

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FenF, LLC
1013 Fountain Street
Ann Arbor, MI 48103

Plaintiff,

-vs.-

HEALIO HEALTH INC.
1340 Home Ave.
Suite A
Akron, Ohio 44310

HEALTHY TOES LLC
1340 Home Ave.
Suite A
Akron, Ohio 44310

PMT MEDICAL, INC.
1340 Home Ave.
Bldg. A
Akron, Ohio 44310

And

Joshua A. Lefkovitz, an individual
1340 Home Ave.
Bldg. A
Akron, Ohio 44310

Defendants.

) CASE NO.
)
)
) JUDGE:
)
)
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)

VERIFIED COMPLAINT FOR:

- (A) Patent Infringement
- (B) Federal Trademark Infringement;
- (C) Unfair Competition;
- (D) Copyright Infringement;
- (E) False Advertising;
- (F) Fraudulent Misrepresentation;;
- and
- (G) Ohio Unfair Competition

JURY DEMAND ENDORSED HEREIN

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Plaintiff FenF, LLC, by its undersigned attorneys, for its complaint against Defendants Healio Health Inc., Healthy Toes LLC, PMT Medical, Inc., and Joshua A. Lefkovitz (collectively, “Defendants”) alleges as follows:

THE PARTIES

1. FenF, LLC (“FenF”) is a limited liability company organized and existing under the laws of the State of Michigan, having its principal place of business at 1013 Fountain Street, Ann Arbor, Michigan 48103.

2. Defendant Healio Health, Inc., (“Defendant Healio Health”) is, on information and belief, a corporation organized and existing under the laws of the State of Ohio having a principal place of business located at 1340 Home Ave. Suite A, Akron, Ohio 44310.

3. Defendant Healthy Toes, LLC (“Defendant Healthy Toes LLC”), is, on information and belief, a limited liability company organized and existing under the laws of the State of Ohio having a principal place of business located at 1340 Home Ave. Suite A, Akron, Ohio 44310.

4. Defendant PMT Medical, Inc. (“Defendant PMT Medical”) is, on information and belief, a corporation organized and existing under the laws of the State of Ohio having a principal place of business located at 1340 Home Ave., Bldg. A, Akron, Ohio 44310.

5. Upon information and belief, Defendant Joshua Lefkovitz is an individual, Owner and Officer of the aforementioned Defendants, having an unknown principal place of residence, with a principal place of business located at 1340 Home Ave. Suite A, Akron, Ohio 44310.

JURISDICTION AND VENUE

6. This is an action for patent, copyright and trademark infringement and unfair competition, *inter alia*. The patent claims arise under the patent laws of the United States, specifically 35 U.S.C. § 281. The copyright claims arise under the Federal Copyright Act of 1976, as amended, 17 U.S.C. § 101, *et seq.* This Court has subject matter jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331, 1338 and 35 U.S.C. § 281 because this action arises under the patent laws of the United States. This Court also has jurisdiction under 28 U.S.C. § 1338(a) in that this case arises under the trademark laws of the United States. This Court has jurisdiction over the unfair competition claims herein under the provisions of 28 U.S.C. § 1338(b) in that said claims are joined with a substantial and related claim under the trademark laws of the United States. Alternatively, this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1), as the amount in controversy exceeds the sum of \$75,000, and the action is between citizens of different states.

7. This Court has personal jurisdiction over Defendants since they reside in this District and by virtue of Defendants' sale of products, transaction of business and solicitation of business within the State of Ohio, within this judicial district and elsewhere.

8. This Court has supplemental jurisdiction over the claims in this Complaint which arise under the statutory and common law of the State of Ohio pursuant to 28 U.S.C. § 1367(a), because the state law claims are so related to the federal claims that they form part of the same case or controversy and derive from a common nucleus of operative facts.

9. Venue is proper in the Northern District of Ohio pursuant to 28 U.S.C. § 1391(b), and/or (c), and 28 U.S.C. § 1400(b) because a substantial part of the events giving rise to the claims occurred in this judicial district and because Defendants are subject to personal jurisdiction in this District.

