

• AO 440 (Rev. 10/93) Summons in a Civil Action •

UNITED STATES DISTRICT COURT

Southern

District of

Texas

Heartbrand Beef, Inc.

SUMMONS IN A CIVIL CASE

v.

Lobel's of New York, LLC &
Worldwide Media, Inc.

CASE NUMBER: 6:08-cv-00062

TO: (Name and address of Defendant)

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

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Ted D. Lee
Gunn & Lee, PC
700 N. St. Mary's Street
Suite 1500
San Antonio, TX 78205

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

Michael N. Milby

JUL 30 2008

CLERK

DATE


(By) DEPUTY CLERK

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

HEARTBRAND BEEF, INC.

Plaintiff,

vs.

LOBEL'S OF NEW YORK, LLC,
WORLDWIDE MEDIA, INC. THOUGHT
CONVERGENCE, INC. and YAHOO! INC.
Defendants.

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Civil Action No. 6:08-cv-00062

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,

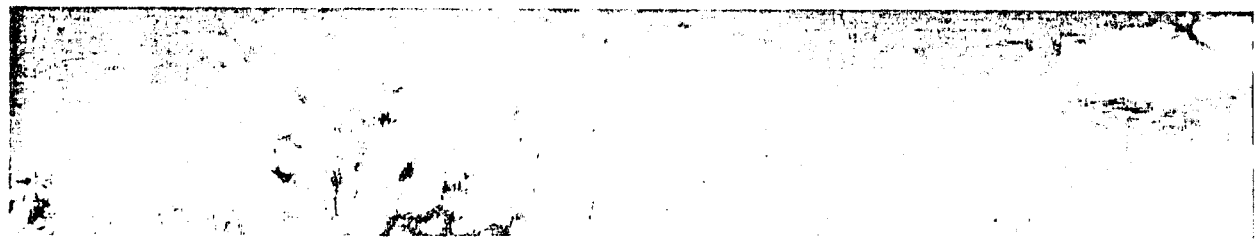
GUNN & LEE, P.C.
700 North St. Mary's St., Suite 1500
San Antonio, Texas 78205
(210) 886-9500 Telephone
(210) 886-9883 Facsimile

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

EXHIBIT

A

akaushisteaks.



Akaushi

- Akaushi
- Steak
- Omaha Steak
- Meat Grinder

Omaha Steak

- Akaushi
- Steak
- Omaha Steak
- Meat Grinder

Steak

- Restaurant Pos
- Steaks
- Buffalo
- Food Nutrition

Meat Grinder

- Kitchen Remodeling
- Wine Storage
- Restaurant Supplies
- Restaurant Equipment

Most popular sea

- Akaushi
- Steak
- Omaha Steak
- Meat Grinder
- Meat Slicer
- Fresh Seafood
- Lobster
- Beef Jerky

Search here...

Search

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EXHIBIT

B

akaushisteaks.



Sponsored Results for: Akaushi

Akaushi

Order deliciously flavorful beef from our butcher shop to your door.
www.lobels.com

1/1/2008

Most popular searches

- Real Estate
- Apartment For Rent
- Personals
- Cheap Airfare
- Vacation Package
- Vegas Vacation
- Cancun Hotel
- New Cars

Search here...

Search

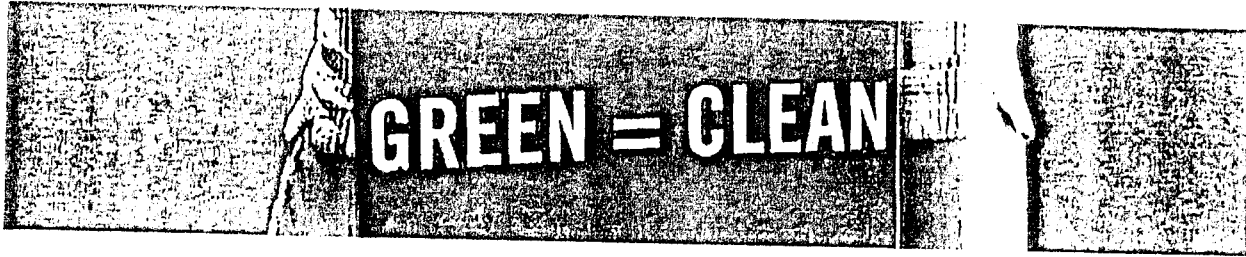
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EXHIBIT

C

akaushisteaks.



