

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. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

Plaintiff Valerie Bezdek (“Plaintiff”), on behalf of herself and all others similarly situated, hereby submits the following Class Action Complaint (“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. Plaintiff files this class action on behalf of herself and all others similarly situated to obtain restitution and injunctive relief from Defendants for the Class, as defined, *infra*, at paragraphs 59 and 60.

2. In recent years, “barefoot running” has increased in popularity. Defendants design, manufacture, market, distribute and sell shoes called Vibram FiveFingers (“FiveFingers”) that are designed to capitalize on this fitness craze. FiveFingers are among the so-called “minimalist” shoes intended to replicate barefoot running.

3. Through an extensive, comprehensive, and uniform nationwide marketing campaign, Defendants claim that “scientific research” shows that their expensive FiveFingers

(ranging from approximately \$80-\$125 per pair) will provide “all the health benefits of barefoot running” to anyone who runs in them and that traditional running shoes do not provide such health benefits. Given that Defendants’ advertising and marketing equates barefoot running with running in FiveFingers, Defendants’ uniform deceptive statements about barefoot running are also deceptive statements about FiveFingers.

4. Defendants have claimed that running in 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 a premium for FiveFingers that consumers readily paid, believing FiveFingers would confer upon them significant health benefits. Unbeknownst to consumers, Defendants’ health benefit claims are 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 running barefoot.

5. The American Podiatric Medical Association’s position on barefoot running 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.<sup>1</sup>

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

6. Not only is there no reliable data demonstrating that running in FiveFingers will yield the health benefits Defendants say they will yield, but consumers hoping to reap the touted health benefits from FiveFingers must first change the way they have always run with conventional running shoes. With conventional running shoes, the runner runs with a heel-strike manner. But with FiveFingers, a runner must run with a forefoot strike pattern.<sup>2</sup> This process, necessary with 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.”<sup>3</sup> Notably, some people may never change their gait.

7. A consumer would only purchase the premium-priced FiveFingers, which requires that consumer to change his/her gait while running, in reliance on Defendants’ uniform deceptive health benefit claims.

8. 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.”<sup>4</sup> Defendants’ conveyed and continue to convey

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<sup>2</sup> “More minimal sneakers tend to continue enabling a heel-strike running form, whereas running in Vibram FiveFingers means learning to run on the forefoot.” Vibram, [http://www.vibramfivefingers.com/faq/barefoot\\_running\\_faq.htm](http://www.vibramfivefingers.com/faq/barefoot_running_faq.htm) (last visited Mar. 9, 2012).

<sup>3</sup> 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).

<sup>4</sup> Tomlinson LLC, *Vibram FiveFingers Brand Image Development*, <http://www.tomlinson-llc.com/casestudy/vibram-fivefingers/> (last visited Mar. 9, 2012).

their deceptive claims about FiveFingers through a variety of media, including the Internet, social media websites, magazines, and newspapers. Additionally, Defendants conveyed and continue to convey their deceptive claims about FiveFingers at the point of sale, with packaging that typically includes booklets and hang tags and with displays.

9. As a result of Defendants' 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. Moreover, Defendants have been able to charge a significant price premium for FiveFingers over other conventional running shoes. This action seeks to obtain redress for purchasers of FiveFingers, and to enjoin Defendants' deceptive and unlawful advertising. Plaintiff brings this 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 and the Florida Deceptive and Unfair Trade Practices Act, Florida Statutes §501.201 *et seq.*

#### **JURISDICTION AND VENUE**

10. 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.

11. 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**

12. 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.

13. 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.

14. 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.

15. 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.

