

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS**

VALERIE BEZDEK, Individually and on Behalf of
All Others Similarly Situated,

Plaintiff,

v.

VIBRAM USA INC. and VIBRAM
FIVEFINGERS LLC,

Defendants.

Case No. 12-10513-DPW

**AMENDED CLASS ACTION
COMPLAINT**

DEMAND FOR JURY TRIAL

Plaintiff Valerie Bezdek (“Plaintiff”), on behalf of herself and all others similarly situated, hereby submits the following Amended Class Action Complaint (“Amended Complaint”) against Vibram USA Inc. and Vibram FiveFingers LLC (“Defendants”) and upon personal knowledge as to her own acts and status, and upon information and belief, the investigation of her counsel, and the facts that are a matter of public record, as to all other matters, alleges as follows:

NATURE OF THE ACTION

1. Defendants design, manufacture, market, distribute and sell shoes for men, women, and children called Vibram FiveFingers (“FiveFingers”).
2. Through an extensive, comprehensive, and uniform nationwide marketing campaign, Defendants claim implicitly and explicitly that scientific research shows that their expensive FiveFingers (ranging from approximately \$80-\$125 per pair) will provide certain “health benefits” that traditional running shoes do not provide. Such representations are false and misleading.

3. FiveFingers are among the so-called “minimalist” shoes intended to mimic “barefoot running,” which is a form of running that has recently increased in popularity. Defendants have claimed that wearing FiveFingers, *inter alia*, improves posture and foot health, reduces risk of injury, strengthens muscles in feet and lower legs, and promotes spine alignment. Defendants have used these claims to charge prices for FiveFingers that consumers readily paid, believing FiveFingers would confer upon them significant advertised health benefits. Unbeknownst to consumers, Defendants’ health benefit claims are false and deceptive because FiveFingers are not proven to provide any of the health benefits beyond what conventional running shoes provide. In fact, there are no well-designed scientific studies that support Defendants’ health benefits claims regarding FiveFingers. Indeed, running in FiveFingers may increase injury risk as compared to running in conventional running shoes, and even when compared to barefoot running.

4. The American Podiatric Medical Association’s position on barefoot running, which FiveFingers are intended to mimic, demonstrates how Defendants’ uniform statements are false and deceptive. That position is as follows:

While anecdotal evidence and testimonials proliferate on the Internet and in the media about the possible health benefits of barefoot running, ***research has not yet adequately shed light on the immediate and long term effects of this practice.***

Barefoot running has been touted as improving strength and balance, while promoting a more natural running style. However, risks of barefoot running include a lack of protection--which may lead to injuries such as puncture wounds--and increased stress on the lower extremities.¹

5. With conventional running shoes, the runner runs with a heel-strike manner. But with FiveFingers, a runner must run with a forefoot strike pattern. This process, necessary with

¹ APMA Position Statement on Barefoot Running, <http://www.apma.org/MainMenu/News/MediaRoom/PositionStatements/Barefoot-Running.aspx> (emphasis added) (last visited Mar. 9, 2012).

FiveFingers, can be long and painful, and can even lead to injuries. As indicated in a recent study by the University of Wisconsin — La Crosse and published by the American Council On Exercise (the “ACE Study”), ““If you want to run in Vibrams, you should be prepared to change your gait pattern If you run in them, give yourself time to acclimate to them and adapt.””² Notably, some people may never change their gait.

6. A consumer would only purchase FiveFingers, which requires that consumer to change his/her gait while running and may involve a long, painful, and injury fraught regimen, in reliance on Defendants’ uniform deceptive health benefit claims.

7. Defendants’ false and misleading advertising campaign has allowed them to reap millions of dollars of profit at the expense of the consumers they have misled. According to “brand experts” Tomlinson LLC, which, in 2006, “was asked to help create the brand look and feel for Vibram FiveFingers[,] . . . [s]ales have grown an average of 300% a year for the past 5 years sales are approaching 70 million in 2011.”³ Defendants conveyed and continue to convey their deceptive claims about FiveFingers in a variety of ways that repeat and reinforce the deceptive message, including at the point of sale, with in-store displays, with packaging that typically includes booklets and hang tags, and on the Internet.

8. As a result of Defendants’ false and deceptive claims, consumers—including Plaintiff and the other members of the proposed Class—have purchased a product that has not been proven to perform as advertised. This action seeks to obtain redress for purchasers of FiveFingers, and to enjoin Defendants’ deceptive and unlawful advertising. Plaintiff brings this

² Caitlin McCarthy, M.S., *et. al.*, *Like Barefoot, Only Better?* ACE CertifiedNews (Sept. 9, 2011), *available at* <https://www.acefitness.org/certifiednews/images/article/pdfs/ACEVibramStudy.pdf> (last visited Mar. 2, 2012).

³ Tomlinson LLC, *Vibram FiveFingers Brand Image Development*, <http://www.tomlinson-llc.com/casestudy/vibram-fivefingers/> (last visited Mar. 9, 2012).

lawsuit against Defendants on behalf of herself and all other similarly situated purchasers of FiveFingers in the United States, alleging claims for unjust enrichment and violations of Mass. Gen. Laws ch. 266 § 91, M.G.L., c. 93A, § 2, and the Florida Deceptive and Unfair Trade Practices Act, Florida Statutes §501.201 *et seq.*

JURISDICTION AND VENUE

9. This Court has jurisdiction over all causes of action asserted herein pursuant to 28 U.S.C. § 1332(d) because the aggregate claims of Plaintiff and members of the Class, which exceeds one hundred persons, exceed the sum or value of \$5,000,000, and there is diversity of citizenship between at least one member of the proposed Class and Defendants.

