THIS IS NOT AN ARBITRATION CASE. ASSESSMENT OF DAMAGES HEARING IS REQUIRED. MAJOR JURY TRIAL IS DEMANDED.

SHABEL & DeNITTIS, P.C.
By: Stephen P. DeNittis, Esquire
Identification No: 80080
Two Penn Center, Suite 200
1500 JFK Boulevard
Philadelphia, PA 19102
(215) 564-1721

ANDREW ROSEMAN, on behalf of himself and all others similarly situated, Plaintiff, v. SUBWAY SANDWICH SHOPS, INC. and DOCTOR'S ASSOCIATES, INC. Defendants.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY TERM NO. **CLASS ACTION**

NOTICE - CIVIL ACTION – CONSUMER FRAUD CLASS ACTION

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by an attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Lawyers Reference Service
Philadelphia County Bar Association
One Reading Center
Philadelphia, PA 19107
(215) 238-1701

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ANDREW ROSEMAN, on behalf of himself and all others similarly situated, Plaintiff, v. SUBWAY SANDWICH SHOPS, INC. and DOCTOR'S ASSOCIATES, INC. Defendants.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY TERM NO. **CLASS ACTION**

INTRODUCTION

1. This is a state-wide class action brought under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Cons.St. § 201–1 et seq, against Subway Sandwich Shops, Inc., a wholly owned subsidiary of Doctor's Associates, Inc. (hereafter collectively referred to as "Subway") over identical, false, affirmative misstatements of material fact and knowing material omissions made by Subway regarding its trademarked "Footlong" sandwich, as alleged herein.

2. Starting at a time prior to January 24, 2007 and continuing until the present, Subway has engaged in a massive advertising campaign regarding its large size sandwich, which Subway has named the "Footlong" sandwich. Each component of this campaign, including all signs posted in

each Pennsylvania Subway store, the menu in each Pennsylvania Subway store, and all television ads, radio ads, internet ads and newspaper ads appearing in Pennsylvania at any time during the class period, all used the same identical language to describe this sandwich, uniformly described by Subway in each such instance as a "Footlong" sandwich.

3. Indeed, the name given to this product by Subway is the "Footlong".

4. These repeated references by Subway to this sandwich as a "Footlong" are intended by Subway to convey the impression that such sandwiches are at least one foot---i.e. twelve inches ---in length and that is the effect such representations have in fact on the average consumer.

5. In actuality, despite the repeated use of uniform language by Subway stating that this sandwich is a "Footlong," the product in question is not, in fact, a foot long. Rather, this product consistently measures significantly less than twelve inches in length.

6. Subway is well aware of this fact and, at all times relevant to this complaint, has been aware of the fact that the "Footlong" sandwich is, and has been, consistently less than a foot long since Subway named its large sandwich the "Footlong" sometime prior to January 24, 2007.

7. The discrepancy in size between the uniform statements in Subway's signs, menus and advertising regarding the size of this sandwich and the actual size of this sandwich is not an accident nor is it the result of any variation in size among such sandwiches.

8. Rather, Subway has admitted in communications with the press that this sandwich is made according to exacting, uniform procedures and specifications imposed by Subway upon its franchisees and stores, all of whom are required by Subway to use specified ingredients in specified amounts. All such procedures by Subway are intended by Subway to maintain consistency as to, inter alia, the size of the product and do in fact maintain such consistency.

9. The use of the uniform procedures and specifications mandated by Subway does not

result in a sandwich which is at least twelve inches long. Rather, the use of the uniform procedures and specifications mandated by Subway consistently results in a sandwich which is between eleven and eleven and one half inches long.

10. This fact is known to Subway and has been known to Subway since before it named its large sandwich a "Footlong".

11. This action aims at obtaining redress under the Pennsylvania UTPCPL for those persons in Pennsylvania who received less than what they were promised when they purchased a "Footlong" sandwich in Pennsylvania between January 24, 2007 and the present.

JURISDICTION AND VENUE

12. All claims in this matter arise exclusively under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Cons.St. § 201–1, et seq.

13. This matter is properly venued in Philadelphia County, in that the named plaintiff purchased "Footlong" sandwiches in Philadelphia County, and Subway's uniform statements on signs, menus and advertising regarding the sandwich being a "Footlong" were made, inter alia, in Philadelphia County and were intended to be seen, heard and read, inter alia, in Philadelphia County.