Sponsored Results for: Akaushi

Akaushi

Buy delicious premium prime beef from Lobel's of NY butcher shop.
www.Lobels.com

Prev | Next

Most popular searches

- Real Estate
- Apartment For Rent
- Personals
- Cheap Airfare
- Vacation Package
- Vegas Vacation
- Cancun Hotel
- New Cars

Search here...

Search

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EXHIBIT

D

|GO|

Butcher Shop

- USDA Prime Beef
- Natural Prime Beef
- American Wagyu
- Heritage Beef
- All-Natural Lamb
- Kurobuta Pork
- Heritage Pork
- All-Natural Veal
- Lobel's Hot Dogs
- Sausage Shop
- Fresh Poultry
- Lobel's Gift Shop
- Versatile Packages
- Specialty Foods
- Lobel's At Home
- Lobel's Pantry
- Gift Certificates
- Lobel's Merchandise
- Request A Catalog

At any point while you are shopping, you may click the Shopping Cart icon at the top of the page to check your purchase.

ONLINE SUPPORT CENTER
 CHAT-PHONE-EMAIL



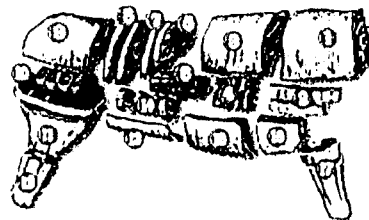
*Steaks and Dry-Aged Roasts
 USDA Prime Beef*

Of all the beef produced in the U.S., certified prime grade by the USDA. In amount, the Lobels choose only the prime- you just can't get any better

Our USDA prime beef comes from the corn-fed cattle the Midwest has to offer

Then we dry age the beef for up to 30 days, imparting a buttery taste and melt-in-your-mouth texture that many beef connoisseurs consider the ultimate beef experience.

| Lobel's Beef Selections | Beef Recipes | Thickness & Serving Chart | Beef Anatomy



- | | | |
|-----------------|-----------------|-----------------|
| 1. Chuck | 7. Porterhouse | 13. Flank |
| 2. Flanken Ribs | 8. Sirloin | 14. Flat Iron |
| 3. Rib | 9. Round | 15. Short Ribs |
| 4. Back Ribs | 10. Rump Roast | 16. Brisket |
| 5. Short Loin | 11. Round Steak | 17. Forequarter |
| 6. Tenderloin | 12. Hind Steak | |

Lobel's Steaks and Prime Beef Selections

Steaks

- Flat Iron Steak
- Hanger Steak
- Bacon-Wrapped Tenderloin Steak
- Tenderloin Steak
- Filet Mignon
- Bone-In Filet Mignon
- Minute Steak
- Bone-In Rib Steak
- Boneless Rib Steak
- Cowboy Steak
- Bone-In Strip Steak
- Boneless Strip Steak
- Boneless Double Strip Steak for Two
- T-Bone Steak
- Porterhouse Steak

Roasts

- Tenderloin & Chateaubriand Roasts
- Prime Rib Roasts: Bone-in, boneless, and boned & tied
(Click here for rib roast roasting tips & techniques)
- Boneless Shell Roast
- Pot Roast

Additional Beef Selections

- Ground Beef
- Turnedos of Beef
- Filet Tails
- Tenderloin for Kabobs
- London Broil for Two
- Beef for Stew

Versatile Packages with USDA Prime Beef


- The Central Park
- Bone-In Rib Samplers
- Porterhouse Samplers
- Recipe Pack: Thai-Marinated Steak
- Lobel's Sweetheart Packages
- Recipe Pack: Spiced Portuguese-Style Pot Roast with Bacon, Onions, and White Wine
- Recipe Pack: Tuscan-Style Meat Loaf with White Wine-Vegetable Sauce
- Weekender
- The Get Together Pack
- The New Yorker
- The Ultimate
- The Madison Avenue
- Mixed Grill
- The Sierra Collection
- Signature Roast Collection


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Beef Recipes

You'll find these recipes here on the site, plus many more in our cookbooks.

