

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,

Plaintiffs,

-against-

Index No. 11-cv-3153 (PAE)

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

Defendants.

----- X

Declaration Of William W. Chuang In Opposition  
To Plaintiffs' Motion To Dismiss

William W. Chuang, Esq., an attorney duly admitted to practice law before the courts of the State of New York, hereby affirms the following under the penalties of perjury:

1. I am a partner of the firm of Jakubowitz & Chuang LLP, the attorneys for Plaintiffs. As such, I am fully familiar with the facts and circumstances of the within proceeding, except as to those matters that I allege to be based upon information and belief, and as to those matters, I believe them to be true. The basis of my belief is information provided to me by my clients, and information contained within the Court file.
2. Documents bearing Bates Nos. PLFS000001-PLFS000506 were served on Defendants on August 19, 2011. Bates Nos. PLFS000507-000665 are privileged. PLFS000666-000669 were produced on September 27. Bates Nos. PLFS000670-PLFS000672, containing a picture of the Instant Heart Attack Sandwich posted on the Deli's website and an invoice from the Deli's public relations firm, were produced on October 14.

3. The Deli served its responses to HAG's requests for admissions on November 4, 2011. Many of the requests for admissions were based on HAG's requests for production and interrogatories.
4. I personally had the pleasure of eating an Instant Heart Attack Sandwich at the Second Ave Deli. The sandwich is served on a plate without a wrapper or container. The Instant Heart Attack Sandwich is on the Deli's in-store menus, which I ordered from. The menus are also posted online on their website. A picture of the Instant Heart Attack Sandwich is also posted on the Deli's website. A copy of the document bearing Bates No. PLFS000670 is attached hereto as Ex. A.
5. Exhibit B to this Declaration contains true and correct copies of documents bearing Bates Nos. HAG—000001, HAG—000005, HAG—000019.
6. Exhibit C to this Declaration contains true and correct copies of documents bearing Bates Nos. PLFS000089, PLFS000091, PLFS000096-0000097.
7. Exhibit D to this Declaration contains true and correct copies of newspaper articles accessible at  
<http://www.bloomberg.com/apps/news?pid=21070001&sid=aTPxw51z34zY>  
<http://www.nytimes.com/2006/01/06/nyregion/06deli.html?pagewanted=print>

8. Exhibit E to this Declaration contains true and correct copies of the newspaper article accessible at <http://blogs.wsj.com/law/2011/05/11/who-owns-the-legal-right-to-promote-death-on-a-plate/tab/print/>.

Affirmed.

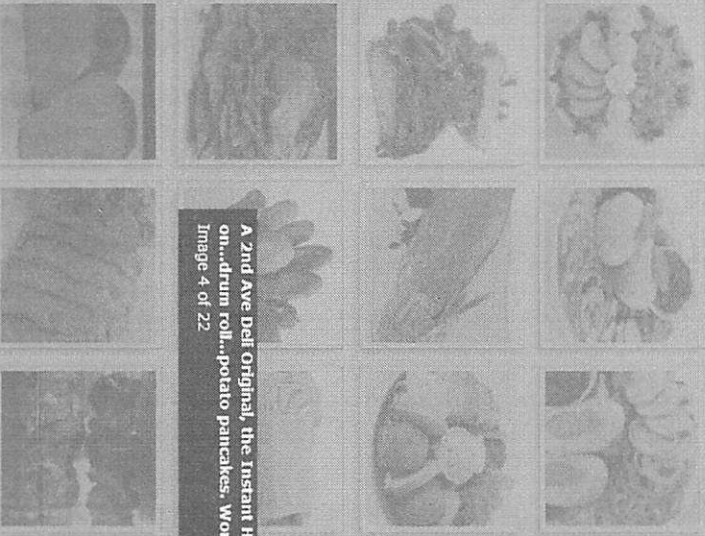
Dated: December 16, 2011  
New York, NY

  
\_\_\_\_\_  
William W. Chuang  
Jakubowitz & Chuang LLP  
401 Broadway, Suite 408  
New York, NY 10013  
Tel.: (347) 542-8529  
Fax: (347) 532-1344

