

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.

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**STATEMENT PURSUANT TO LOCAL RULE 56.1 IN SUPPORT OF  
PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT**

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Plaintiffs submit this Statement Pursuant to Local Rule 56.1 in Support of Plaintiffs' Motion for Partial Summary Judgment to set forth the material facts as to which there is no genuine issue or dispute. Plaintiffs respectfully reserve the right to amend and supplement this Statement as circumstances warrant during the further briefing on the Motion and the Court's consideration of it.

1. The 2ND AVE DELI (the "Deli") is a kosher deli-style restaurant which was founded in 1954 at 156 Second Avenue in the Lower East Side of Manhattan. (Lebewohl Decl. ¶ 2.) In January 1, 2006, the Deli closed that location and reopened in December, 2007 at 162 East 33<sup>rd</sup> Street in Midtown, serving a similar menu to what the Deli has been serving since 1954. In August, 2011, the Deli opened a second location at 1442 First Avenue on the Upper East Side.
2. In nearly sixty years of business, the Deli has become well-known in the United States as a kosher deli. (Lebewohl Decl. ¶ 3.) The Deli states that it is a kosher restaurant on its website and menus. (Id.) The Deli is unique in this sense because competing delis such as Carnegie, Katz's, and Stage are not kosher. (Id.) The Deli intends to remain kosher. (Id.)
3. Amongst other requirements, the kosher dietary laws forbid the consumption of pork, and the consumption of meats with dairy products. (Lebewohl Decl. ¶ 4.) Therefore, we do not serve any pork or dairy items in the Deli and are not permitted, under kosher law, to mix meat and dairy. (Id.)
4. The Deli has appeared in many articles and news stories in the national press, being the subject of articles in the New York Times and Wall Street Journal and featured on the

Daily Show with Jon Stewart, CBS News, and other national and local media. (Lebewohl Decl. ¶ 5.) The Deli even published a 2ND AVE DELI cookbook in 1999. (Id.)

5. Jack Lebewohl conceived of the Instant Heart Attack Sandwich around 2004. (Lebewohl Decl. ¶ 6.) It is a sandwich made from two large potato pancakes (*latkes*) packed with the customer's choice of corned beef, pastrami, turkey, or salami. (Id.) Pictures of the sandwich are attached as Exhibit P. When he came up with the sandwich and its name, he discussed it with his wife who thought it was a bad idea because of its connotation. (Id.) One day, he made the sandwich for Detective Jimmy Piccione. (Id.) At the same time, Chef Bobby Flay was in the restaurant and Jack asked him if the Deli should add the sandwich to the menu. (Id.) Mr. Flay thought it was a good idea, so the Deli added the Instant Heart Attack Sandwich to the menu the next time it was printed. (Id.)
6. The Deli called the sandwich the Instant Heart Attack Sandwich to distinguish it from other sandwiches sold by competing delis. (Lebewohl Decl. ¶ 7.) Everyone has a pastrami sandwich, but no one has the Instant Heart Attack Sandwich. (Id.) People come into the Deli and ask for it by name. (Id.) The Deli does not intend to change it by removing the potato latkes or include cheese or bacon, as that would be contrary to kosher dietary laws. (Id.)
7. The Deli put the Instant Heart Attack Sandwich on the menu in around 2004. (Lebewohl Decl. ¶ 7.) It has remained on the menu ever since. (Id.) The menu attached as Exhibit A to Jack Lebewohl's declaration is from 2004-2005. (Id.) The address on the menu is 156 Second Ave, which was closed on January 1, 2006.