10. Venue is proper in this District under 28 U.S.C. § 1391(a)(1) and (2). Defendants conduct substantial business throughout Massachusetts, and their headquarters and principal place of business are located in this District.

PARTIES

11. Plaintiff is a resident of the state of Florida, and was exposed to Defendants' deceptive and misleading statements in the state of Florida through Defendants' website on or about April 2011. In reliance on the misleading health benefit claims about FiveFingers on Defendants' website, Plaintiff purchased a pair of FiveFingers (Vibram Bikilas) on April 13, 2011 through Defendants' website, for which she paid \$104.90. Had Plaintiff known the truth about Defendants' representations, she would not have purchased the FiveFingers.

12. Defendant Vibram USA Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 9 Damonmill Square, Suite H3, Concord, MA 01742. Vibram USA Inc., thus, is a citizen of Massachusetts and Delaware. Vibram USA Inc. conducts business in Massachusetts and has marketed, distributed, and sold "five-finger footwear" to thousands of consumers in Massachusetts. Vibram USA Inc. is a

wholly-owned subsidiary of Vibram S.p.A., which is a joint stock company organized and existing under the laws of Italy. The name and address of Vibram USA Inc.'s registered agent is National Registered Agents, Inc., 303 Congress Street, 2nd Floor, Boston, MA 02110.

13. Defendant Vibram FiveFingers LLC is a domestic limited liability company organized and existing under the laws of the Commonwealth of Massachusetts, with its principal place of business at Damonmill Square, Suite H3, Concord, MA 01742. Defendant Vibram FiveFingers LLC is thus a citizen of Massachusetts. Vibram FiveFingers LLC conducts business in the Commonwealth and has marketed, distributed, and sold "five-finger footwear" to thousands of consumers in Massachusetts.

14. Defendants market and sell FiveFingers to consumers through authorized retailers and through their website throughout the United States, including in Florida. Based upon information and belief, Defendants provide the FiveFingers' deceptive advertising and marketing materials to their authorized retailers and approve or instruct FiveFingers' authorized retailers as to how to advertise and/or market FiveFingers.

15. Plaintiff is informed and believes, and thus alleges, that at all times herein, Defendants' agents, employees, representatives, and/or partners, were acting within the course and scope of such agency, employment, and representation, on behalf of Defendants.

SUBSTANTIVE ALLEGATIONS

Defendants' So-Called Minimalist Shoes

16. Defendants launched FiveFingers in the U.S. in or about April 2006.

17. Running in FiveFingers is intended to mimic running barefoot. FiveFingers are "thin, flexible soles that are contoured to the shape of the human foot, including visible

individual sections for the toes.”⁴ According to Defendants’ website, with FiveFingers, “you get all the health benefits of barefoot running combined with our patented Vibram® sole.”⁵

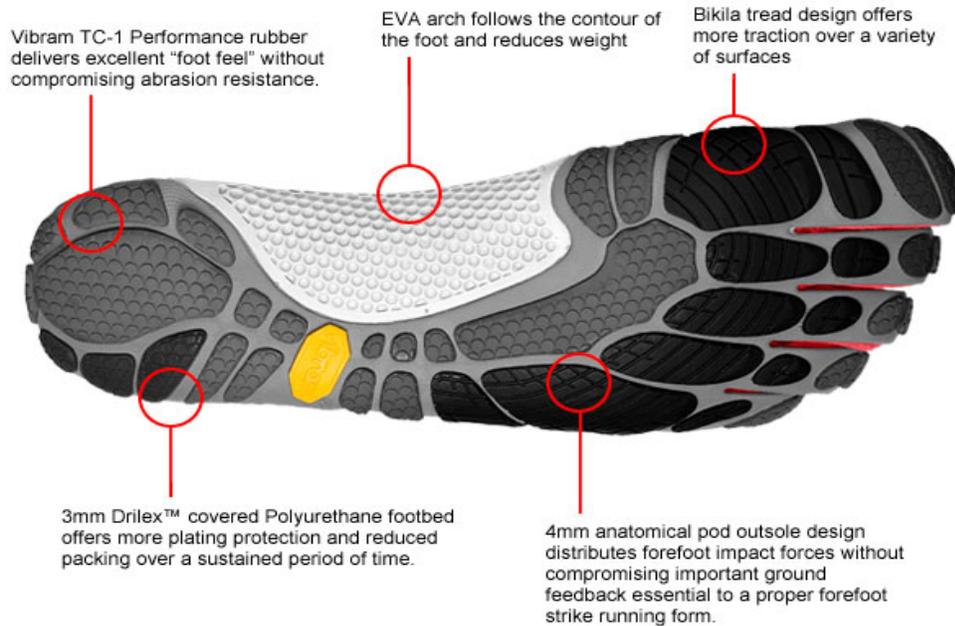
18. The following pictures are representative of the FiveFingers that are offered to consumers, which are all marketed to provide the same “health benefits”:



⁴ Wikipedia, http://en.wikipedia.org/wiki/Vibram_FiveFingers (last visited Mar. 9, 2012).

⁵ Vibram, http://www.vibramfivefingers.com/barefoot-sports/barefoot_running.htm (last visited Mar. 9, 2012).

19. Defendants use the following image to illustrate the design of one the FiveFingers:



The Deceptive Marketing Campaign

20. Upon information and belief, since Defendants began selling FiveFingers in the U.S. in or around April 2006, they have made uniform representations that FiveFingers provide numerous "health benefits" that conventional running shoes do not provide. Although there is no reliable scientific proof demonstrating FiveFingers actually provide those health benefits, Defendants' marketing and advertising conveys that there is such reliable scientific proof.

