

Defendants threatened to terminate Plaintiffs' decade-long relationship with Defendants, insisting that Plaintiffs turn over management of the hotel food and beverage services to Defendants. Even though the grounds espoused by Defendants for the purported unilateral termination of their contractual relationships with Plaintiffs were baseless, Plaintiffs agreed to terminate the relationships amicably in order to preserve the goodwill among the parties and save all parties a costly and distracting litigation.

2. At the time of the termination, Plaintiffs were owed \$5,956,251.88 from Defendants in the form of outstanding management fees and reimbursable operating expenses. However, following a frustratingly-protracted negotiation between the parties, in early 2020, Plaintiffs acceded to Defendants' request to terminate the relationship between the parties in exchange for Defendants' prompt payment of \$1,884,876.00, representing a portion of the outstanding fees and expenses. To date, Defendants have failed to pay. Plaintiffs bring this lawsuit for breach of contract to enforce the parties' prior settlement agreement – with which Plaintiffs have fully complied – and to recover the long-overdue payment promised by Defendants therein.

3. In the alternative, Plaintiffs assert breach of contract claims under their respective restaurant management agreements for the full amount of fees and expenses owed, totaling over \$5.9 million. Plaintiffs further assert a claim for unjust enrichment against Defendants in connection with their appropriation of the good will, trade secrets and other intellectual property that Plaintiffs developed in creating the restaurants and that Defendants have continued to use subsequent to their termination of the restaurant management agreements.

Parties

4. Sympathy is a New York limited liability company having its at address 22 West 27th St., 2nd Floor, New York, NY 10001.

5. Hot Lips is a Delaware limited liability company having its address at 22 West 27th St., 2nd Floor, New York, NY 10001. Sympathy and Hot Lips are both wholly-owned by Make It Nice Hospitality II, LLC, a New York limited liability company having its address at 22 West 27th St., 2nd Floor, New York, NY 10001.

6. Broadway Tenant is a Delaware limited liability company having its principal place of business at 1170 Broadway, New York, NY 10001.

7. South Olive is a Delaware limited liability company having its principal place of business at 649 South Olive St., Los Angeles, CA 90014.

8. Upon information and belief, both Broadway Tenant and South Olive are jointly owned by The Sydell Group, having its headquarters at 30 West 26th St., 12th Floor, New York, NY 10010 and The Yucaipa Companies, having its headquarters at 9130 West Sunset Boulevard, Los Angeles, CA 90069.

Jurisdiction and Venue

9. The parties have consented to jurisdiction of the courts of the State of New York and to venue in New York County. They have further agreed that New York law shall apply to their dispute.

10. Specifically, Section 36.9 of the Amended and Restated Restaurant Management Agreement, dated June 10, 2013, between Broadway Tenant and Sympathy states that each:

(a) irrevocably consents and submits to the jurisdiction of any Federal, state, county or municipal court sitting in the State of New York in respect to any action or proceeding brought against it by the other concerning matters arising out of or in any way relating to this Agreement; (b) irrevocably waives personal service of any summons and complaint and consents to the service upon it of process in any such action or

proceeding by mailing of such process to the address set forth herein; (c) irrevocably waives all objections to venue and any and all rights it may have to seek a change of venue with respect to any such action or proceedings; (d) agrees that the laws of the State of New York shall govern in any such action or proceedings and waives any defense to any action or proceeding granted by the laws of any other country or jurisdiction unless such defense is also allowed by the laws of the State of New York; and (e) agrees that any final judgment rendered against it in any such action or proceeding shall be conclusive and may be enforced in any other jurisdiction by suit on the judgment or in any other manner provided by law. Each party further agrees that any such action shall be brought only in the State of New York, county of New York.

(Emphasis added.)

11. Pursuant to Section 36.9 (a) of the Restaurant Management Agreement between South Olive and Hot Lips, dated November 30, 2015, South Olive and Hot Lips executed a nearly identical forum selection clause and consented to the same.

12. In addition, both Broadway Tenant and South Olive are subject to personal jurisdiction in New York under CLPR §§ 301 and 302.

