UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IN RE: SUBWAY FOOTLONG SANDWICH MARKETING AND SALES PRACTICES LITIGATION	)	Case No. 2:13-md-02439-LA
	)	Judge Lynn Adelman

PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT

Plaintiffs Nguyen Buren, Charles Noah Pendrak, John Farley, Jason Leslie, Barry Gross, Richard Springer, Andrew Roseman, Vincent Gotter, Zana Zeqiri, and Ayanna Nobles (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, by and through counsel, hereby consolidate the following actions transferred into this multidistrict proceeding:

Buren v. Doctor's Associates Inc., No. 1:13-cv-498 (N.D. Ill.);

Gross v. Doctor's Associates Inc., No. 1:13-cv-601 (N.D. Ill.);

Pendrak, et al. v. Subway Sandwich Shops, Inc., et al., No. 3:13-cv-918 (D.N.J.);

Leslie v. Doctor's Associates Inc., et al., No. 3:13-cv-465-FLW-DEA (D.N.J.);

Springer v. Doctor's Associates Inc., No. 2:13-cv-143 (E.D. Cal.);

Roseman v. Subway Sandwich Shops, Inc., et al., No. 2:13-cv-793 JCJ (E.D. Pa.);

Gotter v. Doctor's Associates Inc., No. 5:13-cv-5033 JLH (W.D. Ark.);

Zeqiri v. Doctor's Associates Inc., No. 13-cv-675 (E.D. Wis.); and

Nobles v. Doctor's Associates Inc., No. 13-1767 MEJ (N.D. Cal.).

In connection with this consolidation, Plaintiffs, individually and on behalf of all others similarly situated, amend all previously filed Complaints in this action by substituting the following allegations of this Joint Consolidated Class Action Complaint:

Nature of the Case

1. Plaintiffs bring this action individually and on behalf of a proposed class (the "Class"), as more fully defined below, of similarly situated consumers throughout the United States to redress the pervasive pattern of fraudulent, deceptive and otherwise improper advertising, sales and marketing practices that Defendant Doctor's Associates, Inc. ("DAI") ("Defendant") engaged in and continues to engage in regarding the length of purported "Footlong" submarine sandwiches ("subs"), which are a core product sold by Defendant's SUBWAY® restaurants. In reality, Defendant's "Footlong" subs are not one foot, or 12 inches, in length.

2. As more fully alleged herein, Defendant's schemes or artifices to defraud Plaintiffs and other members of the proposed Class consist of systemic and continuing practices of disseminating false and misleading information via television commercials, Internet websites and postings, point of purchase advertisements and national print advertisements, all of which are intended to trick unsuspecting consumers, including Plaintiffs and other members of the proposed Class, into believing that they are receiving more food for their money than they actually are receiving.

3. SUBWAY® is a registered trademark of Defendant, and Defendant franchises SUBWAY® restaurants throughout the world. Defendant's SUBWAY® brand franchise is the world's largest submarine sandwich chain, with more than 38,000 locations around the world, including approximately 24,000 locations in the United States.

4. Defendant and its franchisees heavily market SUBWAY® "Footlong" subs as actually being 12 inches—a "foot"—long. This is made clear in Defendant's marketing

campaigns, which often refer to the measurement unit of one foot, or refer to measurements generally, when advertising the "Footlong" subs. However, the "Footlong" subs that SUBWAY® sells to its customers are materially shorter than the advertised 12 inches. As a result, consumers are receiving less than they are paying for.

5. Defendant's comprehensive nationwide advertising campaign for SUBWAY® "Footlong" subs has been extensive, and Defendant has spent a significant amount of money to convey deceptive messages to consumers throughout the United States. Defendant utilizes a wide array of media to convey its deceptive claims about SUBWAY® "Footlong" subs, including television, magazines, and the Internet. Indeed, SUBWAY® "Footlong" subs have been heavily endorsed by celebrities and athletes. Through this massive marketing campaign, Defendant has conveyed one message about these subs, inherent in the name: "Footlong" subs are actually a foot (*i.e.* 12 inches) long. Each person who has purchased SUBWAY® "Footlong" subs, including the Plaintiffs, has been exposed to Defendant's misleading advertising message and purchased those subs as a result of that advertising.

6. Plaintiffs bring this action on behalf of themselves and other similarly situated consumers throughout the United States to halt the dissemination of these false and misleading advertising messages, correct the false and misleading perception that they have created in the minds of consumers, and obtain equitable and injunctive relief for purchasers of SUBWAY® "Footlong" subs.

7. Plaintiffs allege violations of the consumer fraud statutes of all fifty (50) states and the District of Columbia, and seek equitable and injunctive relief only, not monetary damages.

Jurisdiction and Venue

8. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d). The proposed Class involves more than 100 individuals. A member of the proposed Class is a citizen of a state different from the Defendant, and the amount of controversy, in the aggregate, exceeds the sum of $5,000,000 exclusive of interest and costs.

9. Venue and personal jurisdiction are proper in this Court pursuant to recognized principles of due process and in accordance with 28 U.S.C. § 1407, as each of the actions in which this Joint Consolidated Class Action Complaint has been filed are part of a multi-district preceding No. 2439, which was consolidated in this Court as "In Re: Subway Footlong Sandwich Marketing and Sales Practices Litigation."

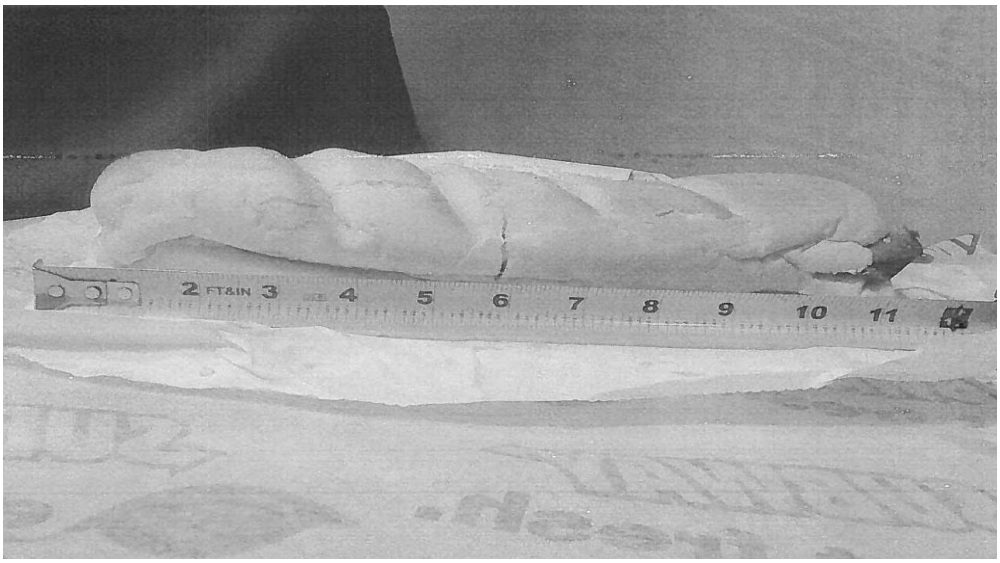
10. Venue is also proper in this district under 28 U.S.C. §1391, because a substantial part of the events and omissions giving rise to the claims occurred in this district.

The Plaintiffs

11. Plaintiff Nguyen Buren is, and at all times relevant to this action has been, a resident and citizen of Illinois. Plaintiff Buren was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in Illinois. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff purchased a "Footlong" sub to eat on January 20, 2013 at the SUBWAY® restaurant located at 1427 West Montrose Avenue, Chicago, Illinois, and other "Footlong" subs at that location and other SUBWAY® restaurants in Illinois on various other dates during the class period. The sub purchased by Plaintiff Buren on January 20, 2013 was less than eleven (11) inches in length, which is

materially (*i.e.* approximately 10%) shorter than 12 inches, or one foot, in length, as shown below:

12. Plaintiff Barry Gross is, and at all times relevant to this action has been, a resident and citizen of Illinois. Plaintiff Gross was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in Illinois. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff Gross purchased a "Footlong" sub to eat on January 23, 2013 at the SUBWAY® restaurant located at 1951 Cherry Lane, Meadow Shopping Center, Northbrook, Illinois 60062, and other "Footlong" subs at that location and other SUBWAY® restaurants in Illinois on various other dates during the class period. The sub purchased by Plaintiff Gross on January 23, 2013 was approximately eleven (11) inches in length, which is materially (*i.e.* approximately 10%) shorter than 12 inches, or one foot, in length, as shown below:



13. Plaintiff Charles Noah Pendrak is, and at all times relevant to this action has been, a resident and citizen of New Jersey. Plaintiff Pendrak was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in New Jersey. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff Pendrak purchased a "Footlong" sub to eat on January 9, 2013, December 3, 2012, and December 5, 2012 at the SUBWAY® restaurant located in Middle Township, Cape May County, New Jersey, and purchased other "Footlong" subs at SUBWAY® restaurants located in New Jersey on various other dates during the class period. The subs purchased by Plaintiff Pendrak were materially shorter than 12 inches, or one foot, in length.

14. Plaintiff John Farley is, and at all times relevant to this action has been, a resident and citizen of New Jersey. Plaintiff Farley was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in New Jersey. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff Farley purchased a "Footlong" sub to eat on December 16, 2012 at the SUBWAY® restaurant located in Marlton,

New Jersey, and purchased other "Footlong" subs at SUBWAY® restaurants located in New Jersey on various other dates during the class period. The subs purchased by Plaintiff Fairley were materially shorter than 12 inches, or one foot, in length.

