

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

J. M. MURRAY

Plaintiff

- and -

FITFLOP LIMITED

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: February 21, 2014

Issued by (S) Signature
Local Registrar

Address of court office: 161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

TO: FitFlop Limited
6 New Street Square, 8th Floor
London, England
EC4A 3AQ

Tel: 0207 751 3612
Fax: 0845 359 9899

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Toning Shoes**”, “**Toning Footwear**” and “**FitFlop Footwear**” means all past and present men’s and women’s style sandals, boots, clogs, slippers, and shoes marketed with the **Defendant’s** “Microwobbleboard™ Technology”;
- (b) “**Class**” or “**Class Members**” means all people in Canada, excluding Quebec, who have purchased **FitFlop Footwear**;
- (c) “*Courts of Justice Act*” means the *Ontario Courts of Justice Act*, RSO 1990, c. C-43, as amended;
- (d) “*Class Proceedings Act*” means the *Class Proceedings Act*, 1992, SO 1992, c. 6, as amended;
- (e) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Schedule A, as amended;
- (f) “*Competition Act*” means the *Competition Act*, RSC 1985, c. C-34, as amended;
- (g) “*Negligence Act*” means the *Negligence Act*, R.S.O. 1990, c. N-1, as amended;
- (h) “*Sale of Goods Act*” means the *Sale of Goods Act*, R.S.O. 1990, c. S.1, as amended;

- (i) “**Consumer Protection Legislation**” means:
- (i) *Fair Trading Act*, RSA 2000, c. F-2, as amended;
 - (ii) *Business Practices and Consumer Protection Act*, SBC 2004, c. 2, as amended;
 - (iii) *The Business Practices Act*, CCSM, c. B120, as amended;
 - (iv) *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, as amended, and *Trade Practices Act*, RSNL 1990, c. T-7, as amended;
 - (v) *Business Practices Act*, RSPEI 1988, c. B-7, as amended; and
 - (vi) *Consumer Protection Act*, SS 1996, c. C-30.1, as amended;
- (j) “**Defendant**” or “**FitFlop**” means FitFlop Limited;
- (k) “**Plaintiff**” means J. M. Murray; and
- (l) “**Representation**” means the **Defendant’s** false, misleading or deceptive representations that their **Toning Shoes** (a) have performance characteristics, uses, benefits and/or qualities which they did not possess, (b) are available for a reason that does not exist; and the **Defendant’s** (c) use of exaggeration, innuendo and ambiguity regarding their ability to provide significant **Health Benefits**;
- (m) “**Health Benefits**” means the **Defendant’s** claims that wearing the **Toning Shoes** will:
- (i) Reduce lower back strain;
 - (ii) Reduce hip joint stress;
 - (iii) Reduce ankle joint stress;
 - (iv) Reduce knee joint stress;

- (v) Reduce foot pressure concentration;
- (vi) Reduce cellulite and slim and tone thighs;
- (vii) Increase quadriceps muscle activation (up to 16%);
- (viii) Increase calf muscle activation (up to 11%);
- (ix) Increase bottom muscle activity (up to 30%);
- (x) Increase hamstring muscle activation (up to 16%);
- (xi) Improve core muscle strength;
- (xii) Improve muscle tone;
- (xiii) Encourage better posture and stronger muscles;
- (xiv) Burn calories;
- (xv) Strengthen and tone muscles in the feet, legs, buttocks, stomach and back; and
- (xvi) Increase leg muscle activity and circulation.

CLAIM

2. The proposed Representative Plaintiff, J. Maria Murray, claims on his own behalf and on behalf of the members of the Class of persons as defined in defined in paragraph 4 below (the “Class”) as against FitFlop Limited (the “Defendant”):

- (a) An order pursuant to the Class Proceedings Act certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;

- (b) A declaration that the notice hereby given by the Plaintiff on February 21, 2014, on her own behalf and on behalf of “person similarly situated”, is sufficient to give notice to the Defendant on behalf of all Class Members;
- (c) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation¹;
- (d) A declaration that the Representation was made in violation of s. 14 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation²;
- (e) A declaration that the Representation was made in violation of s. 15 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation³;
- (f) A declaration that the Representation was a false and misleading representation contrary to s. 52 of the *Competition Act*;

¹ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s 7.2(3).

² Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 6; *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 4; *The Business Practices Act*, CCSM, c B120, s. 2; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 2; *Trade Practices Act*, RSNL 1990, c T-7, s. 5; *Business Practices Act*, RSPEI 1988, c B-7, s. 2; and *Consumer Protection Act*, SS 1996, c C-30.1, s. 5.

³ Specifically, the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 8; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 8; *Trade Practices Act*, RSNL 1990, c T-7, s. 6; and *Business Practices Act*, RSPEI 1988, c B-7, s. 2.

- (g) General damages in an amount to be determined in the aggregate for the Class Members to compensate them for the purchase price of the Defendant's Toning Shoes;
- (h) Punitive, aggravated and exemplary damages in an amount that this Honourable Court deems appropriate;
- (i) In the alternative, an order for an accounting of revenues received by the Defendant resulting from the sale of their Toning Shoes as a result of the Representation to the Plaintiff and to the Class Members;
- (j) A declaration that any funds received by the Defendant through the sale of its Toning Shoes as a result of the Representation are held in trust for the benefit of the Plaintiff and Class Members;
- (k) Restitution and/or a refund of all monies paid to or received by the Defendant from the sale of its Toning Shoes to members of the Class on the basis of unjust enrichment;
- (l) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendant from the sale of its Toning Shoes to members of the Class on the basis of *quantum meruit*;
- (m) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;

- (n) A permanent injunction restraining the Defendant from continuing any actions taken in contravention of the Consumer Protection Legislation, the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act*;
- (o) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (p) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 2 (9) of the *Class Proceedings Act*;
- (q) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon pursuant to the *Excise Tax Act*, R.S.C. 1990. C. E-15; and
- (r) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in all the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff, J. M. Murray, is an individual residing in the City of Toronto, in the Province of Ontario. Ms. Murray purchased a pair of the Defendant's Toning Shoes after having received information from the Defendant as to the alleged Health Benefits.

