

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEREMY LEBEWOHL, UNCLE ABIES DELI
INC. d/b/a 2nd AVE DELI, UNCLE ABIES
DELI ON FIRST INC., and UNCLE ABIES
DELI SANDWICH TRADEMARKS LLC,
Plaintiffs,

CIVIL ACTION NO: 11-CIV-3153-
LAK

v.

HEART ATTACK GRILL LLC, HAG LLC,
and JON BASSO,
Defendants.

STIPULATION AND AGREED UPON PROTECTIVE ORDER
REGARDING CONFIDENTIAL INFORMATION

The parties, by application to this Court, hereby stipulate and agree that certain information, documents and things subject to discovery in this action may be claimed to be or to contain trade secrets (including but not limited to business plans, financial documents, marketing plans and customer and distributor lists) (hereinafter collectively referred to as "Proprietary Information").

To expedite discovery and permit the parties to proceed without delay occasioned by disputes regarding claims of confidentiality, the parties have agreed to provide access to and accept such information, documents and things subject to the protective provisions set forth in this Stipulation and Protective Order. Accordingly, and by agreement of the parties,

IT IS HEREBY ORDERED:

1. All Proprietary Information, produced or exchanged in the course of this litigation

shall be used solely for the purpose of preparation and trial of this litigation, and for no other purpose and shall not be disclosed to any person except in accordance with the terms of this Order.

2. Identifying and Designating Proprietary Information as Confidential and Disclosure to Qualified Persons Defined in Para. 4a – 4f. Proprietary Information includes any document, tangible thing, transcript of oral testimony or recorded statement of counsel designated by a party or other supplier as "CONFIDENTIAL" (including but not limited to documents, transcripts, answers to interrogatories and other responses to discovery requests, pleadings, briefs, summaries, notes, abstracts, motions, drawings and any instrument which comprises, embodies or summarizes matter which is confidential to the party or other supplier and which the party or other supplier desires not to be made public). A party or other supplier will only designate information as "CONFIDENTIAL" which it in good faith believes contains information in which it has a proprietary interest. "Other supplier" includes non-parties which may produce Proprietary Information in this litigation. Hereinafter, the term "party" includes such "other supplier" as may be applicable. CONFIDENTIAL Proprietary Information may be disclosed to Qualified Persons consistent with the provisions of paragraphs 4 - 21 hereof.

3a. Identifying and Designating Proprietary Information as AEO Confidential and Disclosure to Qualified Persons Defined in Para. 4a, 4b, 4c and 4d. Proprietary Information comprising particularly sensitive proprietary, business or financial information of a party may be designated as "CONFIDENTIAL -- ATTORNEYS' EYES ONLY" or "CONFIDENTIAL -- AEO," consistent with the procedures of paragraphs 4 - 21 hereof. Documents and information designated "CONFIDENTIAL -- ATTORNEYS' EYES ONLY" or "AEO" shall be disclosed

only to attorneys of record identified in paragraph 4(a), to technical experts or consultants identified in paragraph 4(b), to staff of the Court identified in paragraph 4(c), and to court reporters identified in paragraph 4(d).

3b. Declassifying AEO Proprietary Information. Where a party perceives a need to disclose Proprietary Information designated as "CONFIDENTIAL -- ATTORNEYS' EYES ONLY" to persons not encompassed in one of the foregoing categories of persons specifically permitted to receive such information, that party may request in writing the permission of the producing party to disclose such information to such person or persons on a document by document basis. Upon receipt of such a request, the producing party shall, in writing and within ten (10) days of the request, grant or deny permission to disclose, or may limit or otherwise designate the information to be disclosed, the manner of such disclosure, and the treatment (*e.g.*, copying, receipt of materials, etc.) to be accorded the disclosure. In the event the producing party fails to respond in writing, the request shall be deemed approved. The Court reserves the right to reject any of the parties' designations.

