GIBSON, DUNN & CRUTCHER LLP
JOSHUA S. LIPSHUTZ, SBN 242557
jlipshutz@gibsondunn.com
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: 415.393.8200
Facsimile: 415.393.8306

MICHAEL HOLECEK, SBN 281034
mholecek@gibsondunn.com
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520

Attorneys for Plaintiffs
DOORDASH, INC. and GRUBHUB INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOORDASH, INC. and GRUBHUB INC.,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

CASE NO. 3:21-CV-05502

COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs DOORDASH, INC. and GRUBHUB INC. bring this Complaint for Declaratory Relief, Injunctive Relief, and Damages against Defendant CITY AND COUNTY OF SAN FRANCISCO. By this Complaint, Plaintiffs allege as follows:

I.
INTRODUCTION

1. The City of San Francisco has taken the unprecedented step of imposing *permanent* price controls on a private and highly competitive industry—the facilitation of food ordering and delivery through third-party platforms—by enacting an ordinance that prevents restaurants and third-party platforms from freely negotiating the price that platforms may charge restaurants for their services (the "Ordinance").[1] This legislation is unnecessary because restaurants currently have an array of options for delivery, including options well below the price control established by the Board (although most restaurants have voluntarily chosen options with commissions above the Ordinance's 15% cap). It is also harmful because it likely will lead to reduced choice for restaurants, higher prices for consumers, and fewer delivery opportunities for couriers. And it is unconstitutional because it disrupts contracts between platforms and restaurants, and permanently dictates the economic terms on which a dynamic industry operates. Plaintiffs are committed to help bring renewed vibrancy to the City's local restaurants now that restrictions imposed during the COVID-19 pandemic have been lifted. But the legislation adopted by the Board of Supervisors will do the opposite. Echoing associations and delivery couriers who spoke out against this permanent price control because of its anticipated harmful effects, Mayor Breed declined to sign the Ordinance because it "oversteps what is necessary for the public good." Left unchecked, the Ordinance's interference with voluntary, private contracts between businesses would set a dangerous precedent for government overreach. It should be struck down.

2. The United States and California Constitutions prohibit such government intervention by safeguarding the terms of freely negotiated contracts, protecting the right to contract and pursue legitimate business enterprises, and providing for equal protection under the law. Among other aims, these constitutional protections seek to prevent political actors from picking economic winners and

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[1] Ordinance No. 234-20 added Article 53 to the San Francisco Police Code and capped fees that certain third-party platforms can charge restaurants at 15%.

losers, which is precisely the intent of the Ordinance. Through statements made collectively and individually, members of San Francisco's Board of Supervisors have made plain the Ordinance is intended to punish the industry for its recent support of Proposition 22, a California ballot initiative that passed by an overwhelming majority during the 2020 election, and is intended to make third-party platforms less profitable. These are not the legitimate ends of government intervention.

3. That the Ordinance lacks a legitimate objective is underscored by the fact that it may actually harm the group it purports to help: local restaurants. Costs to facilitate food delivery that are not covered by restaurants will likely shift to consumers—irrespective of whether those restaurants would prefer to bear those costs to increase their own sales—thereby reducing order volume, lowering restaurant revenues, and decreasing earning opportunities for couriers. There is no evidence that the Board of Supervisors solicited or reviewed any studies or data to understand the impact of this extreme form of price-fixing, including the negative externalities it will have for San Francisco restaurants, couriers, and consumers, or the relationship between what platforms charge restaurants and restaurant profitability. Moreover, the Board appears to have ignored these negative externalities, even though pointedly raised by couriers and trade associations at the committee hearing where this ordinance was first introduced. Furthermore, San Francisco—which ended the most recent fiscal year with a surplus exceeding $150 million—has other, lawful means to aid restaurants, such as tax breaks or grants. Indeed, it has used such lawful means to aid the City's nightlife venues.[2] But the Board did not adopt similar legislation to aid the City's restaurants in contrast to Mayor Breed, who made $12 million in interest-free loans accessible to certain local businesses.[3] Rather than limit itself to means consistent with the United States and California Constitutions, it chose instead to adopt an irrational law, driven by naked animosity and ill-conceived economic protectionism, that violates the United States and California Constitutions and exceeds San Francisco's limited police power.

