

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

700 FEB 25 2010

Dina Castillo, individually; Frank Nunez,
individually; and Dina Castillo and Frank
Nunez together d/b/a Unicus Performance
Training, LLC,

Case No.

Plaintiffs,

v.

Harpo, Inc.,

Defendant.

10 CH07973

VERIFIED COMPLAINT

Plaintiffs, Dina Castillo, individually ("Castillo"); Frank Nunez, individually ("Nunez"); and Dina Castillo and Frank Nunez together d/b/a Unicus Performance Training, LLC, (together referred to as "UNICUS") for their Complaint against Harpo, Inc. ("HARPO"), state as follows:

Nature of Lawsuit

This Complaint seeks declaratory relief and an award of damages for HARPO's unfair business practices, unjust enrichment, quantum meruit and breach of oral contract.

Parties

1. Plaintiff, Dina Castillo is an individual residing in Indian Head Park, Cook County, Illinois.
2. Plaintiff, Frank Nunez is an individual residing in Indian Head Park, Cook County, Illinois.
3. Plaintiff, Unicus Performance Fitness, LLC is an Illinois Limited Liability Company with its principal place of business at 233 North Michigan Avenue, Chicago, Illinois.

Dina Castillo and Frank Nunez are the principal owners and operating members of UNICUS and conduct business by and through that company under the name Unicus Fitness.

4. Defendant Harpo, Inc. is an Illinois corporation with its principal place of business at 110 N. Carpenter, Chicago, IL 60607.

5. Jurisdiction and venue are proper pursuant to 735 ILCS 5/2-209 and 5/2-102.

6. Plaintiff, Castillo is a 2002 University of Wisconsin-LaCrosse graduate with a degree in Exercise Science and Sports Management. Since graduation, Castillo has been active in designing and implementing fitness training and wellness programs for individuals, groups and corporations. She is a NSCA-CSCS certified strength and conditioning specialist.

7. Plaintiff, Nunez is a 1995 University of Michigan graduate with a degree in Kinesiology-and Biomechanics. Since graduation, Nunez has been integrally involved in fitness science, strength and conditioning, personal training, corporate wellness programs and management of commercial fitness facilities.

8. In or about July 2003, Castillo and Nunez established UNICUS. UNICUS is a full-service fitness instruction and training company offering a broad range of fitness programs, from individual personal training and instruction to group programs such as *Wedding Boot Camp*[™], *HEAT*[™] and *Beach Body Emergency*[™], as well as providing branded, professional fitness facility management for commercial and residential buildings. The programs offered by UNICUS include specific planned exercises and services ranging from individual physical fitness assessments and training to consultation on nutrition and meal planning.

9. In about September 2004, UNICUS developed a program entitled *Wedding Boot Camp*[™]. The *Wedding Boot Camp* program gained national attention and recognition as a unique and highly successful fitness program for brides-to-be, grooms-to-be and those seeking

specialized training focused on a time-measured goal. Other successful programs include Health Evaluation and Testing (HEAT™), a program designed and created by UNICUS and implemented by Chicago area Fire Departments, namely, New Lenox, LaGrange, Pleasantview and Minooka.

10. In addition to its other fitness programs, UNICUS develops and conducts Corporate Wellness Programs. UNICUS' Corporate Wellness Programs are unique, custom-designed fitness programs for a company's employees which include identifying health risk factors, performing individual fitness evaluations, custom-designing fitness exercises, developing and implementing programs including the monitoring and tracking of the employees' performance and progress.

11. Over the past six years, UNICUS has provided Corporate Wellness Programs for Weiss Insurance Agency, the Federal Aviation Administration (FAA), AON Insurance and others.

12. One unique Corporate Wellness Program developed by UNICUS is called The Corporate Fitness Challenge. This is a program design based on establishing a series of goals that each person attempts to meet each month. The individuals who meet their goals then qualify for prizes or gifts that the company can choose, and thus, provides an incentive for the employees to achieve improved fitness, and ultimately improve their health and work performance for their employer. Both the Corporate Wellness and Corporate Fitness Challenge Programs can benefit a company by lowering health care expenses, reducing absenteeism, improving teamwork and reducing stress in the work place.

13. Because of the unique and creatively designed fitness programs, UNICUS has received national recognition and acclaim in the Wall Street Journal, NBC Television and Chicago News Beat and other Chicago area media.

14. In or about June 2008, Plaintiffs were invited to meet with Tenia Davis, the head of Human Resources for HARPO, Kimberly Russell and Sandra Lopez, both HARPO Human Resources employees, as well as a small group of other HARPO employees, to introduce UNICUS Corporate Wellness Programs to HARPO.

