

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

FENF, LLC,)	
)	
Plaintiff,)	Civil Action No.: 2:18-cv-10879s
)	
vs.)	
)	
IFG Corp. and)	
TJX Companies, Inc. d/b/a T.J. MAXX,)	JURY TRIAL DEMANDED
)	
Defendant.)	
)	

COMPLAINT

Plaintiff FenF, LLC ("FenF"), by its undersigned attorneys, alleges the following for its Complaint against Defendants IFG Corp. ("IFG") and TJX Companies, Inc., d/b/s T.J. Maxx (T.J. Maxx) (hereafter collectively "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, IMG Corp. is corporation existing under the laws of New York and having a place of business at 463 Seventh Avenue, New York, New York 10018.

3. On information and belief TJX Companies, Inc., is a corporation existing under the laws of Delaware and does business in this district under the name T.J. Maxx.

4. On information and belief, TJX Companies, Inc. has a place of business at 770 Cochituate Road Framingham, MA 01701.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338, as well as 15 U.S.C. § 1121, because this action arises under the patent laws of the United States (Title 35 of the United States Code) and the trademark laws of the United States (Title 15 Chapter 22 of the United States Code).

6. This Court has personal jurisdiction over Defendant's because Defendants have conducted and continue to conduct business in this judicial district and, upon information and belief, has engaged in activities related to FenF's claims federal trademark infringement and patent infringement that establish minimum contacts with the state of Michigan, including having committed acts of trademark infringement and patent infringement, in this judicial district, and the exercise of personal jurisdiction over Defendants is reasonable and fair. Personal jurisdiction over Defendants may be established under Fed. R. Civ. P. 4(k)(1)(A) and/or Fed. R. Civ. P. 4(k)(2).

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 and § 1400(b).

Common Allegations

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

9. FenF sells a line of Yoga Toes® products, including the GEMS® product which were invented by Frederic Ferri. Mr. Ferri has received at least six (6) United States Patents covering features of the Yoga Toes® line of products.

10. FenF has also acquired at least six (6) different trademarks used in connection with its Yoga Toes® products, including the mark GEMS®.

11. FenF sells its GEMS® foot-therapy product on-line through its websites (www.yogapro.com and www.yogatoes.com) as well as through other on-line retailers such as Amazon.com.

12. FenF's Yoga Toes® products, including its GEMS® product have been featured on television shows such as *Rachel Ray*, *Dr. Oz* and *The Today Show* featuring Kathy Lee and Hoda.

13. FenF's Yoga Toes® products, including its GEMS® product have also been featured in publications such as *The Wall Street Journal*, *New York Magazine* and *Oprah Magazine*.

14. FenF has spent over \$5 Million dollars in promoting its Yoga Toes® products including its GEMS® product.

15. As a result of FenF's sales, advertising and the quality and uniqueness of it is Yoga Toes ® and GEMS® products, FenF has been the number 1 seller on Amazon in its product category for over 3 years.

16. The GEMS® product sold by FenF includes upstanding posts made of an elastic material. Each of the upstanding posts has a faceted gemstone handle design feature at a free end thereof. A representative photograph of the YogaToes® GEMS® product is shown below.



FenF's GEMS® product showing faceted toe posts

17. FenF has acquired value, name and brand recognition, and goodwill in the use of its faceted gemstone handle design in connection with its GEMS® product as a result of continual and substantial advertising, promotion, and interstate commercial activity related to its GEMS® product that dates back to at least December 2010.

18. FenF has obtained Federal Trademark Registration No. 5,040,435 for the mark GEMS® ("the '435 registration"), Exhibit A. And FenF has obtained Federal Trademark Registration No. 5,098,981 for the faceted gemstone handle design ("the '981 registration"), Exhibit B.

19. FenF is the owner by assignment of United States Patent No. 8,002,675 (the '675 patent), entitled "Foot-Therapy and Toe-Aligning Device," which as issued to Frederic Ferri on August 23, 2011, and has the right to bring a cause of action for infringement of that patent. A true and correct copy of the '675 patent is attached to this Complaint as Exhibit C.

20. FenF is the owner by assignment of United States Patent No. 9,138,616 ("the '616 patent"), entitled "Foot-Therapy and Toe Aligning Device," which was issued to Frederic Ferri on September 22, 2015, and has the right to bring a cause of action for infringement of that patent. A true and correct copy of the '616 patent is attached to this Complaint as Exhibit D.

21. FenF is the owner by assignment of United States Patent No. 9,387,359 ("the '359 patent"), entitled "Foot-Therapy and Toe Aligning Device," which was issued to Frederic Ferri on July 12, 2016, and has the right to bring a cause of action for infringement of that patent. A true and correct copy of the '359 patent is attached to this Complaint as Exhibit E.