15. Plaintiff Jason Leslie is, and at all times relevant to this action has been, a resident and citizen of New Jersey. He has been a Subway customer for at least seven (7) years. During that time, Plaintiff Leslie was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in New Jersey. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff Leslie purchased "Footlong" subs at SUBWAY® restaurants in various Monmouth County, New Jersey locations, including, but not limited to, Freehold, Marlboro, Howell, and Middletown Townships, as well as SUBWAY® restaurants located in the New Jersey counties of Middlesex and Ocean. The subs purchased by Plaintiff Leslie were materially shorter than 12 inches, or one foot, in length, as shown by a measurement of one of the subs below:

16. Plaintiff Andrew Roseman is, and at all times relevant to this action has been, a resident and citizen of New Jersey, but works in Philadelphia, Pennsylvania. Plaintiff Roseman was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in Pennsylvania and New Jersey. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff Roseman purchased "Footlong" subs to eat on April 12, 2012 and May 14, 2012 at a SUBWAY® restaurant located in Philadelphia, and purchased other "Footlong" subs at SUBWAY® restaurants located in Pennsylvania on various other dates during the class period. The subs purchased by Plaintiff Roseman were materially shorter than 12 inches, or one foot, in length, similar to a "Footlong" sub he purchased on April 13, 2013, shown below:

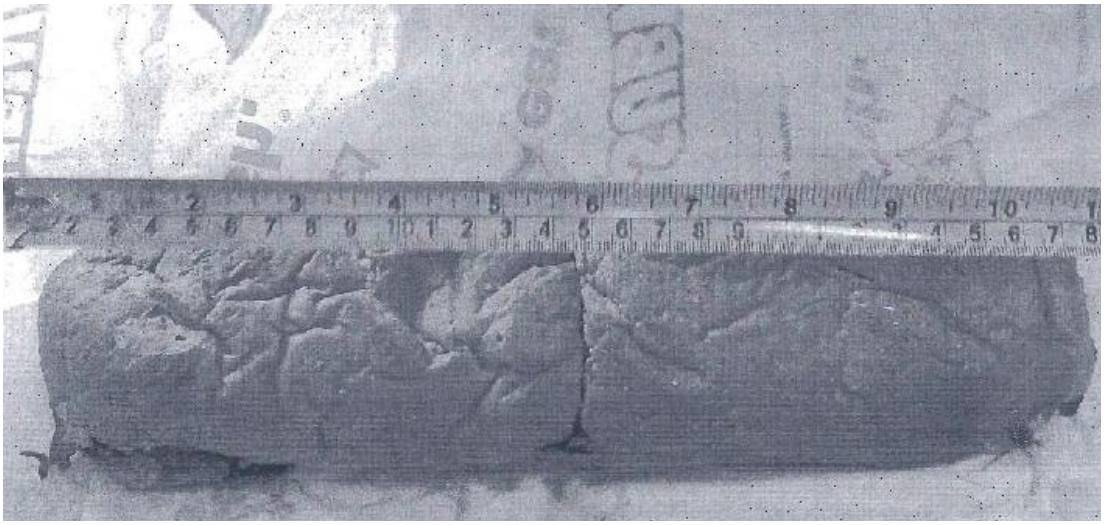
17. Plaintiff Richard Springer is, and at all times relevant to this action has been, a resident and citizen of California. Plaintiff Springer was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in

California. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff Springer purchased a "Footlong" sub to eat on January 16, 2013 at the SUBWAY® restaurant located at 1857 El Camino Real, Burlingame, California 94010, and other "Footlong" subs at that location and other SUBWAY® restaurants in California on various other dates during the class period. The sub purchased by Plaintiff Springer on January 16, 2013 was approximately eleven (11) inches in length, which is materially (*i.e.* approximately 10%) shorter than 12 inches, or one foot, in length, as shown below:

18. Plaintiff Ayanna Nobles is, and at all times relevant to this action has been, a resident and citizen of California. Plaintiff Nobles was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in California. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff Nobles purchased a "Footlong" sub to eat at a SUBWAY® restaurant located at 4496 Broadway, Oakland, California, and other "Footlong" subs at that location and other SUBWAY®

restaurants in California on various other dates during the class period. The sub purchased by Plaintiff Nobles was approximately eleven (11) inches in length, which is materially (*i.e.* approximately 10%) shorter than 12 inches, or one foot, in length.

19. Plaintiff Vincent Gotter is, and at all times relevant to this action has been, a resident and citizen of Arkansas. Plaintiff Gotter was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in Arkansas. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff Gotter purchased a "Footlong" sub to eat on January 24, 2013 at the SUBWAY® restaurant located in Springdale, Arkansas, and other "Footlong" subs at that location and other SUBWAY® restaurants in Arkansas on various other dates during the class period. The sub purchased by Plaintiff Gotter on January 24, 2013 was less than eleven (11) inches in length, which is materially (*i.e.* approximately 10%) shorter than 12 inches, or one foot, in length, as shown below:



20. Plaintiff Zana Zeqiri is, and at all times relevant to this action has been, a resident and citizen of Wisconsin. Plaintiff Zeqiri was repeatedly exposed to and saw Defendant's advertisements and representations regarding the SUBWAY® "Footlong" subs in Wisconsin. After seeing Defendant's advertising regarding the "Footlong" subs, Plaintiff Zeqiri purchased "Footlong" subs to eat at the following SUBWAY® restaurant locations

a. 8201 South Howell Ave., Oak Creek, Wisconsin, 53154,

b. 222 North Chicago Ave., South Milwaukee, Wisconsin, 53172,

c. 5861 South Packard Ave., Cudahy, Wisconsin, 53110,

d. 5300 South 76th Street, Greendale, Wisconsin, 53129, and

e. various other SUBWAY® locations, including locations in Illinois and Texas.

The subs purchased by Plaintiff Zeqiri were materially shorter than 12 inches, or one foot, in length.

21. Plaintiffs purchased the "Footlong" subs in reliance on the misrepresentations and omissions of the Defendant. Plaintiffs suffered an injury in fact as a result of the deceptive and unfair conduct described herein, because the "Footlong" subs that they purchased were materially less than 12 inches, or one foot, in length, represented by Defendant.

22. Plaintiffs are repeat purchasers of SUBWAY® "Footlong" subs and exhibit strong brand loyalty. Plaintiffs intend to continue to purchase SUBWAY® "Footlong" subs because the huge number of SUBWAY® restaurants often make it the most convenient place to eat, and because Plaintiffs believe the subs to be healthier and tastier than other fast food options.

Therefore, equitable and injunctive relief is necessary to prevent future injury to Plaintiffs and the Class.

The Defendant

23. Defendant is a private corporation incorporated in the State of Florida, and has its principal place of business in Milford, Connecticut. Defendant, therefore, is a citizen of Florida and Connecticut.

24. Defendant, as the franchisor of SUBWAY® restaurants, is in the business of promoting, marketing, distributing and selling SUBWAY® "Footlong" subs throughout the United States, including to millions of consumers nationwide, through approximately 24,000 SUBWAY® brand restaurants nationwide. Although SUBWAY® restaurants are owned and/or operated by franchisees, Defendant creates, maintains and enforces strict uniform standards and practices for all aspects of its SUBWAY® restaurants, including the length of "Footlong" subs.

25. Upon information and belief, Defendant has the right of complete or substantial control over all SUBWAY® restaurants in that it could implement and direct the policies and procedures of those restaurants as well as dictate the restaurants' appearance, equipment, menu, hours of operation, employees' appearance and demeanor, and marketing and advertising. Defendant represents that its centralized Operations department of its business "enforces standards and provides training and operational assistance to franchisees and field staff." (*See* Subway Student and Educator Resource Guide ("Resource Guide"), attached hereto as Exhibit A, p. 3).

26. Further, Defendant and its franchisees hold themselves out to the general public as one company—SUBWAY®—as evidenced by the fact that the advertising materials, signs,

and store appearance all are uniform and identify Defendant's franchisees' restaurants as SUBWAY®. For example, Defendant represents that its centralized Marketing department "presents the public face of SUBWAY®. It includes departments like Research & Development, which develops and test markets the food that we serve, and FAF (Franchisee Advertising Fund) – responsible for the creation and placement of commercials and print ads." (Resource Guide, Exhibit A, p. 3).

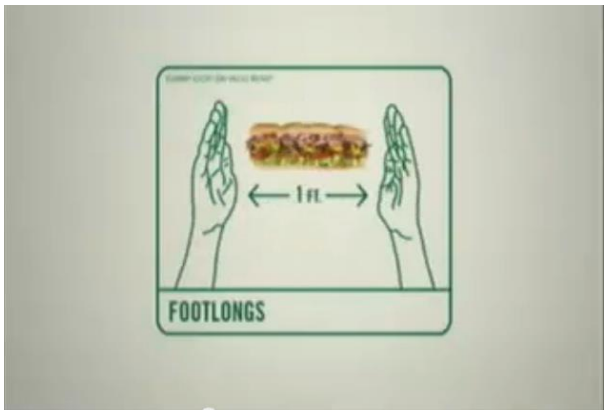
27. Defendant's actions were intended to and did lead Plaintiffs and members of the proposed Class to believe that all SUBWAY® restaurants had uniform standards and practices, and that all menu items would be the same at each SUBWAY® restaurant. Plaintiffs and members of the Class justifiably relied on Defendant's and its franchisees' representations that the food would be identical in all material respects at each SUBWAY® restaurant.

