

# **EXHIBIT C**

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Superior Court of California  
County of Los Angeles

**APR 12 2021**

Sheri R. Carter, Executive Officer/Clerk of Court  
By: Tanya Herrera, Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

ZA-ZEN ENTERPRISES, LLC dba SHIBUMI,  
Individually and on Behalf of All Others  
Similarly Situated,

Plaintiff,

vs.

GRUBHUB INC.; and DOES 1 through 100,  
Defendants.

Case No. **21STCV13874**

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

**CLASS ACTION COMPLAINT**

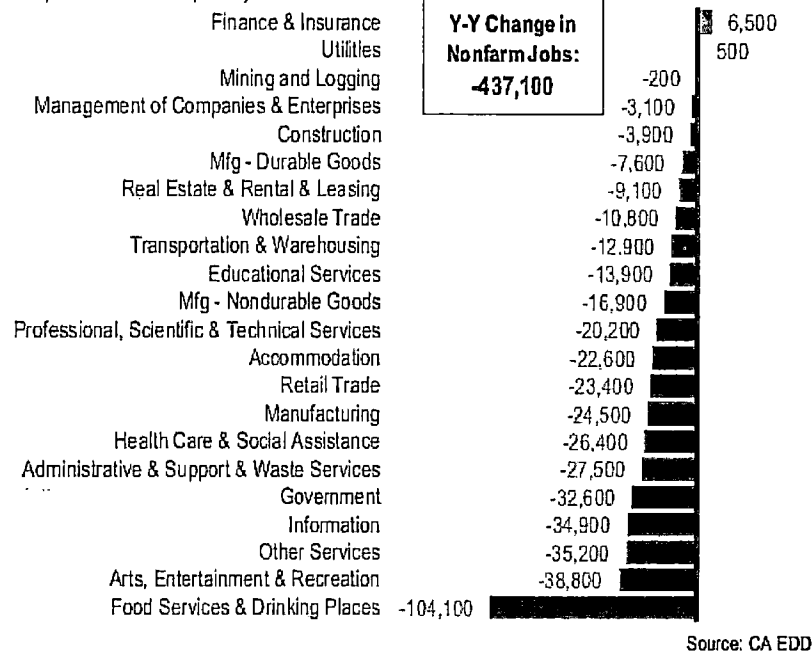
Plaintiff Za-Zen Enterprises, LLC dba Shibumi (“Shibumi” or “Plaintiff”) brings this complaint on behalf of itself and all other similarly situated restaurants in the City of Los Angeles (the “Class”), against Defendants Grubhub Inc. (“Grubhub”) and DOES 1 through 100 (Grubhub and DOES 1 through 100 are collectively referred to herein as “Defendants”), alleging as follows upon information and belief and investigation of counsel, except as to the allegations specifically pertaining to Plaintiff, which are based on personal knowledge:

### INTRODUCTION

1. This case challenges Grubhub’s unlawful and unfair conduct directed towards the hospitality industry of Los Angeles, whereby Grubhub overcharged Plaintiff and the Class fees for the use of its technology platform.

2. The COVID-19 pandemic has devastated the economy of Los Angeles County – 716,000 jobs were lost in March and April 2020, and unemployment reached 21.1 percent by May 2020. No business sector in Los Angeles County has been hit harder by COVID-19 than hospitality.<sup>1</sup> Restaurants

**Year-Over-Year Change in Jobs by Industry  
September 2020 (NSA)**



<sup>1</sup> LA County Department of Workforce Development, Aging and Community Services, *Pathways for Economic Resiliency: Los Angeles County 2021-2026*, at 4.

1 and drinking establishments lost 104,100 jobs by September 2020, far outpacing any other sector.<sup>2</sup>

2 3. The hospitality industry is not expected to recover anytime soon. The Los Angeles  
3 County Department of Workforce Development, Aging and Community Services (“WDACS”) projects  
4 124,300 lost jobs in accommodation and food services between 2019 and 2022.<sup>3</sup>

5 4. Despite COVID-19’s impact, not all industries have fared so badly. Technology  
6 companies, particularly those without brick-and-mortar stores, have benefitted from people working and  
7 staying at home during the COVID-19 pandemic. According to the Brookings Institute, “the COVID-19  
8 recession has crushed certain industries—those that depend on the movement of people—while leaving  
9 others relatively unscathed—those that depend on the movement of information.”<sup>4</sup>

10 5. Some of the biggest beneficiaries of the work-from-home economy are the four major  
11 third-party food delivery platforms, DoorDash, Inc. (“DoorDash”), Uber Technology, Inc. (“Uber  
12 Eats”), Postmates, Inc. (“Postmates”) and Grubhub (collectively, the “Delivery Platforms”). Together,  
13 these four platforms generated approximately \$5.5 billion in combined revenue from April through  
14 September 2020, more than double their combined revenue during the same period in 2019.<sup>5</sup> According  
15 to Grubhub’s 2020 Form 10-K, COVID-19 was a key driver of its year-over-year revenue growth:

16 Compared to 2019, our revenues increased by \$507.8 million, or 39%, to \$1.8 billion for  
17 the year ended December 31, 2020. The increase was primarily related to a 26% increase  
18 in Daily Average Grubs and a 16% higher average order size. Daily Average Grubs  
19 increased to 622,700 during the year ended December 31, 2020 from 492,300 during  
20 2019 driven by improved diner retention and frequency as well as significant growth in  
21 Active Diners, which increased from 22.6 million to 31.4 million at the end of each year.  
22 The growth in Active Diners and Daily Average Grubs was primarily as a result of  
23 increased product and brand awareness by diners largely driven by accelerated adoption  
24 of online food ordering as a result of COVID-19, marketing efforts and word-of-mouth  
25 referrals, better restaurant choices for diners in our markets and technology and product  
26 improvements. The higher average order size was primarily driven by changing diner  
27 behavior as a result of COVID-19 including family or group orders.”<sup>6</sup>

24 <sup>2</sup> *Id.*

25 <sup>3</sup> *Id.* at 5.

26 <sup>4</sup> <https://www.brookings.edu/research/explaining-the-economic-impact-of-covid-19-core-industries-and-the-hispanic-workforce/>

27 <sup>5</sup> <https://www.marketwatch.com/story/the-pandemic-has-more-than-doubled-americans-use-of-food-delivery-apps-but-that-doesnt-mean-the-companies-are-making-money-11606340169>

28 <sup>6</sup> Grubhub Inc., Annual Report (Form 10-K) (Dec. 31, 2020) (“Form 10-K”), at 28, available at: [https://www.sec.gov/ix?doc=/Archives/edgar/data/1594109/000156459021009522/grub-10k\\_20201231.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1594109/000156459021009522/grub-10k_20201231.htm).

1           6.       The Delivery Platforms' spike in business was fueled by stay-at-home orders that gave  
2 retail food establishments no reasonable alternative to the Delivery Platforms. Because in-person dining  
3 has been prohibited at various points during the pandemic, the Delivery Platforms provided restaurants  
4 with an alternative to selling their food and beverages to remain in business during the pandemic.

5           7.       Restaurants quickly realized that the benefits of third-party delivery services came at a  
6 price. The Delivery Platforms charged restaurants steep fees and commissions for every order, usually  
7 around 30 percent of the order price. Restaurants had no meaningful bargaining power to negotiate  
8 lower fees and commissions. The Delivery Platforms' fees and commissions wiped out profits for many  
9 restaurants, which were already operating on thin margins prior to the pandemic.

10          8.       When State and local lawmakers became aware of this problem, they took steps to level  
11 the playing field. Legislatures in a number of cities, including Chicago, Massachusetts, San Francisco,  
12 Los Angeles, Portland, New York City, and Washington all instituted temporary caps on food delivery  
13 fees for restaurants, typically around 15 percent of the order price.

14          9.       In Los Angeles, the City Council introduced Ordinance No. 186665 ("Ordinance"). The  
15 Ordinance makes it unlawful for third-party food delivery services to charge restaurants in the City of  
16 Los Angeles a delivery fee that totals more than 15 percent of the purchase price of each online order.

17          10.       The Ordinance also makes it unlawful for third-party food delivery services to charge  
18 restaurants any combination of fees, commissions, or costs for the restaurant's use of the third-party  
19 food delivery service that is greater than 5 percent of the purchase price of each online order.  
20 Importantly, fees, commissions, or costs are not included in the delivery fee. The Ordinance further  
21 prohibits third-party food delivery services from charging restaurants in the City of Los Angeles any  
22 combination of fees, commissions, or costs (including delivery fees) that exceed 20 percent of the  
23 purchase price of each online order.

24          11.       The Ordinance was passed by the Los Angeles City Council on May 20, 2020. It was  
25 approved as to form and legality by the Los Angeles City Attorney on May 26, 2020, and then certified  
26 by the City Clerk on June 3, 2020. The Ordinance was signed into law by the Mayor of Los Angeles on  
27 June 5, 2020, with an effective date of June 10, 2020. The Ordinance was added to the COVID-19  
28

1 Protection and Recovery Chapter (Chapter XX) of the Los Angeles Municipal Code, as Article 6 (the  
2 “COVID-19 Fee Cap”). The first COVID-19 Fee Cap was set to expire on August 31, 2020.

3 12. On August 14, 2020, the Chief Legislative Analyst (“CLA”) of the City of Los Angeles  
4 presented a report to the City Council regarding the impact of the COVID-19 Fee Cap (the “Report”).<sup>7</sup>

5 13. According to the Report, on July 9, 2020, almost a month after the COVID-19 Fee Cap  
6 went into effect, the restaurant industry blog, Eater.com, published a story stating that numerous  
7 restaurants in the City of Los Angeles were being charged more than what was permissible under the  
8 COVID-19 Fee Cap. In order to better understand the impact of the COVID-19 Fee Cap on the City’s  
9 restaurant industry, the CLA enlisted the assistance of the City’s Economic and Workforce Development  
10 Department to create a survey. The purpose of the survey was to “query restaurants on their awareness  
11 of the [COVID-19 Fee Cap] and their experience with third-party food delivery companies.”<sup>8</sup>

12 14. Incredibly, the survey results showed that the Delivery Platforms were largely ignoring  
13 the COVID-19 Fee Cap: 72.9 percent of restaurants reported being charged more than the 15 percent  
14 Delivery Fee; 55.9 percent of restaurants reported being charged more than the 5 percent Additional  
15 Benefits Fee; 72.9 percent of restaurants reported that the COVID-19 Fee Cap was beneficial during  
16 COVID-19; and 94.9 percent of restaurants wanted the COVID-19 Fee Cap to be extended past August  
17 31, 2020.<sup>9</sup> Additionally, “*most restaurants* reported being overcharged by third-party food delivery  
18 companies that are *failing or refusing to comply* with the [COVID-19 Fee Cap].”<sup>10</sup>

19 15. Plaintiff brings this action on behalf of itself and the Class that have been unlawfully and  
20 unfairly charged fees and costs in excess of the COVID-19 Fee Cap by Defendants, during the Class  
21 Period (defined in ¶52, *infra*).

22 16. Plaintiff seeks public injunctive relief and restitution on behalf of itself and the Class,  
23 resulting from Defendants’ unfair and unlawful conduct, which violates California Business &  
24 Professions Code §17200, *et seq.*, and Chapter XX, Article 6, of the Los Angeles Municipal Code.

26 <sup>7</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_rpt\\_CLA\\_08-14-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_rpt_CLA_08-14-2020.pdf).

27 <sup>8</sup> *Id.* at 3.

28 <sup>9</sup> *Id.*

<sup>10</sup> *Id.* [emphasis added].

17. Plaintiff further seeks a public injunction under California's Unfair Competition Law (Bus. & Prof. Code §17200, *et seq.*) ("UCL") for the benefit of restaurants in the City of Los Angeles, their employees, customers, and all members of the general public who are impacted by Defendants' unlawful and unfair business practices.

#### **JURISDICTION AND VENUE**

18. This Court has jurisdiction over all causes of action asserted herein pursuant to the California Constitution, Article VI, Section 10, because this case is a cause not given by statute to other trial courts. This Court also has jurisdiction pursuant to Business & Professions Code §§17203 and 17204, which allow enforcement in any Court of competent jurisdiction.

19. This Court has jurisdiction over Defendants because each of them is a corporation or other entity that has sufficient minimum contacts in California, is a citizen of California, or otherwise intentionally avails itself of the California market, either through the distribution, sale, or marketing of its products and services in the State of California, or by having a facility located in California so as to render the exercise of jurisdiction over it by the California courts consistent with traditional notions of fair play and substantial justice.

