

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – DETROIT

FenF, LLC,)	
)	
Plaintiff,)	Civil Action No.: 18-13323
)	
vs.)	
)	
Sequential Brands Group, Inc. and)	
Fit for Life LLC,)	JURY TRIAL DEMANDED
)	
Defendants.)	
)	

COMPLAINT AND JURY DEMAND

Plaintiff FenF, LLC ("FenF"), by its undersigned attorneys, alleges the following for its Complaint against Defendants Sequential Brands Group ("Sequential") and Fit for Life LLC ("FFL") (hereafter collectively referred to as "Defendants"):

Parties

1. FenF is a limited liability company organized and existing under the laws of Michigan and having a place of business located at 8155 Huron River Drive, Dexter, Michigan 48130.
2. On information and belief, Sequential is a corporation existing under the laws of Delaware and having a place of business at 601 West 26th Street, 9th Floor, New York, New York 10001.

3. On information and belief, FFL is a corporation existing under the laws of Delaware and having a place of business at 833 West South Boulder Road, Suite G, Louisville, Colorado 80027.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1121, because this action arises under the federal trademark and unfair competition laws of the United States (Title 15 Chapter 22 of the United States Code).

5. This Court has personal jurisdiction over Defendants because Defendants have conducted and continue to conduct business in this judicial district and, on information and belief, have engaged in activities related to FenF's claims of unfair competition and federal trademark infringement that establish minimum contacts with the State of Michigan, including having committed acts of federal unfair competition and federal trademark infringement in this judicial district, and the exercise of personal jurisdiction over Defendants is reasonable and fair.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391.

Common Allegations

7. FenF sells foot-therapy products under the name "Yoga Toes" that are designed to treat various foot and toe ailments including hammertoes, flat feet, bunions, poor circulation, plantar fasciitis, and crossed toes.

8. The foot-therapy products that FenF sells under the Yoga Toes name include the Yoga Toes GEMS® Toe Stretcher (pictured below to the left) and the Original Yoga Toes Toe Stretcher (pictured below to the right). The Yoga Toes GEMS® Toe Stretcher and the Original Yoga Toes Toe Stretcher are referred to collectively as the “Yoga Toes products”).



YogaToes GEMS® Toe Stretcher



Original YogaToes Toe Stretcher

9. FenF sells its YogaToes products on-line through its website (www.yogatoes.com) as well as through other on-line retailers such as Amazon.com.

10. At all relevant times since at least December 10, 2002, FenF has been using the trade name Yoga Toes in interstate commerce in connection with advertising, marketing, promoting, and selling its Yoga Toes products.

11. FenF’s Yoga Toes products have been featured on television shows such as *Rachel Ray*, *Dr. Oz* and *The Today Show* featuring Kathy Lee and Hoda.

12. FenF's Yoga Toes products have also been featured in publications such as The Wall Street Journal, New York Magazine, and Oprah Magazine.

13. FenF has spent over \$5 Million dollars in promoting its Yoga Toes products since at least 2003.

14. As a result of FenF's sales, advertising, and the quality and uniqueness of its Yoga Toes products, FenF has been the number one seller on Amazon in its product category for over 3 years.

15. FenF has acquired value, name and brand recognition, and goodwill in the Yoga Toes names as a result of continual and substantial advertising, promotion, and interstate commercial activity related to its Yoga Toes products.

16. FenF is the owner by assignment of United States Trademark Registration No. 3,253,636 ("the 636 registration") for the mark YOGA TOES and has the right to bring a cause of action for infringement of a federally registered trademark. The YOGA TOES mark was registered on June 19, 2007. A true and correct copy of the 636 registration is attached to this Complaint as Exhibit A.

17. FenF is the owner by assignment of United States Trademark Registration No. 3,430,215 ("the 215 registration") for the mark YOGATOES and has the right to bring a cause of action for infringement of a federally registered trademark. The YOGATOES mark was registered on May 20, 2008. A true and correct copy of the 215 registration is attached to this Complaint as Exhibit B.

