

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

WISEAU STUDIO, LLC and TOMMY WISEAU d.b.a. WISEAU-FILMS

Plaintiffs/Defendants by Counterclaim

-and-

RICHARD HARPER, FERNANDO FORERO MCGRATH, MARTIN RACICOT d.b.a.
ROCKHAVEN PICTURES, ROOM FULL OF SPOONS INC., PARKTOWN
STUDIOS INC., RICHARD STEWART TOWNS

Defendants/Plaintiffs by Counterclaim

STATEMENT OF DEFENCE AND COUNTERCLAIM

1. Unless expressly admitted herein, the defendants deny the allegations contained in Wiseau Studio, LLC and Tommy Wiseau d.b.a. Wiseau-Films' Statement of Claim.

A. The Defendants and the Documentary

2. The Defendant, Room Full of Spoons Inc. ("**Spoons Inc.**") produced *Room Full of Spoons* (the "**Documentary**"), an in depth documentary about the cult-film phenomenon *The Room* (the "**Film**"), and the Film's creator, Mr. Wiseau.

3. The Film is a 99 minute film purportedly directed and written by Tommy Wiseau. The Film has, amongst others, the following reviews:

- (a) The BBC writes that “it’s not just bad – it’s intoxicatingly awful”,
- (b) Entertainment Weekly writes that the Film is the “Citizen Kane of bad movies”,
- (c) a rating of 3.6/10 on IMDb (the Internet Movie Database), and
- (d) a rating of 32% on Rotten Tomatoes with an average rating of 3.3/10.

4. Notwithstanding these reviews, the Film has a cult like following with monthly viewing parties all over the world. The Film is screened monthly in over 60 theatres worldwide. Mr. Wiseau is also treated as a celebrity at these screenings because of his acting in the Film and because his persona is inextricably linked to the persona of “Johnny”, the main character in the Film.

5. The Documentary provided by the defendants has been described as a “love letter to *The Room*”. The Documentary’s budget is approximately \$100,000 and was raised primarily through self-funding and a Kickstarter campaign, which Kickstarter campaign raised \$26,101.

6. The Documentary has been screened in select theatres in Europe and North America. Between January 31, 2016 and April 20, 2017, it screened in Madrid, Spain; Poznan, Poland; Copenhagen, Denmark; Sheffield, United Kingdom; Winnipeg, Manitoba; Ottawa, Ontario; Toronto, Ontario; Montreal, Quebec; Philadelphia, Pennsylvania; and Mexico City, Mexico.

7. Spoons Inc. is an Ottawa, Ontario based production company operated by Richard Harper, Fernando Forero McGrath, Martin Racicot, and Richard Stewart Towns.

8. Spoons Inc. holds all rights, title and interest, including copyright in and to the Documentary.

9. Parktown Studios Inc. ("**Parktown**") is an Ottawa based film rental company run by Richard Towns. It has no involvement in the release of the Documentary and was not involved in the production of the Documentary. Spoons Inc. is solely responsible for all release and distribution efforts related to the Documentary. Parktown is being provided a courtesy credit in the Documentary for marketing purposes only.

10. As admitted in paragraph 7 of the Statement of Claim, RockHaven Pictures does not exist as a legal entity. RockHaven Pictures is not involved in the release or distribution efforts for the Documentary.

B. There is No Contract between the Parties

The Parties Meet in 2011

11. Contrary to the allegations in paragraphs 29-31 of the Statement of Claim, on April 24, 2011, Mr. Harper met with Mr. Wiseau in Toronto (the "**First Meeting**"). During this meeting, Mr. Harper explained to Mr. Wiseau that Mr. Harper had an initial concept for a documentary about the fans of the Film and what made the Film a popular cult film.

12. When the parties met, the parties did *not* discuss any use or licensing of the Film. The parties did *not* come to any agreement as to Mr. Wiseau's involvement in or approval rights to the Documentary.

13. Shortly after the Initial Meeting, Mr. Wiseau informed Mr. Harper that he did not want to participate in their documentary. After learning this, Mr. Harper, Mr. Forero McGrath and Mr. Racicot abandoned their initial concept for the documentary and began developing an entirely different documentary, which was filmed over the following five years.

14. This new concept became the concept used in the final version of the Documentary. The new concept of the Documentary goes beyond documenting the Film's fan base, it tells the story of the Film from its conception to its current cult status. The Documentary surveys perspectives from everyone involved in the Film's production including the production team and members of the cast.

