

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

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WATERSCAPE RESORT, LLC,

Plaintiff,

-against-

70 WEST 45th STREET HOLDING LLC, and
WATERSCAPE RESORT II, LLC,

Defendants.

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Index No.: _____

Date Purchased: _____

SUMMONS

VENUE

Plaintiff designates New York County as the place of trial. The basis of venue is the county where Defendant maintains its principal place of business.

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to appear in the Supreme Court of the State of New York, County of New York, at the office of the clerk of said Court at 60 Centre Street, in the County of New York, within twenty (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 to serve your answer to the summons and annexed complaint upon counsel for the Plaintiff and file same with the Clerk; upon your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
July 9, 2014

Yours, etc.,
RICHARD J. MIGLIACCIO, ESQ.

/s/ Richard Migliaccio
By: Richard Migliaccio, Esq.
Attorney for Plaintiff
410 Park Avenue, Ste. 1630
New York, NY 10022
(212) 239-9900 ext. 40

TO:

70 WEST 45th STREET HOLDING LLC
70 West 45th Street
New York, NY 10036

WATERSCAPE RESORT II, LLC,
70 West 45th Street
New York, NY 10036

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

-----X

WATERSCAPE RESORT, LLC,

Index No.: _____

Plaintiff,

-against-

COMPLAINT

70 WEST 45th STREET HOLDING LLC, and
WATERSCAPE RESORT II, LLC,

Defendants.

-----X

Plaintiff, WATERSCAPE RESORT, LLC, by and through its attorney, Richard J. Migliaccio, Esq., by way of complaint against all Defendants, respectfully shows and alleges:

THE PARTIES

1. Plaintiff, Waterscape Resort, LLC, (“Waterscape” or Plaintiff), is a Foreign Limited Liability Company that exists pursuant to the laws of the State of Delaware with its principal place of business at 410 Park Avenue, Ste. 1630, New York, New York 10022.

2. Defendant, 70 West 45th Street Holding LLC, is a domestic business entity existing pursuant to the laws of the State of New York doing business at 70 West 45th Street, New York, NY 10036.

3. Defendant, Waterscape Resort II, LLC, is a domestic business entity existing pursuant to the laws of the State of New York doing business at 70 West 45th Street, New York, NY 10036.

FACTS APPLICABLE TO ALL CAUSES OF ACTION

4. Waterscape, as owner of the premises located at 70 West 45th Street, New York, New York, developed and constructed a building containing a hotel, restaurant and residences (the “Project”).

5. Waterscape named it’s the Project “Cassa NY Hotel and Residences.”

6. Beginning as early as March, 2009, Waterscape commenced a state wide, national and international marketing campaign in which it advertised Cassa NY Hotel and Residences, either as Cassa NY Hotel or Cassa NY Residences or Cassa NY Hotel and Residences.

7. Waterscape adopted the names “Cassa NY” and “Cassa Hotel & Residences” as trade names to carry on its business (the “Trade Names”).

8. On or about October 28, 2009, Waterscape filed a certificate of assumed name for the trade name “Cassa NY” with the State of New York.

9. On or about February 19, 2010, Waterscape filed a second certificate of assumed name for the trade name “Cassa Hotel & Residences” with the State of New York.

10. In June, 2010, Waterscape filed its Declaration of Condominium with the State of New York in which the hotel, restaurant and residences were all designated with separate lot numbers.

11. In or about August, 2010, Waterscape commenced operation of the hotel.

12. In April, 2011, Waterscape filed for bankruptcy protection pursuant to Chapter 11 of the Bankruptcy Code, because of a dispute with its Construction Manager.

13. As part of the Chapter 11 Plan, Waterscape sold the Cassa Hotel to Defendant in January, 2012.

14. As part of the sale of the hotel, Waterscape and Defendant entered into a licensing agreement dated January 20, 2012 (the “License Agreement”).

15. Pursuant to the License Agreement, Waterscape licensed to Defendant the use of the name “CASSA HOTEL” and related and derived marks and names (all referred to as the “Licensed Mark”).

16. Pursuant to Section 2 of the License Agreement, the term of the license was for six months from the date of the License Agreement.

17. Section 8 of the License Agreement set forth the various condition that constituted termination of license that including terminating the agreement six months after the date of the License Agreement.

18. Pursuant to Section 9(a) of the License Agreement, in the event the License Agreement terminated, Defendant was obligated to immediately discontinue and cease to use the Licensed Mark.

