

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X

MICHELI & SHEL, LLC, *individually and on behalf
of others similarly situated,*

Plaintiff,

v.

GRUBHUB INC., GRUBHUB INC. d/b/a
SEAMLESS, SEAMLESS NORTH AMERICA,
LLC, UBER TECHNOLOGIES INC., UBER EATS,
POSTMATES LLC, and DOORDASH INC.,

DEFENDANTS.

-----X

Case No. 21-CV-04995 (JMF)

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT POSTMATES' MOTION FOR JUDGMENT ON THE PLEADINGS**

HELBRAUN & LEVEY LLP

Eric Dawson
Lee Jacobs
40 Fulton St., Fl. 28
New York, NY 10038
(212) 219-1193
eric.dawson@helbraunlevey.com
lee@helbraunlevey.com
Attorneys for Plaintiff

Table of Contents

TABLE OF AUTHORITIES..... II
PRELIMINARY STATEMENT 1
ARGUMENT.....3
 I. LOCAL LAWS PERMIT A PRIVATE RIGHT OF ACTION3
 II. COMPLAINT PROPERLY STATES A CAUSE OF ACTION.....8
 III. PLAINTIFF SHOULD BE GRANTED LEAVE TO REPLEAD IN LIEU OF DISMISSAL..... 12
CONCLUSION 14

Table of Authorities

Cases

| | |
|--|---------|
| <i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)..... | 8 |
| <i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)..... | 8 |
| <i>Briarpatch, Ltd., L.P v. Phoenix Pictures, Inc.</i> , 373 F.3d 296 (2d Cir. 2004) | 11 |
| <i>Brook v. Simon & Partners LLP</i> , 783 Fed. Appx. 13 (2d Cir. 2019)..... | 13 |
| <i>Doe v. Roe</i> , 190 A.D.2d 463 (4th Dep’t 1993)..... | 6 |
| <i>Harris v. Mills</i> , 572 F.3d 66 (2d Cir. 2009)..... | 8 |
| <i>Maimonides Medical Center v. First United American Life Ins. Co.</i> , 116 A.D.3d 207 (2d Dep’t 2014)..... | 6, 7 |
| <i>New York Wheel Owner LLC v. Mammoet Holding B.V.</i> , 481 F. Supp. 3d 216 (S.D.N.Y. 2020).. | 3 |
| <i>Schlessinger v. Valspar Corp.</i> , 817 F. Supp. 2d 100 (E.D.N.Y. 2011) | 5, 6 |
| <i>Sheehy v. Big Flats Community Day, Inc.</i> , 73 N.Y.2d 629 (1989)..... | 3 |
| <i>Uhr v. East Greenbush Cent. School Dist.</i> , 94 N.Y.2d 32 (1999)..... | 4, 5, 6 |

Statutes

| | |
|--------------------------|----|
| FED. R. CIV. P. 15 | 12 |
|--------------------------|----|

..

Plaintiff MICHELI & SHEL, LLC, *individually and on behalf of others similarly situated* (“Plaintiff”), respectfully submits this Memorandum of Law in opposition to the Defendant Postmates LLC’s (“Postmates” or “Defendant”) motion for judgment on the pleadings.

PRELIMINARY STATEMENT

Plaintiff commenced this action on June 7, 2021, against Defendant, and other similar third-party food delivery services, seeking to hold Defendant responsible for its unjust and illegal fee increases designed to take advantage of Plaintiff, and others similarly situated, by profiting off of the global COVID-19 Pandemic.

On March 7, 2020, due to the widespread COVID-19 Pandemic, former Governor Andrew Cuomo declared a state of emergency for the entire State of New York. On March 16, 2020, Governor Cuomo issued Executive Order Number 202.3 prohibiting restaurants and bars in the State of New York from serving food or beverages on-premises due to the spread of COVID-19 and limiting orders to takeout or delivery only. Effective March 22, 2020, Governor Cuomo’s “New York on Pause” Program began requiring all non-essential businesses to close in-office functions. In the following days, weeks and months, as part of Governor Cuomo’s “New York State on Pause” executive order, New York City residents were encouraged to stay home to prevent the spread of COVID-19. Additionally, restaurants and bars were limited to providing take-out and delivery services only creating an unprecedented demand for delivery services.

On May 13, 2020, the New York City Council, in an effort to curb the imbalance of power between small, locally owned restaurants and powerful, national third-party delivery companies, passed emergency legislation placing a cap on the exorbitant delivery fees that third-party delivery companies such as Defendants were charging restaurants for their services. Effective June 2, 2020, Local Law No. 52 of 2020, Council Int. No. 1908-B of 2020 (the “Delivery App. Legislation” or

“Local Law 52”) placed a twenty percent (20%) cap on all fees that Defendants could charge their customers with a specific cap of fifteen percent (15%) on all fees charged for delivery and a five percent (5%) cap for any additional fees including those for marketing, credit card processing or any other fees. The Delivery App. Legislation was amended pursuant to Local Law No. 88 of 2020, Council Int. No. 2054-A of 2020 (the “Amended Delivery App. Legislation” or “Local Law 88”), effective September 14, 2020, to allow for “pass-through” costs, such as credit card fees, to be charged to the restaurant above the fifteen percent (15%) and five percent (5%) fee caps.

Despite the passage of the Delivery App. Legislation and the Amended Delivery App. Legislation, Defendants continued their prior practices of bleeding New York City’s restaurants dry through exorbitant, prohibited fees while collecting millions of dollars at their expense in blatant disregard for the laws of the City of New York. In fact, despite the passing of the Delivery App. Legislation and the Amended Delivery App. Legislation, Plaintiff and the Class members, continued to be charged in excess of the fifteen percent (15%) delivery fee cap and the five (5%) cap on all additional fees.

This Class Action seeks to hold Defendant accountable for its predatory behavior toward the businesses most impacted by the COVID 19 Pandemic. The Defendants extorted the Plaintiff and other similarly situated Class members that were desperately dependent on its delivery services during a time when the restaurant industry was experiencing a historic decline in sales and the largest disruption the NYC restaurant industry had faced since Hurricane Sandy in 2012 and the destruction of the Twin Towers on September 11, 2001.

Despite the well pleaded allegations of the Complaint, Defendant now seeks to avoid responsibility for its actions by asking the Court to dismiss the Complaint for failure to state a claim. Defendant’s arguments lack any merit. Although the Delivery App. Legislation and

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.