Allegations of Misconduct

28. Defendant engages in an extensive, nationwide advertising and marketing campaign of its SUBWAY® "Footlong" subs, consisting of print, television, Internet-based media and in-store advertisements. Defendant proudly boasts of the ubiquity of its marketing efforts, representing that "[t]he majority of advertising happens on national TV during prime time, sports and late programming on major broadcast networks and cable networks. Additional advertising occurs via local markets on TV, radio and print. SUBWAY® restaurants is also navigating the world of online social media to bring our message closer to consumers." (Resource Guide, Exhibit A, p. 3).

29. Defendant's advertisements relating to SUBWAY® "Footlong" subs are intended to convey to consumers that the subs are actually one foot, or 12 inches, in length.

30. Indeed, in its marketing and advertising materials, Defendant repeatedly references the length of the "Footlong" subs by having its actors (or artists' renderings) hold their hands approximately one foot apart, and including a graphic between the actors' hands indicating that the hands are "1 FT." (short for one foot) apart, as follows:



31. Moreover, some of Defendant's advertisements do not specifically reference one foot, or 12 inches, but they are designed to show that the "Footlong" name is associated with a measurement, by, for instance, using arrows to indicate size, as follows:

32. Defendant also markets, advertises and offers 6 inch (designated by Defendant as 6") subs for purchase at its SUBWAY® restaurants. These 6 inch subs are created by Defendant's employees by simply cutting the bread used for "Footlong" subs in half, and then preparing the 6" subs to its customers' specifications. Accordingly, because Defendant's "Footlong" subs are less than 12 inches in length, SUBWAY® 6 inch subs are also shorter than advertised.

33. Defendant designed, created and enforces uniform standards and practices that each of its and its franchisees' employees must follow relative to making SUBWAY® menu items for customers, including SUBWAY® "Footlong" subs. Employees are required to undergo training programs regarding these uniform standards and practices, and are not permitted to deviate therefrom.

34. Additionally, Defendant's franchisees are required to get their bread from a centralized supply source, which stretches the dough out to a pre-set length according to Defendant's specifications, and freezes it before delivering the frozen dough to SUBWAY® restaurants. This pre-set length specified by Defendant is the primary factor in how long SUBWAY® "Footlong" subs will be.

35. At the time that Plaintiffs purchased their SUBWAY® "Footlong" subs, Defendant was misrepresenting the length of its "Footlong" subs through the advertising and marketing mediums set forth above, including marketing and advertising materials at the specific stores at which Plaintiffs made their purchases.

36. Defendant's standards and practices relative to the creation of SUBWAY® "Footlong" subs result in the subs routinely being materially shorter than one foot, or 12 inches, in length.

37. Immediately after contacting counsel, certain Plaintiffs enlisted the services of investigator Leonard Niedermayer, on January 22, 2013, to purchase several "Footlong" subs from 19 different SUBWAY® stores throughout Pennsylvania and New Jersey. At each store randomly visited, Mr. Niedermayer purchased a "Footlong" sub, opened it, measured it and photographed the sub being measured along with a receipt of purchase. In every instance, the SUBWAY® "Footlong" sub measured less than 12 inches. All 19 subs ranged in size from 11 inches to 11 ¾ inches.

38. Defendant implicitly admitted that its "Footlong" subs are not actually one foot, or 12 inches, in length when in its initial press release to the public in response to the lawsuits filed by Plaintiffs, Defendant stated:

> With regards to the size of the bread and calling it a footlong, SUBWAY FOOTLONG is a registered trademark as a descriptive name for the sub sold in Subway® Restaurants and not intended as a measurement of length.

(*See* Defendant's Press Release, Exhibit B).

39. However, Defendant's statement was untrue, as its purported "Footlong" trademark was found not to be a trademark at all, but rather a measurement of length in a previous lawsuit Defendant unsuccessfully litigated against another sandwich retailer who was

using the same “Footlong" name for its subs. (*See Doctor's Associates, Inc. v. Sheetz, Inc.*, Case No. 1:09-cv-00088-CMH-IDD (E.D. Va., 2009), Exhibit C).

40. Indeed, Defendant has knowingly and intentionally tolerated and permitted a common policy to exist which allowed “Footlong” subs to be sold to consumers that are materially shorter than promised.

41. This is not the first time Defendant has engaged in misrepresentations regarding the length of SUBWAY® subs. In 2007, it was reported that SUBWAY® “Giant Sub” sandwiches, which were advertised as being 3 feet long, were materially shorter than advertised (*i.e.* 2 feet 8½ inches long, and the box that they came in was only 2 feet 10¾ inches long). Because of the complaints about Defendant’s advertising at the time, Defendant had knowledge that the precise length of SUBWAY® subs is material to its customers, and that its customers rely on Defendant’s representations regarding the length of the subs when purchasing them.

42. As discussed below, Defendant’s statements regarding SUBWAY® “Footlong” subs, in conjunction with the impression regarding the length of those subs Defendant intended to convey by naming and promoting them as “Footlong” subs, were false, deceptive and misleading. Plaintiffs and the proposed Class members purchased SUBWAY® “Footlong” subs in reliance on the foregoing uniform misrepresentations and omissions of the Defendant.

43. As a result of SUBWAY® “Footlong” subs not being as long as advertised, Plaintiffs and the proposed Class members received less food then they were promised by Defendant, and received less than they bargained for.

Class Action Allegations

44. Plaintiffs bring this lawsuit, both individually and as a class action on behalf of similarly situated purchasers of the SUBWAY® "Footlong" and "6-inch" subs, pursuant Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The proposed Class is defined as:

> All persons in the United States who purchased a six inch or Footlong sandwich at a Subway® restaurant after January 1, 2007.

In the alternative, Plaintiffs seek approval of the following subclasses:

(a) All Illinois consumers who purchased a six inch or Footlong sandwich at a Subway® restaurant after January 1, 2007.

(b) All New Jersey consumers who purchased a six inch or Footlong sandwich at a Subway® restaurant after January 1, 2007.

(c) All California consumers who purchased a six inch or Footlong sandwich at a Subway® restaurant after January 1, 2007.

(d) All Pennsylvania consumers who purchased a six inch or Footlong sandwich at a Subway® restaurant after January 1, 2007.

(e) All Wisconsin consumers who purchased a six inch or Footlong sandwich at a Subway® restaurant after January 1, 2007.

(f) All Arkansas consumers who purchased a six inch or Footlong sandwich at a Subway® restaurant after January 1, 2007.

The Class and all subclasses defined above are collectively referred to herein as the "Class." Excluded from the proposed Class are Defendant, its respective officers, directors and employees, any entity that has a controlling interest in Defendant, and all of its respective employees, affiliates, legal representatives, heirs, successors, or assignees. Any claims for personal injury, actual, incidental, or consequential damages, are expressly excluded from this action. Plaintiffs reserve the right to amend the Class definition as necessary.

45. Upon information and belief, the Class comprises millions of consumers throughout the nation, and is so numerous that joinder of all members of the Class is impracticable. While the exact number of Class members is presently unknown and can only be ascertained through discovery, Plaintiffs believe that there are millions of Class members based upon the fact that SUBWAY® is one of the largest, if not the largest, restaurant chains in the world, with over 38,000 restaurants worldwide, and "Footlong" subs are the core product sold by SUBWAY®.

46. There are questions of law and fact common to the Class, which predominate over any individual issues, including:

a. whether Defendant represented that SUBWAY® "Footlong" subs were one foot, or 12 inches, in length;

b. Whether the use of the name "Footlong" was intended to signify a length of measurement;

c. Whether the marketing and advertising materials for the "Footlong" subs were created, designed, and/or prepared by Defendant;

d. Whether the marketing and advertising materials for the "Footlong" subs were approved by Defendant;

e. Whether the marketing and advertising materials for the "Footlong" subs indicated that the subs could be less than a foot, or 12 inches, in length;

f. Whether Defendant's SUBWAY® "Footlong" subs were one foot, or 12 inches, in length;

g. Whether Defendant ever warned consumers through disclaimers, signage or by any other means, that the "Footlong" subs are, or could be, less than one foot, or 12 inches, in length;

h. whether Defendant failed to disclose that SUBWAY® "Footlong" subs were less than 12 inches in length;

i. whether Defendant's claims regarding the SUBWAY® "Footlong" subs are deceptive or misleading;

j. whether Defendant engaged in false, deceptive and/or misleading advertising;

k. whether Defendant's conduct as alleged herein violates the consumer fraud statutes of the various States and the District of Columbia;

l. whether Defendant's conduct as alleged herein violates public policy;

m. whether Plaintiffs and Class members are entitled to equitable and injunctive relief.

47. Plaintiffs' claims are typical of the claims of the proposed Class, and Plaintiffs will fairly and adequately represent and protect the interests of the proposed Class. Plaintiffs do not have any interests antagonistic to those of the proposed Class. Plaintiffs have retained competent counsel experienced in the prosecution of this type of litigation.

48. Defendant has acted and refuses to act on grounds generally applicable to the proposed Class, as Defendant makes uniform representations to each proposed Class member. Each proposed Class member has been exposed to Defendant's representations, as the name of the "Footlong" sub itself is misleading. Therefore, final equitable and injunctive relief with respect to the proposed Class as a whole is appropriate.

49. Unless an injunction is issued, Defendant will continue to commit the violations alleged, and the members of the proposed Class and the general public will continue to be misled.

COUNT I
(Violation of the Consumer Fraud and Deceptive Trade Practices Acts of the Various States and District of Columbia)

50. Plaintiffs repeat and reallege the allegations of Paragraphs 1 through 49 with the same force and effect as though fully set forth herein.