15. In or June 2008, HARPO, through its authorized employees advised UNICUS that it was interested in having UNICUS create a Corporate Fitness Challenge (hereafter the "Program") specifically for HARPO employees to be called the "O Fitness Challenge" and that they wanted UNICUS to be the fitness company to implement the employee fitness program for HARPO.

16. Over the next several weeks in June 2008, Plaintiffs met with HARPO representatives to discuss the nature of the Program, and how it could be structured, implemented and documented. At these times, it was also repeatedly stated that HARPO was looking at making the "O Fitness Challenge" into a show segment for the Oprah Winfrey TV Show at some time in the future. HARPO authorized employees discussed the possibility that UNICUS would be involved with the show's creation and implementation as an inducement for UNICUS to provide its services to HARPO.

17. UNICUS and authorized representatives of HARPO continued discussions over the next several weeks. In that time, UNICUS developed and proposed an outline for the "O Fitness Challenge" Corporate Wellness Program. A specific outline of Program features

including employee testing and monitoring was provided to HARPO by UNICUS (see Exhibit A, attached).

18. In or about July 2008, UNICUS and HARPO, through its authorized agent and employee, Tenia Davis, agreed that HARPO would retain UNICUS to create, design and provide fitness program services for the "O Fitness Challenge" to HARPO. Specifically, UNICUS would be the official fitness training company for HARPO and the "O Fitness Challenge." UNICUS would help design the exercise area inside Harpo Studios, to supervise a weigh-in, take body measurements, conduct one-on-one interviews with each employee and set goals. UNICUS would record the data and then develop an individual file and record of those goals for each employee. UNICUS was also responsible for fully staffing the weigh in and measurement days, with a staff of qualified fitness test administrators.

19. Under the terms of the agreement, UNICUS was to design and provide a Program for up to 100 HARPO employees, and, after initial enrollment and processing, monitor the Program. UNICUS and HARPO agreed that Plaintiffs would provide about two hours of services per week for monitoring employee performance. Any work performed by Plaintiffs beyond that commitment would be paid for by HARPO at Plaintiffs' standard pricing.

20. In exchange for UNICUS' initial work, HARPO, through Tenia Davis, promised UNICUS that UNICUS would receive the right to issue two (2) Press Releases announcing the formal relationship between HARPO and UNICUS, appointing UNICUS the sole and exclusive fitness vendor with the "O Fitness Challenge" and provide UNICUS with a minimum of five (5) Corporate Referrals and professional introductions. Failure to meet those conditions would result in UNICUS receiving its normal Corporate Wellness pricing for its work on the "O Fitness Challenge" program.

21. Thereafter, beginning in August 2008, UNICUS processed 99 HARPO employees and enrolled them in the Program. As part and parcel of the work requested by HARPO, UNICUS also created an instructional DVD for display in the testing and measuring area. HARPO initially estimated that testing, measuring and consulting would take four to five hours. The actual length of time for initial testing took more than eight hours.

22. At the request of HARPO and in performance of their agreement, Plaintiffs created a health evaluation and fitness performance checklist and form for use by each employee enrolled in the Program. The Program created by Plaintiffs organized employees into teams of three to five persons, or allow individual participation. Folders for each employee, including Oprah Winfrey, were prepared by UNICUS for the Program (see Exhibit B, attached).

23. At the special instance and request of HARPO employees including Ms. Davis, Ms. Russell and Ms. Lopez, UNICUS expanded the Program to accommodate additional HARPO employees.

24. By September 2008, nearly 300 HARPO employees were enrolled and processed in the Program by UNICUS. Because of the expanded size of the Program, UNICUS was required to engage persons to assist in fitness testing. Each testing and measuring day performed by UNICUS each month became a logistical challenge to coordinate 25-35 UNICUS testers to service HARPO employees and process all of those employees in the "O Fitness Challenge" in a six to eight hour time period required by HARPO.

25. In furtherance of the agreement, UNICUS designed a questionnaire and spreadsheet, produced individual employee folders, gathered data and oversaw the Program implementation. At the request of HARPO and Ms Davis, Ms. Russell and Ms. Lopez, UNICUS

continued to expand the Program, converting the contemplated basic Wellness Program for 100 employees, into a sophisticated time consuming program for more than 300 HARPO employees.

26. Between August 2008 and March 2009, HARPO employees, Ms. Davis, Ms. Russell and Ms. Lopez, made repeated requests for additional work, additional training and employee monitoring. Between January and March 2009, UNICUS, through Plaintiff, Castillo, provided training up to five hours per day, three days per week, enrolled several hundred more employees and delivered Program materials and services to HARPO, all at HARPO's insistence and request. During this entire time, no press release was created and no corporate referrals were provided by HARPO in compliance with the agreement.

27. By March 2009, 341 employees were enrolled and processed by UNICUS in the Program. This expanded Program required Castillo to work ten hours per day, five days per week, over a four to eight week period, well in excess of the initial agreed commitment of time.

28. In or about March 2009, HARPO asked Castillo and Nunez to participate in an Oprah Radio XM program hosted by Oprah Winfrey's former personal trainer, Bob Green. UNICUS agreed.

29. In or about March 15, 2009, UNICUS sent an e-mail announcement to its clients and customers promoting the Bob Green radio show and asking them to listen to the show. A true and correct copy of the announcement is attached as Exhibit C.

30. On March 16, 2009, Plaintiffs Castillo and Nunez participated in the radio show and answered Mr. Green's questions about how they got into the fitness industry and the creation of UNICUS.

31. Shortly, thereafter, HARPO, through its authorized agent and employee, Tenia Davis, accused Castillo and Nunez of "a gross and egregious" violation of the Confidentiality

Assurances Agreement by publishing the fact of their appearance on the HARPO affiliated Oprah Radio Show hosted by Bob Green.

32. Shortly thereafter, Plaintiff, Castillo, met with HARPO employees, Kimberly Russell and Sandra Lopez who advised UNICUS that its work on the "O Fitness Challenge" program was being terminated.

33. On information and belief, shortly thereafter, HARPO ended the "O Fitness Challenge" program for its employees.

34. In or about April 1, 2009, UNICUS requested that the consideration promised by HARPO be performed. At that time, UNICUS sent an invoice to HARPO requesting payment for its services.

35. Although the value of the Corporate Wellness Program performed by UNICUS would typically be in the range of \$100,000 to \$130,000, UNICUS sent an invoice to HARPO asking for \$63,628.50 as compensation. A true and correct copy of the invoice is attached as Exhibit D.

36. In or about April 15, 2009, rather than paying the invoice or performing on its agreement, HARPO, through its Vice President/General Counsel, William L. Becker, sent a letter to Plaintiffs accusing them of violating a Confidential Assurances Agreement and denying that HARPO and UNICUS had entered into a business relationship. HARPO, through William L. Becker, claims that Plaintiffs' services were "voluntary." A true and correct copy of the letter is attached as Exhibit E.

37. In or about April 27, 2009, UNICUS, through its counsel, notified HARPO that UNICUS considered an agreement existed and that consideration for the services provided was appropriate (see Exhibit F, attached).

38. In or about May 7, 2009, HARPO responded that UNICUS' performance was voluntary and provided without consideration. A true and correct copy of the May 7, 2009 response is attached as Exhibit G.

39. A real and actual controversy exists over the validity and enforceability of the Confidential Assurances Agreement, a true and correct copy of which is attached as Exhibit H.

COUNT I
Declaratory Judgment

1. – 39. Plaintiff repeats the allegations of paragraphs 1 through 39 above as paragraphs 1 through 39 of this Count I.

40. In or about July 23, 2008, in conjunction with UNICUS' agreement to provide services, HARPO required UNICUS to execute a Confidentiality Assurances Agreement (see Exhibit H).

41. The Confidential Assurances Agreement is an unenforceable Agreement being unsupported by adequate consideration.

42. Plaintiffs are entitled to a judgment as a matter of law that the Confidential Assurances Agreement is unenforceable.

WHEREFORE, Plaintiffs pray this Court will enter judgment in favor of Plaintiffs and declare as a matter of law the Confidential Assurances Agreement dated July 23, 2008 by and between the parties is unenforceable.

COUNT II
Unjust Enrichment

1. – 39. Plaintiff repeats the allegations of paragraphs 1 through 39 above as paragraphs 1 through 39 of this Count II.

40. Specifically, HARPO's unfair and intentional actions as described above induced UNICUS to provide a benefit to HARPO.

41. As a result of the conduct described above, HARPO received the full benefit of Plaintiffs' services, has been and will remain unjustly enriched at the expense of UNICUS.

42. Further, HARPO knowingly and voluntarily accepted the benefits of UNICUS' work and has retained that benefit to the detriment of UNICUS.

