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19  
20 **UNITED STATES DISTRICT COURT**  
21 **NORTHERN DISTRICT OF CALIFORNIA**

22 NILIMA AMIN, on behalf of herself and  
all others similarly situated,

23 Plaintiff,

24 v.

25 SUBWAY RESTAURANTS, INC., a  
Delaware Corporation; FRANCHISE  
26 WORLD HEADQUARTERS, LLC., a  
Connecticut Limited Liability  
27 Corporation; SUBWAY FRANCHISEE  
28

Case No: 4:21-CV-00498-JST

**PLAINTIFF NILIMA AMIN'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS PURSUANT TO F.R.C.P.  
41(a)(2))**

Date: July 6, 2023  
Time: 2:00p.m.  
Ctrm: Courtroom 6 – 2<sup>nd</sup> Floor

1 ADVERTISING TRUST FUND LTD., a  
2 Connecticut Corporation; and DOES 1  
3 through 50, Inclusive,  
4 Defendants.  
5

Judge: Hon. Jon S. Tigar

Complaint Filed: January 21, 2021  
TAC Filed: July 28, 2022


6 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

7 NOTICE IS HEREBY GIVEN that on July 6, 2023, at 2:00p.m., or as soon  
8 thereafter as counsel may be heard by the above-entitled Court, located at 1301 Clay  
9 Street, Oakland Courthouse, Courtroom 6-Second Floor, Oakland, CA 94612, Plaintiff  
10 Nilima Amin will and does move the Court to voluntarily dismiss the matter filed on  
11 January 21, 2021, against Defendants Subway Restaurants Inc.; Franchise World  
12 Headquarters LLC; and Subway Franchisee Advertising Trust Fund Ltd (collectively  
13 hereinafter referred to as “Subway”).

14 Plaintiff Nilima Amin seeks an Order dismissing this case on the grounds that in  
15 light of Plaintiff’s medical condition and the health effects of her pregnancy, judicial  
16 efficiency and conservation of Court resources will be best served by dismissal of this  
17 matter. This motion is based upon this Notice of Motion, and the Memorandum of Points  
18 and Authorities filed concurrently herewith, the accompanying Declaration of Plaintiff,  
19 the accompanying Declaration of Jeffrey R. Lamb, as well as the records and files herein,  
20 and any such evidence as may be presented at the time of hearing of this motion.  
21

22 Dated: April 20, 2023

**Respectfully Submitted By,**

23  
24 By:   
25 \_\_\_\_\_  
26 Patrick McNicholas, Esq.  
27 Jeffrey Lamb, Esq.  
28 *Attorneys for Plaintiff*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Due to the unexpected and unforeseen complications of her pregnancy which have  
4 caused Plaintiff to be unavailable and/or required her to devote her limited time and  
5 resources elsewhere, Plaintiff seeks voluntary dismissal of the instant matter pursuant to  
6 FRCP 41(a)(2). Plaintiff filed this action in good faith and continues to believe there is  
7 good cause to continue it as addressed herein. However, granting Plaintiff's instant  
8 motion will not cause Defendants to incur any legal prejudice and Plaintiff cannot  
9 currently proceed. Voluntary dismissal is permissible here and Plaintiff respectfully  
10 requests the Court to dismiss her claims without prejudice here and grant the instant  
11 motion in its entirety.

12 **II. STATEMENT OF ISSUES**

13 Whether the Court should ORDER dismissal of the action under Federal Rule of  
14 Civil Procedure ("FRCP") 41(a)(2), by granting Plaintiff's instant Motion to Dismiss.

15 **III. RELEVANT FACTUAL BACKGROUND**

16 Plaintiff filed her First Amended Complaint [Dkt. No. 33] on June 8, 2021.  
17 Defendants filed a Motion to Dismiss the First Amended Complaint. The Court granted  
18 Plaintiff leave to amend the FAC to add additional factual allegations to support  
19 Plaintiffs' theory of misrepresentation and/or omission and to plead additional facts  
20 regarding reliance and damages. Plaintiff accordingly filed her Second Amended  
21 Complaint on November 8, 2021. [Dkt. No. 54.] Defendants filed their Motion to  
22 Dismiss Second Amended Complaint on December 8, 2021. [Dkt. No. 57.] On July 7,  
23 2022, the Court denied Defendants' motion in part and ordered Plaintiff to file an  
24 amended complaint. [Dkt. No. 62.] Plaintiff filed her third amended complaint on July  
25 28, 2022 [Dkt. No. 63] and Defendants filed their Answer on August 11, 2022. [Dkt. No.  
26 64]. On November 1, 2022, the Court issued a scheduling order for the instant litigation,  
27 which included a filing deadline of May 25, 2023 for Plaintiff's motion for class  
28 certification. [Dkt. No. 70]. Subsequently, in January 2023, Plaintiff found out she was

