

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

HEARTBRAND BEEF, INC. §
§
Plaintiff, §
§
vs. § Civil Action No. 6:08-cv-00062
§
LOBEL’S OF NEW YORK, LLC, §
WORLDWIDE MEDIA, INC. THOUGHT §
CONVERGENCE, INC. and YAHOO! INC. §
Defendants. §

AMENDED COMPLAINT

I. Parties

1. Plaintiff, Heartbrand Beef, Inc., is a corporation organized and existing under the laws of the State of Texas with its corporate headquarters being located at 404 Airport Drive, Yoakum, Texas 77995.

2. Defendant, Lobel’s of New York, LLC, is a limited liability company organized and existing under the laws of the State of New York and may be served at either of the following addresses:

Lobel’s of New York, LLC
19 The Crossing
Purchase, NY 10577

Steve Fraum
Lobel’s of New York, LLC
774 Jay St.
Rochester, NY 14611-1339

3. Defendant, Worldwide Media, Inc., is a corporation organized and existing under the laws of the State of Florida and may be served through its registered agent at the following address:

Randolph Wolfe
100 N. Tampa St., Suite 2700
Tampa, FL 33602-2320

4. Defendant, Thought Convergence, Inc., is a company organized and existing under the laws of the State of Delaware and may be served by serving the agent for service of process at the following address:

C.T. Corporation System
818 W. 7th Street
Los Angeles, CA 90017

5. Defendant, Yahoo! Inc., is a company organized and existing under the laws of the State of Delaware and may be served through its registered agent at the following address:

C.T. Corporation System
818 W. 7th Street
Los Angeles, CA 90017

II. Jurisdiction and Venue

6. This is an action for false designation of origin and unfair competition pursuant to § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). This Court has jurisdiction under 15 U.S.C. § 1121, 15 U.S.C. § 1125(a), and 28 U.S.C. § 1338(a).

7. This Court also has jurisdiction of the action under 28 U.S.C. § 1332, as there is diversity of citizenship between the parties and the amount in controversy exceeds \$75,000.00, exclusive of interest and cost. Venue is proper in this district under 28 U.S.C. § 1391. Through the use of internet, the Defendants have done business in the Western District of Texas.

III. Facts

8. Kyusha is one of the islands of Japan in the Mount Aso Region. Akaushi cattle are raised on the island of Kyusha. The Akaushi Cattle herds are considered to be a national treasure and are a protected breed by the government of Japan.

9. Akaushi beef made from Akaushi cattle is healthier than other types of beef due to its unique fatty acid composition. Akaushi cattle produce meat that has a higher amount of intramuscular fat, commonly known as marbling. As a result, beef from Akaushi cattle is very tender, juicy and flavorful. Many beef experts consider Akaushi beef to be the most palatable, and yet healthy, beef in the world.

10. As a result of the fatty acid composition, Akaushi beef is lower in saturated fats and cholesterol and higher in nonsaturated fats and conjugated linoleic acid (LCA). LCA is a very beneficial and essential fatty acid for good human nutrition.

11. Some studies have even shown LCA to slow the growth of a wide variety of tumors, including cancer of the skin, breast and prostate. Other research has shown LCA helps control insulin level and reduce diabetes. Still other studies show Akaushi beef helps increase weight loss, lowers cholesterol and reduces bone loss. Most significantly, some studies show that Akaushi beef reduces the risk of heart disease.

12. As a result of some of these studies, plus the flavorful nature of Akaushi beef, Akaushi beef has become one of the most sought after beef products in the United States. Akaushi beef will sell for as much as ten times the price of ordinary beef.

13. A number of years ago, a predecessor in interest of Plaintiff was able to obtain a limited number of purebred Akaushi cattle. From that limited number, herds of purebred Akaushi cattle have been grown in the United States, all of which are owned and controlled by the Plaintiff.

14. The Akaushi cattle lineage is very accurately controlled. The ancestry and the lineage of cattle can be traced back to the Mount Aso Region of Japan and the revered Akaushi herds.

15. As a result of Japan's protection of the revered Akaushi herds as a national treasure, the only source of Akaushi beef in the United States is from the herds of Plaintiffs. Based upon information and belief, there is no other source of Akaushi beef in the United States.

16. Recently, Defendant Worldwide Media, Inc. started operating a website of www.akaushisteaks.com, the homepage of which is attached as Exhibit A. The word "Akaushi" appears five times on the homepage (see Exhibit A). If someone clicks on any of the five different uses of the words Akaushi, one of two connections to www.lobels.com is provided (see Exhibit B or C) under the term "Akaushi." If the person then clicks on www.lobels.com, the homepage of Lobel's is connected (see Exhibit D). Lobel's then attempts to switch the person accessing their website via www.akaushisteaks.com from Akaushi steaks to some other type of beef or meat product.

17. Based upon information and belief, Defendant Worldwide Media, Inc. is operating a website of www.akaushisteaks.com and is paid for click throughs under the word "Akaushi."

