

EXHIBIT 1

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

JEFFREY OFFUTT, AS A TRUSTEE
OF THE SUBWAY FRANCHISEE
ADVERTISING FUND TRUST,

Plaintiff,

v.

DOCTOR’S ASSOCIATES, INC.,

Defendant.

Case No.: 3:07-CV-00363 (AWT)

DOCTOR’S ASSOCIATES, INC.,

Counterclaim Plaintiff,

v.

JEFFREY OFFUTT, RAY BURROWS,
MIKE ZWALLY, GARY DAVIS,
GEORGE ESTEP, PATTI SWIERBUT,
SCOTT SIMPSON, MIKE MCCOY,
DEBRA ODOM, KAREN MILLER,
RICK ORWICK, CHUCK ROY,
ANDREW JOHNSTON, and BEN OLD,

Counterclaim Defendants.

August 28, 2008

SUPPLEMENTAL ANSWER AND COUNTERCLAIMS

Defendant Doctor’s Associates, Inc. (“DAI”) hereby supplements its June 25, 2007 Answer to the Amended Complaint (“Answer”) with counterclaims against Plaintiff Jeffrey Offutt and the remaining Trustees of the Subway Franchisee Advertising Fund Trust (“SFAFT” or “Trust”). DAI sues Offutt and the other SFAFT Trustees solely in their capacities as SFAFT Trustees for acts arising out of and relating to their management of the Trust, and occurring after

DAI filed its Answer.

DAI incorporates its original Answer by reference and pleads the following counterclaims:

INTRODUCTION

1. This action arises out of the Subway Franchisee Advertising Fund Trust Agreement (“Trust Agreement”), which created SFAFT. DAI, the Subway sandwich shop franchisor, is the settlor of the Trust. Plaintiff Jeffrey Offutt filed this lawsuit “in his representative capacity as a duly authorized Trustee of [SFAFT],” *see* June 11, 2007 Amended Complaint for Declaratory Judgment and Other Relief (“Complaint”) at 1, seeking a declaration that the Trust Agreement requires DAI to pay to SFAFT, forever, all advertising contributions from Subway franchisees, no matter how poorly SFAFT’s Trustees might perform or how ineffective the advertising that SFAFT arranges might be in increasing sales for Subway stores. However, the recent deposition of Neal Borden, SFAFT’s former general counsel, who drafted the Trust Agreement, establishes that Offutt’s claim has no foundation. As described in more detail below, in his sworn testimony Borden repeatedly acknowledged that the Trust Agreement that he drafted expressly recognizes DAI’s right to do the very things that Offutt is asking this Court to enjoin. Based upon the Borden deposition and other discovery to date, DAI recently asked Offutt to withdraw this groundless case. His response was to assert that there is a need for many additional depositions and a trial before the Court can determine the proper construction of the Trust Agreement, which the Complaint repeatedly alleges is “unambiguous.”

2. In addition, Offutt and his fellow Trustees recently have engaged in a series of actions that flagrantly breach the Trust Agreement and clearly violate their duties to DAI and the franchisee-beneficiaries of the Trust. *First*, the Trustees have permitted assets of the Trust,

whose sole purpose is to fund group advertising and promotion of the Subway franchise system for the benefit of all franchisees, to be used as an interest-free loan to a former Trustee to pay his lawyers to prosecute his own personal claims against DAI, with the loan to be forgiven if the claims are unsuccessful. As explained more fully below, this decision – taken without the formal Trustee vote that SFAFT’s own rules require – sets a dangerous precedent for potential self-dealing by Trustees. **Second**, without properly consulting DAI, the Trustees have purported to convert SFAFT into a statutory trust, thereby breaching the Trust Agreement by amending that Agreement without DAI’s written consent and by ignoring SFAFT’s own internal policies and procedures, which the Trust Agreement requires them to follow. **Third**, the Trustees have breached the Trust Agreement requirement that they give DAI access on reasonable notice to all of SFAFT’s accounts, books and records, by imposing conditions on that access which the Trust Agreement does not contemplate and which are excessive, overbearing and wholly unreasonable.

3. The Trustees’ recent conduct has breached their duties under the Trust Agreement to DAI and to SFAFT’s franchisee-beneficiaries. The Trustees’ decisions, if left unchecked, will ultimately threaten the security of the Trust’s assets, and endanger the success of the entire Subway® franchise system. Through these counterclaims, DAI seeks a declaration that the Trustees have violated their fiduciary obligations and breached the Trust Agreement. DAI further seeks judgment against the named Trustees jointly and severally for breaches of their fiduciary duties resulting in improper expenditures of Trust assets.

PARTIES

4. DAI is a Florida corporation with a principal place of business in Fort Lauderdale, Florida.

5. Each counterclaim defendant is a Trustee of SFAFT. SFAFT is a trust organized

under the laws of Connecticut with its principal place of business in Milford, Connecticut. As a common law trust, SFAFT cannot be a party to litigation under Connecticut law.

6. Upon information and belief, the counterclaim defendants reside in and are citizens of the states in the United States or the foreign states listed below:

- (1) Jeffrey Offutt – Columbia, Missouri
- (2) Ray Burrows – Belair, Maryland
- (3) Mike Zwally – Lancaster, Pennsylvania
- (4) Gary Davis – Statesboro, Georgia
- (5) George Estep – Columbus, Indiana
- (6) Patti Swierbut – St. Joseph, Michigan
- (7) Scott Simpson – Omaha, Nebraska
- (8) Mike McCoy – San Antonio, Texas
- (9) Debra Odom – Edmond, Oklahoma
- (10) Karen Miller – Auburn, California
- (11) Rick Orwick – Upland, California
- (12) Chuck Roy – Ontario, Canada
- (13) Andrew Johnston – Antrim, Northern Ireland, United Kingdom
- (14) Ben Old – Queensland, Australia

JURISDICTION AND VENUE

7. This Court has supplemental jurisdiction over DAI's counterclaims because they arise out of the same transaction and occurrence as the Complaint. The Court also has original jurisdiction over the counterclaims under 28 U.S.C. § 1332(a) because the amount in controversy exceeds \$75,000, exclusive of interests and costs, and is among citizens of different states.

8. Venue properly lies in this District pursuant to 28 U.S.C. § 1391(a)(2) and 1391(b)(2) because a substantial portion of the events or omissions giving rise to the claims occurred in this District, and counterclaim defendants are subject to personal jurisdiction here.

STATEMENT OF FACTS

The Subway® Marks and the Subway® Franchise System

9. DAI is the franchisor of Subway Sandwich Shops, one of the largest, most successful franchise systems in the world. DAI owns the federally registered trademark “Subway®,” and also owns all the related trademarks and service marks (collectively, “the Marks”) used in the operation of Subway Sandwich Shops and in advertising, marketing and otherwise promoting the Subway® brand.

10. DAI enters into a separate franchise agreement with the franchisee-owner of each sandwich shop in the Subway® system. Each franchise agreement grants the franchisee a limited license to use the Marks in connection with operation of the sandwich shop in accordance with the franchise agreement.

11. Each franchise agreement also requires the franchisee, among other things, to:
- (a) Comply with the Subway® operations manual, which DAI issued and periodically updates;
 - (b) Pay DAI an upfront fee to purchase the franchise;
 - (c) Pay DAI, for the life of the franchise, a weekly royalty, calculated as a percentage of the store’s weekly gross revenue; and
 - (d) Make, for the life of the franchise, a weekly contribution, calculated as a separate and additional percentage of the store’s weekly revenue, to help fund advertising on behalf of the franchise system.

The Creation of SFAFT and the Terms of the Trust Agreement

12. Before the creation of SFAFT, DAI's franchise agreements provided that weekly advertising contributions from Subway® franchisees would be paid into the Franchisee Advertising Fund ("FAF"), an unincorporated entity that sometimes described itself as a division of DAI.

