Red [R]abbit will provide the children with superior nutrition compared to the average alternative for lunch" (Exhibit 1).

7. Now, after years of investing and helping the Company grow, Brummer has been swindled out of sharing in his deserved 7% of Red Rabbit, which is currently servicing 70 schools (Red Rabbit Website: Schools Tab, last viewed June 26, 2012,

attached hereto as Exhibit 2) with total annual revenues of almost \$2 million (Red Rabbit Profit and Loss Report for 2011, attached hereto as Exhibit 3).

8. Powell's misconduct on behalf of Red Rabbit is in fact actionable as a misdemeanor under the Martin Act, New York General Business Law § 352(c), which prohibits fraudulent misrepresentations in the issuance, exchange, purchase, sale, promotion, negotiation, or advertisement of commodities, stocks, bonds, securities, evidences of interest or indebtedness, and under New York General Business Law § 339(a), which prohibits intent to deceive in making, issuing, or publishing statements or advertisements affecting the value of stocks, bonds, or other evidences of debt of a corporation, company, or association.

JURISDICTION AND VENUE

9. This Court has personal jurisdiction over the parties as Defendant Powell lives and conducts business in this jurisdiction and Defendant Red Rabbit is a limited liability company under New York law which conducts its business and maintains its headquarters in this jurisdiction.

10. Venue is properly laid in New York County, New York pursuant to CPLR § 503 and CPLR § 509.

PARTIES

Plaintiff

11. Dr. John Brummer is a Manhattan podiatrist who resides in New York County. Brummer was the initial investor in Red Rabbit. He originally possessed 7% of the Company, but now has a .76% Membership Interest in Red Rabbit.

Defendants

12. Red Rabbit, LLC, is a New York Limited Liability Company with headquarters at 1751 Park Ave., New York, New York 10035. Red Rabbit is a New York City-based healthy school meal provider to the New York metro area.

13. Rhys W. Powell is Red Rabbit's president, founder, and current owner of 71.07% of Red Rabbit. Powell resides in New York County.

STATEMENT OF FACTS

Powell Requests Brummer's Investment in Red Rabbit

14. Brummer is a podiatrist in Manhattan who first met Powell as his patient in or around 2004. As their friendship bloomed, Powell began to take advantage both of Brummer's affluence and his connections, raising with Brummer the possibility of his investing in Powell's vision of a company intended to expand into a currently underserved market—providing healthy breakfast, lunch, and snack options to New York metro area schools. As Powell told Brummer at multiple times, Red Rabbit would greatly benefit from the association with a physician as Red Rabbit was branding itself as a health-conscious, pro-child company.

Powell and Red Rabbit's Investment Materials Mislead Brummer – Fraudulent Inducement

15. Based on Powell's representations to Brummer made in person, via e-mail, and over the phone between 2005 and 2008, Brummer believed any investments in Red Rabbit would be worthwhile, as early Red Rabbit Investor Materials from 2005 projected annual revenue from only 2 schools to be \$201,600, from 17 schools to be

\$2.016 million, and from 67 schools to be \$8.064 million (Red Rabbit Investor Materials, attached hereto as Exhibit 4 at 19).

16. However, by the time the Company was serving 70 schools, Red Rabbit's 2011 revenue was only \$1.962 million, less than a quarter of what Powell had claimed to Brummer it would be when he and Red Rabbit induced Brummer's investment with the Company. This difference demonstrates the deceit used by Red Rabbit and Powell to obtain investor Brummer.

17. In a business with fairly stable input costs (e.g. employment, rent, and food items) and stable and predictable output revenues (e.g. price per meal), Red Rabbit's investor projections represent a future expectation that was beyond a reasonable expectation, unwarranted by existing circumstances, and for which Powell and Red Rabbit made no reasonable effort to ascertain the truth.

18. Powell and Red Rabbit engaged in this deceit and fraud in the Company's Investor Materials in order to gain Brummer's equity and debt investments in Red Rabbit which allowed the Company to begin marketing, production, and delivery of its services. By engaging in deceit, Red Rabbit was able to obtain its highest contributing capital investor in its first five years of operation—prior to when the VCs made their investment—and its third highest contributing capital investor ever. It is reasonable to believe that without Brummer's investment, Red Rabbit would have never been able to market its services which have now developed a niche market, ripe for expansion, that currently services 70 schools in the New York metro area.