OPERATIVE FACTS

Background of FenF

10. FenF through its related entities, promotes, markets and sells a variety of products designed to enhance one's life. Most importantly for this action, FenF promotes, markets and sells a patented orthopedic device to stretch and exercise the toes and feet under its federally registered trademark Yoga Toes[®]. A digital image of the Yoga Toes[®] product is attached hereto as Exhibit A.

11. On November 7, 2006, United States Letters Patent No. 7,131,939, entitled "Toe Stretcher" ("the '939 Patent") duly and legally issued to Frederic Ferri, as inventor, for the aforementioned orthopedic device to stretch and exercise the toes and feet, and since that date all rights to the '939 Patent, including but not limited to, the right to recover for infringement thereunder, has been assigned to FenF. A true and accurate copy of the '939 Patent as issued is attached hereto as Exhibit B.

12. On January 29, 2008, United States Letters Patent No. 7,322,915, entitled "Toe Stretcher" ("the '915 Patent") duly and legally issued to Frederic Ferri, as inventor, for the aforementioned orthopedic device to stretch and exercise the toes and feet, and since that date all rights to the '915 Patent, including but not limited to, the right to recover for infringement thereunder, has been assigned to FenF. A true and accurate copy of the '915 Patent as issued is attached hereto as Exhibit C.

13. The '939 Patent and '915 Patent (collectively, the "Yoga Toes[®] Patents") claim, *inter alia*, a toe stretcher for stretching toes.

14. FenF has widely and continuously promoted and sold Yoga Toes[®] under the Yoga Toes[®] mark since at least as early as November 26, 2002. To date, FenF has invested more than two million dollars (\$2,000,000) in marketing and advertising.

15. On June 19, 2007 FenF received the aforementioned Yoga Toes[®] federal trademark registration on the Principal Register for use with “an orthopedic device to stretch and exercise the toes and feet.” A true and accurate copy of the Yoga Toes[®] federal trademark registration is attached hereto as Exhibit D.

16. As a result of FenF’s widespread and continuous use of the Yoga Toes[®] mark in interstate commerce and throughout the United States, an appreciable number of consumers have come to identify the mark with the genuine Yoga Toes[®] product.

17. FenF has invested considerable resources in developing goodwill in its Yoga Toes[®] mark such that, significant segments of consumers are likely to purchase FenF’s Yoga Toes[®] products as they identify them with a single unidentified source.

18. FenF advertises, promotes and sells its Yoga Toes[®] product primarily through its website, www.yogapro.com.

19. In advertising and promotion of its Yoga Toes[®] product, FenF uses certain marketing and promotional materials, which have been registered with the Library of Congress.

20. On November 27, 2007, the Copyright Office of the Library of Congress, duly and legally issued to Frederic Ferri, as Copyright Claimant, registration nos. VA-1-623-536 and VA-1-623-537 (collectively, the “Yoga Toes[®] Copyrights”) for creative works entitled “Kelly’s 3 Foot Drawing” and “Point Magazine Ad,” respectively, and since that date all rights to the Yoga Toes[®] Copyrights, including but not limited to, the right to recover for past infringement thereunder, has been assigned to FenF. True and accurate copies of registration nos. VA-1-623-536 and VA-1-623-537, along with their deposit material are attached hereto as Exhibits E and F, respectively.

Defendants' Actions Relevant To This Complaint

21. In 2005, FenF, through its Yoga Pro division, began selling its Yoga Toes[®] product to Defendant Healio Health, as a wholesale distributor.

22. Pursuant to being a wholesale distributor, Defendant Healio Health offered for sale and sold Yoga Toes[®] on its website, www.healiohealth.com.

23. On or about December, 2005, due to non-compliance with certain policies and procedures, FenF elects to cease any and all business transactions with Defendants are thereafter no longer an wholesale distributor of Yoga Toes[®].

24. Thereafter, despite no longer being able to offer for sale, market, advertise or sell Yoga Toes[®], Defendants began selling and continue to sell the Yoga Toes[®] product; however, under a new product name, called "Healthy Toes." A true and accurate digital image of the Healthy Toes product is attached hereto as Exhibit G.