20. Venue is proper in this Court because the actions at issue occurred in Los Angeles County. Venue is also proper in this Court under California Bus. & Prof. Code section 17203 and Code of Civil Procedure sections 395(a) and 395.5 because Defendants do business in the State of California and in the County of Los Angeles. Plaintiff's business also operates in Los Angeles County. The unlawful acts alleged occurred within Los Angeles County and have a direct effect on Plaintiff and others similarly situated within the City of Los Angeles.

#### **PARTIES**

21. Plaintiff Shibumi is a California Limited Liability Company. Shibumi is a highly acclaimed, Michelin-star Japanese restaurant located in the heart of downtown Los Angeles. Shibumi is a "Retail Food Establishment" within the meaning of the COVID-19 Fee Cap.

22. Defendant Grubhub is a publicly-traded Delaware corporation. Its principal place of business is located in Chicago, Illinois. Grubhub holds itself out as a "leading online and mobile platform for restaurant pick-up and delivery orders" which "connects more than 300,000

1 restaurants...with hungry diners in thousands of cities across the United States” with a focus on  
2 “transforming the takeout experience.”<sup>11</sup>

3 23. DOES 1 through 100 are persons or entities whose true names and capacities are  
4 presently unknown to Plaintiff, and who therefore are sued by such fictitious names. Plaintiff is  
5 informed and believes, and on that basis alleges, that each of the fictitiously-named defendants  
6 perpetrated some or all of the wrongful acts alleged herein and is responsible, in some manner, for the  
7 matters alleged herein. Each fictitiously named defendant is a “Third-party Food Delivery Service”  
8 within the meaning of the COVID-19 Fee Cap. Plaintiff will amend this Complaint to state the true  
9 names and capacities of such fictitiously-named defendants when ascertained.

### 10 **FACTUAL BACKGROUND**

#### 11 **A. Grubhub Charges Delivery Fees to Consumers, Not Retail Food Establishments.**

12 24. Grubhub’s Terms of Use state that it “is not a restaurant or food preparation entity.”<sup>12</sup>  
13 Rather, it is a “virtual marketplace Platform that connects hungry diners with third-party service  
14 providers, including local restaurants and independent delivery service providers.”<sup>13</sup> Grubhub is also  
15 “not a delivery company or a common carrier...[its] deliveries are provided by Grubhub’s network of  
16 independent delivery service providers” called “Delivery Partners.”<sup>14</sup> A consumer ordering through  
17 Grubhub can pick up their order from a restaurant or have it delivered by a Delivery Partner. For this  
18 service, Grubhub charges both parties to the transaction (the restaurant and the consumer) an assortment  
19 of fees and costs. Grubhub charges consumers a delivery fee, while it charges restaurants commissions  
20 and other fees and costs. This is illustrated by the following graphic that Grubhub included in its  
21 February 5, 2020 Shareholder Letter, which is based on actual (redacted) Grubhub consumer receipts:<sup>15</sup>

22  
23  
24  
25 <sup>11</sup> Form 10-K, at 28.

26 <sup>12</sup> Grubhub Terms of Use (Effective December 14, 2020), available at:  
<https://www.Grubhub.com/legal/terms-of-use>.

27 <sup>13</sup> *Id.*

28 <sup>14</sup> *Id.*

<sup>15</sup> Grubhub Shareholder Letter (February 5, 2020), available at:  
[https://www.sec.gov/Archives/edgar/data/0001594109/000156459020003495/grub-ex992\\_91.htm](https://www.sec.gov/Archives/edgar/data/0001594109/000156459020003495/grub-ex992_91.htm)



Partnered Independent Restaurant Order	Partnered QSR Restaurant Order	Non-Partnered Restaurant Order
<p>Cancel      Review order</p> <p>Your order</p> <p>Estimated delivery: 25-35 mins</p> <p>1 Chicken Wings, Regular, Grilled, Buffalo S... \$9.65</p> <p>1 Reuben, Mac and Cheese \$14.20</p> <p>1 Side Salad, With Ranch Dressing On The... \$2.20</p> <p>Subtotal \$26.05</p> <p>Delivery fee \$2.49</p> <p>Driver tip \$5.00</p> <p>Tax and fees 0 \$4.19</p> <p>Total \$37.73</p> <p>Place your order \$37.73</p> <p>By placing your order, you agree to Grubhub's terms of use and privacy agreement</p>	<p>Cancel      Review order</p> <p>Your order</p> <p>Estimated delivery: 25-35 mins</p> <p>3 Chicken Breast, Spicy \$10.47</p> <p>1 Onion Rings , 12 Piece \$4.99</p> <p>Subtotal \$15.46</p> <p>Delivery fee \$1.99</p> <p>Driver tip \$3.00</p> <p>Tax and fees 0 \$4.31</p> <p>Total \$24.76</p> <p>Place your order \$24.76</p> <p>By placing your order, you agree to Grubhub's terms of use and privacy agreement</p>	<p>Cancel      Review order</p> <p>Your order</p> <p>Estimated delivery: 60-70 mins</p> <p>1 Chicken Breast Kebabs \$11.65</p> <p>1 Tuna Salad \$8.95</p> <p>1 Eggplant Dip &amp; Pita \$5.95</p> <p>Subtotal \$26.55</p> <p>Delivery fee \$5.99</p> <p>Driver tip \$5.00</p> <p>Tax and fees 0 \$9.90</p> <p>Total \$47.74</p> <p>Place your order \$47.74</p> <p>By placing your order, you agree to Grubhub's terms of use and privacy agreement</p>

Commission from restaurant	\$6 - \$8	\$2 - \$4	\$0
Delivery & service fee from diner	\$4	\$5	\$11
<b>Grubhub revenue</b>	<b>\$11</b>	<b>\$8</b>	<b>\$11</b>
Credit card & care contact costs	\$1	\$1	\$2
Delivery costs	\$6	\$7	\$8
<b>Variable order costs</b>	<b>\$7</b>	<b>\$8</b>	<b>\$10</b>
<b>Contribution profit per order</b>	<b>\$4</b>	<b>\$0</b>	<b>\$1</b>

25. The itemized payment reports Grubhub provides to restaurants include columns showing charges for "Commission," "Delivery Commission," "Processing Fee," and "Targeted Promotion." In its Restaurant Terms,<sup>16</sup> Grubhub collectively refers to these charges as "Commissions."

**Payment Terms** In consideration for Restaurant's access to the applicable Systems and Services, Restaurant will pay to [Grubhub] the commissions and other fees set forth in the Services Form (collectively, the "Commissions").

#### B. The COVID-19 Fee Cap was Enacted for Public Benefit.

26. On April 22, 2020, Mitch O'Farrell, Councilmember for Los Angeles' 13th District, introduced a motion ("Motion") to curb runaway fees and costs charged to retail food establishments by third-party food delivery services, including Defendants.<sup>17</sup> The Motion was seconded by Paul Krekorian, Councilmember for Los Angeles' 2nd District. It stated, in pertinent part:

Third-party food delivery companies such as Grubhub, Uber Eats, DoorDash, and Postmates provide residents with delivery from local restaurants. However, these companies charge restaurants commissions that can reach 30 percent, potentially wiping out any profit that a local business might make from a delivery order. With an increasing amount of food delivery business being performed through online third-party services, restaurants must comply with these companies' steep fees or risk losing customers.

<sup>16</sup> Grubhub Restaurant Terms (October 15, 2018), available at: <https://get.Grubhub.com/legal/restaurant-terms>.

<sup>17</sup> [https://clkrep.lacity.org/onlinedocs/2020/20-0470\\_mot\\_04-22-2020.pdf](https://clkrep.lacity.org/onlinedocs/2020/20-0470_mot_04-22-2020.pdf).

1 The COVID-19 pandemic has forced profound changes on the way residents and  
 2 businesses access food. As of April 16, 2020, the virus has accounted for 10,496  
 3 identified cases and 402 deaths in Los Angeles County. On March 4, 2020, Mayor Eric  
 4 Garcetti declared a local public health emergency in response to increased spread of  
 COVID-19 across the country. To slow the proliferation of the virus, on March 19, 2020,  
 Governor Gavin Newsom issued a Stay-at-Home order that forced residents to stay  
 sheltered in place outside of essential needs.

5 Among other restrictions, the Stay-at-Home order barred restaurants from dine-in service,  
 6 compelling numerous local food preparation businesses to either close or convert to  
 7 delivery-only service. With fewer available options for the purchase and sale of meals,  
 8 food delivery has become an even more essential service for residents and restaurants.  
 Local businesses already in peril of financial collapse due to the COVID-19 pandemic are  
 now reliant on food delivery companies that are charging exorbitant rates to get their food  
 to customers.

9 ...

10 Countless Los Angeles restaurants are in danger of closing due to the COVID-19  
 11 pandemic, and the exorbitant rates charged by third-party food delivery companies  
 12 provide an additional unnecessary obstacle during this profoundly difficult international  
 emergency. Swift action is required to protect our local businesses and residents from  
 economic catastrophe.

13 I THEREFORE MOVE that the Council request the City Attorney to prepare and present  
 14 an Ordinance that will make it unlawful for a third-party food delivery service to charge a  
 15 restaurant a fee per online order for the use of its services that totals more than 15 percent  
 of the purchase price of such online order during the local public health emergency  
 related to COVID-19 as declared by the Mayor.

16 27. During a public comment period, O'Farrell's Motion received support from groups  
 17 representing a broad spectrum of public interests impacted by the Delivery Platforms. The Motion was  
 18 supported by restaurant owners and operators, the Independent Hospitality Coalition, the City of South  
 19 Pasadena, the Hollywood Chamber of Commerce, UFCW Local 770, and Teamsters Local Union No.  
 20 396, among others.<sup>18</sup>

21 28. On May 21, 2020, 14 out of 15 City Councilmembers voted to approve the Motion as  
 22 amended and referred it to the Economic Development Committee ("EDC") for consideration. One  
 23 Councilmember was absent and did not vote.<sup>19</sup>

24 29. On May 26, 2020, the City Attorney prepared a draft ordinance to establish a temporary  
 25 limit on the charges imposed by third-party delivery services on retail food establishments and submitted  
 26 it to the City Council.<sup>20</sup>

27 <sup>18</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_pc\\_052020b.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_pc_052020b.pdf).

28 <sup>19</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_CAF\\_05-21-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_CAF_05-21-2020.pdf).

30. On May 28, 2020, the EDC considered the draft ordinance and provided an opportunity for public comment. After discussion, the EDC unanimously approved the draft ordinance and forwarded it to the City Council.<sup>21</sup>

31. On June 3, 2020, 14 out of 15 City Councilmembers voted to adopt the draft ordinance and EDC report. One Councilmember was absent and did not vote.<sup>22</sup>

32. The draft ordinance and EDC report were approved by Mayor Eric Garcetti on June 5, 2020. The draft ordinance was made into Ordinance No. 186665.<sup>23</sup> It was published on June 10, 2020 and made effective the same day.<sup>24</sup>

33. Ordinance No. 186665, which was added to the Los Angeles Municipal Code as Chapter XX, Article 6, included the following pertinent provisions:<sup>25</sup>

**SEC. 200.70. DEFINITIONS.**

For purposes of this ordinance, the following definitions apply:

1. "City" means the City of Los Angeles.
2. "Delivery Fee" means a fee charged by a Third-party Food Delivery Service for providing a Retail Food Establishment with a service that delivers food and beverages from such establishment to customers. The term does not include any other fee or cost that may be charged by a Third-party Food Delivery Service to a Retail Food Establishment, such as fees for listing or advertising the Retail Food Establishment on the Third-party Food Delivery Service platform or fees related to processing the Online Order, including, but not limited to, service fees, fees for facilitating Online Orders for pick-up, and credit card processing fees.
3. "Online Order" means an order placed by a customer through or with the assistance of a platform provided by a Third-party Food Delivery Service, including a telephone order, for delivery or pick-up within the City.
4. "Purchase Price" means the price, as listed on the menu, for the items contained in an Online Order, minus any applicable coupon or promotional discount provided to the customer by the Retail Food Establishment through the Third-Party Food Delivery Service. This definition does not include taxes, gratuities, and any other

<sup>20</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_rpt\\_ATT\\_05-26-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_rpt_ATT_05-26-2020.pdf).

<sup>21</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_rpt\\_edc\\_5-28-20.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_rpt_edc_5-28-20.pdf).

<sup>22</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_CAF\\_06-08-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_CAF_06-08-2020.pdf).

<sup>23</sup> *Id.*

<sup>24</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_ORD\\_186665\\_06-10-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_ORD_186665_06-10-2020.pdf).

<sup>25</sup> A true and correct copy of the COVID-19 Fee Cap is attached hereto as Exhibit 1.

1 fees or costs that may make up the total amount charged to the customer of an  
2 Online Order.