Brummer's Equity Investment in Red Rabbit

19. Brummer was enticed by Red Rabbit's Investor Materials projecting annual revenues of around \$100,000 for each school serviced by Red Rabbit, especially since there are 200 pre-schools in Manhattan alone according to the Investor Materials (Exhibit 4 at 19). The Investor Materials demonstrated an underexploited market with very little entry costs.

20. Powell and Francis Hwang ("Hwang") (who is no longer participating in the management of Red Rabbit) formed Red Rabbit on October 5, 2005. Less than two weeks later, on October 19, 2005, Brummer became Red Rabbit's first and only investor when he invested \$12,500 in cash. In return for this initial equity investment, Brummer received 7% of the Membership Interest in Red Rabbit.

Brummer's Debt Investment in Red Rabbit

21. After Brummer's equity investment in Red Rabbit, Brummer continued to invest in Red Rabbit by extending credit to the Company.

22. Brummer's debt contributions to Red Rabbit included his guarantee and monthly payments on a \$10,000 credit line as well as his payments towards Red Rabbit's first delivery car.

23. Brummer's debt contribution to the Company totaled to over \$12,500 making Brummer's total investment in Red Rabbit over \$25,000—the Company's largest investment until the investments of Serious Change and the Kapor Trust's in 2011.

Powell Defrauds Brummer Into Selling 86% of His Membership Interest in Red Rabbit – Fraudulent Concealment

24. Powell approached Brummer in the summer of 2010 with an offer to buy 6% of Red Rabbit from Brummer whose Membership Interest was 7% at the time. Powell offered to pay \$40,000 to acquire 6% of Red Rabbit from Brummer. Initially, Brummer was excited to accept a positive return on investment during an economic downturn. But Brummer was unaware of just how badly Powell swindled him. Powell insinuated that he approached Brummer for the Fraudulent Buyout so that Brummer could move on with his investments. Powell appeared thrilled that Brummer would be the first investor to receive a positive return on investment from Red Rabbit. Powell had this conversation with Brummer in a restaurant in New York City.

25. However, Powell drastically misrepresented the Company outlook to Brummer. It was a material omission of fact, intentionally withheld to deceive Brummer, that Powell did not disclose to Brummer that he was having negotiations with Serious Change and the Kapor Trust who were both proposing to inject large amounts of venture capital in to the Red Rabbit start-up that was finally thriving after 5 years of negative or marginal profits. Red Rabbit only succeeded in its first five years by being built on the investments, physician credentials, nutritionist networking, and general sweat equity of Brummer. Prior to this incoming influx of capital, Powell wished to obtain Brummer's shares so that he and the VCs would receive higher profits, due to the higher percentages of Membership Interest obtained after Brummer's buyout, after the VCs investment in Red Rabbit.

26. Powell based his valuation of Brummer's Membership Interest on the formula as follows: Annual Revenue*.01*Membership Interest. With a 2010 revenue of \$475,000, Powell valued the portion of Brummer's Membership Interest he wished to purchase at \$28,500. After negotiations, Powell offered \$40,000 to Brummer, an offer which Brummer took, not knowing of the VCs' interest, on September 22, 2010.

27. Powell withheld from Brummer the true reason he wished to have Brummer out of the Company: more profits for himself and the VCs once Red Rabbit's large investments arrived. On March 29, 2011, Powell notified Brummer of the \$200,000 investment by the VCs, a deal that had been in the works for many months. This investment was shortly followed by yet another \$500,000 from the VCs resulting in a total of \$700,000 in investment funds in the months immediately after Powell convinced Brummer to leave the Company. In return, the VCs received 23.58% of the Membership Interest in Red Rabbit, thus valuing the Company at \$2,968,617.47.