19. Pursuant to Section 9(b) of the License Agreement, Waterscape had the right to seek injunctive or other proper relief to halt Defendant’s use and receive financial compensation.

20. On July 20, 2012, the License Agreement terminated.

21. Prior to and after the License Agreement terminated, Waterscape and Defendant were negotiating Defendant’s continued use of the Licensed Mark.

22. The negotiations ended without an agreement.

23. Since the termination of the License Agreement to the present, Defendant used the Licensed Mark and is currently still using the Licensed Mark without permission from Waterscape.

24. As a result of its continued use since the termination of the License Agreement, Defendant is infringing Waterscape's Licensed Mark and to use its Trade Names without permission.

**AS AND FOR A FIRST CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Infringement)**

25. Plaintiff repeats, realleges and reiterates each and every allegations contained in Paragraphs "1" though "24" of the Complaint.

26. Waterscape is the sole holder of the rights to the Licensed Mark, i.e. "Cassa Hotel" and those derived or otherwise related marks thereto.

27. Waterscape is the first to use the Licensed Mark within the United States of America and specifically in the State of New York.

28. Waterscape has a valid and legally protectable mark as to the Licensed Mark.

29. Defendants are using the Licensed Mark without authorization from Waterscape.

30. Defendants have exploited the use of the Licensed Mark without permission and without securing the rights to use the materials.

31. The prior and continuing use of the Licensed Mark without authorization, without permission or without securing the rights to use the materials is likely to lead to confusion as to the origin.

32. Accordingly, Defendants' use of the Licensed Mark is infringing Waterscape's rights to them.

33. Defendants' continued prior and continued use of the Licensed Mark is being done with the intent to cause confusion, mistake or to deceive.

34. Waterscape is entitled to injunctive relief and disgorgement of Defendants' profits.

35. As a result of the foregoing infringement, Waterscape has been damaged and suffers great damage not fully measurable in money terms and will continue to suffer irreparable damage, and Defendants made and will continue to make sales and profits that equitable belong to Waterscape. Waterscape is entitled to an injunction against Defendants from the continued use of the Licensed Mark and an accounting to determine the gross sales made by Defendants, and the compensatory and punitive damages suffered by Waterscape's Licensed Mark in an amount to be determined at trial, but is more than the jurisdictional limit of all lesser courts in New York State, including interest, costs, and attorney fees.

**AS AND FOR A SECOND CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Dilution)**

36. Plaintiff repeats, realleges and reiterates each and every allegations contained in Paragraphs "1" though "35" of the Complaint.

37. Waterscape is the sole holder and owner of the rights to the Licensed Mark, i.e. "Cassa Hotel" and those derived or otherwise related marks thereto.

38. The Licensed Mark has become the means by which Waterscape and its services are identified by the public and distinguish it form other businesses and services, and the Licensed Mark has come to symbolize a valuable good will for which Waterscape enjoys.

39. The Licensed Mark has acquired in connection with hotel and hotel services a secondary meaning and is associated in the public mind with and connotes Waterscape.

40. The Licensed Mark has a truly distinctive quality.

41. The Licensed Mark has acquired secondary meaning.

42. Defendants' unauthorized use of Waterscape's Licensed Mark creates and has been creating an association, in the mind of the consumer, with Defendants and not Waterscape causing a lessening of the distinctiveness of Waterscape's Licensed Mark.

43. Defendants' unauthorized use of the Licensed Mark creates and is causing a likelihood of dilution.

44. As a result of the foregoing dilution, Waterscape has been damaged and suffers great damage not fully measurable in money terms and will continue to suffer irreparable damage, and Defendants made and will continue to make sales and profits that equitable belong to Waterscape. Waterscape is entitled to an accounting to determine the gross sales made by Defendants, and the compensatory and punitive damages suffered by Waterscape's Licensed Mark in an amount to be determined at trial, but is more than the jurisdictional limit of all lesser courts in New York State, including interest, costs, and attorney fees.

**AS AND FOR A THIRD CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Unjust Enrichment)**

45. Plaintiff repeats, realleges and reiterates each and every allegations contained in Paragraphs "1" through "44" of the Complaint.

46. Through Defendants' wrongful acts, Defendants received and used Waterscape's property, i.e. the Licensed Mark, to which Defendants were not entitled to use after termination of the License Agreement.