18. Based upon information and belief, Defendant Worldwide Media, Inc., uses and aggregator by the name of Thought Convergence, Inc. d/b/a TrafficZ. TrafficZ in providing its domain management service, post on www.akaushisteaks.com, a legal notice concerning its "policy" (see Exhibit E).

19. Further, based upon information and belief, Defendant Thought Convergence, Inc. d/b/a TrafficZ has an arrangement with Yahoo.com to provide the maximum number of click throughs to paying customers as possible. Further based upon information and belief, Defendant Lobel's of New York, LLC is one of those paying customers. When going to www.yahoo.com and searching for "Akaushi," the number one paid listing was www.lobels.com.¹

¹ This was removed by Yahoo! Inc. after the filing of this lawsuit.

20. A person searching the word “Akaushi” is normally looking for a source of Akushi steaks or beef. Defendant Yahoo! Inc. rather than directing people to Plaintiff, the only source of Akaushi steaks in the United States, Defendant Yahoo! Inc. would direct people to www.lobels.com. Based upon information and belief, Defendants are paid each time a person clicks through to www.lobels.com.

21. While Plaintiff is not sure exactly what Defendant was doing what, it is clear that all four of the Defendants were directing the public when they inquire about “Akaushi,” “Akaushi steaks,” “Akaushi beef” or similar such terms to the website of www.lobels.com.

22. Based upon information and belief, none of the Defendants have sold nor have they ever sold, Akaushi steaks or any other Akasuhi meat products.

23. The acts of the Defendants complained of hereinabove is a clear attempt to “bait and switch” a perspective buyer that is looking for an “Akaushi steak” to some other lesser quality beef or other meat product as sold by Lobel’s.

24. A person going to the website of www.akaushisteaks.com is normally looking for a source of Akaushi steaks or beef. Rather than Akaushi steaks (which are only available through Plaintiff), attempt is made to divert the inquirer to www.lobels.com for the purchase of some other beef or meat product of lesser quality.

COUNT 1

False Designation of Origin

25. Plaintiff repeats and realleges each and every allegations contained in paragraphs 1-19 as if fully set forth herein.

26. Defendants conduct complained of hereinabove constitutes use in commerce of words or terms that are a misleading description of fact, or misleading representation of fact, which:

a. is likely to cause confusion or to cause mistake or to deceive as to the affiliation, connection, or association of Defendants with Plaintiff, or as to the origin, sponsorship or approval of Defendants goods by Plaintiff; or,

b. misrepresents the nature, characteristics, qualities or geographic origin of Defendants goods.

27. Such acts of Defendants are a violation of 15 U.S.C. § 1125(a) and will continue unless enjoined by this Court. As a result of such acts, Plaintiff has been damaged.

28. Further, such acts will continue unless enjoined by this Court.

COUNT 2

Common Law Unfair Competition

29. Plaintiff repeats and realleges every allegation contained in paragraphs 1-22 as if fully set forth herein.

30. Defendants acts complained of hereinabove constitute common law unfair competition under the laws of the State of Texas.

31. As a result of such common law unfair competition, Plaintiffs have been damaged. Such acts of unfair competition will continue unless enjoined by this Court.

PRAYER

WHEREFORE, Plaintiff requests the Court enter judgment:

A. declaring that Defendants have engaged in unfair competition under § 43(a) of the Lanham Act and have engaged in common law unfair competition of the laws of the State of Texas;

B. ordering that Defendants, their officers, directors, agents, servants, employees, attorneys and other persons in active concert or participation with them, be preliminary and permanently enjoined from:

1. using alone, or in combination with other words the term AKAUSHI, or any confusingly similar word or words when referring to meat products;

2. causing likelihood of confusion between the products offered for sale by Defendants and the Akaushi beef products offered for sale by Plaintiff; and,

3. otherwise engaging in unfair competition, Federal or State, in any matter whatsoever.

C. ordering that Defendants be required to deliver up and destroy all literature, advertising, or electronically stored information about any products under the word “Akaushi” or any confusingly similar term;

D. ordering that Defendants immediately stop using the word “Akaushi” on their websites including in their domain name;

E. ordering that Defendants be directed to file with this Court and to serve on Plaintiff within fifteen days after the service of an injunction, a report, in writing under oath, setting forth in detail the manner and form in which they have complied with the injunction;

F. awarding Plaintiff Defendants’ profits received from use of the term “Akaushi”;

G. awarding the Plaintiff its damages, which damages should be increased three times actual damages due to the willful nature of Defendants’ conduct;

H. awarding Plaintiff punitive damages;

I. awarding Plaintiff its attorney’s fees and costs in this suit;

J. awarding Plaintiff pre and post judgment interest; and,

K. granting Plaintiff such other and further relief as the Court may deem just and proper.

Respectfully submitted,

GUNN & LEE, P.C.
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San Antonio, Texas 78205
(210) 886-9500 Telephone
(210) 886-9883 Facsimile

By: /s/ Ted D. Lee
Ted D. Lee
State Bar No. 12137700