4. Qualified Persons Defined. "Qualified Persons" means:

(a) Attorneys of record, attorneys of counsel, attorneys supervising or working under the direction of an attorney of record, and regular employees of such attorneys to whom it is necessary that the information be shown for purposes of this litigation;

(b) Actual or potential technical experts or consultants, who are not regularly employed by a party and who have been designated in writing by notice to all parties prior to any disclosure of Proprietary Information to such person and who have signed a document in the form of Exhibit A attached hereto (such signed document will be retained by the party who has

designated the expert or consultant and copies of the signed document will be promptly provided to the other parties);

(c) The staff of the Court;

(d) Court reporters and their staff who are required to transcribe testimony containing Proprietary Information;

(e) If this Court so elects, any other person may be designated as a Qualified Person by Order of this Court, after all parties have been given notice and an opportunity to be heard; and

(f) No more than three representatives of the plaintiff corporations (on behalf of each plaintiff corporations, Jeremy Lebewohl, Josh Lebewohl and Jason Lebewohl) and no more than two representatives of defendant corporations (on behalf of each defendant corporation, Jon Basso), in house counsel of a party who is employed by the party and any individual who is a named party to this litigation.

5. Marking Documents. To designate documents produced in this action as having Proprietary Information, each party or other supplier designating a document as privileged ("designating party") shall mark each page of such documents with: "CONFIDENTIAL (name of designating party)," or "CONFIDENTIAL - ATTORNEYS' EYES ONLY (name of designating party)." In lieu of marking the original of a document, if the original is not produced the designating party may mark the copies that are produced or exchanged.

6. Inspection of Documents. Claims of confidentiality as to documents made available to a party for inspection and copying pursuant to F.R.C.P. 33(c) or otherwise under the

Federal Rules of Civil Procedure may be made either before such documents are made available for inspection and copying, or after designation for copying by the inspecting party but prior to production of the requested copy.

7(a). Deposition Procedures. Information disclosed at the deposition of any party or one of its present or former officers, directors, employees, or agents, or experts retained by counsel for any party for purposes of this litigation, may be designated as Proprietary Information by indicating on the record at the deposition that the testimony is subject to the provisions of this Protective Order. In the event such a statement is made, all persons attending the deposition who are not Qualified Persons permitted to view such Proprietary Information other than the deponent will be excused from the deposition for each portion thereof that is Proprietary Information. To the extent possible, the Court Reporter shall consecutively number each page of the entire transcript and then segregate into separate binders the Proprietary Information.

7(b). Any document or thing designated as Proprietary Information, CONFIDENTIAL or CONFIDENTIAL - ATTORNEYS' EYES ONLY which is marked as an exhibit during a deposition, if retained by the reporter for inclusion with deposition transcript, shall also be segregated into separate binders.

7(c). A party may also designate Proprietary Information disclosed at such a deposition by notifying the other parties, in writing, within ten (10) days after receipt of the transcript by counsel of record, of the specific pages and lines of the transcript which should be treated as Proprietary Information. Each party shall attach a copy of such written Notice(s) to the face of the transcript and each copy thereof in its possession, custody or control. Each transcript of a deposition taken of any party, its present or former officers, directors, employees, or agents, or

of experts retained by counsel for any party for purposes of this litigation shall be treated as Proprietary Information for a period of ten (10) days after receipt of the transcript. No person or party shall incur any liability hereunder with respect to any information produced in this litigation by a party without a CONFIDENTIAL marking, unless and until the receiving person or party shall have received written notice that such information has been designated Proprietary Information marked CONFIDENTIAL.

7(d). Notwithstanding anything to the contrary in this Protective Order, any deponent may review the transcript of his own deposition at any time.

8. Disclosure Limited to Qualified Persons and Originators, Authors and Recipients. A party receiving Proprietary Information from any other party shall not make it available to persons other than those individuals identified in paragraph 4 and shall limit disclosure to Qualified Persons as provided in paragraphs 2 and 3, except that with respect to a document designated as containing Proprietary Information, any person indicated on the face of the document to be its originator, author or recipient of a copy thereof may be shown the document.

9. Persons with Prior Knowledge. Persons who are not Qualified Persons under this Protective Order may be interviewed or examined by any party concerning all Proprietary Information of which such persons have prior knowledge. Furthermore, persons who are not Qualified Persons under this Protective Order may be interviewed or examined as witnesses at depositions and trial concerning all Proprietary Information of which such persons have prior knowledge.