Powell and Red Rabbit's Acts of Fraud Damage Brummer

28. If not for Powell and Red Rabbit's misrepresentations, deception, fraud, and concealment, Brummer would still own the 6% of Membership Interest in Red Rabbit that constituted the Fraudulent Buyout. That 6% Membership Interest in Red Rabbit would now be 4.56% of the Membership Interest in Red Rabbit after all Membership Interest in Red Rabbit was diluted so that the VCs could receive Membership Interest in Red Rabbit. This share would be valued in at least the hundreds of thousands of dollars now, and many hundreds of thousands of dollars more as the Company grows with the VCs' capital—capital the VCs were only willing

to invest in the Company after Brummer made his crucial initial financial and professional investments that helped develop the brand of the Company. Using Powell's own calculations from the Fraudulent Buyout (Annual Revenue*.01*Membership Interest), this 4.56% would be worth \$89,467.76 ($(\$1,962,012.28 \text{ (2011 Revenue)} \cdot .01 \cdot 4.56 = \$89,467.76)$) or \$49,467.76 plus interest in damages. These damages would, of course, be assuming Brummer was willing to sell 4.56% of Red Rabbit in 2011.

29. However, multiple investor profiles led Brummer to invest in a company that would have \$8.064 million in annual revenues when servicing 67 schools. At this promised annual revenue rate, Brummer's 4.56% would be worth \$367,718.40 resulting in damages of \$327,718.40.

FIRST CAUSE OF ACTION
(Fraud Against All Defendants)

30. Plaintiff Brummer repeats and realleges the allegations made above as if fully set forth herein.

A. Who Made the Fraudulent Statements or Omitted to Speak?

31. Powell and Red Rabbit made fraudulent statements and omitted to speak.

B. What are the Fraudulent Statements or Omissions?

32. **False, Reckless, and Fraudulent Investor Materials:** Red Rabbit and Powell engaged in fraud by marketing Investor Materials to Brummer which projected revenues beyond reasonable expectations which were unwarranted by existing

circumstances, and of which Red Rabbit and Powell made no reasonable effort to ascertain the truth.

33. Material Misrepresentation as to Red Rabbit Prospectus and Future Investments: Powell engaged in fraud by enticing Brummer to sell 6% of Red Rabbit to Powell on the premise that Brummer understood the full and complete conditions of the buyout. It was a material omission for Powell to not notify Brummer of his discussions with Serious Change and the Kapor Trust regarding an influx of future capital to be invested in Red Rabbit in early 2011.

C. When and Where Did the Speakers Make the Fraudulent Statements or Omit to Speak?

34. Red Rabbit and Powell made the initial misrepresentations regarding Investor Materials to Brummer in late 2005. The misrepresentations were made in discussions between Brummer and Red Rabbit's founder Powell and former managing member Hwang. The same misrepresentations to induce investment were made by email on at least the following dates: December 6, 2005, December 7, 2005, and December 8, 2005. The misrepresentations were made in New York City as the correspondence and discussions were in New York City.

35. Powell made misrepresentations and omitted material facts when discussing his buyout of 6% of Red Rabbit from Brummer in late summer of 2010. Specifically, Powell omitted these details in emails discussing his buyout of Brummer on at least September 15, 2010 and September 21, 2010. These material omissions of facts and misrepresentations by Powell occurred in New York City.

D. To Whom Did the Speakers Make the False Statements or Omit to Speak?

36. Powell and Red Rabbit made false statements to Brummer.

37. Powell and Red Rabbit omitted material facts from Brummer.

E. Why Were the Statements or Omissions False or Misleading?

38. It was misleading and false for Red Rabbit and Powell to project annual revenues that have consistently been incorrect by a factor of 4, especially in a business with stable input costs (e.g. employment, rent, and food items) and stable and predictable output revenues (e.g. price per meal). Powell and Red Rabbit knew or should have known that their projected revenues were false. Powell's and Red Rabbit's investor projections represent a future expectation that was beyond a reasonable expectation, unwarranted by existing circumstances, and of which Red Rabbit and Powell made no reasonable effort to ascertain the truth—a \$6 million over-projection is not mere cause for concern, it is fraud.

39. It was misleading and false for Powell to materially omit his discussions with perspective investors, Serious Change and the Kapor Trust, before approaching Brummer regarding his buyout. This information regarding a perspective influx of capital investment was material to Brummer in evaluating the price of his buyout.

F. Why Was It Reasonable for Brummer to Believe the False Statements or Not to Question the Omissions?

40. It was reasonable for Brummer to believe Red Rabbit's Investor Materials as Powell and Hwang supported Red Rabbit's data with calculations and references to alleged industry norms. Brummer had no way of knowing that Red Rabbit's projected

annual revenues based on approximate numbers of schools were all inflated by a factor of 4.