51. Plaintiffs bring Count I individually, and on behalf of all similarly situated residents of each of the 50 states and the District of Columbia for violations of the respective statutory consumer protection laws, as follows:

a. the Alabama Deceptive Trade Practices Act, Ala.Code 1975, § 8–19–1, *et seq*.

b. the Alaska Unfair Trade Practices and Consumer Protection Act, AS § 45.50.471, *et seq*.;

c. the Arizona Consumer Fraud Act, A.R.S §§ 44-1521, *et seq*.;

d. the Arkansas Deceptive Trade Practices Act, Ark.Code §§ 4-88-101, *et seq*.;

e. the California Unfair Competition Law, Bus. & Prof. Code §§17200, *et seq*. and 17500 *et seq*.;

f. the California Consumers Legal Remedies Act, Civil Code §1750, *et seq*.;

g. the Colorado Consumer Protection Act, C.R.S.A. §6-1-101, *et seq*.;

h. the Connecticut Unfair Trade Practices Act, C.G.S.A. § 42-110, *et seq*.;

i. the Delaware Consumer Fraud Act, 6 Del. C. § 2513, *et seq*.;

j. the D.C. Consumer Protection Procedures Act, DC Code § 28-3901, *et seq*.;

k. the Florida Deceptive and Unfair Trade Practices Act, FSA § 501.201, *et seq*.;

l. the Georgia Fair Business Practices Act, OCGA § 10-1-390, *et seq*.;

m. the Hawaii Unfair Competition Law, H.R.S. § 480-1, *et seq*.;

n. the Idaho Consumer Protection Act, I.C. § 48-601, *et seq*.;

o. the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 501/1 *et seq*.;

p. the Indiana Deceptive Consumer Sales Act, IN ST § 24-5-0.5-2, *et seq*.

q. The Iowa Private Right of Action for Consumer Frauds Act, Iowa Code Ann. § 714H.1, *et seq*.;

r. the Kansas Consumer Protection Act, K.S.A. § 50-623, *et seq*.;

s. the Kentucky Consumer Protection Act, KRS 367.110, *et seq*.;

t. the Louisiana Unfair Trade Practices and Consumer Protection Law, LSA-R.S. 51:1401, *et seq*.;

u. the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A, *et seq*.;

v. the Maryland Consumer Protection Act, MD Code, Commercial Law, § 13-301, *et seq*.;

w. the Massachusetts Regulation of Business Practices for Consumers Protection Act, M.G.L.A. 93A, *et seq*.;

x. the Michigan Consumer Protection Act, M.C.L.A. 445.901, *et seq*.;

y. the Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68, *et seq*.;

z. the Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-1, *et seq*.

aa. the Missouri Merchandising Practices Act, V.A.M.S. § 407, *et seq*.;

bb. the Montana Unfair Trade Practices and Consumer Protection Act of 1973, Mont. Code Ann. § 30-14-101, *et seq*.;

cc. the Nebraska Consumer Protection Act, Neb.Rev.St. §§ 59-1601, *et seq*.;

dd. the Nevada Deceptive Trade Practices Act, N.R.S. 41.600, *et seq*.

ee. the New Hampshire Regulation of Business Practices for Consumer Protection, N.H.Rev.Stat. § 358-A:1, *et seq.*;

ff. the New Jersey Consumer Fraud Act, N.J.S.A. 56:8, *et seq.*;

gg. the New Mexico Unfair Practices Act, N.M.S.A. §§ 57-12-1, *et seq.*;

hh. the New York Consumer Protection from Deceptive Acts and Practices, N.Y. GBL (McKinney) § 349, *et seq.*;

ii. the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen Stat. § 75-1.1, *et seq.*;

jj. the North Dakota Consumer Fraud Act, N.D. Cent.Code Chapter 51-15, *et seq.*;

kk. the Ohio Consumer Sales Practices Act, R.C. 1345.01, *et seq.*;

ll. the Oklahoma Consumer Protection Act, 15 O.S.2001, §§ 751, *et seq.*;

mm. the Oregon Unlawful Trade Practices Act, ORS 646.605, *et seq.*;

nn. the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*;

oo. the Rhode Island Deceptive Trade Practices Act, G.L.1956 § 6-13.1-5.2(B), *et seq.*;

pp. the South Carolina Unfair Trade Practices Act, SC Code 1976, §§ 39-5-10, *et seq.*;

qq. the South Dakota Deceptive Trade Practices and Consumer Protection Act, SDCL § 37-24-1, *et seq.*;

rr. the Tennessee Consumer Protection Act, T.C.A. § 47-18-101, *et seq.*;

ss. the Texas Deceptive Trade Practices-Consumer Protection Act, V.T.C.A., Bus. & C. § 17.41, *et seq.*;

tt. the Utah Consumer Sales Practices Act, UT ST § 13-11-1, *et seq.*;

uu. the Vermont Consumer Fraud Act, 9 V.S.A. § 2451, *et seq.*;

vv. the Virginia Consumer Protection Act of 1977, VA ST § 59.1-196, *et seq*.;

ww. the Washington Consumer Protection Act, RCWA 19.86.010, *et seq*.;

xx. the West Virginia Consumer Credit And Protection Act, W.Va.Code § 46A-1-101, *et seq*.;

yy. the Wisconsin Deceptive Trade Practices Act, WIS.STAT. § 100.18, *et seq*.; and

zz. the Wyoming Consumer Protection Act, WY ST § 40-12-101, *et seq*.

52. Defendant's foregoing misrepresentations and omissions regarding the length of SUBWAY® "Footlong" subs, as set forth in Paragraph Nos. 28-39, are deceptive and/or unfair acts or practices prohibited by the consumer fraud statutes set forth above.

53. Defendant intended to be deceptive and/or unfair to Plaintiffs and the proposed Class by intentionally making the foregoing false and misleading statements and omitting accurate statements as alleged above.

54. Defendant's practice of creating, approving and distributing advertising for SUBWAY® "Footlong" subs that contained false and misleading representations regarding the length of those subs for the purpose of selling them to Plaintiffs and the proposed Class, as alleged in detail *supra*, is both an unfair act and deceptive practice prohibited by the foregoing statutes.

55. Defendant intended to be deceptive and unfair to Plaintiffs and the proposed Class by unlawfully representing that each SUBWAY® "Footlong" sub is 12 inches, or one foot, in length. Defendant's intent is evidenced by, *inter alia*, its heavy reliance on units of

measurement, such as the "1 FT." graphic displayed in its advertising for the "Footlong" subs, as well as the fact that Defendant named its subs "Footlong."

56. Defendant intended that Plaintiffs and the proposed Class members rely on Defendant's misrepresentations as to the length of the SUBWAY® "Footlong" subs when purchasing them, and Defendant omitted to disclose to or notify Plaintiffs and the proposed Class that the SUBWAY® "Footlong" subs were materially less than one foot, or 12 inches, in length.

57. Plaintiffs and the proposed Class members justifiably relied on the misrepresentations and omissions to their detriment by purchasing the SUBWAY® "Footlong" subs after seeing Defendants' advertising. Defendants made no attempt to inform consumers that SUBWAY® "Footlong" subs are not uniformly 12 inches, or one foot, in length.

58. The above-described deceptive and unfair acts and practices were used or employed in the conduct of trade or commerce, namely, the sale of the SUBWAY® "Footlong" subs to Plaintiffs and the proposed Class members.

59. The above-described deceptive and unfair acts offend public policy and cause substantial injury to consumers.

60. As a direct and proximate result of the foregoing, the Plaintiffs and Class members have been damaged in that they have received less than they bargained for.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the Class, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23, and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class, and Thomas A. Zimmerman, Jr. and Stephen P. DeNittis as Co-Lead Counsel;

C. Entering judgment in favor of Plaintiffs and the Class and against Defendant, and ordering Defendant to provide equitable relief to ensure that its "Footlong" subs are 12 inches in length, and to advise the public that the length of "Footlong" subs may vary;

D. Enjoining Defendant's illegal conduct alleged herein;

E. Awarding Plaintiffs and the Class attorney's fees and costs as allowed or required by law; and

F. Granting all such further and other relief as the Court deems just and appropriate.

JURY DEMAND

Plaintiffs demand a trial by a 12-person jury.