The Class

4. The Plaintiff seeks to represent the following class of which he is a member (the “Proposed Class”):

All residents in Canada, excluding Quebec, who have purchased FitFlop Footwear.

The Defendant

5. The Defendant FitFlop Limited (“FitFlop”) is an English company based in London. It is a lifestyle and athletic footwear company that designs, manufactures, markets, distributes, promotes and/or sells footwear, including FitFlop Footwear, to men, women and children of all ages, throughout Canada, including within the Province of Ontario.

6. The Defendant is resident in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.

THE NATURE OF THE CLAIM

7. The Defendant is and, has been at all relevant times, engaged in the business of designing, manufacturing, marketing, distributing, promoting and/or selling FitFlop Footwear.

8. FitFlop Footwear are shoes that purportedly provide health and fitness benefits such as toning and strengthening muscles in the lower body. Unlike traditional athletic shoes, which are designed to provide the wearer with support, FitFlop Footwear is designed with a patent pending Microwobbleboard™ design to create a slight instability. The theory of FitFlop Footwear is that

the instability the shoe causes will force muscles to work harder to stabilize, resulting in benefits such as muscle toning, shaping and strengthening.

9. The Defendant represents that its expensive FitFlop Footwear (ranging from \$50-\$240 per pair) with its “Microwobbleboard™ Technology” will provide to anyone who wears it a variety of Health Benefits that ordinary footwear cannot provide.

10. These class proceedings concern the false, misleading and/or deceptive Representations made by the Defendant concerning the alleged Health Benefits associated with the FitFlop Toning Shoes that were designed, manufactured, marketed, distributed, promoted and ultimately offered for sale to the public by the Defendant.

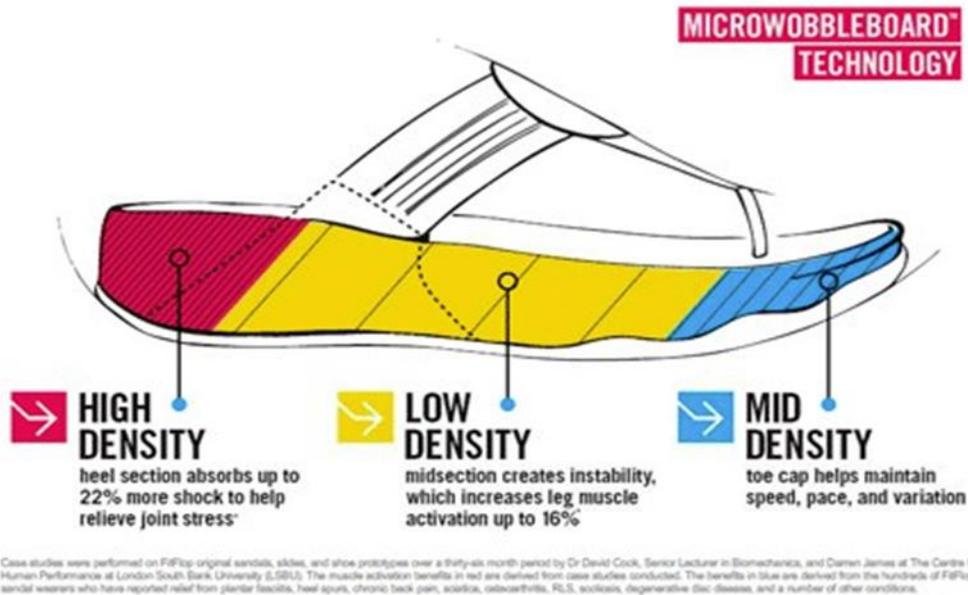
11. The Defendant made the Representation that its Toning Shoes had been scientifically proven to provide significant Health Benefits as defined above, more so than ordinary running shoes.

12. These claims were not supported by verified facts or by any scientific evidence at the time they were made, and presently, they continue to be unverified.

13. The Defendant claims that the instability created by the Microwobbleboard™ design (essentially three different densities of foam rubber made of a chemical called ethylene vinyl acetate (“EVA”)), results in increased toning, increased muscle activity, and reduction of joint strain.

14. All styles of FitFlop Footwear that the Defendant manufactures, and/or advertises, markets and sells feature the Microwobbleboard™ Technology, which the Defendant describes

as a three-part system comprised of: (1) a high density heel that “absorbs up to 22% more shock to help relieve joint stress;” (2) a low density midsection that “creates instability, which increases leg muscle activation up to 16%,” and (3) a mid density toe cap that “helps maintain speed, pace, and variation” in walking, as illustrated below.



15. Paradoxically, these precise percentages have been wholly inconsistent in the Defendant’s marketing campaign. As an example, even the product labelling attached to certain of the products themselves asserts a different percentage of muscle activation than otherwise advertised. Whereas the above picture represents that leg muscle activation is increased up to 16%; certain product labels represent that leg and bottom muscle activation is increased up to 30%.

16. The Defendant’s misleading marketing campaign begins with the products’ name - FitFlop – along with its deceptive trademarked taglines: “GET A WORKOUT WHILE YOU

WALK™”, “IT’S THE FLIP FLOP WITH THE GYM BUILT-IN”, and “RELIEF YOU CAN WEAR ON YOUR FEET™”.

17. The Defendant has uniformly represented that the Microwobbleboard™ technology allows consumers to “get a workout while you walk” because the shape and density of the soles are “biomechanically engineered” to increase the time that your leg muscles are engaged as compared with ordinary shoes.

18. The “How They Work” page on the Defendant’s website states:

“FitFlop Footwear is biomechanically engineered to help tone and tighten your leg muscles while you walk in them. Studies at the Centre for Human Performance at London South Bank University (“LSBU”) show that normal walking in FitFlop sandals can help:

- ...Increase leg and bottom muscle activity (up to 30%) (so you feel less ache in your hips and knees),
- Absorb more shock than a normal shoe (up to 22%),
- ...Realign ground force reaction closer to your joints,
- Reduce foot pressure”.