18. Each of the 636 registration and the 215 registration has become incontestable under 15 U.S.C. § 1065.

19. Sequential sells a toe stretcher product (pictured below) under its GAIAM brand and identifies the product as “YOGA TOE SPREADERS.”



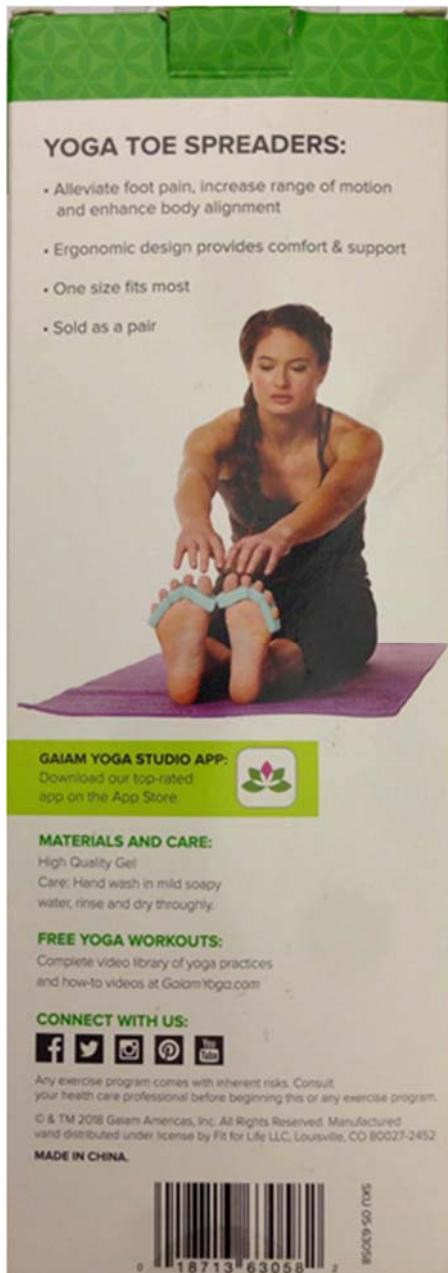
Defendants' YOGA TOE SPREADERS

20. Sequential sells Defendants' YOGA TOE SPREADERS on-line through a website it owns and controls, www.gaiam.com.

21. Sequential also supplies Defendants' YOGA TOE SPREADERS to Amazon.com, Inc. (“Amazon”) for resale by Amazon to the general public on Amazon's retail website (www.amazon.com).

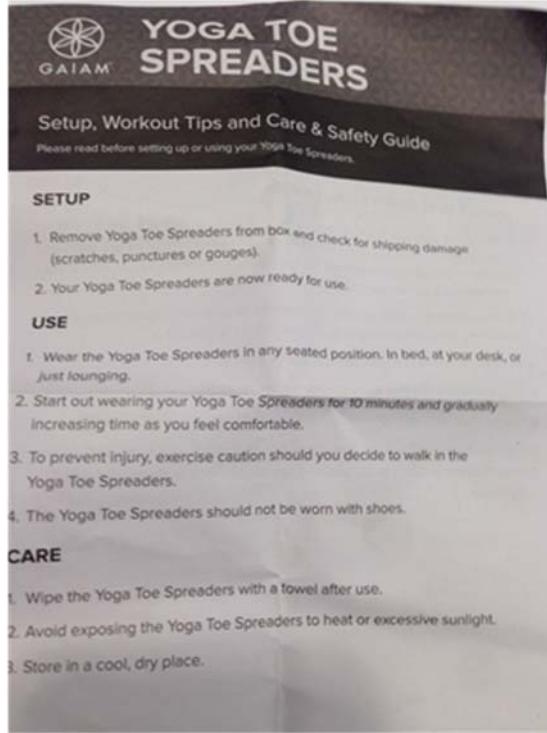
22. According to the packaging, FFL is a licensed distributor of Defendants' YOGA TOE SPREADERS for Sequential.