1 pregnant with her third child. Plaintiff’s Declaration (“Decl. of Amin”), ¶ 3. Plaintiff’s  
2 third pregnancy triggered severe morning sickness and continues to cause her  
3 debilitating conditions which have affected her activities of daily living to a significant  
4 degree. Id at 3-4. Consequently, in light of her medical condition, Plaintiff has  
5 determined that she is unable to proceed with the obligations of a plaintiff and that she  
6 must focus on her health and family. As such, she requests this Court dismiss the  
7 currently pending action. Id., ¶ 5.

#### 8 **IV. LEGAL STANDARD**

9 Plaintiff seeks dismissal of this case under FRCP 41(a)(2), which provides in relevant  
10 part, “an action may be dismissed at the plaintiff’s request only by court order, on terms  
11 that the court considers proper.” FRCP 41(a)(2) at the plaintiff’s request only by court  
12 order, on terms that the court considers proper.” FRCP 41(a)(2).

#### 13 **V. LEGAL DISCUSSION**

##### 14 **a. The Court Should Grant Plaintiff’s Motion to Dismiss This Action** 15 **Under FRCP 41(a)(2) Because Defendant Subway Will Not be Unfairly** 16 **Affected Nor Suffer Any Legal Prejudice as a Result of the Dismissal** 17 **And Because Plaintiff’s Health Condition Necessitates Dismissal**

18 On January 21, 2021, Plaintiff this instant action in good faith on behalf of herself  
19 and with the intention of seeking certification of a class of plaintiffs against the  
20 Defendants based on allegations that they had and were misrepresenting the content and  
21 accuracy of their Tuna Products contained 100% tuna. The support for Plaintiff’s claims  
22 included test results that showed no detectable tuna DNA sequences whatsoever were  
23 found in a substantial number of the Tuna Products which were actually tested for tuna  
24 DNA. [Dkt. No. 63, ¶¶ 22-24.] Thus, Plaintiff’s complaint was unequivocally filed in  
25 good faith and based on reasonable investigation and in support and protection of  
26 consumers in the state of California. Despite this, Plaintiff seeks dismissal of the instant  
27 action because of unanticipated health issues she has encountered during her current  
28 pregnancy.

1 As a result of the unexpected medical health impact Plaintiff continues to suffer,  
2 she requests the Court to dismiss the case so that she can focus on her family and her  
3 health without the pressure of litigation which has been complicated and distracting as  
4 result of her current health issues. Plaintiff regrets this situation, but finds this course of  
5 action more prudent than any other, as it remains uncertain how her pregnancy will  
6 continue to impact her health.

7 **b. Given that Subway Has Not and Cannot Show Any Legal Prejudice the**  
8 **Motion to Dismiss Should Respectfully be Granted**

9 A district court should grant a motion for voluntary dismissal under Rule 41(a)(2)  
10 unless a defendant can show that it will suffer some “plain legal prejudice” as a result.  
11 *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987); *see also Hamilton v.*  
12 *Firestone Tire & Rubber Co.*, 679 F.2d 143, 145-46 (9th Cir. 1982). The Ninth Circuit  
13 has clarified that legal prejudice means “prejudice to some legal interest, some legal  
14 claim, some legal argument.” *Smith v. Lenches*, 263 F.3d 972, 976 (9th Cir. 2001)  
15 (quoting *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996)); *see*  
16 *also WPP Luxembourg Gamma Three Sarl v. Sport Runner, Inc.*, 655 F.3d 1039, 1059  
17 (9th Cir. 2011). In so holding, the Court further explained that “uncertainty because a  
18 dispute remains unresolved” or because “the threat of future litigation . . . causes  
19 uncertainty” does not result in plain legal prejudice. *Smith*, 263 F.3d at 976. Moreover,  
20 plain legal prejudice does not result merely because the defendant will be inconvenienced  
21 by having to defend in another forum or where a plaintiff would gain a tactical advantage  
22 by that dismissal. *Hamilton*, 679 F.2d at 145. In addition, whether Defendants have  
23 already incurred substantial legal expenses does not constitute sufficient prejudice or  
24 hardship to justify refusing a voluntary motion to dismiss. *See, e.g., In re Lowenschuss*,  
25 67 F.3d 1394, 1400-01 (9th Cir. 1995). No such showing of any legal prejudice can be  
26 established by Defendants in having this case dismissed.