14. There is no federal subject matter jurisdiction over the claims pleaded in this proposed class action, in that the total amount in controversy, including treble damages and attorney's fees, is less than $5 million.

15. Plaintiff estimates the damages to the class in this proposed class action are at least several hundred thousand dollars.

THE PARTIES

16. Plaintiff Andrew Roseman resides in Voorhees, New Jersey, works in the City of Philadelphia and regularly purchased Footlong sandwiches at Subway restaurants in the City of Philadelphia.

17. Like all members of the proposed class, Plaintiff Roseman purchased at least one "Footlong" sandwich from a Subway restaurant in Pennsylvania during the class period, after viewing a uniformly-worded sign and menu, which are posted in each Subway in Pennsylvania, which labels the large Subway sandwich a "Footlong." Specifically, Plaintiff Roseman purchased a "Footlong" sandwich on April 12, 2012 and May 14, 2012 at a Subway restaurant located in the City of Philadelphia, as well as other "Footlong" sandwiches at Subway restaurants located in Pennsylvania on various other dates during the class period.

18. Subway Sandwich Shops, Inc. is a wholly owned subsidiary of Doctor's Associates, Inc., with the primary offices of both being located at 325 Bic Drive, Milford, Connecticut.

19. Upon information and belief, both of these entities jointly participated in the actions described herein, with each entity causing the name of the sandwich to be the "Footlong", each entity causing uniformly-worded signs and menus in Subway stores to each bear the word "Footlong" in describing the sandwich in question and in causing the word "Footlong" to appear in all advertising relating to this sandwich, as described herein.

20. Both Defendants are hereafter collectively referred to as "Subway."

CLASS ACTION ALLEGATIONS

21. **Class Definition:** Plaintiff brings this action as a class action pursuant to Rule 1701, et seq. of the Pennsylvania Rules of Civil Procedure on behalf of himself and all members of the following proposed Class:

All persons who, between January 24, 2007 and the present, purchased a "Footlong" sandwich from a Subway restaurant in Pennsylvania.

22. **Rule 1702(1) Numerosity:** The class for whose benefit this action is brought is so numerous that joinder of all members is impracticable.

23. Upon information and belief, the proposed class is composed of at least 10,000 persons.

24. **Rule 1702(2) Commonality:** Common questions of law and fact exist as to each class member.

25. All claims in this action arise exclusively from Subway's uniform policy as alleged herein.

26. No violations alleged in this complaint are a result of any individualized oral communications or individualized interaction of any kind between class members and Subway or anyone else.

27. Rather, all claims in this matter arise from the identical, false affirmative statements made by Subway which, regardless of the means or media by which it was conveyed, uniformly referred to this sandwich as a "Footlong."

28. There are common questions of law and fact affecting the rights of the class members, including, inter alia, the following:

a. whether Subway's policy as described herein violates the UTPCPL;

b. whether Subway's repeated, uniform statements that this sandwich was a "Footlong" was a false, deceptive or misleading affirmative statement of fact;

c. whether giving the name "Footlong" to this sandwich was "deceptive conduct which creates a likelihood of confusion or misunderstanding" within the meaning of 73 P.S. § 201-2(4)(xxi); and

d. whether Subway engaged in a knowing omission of material fact by failing to inform consumers in any fashion that, under the uniform specifications and

procedures imposed by Subway, this sandwich could be, and consistently was, less than twelve inches in length.

28. **Rule 1702(3) Typicality:** The claims of Plaintiff are typical of those of all class members.

29. The claims of plaintiff are not only typical of all class members, they are identical.

30. All claims of plaintiff and the class arise from the same identical, false, statement of affirmative fact by Subway, which uniformly described the sandwich as a "Footlong" in uniformly-worded signs and menus posted in each Subway restaurant in Pennsylvania, and from the same material omission of fact in that Subway failed to warn customers in any fashion that this product could be, and consistently was, less than twelve inches long.

31. All claims of plaintiff and the class are based on the exact same legal theories.

32. **Rule 1702(4) Adequacy of Class Representation:** Plaintiff will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709.

33. Plaintiff is a member of the class he seeks to represent.

34. Plaintiff has no interest antagonistic to, or in conflict with, the class.

35. Plaintiff will thoroughly and adequately protect the interests of the class, having retained qualified and competent legal counsel to represent himself and the class.