23. The product packaging of Defendants' YOGA TOE SPREADERS uses the term "YOGA TOE" in a non-descriptive, trademark sense as part of the product name, as shown below:



24. A package insert, which is included in the product packaging along with Defendants' YOGA TOE SPREADERS, also repeatedly uses the term "YOGA

TOE" in a non-descriptive, trademark sense as part of the product name, as shown below:

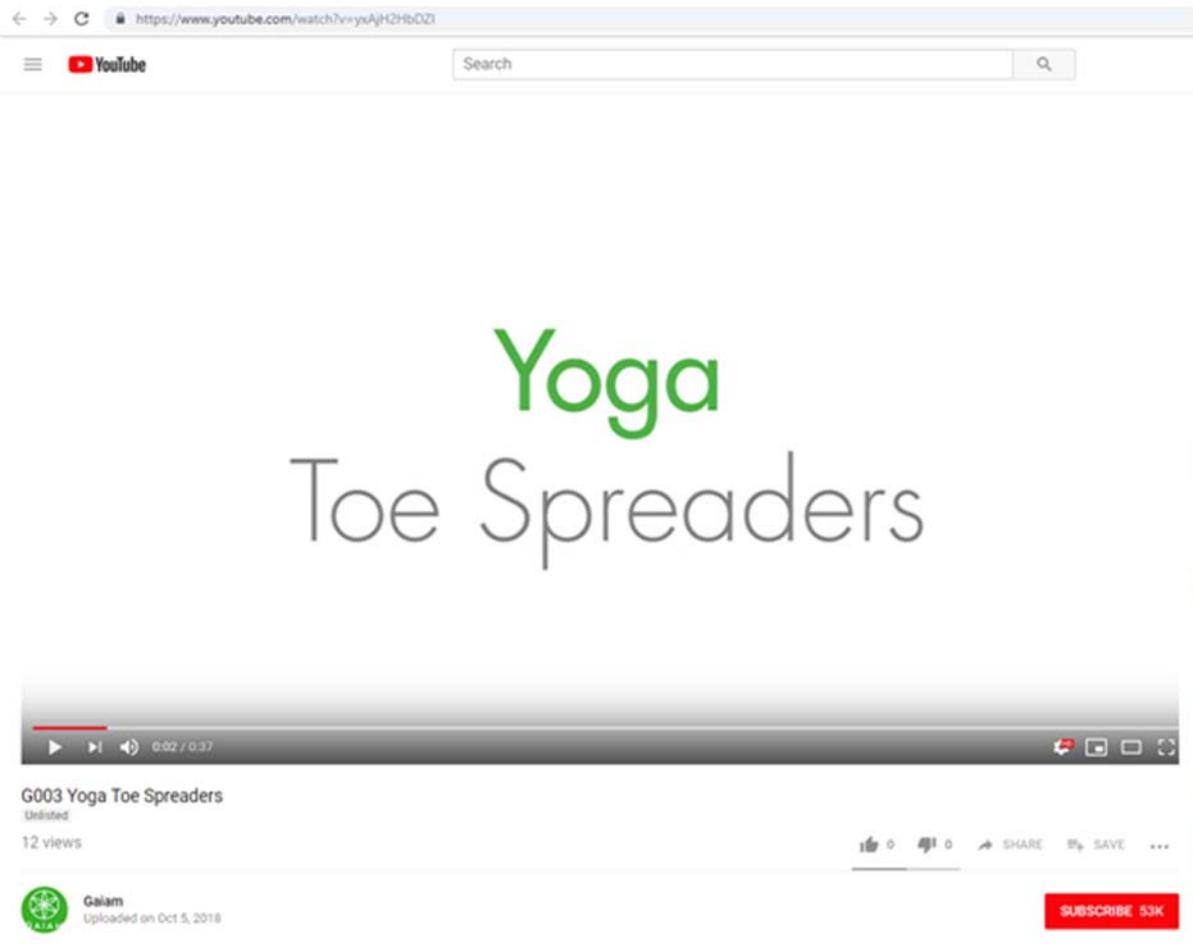


25. In the webpage of the [gaiam.com](https://www.gaiam.com/collections/yoga-props-accessories/products/yoga-toe-spreaders) website where Defendants' YOGA TOE SPREADERS can be purchased, shown below (<https://www.gaiam.com/collections/yoga-props-accessories/products/yoga-toe-spreaders>), which upon information and belief is owned and controlled by Sequential, the term "YOGA TOE" is used in a non-descriptive, trademark sense and is prominently displayed as part of the product name.