22. Defendants sell a foot-therapy product that is likely to cause confusion with FenF's GEMS® foot therapy device. Defendants call their product "Foot Relief Jewel Spacers." (the "Accused Product") The Accused Product includes upstanding elastic posts—each of which includes a faceted gemstone handle at a free end thereof—that are configured on the foot-therapy product to separate a user's toes. A photograph of Defendants' Accused Product is also shown below.



Accused Device including upstanding elastic posts, each of which includes a faceted gemstone handle at the free end

23. As readily seen from the above photograph, the Accused Product incorporates faceted handles that are confusingly similar to FenF's GEMS® product.

24. The packaging for the Accused Product, also includes the name "Foot Relief Jewel Spacers" as shown below.



25. The use of the word "Jewel" in the name of the Accused Product is likely to cause confusion with FenF's GEMS® registered trademark, particularly when in combination with the faceted handle design.

26. Defendants offer to sell and/or sells the Accused Product in the United States through TJ Maxx stores.

27. Defendants' Accused Product competes directly with FenF's GEMS® product for sales in the same relevant market and to the same customer base.

**Count I - Violation of Section 32 of the Lanham Act
(Infringement of Trademark Registration No. 5,098,981)**

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

29. The faceted gemstone handles of FenF's GEMS® product are non-functional and have acquired secondary meaning through long and sustained use in interstate commerce and through substantial advertising, promotion, and sales of FenF's GEMS® product, and are the subject of the '981 registration owned by FenF, Exhibit B.

30. Defendants have used, and are continuing to use, in interstate commerce and without authorization from FenF, faceted gemstone handles which are a reproduction, copy and/or colorable imitation of FenF's '981 registration, Exhibit B.

31. Defendants' use in commerce of faceted gemstone handles in connection with the sale, offering for sale, distribution, or advertising of the Accused Products is likely to cause confusion, to cause mistake, and/or to deceive purchasers

as to the source of the Accused Products or as to Defendants' affiliation, connection, approval, sponsorship, or association with FenF.

32. Defendants' actions constitute infringement of FenF's federally registered trademark for the faceted gemstone handle design (the '981 registration, Exhibit B) in violation of Section 32(a) of the Lanham Act, 15 U.S.C. § 1114.

33. Defendants' use of FenF's registered mark in connection with the use of faceted gemstone handles as part of the Accused Product in interstate commerce has caused, is causing, and will continue to cause damage to FenF's business, reputation, goodwill, profits, and the strength of FenF's federally registered trademark rights.

34. On information and belief, and by virtue of the widespread exposure and success of FenF's GEMS® product, Defendants were actively aware of FenF and its trademark rights in the faceted gem design when Defendants began selling the Accused Product, yet proceeded anyway to use faceted gemstone handles as part of the Accused Product, and is continuing to do so, thus rendering Defendants' use of a reproduction and/or copy of FenF's registered trademark willful and deliberate.

**Count II - Violation of Section 32 of the Lanham Act
(Infringement of Trademark Registration No. 5,040,435)**

35. FenF repeats and realleges the allegation contained in paragraphs 1 through 34 as if fully set forth herein.

36. Defendants have used, and are continuing to use, in interstate commerce and without authorization from FenF, a name incorporating the word "Jewel" affixed to the packaging for the Accused Products which are a reproduction, copy and/or colorable imitation FenF's '435 registration, Exhibit A. The word "Jewel" is a colorable imitation of FenF's "GEMS" mark at least because the terms "Jewel" and "GEMS" have the same connotation.

37. Defendants' use in commerce of the name incorporating the word "Jewel" in connection with the sale, offering for sale, distribution, or advertising of the Accused Product is likely to cause confusion, to cause mistake, and/or to deceive purchasers as to the source of the Accused Product or as to Defendants' affiliation, connection, approval, sponsorship, or association with FenF.

38. Defendants' actions constitute infringement of FenF's federally registered trademark for the GEMS mark (the '435 registration, Exhibit A) in violation of Section 32(a) of the Lanham Act, 15 U.S.C. § 1114.

39. Defendants' use of the name including the word "Jewel" in connection with sale, offering for sale, distribution and/or advertising of the Accused Product in interstate commerce has caused, is causing, and will continue to cause damage to FenF's business, reputation, goodwill, profits, and the strength of FenF's federally registered trademark rights.

40. On information and belief, and by virtue of the widespread exposure and success of FenF's GEMS® product, Defendants were actively aware of FenF and its trademark rights in the faceted gem design when Defendants began selling the Accused Product, yet proceeded anyway to use faceted gemstone handles as part of the Accused Product, and is continuing to do so, thus rendering Defendants' use of a reproduction and/or copy of FenF's registered trademark willful and deliberate.