19. Further, the Defendant makes these deceptive health benefit claims on the product labelling that are attached to FitFlop Footwear, some of which appears below:

"Everyone flips for the 'miraculous' FitFlop!"
The Independent On Sunday
19/5/08

"I never take my FitFlops off. They are unbelievably comfy and I do find my legs and bum much tighter since wearing them. Miracle shoes or what!"
Eaine Lally, Galway, Ireland

FitFlops' patent-pending microwobbleboard™ multi-density midsole can help: • improve your posture • tone your calves, thighs and bum muscles (studies show up to 42% increase in duration of gluteal muscle activity while subjects wore FitFlops for normal walking). Put FitFlops on your feet, and **get a workout while you walk.**

Visit fitflop.com to read feedback, send suggestions, and tell us:

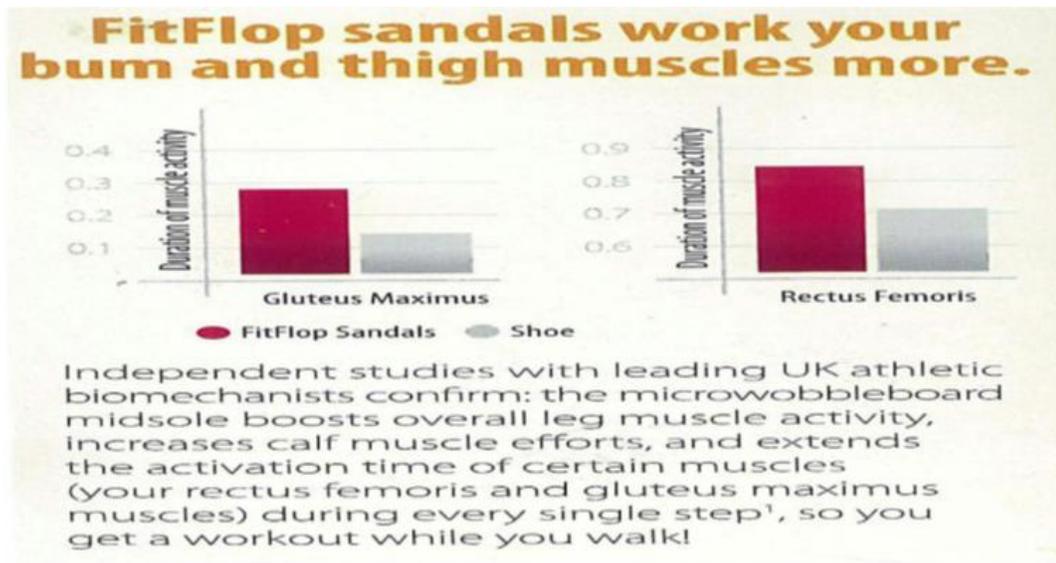
WHAT DO YOUR FITFLOPS DO FOR YOU?

Every pair of FitFlops features our patent-pending microwobbleboard™ multi-density midsole, which was biomechanically designed at London's South Bank University to load your muscles more while you wear them. Refer to our hangtag, or visit fitflop.com for more information

fitflop

It's the flip flop with the gym built-in.

www.fitflop.com



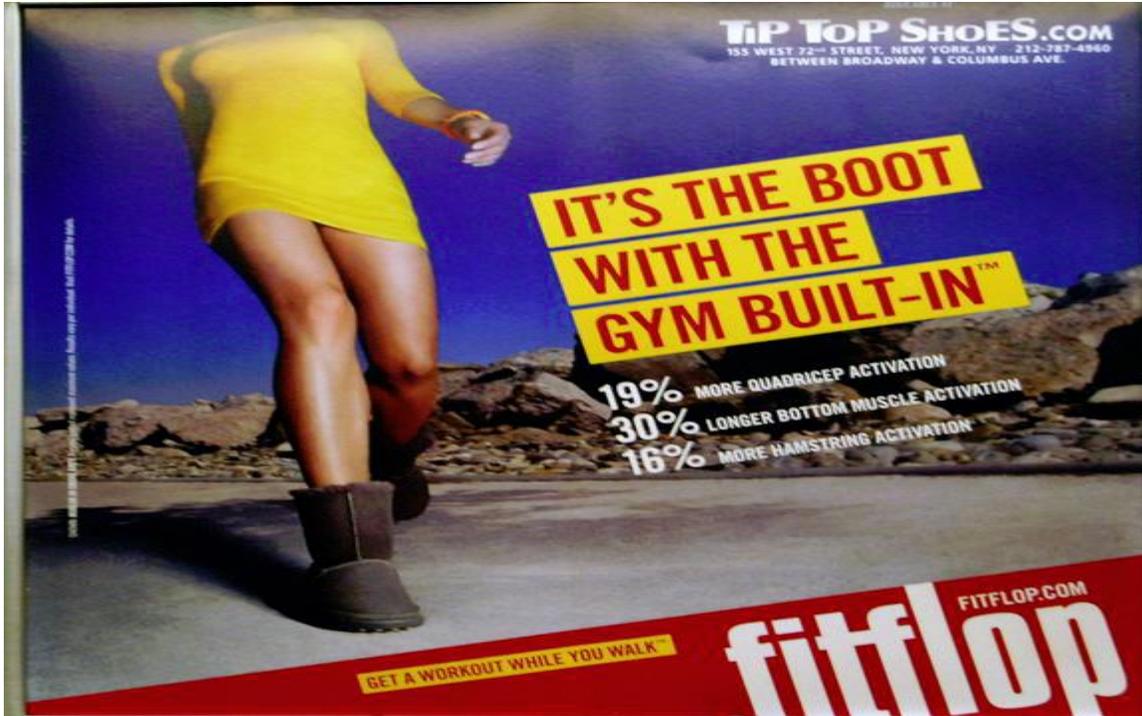
20. The Defendant has conveyed and continues to convey its deceptive claims about FitFlop Footwear through a variety of media, including point of sale displays, magazines, newspapers,

the internet, social media websites, outdoor billboards, bus wraparounds and on the product packaging.

