

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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JACK LEBEWOHL, JEREMY LEBEWOHL,
UNCLE ABIES DELI INC. d/b/a 2nd AVE DELI,
UNCLE ABIES DELI ON FIRST INC., and
UNCLE ABIES DELI SANDWICH TRADEMARKS LLC,

AMENDED COMPLAINT

Plaintiffs,

Index No. 11-cv-3153

-against-

HEART ATTACK GRILL LLC, HAG LLC, and JON BASSO,

Defendants.

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Plaintiffs JEREMY LEBEWOHL, JACK LEBEWOHL, UNCLE ABIES DELI INC. d/b/a 2nd AVE DELI, UNCLE ABIES DELI ON FIRST INC., and UNCLE ABIES DELI SANDWICH TRADEMARKS LLC (“Plaintiffs”), for their Complaint against Defendants HEART ATTACK GRILL LLC, HAG LLC, and JON BASSO (collectively, “Defendants” or “The Heart Attack Grill”) allege:

PARTIES

1. Plaintiff JEREMY LEBEWOHL is an individual residing at 157 East Houston St., 2nd Fl., New York, New York 10002.
2. Plaintiff JACK LEBEWOHL is an individual residing at 20 E 9th Street, New York, NY 10003.
3. Plaintiff UNCLE ABIES DELI INC. d/b/a 2nd AVE DELI is a New York corporation, with its principal place of business at 162 East 33rd St., New York, New York 10016. Uncle Abies Deli Inc. currently operates the 2nd Ave Deli.

4. Plaintiff UNCLE ABIES DELI ON FIRST INC. is a New York corporation with its principal place of business at 162 East 33rd St., New York, New York 10016.
5. Plaintiff UNCLE ABIES DELI SANDWICH TRADEMARKS LLC is a New York corporation with its principal place of business at 162 East 33rd St., New York, New York 10016.
6. Upon information and belief, Defendant HEART ATTACK GRILL LLC (the "Heart Attack Grill") is an Arizona limited liability company with its principal place of business at 15090 N Northsight Boulevard #115, Scottsdale, Arizona 85260.
7. Upon information and belief, Defendant HAG LLC (the "Heart Attack Grill") is an Arizona limited liability company with its principal place of business at 37401 N Dream St., Carefree, Arizona 85377.
8. Upon information and belief, Defendant JON BASSO is an individual residing at 37401 N Dream St., Carefree, Arizona 85377. He is an indispensable party, as US Patent and Trademark Office files show that he is the sole owner of the trademarks asserted against the Plaintiffs, with no assignment on record to either HEART ATTACK GRILL LLC or HAG LLC.

NATURE OF THE ACTION

9. This is an action seeking the Court's declaration that Plaintiffs have not violated any rights Defendants may have under the Lanham Act 15 U.S.C. §§ 1114, 1125(a) and (c), state unfair competition laws, and common law with regard to a few of Defendants' trademarks, specifically, "HEART ATTACK GRILL," Registration No. 3128169, "TRIPLE BYPASS BURGER," Registration No. 3180519, and its other "BYPASS" marks (collectively, the "Marks in Dispute").

10. Defendants have threatened to file suit in federal court to enforce these claimed rights.
11. Plaintiff Uncle Abies Deli On First Inc. operates the 2nd Ave Deli in New York. The 2nd Ave Deli has sold the “Instant Heart Attack Sandwich” since at least 2004, and is planning to sell the “Triple Bypass Sandwich,” having filed trademark registrations for both marks. The 2nd Ave Deli operates only within New York.
12. By letter dated March 29, 2011, Defendants alleged that Plaintiffs’ use of the terms “Instant Heart Attack Sandwich” and the “Triple Bypass Sandwich” in restaurant menus, advertisements, signs, menus, and promotional materials violated Defendants’ rights under the Lanham Act, as well as those under state and common law. All of the alleged violations occurred in New York City.
13. Defendants, in their March 29 letter, also unequivocally threatened a federal lawsuit against Plaintiffs. Defendants pointedly noted that they have sued many other parties in diverse jurisdictions for alleged infringement of the same marks.
14. As a result of the parties' conflicting positions, an actual and justiciable controversy exists over the parties' respective rights and obligations. This controversy can be fully resolved by way of a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

JURISDICTION AND VENUE

15. An actual and justiciable controversy exists between Plaintiffs and Defendants concerning the alleged violation of Defendants’ rights, if any, in the Marks in Dispute. Accordingly, subject matter jurisdiction for this declaratory action is proper in this Court under 28 U.S.C. §§ 1331, 1338, 1367, 2201, and 2202.

16. This Court has personal jurisdiction over Defendants pursuant to the New York long-arm statute, CPLR § 302(a)(1). Defendants sent correspondence to Plaintiffs in New York threatening to file suit for the violation of various federal and state rights for actions allegedly performed in New York. This threatened federal action could only be filed in New York, as Plaintiffs lack any jurisdictional nexus with any other state. By virtue of these dealings in the State of New York, and this District, Defendants are subject to the personal jurisdiction of this Court under CPLR § 302(a)(1).
17. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claims asserted occurred in this District and because Defendants are subject to jurisdiction in this district. Defendants' activities in this judicial district make it fair and reasonable for it to be sued in this judicial district.

DECLARATORY JUDGMENT OF NON-INFRINGEMENT

18. Plaintiffs repeat and re-allege the previous paragraphs set forth herein.
19. The 2nd Ave Deli is a popular, family-run New York landmark that has been in business since the 1950's. Abe Lebewohl began what would become the 2nd Ave Deli in 1954. The business flourished through his hard work and devotion, and the help of his family. After Abe was tragically murdered during a botched robbery, his widow Eleanor and brother Jack reopened the restaurant. A decade later, the 2nd Ave Deli moved to its current address at 162 East 33rd Street. The 2nd Ave Deli is now in the hands of Jack's sons, Josh and Jeremy.
20. The 2nd Ave Deli's single-minded focus on serving the best kosher New York Delicatessen food available has earned it much publicity and praise. The New York Times referred to the 2nd Ave Deli as an "ethnic culinary legend" and published an article

about the history of the restaurant in its Sunday Magazine. New York Magazine featured the Deli's famous chicken soup in a pot. CBS News devoted a segment to its potato latkes. On the Daily Show, Jon Stewart emphatically expressed his love for the deli's babka and corned beef sandwich. The 2nd Ave Deli Cookbook, published in 1999, contained anecdotes from the likes of Paul Reiser, Sam Levenson, and Raoul Felder.

21. The 2nd Ave Deli is proud to be one of the few kosher Jewish Delicatessens of its kind left in New York. Its former location had a dining room named after Molly Picon, a star of Yiddish theatre, as well as a "Walk of Stars of the Jewish stage," which featured a star for Fyvush Finkel. It serves traditionally Jewish fare such as corned beef, pastrami, brisket, chicken soup, chopped liver, and hummus.
22. As of this filing, there is only one 2nd Ave Deli, and it is in Midtown East, Manhattan.
23. Since late 2005, the Heart Attack Grill has operated the eponymous medically-themed hamburger restaurant in Phoenix, Arizona. The provocatively dressed waitresses are called "nurses." Patrons are called "patients" and are issued hospital wristbands upon entering the restaurant.
24. The Heart Attack Grill proudly serves unhealthy and overly caloric fare such as hamburgers, fries cooked in lard, and milkshakes. Defendants contend that they are known nationally and internationally for serving this type of cuisine.
25. The Heart Attack Grill has accused Plaintiffs of trademark infringement and other violations by virtue of the use of the phrases "INSTANT HEART ATTACK SANDWICH" and "TRIPLE BYPASS SANDWICH" in the 2nd Ave Deli's restaurant menus, signs, website, and other materials. Defendants have further alleged that Plaintiffs

are deliberately imitating their medical theme and are creating a likelihood of confusion with its marks.

26. There is no likelihood of confusion. As an initial matter, the restaurants serve geographically distant markets. Defendants operate in Phoenix, Arizona and the 2nd Ave Deli operates solely in New York City. Furthermore, the food sold, as well as the clientele served, could not be more different. The Defendant's Triple Bypass Burger is more precisely a cheeseburger, and as such is decidedly not kosher and unsuitable for the 2nd Ave Deli's customer base. Similarly, anyone looking for a milkshake, cheeseburger, or French fries cooked in lard will not find them at the 2nd Ave Deli.
27. The 2nd Ave Deli has been in business for almost sixty years serving quality kosher food to New Yorkers, having earned renown in that market. It has no intention of becoming a medically-themed hamburger restaurant and grill.
28. The 2nd Ave Deli has been serving its popular Instant Heart Attack Sandwich since before the Heart Attack Grill even existed, much less used the trademark "Heart Attack Grill" in commerce.
29. Without a prompt determination as to whether the 2nd Ave Deli's use of the "Instant Heart Attack Sandwich" and "Triple Bypass Sandwich" infringes upon Defendants' claimed intellectual property rights, Plaintiffs cannot know with any certainty whether or not they are exposing themselves to liability if they do not accede to Defendants' demands.
30. Plaintiffs demand trial by jury on all issues so triable.

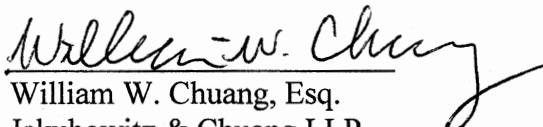
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment in their favor against Defendants for the following relief:

- (1) A judgment declaring that Plaintiffs have not infringed upon any rights Defendants may have under the Lanham Act with regard to the Marks in Dispute or with regard to any other of Defendants' marks;
- (2) A judgment declaring that Plaintiffs did not violate any state or common law claim or right of Defendants with regard to the Marks in Dispute or with regard to any other of Defendants' marks;
- (3) Costs and reasonable attorneys' fees; and
- (4) Such other relief as the Court may deem just and proper.

Dated: New York, NY
July 29, 2011

Respectfully Submitted,



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