

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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Declaration of Jack Lebewohl in Support of Plaintiffs' Motion For Summary Judgment

1. My name is Jack Lebewohl, and I am a Plaintiff in this case. 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. I hereby affirm the statements in this declaration under the penalties of perjury.
2. 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. In January 1, 2006, we closed that location. In December, 2007, we reopened at 162 East 33rd Street in Midtown, serving a similar menu to what we have been serving since 1954. In August, 2011, we opened a second location at 1442 First Avenue on the Upper East Side.
3. In nearly sixty years of business, the Deli has become well-known in the United States as a kosher deli. We state that we are a kosher restaurant on our website and menus.

The Deli is unique in this sense because competing delis such as Carnegie, Katz's, and Stage are not kosher. We intend to remain kosher.

4. Amongst other requirements, the kosher dietary laws forbid the consumption of pork, and the consumption of meats with dairy products. 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.
5. 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. We even published a 2ND AVE DELI cookbook in 1999.
6. I conceived of the Instant Heart Attack Sandwich around 2004. It is a sandwich made from two large potato pancakes (*latkes*) packed with the customer's choice of corned beef, pastrami, turkey, or salami. When I came up with the sandwich and its name, I discussed it with my wife who thought it was a bad idea because of its connotation. One day, I made the sandwich for Detective Jimmy Piccione. At the same time, Chef Bobby Flay was in the restaurant and I asked him if we should add the sandwich to our menu. He thought it was a good idea, so I decided to add the Instant Heart Attack Sandwich to the menu the next time it was printed.
7. We called the sandwich the Instant Heart Attack Sandwich to distinguish it from other sandwiches sold by competing delis. Everyone has a pastrami sandwich, but no one has the Instant Heart Attack Sandwich. People come into the Deli and ask for it by name. We do not intend to change it by removing the potato pancakes or including cheese or bacon, as that would be contrary to kosher dietary laws.

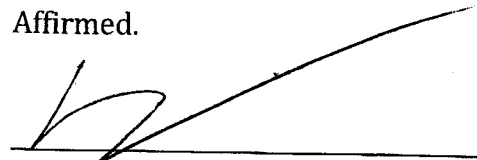
8. We put the Instant Heart Attack Sandwich on the menu in around 2004. It has remained on our menu ever since. The menu attached as Exhibit A is from 2004-2005. The address on the menu is 156 Second Ave. We closed that location on January 1, 2006.
9. We intended to sell the Triple Bypass Sandwich, which was also made from potato pancakes but had three layers. It was related to the Instant Heart Attack Sandwich, so we wanted to call the new sandwich the Triple Bypass Sandwich. We do not intend to introduce any other medically-themed products. Indeed, we have no intention of ever becoming a medically-themed restaurant.
10. We have used the mark "Instant Heart Attack Sandwich" on the menu and website. Other than this, we do not advertise or market the Instant Heart Attack Sandwich. We do not use the mark on our signage.
11. We intend to use the mark "Triple Bypass Sandwich" in a similar fashion. We were not aware of the Defendants' "Triple Bypass Burger" when we conceived of the name. We would not adopt the mark if we believed that there would be any likelihood that customers would confuse us with Defendants. We are not interested in becoming a medically-themed institution.
12. No one has ever confused the Instant Heart Attack Sandwich with any of the Defendants' products.
13. The Deli has always served many interstate travelers. Many of our customers are from New Jersey or Connecticut, and we also draw many out-of-state tourists. We have also sold and shipped products to out-of-state customers, as shown by FedEx invoices from 2004 attached as Ex. B. We gave over 1,000 pages of such invoices to the Defendants,

but to prevent waste, we are only attaching roughly 70 pages here. We are close to New Jersey and Connecticut, and we are also very close to many interstate highways.

14. The Deli has always bought a lot of its supplies from out-of-state vendors. Attached as Ex. C is a statement showing payments to out-of-state food vendors in 2004 and 2005. We also buy many other products from out-of-state. Ex. D contains some invoices from 2004 and 2005. Our purchases from out-of-state are substantial, but we do not have many documents from back then as we have moved.

Dated: March 26, 2012
New York, NY

Affirmed.



Jack Lebewohl