25. Defendants Healio Health and Lefkovitz sell the Healthy Toes product through the website, www.healiohealth.com. A true and accurate digital image of Defendant Healio Health's advertising and offering for sale of the Healthy Toes product is attached hereto as Exhibit H.

26. Without authorization from FenF, Defendants Healio Health and at least Defendant Lefkovitz intentionally copied the subject matter of the Yoga Toes[®] Copyrights and advertise and promote the Healthy Toes product utilizing the Yoga Toes[®] copyrighted subject matter. True and accurate digital images of Defendant Healio Health's website showing the subject matter of the Yoga Toes[®] Copyrights are attached hereto as Exhibit I.

27. Defendants Healio Health and Lefkovitz advertise and promote the Healthy Toes product by stating that the Healthy Toes product is a "NEW!!! 2nd Generation YOGA TOES formula." Such statement is made by at least Defendants Healio Health and Lefkovitz knowing

such is false as there is no such thing as a “2nd Generation Yoga Toes[®]” product. Such statement was made without any authorization from FenF.

28. On or about October 8, 2006, Defendant Healio Health offers for sale and sells its Healthy Toes product on the World Wide Web using the website www.healthytoes.com. A true and accurate digital image showing the offering for sale of the Healthy Toes product on the Healthy Toes website is attached hereto as Exhibit J.

29. On or about January 1, 2008, Defendants PMT Medical Inc. and Lefkovitz forms Healthy Toes LLC., which is now marketing, offering for sale and selling the Healthy Toes product.

30. Upon information and belief, Defendants PMT Medical and Lefkovitz, through Defendants Healio Health and Defendant Healthy Toes LLC, offers for sale and sells the Healthy Toes product.

31. Upon information and belief, Defendants utilize independent dealers throughout the United States, which offer for sale and sell its Healthy Toes product.

32. More specifically, upon information and belief, Defendants and its dealers utilize the e-commerce website known as the famous auction website eBay, www.eBay.com, where consumers may purchase Defendants’ Healthy Toes products.

33. Defendants and its dealers, in offering for sale the Healthy Toes product utilize FenF’s Yoga Toes[®] mark. An example of such offer for sale on eBay is attached hereto as Exhibit K.

34. Defendants and/or its dealers also utilize the famous website www.youtube.com to depict a video of its Healthy Toes product using the title “Yoga toes toe stretchers heal foot pain bunions hammer toe” (“Healthy Toes Video”) and at the end of such video the Healthy Toes product is displayed and

35. advertised. True and accurate digital still images showing a portion of the Healthy Toes Video is attached hereto as Exhibit L.

36. On information and belief, Defendants are actively promoting the sale of the Healthy Toes product as a direct substitute for the genuine Yoga Toes[®] product. On further information and belief, Defendants have in fact deceived purchasers who have attempted to purchase the Yoga Toes[®] product from Defendants by selling purchasers their Healthy Toes product as identical to Yoga Toes[®]. As a result, consumers are deceived and FenF is injured by the activities of the Defendants.

37. The aforementioned activities of Defendants have also injured and threaten future injury to FenF. More specifically, Defendants' activities have diminished FenF's goodwill in the Yoga Toes[®] mark and caused FenF to lose sales of the Yoga Toes[®] product that it otherwise would have made but for the sales of the Defendants.

38. Defendants are not authorized in any way to sell the Healthy Toes product or use the Yoga Toes[®] mark, Copyrights, Patents or any other intellectual property owned by FenF.

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FIRST CLAIM FOR RELIEF

Patent Infringement
(35 U.S.C. § 271)

39. FenF incorporates by reference the averments of paragraphs 1 through 38 of this Complaint as if specifically set forth herein.

40. Defendants' selling, offering for sale of their Healthy Toes product is an infringement of the Yoga Toes[®] Patents pursuant to, and in violation of 35 U.S.C. § 271 within this judicial district and elsewhere.

41. Defendants will continue to sell and offer for sale their infringing Healthy Toes products unless enjoined by this Court.

42. Defendants have been, and are, actively inducing infringement of the Yoga Toes[®] Patents, by offering for sale and selling their Healthy Toes products to "dealers" at wholesale prices who have, and will continue to, offer them for sale and sell them to end users.