27 Plaintiff is not seeking to temporarily avoid an adverse ruling by filing this motion  
28 to voluntarily dismiss since there are no such pending motions before this court. Many

1 courts have determined that unless a third party's rights would be affected the court lacks  
 2 discretion and must grant a voluntary motion to dismiss. *See, e.g., Smoot v. Fox*, 340  
 3 F.2d 301, 303 (6th Cir. 1964); *Century Manufacturing Co., Inc. v. Central Transport*  
 4 *Int'l, Inc.*, 209 F.R.D. 647, 648 (D. Mass. 2002); *Shepard v. Egan*, 767 F. Supp. 1158,  
 5 1165 (D. Mass. 1990); *Bridgeport Music, Inc. v. London Music, U.K.*, 345 F. Supp. 2d  
 6 836, 841 (M.D. Tenn).

7 Rather than being prejudiced by voluntarily dismissal, defendants are benefitted by  
 8 not having to make extensive expenditures that cannot be recouped even if Defendants  
 9 are prevailing parties. The Supreme Court and numerous subsequent Ninth Circuit cases  
 10 have made it clear that prevailing defendants can only recovery attorney fees and non-  
 11 taxable costs by a clear showing that the case was frivolous.<sup>1</sup> Subway cannot make any  
 12 such showing here, given that Plaintiff's claims were supported by scientific test results.  
 13 *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S.  
 14 412, 421-22 (1978). Dismissing this action will not cause Subway any harm and in fact  
 15 will provide them with the relief they sought in their prior law and motion. Thus,  
 16 Plaintiff's motion to dismiss pursuant to Fed. R. Civ. P. 41(a)(2) is not legally prejudicial  
 17 and should respectfully be granted.

18 **c. Plaintiff's Allegations Are in Good Faith and Based on Scientific**  
 19 **Evidence Justifying the Action**

20 Plaintiff's claims are based on reliable and valid scientific test results. Declaration  
 21 of Jeffrey R. Lamb ("Lamb Decl.") ¶ 2. As detailed in Plaintiff's complaint, marine  
 22 biologist Paul Barber, Ph.D. of Integrative Biology, performed testing on twenty (20)  
 23 samples of Tuna Products from twenty different Subway restaurants in the greater  
 24 Southern California region. *Id.* This testing was performed at the direction of Dr. Paul  
 25 Barber who runs the Barber Lab at UCLA's Department of Ecology and Evolutionary  
 26

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27 <sup>1</sup> There is no contractual or statutory basis to award attorney's fees in this action.  
 28 This case follows the general rule in the United States that in the absence of legislation  
 providing otherwise, litigants must pay their own attorney's fees. *Alyeska Pipeline Co. v.*  
*Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141.

