ESTTA Tracking number: **ESTTA597020**

Filing date: **04/07/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92058909
Party	Plaintiff Fashion TV Programmgesellschaft mbH
Correspondence Address	RAYMOND J DOWD DUNNINGTON BARTHOLOW & MILLER LLP 1359 BROADWAY, SUITE 600 NEW YORK, NY 10018 UNITED STATES rdowd@dunnington.com, jkelton@dunnington.com, sblaustein@dunnington.com, azablocki@dunnington.com, dhenry@dunnington.com, asiqueira@dunnington.com
Submission	Other Motions/Papers
Filer's Name	Justin Kelton
Filer's e-mail	Jkelton@dunnington.com, Dhenry@dunnington.com, AZablocki@dunnington.com, Rdowd@dunnington.com
Signature	/Justin Kelton/
Date	04/07/2014
Attachments	FTV Affidavit of Service with Exhibits.pdf(1238103 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No. 3482166	§	
Mark: FASHIONONE	§	
Issued: August 5, 2008	§	Cancellation No. 92058909
	§	
FASHION TV Programmgesellschaft mbH,	§	**AFFIDAVIT OF DYLAN HENRY IN**
	§	**COMPLIANCE WITH 37 C.F.R. 2.111(b)**
Petitioner	§	
	§	
v.	§	
	§	
Fashion One Television LLC,	§	
	§	
Owner	§	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DYLAN HENRY being duly sworn, deposes and says:

1. I am over the age of eighteen years, reside in Kings County, State of New York and I am not a party to this action.

2. I am a Paralegal at the law firm of Dunnington, Bartholow & Miller, LLP, counsel for Petitioner in this matter.

3. On the 19th day of March 2014, I served the Petitioner's Petition for Cancellation, a true and correct copy of which is attached hereto as Exhibit A, upon:

MICHAEL G. GLEISSNER
FASHION ONE TELEVISION, LLC
246 WEST BROADWAY
NEW YORK, NY 10013

- and -

MICHAEL G. GLEISSNER
820 MERIDIAN AVENUE, SUITE 100
MIAMI BEACH, FL 33139

via first-class mail by depositing true copies thereof in post-paid wrappers into the custody of the United States Postal Service within New York State, to the individual named above at the addresses shown above.

4. On the 19th day of March 2014, I also served the Petitioner's Petition for Cancellation, a true and correct copy of which is attached hereto as Exhibit A, upon Respondent at each of the addresses identified in Paragraph 3 above via Federal Express by depositing true copies thereof in prepaid wrappers into the custody of Federal Express within New York State, to each of the addresses identified in Paragraph 3 above.

5. On April 3, 2014, the Federal Express service copy of the above-mentioned Petition for Cancellation was returned from the Florida address identified in Paragraph 3 above in its original Federal Express envelope which included a marking indicating that Respondent had refused to accept delivery from Federal Express. A true and correct copy of a scan of the envelope for this package with the marking described herein is attached hereto as Exhibit B.

6. On April 4, 2014, I accessed the tracking information available on Federal Express's website for the service package sent to the New York address identified in Paragraph 3 above. The tracking information indicated that the package could not be delivered, and stated: "Customer not available or business closed." A true and correct copy of the tracking information is attached hereto as Exhibit C.

7. As of the date of this affidavit, neither of the service packages sent to Respondent via first-class mail have been returned, nor have Petitioner or Petitioner's counsel received any indication that such packages were not delivered successfully.

DYLAN HENRY

SWORN TO ME THIS 7th
DAY OF APRIL, 2014

Notary Public

SAMUEL ASHER BLAUSTEIN
Notary Public, State of New York
No. 02BL6254330
Qualified in Kings County
Commission Expires January 17, 2016

EXHIBIT A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Fashion TV Programmgesellschaft mbH		
Entity	GmbH (Limited Liability Company)	Citizenship	Austria
Address	Wasagasse 4 A-1090 Wien AUSTRIA		

Attorney Information	Raymond J. Dowd Dunnington, Bartholow & Miller LLP 1359 Broadway, Suite 600 New York, NY 10018-7160 UNITED STATES rdowd@dunnington.com

Registration Subject to Cancellation

Registration No.	3482166	Registration Date	August 5, 2008
International Registration No.	-	International Registration Date	-
Registrant	BIGFOOT ENTERTAINMENT LTD. 1214 ABBOT KINNEY BLVD. VENICE, CALIFORNIA 90291		
Owner	FASHION ONE TELEVISION LLC 246 WEST BROADWAY NEW YORK, NEW YORK 10013		

Goods/Services Subject to Cancellation

Class 041. All goods and services in the class are cancelled, namely: ENTERTAINMENT IN THE NATURE OF BEAUTY PAGEANTS, FASHION SHOWS AND MODELING SHOWS IN THE FIELD OF FASHION

Grounds for Cancellation

Abandonment	Lanham Act Section 14 (15 U.S.C. §1064)
False Designation of Origin	Lanham Act Section 14 (15 U.S.C. §1064)
Torres v. Cantine Torresella S.R.I. Fraud	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)

Attachments	Petition for Cancellation (2008 F1 Reg) – In re Reg No 3482166.pdf EXHIBIT A.pdf EXHIBIT B.pdf EXHIBIT C.pdf EXHIBIT D.pdf EXHIBIT E.pdf EXHIBIT F.pdf EXHIBIT G.pdf

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address of record by Federal Express on this date.

Signature	/s/ Raymond J. Dowd
Name	Raymond J. Dowd
Date	March 19, 2014

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration No. 3482166	§	
Mark: FASHIONONE	§	
Issued: August 5, 2008	§	
	§	Cancellation No.
	§	_____
	§	
FASHION TV Programmgesellschaft mbH,	§	
	§	
Petitioner	§	
	§	
v.	§	
	§	
Fashion One Television LLC,	§	
	§	
Owner	§	

PETITION FOR CANCELLATION

FASHION TV Programmgesellschaft mbH ("Petitioner"), a limited liability company organized and existing under the laws of Austria, having its principal place of business at Wasagasse 4, A-1090 Wien, Austria, believes that it has been damaged by Registration No. 3,482,166, and hereby petitions to cancel the same under the provisions of Section 14 of the Lanham Act, 15 U.S.C. §1064(3). As grounds for cancellation, Petitioner asserts that:

1. Petitioner is a well-known media corporation in the fashion and entertainment world that conducts direct marketing across Europe as well as in the United States.

2. Upon information and belief, Bigfoot Entertainment Ltd. is a limited liability corporation organized and existing under the laws of the British Virgin Islands, with its principal place of business at 1214 Abbot Kinney Boulevard, Venice, CA 90291 ("Registrant").

3. On August 12, 2005, Registrant filed with the U.S. Patent and Trademark Office an application to register the mark FASHIONONE (as a standard character mark) under Section 1(b) of the Lanham Act, 15 U.S.C. §1051(a). On July 3, 2008, Registrant's Statement of Use was accepted and the filing basis was changed to Section 1(a). Based on this application, Registrant obtained U.S. Registration No. 3,482,166 (the "Registration"), which issued on August 5, 2008 for use on "entertainment in the nature of beauty pageants, fashion shows and modeling shows in the field of fashion" in International Class 041.

4. On June 10, 2012, Registrant filed with the U.S. Patent and Trademark Office a trademark assignment transferring ownership of the mark FASHIONONE to Fashion One Television Limited, a corporation organized and existing under the laws of Hong Kong, with its principal place of business at 22/F Bigfoot Centre, 38 Yiu Wa Street, Causeway Bay, Hong Kong ("Fashion One Ltd.").

5. On December 3, 2013, Fashion One Ltd. filed with the U.S. Patent and Trademark Office a Combined Declaration of Use and Incontestability under Sections 8 & 15 claiming that "for International Class 041, the mark is in use in commerce on or in connection with **all** of the goods or services listed in the existing registration for this specific class: Entertainment in the nature of beauty pageants, fashion shows and modeling shows in the field of fashion; **and** the mark has been continuously used in commerce for five (5) consecutive years after the data of registration, or the date of publication under Section 12(c), and is still in use in commerce on or in connection with **all** goods or services listed in the existing registration for this class."

6. On January 8, 2014, Fashion One Ltd. filed with the U.S. Patent and Trademark Office a trademark assignment transferring ownership of the mark FASHIONONE to Fashion One Television LLC, a limited liability company organized and existing under the laws of the

State of Delaware, with its principal place of business at 246 West Broadway, New York, NY 10013 (the "Owner" or "Fashion One LLC").

First Basis for Cancellation – False Designation of Origin

7. On November 27, 2007, Registrant filed with the U.S. Trademark Office a Statement of Use in connection with its pending application for the mark FASHIONONE. This Statement of Use included a sworn declaration signed under penalty of perjury by Mr. Jeffrey W. Berkman, General Counsel for Registrant.

8. Mr. Berkman swore that Registrant was, as of November 27, 2007, using the mark FASHIONONE "in commerce on or in connection with the goods/services identified above [namely, Entertainment in the nature of beauty pageants, fashion shows and modeling shows in the field of fashion], as evidenced by the attached specimen(s) showing the mark as used in commerce."