16. 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**

17. Running barefoot has increased in popularity in recent years.

18. Intending to capitalize on the rising popularity of barefoot running, Defendants launched FiveFingers in the U.S. in or about April 2006. Running in FiveFingers is intended to mimic running barefoot. According to Defendants, "running completely barefoot . . . exposes you to elements and obstacles that can cause injury. Running in Vibram FiveFingers® enables you to reap the rewards of running barefoot while reducing those risks."<sup>5</sup>

19. FiveFingers are "thin, flexible soles that are contoured to the shape of the human foot, including visible individual sections for the toes."<sup>6</sup> According to Defendants' website, with 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."<sup>7</sup> Defendants thus tout the "health benefits" of FiveFingers as akin to the "rewards of running barefoot."

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<sup>5</sup> Vibram, <http://vibramfivefingers.shopinas.com/pages/index/about-us> (last visited Mar. 9, 2012).

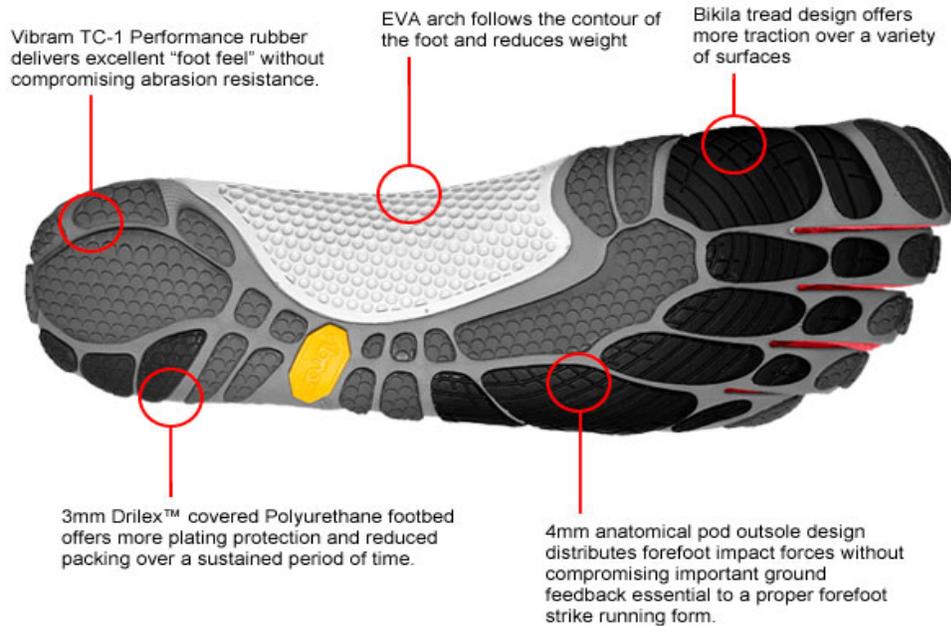
<sup>6</sup> Wikipedia, [http://en.wikipedia.org/wiki/Vibram\\_FiveFingers](http://en.wikipedia.org/wiki/Vibram_FiveFingers) (last visited Mar. 9, 2012).

<sup>7</sup> Vibram, [http://www.vibramfivefingers.com/barefoot-sports/barefoot\\_running.htm](http://www.vibramfivefingers.com/barefoot-sports/barefoot_running.htm) (last visited Mar. 9, 2012).

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



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



22. Because FiveFingers require a running style that is different from traditional running shoes, runners must change the way they run when running in FiveFingers. However, as indicated in the recent ACE Study, changing one’s running form to use FiveFingers can be an extremely long and complicated process.<sup>8</sup> Given that most runners have always worn traditional running shoes, they have “been ‘programmed’ to run in the conventional heel-strike manner.”<sup>9</sup> As Dr. Cedric Bryant, the chief science officer for the American Council on Exercise stated, “[t]he key thing our study seems to suggest is that it’s really important you take some time to really adjust your running form or running style.”<sup>10</sup>

<sup>8</sup> See McCarthy, et al., *supra* note 3, *Like Barefoot, Only Better?* at 10-12.

<sup>9</sup> See *id.* at 9.

<sup>10</sup> 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).