21. Defendants' deceptive acts are intended to induce consumers to purchase FiveFingers.

22. Since April 2006, Defendants have heavily promoted FiveFingers through a fully-integrated advertising campaign, which is designed to repeat and reinforce the deceptive health benefit claims, including through: 1) point of sale promotions (in-store displays and salespersons

in stores); 2) hang tags and brochures accompanying FiveFingers; and 3) various types of additional advertisements, including, *inter alia*, Internet advertising and marketing, such as statements on their www.vibramfivefingers.com website, postings on the video sharing website youtube.com, Defendants' facebook.com webpage, and advertisements on Internet search engines including Google. FiveFingers have been featured in *The Wall Street Journal*, *Runner's World*, *Running Times*, *Trail Runner*, the *New York Times*, *Her Sports*, *Men's Health*, *Health & Fitness*, *Women's Health*, the *Los Angeles Times*, and the *Today Show*.⁶

23. Defendants' uniform, deceptive claims regarding FiveFingers are repeated and reinforced to such an extent (for example, on in-store displays at points of sale, in FiveFingers' packaging, and on Defendants' websites) that anyone purchasing the shoes would necessarily be exposed to them.

24. Defendants' in-store displays state as follows:

5 Reasons to Wear or Train in Vibram FiveFingers

1. Strengthens Muscles in Feet and Lower Legs
2. Improves Range of Motion in Ankles, Feet and Toes
3. Stimulates Neural Function. Important to Balance and Agility
4. Eliminates Heel Lift to Align the Spine and Improve Posture
5. Allows the Foot and Body to Move Naturally, Which Just Feels Good

These in-store displays necessarily give the impression to reasonable consumers that there is scientific evidence supporting the specific health-benefit representations.

25. Defendants' uniform deceptive "health benefits" claims are also on the hang tags attached to FiveFingers. For example, Defendants state:

Unlike any running shoe on the market today, the Vibram FiveFingers Bikila® is a breakthrough product that encourages a more natural,

⁶ Tomlinson LLC, *supra* note 3, *Vibram Fivefingers Brand Image Development*.

healthier and efficient forfoot [sic] *strike*. Built on an entirely new platform, the Bikila features a Dri-Lex covered 3mm polyurethane insole (thickest under the ball) and a 4mm anatomical pod outsole design that offers plating production and distributes forefoot impact without compromising important ground [sic] feedback. (Emphasis added).

26. Defendants make similarly deceptive claims in a brochure included with FiveFingers, such as the following claim:

The benefits of running barefoot have long been supported by scientific research, coaches, and athletes who believe that a gradual system of training barefoot will strengthen muscles in the feet and lower legs, leading to better running form and improved injury resistance. However, running completely barefoot also exposes you to elements and obstacles that can cause injury. Running in FiveFingers enables you to reap the rewards of running barefoot while reducing those risks. To learn more about running barefoot in Vibram FiveFingers, please visit www.vibramfivefingers.com.

27. Consumers are also exposed to Defendants' uniformly deceptive claims on the Internet. As Tony Post, CEO of Vibram USA Inc., stated: "we've really grown this consumer franchise on the web, the web has been instrumental in how we've spread the word."⁷ Even the hang tag attached to FiveFingers refers consumers to Defendants' website. Defendants' website had 5,806,936 page views in one month alone.⁸

28. Defendants' website is replete with uniform deceptive statements about the health benefits that FiveFingers purportedly provide. For example, Defendants prominently state the following on their website:

Vibram FiveFingers® footwear is different than any other footwear on the planet. Not only does it bring you closer to your environment, it also delivers a number of positive health benefits—by leveraging all of the body's natural biomechanics, so you can move as nature intended.

⁷ Vibramfivefingers, *The Making of Vibram FiveFingers*, "You are the Technology" Microsite, YouTube (Jan. 16, 2011) <http://www.youtube.com/watch?v=eFwgupPvzdg> (last visited on Mar. 9, 2012).

⁸ Tomlinson LLC, *supra* note 3, *Vibram Fivefingers Brand Image Development*.

5 Reasons to Wear Vibram FiveFingers:

1. Strengthens Muscles in the Feet and Lower Legs—Wearing Vibram FiveFingers will stimulate and strengthen muscles in the feet and lower legs, improving general foot health and reducing the risk of injury.

2. Improves Range of Motion in Ankles, Feet and Toes—No longer ‘cast’ in a shoe, the foot and toes move more naturally.

3. Stimulates Neural Function Important to Balance and Agility—When wearing Vibram FiveFingers, thousands of neurological receptors in the feet send valuable information to the brain, improving balance and agility.

4. Eliminate Heel Lift to Align the Spine and Improve Posture—By lowering the heel, your bodyweight becomes evenly distributed across the footbed, promoting proper posture and spinal alignment.

5. Allow the Foot and Body to Move Naturally—Which just FEELS GOOD.

*For those interested in running in Vibram FiveFingers, please go to our Barefoot Running page for further information.*⁹

29. Defendants’ postings on their Facebook webpage repeat similar deceptive statements. For example, Defendants make the following representation:¹⁰

Here at Vibram we feel there are five main reasons to wear or train in FiveFingers.

1. Strengthens Muscles in the feet and lower legs. This improves foot health and reduces the risk of injury.
2. Improves range of motion in ankles and feet.
3. Stimulates neural function improving balance and agility.
4. Eliminates heel lift to align spine and improve posture.
5. Allows the body to move naturally, which FEELS GREAT!

⁹ Vibram, http://www.vibramfivefingers.com/about_vibram_fivefingers/health_wellness.htm (last visited Mar. 9, 2012).

¹⁰ Facebook, <http://www.Facebook.com/VibramFiveFingers> (click on “About” link) (last visited June 11, 2012).