9. Upon information and belief, such statement was false at the time it was made.

10. In support of its November 27, 2007 Statement of Use, Registrant attached a specimen of use consisting of a screenshot of a website advertising various fashion- and modeling-related television shows.

11. The content displayed in this screenshot, specifically the photograph of a model, belongs to Petitioner.

12. The photograph is of model Sandra Bakker and was taken by photographer Sao Esquillon on September 20, 2007.

13. Petitioner organized and paid for the photo shoot during which the photograph was taken, and all content created during this photo shoot was and continues to be owned by Petitioner.

14. At no time did Petitioner transfer ownership of the photo displayed in Registrant's specimen to another entity.

15. Petitioner broadcast the photo over its international network in 2007. A clip of this broadcast may be found at http://www.youtube.com/watch?v=BHufmY31UfI&list=UUkBIQL0ka8nhEVLSaw3AhAA. A still from this footage, in which the photograph is displayed under Petitioner's name, is attached as Exhibit A.

16. Registrant's juxtaposition of the mark FASHIONONE with content belonging to Petitioner and which had been displayed worldwide under Petitioner's name is a situation of "the registrant . . . misrepresent[ing] the source of the goods or services on or in connection with which the mark is used." (15 U.S. Code § 1064(3)).

17. The mark FASHIONONE should be cancelled for misrepresentation of source based on Registrant's use of content belonging to Petitioner and submission of a specimen containing such content.

18. Petitioner has retrieved records from archive.org evidencing that the website purported to be fashionone.com at various times redirected to Petitioner's website, ftv.com, and/or displayed an inline frame ("iframe") of Petitioner's website, ftv.com.

19. Upon information and belief, Registrant first utilized Petitioner's website for redirecting of Registrant's website and/or placing an iframe on Registrant's website on or around March 28, 2007.

20. As shown in Exhibit B, clicking on the March 28, 2007 archive.org record for fashionone.com prompts the display first of an Error 302 redirect message, automatically followed by display of an April 5, 2007 version of ftv.com.

21. Upon information and belief, Registrant ceased to use Petitioner's website for redirecting of Registrant's website and/or placing an iframe on Registrant's website on or around April 2, 2009.

22. As shown in Exhibit C, the April 2, 2009 archive.org record for fashionone.com prompts the display of Petitioner's website, ftv.com, on which are shown various direct references to FTV as well as trademarked FTV content.

23. Upon information and belief, Registrant ceased to use Petitioner's website for redirecting of Registrant's website and/or placing an iframe on Registrant's website on or around May 2, 2009. As shown in Exhibit D, Registrant's website displayed an Error 404 ("Not Found") message on May 2, 2009.

24. Upon information and belief, it was not until on or around March 5, 2010 that Registrant's still "under construction" website first displayed the mark FASHIONONE in conjunction with non-FTV-owned content. The March 5, 2010 archive.org record for fashionone.com is attached as Exhibit E.

25. As demonstrated in the foregoing paragraphs, Registrant relied on use of Petitioner's website and Petitioner's proprietary content without Petitioner's permission in order to create and/or maintain public awareness of Registrant's mark FASHIONONE.

26. Upon information and belief, such action constitutes "blatant misuse of the mark by respondent in a manner calculated to trade on the goodwill and reputation of petitioner." *Otto International, Inc. v. Otto Kern GmbH,* 83 U.S.P.Q.2d 1861 (TTAB 2007) (*quoting McDonnell Douglas Corporation v. National Data Corporation,* 228 USPQ 45, 47 (TTAB 1985)).

27. Furthermore, this is a situation "where it is deliberately misrepresented by or with the consent of the registrant that goods and/or services originate from a manufacturer or other

entity when in fact those goods and/or services originate from another party"—a classic scenario of misrepresentation of source. *Otto International, Inc. v. Otto Kern GmbH,* 83 U.S.P.Q.2d 1861 (TTAB 2007) (*quoting Osterreichischer Molkerei-und Kasereiverband Registriete GmbH v. Marks and Spencer Limited,* 203 USPQ 793, 794 (TTAB 1979)).

28. The mark FASHIONONE should be cancelled because Registrant misappropriated the goodwill of Petitioner in appropriating Petitioner's website and the content thereof, and in doing so deliberately and falsely misrepresented its sources.

Second Basis for Cancellation – Fraud

29. In its application filed on August 12, 2005 with the U.S. Patent and Trademark Office to register the mark FASHIONONE, Registrant included a sworn declaration signed under penalty of perjury by Deena Levy Weinhouse, Registrant's designated attorney.

30. Ms. Weinhouse swore that she believed Registrant was "entitled to use such mark in commerce" and that "to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive."

31. Upon information and belief, Registrant became aware of use of the trade name "FASHIONONE" by FTV through its Turkish licensee Ali Karacan of Number 1 TV and Media Ltd. at least three months prior to the filing of its application for registration. It was at such time that Registrant and Petitioner commenced negotiations for a distribution agreement whereby Registrant would acquire commercial rights for FTV operations for the Republic of Singapore and the Republic of the Philippines for a period spanning from December 2005 through May 2009 in exchange for cash consideration.

32. These negotiations culminated in the signing of a Memorandum of Understanding on November 13, 2005 (attached as Exhibit F).

33. Among the terms agreed to in the Memorandum of Understanding is the following: "Bigfoot [Registrant] is not allowed to register any trademarks of names of FTV [Petitioner] or **trade names used by FTV** [emphasis added]." (Exhibit F § 9)

34. Registrant not only was aware that FASHIONONE was a trade name of Petitioner, but additionally had agreed in a legally binding contract not to register or attempt to register such a trade name.

35. Registration for the mark FASHIONONE was issued in August 2008, more than eight months after Registrant had agreed to be bound by the aforementioned terms.

36. Based on the foregoing, Ms. Weinhouse's statement that Registrant was "entitled to use such mark in commerce" and that "to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive" is patently untrue.

37. Upon information and belief, the U.S. Patent and Trademark Office relied upon Registrant's material false statements in allowing the registration of the FASHIONONE mark. The U.S. Patent and Trademark Office would not have allowed the mark FASHIONONE to register absent Registrant's knowingly false statements and false specimen.

38. Registrant filed on November 27, 2007 a Statement of Use which included a sworn declaration signed under penalty of perjury by Mr. Jeffrey W. Berkman, General Counsel for Registrant.

39. Mr. Berkman swore that Registrant was, as of November 27, 2007, using the mark FASHIONONE "in commerce on or in connection with the goods/services identified above [namely, Entertainment in the nature of beauty pageants, fashion shows and modeling shows in the field of fashion], **as evidenced by the attached specimen(s) showing the mark as used in commerce** [emphasis added]."

40. Upon information and belief, such statement was false at the time it was made.

41. In support of Mr. Berkman's Statement of Use, Registrant attached a specimen consisting of a screenshot of a website displaying Petitioner's content. (Please see ¶¶ 10-15 above for further explanation.)

42. Upon information and belief, the U.S. Patent and Trademark Office relied upon Registrant's material false statements and false specimen in allowing the continued registration of the FASHIONONE mark. The U.S. Patent and Trademark Office would not have allowed Registration No. 3,482,166 to remain valid absent Registrant's knowingly false statements and specimen.

43. The mark FASHIONONE should be cancelled because it was maintained through commission of fraud.

Third Basis for Cancellation – Abandonment/Nonuse

44. Fashion One Television Limited claims that it began using the mark FASHIONONE in connection with offerings of entertainment in the nature of beauty pageants, fashion shows and modeling shows in the field of fashion on or around October 1, 2007.

45. Notwithstanding the fact that the mark was registered with Registrant's full knowledge of Petitioner's ownership of the intellectual property comprising the mark, it was

only through false allegations of use and continued perpetration of fraud on the U.S. Patent and Trademark Office that the mark was registered.

46. Upon information and belief, neither Registrant nor Respondent has ever used the mark in commerce in the United States in connection with its claimed uses in International Class 041 of beauty pageants, fashion shows or modeling shows in the field of fashion.

47. Upon information and belief, Fashion One LLC is not currently using the mark in the United States in connection with its claimed uses in International Class 041 of beauty pageants, fashion shows or modeling shows in the field of fashion.

48. Upon information and belief, Fashion One LLC does not intend to commence bona fide use in the United States of the mark FASHIONONE in the ordinary course of trade and in connection with its claimed uses in International Class 041 of beauty pageants, fashion shows or modeling shows in the field of fashion.

49. Fashion One LLC has abandoned the mark FASHIONONE.

50. The mark FASHIONONE should be cancelled because it has been abandoned.

51. As further evidence of general bad faith, Respondent has filed a slew of similarly spurious trademark applications across a range of international classes, all of which proposed trademarks infringe upon Petitioner's trade names. Trademarks applied for include: Fashion One (serial no. 85952027); F FASHIONIONE (serial no. 86006104); Fashion One (serial no. 86006074); F ONE IFASHION (serial no. 86010273); One Fashion (serial no. 86010264); Fashion One (serial no. 86975063); Fashion One (serial no. 86090126); FASHION ONE (serial no. 86095076); and FO.com (serial no. 86183122).