23. Defendants themselves acknowledge how difficult it is to transition to running in FiveFingers. On the hang tag of each FiveFingers shoe, Defendants state as follows: “If you are running in FiveFingers for the first time, we encourage a very gradual transition to ensure a safe and pleasurable experience. Please visit our website, [www.vibramfivefingers.com](http://www.vibramfivefingers.com) for resources related to natural running and training.” This website features, among other things, a twenty-page step-by-step guide that purports to provide advice as to how to run in FiveFingers.<sup>11</sup>

24. Moreover, on their website, Defendants admit that it could take more than a year before one is able to transition to run in FiveFingers:

**How long will it take to transition to Vibram FiveFingers®?**

For some, it is a matter of weeks, for others months, and **for a few it could be a year or more.** Much is dependent on your foot type, the activities you're using Vibram FiveFingers for, and the amount of pronation you experience. The progression will ultimately be worth the wait, and your foot and body will be stronger and better off for it. The answer lies in your inherent foot and body biomechanics and the condition of your muscles. Just remember, improving the skill of those muscles then practicing and using those muscles in Vibram FiveFingers will increase both endurance and strength. This will have profound beneficial effects on your body and wellbeing. Listen to your body.<sup>12</sup>

25. Not only will transitioning to run in FiveFingers take significant time, it can be fraught with pain and injuries. According to the ACE Study, runners wearing FiveFingers “who fail to change over to a more forefoot stride while wearing Vibrams may open themselves up to discomfort and possible injury.”<sup>13</sup> Indeed, one podiatrist, who specializes in sports medicine and

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<sup>11</sup> Vibram, *Running In Vibram Five-Fingers®: A Step-By-Step Guide*, [http://s3.amazonaws.com/VibramFiveFingers/Barefoot\\_Running\\_Brochure\\_R13\\_062211.pdf](http://s3.amazonaws.com/VibramFiveFingers/Barefoot_Running_Brochure_R13_062211.pdf) (last visited Mar. 9, 2012).

<sup>12</sup> Vibram, <http://www.vibramfivefingers.com/faq/biomechanics.htm> (emphasis added) (last visited Mar. 9, 2012).

<sup>13</sup> McCarthy, et. al., *supra* note 3, *Like Barefoot, Only Better?*, at 11.

is a marathon runner, said that 85% of her patients get injured trying to transition to minimalist shoes.<sup>14</sup>

26. Even on their website, Defendants admit that it is not unusual to experience pain when using FiveFingers:

**If my Vibram FiveFingers® hurt while running, should I continue using them?**

Minor initial discomfort is not unusual for some individuals, depending on your foot type and running style, but you should not continue if pain persists. Transitioning slowly to build proper strength is imperative when beginning to run in Vibram FiveFingers.<sup>15</sup>

27. It does not appear that Defendants mention on their website that some runners attempting to transition to FiveFingers may never adjust their form. The researchers in the ACE Study “found that half of the women who switched to barefoot running or minimalist sports shoes failed to adjust their form.”<sup>16</sup> These runners had “more wear and tear on their bodies, not less.” John P. Porcari, professor of exercise and sports science and one of the authors of the ACE Study, stated that “[p]eople who run, they’ve run in shoes for so long, landing on their heels, that some of them are going to continue to do that . . . . When you land on your feet, the force gets transmitted up the kinetic chain — to feet, to ankles, to knees, to hips, to back. That’s why runners can have injuries from their toenails to their belly button.”<sup>17</sup>

**The Deceptive Marketing Campaign**

28. Upon information and belief, since Defendants began selling FiveFingers in the U.S. in or around April 2006, they made uniform representations that FiveFingers provide

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<sup>14</sup> Andrew Adam Newman, *Appealing to Runners, Even the Barefoot Brigade*, N.Y. Times, Jul. 27, 2011, at B3, available at [http://www.nytimes.com/2011/07/28/business/media/appealing-to-runners-even-the-shoeless.html?\\_r=1](http://www.nytimes.com/2011/07/28/business/media/appealing-to-runners-even-the-shoeless.html?_r=1) (last visited Mar. 16, 2012).