# Exhibit A

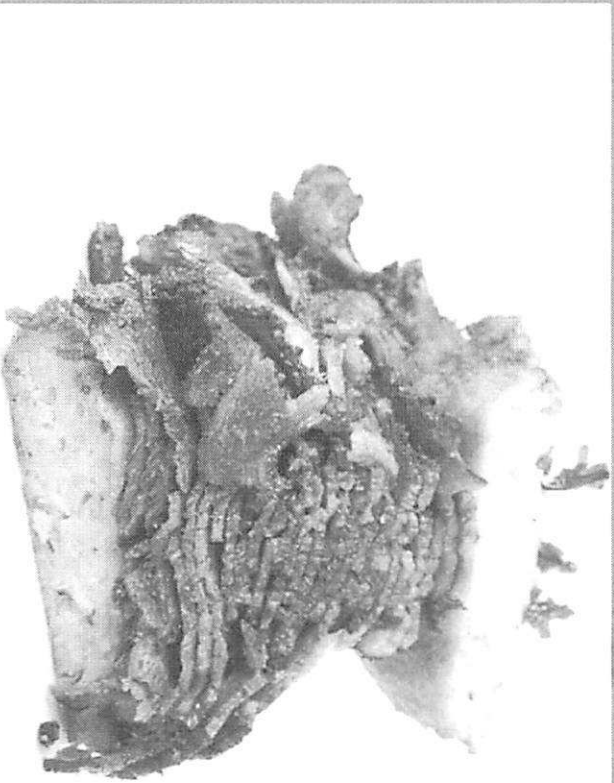
Literally translated: A taste like the Garden of Eden. The 2nd Ave Deli brings you some delicious images, all available at the restaurant for dining in or take-out/delivery.

[View Images As Flash Slideshow]



A 2nd Ave Deli Original, the Instant Heart Attack Sandwich: It's pastrami on...drum roll...potato pancakes. Worth the hospital bills.

CLOSE X



2ND AVE FOOD

# Exhibit B

**Int. Cl.: 43**

**Prior U.S. Cls.: 100 and 101**

**United States Patent and Trademark Office**

**Reg. No. 3,128,169**

**Registered Aug. 8, 2006**

**SERVICE MARK  
PRINCIPAL REGISTER**

# Heart Attack Grill

BASSO, JON (UNITED STATES INDIVIDUAL)  
PO BOX 3347  
CAREFREE, AZ 85377

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE GRILL, APART FROM THE MARK  
AS SHOWN.

FOR: RESTAURANT SERVICES, IN CLASS 43  
(U.S. CLS. 100 AND 101).

SN 78-647,668, FILED 6-9-2005.

FIRST USE 6-1-2005; IN COMMERCE 10-1-2005.

THE MARK CONSISTS OF STANDARD CHAR-  
ACTERS WITHOUT CLAIM TO ANY PARTICULAR  
FONT, STYLE, SIZE, OR COLOR.

WILLIAM BRECKENFELD, EXAMINING ATTOR-  
NEY

**Int. Cl.: 30**

**Prior U.S. Cl.: 46**

**Reg. No. 3,180,519**

**United States Patent and Trademark Office**

**Registered Dec. 5, 2006**

**TRADEMARK  
PRINCIPAL REGISTER**

**TRIPLE BYPASS BURGER**

BASSO, JON (UNITED STATES INDIVIDUAL)

PO BOX 3347

CAREFREE, AZ 85377

FOR: HAMBURGER SANDWICHES, IN CLASS 30  
(U.S. CL. 46).

FIRST USE 6-9-2005; IN COMMERCE 10-0-2005.

THE MARK CONSISTS OF STANDARD CHAR-  
ACTERS WITHOUT CLAIM TO ANY PARTICULAR  
FONT, STYLE, SIZE, OR COLOR.

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE "BURGER", APART FROM THE  
MARK AS SHOWN.

SER. NO. 78-780,876, FILED 12-27-2005.

GIANCARLO CASTRO, EXAMINING ATTORNEY





# Exhibit C





Orbis Brynmore Printing  
 1735 Second Avenue  
 New York, NY 10128  
 Tel 212-987-2100

# Invoice

Date	Invoice No.
08/10/05	2044

<b>Bill To</b>
Second Avenue Deli 156 Second Avenue Corner 10th Street New York, NY 10003

<b>Ship To</b>
Second Avenue Deli 156 Second Avenue Corner 10th Street New York, NY 10003

P.O. No.	Terms	Rep	Ship Date	Ship Via	FOB	Project
	Net 30	DB	08/10/05			
Qty	Item	Description			Rate	Amount
100	Misc.	Menus Printed on 80lb cream card stock in 1 pms color B/B (13 x19), scored and laminated			2.75	275.00T
	Laminating	13 x 19 (Ordered by Jack- 7-28-05)			300.00	300.00T
		Sales Tax			8.375%	48.16
Thank you for your business.					<b>Total</b>	\$623.16

9/28/2010

Hosuton Hound in NYC: 2nd Ave Deli Re...