36. Plaintiff has no interest antagonistic to, or in conflict with, the class.

37. Plaintiff will thoroughly and adequately protect the interests of the class, having retained qualified and competent legal counsel to represent himself and the class.

38. **Rule 1702(5):** A class action would provide a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

39. **Rule 1708:** A class action is a fair and efficient method of adjudicating the controversy.

40. Common questions of law or fact predominate over any question affecting only

individual members.

41. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would confront Subway with incompatible standards of conduct.

42. Adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of other members not parties to the adjudications and would substantially impair or impede their ability to protect their interests.

43. To plaintiff's knowledge, no other litigation has already commenced raising these same issues against Subway in Pennsylvania or under Pennsylvania law.

44. This particular forum is appropriate for the litigation of the claims of the entire class since all proposed class members purchased "Footlong" sandwiches from Subway stores in Pennsylvania, the action raises claims exclusive under Pennsylvania law, and the plaintiff purchased his "Footlongs" at Subway stores in Philadelphia.

45. The expenses of litigation of separate claims by individual class members would be high compared to the potential recovery of each individual class member.

46. Indeed, the sandwich at issue costs less than $6 and thus individual actions to recover that amount, or any portion of that amount, are not economically feasible.

47. Thus, the absence of class certification would spell the death knell of any litigation over Subway's failure to live up to its promises regarding the size of its product.

48. The size of the class is unknown to plaintiff but is believed to be over 10,000 and there will be no difficulties likely to be encountered in the management of the action as a class action.

49. **Rule 1709:** The attorneys for the representative party will adequately represent the interests of the class.

50. Plaintiff's attorneys have participated in over 50 class actions and have been appointed by courts to serve as sole class counsel or class co-counsel in several dozen certified class actions.

51. Plaintiff has no conflict of interest with other class members.

52. Plaintiff seeks the same relief for himself as for every other class member.

53. Plaintiff has or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

FACTS GIVING RISE TO THE CAUSE OF ACTION

54. For several years, Subway has bombarded consumers in Pennsylvania and elsewhere with television and radio ads for its trademarked "Footlong" sandwich, each of which repeat the word "Footlong" over and over.

55. Subway has also aimed internet and newspaper ads at Pennsylvania consumers, all of which use the word "Footlong" to describe Subway's large submarine sandwich, which were seen and heard, inter alia, by plaintiff.

56. The word "Footlong" also appears on uniformly-worded signs posted in all Subway stores in Pennsylvania, which were seen, inter alia, by plaintiff.

57. The word "Footlong" also appears on uniformly-worded menus posted in all Subway stores in Pennsylvania, which were seen, inter alia, by plaintiff.

58. Regardless of any other variations in the content of Subway's reference or advertising for its "Footlong" sandwich, or the media by which it is projected to consumers, every single such reference or advertisement by Subway during the class period, whether it be in print, on a sign in a Subway store, on a menu, or on television, computer, radio or otherwise, uniformly refers to Subway's large sandwich as a "Footlong."

59. Indeed, the name given to the product itself by Subway expressly describes its purported size: i.e. the "Footlong."

60. Subway is well aware that the impression created in the minds of the average consumer by the use of the name "Footlong," whether it be in Pennsylvania or any other area where Standard English measurements are used, is that the sandwich in question is at least one foot---i.e. twelve inches---long.

61. Subway is aware of this fact from, inter alia, market research and focus groups conducted by and on behalf of Subway.

62. Subway is also well aware that its "Footlong" sandwich is shorter than twelve inches long.

63. Despite this knowledge, Subway does not warn consumers in any way, shape or form, whether through disclaimers, signage or by any other means, that the "Footlong" sandwich is, or could be, less than one foot long or that the name "Footlong" is intended by Subway to be anything other than a literal description of its length.

64. To the contrary, it is Subway's conscious intent to create the impression in the minds of consumers that its large sandwich is a foot---i.e. twelve inches---long.

65. The fact that the "Footlong" sandwich is less than twelve inches long is not the result of an isolated instance, or an accident, or any variation in the recipe.

66. Rather, as a matter of uniform policy, Subway imposes strict controls and procedures on all its franchisees and stores in Pennsylvania; procedures which are designed to create a uniform product that does not vary in size or composition from store to store.

67. As a matter of policy, following the procedures imposed by Subway, and using the

materials mandated by Subway, in the amounts mandated by Subway, results in a large sandwich that is less than twelve inches in length, a fact of which Subway is fully aware.

