

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.)

DEPOSITION OF JON BASSO

Taken at DepoInternational
703 South Eighth Street
Las Vegas, Nevada 89101

On Friday, January 13, 2012
9:00 a.m.

Reported by: Renee Silvaggio, CCR No. 122

Jon Basso - January 13, 2012
Lebewohl vs. Heart Attack Grill, LLC

1 APPEARANCES:

2

For the Plaintiffs: WILLIAM W. CHUANG, ESQ.
3 401 Broadway
Suite 408
4 New York, NY 10013
347.542-8529

5

6 For the Defendants: DARREN SPIELMAN, ESQ.
KAIN & ASSOCIATES
7 900 S.E. THIRD AVENUE
Suite 205
8 Ft. Lauderdale, FL 33316
954.768-9002

9

10 Also present: Jack Lebewohl
Jeremy Lebewohl

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I N D E X

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JON BASSO

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1 (Prior to the commencement of the deposition proceedings, a
2 discussion was held off the record among the court reporter and
3 counsel, wherein counsel stipulated to waive the reporter
4 requirements under Rule 30 (b) (4).)

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7 (Plaintiffs' Exhibits 1 through 5, respectively,
8 were marked for identification.)

9

10 Whereupon,

11

JON BASSO,

12

Called as a witness by plaintiffs,

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having been first duly sworn,

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was examined and testified as follows:

15

16

EXAMINATION

17

BY MR. CHUANG:

18

Q. MR Basso, could you state your name for the record,

19

please?

20

A. That would be Jon Basso.

21

Q. And do you have any other names in the -- have you

22

ever had any names in the past?

23

A. Nope.

24

Q. And what is your address?

25

A. 450 Fremont, Number 130; Las Vegas, Nevada.

- 1 **A. Heart Attack Grill.**
- 2 Q. Where was it located?
- 3 **A. Tempe, Arizona.**
- 4 Q. Did you open it completely in your own name?
- 5 **A. No. It was opened in a LLC.**
- 6 Q. Which LLC?
- 7 **A. Heart Attack Grill, LLC.**
- 8 Q. Who were the openers of that LLC?
- 9 **A. I was the sole member of the LLC.**
- 10 Q. Were there any other officers?
- 11 **A. No.**
- 12 Q. Managers?
- 13 **A. No.**
- 14 Q. Okay. And did you open another restaurant after
15 that one?
- 16 **A. Yes.**
- 17 Q. Which restaurant was it?
- 18 **A. Also the Heart Attack Grill.**
- 19 Q. Where was this location?
- 20 **A. Chandler, approximately two miles away from the
21 previous restaurant.**
- 22 Q. When did you open this restaurant?
- 23 **A. 2000 -- excuse me, excuse me.**
- 24 **No. I had -- I want to be clear for the record.**
- 25 **I had the licensed the trademarks from myself as**

1 a person to Heart Attack Grill, LLC, which was operated in
2 Tempe, Arizona.

3 The restaurant, the staff, the clientele, picked
4 up and moved to Phoenix, Arizona, operated by another LLC. The
5 name of that LLC is Basswood, B-A-S-S-W-O-O-D.

6 I was a 50 percent member of that company and
7 also the licensor of the trademarks.

8 That company conducted business in 2007.

9 That company then ceased business, and the
10 restaurant, the concept, the trademarks, the employees,
11 everything, moved to Chandler, Arizona.

12 At that point I then licensed the trademarks to
13 HAG, LLC, which -- HAG, LLC.

14 All three of these LLCs were Arizona-formed
15 LLCs.

16 And that transition was in 2008.

17 Q. Okay. So I just wanted to clarify.

18 A. Sure. Just wanted to make sure everybody clear for
19 the record.

20 Q. Sure.

21 So you opened the Heart Attack Grill in
22 Tempe, Arizona, in 2005?

23 A. Correct.

24 Q. The company that operated the restaurant was the
25 Heart Attack Grill, LLC?

1 **A. Correct.**

2 Q. And in 2007 that restaurant closed and the entire
3 operations were moved to Phoenix, Arizona?

4 **A. Correct.**

5 Q. And the restaurant in Phoenix, Arizona, was operated
6 by Basswood, LLC?

7 **A. Correct.**

8 Q. What time in -- what month in 2007 did Basswood,
9 LLC, begin its operations?

10 **A. July.**

11 Q. When did it cease its operations?

12 **A. Um, January of 2008.**

13 Q. And this -- strike that.

14 The Heart Attack Grill then moved from Phoenix,
15 Arizona, to Chandler, Arizona?

16 **A. Correct.**

17 Q. And that was operated under HAG, LLC?

18 **A. Correct.**

19 Q. Okay. Who were the owners of Basswood, LLC?

20 **A. I was a 50 percent member, and a Kimberly Sherwood
21 was the other 50 percent member.**