Cut of Meat	Method of Cooking	Recipe
Steaks		
Hanger Steak	Grilling	Grilled Hanger Steak
	Grilling	Enid & Ann Stettner's New Orleans Sandwich from our "Look Who's in the Kitchen"
Tenderloin Steak	Sautéing	Tenderloin Steak with Peppercorn Sauce
	Grilling	Grilled Satays with Dipping Sauce
	Grilling	Enid & Ann Stettner's New Orleans Sandwich from our "Look Who's in the Kitchen"
Filet Mignon	Grilling	Grilled Filet Mignon with Gorgonzola Compound Butter

	Broiling	Filet Mignon with Cognac & Herb
	Sautéing	Butterfly Filet Mignon with Sher
Minute Steak	Grilling or Broiling	Leon's Great Open-Faced Steak
	Grilling	Enid & Ann Stettner's New Orleans Sandwich from our "Look Who's in the Ki
Boneless Rib Steak	Grilling	Steak with a Spicy Marinade
Boneless Strip Steak	Grilling	Grilled Steak au Poivre
		Bobby Flay's New York Strip Ste Horseradish-Mint Glaze from our "Look Who's in the Ki
	Grilling	Robert Parker's Grilled NY Strip from our "Look Who's in the Ki
Boneless Double Strip Steak for Two	Grilling	Grilled Strip Steak for Two with Butter
T-Bone Steak	Grilling	T-Bone for Two with Mushroom
	Grilling	Teriyaki Steak with Grilled Pineap
Porterhouse Steak	Grilling	Lobel's Classic Grilled Porterho
Roasts		
Tenderloin Roasts	Roasting	Chateaubriand Roast with Borde
	Roasting	Tenderloin Roast with Mushroom
	Roasting / Baking	Beef Wellington
Bone-In Prime Rib Roast	Grilling	Leon's Grilled Standing Rib Roas As seen on Martha Stewart Livi
	Roasting	Standing Rib Roast
	Grilling	Grilled Standing Rib Roast
Boneless Shell Roast	Roasting	Shell Roast New Yorker
	Roasting	Oven-roasted Shell Roast
Pot Roast	Braising	Family Pot Roast
	Braising	 Spiced Portuguese-Style I Bacon, Onions, and White
Additional Selections		
Ground Beef	Grilling	Classic Hamburger with Baja-St
	Grilling	Stuffed Cheeseburger Deluxe
	Grilling	Blue Cheese Burgers with Grilled

	Grilling	Bacon-Mushroom Burgers
	Stewing	West Indian Chili Con Carne
	Grilling	Grilled Meat Loaf
	Baking	Arkansas Meat Loaf
	Baking	Meat Loaf Parmigiana
	Pan-Searing / Braising	 Tuscan-Style Meat Loaf w Vegetable Sauce
Tournedos of Beef	Sautéing	Nirmala's Sautéed Steaks with 1 Wine from our "Look Who's in the Ki
	Sautéing	Tournedos of Beef
Filet Tails	Sautéing	Beef Stroganoff
	Stir Frying	Stir-Fried Beef with Onions and
Tenderloin for Kabobs	Grilling	Tenderloin Kabobs with Rosema Potatoes and Red Peppers
London Broil for Two	Grilling	Bloody Mary London Broil As seen on Martha Stewart Live
	Grilling	Grilled Satays with Dipping Sau
Beef for Stew	Stewing	Beef Stew With Beer
	Stewing	Beef Stew Topped with Black Pe Crust

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Thickness & Serving Chart

Product	Weight (in oz. unless otherwise noted)	Thickness in Inches (approximate)	Number of Servings
Hanger Steak	16 – 18	N/A	1 – 2
Bacon-Wrapped Tenderloin Steak	6	1 1/2 – 2	1 s
	10	2 1/2 – 3	1 a
Tenderloin Steak	5	1 1/4 – 1 1/2	1 s
	8	2 – 2 1/2	1 a
Filet Mignon	6	1 – 1 1/2	1 a
	8	1 3/4 – 2	1 a
	10	2 1/4 – 2 1/2	1 k
	12	2 1/2 – 3	1 e
Minute Steak	4	1/4	1 s

