

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. d/b/a 2ND AVE DELI,
AND UNCLE ABIES DELI SANDWICH TRADEMARKS LLC,

**SECOND AMENDED
COMPLAINT**

Plaintiffs,

-against-

Index No. 11-cv-3153

HEART ATTACK GRILL LLC, HAG LLC,
JON BASSO, DIET CENTER LLC (TEXAS) AND
DIET CENTER LLC (DELAWARE)

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. d/b/a 2ND AVE DELI, and UNCLE ABIES
DELI SANDWICH TRADEMARKS LLC ("Plaintiffs"), for their Second Amended Complaint
against Defendants HEART ATTACK GRILL LLC, HAG LLC, JON BASSO, DIET CENTER LLC
(TEXAS) AND DIET CENTER LLC (DELAWARE) (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 that operates a 2ND AVE DELI restaurant at its principal place of business, 162 East 33rd St., New York, New York 10016.
4. Plaintiff UNCLE ABIES DELI ON FIRST INC. d/b/a 2ND AVE DELI is a New York corporation that operates a 2ND AVE DELI restaurant at its principal place of business, 1442 1st Ave., New York, NY 10021.
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 is a limited liability company formed under the laws of Arizona. Upon information and belief, HEART ATTACK GRILL LLC formerly operated a Heart Attack Grill restaurant at 6185 W Chandler Blvd., Chandler, AZ 85226, but currently does not conduct business.
7. Upon information and belief, Defendant HAG LLC is a limited liability company formed under the laws of Arizona. Upon information and belief, HEART ATTACK GRILL LLC formerly operated a Heart Attack Grill restaurant at 6185 W Chandler Blvd., Chandler, AZ 85226, but currently does not conduct business.
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.

9. Upon information and belief, Defendant DIET CENTER LLC (TEXAS) is a limited liability company formed under the laws of Texas. Upon information and belief, DIET CENTER LLC (TEXAS) formerly operated a Heart Attack Grill restaurant at 1718 N Market St., Dallas, TX 75202 but currently does not conduct business.
10. Upon information and belief, Defendant DIET CENTER LLC (DELAWARE) is a limited liability company formed under the laws of Delaware with its principal place of business at 450 Fremont St., Las Vegas, NV 89101, where it currently operates the only Heart Attack Grill restaurant still open.

NATURE OF THE ACTION

11. 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").
12. Defendants have threatened to file suit in federal court to enforce these claimed rights.
13. Plaintiffs UNCLE ABIES DELI INC. and UNCLE ABIES DELI ON FIRST INC. each operate a 2ND AVE DELI restaurant in New York.

14. 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.
15. 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.
16. 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.
17. 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

18. 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.
19. 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).

20. 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

21. Plaintiffs repeat and re-allege the previous paragraphs set forth herein.
22. 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 on March 4, 1996, his widow Eleanor and brother Jack reopened the restaurant. A decade later, the 2nd Ave Deli operated by UNCLE ABIES DELI INC. moved to its current address at 162 East 33rd Street. In 2011, another location of the 2nd Ave Deli operated by UNCLE ABIES DELI ON FIRST INC. opened on 1442 1st Ave., New York, NY 10021.

23. The 2nd Ave Deli is now in the hands of Jack's sons, Josh and Jeremy Lebewohl.
24. 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.
25. 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.
26. 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.
27. 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.

28. 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.
29. There is no likelihood of confusion. As an initial matter, the restaurants serve geographically distant markets. Defendants operate solely in Las Vegas, Nevada, 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.
30. 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.
31. 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.
32. 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.

33. Plaintiffs demand trial by jury on all issues so triable.

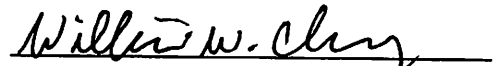
PRAYER FOR RELIEF

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
October 28, 2011

Respectfully Submitted,



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