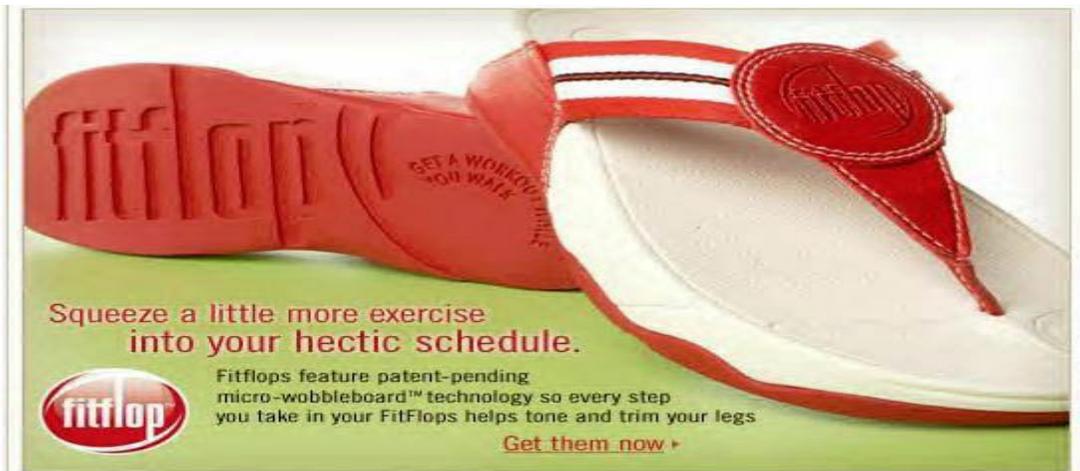
21. Some of the specific representations made by FitFlop through print advertisements as well as through online advertising are that walking in FitFlop Footwear:

- Improves core muscle strength;
- Absorbs shock on feet, knees and back;
- Encourages better posture and stronger muscles;
- Burns calories;
- Mimics barefoot walking, but with more of a challenge;
- Can help reduce cellulite and slim and tone thighs
- Improves muscle tone;
- Strengthens and tones muscles in the feet, legs, buttocks, stomach and back;
- Increases leg muscle activity and circulation;
- Reduces lower back strain;
- Reduces hip joint stress;
- Increases quadriceps muscle activation (up to 16%);
- Reduces knee joint stress;
- Increases calf muscle activation (up to 11%);
- Reduces ankle joint stress;
- Reduces foot pressure concentration;
- Increases bottom muscle activity (up to 30%);
- Increases hamstring muscle activation (up to 16%).

22. The Defendant's print advertisements contain substantially similar deceptive messages about the ability of FitFlop Footwear to provide health benefits, as illustrated below:



23. All of the Defendant's advertisements convey the same message – that FitFlop Footwear provides increased muscle toning over traditional footwear simply by walking in it, two such examples are illustrated below:





24. Through its labeling and advertising the Defendant has consistently conveyed the message that FitFlop Footwear products provide increased muscle activation over traditional footwear, resulting in increased muscle toning and related health benefits simply by walking in them.

25. To further reinforce the appearance that its claims are legitimate and that FitFlop Footwear is different from ordinary footwear, the Defendant has consistently represented that its product line has “the backing of the medical profession ... from top physiotherapists to leading podiatrists”.

26. The Defendant claims that FitFlop Footwear’s major health benefits have been shown in clinical studies. On the product labelling, the Defendant states that studies at the Centre for Human Performance at LSBU show that normal walking in Fit Flop sandals can help:

- Increase leg, calf and gluteal muscle activity,
- Improve your posture,
- Mimic the gait of barefoot walking but with more muscle load, and
- Improve muscle tone.

27. The Defendant has been consistent in its claims that FitFlop Footwear is scientifically proven to provide the alleged health benefits. However, as outlined above in paragraph 15, these “scientific claims” are not always consistent with its advertisements. For example, while the advertisements allege certain specific percentages, the FitFlop website states:

“Studies at the Centre for Human Performance at London South Bank University (“LSBU Study”) show that normal walking in FitFlop sandals can help: (a) “increase leg and bottom muscle activity (up to 30%). (so you feel less ache in your hips and knees);” (b) “absorb more shock than a normal shoe (up to 22%);” (c) “help realign ground force reaction closer to your joints;” and (d) “reduce foot pressure and pain from heel spurs and plantar fasciitis.”

28. In truth and in fact, these representations were not substantiated at the times that they were made and there are no well-designed, reliable scientific studies that support the Defendant’s Health Benefits claim.

29. Contrary to the Defendant’s statements about the increased muscle activation effect of its FitFlop Footwear, walking in FitFlop Footwear provides no greater amount of muscle activation or exercise response than walking in ordinary footwear. Indeed, clinical evidence actually advises that the Defendant’s claims regarding the FitFlop Footwear are deceptive and that wearing FitFlop products could actually result in harm to the wearer.

SCIENTIFIC CLAIMS

30. FitFlop bolstered consumers' confidence in its Representations by claiming that the Health Benefits have been shown in clinical studies and that they were scientifically tested.

31. Virtually every independent scientist has verified that none of the benefits promised by the Defendant are actually realized by the consumer and that there is no evidence to support the claims that FitFlop Toning Shoes provide any Health Benefits whatsoever compared to regular athletic and walking shoes.

32. In the study entitled "THE PHYSIOLOGIC AND ELECTROMYOGRAPHIC RESPONSES TO WALKING IN REGULAR ATHLETIC SHOES VERSUS "FITNESS SHOES" by John P. Porcari, Ph.D., John Greany, Ph.D., Stephanie Tepper, B.S., Brian Edmonson, B.S., Carl Foster, Ph.D. from the Departments of Physical Therapy and Exercise and Sport Science, University of Wisconsin-La Crosse it states:

"The "clinical" studies supporting the benefits of these shoes have all been non-peer reviewed and internally funded. A review of these studies finds that they generally had small sample sizes, lacked adequate research control, and had questionable or no statistical analyses.

...

Because there seems to be unsubstantiated claims about the benefits of walking in fitness shoes, the purpose of this study was two fold: First was to evaluate the exercise responses (heart rate, oxygen consumption, caloric expenditure, and ratings of perceived exertion) to walking in regular

athletic shoes compared to fitness shoes. The second was to evaluate muscle activation (via electromyography) when walking in regular athletic shoes compared to fitness shoes. This investigation was conducted as two separate studies using two separate groups of subjects.