43. Defendant's infringement is and, at all times, has been deliberate, willful, with full knowledge of FenF's patent rights, and wanton, and as a result, FenF is entitled to treble damages pursuant to 35 U.S.C. § 284. This is an exceptional case within the meaning of 35 U.S.C. § 285, and the award of appropriate attorneys' fees is justified.

SECOND CLAIM FOR RELIEF

Federal Trademark Infringement; Unfair Competition
(15 U.S.C. §1125(a); §43(a) of the Lanham Act)

44. FenF incorporates by reference the averments of paragraphs 1 through 43 of this Complaint as if specifically set forth herein.

45. Defendants have used, and are using, the Yoga Toes[®] mark without any authorization from FenF in order to sell their Healthy Toes product in such a fashion and design as to imitate, counterfeit, copy, and reproduce FenF's Yoga Toes[®] mark.

46. Defendants' acts as alleged above were with the purpose of exploiting and trading on the substantial goodwill and reputation of FenF as symbolized by the Yoga Toes[®] mark. Such intentional acts on the part of Defendants have damaged FenF's goodwill as symbolized by its Yoga Toes[®] mark, causing FenF immediate and irreparable damage.

47. Defendants' acts as alleged above have caused confusion, mistake, and deception, and are likely to continue to cause confusion, mistake, and deception, and have infringed upon FenF's exclusive rights in its trademarks.

48. Defendants had actual knowledge of FenF's exclusive rights in the Yoga Toes[®] mark and willfully and deliberately infringed FenF's rights.

49. Defendants' above averred acts in connection with the same or similar goods offered by FenF is likely to cause the consuming public to mistakenly believe that the Healthy Toes products originate from, are sponsored by or are associated with FenF, constituting a false designation of origin or false or misleading description or representation of fact, and are also likely to cause the mark in question to lose its significance as an indicator of origin, in violation of 15 U.S.C. § 1125(a).

50. The Defendants' actions complained of herein constitute trademark infringement, unfair competition, in violation of FenF's rights under 15 U.S.C. § 1125(a).

51. FenF has no adequate remedy at law due to (i) Defendants' above averred acts, and (ii) the damage being caused to the goodwill associated with the Yoga Toes[®] mark; and, the conduct of Defendants complained of herein has caused and will continue to cause irreparable damage to FenF if not enjoined.

THIRD CLAIM FOR RELIEF
Copyright Infringement
(17 U.S.C. §501, *et seq.*)

52. FenF incorporates by reference the averments of paragraphs 1 through 51 of this Complaint as if specifically set forth herein.

53. Defendants unlawfully and willfully copied the subject matter of the Yoga Toes[®] Copyrights, in violation of FenF's copyrights.

54. Defendants' advertising material set forth in Exhibit I in all respects are not only substantially similar, but are strikingly similar and identical to the original FenF work.

55. FenF has lost substantial revenue from Defendants' unlawfully and willful copying of the aforementioned copyrighted material.

56. FenF's sale of its own works and derivative works is prejudiced by Defendants' copyright infringements.

57. Defendants' activities with respect to their copyright infringement have been without the express or implied license or authority of FenF.

58. The continuing manufacture, distribution, use, offer for sale, and/or sale by Defendants of their Healthy Toes product, along with the copyright infringing material shown in Exhibit I, has caused and will continue to cause FenF to lose markets, opportunities, sales, and customers for the sale of FenF's Yoga Toes[®] product.

59. The wrongful acts of Defendants have caused and will continue to cause FenF to lose revenue from potential sales of FenF's Yoga Toes[®] products. Those acts also will cause FenF to expend their energies and funds to protect against the loss of market share.

60. FenF has no adequate remedy of law and will be irreparably harmed, including, but not limited to, the loss of goodwill, competitive advantage, an ability to maintain a reputation

of superior quality and reliability for its exclusive products unless the Defendants' actions are enjoined.