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Your email

Friend's email

Message

Check out this Topic from CHOW.com, your home for food on the web.

## Hosuton Hound in NYC: 2nd Ave Deli Report

I had the No.4 Decker sandwich (\$17), while my friend had the Instant Heart ATtack (\$17).

Before the food arrived, we were served Jewish dill pickles (which weren't too sweet, but were just right and totally crisp) and a coleslaw-like pickled cabbage thing that had no milky dressing but was slightly sweet tasting.

The No.4 came, looking about six inches high, and my arteries trembled in fear as I gazed upon this tall monstrosity. In between the thin slices of Jewish deli rye bread, the "sandwich" had hot pastrami, corned beef and chicken salami in between. Somehow, I managed to actually eat the damned thing altogether without getting a locked jaw, but boy, it was good: pastrami was flavourful, and tender, and blended in with the corned beef and chicken salami to make a flavourful sandwich that was also extremely filling.

The Instant Heart Attack consisted of a "sandwich" made from fried potato pancakes instead of bread, with pastrami in between. It was, ironically, less filling than the No.4, and in my opinion, less likely to cause a heart attack than the No.4. It too, was flavourful and good.

Come to think of it, maybe they should rename the No.4 "Instant Asphyxiation".

All in all, it's definitely worth revisiting.

cheers

PJ


 By **fatmonky** on May 19, 2004 02:59AM

## 2 Replies so Far

Yeah, the combo sandwiches are great. They also make an ambrosial creamy cole slaw, but you have to pay for it. Great chopped liver too, and the motzah-ball soup is deservedly famous.

My favorite heart attack meal is braised turkey wing (don't knock it till you've tried it), with kasha varnishkas and egg barley, plus a tureen of gravy.

And a diet Dr. Brown's Celray Tonic :-).

 By **KRS** on May 19, 2004 10:27AM

re: [KRS](#)

I concur on the matzo ball soup and the chopped liver. I also enjoyed the gefilte fish. It was mild, light and just ever so slightly sweet. The serving was huge. Luckily, my friend and I had ordered one serving to split between us. The blintze were delicious, too.

 By **lizard acres** on May 20, 2004 07:59AM

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# Exhibit D

# Bloomberg

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## Second Avenue Deli Moves Pastrami, Corned Beef Uptown: Update 1

Dec. 18 (Bloomberg) -- Jack Lebewohl poked the gefilte fish, which he thought was pretty good. Actually, it was great, was the consensus at the table near the back of the Second Avenue Deli, which opened yesterday morning 22 blocks north and one block west of its previous location in New York's East Village.

Not that Lebewohl, 59, disagreed. He was just acknowledging the fact that some days are better than others, even when it comes to great gefilte fish.

``My mother used to say, `Some days are good, some days are not so good,'" he said with a shrug in Yiddish, which made it sound learned and funny at the same time.

For the customers jammed into the restaurant, which is half the size of the original, it was unquestionably a very good day in a story that begins with a tragedy. On March 4, 1996, Abraham Lebewohl, known to an appreciative world as Abe, was murdered during an after-hours robbery at the institution he had founded in 1954 after fleeing Nazi Europe. (The case remains open; a sign outside the new location, with a photograph of Abe Lebewohl, offers a \$100,000 reward for information leading to the arrest of his killer.)

The Second Avenue Deli was home not only of the ``nickel schtikel," beef sausage links sold from the counter, but also Abe's pride, the world's first parve cheesecake (meaning it had no dairy and thus could be consumed in a kosher deli that serves meat dishes). Not to mention inarguably the world's best corned beef and pastrami. And chopped liver.

One could go on; I had eaten there regularly and exchanged embraces and greetings with Abe since 1972. The only thing he couldn't comprehend was my dislike of center-cut tongue.

Enter Scions

Jack, Abe's kid brother and a real-estate lawyer, made a go of running the deli but finally threw in the towel when rents in the hipper-than-hip East Village got ridiculous. The deli closed on Jan. 1, 2006. That's when the scions went to work, led by Jack's now-25-year-old son, Jeremy Lebewohl, also



much in evidence yesterday, prowling the aisles, shaking hands, checking orders.

They bought the building at 162 E. 33rd St., perhaps not coincidentally right up the block from Yeshiva University and a kidney-stone's throw from N.Y.U. Medical Center.

The menu is largely unchanged, including the ``Instant Heart Attack," one of Jack's creations: a sandwich composed of ``two large potato pancakes with your choice of Corned Beef, Pastrami, Turkey or Salami." Dramatically changed are the prices: When I asked Jack what the \$14.25 pastrami sandwich went for 30 years ago, he laughed and said: ``Who knows? Fifty cents?"

### Still a Bargain

At \$14.25, it's still a bargain, a small mountain of perfectly tender salty slightly fatty meat on fresh rye slathered with grainy deli mustard.

After waiting on line an hour to get in, I ordered matzo- ball soup, the pastrami sandwich (anyone who orders extra-lean pastrami is an idiot) and kasha varnishkes. The couple sitting next to me, though regulars at the old place, didn't know what kasha varnishkes are. I explained.

Kasha is buckwheat groats; varnishkes are bow-tie noodles, all cooked with onions and schmaltz, which is rendered chicken fat, Jewish mayonnaise that goes on everything.

I demanded the woman's plate and spooned on a small amount. ``I warn you," I said. ``Taste this and you will never settle for grits or polenta again." After one bite, she reluctantly agreed.

Of course, I washed it all down with Dr. Brown's Cel-Ray, really the only drink right for such a feast.

The tab was \$33. Just like the street, oddly enough.

The Second Avenue Deli is at 162 E. 33rd St., near Third Avenue. Information: +1-212-689-9069.

(Jeremy Gerard is an editor for Bloomberg News. The opinions expressed are his own.

To contact the writer on this story: Jeremy Gerard in New York at [jgerard2@bloomberg.net](mailto:jgerard2@bloomberg.net).

To contact the editor responsible for this story: Manuela Hoelterhoff at [mhoelterhoff@bloomberg.net](mailto:mhoelterhoff@bloomberg.net).

# The New York Times

January 6, 2006

## Hold the Mustard, Maybe Forever

By ANDY NEWMAN

The Second Avenue Deli has survived turbulence and tragedy in its 51 years. The decline of the Jewish enclave on the Lower East Side did not kill it. The broad-daylight murder of its beloved founder, Abe Lebewohl, in a robbery in 1996 shut it down but briefly. Dietary fashion campaigns against artery-clogging fare like brick-thick pastrami sandwiches and fat-saturated potato latkes seemed only to make the lines of defiant fans longer.

But the deli seems to have met its match in that implacable beast, the real estate market.

On Sunday, facing a \$9,000 increase in his \$24,000-a-month base rent, the deli's owner, Jack Lebewohl, Abe's brother, pulled down the grates on the glimmering restaurant at East 10th Street and Second Avenue. The closing was described as temporary, but Mr. Lebewohl said yesterday that the next time the place opens it might very well be to clear out.

The rent increase is actually built into the lease that Mr. Lebewohl negotiated with the previous owners 15 years ago. The new owners have volunteered to come down \$3,000 in the new rent, but no further.

"If I don't get this resolved in x number of days," Mr. Lebewohl said, "I'll vacate." He declined to say what "x" equaled but implied that it was a one-digit number. "Less than weeks," he said.

And so the mourning has begun.

"It's almost like wiping out Carnegie Hall," said the comic Jackie Mason, whose \$10,000 reward for the capture of Abe Lebewohl's killer remains unclaimed. "A sandwich to a Jew is just as important as a country to a Gentile."

To Joan Washington, a community activist who has been going to the deli since shortly after running away from home at age 15 in search of the radical life on the East Side, the deli was about a lot more than a sandwich.

"It's not just a pastrami palace," said Ms. Washington, who is now 58. "It's the history of Lower East Side Judaism."

For all its legendary status, the Second Avenue Kosher Delicatessen, as it is formally known, is an odd sort of New York institution: It was already an anachronism the day it opened in 1954. The Yiddish theaters - Second Avenue was once known as the Yiddish Broadway - were mostly dark, and Jews and their businesses were leaving the East Village.

But Abe Lebewohl, a concentration camp survivor who had come to the United States just a few years before, was determined to make a go of it, and he did, eventually expanding from 10 seats to 250. Along the way, he fed countless homeless or otherwise hungry people at no charge and built a Yiddish Walk of Fame in front of the restaurant.