<sup>15</sup> Vibram, [http://www.VibramFiveFingers.com/FAQ/barefoot\\_running\\_Faq.htm](http://www.VibramFiveFingers.com/FAQ/barefoot_running_Faq.htm) (last visited Mar. 9, 2012).

<sup>16</sup> Parker-Pope, *supra* note 10, *Are Barefoot Shoes Really Better?*

<sup>17</sup> *Id.*; see also McCarthy, et. al., *supra* note 3, *Like Barefoot, Only Better?*, at 10-11.

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 give the impression that there is such reliable scientific proof.

29. Defendants make these representations either specifically about FiveFingers or about barefoot running, which FiveFingers are intended to mimic. Either way, these deceptive claims are intended to induce consumers to purchase FiveFingers.

30. Since April 2006, Defendants have heavily promoted FiveFingers through: 1) point of sale promotions (in-store displays and/or salespersons in stores); 2) hang tags and brochures accompanying FiveFingers; and 3) various types of advertisements, including, *inter alia*, Internet advertising and marketing, such as statements on [www.vibramfivefingers.com](http://www.vibramfivefingers.com), postings on the video sharing website [youtube.com](http://youtube.com), [facebook.com](http://facebook.com), 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*.<sup>18</sup> Upon information and belief, Defendants’ deceptive claims regarding FiveFingers are repeated and reinforced in all of their advertising and marketing materials.

31. Defendants’ uniform, deceptive statements on their website have been conveyed to Class members. 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.”<sup>19</sup> Even the hang tag attached to FiveFingers refers consumers to Defendants’ website with the following language: “If you are running in FiveFingers for the first time, we encourage a very

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<sup>18</sup> Tomlinson LLC, *supra* note 4, *Vibram Fivefingers Brand Image Development*.

<sup>19</sup> [vibramfivefingers.com](http://vibramfivefingers.com), *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).

gradual transition to ensure a safe and pleasurable experience. Please visit our website, [www.vibramfivefingers.com](http://www.vibramfivefingers.com) for resources related to natural running and training.” Not surprisingly, Defendants’ website had 5,806,936 page views in one month alone.<sup>20</sup>

32. Defendants’ website is replete with uniform deceptive statements about the health benefits that FiveFingers provide. For example, Defendants 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.

### **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.\*<sup>21</sup>

33. Defendants’ postings on their Facebook page repeat similar deceptive statements.<sup>22</sup>

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<sup>20</sup> Tomlinson LLC, *supra* note 4, *Vibram Fivefingers Brand Image Development*.

<sup>21</sup> Vibram, [http://www.vibramfivefingers.com/about\\_vibram\\_fivefingers/health\\_wellness.htm](http://www.vibramfivefingers.com/about_vibram_fivefingers/health_wellness.htm) (last visited Mar. 9, 2012).

<sup>22</sup> Facebook, <http://www.Facebook.com/VibramFiveFingers> (click on “Info” link) (last visited Mar. 9, 2012).

34. On prior versions of [www.vibramfivefingers.com](http://www.vibramfivefingers.com), Defendants represented that there were *six* reasons to wear FiveFingers.<sup>23</sup> 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.**

35. 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.”

36. Similarly deceptive statements on [www.vibramfivefingers.com](http://www.vibramfivefingers.com) are as follows:

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<sup>23</sup> Way Back Machine, [http://web.archive.org/web/20100817003233/http://www.vibramfivefingers.com/technology/health\\_wellness.cfm](http://web.archive.org/web/20100817003233/http://www.vibramfivefingers.com/technology/health_wellness.cfm) (last visited Mar. 9, 2012).

**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.<sup>24</sup>

37. Defendants deceptively claim there is scientific support for these “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.*<sup>25</sup>

38. Defendants make similarly deceptive claims in a brochure included within FiveFingers boxes, 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](http://www.vibramfivefingers.com). (Emphasis added).*

39. 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

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<sup>24</sup> Vibram, <http://www.vibramfivefingers.com/barefoot-sports/> (last visited Mar. 9, 2012).