Respectfully submitted,

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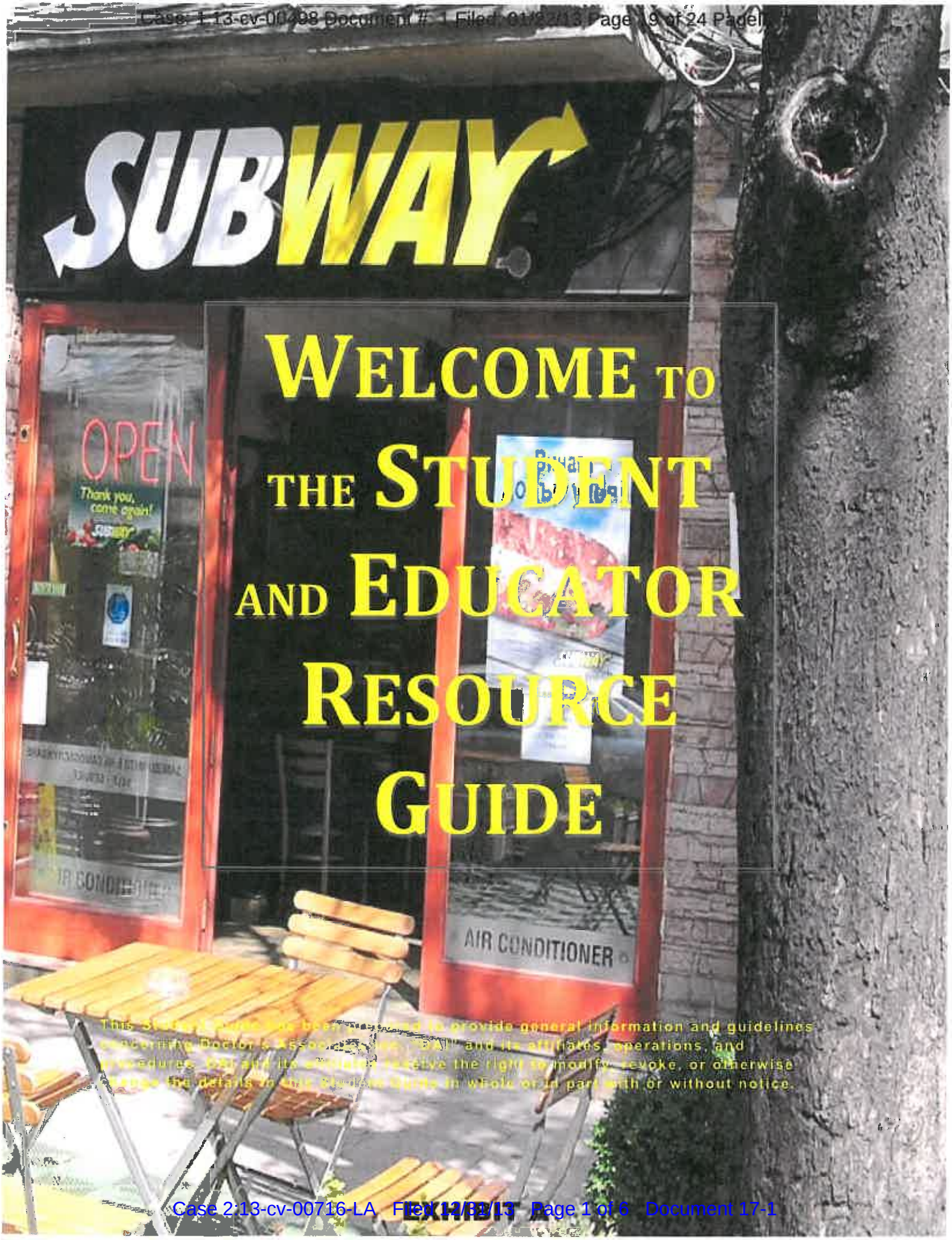

WELCOME TO THE STUDENT AND EDUCATOR RESOURCE GUIDE

This Student Guide has been created to provide general information and guidelines concerning Doctor's Associates, Inc., DAI and its affiliates, operations, and procedures. DAI and its affiliates reserve the right to modify, revoke, or otherwise change the details in this Student Guide in whole or in part with or without notice.

Welcome to SUBWAY® Restaurants!

This guide is designed to help answer the many questions you may have about SUBWAY® Restaurants.

SUBWAY® Restaurants is a registered trademark of **Doctor's Associates Inc. (DAI)**, located in Milford, Conn., USA.

Our Mission Statement

Delight every customer so they want to tell their friends – with great value through fresh, delicious, made-to-order sandwiches, and an exceptional experience.

Our Core Values and Philosophy

- **Family** – We build our business relationships by serving each other, our customers and our communities, much as we do within our own families.

SUBWAY®'s Vision:
Be the #1 Quick Service Restaurant (QSR) franchise in the world, while delivering fresh, delicious sandwiches and an exceptional experience.

- **Teamwork** – We challenge ourselves and each other to succeed through teamwork, against shared goals and to be accountable for our responsibilities.

- **Opportunity** – We create an entrepreneurial, ever-growing SUBWAY® community, increasing the opportunity for everyone.

The History of SUBWAY®

It was the summer of '65. Having just graduated from high school, 17-year-old Fred DeLuca turned his thoughts toward achieving a higher education. That summer, there wasn't much hope that Fred would have enough money to pay for his college tuition. He was a hard-working young man but his $1.25-per-hour minimum wage job wasn't enough. He decided to ask Dr. Pete Buck, a nuclear physicist and longtime DeLuca family friend, for some financial advice. When he learned how badly Fred had wanted to go to college, maybe the doctor would offer to help.
Instead, Dr. Buck had a rather unusual idea.

"I think you should open a submarine sandwich shop," said Buck. Before Fred could think about it or express his surprise, he heard himself say, "How does it work?"

Dr. Buck explained the submarine sandwich business. Customers would come in, put money on the counter and Fred would have enough to pay for college. To Dr. Buck, it was just as simple as that, and if young Fred was willing to do it, Dr. Buck was willing to be his partner. He pulled out his checkbook and wrote a check for $1,000. The first restaurant, then called Pete's Super Submarines, opened that year.

45 years and more than 35,000 restaurants later, Fred DeLuca remains the President of SUBWAY®.

SUBWAY® Departments – Who We Are

The SUBWAY® franchise is the world's largest submarine sandwich franchise and the second-largest restaurant franchise in the world. Here are just some of the diverse departments that are required to run a truly world-class operation:

- **Executive:** This team supports company-wide operations at SUBWAY®'s headquarters in Milford, CT and includes departments like Customer Care and the Business Process Team.
- **Administrative**: This team is responsible for DAI employee management and grounds and shipping center oversight.
- **Franchise Brands**: This team offers a diversified portfolio of new and promising ideas that will improve the SUBWAY® experience for franchisees and their customers.
- **Development**: This team works closely with potential franchisees who wish to open a SUBWAY® restaurant and includes everything from real estate planning to recruiting new franchisees.
- **Operations**: This team enforces standards and provides training and operational assistance to franchisees and field staff.
- **Technology**: This team is responsible for implementing and maintaining all technology systems throughout the company and providing technology initiatives so franchisees can operate their businesses more efficiently.
- **Marketing**: This plank presents the public face of SUBWAY®. It includes departments like Research & Development, which develops and test markets the food that we serve, and FAF (Franchisee Advertising Fund) – responsible for the creation and placement of commercials and print ads.
- **International**: This plank supports franchisees outside of the United States and Canada.
- **Finance**: This plank is responsible for tracking, organizing and reporting on the financial activities within DAI.
- **Legal**: This department is responsible for ensuring DAI and SUBWAY® comply with national and international laws, customs and ordinances.

WHAT IS DAI?

Doctor's Associates Inc. (DAI) is the franchisor of the SUBWAY® system and the corporation that owns the SUBWAY® service mark. The name was chosen by Dr. Peter Buck and Fred DeLuca in 1966. Dr. Buck was a nuclear physicist by profession, and Fred had aspirations of attending medical school to become a doctor. So, the name Doctor's Associates Inc. seemed to fit their situation.

WHAT IS FWH?

Franchise World Headquarters, LLC (FWH) is a service organization for the SUBWAY® brand. DAI remains the trademark holder and franchisor of SUBWAY® restaurants in the US. FWH serves not only DAI, but also Subway Franchise Systems of Canada, Subway International BV, Subway Real Estate, LLC, Franchise Brands and other franchisors and SUBWAY® leasing companies. FWH is located in Milford, Conn.

ADVERTISING

The target for the SUBWAY® franchise's media buying is adults aged 18-49. The majority of advertising happens on national TV during prime time, sports and late programming on major broadcast networks and cable networks. Additional advertising occurs via local markets on TV, radio and print. SUBWAY® restaurants is also navigating the world of online social media to bring our message closer to consumers.

The Franchisee Advertising Fund, or FAF, creates advertising for SUBWAY®. FAF employs a national media agency to advertise for SUBWAY®, a public relations agency responsible for messaging and promotion of new products and programs and also interacts with local advertising agencies throughout the world.

Where We've Been – And Where We're Going!

From one store in 1965 to over 35,000 stores around the world, SUBWAY® restaurants come in any location and every shape and size that you can imagine.

Unique Store Locations

The simplicity of the SUBWAY® concept and the ability to fit into spaces that our competitors cannot enables us to open restaurants in many unusual sites, such as airports, amusement parks, stadiums, colleges and universities, hospitals, military bases, schools, supermarkets and truck stops. Here are a few unique SUBWAY® sites:

- **Clyde Peelings Reptileland**, Allenwood, PA
- **Bingoland Bingo Hall**, Killeen, TX
- **Duds & Suds**, Omaha, NE
- **Discovery Center Museum**, Fort Lauderdale, FL

Today, there are over 8,000 non-traditional SUBWAY® restaurants operating around the world. For more details about non-traditional locations, and other types of SUBWAY® restaurants, visit Own a Franchise on subway.com.

International Locations

In 1984, the SUBWAY® franchise opened its first international location in Bahrain. Today, there are more than 15,000 locations outside the U.S.

To find SUBWAY® restaurants around the globe, check out store counts by country.

Franchising 101

The SUBWAY® Franchise

DAI owns the operational business concept and trademark of SUBWAY® Restaurants. It is the franchisor and seeks to find entrepreneurs, or franchisees to partner with. The franchisee buys the right to operate the SUBWAY® franchise according to DAI's contract.

> fran·chise, 'fran-"chIz, *noun.*
> A special privilege granted to an individual or group: the right to be and exercise the powers of a corporation: the right or license granted to an individual or group to market a company's goods or services.

Forming the Franchise

In 1974, the SUBWAY® brand's founders met with their attorney to discuss the future of their business. Talk turned to franchising. Being behind schedule in achieving his goals, SUBWAY® President Fred DeLuca decided that the fastest way to expand the business was to find a franchisee. He approached Brian Dixon, a friend. Fred offered to loan him the money to buy their store located in Wallingford, Conn. Soon after, Brian Dixon's life, and the future of SUBWAY®, changed forever.

SUBWAY® by the Numbers

Founded in 1965, SUBWAY® restaurants has done a lot of growing up over the years. Here are some handy numbers to quantify and explain SUBWAY®'s business trajectory, spanning almost five decades.

Figure 1.