15. Contrary to the allegations in paragraph 32 of the Statement of Claim, Mr. Wiseau did not provide the defendants with special access to him for footage used in the Documentary.

16. With regards to the allegations of a screening of the Film in New York, while Mr. Wiseau invited the defendants to attend a Film related event in New York, Mr. Wiseau did not grant the defendants special access to him or the event itself. The defendants paid full ticket price to attend this event. Mr. Wiseau ignored the defendants' requests to film and interview him and misrepresented his whereabouts in effort to avoid the defendants.

17. Mr. Wiseau had another film crew with him at the time of the New York trip referenced in paragraph 32 of the Statement of Claim. The defendants incurred significant monetary damages (i.e. equipment purchase, paid assistants, car rental, travel to New York, accommodations, and daily expenses) for what amounted to attending a screening of the Film like any other fan. Mr. Wiseau did not even acknowledge the defendants' presence at this event.

18. Similarly, the event in Toronto referenced in paragraph 32 of the Statement of Claim occurred *before* the First Meeting described in paragraph 11 above. As such, the defendants' attendance at same was not connected to the Documentary.

19. Contrary to paragraph 33 of the Statement of Claim, Mr. Wiseau was in contact with the defendants prior to 2015. For example, in 2011 and 2012, Mr. Harper and Mr. Wiseau were regularly in touch concerning the sale of Mr. Wiseau's Film DVDs on Amazon.ca. Also, on March 15, 2014, Mr. Harper and Mr. Forero McGrath met with Mr. Wiseau and Mr. Sestero at TYPE bookstore in Toronto. They then all reunited at the Film's screening at the Carlton Cinema in Toronto, Ontario. After this screening, Mr. Wiseau, Mr. Sestero, Mr. Harper and Mr. Forero McGrath had dinner together at a Toronto restaurant.

The Defendants' Good Faith Efforts to Avoid Conflict

20. Although the defendants maintain their position that their use of the clips in the Documentary do *not* require a license (as described in greater detail below), in good faith and an effort to avoid any disagreement, the defendants sought to negotiate a license with Mr. Wiseau.

21. Mr. Harper did email an employee of Wiseau Films in March 2015 requesting clips from the Film for use in the Documentary. This email was sent at Mr. Wiseau's request following a phone conversation between Mr. Harper and Mr. Wiseau. During this call, Mr. Wiseau represented to the defendants that he would license clips from the Film for \$500USD.

22. However, the terms in the draft agreement the plaintiffs later provided to the defendants following this phone call did not reflect the call with Mr. Wiseau. For example, the cost of clips was set at \$5,000USD per clip, Mr. Wiseau required final approval on the Documentary, and the focus of the Documentary needed to be on the Film's fans (as opposed to the Film itself and/or Mr. Wiseau). These terms were, *inter alia*, impracticable and unacceptable to the defendants.

23. Mr. Wiseau's unreasonable demands on the content of the Documentary and the prohibitive cost of the clips made such negotiations unsuccessful.

24. The defendants never represented to Mr. Wiseau that he would be given any rights to control or approve the content of the Documentary.

25. As a further good faith gesture, on February 23, 2016, the defendants provided an advance screener to the plaintiffs, so they could review the Documentary.

26. On March 3, 2016, the plaintiffs explained their primary concern relating to the Documentary: the Documentary does not portray Mr. Wiseau or the Film in a manner that is exclusively positive (regardless of the truth of such information). Spoons Inc. responded to each of the plaintiffs' concerns at the time.

C. There has been No Misappropriation of Personality or Passing Off

27. The Documentary and its supporting material do not create the impression that the Documentary was approved, authorized, endorsed and/or sanctioned by the plaintiffs. In fact, it specifically disclaims such approval, describing the Documentary as “the documentary Tommy Wiseau doesn’t want you to see!”

28. Mr. Wiseau’s connection to the Documentary is that of a subject and not as an endorser. This is because his persona has become so intertwined with the Film such that any work about the Film necessarily includes him as a subject of the Documentary.

D. There has been No Invasion of Privacy

29. None of the details disclosed in the Documentary (i.e. the fact that Mr. Wiseau’s family originates in Poland, and what other individuals involved in the production of the Film say about him) are offensive to a reasonable person.

30. Further, as an individual who has attained a level of public celebrity, Mr. Wiseau’s expectation of privacy is less than that of a non-celebrity.

31. While researching the content for the Documentary, the defendants learned many highly private details about Mr. Wiseau’s personal life that they did *not* include or detail in the Documentary as a courtesy to Mr. Wiseau and because these facts do not advance the Documentary’s narrative.