Screenshot of webpage from www.gaiam.com

26. In a YouTube video where Defendants' YOGA TOE SPREADERS are advertised, available at <https://www.youtube.com/watch?v=yxAjH2HbDZI> and pictured below in still frame, which upon information and belief is controlled by Sequential, the term "Yoga Toe Spreaders" is prominently displayed beneath the video, and the narrator of the video repeatedly refers to GAIAMS's product as "yoga toe spreaders."



Still frame of Defendants' YOGA TOE SPREADERS from their YouTube video

27. Defendants' YOGA TOE SPREADERS compete directly with FenF's Yoga Toes products for sales in the same relevant market and to the same customer base.

28. The use of the term "YOGA TOE" in connection with Defendants' YOGA TOE SPREADERS sold by Sequential and distributed by FFL is likely to cause confusion with FenF's "Yoga Toes" brand as to the source of Defendants' YOGA TOE SPREADERS.

29. Neither Sequential nor FFL has a license or is otherwise duly authorized to use FenF's YOGA TOES® or YOGATOES ® marks.

30. Upon information and belief, Sequential and FFL were actively aware of FenF, FenF's Yoga Toes products, and FenF's trademark rights in YOGA TOES® and YOGATOES ® since at least 2011.

31. From approximately August 2011 until March 2015, GAIAM, Inc. purchased Original Yoga Toes Toe Spreaders from FenF under a supply agreement and resold the purchased products on the website www.gaiam.com, which it owned at the time, as supplied by FenF under the Yoga Toes brand name.

32. In February 2015, a product developer from GAIAM, Inc. Mr. Christopher Salt, contacted FenF on behalf of GAIAM, Inc. to discuss the possibility of FenF and GAIAM, Inc. entering into a new product co-branding relationship whereby FenF would sell Original Yoga Toes Toe Spreaders to GAIAM as a private label bearing the GAIAM brand name.

33. During discussions between FenF and GAIAM, Inc., FenF reiterated to Christopher Salt in a March 2015 email that FenF owned various trademarks and patents in relation to its Yoga Toes brand and the Yoga Toes products it sells.

34. FenF and GAIAM, Inc. never entered into the new product relationship proposed by Christopher Salt.

35. Upon information and belief, Sequential Brands closed on the acquisition of the branded consumer product business of GAIAM, Inc. in July 2016, which included the purchase of the GAIAM brand.

36. Upon information and belief, Christopher Salt is employed by Sequential as Director of Product Development / Director of Creative at GAIAM.

**Count I - Violation of Section 32 of the Lanham Act
(Infringement of Trademark Registration No. 3,253,636)**

37. FenF repeats and realleges the allegations contained in paragraphs 1 through 36 as if fully set forth herein.

38. Defendants have used and continue to use of the mark “YOGA TOE” in interstate commerce, without authorization from FenF, in connection with the marketing, advertising, promotion, sale, and distribution of Defendants’ YOGA TOE SPREADERS.

39. Defendants’ use of the mark “YOGA TOE” is likely to cause confusion, to cause mistake, and/or to deceive purchasers as to the source of Defendants’ YOGA TOE SPREADERS or as to Defendants’ affiliation, connection, approval, sponsorship, or association with FenF.

40. Defendants’ actions constitute infringement of FenF’s federally registered trademark for “YOGA TOES” (the 636 registration) in violation of Section 32(a) of the Lanham Act, 15 U.S.C. § 1114.

41. Defendants' infringing conduct has caused damage to FenF's business, reputation, goodwill, profits, and the strength of FenF's federally registered YOGA TOES trademark.

42. On information and belief, Defendants were actively aware of FenF and its YOGA TOES federal trademark registration when they began selling Defendants' YOGA TOE SPREADERS, yet proceeded anyway to use the mark YOGA TOES in connection with their product, thus rendering Defendants' infringement willful and deliberate.