13. Venue is also proper in this County pursuant to CPLR § 503(a) because, among other things, a substantial part of the events or omissions giving rise to the claim occurred in this County.

Factual Allegations

14. Daniel Humm (“Mr. Humm”) and Will Guidara (“Mr. Guidara”) founded Sympathy and Hot Lips.

15. Mr. Humm is a world-renowned, award-winning chef, and Mr. Guidara was his erstwhile business partner, with “front-of-house” responsibilities.

16. Beginning in 2006, Mr. Humm was the chef at, and Mr. Guidara managed, Eleven Madison Park, generally regarded as one of the best restaurants in New York City, if not the world. The two purchased Eleven Madison Park from Danny Meyer in 2011 and escalated it to

new heights: it received three Michelin stars, a four-star review from the New York Times, and, in 2017, topped the list of the Best Restaurants in the World.

17. Amidst this meteoric rise to restaurant fame, the Sydell Group – owners of Broadway Tenant and South Olive – approached Mr. Humm and Mr. Guidara about creating, designing, and ultimately running, a restaurant in a new hotel space at 1170 Broadway in Manhattan, to be named the NoMad Hotel.

18. Messrs. Humm and Guidara agreed to do so pursuant to a Restaurant Management Agreement entered into by Sympathy with Broadway Tenant, dated February 1, 2011. Under the terms of that Restaurant Management Agreement, Sympathy was to consult with Broadway Tenant in the design and development of the hotel's food and beverage facilities and to operate the hotel's restaurant and bars in exchange for a salary for Mr. Humm and Mr. Guidara as well as a fee based upon a net revenue formula. Broadway Tenant was further obligated to fund *all* operating expenses of the hotel and its restaurants.

19. Sympathy spent over two years designing the restaurant and food and beverage services for the hotel, including the creation of a menu incorporating many of Mr. Humm's signature dishes.

20. The hotel and its restaurant opened on or about April 1, 2012.

21. On June 10, 2013, Broadway Tenant and Sympathy entered into an Amended and Restated Restaurant Management Agreement (the "NY RMA"). Similar to the February 1, 2011 Restaurant Management Agreement, the NY RMA required Sympathy to operate the hotel's various food and beverage spaces.

22. Under Section 1.1 of the NY RMA, Broadway Tenant was to fund the Working Capital Account from which all of the operating expenses for the hotel's food and beverage

services would be paid. In this regard, Section 1.1(b) states that, while the hotel's food and beverage employees were to be employees of Sympathy, their salaries and benefits would be considered "Operating Expenses" for which Broadway Tenant would be responsible.

23. Section 17.4 of the NY RMA further indicates that nothing in the NY RMA requires Sympathy to use its own funds in connection with the operation of the hotel's food and beverage facilities.

24. In consideration for services provided under the NY RMA, Sympathy was entitled to receive a variety of payments. Namely, Sympathy was entitled to receive: (i) a "Food and Beverage Fee," calculated as 4% of net revenues (as defined in the NY RMA); (ii) a "Hotel Room Revenue Fee," calculated as 1% of hotel room revenues; and (iii) an "Incentive Fee," which comprised 50% of net revenues less operating expenses, and after deducting working capital distributions ("NOI").

25. Sympathy performed all its obligations throughout the term of the NY RMA. Among other things, Sympathy participated in the design of the food and beverage spaces in the hotel, curated the various food and drink menus, and successfully operated the food and beverage services of the hotel for nearly 8 years.

26. In large part due to the input of, and association with, Mr. Humm and Mr. Guidara, the New York hotel and its restaurant were wildly successful. The food and beverage services' revenue increased significantly over the term of the agreement.

27. In 2015, the owners of the New York NoMad hotel – the companies and people behind Broadway Tenant – decided to open a second NoMad hotel in Los Angeles. Hoping to repeat the success they had with Sympathy, they formed South Olive and contracted with Hot

Lips, a separate entity controlled by Messrs. Humm and Guidara, for the design and operation of the restaurants in the Los Angeles NoMad.