E. The Documentary does Not Infringe the Plaintiffs' Copyright

32. As admitted in paragraph 43 of the Claim, the Documentary only contains 7 minutes of content from the Film. This small amount represents approximately 7% of the Film's run time and 5% of the Documentary's run time.

33. The use of these clips does not constitute a substantial part of the Film and therefore, the Documentary does not infringe the plaintiffs' copyright.

F. In the alternative, the Use of the Clips Constitutes Fair Dealing

34. If this Honourable Court finds that the Documentary's use of the clips from the Film constitutes copyright infringement, which is denied, the use of the clips constitutes fair dealing, pursuant to sections 29, 29.1, and 29.2 of the *Copyright Act*. Fair dealing is a full defence to copyright infringement.

35. The use of the Film's clips within the Documentary falls squarely within a number of the permissible purposes created by the fair dealing defence under the *Copyright Act*. These purposes include documenting a newsworthy event as well as providing criticism and review of the Film and the social response to it. The Documentary comments on, *inter alia*, Mr. Wiseau's acting style, the inconsistency in the Film's scenes, its poor dialogue, ineffective character development, unusual reliance on classically characterized "American" motifs (i.e. football), and the fact that the Film has developed a cult-like following. The Documentary seeks to understand and comment on the phenomena that is the Film. The Documentary also reports on how this "intoxically awful" film became so popular.

36. The Documentary in no way replaces the Film and instead encourages viewers to watch the Film.

37. The use of the Film's clips within the Documentary is at all times for permissible purposes and is also fair. The factors which establish fairness of the dealing include, but are not limited to, the minimal use of the clips in connection with the purpose, the lack of alternatives to the use, industry standards in connection with such use and the lack of negative economic impact on the Film. The Documentary in no way replaces the Film and instead encourages viewers to watch the Film.

38. Each clip from the Film also provides the source and author of the originating work.

COUNTERCLAIM

39. The defendants claim:

- (a) Damages in an amount to be particularized before trial or other final disposition of the action;
- (b) \$500,000 for punitive, aggravated, and exemplary damages;
- (c) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O 1990, c. C.43;
- (d) Costs of this action, including disbursements and all applicable taxes, on a substantial indemnity basis; and
- (e) Such further and other relief as this Honourable Court may permit and deem just.

40. Spoons Inc. repeats and relies upon the facts set out in the Statement of Defence.

41. The defendants also rely on the undertaking concerning damages provided by the plaintiffs in paragraph 62 of Mr. Wiseau's affidavit sworn June 13, 2017 in connection with the *ex parte* injunction awarded on June 14, 2017 and extended on June 23, 2017.

42. The Order of Justice Akbarali dated June 23, 2017 provides, *inter alia*, that:

(a) until trial or other disposition of the action, the defendants cannot (i) release, exhibit, promote, provide copies, distribute copies of the Documentary, (ii) reproduce, exhibit or use the Film, (iii) appropriate Mr. Wiseau's personality, image and moral rights, (iv) pass off the Documentary as being sanctioned by the plaintiffs or (iv) disclose alleged details of Mr. Wiseau's private life; and

(b) the defendants account for and preserve the crowd-funding proceeds from the Documentary's Kickstarter campaign.

G. Gravitas Deal

43. As a result of the injunction, Spoons Inc. has not been able to finalize a distribution deal for the Documentary by and between Gravitas Ventures, LLC ("**Gravitas**"), an independent film distributor based in California, and Spoons Inc.

44. Prior to the injunction being awarded, Gravitas offered Spoons Inc. a distribution agreement with a 15 year term. Under this agreement, Gravitas would exploit the Documentary in the United States and Canada.

45. Given the injunction, Spoons Inc. has not been able to accept any other offers from other international or North American distributors.

H. Loss of Reputation

46. Because of the injunction, Spoons Inc. has not been able to fulfil its obligations to individuals entitled to DVD copies of the Documentary. The failure to deliver the Documentary or provide refunds to donors damages the defendants' reputation and limits their ability to self-fund documentaries in the future.

47. When individuals donated between \$20 and \$5,000 (the majority of pledges were between \$20 and \$100 each) to the Documentary's Kickstarter campaign, which campaign was used to fund part of the production of the Documentary, they were promised a copy of the DVD. Certain individuals also pre-ordered DVD copies of the Documentary.

48. Although the Documentary was set to be released directly to the public on June 1, 2017, at the request of the plaintiffs' counsel, Spoons Inc. agreed to delay the release of the Documentary to late June 2017. At the further request of plaintiffs' counsel, Spoons Inc. announced to its supporters (including Kickstarter campaign contributors and individuals who pre-ordered DVDs) that it would postpone the release of the Documentary to late June.