**Count II - Violation of Section 32 of the Lanham Act
(Infringement of Trademark Registration No. 3,430,215)**

43. FenF repeats and realleges the allegations contained in paragraphs 1 through 42 as if fully set forth herein.

44. Defendants have used and continue to use of the mark "YOGA TOE" in interstate commerce, without authorization from FenF, in connection with the marketing, advertising, promotion, sale, and distribution of Defendants' YOGA TOE SPREADERS.

45. Defendants' use of the mark "YOGA TOE" is likely to cause confusion, to cause mistake, and/or to deceive purchasers as to the source of Defendants' YOGA TOE SPREADERS or as to Defendants' affiliation, connection, approval, sponsorship, or association with FenF.

46. Defendants' actions constitute infringement of FenF's federally registered trademark for "YOGATOES" (the 215 registration) in violation of Section 32(a) of the Lanham Act, 15 U.S.C. § 1114.

47. Defendants' infringing conduct has caused damage to FenF's business, reputation, goodwill, profits, and the strength of FenF's federally registered YOGATOES trademark.

48. On information and belief, Defendants were actively aware of FenF and its YOGATOES federal trademark registration when Defendants began selling Defendants' YOGA TOE SPREADERS, yet proceeded anyway to use the mark YOGA TOES in connection with their product, thus rendering Defendants' infringement willful and deliberate.

Count III – Federal Unfair Competition
(False Designation of Origin or Sponsorship – YOGA TOES)

49. FenF repeats and realleges the allegations contained in paragraphs 1 through 48 as if fully set forth herein.

50. FenF's YOGA TOES mark, which have been used in connection with YogaToes products since at least December 10, 2002, is inherently distinctive and has acquired secondary meaning through long and sustained use in interstate commerce and through substantial advertising, promotion, and sales.

51. Defendants and continue to use of the mark "YOGA TOE" in interstate commerce, without authorization from FenF, in connection with the marketing,

advertising, promotion, sale, and distribution of Defendants' YOGA TOE SPREADERS.

52. Defendants' use of "YOGA TOE" is likely to cause confusion, to cause mistake, and/or to deceive purchasers as to the source of Defendants' YOGA TOE SPREADERS or as to Defendants' affiliation, connection, approval, sponsorship, or association with FenF.

53. Defendants' actions constitute false designation of origin and false representation in connection with the sale, distribution, and related interstate commercial activity of Defendants' YOGA TOE SPREADERS in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125.

54. Defendants' unfair competition in connection with the use "YOGA TOE" in interstate commerce has caused, is causing, and will continue to cause damage to FenF's business, reputation, goodwill, profits, and the strength of the "YOGA TOES" mark.

55. On information and belief, Defendants were actively aware of FenF and its rights to the YOGA TOES mark when Defendants began selling Defendants' YOGA TOE SPREADERS, yet proceeded anyway to use the mark YOGA TOES in connection with their product, thus rendering Defendants' unfair competition willful and deliberate.

Count IV – Federal Unfair Competition
(False Designation of Origin or Sponsorship – YOGATOES)

56. FenF repeats and realleges the allegations contained in paragraphs 1 through 27 as if fully set forth herein.

57. FenF's YOGATOES mark, which have been used in connection with YogaToes products since at least December 10, 2002, is inherently distinctive and has acquired secondary meaning through long and sustained use in interstate commerce and through substantial advertising, promotion, and sales.

58. Defendants and continue to use of the mark "YOGA TOE" in interstate commerce, without authorization from FenF, in connection with the marketing, advertising, promotion, sale, and distribution of Defendants' YOGA TOE SPREADERS.

59. Defendants' use of "YOGA TOE" is likely to cause confusion, to cause mistake, and/or to deceive purchasers as to the source of Defendants' YOGA TOE SPREADERS or as to Defendants' affiliation, connection, approval, sponsorship, or association with FenF.

60. Defendants' actions constitute false designation of origin and false representation in connection with the sale, distribution, and related interstate commercial activity of Defendants' YOGA TOE SPREADERS in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125.