22 Q. Do you have a copy of that Licensing Agreement
23 between you and Basswood LLC?

24

25 (Sotto voce at this time.)

1 Grill opened outside of Arizona?

2 A. Outside, yes.

3 Q. When was that?

4 A. In May of 2011 we opened a Heart Attack Grill in
5 Dallas, Texas.

6 Q. Which entity operated that restaurant?

7 A. Diet Center, LLC, a Texas LLC.

8 Q. Who were the members of that LLC?

9 A. Myself.

10 Q. Were there any other members?

11 A. No.

12 Q. Were you the sole officer?

13 A. Correct.

14 Q. And is that location still in operation?

15 A. No, it is not.

16 Q. When did it close?

17 A. October of 2011.

18 Q. Why did it close within the span of five months?

19 MR. SPIELMAN: If you are going to get into --
20 that's business reasons -- other than something that's publicly
21 known, than we can leave it in.

22 THE WITNESS: They will have to leave if you want my
23 to answer to that question.

24 MR. CHUANG: Hold on a second.

25 MR. SPIELMAN: Go ahead.

1 at this time?

2 **A. Correct.**

3 Q. Okay. So even though you came up with the idea for
4 the HAG marks in 1996, you didn't first use them until
5 September 2005; isn't that correct?

6 **A. Correct, nine years later.**

7 Q. How did you first use the Heart Attack Grill mark?

8 **A. It was used in signage. It was used in -- in paper**
9 **products. It was used on menus.**

10 **It was used electronically on web sites. And**
11 **within two short weeks of being open it was full-paged**
12 **published in the East Valley Tribune, which is the second**
13 **largest paper in the State of Arizona after the -- whatever,**
14 **Sun.**

15 **Full color photos, use of the marks, and that**
16 **would have been in November of 2005, early November when it was**
17 **first majorly publicized, you know, in an area of four million**
18 **people.**

19 Q. When was the first time you first used the Triple
20 Bypass Burger?

21 **A. The first time I physically sold the --**

22 Q. The first time you used the Triple Bypass Burger as
23 a trademark in commerce.

24 **A. October 31st, Halloween day, 2005.**

25 Q. How did you use that mark?

1 A. Sold a hamburger.

2 Q. Did you --

3 A. Sold a hamburger from a menu and displayed the mark
4 and displayed it with a TM.

5 And at that point I had already registered or
6 had filed for the registration of the trademarks a few months
7 prior to that. I think it was August of 2005. I could be
8 wrong. It could be September. But I think it was August of
9 2005 when I filed the registration. Did this myself.

10 And so it was on file prior to me even using it,
11 and I used it with a TM until such time that my marks became
12 registered. And then I began using an R after them, and I
13 never once had a Single publication, print or anything, that
14 does not have the registered trademark on it.

15 And that would have been in 2000--and -- late
16 2006, I believe, I received the official registration for a
17 Single Bypass, Double Bypass, Triple Bypass, Quadruple Bypass,
18 taste worth dying for and Heart Attack Grill.

19 Q. You testified that you used the Triple Bypass Burger
20 initially only as an item on your menu; is that correct?

21 A. The exterior signage of the building used all of the
22 marks. I have photographic evidence of that.

23 We had publicized on the internet as anyone can
24 see.

25 Q. The so --

1 A. The sign itself said Heart Attack Grill, home of the
2 Double Bypass Burger, the Single Double, Triple, Quadruple
3 Bypass burgers were littered throughout the window stickers all
4 throughout the front of the restaurant.