47. Defendants used the Licensed Mark that rightfully belonged to Waterscape.

48. If Waterscape does not recover Defendants' profits or compensation for the use which Defendants have not paid, then Defendants will be unjustly enriched.

49. A benefit was bestowed upon Defendants who obtained such benefit without adequately compensating Waterscape.

50. Circumstances are such that equity and good conscience requires that Defendants make payment to Waterscape.

51. By reason of the foregoing, Waterscape has been damaged and suffers great damage not fully measurable in money terms and will continue to suffer irreparable damage, and Defendants made and will continue to make sales and profits that equitable belong to Waterscape. Waterscape is entitled to an accounting to determine the gross sales made by Defendants, and the compensatory and punitive damages suffered by Waterscape's Licensed Mark in an amount to be determined at trial, but is more than the jurisdictional limit of all lesser courts in New York State, including interest, costs, and attorney fees.

**AS AND FOR A FOURTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Conversion)**

52. Plaintiff repeats, realleges and reiterates each and every allegation contained in paragraphs “1” through “51” with the same force and effect as if they were set forth at length herein.

53. On or about January 20, 2012, Waterscape licensed to Defendants the use of the Licensed Mark and related marks for six months.

54. On or about June 22, 2012, the License Agreement terminated and Defendants were no longer authorized to use the Licensed Mark.

55. Defendants continued to use and continues to use the Licensed Mark and related marks since the License Agreement terminated without making any payments for the use.

56. Waterscape tried negotiating a settlement.

57. Defendants knew or should have known that it was using the Licensed Mark without paying for the use.

58. Defendants converted the Licensed Mark to their own us.

59. Despite knowing that the Licensed Mark was Waterscape’s property and that it was obligated to pay for the use, Defendants used the Licensed Mark without paying Waterscape.

60. Defendants converted Waterscape’s property by virtue of using the Licensed Mark without paying Waterscape.

61. As a direct and proximate result of Defendants’ conversion, Waterscape has been damaged and suffers great damage not fully measurable in money terms and will continue to suffer irreparable damage, and Defendants made and will continue to make sales and

profits that equitable belong to Waterscape. Waterscape is entitled to an accounting to determine the gross sales made by Defendants, and the compensatory and punitive damages suffered by Waterscape's Licensed Mark in an amount to be determined at trial, but is more than the jurisdictional limit of all lesser courts in New York State, including interest, costs, and attorney fees.

**AS AND FOR A FIFTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Unauthorized use of Plaintiff's Trade Name)**

62. Plaintiff repeats, realleges and reiterates each and every allegation contained in paragraphs "1" through "61" with the same force and effect as if they were set forth at length herein.

63. Waterscape and its Trade Names have become well and favorably known to the public.

64. The Trade Names have become the means by which Waterscape and its services are identified by the public and distinguish it from other businesses and services, and the Trade Names have come to symbolize a valuable good will for which Waterscape enjoys.

65. The Trade Names have acquired in connection with hotel and hotel services a secondary meaning and is associated in the public mind with and connotes Waterscape.

66. At the time of the termination of the License Agreement, Defendants knew of should have known of the existence of Waterscape's Trade Names in connection with and to identify its business.

67. Since the termination of the License Agreement, Defendants advertises on the internet, magazines and other publications under Waterscape's Trade Names and continues to do so to the present day.

68. Defendants have developed a national and international business based on using Waterscape's Trade Names which are widely established.

69. Defendants' activities have caused and will cause its business to be mistaken for Waterscape's business.

70. Defendants' activities have caused and will cause confusion between Waterscape's and Defendants' businesses.

71. Defendants' activities have misled and will mislead the public into the false belief that Waterscape and Defendants are affiliated or Defendants' business has its source in Waterscape or sponsored by Waterscape or associated with Waterscape in the course of trade.

72. As a result of its activities set forth herein, Defendants traded and now are trading upon the good will created by Waterscape, have infringed and are now infringing Waterscape's Trade Names and unfairly compete with Waterscape at Waterscape's expense and damages.

73. Defendants' use of Waterscape's Trade Names in their advertisement impairs and will continue impair the distinctive value of Waterscape's Trade Names and business reputation.

74. Defendants continued use of Waterscape's Licensed Mark confuses the businesses in the public mind.

75. By reason of the foregoing, Waterscape suffered great damage not fully measurable in money terms and will continue to suffer irreparable damage, and Defendants made

and will continue to make sales and profits that equitable belong to Waterscape. Waterscape is entitled to an accounting to determine the gross sales made by Defendants, and the compensatory and punitive damages suffered by Waterscape's Trade Names and Defendants' unfair competition in an amount to be determined at trial, but is more than the jurisdictional limit of all lesser courts in New York State, including interest, costs, and attorney fees.