This chart illustrates the J-curve principle of upward growth for SUBWAY®, spanning only the last five years! By the end of 2010, SUBWAY® projects to have 34,250 open stores across the globe.*

**Projected as of May 2010.*

Figure 2.
Figure 2 more clearly illustrates SUBWAY®'s growth over time.

Community Involvement

The SUBWAY® franchise and its more than 35,000 stores are very active in the community. Many of the franchise owners and their employees help support their local communities through monetary and product donations. Their assistance has helped benefit many non-profit organizations and charities, as well as schools and clubs.

The corporate headquarters also assists many organizations, including the American Cancer Society, American Heart Association, Big Brothers/Big Sisters, Conservation International, United Way, the National Foundation for Teaching Entrepreneurship, Multiple Sclerosis Society of America, and many organizations local to the Milford, Conn. HQ.

To learn more about SUBWAY®'s community service or request a sponsorship, click here.

More Questions About SUBWAY®?

For other questions and inquiries, submit a Comment/Question Query here, or call or write to:

SUBWAY FRANCHISE HEADQUARTERS
325 Bic Drive
Milford, Connecticut, USA 06461-3059
Phone: (203) 877-4281 or
toll-free at: 1-800-888-4848

For answers to more Frequently Asked Questions about SUBWAY®, click here.

January 21, 2013
HUFF POST BUSINESS

Subway Response To 'Footlong' Controversy: Name 'Not Intended To Be A Measurement Of Length'

The Huffington Post | By Cavan Sieczkowski
Posted: 01/19/2013 12:46 pm EST | Updated: 01/19/2013 3:50 pm EST

After finding itself in the middle of an 11-inch controversy, Subway has responded to claims that its "Footlong" subway sandwich is one inch too short by saying that "Footlong" is only a name and not a measurement.

The Subway Footlong debate began on Tuesday, when teenager Matt Corby ordered a supposed 12-inch sub from a Subway in Perth, Australia. Before eating, he pulled out a tape measure to see if the sandwich really measured up, only to discover that his Footlong was a measly 11 inches.

He posted the photo to Subway Australia's Facebook page with the simple message "subway pls respond" and the image quickly got over 100,000 "Likes," according to Gawker.

On Wednesday, Subway Australia posted a response to the Footlong controversy on its Facebook page, alleging that "Footlong" is merely creative license and does not designate measurement.

Via BuzzFeed:

With regards to the size of the bread and calling it a footlong, 'SUBWAY FOOTLONG' is a registered trademark as a descriptive name for the sub sold in Subway® Restaurants and not intended to be a measurement of length. The length of the bread baked in the restaurant cannot be assured each time as the proofing process may vary slightly each time in the restaurant.
The Subway Australia Facebook post has since been deleted.

BuzzFeed Copyranter notes that Subway has, in fact, marketed its Footlong sub as being, well, a foot long. A 2008 Subway commercial features a series of one-foot measurements which seemingly reference the measurement of the sub.

When ABC News contacted the company, Subway stated that it strives for 12 inches every time. "Most countries, such as Australia, follow the metric system so the term Footlong can only be used as part of a trademark," a spokesman told ABC News. "Our global standard for a Subway Footlong sandwich is 12 inches regardless of the restaurant's location."

After Corby's Footlong photo went viral, Subway customers around the world shared more photos to prove that their sandwiches also came up short. Four out of seven Footlongs purchased by the New York Post in the NYC region measured only 11 or 11.5 inches.

A Manhattan franchise owner told the Post that Subway's bread is not the only thing shrinking. The cold-cut sizes have been cut by 25 percent. "The distributor has increased the food cost on the individual owners by 4 to 5 percent every year and provided the owners with less food," he told the Post.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

DOCTOR'S ASSOCIATES, INCORPORATED,

Plaintiff,

v.

SHEETZ, INCORPORATED, et al,

Defendant.

Civil Action No. 09-88

ORDER

This matter comes before the Court on Plaintiff's Motion for a Temporary Restraining Order, and as the matter had been fully briefed and argued, the Court construes this motion as a Motion for a Preliminary Injunction.

For reasons stated from the bench, the Court finds there is no showing of confusion and no showing of any irreparable harm. It is hereby

ORDERED that the Motion for a Preliminary Injunction is DENIED.

/s/
CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
February 6, 2009

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

DOCTOR'S ASSOCIATES INC.,

Plaintiff,

v.

SHEETZ, INC.,
SHEETZ OF DELAWARE, INC., and
DOES 1-10,

Defendants.

Case No. 1:09cv88

PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER

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TABLE OF AUTHORITIES

I. INTRODUCTION

The Plaintiff, Doctor's Associates Inc. (hereinafter "Plaintiff" or "Subway") submits this memorandum in support of its Motion for a Temporary Restraining Order pursuant to FED. R. CIV. P. 65(a), enjoining the Defendants Sheetz, Inc., and Sheetz of Delaware, Inc. (collectively referred to as "Sheetz" or "Defendants"), from the unauthorized use, misappropriation, and/or registration of Subway's marks in connection with restaurant services or sandwiches.

This action seeks immediate redress of the Defendants' wrongful acts. As detailed herein and in the Complaint, the Defendants' wrongful acts constitute irreparable injury due to confusion, mistake, deception, and other harm caused by Defendants' unauthorized use, misappropriation, and/or registration of Subway's marks and other protectable interests. The harm continues on a daily basis. Subway requests that the Court grant injunctive relief as soon as possible.

II. STATEMENT OF FACTS

A. Subway and Its Marks

The Plaintiff is the owner of U.S. Trademark Registration Number 1,174,608 for the famous service mark SUBWAY® and is the franchiser of SUBWAY® Restaurants. (*See* Exhibit 1, Wilker Decl. ¶ 2 and Exhibit 1 to the Complaint.) In addition to the SUBWAY® mark, Subway owns other registered and unregistered trademarks and service marks associated with the SUBWAY® restaurant system. (*See* Wilker Decl. ¶ 2.) Subway also has copyright protection in all of the images and materials used throughout the Subway system, including all advertising materials. (*See* Wilker Decl. ¶ 2.) Subway licenses many franchises throughout the Commonwealth of Virginia including this Judicial District. (*See* Wilker Decl. ¶ 3.)

Subway franchises 21,900 SUBWAY® restaurants in the United States and 30,524 SUBWAY® restaurants in 87 countries. (*See* Wilker Decl. ¶ 3.) Subway is the fastest growing franchise in the world and is the third largest fast food operator globally after Yum! Brands (approximately 35,000 locations) and McDonald's (approximately 31,000 locations). Subway is the world leader in restaurants specializing in sandwiches. (*See* Wilker Decl. ¶ 6.)

Subway franchisees are commonly found in convenience stores, gasoline stations, roadside rest facilities, and similar concessions throughout the Eastern District of Virginia and elsewhere. (*See* Wilker Decl. ¶ 4.) There are currently 351 Subway locations operating in the Eastern District of Virginia. (*See* Wilker Decl. ¶ 5.) At least 28 of these locations are convenience stores and/or gas stations and at least four are truck stops. (*See* Wilker Decl. ¶ 5.)

Subway, because of its prominent position in the marketplace, is accustomed to competitors comparing their services or products to Subway's services and products. Such comparisons are often in the form of advertisements touting some alleged consumer preference. (*See* Wilker Decl. ¶ 7.)

One of Subway's well-known and famous advertising campaigns includes the appearance of a man named Jared Fogel, who had lost 240 pounds by following a "Subway diet." (*See* Wilker Decl. ¶ 9.) Subway's advertisements featuring Mr. Fogel began running in 2000, continue to run, and are exceptionally well recognized by the public. (*See* Wilker Decl. ¶ 9.)

In or about May 2008 Subway began using two marks to promote its services (collectively the "Subway Marks"). (*See* Wilker Decl. ¶ 10.) The first mark consists of a hand with a "$5" symbol (the "Hand and $5 Design Mark"). (*See* Wilker Decl. ¶ 11 and Exhibit 3 to the Complaint.) The second mark consists of a hand with the "$5" symbol in association with the word element "FOOTLONG" (the "Hand, $5 and FOOTLONG Design Mark"). (*See* Wilker

Decl. ¶ 11 and Exhibit 4 to the Complaint.) The Subway Marks appear in copyrighted promotional materials which include other features of text and symbols. (*See* Wilker Decl. ¶ 16.) Subway's copyrighted promotional materials include text such as "every day value menu." (*See* Wilker Decl. ¶ 16.)

B. Sheetz's Acts

In 2003 the Defendants aired a television commercial featuring a man, which resembled Subway's spokesman "Jared." (*See* Wilker Decl. ¶ 17.) The man in the Defendants' commercial drives a vehicle with the license plate "JARED 1." (*See* Wilker Decl. ¶ 17.) The man is then seen eating a sandwich from a Sheetz's wrapper. (*See* Wilker Decl. ¶ 17.)

On or about January 9, 2009, Subway learned that Sheetz was using marks similar to the Subway Marks in connection with promotion of Sheetz's sandwiches and related products. (*See* Wilker Decl. ¶¶ 18-21.) Sheetz is using marks consisting of a hand with a "$4" symbol (the "Sheetz Hand and $4 Design Mark) and a hand with the "$4" symbol in association with the word element "FOOTLONG" (the "Sheetz Hand, $4 and FOOTLONG Design Mark) (collectively, the "Sheetz Marks.") (*See* Exhibit 5 to the Complaint.) Sheetz is also using a mark consisting of a hand with a "2" symbol (the "Sheetz Hand and $2 Design Mark") (collectively, with Sheetz's prior marks, the "Sheetz Marks"). (*See* Exhibit 6 to the Complaint.)