...

There was no significant difference in EMG levels in the gastrocnemius, rectus femoris, biceps femoris, gluteus maximus, erector spinae, or rectus abdominus between the four types of shoes. It can be seen that EMG activity was generally higher at the higher workloads (i.e., 3.0/0% grade vs. 3.5 mph/0% grade vs. 3.5 mph/5% grade), as expected.

...

The results of this study found no evidence that walking in fitness shoes had any positive effect on exercise heart rate, oxygen consumption, or caloric expenditure compared to walking in a regular running shoe.

Based upon the results of this study, wearing so-called fitness shoes will have no beneficial effect on exercise intensity or caloric expenditure compared to wearing a regular running shoe. Additionally, there is no evidence that wearing shoes with an unstable sole design will improve muscle strength and tone more than wearing a regular running shoe.”

33. In a summary of this study by the American Council on exercise (“ACE”), the following further remarks were made:

“For the exercise response study, researchers recruited 12 physically active female volunteers, ages 19 to 24 years. All study subjects completed a dozen five-minute exercise trials in which they walked on a treadmill for five minutes wearing each type of shoe. The shoe order was randomized as the subjects were asked to walk at 3.0 mph with a 0% grade hill; 3.5 mph/0% grade; and at 3.5 mph/5.0% grade. Meanwhile researchers monitored each subject’s oxygen consumption, heart rate, ratings of perceived exertion (RPE) and caloric expenditure.

To measure muscle activation, researchers recruited a second group of 12 physically active female volunteers, ages 21 to 27 years, who performed a similar battery of five-minute treadmill trials (as explained above) rotating shoes at random. Researchers used electromyography (a.k.a. EMG) to record muscle activity in six muscle areas: gastrocnemius (calf), rectus femoris (quads), biceps femoris (hamstrings), gluteus maximus (buttocks), erector spinae (back), and rectus abdominis (abs), as subjects walked in each of the four pairs of shoes. As a baseline for EMG analysis, maximum voluntary isometric contractions (MVIC) on all muscles were also performed using manual muscle techniques prior to testing.”

...

“Do you feel different when you’re wearing these shoes? Of course you do because you’re walking on probably an inch worth of cushioning,” explains Porcari. “They feel different, and that’s why when people first wear them they’re probably going to be sore because you’re using

different muscles. But if you wear any sort of abnormal shoes that you're not used to wearing, your muscles are going to get sore. Is that going to translate into toning your butt, hamstrings and calves? Nope. Your body is just going to get used to it."

34. The ACE concluded that: "Across the board, none of the Toning Shoes showed statistically significant increases in either exercise response or muscle activation during any of the treadmill trials" and that "there is simply no evidence to support the claims that these shoes will help wearers exercise more intensely, burn more calories or improve muscle strength and tone".

35. A USA Today article stated in part:

"A growing number of doctors are warning that toning shoes don't deliver on their marketing promises and could cause injuries by, among other things, changing a person's gait, or way of walking.

Claims that Toning Shoes can significantly contribute to person's fitness are "utter nonsense."

36. In another recent scientific study published in Clinical Biomechanics, conducted by K.E. Burgess and P.A. Swinton, entitled "Do FitflopsTM increase lowerlimb muscle activity?", researchers compared the muscle activity of women wearing Fitflops to those wearing regular flipflops and to those barefoot when participating in different tasks to simulate daily living activities.

37. The following conclusions were drawn from the study:

“In conclusion the results presented here indicate that there are no differences in lower limb muscle activity during simulated activities of daily living between Fitflops™ and flip flop and barefoot control conditions in a healthy recreationally active female population. It is possible that the Fitflops™ did not induce the level of instability required to increase the activity in these larger lower leg muscles, however it is still possible that wearing Fitflops™ could increase activity in smaller stabilising muscles not monitored here, therefore this needs to be investigated. However, it is unclear how this would make any major change to energy expenditure which would have an impact on health. Based on the current study's results the use of Fitflops™ is questioned as a means of increasing muscle activity of the medial gastrocnemius, biceps femoris, rectus femoris and gluteus maximus during activities of daily living in a healthy recreationally active female population.”

38. The Defendant's representations are deceptive. In fact, many notable physicians and podiatrists will not endorse FitFlop Footwear. For example, the president of the American Academy of Podiatric Sports Medicine stated that toning shoes pose “major risks, especially for adults. Creating instability, on adults especially is not a good thing.”

39. Moreover, one published study conducted to determine the effectiveness of unstable shoe construction (rocker bottom shoes) on reducing pain and increasing balance in persons with knee

osteoarthritis found that there was no significant difference between the test group that wore an unstable shoe construction and the control group in either pain reduction or increased balance.

40. Not only does FitFlop Footwear not provide the benefits as claimed, they have significant drawbacks which FitFlop has omitted from its advertising. Specifically, because FitFlop Footwear is designed to constantly challenge the user's balance, they are unsuitable for users with flat feet, or those who have pre-existing difficulties maintaining their balance. Additionally, consumers who are more prone to injury in areas that are responsible for maintaining balance (such as the hamstring or ankle) will exacerbate that risk by using FitFlop Footwear.

41. Even though walking in FitFlop Footwear offers no greater benefit in toning or muscle activation than walking in traditional (and lower-priced) walking shoes, FitFlop Footwear has been a huge commercial success for the Defendant; "FitFlop ha[s] been the top selling fitness Footwear brand since their launch a few years ago."

42. The advertisements and representations made by the Defendant as set forth herein were, and are, false or misleading. The acts and practices of the Defendant as alleged herein constitute unfair or deceptive acts or practices and the making of false advertisements.

43. As a result of the Defendant's deceptive claims, consumers have purchased a product that does not perform as advertised. Moreover, the Defendant has been able to charge a significant price premium for FitFlop Footwear over other traditional, comparable footwear products that do not make deceptive health benefits claims.

44. Consumers were induced into purchasing FitFlop Footwear through the use of false and misleading representations, thereby vitiating their consent and entitling them to claim a refund for the purchase price of the product.