13. On November 14, 1990, DAI and the FAF Board of Directors signed the Trust Agreement, which established SFAFT for the sole purpose of "fund[ing] group advertising and promotion of the Subway Sandwich Shop business for the benefit of all Franchisees." Trust Agreement, (copy attached as Exhibit A), § 2.

14. Lawyers at SFAFT's law firm, now known as Venable, prepared the various drafts of the Trust Agreement, including the final version that DAI and the FAF Directors executed. As the lead Venable partner on the SFAFT engagement, Neal Borden had ultimate responsibility for preparing the Trust Agreement.

15. With the conversion from FAF to SFAFT, the FAF Board of Directors became the SFAFT Board of Trustees ("Trustees" or "Board"), the members of which are Subway franchisees elected by fellow franchisees. As a similar transition measure, the Trust Agreement provided that DAI would "take all steps necessary to cause all payments made by its Franchisees to the Franchisee Advertising Fund to be paid hereafter directly to the Trust." Trust Agreement, Exhibit A, § 4.2.

16. The Trust Agreement requires the Trustees to establish and follow rules governing the regulation and management of SFAFT's affairs, as set forth in a Franchisee Advertising Policy and Procedure Manual ("Policy and Procedure Manual" or "PPM"). *See* Exhibit A, §§ 3, 5.1, 15. The PPM in turn expresses the SFAFT Board's determination that "it is

in the best interests of the franchisees for SFAFT to coordinate its efforts with the franchisor to achieve the best results for the Subway system.” PPM (excerpts attached as Exhibit B), Art. I, ¶ C.

17. The Trust Agreement itself also recognizes that DAI has an important continuing interest in the proper management of the Trust. Thus, under the Trust Agreement, DAI: (a) has the right to inspect the Trust’s accounts, books, and records at any time on reasonable notice, and to receive a copy of annual audited financial statements; and (b) must provide written consent before any amendment to the Trust Agreement proposed by the Trustees takes effect. Exhibit A, §§ 8.1, 8.2, 12.

18. In addition, the Trust Agreement reflects the settlor’s understanding and intent in 1990, when DAI created SFAFT, that Subway was a dynamic, rapidly growing franchise system; that DAI did not know how well SFAFT would function over time; and that under these circumstances, it would make no business sense for DAI to commit to the SFAFT structure in perpetuity. Instead, DAI needed the flexibility to respond to evolving business conditions.

19. For tax reasons, SFAFT’s lawyer Borden took the position that the Trust should be irrevocable, but the Trust Agreement nonetheless reflected the settlor’s intent that DAI have the necessary flexibility to react to changing circumstances, by expressly recognizing in § 4.2 DAI’s right to “alter[], modif[y] or cancel[] the provisions of its Franchise Agreements with its Franchisees (either now in existence or subsequently executed),” *even if* “such action causes the payments by the Franchisees to the Trust to be reduced, encumbered, or eliminated.” Trust Agreement, Exhibit A, § 4.2. (In the event that DAI exercises this right, it assumes the Trust’s burden as the indemnitor of the Trustees under Sections 9.6 and 9.8 of the Trust Agreement.)

20. Accordingly, while DAI has no right unilaterally to revoke the Trust or assert

control over funds already in the Trust, the Trust Agreement expressly recognizes DAI's right as franchisor to change its franchise agreements and direct future franchisee advertising contributions somewhere other than to SFAFT. Thus, in its practical effect, the Trust Agreement distinguishes between the existence of the Trust and control over its existing corpus, on the one hand, from any obligation to provide future funding of the Trust, on the other.

21. The Trust Agreement imposes numerous obligations on the Trustees. For example, Section 9.1 requires each Trustee to administer the Trust "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent individual acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." Exhibit A, § 9.1.

22. Further, Section 5.1 of the Trust Agreement provides that "[t]he Trustees shall distribute from the Trust Fund . . . such amounts as are necessary to make payment upon or reimbursement for each cost, expense or charge that is to be paid . . . under the terms of the Franchisee Advertising Fund Policy and Procedure Manual, *provided that . . . the Trustees are otherwise satisfied that the cost, expense or charge is properly payable from the Trust.*" Exhibit A, § 5.1 (emphasis added).

23. In addition to the fees paid by Subway franchisees, DAI itself has made large financial contributions to the Trust – amounting to over \$100 million since 1997.

24. Because of the enormous success of the Subway franchise system, total franchisee advertising contributions have increased dramatically over time: The Trustees are now responsible for managing approximately half a billion dollars annually.

25. As the Subway franchisor, party to the franchise agreements requiring franchisees to pay advertising fees, settlor of the Trust, contributor of substantial supplemental funding to the

Trust, and licensor (by separate agreement) of trademarks to the Trust, DAI obviously has an important stake in the proper administration of the Trust, and a legitimate interest in trying to ensure that the Trustees do not waste Trust assets by reckless, imprudent or otherwise inappropriate conduct.

The Radical Shift in the Theory of Offutt's Misguided Claim

26. The original theory of Offutt's case was that the intent, purpose and provisions of the Trust Agreement were all "unambiguous," *see* Complaint ¶¶ 1, 32, and that the Trust Agreement unambiguously requires DAI "to pay to SFAFT all advertising contributions made by Subway franchisees," *id.*, ¶ 1, in perpetuity.

27. On July 29, 2008, DAI's counsel deposed Neal Borden, SFAFT's former outside general counsel, who was responsible for drafting the Trust Agreement. Borden's testimony established that Offutt's claim has no foundation in the language or intent of the Trust Agreement.

28. Among other things, Borden confirmed the accuracy of his sworn testimony from an earlier arbitration that "there is nothing of which I'm aware which would prevent DAI, the settlor of this trust, from making a decision . . . that it was going to create the new franchisee advertising trust and set up another trust with people it appoints as trustees and start using a franchise agreement that says your advertising contributions are going to be directed to the new trust." Borden Depo. Tr. (excerpts attached as Exhibit C) at 74. Borden also repeatedly confirmed that "[t]here is no language in the trust agreement which purports to limit DAI's rights to exercise its power which it has extrinsic to the trust agreement to alter, modify, or cancel the provisions of its franchise agreements such that payments by the franchisees to the trust would be reduced, unencumbered or eliminated entirely." *Id.* at 130; *see also id.* at 77-78, 114-15, 129.

29. Based on Borden's testimony and the balance of discovery to date, it is clear that Offutt's claim is without any basis in fact. Accordingly, DAI asked Offutt to withdraw his case. Offutt has refused, taking the position that proper construction of the Trust Agreement – which the Complaint repeatedly characterized as “unambiguous” – is now so riddled with disputed issues of material fact that there must be many more depositions and a trial before the Court can address and decide Offutt's claim.

30. Apparently, the Trustees are intent upon wasting Trust assets, in violation of their fiduciary duties, by continuing to press Offutt's groundless case. As set forth in detail below, they have also engaged in a series of actions that clearly breach the Trust Agreement and violate their duties to DAI and the franchisee-beneficiaries of the Trust.

The Decision to Underwrite Prosecution of Dielli Husen's Personal Claims Against DAI

31. Dielli Husen, a former SFAFT trustee, is a Subway franchisee and development agent (“DA”). A DA is an independent contractor who contracts with DAI to service a designated geographic territory, by helping to identify and recruit prospective franchisees, facilitating DAI's sale of franchises, assisting franchisees to find and build-out suitable locations, and inspecting Subway stores to ensure compliance with operating standards. DAI pays each DA a portion of the up-front franchise fees and a percentage of the continuing royalties received from franchisees in the DA's territory.

32. In 2006 and 2007, DAI disapproved Husen's attempts to sell his two development agent agreements (“DAAs”) and declined to extend one of Husen's DAAs beyond its original twenty-year term, which expired on July 8, 2008. Husen filed an arbitration (“Husen Arbitration”) against DAI, alleging, among other things, that DAI was obliged to approve the transfers and/or renew the expired development agent agreement, and that it had declined to do

so in retaliation for Husen's activities during his tenure as a SFAFT trustee.