52. Petitioner has successfully opposed the EU-registered mark FASHION ONE (CTM 009562661), which belongs to Fashion One Television Ltd., the former owner of the

FASHIONONE mark opposed herein and a current affiliate of Respondent. An injunction was granted by the Austrian courts ordering that Fashion One Television Ltd. cease use of the mark. This injunction, with accompanying certified partial-translation from German to English, is attached as Exhibit G.

WHEREFORE, Petitioner prays that Registration No. 3,482,166 be cancelled pursuant to 15 U.S.C. §1064(3) because: (1) the Registration relied on misrepresentation of source in order to proceed; (2) the Registration was filed and has been maintained via fraudulent representations to the U.S. Patent and Trademark Office; and (3) the FASHIONONE trademark has been abandoned by the Registrant.

Dated: March 19, 2014

Respectfully submitted,

Dunnington, Bartholow & Miller LLP

By: /s/ Raymond J. Dowd

Raymond J. Dowd
Justin T. Kelton
1359 Broadway – Suite 600
New York, NY 10018
(212) 682 – 8811
rdowd@dunnington.com
jkelton@dunnington.com

CERTIFICATE OF SERVICE

Pursuant to C.R.F. §2.111, I hereby certify that a true and correct copy of the foregoing Petition for Cancellation was served, via Federal Express, on Fashion One Television LLC at the following address:

246 West Broadway
New York, NY 10013

/s/ Raymond J. Dowd
Raymond J. Dowd

EXHIBIT A

3:12

EXHIBIT B

Loading...

http://www.ftv.com:80/ | 20:37:46 Apr 5, 2007

Got an HTTP 302 response at crawl time

Redirecting to...

http://www.ftv.com/online/page.php?P=24

Impatient?

INTERNET ARCHIVE Wayback Machine
http://www.ftv.com/online/page.php?P=24 Go
474 captures 18 Feb 06 - 9 Feb 14
JAN APR MAY
2006 2007 2008
Close Help

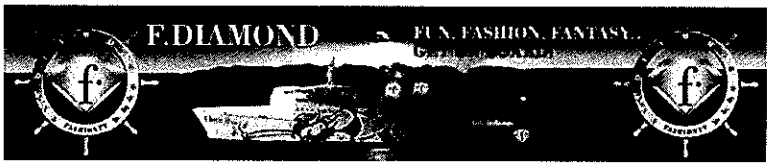
ADVERTISEMENT

ADVERTISEMENT

SEARCH
LOGIN BECOME A MEMBER

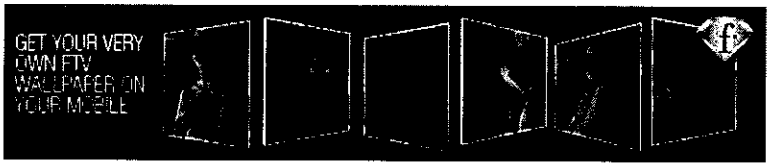
life

F.RADIO



ADVERTISEMENT

Mail this site



FASHION TV PLAYLISTS: MOSCOW | INDIA | HONG KONG | USA / LATIN AMERICA | LONDON | PARIS

FASHION ARTICLES: FASHION ONLINE | FASHION INDUSTRY | FASHION PEOPLE

Credits / Terms of use / Contact / Last change: 3.3.114 / © by FTV / site by c21 / Sitemap / back to Top

EXHIBIT C

INTERNET ARCHIVE
Wayback Machine
http://www.fashionone.com/ Go
140 captures
26 Nov 05 - 9 Feb 14
FEB APR MAY
2008 2009 2010
Close
Help

ADVERTISEMENT

CHOOSE YOUR GAME

ADVERTISEMENT

SEARCH

THE SITE THE CLIPS

RADIO

Charles Svingholm Show

FTV UK Launch- Charles Svingholm Show

View Gallery

Loading

CLICK TO WATCH RECENT CLIPS

Mail this page

Black F Diamond in Sardinia

Black F Diamond in Sardinia

The floating center of luxury is heading to a mediterranean party cruise.

>> More about Black F Diamond in Sardinia

>> FTV Yacht Section

Prelude to Wardrobe 2008

Fashion TV Internship Program

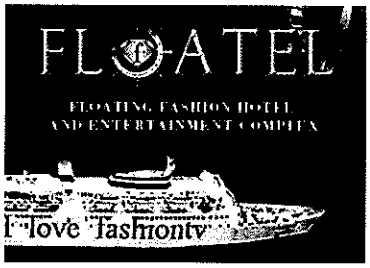
Fashion TV Screen Test

fashiontv presents Top Models

Following the success of our Top Designers section, fashiotnv is proud to unveil its newest section, Top Models, where everyone is free to browse...

>> **fashion tv Top Models**

>> **fashion tv Top Designers**



Fashion Rocks

Stars, musicians, artists and designers all gather for Prince's Trust grand charity event mixing music and fashion.

>> **More about Fashion Rocks 2007**

>> **More Fashion Articles**

Fashion Rocks 2007

FTV Polls My favorite sin -

- Chocolate
- Expensive perfume
- Shopping spree
- High heels

Previous Poll Next Poll

Enter your e-mail to receive glamourous FTV newsletter:

Submit e-mail

Fashion Portal

FASHION ONLINE: **FASHION ARTICLES** | **WATCH FTV & FMEN LIVE** | **BECOME A DC MEMBER TODAY!**

EXHIBIT D

Error 404 - Not found

The document you requested is not found.

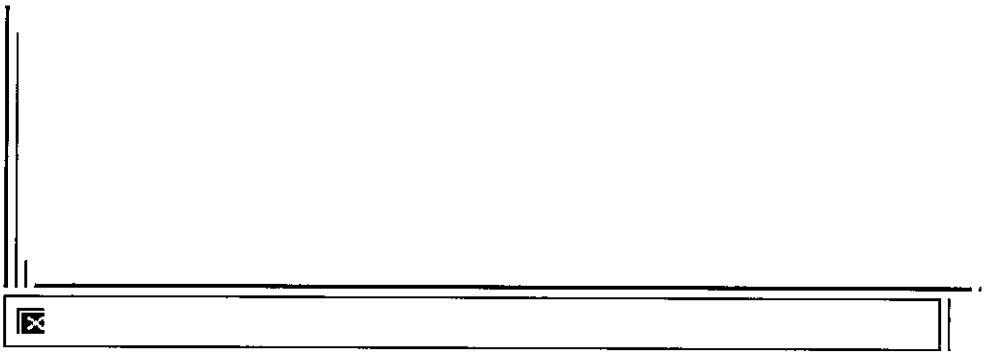


EXHIBIT E

INTERNET ARCHIVE
Wayback Machine
http://www.fashionone.com/ Go
140 captures
26 Nov 05 - 9 Feb 14
MAY MAR APR
5
2009 2010 2011

Search

CONTACT US

Watch Fashion One in HD!
See the world's Top Models.
Latest Fashion Shows & backstage interviews.
Discover exotic travel destinations and the glamour of A list Parties and red carpet events!
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EXHIBIT F

MEMORANDUM OF UNDERSTANDING

Between the parties:

- FTV BVI Ltd., P.O. Box 3149, Road Town, Tortola, British Virgin Islands and related companies ("FTV")
- Bigfoot Entertainment (BVI) Ltd., 2/F Beautiful Group Tower, 74-77 Connaught Rd., Hong Kong SAR ("Bigfoot")
- Michael Gleissner, Melkmarkt 41, B-2000 Antwerpen, Belgium ("MG")
- Michel Adam Lisowski ("MA")

1. **Asia Operations.** Bigfoot acquires the commercial rights for FTV operations for the Republic of Singapore and the Republic of the Philippines (collectively the "Territory"), starting Dec. 2005 until May 31, 2009 for a total of $3m. The first 6 months will be Development Period, the 36 months starting June 2006 are considered Operational Months.

2. **Scope.** The licence includes the exclusive right to sell advertising on "Fashion TV" (both AsiaSat feed and worldwide program) in the Territory as well as the master franchise for "FTV Cafes" in the Republic of the Philippines

3. **Payment terms.** $1m will be paid upon signing, representing the licence fee for the period June 2008 to May 2009). From June 2006 to May 2008, a monthly payment of $83,333.00 is due to FTV.

   All payments shall be made to:

   FTV BVI
   Account # 843449-12-1
   IBAN CH87 0483 5084 3449 1200 1
   Credit Suisse Zurich
   SWIFT CRESCHZZ80A

   All correct and cap
   US Dollars

4. **Revenue.** All revenue from ad sales, sponsoring, etc. generated by Bigfoot shall be used first to recoup licencing fees applicable so far and any agreed expenses for delivery of a separate feed (at the time such would be profitable), the excess to be shares 50%/50%.