Boneless Strip Steak	8	3/4	1 s
	10	1	1 s
	12	1 1/4	1 a
	14	1 1/2	1 a
	16	2	1 k
	18	2 - 2 1/2	1 k ser
	20	2 1/2	1 e ser
Boneless Double Strip Steak for Two	30	4	2 k
Bone-In Strip Steak	14	1 1/4	1 a
	16	1 1/2 - 1 3/4	1 a
	18	2	1 k
	20	2 - 2 1/2	1 k ser
T-Bone Steak	16	1 1/8	1 a
	20	1 1/2 - 1 3/4	1 k
	24	2 - 2 1/2	2 a
Porterhouse Steak	18	1	1 a
	22	1 1/4 - 1 1/2	1 k ser
	36	2 1/4 - 2 1/2	2 a
	48	3 - 3 1/2	2 k ser
Boneless Rib Steak	8	3/4	1 s
	12	1 1/4	1 a
	16	1 3/4	1 k
	20	2 1/4	1 e
Bone-In Rib Steak	16	1	1 a
	20	1 1/4 - 1 1/2	1 k
	24	2 - 2 1/4	1 e ser
	28	2 1/2 - 2 3/4	2 a
Cowboy Steak	32 - 36	2 1/2 - 2 3/4	2 k
Tenderloin & Chateaubriand Roasts	20 oz. Tenderloin Roast	N/A	2 -
	24 oz. Chateaubriand for Two	N/A	2 -

	2 lbs. Chateaubriand Roast	N/A	4 -
	3 1/2 lbs. Whole Tenderloin	N/A	8 -
Boneless Rib Roast	3 lbs.	N/A	3 -
	5 lbs.	N/A	4 -
	8 lbs.	N/A	7 -
	11 lbs.	N/A	10
Bone-In Rib Roast /Boned & Tied Rib Roast	4 lbs.	N/A	3 -
	7 lbs.	N/A	6 -
	10 lbs.	N/A	8 -
	14 lbs.	N/A	10
Boneless Shell Roast	4 lbs.	N/A	5 -
	8 lbs.	N/A	10
Pol Roast	3 - 4 lbs.	N/A	6 -
Tournedos of Beef	4 oz.	1/2 - 3/4	1 s
London Broil for Two	1 1/2 lbs.	5 - 7 inches long	2 a

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EXHIBIT

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akaushisteaks.com

Copyright / Trademark Policy

TrafficZ is a domain management service provider that fully respects the trademark, copyright and other intellectual property rights that others have acquired. As a prerequisite to enrolling in and/or using our service, all of our clients must agree to abide by our Domain Management Services Agreement which strictly prohibits utilizing our service for any domain name that infringes in any way upon the trademark, copyright and/or intellectual property rights of any third party individual or entity. If you wish to assert a trademark right, please contact the owner of this domain as TrafficZ does not own nor control this domain. If, however, you believe that any element of this website infringes upon a copyright held by you or an entity which you have the authority to represent, you may notify our legal department to resolve the issue. When contacting TrafficZ's legal department regarding a copyright matter, please provide the following information in writing:

Terms

- Di
- Cc
- Pr

1. identification of the work entitled to copyright protection;
2. identification of the copyright holder;
3. identification of the element of this website that is claimed to be infringing upon the copyrighted work and reasonably sufficient information to permit TrafficZ to identify the allegedly infringing material;
4. a statement by you that you have a good faith belief that the use of the allegedly infringing material is not authorized by the copyright holder, any of its agents, or the law; and
5. a statement, made under penalty of perjury, that all information in the notification is true and accurate and that you are the copyright holder or are authorized to act on behalf of said holder.

Our legal department may be reached at:

Mailing Address: Attn: Legal Department
 11300 W. Olympic Blvd., Suite 900
 Los Angeles, CA 90064

Email Address: legal@TrafficZ.com

Facsimile: 310.362.8483

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