33. Husen later filed a separate suit against DAI's founder, Frederick DeLuca, on the same claims. That action is now pending before Judge Dorsey in this Court. DeLuca has moved to dismiss that case or, in the alternative, to stay it pending the outcome of the Husen Arbitration.

34. The Husen Arbitration and lawsuit against DeLuca involve numerous claims arising out of several different provisions of Husen's DAA. The failure to renew and/or extend Husen's DAAs and DAI's alleged retaliation for Husen's service as a SFAFT Trustee represent only a small portion of Husen's claims. In fact, by Husen's own admission, many of the claims in the Husen Arbitration and suit against DeLuca involve Husen's requests for damages based upon events that long antedate his service as a SFAFT Trustee.

35. Upon information and belief, the Trustees, acting through SFAFT's in-house counsel Mary Jane Saunders, have agreed that the Trust will pay Husen's attorneys' fees in his arbitration and related federal suit, allegedly pursuant to Section 9.6 of the Trust Agreement.

36. Section 9.6 of the Trust Agreement provides, in relevant part:

If, and only if, (i) a Trustee is serving in compliance with the terms of this Trust Agreement, (ii) grants to the Trust the sole and exclusive control of the defense of any action that may require indemnification of such Trustee, and (iii) offers his full cooperation in the preparation of appropriate defenses to any action commenced - the Trust shall indemnify and hold harmless such Trustee of and from any and all costs, claims, losses, demands or liabilities, including reasonable attorney's fees and expenses in defending against such claims, losses, demands and liabilities, in respect of the acts, transactions, duties, obligations or responsibilities which such Trustee performs or undertakes, or fails to perform or undertake, in the capacity of a Trustee hereunder, or by reason of such Trustee's good faith execution of his duties in the administration of this Trust, unless such loss or liability is due to such Trustee's negligence or arises from such Trustee's failure to satisfy any obligation imposed upon him by law

Exhibit A, § 9.6

37. On its face, the Trust's indemnification obligation is clearly limited to situations

where a Trustee must *defend* against claims arising from good faith actions as trustee and completely cedes control over the defense to SFAFT. Exhibit A, § 9.6. Section 9.8 of the Trust Agreement extends this indemnification obligation, subject to the same conditions, to former Trustees.

38. The Trustees' decision to underwrite the prosecution of Husen's personal claims against DAI and DeLuca not does comply with the Trust Agreement's plain language: Husen is not defending against any claims related to his service as a Trustee; he is the claimant in the arbitration and the plaintiff in the lawsuit, seeking substantial money damages and injunctive relief on a number of claims (many of which have no colorable connection to his service as a SFAFT Trustee). It is also clear that Husen has not, as required to satisfy Section 9.6, granted the Trust "sole and exclusive control" of either proceeding.

39. The Trustees have coupled their indefensible construction of Section 9.6 of the Trust Agreement with what appears to be, upon information and belief, willful disregard for the decision-making process that the Trust Agreement, through the Policy and Procedure Manual, requires them to follow. The Policy and Procedure Manual mandates that the Trustees make all decisions by roll call vote, and publish those votes in the minutes of the meeting. Exhibit B, Art. II, § G, ¶ 5. There is no exception to the requirement of roll call votes. However, upon information and belief, there was never a roll call vote about paying Husen's legal bills.

40. As noted above, moreover, SFAFT's Policy and Procedure Manual also recognizes DAI's interest in the conduct of the Trust and confers upon DAI the right to "request that the SFAFT Board reconsider any decision made by the Board . . . within five business days of receipt of notice of the decision." Exhibit B, Art. I, § C. If DAI requests reconsideration, an affirmative vote by at least a majority of the Members of the Board is required to sustain the

decision. *Id.*

41. Pursuant to this reconsideration procedure, SFAFT must provide DAI with notice of all its decisions and wait five business days to see if DAI will request reconsideration. The established protocol for giving DAI notice of SFAFT decisions is for a SFAFT staff member to send an email to DAI's Assistant Vice President Cindy Eadie, attaching a copy of the motion, the voting record, and the minutes of the meeting.