30. On prior versions of www.vibramfivefingers.com, Defendants represented that there were *six* reasons to wear FiveFingers.¹¹ For example, in August 2010, Defendants represented as follows:

Vibram FiveFingers is different than any other footwear on the planet. Not only do they bring you closer to your environment, FiveFingers deliver a number of positive health benefits—by leveraging all of the body’s natural biomechanics, so you can move as nature intended.

6 Reasons to Wear Vibram FiveFingers:

- 1. Strengthens Muscles in the Feet and Lower Legs** - wearing FiveFingers will stimulate and strengthen muscles in the feet and lower legs, improving general foot health and reducing the risk of injury.
- 2. Improves Range of Motion in Ankles, Feet and Toes** – no longer ‘cast’ in a shoe, the foot and toes move more naturally.
- 3. Stimulates Neural Function Important to Balance and Agility** - when wearing Vibram FiveFingers, thousands of neurological receptors in the feet send valuable information to the brain, improving balance and agility.
- 4. Improves Proprioception and Body Awareness** – those same neurological receptors heighten body awareness, sending messages about body mechanics, form, and movement.
- 5. Eliminates Heel Lift to Align the Spine and Improve Posture** – By lowering the heel, our bodyweight becomes evenly distributed across the footbed, promoting proper posture and spine alignment.
- 6. Allows the Foot and Body to Move Naturally, Which Just FEELS GOOD.**

31. On yet another one of Defendants’ websites, <http://www.youarethetechnology.com/>, which features a woman and man with representations about FiveFingers written on their naked bodies, Defendants deceptively state, among other things, that FiveFingers “makes your legs and feet stronger.”

¹¹ Way Back Machine, http://web.archive.org/web/20100817003233/http://www.vibramfivefingers.com/technology/health_wellness.cfm (last visited Mar. 9, 2012).

32. Similarly deceptive statements on www.vibramfivefingers.com are as follows:

Discover the Alternative®:

Like all things in life, there is a balance, and Vibram FiveFingers® offers an alternative to traditional footwear. Wearing FiveFingers for fitness training, running, or just for fun will make your feet stronger and healthier—naturally.¹²

33. Defendants also explicitly and deceptively claim there is scientific support for their “health benefit” claims. For example, Defendants state on their website:

The benefits of running barefoot have long been supported by scientific research. And there is ample evidence that training without shoes allows you to run faster and farther with fewer injuries.

No footwear comes closer to recreating this natural sensation than Vibram FiveFingers®. It allows you to land on your forefoot, directly below your center of gravity, resulting in optimum balance, increased stability, less impact and greater propulsion. Running in FiveFingers delivers sensory feedback that improves agility and equilibrium and allows immediate form correction. In addition it stimulates and strengthens muscles in the feet and lower legs.

In FiveFingers, you get all the health benefits of barefoot running combined with our patented Vibram® sole that protects you from elements and obstacles in your path.¹³

34. Likewise, CEO Tony Post also falsely promotes and advertises that FiveFingers’ purported “health benefits” are supported by research. Mr. Post has stated that the “strong commitment to research and innovation, along with passionate consumer feedback, inspired our new educational section on the Vibram website[]” and referred to the “the vital health benefits in utilizing a minimalist fitness routine.”¹⁴

¹² Vibram, <http://www.vibramfivefingers.com/barefoot-sports/> (last visited Mar. 9, 2012).

¹³ Vibram, *supra* note 5.

¹⁴ *Vibram FiveFingers: Minimalist Footwear Company, Vibram FiveFingers Debuts New Educational Resources*, India Retail News, Feb. 8, 2012.

35. Defendants' marketing deceptively includes the endorsement of doctors, including podiatrists, to give credence to their claims that there is scientific support for Defendants' uniform "health benefit" claims. For example, at www.vibramfivefingers.com, Defendants included a testimonial by Dr. Ivo Waerlop of the Vibram "Biomechanics Advisory Board" who stated that "Running in FiveFingers improves agility, strength, and equilibrium, plus it delivers sensory feedback that allows runners to make immediate corrections in their form. This greatly improves running efficiency."¹⁵ On the current version of www.vibramfivefingers.com, Dr. Nick Campitelli, who is on the Vibram "Biomedical Advisory Board" and is purportedly a board certified podiatrist states: "After 10 years of foot pain while running, I began researching the biomechanics of barefoot running and the use of minimalist shoes. I immediately started running in FiveFingers and have been pain free since. I now incorporate my research into my medical practice. It is truly amazing to witness the consistent positive results with my clients."¹⁶

36. Regardless of the medium used, Defendants' advertisements and marketing for FiveFingers convey to consumers that by wearing FiveFingers, consumers will reap significant "health benefits," more so than through wearing conventional shoes. These purported "health benefits" include but are not limited to:

- (a) Improved foot health;
- (b) Reduced risk of injury;
- (c) Strengthened muscles in feet and lower legs;

¹⁵ Way Back Machine, http://web.archive.org/web/20100722095020/http://www.vibramfivefingers.com/barefooting/barefoot_running.cfm (last visited Mar. 9, 2012).

¹⁶ Vibram, http://www.vibramfivefingers.com/about_vibram_fivefingers/medical_advisory_board.htm (last visited June 11, 2012).

- (d) Stimulated neural function improving balance, agility and range of motion;
- (e) Improved spine alignment;
- (f) Improved posture;
- (g) Reduced lower back pain;¹⁷ and
- (h) Improved proprioception and body awareness.