5. **Reporting.** Reporting will be monthly and transmitted via email to **adam@ftv.com** and should include copies of contracts and invoices as well as a management report in case of extraordinary events. Report and payment is due the 15th of the following month. All revenues are net of value-added taxes (VAT, GST).

1/4

Examples:
In the 3rd Operational Month, total revenues to date are $280,000
Licencing fees assumed 3 x $83,333 = $250,000
Payment to FTV = 50% of $30,000 = $15,000

In the 30th Operational Month, revenues are $2,800,000
Licencing fees assumed 30 x $83,333 = $2,499,990
Payment to FTV = 50% of $300,010 = $150,005

If FTV does not receive the report in time, it will notify Bigfoot in writing (via registered mail), and if the report will not be received within 14 days after receipt of the notice, FTV may terminate the agreement.

6. **Commission.** Bigfoot will receive a 20% commission for sales by Bigfoot to customers outside the Territory. FTV will not solicit direct business with those clients.

7. **Contracts.** All material contracts have to be countersigned by FTV, FTV shall not unreasonably withhold the signature.

8. **Programming.** Starting in the first operational month, Bigfoot will provide 1 hour per month of local programming for each Philippines and Singapore ("F-People" etc.) to be aired on FTV. Such programming shall be in accordance with the style FTV programming guidelines and is subject to approval by FTV, such approval shall not be unreasonably withheld.

9. **Use of FTV brand and assets for related operations.** Bigfoot will receive favorable terms for commercials for related companies (i.e. the Int. Academy of Film and Television), per 30 seconds spot a rate of $100 is assumed. After 1000 spots, a 35% discount applies, after 2500 spots a 60% discount applies. Shows that are primarily produced by Bigfoot's Cebu staff or IAFT staff should be endorsed "brought to you" free of charge as long as there is no paying sponsor. Bigfoot is not allowed to register any trademarks of names of FTV or trade names used by FTV.

(US$ 1,000,000,-)

10. **Termination.** The agreement becomes valid only if the initial payment of $1mm is made by November 16, 2005, and can be terminated if a payment is overdue for more than 14 days.

11. **Applicable Law.** All agreements will be under the law of the Federal Republic of Germany.

With signing of this Memorandum, Bigfoot has an option until Jan. 10, 2006, to make an equity investment into FTV under the following terms (the "Investment"):

THE INVESTMENT

1. **Investment.** Bigfoot will make an investment of US$ 29mm in cash in addition to the $1mm initial investment in exchange for 15% of Fashion TV. This amount includes upfront/guarantee payments for the franchises and licencing operations involved for the first 3 years of operation (with a 6 months startup grace period).

2. **Due Diligence.** Upon signing the agreement, FTV and MA will allow Bigfoot staff to conduct the due diligence.

3. **Valuation.** The valuation of the company is based on very preliminary data provided based on the financials provided (run rate of a quarterly profit of $1.5mm on revenue of $4.5mm from the ongoing operation excluding extraordinary income, no debt). It is agreed that the valuation of FTV should be in line with market comparables, and will be adjusted if an independent valuation suggests a materially lower market value, and at Bigfoot's choice either adjust the amount to be invested or the equity percentage.

4. **Equity Interest.** FTV currently operates different entities in various countries. It is understood that the equity stake should be in all companies that are used to operate the entire scope of the business (TV business, trademark, intellectual property), specifically those that are owned by MA, regardless if outright or as a majority shareholder.

5. **Anti dilution rights.** Bigfoot will be protected against dilution, any sale of additional equity requires the consent of Bigfoot, with the exception of an IPO yielding proceeds of at least $50mm at a minimum valuation of $500mm

6. **Online Strategy.** MG will be in charge of Internet strategy of the company, and spearhead the consumer business to be built around a community site ("F-People") that provides premium membership services like an Industry Directory ("Model Database"), event promotion, networking/dating, and submission of footage.

7. **Asia Operations.** Bigfoot will fold all Asian operations into FTV. FTV will establish their regional headquarters in Singapore, MG will assume the title of president in addition to the online strategy.

8. **F-Schools.** Starting 2Q2006, Bigfoot will start the prototype of an "FTV School" based in a local mall that provides training in modeling, photography, camera operation and editing. Based on deliverables in profitability, Bigfoot has the option to acquire the master franchise for the Philippines and Vietnam.

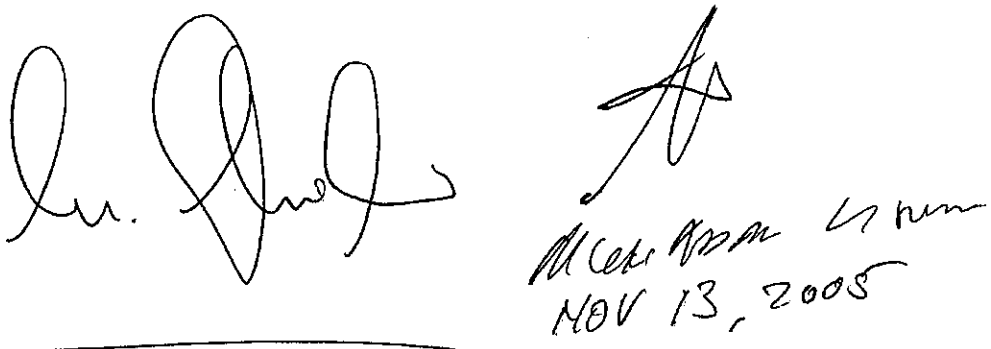
3/4

9. **IAFT/Outsourcing.** Bigfoot will provide outsourcing facilities and the production operations of "Bigfoot Entertainment" and "Int. Academy of Film and Television" at marginal cost for editing, outsource operations (call center, Internet, footage classification), and production. Charges to FTV are limited to direct labor costs (salary plus mandatory benefits and health insurance), office space at comp. rates for the actually require work space, and equipment costs (PCs, video equipment). In exchange, FTV will promote IAFT worldwide through free advertising spots and events to be covered in the facilities of IAFT. FTV will also promote IAFT to online members whose profile or usage habits suggest that they are interested in film education.

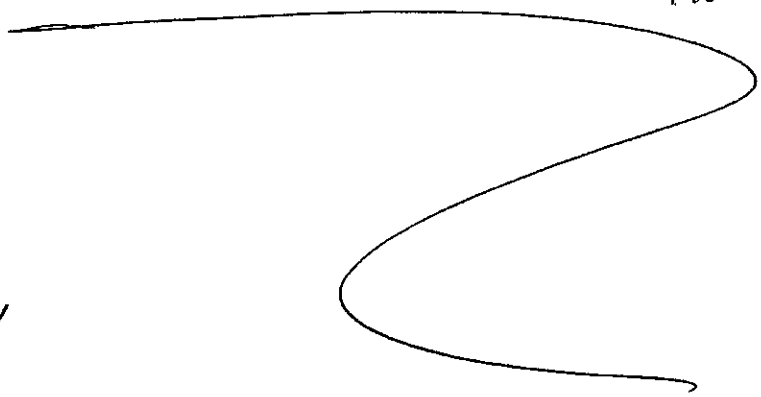
10. **Corporate Structure.** FTV will start the process of adopting a corporate structure that ensures the transparency required for a listing of the company, including, but not limited to, restructuring the holding company to be located in the Cayman Islands (instead of British Virgin Islands)

11. **IPO Process.** Bigfoot will spearhead a possible IPO on a best effort basis. If based on Bigfoot's material impact an IPO is possible at a valuation of at least $500m, Bigfoot will receive additional 5% equity in the listed company. Expenses related to that process are to be born at Bigfoot.

12. **Licencing Terms.** Both parties agree that the franchise and licencing terms for the various operations should enable the licensor to create a profitable operation, and if such terms disadvantage the licencee in an unfair manner, a conflict resolution process should ensure that Bigfoot may sell the entity in exchange for equity in FTV if such terms are deemed unreasonable by an objective third party.



NOV 13, 2005



ABN·AMRO Bank

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Swift ABNABEBR BRU

BTW TVA BE 434.676.301
RPR 0434.676.301

Mr. Michael Gleissner
65-6491-5031

Brussels, 14/11/2005

Dear Sir,

We executed today the following wire. This will be on the benificiary's account with value date today.