28. On November 30, 2015, South Olive and Hot Lips entered into a Restaurant Management Agreement (the “LA RMA”), for the design and operation of food and beverage services at a hotel located at 649 South Olive Street in Los Angeles.

29. The LA RMA is substantially similar to the NY RMA.

30. Under Section 1.1 of the LA RMA, Hot Lips was obligated to consult with the hotel owner in the design and development of the hotel’s food and beverage facilities and to ultimately operate those food and beverage facilities. South Olive was to fund the Working Capital Account and pay for the operating expenses associated with the food and beverage facilities.

31. Section 17.4(a) of the LA RMA states that nothing in that agreement shall be construed as requiring Hot Lips to provide its own funds for the operation of the food and beverage services.

32. The fee structure under the LA RMA is similar to the NY RMA, although the percentages are slightly different. The food and beverage fee was set at 5% of net revenues (as defined therein) and the Incentive Fee was to be 35% of NOI. The LA RMA did not provide for any Hotel Room Revenue Fee.

33. The LA NoMad opened in January 2018.

34. Hot Lips performed its obligations under the LA RMA.

35. Unlike the New York hotel, the Los Angeles NoMad struggled to make a profit, through no fault of Hot Lips. Upon information and belief, the hotel suffered due to its location

in an uninviting spot in downtown Los Angeles, which had been selected by the hotel's owners without input from Mr. Humm or Mr. Guidara.

36. In light of the financial struggles of the Los Angeles hotel, in August and September 2019, Broadway Tenant and South Olive sought to renegotiate the economic terms of the NY RMA and the LA RMA (collectively, the "RMAs").

37. On September 20, 2019, Bradford Nugent, on behalf of the hotel owners, emailed Mr. Humm to confirm certain revised economic terms for the RMAs "in which we can move forward and continue to build profitability and value in both NY and LA together." Mr. Nugent noted that the parties had "built an incredible brand we should all be proud of" and that the owners "appreciate[d] [Mr. Humm's] renewed commitment to the NoMads and . . . look forward to working more closely with [Mr. Humm] to continue to be the best."

38. The necessary amendments to the RMAs were never signed.

39. Instead, with each passing month, Broadway Tenant and South Olive asked for greater and greater concessions from Sympathy and Hot Lips. As a result, the relationship between the parties deteriorated.

40. On October 21, 2019, Broadway Tenant and South Olive sent default notices under the NY and LA RMAs to Sympathy and Hot Lips respectively, in which they incorrectly alleged that, since July 2019, Mr. Guidara's presence at the restaurants was insufficient to satisfy the requirements of the RMAs. Broadway Tenant and South Olive did not terminate the RMAs at this time, but reserved their right to do so.

41. Defendants then threatened to terminate the RMAs unilaterally and without cause. After Plaintiffs unsuccessfully attempted to secure Defendants' commitment to the previously-

negotiated terms and, faced with the prospect of not recovering the fees owed to them by Defendants, Plaintiffs reluctantly decided to negotiate the termination of the RMAs.

42. Between October 2019 and February 2020, the parties negotiated the termination of the RMAs.

43. An important issue that arose in connection with the negotiation of the termination of the RMAs was who bore responsibility for a lawsuit threatened in connection with the operations of the New York hotel (the “NY Claim”). Sympathy was threatened with suit, even though all related expenses were ultimately contractually required to be paid by the hotel owners as an operating expense. With the knowledge of Broadway Tenant, Sympathy participated in a mediation in October 2019 with plaintiff’s counsel. Sympathy denied (and continues to deny) fault and liability in that threatened suit, but opted to settle it in the mediation.

44. The NY RMA obligates Broadway Tenant to pay all operating expenses of the food and beverage services. Nevertheless, in the context of the negotiation of the termination of the NY RMA, Broadway Tenant sought to pass the burden of payment of the NY Claim settlement amount to Sympathy.