5 The wrapping -- the wrapping paper, which went
6 around the burgers had my marks on it as well.

7 We currently don't use wrapping papers on the
8 burgers, but we did from 2005 up until September -- nope,
9 excuse me.

10 Until January of 2008 we used wrapping papers
11 around the burger.

12 Q. Do you have any examples of the wrapping papers?

13 A. Obviously with me, no.

14 Many photographs exhibit on the internet and can
15 be easily pulled up.

16 They said Heart Attack Grill, and Taste Worth
17 Dying For on the wrapping papers, two of the marks.

18 Q. Was the mark Triple Bypass Burger ever used on the
19 wrapper?

20 A. No.

21 Q. Do you have a copy of the wrapper in your
22 possession, custody or control?

23 A. No, but many photographs exist.

24 I could dig up receipts from the paper companies
25 in which I used to purchase them from.

1 Q. Would you oppose my clients registering the Instant
2 Heart Attack Sandwich mark with the USPTO?

3 A. It would --

4 MR. SPIELMAN: Same objection.

5 Sorry, go ahead.

6 THE WITNESS: It would depend a great deal on the
7 surrounding circumstances.

8 In some circumstances, absolutely oppose; in other
9 circumstances, not opposed in the least.

10 BY MR. CHUANG:

11 Q. What circumstances would those be?

12 A. They are too varied to give you a one-line answer.

13 Q. Just --

14 A. Previous negotiations had attempted to hash out
15 those circumstances and unfortunately nothing successful had
16 arisen from it.

17 My intent is only to not be infringed upon. I
18 have no malicious feelings towards any person in this world and
19 they should be free to do whatever they want that's not against
20 the law so long as they don't infringe upon my actual property,
21 and I have earned and is now incontestable because of the many
22 dollars and the many years that I have and will always continue
23 to spend.

24 Q. Do you believe that my clients' use of the Instant
25 Heart Attack Sandwich and the Triple Bypass Sandwich marks

1 infringe upon your trademarks?

2 A. Taken as a whole at the time in which I saw their
3 attempt for registration, obviously, I felt that; otherwise, a
4 cease and desist letter would not have been sent out.

5 Q. What about now?

6 A. I don't -- I don't see any medical theme to their
7 operation; although, I have never taken notice of their
8 operation until just this morning.

9 My attorney had prepped me quickly for what I
10 was about to sit through, and he let me glance at their menu,
11 and that's the first time that I have ever paid any attention
12 to it.

13 And it doesn't seem to be medically themed, the
14 technical meaning together, a Heart Attack Sandwich with a
15 Bypass Sandwich seems to be greatly and dangerously going in
16 that direction.

17 But as their current menu stands, since I've
18 just seen it now, I don't think that they are harming my
19 business or I'm harming their business.

20 I see them as totally, mutually exclusive
21 entities.

22 Q. If my clients use of their marks right now do not
23 infringe upon your --

24 A. Mark, singular. I'm not aware of them using a
25 Triple Bypass Sandwich and I'm unaware of them using them as a

1 Q. Okay. But clearly you contemplate circumstances
2 where the use of a term on a menu alone is sufficient to
3 constitute use of that term as a trademark?

4 A. You are referring to a term which is identical to an
5 incontestably registered trademark.

6 Q. I understand.

7 A. Your clients use an Instant Heart Attack, which is
8 not a burger, but it is something else -- excuse me I don't
9 know what it is -- and are trying to equate that term -- it's a
10 very different situation.

11 Q. Could you elaborate on that?

12 A. And I think I'm going around in circles. They have
13 answered the question in ten different ways.

14 Q. So do you believe that a sandwich and a burger are
15 different products on the market?

16 A. I think they can be used similar if the naming --
17 the naming in the wrappings are similar.

18 Anything could be -- a dirty shoe could be made
19 to look like a burger if necessary.

20 Q. Well, I mean you just testified that my client --
21 that your clients' hamburger does not -- cannot be confused
22 with whatever my client sells; isn't that right?

23 A. I don't believe that it currently is confused.

24 Q. Why?

25 I'm just asking --

1 A. They are different things. Theirs is a sandwich,
2 this is a burger.

3 They -- I use marks, my marks are widely
4 publicized. They use terms. Their terms are little known
5 outside the person actually reading the menu.

6 No, I don't think there is any confusion.

7 Q. Are those the factors that you believe support your
8 claim of no infringement? Likelihood of confusion is the fact
9 that my client sells a sandwich and you sell a hamburger; isn't
10 that correct?

11 A. I'm sorry. Because they sell a sandwich and I sell
12 a hamburger, you say I do or do not believe there is confusion?