Amount : USD $1,000,000.00 (one million)

From Account : MG Holdings

RECIPIENT

Account Name : FTV BVI

Bank Name : Credit Suisse Zurich

Account Number : # 843449-12-1,

SWIFT Code : CRESCHZZ80A

Yours faithfully,

Hans De Schouwer
Senior Account Manager
ABN AMRO Belgium

p.p.
Danny Janssens
Senior Account Manager
ABN AMRO Belgium

ABN AMRO Bank N.V., gevestigd te Gustav Mahlerlaan 10, 1082 PP Amsterdam, Nederland
Handelsregister K.v.K. Amsterdam, nr 33002587

Griffie Rechtbank van Koophandel Brussel
ABN AMRO Bank, 724-1705555-64

EXHIBIT G

Commercial Court of Vienna

Address: 1030 Vienna, Marxergasse 1a
Telephone: :01/51528-0
Fax: 01/51528-576

Please specify the following file number on all submissions:

29 Cg 8/14t

TEMPORARY INJUNCTION

Claimant party
FASHION TV Programmgesellschaft mbH
Wasagasse 4
1090 Vienna
Tel: 01 / 319 64 11
Trademarks: Fashion TV - Fashion One II

represented by:
Dr. Daniel CHARIM, Mag.
Wolfgang STEINER,
Mag. Anton HOFSTETTER
1090 Vienna, Wasagasse 4
Tel: 319 64 11

Defendant party
Fashion One Television Ltd. Bigfoot
Centre, 22nd Floor
38 Yiu Wa Street
HK-0000 Causeway Bay, Hong Kong

represented by:
Schwarz Schönherr Lawyers KG
Parkring 12
1010 Vienna
Tel: 512 42 43

Concerning: 35,000.00 EUR with supplementary charges (intellectual property rights /copyright)

1.) In order to protect the claim for injunctive relief of the Claimant and endangered party against the Defendant party and opponent to the endangered party, the Defendant party and opponent to the endangered party is instructed to refrain from broadcasting a special interest fashion channel under the name "FASHION ONE", in the course of trade in the territory of the European Union, within one month of notification of this order.

2.) This temporary injunction is issued until the legal conclusion of the claim for injunctive relief.

3.) The temporary injunction will only become legally effective after the payment of a security deposit of 50,000 EUR or the payment of a bank guarantee of this amount from a domestic bank.

Reasons:

The counterclaimant and endangered party (hereinafter: Claimant) is the proprietor of the word, figurative and community trademark "FASHION ONE", CTM 009562661,

with priority from 30.11.2010, which is registered for the following goods and services:

- Television advertising and sales promotion; rental of advertising space on cable, digital and satellite television channels; television advertising spots (goods and services class 35),

- Transmission and broadcasting of television channels; cable, digital and satellite television broadcasts; broadcasting via telecommunication networks, including the internet; broadcasting of online television channels via the internet and other electronic media (goods and services class 38),

- Television entertainment services; production, presentation and sales of online television channels via the internet and other electronic media; production, presentation, sales and broadcasting of television channels as well as audio and video recordings for broadcasting via television, cable, satellite, video and via electronic media, including the internet (goods and services class 41).

An application for a declaration of invalidity before the Office for Harmonisation in the Internal Market (HBMA) or a counterclaim in terms of Art 100 of the Community trade mark regulation (GMV) for these reasons is not pending.

The counterclaim defendant party and opponent to the endangered party (hereinafter: Defendant) operates a "global TV network" via satellite and partly cable television and broadcasts a fashion channel under the name "FASHION ONE" and the logo

in Austria and other EU countries (cf. the pleading concerning hg 29 Cg 7/14w [formerly 10 Cg 58/13d]; the graphical representations are derived from this proceeding.)

A claim was made against the Claimant by the Defendant concerning hg 29 Cg 7/14w (as the "main proceedings" for the "counterclaim" filed here) due to alleged immoral industrial property right warnings. The dismissal of the proposed temporary injunction by the presiding judge became legally valid after the withdrawal of the appeal of the Defendant.

With the present claim (formerly 10 Cg 70/13v), the **Claimant** requests the Court to recognise the Defendant as guilty, the Defendant to refrain from broadcasting a special interest fashion channel under the name "FASHION ONE" in the course of trade in the territory of the European Union, and applies for the issuance of an equivalent temporary injunction for protection.

In accordance with the Trade Mark Assignment in April 2013, the Claimant acquired the trademark and the trade name "Fashion One" or "Fashionone" with all corresponding rights, as they had been granted to the legal predecessor, from Number 1 TV and Media Ltd.

On the basis of the similarity between the name "Fashion One", used by the Defendant to operate their special interest fashion channel, and their trademark, there is a danger of confusion in terms of Art 9 (1) lit b of the Community trade mark regulation (GMV), wherefore they have a claim for injunctive relief.

In their statement and pleading, the **Defendant** filed a motion to dismiss (cf. with regard to the current fundamental applicability of Art 6 of the European Convention on Human Rights (EMRK) also in the preliminary court proceedings at the European Court of Human Rights (EGMR), Micallef versus Malta; 2 Ob 140/10t) the application for the issuance of the TI, or in the alternative, order the payment of a security deposit of 3.51 million EUR.

They had already used the 'distinctive' company name "Fashion One" and the company logo before the priority date 30.11.2010 for their special interest fashion channel in the European Union and particularly in Austria and thus they acquired an earlier trademark right according to § 9 of the Unfair Competition Law (UWG) in conjunction with Art 8 of the Paris Convention for the Protection of Industrial Property (PVÜ). This invalidity objection could also be raised without a counterclaim in the injunction procedure. Their company name would be protected in Hong Kong and thus within the scope of the Paris Convention for the Protection of Industrial Property (PVÜ). However, the decisive factor would be the bringing into use within the domestic territory, whereby Austria would be a member state for the Paris Convention for the Protection of Industrial Property (*PVÜ*).

Their legal predecessor, Fashion One (BVI) Ltd, which had its head office in Hong Kong since February 2010, concluded a contract concerning the cable broadcasting of the channel in Austria on 23.08.2010 with Liwest Kabelmedien GmbH with its head office in Linz. The first transmission was broadcast by Liwest on 01.09.2010 using the company name "Fashion One" and the company name. Liwest would cover a major Austrian region, including the province's capital Linz. They were already active in customer acquisition and advertisement announcements in Austria under the company name and logo.

On the basis of a contract between Fashion One (BVI) Ltd and GlobeCast Hong Kong Ltd, there were already reception possibilities in the European Union via satellite (HotBird), in Austria among other countries, as from 01.08.2010. "Fashion One" went "on air" in the Netherlands on 07.08.2010 and there were also reception possibilities in Germany and Poland at the end of July 2010. A survey by the European Centre for Satellite Reception from October 2010 showed an even greater range, also for Slovakia. In this regard, the channel had been independently compiled.

Furthermore, their legal predecessor also participated in relevant international trade fairs in France as "Fashion One" before 30.11.2010.

As a matter of fact, Fashion One (BVI) Ltd had already registered the website www.fashionone.at (which redirects to www.fashionone.com) on 23.9.2010 and also used the website with their logo before 30.11.2010. They published content on www.fashionone.com from August 2010 and made this content available to the general public in the European Union. They also had the domain registered in other EU countries with the corresponding country-specific top-level.

In September 2011, the Defendant changed its company name from Lady Coco Ltd to Fashion One Television Ltd and acquired the total assets of Fashion One (BVI) Ltd with the Asset Purchase Agreement dated 03.01.2012, including in particular the company names and all corresponding rights, i.e. previously obtained trademark rights.

Therefore, the Claimant cannot invoke their rights conferred by the trademark, as they acted immorally in terms of § 1 of the Unfair Competition Law (UWG) in this respect. Fashion One (BVI) Ltd had used "Fashion One" for its special interest fashion channel and websites for years. Furthermore, group companies had already registered "Fashionone" as a US trademark in August 2008 and as an international trademark in July 2011 with protection for Ukraine. These circumstances would have been known to the Claimant before the acquisition of their trademark from Number 1 TV and Media Ltd in 2013. The Claimant had no interest of its own in the trademark, as they operated successfully for years under Fashion TV; the domains www.fashiononeeurope.com and www.fashiononegermany.com were also only used in pretence, the mere availability would not give rise to a trademark right. The earlier trademark rights of the Claimant founded in 2002 did not exist and they should not be considered as the universal legal successor of Number One Media Group. Prior to 30.11.2010, the Claimant did not operate under the trade name "Fashion One" in Austria, nor did they assert the public recognition in terms of § 9 (3) of the Unfair Competition Law (UWG). In fact, the Claimant exclusively acquired the trademark with the immoral intent to hinder and cause damage. Immediately thereafter, they sent 'unauthorised' warning letters to various contractual partners of the Defendant and offered to assign the trademark rights to Fashion One for the "fantasy amount" of 10 million EUR. Thus, the Claimant attempted to ruin them economically and push them

out of the market, without ever wanting to operate under "Fashion One". They themselves, or their employees, would by no means attempt to hinder the activities of the Claimant.

Furthermore, they could not be prevented from using their company name; an amendment in the commercial register would create a no longer traceable condition.

Finally, in case the court should still issue a temporary injunction, the payment of a security deposit of 3.51 million EUR is requested, particularly as it would be unclear whether the Claimant would actually have the financial strength to compensate for the expected damages. The conversion of the websites and videos in all media alone would require expenditure of 2.25 million EUR (75 EUR per minute by 500 hours) and the reconfiguration of the corporate design would cost approx. 75,000 EUR. The redesign through to a "re-launch" would take 6 to 9 months, whereby damages of 510,000 EUR to 765,000 EUR (85,000 EUR per month) would be expected for the connected areas of Europe and Russia. The personnel costs are to be estimated at 2,000 EUR monthly with regard to 10 persons for 6 to 9 months, thus a total of 120,000 EUR to 180,000 EUR. The registration costs of 24 new European domains would amount to 240,000 EUR. Recourse claims of contractual partners and image damage would be expected, but the amounts of these claims cannot be accessed.