45. As of the time of termination of the RMAs on January 29, 2020, Broadway Tenant owed Sympathy \$713,013.00 in fees and \$186,914.00 in operating expenses, plus the additional \$3 million from the NY Claim settlement (and \$40,620.61 in attorneys’ fees) owed as an operating expense. South Olive owed Hot Lips \$574,370.00 in fees and \$1,310,579.00 in operating expenses, plus an additional \$130,755.27 for the settlement of a claim related to the operations of the LA hotel (the “LA Claim”). In total, the amount owing to Sympathy and Hot Lips in fees and operating expenses was \$5,956,251.88.

46. On January 8, 2020, Mr. Nugent wrote to Mr. Humm with the following proposal that was exceedingly generous to Defendants: that the hotel owners would pay Sympathy and Hot Lips the “accrued fees in LA less \$1mm” and “round up the fees owed in NY to \$1mm.” In exchange, the hotel owners asked Sympathy to release them from the NY Claim and for both Sympathy and Hot Lips to vacate the restaurants by the end of January 2020. Mr. Humm indicated his agreement in a response e-mail dated January 13, 2020.

47. Under this agreement, highly advantageous to Defendants, Plaintiffs agreed to accept \$1,884,949.00 in connection with the termination of the RMAs, provided that Defendants remit the settlement amount forthwith. Plaintiffs agreed to this materially reduced amount solely to move forward, get prompt payment, and hopefully preserve the good will that had been built up between the parties over the prior decade.

48. In reliance on this agreement, and on Defendants’ promise to pay the agreed-upon amount right away, Sympathy and Hot Lips vacated the hotels and turned over management of the restaurants on January 29, 2020, as agreed.

49. Having not received payment from the Defendants by the time Sympathy and Hot Lips vacated the restaurants, Mr. Humm wrote on February 3, 2020 to Ron Burkle, one of the controlling owners of Broadway Tenant and South Olive, to push for payment. Mr. Humm’s email stated: “As you know, the actual separation happened last week. We allowed for it to go forward because the key terms were agreed and we thought it best to do in a way that minimized disruption.”

50. Still having not received payment, Mr. Humm wrote to Mr. Burkle again on February 6: “We agreed on a deal and I’ve been more than correct in the way I’ve left the

Nomad and help [sic] you with the transition. Even without you having signed. I thought because of our friendship a hand shake deal was sufficient.”

51. The parties then reiterated the terms of their deal in an exchange of emails between Mr. Humm and Bradford Nugent on February 7, 2020. Mr. Nugent wrote to Mr. Humm:

Daniel the settlement offered that was delivered previously was as follows:

- NoMad LA fees: Accrued fees in LA less \$1 mm
 - NoMad Ny Fees: \$1 mm
 - Full release from the [NY Claim] for the above
- Let me know if you would like to discuss . . .

52. Mr. Humm responded to Mr. Nugent:

The terms you outlined below are consistent with my understand [sic] and the draft that our lawyer . . . sent across to your lawyers. Specifically, that would result in a total payment of \$1,884,949 (\$1m for NY and another \$884,949 for LA). Given we seem to be on the same page, can we get the docs signed and payment processed asap? Please coordinate with [our lawyer] so we can get this across the finish line.

53. Mr. Nugent then responded: “Yes for sure. I think our lawyers got crossed-up. Will come back to you ASAP.”

54. Mr. Humm responded to that, saying “Thank you. Hope you can let me know by the end of the day when to expect payment.”

55. A few hours later, Mr. Nugent wrote to Mr. Humm again: “Daniel one fundamental issue is that these payments release us from the New York [] [C]laim dispute. Can you confirm you’re in agreement with that?” Mr. Humm responded with a simple: “Yes.” Finally, Nugent confirmed: “Thanks Daniel. We’ll get this wrapped up.”

56. On that same day, and once Mr. Humm had received reassurance from Mr. Nugent that the terms of the deal were as previously agreed, Mr. Humm wrote to Mr. Burkle: “Hope we can sign and receive funds early next week.” Mr. Burkle responded: “Sounds good.”