45. The FitFlop Toning Shoes were intended to be placed into the stream of commerce, to be distributed, offered for sale and sold to the Plaintiff and to the public in Ontario and in other Provinces and Territories within Canada.

46. FitFlop knew or ought to have known that purchasers of these Toning Shoes would not be reasonably able to protect their interests, that such purchasers would be unable to receive a substantial benefit from the Toning Shoes and that consumers would be relying on the Defendant's untrue statements to their detriment.

47. The Representation was made for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendant. The Representation was made knowingly or recklessly. The Representation was made to the public. The Representation was false or misleading in a material respect, namely as to the strengthening and toning benefits of the Defendant's Toning Shoes.

48. The Class Members have suffered and will suffer injuries, losses or damages as a result of the Defendant's conduct.

49. Canadian consumers were never compensated for damages incurred as a result of purchasing the Defendant's Toning Shoes in reliance upon the Representation.

50. The Defendant knows or understands that the promotion and advertising of their Toning Shoes in part targets consumers and customers in Canada.

51. The Defendant placed these Toning Shoes into the stream of commerce in Ontario and elsewhere with the expectation that consumers, such as the Plaintiff and Class Members, would purchase the product based on their Representation.

THE REPRESENTATIVE PLAINTIFF

52. In the spring of 2011, the Plaintiff purchased FitFlop Footwear from the Hudson's Bay Queen Street in Toronto, Ontario for a purchase price of approximately \$100 including taxes. The Plaintiff purchased a second pair of FitFlop Footwear several months later from the same store for approximately the same price. In total, the Plaintiff spent approximately \$200 including taxes on her FitFlop Footwear.

53. The Plaintiff purchased the Toning Shoes based on the Defendant's marketing and after having read the product's labelling. Specifically, she believed that the FitFlop Footwear would cause her to tone and strengthen his muscles and cause her to lose weight while she walked without any further changes in a diet or exercise routine.

54. The Plaintiff walked in her Toning Shoes for the summer of 2011 and again in the summer of 2012. At this point, she began to question whether her FitFlop Footwear was indeed providing the Health Benefits as advertised as her fitness level was not improving and she did not experience any noticeable weight loss.

55. The Plaintiff became aware of the United States Skechers Settlement sometime in the winter of 2013 and became suspicious of the efficacy claims of all toning shoe companies.

56. The Plaintiff then did further internet research with regard to her specific FitFlop Footwear where she discovered that these product claims have not been scientifically proven and that a class action was filed against FitFlop in the United States for this same product due to the Defendant's false advertising. Recently, the Plaintiff became aware that a settlement had been reached in the United States providing for both monetary and injunctive relief in the form of a \$5.3 million settlement fund for class members and Fitflop is enjoined, for a period of five (5) years, from making the false and misleading claims relating to fitness unless it has proper scientific backing.

57. The Plaintiff also discovered that a Canada-wide, national class action had been instituted in the Superior Court of Quebec from having visited the website www.clg.org.

58. The Plaintiff has suffered damages as a result of purchasing the Toning Shoes, including the costs of purchasing these expensive Toning Shoes, including sales taxes.

CAUSES OF ACTION

A. Breach of Contract – Defence to Formation

59. The Plaintiff and Class Members submit that the contract of sale is voidable by at their election due to misrepresentation or fraud in the inducement.

60. Upon purchasing the Defendant's Footwear, the Plaintiff and Class Members entered into an express contract of sale with the Defendant such that in exchange for money (or a money equivalent) the Defendant would provide the Toning Shoes based on the purported associated Health Benefits.

61. This contract of sale was based on a fraudulent material misrepresentation or a non-fraudulent material misrepresentation on the part of the Defendant such that the Plaintiff and Class Members were induced into purchasing the Toning Shoes in justifiable reliance upon the Defendant's misrepresentations regarding the associated Health Benefits.

62. As such, the contract of sale is wholly voidable by the Plaintiff and Class Members who are entitled to compensatory damages in the amount of the money that was expended to purchase Defendant's Footwear.

B. Breach of Warranty

63. The Defendant is a "merchant" in the business of selling footwear to foreseeable consumers such as Plaintiff and the members of the Class, including, but not limited to Toning Shoes of the kind sold to Plaintiff and the members of the Class in this Claim.

64. Plaintiff and the members of the Class purchased Defendant's Toning Shoes designed with Microwobbleboard™ Technology.

65. The Defendant expressly warranted that the Toning Shoes would reduce lower back strain, hip and knee joint stress, foot pressure concentration, cellulite and slim and tone thighs, would increase quadriceps muscle activation (up to 16%), calf muscle activation (up to 11%),

bottom muscle activity (up to 30%) and hamstring muscle activation (up to 16%), leg muscle activity and circulation, would improve core muscle strength and muscle tone, would encourage better posture and stronger muscles, burn calories and strengthen and tone muscles in the feet, legs, buttocks, stomach and back. These express representations become a basis of the bargain, implicating the Defendant's liability for breach.

66. The Toning Shoes do not conform to these express representations because they do not provide these Health Benefits. Thus, Defendant breached its express warranties.

67. As a direct and proximate result of the breach of said warranties, Plaintiff and the Class members suffered and/or will continue to be harmed and suffer economic loss.

68. Plaintiff and the Class members did rely on the express warranties of the Defendant herein.

69. The Defendant knew or should have known that, in fact, said Representation and warranties were false, misleading and untrue.

70. As a direct and proximate result of the foregoing acts and/or omissions, Plaintiff and the Class members have suffered damages entitling them to compensatory damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

71. Further, and or in the alternative, the Defendant breached its implied warranties of fitness for a particular purpose, i.e. the Health Benefits and/or committed intentional misrepresentations of material fact which induced the Plaintiff and Class Members to purchase the FitFlop Footwear in reliance.

72. Class Members were unable to receive a substantial benefit from the Toning Shoes to their detriment.

C. Tort of Negligence

73. The Defendant had a positive legal duty to use reasonable care to perform its legal obligations to the Plaintiff and Class Members;

74. The Defendant was aware that its customers (including Plaintiff and the Class) relied on it to provide truthful and accurate information about its products, including their Toning Shoes.