61. Defendants' unfair competition in connection with the use "YOGA TOE" in interstate commerce has caused, is causing, and will continue to cause damage to FenF's business, reputation, goodwill, profits, and the strength of the "YOGATOES" mark.

62. On information and belief, Defendants were actively aware of FenF and its rights to the YOGATOES mark when Defendants began selling Defendants' YOGA TOE SPREADERS, yet proceeded anyway to use the mark YOGA TOES in connection with their product, thus rendering Defendants' unfair competition willful and deliberate.

RELIEF REQUESTED

WHEREFORE, FenF respectfully requests that this Court enter a judgment that:

- A. Finds that Defendants infringe the 215 registration ("YOGATOES") in violation of 15 U.S.C. § 1114;
- B. Finds that Defendants infringe the 636 registration ("YOGA TOES") in violation of 15 U.S.C. § 1114;
- C. Awards FenF profits gained by Defendants as a result of Defendants' trademark infringement, increased to an amount this Court deems just, pursuant 15 U.S.C. § 1117;

D. Awards FenF actual damages sustained as a result of Defendants' willful trademark infringement, increased by up to three times, pursuant 15 U.S.C. § 1117;

E. Awards FenF costs and any additional damages to which FenF is entitled as a result of Defendants' trademark infringement;

F. Finds this case exceptional and awards to FenF its reasonable attorney fees pursuant 15 U.S.C. § 1117;

G. Orders Defendants and their officers, directors, agents, servants, employees, successors, assigns, and all persons in active concert or participation with it, be preliminarily and permanently enjoined from infringing each of the 215 registration and the 636 registration;

H. Awards FenF costs, pre-judgment and post-judgment interest at the maximum allowable rate, fees, and other such further relief as the Court deems just and proper.

I. Orders Defendants to recall from any distributors, shippers, resellers, retailers, or wholesalers any and all advertising, products, packaging, or any other items that infringe FenF's rights in the YOGA TOES mark and/or the YOGATOES mark including infringement of the 635 registration and/or the 215 registration;

J. Orders Defendants to deliver to FenF any and all advertising, products, packaging, or any other items that infringe FenF's rights in the YOGA TOES mark

and/or the YOGATOES mark including infringement of the 635 registration and/or the 215 registration;

K. Orders Defendants to identify in writing each and every manufacturer, supplier, distributor, shipper, reseller, retailer, or wholesaler of all products and packaging that infringes FenF's rights in the YOGA TOES mark and/or the YOGATOES mark including the 635 registration and/or the 215 registration by providing at least the name, address, telephone number, and email address of such person;

L. Orders Defendants to provide FenF in writing with the identification of any and all entities that are presently using any of the FenF marks identified in this Complaint on Defendants' behalf and orders Defendants to inform such users that they must immediately cease and desist such use;

M. Orders Defendants to provide to FenF in writing a full accounting as to the precise dollar amount of products that infringe FenF's rights in the YOGA TOES mark and/or the YOGATOES mark including infringement of the 635 registration and/or the 215 registration and the profits recognized by Defendants in connection with such infringement.

Respectfully submitted,

Dated: October 24, 2018

/s/ Richard W. Hoffmann

RICHARD W. HOFFMANN (P42352)
MICHAEL J. DRUZINSKI (P72711)
Reising Ethington PC
755 W. Big Beaver Road, Suite 1850
Troy, Michigan 48084
Telephone: (248) 689-3500
E-mail: hoffmann@reising.com
druzinski@reising.com

Attorneys for Plaintiff FenF, LLC

JURY TRIAL DEMANDED

FenF demands a jury trial on all issues so triable.

Respectfully submitted,

Dated: October 24, 2018

/s/ Richard W. Hoffmann

RICHARD W. HOFFMANN (P42352)

MICHAEL J. DRUZINSKI (P72711)

Reising Ethington P.C.

755 W. Big Beaver Road, Suite 1850

Troy, Michigan 48084

Telephone: (248) 689-3500

E-mail: hoffmann@reising.com

druzinski@reising.com

Attorneys for Plaintiff FenF, LLC