42. SFAFT never provided DAI with notice in accordance with this protocol of the Trustees' decision to underwrite the prosecution of Husen's personal claims against DAI and DeLuca. Upon information and belief, that is because the Trustees made this decision in such an irregular fashion, with no motion, no vote, and no minutes recording whatever discussion, if any, took place. Since DAI learned about the decision, it has written a series of letters to SFAFT seeking information about the Trustees' decision to underwrite the prosecution of Husen's claims, but SFAFT has simply stonewalled, refusing to answer any of DAI's substantive questions and invoking the attorney-client privilege.

43. In the Husen Arbitration, DAI obtained a copy of a July 1, 2008 email that Husen sent to SFAFT officers Chuck Roy, Gary Davis, and Ray Barrows. In this email, Husen confirmed an alleged agreement that he will reimburse SFAFT for the funds it pays his lawyers, but only if and to the extent that the Husen Arbitration panel awards him legal fees and costs. As a practical matter, therefore, what the Trustees have done bears no relationship whatsoever to "indemnification." Instead, they have used franchisee advertising contributions to give their former colleague Husen an interest-free prosecution loan, which he will never have to repay if his claims are unsuccessful, thereby putting all risk of loss on the Trust's beneficiaries and setting an extraordinarily dangerous precedent, rife with the potential for abusive self-dealing by

SFAFT Trustees and former Trustees.

44. Because every SFAFT Trustee must be a Subway franchisee (and some, like Husen, are also DAs), every Trustee has at least one contractual relationship with DAI or one of its affiliates. Certain Trustees have owned and operated numerous Subway outlets, each subject to a separate, long-term franchise agreement; some Trustees have been multi-unit franchise owners while also serving as a DA pursuant to a long-term development agent agreement. As a result of the Trustees' wrongful conduct described above, any time a Trustee has a dispute with DAI concerning his performance as a franchisee or DA, all he will need to do is allege that DAI is retaliating against him because of his service as a SFAFT Trustee, start an arbitration and, citing the Husen matter as precedent, demand that SFAFT pay his counsel to prosecute his personal causes of action, secure in the knowledge that, win or lose, he will never be responsible for his own legal fees.

45. As franchisees and development agents, the Trustees clearly have a personal, pecuniary interest in diverting franchisee advertising contributions in this fashion to insure themselves against the consequences of underperformance by their restaurants or territories – an interest squarely in conflict with their fiduciary duty to interpret and execute the Trust Agreement solely in the best interests of the Trust's beneficiaries.

46. The Trustees' decision, apparently implemented by SFAFT's in-house counsel without a motion, vote or meeting minutes, to provide Husen with an interest-free loan insuring him against the financial consequences of a defeat in his arbitration against DAI and action against DeLuca violates the plain language of the Trust Agreement and the Policy and Procedure Manual, wastes trust assets in breach of the Trustees' duty of trust, and constitutes self-dealing by the Trustees in breach of the duty of loyalty.

The Trustees' Unilateral Amendment of the Trust Agreement

47. Section 12 of the Trust Agreement provides that DAI as settlor must provide written consent before any amendment to the Trust Agreement takes effect. Exhibit A, § 12.

48. On July 20, 2008, the Trustees approved a Statement of Consent and Certificate of Trust intended to convert SFAFT from a common law trust to a statutory trust pursuant to Connecticut General Statutes Sections 34-500 to 34-547 ("Statutory Trust Act").

49. The Statutory Trust Act contains provisions regulating, *inter alia*, the rights of creditors of the beneficiaries, the authority of the trustees to approve merger or consolidation, the ability of beneficiaries to bring derivative actions, and the scope of personal liability of the trustees. *See* Conn. Gen. Stat. §§ 34-516, 34-521, 34-522, 34-523(b), respectively. Upon conversion to a statutory trust, the default provisions of the Act are incorporated to the trust instrument except to the extent they are inconsistent with provisions in an instrument which predates the effective date of the Act (October 1, 1997). *See* Conn. Gen. Stat. § 34-502.