75. It was certainly reasonably foreseeable that if the Defendant was negligent in its duty to provide accurate information about its Toning Shoes, that customers would sustain injury and damages.

76. By its acts described herein, the Defendant failed to take reasonable care to ensure that its Representations were accurate and to ensure that its Toning Shoes would perform as advertised.

77. The Defendant breached its duty of care to the Plaintiff and to the Class Members by offering for sale Toning Shoes that were not fit for the purpose for which they were purchased, i.e. the purported Health Benefits. The Defendant designed, manufactured, marketed, distributed, promoted and/or sold Toning Shoes to the Class Members who purchased said shoes in reliance upon the Defendant's untrue Representation. Class Members were unable to receive a substantial benefit from the Toning Shoes to their detriment.

78. This breach was a direct and proximate result of the Defendant's failure to use reasonable care in its marketing and advertising campaign.

79. By virtue of the acts and omissions described above, the Defendant was negligent and caused damage to the Plaintiff and to the Class Members.

80. By reason of the foregoing, Plaintiff and each member of the Class are entitled to recover damages and other relief from Defendant.

CAUSATION

81. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendant are the direct and proximate cause of the Plaintiff's and Class Members' injuries.

82. The Plaintiff pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the Defendant, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

Compensatory Damages (Economic Losses)

83. By reason of the acts, omissions and breaches of legal obligations of the Defendant, the Plaintiff and Class Members have suffered injury, economic loss and damages, the particulars of which include the purchase price of the FitFlop Footwear and other damages as described herein.

Punitive, Exemplary and Aggravated Damages

84. The Defendant has taken a cavalier and arbitrary attitude to its legal and moral duties to the Class Members.

85. In addition, it is imperative to avoid any perception of evading the law without impunity. Should the Defendant only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive, aggravated and exemplary damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations.

86. At all material times, the conduct of the Defendant as set forth was malicious, deliberate and oppressive towards their customers and the Defendant conducted itself in a wilful, wanton and reckless manner.

STATUTORY REMEDIES

87. The Defendant is in breach of the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act* and/or other similar/equivalent legislation.

88. The Plaintiff pleads and relies upon consumer protection and trade legislation and common law, as it exists in this jurisdiction and the equivalent/similar legislation and common law in other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendant's inappropriate and unfair business practices, which includes the Defendant being in breach of applicable Consumer Protection laws.

A. Breach of the *Sale of Goods Act*

89. At all times relevant to this action, the Plaintiff and Class Members were “buyer[s]” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

90. At all times relevant to this action, the Defendant was a “seller” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

91. The transactions by which the Plaintiff and Class Members purchased their “goods” from the Defendant were “sale[s]” within the meaning of those terms as defined in s.1 of the *Sale of Goods Act*.

92. The Defendant was aware that the consumers purchased the Toning Shoes for the particular purpose of the alleged Health Benefits based on their marketing and advertising and there is therefore an implied warranty or condition that the goods will be reasonably fit for such purpose.

93. The Defendant committed a fault or wrongful act by breaching the implied condition as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed and/or advertised, as per s.15 of Part I of the *Sale of Goods Act*, the Defendant is liable. The Class is entitled to maintain an action for breach of warranty under ss. 51 & 55 of the *Sale of Goods Act*.

B. Breach of the *Consumer Protection Act*

94. At all times relevant to this action, the Plaintiff and Class Members were “consumer[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

95. At all times relevant to this action, the Defendant was a “supplier” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

96. The transactions by which the Plaintiff and Class Members purchased their Toning Shoes from the Defendant were “consumer transaction[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

97. The Defendant has engaged in an unfair practice by making a Representation to Class Members which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss.14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Representing that the Toning Shoes has performance characteristics, uses, benefits and/or qualities, which they did not have;
- (b) Representing that the Toning Shoes are available for a reason that does not exist; i.e. Health Benefits; and
- (c) Using exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding their ability to provide significant Cosmetic Benefits as such use or failure deceives or tends to deceive; and

- (d) The Defendant knew or ought to have known about the substantial risk that the consumer would be unable to receive a substantial benefit from the Toning Shoes.

98. The Representation was and is unconscionable because *inter alia* the Defendant knows or ought to know that the consumer is unable to receive a substantial benefit from the subject-matter of the representation.

99. The Plaintiff states that the Representation was and is false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Plaintiff and the Class to purchase the Toning Shoes as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

100. The Plaintiff and the Class Members relied on the Representation.

101. The reliance upon the Representation by the Plaintiff and Class Members is established by his or her purchase and/or use of the Toning Shoes. Had the Plaintiff and Class Members known that the Representation were false and misleading they would not have purchased and/or used the Toning Shoes or would not have paid such a high price.

C. Breach of the *Competition Act*

102. At all times relevant to this action, the Defendant's manufacturing, marketing and selling business was a "business" and the Toning Shoes were "product[s]" within the meaning of that term as defined in s.2 of the *Competition Act*.

103. The Defendant's acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render the Defendant liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

104. The Defendant made the Representation to the public and in so doing breached s.52 of the *Competition Act* because the Representation:

- (a) Was made for the purpose of promoting, directly or indirectly, the use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendant;
- (b) Was made to the public;
- (c) Was false and misleading in a material respect; and
- (d) Stated performance characteristics, uses, benefits and/or qualities of the Toning Shoes that were false and not based on adequate and proper testing and represented that the FitFlop Footwear are available for a reason that does not exist, i.e. the Health Benefits.

105. The Plaintiff and Class Members relied upon the Representation by buying and/or using the Toning Shoes and suffered damages and loss.

106. Pursuant to s. 36 of the *Competition Act*, the Defendant is liable to pay the damages which resulted from the breach of s. 52.