49. As a result of the injunction obtained without notice to Spoons Inc., Spoons Inc. has not been able to deliver the Documentary to its supporters or refund donors' money.

50. On April 18, 2015, Mr. Wiseau posted a three part series entitled "Shame on You" (the "**Shame on You Series**") on YouTube and his website <http://theroommovie.com>. The "Shame on You" series also diminishes the defendants' reputation as it alleges that the documentary stole from the Film and constitutes defamation.

51. In the summer of 2016, Spoons Inc. planned a North American tour to screen the Documentary in approximately 25 cities. After receiving various demand letters from the plaintiffs, Spoons Inc. was forced to abandon this tour.

52. The plaintiffs have sent threatening letters to various film festivals in Australia, Pennsylvania, the United Kingdom, Ottawa and Toronto planning on screening the Documentary. As a result of these demand letters, the screenings for the Documentary were cancelled. These demand letters have caused monetary and reputational damage to the defendants.

53. The defendants have had to cancel flights and hotels booked to attend these cancelled events and have missed press opportunities from cancelled media interviews. As independent film makers, these opportunities are essential to the success of their work.

54. Because of the injunction, the defendants were also forced to remove their social media content since 2011 relating to the Documentary. This includes posts on the Documentary's Facebook, Twitter, Instagram and YouTube pages. Thousands of dollars have been invested in creating, maintaining and advertising on these platforms. Now that the defendants' social media platforms are substantially bare, the defendants reputation is severely damaged as many fans and followers believe that the Documentary will never see the light of day. The public's loss of confidence towards the defendants is irreparable and will hinder the defendants ability to fund any future productions.

I. The Plaintiffs' Litigation Misconduct

55. On June 13, 2017, The plaintiffs moved for an *ex parte* injunction. An injunction was granted and the hearing was adjourned to June 23, 2017.

56. The plaintiffs have acted in a high handed and malicious manner in obtaining the injunction.

57. As set out in paragraph 48 above, plaintiffs' counsel repeatedly demanded that Spoons Inc. delay the release of the Documentary to late June, rather than June 1, 2017 as previously scheduled.

58. As soon as the release was delayed, which Spoons Inc. only agree to do in order to facilitate settlement, the plaintiffs moved for an *ex parte* injunction heard on June 14, 2017. There is no basis for failing to give the defendants proper notice of the motion. The plaintiffs obtained an interim injunction in place for ten days, which injunction was extended to October 10, 2017 on June 23, 2017.

59. At the June 23, 2017 hearing, the plaintiffs relied on this new release date (late June) as purported evidence of the breach of the injunction restraining the defendants from promoting the Documentary. Plaintiffs' counsel, however, had previously *demand*ed Spoons Inc. post this notice, which states that the release date had been moved to late June 2017.

J. The Injunction Should be Lifted

60. Despite moving for *ex parte* relief, the plaintiffs failed to make full and frank disclosure by omitting and misrepresenting material facts, including the facts as described above at paragraphs 47, and 57-59 and, *inter alia*, the following:

- (a) no agreement exists between any of the defendants and Mr. Wiseau regarding the Documentary, and even if the plaintiffs could point to an agreement, which is denied, there was no *consensus ad idem* or consideration exchanged;
- (b) the Documentary has already been theatrically released in select theatres;
- (c) the Documentary clearly disclaims any affiliation with Mr. Wiseau;
- (d) the plaintiffs have conflated interviews in the Documentary with what the Documentary posits, misattributing allegations in the Documentary;
- (e) copies of the Documentary and the Film were not put into evidence;
- (f) Mr. Wiseau met with the defendants prior to 2015;

(g) the plaintiffs have already lost exclusivity in the copyright of the Film as a search of YouTube includes numerous unauthorized clips from the Film available for viewing online, including:

i. *The Best of "The Room" (2003)*, published on January 25, 2016 with 39,187 views as of August 8, 2017 <https://www.youtube.com/watch?v=b7xl73JcV7I>;

ii. *The Room Funniest Scenes*, published on October 30, 2016 with 3,010,666 views as of August 8, 2017 <https://www.youtube.com/watch?v=2NOIzW8hx5A&t=238s>;

iii. *Everything Wrong with the Room in 8 Minutes or Less*, published on January 28, 2013 with 7,171,312 views as of August 8, 2017 <https://www.youtube.com/watch?v=mvuwldnG7c0>; and

iv. *The Room – Nostalgia Critic*, published on April 25, 2015 with 1,675,085 views as of August 8, 2017 <https://www.youtube.com/watch?v=Tri9i3WtXLc>;

(h) the defendants informed the plaintiffs that they were entitled to proceed with the Documentary without a license from Mr. Wiseau as their use constitutes fair dealing;

(i) there has not been any copyright infringement because the defendants' use of the clips constitutes fair dealing, which use attributed the plaintiffs in accordance with the *Copyright Act*.