On January 14, 2009, Subway communicated with Sheetz regarding these marks, asking Sheetz to agree to stop using marks similar to the Subway Marks. (*See* Wilker Decl. ¶ 24.) Sheetz responded, through counsel, on January 22, 2009, informing Subway that Sheetz would not stop using its marks. (*See* Wilker Decl. ¶ 24.)

III. ARGUMENT

The Plaintiff is likely to prevail on the merits of its infringement and unfair competition claims, and will continue to suffer irreparable harm if the Defendants are not enjoined from continuing their unlawful conduct.

A. Applicable Law for Temporary or Preliminary Injunctive Relief

The issuance of a temporary restraining order or preliminary injunction is "committed to the sound discretion of the trial court." *Quince Orchard Valley Citizens Ass'n, Inc v. Hodel*, 872 F.2d 75, 78 (4th Cir. 1989). In determining whether to an issue an injunction, a district court in the Fourth Circuit must apply a "balance-of-hardship" test. *See Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194 (4th Cir. 1977); *Railway Labor Execs.' Ass'n v. Wheeling Acquisition Corp.*, 736 F. Supp. 1397, 1401-02 (E.D. Va. 1990) (Ellis, J.) (applying *Blackwelder* test to determine issuance of temporary restraining order).

Under this test the following four factors should be examined by the court: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. *See Hughes Network Systems, Inc. v. InterDigital Comm'n Corp.*, 17 F.3d 691, 693 (4th Cir. 1994); *Blackwelder*, 550 F.2d at 193-96. "No single factor can defeat a motion for a preliminary injunction or temporary restraining order. Rather, '[t]he decision to grant or deny a preliminary injunction depends upon a 'flexible interplay' among all the factors considered.'" *H. Jay Spiegel & Assocs., P.C. v. Spiegel*, 2008 U.S. Dist. LEXIS 100558, at *4 (E.D. Va. Dec. 11, 2008) (citing *Blackwelder,* 550 F.2d at 196.)

Subway seeks a temporary restraining order against unfair competition and service mark infringement pursuant to the Lanham Act, 15 U.S.C. § 1125(a), and the applicable state common

law. To state a claim under 15 U.S.C. § 1125(a), Subway must show (1) it has a valid, protected trademark and (2) that a defendant's use of a similar mark is likely to cause confusion among consumers. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia,* Inc., 43 F.3d 922, 930 (4th Cir. 1995). "The test for a claim of common law infringement and unfair competition under Virginia law likewise focuses on the likelihood of confusion among consumers, and as such a claim need not be analyzed separately." *Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc.*, 405 F. Supp.2d 680 (E.D. Va. 2005).

B. Subway Will Suffer Irreparable Harm without a Temporary Restraining Order

"The Fourth Circuit has noted that, in Lanham Act trademark infringement cases, 'a presumption of irreparable injury is generally applied once the plaintiff has demonstrated a likelihood of confusion, the key element in an infringement case.'" *H. Jay Spiegel*, 2008 U.S. Dist. LEXIS 100558, at *5 (citing *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 273 (4th Cir. 2002)). As explained below, a likelihood of confusion exists and there is a presumption that Subway will suffer irreparable injury if the temporary restraining order does not issue. Indeed, Subway has suffered harm since Sheetz began using the Sheetz Marks. (*See* Exhibit 2, Rogers Decl.) Moreover, Sheetz has made a practice of mirroring Subway's advertisements. In 2003 Sheetz traded on a well-known personality for Subway, Jared Fogel, in an on-air commercial played in Virginia and other locations. (*See* Wilker Decl. ¶ 17.) Sheetz's current use of advertisements employing a hand, numeral, and word design that is confusingly similar to, if not the same as, Subway's famous Marks, repeats the prior attempts of Sheetz to mimic Subway's advertisements and marks and cause confusion among consumers.

C. A Temporary Restraining Order Is Not Likely to Harm Sheetz

Sheetz is not likely to be harmed by the issuance of a temporary restraining order. Subway is not objecting to Sheetz's sale of certain menu items for $4 or $2, and the requested temporary restraining order will not effect Sheetz's ability to sell menu items for $4 or $2. Rather, the temporary restraining order will affect Sheetz's pattern of trading on Subway's Marks and advertisements by prohibiting Sheetz's use of its Hand and $4 Design Mark, its Hand, $4 and FOOTLONG Design Mark, and its Hand and $2 Design Mark from its advertisements and menus. In other words, Sheetz will not be required to shut down its businesses, nor will the temporary restraining order affect Sheetz's ability to sell menu items for a certain price.

D. Subway's Likelihood of Success on the Merits Is High

There is a strong likelihood that Subway will succeed on the merits of its claims. As noted above, to succeed on the merits of its infringement and unfair competition claims, Subway must show its Marks are valid and protected and that Sheetz's use of its similar marks is likely to cause confusion. *See Lone Star Steakhouse & Saloon, Inc.*, 43 F.3d at 930.

1. Subway's Marks Are Valid and Protected

The Subway Marks are valid, legally protected marks. While none of Subway's Marks has received a federal registration as of yet, the owner of an unregistered mark has a protectable interest in its mark if the mark is used in commerce and is distinctive. *Adventis, Inc. v. Consolidated Prop. Holdings, Inc.*, 2006 U.S. Dist. LEXIS 22436, *6 (E.D. Va. Apr. 24, 2006) (citations omitted). "Fanciful, arbitrary, and suggestive marks are inherently distinctive. Descriptive marks can be afforded protection if they acquire secondary meaning." *Id.* at *7.

The declaration and evidence attached to this motion clearly show that Subway uses its Marks in commerce. (*See* Wilker Decl. ¶¶ 10-16. and Exs. 3, picture of window signage, and 4,

picture of a billboard.) Indeed, Subway began using its Marks in commerce on or about May 2008. (*See* Wilker Decl. ¶ 10.)

Moreover, Subway's Marks are distinctive. Subway's Hand and $5 Design Mark is suggestive because it does not describe a quality, ingredient, or characteristic of Subway's services. All that Subway's Mark connotes is "5" or "$5" without any reference to what the "5" pertains to. *See Retail Servs. v. Freebies Publ'g*, 364 F.3d 535, 539 (4th Cir. 2003) (citations omitted). However, even if Subway's Hand and $5 Design Mark is considered descriptive it, as well as Subway's Hand, $5 and FOOTLONG Design Mark, has acquired more than enough secondary meaning to afford the Marks protection. "Secondary meaning exists if in fact a substantial number of present and prospective customers understand the designation when used in connection with a business to refer to a particular person business enterprise." *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 125 (4th Cir. 1990) (quoting *Food Fair Stores, Inc. v. Lakeland Grocery Corp.*, 301 F.2d 156 (4th Cir. 1962). The "following factors are relevant to, though not dispositive of, the 'secondary meaning' inquiry: (1) advertising expenditures; (2) consumer studies linking the mark to a source; (3) sales success; (4) unsolicited media coverage of the product; (5) attempts to plagiarize the mark; and (6) the length and exclusivity of the mark's use." *Id.* (citing *Thompson Medical Co. v. Pfizer, Inc.*, 753 F.2d 208, 217 (2d Cir. 1985)).

Subway incurred significant advertising expenditures since May 2008 for its Marks. (*See* Wilker Decl. ¶ 13.) This advertising and use of Subway's Marks are widespread, including not only television commercials and Subway's website, but through point of sale placements as well. (*See* Wilker Decl. ¶ 13 and Exs.3, 4, 5, July 3, 2008 article from Brandweek.com, and 6, July 2, 2008 blog entry from www.stephaniefiremanmarketingdaily.com.) Subway commissioned a

study in the summer of 2008 regarding the Subway Marks. The results of the study show that the public recognizes the Subway Marks and associates them, including just the hand cutout, with Subway. (*See* Wilker Decl. ¶ 27 and Encls. 1 thereto.) Subsequently, Subway has enjoyed considerable commercial success. (*See* Wilker Decl. ¶ 13.) To the best of Subway's knowledge, prior to Sheetz's unlawful use, Subway was exclusively using its Marks. (*See* Wilker Decl. ¶ 14.)

Subway's Marks are distinctive and are used in commerce. Therefore, Subway's Marks are valid and should be afforded protection from Sheetz's use of confusingly similar marks.

2. Sheetz's Marks Are Likely to Cause Confusion with Subway's Marks

The next question, the likelihood of confusion, is determined by evaluating several factors: (1) the strength or distinctiveness of the plaintiff's mark; (2) the similarity of the two marks; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities the two parties use in their businesses; (5) the similarity of the advertising used by the two parties; (6) the defendant's intent; and (7) actual confusion. *See Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984). "These *Pizzeria Uno* factors are not always weighted equally, and not all factors are relevant in every case." *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 259-60 (4th Cir. 2007) (citation omitted).

A court need not weigh each of these factors equally; rather, the determination is made on a case-by-case basis. *See Id.*; *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 463 (4th Cir. 1996); *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 320 (4th Cir. 1992) (noting that the *Pizzeria Uno* factors are merely a guide, "a catalog of various considerations that may be relevant in determining the ultimate statutory question of likelihood of confusion--and that all factors are not always relevant in a given case.")

a. Strength or Distinctiveness of Subway's Marks

As discussed above, Subway has been using its Marks since May 12, 2008, both of which are distinctive. The extensive advertising and recognition of Subway's Marks not only demonstrate their distinctiveness but also show their fame. Therefore, Subway's Marks are strong and distinctive and the first *Pizzeria Uno* factor weighs strongly in Subway's favor.