107. Pursuant to s. 36 of the *Competition Act*, the Plaintiff and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

108. The Plaintiff and Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

109. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendant's conduct, including the alleged breaches of any of the *Sale of Goods Act*, the *Consumer Protection Act*, or the *Competition Act* constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

110. The Plaintiff reserves the right to elect at the Trial of the Common Issues to waive the legal wrong and to have damages assessed in an amount equal to the gross revenues earned by the Defendant or the net income received by the Defendant or a percent of the sale of the Toning Shoes as a result of the Defendant's false Representation which resulted in revenues and profit for the Defendant.

111. Further, the Defendant has been unjustly enriched as a result of the revenues generated from the sale of the Toning Shoes and as such, *inter alia*, that:

- (a) The Defendant has obtained an enrichment through revenues and profits from the sale of the Toning Shoes;

- (b) The Plaintiff and other Class Members have suffered a corresponding deprivation including the price of the Toning Shoes; and
- (c) The benefit obtained by the Defendant and the corresponding detriment experienced by the Plaintiff and Class Members has occurred without juristic reason. Since the monies that were received by the Defendant resulted from the Defendant's wrongful acts, there is and can be no juridical reason justifying the Defendant retaining any portion of such money paid.

112. Further, or in the alternative, the Defendant is constituted as constructive trustees in favour of the Class Members for all of the monies received because, among other reasons:

- (a) The Defendant was unjustly enriched by receipt of the monies paid for the Toning Shoes;
- (b) The Class Members suffered a corresponding deprivation by purchasing the Toning Shoes;
- (c) The monies were acquired in such circumstances that the Defendant may not in good conscience retain them;
- (d) Equity, justice and good conscience require the imposition of a constructive trust;
- (e) The integrity of the market would be undermined if the court did not impose a constructive trust; and

- (f) There are no factors that would render the imposition of a constructive trust unjust.

113. Further, or in the alternative, the Plaintiff claims an accounting and disgorgement of the benefits which accrued to the Defendant.

COMMON ISSUES

114. Common questions of law and fact exist for the Class Members and predominate over any questions affecting individual members of the Class. The common questions of law and fact include:

- (a) Did the Defendant advertise, represent or hold itself out as producing or manufacturing Toning Shoes that would yield significant the Health Benefits?
- (b) Did the Defendant engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its FitFlop Footwear?
- (c) Did the Defendant impliedly warrant these products for fitness for a particular purpose?
- (d) Is the Defendant in breach of contract or is there a valid defence to enforcement whereby the Plaintiff and Class Members may elect to void the contract?
- (e) Did the Defendant's breach of contract proximately cause loss or injury and damages?

- (f) Did the Defendant breach its express or implied warranties as to the existence of Health Benefits?
- (g) Does the Defendant owe the Class members as duty to use reasonable care?
- (h) Did the Defendant act negligently in failing to use reasonable care to perform its legal obligations?
- (i) Did the Defendant intend that the Toning Shoes be purchased by the Plaintiff, Class Members and/or others?
- (j) Did the Defendant intend or foresee that the Plaintiff or other Class Members would purchase the Toning Shoes based on the Representation regarding the Health Benefits?
- (k) Did the Defendant's negligence proximately cause loss or injury and damages?
- (l) Did the Defendant's acts or practices breach the *Consumer Protection Act*, the *Competition Act* and/or other similar/equivalent legislation?
- (m) Was the Defendant unjustly enriched?
- (n) Have Class Members been damaged by the Defendant's conduct and, if so, what is the proper measure of such damages?

- (o) Is the Defendant liable to the Class Members for reimbursement of the purchase price of the FitFlop Footwear as a result of its misconduct and unfair business practices?
- (p) Should an injunctive remedy be ordered to prohibit the Defendant from continuing to perpetrate its unfair, false, misleading, and/or deceptive conduct?
- (q) Is the Defendant responsible to pay punitive damages to class members and in what amount?

EFFICACY OF CLASS PROCEEDINGS

115. The members of the proposed Class potentially number in the hundreds of thousands if not millions. Because of this, joinder into one action is impractical and unmanageable. Conversely, continuing with the Class Members' claim by way of a class proceeding is both practical and manageable.

116. Class counsel proposes to prosecute these claims on behalf of the Class through this Action and through other actions commenced by the offices of Consumer Law Group. These actions include *Emily Cunning v. FitFlop Limited*, an action commenced before the Quebec Superior Court in Montreal (October 19, 2012, File No.: 500-06-000629-127).

117. On February 20, 2014, the Honourable Madam Justice Marie Gaudreau, J.S.C. for the Quebec Superior Court in the district of Montreal issued a judgment authorizing the bringing of a class action within the province of Quebec. Madam Justice Gaudreau granted the Petitioner's

Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative pursuant to the Quebec Code of Civil Procedure.

118. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, and the small amount being claimed by each person, many people will hesitate to institute an individual action against the Defendant. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Defendant would increase delay and expense to all parties and to the court system.

119. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgements on questions of fact and law that are similar or related to all members of the class.

120. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice.

121. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to her counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments.

In addition, class counsel are qualified to prosecute complex class actions.

LEGISLATION

122. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Courts of Justice Act*, the *Consumer Protection Act*, the *Negligence Act*, the *Sale of Goods Act*, the *Competition Act* and other Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

123. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) The Defendant engages in business with residents of Ontario;
- (b) The Defendant derives substantial revenue from carrying on business in Ontario;
and
- (c) The damages of Class Members were sustained in Ontario.

124. The Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

SERVICE OUTSIDE ONTARIO

125. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h) and (p) of Rule 17.02 of the *Rules of Civil Procedure*.

Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));
- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (e) The claim is authorized by statute, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)); and
- (f) Against a person carrying on business in Ontario (rule 17.02(p)).

Date: February 21, 2014

**CONSUMER LAW GROUP
PROFESSIONAL CORPORATION**

340 Albert Street
Suite 1300
Ottawa, Ontario
K1R 7Y6

Jeff Orenstein
LSUC# 59631G
Email: jorenstein@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiff

Court File No.

J. M. MURRAY
Plaintiff

FITFLOP LIMITED
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

CONSUMER LAW GROUP
PROFESSIONAL CORPORATION

340 Albert Street
Suite 1300
Ottawa, Ontario
K1R 7Y6

Jeff Orenstein
LSUC# 59631G
Email: jorenstein@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiff