

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

QVC, INC.,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Civil Action No.
	:	
HSN, LP,	:	
	:	
Defendant.	:	<u>COMPLAINT AND JURY DEMAND</u>

JURISDICTION

1. This civil action asserts claims for trademark infringement, false designation of origin, unfair competition, breach of contract and unjust enrichment, arising under the Lanham Act, as amended, 15 U.S.C. §§ 1051, et seq., and the laws of the Commonwealth of Pennsylvania. The amount in controversy exclusive of interests and costs exceeds the sum or value of \$75,000.

2. This Court has subject matter jurisdiction under § 39 of the Federal Trademark Act, 15 U.S.C. § 1121, and the Judicial Code, 28 U.S.C. §§ 1331, 1332(a) and (b), 1338(a) and (b), and 1367(a).

3. Plaintiff, QVC, Inc. ("QVC"), is a Delaware corporation having a principal place of business located at Studio Park, West Chester, Pennsylvania 19380.

4. Defendant HSN, LP ("HSN") is a Delaware limited partnership, having its principal place of business at 1 HSN

Drive, St. Petersburg, FL 33729. On further information and belief, HSN is engaged in the business of providing home shopping services in the field of jewelry and provides said services in direct competition with QVC.

COUNT I -- TRADEMARK INFRINGEMENT

5. As a cause of action and ground for relief, QVC alleges trademark infringement by HSN under, §§ 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1) and 1125(a), and at common law, and incorporates ¶¶ (1) through (4) of this complaint as a part of this count.

6. QVC has been and now is extensively engaged in the business of providing in interstate commerce home shopping services in the field of jewelry.

7. Since 1988, long prior to the acts complained of herein, QVC has used the trademark GEM FEST for home shopping services in the field of jewelry and in the advertising, marketing and sale of such services in interstate commerce.

8. From 1988 to the present, QVC's advertising, rendering of services and sales under the trademark GEM FEST have been and are significant.

9. As a result of such substantial advertising and sales under the trademark GEM FEST, said trademark has become well and favorably known to the general public and the industry as a

distinctive indication of the origin of the services rendered and provided by QVC.

10. QVC duly registered the trademark GEM FEST, for home shopping services in the field of jewelry by means of television, in the United States Patent and Trademark Office ("USPTO") under Registration No. 1,935,672, which issued on November 14, 1995.

11. Registration No. 1,935,672 is prima facie evidence of the validity the trademark shown therein and QVC's ownership thereof, and is constructive notice of ownership of the trademark GEM FEST by QVC, all as provided by §§ 7(b) and 22 of the Lanham Act, 15 U.S.C. §§ 1057(b) and 1072. As Registration No. 1,935,672 has achieved incontestable status under § 15 of the Lanham Act, 15 U.S.C. § 1065, said registration is conclusive evidence of QVC's exclusive right to use the trademark GEM FEST in commerce. A true and correct copy of Registration No. 1,935,672 is annexed hereto as Exhibit 1 and is made a part hereof.

12. Notwithstanding QVC's well-known and prior rights in the trademark GEM FEST, HSN, with knowledge of said rights, and long after QVC had established its rights in GEM FEST, has adopted and used the mark GEM FEST for home shopping services in the field of jewelry offered in the Commonwealth of Pennsylvania and in interstate commerce.

13. The trademark GEM FEST adopted and used by HSN is identical or substantially identical to QVC's trademark GEM FEST and is used in connection with identical or substantially identical services.

14. HSN's use of the trademark GEM FEST is likely to cause confusion, to cause mistake and to deceive as to the source, origin, sponsorship and/or approval of the services which are provided by HSN under said trademark.

15. HSN's use of the trademark GEM FEST in the manner hereinabove alleged infringes QVC's trademark GEM FEST under §§ 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1115(1) and 1143(a), and at common law.

16. On information and belief, since at least prior to its adoption of GEM FEST, HSN has actively watched and monitored QVC's home shopping television program and QVC's other retail channels.

17. On information and belief, HSN had actual knowledge of QVC's use of the trademark GEM FEST prior to HSN's adoption and use of the trademark GEM FEST.

18. In or around January 1997, QVC requested HSN to cease and desist from its acts of infringement and gave HSN actual notice of QVC's registration of the trademark GEM FEST. On February 5, 1997, through its attorneys and agents Edward T. Colbert and Kenyon & Kenyon, HSN stated, in response to the

above-mentioned request, that it "is not presently using [GEM FEST]" and that "HSN has undertaken not to use th[e] mark[] [GEM FEST] in the future, in response to your request." In spite of QVC's rights and the above-mentioned request, and notwithstanding the above-mentioned representations, HSN used the mark GEM FEST in connection with its home shopping services in the field of jewelry.

19. On further information and belief, HSN has long known of the fact that the public associates the trademark GEM FEST with the goods and services of QVC, and HSN has sought to capitalize on the goodwill engendered by said trademark by adopting the identical trademarks for identical services.

20. Upon information and belief, HSN has performed the complained of acts willfully, and with the knowledge of the risk of infringement they would cause, and to appropriate and unfairly trade upon the goodwill in the trademark GEM FEST.

21. By reason of HSN's acts alleged herein, QVC has and will suffer damage to its business, reputation and goodwill, and HSN has and will enjoy profits to which it is otherwise not entitled, for which QVC is entitled to relief at law.

22. Unless enjoined by this Court, HSN will continue to infringe the trademark GEM FEST, thereby deceiving the public and causing QVC immediate and irreparable injury. It would be difficult to ascertain the amount of compensation which could

afford QVC adequate relief for such continuing acts, and a multiplicity of judicial proceedings would be required. QVC's remedy at law is not adequate to compensate it for injuries threatened.

COUNT II -- FALSE DESIGNATION OF ORIGIN

23. As a cause of action and ground for relief, QVC alleges that HSN has engaged in acts in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and incorporates by reference ¶¶ (1) through (22) inclusive, as a part of this count.

24. The confusingly similar designation GEM FEST adopted and used by HSN in the manner hereinabove alleged constitutes a false designation of origin within the meaning of § 43(a) of the Federal Trademark Act, 15 U.S.C. § 1125(a), which is likely to cause confusion, mistake or deception as to the source, origin, sponsorship and/or approval of the services which are provided by HSN under said designation.

25. The nature and probable tendency and effect of HSN's use of the confusingly similar designation GEM FEST in the manner hereinabove alleged is to enable HSN to confuse or deceive the public by misrepresenting the services offered under said designation as sponsored, licensed and/or otherwise approved by, or are in some way connected or affiliated with

QVC. Such conduct constitutes a false designation of origin in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

COUNT III -- UNFAIR COMPETITION

26. As a cause of action and ground for relief, QVC alleges that HSN has engaged in acts of unfair competition at common law, and incorporates by reference ¶¶ (1) through (25) inclusive, as a part of this count.

27. By virtue of HSN's acts, hereinabove pleaded, HSN has engaged in conduct which is contrary to honest, industrial and commercial practice, and thus, has engaged in unfair competition, in violation of the common law of Commonwealth of Pennsylvania.

28. HSN's acts, hereinabove pleaded, are calculated to procuring an unfair competitive advantage by misappropriating the valuable goodwill developed by QVC at substantial effort and expense and represented by the distinctiveness of the trademark GEM FEST, and by misrepresenting the nature, characteristics, qualities and origin of HSN's business activities.

29. Upon information and belief, HSN will continue to compete unfairly unless restrained by this Court. As a result of HSN's unfair competition, QVC will incur substantial damages and loss of goodwill and profits, will be unable to control its good reputation and will sustain still further damages in an amount difficult to ascertain.

COUNT V -- BREACH OF CONTRACT

30. As a cause of action and ground for relief, QVC alleges breach of contract by HSN, and incorporates by reference ¶¶ (1) through (29) inclusive, as a part of this count.

31. In or around February 1997, HSN and QVC, through their respective attorneys and agents, entered into an agreement in which HSN agreed to cease and permanently refrain from using the designation GEM FEST in connection with home shopping services in the field of jewelry. In consideration of and reliance on HSN's promise, QVC agreed to refrain from taking any legal action against HSN and asserting its statutory right to obtain an injunction and recover damages, lost profits and the costs and fees thereof due to HSN's use of GEM FEST.

32. In breach of the aforementioned agreement, HSN has used the designation GEM FEST as a trademark and/or otherwise to market, advertise and/or identify HSN's home shopping services in the field of jewelry.

33. As a result of said breach, QVC has been injured and has sustained substantial damage.

COUNT VI -- UNJUST ENRICHMENT

34. As a cause of action and ground for relief, QVC alleges unjust enrichment by HSN, and incorporates by reference ¶¶ (1) through (33) inclusive, as a part of this count.

35. At all times relevant to the acts complained of in this Complaint, Edward T. Colbert, Esq. and the firm of Kenyon & Kenyon were attorneys and agents of and had the express, implied and/or apparent authority of HSN to act on HSN's behalf.

36. In or around January 1997, QVC requested HSN to cease and desist from HSN's acts of infringement of QVC's trademark GEM FEST and gave HSN actual notice of QVC's registration of the trademark GEM FEST.

37. On February 5, 1997, Edward T. Colbert and Kenyon & Kenyon, acting within the scope of their authority as agents of HSN, represented to QVC that HSN "is not presently using [GEM FEST]" and that "HSN has undertaken not to use th[e] mark[] [GEM FEST] in the future, in response to your request."