The **Claimant** objects that the prerequisites of Art 8 (4) of the Community trade mark regulation (*GMV*) are not given.

The legal predecessor of the Defendant, Fashion One (BVI) Ltd, was actually only registered in the British Virgin Islands, which was not a member state for the Paris Convention for the Protection of Industrial Property (PVÜ); furthermore, this was not directly applicable within the European Union. The company name change of the Defendant itself took place after the priority date. Furthermore, the Asset Purchase Agreement shows no universal succession, the mere "purchase of the name" would only affect the contracting parties and it would not involve the assignment of previously acquired trademark rights.

As the Defendant made express reference to § 9 of the Unfair Competition Law

(UWG) in conjunction with Art 8 of the Paris Convention for the Protection of Industrial Property (PVÜ), the focus would only be on usage in Austria. These certainly did not have the "more than local" significance required according to Art 8 (4) of the Unfair Competition Law (UWG). The range of Liwest still only extends to individual municipalities in Upper Austria. All other alleged usages would not relate to Austria.

Furthermore, the Claimant had rights with earlier priority, which would have been recognised by the parent company of the Defendant, Bigfoot Entertainment Ltd. They had attempted to register "Fashion One" as a community trademark, but no longer pursued this after the legal successor of the Claimant submitted extensive evidence of its earlier usage rights in opposition proceedings.

Between 1999 and 2004, the Turkish Number One Media Group produced the Turkish Fashion TV channel and the Number One TV channel as a licensee of the Claimant. Since 2003, the Number One Media Group produced its own fashion and music programme for the Turkish Fashion TV channel under the name "Fashion One"; the range of which included the entire core area of the European Union, including Austria. Following expiration of the licensing agreement 2004, the Claimant authorised the Number One Media Group to produce and broadcast its own special interest fashion channel under "Fashion One". In 2006, the Number One Media Group founded Number 1 TV and Media Ltd (consequently the legal predecessor of the Claimant) with the aim of establishing "Fashion One" as a television channel in the United Kingdom. They obtained a broadcasting licence for this purpose and they have used the name "Fashion One" and the domain www.fashionone.tv for different business purposes in connection with the production and broadcasting of the "Fashion One" channel since 2007. This free channel would have been broadcast in English and Turkish and this could have been received almost throughout the European Union since mid-2008. This channel would have had millions of subscribers in Europe and it could have been received by means of online-streaming and Apps. Furthermore, the legal predecessor of the Claimant hosted its own successful Fashion One TV channel on YouTube. Finally, they participated in numerous events, sponsored such events, and carried out various advertising activities under the name "Fashion One TV".

The alleged acting in bad faith of the proprietor of the trademark plays no part in the present proceedings on the basis of Art 52, 95 and 101 of the Community trade mark regulation (GMV). These exclusive regulations are to be given priority over § 1 of the Unfair Competition Law (UWG). However, the Defendant actually acted in bad faith; the Defendant or its Managing Director and its parent company had been former licensees of the Claimant and they had founded their "Fashion One" channel in substantial breach of the contractual obligations. Furthermore, in June 2013, one of their subsidiaries attempted to register "Fashion One" as a community, word and figurative trademark, no doubt with positive knowledge of the existing community trademark. In addition, a senior employee of the Defendant founded Fashion TV LLC with its head office in Miami and attempted to register global word and word/figurative trademarks with the element "Fashion TV". In contrast, the Claimant acquired the trademark to continue the business activity of its legal predecessor and former licensee.

The requested security deposit would have been excessively inflated. Processing of the graphical material would not be required to change the logo and the name of the television channel and the downtime of 6 to 9 months and the alleged expenditure would also not be plausible for a reconfiguration. Incidentally, the amount of the security deposit must not prevent the enforcement of a legitimate security measure.

With regard to the certification, the presented documents Annex ./A – ./T and Annex./1 – ./57 were analysed.

On the basis of the certification, the following information relevant to the decision shall apply:

Fashion One (BVI) Ltd registered in the British Virgin Islands on 10.11.2009 (cf. Annex ./2) concluded a contract concerning the broadcasting of a English language "Fashion" channel in Austria with Liwest Kabelmedien GmbH based in Linz on 23.08.2010 for the period from 15.08.2010 to 15.08.2010 using its channel logo (this in turn contains the company name "Fashion One"); broadcasting via the cable network

commenced on 01.09.2010 (Annex ./1, ./5, ./6). The coverage area of Liwest is already restricted to parts of Upper Austria (for details, refer to ON 8 S 8 and Annex ./i dated 06.11.2013), whereby it cannot be established in which specific areas the channel of the Defendant was broadcast before 30.11.2010.

On 08.07.2010, Fashion One (BVI) Ltd concluded a contract (Amendment No 1) with GlobeCast Hong Kong Ltd concerning the broadcasting of the "Fashion One" channel by means of satellite with Europe-wide reception possibilities as from 01.08.2010 (cf. amendment to Annex ./7, Annex./8, ./9, ./10). The company name "Fashion One" and the logo of the Defendant was used for the (English language) content broadcast at this time (cf. Annex ./22, ./23, ./24, ./25, ./26).

In addition, Fashion One (BVI) Ltd registered the domain www.fashionone.at on 23.09.2010 (Annex ./29, ./30, ./33). This website had no independent content, but rather it redirected to www.fashionone.com (Annex ./31). Since Spring 2010, content from the fashion channel was published in English on this website (cf. Annex ./32, ./34, ./35). The link was made in the second half of 2010, a more precise date cannot be established (cf. Annex ./31).

The "advertising activity and customer acquisitions" of Fashion One (BVI) Ltd before 30.11.2010 in Austria cannot be established, with the exception of the contact with Liwest (cf. Annex ./11; and it was also not specifically asserted).

The Claimant acquired "all of the material assets of Fashion One (BVI) Ltd as well as the business connections, the registered company names, the telephone number and registration, the goodwill and all other intangible assets of the company" from Fashion One (BVI) Ltd for 1 USD (Annex ./4, ./54), with the Asset Purchase Agreement dated 03.01.2012.

The Claimant is entitled to broadcast their special interest fashion channel in Austria under the name "Fashion TV" (cf. Annex ./A) and they also operate the website www.fashiontv.com (Annex ./B). In addition, the Claimant uses the domains www.fashiononeeurope.com and www.fashiononegermany.com; where fashion

content is presented in English and Turkish using the word element of their trademark (cf. Annex /D). A Turkish fashion channel "FASHIONONE" was first produced and broadcast throughout Europe in 2003 by a former licensee of the Claimant for "Fashion TV" by mutual agreement (Annex ./P, ./P1). Number 1 TV and Media Ltd was founded in 2006 with the aim of establishing this channel in the United Kingdom; this took place as a result of their business activities using the key word "Fashion One" (cf. Annex ./Q, Q1). The community, word and figurative trademark specified at the beginning of this decision was indisputably registered on 10.05.2011 with effect as of 30.11.2010 by Number 1 TV and Media Ltd and assigned as such to the Claimant on 09.05.2013 (Annex ./C, ./O, ./38).

The Managing Director of the Claimant and its parent company, Bigfoot Entertainment (BVI) Ltd, were licensees for "Fashion TV" since the end of 2005 (cf. Annex ./R).

These findings arise from the unobjectionable documents and declarations submitted as certification material, as they were quoted. Other findings and certificates were not required due to legal circumstances, partly due to irrelevance and partly due to an insufficient submission, see below.

From a legal perspective:

With regard to the claim for injunctive relief:

In the absence of an application for cancellation or counterclaim, the validity of the community trademark of the Claimant with priority from 30.11.2010 is to be expected; as the Claimant was still in the "grace period" of Art 15 of the Community trade mark regulation (*GMV*), it was not a matter of actual use.

In accordance with Art 99 (3) of the Community trade mark regulation (*GMV*), a plea relating to revocation or invalidity of the community trademark against an action pursuant to Article 96 (a) and (c), which is not filed as part of the counterclaim, is permissible insofar as the Defendant submits that the community trademark could be declared as expired due to the lack of use or null and void due to an earlier right of the Defendant.

In addition, the Defendant maintains the relative ground for refusal of Art 8 (4) of

the Community trade mark regulation (*GMV*), which reads: "*Upon opposition by the proprietor of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance, the trade mark applied for shall not be registered where and to the extent that, pursuant to a Community Regulation or the law of the Member State governing that sign,*

a) rights to that sign were acquired prior to the date of application for registration of the Community trade mark, or the date of the priority claimed for the application for registration of the community trademark;

b) this sign gives its proprietor the right to prohibit the use of a subsequent mark."