13 Q. Do not believe there is confusion?

14 A. So I have stated that there is a contributing --
15 same -- the same thing.

16 Q. Let me strike that. I'm trying to be clear.

17 A. Let me say it directly, I'll answer it directly.

18 Q. Yeah, I think I'm not phrasing it well.

19 You believe that my client does not infringe
20 upon your rights partly because their product is a sandwich and
21 your product is a hamburger; is that correct?

22 A. No, that is not correct.

23 These are entrees, entrees topped and bottomed
24 by bread, with some form of meat in between.

25 If they were selling a bowel of spaghetti, then,

1 yes, I would say that these are different animals and there is
2 far less infringements.

3 But if you also look at my registered trademark,
4 it says clearly on the USPTO, if anyone can look up, the Triple
5 Bypass Burger, in section 45, I believe, sandwich, a sandwich
6 is a generic term for all things like that.

7 So, you know, I -- I hold this trademark for the
8 sandwich category.

9 Your client can't escape the fact that they are
10 selling a sandwich. This is not a bowl of spaghetti, a cup of
11 coffee, or some ice cream.

12 Q. Okay. I want to clarify something, because I think
13 we are -- at least your answers are confusing some of these
14 points.

15 But let's talk about the use of a term as a
16 trademark.

17 A. Use of a term as a trademark.

18 Q. What did you believe that entails?

19 MR. SPIELMAN: Objection, asked and answered.

20 But you can go ahead and try again.

21 MR. CHUANG: I think he's been giving different
22 answers.

23 MR. SPIELMAN: Okay, so what does that mean?

24 THE WITNESS: I could say again, please.

25 What is the use of a trade -- when does something

1 MR. SPIELMAN: Objection, calls for speculation.

2 But you can answer that question.

3 THE WITNESS: The way your client is currently using
4 the Instant Heart Attack term on their menu, no, I do not
5 believe there would be any confusion whatsoever.

6 BY MR. CHUANG:

7 Q. If my clients put an ad in a newspaper for the
8 Instant Heart Attack Sandwich, put signage on their restaurant
9 for Instant Heart Attack Sandwich, would there be a likelihood
10 of confusion then if --

11 MR. SPIELMAN: Objection, asked and answered.

12 We've already went through this.

13 BY MR. CHUANG:

14 Q. If the Heart Attack Grill moved to New York --

15 A. Again, I'll answer in the same way I've answered
16 many, many times earlier in this deposition: These are
17 entirely subjective things. Each and every usage or expansion
18 away from a term and into a legitimate trademark would
19 progressively arouse action on my part.

20 But this is subjective. I would have to --
21 rather than hypotheticals, these would have to be real things
22 which I could view and evaluate on a case-by-case basis.

23 Q. If you open a Heart Attack Grill in New York doing
24 what you are currently doing in Las Vegas, and my clients
25 continue using their Instant Heart Attack trademark the way

1 that they've been using it, would there be a likelihood of
2 confusion?

3 **A. If -- if your client came to Las Vegas --**

4 **Q. No. If my client just kept on doing what it's**
5 **doing --**

6 **A. No. I -- -- I feel there would be very little**
7 **likelihood of confusion.**

8 **Q. Even if your restaurant moved to New York?**

9 **A. Yes.**

10 **Q. And if my client moves its restaurant to Las Vegas,**
11 **would there be any likelihood of confusion there?**

12 **A. Not in the way they are currently using it, no.**

13 **Q. If my client -- okay. Thank you.**

14 **Did your publicity improve after the lawsuit?**

15 **A. Which one?**

16 **Q. After this current lawsuit?**

17 **A. We're referring to our interaction?**

18 **Q. Yes.**

19 **A. No.**

20 **Q. Did business go up after this lawsuit?**

21 **A. No.**

22 **Q. Did you get more press as a result of this lawsuit?**

23 **A. I believe there was some press, but it was a very**
24 **tiny drop in the bucket compared to the overall Heart Attack**
25 **Grill marketing machine, if I can call it that.**

1 production of a financial statement?

2 **A. Yeah.**

3 Q. Of the current financials for that month or a couple
4 of months?

5 **A. Correct.**

6 Q. The Attorney General situation that raised its head
7 in Arizona about the designation of your employees as nurses,
8 what was the result of that case, slash, investigation?