37. As sellers, manufacturers and designers of FiveFingers, Defendants know or, at the very least, should know of existing literature (some of which is discussed herein) demonstrating that there is no scientific evidence which substantiates or proves that wearing FiveFingers will provide these benefits in any greater degree than with conventional running shoes. Indeed, one website purporting to present research on running that is funded “in part, by Vibram USA ®” states as follows:

Do barefoot runners get injured less? Barefoot runners often adopt forefoot or midfoot strike gaits and have a softer, more gentle landing, which may reduce their risk of injury. ***While there are anecdotal reports of barefoot runners being injured less, there is very little scientific evidence to support this hypothesis at this time. Well-controlled studies are needed to determine whether barefoot running results in fewer injuries.***¹⁸

38. Defendants’ statements set forth above and others like them made by Defendants demonstrate Defendants’ intention to deceptively persuade consumers to purchase FiveFingers to gain certain health benefits, despite the fact that the purported health benefits from wearing FiveFingers are false, and not substantiated or proven to exist through accepted scientific research, and even though the required physical transition to running in FiveFingers is a long, complicated process that can actually cause, rather than prevent, injury.

¹⁷ Way Back Machine, <http://web.archive.org/web/20070322215621/http://www.vibramfivefingers.com/health.html> (last visited Mar. 9, 2012).

¹⁸ Running Barefoot: FAQ, <http://barefootrunning.fas.harvard.edu/6FAQ.html> (last visited June 11, 2012) (emphasis added).

39. Plaintiff cannot, without discovery, know the details of the bases for Defendants' deceptive claims concerning running in FiveFingers. However, the above-mentioned health benefits claims were not and are not based on well-designed scientific studies subject to traditional scientific scrutiny, including being performed by impartial parties who conducted appropriately powered double-blinded, placebo-controlled studies, which were subjected to peer review or other methods traditionally used by the scientific community to ensure accurate results.

There is No Adequate Support for Defendants' Deceptive Representations

40. As discussed above, Defendants consistently mislead consumers into thinking that there is scientific research proving that wearing FiveFingers provides the purported health benefits--such as improved foot health, reduced risk of injury, strengthened muscles in feet and lower legs, improved range of motion in ankles and feet, spine alignment, improved posture, reduced lower back pain, and improved proprioception--that wearing conventional running shoes does not provide.

41. However, as illustrated below, Defendants' health-benefit representations are false and deceptive, and there is no adequate scientific proof supporting Defendants' representations.

42. As the American Podiatric Medical Association's position on barefoot running indicates, Defendants' many deceptive statements about the purported "health benefits" of FiveFingers are false and deceptive and not supported by reliable scientific research or clinical proof. That position is as follows:

While anecdotal evidence and testimonials proliferate on the Internet and in the media about the possible health benefits of barefoot running, research has not yet adequately shed light on the immediate and long term effects of this practice.

Barefoot running has been touted as improving strength and balance, while promoting a more natural running style. However, risks of barefoot

running include a lack of protection--which may lead to injuries such as puncture wounds--and increased stress on the lower extremities. *Research is ongoing in regards to the risk and benefits of barefoot running.*¹⁹

43. As one article in the May/June 2011 Journal of the American Podiatric Medical Association (“APMA Article”) states, “professional organizations and many clinicians with a keen interest in foot health and podiatric sports medicine are becoming more aware of the purported claims and risks but are going to be reluctant to support or oppose barefoot running until more definitive research and evidence are available.”²⁰

44. Another example demonstrating the lack of scientific research on minimalist shoes is illustrated through the U.S. Army. The U.S. Army plans to study the effectiveness of the shoes. The reason is that the effectiveness of minimalist shoes is scientifically unproven.²¹ As Lt. Col. Timothy Pendergrass stated, “[w]hat we do know is we don’t know a whole lot, and we need more research.”²² Lt. Col. Pendergrass also stated that “[t]here’s a lot that’s stated out there without any research out there to back it up, so we’re trying to look at the kinds of research we can do to answer those questions.”²³

45. Another recent article, published by the American Academy of Physical Medicine and Rehabilitation — stating that “it should be obvious that foot intrinsic muscle strengthening cannot be a potential benefit from barefoot running” — indicates that Defendants’ muscle-strengthening claim is false.²⁴ That article also states that “other aspects of muscle function

¹⁹ APMA Position Statement on Barefoot Running, *supra* note 1 (emphasis added).

²⁰ David W. Jenkins, DPM & David J. Cauthon, RPh, *Barefoot Running Claims and Controversies*, Journal of the American Podiatric Medical Association, May/June 2011, 231, 243.

²¹ Joe Gould, *Army Seeks More Input on Minimalist Shoes*, Army Times, Feb. 13, 2012, 23.

²² *Id.*

²³ *Id.*

²⁴ See Brian J. Krabak, M.D., M.B.A., *et. al.*, *Barefoot Running*, PM&R, Vol. 3, Dec. 2011, at 1148-49.

might be improved by barefoot running, but this remains to be examined.” That article therefore demonstrates that Defendants’ muscle-strengthening claims are unsubstantiated.

46. As for Defendants’ deceptive statements about the reduced injury risk, the APMA Article notes that although there are studies demonstrating reduced injury factors in laboratory situations, “[n]o evidence was found that demonstrates a reduced prevalence of running injuries in barefoot runners.”²⁵ Another recent article published in *Foot & Ankle International* in April 2012 states:

Despite booming sales in minimalist footwear, there is no evidence that their use has decreased the incidence of injuries in runners. Since the introduction of these shoes, we have treated a series of experienced runners that have made the transition from traditional footwear to minimalist footwear and sustained an injury either during or shortly after their transition. All of the runners were uninjured in the year prior to their transition and all developed an injury within a year of the transition.²⁶

47. Furthermore, the APMA Article notes that “[m]ost of the claims regarding the reduction of running-related injuries in barefoot runners are made on the basis of logical assumptions However, no studies or even surveys have sustained these claims. Although there are numerous studies that demonstrate reduced lateral ankle instability in the barefoot condition, they do not look at barefoot runners.”²⁷ Indeed, “[e]vidence that barefoot running directly prevents or improves running-related injuries is nonexistent.”²⁸ Also, Amby Burfoot, editor-at-large for *Runner’s World*, magazine wrote of another study, “[n]o one has ever proven

²⁵ Jenkins, *et al.*, *supra* note 20, *Barefoot Running Claims and Controversies*, at 235 (emphasis added).