As the Defendant raised a legal argument to the effect that they had obtained an earlier trademark right in Austria according to § 9 of the Unfair Competition Law (*UWG*) in conjunction with Art 8 of the Paris Convention for the Protection of Industrial Property (*PVÜ*), and did not rely on the argument that they are conferred such a right in another specific European state under their law, the submission of a new fact concerning Europe-wide prior use is unremarkable (cf. RS0005452, particularly T14).

The Defendant, which initially operated under the name Fashion One Television Ltd from a date after the priority date, is depending on the their alleged legal predecessor, Fashion One (BVI) Ltd, to take action under the company name "Fashion One" within the domestic territory. In this respect, protection can exist according to § 9 (1) of the Unfair Competition Law (*UWG*) if the trade name has a particularly distinctive character (cf. RS0117763, public recognition not asserted). This is the case, indeed, "Fashion One" is not particularly original for a fashion channel or a company producing such a fashion channel, but it is also not merely descriptive; weak trademarks are also fundamentally eligible for protection (cf. RS0078887).

As the trade name is fundamentally protected according to § 9 (1) of the Unfair Competition Law (*UWG*) in conjunction with Art 8 (4) of the community trade mark regulation (*GMV*) anyway, it does not invoke Art 8 of the Paris Convention for the Protection of Industrial Property (*PVÜ*) (cf. RS0113131 for the issue of the encountering of international treaties and directly applicable community law).

According to Art 8 (4) of the community trade mark regulation (*GMV*), it must always concern a "trademark right used in the course of trade with more than mere local significance" (cf. also Kucsko, Geistiges Eigentum [2003] p 582 with further

references; Fezer, Markenrecht4 § 12 of the Trademark Act (*MarkenG*) recital 16ff with further references). This condition is not met for a cable feed in a sub-region of a member state, even if it includes Linz as one of the 9 Austrian provincial capitals (cf. the list in ON 8 p 8f; Annex ./i). The domestic (non-certified) "advertising measures and customer acquisitions" under the company name, which have not been specified in greater detail with regard to scope and duration, do not change the situation and this does not constitute more than mere local significance. Finally, in this respect, the Defendant cannot rely on the alleged registration of the website www.fashionone.at on 23.09.2010. Indeed, domain names are also fundamentally protected as trademarks in terms of § 9 of the Unfair Competition Law (*UWG*) (cf. 4 Ob 36/98t – jusline). However, according to the claim, there was no corresponding use in the course of trade within the domestic territory and, irrespective of the question of when the link actually worked, the website contained no independent content, but rather redirected to the website www.fashionone.com, which was held in English and thus was not directly aimed at Austrian users (cf. also RS0127999 concerning trademark infringement on the internet). The same must apply for the mere basic reception possibility of the English channel by satellite.

Furthermore, the Defendant "refers" to Art 111 (3) of the Community trade mark regulation (*GMV*) (formerly Art 107). This provision reads:

"(1): The proprietor of an earlier right which only applies to a particular locality may oppose the use of the Community trade mark in the territory where his right is protected in so far as the law of the Member State concerned so permits [...]

(3): The proprietor of the Community trade mark shall not be entitled to oppose use of the right referred to in paragraph 1 even though that right may no longer be invoked against the Community trade mark."

In the event of a conflict between the right to an establishment designation (or a right to a name or company name right) and a trademark right, the Austrian courts shall decide on priority (RS0066654). The more recent trademark right established through registration must accept the limitation by the earlier, more powerful right to

use an establishment designation. The time of first usage within the domestic territory is decisive (T10) for the priority of a company name. According to § 9 (3) of the Unfair Competition Law (*UWG*), public recognition must be developed for legal protection (cf. RS0078871), which has not been asserted. However, in general, such trademarks only convey an exclusive right for the territory where the sign is broadcast (cf. 17 Ob 23/11y - Braun).

In this respect, there is a lack of a substantive submission from the Defendant (including certificate) with regard to through which specific acts of use and in which specific territory they had acquired a trademark right before the priority date in terms of these provisions, and to what extent this would affect the Europe-wide application for injunction; the submission concerning general (current) range of Liwest in connection with the alleged more than mere local significance according to Art 8 (4) Community trade mark regulation (*GMV*) is not sufficient in this respect.

By way of a provisional conclusion, it can be stated that the Defendant cannot invoke an earlier trademark right, regardless of the legal succession.

There is also a danger of confusion in terms of Art 9 Community trade mark regulation (*GMV*) between the trademarks of the parties in dispute (cf. with regard to the review standard RS0121482, RS0121500). With regard to a word and figurative mark, the word element is normally decisive for the overall impression, as business dealings are mostly aligned with this key word, provided that it is sufficiently distinctive, and, above all, this word is remembered (RS0066779). Trademarks which are less distinctive, so-called weak trademarks, are also protected against misuse, whereby this protection must be assessed with reservations. The unaltered acquisition to the letter by a competitor is not permitted in any case, even with regard to such trademarks (RS0078887). The use of the key word "Fashion One" and the logo, which is primarily characterised by the word element and registered by the Defendant for the same services as the word and figurative trademark of the Claimant, thereby create a danger of confusion and thus justify a claim for injunctive relief.

In this respect, the Defendant merits agreement, as there is no need to examine the objection of acting in bad faith with regard to the trademark registration, however, exercising a basic right conferred to them may be frowned upon. This is not stipulated by the Community trade mark regulation (*GMV*) and is therefore governed by national law.

Firstly, a claim for injunctive relief can result from the prohibition of acting contrary to good faith of § 1295 (2) of the Austrian Civil Code (*ABGB*) (cf. RS0043250). However, it can only be described as the unconscionable misuse of a right if the party who exercises their right cannot claim to have any other interest than the interest to cause damage to the other party. If there is a legitimate interest of the party exercising the right to restore the condition of one of their rights, exercising the right shall not be deemed misuse, i.e. the party exercising their right also intended to cause damage to the other party by exercising the right (RS0026271; cf. also RS0026265). The party asserting chicanery shall be bound to prove that the party exercising the right had no other interest than to damage (RS0026205). If the course of an occurrence justifies the presumption of intent to cause damage, it shall be up to the presumed damaging party to assert and prove a justified reason for their conduct (RS0117937).

The 4th Senate has also stated on many occasions that the exercising of a right can also justify a claim for injunctive relief according to § 1 of the Unfair Competition Law (*UWG*), because, and if, there is an immoral hindrance (with regard to the unauthorised industrial property right warning, see RS0121544, RS0122351, RS0121542, RS0121541, RS0078106, with regard to the acquisition of a trademark right RS0112306, RS0115543, RS0123318, with regard to domain grabbing RS0115379, RS0115380, with regard to the publication of the decision RS0026169, RS0026232). Not only the acquisition of a trademark, but also the assertion of claims arising therefrom can be specifically immoral (abuse of law) (RS0121116).

However, there was no such immoral damage or hindrance in this case based on the certified facts of the case. Therefore, the Claimant has a legitimate interest in the word and figurative trademark, and the "Fashion One" channel, which has existed since 2003, is attributable to the Claimant and their licensees and not to the

Defendant, which was founded at a later date, or their legal predecessor, based on the stated procedures.

With regard to the legitimate objection of the Defendant, they must not be prohibited from using their registered trade name by means of TI, and it is important to note that the requested security measures are aimed at recognising the Defendant as guilty and refraining them from broadcasting a special interest fashion channel in the course of trade in the European Union under the name "Fashion One", and thus the use of the company name as such should not be prohibited. However, the prohibition of the isolated use of a certain company name element or the advertising of certain goods in connection with the (misleading) use of the company name is permissible (cf. RS0004997 [T1, T2]).

With regard to the security deposit:

In accordance with § 390 (2) EO, where circumstances allow, the court can make the granting of a temporary injunction dependent on a security deposit, even if the requesting party has sufficiently provided the required certification, if concerns are raised due to major interventions in the interest of the Defendant, or if business activities are significantly interfered with (cf. Angst/Jakusch/Mohr14 § 390 E 14, 17). The deposit serves to secure the claim for damages including costs of opponent to the endangered party arising from the unauthorised use, and the amount is at its own discretion without special surveys. In principle, no consideration can be given to the financial circumstances of the endangered party, however, according to § 390 (2) EO, the deposit for a certified claim should not be so high that it could hinder the enforcement of the TI, particularly if the economic difficulties are due to the actions of the Defendant. If the question of whether and to what extent damage will be caused by the enforcement cannot yet be answered with certainty, the setting of a relatively low deposit shall suffice according to case law, particularly since there is always the possibility of increasing it at a later date (cf. Angst/Jakusch/Mohr14 § 390 E 33f).

In the present case, the payment of a security deposit appears to be necessary in view of the fact that the Europe-wide business activities of the Defendant will be demonstrably interfered with. However, their statements concerning the expected damages are not comprehensible, as they can fundamentally continue their business activity and they are "only" obligated to broadcast their fashion channel under a different name. It is unclear why they would need to close down their channel for up to 9 months, register 24 new domains and appoint 10 persons for up to 9 months (in addition to the other asserted expenditure). The Claimant's objection that the logo is not "displayed" on every image, but rather sent together with the broadcast (in the same way as other TV channels), hence not all material would need to be revised, is technically comprehensible. Finally, since the graphically presented "F" is unobjectionable (but rather the use of the word element "FASHION ONE"), the Defendant does not have to completely change their Corporate Design.