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[2] *See* Amanda Bartlett, *SF Board of Supervisors unanimously approves recovery fund to save local entertainment venues,* SFGATE.COM (updated Feb. 23, 2021), https://bit.ly/3e09ZSV; *see also* Nat'l Restaurant Ass'n, Letter to Governor Andrew Cuomo (Feb. 18, 2021), https://bit.ly/3wubYoS (laying out strategies to aid restaurants, including tax breaks and grants, but not suggesting any form of price-fixing).

[3] *See Mayor Breed Launches $12 Million San Francisco Small Business Recovery Loan Fund,* S.F. OFF. OF THE MAYOR (July 8, 2021) https://bit.ly/3hzMYZc.

4. For at least the last century, courts have held that the Constitution prohibits local governments from engaging in such economic protectionism. Further, California courts consistently have held that cities may not fix prices to benefit only a segment of the general public—such as one industry or group of businesses. *See State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal. 2d 436, 447 (1953) (holding that a minimum dry cleaning price-setting ordinance was unconstitutional because it "protect[s] the industry" which is "only a small segment of the general public"); *In re Kazas*, 22 Cal. App. 2d 161, 171 (1937) (holding that a municipality could not legislate minimum barbershop prices to protect barbers).

5. For this reason, the only price controls that typically survive constitutional scrutiny are those applicable to public utilities of civic necessities (e.g., electricity, gas, water). But platforms such as those covered by the Ordinance here are not so essential to public health or safety, particularly as the pandemic abates, that they should be regulated like public utilities. Moreover, unlike a public utility—which often is granted a geographic monopoly in exchange for regulated prices—Plaintiffs compete vigorously with each other and other platforms, and merchants and consumers can choose which platform(s) to use, if any.

6. In light of the significant competition, Plaintiffs have always strived for fair contracts that properly value the services that their platforms offer to restaurants. To that end, in April 2021, DoorDash introduced new Partnership Plans that provide restaurants with even greater transparency and choice, including a Basic Partnership Plan where DoorDash facilitates delivery of online orders, for a flat commission rate of 15%. (Tellingly, the vast majority of San Francisco-based restaurants who opted into a new Partnership Plan selected plans with 25% and 30% commission rates so as to obtain enhanced services to boost sales.) Grubhub's commission structure is also negotiable with restaurants selecting a rate that reflects their desired level of marketing and visibility on the Grubhub Marketplace. Further, Plaintiffs have partnered with restaurants, spending hundreds of millions of dollars in marketing to enable restaurants to expand the reach of their menus to new consumers because when restaurants survive and succeed, so do platforms. As a result, restaurants have had meaningful choice in whether and how they use delivery and marketing services from Plaintiffs to grow their businesses. For example, restaurants can:

a. Choose whether to offer delivery at all,

b. Choose to facilitate delivery themselves,

c. Choose which, if any, third-party platform to use,

d. Choose a third-party delivery option that charges nothing more than credit card fees,

e. Choose a third-party delivery option that charges a flat fee per delivery instead of a commission, or

f. Subject to the cap, choose from a range of commission-based third-party delivery and marketing options at different price points, depending on the products and services that are best suited to their business' needs.

7. But San Francisco's permanent cap puts restaurants' choice in jeopardy. Mayor Breed agrees. In refusing to sign the law, Mayor Breed stated it was "unnecessarily prescriptive in limiting the business models of the third-party organizations, and oversteps what is necessary for the public good." Accordingly, through this Complaint, Plaintiffs seek declaratory relief, injunctive relief, and damages on the grounds that:

a. The Ordinance violates the Contract Clauses of the United States and California Constitutions;

b. The Ordinance violates the Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the California Constitution;

c. The Ordinance violates Article I, Section 7 of the California Constitution (Police Power);

d. The Ordinance violates the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the California Constitution (Due Process);

e. The Ordinance violates the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the California Constitution (Equal Protection);

f. The Ordinance violates the First Amendment to the United States Constitution and Article I, Section 2 of the California Constitution; and

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