57. The parties' exchange of emails on January 8 and January 13 – as reiterated by the parties in subsequent correspondence on February 7 – constitutes an enforceable agreement, and Plaintiffs have honored their obligations under it.

58. Specifically, Plaintiffs vacated the respective NoMad hotels and turned over operations of the restaurants to the hotels' owners. Consistent with Sympathy's promise, it has not – to date – sought to include the settlement of the NY Claim as an operating expense reimbursable from Broadway Tenant. However, in the event that Defendants repudiate the parties' prior settlement agreement, and the Court finds the settlement agreement unenforceable, then Sympathy will seek, as set forth below, full reimbursement for the amounts paid to settle the NY Claim as valid and reimbursable operating expenses under the NY RMA.

59. A few days after the February 7 e-mail exchange, and in contravention of the parties' settlement agreement, Broadway Tenant and South Olive began to demand that Sympathy and Hot Lips agree to additional concessions (as they had done after the parties reached agreement on amending the economic terms of the RMAs in September 2019). Specifically, the owners: (a) asked for a broader release than what had previously been agreed; and (b) sought explicit permission to continue to use some of Mr. Humm's recipes at the hotels.

60. By mid-March, having vacated the restaurants nearly two months prior, and having believed he had an agreement with his long-time business partners whom he trusted, Mr. Humm, now beleaguered, acquiesced to some of these additional demands. But for every inch Mr. Humm continued to offer, Defendants shamelessly took a mile in return. Thus, even after Plaintiffs acquiesced to Defendants' latest re-trading of agreed-upon deal terms, Broadway Tenant and South Olive *still* did not pay Sympathy and Hot Lips what they were owed – whether it be the more than \$5.9 million they were actually owed or the \$1.8 million Defendants had

agreed to pay; or even a reduced amount that Broadway Tenant and South Olive subsequently indicated they would accept in order to facilitate payment.

61. Indeed, to date, Sympathy and Hot Lips have still not received any payment from Broadway Tenant or South Olive for the outstanding fees and expenses they are owed, despite repeated requests from Mr. Humm to Defendants, individually and through counsel, throughout 2020.

FIRST CAUSE OF ACTION
(Breach of the Settlement Agreement As Against All Defendants)

62. Plaintiffs repeat and reallege the allegations in all preceding paragraphs as if set forth fully herein.

63. In an exchange of emails on January 8 and 13, 2020, and memorialized again in an email exchange on February 7, 2020, Plaintiffs and Defendants entered into an agreement to settle their dispute in connection with the Defendants' termination of the RMAs.

64. Specifically, a representative for Defendants confirmed in writing to a representative for Plaintiffs that, in exchange for Plaintiffs vacating the NoMad restaurants and releasing Defendants from any liability from the NY Claim, Defendants agreed to pay Plaintiffs \$1,884,949.00 for fees and expenses earned in connection with the management of the restaurants.

65. Plaintiffs have performed their obligations under the settlement agreement and have vacated the restaurants.

66. Defendants, however, have failed to pay to Plaintiffs the amounts owing to them despite repeated demands from Plaintiffs and their representatives made over the past year that Defendants follow through on their commitment to make such payment.

67. Defendants are thus in breach of their contract and Plaintiffs are entitled to \$1,884,949.00 in damages, plus prejudgment interest.

68. Plaintiffs are also entitled to recover their reasonable attorneys' fees as set forth in Article 18 of the NY RMA and Article 18 of the LA RMA.

SECOND CAUSE OF ACTION
(As Against Broadway Tenant, in the alternative)
(Breach of NY RMA)

69. Plaintiffs repeat and reallege the allegations in all preceding paragraphs as if set forth fully herein.

70. As set forth in the NY RMA, in consideration for operating the food and beverage services for the NoMad Hotel in New York, Sympathy was entitled to receive from Broadway Tenant a "Food and Beverage Fee," calculated as 4% of net revenues, a "Hotel Room Revenue Fee," calculated as 1% of hotel room revenues, and an "Incentive Fee," which was 50% of NOI.