**AS AND FOR A SIXTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Consumer Fraud pursuant to GBL §349, *et seq.*)**

76. Plaintiff repeats, realleges and reiterates each and every allegation contained in paragraphs "1" through "75" with the same force and effect as if they were set forth at length herein.

77. Defendants' use of the Licensed Mark without permission and passing them off as its own, perpetrates a fraud on consumers.

78. As a result of Defendants' actions, Defendants are in violation of New York State General Business Law §349, *et seq.*

79. By reason of the foregoing, Waterscape suffered great damage and is entitled to all remedies of New York State's consumer fraud statutes, GBL §349, *et seq.*, costs, interest, and attorney fees.

**AS AND FOR A SEVENTH CAUSE OF ACTION
AGAINST ALL DEFENDANTS
(Breach of Contract)**

80. Plaintiff repeats, realleges and reiterates each and every allegation contained in paragraphs “1” through “79” with the same force and effect as if they were set forth at length herein.

81. Plaintiff and Defendant, 70 West 45th Street Holding, LLC, entered into the License Agreement dated January 20, 2012.

82. The License Agreement was a written contract.

83. Defendant, 70 West 45th Street Holding, LLC, was obligated to perform certain actions pursuant to the License Agreement.

84. Defendant, 70 West 45th Street Holding, LLC, failed to perform those obligations it was obligated to take pursuant to the License Agreement.

85. As a result of failing to perform, Defendant, 70 West 45th Street Holding, LLC, has breach the License Agreement.

86. Defendant, Waterscape Resort II, LLC, is the parent, assignee, subsidiary, transferee, partner, successor or alter ego of, or operating as a joint venture with Defendant, 70 West 45th Street Holding, LLC.

87. As a result of the relationship between Defendants, Defendant, Waterscape Resort II, LLC, is a beneficiary of the License Agreement.

88. By virtue of their relationship, Defendant, Waterscape Resort II, LLC, breached the License Agreement.

89. By reason of the foregoing, Waterscape is entitled to both compensatory and punitive damages from Defendants in an amount to be determined at trial, but is more than the jurisdictional limit of all lesser courts in New York State, including interest, costs and attorney fees.

WHEREFORE, Plaintiff demands judgment against all Defendants as follows:

- A. For the First Cause of Action against all Defendants for an injunction prohibiting the continued use of the Licensed Mark, an accounting, compensatory and punitive damages, and disgorgement of gross sales in an amount to be determined at trial, including interest, costs and attorney fees;
- B. For the Second Cause of Action against all Defendants for an accounting, and compensatory and punitive damages in an amount to be determined at trial, including interest, costs and attorney fees;
- C. For the Third Cause of Action against all Defendants for an accounting and compensatory and punitive damages in an amount to be determined at trial, including interest, costs and attorney fees;
- D. For the Fourth Cause of Action against all Defendants for an accounting and compensatory and punitive damages in an amount to be determined at trial, including interest, costs and attorney fees;
- E. For the Fifth Cause of Action against all Defendants for an accounting and compensatory and punitive damages in an amount to be determined at trial, including interest, costs and attorney fees;
- F. For the Sixth Cause of Action against all Defendants all remedies of New York State's consumer fraud statutes, GBL §349, *et seq.*, interest, costs and attorney fees;
- G. For the Seventh Cause of Action against all Defendants compensatory and punitive damages in an amount to be determined at trial, including interest, costs and attorney fees; and
- H. Awarding Plaintiff such other and further relief that this Court deems just and proper.

Dated: New York, New York
July 9, 2014

Yours, etc.,
RICHARD J. MIGLIACCIO, ESQ.

/s/ Richard Migliaccio
By: Richard Migliaccio, Esq.
Attorney for Plaintiff
410 Park Avenue, Ste. 1630
New York, NY 10022
(212) 239-9900 ext. 40

TO:

70 WEST 45th STREET HOLDING LLC
70 West 45th Street
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WATERSCAPE RESORT II, LLC,
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SUPREME COURT OF THE STATE OF NEW YORK
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SUMMONS & COMPLAINT

RICHARD J. MIGLIACCIO, ESQ.

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