

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

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

PLAINTIFFS' NOTICE OF TERMINATION OF SETTLEMENT AGREEMENT

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:
PLEASE TAKE NOTICE that, pursuant to Paragraphs 44-46 of the Settlement Agreement entered into by the parties on or about September 24, 2015, the plaintiffs hereby terminate that Settlement Agreement.

In 2013, nine (9) lawsuits were filed in state and federal courts across the country against defendant Doctor's Associates, Inc. ("DAI") alleging that DAI had engaged in unfair and deceptive marketing practices regarding the length of Subway® Footlong sandwiches. Over the next two (2) years, plaintiffs' counsel obtained from DAI voluminous documents and information relating to DAI's bread vendors and quality control processes. Much of the information and documents were designated by DAI as being "confidential", and DAI would not allow them to be disseminated to the public.

The parties engaged a well-respected retired federal magistrate judge as a mediator to assist them in attempting to settle the lawsuits, and the mediator was allowed access to DAI's confidential documents and information. Subsequently, the parties met with this court overseeing the consolidated lawsuits, and this court further mediated the dispute until the parties ultimately reached a global resolution of the lawsuits. This court was also allowed access to DAI's confidential documents and information during that mediation.

A major concern in the lawsuits was that DAI's bread vendors were not putting enough dough in the frozen dough sticks used to make Footlong sandwiches, and they were skimping on the dough in order to increase their profits at the expense of Subway® customers. Plaintiffs did not view this as a situation where the correct amount of dough was being provided to the franchisee, and the length of the bread happened to be short due to variabilities in the bread baking process.

For example, a former Quality Assurance Lead at one of DAI's captive bread manufacturers attested under oath that she commonly and routinely inspected boxes containing frozen dough sticks that measured much shorter than 10.5 inches, and that it was not uncommon to find frozen dough sticks in boxes as short as 9 inches long. *See* Affidavit of Bread Vendor Employee (redacted to remove personal identifying information), at ¶¶ 2, 6, attached hereto. This bread vendor employee further attested that on several occasions, DAI received complaints from franchisees that several dough sticks in the boxes were far short of the required length, and that despite having knowledge of these deficiencies, no new controls were implemented and the boxes of frozen dough sticks continued to be approved for shipment to franchisees. *See* Affidavit of Bread Vendor Employee, at ¶¶ 7, 8. Finally, this bread vendor employee attested that the short size of the Footlong dough sticks was a widespread and known problem throughout all of DAI's bakery captives, and after these lawsuits were filed, DAI began attempting to implement tighter controls in the dough making process. *See* Affidavit of Bread Vendor Employee, at ¶ 9.

Under the terms of the settlement of these lawsuits, DAI was required to make certain changes to its business practices, including implementing additional quality control measures regarding the length of the bread in its Footlong sandwiches. Based on the confidential information and documents that plaintiffs' counsel obtained during the mediation process, some

of the injunctive relief that was included as part of the settlement to address the concerns of the plaintiffs, the retired magistrate judge, and this court, required:

- DAI will institute and maintain additional quality control measures regarding bread length, and enhance the standards relating to the supervision of third party dough manufacturers, including *replacing the company* retained to test the quality and uniformity of the bread dough produced by those manufacturers that is shipped to Subway® stores.
- All DAI franchisee protocols, training materials, and communications (including University of Subway® course materials, the Franchise Disclosure Document, and the Operations Manual), which had previously allowed for the size of a Footlong sandwich to be less than 12 inches, will now require that a Footlong sandwich must be at least 12 inches in length.
- DAI will institute and maintain a requirement that each regular compliance inspection (conducted by DAI or its agents of each Subway® restaurant, generally monthly) will include a sampling of the baked bread to ensure it is at least 12 inches long, and DAI will increase the penalty for non-compliance for Subway® restaurants found using bread that is not at least 12 inches long.

The terms of the settlement only included injunctive relief to force DAI to implement changes to its business practices, and anyone who purchased a Subway® Footlong sandwich was still free to independently pursue a claim against DAI for money damages if they wanted to.

This court approved the settlement as being fair and reasonable. Additionally, this court awarded the ten (10) law firms representing the plaintiffs attorneys' fees and reimbursed costs amounting to less than 50% of the over 2,000 hours they had spent working on the cases.

On appeal, the appellate court rejected the settlement and sent the cases back to this court for further proceedings. The confidential information and documents were not made part of the public record, so the appellate court did not know their contents when the appellate court was reviewing the settlement. Plaintiffs believe the appellate court would have reached the opposite conclusion if the confidential information and documents had been in the public record. On

remand, plaintiffs intend to have all of the confidential information and documents made part of the public record, and plaintiffs intend to pursue this litigation.

Respectfully submitted,

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AFFIDAVIT OF [REDACTED]

I, [REDACTED] under oath deposes and says:

1. I reside in [REDACTED]. I am a former employee of [REDACTED].
2. I am a former Quality Assurance Lead of [REDACTED] [REDACTED] one of Doctor Associates Inc. ("DAI") captive dough makers located in [REDACTED].
3. I was an employee of [REDACTED] for 5 and a half (5 1/2) years and ceased my employment approximately two weeks ago.
4. [REDACTED] make frozen dough sticks to package and send to DAI's franchisees so they could bake SUBWAY® bread at their stores. [REDACTED] was required to make the dough sticks 10.75 inches in length so that when the frozen sticks are baked they would expand to the required length (*i.e.*, between 11.5 - 12.5 inches long).
5. As Quality Assurance Lead, I would often be in packaging at [REDACTED] and I would spot inspect boxes of 70 frozen dough sticks to ensure that the sticks measured in each box were no shorter than 10.5 inches (an acceptable length to DAI even though specifications required 10.75 inches).
6. I commonly and routinely inspected boxes containing frozen dough sticks that measured much shorter than 10.5 inches. It was not uncommon for me to find frozen dough sticks in boxes as short as 9 inches long. Despite my identification and documentation of the short dough sticks, the boxes of product would still be shipped.
7. On several occasions, [REDACTED] and DAI received complaints from franchisees that several dough sticks in boxes were far short of the 10.75" standard. Many complaints received documented that the dough sticks measured far less than 10". DAI was

aware of these complaints because complaints came through the [REDACTED] System used at [REDACTED] which also notified DAI representatives.

8. Despite DAI having knowledge of these glaring deficiencies, no new controls were implemented. Boxes of frozen dough sticks continued to be approved for shipment, and sent to franchisees for baking regardless of whether dough sticks were too short.
9. The short size of the Footlong dough sticks was widespread and known problem throughout all of DAI's bakery captives. As a result of the Footlong lawsuits being filed, DAI began attempted to implement tighter controls in the dough making process. However, the production of undersized dough sticks still occurred.
10. After the lawsuits were filed in January, 2013, [REDACTED] changed its internal protocols and started making frozen dough sticks 10.85 inches to try and help compensate for the deficiencies.
11. The statements in this affidavit are true. I understand that if any of the statements in this affidavit are false I may be subject to punishment.

[REDACTED]

Sworn to and subscribed
before me this 13 day
of April, 2013.

[REDACTED]



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CERTIFICATE OF SERVICE

Thomas A. Zimmerman, Jr., an attorney, hereby certifies that he caused the *Plaintiffs' Notice of Termination of Settlement Agreement* to be served upon counsel of record in this case via the U.S. District Court CM/ECF System, on this day August 29, 2017.

All Plaintiffs, individually, and on behalf of all others
similarly situated,

By: s/Thomas A. Zimmerman, Jr.
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