50. In order to register as a statutory trust, the Trustees were required to change the name of the Trust from Subway Franchisee Advertising Fund Trust, to Subway Franchisee Advertising Fund Trust, Ltd. *See* Conn. Gen. Stat. § 34-504; Ex. D.

51. By changing the name of the Trust and by incorporating statutory provisions additional to the terms of the Trust Agreement, the conversion to a statutory trust effects multiple amendments of the Trust Agreement. For example, registering as a statutory trust alters the trustees' personal liability for their decisions. *See* Conn. Gen. Stat. § 34-523.

52. SFAFT did not seek and has not obtained DAI's written consent to amend the Trust Agreement. Accordingly, the purported conversion to a statutory trust is invalid and a breach of the terms of the Trust Agreement and the Trustees' fiduciary duties.

53. Moreover, the Trustees also approved this purported conversion to a statutory trust without following their own internal procedures, required by the Policy and Procedure Manual. SFAFT did not timely notify DAI in accordance with the standard protocol, described above, or give DAI a meaningful opportunity to request reconsideration as the PPM requires.

54. Although the Trustees apparently approved the conversion to a statutory trust on July 20, 2008, it was not until July 30, 2008 at 3:06 p.m. that SFAFT, in accordance with its established practice for notifying DAI of decisions, sent Cindy Eadie an email attaching the motion, vote, and minutes relating to the conversion decision – thereby starting the five-day clock for requesting reconsideration.

55. In several communications starting on August 1, 2008, DAI informed SFAFT that it was requesting reconsideration and needed a reasonable opportunity to investigate the proposed conversion to a statutory trust.

56. DAI later learned that SFAFT had already filed the Certificate of Trust (copy attached hereto as Exhibit D) with the Connecticut Secretary of the State at 3 p.m. on July 30, 2008 – six minutes *before* sending the official notification to Ms. Eadie.

57. Significantly, SFAFT filed the Certificate one day after Mr. DeLuca sent the Trustees an email reiterating DAI's concerns about the decision to "indemnify" Husen and explaining that the Trustees could be personally liable for repayment of funds improperly disbursed to Husen; and one day after Neal Borden gave the deposition testimony described above.

58. By failing to provide proper notice of their decision until after they had acted upon that decision, the Trustees deprived DAI of its right to request reconsideration of the decision.

59. To this day, DAI has not been asked for or provided its written consent to the amendment of the Trust Agreement, as required under Section 12 of the Trust Agreement. SFAFT's purported filing with the Secretary of State is therefore invalid.

60. The Trustees' attempt to register SFAFT as a statutory trust without providing DAI with the requisite notice and opportunity to request reconsideration, and without obtaining DAI's consent to the conversion violates the plain language of the Trust Agreement and the Policy and Procedure Manual and constitutes a breach of the Trustees' duties.

The Trustees Refuse to Release Financial Records to DAI

61. On August 8, 2008, DAI sent an email to SFAFT requesting the opportunity to review a variety of records related to disbursements from the Trust. In particular, DAI asked to see: (1) All expense accounts for the last 12 months for all SFAFT employees and board members; (2) Accounts of the costs of all SFAFT meetings and conferences for the last 12 months; (3) Accounts of entertainment, meals, tickets, or other gifts and favors provided to SFAFT employees or board members in the last 12 months; and (4) Details of all SFAFT employee costs and employment contracts for the last 5 years, including salaries and bonus programs, costs by department, and details of separation, termination, or retirement payments. *See* August 8 Email (copy attached as Exhibit E).

62. DAI's request was a straightforward exercise of the right recognized in Section 8.1 of the Trust Agreement, which clearly requires SFAFT to provide DAI with unrestricted access to any and all SFAFT accounts, books and records:

The Trustees shall keep accurate and detailed records of *all* investments, receipts, disbursements, *and all other transactions* of the Trust Fund. *All such accounts, books and records shall be open to inspection at all reasonable times, upon reasonable prior written request, by each Franchisee and by the Settlor.*

Exhibit A, § 8.1 (emphasis added).