- 3 5. "Retail Food Establishment" means a restaurant, delicatessen, bakery, coffee  
4 shop, or other eat-in or carry-out service of processed or prepared raw and ready-  
5 to-eat food or beverages.
- 6 6. "Third-party Food Delivery Service" means any website, mobile application, or  
7 other internet service that offers or arranges for the sale of food and beverages  
8 prepared by, and the delivery or pick-up of food and beverages from, no fewer  
9 than 20 Retail Food Establishments located in the City that are each owned and  
10 operated by different persons.

#### 11 **SEC. 200.71. PROHIBITIONS.**

- 12 1. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail  
13 Food Establishment a Delivery Fee that totals more than 15 percent of the  
14 Purchase Price of each Online Order.
- 15 2. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail  
16 Food Establishment any amount designated as a Delivery Fee for an Online Order  
17 that does not involve the delivery of food or beverages.
- 18 3. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail  
19 Food Establishment any combination of fees, commissions, or costs for the Retail  
20 Food Establishment's use of the Third-party Food Delivery Service that is greater  
21 than 5 percent of the Purchase Price of each Online Order. Fees, commissions, or  
22 costs do not include Delivery Fee.
- 23 4. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail  
24 Food Establishment any fee, commission, or cost other than as permitted in  
25 Subsections 1. through 3., above.

#### 26 **SEC. 200.73. ENFORCEMENT.**

27 A violation of this article shall subject the violator to the following:

- 28 1. An action in the Superior Court of the State of California to recover all actual  
damages resulting from a violation of this article.
2. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails  
in an action against a Third-party Food Delivery Service. If plaintiff fails to  
prevail against a Third-party Food Delivery Service, a court may award  
reasonable attorneys' fees and costs to the Third-party Food Delivery Service  
upon a determination by the court that the plaintiff's action was frivolous.
3. A civil action alleging a violation of any provision of this article shall commence  
only after the following requirements have been met:

1 a. Written notice is provided to the Third-party Food Delivery Service of the  
2 provisions of the article alleged to have been violated and the facts to  
3 support the alleged violation; and

4 b. The Third-party Food Delivery Service is provided 15 days from the date  
5 of the written notice to cure any alleged violation.

6 4. The remedies in Subsections 200.73 1. through 3. are non-exclusive. A violation  
7 of this article is unlawful and may be prosecuted under state and City law,  
8 including, but not limited to, Section 396 of the California Penal Code or Section  
9 47.12 of the Los Angeles Municipal Code.

10 34. The COVID-19 Fee Cap was extended by way of Ordinance No. 186790, which was  
11 made effective on October 19, 2020. The COVID-19 Fee Cap has been continuously in effect from June  
12 10, 2020 through the present.<sup>26</sup>

13 **C. The Santa Monica Code Enforcement Action and Appeal.**

14 35. On May 19, 2020, the Director of Emergency Services for the City of Santa Monica  
15 issued the Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring  
16 the Existence of a Local Emergency, based on the COVID-19 pandemic ("Sixteenth Supplement").<sup>27</sup>  
17 The Sixteenth Supplement includes a 15 percent cap on delivery fees and a 5 percent cap on other fees  
18 charged to restaurants by third-party food delivery companies, like the COVID-19 Fee Cap. It states, in  
19 pertinent part:

20 It shall be unlawful for a third-party food delivery service to charge a restaurant (a) a  
21 delivery fee that totals more than 15% of the purchase price of each online order or (b)  
22 any fee or fees other than a delivery fee for the use of its service greater than 5% of the  
23 purchase price of each online order.

24 36. The Sixteenth Supplement defines a "delivery fee" as "a fee charged by a third-party food  
25 delivery service for providing a restaurant with a service that delivers food from such restaurants to  
26 customers in the City." It also states: "The term does not include any other fee that may be charged by a  
27 third-party food delivery service to a restaurant, such as fees for listing or advertising the restaurant on  
28 the third-party food delivery service platform or fees related to processing the online order."

<sup>26</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_ORD\\_186790\\_10-16-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_ORD_186790_10-16-2020.pdf).

<sup>27</sup> A true and correct copy of the Sixteenth Supplement is attached hereto as Exhibit 2.

1           37. On July 1, 2020, a City of Santa Monica Code Enforcement Supervisor received a call  
2 from the owner of a Santa Monica restaurant. The restaurant owner was concerned that DoorDash was  
3 violating the Sixteenth Supplement by charging her restaurant a 20 percent delivery fee on its orders.  
4 She forwarded the Code Enforcement Supervisor email correspondence between her and DoorDash,  
5 including an Excel spreadsheet outlining the fees incurred from the restaurant's orders between June 23,  
6 2020 and June 28, 2020.<sup>28</sup>

7           38. The email correspondence showed a disagreement between the restaurant owner and a  
8 DoorDash representative about how to interpret the Sixteenth Supplement. Upon receiving a copy of the  
9 Sixteenth Supplement from the restaurant owner, a DoorDash employee wrote back and stated: "The  
10 document you sent is referring to *Delivery fees, which is the fee the customer pays* when ordering an  
11 item online and *commission rate is a percentage of the pre-tax total that is paid to DoorDash for using*  
12 *the services*, usually based on area determinations."<sup>29</sup>

13           39. Based on the information provided by the restaurant owner and DoorDash's Terms of  
14 Service, the City of Santa Monica determined that DoorDash violated the Sixteenth Supplement because  
15 DoorDash's Terms of Services define a "commission rate" as "the commission fees collected by  
16 DoorDash in exchange for promoting and featuring the Merchant and Merchant Store(s) on the DoorDash  
17 platform, which is charged as a percentage of revenues transacted on the DoorDash Platform." The Code  
18 Enforcement Supervisor directed a Code Enforcement Officer to issue eight Administrative Citations to  
19 DoorDash for 23 violations of Santa Monica Municipal Code §2.16.100, from June 26, 2020 through July  
20 5, 2020, and assessed a total fine of \$11,500.00.<sup>30</sup> On September 17, 2020, DoorDash timely requested  
21 review of the Administrative Citations.<sup>31</sup>

22           40. On appeal, DoorDash argued there was no violation, "because Santa Monica's temporary  
23 cap 'does anticipate that a total of 20% may be applied to delivery orders (up to 15% for the delivery fee  
24

25 <sup>28</sup> See a true and correct copy of the December 3, 2020 Hearing Officer's Decision on Appeal of  
26 Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107,  
SM020001108, SM020001109, SM020001110, and SM020001111, at 5, which is attached hereto as  
Exhibit 3.

27 <sup>29</sup> *Id.* at 5-6 [emphasis added].

28 <sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 1.



1 and up to 5% for additional services,' and the customer orders that were subject of the Administrative  
2 Citations were subject to a 20% total fee."<sup>32</sup>

3 41. The presiding Hearing Officer rejected DoorDash's argument, citing well-settled  
4 California law on statutory interpretation. DoorDash's own employees referred to DoorDash's  
5 restaurant fee as a "commission rate." One of DoorDash's employees also stated that delivery fees are  
6 paid by customers, while the commission rate is a percentage of the pre-tax total that is paid by  
7 restaurants for using DoorDash services.<sup>33</sup>

8 42. The Hearing Officer also relied on the definition of "Commission Rate" in DoorDash's  
9 Terms of Use (quoted in ¶39, *supra*). The Hearing Officer stated that the "Commission Rate" definition  
10 "would seem to fall squarely within the type of fee expressly excluded from the definition of 'delivery  
11 fee' in the Sixteenth Supplement (i.e. 'fees for listing or advertising the restaurant on the third-party food  
12 delivery service platform')."<sup>34</sup>

13 43. The Hearing Officer concluded her analysis by stating:

14 [T]he 20% fee charged by Appellant on the customer orders subject to the Administrative  
15 Citations is labeled 'commission' and not broken out into two or more fees, suggesting  
16 that [DoorDash] did not view this fee as an aggregate of several fees. Simply because  
17 adding the two fee restrictions under the Sixteenth Supplement results in an aggregate fee  
of 20% does not mean that [DoorDash] was entitled to charge [the restaurant] a 20% total  
fee, where [DoorDash] has defined its commission fee as being in exchange for  
promoting and featuring a merchant.<sup>35</sup>

18 **D. Shibumi's Agreement with Grubhub.**

19 44. Shibumi entered into an agreement with Grubhub on or about December 1, 2020  
20 ("Shibumi Agreement"). The monthly account statements Grubhub provided to Shibumi state that  
21 Shibumi pays 15 percent commission on delivery orders, and an additional 5 percent for marketing  
22 services on standard orders. But these rates are not consistent with the commissions and fees Grubhub  
23 retained, as detailed on the same account statements.

24 45. On September 4, 2020, Shibumi received one Marketplace order and one Partner order  
25 through the Grubhub platform. The subtotal of the Marketplace order was \$68.00. Grubhub charged

26 <sup>32</sup> *Id.* at 7.

27 <sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* at 7-8.

28 <sup>35</sup> *Id.* at 9.

1 \$10.20 for Marketing, \$6.80 for Delivery, and \$2.59 for Processing.<sup>36</sup> Grubhub's total charges to  
2 Shibumi amount to 28.8 percent of the subtotal, which exceeds the maximum 20 percent of combined  
3 fees under the COVID-19 Fee Cap. The Marketing and Processing fees alone amounted to 18.8 percent  
4 of the subtotal. Had Grubhub charged Shibumi the maximum 5 percent fee on non-delivery charges  
5 under the COVID-19 Fee Cap, the Marketing and Processing fees would have been no more than \$3.40.

6 46. The subtotal of the Partner order was \$52.00. Grubhub charged Shibumi \$7.80 for  
7 Marketing and \$2.05 for Processing, which amounts to 18.9 percent on a pickup order. Grubhub should  
8 have charged Shibumi a maximum 5 percent fee on this order under the COVID-19 Fee Cap, which  
9 amounts to \$2.60.<sup>37</sup>

10 47. For each Grubhub pick-up order between September 2020 and the present, Shibumi was  
11 charged commissions and fees that exceeded the five percent cap on non-delivery fees. For each  
12 Grubhub delivery order between September 2020 and the present, Shibumi was charged commissions  
13 and fees that exceeded the twenty percent combined cap on delivery and non-delivery fees under the  
14 COVID-19 Fee Cap.

15 48. Shibumi is informed and believes that Grubhub also charged the Class (as defined below)  
16 commissions and fees in relation to the Purchase Price that exceeded the five percent cap on non-  
17 delivery fees and the twenty percent combined cap on delivery and non-delivery fees under the COVID-  
18 19 Fee Cap for each Online Order, in violation of Section 200.71(3) of the COVID-19 Fee Cap. The  
19 non-delivery commissions and fees charged to Shibumi and the Class are unfair and unlawful as they  
20 exceed the maximum 5 percent fee for non-delivery fees and the combined 20 percent maximum fee on  
21 the Purchase Price for each Online Order.

22 49. On March 19, 2021, pursuant to Section 200.73(3) of the COVID-19 Fee Cap, Shibumi  
23 provided written notice to Grubhub that its commissions and fees violate the COVID-19 Fee Cap.  
24 Shibumi requested that Grubhub provide a refund for itself and the Class for all non-delivery  
25 commissions and fees charged in excess of the maximum 5 percent fee for non-delivery fees and the  
26

27 <sup>36</sup> A true and correct copy of an Excel spreadsheet showing Grubhub's payments to Shibumi during  
the Class Period is attached hereto as Exhibit 4.

28 <sup>37</sup> *Id.*



1 combined 20 percent maximum fee on the Purchase Price for each Online Order. More than fifteen days  
2 have elapsed and no corrective action has been taken by Grubhub.<sup>38</sup>

### 3 CLASS ACTION ALLEGATIONS

4 50. Plaintiff and the Class have suffered injury-in-fact as a result of Grubhub charging non-  
5 delivery commissions and fees that exceed the maximum 5 percent fee for non-delivery fees and the  
6 combined 20 percent maximum fee on the Purchase Price for each Online Order allowed under Section  
7 200.71(3) of the COVID-19 Fee Cap.

8 51. Grubhub has charged Plaintiff and the Class (as defined below) these unlawful  
9 commissions and fees from June 10, 2020 until the present (the “Class Period”).

10 52. Plaintiff brings this lawsuit on behalf of itself and other similarly-situated restaurants in  
11 the City of Los Angeles, pursuant to the Code of Civil Procedure §382. Subject to additional  
12 information obtained through further investigation and/or discovery, Plaintiff brings this lawsuit on  
13 behalf of the following proposed Class:

14 All restaurants in the City of Los Angeles who Grubhub charged: (a) non-delivery commissions  
15 and fees that exceed the maximum 5 percent of the Purchase Price of each Online Order, or (b)  
16 combined delivery fees and non-delivery fees and commissions that exceed 20 percent of the  
17 Purchase Price of each Online Order during the Class Period (the “Class”).