41. It was reasonable for Brummer to be misled by Powell's friendly buyout approach for several reasons.

42. First, Powell and Brummer had been friends since in or around 2004. Brummer, at the time, did not think it was Powell's intent to ever swindle him out of hundreds of thousands of dollars in profits from Red Rabbit, a company Brummer helped Powell to expand with his investments and physician backing as the Company's original medical liaison.

43. Second, prior to the VCs' investment, Red Rabbit had never had an institutional investor willing to input large amounts of capital into the Company. Therefore, without knowledge that such investors were on the horizon, it was reasonable for Brummer to accept a positive, albeit marginal, return on investment for his equity and debt investments in Red Rabbit.

44. Third, Brummer owned 7% of the Membership Interest and had been a managing partner in Red Rabbit for almost five years. It was reasonable for Brummer to believe that the only other Red Rabbit member who had been with Red Rabbit for as long as Brummer, Powell, would not mislead Brummer into selling 86% of his Membership Interest in Red Rabbit. Powell was, of course, willing to forsake Brummer's aid and friendship in order to realize more individual profits from Red Rabbit once the Company received the large capital investments, which Powell was discussing concurrently with the VCs.

G. The Common Course of Conduct of Fraud and Reliance Upon It

45. Red Rabbit and Powell repeatedly misled Brummer to believe that the Investor Materials presented to him by Red Rabbit were accurate depictions of the Company's annual revenue prospects, and not merely inflated projections created to induce Brummer to become Red Rabbit's first investor, thus allowing Red Rabbit to begin marketing, producing, and distributing its services.

46. Powell repeatedly misled Brummer to believe that the Fraudulent Buyout presented to Brummer by Powell was predicated on Brummer having full material facts of the buyout, a fact supposed to be inherent in any transaction, especially one between managing members of a company. For Powell to have misled Brummer otherwise is fraud.

SECOND CAUSE OF ACTION **(Fraudulent Inducement Against All Defendants)**

47. Plaintiff Brummer repeats and realleges the allegations made above as if fully set forth herein.

48. Powell and Red Rabbit engaged in fraud in utilizing fraudulent misrepresentations in the Company's Investor Materials to induce Brummer to invest in the Company with both equity, debt, and time in using his network of physicians and nutritionists to back the Company with testimonials regarding its products' healthful benefits.

49. The Defendants' revenue projections were recklessly made with indifference to the truth. This intentional misrepresentation of existing fact by Defendants affected the essence of the transaction Brummer sought to commit.

50. The Defendants' fraud in advertising fraudulent projections in Red Rabbit's Investor Materials led Brummer to invest in a company that would have \$8.064 million in annual revenues when servicing 67 schools. At this promised annual revenue rate, Brummer's Membership Interest sold to Powell would be worth \$367,718.40 resulting in damages of \$327,718.40, as Powell only paid \$40,000 for 86% of Brummer's Membership Interest in Red Rabbit. These damages are a direct result of Defendants' fraudulent misrepresentations to induce Plaintiff to invest in Red Rabbit

51. Brummer justifiably relied on Red Rabbit's Investor Materials as Powell and Hwang supported Red Rabbit's data with calculations and references to supposed industry norms. Brummer had no way of knowing that Red Rabbit's projected annual revenues based on approximate numbers of schools were all inflated by a factor of 4. Brummer reasonably relied on these projections and as a result, became the first investor in Red Rabbit. Brummer essentially gave Red Rabbit the financial backing it required to begin marketing, producing, and distributing its services.

52. Brummer continued to be disappointed by Red Rabbit's fledging annual revenues, but, Brummer did not realize the full extent of the fraud in the Investor Materials until Powell emailed him the Red Rabbit Profit and Loss Report for 2011 (Exhibit 3) on May 28, 2012 which demonstrated that, even at 70 schools (Exhibit 2), Red Rabbit's annual revenues were only 25% what was projected for roughly the same

number of schools in the Investor Materials (Exhibit 4 at 19). This realization made Brummer realize that Powell and Red Rabbit fraudulently induced him in order to reap the benefits of his inclusion and investments into the Company.