68. Despite this, Subway continues to post signs in each of its stores and to run advertising which uniformly describes this product as a "Footlong" sandwich and to list this item as a "Footlong" on each menu in each Subway in Pennsylvania.

69. Subway does so without posting any warning or disclaimer of any type that the name "Footlong" is intended to be anything other than a literal description of the length of this sandwich and/or warning that the actual sandwich is, or could be, less than twelve inches long.

70. Subway is aware that one of Subway's competitors, McDonald's, posts warnings and disclaimers that its "Quarter Pounder" represents the pre-cooked weight of that product and that the completed sandwich may not in fact be a quarter pound when served to consumers. Despite this example, Subway provides no similar warning to consumers stating that the "Footlong" is less than a foot in length.

71. Based on all of the foregoing facts, plaintiff submits that Subway's conduct is "deceptive conduct which creates a likelihood of confusion or misunderstanding" in violation of 73 P.S. § 201-2(4)(xxi).

72. While it may not be the end of the world that consumers got an eleven inch sandwich instead of the twelve inch sandwich promised, the simple fact is that these consumers were promised one thing and received something less than what was promised by Subway.

73. Moreover, as alleged herein, this conduct is not simply an accident, but rather the result of a conscious and knowing policy by Subway in which Subway promises one thing and then knowingly and systematically delivers something less than what was promised.

74. The loss of 8.3% of a $5 sandwich is far too small to warrant individual litigation by an individual consumer. Indeed, the out of pocket loss suffered by each consumer would be far less than the fee for filing a complaint in small claims court, even if the consumer attempted to seek redress pro se against what is a powerful and well-funded corporate entity.

75. Yet while the individual loss to any one class member is small, the aggregate effect of Subway's misconduct is large. By providing less than what was promised in hundreds of thousands of instances, Subway has managed to inflate profits in Pennsylvania by hundreds of thousands of dollars, using false and deceptive information to accomplish this result.

76. It is submitted that this is exactly the situation which the class action device was designed to remedy.

COUNT I

Pennsylvania Unfair Trade Practices and Consumer Protection Law
73 Pa. Cons.St. § 201–1 et seq

77. Plaintiff incorporates all preceding paragraphs of this complaint as if set forth fully herein.

78. This action does not raise any claims of common law fraud.

79. Rather, all claims in this action arise exclusively under the UTPCPL.

80. **"The purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices."** Keller v. Volkswagen of Am., Inc., 733 A.2d 642, 646 (Pa.Super.1999).

81. It is well-established that, in order to carry out that purpose, the UTPCPL must be liberally construed. See Chiles v. Ameriquest Mortg. Co., 551 F.Supp.2d 393, 398 (E.D.Pa.2008)(**"The UTPCPL must be construed liberally."**); Pirozzi v. Penske Olds-

Cadillac-GMC, Inc., 413 Pa.Super. 308, 605 A.2d 373, 376, appeal denied, 532 Pa. 665, 616 A.2d 985 (1992)**("our supreme court held that the UTPCPL is to be liberally construed in order to effect its purpose.")**

82. In order to prevail under the UTPCPL, a plaintiff must prove the transaction between plaintiff and defendant constituted "trade or commerce" within the meaning of the UTPCPL and that the defendant was engaged in unfair or deceptive acts or practices.

83. The conduct alleged herein took place during "trade and commerce" within the meaning of the UTPCPL.

84. The conduct alleged herein constitutes a deceptive practice.

85. The UTPCPL 73 P.S. § 201-2(4)(xxi) defines unfair or deceptive acts or practices, inter alia, as any: **"deceptive conduct which creates a likelihood of confusion or misunderstanding."**

86. Prior to 1996, 73 P.S. § 201-2(4)(xxi) required that a defendant engage in the equivalent of common law fraud. See Flores v. Shapiro & Kreisman, 246 F.Supp.2d 427, 432 (E.D.Pa.2002); Commonwealth of Pa. v. Percudani, 825 A.2d 743, 746-47 (Pa.Commw.2003).