18 53. Excluded from the Class is Defendants, their subsidiaries and affiliates, their officers,  
19 directors, and members of their immediate families and any entity in which any Defendant has a  
20 controlling interest, the legal representative, heirs, successors, or assigns of any such excluded party, the  
21 judicial officer(s) to whom this action is assigned, and the members of their immediate families and  
22 judicial staff.

23 54. Plaintiff reserves the right, under California Rules of Court, Rule 3.765(b) and other  
24 applicable law, to amend or modify the Class definitions. Plaintiff is the Named Representative and is a  
25 member of the Class. Plaintiff seeks class-wide recovery based on the allegations set forth in this  
26 Complaint. The Court can define the Class and create additional subclasses as may be necessary or

27 <sup>38</sup> A true and correct copy of the written notice Shibumi provided to Grubhub is attached as Exhibit  
28 5.

1 desirable to adjudicate common issues and claims of the members of the Class, if necessary, based on  
2 discovery of additional facts.

3 55. **Ascertainability.** The members of the Class are readily ascertainable from Defendants'  
4 business records during the Class Period, and the specific transactions, terms, and parties identified  
5 therein.

6 56. **Numerosity.** The Class described above is so numerous that joinder of all individual  
7 members in one action would be impracticable. The disposition of the individual claims of the  
8 respective class members through this class action will benefit both the parties and this Court. The exact  
9 size of the Class and the identities of the individual members thereof are ascertainable through  
10 Defendants' records, but based on public information, the Class includes hundreds of restaurants.

11 57. **Existence and Predominance of Common Questions of Law and Fact.** There is a  
12 well-defined community of interest and there are common questions of fact and law affecting members  
13 of the Class. All members of the Class have been subject to the same unlawful conduct and their claims  
14 are based on violations by Defendants of the COVID-19 Fee Cap. The questions of fact and law  
15 common to the Class predominate over questions which may affect individual members and include the  
16 following:

- 17 a. The nature, scope, and operations of Defendants' unlawful practices;
- 18 b. Whether Defendants engaged in a course of unfair and unlawful conduct with  
19 respect to their food delivery fees;
- 20 c. Whether Defendants' business practices were unfair under the UCL;
- 21 d. Whether Defendants knew or should have known that their business practices  
22 were unfair and unlawful and violated the COVID-19 Fee Cap and the UCL;
- 23 e. Whether Plaintiff and the other members of the Class are entitled to damages and  
24 restitution to redress Defendants' wrongful conduct, and the amount of such  
25 damages and restitution; and
- 26 f. Whether Plaintiff and the Class are entitled to injunctive relief to redress the  
27 imminent and currently ongoing harm faced as a result of Defendants' wrongful  
28 conduct.



1           62. Prior to filing this action, Shibumi provided Defendants notice of their unlawful conduct  
2 and requested refunds on behalf of itself and the Class. More than fifteen days have elapsed and no  
3 corrective action has been taken by Defendants.

4           63. Shibumi is a “Retail Food Establishment” within the meaning of Section 200.71 of the  
5 COVID-19 Fee Cap.

6           64. Each Defendant is a “Third-party Food Delivery Service” within the meaning of Section  
7 200.71 of the COVID-19 Fee Cap.

8           65. Section 200.71(1) of the COVID-19 Fee Cap states, “[i]t shall be unlawful for a Third-  
9 party Food Delivery Service to charge a Retail Food Establishment a Delivery Fee that totals more than  
10 15 percent of the Purchase Price of each Online Order.” Section 200.71(3) of the COVID-19 Fee Cap  
11 states, “[i]t shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food  
12 Establishment any combination of fees, commissions, or costs for the Retail Food Establishment’s use  
13 of the Third-party Food Delivery Service that is greater than 5 percent of the Purchase Price of each  
14 Online Order. Fees, commissions, or costs do not include Delivery.” Thus, the total combination of  
15 delivery and non-delivery fees charged to a restaurant may not exceed 20 percent of each Online Order.

16           66. Section 200.71(2) of the COVID-19 Fee Cap states, “[i]t shall be unlawful for a Third-  
17 party Food Delivery Service to charge a Retail Food Establishment any amount designated as a  
18 Delivery Fee for an Online Order that does not involve the delivery of food or beverages.”

19           67. Section 200.73(1) of the COVID-19 Fee Cap provides a private right of action by a  
20 Retail Food Establishment injured by a Third-Party Food Delivery Service that charges fees in violation  
21 of the COVID-19 Fee Cap, provided that the Retail Food Establishment issues notice to the Third-party  
22 Food Delivery Service as required by Section 200.73(3). Plaintiff has complied with the notice and  
23 cure provisions of Section 200.73(3), and Defendants have not provided refunds to Plaintiff and the  
24 Class as requested after fifteen days.

25           68. Defendants violated and continue to violate Section 200.71(3) of the COVID-19 Fee Cap  
26 by charging Plaintiff and the Class non-delivery fees and commissions greater than the 5 percent of the  
27 Purchase Price of each Online Order allowed by the COVID-19 Fee Cap. Defendants violated and  
28 continue to violate the COVID-19 Fee Cap by charging Plaintiff and the Class total fees and

1 commissions greater than the 20 percent of the Purchase Price of each Online Order allowed by the  
2 COVID-19 Fee Cap.

3 69. Defendants violated and continue to violate Section 200.71(2) of the COVID-19 Fee Cap  
4 by charging Plaintiff and the Class "Delivery Commissions," which, on information and belief, amount  
5 to a commission that does not involve the delivery of food or beverages.

6 70. Plaintiff and the Class are the types of businesses the COVID-19 Fee Cap was designed  
7 to protect, and the harm that occurred is the type of harm that the COVID-19 Fee Cap was meant to  
8 guard against.

9 71. As a direct result of Defendants' violations of the COVID-19 Fee Cap, Plaintiff and the  
10 Class have been injured as described herein, and are entitled to damages and injunctive relief according  
11 to proof.

12 Wherefore, Plaintiff prays for judgment against Defendants, as set forth hereafter.

13 **SECOND CAUSE OF ACTION**  
14 **VIOLATIONS OF CALIFORNIA'S UNFAIR COMPETITION LAW BASED ON**  
15 **COMMISSION OF UNLAWFUL ACTS**  
**(Alleged by Plaintiff and the Class against all Defendants)**

16 72. Plaintiff restates and realleges all preceding factual allegations above as if fully set forth  
17 herein.

18 73. The violation of any law constitutes an unlawful business practice under Cal. Bus. &  
19 Prof. Code §17200.

20 74. Plaintiff and each Defendant is a "person" as that term is defined by Cal. Bus. & Prof.  
21 Code §17201.

22 75. Defendants violated the UCL's prohibition against engaging in unlawful acts and  
23 practices by, inter alia, routinely charging Shibumi and the Class non-delivery fees and commissions  
24 greater than the maximum 5 percent fee, and by charging fees and commissions greater than the  
25 combined 20 percent maximum fee on the Purchase Price for each Online Order during the Class  
26 Period. Defendants also violated the UCL's prohibition against engaging in unlawful acts and practices  
27 by, inter alia, routinely charging Shibumi and the Class non-delivery fees and commissions greater than  
28 the maximum 5 percent fee, and by charging fees and commissions greater than the combined 20

1 percent maximum fee on the Purchase Price for each Online Order during the Class Period. In doing  
2 so, Defendants violated the COVID-19 Fee Cap and thus engaged in unlawful business practices.

3 76. Plaintiff and the Class each suffered actual monetary injury and ascertainable loss and  
4 are entitled to equitable and other such relief the Court considers necessary and proper resulting from  
5 Defendants' conduct of charging fees and commissions in excess of the amount allowed by law.  
6 Plaintiff and the Class have thus suffered injury-in-fact and lost money or property as a direct result of  
7 Defendants' unlawful business practices.

8 77. An action for injunctive relief and restitution is specifically authorized under Cal. Bus. &  
9 Prof. Code §17203.

10 Wherefore, Plaintiff prays for judgment against Defendants, as set forth hereafter.

11 **THIRD CAUSE OF ACTION**  
12 **VIOLATIONS OF CALIFORNIA'S UNFAIR COMPETITION LAW BASED ON**  
13 **COMMISSION OF UNFAIR ACTS**  
**(Alleged by Plaintiff and the Class against all Defendants)**

14 78. Plaintiff restates and realleges all preceding factual allegations above as if fully set forth  
15 herein.

16 79. Under the UCL, any business act or practice that is unethical, oppressive, unscrupulous,  
17 and/or substantially injurious to consumers, or that violates a legislatively declared policy, constitutes  
18 an unfair business act or practice.

19 80. Defendants have engaged and continue to engage in conduct which is immoral,  
20 unethical, oppressive, unscrupulous and substantially injurious to small businesses, their employees,  
21 and consumers who are forced to pay higher costs for food deliveries. By taking advantage of small  
22 businesses, their employees, and their consumers during a global pandemic, Defendants' conduct, as  
23 described herein, far outweighs the utility, if any, of such conduct.

24 81. The business practices describe herein are also "unfair" because they violate the  
25 legislatively declared policy of the City of Los Angeles, and offend public policy, particularly during a  
26 public health crisis. The COVID-19 Fee Cap and other laws like it were passed precisely because  
27 restaurants have limited bargaining power to negotiate lower commission fees with third-party food  
28

1 delivery services, and have no reasonable alternatives because take-out and delivery are the only  
2 options available while dining restrictions remain in place.

3 82. Defendants' conduct harmed competition. Defendants charged fees which exceeded the  
4 amount that was lawfully allowed to be charged. The injuries suffered by Plaintiff and the Class are not  
5 outweighed by any countervailing benefits to consumers or competition.

6 83. Plaintiff and the other members of the Class each suffered actual monetary injury and  
7 ascertainable loss and are entitled to equitable and other such relief the Court considers necessary and  
8 proper resulting from Defendants' unfair business practice of charging fees in excess of the amount  
9 allowed by law. Plaintiff and the Class have thus suffered injury-in-fact and lost money or property as  
10 a direct result of Defendants' unfair business practices.

11 84. An action for injunctive relief and restitution is specifically authorized under Cal. Bus. &  
12 Prof. Code §17203.

**FOURTH CAUSE OF ACTION**  
**DECLARATORY RELIEF**

**(Alleged by Plaintiff and the Class against all Defendants)**

15 85. Plaintiff restates and realleges all preceding factual allegations above as if fully set forth  
16 herein.

17 86. An actual controversy has arisen and now exists between Plaintiff, and the Class, on the  
18 one hand, and Defendants on the other hand. Plaintiff and the Class contend that Defendants violated  
19 and continue to violate the COVID-19 Fee Cap. A judicial determination of this issue, and of the  
20 respective duties of Plaintiff and the Class and Defendants, is necessary and appropriate under the  
21 circumstances because the COVID-19 Fee Cap was promulgated by the Los Angeles City Council,  
22 approved by the Los Angeles City Attorney as to form and legality, signed into law by the Mayor of  
23 City of Los Angeles, and added to the Los Angeles Municipal Code as Chapter XX, Article 6.

24 87. A judicial determination that Defendants violated the COVID-19 Fee Cap is necessary to  
25 ensure that Plaintiff and the Class are protected from the unlawful and unfair conduct of Defendants,  
26 because the City of Los Angeles has not instituted an enforcement scheme for the COVID-19 Fee Cap.  
27 This has allowed Defendants to flout the COVID-19 Fee Cap and continue to overcharge Plaintiff and  
28 the Class.



Wherefore, Plaintiff prays for judgment against Defendants, as set forth hereafter.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of itself and all others similarly situated, prays for relief as follows:

A. That this action be certified as a Class Action, Plaintiff be appointed as the representative of the Class, and Plaintiff's attorneys be appointed as Class counsel;

B. That Defendants' wrongful conduct alleged herein be adjudged and decreed to violate the laws alleged herein;

C. A temporary, preliminary, and/or permanent order for public injunctive relief requiring that Defendants: (i) cease charging Retail Food Establishments in the City of Los Angeles more than permitted by the COVID-19 Fee Cap; and (ii) institute corrective advertising and provide written notice to the public of its unlawful fees;

D. An order requiring imposition of a constructive trust and to pay damages and restitution to Plaintiff and all members of the Class and, also, to restore to Plaintiff and members of the Class all funds acquired by means of any act or practice declared by this Court to be an unlawful or unfair business act or practice, or in violation of laws, statutes, or regulations, or as constituting unfair competition;

E. Awarding costs necessary to perform accounting and/or administration costs for distribution of damages and restitution to the proposed Class;

F. Prejudgment and post judgment interest;

G. For actual damages and restitutionary relief in an amount according to proof;

H. Reasonable attorneys' fees and costs pursuant to the COVID-19 Fee Cap, Cal. Code of Civil Procedure §1021.5, the common fund doctrine, or any other appropriate legal theory;

I. Public injunctive relief prohibiting Defendants' unlawful and unfair practices as described herein, pursuant to Cal. Bus. & Prof. Code §17204; and

J. Awarding any and all other relief that this Court deems necessary, just, equitable, and proper.



**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury.

Dated: April 12, 2021

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## **EXHIBIT 1**

## ARTICLE 6

### LIMIT ON THIRD-PARTY FOOD DELIVERY SERVICE FEES

(Added by Ord. No. 186,790, Eff. 10/16/20.)

Section	
200.70	Definitions.
200.71	Prohibitions.
200.72	Disclosures.
200.73	Enforcement.
200.74	Operative Dates.
200.75	Severability.

#### SEC. 200.70. DEFINITIONS.

For purposes of this ordinance, the following definitions apply:

1. "City" means the City of Los Angeles.
2. "Delivery Fee" means a fee charged by a Third-party Food Delivery Service for providing a Retail Food Establishment with a service that delivers food and beverages from such establishment to customers. The term does not include any other fee or cost that may be charged by a Third-party Food Delivery Service to a Retail Food Establishment, such as fees for listing or advertising the Retail Food Establishment on the Third-party Food Delivery Service platform or fees related to processing the Online Order, including, but not limited to, service fees, fees for facilitating Online Orders for pick-up, and credit card processing fees.
3. "Online Order" means an order placed by a customer through or with the assistance of a platform provided by a Third-party Food Delivery Service, including a telephone order, for delivery or pick-up within the City.
4. "Purchase Price" means the price, as listed on the menu, for the items contained in an Online Order, minus any applicable coupon or promotional discount provided to the customer by the Retail Food Establishment through the Third-Party Food Delivery Service. This definition does not include taxes, gratuities, and any other fees or costs that may make up the total amount charged to the customer of an Online Order.
5. "Retail Food Establishment" means a restaurant, delicatessen, bakery, coffee shop, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat food or beverages.
6. "Third-party Food Delivery Service" means any website, mobile application, or other internet service that offers or arranges for the sale of food and beverages prepared by, and the delivery or pick-up of food and beverages from, no fewer than 20 Retail Food Establishments located in the City that are each owned and operated by different persons.

#### SEC. 200.71. PROHIBITIONS.

1. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment a Delivery Fee that totals more than 15 percent of the Purchase Price of each Online Order.
2. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any amount designated as a Delivery Fee for an Online Order that does not involve the delivery of food or beverages.
3. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any combination of fees, commissions, or costs for the Retail Food Establishment's use of the Third-party Food Delivery Service that is greater than 5 percent of the Purchase Price of each Online Order. Fees, commissions, or costs do not include Delivery Fee.
4. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any fee, commission, or cost other than as permitted in Subsections 1. through 3., above.
5. It shall be unlawful for a Third-party Food Delivery Service to charge a customer any Purchase Price for a food or beverage item that is higher than the price set by the Retail Food Establishment on the Third-party Food Delivery Service or, if no price is set by the Retail Food Establishment on the Third-party Food Delivery Service, the price listed on the Retail Food Establishment's own menu.
6. It shall be unlawful for a Third-party Food Delivery service to retain any portion of amounts designated as a tip or gratuity. Any tip or gratuity shall be paid by the Third-party Delivery Service, in its entirety, to the person delivering the food or beverages.

**SEC. 200.72. DISCLOSURES.**

The Third-party Food Delivery Service shall disclose to the customer an accurate, clearly identified, and itemized cost breakdown of each transaction, including, but not limited to, the following:

- (a) the Purchase Price of the food and beverages at the cost listed on the Retail Food Establishment's menu;
- (b) the Delivery Fee charged to the Retail Food Establishment;
- (c) each fee, commission, or cost, other than a Delivery Fee, charged to the Retail Food Establishment;
- (d) each fee, commission, or cost, other than the Delivery Fee or the Purchase Price of the food, charged to the customer by the Third-party Food Delivery Service; and
- (e) any tip or gratuity that will be paid to the person delivering the food or beverages.

**SEC. 200.73. ENFORCEMENT.**

A violation of this article shall subject the violator to the following:

- 1. An action in the Superior Court of the State of California to recover all actual damages resulting from a violation of this article.
- 2. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails in an action against a Third-party Food Delivery Service. If plaintiff fails to prevail against a Third-party Food Delivery Service, a court may award reasonable attorneys' fees and costs to the Third-party Food Delivery Service upon a determination by the court that the plaintiff's action was frivolous.
- 3. A civil action alleging a violation of any provision of this article shall commence only after the following requirements have been met:
  - (a) Written notice is provided to the Third-party Food Delivery Service of the provisions of the article alleged to have been violated and the facts to support the alleged violation; and
  - (b) The Third-party Food Delivery Service is provided 15 days from the date of the written notice to cure any alleged violation.
- 4. The remedies in Subsections 200.73 1. through 3. are non-exclusive. A violation of this article is unlawful and may be prosecuted under state and City law, including, but not limited to, Section 396 of the California Penal Code or Section 47.12 of the Los Angeles Municipal Code.

**SEC. 200.74. OPERATIVE DATES.**

This article shall be operative at any time during which a federal, state, or local order, resulting from the COVID-19 pandemic, limits customer capacity to less than full capacity at Retail Food Establishments in the City of Los Angeles, and for a period of 90 days after any such federal, state, or local order is lifted.

**SEC. 200.75. SEVERABILITY.**

If any subsection, sentence, clause or phrase of this article is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this article. The City Council hereby declares that it would have adopted this article and each and every subsection, sentence, clause, and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the article would be subsequently declared invalid or unconstitutional.

## **EXHIBIT 2**



**Lane Dilg**  
*Interim City Manager*

Office of the City Manager  
1685 Main Street  
PO Box 2200  
Santa Monica, CA 90407-2200

## **SIXTEENTH SUPPLEMENT TO THE EXECUTIVE ORDER OF THE DIRECTOR OF EMERGENCY SERVICES DECLARING THE EXISTENCE OF A LOCAL EMERGENCY**

WHEREAS international, national, state, and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus named “SARS-CoV-2,” and the disease it causes has been named “coronavirus disease 2019,” abbreviated COVID-19, (“COVID-19”); and

WHEREAS, on March 4, 2020, the Los Angeles County Board of Supervisors and Department of Public Health declared a local emergency and local public health emergency to aid the regional healthcare and governmental community in responding to COVID-19; and

WHEREAS, on March 4, 2020, the Governor of the State of California declared a state of emergency to make additional resources available, formalize emergency actions already underway across multiple state agencies and departments, and help the State prepare for broader spread of COVID-19; and

WHEREAS, on March 12, 2020, in response to social distancing guidance issued by the Centers for Disease Control and Prevention, the California Department of Public Health, and the Los Angeles County Department of Public Health, the City of Santa Monica (“the City”) cancelled all social gatherings (events, activities, programs, and gatherings) in City facilities that were scheduled to occur through permit or license between March 12, 2020, and March 31, 2020, absent a persuasive showing by the permittee or licensee that the gathering could take place in accordance with the guidance and directives of public health authorities; and

WHEREAS, on March 12, 2020, in response to social distancing guidance issued by the Centers for Disease Control and Prevention, the California Department of Public Health, and the Los Angeles County Department of Public Health, and to protect the health and safety of the City workforce, the City announced that Santa Monica City Hall would be closed to the public and open only to City employees from March 16, 2020, to March 31, 2020; and

WHEREAS, on March 13, 2020, the President of the United States of America declared a national emergency and announced that the federal government would make emergency funding available to assist state and local governments in preventing the spread of and addressing the effects of COVID-19; and

WHEREAS, on March 13, 2020, the City Manager, in his role as the Director of Emergency Services, ("Director of Emergency Services") proclaimed the existence of a local emergency pursuant to Chapter 2.16 of the Santa Monica Municipal Code to ensure the availability of mutual aid and an effective the City's response to the novel coronavirus ("COVID-19") and this local emergency was restated on March 14, 2020, through a revised declaration of local emergency to ensure compliance with all digital signature requirements; and

WHEREAS, on March 14, 2020, the Director of Emergency Services issued a first supplemental emergency order placing a temporary moratorium on evictions for non-payment of rent and temporarily suspending (a) the discontinuation or shut off of water service for residents and businesses in the City for non-payment of water and sewer bills; (b) the imposition of late payment penalties or fees for delinquent water and/or sewer bills; and (c) the imposition of late payment penalties or fees for parking violations; and

WHEREAS, on March 15, 2020, the Director of Emergency Services issued a second supplemental emergency order temporarily closing the Santa Monica Pier to the general public; and

WHEREAS, on March 16, 2020, the Los Angeles County Department of Public Health issued a Health Officer Order for the Control of COVID-19 temporarily prohibiting group events of 50 or more people, requiring certain social distancing measures, and ordering the closure of certain businesses; and

WHEREAS, on March 16, 2020, the Director of Emergency Services issued a third supplemental emergency order that ordered the temporary closure of bars and nightclubs that do not serve food, movie theaters and entertainment venues, bowling alleys and arcades, gyms and fitness centers, and non-medical physical health and beauty businesses; temporarily prohibited restaurants, bars, and retail food facilities from serving food on-premises; and strongly urged houses of worship to limit large gatherings on their premises and to observe social distancing practices in their services; and

WHEREAS, on March 16, 2020, the Governor of the State of California issued Executive Order N-28-20, suspending any and all provisions of state law that would preempt or otherwise restrict a local government's exercise of its police powers to impose substantive limitations on residential and commercial evictions with respect to COVID19-related rent payment issues; and

WHEREAS, on March 17, 2020, the Director of Emergency Services issued a Revised Fourth Supplement to the Executive Order to permit public safety facilities, hospitals, clinics, and emergency shelters in all zoning districts and allow the Director of the Department of Planning and Community Development or designee to waive development standards, design review, parking and access requirements, and sign standards related to such uses; to permit limited service and take-out restaurant uses in any zoning district that allows full-service restaurants; to allow drive-through facilities for clinics, convenience markets, farmers markets, general markets, hospitals, pharmacies, and restaurants; to suspend planning deadlines and automatic approvals; to extend interim zoning ordinances now in effect; to direct that street sweeping not be conducted unless essential for public health and safety and suspend parking citations related thereto; to suspend preferential parking rules; to suspend certain regulations relating to the operation of oversize vehicles; and to suspend Breeze bike share fees; and

WHEREAS, on March 17, 2020, the Governor of the State of California issued Executive Order N-29-20 which, among other things, amended Paragraph 11 of earlier Executive Order N-25-20 to suspend and waive certain provisions of state and local law, including but not limited to those provisions in the Bagley-Keene Act and the Brown Act related to the notice and accessibility requirements for the conduct of public meetings where the physical presence of public attendees or members of the public body seeking to meet are impliedly or expressly required; and

WHEREAS, on March 18, 2020, the Director of Emergency Services issued a Revised First Supplement to the Executive Order of the Director of Emergency Services implementing eviction protections for residential and commercial tenants and suspending removals of rental property from the market under the Ellis Act; and

WHEREAS, on March 18, 2020, the Director of Emergency Services issued a Revised Fifth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency implementing a rear-door boarding policy for all Big Blue Bus (BBB) customers, with the exception of Americans with Disabilities Act customers traveling in mobility devices; suspending all passenger fares on the BBB; suspending discontinuation or shut-off of water services for residents and businesses based on non-payment of water or sewer bills; suspending late payment penalties for (a) water and/or sewer bills; (b) parking citations; (c) refuse and recycling collection bills; (d) Certified Unified Program Agency (CUPA) charges; (e) Fire Prevention inspection charges; (f) Transient Occupancy Taxes; (g) Utility Users Taxes; and (h) Parking Facility Taxes; suspending parking restrictions and limitations in many City parking lots, parking zones, and parking spaces; and suspending penalty assessments related to business licenses and business improvement district assessments; and

WHEREAS, on March 19, 2020, the City Council ratified the proclamation of local emergency made by the Director of Emergency Services, as well as the Revised First, Second, Third, Revised Fourth, and Revised Fifth Supplements thereto, and resolved that the proclamation and the aforementioned Supplements shall be operative and in effect through April 30, 2020; and

WHEREAS, on March 19, 2020, the Governor of the State of California issued Executive Order N-33-20 directing all residents of the State of California to heed directives issued by the State Health Officer on the same date instructing all Californians to stay home except as needed to maintain continuity of operations of the federal critical infrastructure sectors; and

WHEREAS, on March 19, 2020, the Los Angeles County Department of Public Health issued an enhanced Health Officer Order, the Safer at Home Order for Control of COVID-19, amending and superseding its March 16, 2020, Order, closing all nonessential businesses, and limiting gatherings to 9 people or less; and