10. Maintaining Records of Proprietary Information. Proprietary Information produced by any party to any other party shall be maintained at the offices of the recipient's

attorney of record. Copies of Proprietary Information may be maintained in the offices of appropriate Qualified Persons only to the extent that such appropriate Qualified Persons require the copies to perform their work in this action. Each party making copies of Proprietary Information shall ensure that each copy bears the designations provided on in Paragraphs 2 and 3. Copies of Proprietary Information may be made, or exhibits prepared, by independent printers or illustrators for the purposes of this litigation after such printers or illustrators have executed a document in the form of Exhibit A.

11A. Challenges. A party shall not be obligated to challenge the propriety of a designation of Proprietary Information at the time the designation is made, and a failure to do so shall not preclude a subsequent challenge to the designation. In the event that a party challenges at any stage of this proceeding a designation of Proprietary Information, the parties shall first try to resolve such a challenge in good faith on an informal basis. If a resolution cannot be reached, the party challenging the Proprietary Information designation shall send a written notice to the designating party identifying with particularity the challenged Proprietary Information, stating the reasons why the Proprietary Information designation is being challenged and stating that the party will within ten (10) days move the Court to remove the designated status of Proprietary Information. The designating party bears the burden of establishing the need for the designated status of Proprietary Information. Until such time as the challenge is resolved, such Proprietary Information shall be maintained in accordance with this Protective Order.

11B. Inadvertent Disclosures. For purposes of this subsection 11B, an "Inadvertently Produced Document" is a document produced to a party in this litigation that could have been withheld, in whole or in part, based on a legitimate claim of attorney-client privilege,

work-product protection, or other applicable privilege.

(i) Disclosure of any Inadvertently Produced Document shall not result in the waiver of any privilege or protection associated with such document, nor result in a subject matter waiver of any kind.

(ii) A producing party may demand the return of any Inadvertently Produced Document within ten (10) days of production. If the demand for return is not made within ten (10) days of production, the producing party must explain why the demand for return was tardy. The demand for return must contain information sufficient to identify the Inadvertently Produced Document. Upon receipt of such demand, the receiving party must immediately return the Inadvertently Produced Document (and any copies thereof) to the producing party and must immediately delete all electronic versions of the document. Challenges to such demand for return will be governed by paragraph 11A.

12. Proposed Experts. Any notice of a proposed expert or consultant as an appropriate Qualified Person shall include in the designation a curriculum vitae including an employment history and a statement of all affiliations with or prior work for or payments by the designating party or any business or concern related to the designating party.

13(a). Use of Proprietary Information in Court Proceedings. A party may use Proprietary Information in any affidavits, briefs, memoranda of law, deposition transcript or other document filed in this action but such documents shall be filed as required by the Sealed Records Filing Instructions on the SDNY website.

13(b). The party making such filing must follow Sealed Records Filing Instructions.

Where Proprietary Information is a severable portion of a document, e.g., interrogatories, deposition transcripts, test reports, lines of a legal memorandum, etc., the portion containing Proprietary Information should, where practicable, be filed and served separately from the rest of such document.

13(c). This shall not prevent a second copy of any pleading or paper, specifically intended for review by the Court, from being forwarded to the Court under seal as per the Sealed Records Filing Instructions for consideration by the Court.

14. Return of Proprietary Information. Within sixty (60) days after the conclusion of this litigation, whether by settlement, judgment or final appeal, documents designated as Proprietary Information and copies of such documents shall be returned to the designating party except as this Court may otherwise order or to the extent such information was used as evidence at the trial. This Protective Order shall continue to be binding after the conclusion of this litigation except (a) that there shall be no restriction of exhibits used in Court (unless such exhibits were admitted under seal), and (b) that a party may seek written permission from the designating party or Order of the Court with respect to dissolution or modification of this Protective Order.

15. Legal Advice Permitted. This Order shall not restrict any attorney of record in this action from rendering legal advice to his or her client with respect to this action and, in the course thereof, generally referring to or relying upon his examination of Proprietary Information. In rendering such advice, and in otherwise communicating with his or her client, the attorney shall not disclose the specific content of any Proprietary Information or its source to his or her client.

16. Responsibility for the Experts. Any party designating an expert or consultant as a Qualified Person under Paragraph 4(c) shall have the duty to reasonably ensure that such person observes the terms of this Protective Order.

17. Challenge Based on Public Knowledge. A determination that information is public knowledge shall not be made unilaterally by any party, but rather by challenge to the propriety of a designation of Proprietary Information made in accordance with Paragraph 11.

18. No Waiver. Nothing contained in this Order shall be deemed a waiver of any requirements for a showing of good cause under the Court rules or of any right of the conveying party to seek an order from the Court regarding further conditions for any inspection of its property, documents and/or premises. Notwithstanding the foregoing provisions, this Order shall be without prejudice to the right of any party to challenge the propriety of discovery on grounds of privilege, relevance, materiality, etc., and nothing contained herein shall be construed as a waiver of any objection which might be raised as to the admissibility at trial of any evidentiary material.

19. Amendment by Agreement or Court Order. This Order may be amended by the agreement of counsel for the parties, subject to the approval of the Court, provided it is in the form of a stipulation that shall be filed with the clerk and made part of the record in this case. This Order shall be without prejudice to the right of any party to apply to the Court for such further protective order under the provisions of the Court rules as justice may require.

20. Injunctive Relief. In the event anyone shall violate or threaten to violate any term of this Order, the parties agree that the aggrieved party may immediately apply to obtain injunctive relief against any such person violating or threatening to violate any of the terms of

this Order and, in the event the aggrieved party shall do so, the respondent person subject to the provisions of this Order shall not employ as a defense thereto the claim that the aggrieved party possesses an adequate remedy at law. The parties and any other person subject to the terms of this Order agree that this Court has jurisdiction over such person or party, for the purposes of enforcing this Order. In the event that any Confidential Information is disclosed by a receiving party in violation of this Order, the Confidential Information shall not lose its status through such disclosure, and the parties shall take all steps reasonably required to assure its continued confidentiality. Nothing herein shall limit or restrict the aggrieved party from seeking additional remedies or relief from the actual or threatened violation of this Order.

21. Miscellaneous. This Order may be executed in counterparts, each of which shall be deemed an original hereof. The descriptive headings in this order are inserted for convenience only and do not limit or effect the provisions in this order.

22. Requesting Additional Relief. None of the foregoing provisions of this Protective Order shall be deemed to preclude any party hereto from seeking and obtaining, on an appropriate showing, additional protection with respect to the Protective Order or relief from this Protective Order with respect to matter designated as “CONFIDENTIAL – ATTORNEY’S EYES ONLY” or “CONFIDENTIAL.”

DONE AND ORDERED this ___ day of _____, 2011.

UNITED STATES DISTRICT COURT JUDGE

Agreed as to Form and Substance:

By: /RobertKain/
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EXHIBIT A
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEREMY LEBEWOHL, UNCLE ABIES DELI
INC. d/b/a 2nd AVE DELI, UNCLE ABIES
DELI ON FIRST INC., and UNCLE ABIES
DELI SANDWICH TRADEMARKS LLC,
Plaintiffs,

CIVIL ACTION NO: 11-CIV-3153-
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HEART ATTACK GRILL LLC, HAG LLC,
and JON BASSO,
Defendants.

AFFIDAVIT AND AGREEMENT OF:

STATE OF)
)ss
COUNTY OF)

I, _____, being duly sworn, state that:

1. My address is _____

2. My present employer is and the address of my present employment is _____

3. My present occupation or job description is _____

4. I have received a copy of this Joint Protective Order in this action (the "Order") and I have read the same. Counsel for _____ has explained to me my obligations under the Order.

5. I will comply with all of the provisions of the Order.

6. I will hold in confidence, will not disclose to anyone not qualified under the Order, and will use only for purposes of this action, any confidential information which is disclosed to me.

7. I will return all confidential information which comes into my possession, and all notes, documents or things which I prepare relating thereto, to counsel for the party by whom I am employed or retained.

8. I hereby submit to the jurisdiction of this Court for the purpose of enforcement of this Affidavit and Agreement pursuant to the Order.

SUBSCRIBED AND SWORN TO before me this ____ day of _____, ____ .

Notary Public

My commission expires: