

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

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 JEREMY LEBEWOHL et al.,

Plaintiff,

-v-

HEART ATTACK GRILL, LLC et al.,

Defendants.
 -----X

11 Civ. 3153 (PAE)

ORDER

PAUL A. ENGELMAYER, District Judge:

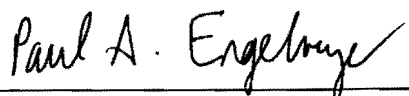
The Court has received plaintiffs' December 9, 2011 letter alleging that defendant HAG LLC has failed to provide adequate responses to certain interrogatories (attached), and defendants' December 14, 2011 letter in response (attached).

Specifically, plaintiffs allege that HAG has failed to provide adequate responses to plaintiffs' second set of interrogatories, which were issued after the Diet Center LLC entities were added to this case. Plaintiffs seek the identities of certain HAG personnel, copies of licensing and franchising agreements, documents referring to the Diet Center LLCs, financial records, and communications to and from HAG investors. HAG responds, *inter alia*, by noting that the parties previously agreed to specific limitations as to the disclosure of HAG investors.

As to interrogatories that call for the identification of (or communication among) HAG investors, the Court declines to enforce those interrogatories. The Court is reluctant to override explicit agreements among parties as to the scope of discovery, and here an agreement appears to have put the identities of investors off-limits. In addition, the Court sees these investor communications as having minimal potential probative value.

However, as to the other discovery disputes raised in plaintiffs' letter, the Court rules for plaintiffs. HAG is hereby directed to respond in good faith to plaintiffs' second set of interrogatories, within one week of this order, and to produce all documents responsive to plaintiffs' discovery requests.

SO ORDERED.



Paul A. Engelmayer
United States District Judge

Dated: December 20, 2011
New York, New York

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December 9, 2011

BY FEDEX

Hon. Judge Paul A. Engelmayer
U.S. District Court, Southern District of New York
500 Pearl Street
New York, NY 10016

RE: Lebewohl et al. v. Heart Attack Grill LLC, et al., Case No. 11-cv-3153.

Dear Judge Engelmayer:

My firm represents Plaintiff 2nd Ave Deli in this case. I write to inform the Court of HAG's failures to comply with its discovery obligations.

On July 28, 2011, the Deli served HAG with its First Set Of Interrogatories And Requests For Productions (the "First Set"). After HAG belatedly disclosed the existence of the Diet Center LLC entities, the Deli served HAG on October 17, 2011 with its Second Set Of Interrogatories and Requests For Production (the "Second Set"), which requested information regarding the Diet Center LLCs. HAG has not provided adequate responses to either set of discovery requests.

Counsel for the Deli informed HAG of deficiencies in its discovery responses beginning on September 16, 2011. HAG's initial response to interrogatories asking for the identities of important HAG personnel was to state that Jon Basso was the person most knowledgeable on those topics. Furthermore, HAG did not produce a single executed copy of a licensing, assignment, or franchising agreement despite references to licenses and franchisees in documents. HAG did not respond to the letter for over a week. On September 23, HAG refused the Deli's request to meet and confer on the topics, promising an imminent amendment of the responses. Despite many follow up emails, HAG did not amend its responses until October 5, 2011. It was then that HAG first produced documents regarding the Diet Center LLC (Delaware) and Diet Center LLC (Texas).

HAG's amended responses were still incomplete. The Deli had to send another letter on October 14 detailing shortcomings with HAG's amended responses. HAG did not provide any documents referring to the Diet Center LLCs. And there were no communications to and from investors. HAG failed to identify anyone associated with the Diet Center LLCs as having knowledge about the issues in this case. Furthermore, HAG again failed to disclose the identities of various persons described in the Interrogatories, only referring to Jon Basso as being "responsible." Most

importantly, HAG maintained boilerplate objections to virtually every request, especially that the requests were “overbroad.” The Deli asked that these objections be withdrawn, which HAG refused to do.

On October 24, 2011, counsel for the parties held a meet and confer regarding the First Set. (HAG mistakenly claims the meet and confer occurred on October 28.) HAG maintained its objections based on overbreadth, basing its objections on interpretations of the Deli’s requests that are contrary to the plain English meaning of the requests. For example, HAG claimed that RFP No. 13, which calls for the production of “documents which record, refer to, or relate to any use of any of the HAG Marks by a third party as a trademark for goods and restaurant service” encompasses the use of food wrappers and take-out containers by HAG’s customers. Clearly, HAG’s customers are not using wrappers to designate themselves as sources for HAG’s products—especially in light of HAG’s recent claims that the Deli is not using its marks as a trademark. In any event, HAG agreed to disclose responsive documents relating to the HAG Marks, but would not disclose information on investors. The Deli clearly and expressly reserved its right to challenge HAG’s production pending that disclosure.

HAG’s second amended production yielded a single email, which referred to an Operating Agreement, Trademark Agreement, and Option Agreement. HAG did not produce any of these documents—not even the *Trademark Agreement*—despite claiming to have produced documents relating to “trademarks”. Furthermore, HAG also failed to produce any financial paperwork demanded by the Second Set of discovery requests. Correspondence with HAG regarding these issues was unsuccessful in obtaining disclosure.