WHEREAS, on March 20, 2020, the Director of Emergency Services issued a Sixth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency suspending labor negotiations through April 30, 2020, so that the City may assess the financial impacts of COVID-19 prior to engaging in collective bargaining, and suspending various human resources processes in order to decrease in-person meetings and enable effective emergency response, including suspending requirements associated with the administration of competitive examinations and the appointment of individuals from eligibility lists; suspending certain requirements and minimum qualifications associated with the appointment of temporary, limited-term, and as-needed employees; and modifying the Municipal Code to state that certain additional appointments will be subject to a probationary period; and

WHEREAS, on March 21, 2020, the Director of Emergency Services issued a Seventh Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency aligning the Santa Monica Municipal Code with a California Department of Alcoholic Beverage Control ("ABC") "Notice of Regulatory Relief" permitting restaurants and retailers holding valid ABC licenses to sell alcoholic beverages for off-site consumption via delivery and take-out; and

WHEREAS, on March 21, 2020, the Los Angeles County Department of Public Health issued an enhanced Health Officer Order, the Safer at Home Order for Control of COVID-19, amending and superseding its March 16, 2020, and March 19, 2020 Orders, closing all nonessential businesses and prohibiting gatherings of non-household members; and

WHEREAS, on March 22, 2020, the Director of Emergency Services issued an Eighth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency adopting as rules and regulations of the City of Santa Monica the Executive Order N-33-20, issued by the Governor of the State of California on March 19, 2020 (the "Governor's Stay at Home Order") and the Safer at Home Order for Control of COVID-19, issued by the Los Angeles County Department of Public Health on March 21, 2020 (the "County Department of Public Health's Safer at Home Order"), including any later amendments or successors thereto, the stricter of which shall apply if there is any conflict between the Governor's Stay at Home Order and the County Department of Public Health's Safer at Home Order; and authorizing the City to issue administrative citations to enforce this and the previously issued supplements to its emergency declaration; and

WHEREAS, on March 27, 2020, the Governor of the State of California issued Executive Order N-37-20, building on Executive Order N-28-20 by extending the time for a tenant to respond to a summons and prohibiting the enforcement of a writ for tenants unable to pay due to reasons related to COVID-19; and

WHEREAS, on March 27, 2020, the Los Angeles County Department of Public Health issued an Addendum to the County Department of Public Health's Safer at Home Order closing all public trails and trailheads, as well as all public beaches, piers, public beach parking lots, beach bike path that traverse that sanded portion of the beach, and beach access points; and

WHEREAS, on March 27, 2020, the Director of Emergency Services issued a Ninth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency closing certain City facilities, waiving late payment fees for City leases and licenses during the effective period of the order, suspending rent payments for City tenants on the Santa Monica Pier for the month of April, suspending outdoor dining licenses and outdoor dining license payments for City licensees for the month of April, granting the Director of the Department of Housing and Community Development discretion to suspend additional rent or license payments for the month of April for City tenants and licensees whose operations have been closed pursuant to emergency orders issued by the City, the County of Los Angeles Department of Public Health, or the Governor of California, authorizing the City to delay responses and productions of records in response to public record requests under specified circumstances, and extending by one month Santa Monica Fire Department annual permits of operation set to expire on May 1, 2020; and

WHEREAS, on March 31, 2020, the Los Angeles County Department of Public Health issued Addendum No. 2 to the County Department of Public Health's Safer at Home Order clarifying that all government employees are essential workers during the pandemic; and

WHEREAS, on April 1, 2020, the Director of Emergency Services issued a Tenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency imposing requirements specific to construction sites and projects to ensure their compliance with the social distancing and hygiene directives imposed by the County Department of Public Health's Safer at Home Order; and

WHEREAS, on April 6, 2020, the Judicial Council of the State of California adopted an emergency court rule that effectively delays all evictions, other than those necessary to protect public health and safety, for the duration of the COVID-19 emergency; the rule is applicable to all courts and to all eviction cases, whether they are based on a tenant's missed rent payment or another reason; among other things, the rule temporarily prohibits a court from issuing a summons after a landlord files an eviction case, unless necessary to protect public health and safety; as a result, even if a landlord files an eviction case, he or she will not have a summons to serve on the tenant until 90 days after the emergency passes; and

WHEREAS, on April 6, 2020, the City Council ratified the proclamation of local emergency made by the Director of Emergency Services, as well as the Revised First, Second, Third, Revised Fourth, Revised Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Supplements thereto, and resolved that the proclamation and the aforementioned Supplements shall be operative and in effect through April 30, 2020; and

WHEREAS, on April 8, 2020, the Director of Emergency Services issued a Second Revised First Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency enhancing eviction protections to require landlords to provide notice of local eviction protections to tenants, prohibiting no-fault residential evictions, prohibiting certain evictions based on a tenant's refusal of landlord entry into a residential unit, prohibiting certain evictions of residential tenants based on the presence of unauthorized pets or occupants, prohibiting use of the eviction process to seek rent delayed under the Supplement if the landlord has already obtained compensation for the delayed rent through governmental relief, and temporarily enhancing penalties under the City's Tenant Harassment Ordinance to \$15,000; and

WHEREAS, on April 8, 2020, the Director of Emergency Services issued an Eleventh Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency requiring workers and customers at covered businesses (including but not limited to grocery stores, farmers markets, restaurants, hardware stores, transportation providers, and plumbing and similar businesses) to wear face coverings; and

WHEREAS, on April 10, 2020, the Los Angeles County Department of Public Health issued a revised Safer At Home Order for Control of COVID-19 that amended and superseded the earlier March 16, 19, 21, 27, and 31 County Health Officer Orders and Addendums and continued to prohibit all indoor and outdoor public and private gatherings and events; require all businesses to cease in-person operations and remain closed to the public, unless defined as an Essential Business by the order; require the closure of all indoor malls and shopping centers, all swap meets and flea markets, indoor and outdoor playgrounds, public beaches, piers, public beach parking lots, beach access points, and public trails and trailheads; and prohibit in-person operations of all non-essential businesses; and

WHEREAS, on April 14, 2020, the City Council ratified the proclamation of local emergency made by the Director of Emergency Services, as well as the Second Revised First, Second, Third, Revised Fourth, Revised Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Supplements thereto, and resolved that the Second Revised First Supplement shall be operative and remain in effect through May 31, 2020, and that the other aforementioned Supplements shall be operative and in effect through May 15, 2020; and

WHEREAS, on April 24, 2020, the Director of Emergency Services issued a Twelfth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency tolling deadlines for reviewing and acting on planning applications, exercising rights under planning entitlements, and expiration of building permits; permitting lodging establishments operating as hotels and motels under Santa Monica's zoning rules to allow stays of greater than 30 days, and waiving the City's rule precluding employees from accepting gifts of any sort to allow City first responders and disaster workers to take advantage of City-approved public or private discount, specials, and subsidies programs; and

WHEREAS, on April 30, 2020, the Director of Emergency Services issued a Third Revised First Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency extending the eviction moratorium to June 30 and modifying it by limiting the commercial tenants subject to the protections of the order to exclude multinational companies, public companies, and companies with more than 500 employees; making clear that notice and documentation that indicates any loss of income or increase in expenses due to COVID-19 is sufficient to trigger the moratorium on eviction for non-payment of rent due to financial impacts related to COVID-19, and that a statement written by the tenant in a single communication may constitute both notice and documentation; and extending the protection against eviction based on rent unpaid due to financial impacts related to COVID-19 from 6 to 12 months; in addition, the Third Revised First Supplement, in accordance with the Governor's Executive Order suspending state law provisions, suspends SMMC 5.45.020 and 5.45.030 to the extent they prohibit retail establishments from providing without charge reusable grocery bags or recycled paper bags or single-use plastic carryout bags to customers at point of sale and adds language to the City's Housing Trust Fund and Affirmative Housing Production Program Guidelines to extend eligibility to individuals who were working in Santa Monica prior to March 1, 2020, but lost employment due to COVID-19 related reasons; and

WHEREAS, on May 7, 2020, the California State Public Health Officer issued an order that stated that COVID-19 continues to present a significant risk to the health of individuals throughout California, but, consistent with Californians' mitigation efforts and other factors determined that the statewide data supported the gradual movement of the entire state from Stage 1 to Stage 2 of California's Pandemic Resilience Roadmap, while authorizing local health jurisdictions to implement or continue more restrictive public health measures if warranted; and

WHEREAS, on May 8, 2020, the Los Angeles County Department of Public Health issued Addendum No. 2 to the April 10 revised County Department of Health Safer at Home Order amending that order to permit, subject to specific conditions, the reopening of certain specified types of lower-risk retail business for sales and service transactions made via curbside pick-up or delivery only, and the reopening of all previously closed public trails and trailheads, public and private golf courses, and new and used auto sales dealerships and operations; and

WHEREAS, on May 8, 2020, the Director of Emergency Services issued a Fourth Revised First Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency restating the eviction moratorium and modifying it to define a set of "non-retail commercial tenants" consisting of commercial tenants, other than non-profits, that are tenants in an office building, do not collect sales tax on greater than 50% of their revenue, and do not provide medical, dental, veterinary, fitness, educational, or child, marriage, family, mental health, or substance abuse counseling services; specify that, for non-retail commercial tenants, the protection against eviction will extend only for 30 days after the expiration of the Order; and specify that, with respect to rent unpaid due to financial impacts related to COVID-19, landlords may not charge residential tenants interest on that unpaid rent for a period of 12 months following the expiration of the Order, may not charge commercial tenants (other than non-retail commercial tenants) interest on that unpaid rent for a period of 90 days following the expiration of the Order, and may not charge non-retail commercial tenants interest on that unpaid rent during the duration of the Order; and

WHEREAS, on May 8, 2020, the Director of Emergency Services issued a Thirteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency incorporating the provisions of the Third Revised First Supplement that add language to the City's Housing Trust Fund and Affirmative Housing Production Program Guidelines to extend eligibility to individuals who were working in Santa Monica prior to March 1, 2020, but lost employment due to COVID-19 related reasons; incorporating the provisions of the Third Revised First Supplement that, in accordance with the Governor's Executive Order suspending state law provisions, suspend SMMC 5.45.020 and 5.45.030 to the extent they prohibit retail establishments from providing without charge reusable grocery bags or recycled paper bags or single-use plastic carryout bags to customers at point of sale; further extending to July 1, 2020 the expiration of Fire Department annual permits of operation; and limiting to between the hours of 10:00 am and 3:00 pm on weekdays the conduct of certain loud construction activities, including cement cutting or grinding, sandblasting, and the use of pile drivers, jackhammers, or pavement breakers, at construction projects other than public works construction; and



WHEREAS, on May 12, 2020, the City Council ratified the proclamation of local emergency made by the Director of Emergency Services, as well as the Third and Fourth Revised First, Second, Third, Revised Fourth, Revised Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth Supplements thereto; resolved that the local emergency shall be deemed to continue and exist until its termination is proclaimed by the City Council; and resolved that the Fourth Revised First and Second through Thirteenth Supplements shall be operative and remain in effect through May 15, 2020, or any later date expressly stated within the text of an individual supplement; and

WHEREAS, on May 13, 2020, the Los Angeles County Department of Public Health issued a revised Safer At Home Order for Control of COVID-19 that amended and superseded the earlier March 16, 19, 21, 27, 31, April 10, May 3, and May 9, 2020 County Health Officer Orders and Addendums; recognized that existing community transmission of COVID-19 in Los Angeles County continues to present a substantial and significant risk of harm to residents' health; but took a limited and measured step to partially move the County into Stage 2 of its phased approach to reopening while keeping a low incidence of person-to-person contact and ensuring continued social distancing and adherence to other infection control procedures – accordingly, the order continued to prohibit indoor and outdoor public and private gatherings and events; continued to require the continued closure of higher-risk businesses, recreational sites, commercial properties, and activities, where more frequent and prolonged person-to-person contacts are likely to occur; continued to allow Essential Businesses to operate subject to social distancing requirements; allowed two categories of lower-risk businesses to reopen subject to specified social distancing protocols, retailers not located within an indoor mall or shopping center and manufacturing and logistics sector businesses that supply lower-risk retail businesses; and permitted the reopening of beaches, while retaining closures of beach parking lots, beach bike paths, and piers; and

WHEREAS, on May 13, 2020, the City of Los Angeles issued a revised version of its safer at home order including requirements that all individuals engaging in outdoor activities, except for water activities, and all individuals engaging in essential activities whenever there is or can be contact with other who are non-household members in both public and private places, must wear a cloth face covering; and