THIRD CAUSE OF ACTION
(Fraudulent Concealment Against Defendant Powell)

53. Plaintiff Brummer repeats and realleges the allegations made above as if fully set forth herein.

54. Powell willfully concealed the existence of discussions with the venture capitalist investors Serious Change and the Kapor Trust and those venture capitalists' plans to inject hundreds of thousands of dollars in investments into Red Rabbit.

55. Powell had a duty to disclose to Brummer, a managing member and founding investor of Red Rabbit, that negotiations between Powell and venture capitalist firms were proceeding concurrently with Powell's decision to buy 86% of Brummer's Membership Interest in Red Rabbit.

56. By actively concealing the existence and knowledge that the discussions with Serious Change and the Kapor Trust were proceeding, Powell fraudulently concealed a material fact from Brummer, which he had a duty to disclose, that would have materially affected Brummer's evaluation of Powell's buyout request.

57. It was reasonable for the Brummer to rely on Powell's misrepresentations, as Brummer was friends with Powell and had been a keystone investor in Red Rabbit since the Company was founded in October 2005, and, therefore, was rationally susceptible to the concealment by Powell.

58. Plaintiff has been damaged by Defendant's fraud and concealment in the amount of \$327,718.40.

FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty Against Defendant Powell)

59. Plaintiff Brummer repeats and realleges the allegations made above as if fully set forth herein.

60. Powell owed a fiduciary duty to investor Brummer. This fiduciary duty arose when Powell allowed Brummer to invest over \$25,000 in equity and debt into Powell's company, Red Rabbit. As a fiduciary, Powell is expected to put the duty he owes to investor Brummer before his own personal interests.

61. Powell breached his fiduciary obligations to Brummer when he bought 86% of Brummer's Membership in Red Rabbit without acknowledging that he had negotiations regarding large capital investments in Red Rabbit with the VCs. It is abundantly clear that this information was material to Brummer's evaluation of his Membership Interest in Red Rabbit, and, as fiduciary, Powell owed a duty of loyalty to Brummer to acknowledge any information that would affect Brummer's evaluation.

62. But Powell put his own financial interests and stake in Red Rabbit above the fiduciary duty he owed Brummer because he understood that the buyout costs of 86% of Brummer's Membership Interest would be rightfully increased if Brummer had knowledge of all the facts present when Powell approached him regarding the Fraudulent Buyout.

63. Powell's breach of fiduciary duty has proximately caused Brummer damages of \$327,718.40.

FIFTH CAUSE OF ACTION
(Unjust Enrichment Against Defendant Powell)

64. Plaintiff Brummer repeats and realleges the allegations made above as if fully set forth herein.

65. Powell had a real and tangible benefit conferred upon him by Brummer. Brummer, in not having all the necessary information in order to fully evaluate his transaction to sell 86% of his Membership Interest in Red Rabbit to Powell, charged Powell at least \$327,718.40 less than 86% of his Membership Interest in Red Rabbit was worth. This benefit enriched Powell.

66. Powell has fully enjoyed, appreciated, accepted, and retained the benefits conferred upon him by Brummer's transaction to sell 86% of his Membership Interest in Red Rabbit to Powell.

67. Powell, by accepting and retaining such benefit described above, without the offer to return said benefit, has been unjustly enriched by Brummer. It would be inequitable and without good conscience for Powell to retain the benefit conferred by Brummer without justly compensating him.

68. Powell's unjust enrichment has caused Brummer damages for which he should be compensated in the amount \$327,718.40.

PRAYER FOR RELIEF

WHEREFORE, by reason of the foregoing, Plaintiff demands judgment against Defendants as follows:

- A. At least, \$327,718.40 in damages for Defendants' fraud, fraudulent inducement, and fraudulent concealment, including, but not limited to, any damages arising from the misrepresentations in Red Rabbit's Investor Materials and the material omission of Powell's discussions with venture capitalist investors, breach of fiduciary duty, and unjust enrichment;
- B. Applicable interest on the foregoing amount;
- C. Attorneys' fees; and
- D. Such other and further relief as the Court deems just and proper.

Dated: July 25, 2012
New York, New York

By: _____



John G. Balestriere
Jillian L. McNeil
BALESTRIERE FARIELLO
225 Broadway, Suite 2900
New York, NY 10007
Telephone: (212) 374-5401
Facsimile: (212) 208-2613
john.balestriere@balestriere.net
Attorneys for Plaintiff