38. In reliance upon HSN's representations, QVC refrained from asserting its rights to obtain an injunction against HSN and recover damages, lost profits and the costs and fees thereof due to HSN's unlawful use of the trademark GEM FEST, all to HSN's benefit.

39. Upon information and belief, at the time that HSN's agents represented to QVC that HSN was not presently using the trademark GEM FEST and that HSN had undertaken not to use the trademark GEM FEST in the future, HSN and/or its agents Edward T. Colbert and Kenyon & Kenyon knew these representations to be false.

40. However, despite realizing the benefits of QVC's refraining from the assertion of its rights against HSN, HSN has continued to use the mark GEM FEST for home shopping services in the field of jewelry.

41. HSN has therefore been unjustly enriched at QVC's expense.

42. As a proximate result of HSN's representations and refusal to cease using the mark GEM FEST for home shopping services in the field of jewelry, HSN is in possession of monies and benefits that it in equity should not be entitled to retain.

43. QVC is therefore entitled to damages resulting from HSN's unjust enrichment, including the imposition of a constructive trust on all profits and benefits realized by HSN under the trademark GEM FEST.

WHEREFORE, QVC respectfully prays that:

1. The Court enter judgment that:
 - a. HSN has infringed the trademark GEM FEST under §§ 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1115(1) and 1125(a), and at common law;
 - b. HSN has violated § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), by making false designations of origin;
 - c. HSN has engaged in unfair competition;

- d. HSN has breached the aforementioned agreement with QVC; and
- e. HSN has been unjustly enriched.

2. HSN and its agents, employees, servants, attorneys, successors and assigns, and all others in privity or acting in concert therewith be permanently enjoined from:

- a. Using the GEM FEST trademarks and/or any other trade names, trademarks, service marks, corporate or other commercial designations which are confusingly similar to QVC's trademark GEM FEST;
- b. Otherwise infringing QVC's GEM FEST trademark; and
- c. Unfairly competing with QVC in any manner whatsoever or otherwise injuring their business reputation in the manner complained of herein.

3. Pursuant to § 36 of the Lanham Act, 15 U.S.C. § 1118, HSN be directed to deliver up for destruction or other disposition by QVC all signage, advertisements, price lists, brochures, labels, signs, prints, decals and all other materials in the possession, custody or control of HSN which bear or are labeled with the designations GEM FEST or any other reproduction, counterfeit, copy or colorable imitation of the CHRISTMAS IN JULY and GEM FEST trademarks, and all plates,

molds, films, matrices and any other means of making or duplicating the same.

4. Pursuant to § 35 of the Lanham Act, 15 U.S.C. § 1117, HSN be directed to pay to QVC compensatory damages in an amount to be determined at trial for the injuries sustained by QVC in consequence of the acts complained of herein and that such damages be trebled because of the willful acts described herein.

5. Pursuant to § 35 of the Lanham Act, 15 U.S.C. § 1115, HSN be required in equity to account for and pay to QVC all profits realized by HSN as the result of the acts complained of herein.

6. HSN be required to pay QVC actual and consequential damages and any profits and benefits derived from HSN's breach of contract.

7. HSN be required to pay QVC any damages, profits and benefits resulting from HSN's unjust enrichment.

8. HSN be required to pay to QVC both the costs of this action and the reasonable attorneys' fees incurred by QVC.

9. The Court award any punitive and exemplary damages against HSN and in favor of QVC.

10. QVC be granted such other, different and additional relief as this Court deems equitable and proper.

JURY DEMAND

Plaintiff QVC, Inc. hereby demands a trial by jury.

Respectfully submitted,

**CAESAR, RIVISE, BERNSTEIN,
COHEN & POKOTILOW, LTD.**

April 11, 2008

By /SGuerriero/ Val. Code SRG 3999

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EXHIBIT 1

Int. Cl.: 42

Prior U.S. Cls.: 100 and 101

United States Patent and Trademark Office

Reg. No. 1,935,672
Registered Nov. 14, 1995

**SERVICE MARK
PRINCIPAL REGISTER**

GEM FEST

QVC, INC. (DELAWARE CORPORATION)
1365 ENTERPRISE DRIVE
WEST CHESTER, PA 19380

NO CLAIM IS MADE TO THE EXCLUSIVE
RIGHT TO USE "GEM" , APART FROM THE
MARK AS SHOWN.

FOR: HOME SHOPPING SERVICES IN THE
FIELD OF JEWELRY BY MEANS OF TELEVI-
SION, IN CLASS 42 (U.S. CLS. 100 AND 101).

SER. NO. 74-620,577, FILED 1-12-1995.

FIRST USE 11-1-1988; IN COMMERCE
11-1-1988.

JACQUELINE A. COLE, EXAMINING ATTOR-
NEY