1 Biology. Id. Dr. Barber had DNA barcoding analysis performed by collecting and testing  
2 twenty samples of Defendants' Tuna Products. DNA barcoding is a method for  
3 identifying an unknown sample to a particular specie(s) based on a diagnostic DNA  
4 sequencing. Id. Much like how barcodes can differentiate the broad diversity of products  
5 in a grocery store, DNA barcoding can accurately identify organisms to species based on  
6 the uniqueness of their DNA sequence at a predefined region of the genome. DNA  
7 barcoding is widely applied as a forensic tool to identify wildlife products, including  
8 marine wildlife, and is increasingly used to detect seafood fraud both in commercial and  
9 consumer markets. [Dkt. No. 63, ¶22]. Fifty grams of Tuna Products were collected from  
10 each of the twenty Subway restaurant locations. Custom sequencing was used to try and  
11 identify the kind of genetic information that was present in each of the twenty samples of  
12 Tuna Products. The samples were tested against four different primers: vertebrate  
13 primers, tuna primers, COI (cytochrome c oxidase I) primers, and plant primers. Id., ¶23;  
14 see also Lamb Decl., ¶ 2., Exhibit 1. Of the twenty samples tested, nineteen of them had  
15 no detectable tuna DNA sequences whatsoever. Additionally, the test results indicate that  
16 all twenty of the samples contained detectable sequences of chicken DNA; Eleven of of  
17 twenty samples contained detectable sequences of pork DNA; and seven out of twenty  
18 samples contained detectable sequences of cattle DNA. Id., ¶24. Therefore, Plaintiff has  
19 reasonable grounds to allege that the Tuna Products being sold were not "tuna" or "100%  
20 tuna." Similarly, Plaintiff's conclusions and reasoning for why the Tuna Products are  
21 adulterated or otherwise contaminated reflect a reasonable interpretation of Dr. Barber's  
22 findings. In addition to Dr. Barber's test results, Plaintiff also relied on separate rounds  
23 of polymerase chain reaction ("PCR") tests, all of which yielded test results of "ND<  
24 4ppm (None Detected)" of tuna/fish protein in Subway samples. Lamb, Decl., ¶ 3.  
25 Research has demonstrated that protein-based testing methods, such as PCR, can be used  
26 to examine the adulteration of cooked fish samples. The technique of real- time  
27 polymerase chain reaction (PCR) has been described as a "highly effective tool for  
28 detection of fish species in canned and processed products, in which the raw material is

1 subjected to high pressures and temperatures and DNA is partially degraded” because  
2 “due to its sensitivity, [real time PCR] can be applied to highly processed samples,  
3 allowing the amplification of small DNA fragments of less than 200bp.” See Gerard  
4 Downey, *Advances in Food Authenticity Testing*, at 427 (Woodhead Publishing, 2016)  
5 citing S.A. Bustin, *AZ of Quantitative PCR* (International University of Line, La Jolla,  
6 2004). Lamb Decl. ¶ 5. Furthermore, independent PCR testing conducted on the Tuna  
7 Products by the New York Times in June 2021 also yielded results of “[n]o amplifiable  
8 tuna DNA was present in the sample and so we obtained no amplification products from  
9 the DNA.” Lamb Decl. ¶ 4.

10 Despite the good faith basis to maintain this action, as indicated above and in the  
11 Declaration of Nilima Amin, Plaintiff Nilima Amin respectfully requests this Court  
12 dismiss the instant action. Plaintiff anticipates that Defendants will argue that the  
13 complaint was “frivolous” and take a position against dismissal. It defies reason as to  
14 why Defendants would not then agree to stipulate to a dismissal of the action. Further, a  
15 case is “frivolous” when: 1) it is so lacking in arguable merit as to be groundless or  
16 without foundation; when 2) the result is obvious, or when 3) the plaintiff continues to  
17 litigate after the matter clearly becomes frivolous. See *Karam v. City of Burbank*, 352  
18 F.3d 1188, 1195 (9th Cir. 2003). In deciding whether a claim is frivolous, the court must  
19 first “assess the claim at the time the complaint was filed.” *Tutor-Saliba Corp. v. City of*  
20 *Hailey*, 452 F.3d 1055, 1060 (9th Cir. 2006). As demonstrated above, that is not the case  
21 here.

22 Ultimately, the health of the Plaintiff and her unborn child is paramount to her  
23 participation in this litigation. Given that this case remains in the early stages of  
24 litigation with no depositions taken and some basic written discovery exchanged, there is  
25 no prejudice to any party by dismissing the action at this juncture. Doing so will promote  
26 judicial economy and judicial efficiency in that it will allow the dismissal of a potential  
27 class case from the Court’s dockets and will avoid protracted litigation and/or requests  
28 for continuances.

1 **VI. CONCLUSION**

2 For the foregoing reasons, Plaintiff requests the Court to grant the motion to  
3 dismiss under Fed. R. Civ. P. 41(a)(2), as such relief does not impose any plain legal  
4 prejudice to any party and is in the interest of judicial economy and judicial efficiency.  
5

6 Dated: April 20, 2023

**Respectfully Submitted By,**

7  
8 By:



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