<sup>25</sup> Vibram, *supra* note 7 (emphasis added).

section on the Vibram website[]” and referred to the “the vital health benefits in utilizing a minimalist fitness routine.”<sup>26</sup>

40. Defendants deceptively use the endorsement of podiatrists to give credence to their claims that there is scientific support for Defendants’ uniform “health benefit” claims. For example, in previous versions of [www.vibramfivefingers.com](http://www.vibramfivefingers.com), Dr. Ivo Waerlop of the “Vibram Biomechanics Advisory Board” 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.””<sup>27</sup>

41. Defendants repeat their uniform deceptive “health benefits” claims in 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, 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).

42. Regardless of the medium used, Defendants’ advertisements and marketing for FiveFingers convey to consumers that by running in FiveFingers, consumers will reap significant “health benefits,” more so than through running in conventional running 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;

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<sup>26</sup> *Vibram FiveFingers: Minimalist Footwear Company, Vibram FiveFingers Debuts New Educational Resources*, India Retail News, Feb. 8, 2012.

<sup>27</sup> Way Back Machine, [http://web.archive.org/web/20100722095020/http://www.vibramfivefingers.com/barefooting/barefoot\\_running.cfm](http://web.archive.org/web/20100722095020/http://www.vibramfivefingers.com/barefooting/barefoot_running.cfm) (last visited Mar. 9, 2012).

- (d) Stimulated neural function improving balance, agility and range of motion;
- (e) Improved spine alignment;
- (f) Improved posture;
- (g) Reduced lower back pain;<sup>28</sup> and
- (h) Improved proprioception and body awareness.

43. As set forth herein, however, Defendants know or should know that there is no scientific evidence proving that running in FiveFingers will provide these benefits in any greater degree than running in conventional running shoes.

44. 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 while running in FiveFingers that are not proven to exist even though the transition to running in FiveFingers would likely be a long, complicated process that can actually cause, rather than prevent, injury.

45. Plaintiff cannot, without discovery, know the details of the bases for Defendants' deceptive claims concerning running in FiveFingers. However, Plaintiff is informed and believes and thereon alleges that each statement regarding the above-mentioned health benefits was not and is not based on any sound scientific studies subject to traditional scientific scrutiny in that none of the studies (to the extent there were any) was performed by impartial parties who conducted appropriately powered double-blind, placebo-controlled studies, and none of the studies was subjected to peer review or other methods traditionally used by the scientific community to ensure accurate results.

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<sup>28</sup> Way Back Machine, <http://web.archive.org/web/20070322215621/http://www.vibramfivefingers.com/health.html> (last visited Mar. 9, 2012).

### **There is No Adequate Support for Defendants' Deceptive Representations**

46. As discussed above, Defendants consistently mislead consumers into thinking that there is “scientific research” proving that running in FiveFingers has health benefits--such as improved foot health, reduced risk of injury, strengthened muscles in feet and lower legs, stimulated neural function, spine alignment, improved posture, reduced lower back pain, and improved proprioception--that running in conventional running shoes does not provide.

47. However, as illustrated below, there is no scientific proof supporting Defendants' representations.

48. As the American Podiatric Medical Association's position on barefoot running indicates, Defendants' many deceptive statements about the purported “health benefits” are false 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.***<sup>29</sup>

49. As one recently published 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.”<sup>30</sup>

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<sup>29</sup> APMA Position Statement on Barefoot Running, *supra* note 1 (emphasis added).

<sup>30</sup> 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.