Count III – Patent Infringement
(Infringement of the '675 Patent)

41. FenF repeats and realleges the allegations contained in paragraphs 1 through 40 as if fully set forth herein.

42. Defendants have directly infringed, and continues to directly infringe, one or more claims of the '675 patent (Exhibit C) under 35 U.S.C. § 271, either literally or under the doctrine of equivalents, by making, using, offering to sell, and/or selling the Accused Product within the United States, and/or importing the Accused Product into the United States, and will continue to infringe unless enjoined by this Court.

43. As shown in paragraphs 22 and 24 above, each Accused Product is a foot-therapy and toe-aligning device comprising: a frame, the frame including a top portion.

44. As shown in paragraphs 22 and 24 above, each Accused Product includes a plurality of posts formed of an elastic material extending from the top portion of the frame, whereby a user may place at least one of the plurality of posts between a user's toes.

45. As shown in paragraphs 22 and 24 above, the posts of each Accused Product have a length, a diameter, and a circumference.

46. As shown in paragraphs 22 and 24 above, the posts of each Accused Product have elastic properties and wherein each of the plurality of posts has an outer edge and further includes a handle attached with the outer edge.

47. Accordingly, the Accused Product infringes at least claim 1 of the '675 patent, Exhibit C.

48. Defendants have been aware of the '675 patent since at least notice of this Complaint.

49. Defendants' continued infringement of the '675 patent (Exhibit C) continues to be, willful, deliberate, and objectively reckless.

50. Defendants' infringing conduct has caused, is causing, and will continue to cause irreparable injury to FenF unless such infringing conduct is enjoined by this Court.

**Count IV – Patent Infringement
(Infringement of the '616 Patent)**

51. FenF repeats and realleges the allegations contained in paragraphs 1 through 50 as if fully set forth herein.

52. Defendants directly infringed, and continues to directly infringe, one or more claims of the '616 patent, Exhibit D, under 35 U.S.C. § 271, either literally or under the doctrine of equivalents, by making, using, offering to sell, and/or selling the Accused Product within the United States, and/or importing the Accused Product into the United States, and will continue to infringe unless enjoined by this Court.

53. As shown in paragraphs 22 and 24 above, each Accused Product is a foot-therapy and toe-aligning device comprising: a frame being formed of an elastomeric material.

54. As shown in paragraphs 22 and 24 above, the frame of each Accused Product has a top portion, a bottom portion, a front portion, a back portion, and opposed first and second ends that define a frame length.

55. As shown in paragraphs 22 and 24 above, the frame of each Accused further includes a first peripheral projection and a second peripheral projection, the first and second peripheral projections rising upwards from the first and second ends of the frame, respectively, and being spaced apart along the frame length.

56. As shown in paragraphs 22 and 24 above, each Accused Product includes a plurality of stretchable toe posts formed of an elastomeric material that

are integrally formed with the top portion of the frame and are spaced apart along the frame length between the first and second peripheral projections; each of the toe posts extends upwards from the top portion of the frame along a toe post length and terminates in an outer edge having a bulbous shape; the bulbous shape at the outer edge of each toe post extends beyond a portion of the toe post immediately beneath the bulbous shape in all directions.

57. As shown in paragraphs 22 and 24 above, the plurality of toe posts in each Accused Product consists of four toe posts that are positionable to separate all five toes of a human foot, with two of the four toe posts being inner toe posts and two of the four toe posts being outer toe posts.

58. As shown in paragraphs 22 and 24 above, in each Accused Product, the first peripheral projection is located outside of and adjacent to one of the two outer toe posts and the second peripheral projection is located outside of and adjacent to the other of the two outer toe posts, the first peripheral projection and the second peripheral projection being sized so that, when the plurality of toe posts are received between five toes of a human foot, the first peripheral projection rises above a toe located between the first peripheral projection and its adjacent outer toe post, and the second peripheral projection rises above a toe located between the second peripheral projection and its adjacent outer toe post.

59. Accordingly, the Accused Product infringes at least claim 1 of the '616 patent, Exhibit D.

60. Defendants have been aware of the '616 patent since at least notice of this Complaint.

61. Defendants' continued infringement of the '616 patent (Exhibit D) continues to be, willful, deliberate, and objectively reckless.

62. Defendants' infringing conduct has caused, is causing, and will continue to cause irreparable injury to FenF unless such infringing conduct is enjoined by this Court.

**Count V - Patent Infringement
(Infringement of the '359 Patent)**

63. FenF repeats and realleges the allegations contained in paragraphs 1 through 62 as if fully set forth herein.

64. Defendants have directly infringed, and continues to directly infringe, one or more claims of the '359 patent, Exhibit E, under 35 U.S.C. § 271, either literally or under the doctrine of equivalents, by making, using, offering to sell, and/or selling the Accused Product within the United States, and/or importing the Accused Product into the United States, and will continue to infringe unless enjoined by this Court.