A security deposit of 50,000 EUR currently appears to be sufficient and appropriate for possible damages, expenses and claims for compensation, so that the enforcement is not hindered, specifically with regard to the extended performance period, see below.

If the security deposit is not paid within the period of one month (§ 396 EO) of notification, then the enforcement of the temporary injunction shall be inadmissible; it shall lose its effectiveness due to such a failure and it shall be considered as if it had never been issued (cf. RS0005858).

The Defendant shall therefore be notified of this decision after the demonstrable payment of the security deposit.

With regard to the performance period

As the Defendant in this case should actually be obliged to carry out an active role due to the injunction, particularly the redesigning of its corporate image, which will take a certain amount of time, they were to be allowed a sufficient "conversion period" to avoid major damage from the immediate cessation of business activities (cf. § 391 (1) EO, §§ 409 (2), 459 of the Code of Civil Procedure (*ZPO*)). It must also be kept in

mind that, pursuant to Art 103 of the Community trade mark regulation (*GMV*) in conjunction with § 56 (3) of the Trademark Act (*MschG*), temporary injunctions can be issued regardless of the prerequisites of § 381 EO.

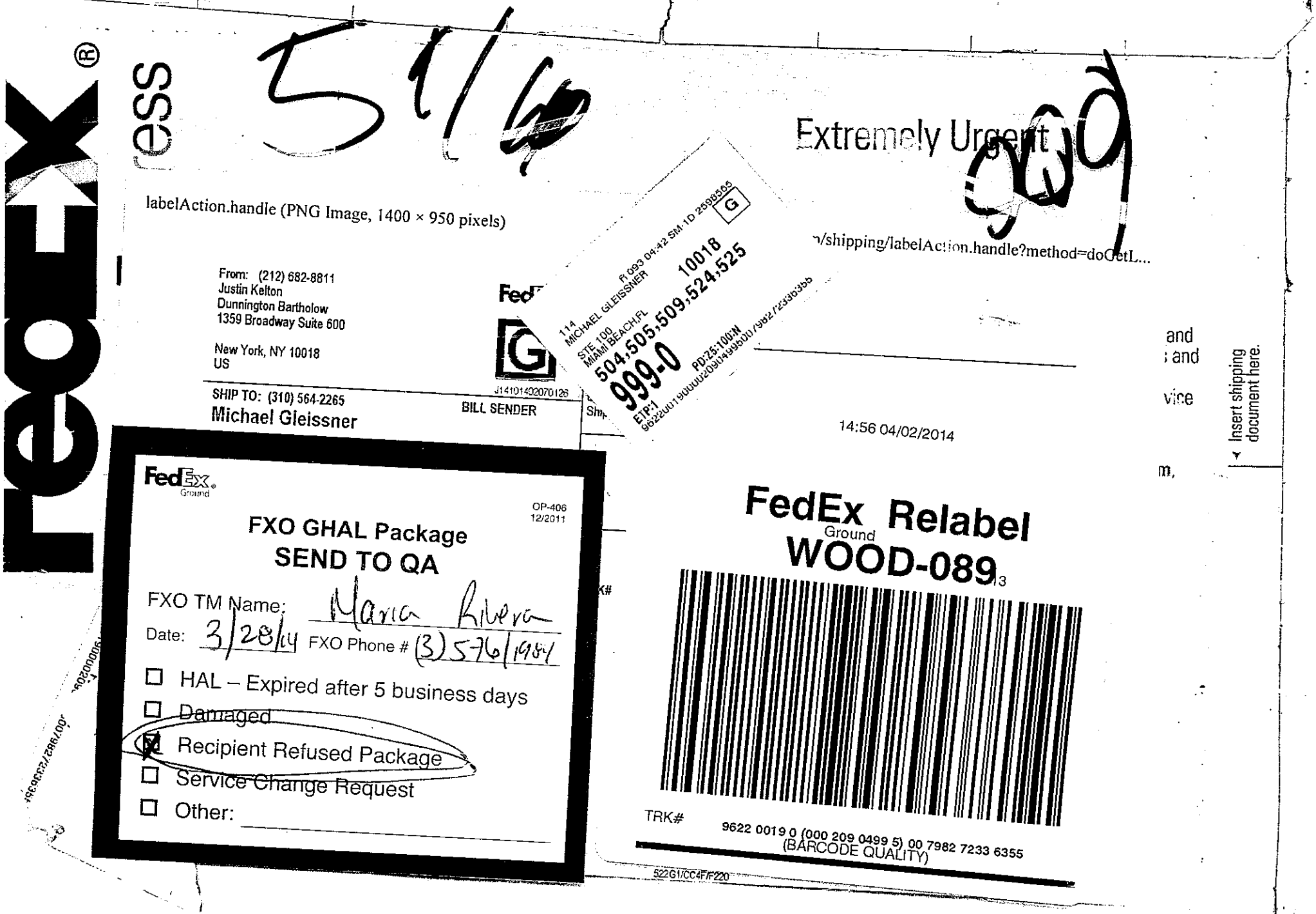
With regard to the costs:

In accordance with § 393 (1) of the Code of Civil Procedure (*ZPO*), temporary injunctions are always taken out at the expense of the Claimant party, without prejudice to a claim for compensation in the main proceedings.

Commercial Court of Vienna, Division 29
Vienna, 21 January 2014
Mag. Sylvia Waldstätten, Judge

Electronic copy
pursuant to § 79 of the Court Organisation Act (*GOG*)

EXHIBIT B



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labelAction.handle (PNG Image, 1400 × 950 pixels)

From: (212) 682-8811
Justin Kelton
Dunnington Bartholow
1359 Broadway Suite 600

New York, NY 10018
US

SHIP TO: (310) 564-2265
Michael Gleissner

BILL SENDER

J14101402070126

114 MICHAEL GLEISSNER
STE 100
MIAMI BEACH,FL
10018
504,505,509,524,525
999-0
ETP:1
PD:25:100:N
9622001900002090499500/9827233635

Extremely Urgent

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Insert shipping document here.

14:56 04/02/2014

FedEx Ground

OP-406
12/2011

FXO GHAL Package
SEND TO QA

FXO TM Name: Maria Rivera

Date: 3/28/14 FXO Phone # (3) 576/1984

- ☐ HAL – Expired after 5 business days
- ☐ Damaged
- ☒ Recipient Refused Package
- ☐ Service Change Request
- ☐ Other: _____

FedEx Relabel
Ground
WOOD-089

TRK# 9622 0019 0 (000 209 0499 5) 00 7982 7233 6355
(BARCODE QUALITY)

522G1/CC4F/F220

EXHIBIT C

IMPORTANT!

FedEx

Ship (P/U) date:
Wed 3/19/2014

Dunnington Bartholow
Justin Kelton
1359 Broadway Suite 600
New York, NY US 10018
212 682-8811

Delivery exception
BROOKLYN, NY

Estimated delivery:
Tues 3/25/2014

Fashion One Television LLC
Michael G. Gleissner
246 West Broadway
New York, NY US 10013
310 564-2265

Travel History

Date/Time	Activity	Location
- 3/25/2014 - Tuesday		
11:55 am	Delivery exception Awaiting additional delivery information from recipient	BROOKLYN, NY
- 3/24/2014 - Monday		
1:13 pm	Delivery exception Customer not available or business closed	BROOKLYN, NY
- 3/22/2014 - Saturday		
4:17 am	On FedEx vehicle for delivery Scheduled for delivery next business day	BROOKLYN, NY
- 3/21/2014 - Friday		
1:17 pm	Delivery exception Customer not available or business closed	BROOKLYN, NY
2:50 am	At local FedEx facility	BROOKLYN, NY
- 3/20/2014 - Thursday		
4:57 pm	Delivery exception Customer not available or business closed	BROOKLYN, NY
5:50 am	On FedEx vehicle for delivery	BROOKLYN, NY
4:11 am	At local FedEx facility	BROOKLYN, NY
1:28 am	Left FedEx origin facility	LONG ISLAND CITY, NY
- 3/19/2014 - Wednesday		
8:59 pm	Arrived at FedEx location	LONG ISLAND CITY, NY
6:06 pm	Picked up	LONG ISLAND CITY, NY
6:05 pm	In FedEx possession Package received after final location pickup has occurred. Scheduled for pickup next business day.	NEW YORK, NY
4:51 pm	Shipment information sent to FedEx	

Local Scan Time

Shipment Facts

Tracking number	798272227612	Service	FedEx Ground
Reference	FTV/TM	Door tag number	DT703449308179, DT703646187218, DT703449305938
Weight	1 lbs		
Total pieces	1		
Packaging	Package	Delivery attempts	3
		Terms	Not Available