The strength and distinctiveness of the Subway Marks weigh heavily in favor of Subway's likelihood of success on the merits of its claims.

b. Similarity of the Marks

The second factor that courts evaluate is the similarity of Subway's Marks and Sheetz's Marks. An analysis of the similarity of each of Sheetz's Marks to each of Subway's Marks shows that the marks are extremely similar.

"[I]n evaluating the similarity of two marks, [the Fourth Circuit] has reasoned that the marks need only be sufficiently similar in appearance, with greater weight given to the dominant or salient portions of the marks." *Lone Star Steakhouse & Saloon*, 43 F.3d at 936. Where the dominant features of the parties' marks are similar, even if there are differences in fonts, lettering, and other aspect to their appearances, the second *Pizzeria Uno* factor favors a finding of a likelihood of confusion. *V&S Vin & Spirit Aktiebolag v. Hanson*, 2001 U.S. Dist. LEXIS 24848, *11 (E.D. Va. Oct. 16, 2001). *See also Renaissance Greeting Cards, Inc.*, 405 F. Supp.2d at 694.

(1) Similarity to Subway's Hand and $5 Design Mark

Subway's Hand and $5 Design Mark consists of a design of a hand showing five open fingers, the hand signal for the number five, (the "hand design") with the numerical price "$5 " appearing in the center of the hand. (*See* Exhibit 3 to the Complaint.) The "$5" is also nearly

two-thirds the size of the hand design. The result of overall impression of the mark is that the "$5" is the focal point of the Hand and $5 Design Mark, while the hand design emphasizes the number "5."

The Sheetz Hand and $4 Design Mark used by Sheetz also incorporates a hand design and numerical price. (*See* Exhibit 5 to the Complaint.) In Sheetz's mark the design consists of a hand showing four open fingers, the hand signal for the number four (the "Sheetz hand design"), in the center of the numerical price "$4." *See Id.* The "$4" is also nearly two-thirds the size of the Sheetz hand design. The result of the overall impression is that the "$4" is the focal point of Sheetz's Hand and $4 Design Mark, while Sheetz's hand design emphasizes the number "4."

The Sheetz Hand and $2 Design Mark used by Sheetz also incorporates a hand design and numerical price. (*See* Exhibit 6 to the Complaint.) In Sheetz's mark the design consists of a hand showing two open fingers, the hand signal for the number two (the "Sheetz second hand design"), in the top of the numerical price "$2." *See Id.* The "$2" is also a significant element in size in the Sheetz second hand design. The result of the overall impression is that the "$2" is the focal point of Sheetz's Hand and $2 Design Mark, while Sheetz's second hand design emphasizes the number "2."

(2) Similarity to Subway's Hand, $5 and FOOTLONG Design Mark

Subway's Hand, $5 and FOOTLONG Design Mark consists of the same elements of Subway's Hand and $5 Design Mark plus the addition of the term "FOOTLONG." (*See* Exhibit 4 to the Complaint.) Sheetz's Hand, $4 and FOOTLONG Design Mark also consists of the same elements as Sheetz's Hand and $4 Design Mark plus the addition of the word element "FOOTLONG." *See Id.*

The strong similarities that exist between the marks identified above remain as strong in regard to Subway's Hand, $5 and FOOTLONG Design Mark and Sheetz's Hand, $4 and FOOTLONG Design Mark. Sheetz's inclusion of the exact same word element as Subway used in its second mark further cements the similarities between the marks.

Sheetz's Marks are strikingly similar to Subway's Marks, similarities which are further emphasized when combined with the evidence that Sheetz obviously intends to profit from the goodwill which Subway has achieved through its Marks. The second *Pizzeria Uno* factor strongly supports Subway's infringement and unfair competition claims.

c. Similarity of Services

The Court next considers factors related to the similarity of goods or services offered under the parties' marks. In this situation Subway and Sheetz are offering identical services - the making of sandwiches for a certain price. This factor also favors a likelihood of confusion.

d. Similarity of Facilities

The fourth consideration, similarity of the facilities the parties use in their businesses, further supports a finding of likelihood of confusion. Subway's services are offered in sandwich shops, many of which are part of convenience stores and/or gas stations. (*See* Wilker Decl. ¶ 4.) Indeed, in the Eastern District of Virginia alone, Subway has 351 locations, at least 28 of which are convenience stores and/or gas stations and at least four of which are truck stops. (*See* Wilker Decl. ¶ 5.) Sheetz offers its services in exactly the same facilities – convenience stores, many of which are also gas stations. (*See* Wilker Decl. ¶ 22 and Composite Exhibit 7, Sheetz.com webpages.) The Parties' facilities are not merely similar but are, once again, identical.

e. Similarity of Advertising

The fifth consideration, similarity of advertising, is another example of the striking similarities between Subway's use of its Marks and Sheetz's use of its Marks. Subway advertises via television and billboards as well as on and inside its locations themselves. (*See* Wilker Decl. ¶¶ 8-13 and Exhibits 3 and 4.) Sheetz advertises on at least television and billboards and at its locations. (*See* Wilker Decl. ¶ 23 and Exhibit 8, a picture of a billboard.)

f. Defendant's Intent

The next factor the Court considers is Sheetz's intent. "If there is intent to confuse the buying public, this is strong evidence establishing likelihood of confusion, since one intending to profit from another's reputation generally attempts to make his signs, advertisements, etc. to resemble the other so as to induce confusion." *Pizzeria Uno*, 757 F.2d at 1535. Subway's Marks were in nationwide use for almost a year before Sheetz began using its Marks. Due to the sheer amount and national inundation of Subway's advertising including its Marks, Sheetz would have had prior knowledge of Subway's Marks. Indeed, Sheetz has shown a pattern of associating itself with Subway's prior established campaigns and marks. In 2003 Sheetz ran commercials throughout Virginia and other states that relied on an association with Subway, namely, through Subway's spokesperson Jared Fogel. *See supra*. Sheetz's repeated efforts to latch onto the goodwill associated with Subway through Subway's own advertisements, campaigns, and marks demonstrate Sheetz's bad intent.

The striking similarity between the Parties' marks, services, advertisements, and facilities combined with Sheetz's prior knowledge of Subway's Marks shows an intentional copying of Subway's Marks. A presumption of a likelihood of confusion can be based on Sheetz's intentional copying of Subway's Marks. *See M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421

(4th Cir. 1985) (citations omitted); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d at 466; and *Atlas Copco AB v. Atlascopcoiran.com*, 533 F. Supp.2d 610, 614 (E.D. Va. 2008). Therefore, this factor also favors a likelihood of confusion.

g. Actual Confusion

The final *Pizzeria Uno* factor is actual confusion. Like the other *Pizzeria Uno* factors, actual confusion is not necessary for a finding of likelihood of confusion. *See CareFirst of Maryland, Inc. v. First Care, P.C.*, 422 F. Supp.2d 592, 607 (E.D. Va. 2006); *Cophertrust, Inc. v. Trusecure Corp.*, 2005 U.S. Dist. LEXIS 46322, *48 (E.D. Va. Nov. 28, 2005). This is particularly true in situations like the instant case where the unlawful use has been occurring for only a few weeks. *See Id.*

The weight of the *Pizzeria Uno* factors, indeed all but one of them, supports a finding of likelihood of confusion. Moreover, the consideration of these factors strongly indicates that Subway will succeed on the merits of its claims.

E. A Temporary Restraining Order Is in the Public Interest

"The public interest favors the protection of valid trademark rights against infringement." *H. Jay Spiegel*, at *18 (citing *Providence Prods., LLC v. Implus Footcare, LLC*, 2008 U.S. Dist. LEXIS 9311, *8 (W.D.N.C. Jan. 25, 2008)). "The purpose of a trademark is to protect the public from confusion about 'the identity of the enterprise from which goods and services are purchased.' Preventing consumers from being confused serves the public interest as does preventing trademarks from being used deceptively." *Toolchex, Inc. v. Trainor*, 2008 U.S. Dist. LEXIS 43030, at *16 (E.D. Va. June 2, 2008) (citing *AMP Inc. v. Foy*, 540 F.2d 1181, 1185-86 (4th Cir. 1976); other citations omitted.) The public relies on Subway's Marks to identify Subway as the source of services offered under its Marks. Additionally, Subway has valid

trademark rights that should be protected against infringement and unfair competition. Therefore, this final factor supports the granting of a temporary restraining order against Sheetz.

IV. CONCLUSION

Subway respectfully requests, for the reasons stated herein, that the Court enter a temporary restraining order enjoining the Defendants Sheetz, Inc., and Sheetz of Delaware, Inc., their officers, agents, servants, employees, representatives, distributors, successors, assigns, and attorneys, and all others in active concert or participation with them from advertising, promoting, using any signage, selling, and offering for sale restaurant services or sandwich related products under Subway's Hand and $5 Design Mark and Hand, $5 and FOOTLONG Design Mark, or any colorable variation thereof or any confusingly similar mark.

Respectfully submitted,

29 January 2009
Date

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CERTIFICATE OF SERVICE

I certify that I tendered to the Clerk of Court a hard copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER with exhibits prior to the CM/ECF system being set up in this matter. I further certify that a true copy of the same was served by facsimile today and hand delivery on January 30, 2009, upon:

Ms. Roberta Jacobs-Meadway
ECKERT SEAMANS CHERIN & MELLOTT, LLC
Two Liberty Place, 22nd Floor
50 South Sixteenth Street
Philadelphia, Pennsylvania 19102

and by hand delivery only on January 30, 2009, on:

SHEETZ OF DELAWARE, INC.
c/o WILMINGTON TRUST SP SERVICES (DELAWARE), INC.
1105 North Market Street, Suite 1300
Wilmington, Delaware 19801

29 January 2009
Date

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