65. As shown in paragraphs 22 and 24 above, each Accused Product is a foot-therapy and toe-aligning device comprising: a frame being formed of an

elastomeric material and having a frame length extending between opposed first and second ends of the frame.

66. As shown in paragraphs 22 and 24 above, the frame in each Accused Product has a top portion, a bottom portion, a front portion, a back portion, and further includes a first peripheral projection and a second peripheral projection. The first and second peripheral projections rise upwards from the first and second ends of the frame, respectively, and are spaced apart along the frame length. Wherein at least a portion of the frame is curved along the frame length, and wherein a frame width as defined by the front and back portions of the frame is greater at the first end of the frame than at the second end of the frame.

67. As shown in paragraphs 22 and 24 above, each Accused Product includes a plurality of stretchable toe posts formed of an elastomeric material that are integrally formed with the top portion of the frame and are spaced apart along the frame length between the first and second peripheral projections.

68. As shown in paragraphs 22 and 24 above, each of the toe posts in each Accused Product extends upwards from the top portion of the frame to an exposed outer edge that is independent of the exposed outer edges of the other toe posts; and wherein the plurality of toe posts consists of four toe posts, with two of the four toe posts being inner toe posts and two of the four toe posts being outer toe posts, wherein the first peripheral projection is located outside of and adjacent to one of

the two outer toe posts and the second peripheral projection is located outside of and adjacent to the other of the two outer toe posts.

69. As shown in paragraphs 22 and 24 above, in each Accused Product, the first peripheral projection and the second peripheral projection are sized so that, when the plurality of toe posts are received between five toes of a human foot, the first peripheral projection rises above a toe located between the first peripheral projection and its adjacent outer toe post, and the second peripheral projection rises above a toe located between the second peripheral projection and its adjacent outer toe post.

70. Accordingly, the Accused Product infringes at least claim 1 of the '359 patent, Exhibit E.

71. Defendants have been aware of the '359 patent since at least notice of this Complaint.

72. Defendants' continued infringement of the '359 patent (Exhibit E) continues to be, willful, deliberate, and objectively reckless.

73. Defendants' infringing conduct has caused, is causing, and will continue to cause irreparable injury to FenF unless such infringing conduct is enjoined by this Court.

RELIEF REQUESTED

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

A. Finds that Defendants infringe the '981 registration (gemstone faceted handle design) violation of 15 U.S.C. § 1114;

B. Finds that Defendants infringe the '435 registration ("GEMS") 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' trademark infringement, increased by up to three times, pursuant 15 U.S.C. § 1117;

E. Finds that FenF be awarded 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 engaging trademark infringement with respect to each of the '981 and '435 registrations;

H. 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 GEMS® and faceted handle trademarks;

I. Orders Defendants to deliver to FenF any and all advertising, products, packaging or any other items that infringe FenF's GEMS® and faceted handle trademarks;

J. Orders Defendants to identify, in writing each and every manufacturer, supplier, distributors, shipper, reseller, retailer or wholesaler of all products and packaging that infringe FenF's GEMS® and faceted handle trademarks by providing at least the name, address, telephone number and email address of such person;

K. Orders Defendants to provide FenF with the identification, in writing, 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;

L. Orders Defendants to provide FenF, in writing, a full accounting as to the precise dollar amount of products that infringe FenF's GEMS® and faceted handle trademarks made available or provided and the profits recognized by Defendants in connection with such infringement;

M. Finds Defendants have directly infringed, and are directly infringing, one or more claims of the '675 patent, '616 patent and the '359 patent in violation of 35 U.S.C. § 271;

N. Finds Defendants' continued infringement has been willful and deliberate with respect to the '675, the '616 and the '359 patents;

O. Awards to FenF damages adequate to compensate for Defendants' infringement of the '675, the '616 and '359 patents, together with interest and costs fixed by this Court, pursuant 35 U.S.C. § 284;

P. Awards to FenF up to three times the amount found or assessed as damages pursuant to 35 U.S.C. § 284;

Q. Finds this case to be exceptional and awards to FenF its reasonable attorney fees pursuant 35 U.S.C. § 285;

R. Orders Defendant 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 the '616 and '359 patents pursuant 35 U.S.C. § 283; and

S. 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.

Respectfully submitted,

Dated: March 16, 2018

By: /s/ Richard W. Hoffmann

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JURY TRIAL DEMANDED

FenF demands a jury trial on all issues so triable.

Respectfully submitted,

Dated: March 16, 2018

By: /s/ Richard W. Hoffmann

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