8. The Deli intended to sell the Triple Bypass Sandwich, which was also made from latke pancakes but had three layers. (Lebewohl Decl. ¶ 9.) Exhibit Q is a picture of the Triple Bypass Sandwich. It was related to the Instant Heart Attack Sandwich, so the Deli wanted to call the new sandwich the Triple Bypass Sandwich. (Id.) The Deli does not intend to introduce any other medically-themed products, nor does it intend to ever become a medically-theme restaurant. (Id.)
9. The Deli has used the mark “Instant Heart Attack Sandwich” on the menu and website. (Lebewohl Decl. ¶ 10.) Other than this, Plaintiffs do not advertise or market the Instant Heart Attack Sandwich or use the mark on their signage. (Id.)
10. The Deli intends to use the mark “Triple Bypass Sandwich” in a similar fashion. (Lebewohl Decl. ¶ 11.) The Deli was not aware of the Defendants’ “Triple Bypass Burger” when it conceived of the name but would not adopt the mark if we believed that there would be any likelihood that customers would confuse Plaintiffs with Defendants. (Id.) We are not interested in becoming a medically-themed institution. (Id.)
11. No one has ever confused the Instant Heart Attack Sandwich with any of the Defendants’ products. (Lebewohl Decl. ¶ 12.)
12. The Deli has always served many interstate travelers. (Lebewohl Decl. ¶ 13.) Many of the Deli’s customers are from New Jersey or Connecticut, and the Deli draws many out-of-state tourists. (Id.) The Deli also sold shipped products to out-of-state customers, as shown by FedEx invoices from 2004 attached as Ex. B to the Lebewohl Declaration. (Lebewohl Decl. Ex. B.) The Deli is close to New Jersey and Connecticut, and various interstate highways. (Lebewohl Decl. ¶ 13.)

13. The Deli's website lists its menus, which includes the Instant Heart Attack Sandwich. (Lebewohl Decl. ¶ 14.)
14. The Deli has always bought a lot of its supplies from out-of-state vendors. (Lebewohl Decl. ¶ 15.) Attached as Ex. C to the Lebewohl Declaration is a statement showing payments to out-of-state food vendors in 2004 and 2005. (Lebewohl Decl. Ex. C.) We also buy many other products from out-of-state. (Lebewohl Decl. ¶ 15.) Exhibit D of the Lebewohl Declaration are statements contains some invoices from 2004 and 2005. (Lebewohl Decl. Ex. D.) Our purchases from out-of-state are substantial, but we do not have many documents from back then as we had moved. (Lebewohl Decl. ¶ 15.)
15. Defendants opened the Heart Attack Grill location owned by the Heart Attack Grill LLC at Tempe, Arizona in October 2005. (Basso Dep. 28:21-25.)<sup>1</sup> In July 2007, that restaurant was moved to Phoenix, Arizona under the operation of Basswood, LLC. (Id. 29:2-10.) In January 2008, the Heart Attack Grill then moved to Chandler, Arizona under HAG, LLC. (Id. 29:14-18.) In May 2011, the Heart Attack Grill moved to Dallas, Texas under the operation of Diet Center LLC (Texas), but that location closed in .3October 2011. (Id. 73:4-17.) The Las Vegas location of the Heart Attack Grill opened soon afterwards, being operated by the Diet Center LLC (Delaware). (Id. 74:20-75:6.)
16. Heart Attack Grill is a medically-themed restaurant where waitresses are dressed as nurses, and customers, who are called "patients," (Exhibit J) are given a medical armband upon entrance. Exhibit I is a copy of such an armband.

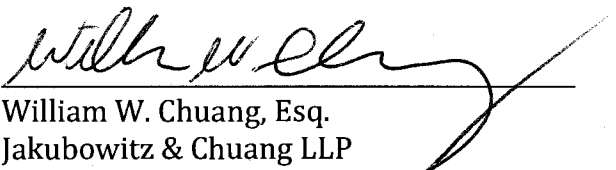
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<sup>1</sup> Basso Dep. \_\_\_ refers to the transcript of the deposition of Jon Basso on behalf of all defendants held on January 13, 2012. Relevant excerpts are attached as Exhibit A.

17. Exhibits K and L are menus from the Heart Attack Grill. The information in this paragraph are based on those exhibits. For entrees, the Heart Attack Grill only serves the Single Bypass Burger, the Double Bypass Burger, the Triple Bypass Burger, and the Quadruple Bypass Burger. The burgers are served with cheese and bacon. The only side item is the Flatliner Fries, which are deep fried in pure lard. All customers need to wear a gown while in the Heart Attack Grill.
18. Articles about the Deli and the Instant Heart Attack Sandwich have been published in the New York Times, Chowhound, and the newsletter for Korean Airlines. A, B, C, D, M, N, and O are copies of articles about the Deli or the Instant Heart Attack Sandwich.
19. The Deli created the Instant Heart Attack Sandwich in 2004, and put it on the menu the same year. Ex. B is an article from Chowhound reviewing the sandwich on May 19, 2004. Ex. C is a copy of the July 2004 issue of Morning Calm, the newsletter of Korean Airlines, which reviewed the Instant Heart Attack Sandwich. Exhibit D is a post from Chowhound dated January 13, 2004

Dated: New York, New York  
March 26, 2012

Respectfully Submitted,



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