FOURTH CLAIM FOR RELIEF

False Advertising

(15 U.S.C. §1125(b), *et seq.*)

61. Paragraphs 1-60 are incorporated herein as set forth in their entirety.

62. Defendants' representation that the infringing Healthy Toes products are "a "NEW!!! 2nd Generation YOGA TOES formula" is a false and misleading statement of fact about Defendants' product, which is likely to influence the deceived consumer's purchasing decisions in violation of 15 U.S.C. §1125(b).

63. As a result of the foregoing, FenF has been damaged in an amount that will be ascertained according to proof. In addition to FenF's actual damages, FenF is entitled to receive Defendants' profits pursuant to 15 U.S.C. §1117(a). These actual damages and profits should be enhanced to achieve justice pursuant to 15 U.S.C. §1117(a) and/or trebled pursuant to 15 U.S.C. §1117(b) due to Defendants' willful conduct.

64. As a result of Defendants' false advertising, FenF has suffered and will continue to suffer losses and irreparable injury to its business reputation and goodwill. Defendants will continue to commit acts of false advertising, and unless restrained and enjoined, will continue to do so, all to FenF's irreparable injury. FenF's remedy at law is not by itself adequate to compensate it for the injuries inflicted and threatened by Defendants.

FIFTH CLAIM FOR RELIEF
Fraudulent Misrepresentation

65. Paragraphs 1-64 are incorporated herein as set forth in their entirety.

66. Defendants' representation that the infringing Healthy Toes products are a "NEW!!! 2nd Generation YOGA TOES formula" is a knowingly fraudulent misrepresentation of fact about Defendants' product, which is meant to deceive the purchasing public into believing that Defendant's Healthy Toes product is associated with or an improvement to FenF's Yoga Toes[®] product.

67. Defendant's fraudulent misrepresentations have injured FenF in an amount to be determined at trial.

68. FenF seeks punitive damages against Defendants' for their fraudulent misrepresentations as alleged *supra*.

SIXTH CLAIM FOR RELIEF
Unjust Enrichment

69. Paragraphs 1-68 are incorporated herein as set forth in their entirety.

70. Defendants' manufacture, sale, and offer for sale, of Defendants' Healthy Toes product have resulted in Defendants being conferred a substantial benefit, at FenF's expense, and without payment to FenF.

71. Defendants' retention of this substantial benefit would be unjust and inequitable.

72. Defendants are obligated to compensate FenF for the substantial benefit conferred upon them and unjustly retained by them, pursuant to a theory of unjust enrichment.

SEVENTH CLAIM FOR RELIEF

Ohio Unfair Competition
(O.R.C. §4165.02, *et seq.*)

73. Paragraphs 1-72 are incorporated herein as set forth in their entirety.

74. Defendants' acts and conduct as alleged above in this Complaint constitute unfair competition as defined by Ohio Revised Code §4165.02, *et seq.*

PRAYER FOR RELIEF

WHEREFORE, FenF prays that this Court enter an Order comprising:

A) a preliminary injunction enjoining Defendants from making, using or selling any product, including, but not limited to, its Healthy Toes product that infringes the Yoga Toes[®] Patents;

B) a permanent injunction enjoining Defendants from making, using or selling any product including, but not limited to, its Healthy Toes product that infringes the Yoga Toes[®] Patents;

C) an accounting for damages resulting from Defendants' patent infringement and contributory infringement and the trebling of such damages because of the knowing, willful, and wanton nature of Defendants' conduct;

D) an assessment of interest on the damages so computed;

E) an award of FenF's attorney's fees and costs in this action under 35 U.S.C. § 285;

F) Judgment against Defendants for temporary, preliminary and permanent injunctions granted pursuant to 15 U.S.C. § 1114, enjoining Defendants and its affiliates, partners, representatives, servants, employees, attorneys and all persons in active concert privity or participation with Defendants from using the Yoga Toes[®] mark, or any other mark confusingly similar to the Yoga Toes[®] mark and from otherwise infringing FenF's trademarks

and/or trade names; from competing unfairly with FenF; from falsely designating the origin of the Defendants' goods and from diluting the distinctive quality of FenF's trademarks, from engaging in deceptive trade practices in violation of 15 U.S.C. § 1051, *et seq.* and Ohio Revised Code § 4165, *et seq.*; and from further engaging in unfair competition, and specifically:

(i) using in any manner FenF's Yoga Toes[®] mark, any mark or name confusingly similar to Yoga Toes[®], or any other mark which so resembles FenF's marks as to be likely to cause confusion, deception or mistake, on or in connection with the manufacturing, sales, or offer for sale, of an orthopedic device to stretch and exercise the toes and feet;

(ii) passing off, inducing or enabling others to sell or pass off any services as being rendered by FenF, which services are not in fact rendered by FenF or belonging to FenF, under the control, supervision and approval of FenF, or for sale under the Yoga Toes[®] mark, or any other mark which so resembles the Yoga Toes[®] mark so as to be likely to cause confusion, deception or mistake;

(iii) committing any acts, including the use of FenF's Yoga Toes[®] mark, calculated to cause purchasers to believe that Defendants' products and/or services are those sold under the control and supervision of FenF, or are sponsored, approved, or connected with FenF, are guaranteed by FenF, or are rendered under the control and supervision of FenF;

(iv) further diluting and infringing FenF's Yoga Toes[®] mark and damaging its goodwill;

(v) rendering any services under the Yoga Toes[®] mark or any other distinctive design or trademark confusingly similar thereto.

G) A preliminary and permanent injunction issued enjoining Defendants from making, using, selling, or offering for sale products that infringe FenF's intellectual property.

H) An accounting for damages resulting from Defendants' infringement and contributory infringement and the trebling of such damages because of the knowing, willful, and wanton nature of Defendants' conduct.

I) Plaintiff's damages, enhanced statutory damages, attorneys', and/or Defendants' profits, pursuant to 17 U.S.C. § 504.

J) Judgment against Defendants for the greater of triple the amount of actual damages suffered by FenF pursuant to 15 U.S.C. § 1117(b) or statutory damages under 15 U.S.C. § 1117(c).

K) Judgment for an award of punitive damages against Defendants and in favor of FenF.

L) Judgment that costs of this action be awarded FenF.

M) Judgment that FenF be awarded its reasonable attorneys' fees along with an assessment of interest on all the damages so computed.

N) Judgment against Defendants indemnifying FenF from any claims brought against FenF for negligence, debts, malpractice, product liability, or other breaches of any duty owed by Defendants to any person who was confused as to some association between FenF and Defendants as alleged in this Complaint.

O) Judgment against Defendants for an accounting and monetary award in an amount to be determined at trial.

P) Ordering the destruction of any and all materials in Defendants' possession, custody or control bearing a colorable imitation of any Yoga Toes® intellectual property,

including but not limited to, the Healthy Toes product, packages, labels, and other printed and digital material, along with the means of making same.

Q) Requiring Defendants to account to FenF for all sales and purchases that have occurred to date, and requiring Defendants to disgorge any and all profits derived by Defendants from selling the Healthy Toes product.

R) Requiring Defendants to provide full disclosure of any and all information relating to its supplier or suppliers of the Healthy Toes product.

S) Requiring Defendants to provide to FenF the location of any and all manufacturing equipment, including, but not limited to, the molds used to manufacture the Healthy Toes products.

T) Requiring Defendants to destroy any and all manufacturing equipment used to manufacture the Healthy Toes products or to deliver said manufacturing equipment to FenF.

U) Ordering a product recall of all Healthy Toes products, for destruction.

V) Requiring Defendants to file with this Court and serve on FenF within thirty (30) days of this Court's order a report setting forth the manner and form in which Defendants have complied with the Order.

W) Requiring Defendants to provide to FenF all sales records including, but not limited to, email, mailing, and advertising lists.

X) Damages according to each and every cause of action alleged herein.

Y) Prejudgment interest.

Z) Such other and further relief as this Court may deem just and proper.

Respectfully submitted,

BROUSE MCDOWELL

/s/ Joseph T. Dattilo

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Attorneys for Plaintiff, FenF, LLC

DEMAND FOR JURY TRIAL

Plaintiff FenF, LLC hereby demands a trial by jury on all issues so triable.

February 19, 2008
Date

/s/ Joseph T. Dattilo
Joseph T. Dattilo
Attorney for Plaintiff FenF, LLC