Even as the restaurant steadily raised its prices - the mammoth Instant Heart Attack, a pile of meat sandwiched between potato pancakes, is listed on the menu at \$19.95 - Jack Lebewohl kept the place full and kept up the restaurant's tradition of helping out the less fortunate. Last year, he hired a down-and-out former pornographer, Al Goldstein, as a greeter.

"I have not eaten so well since I lived with my mom," said Mr. Goldstein, who was fired after he was found sleeping in the restaurant's basement. Mr. Goldstein, a noted gourmand until a recent stomach-stapling operation, declared the

deli's shuttering "almost as sad as the closing of Chock Full O' Nuts," though he added, "I never thought Jack's pastrami was as good as Katz's. It's kosher. It was bland."

Mr. Lebewohl pointed out that he was not the only restaurateur on Second Avenue to fall on hard times. Across the street was a recently shuttered French bistro. Next door to it, workers were pulling down the sign from a pizzeria that had been in business for all of several weeks. Down at the corner of East Ninth Street was a closed Japanese restaurant with a "Store for Rent" sign in the window.

Mr. Lebewohl said that he had already received several offers to relocate, including one of a larger space a few blocks away at half his current rent.

One of the deli building's new owners, Martin Newman of Jonis Realty, said yesterday that he had tried to accommodate Mr. Lebewohl, who was a real estate lawyer before he was a deli man.

"All we know is we bought a lease that has this rent provision in it," he said. "Listen, we didn't want to put him out of business. I thought we were pretty fair."

Mr. Newman said he did not know if Mr. Lebewohl would really be unable to manage the higher rent. "I only know when you go in there at noontime, it's crowded, and he's charging \$17.50 for a tongue on rye," he said.

Across from the deli, the general manager of the Telephone Bar and Grill, Karyn Seltzer, bemoaned the deli's apparent demise.

"It would be a really sad statement to make that, basically, if you are not supported by a huge corporation, then you can't survive in New York," Ms. Seltzer said, ticking off the banks, the Dunkin' Donuts and the Starbucks that have sprouted on her stretch of the avenue. "That's certainly not what the East Village is about."

Yesterday, the stars in the sidewalk in front of the deli shone untarnished - Hymie Jacobson, Zvi Scooler, Max and Rose Bozyk, and the rest. But the restaurant, with its ancient-looking white-tile floor, was dark, and the silver tables were bereft of their heaping bowls of mustard and free pickles.

Mr. Lebewohl said that if he had to close the deli for good, so be it.

"This is life," he said. "Life goes on."

Jackie Mason, however, questioned whether it would be worth living.

"If the pastrami sandwich goes down the drain," he said, "there's no hope for this country at all."

# Exhibit E

**THE WALL STREET JOURNAL**

WSJ.com

MAY 11, 2011, 1:50 PM ET

## Who Owns the Legal Right to Promote Death on a Plate?

It's an East Coast/West Coast culinary death match.

The Heart Attack Grill, an Arizona hamburger establishment that proudly boasts of its "taste worth dying for", sent a letter earlier this year threatening litigation against the 2nd Avenue Deli, perhaps New York City's most famous kosher deli.

The dispute centered around the deli's "instant heart attack" sandwich, which features two potato pancakes with deli meat lopped on top, and its plans to soon sell a "triple bypass" sandwich.

AP

The Heart Attack Grill's triple bypass burger

Problem is that the Heart Attack Grill serves a signature single, double, triple and quadruple "bypass burger."

Can't you just smell the trademark conflict?

Yesterday, 2nd Avenue filed suit in Manhattan federal court, seeking a declaratory judgment that it has not infringed on the Heart Attack's trademarks. Here's an article in the New York Daily News on the suit.

"The defendant's Triple Bypass Burger is more precisely a cheeseburger, and as such is decidedly not kosher and unsuitable for the 2<sup>nd</sup> Ave Deli's customer base," the 2nd Ave lawsuit states. "Similarly, anyone looking for a milkshake, cheeseburger, or French fries cooked in lard will not find them at the 2<sup>nd</sup> Ave Deli."

In response, Jon Basso, of the Heart Attack Grill, told the Law Blog: "These are desperate times for the unimaginative, but a simple formula has emerged; 1) copy my intellectual property, 2) wait for me to object, 3) file suit against me, for exercising my right to object, in the hopes of garnering media attention for what is otherwise an unremarkable deli."

He added: "There really is no story here, other than a possible exposé on the abuse of our civil court system for personal gain."

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