Such failure entitles the defendants to have the injunction set aside with costs awarded on a substantial indemnity basis.

61. There is no serious issue to be tried as there is no copyright infringement, no misappropriation of personality, no representations made by the defendants to Mr. Wiseau, and no agreement between the parties. In any event, the defendants' use of the clips constitutes fair dealing.

62. The plaintiffs have failed to establish any irreparable harm from the release of the Documentary, and the balance of convenience warrants lifting the injunction. The only basis in evidence on the motion was self-serving and speculative evidence by Mr. Wiseau, including the following bald self-serving statements in his affidavit sworn June 13, 2017:

(a) "These statements are false and intended to malign me", (paragraph 53) and

(b) "if the documentary is released, it will cause irreparable harm to my reputation and reveal negative personal, albeit false information about me. This will affect public perception of me and will affect my livelihood, particularly since I am strongly linked with *The Room*, and my reputation as its creator and my public persona are how I make my living. The harm to me would be unquantifiable." (paragraph 54)

63. As detailed above, the plaintiffs' conduct causes harm to the defendants' reputation. There are individuals who are entitled to DVD copies of the Documentary but are restrained by operation of the injunction. Failing to deliver copies of the Documentary to those who invested in the production of same harms the defendants' goodwill as they will have difficulty raising funds for future projects if they are perceived to be producers who cannot deliver on their representations.

64. Spoons Inc. asks that this counterclaim be tried in Toronto together with the main action.

65. The defendants plead and rely on *Copyright Act*, RSC 1985, c C-42.

August 9, 2017

GILBERT'S LLP
77 King St. West
Suite 2010, P.O. Box 301
Toronto-Dominion Centre
Toronto, Ontario M5K 1K2

Matthew Diskin (LSUC # 51010R)
mdiskin@gilbertslaw.ca
Meredith Bacal (LSUC # 68650R)
mbacal@gilbertslaw.ca

Tel: (416) 703-1100
Fax: (416) 703-7422

Lawyers for the Defendants/Plaintiffs by
Counterclaim, Richard Harper, Fernando
Forero McGrath, Martin Racicot d/b/a
Rockhaven Pictures, Room Full Of Spoons
Inc., Parktown Studios Inc., Richard Stewart
Towns

TAYLOR OBALLA MURRAY LEYLAND LLP

330 – 171 East Liberty Street
Toronto, Ontario M6K 3P6
Canada

Doug Murray (LSUC # 35606P)
doug@tomllawyers.com
Victoria Nottingham-Novak (LSUC # 63795A)
victoria@tomllawyers.com

Tel: (416) 537-1529
Fax: (416) 537-1520

Co-Counsel for the Defendants/Plaintiffs by
Counterclaim

TO: BERESKIN & PARR LLP / S.E.N.C.R.L., s.r.l.

Barristers & Solicitors
40th floor, Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3Y2

Michael E. Charles (LSUC # 29802C)
mcharles@bereskinparr.com
Amrita V. Singh (LSUC # 64232R)
asingh@bereskinparr.com
Anastassia Trifonova (LSUC # 70171Q)
atrifonova@bereskinparr.com

Tel: (416) 364-7311
Fax: (416) 361-1398

Lawyers for the Plaintiffs/Defendants by Counterclaim

WISEAU *et al*
Plaintiffs

and

HARPER *et al*
Defendants

Court File No. CV-17-577020

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

STATEMENT OF DEFENCE & COUNTERCLAIM

GILBERT'S LLP

Toronto-Dominion Centre
77 King Street West
Suite 2010, P.O. Box 301
Toronto, Ontario, M5K 1K2

Matthew Diskin (LSUC No. 51010R)
mdiskin@gilbertslaw.ca
Meredith Bacal (LSUC No. 68650R)
mbacal@gilbertslaw.ca
Tel: (416) 703-1100
Fax: (416) 703-7422

Lawyers for the Defendants/Plaintiffs by Counterclaim

Email for party served:
mcharles@bereskinparr.com