On November 23, after an extension granted by the Deli, HAG served its response to the Deli’s Second Set of discovery. These responses claimed that there was an agreement to limit *all* discovery to matters relating to trademarks based on the parties’ October 24 meet and confer on the First Set. No such agreement was made. In fact, many of the discovery requests in the Second Set could not sensibly be limited in that fashion. For instance, Interrogatory No. 9 asks HAG to identify “all officers, directors, owners, managers, and employees of (1) Diet Center LLC (Texas) and (2) Diet Center LLC (Delaware).” HAG refused to provide any response other than to claim that discovery was limited by agreement to only “trademarks”. Interrogatory No. 9 is very clear on its face, and cannot be limited to “trademarks” as it has nothing to do with trademarks.

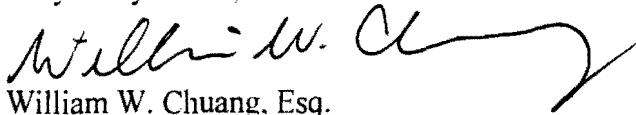
HAG’s failures have frustrated the Deli’s attempt to conduct further discovery. Even though Fred Mossler legally bound Diet Center LLC (Delaware) in an agreement with Mr. Basso, HAG claimed that Mr. Mossler was not an owner or officer of that company, and had to be served personally with a subpoena. Mr. Mossler is dodging the Deli’s process servers. In its recent motion papers, HAG admits that there are co-owners of Diet Center LLC (Delaware). It is hard to believe that Mr. Mossler is not a person within HAG’s control even though he has the authority to bind Diet Center LLC (Delaware).

The undersigned has tried in good faith to resolve the dispute with HAG’s counsel. We exchanged a few rounds of correspondence in an unsuccessful attempt to settle the discovery dispute. HAG has refused to produce any more documents. Written requests to counsel for HAG

on December 7 and 8 to set a telephonic meet and confer in compliance with the Court's Practice Rules received no response.

We request that the Court compel HAG to withdraw its objections to overbreadth because they are boilerplate and made in bad faith contrary to the plain language of the request. We request that HAG be ordered to *promptly* produce all responsive documents, including those referring to investors. At the very least, the Deli requests the Operating Agreement, Trademark Agreement, and Option Agreement referred to above. We also request that HAG be compelled to respond to the Second Set as there was no agreement between the parties to limit discovery. At the very least, the Deli requests that HAG substantively and completely respond to Interrogatory No. 9 regarding the ownership of the Diet Center LLC entities.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "William W. Chuang", with a long, sweeping flourish extending to the right.

William W. Chuang, Esq.

CC: Robert Kain, Counsel For Defendants (By Email)
Darren Spielman, Counsel For Defendants (By Email)

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December 14, 2011
(Federal Express)

Paul A. Engelmayer
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street, Room 670
New York, NY 10007
(212) 805-4893

Re: Lebewohl, 2nd Ave Deli v. Heart Attack Grill, LLC., HAG, LLC, and Jon Basso
U.S. District Court, S.D. New York, Case No. 11-CIV-3153-PAE-JCF
Our Ref.: 5087-23

Dear Judge Engelmayer:

We represent Defendants HAG in this action. HAG files this response to Plaintiff's Lebewohl and 2nd Ave. Deli et al (herein 2nd Ave Deli) December 9 letter regarding discovery.

As the Court may recall HAG has filed a motion to voluntarily dismiss all counterclaims (Counts I - IV) pursuant to Fed.R.Civ.P. 41(a)(2). The only remaining claim is 2nd AVE DELI's sole declaratory relief claim seeking a declaration of "no infringement." As set forth previously, (A) this Court no longer has a jurisdictional basis to keep this case because all violations occurred in New York City and there is no evidence of interstate commerce use of the asserted terms; and (B) JON BASSO (Defendant, trademark owner and manager-owner of the corporate Defendants) has filed a declaration that, based upon the current evidence, there is no likelihood of confusion.

Despite this current case status, 2nd Ave Deli's submitted its letter discovery complaints. As a background, the parties exchanged lengthy meet and confer documents relative to these discovery demands and objections. Additionally, the undersigned participated in a nearly hour long meet and confer telephone conference with counsel for 2nd Ave Deli on October 24, 2011. At that time, the parties agreed, and the undersigned sent a confirming letter of the positions regarding many of the pertinent issues raised herein. Importantly, the parties agreed to specific limitations as to the disclosure of HAG investors. For example the confirming letter stated "HAG will not produce

December 14, 2011

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documents related to investors." HAG's counsel sent out this confirming letter putting forth the positions and agreement on October 28, 2011. Now, 2nd Ave deli is wishing to undo such agreement and seeks information it is not entitled to. Furthermore, the information being sought by 2nd Ave Deli might have been obtained through other means, however, 2nd Ave Deli cancelled its scheduled depositions in this case. Additionally, some documents have already been turned over relative to 2nd Ave. Deli's requests, specifically including corporate documents of the Defendants.

WHEREFORE, HAG requests denial of 2nd Ave Deli's discovery complaints.

Sincerely,

/s/ RobertKain

Robert C. Kain, Jr., for the Firm

RCK/cjp

cc: William Chuang, Esq. via email