71. Broadway Tenant was also required to reimburse Sympathy for the operating expenses it occurred in operating the hotel's food and beverage services.

72. Sympathy performed its obligations under the NY RMA.

73. As of the date of termination of the NY RMA, Broadway Tenant owed Sympathy \$713,013.00 in fees and \$186,914.00 in operating expenses. In addition, pursuant to the terms of the NY RMA, Broadway Tenant is required to pay for the settlement of the NY Claim (\$3 million plus \$40,620.61 in attorneys' fees) as this is an operating expense of the hotel. Broadway Tenant has failed to pay these amounts to Sympathy and is in breach of the NY RMA.

74. Sympathy has been damaged as a result in the amount of \$3,940,547.61, plus prejudgment interest.

75. Sympathy is also entitled to recover its reasonable attorneys' fees from Defendants as provided for in Article 18 of the NY RMA.

THIRD CAUSE OF ACTION
(As Against South Olive, in the alternative)
(Breach of LA RMA)

76. Plaintiffs repeat and reallege the allegations in all preceding paragraphs as if set forth fully herein.

77. As set forth in the LA RMA, in consideration for operating at the food and beverage facilities of the Los Angeles NoMad hotel, South Olive was to pay Hot Lips a fee comprising 5% of net revenues and 35% of NOI. South Olive was also obligated to reimburse Hot Lips for any of its operating expenses in running the food and beverage facilities.

78. Hot Lips performed its obligations under the LA RMA.

79. As of the date of termination of the LA RMA, South Olive owed Hot Lips \$574,370.00 in fees and \$1,441,334.27 in operating expenses (including the LA Claim). To date, South Olive has failed to pay Hot Lips those amounts in breach of the LA RMA.

80. Hot Lips has been damaged as a result in the amount of \$2,015,704.27, plus prejudgment interest.

81. Hot Lips is also entitled to recover its reasonable attorneys' fees from Defendants as set forth in Article 18 of the LA RMA.

FOURTH CAUSE OF ACTION
(As Against All Defendants)
(Unjust Enrichment)

82. Plaintiffs repeat and reallege the allegations in all preceding paragraphs as if set forth fully herein.

83. Plaintiffs designed and developed the concept for the restaurants in the New York and Los Angeles NoMad hotels. The menus for the restaurants contain several of Mr. Humm's signature dishes. The success of the restaurants – the New York restaurant in particular – is largely due to their association with Mr. Humm, and the good will and brand image that Plaintiffs built in the restaurants and in the NoMad name.

84. The Defendants took over the restaurants from Plaintiffs on January 29, 2020 and, other than the replacement of the chef and the management, the Defendants continued to operate the restaurants without any material changes in the menu, the décor or the ambience, until the restaurants were required to be closed due to the coronavirus pandemic.

85. The Defendants have not compensated the Plaintiffs for this appropriation, and continued use, of the Plaintiffs' good will, trade secrets and other equity they have built up in the NoMad name and NoMad restaurants.

86. The Defendants have been unjustly enriched as a result, at the Plaintiffs expense, and equity and good conscience require that the Plaintiffs be compensated accordingly for the Defendants' enrichment.

87. The Defendants have been enriched in an amount, and the Plaintiffs damaged in an amount, to be determined at trial.

88. Plaintiffs are also entitled to recover their reasonable attorneys' fees as set forth in Article 18 of the NY RMA and Article 18 of the LA RMA.

Prayer for Relief

WHEREFORE, Plaintiffs Sympathy and Hot Lips respectfully demand judgment against Defendants Broadway Tenant and South Olive, in an amount to be determined by the trier of fact, but not less than:

- a. \$1,884,949.00; or, in the alternative, \$5,956,251.88, plus the amount the Defendants were unjustly enriched;
- b. accrued interest thereon;
- c. the costs and reasonable attorneys' fees, as provided by the NY RMA and the LA RMA, incurred by Plaintiffs in commencing and maintaining this action; and
- d. such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 11, 2021

BAILEY DUQUETTE P.C.

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