²⁶ Matthew J. Salzler, MD, *et al.*, *Injuries Observed in Minimalist Runners*, *Foot & Ankle International*, Vol. 33, No. 4, April 2012, at 263.

²⁷ *Id.* at 240 (citations omitted).

²⁸ *Id.* at 242.

that any running shoes prevent running injuries, and no one has ever proven that barefoot running prevents running injuries.”²⁹

48. Even research that is sponsored “in part, by Vibram USA®,” demonstrates how Defendants’ statements about reduced injury risk are deceptive. *See supra* ¶ 37. And those performing the research, such as Daniel E. Lieberman, sponsored “in part, by Vibram USA®,” and others, acknowledge that “[a]lthough there are anecdotal reports of reduced injuries in barefoot populations, controlled prospective studies are needed to test the hypothesis that individuals who do not predominantly [rear-foot strike] either barefoot or in minimal footwear, as the foot apparently evolved to do, have reduced injury rates.”³⁰ Lieberman also acknowledges that “[i]t is remarkable how little we know about something so basic and fundamental as barefoot running, and it should be evident that we need to roll up our shirt sleeves and take off our shoes to answer a wide range of questions about how the bare foot functions during running and the relevance of barefoot running to injury.”³¹

49. An article by Benno M. Nigg of the Department of Kinesiology at the University of Calgary also indicates that there is no “publication that provides hard evidence that people running barefoot have fewer running related injuries than people running with running shoes.” Benno Nigg, *Biomechanical Considerations on Barefoot Movement and Barefoot Shoe Concepts*, *Footwear Science*, June 2009, at 76 (“Nigg Article”). The Nigg Article states:

The current claim that people running barefoot have less running related injuries than people running in shoes is a speculation with no

²⁹ Emily Main, *Give Up Running Shoes? Not So Fast*, Rodale (Jan. 12, 2010), available at <http://www.rodale.com/knee-pain-while-running?page=0%2C1> (last visited Mar. 9, 2012).

³⁰ Daniel E. Lieberman, Ph.D., *et. al.*, *Foot Strife Patterns and Collision Forces in Habitually Barefoot Versus Shod Runners*, *Nature*, Jan. 28, 2010, at 534 (citation omitted).

³¹ Daniel E. Lieberman, Ph.D., *What We Can Learn About Running from Barefoot Running: An Evolutionary Medical Perspective*, *Exercise and Sport Sciences Reviews*, April 2012, at 70-71, available at http://journals.lww.com/acsm-essr/Fulltext/2012/04000/What_We_Can_Learn_About_Running_from_Barefoot.3.aspx.

epidemiological support. *We suggest that nobody knows at this point in time whether or not people running barefoot have more or less injuries than people running with conventional running shoes.*³²

50. Another recently published article from the May/June 2012 Current Sports Medicine Reports states:

To date, no clinical studies have been published to substantiate the claims of injury reduction using a “minimalist” style. Opponents of “barefoot” running maintain that the “minimalist” style may alter the type, not incidence, of running injuries. By increasing impact forces on the forefoot and mid foot, “minimalist” runners may be subjected to increase rates of forefoot and midfoot injuries and plantar skin breakdown compared with shod runners.³³

51. As Craig Payne, a senior lecturer in the department of podiatry at La Trobe University in Melbourne, Australia writes: “The barefoot running community have an appalling track record at how they misinterpret, misuse and misquote research The simple facts are that not one risk factor study on running injuries has linked high impacts to running injuries, yet the barefoot running community claim that the evidence shows this and consider high impacts as the cause of all injuries.”³⁴

52. Defendants’ health benefit claim that running in FiveFingers leads to fewer injuries is belied by the fact that until runners are able to change the way they run in FiveFingers (if they are able to change at all), they are *more prone* to injuries while running in FiveFingers than with conventional shoes. Nevertheless, even if FiveFingers consumers are able to change the way they run in order to minimize the potential that wearing FiveFingers will injure them, wearing FiveFingers still do not provide the advertised health benefits.

³² Nigg Article at 76 (emphasis added).

³³ Jeffery A. Rixe, BA, *et. al.*, *The Barefoot Debate: Can Minimalist Shoes Reduce Running-Related Injuries?*, Current Sports Medicine Reports, Vol. 11, No. 3, May/June 2012, at 162.

³⁴ Roger Collier, *The Rise of Barefoot Running*, Canadian Medical Association Journal, Jan. 11, 2011, at E38, available at <http://www.cmaj.ca/content/183/1/E37>.

53. As the APMA Article illustrates, Defendants' representation that running in FiveFingers increases strength in feet and lower legs also does not have sufficient support. The APMA Article states that "[e]vidence is conflicting on the actual strengthening potential of the barefoot condition, and even if the barefoot condition led to increased muscular strength, the claim that this results in reduced injuries or improved performance has not been proved scientifically." APMA Article at 240.

54. Moreover, the authors of the APMA Article noted they were unaware of any study that evaluated "barefoot runners' proprioceptive ability." In fact, as the APMA Article states, "[t]here is even the consideration that in an unshod condition, proprioceptive elements (plantar mechanoreceptors) may be dampened through chronic impact loading . . . [and that] [a]lthough numerous studies support the claimed advantages of the barefoot condition, such as reduced ground reaction force at impact and improved sensory feedback and proprioception, there is no evidence that these changes result in reduced injuries or improved performance in barefoot runners. It seems that these claims are extrapolated or speculative." *Id.* at 240, 242. Thus, Defendants' uniform deceptive and misleading statement that wearing FiveFingers improves proprioception has no reliable scientific support, and is false and deceptive.

55. Finally, Defendants' comparison of running in FiveFingers to barefoot running is itself misleading. Indeed, the ACE Study found that "compared with barefoot runners, shod runners and those in Vibrams showed more pronation, which is the natural side-to-side movement of the foot during running. Excessive pronation is associated with more injuries."³⁵ The Nigg Article further demonstrates why comparing barefoot running and running in FiveFingers is deceptive. The Nigg Article states as follows:

³⁵ Tara Parker-Pope, *Are Barefoot Shoes Really Better?*, N.Y. Times, Sept. 30, 2011, available at <http://well.blogs.nytimes.com/2011/09/30/are-barefoot-shoes-really-better/> (last visited Mar. 9, 2012).

The name “barefoot shoes” is a contradiction in terms. A shoe condition is not a barefoot condition. The discussed “barefoot shoes” typically take one aspect of barefoot and implement it into a shoe. Some of these aspects are close to barefoot, some need a little stretch. To assume that these shoes correspond to barefoot running or moving is not appropriate and the name “barefoot shoes” may well be more a marketing strategy than a functional name.³⁶

56. Defendants have reaped millions of dollars in profits by leading consumers to believe that there is reliable scientific data backing up their claims that wearing FiveFingers, *inter alia*, strengthen muscles and reduce the risk of injury. Reasonable consumers would not have paid the amounts charged for FiveFingers, or would not have purchased FiveFingers at all, had they known the truth about FiveFingers: that there is no scientific evidence supporting Defendants’ major health benefit claims.

CLASS ACTION ALLEGATIONS

57. Plaintiff brings this class action pursuant to Federal Rule of Civil Procedure 23 on behalf of herself and a Class of all others similarly situated consisting of all persons in the United States who purchased FiveFingers running shoes during the period from March 21, 2009 until notice is disseminated to the Class. Excluded from the Class are Defendants and their officers, directors, and employees, those who purchased FiveFingers for the purpose of resale, and those persons pursuing claims for personal injuries.

58. In the alternative, Plaintiff brings this class action pursuant to Federal Rule of Civil Procedure 23 on behalf of herself and a Class of all others similarly situated consisting of all persons who purchased FiveFingers running shoes in the State of Florida, during the period from March 21, 2008 until notice is disseminated to the Class (the “Florida Class”). Excluded from the Florida Class are Defendants and their officers, directors, and employees, those who

³⁶ Nigg Article at 78.

purchased FiveFingers for the purpose of resale, and those persons pursuing claims for personal injuries.

59. **Numerosity.** The members of the Class are so numerous that joinder of all members would be impracticable. Plaintiff is informed and believes, and on that basis alleges, that the Class contains thousands of members. The precise number of Class members is unknown to Plaintiff.

60. **Existence and Predominance of Common Questions of Law and Fact.** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. These common legal and factual questions include, but are not limited to, the following:

- (a) Whether Defendants had adequate substantiation for their representations prior to making them;
- (b) Whether the representations discussed above are true, or are misleading, or reasonably likely to deceive;
- (c) Whether the alleged conduct constitutes violations of the laws asserted herein;
- (d) Whether Defendants engaged in unfair and/or deceptive advertising with respect to FiveFingers;
- (e) Whether Defendants have been unjustly enriched;
- (f) Whether Plaintiff and members of the Class have been injured by Defendants' conduct; and
- (g) Whether Plaintiff and the Class are entitled to relief, and the amount and nature of such relief.

61. **Typicality.** The claims of Plaintiff are typical of the claims of the members of the Class because, among other things, Plaintiff asserts the same claims, and all Class members were injured through the uniform misconduct described above.

62. *Adequacy of representation.* Plaintiff will fairly and adequately protect the interests of the Class, and has retained attorneys experienced in class and complex litigation. Plaintiff has no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiff.

63. *Superiority.* A class action is superior to all other available methods for the fair and efficient adjudication of this controversy for the following reasons:

- a. It is economically impractical for members of the Class to prosecute individual actions;
- b. The Class is readily definable; and
- c. Prosecution as a class action will eliminate the possibility of repetitious litigation.

64. A class action will cause an orderly and expeditious administration of the claims of the Class. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

65. Plaintiff does not anticipate any undue difficulty in the management of this litigation.

66. Plaintiff and the Class expressly exclude any causes of action relating to personal injury or other bodily harm arising from Defendants' conduct.

FIRST CLAIM

(For Violations of Untrue and Misleading Advertising under Mass. Gen. Laws ch. 266 § 91)

67. Plaintiff incorporates the above allegations by reference as if set forth herein in full.

68. Defendants' labeling, marketing, advertising, and promotion of the FiveFingers shoes are untrue, deceptive, and/or misleading, in violation of Mass. Gen. Laws ch. 266 § 91.

69. At all times relevant to this action, Defendants knew, or could, upon reasonable investigation, have ascertained that their labeling, marketing, advertising, and promotion of the FiveFingers shoes were untrue, deceptive, and/or misleading.

70. Defendants' untrue, deceptive, and/or misleading labeling, marketing, advertising, and promotion of the FiveFingers shoes has continued throughout the Class Period and is continuing as of the present date.

71. As a purchaser of FiveFingers who was damaged by Defendants' untrue, deceptive and/or misleading advertising (in that Plaintiff and the other Class members purchased a product that did not conform to the representations made about the product by Defendants), Plaintiff is entitled to and does bring this class action to seek all available remedies under Mass. Gen. Laws ch. 266 § 91, including injunctive relief. The injunctive relief would include an order directing Defendants to cease their false and misleading labeling and advertising, retrieve existing false and misleading advertising and promotional materials, and publish corrective advertising.