63. To date, SFAFT has not provided DAI with access to the requested documents. Instead, SFAFT has taken the position that the request seeks “highly confidential proprietary material, the disclosure of which could help our competitors and hurt our beneficiaries, the Trust, and SFAFT employees,” and has refused to grant access to all the materials unless DAI signs a “non-disclosure agreement.”

64. SFAFT’s proposed non-disclosure agreement is overbroad, unreasonable, and flies in the face of Trust Agreement Section 8.1, which unequivocally establishes DAI’s right to unimpeded access to all of SFAFT’S accounts, books and records. Among other things, this non-disclosure agreement would purport to require that DAI: (a) refrain from disclosing the information in any manner to any third party, including any Subway franchisee, without SFAFT’s express written consent; (b) only share the information with its agents, including legal advisors, “to the extent necessary to confirm the inspection conducted,” and “only if SFAFT is given reasonable notice prior to such disclosure;” and (c) “agree[] to indemnify SFAFT against any and all losses, damages, claims, expenses . . . incurred or suffered by SFAFT as a result of a breach of this agreement by DAI or any of its representatives . . . [in the amount of] its actual damages or the sum of \$14,000,000.00 as liquidated damages.” Confidentiality and Nondisclosure Agreement (copy attached as Exhibit F), ¶¶ 3, 7, 9.

65. SFAFT’s refusal to furnish DAI with the requested information unless DAI signs a non-disclosure agreement violates the plain language of the Trust Agreement and constitutes a breach of the Trustees’ fiduciary duties.

COUNT I
(Breach of Fiduciary Duties)

- 66. DAI incorporates paragraphs 1 – 65 as if fully set forth herein.
- 67. The Trustees owe fiduciary duties to DAI and the franchisees.

68. The Trustees' actions, described above, have breached those fiduciary duties and caused the improper expenditure of trust assets.

69. The Trustees' actions, if allowed to stand, will ultimately threaten the security of the multi-million dollar advertising fund.

70. DAI, the Trust, and the franchisees have suffered and will continue to suffer harm from the Trustees' breaches of their fiduciary duties, for which there is no adequate remedy at law.

COUNT II
(Breach of Trust Agreement)

71. DAI incorporates paragraphs 1 – 65 as if fully set forth herein

72. The Trust Agreement expressly imposes on the Trustees several obligations to DAI, including those obligations found in Sections 3, 8.1 and 12. The Trust Agreement also requires the Trustees to comply with the SFAFT Policy and Procedure Manual.

73. The Trustees have failed to comply with those obligations, and have breached the Trust Agreement.

74. DAI has suffered and will continue to suffer harm from the Trustees' breaches of the Trust Agreement, for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, DAI respectfully requests that the Court grant the following relief:

A. A declaration, after a speedy hearing in accordance with Federal Rule of Civil Procedure 57, that:

1. SFAFT's refusal to grant DAI's August 8, 2008 request for records violates Section 8.1 and any other applicable sections of the Trust Agreement;

2. SFAFT's decision to cover the costs of Husen's legal proceedings against DAI and DeLuca violates Section 9.6 and any other applicable sections of the Trust Agreement;
 3. SFAFT's decision to file the Certificate of Trust purporting to convert SFAFT to a statutory trust without DAI's written consent violates Section 12 and any other applicable sections of the Trust Agreement and the filing is therefore void and without effect;
- B. A Permanent Injunction implementing the Declaratory Judgment described in the Paragraph A (1), (2) and (3);
 - C. Judgment against the Trustees jointly and severally for any and all funds disbursed from the Trust pursuant to the decision to "indemnify" Husen;
 - D. Judgment against the Trustees jointly and severally for any and all funds disbursed from the Trust to pay the costs of the instant lawsuit after the date of this counterclaim; and
 - E. Such other relief as the Court deems just and equitable.

**DEFENDANT
DOCTOR'S ASSOCIATES, INC.**

By: _____

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