WHEREAS, on May 14, 2020, the Director of Emergency Services issued a Fourteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency extending the effective dates of the Fourth Revised First, Second, Third, Revised Fourth, Revised Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth supplements to June 30, 2020, or any later date expressly stated within the text of an individual supplement; and requiring all persons leaving their residences for the limited purposes allowed by the County Department of Public Health's Safer at Home Order to strictly comply with the social (physical) distancing requirements stated in that Order or County Department of Public Health guidance or protocols, including in particular the requirement that cloth face masks must be worn whenever there is or may be contact with others who are non-household members, including while engaging in permitted outdoor activities other than water activities; and

WHEREAS, on May 15, 2020, the Director of Emergency Services issued a Fifteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency authorizing enforcement of preferential parking rules to resume in Zone 3 only beginning May 22, 2020 and authorizing street sweeping to resume with individuals encouraged to comply with posted signs regarding parking prohibitions for street sweeping during the days and times indicated, but only during the first full week of each month, which is when the street sweeping will occur; and

WHEREAS, as of May 18, 2020, the Los Angeles County Department of Public Health has confirmed 38,451 cases of COVID-19 in Los Angeles County and has continued to advise that bold and aggressive measures are required to be put in place to prevent the further spread of COVID-19; and

WHEREAS, the City has a number of Boards, Commissions, and other appointed bodies, many of which serve a primarily or wholly advisory function, and all of which are required to conduct public meetings in accordance with the Brown Act; and

WHEREAS, meetings of the majority of the Boards, Commissions, and other appointed bodies have been suspended during the COVID-19 public health emergency pursuant to a directive from the City Manager for purposes of complying with social distancing requirements and due to the amount of staff time necessary to conduct public meetings either in person or via teleconference; and

WHEREAS, to reduce the spread of the virus and protect the public health, the Governor's Stay at Home Order and the County Department of Public Health's Safer at Home Order prohibit restaurants from offering dine-in service and limits restaurants to delivery and takeout offerings only; and

WHEREAS, during the COVID-19 emergency, it is critical that restaurants stay open because they are performing essential services, along with grocery stores and other food services, to provide the public with access to food; and

WHEREAS, the social/physical distancing measures required to reduce the spread of COVID-19 means that delivery and takeout offerings from restaurants are critical to the public's accessibility of food; and

WHEREAS, many consumers in the City are eager to support local restaurants and use third-party food delivery services to place orders with those restaurants and, as a result, these third-party food delivery services have experienced an uptick in the use of their services during the COVID-19 emergency; and

WHEREAS, third-party food delivery services utilize various commission models that can charge a restaurant as high as 30% or more per order, including delivery, marketing and promotion, subscription, and processing fees; and

WHEREAS, restaurants, and particularly small family-owned restaurants with few locations, have limited bargaining power to negotiate lower commission fees with third-party food delivery services, especially given that only a few companies in the marketplace provide such delivery services, and face dire financial circumstances during this COVID-19 emergency because take-out and delivery are the only options to keep these essential services in operation; and

WHEREAS, capping the maximum fees that third-party food delivery services are permitted to charge restaurants to no more than 15% of the purchase price per order for delivery fees and to no more than 5% of the purchase price per order for all other fees will further the significant and legitimate public purpose of easing the financial burden on struggling restaurants during this public health emergency so that they may remain open and provide essential services to the public while not unduly burdening third-party food delivery services, as up to a 20% fee in aggregate of the purchase price for each order placed through a third-party food delivery service is reasonable and third-party food delivery services are experiencing increased demand for their services during this COVID-19 emergency; and

WHEREAS, California Government Code 8634 empowers the City to promulgate orders and regulations necessary to provide for the protection of life and property during a local emergency, and

WHEREAS, in the interest of public health and safety, as affected by the emergency caused by the spread of COVID-19, it is necessary to exercise my authority pursuant to Section 2.16.060 of the Santa Monica Municipal Code to issue this regulation related to the protection of life and property.

NOW, THEREFORE, I, Lane Dilg, the Director of Emergency Services for the City of Santa Monica, do hereby issue the following order to become effective immediately, subject to ratification as soon as practicable by the City Council:

IT IS HEREBY ORDERED THAT:

Boards, Commissions, and Other Appointed Bodies

1. While this Order remains in effect, the Planning Commission, which is established by the City Charter, may resume meetings but should limit its meetings to those absolutely necessary to perform the legislative, quasi-legislative, adjudicative, and quasi-adjudicative duties set forth in City Charter Section 1008(a)-(d).

2. While this Order remains in effect, the following City Boards and Commissions established by the City Charter may resume meetings but should limit their meetings to those absolutely necessary to perform the adjudicative and quasi-adjudicative duties set forth in the following sections of the City Charter:

- a. Airport Commission: Section 1016(b).
- b. Library Board: Section 1010(a), (b).

- c. Personnel Board: Section 1012(a)-(c).
- d. Recreation & Parks Commission: Section 1014(b).

3. While this Order remains in effect, the following City Boards and Commissions shall not conduct meetings except as absolutely necessary to perform the adjudicative and quasi-adjudicative duties set forth in the following sections of the Santa Monica Municipal Code (“SMMC”):

- a. Architectural Review Board: SMMC Section 9.55.120(A)-(D)
- b. Arts Commission: SMMC Sections 2.64.040(g), 9.30.170.
- c. Building & Fire-Life Safety Commission: SMMC Section 8.08.040(c).
- d. Landmarks Commission: SMMC Sections 9.56.060(A)-(H) and 9.56.070.

4. While this Order remains in effect, meetings of the following City Boards, Commissions, and other appointed bodies shall remain suspended: Audit Subcommittee, Clean Beaches & Ocean Parcel Tax Citizens Oversight Committee, Commission for the Senior Community, Commission on the Status of Women, Disabilities Commission, Housing Commission, Social Services Commission, Task Force on the Environment, and Urban Forest Task Force.

5. While this Order remains in effect, meetings of the following Boards of City-related non-profits may continue to be conducted: Santa Monica Travel and Tourism, Inc.; Santa Monica Pier Corporation; and Downtown Santa Monica, Inc.

6. All meetings of City Boards, Commissions, and appointed bodies conducted while this Order remains in effect shall be conducted remotely via teleconferencing until such time as the City expressly authorizes such meetings to be conducted in person, after which time any meetings conducted in person shall be conducted in compliance with all social distancing requirements imposed by the stricter of the Governor’s Stay at Home Order and the County Department of Public Health’s Safer at Home Order, including any later amendments or successors thereto.

7. This Order does not affect in any way the meetings of the Rent Control Board, an elected City Board.

#### Third-Party Food Delivery Service Charges

- 8. As used in this Order, the following terms are defined as follows:
  - a. “Delivery fee” means a fee charged by a third-party food delivery service for providing a restaurant with a service that delivers food from such restaurants to customers in the City. The term does not include any other fee that may be charged by a third-party food delivery service to a restaurant, such as fees for listing or advertising the restaurant on the third-party food delivery service platform or fees related to processing the online order.



- b. “Online order” means any order placed by a customer through or with the assistance of a platform provided by a third-party food delivery service, including a telephone order, for delivery or pickup within the City.
- c. “Purchase price” means the total price of the items contained in an online order that are listed on the menu of the restaurant where such order is placed. Such term does not include taxes, gratuities, and any other fees that may make up the total cost to the customer of an online order.
- d. “Restaurant” means an Eating and Drinking Establishment, as that term is defined by Santa Monica Municipal Code Section 9.51.030(B)(8), in the City.
- e. “Third-party food delivery service” means any website, mobile application, or other internet service that offers or arranges for the sale of food and beverages prepared by, and the same- or next-day delivery or same- or next-day day pickup of food and beverages from, no fewer than five restaurants located in the City that are owned and operated by different persons.

9. It shall be unlawful for a third-party food delivery service to charge a restaurant (a) a delivery fee that totals more than 15% of the purchase price of each online order or (b) any fee or fees other than a delivery fee for the use of its service greater than 5% of the purchase price of each online order.

10. The Director of Emergency Services or designee may promulgate regulations to implement the provisions of Sections 8 and 9 of this Order. No person shall fail to comply with any such regulation.

11. Sections 8 and 9 of this Order and any regulations promulgated under Section 10 of this Order shall be enforceable as follows:

- a. By a restaurant injured by a third-party delivery service that charges fees in violation of this Order, provided that the restaurant issues notice to the third-party delivery service as required by this Subsection 11(a). If a third-party delivery service charges a restaurant a fee that violates Section 9 of this Order or any regulations promulgated under Section 10 of this Order, the restaurant shall provide written notice to the third-party food delivery service requesting a refund within seven days. If the third-party food delivery service does not provide the refund requested after seven days or the third-party food delivery service continues to charge fees in violation of this Order after the initial notice and seven-day cure period, a restaurant may enforce this Order by means of a civil action seeking damages and injunctive relief. The prevailing party in any such action shall be entitled to an award of reasonable attorney fees. For the purposes of clarity, the requirement of providing notice under this Subsection 11(a) does not apply to any enforcement action taken pursuant to Section 11(b) of this Order.

- b. By the Santa Monica Police Department and any City Officer or employee granted authority to issue written notices to appear pursuant to Santa Monica Municipal Code Section 3.36.090 as misdemeanors pursuant to Government Code Section 8665 and Santa Monica Municipal Code Section 2.16.100 or through the issuance of administrative citations in accordance with Chapter 1.09 of the Santa Monica Municipal Code. Pursuant to Section 1.09.040 of the Santa Monica Municipal Code, the amount of the fine for a violation of any provision of Sections 8 and 9, or any regulations issued under Section 10, of this Order shall not exceed a maximum of \$1,000 per violation. Each day or portion of a day that any person violates or continues to violate any provision of Sections 8 and 9, or any regulations issued under Section 10, of this Order constitutes a separate violation and may be charged and punished separately. Pursuant to Santa Monica Municipal Code 1.09.040(c), a late payment charge of 10% of the applicable fine shall be imposed for the payment of an administrative fine imposed pursuant to this Section after its due date.

12. The City Attorney may initiate an investigation to ascertain facts as may be necessary to bring an enforcement action pursuant to Section 11(b) of this Order and, in connection therewith, shall have the investigatory powers as provided in Santa Monica Municipal Code Section 2.32.040.

#### General Provisions

13. Sections 8 through 12 of this Order shall take effect at 12:01 a.m. on May 26, 2020, and shall remain in effect while the County Department of Public Health's Safer at Home Order, including any later amendments or successors thereto, is in place, unless extended or expressly superseded by a duly enacted Ordinance of the City Council or by a further Order by the Director of Emergency Services.

14. Sections 1 through 7 of this Order shall take effect immediately and shall remain in effect until June 30, 2020, unless extended or expressly superseded by a duly enacted Ordinance of the City Council or by a further Order by the Director of Emergency Services.

15. If any section, subsection, sentence, clause, or phrase of this Order is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Order. The Interim City Manager hereby declares that she would have issued this Executive Order, and any Supplement or Revised Supplement to this Executive Order, and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of the ordinance would be subsequently declared invalid or unconstitutional.

ADOPTED this 19th day of May 2020.

DocuSigned by:  
By: FEC6DBA8A0D3460  
LANE DILG  
Interim City Manager  
Director of Emergency Services

ATTEST:

DocuSigned by:  
Denise Anderson-Warren  
E2F85B056A714C3...  
DENISE ANDERSON-WARREN  
City Clerk

APPROVED AS TO FORM:

DocuSigned by:  
George S. Cardona  
ECB444B01A56432...  
GEORGE S. CARDONA  
Interim City Attorney

## **EXHIBIT 3**

**BEFORE A HEARING EXAMINER  
OF THE  
CITY OF SANTA MONICA**

**In the Matter of the Appeal of  
DOORDASH, INC.**

**HEARING OFFICER'S DECISION ON  
APPEAL OF ADMINISTRATIVE  
CITATION NOS. SM020001103,  
SM020001104, SM020001105,  
SM020001107, SM020001108,  
SM020001109, SM020001110,  
SM020001111**

Review by submission of written materials only

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**BACKGROUND**

On August 18, 2020, Samtavia Signor, a Code Enforcement Officer for the City of Santa Monica (the "City"), issued DoorDash, Inc. (the "Appellant") Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, SM020001111 (the "Administrative Citations") for violating Santa Monica Municipal Code ("SMMC") § 2.16.100 – Violating an Emergency Order (Business). (Exhibit 1, pp.3-18). The Administrative Citations listed the required corrective action as: "Immediately comply with the City's Emergency Order 16th Supplement Section 8, Subsection 9, by reducing your 'delivery fee' charge to no more than 15% and no more than 5% for all other fees. See City's Emergency Order 16th Supplement for as-applied definition of 'delivery fee.'" (*Id.*) Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, SM020001111 (the "Administrative Citations") assessed a total fine of \$11,500.00. (*Id.*)

On September 17, 2020, Appellant timely requested a review of the Administrative Citations and deposited the total fines assessed by the Administrative Citations. (Exhibit 1,

pp. 20-43). Appellant sought review by written materials only and submitted a one-page letter.<sup>1</sup> (Exhibit 1, p. 1; Exhibit 2). Appellant indicated that its basis for the Request for Review was that there was no violation as charged. (Exhibit 1, p.1). On November 6, 2020, the Hearing Officer advised Appellant that any additional documents it intended to submit in support of the Request for Review were due by November 16, 2020. (Exhibit 3). On November 6, 2020, Appellant sent an email to the Hearing Officer, attaching a copy of its one-page letter originally submitted on September 17, 2020. (Exhibit 4).