SECOND CLAIM

(For Violations of Unfair and Deceptive Conduct in Violation of M.G.L., c. 93A, § 2)

72. Plaintiff incorporates each of the foregoing allegations as if fully set forth herein.

73. Defendants' conduct, as alleged herein, constitutes unfair or deceptive acts or practices and unfair methods of competition in trade or commerce in violation of M.G.L. c. 93A, § 2 and the regulations promulgated thereunder, including without limitation, 940 C.M.R. §§ 3.02 (2), 3.05(1) and (2).

74. Defendants' unlawful conduct includes its false and misleading statements, representations, and depictions in its labeling, marketing and advertising for FiveFingers, as alleged in greater detail above. Such conduct injured Plaintiff and each of the other Class

members, in that they paid more for the falsely advertised product they purchased than they were worth at the time of purchase, or would have not purchased FiveFingers at all.

75. Defendants' unfair or deceptive acts or practices, as alleged herein, were willful or knowing violations of M.G.L. c. 93A, § 2, within the meaning of M.G.L. c. 93A, § 9(3).

76. On March 21, 2012, Plaintiff served Defendants with a demand letter, in accordance with M.G.L., c. 93A, § 9(3). The demand letter explained in detail the nature of the unfair or deceptive acts or practices, the injuries suffered by Plaintiff and the other members of the Class she seeks to represent, as well as demanding compensation for those injuries and other relief. A copy of the demand letter is annexed hereto as Exhibit 1.

77. In response to that letter, Defendants have failed and refused to make a reasonable offer of relief.

78. Plaintiff and the other members of the Class have been injured by Defendants' unfair or deceptive acts or practices and unfair methods of competition.

79. Pursuant to M.G.L. c. 93A, §§ 9(3) and 9(4), Plaintiff and each of the other members of the Class are entitled to recover double or treble the amount of their actual damages, or statutory damages, whichever is greater, plus their reasonable attorneys' fees and the costs of this action.

80. Plaintiff and the other members of the Class are also entitled to injunctive relief in the form of an order directing Defendants to cease its false and misleading labeling and advertising, retrieve existing false and misleading advertising and promotional materials, and publish corrective advertising.

THIRD CLAIM

(For Violations of the Florida Deceptive and Unfair Trade Practices Act, Florida Statutes §501.201 *et seq.*)

(applicable to the alternative Florida-only Class under Federal Rule 23 (b)(3))

81. Plaintiff incorporates the above allegations by reference as if set forth herein in full.

82. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201 *et seq.* (the “Act”). The stated purpose of the Act is to “protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” Fla. Stat. §501.202(2).

83. Plaintiff is a consumer as defined by Fla. Stat. §501.203. Defendants are engaged in trade or commerce within the meaning of the Act.

84. Fla. Stat. §501.204(1) declares unlawful “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce”

85. Defendants have violated the Act by engaging in the unfair and deceptive practices as described herein which offend public policies and are immoral, unethical, unscrupulous and substantially injurious to consumers.

86. Plaintiff and the Class have been aggrieved by Defendants’ unfair and deceptive practices in that they purchased FiveFingers.

87. The damages suffered by Plaintiff and the Class were directly and proximately caused by the unfair and deceptive practices of Defendants, as more fully described herein.

88. Pursuant to Fla. Stat. §501.211(1), Plaintiff and the Class seek a declaratory judgment and court order enjoining the above-described wrongful acts and practices of Defendants and for restitution and disgorgement.

89. Additionally, pursuant to Fla. Stat. §§501.211(2) and 501.2105, Plaintiff and the Class make claims for damages, attorneys' fees and costs.

FOURTH CLAIM

(Unjust Enrichment)

90. Plaintiff incorporates the above allegations by reference as if set forth herein in full.

91. Defendants sold FiveFingers shoes based on their advertised ability to promote the physiological health benefits as described above. However, FiveFingers shoes do not have such capabilities, as compared to conventional running shoes, as described above.

92. By purchasing FiveFingers shoes at retail, Plaintiff and the Class have conferred a significant monetary benefit on Defendants, which benefit is known and has been appreciated by Defendants.

93. Retention by Defendants of the benefit conferred by Plaintiff and the Class would, under the circumstances, be inequitable.

94. Plaintiff, on behalf of herself and the Class, seeks restitution or, in the alternative, imposition of a constructive trust on the funds inequitably received and retained.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and the members of the Class, prays for judgment against Defendants as follows:

A. An Order certifying this case as a class action and appointing Plaintiff and her counsel to represent the Class;

- B. An Order awarding restitution and disgorgement of Defendants' revenues to Plaintiff and each member of the Class;
- C. An Order awarding equitable relief, including: enjoining Defendants from continuing the unlawful false advertising practices as set forth herein, directing Defendants to retrieve existing false and misleading advertising and promotional materials, directing Defendants to engage in a corrective advertising campaign, directing Defendants to identify, with Court supervision, victims of their conduct and pay them restitution, and disgorgement of all monies acquired by Defendants by means of any act or practice declared by this Court to be wrongful;
- D. An Order awarding the greater of actual damages (including double or treble damages) or statutory damages, as allowable by law;
- E. An Order awarding attorneys' fees and costs to Plaintiff and the other member of the Class; and
- F. Such other and further relief as may be just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial of her claims by jury to the extent authorized by law.

Dated: June 25, 2012

Respectfully submitted,

BERMAN DEVALERIO

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Counsel for Plaintiff Valerie Bezdek

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and a paper copy will be sent to those indicated as non-registered participants by first class mail on June 25, 2012.

Dated: June 25, 2012

/s/ Glen DeValerio
Glen DeValerio