43. Finally, the retention of said benefit by HARPO violates the principles of justice, equity, and good conscience.

44. Therefore, HARPO should be required to disgorge and pay to UNICUS the value of this unjust enrichment.

WHEREFORE, Plaintiffs pray this Court will enter judgment in favor of Plaintiffs and against Defendant on this Count II and award Plaintiffs their damages as measured by Defendant's unjust enrichment and granting such other relief as is reasonable and just.

COUNT III **Quantum Meruit**

1. – 44. Plaintiff repeats the allegations of paragraphs 1 through 44 of Count II above as paragraphs 1 through 44 of this Count III.

45. As a result of HARPO's conduct described above, UNICUS has been and will remain inadequately compensated for services performed.

46. Specifically, HARPO's unfair and intentional actions as described above induced UNICUS to perform valuable services. The performance of those services was not gratuitous or altruistic.

47. Further, Defendant knowingly and voluntarily accepted the benefit of those services.

48. In addition, despite the expectation of UNICUS, HARPO has and will continue to retain the benefit of those services without compensation to UNICUS.

49. HARPO's retention of said services without compensation is unjust.

50. UNICUS has established a reasonable basis for a determination of the value of those services.

51. HARPO should be required to pay the reasonable value of the services provided and the fair value for the services rendered to HARPO.

WHEREFORE, Plaintiffs pray this Court will enter judgment against Defendant, HARPO and grant the following relief:

- a. An award of damages adequate to make the HARPO's retention of the benefit "just," in light of the actual benefit received;
- b. An award of damages to compensate UNICUS for the fair value of the services performed by UNICUS and unfairly and unlawfully retained by HARPO; and
- c. Such other and further relief as this Court may deem proper and just.

COUNT IV
Breach of Contract

1. – 51. Plaintiff repeats the allegations of paragraphs 1 through 51 of Count III above as paragraphs 1 through 51 of this Count IV.

52. As described above, during meetings between HARPO and UNICUS, HARPO asked UNICUS to establish the "O Fitness Campaign."

53. In or about that time, UNICUS agreed to implement the employee fitness program for HARPO on the terms and conditions set forth above.

54. Under the essential terms and conditions of the mutual agreement, UNICUS would design and provide a program for up to 100 HARPO employees, and after initial enrollment and processing, monitor the Program. UNICUS and HARPO agreed that Plaintiffs would provide about two hours of services per week for monitoring employee performance. Any work performed by Plaintiff's beyond that commitment would be paid for by HARPO at Plaintiff's standard pricing.

55. As a result of the discussions and negotiations between HARPO and UNICUS, HARPO knew that it was entering an agreement with UNICUS to design and provide a Program for HARPO employees.

56. On or about that time, HARPO knew and agreed to the essential terms and conditions of the Agreement between it and UNICUS.

57. On or about that time, UNICUS knew and agreed to the essential terms and conditions of the Agreement between it and HARPO.

58. On or about April 1, 2009, UNICUS requested that the consideration promised by HARPO be performed.

59. On or about April 15, 2009, HARPO refused to perform on the consideration of the Agreement, and, therefore breached that Agreement.

60. As a direct and proximate result, Plaintiffs were harmed, suffered pecuniary losses and are entitled to a remedy at law.

61. UNICUS performed all of their obligations, terms and commitments of the contract.

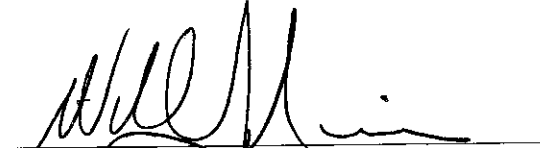
WHEREFORE, Plaintiffs pray this Court will enter judgment in their favor against Defendant, HARPO, on this Count IV and grant Plaintiffs an award of damages sufficient to

compensate UNICUS for the fair value of the services performed by UNICUS, and, such other and further relief as this Court may deem proper and just.

Respectfully submitted,

Dina Castillo, individually; Frank Nunez, individually; and Dina Castillo and Frank Nunez together d/b/a Unicus Performance Fitness, LLC,


By:


William L. Niro,
Attorney for Plaintiffs

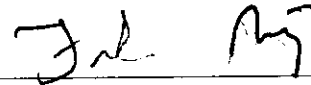
William L. Niro
Attorney for Plaintiffs
Niro, Scavone, Haller & Niro, Ltd.
181 W. Madison St. Suite 4600
Chicago, IL 60602
Telephone: (312) 236-0733
Facsimile; (312) 236-1097
Atty No.: 91554

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.



Dina Castillo



Frank Nunez

Date: 2.22.10