50. One other example as to the lack of scientific research on minimalist shoes is illustrated through the U.S. Army. Although there are those in the military who appear to be transitioning to minimalist shoes, like FiveFingers, the U.S. Army plans to study the effectiveness of the shoes. The reason is that the effectiveness of minimalist shoes is scientifically unproven.<sup>31</sup> As Lt. Col. Timothy Pendergrass stated, “[w]hat we do know is we don’t know a whole lot, and we need more research.”<sup>32</sup> 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.”<sup>33</sup>

51. 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.”<sup>34</sup> 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.”<sup>35</sup> Indeed, “[e]vidence that barefoot running directly prevents or improves running-related injuries is nonexistent.”<sup>36</sup> Also, Amby Burfoot, editor-at-large for Runner’s World magazine wrote of another study, “[n]o one has ever

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<sup>31</sup> Joe Gould, *Army Seeks More Input on Minimalist Shoes*, Army Times, Feb. 13, 2012, 23.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Jenkins, et. al., *supra* note 30, *Barefoot Running Claims and Controversies*, at 235 (emphasis added).

<sup>35</sup> *Id.* at 240 (citations omitted).

<sup>36</sup> *Id.* at 242.

proven that any running shoes prevent running injuries, and no one has ever proven that barefoot running prevents running injuries.”<sup>37</sup>

52. 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 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.***<sup>38</sup>

53. Even Daniel Lieberman, one of the most outspoken proponents of barefoot running acknowledges that “[a]lthough there are anecdotal reports of reduced injuries in barefoot populations, controlled prospective studies are needed to test the hypotheses 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.”<sup>39</sup>

54. Ironically, 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 running shoes.

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<sup>37</sup> 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).

<sup>38</sup> Nigg Article at 76 (emphasis added).

<sup>39</sup> Daniel E. Lieberman, et. al., *Foot Strife Patterns and Collision Forces in Habitually Barefoot Versus Shod Runners*, Nature, Jan. 28, 2010, at 534.

55. 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.

56. 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 running in FiveFingers improves proprioception has no reliable scientific support.

57. 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."<sup>40</sup> The Nigg Article further demonstrates why comparing barefoot running and running in FiveFingers is deceptive. The Nigg Article states as follows:

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<sup>40</sup> See Parker-Pope, *supra* note 10, *Are Barefoot Shoes Really Better?*

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.<sup>41</sup>

58. Defendants have reaped millions of dollars in profits by leading consumers to believe that there is reliable scientific data backing up their claims that FiveFingers, *inter alia*, strengthen muscles and reduce the risk of injury. Consumers intending to use FiveFingers for running 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 was a high likelihood they would be unable to change their gait to properly run in FiveFingers and, that, even if they did change their gait, there is no scientific evidence supporting Defendants’ major health benefit claims.

### **CLASS ACTION ALLEGATIONS**

59. 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 for running, 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.

60. 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 in the State of Florida for running, during the period from

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<sup>41</sup> Nigg Article at 78.

March 21, 2008 until notice is disseminated to the Class. Excluded from the Florida 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.

61. *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.

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

63. **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.

64. **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.

65. **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.

66. 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.

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

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

**FIRST CLAIM**

**(Untrue and Misleading Advertising under Mass. Gen. Laws ch. 266 § 91)**

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

70. 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.

71. 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.

72. 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.

73. 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 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))*

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

75. 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).

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

77. 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 . . . .”

78. 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.

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

80. 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.

81. 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.

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

**THIRD CLAIM**  
**(Unjust Enrichment)**

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

84. Defendants sold FiveFingers shoes at premium prices because of 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.

85. 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.

86. Retention by Defendants of the benefit conferred by Plaintiff and the Class would, under the circumstances, be inequitable in that Defendants have charged a "premium" price for a shoe that performs no better than other running shoes sold for much less.

87. 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. Individual restitution to Plaintiff and each member of the Class;
- C. An order requiring Defendants to immediately cease their wrongful conduct as set forth above;
- D. For reasonable attorneys' fees and the costs of this action;
- E. For statutory pre-judgment interest; and
- F. For such other relief as this Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

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

Dated: March 21, 2012

Respectfully submitted,

BERMAN DEVALERIO

/s/ Glen DeValerio

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