9 **A. The Attorney General decided to quit pursuing me
10 because the media was so overwhelmingly favorable toward me
11 that he realized that it was politically unpopular to sue me.**

12 Q. Were you cited or sanctioned in any way that
13 affected your business over receiving the notice of that
14 investigation?

15 **A. No, no, I was -- I was affected in no way.**

16 Q. Can you explain -- we discussed earlier about your
17 understanding or belief about how your marks were used in
18 interstate commerce.

19 Can you explain the reach or extent that your
20 goods and services as Heart Attack Grill, just the Heart Attack
21 Grill mark, not the Triple Bypass mark, the Heart Attack Grill
22 mark, how that mark reached interstate commerce?

23 MR. CHUANG: Objection, leading.

24 THE WITNESS: Okay. I understand.

25 BY MR. SPIELMAN:

1 Q. You can answer.

2 A. We effect commerce. There is no question. That's
3 verifiable. So in the broader economic sense when people do
4 make a designated trip from California or New Mexico or Texas,
5 to come into a Heart Attack Grill, yes, we definitely effect
6 interstate commerce.

7 Q. Do people come from other states to purchase your
8 goods?

9 A. Yes, they do. And that is documented by third-party
10 studies.

11 Q. Do your patrons leave your restaurant and leave the
12 State with your goods?

13 A. I do --

14 MR. CHUANG: Objection, calls for speculation.

15 BY MR. SPIELMAN:

16 Q. You can answer.

17 A. I do believe that many people take our goods home
18 with them.

19 Certainly the clothing goods.

20 Secondly, I do believe that a few hamburgers
21 have made it home only because I have seen photos on facebook
22 of somebody saying that they brought it all the way home
23 (indicating).

24 So, yes, to answer the question, yes, we effect
25 interstate commerce, not just by drawing people to our

1 restaurant, but those when they purchase goods I do believe
2 that they take them out of state, certainly here in Las Vegas,
3 there is no question in Las Vegas.

4 Q. In your original locations in Arizona were you --
5 was your locations located off of a major highway?

6 A. We were located off of I-10, and that is the artery
7 to both California and New Mexico on either side -- -- as well
8 as Mexico.

9 We had a variety of Mexican nationals at all
10 times into our place. So it's interstate as well as
11 international.

12 Q. When you talk a little bit of your connection with
13 New York, and specifically New York City as it relates to the
14 customers that you were aware of that come from New York City
15 and the media presence that you have had in New York City --

16 MR. CHUANG: Objection, leading; assumes facts not
17 in evidence.

18 BY MR. SPIELMAN:

19 Q. Do you know of media presence about Heart Attack
20 Grill and its trademarks in New York City?

21 A. Yes, I'm aware because we have had a third-party
22 Nielsen ratings company, which has actually captured and can
23 play back the video, and has specific ratings in New York City
24 itself and can do so dating all the way back to 2006.

25 The magazines which we've been featured in,

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CERTIFICATE OF DEPONENT

PAGE LINE CHANGE

* * * * *

I, JON BASSO, deponent herein, do hereby certify and declare under penalty of perjury the within and foregoing transcription to be my deposition in said action; that I have read, corrected, and do hereby affix my signature to said deposition, dated this day of 2012.

JON BASSO, Deponent.

1 CERTIFICATE OF REPORTER

2 STATE OF NEVADA)

)

3 COUNTY OF CLARK)

4

5 I, Renee Silvaggio, a duly commissioned notary
6 public, Clark County, State of Nevada, do hereby certify:

7 That I reported the deposition of JON BASSO,
8 commencing on Friday, January 13, 2012.

9 That prior to being deposed, the witness was duly
10 sworn by me to testify to the truth.

11 That I thereafter transcribed my said shorthand
12 notes into type writing, and that the typewritten transcript is
13 a complete, true, and accurate transcription of my said
14 shorthand notes.

15 I further certify that I am not a relative or
16 employee of counsel or any of the parties, nor relative or
17 employee of the parties involved in said action, nor a person
18 financially interested in the action.

19 IN WITNESS WHERE OF, I have set my hand and affixed
20 my official seal in my office in the County of Clark, State of
21 Nevada, on this 19th day of January 2012.

22

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RENEE SILVAGGIO, CCR NO. 122