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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6

7 DOORDASH, INC., et al.,

8 Plaintiffs,

9 v.

10 CITY AND COUNTY OF SAN
11 FRANCISCO,

12 Defendant.

Case No. [21-cv-05502-EMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Docket No. 28

United States District Court
Northern District of California

13
14 Plaintiffs DoorDash, Inc. (“DoorDash”) and Grubhub Inc. (“Grubhub”) (collectively,
15 “Plaintiffs”) filed this action against Defendant City and County of San Francisco (the “City”)
16 alleging that an enacted ordinance—which caps the commissions that third-party platforms, such
17 as Plaintiffs, can charge restaurants to 15%—is unlawful. *See* Docket No. 1 (“Complaint or
18 Compl.”). After the City filed its motion to dismiss the Complaint, Plaintiffs filed their First
19 Amended Complaint. *See* Docket No. 25 (“FAC”). Pending before the Court is the City’s motion
20 to dismiss Plaintiffs’ First Amended Complaint. *See* Docket No. 28 (“Mot.”). For the following
21 reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the City’s motion to dismiss.

22 **I. BACKGROUND**

23 A. Factual History

24 Around February 25, 2020, Mayor London Breed declared a state of emergency in San
25 Francisco due to COVID-19. FAC ¶ 35. In March 2020, the City issued a shelter-in-place order.
26 *Id.* ¶ 36. On April 10, 2020, Mayor Breed promulgated the Ninth Supplement to Mayoral
27 Proclamation Declaring the Existence of a Local Emergency Dated February 25, 2020 (“April
28 2020 Order”) which temporarily capped the commissions that third-party platforms could charge

1 restaurants to 15%. *Id.* ¶ 39. The intent of the April 2020 Order was to ensure that the City’s
2 restaurants were protected during the COVID-19 pandemic. *Id.* ¶ 40.

3 Beginning in 2019 and throughout 2020, DoorDash and other industry participants
4 publicly supported Proposition 22, a state-wide ballot measure, which would make clear that
5 workers who use platforms such as those of Plaintiffs are independent contractors without certain
6 benefits. *Id.* ¶ 46. Many members of the City’s Board of Supervisors (the “Board”) publicly
7 opposed Proposition 22. *Id.* ¶¶ 47(a), 50. On November 3, 2020, California voters passed
8 Proposition 22 by a margin of over 17 percentage points. *Id.* ¶¶ 46, 48.

9 A week later, on November 10, 2020, the Board codified the temporary commission cap
10 from the April 2020 Order and enacted Article 53 to the San Francisco Police Code (the
11 “Ordinance”). *Id.* ¶ 55. On November 20, 2020, Mayor Breed approved the Ordinance. *Id.* The
12 provision at issue here in the Ordinance is the imposition of a 15% cap on the commissions that
13 certain third-party delivery service companies may charge restaurants (the “Commission Cap”).
14 *Id.* ¶ 57. The Ordinance explains that the Commission Cap is an “important step[] to ensure that
15 restaurants can thrive in San Francisco and continue to nurture vibrant, distinctive commercial
16 districts.” FAC, Ex. D (“S.F. Police Code”) § 5300(j).

17 Specifically, the Ordinance’s findings state that restaurants “are vital to the character and
18 community fabric of San Francisco” and are “important engines of the local economy, providing
19 jobs and serving as commercial anchors in neighborhoods across the City.” *Id.* § 5300(a). The
20 findings note that “in recent years, the City’s restaurant industry has been in decline” and “the
21 number of restaurant closures has exceeded the number of new restaurants in the City for at least
22 the past five consecutive years” according to data from the Department of Public Health. *Id.*
23 § 5300(b). According to the City, this decline “coincides with the rapid rise of third-party food
24 delivery services, businesses that process food delivery and pickup orders through mobile apps
25 and websites.” *Id.* § 5300(d). One consumer market outlook publication found that “revenue in
26 the U.S. ‘platform-to-consumer delivery’ market was \$8.7 billion in 2019, a nearly 10% increase
27 over the same segment’s valuation in 2018” and market research shows that “approximately

1 many on a regular basis.” *Id.*

2 The Ordinance states that “This booming market is highly concentrated in just a handful of
3 businesses” and as of “November 2019, just four third-party food delivery services controlled
4 approximately 98% of the entire market.” *Id.* “The increasing market dominance of a small
5 number of third-party food delivery services companies has resulted in increasingly difficult
6 economic conditions for City restaurants, which must contract with these companies if they wish
7 to access the growing share of customers who rely on delivery platforms to obtain meals.” *Id.*
8 § 5300(e). Because of the platforms’ market dominance, the Ordinance explains that they are able
9 to “use this leverage to extract high fees from restaurants—typically totaling 30% of an order
10 total—and thereby diminish restaurants’ already-narrow profit margins.” *Id.* § 5300(f). For
11 example, “[s]ample contracts used by leading third-party food delivery services companies reflect
12 that these companies commonly charge restaurants a 10% per-order fee for ‘delivery services,’ the
13 most logistically demanding and resource-intensive service they provide to restaurants” and
14 impose additional fees “totaling as much as 20% of the order cost for what are described as
15 ‘marketing’ or ‘logistics’ services.” *Id.* § 5300(g).

16 As a result, the Ordinance explains that “[c]apping the fees third-party food delivery
17 services companies can charge restaurants” would prohibit these companies from “restricting
18 restaurant pricing,” among other things, “to ensure that restaurants can thrive in San Francisco and
19 continue to nurture vibrant, distinctive commercial districts.” *Id.* § 5300(j). It states that because
20 “leading third-party food delivery services companies currently charge a 10% per-order fee for the
21 most resource-intensive aspect of their business – delivery services – and that these companies
22 report high profit margins from all aspects of their business operations” “a 15% fee cap on
23 per-order fees” is “a reasonable step to protect restaurants from financial collapse without unduly
24 constraining third-party food delivery services’ businesses.” *Id.*

25 The Commission Cap applies to “third-party food delivery services,” defined as “any
26 website, mobile application or other internet service that offers or arranges for the sale of food
27 and/or beverages prepared by, and the same-day delivery or same-day pickup of food and
28 beverages from no fewer than 20 separately owned and operated food preparation and service

1 establishments.” FAC ¶ 59 (quoting S.F. Police Code § 5301). It does not apply to “any
 2 restaurant that meets the definition of a formula retail use under section 303.1 of the Planning
 3 Code,” *i.e.*, any restaurant that “has eleven or more other retail sales establishments in operation”
 4 and that “maintains two or more of the following features: a standardized array of merchandise, a
 5 standardized façade, a standardized décor and color scheme, uniform apparel, standardized
 6 signage, a trademark or a servicemark.” *Id.* ¶ 61.

7 Originally, the Commission Cap had a sunset date of sixty days after the amendment or
 8 termination of the pandemic “Stay Safer At Home” order or any subsequent order allowing
 9 restaurants to resume at 100% capacity. *Id.* ¶ 62. But in June 2021, the Board of Supervisors held
 10 meetings to discuss removing the Ordinance’s sunset provision and making it permanent. *Id.* ¶ 64.
 11 Plaintiffs allege that in “voting for the permanent cap,” Supervisor Aaron Peskin publicly stated,
 12 “DoorDash, Uber Eats, Postmates all contributed to the most expensive ballot measure in history,
 13 Prop 22, to gut employee protections.” *Id.* ¶ 69. On the same day, he posted the following on
 14 Facebook:

15 “In another first among major American cities, San Francisco just
 16 passed my legislation setting a permanent 15% cap on delivery fees
 17 charged by DoorDash, UberEats, Grubhub and Postmates to
 18 independent restaurants. Third-party food delivery saw exponential
 19 growth during the pandemic, while SF restaurants incurred \$400M
 20 in rent debt. 70,000 Bay Area hospitality workers lost their jobs,
 while Big Tech spent \$220M to pass Prop 22, the most anti-worker
 initiative in California history. We will continue to push back
 against companies who demonstrate blatant disregard for small
 businesses, workers and neighborhoods. Correcting this imbalance is
 a long-term project.”

21 *Id.* The FAC also alleges that Supervisors Ahsha Safai and Catherine Stefani made statements
 22 about third-party platforms at this time but they do not explicitly discuss DoorDash’s support of
 23 Proposition 22. *See id.* ¶¶ 64(b), 70(a)–(c). On June 10, 2021, the Board voted unanimously to
 24 repeal the sunset date. *Id.* ¶ 71. Mayor Breed declined to sign the sunset repeal measure,
 25 explaining that she had “concerns about making [the Commission Cap] legislation permanent” and
 26 that the Ordinance “is unnecessarily prescriptive in limiting the business models of the third-party
 27 organizations, and oversteps what is necessary for the public good.” *Id.* ¶ 74. On June 29, 2021,

1 B. Procedural History

2 On July 16, 2021, Plaintiffs filed this action against the City and on September 10, 2021,
3 the City filed a motion to dismiss the Complaint. *See* Compl.; Docket No. 20. On October 1,
4 2021, Plaintiffs filed their First Amended Complaint alleging violations of (1) the Contract Clause
5 of the U.S. Constitution, 42 U.S.C. § 1983, and the California Constitution; (2) the Takings Clause
6 of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 19 of the
7 California Constitution; (3) Article IX, Section 7 of the California Constitution; (4) the Due
8 Process Clause of the U.S. Constitution and Article I, Section 7 of the California Constitution;
9 (5) the Equal Protection Clause of the U.S. Constitution and the California Constitution; and
10 (6) the First Amendment of the U.S. Constitution and Article I, Sections 2 and 3 of the California
11 Constitution for DoorDash. Docket. No. 25. Three days later, the City withdrew its original
12 motion to dismiss and on October 15, 2021, the City filed the present motion to dismiss the FAC.
13 The motion hearing took place on December 16, 2021. Docket No. 54 (“Hearing Tr.”).

14 **II. APPLICABLE LEGAL STANDARD**

15 Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include “a short and plain
16 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A
17 complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). *See* Fed. R.
18 Civ. P. 12(b)(6).

19 To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's decisions in
20 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007),
21 a plaintiff's “factual allegations [in the complaint] must . . . suggest that the claim has at least a
22 plausible chance of success.” *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (internal
23 quotation marks omitted). The court “accept[s] factual allegations in the complaint as true and
24 construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St.*
25 *Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But “allegations in a
26 complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient
27 allegations of underlying facts to give fair notice and to enable the opposing party to defend itself

28 effectively.” *Levitt*, 765 F.3d at 1125 (quoting *Swann*, 652 F.2d 1202, 1216 (9th Cir.

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