87. In 1996, however, UTPCPL 73 P.S. § 201-2(4)(xxi) was amended to add the word "deceptive" as an alternative to "fraud" in describing the practices prohibited by this section. Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC, 40 A.3d 145 (Pa.Super.2012)(holding that the amendment to the catch-all provision that added the language "or deceptive conduct" changed the requirement from proving actual fraud to merely proving deceptive conduct); Commonwealth of Pa. v. Percudani, 825 A.2d 743, 746-47 (Pa.Commw.2003) (a plaintiff who alleges deceptive conduct to proceed without proving all of the elements of common law fraud); Flores v. Shapiro & Kreisman, 246 F.Supp.2d 427, 432 (E.D.Pa.2002):

> **"by adding a prohibition on 'deceptive' conduct, the 1996 amendment to the CPL eliminated the need to plead all of the elements of common law fraud in actions under the CPL. Under general principles of statutory interpretation, no word should be rendered redundant. The new word "deceptive" in the statute, therefore, must have been intended to cover conduct other than fraud."**

88. As alleged herein, Subway has engaged in deceptive conduct which creates a likelihood of confusion or misunderstanding.

89. Such conduct is based on both affirmative misrepresentations, material nondisclosures and material omissions.

90. In the case at bar, Subway made false, deceptive and/or misleading affirmative statements of fact, stating repeatedly in uniformly worded signs posted in each Subway in Pennsylvania and on the menu in each such Subway, that the sandwich in question was a "Footlong."

91. In addition, in each television ad, radio ad, print ad, internet ad and other advertisement for this sandwich during the class period, Subway described this sandwich as a "Footlong."

92. Moreover, Subway made knowing omissions of material fact and material nondisclosures with regard to this sandwich.

93. Subway did not post any warning or disclaimer, or advise customers in any way, shape or form, that the name "Footlong" should not be taken as a literal description of the length of the sandwich in question or that the sandwich would or could be less than twelve inches in length.

94. This combination of affirmative representations and omissions was, at best, a deceptive practice.

95. Numerous cases have held that, after 1996, 73 P.S. § 201-2(4)(xxi) does not require

actual fraud. See Flores v. Shapiro & Kreisman,246 F.Supp.2d 427, 432 (E.D.Pa.2002); Commonwealth of Pa. v. Percudani, 825 A.2d 743, 746-47 (Pa.Commw.2003); Rubenstein v. Dovenmuehle Mortg., Inc., 2009 WL 3467769 (E.D.Pa.2009) at *6.

96. In the case at bar, however, the elements of fraud are met.

97. By the acts alleged herein, Subway has made a misrepresentation of a material fact and a material nondisclosure, as described herein.

98. Subway has acted with knowledge that its conduct was deceptive and with intent that such conduct deceived consumers.

99. While it is not clear that actual reliance is required, plaintiff and the class did justifiably rely upon the misrepresentation and material nondisclosure; a reliance which may be presumed in this case where a defendant has engaged in a common course of identical conduct.

100. As a proximate result of this conduct, plaintiff and the class have suffered an ascertainable loss of money.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this court to:

a. Certify the class as a class action pursuant to Rule 1701, et seq of the Pennsylvania Rules of Civil Procedure;

b. Enter an order for injunctive and declaratory relief as described herein;

c. Enter judgment in favor of each class member for damages suffered as a result of the conduct alleged herein, to include interest and pre-judgment interest;

d. Award plaintiff reasonable attorneys' fees and costs;

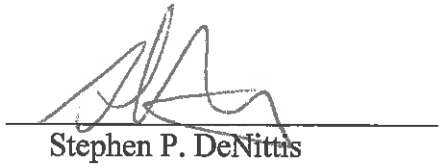
e. Award plaintiff and the class treble damages;

f. Grant such other and further legal and equitable relief as the court deems just and equitable.

JURY DEMAND

Plaintiff hereby demands a trial by jury as to all issues so triable.

SHABEL & DENITTIS

BY: 
Stephen P. DeNittis

Dated: January 24, 2013

VERIFICATION

I, Andrew Roseman, hereby state:

1. I am the Plaintiff in the within matter.

2. I verify that the statements made in the foregoing complaint are true and correct to the best of my knowledge, information and belief.

3. I understand that the statements in said complaint are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Andrew Roseman

VERIFICATION

I, Stephen P. DeNittis, hereby state:

1. I am the attorney for the Plaintiff in the within matter.

2. I verify that the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information and belief.

3. I understand that the statements in said Complaint are made subject to the penalties of 18 Pa. C.S. Section 4904 relating to unsworn falsification to authorities.

Stephen P. DeNittis

Dated: 1/24/13