### EVIDENCE CONSIDERED

The following exhibits comprise the record in this case:

1. Request for Review of Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, SM020001111, dated September 17, 2020;
2. Letter from Appellant, dated September 17, 2020;
3. The Investigative Report of Maurice Cochee, and Attachments A through I, inclusive, dated November 5, 2020 (“Cochee Investigative Report”);
4. The Supplemental Investigative Report of Santavia Signor, including Attachment A, dated November 5, 2020 (“Signor Investigative Report”);
5. Letter from Hearing Officer, dated November 6, 2020, regarding additional documents;
6. Email from Appellant to Hearing Officer, dated November 6, 2020, attaching a one-page letter dated September 17, 2020.

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<sup>1</sup> SMMC § 1.09.060(e) provides that the recipient of an administrative citation may at the time of contesting the citation waive the right to a hearing and elect instead to have the administrative review based exclusively on written materials submitted to the Hearing Officer.

Administrative notice is taken of the Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency and the Santa Monica Municipal Code (“SMMC”) as referenced below.<sup>2</sup>

## **RELEVANT LAW**

### COVID-19 Emergency Orders

On March 4, 2020, the Governor of the State of California declared a state of emergency in response to an outbreak of respiratory disease caused by a novel coronavirus commonly abbreviated as COVID-19. That same day, the Los Angeles County Board of Supervisors and the Los Angeles Department of Public Health declared a local emergency to aid the regional community in responding to COVID-19. On March 13, 2020, the President of the United States of America declared a national emergency in response to COVID-19. Also, on March 13, 2020, 2020, the City of Santa Monica’s Manager, in his role as Director of Emergency Services, proclaimed the existence of a local emergency pursuant to Chapter 2.16 of the SMMC.

Chapter 2.16 of the SMMC states:

The declared purposes of this chapter are to provide for the preparation and carrying out of plans for the protection of persons and property within this City in the event of an emergency; the direction of the emergency organization; and the coordination of the emergency functions of this City with all other public agencies, corporations, organizations, and affected private persons.

In the event of the proclamation of a local or state emergency, the Director is “empowered to...[m]ake and issue rules and regulations on matters reasonably related to the protection of life and property as affected by such emergency...” SMMC § 2.16.060(f).

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<sup>2</sup> The Santa Monica Municipal Code is found at <http://www.qcode.us/codes/santamonica/>. Reference to code sections are to the SMMC unless otherwise noted.



From March 14, 2020 through May 15, 2020, the Director of Emergency Services issued fifteen supplements to the Executive Order. On May 19, 2020, the Director of Emergency Services issued the Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency (“Sixteenth Supplement”), which imposed a 15% cap on delivery fees and a 5% cap on other fees charged to restaurants by third-party food delivery companies. (Exhibit 3, Attachment B). Per the Sixteenth Supplement:

It shall be unlawful for a third-party food delivery service to charge a restaurant (a) a delivery fee that totals more than 15% of the purchase price of each online order or (b) any fee or fees other than a delivery fee for the use of its service greater than 5% of the purchase price of each online order.

*(Id.)*

The Sixteenth Supplement defines a “delivery fee” as “a fee charged by a third-party food delivery service for providing a restaurant with a service that delivers food from such restaurants to customers in the City.” *(Id.)* It goes on to state: “The term does *not* include any other fee that may be charged by a third-party food delivery service to a restaurant, *such as fees for listing or advertising the restaurant* on the third-party food delivery service platform or fees related to processing the online order.” *(Id.)* (Emphasis added).

One of the manners in which the Sixteenth Supplement shall be enforceable is “through the issuance of administrative citations in accordance with Chapter 1.09 of the Santa Monica Municipal Code.” The amount of the fine for a violation of the Sixteenth Supplement was not exceed a maximum of \$1,000 per violation.

## ANALYSIS

### Summary of Evidence

SMMC Section 1.09.090(e) provides that the administrative citation and any additional report submitted by City staff shall constitute prima facie evidence of the respective facts

contained in those documents. Due process considerations allow the person seeking review of the citation to offer evidence or argument to refute the City's prima facie evidence.

The Investigative Report of Maurice Cochee details the events that led to the issuance of Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, SM020001111. (*See* Exhibit 3). On July 1, 2020, at approximately 9:00 a.m., Code Enforcement Supervisor Maurice Cochee received a call from Erika Saito, the owner of Sushi King, a restaurant located at 1330 Wilshire Boulevard in Santa Monica. (*Id.* at p. 1). Ms. Saito expressed concern that Appellant was violating the City's Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency, which outlined restrictions on delivery service fees. According to Ms. Saito, Appellant was charging her a 20% delivery fee. Ms. Saito forwarded to Mr. Cochee email correspondence between her and Appellant, including an Excel spreadsheet outlining the fees incurred from Ms. Saito's orders between June 23, 2020 and June 28, 2020. (*See* Exhibit 3, Attachment C).

According to the emails submitted by Ms. Saito, on June 28, 2020, one of Appellant's employees asked Ms. Saito to provide documentation indicating that she could not be charged more than 15% on deliveries and 5% on pick up orders. (*Id.* at p. 31). On June 29, 2020, another DoorDash employee stated: "I have went ahead and submitted a request to our Account Development Team for commission negotiation." (*Id.* p. 27). Ms. Saito responded to this email by stating: "This is not to do with negotiation." (*Id.*). She explained that DoorDash "ha[d] to honor" the City of Santa Monica's Ordinance, and that she had been contacting DoorDash about this issue since June 24. (*Id.*). Ms. Saito stated her intention to contact City staff if DoorDash did not correct its action. (*Id.*).

A follow up email from a DoorDash employee, sent on June 30, 2020, which seems to be in response to a copy of the Sixteenth Supplement sent by Ms. Saito stated: "The document you sent is referring to Delivery fees, which is the fee the customer pays when ordering an item online and commission rate is a percentage of the pre-tax total that is paid to DoorDash for using

the services, usually based on area determinations.” (*Id.* at p. 26). Earlier on June 30, 2020, a different employee at DoorDash sent an email to Appellant, stating: “We have lowered the commission based on the order passed 5/31/20, to 20% for regular orders and 5% for pick up orders. Reimbursements will be sent out shortly.” (*Id.* at p. 29). On July 2, 2020, a DoorDash employee wrote: “Thank you for sending in that supporting documentation. We have the cap for all merchants in Santa Monica at 20%. The documentation you have provided shows 15%. I am currently in contact with the team that is handling caps.” (*Id.* at p. 35).

On July 6, 2020, Ms. Saito sent Mr. Cochee an email explaining that she had continued to be charged “a 20% delivery fee/commission” from June 29, 2020 to July 5, 2020 and included four excel spreadsheets separated out into cancelled deliveries, overview, adjustments and deliveries. (*Id.* at p. 3). Ms. Saito also explained that some of the charges were 5% because those orders were picked up by customers at the restaurants and not delivered, using the DoorDash platform that allows food for “pick up”. (*Id.*). On August 11, 2020, at Mr. Cochee’s request, Ms. Saito emailed Mr. Cochee transaction spreadsheets from DoorDash for various dates between June 26, 2020 through August 9, 2020. (*Id.* at Attachment F).

The City argues that based on the information provided by Ms. Saito and Appellant’s Terms of Services, Appellant violated the Sixteenth Supplement because its Terms of Services defines a “commission rate” as “the commission fees collected by DoorDash in exchange for promoting and featuring the Merchant and Merchant Store(s) on the DoorDash platform, which is charged as a percentage of revenues transacted on the DoorDash Platform.” (*See id.* at Attachment G). As a result, Mr. Cochee directed Code Enforcement Officer Samtavia Signor to issue Administrative Citations SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, and SM020001111 (the “Administrative Citations”) to Appellant for 23 violations of Santa Monica Municipal Code § 2.16.100 from June 26, 2020 through July 5, 2020. (*See* Exhibit 3, Attachment I). According to the Supplemental Investigative Report of Officer Signor, the Administrative Citations were mailed to Appellant’s mailing address as found on the California Secretary of State website. (Exhibit 4, p. 1).

Appellant DoorDash contends there was no violation as charged. (Exhibit 1, p. 1). In its appeal, Appellant states that it has reviewed the customer orders referenced in the citations and has discussed the matter with its contacts at Sushi King, and they have “resolved and agreed with Sushi King that going forward, a total commission of 20% will be applied to deliver orders placed with Sushi King while Santa Monica’s temporary cap is in place, which combines the 15% cap on delivery fees and the 5% cap on other fees that may be charged for additional services, such as listing the restaurant on our platform.” (Exhibit 2). Appellant appears to argue that it was not in violation of the Sixteenth Supplement because Santa Monica’s temporary cap “does anticipate that a total of 20% may be applied to delivery orders (up to 15% for the delivery fee and up to 5% for additional services,” and the customer orders that were subject of the Administrative Citations were subject to a 20% total fee.

### Discussion

It is a well settled rule of statutory interpretation that a statute must be construed so as to give effect and meaning, if possible, to every clause and word. *Souter v. The Sea Witch* (1850) 1 Cal. 162, 164. Here, Section 9 of the Sixteenth Supplement makes it “unlawful for a third-party food delivery service to charge a restaurant (a) a delivery fee that totals more than 15% of the purchase price of each online order or (b) any fee or fees other than a delivery fee for the use of its service greater than 5% of the purchase price of each online order.” (Exhibit 3, p. 12). Section 8(a) of the Sixteenth Supplement defines “delivery fee” as “a fee charged by a third-party food delivery service for providing a restaurant with a service that delivers food from such restaurants to customers in the City.” It expressly excludes from the definition of “delivery fee” “any other fee that may be charged by a third-party food delivery service to a restaurant, *such as fees for listing*

*or advertising the restaurant on the third-party food delivery service platform or fees related to processing the online order.” (Id. at p. 11) (Emphasis added).*

Appellant concedes that it charged Sushi King a “20% total fee” on the customer orders that are the subject of the Administrative Citations. (Exhibit 2). Appellant seems to argue that it was within its right to charge Sushi King an aggregate 20% fee because Santa Monica’s cap allows “a total of 20% [being] applied to delivery orders (up to 15% for the delivery fee and the 5% for additional services.)” (*Id.*) While Appellant is correct that those two types of fees, when combined, may make up a total of 20%; the Sixteenth Supplement places restrictions on two types of fees, one of which is defined in detail as a “delivery fee.” The evidence here does not support Appellant’s argument that 15% of its commission rate may be construed as a “delivery fee,” as defined in the Sixteenth Supplement.

First, in correspondence from Appellant’s employees to Sushi King, Appellant’s employees regularly refer to the fee being deducted from the customer orders as a “commission rate.” (*See* Exhibit 3, pp. 26, 27, 29, 36). One of Appellant’s own employees notes a distinction between a delivery fee and a commission rate, defining delivery fees as “the fee the customer pays when ordering an item online” while explaining that “a commission rate is a percentage of the pre-tax total that is paid to DoorDash for using the services, usually based on area determinations.” (*Id.* at p. 26).

This understanding is further supported by Appellant’s Terms of Use, which defines “Commission Rate” as “the commission fees collected by DoorDash in exchange for promoting and featuring the Merchant and Merchant store(s) on the DoorDash Platform, which is charged as a percentage of revenue transacted on the DoorDash

platform.” (*Id.* at p. 67). This definition would seem to fall squarely within the type of fee expressly excluded from the definition of “delivery fee” in the Sixteenth Supplement (i.e. “fees for listing or advertising the restaurant on the third-party food delivery service platform”).

Moreover, the 20% fee charged by Appellant on the customer orders subject to the Administrative Citations is labeled “commission” and not broken out into two or more fees, suggesting that Appellant did not view this fee as an aggregate of several fees. (*See id.* at pp. 33, 42, 45, 57-64). Simply because adding the two fee restrictions under the Sixteenth Supplement results in an aggregate fee of 20% does not mean that Appellant was entitled to charge Sushi King a 20% total fee, where Appellant has defined its commission fee as being in exchange for promoting and featuring a merchant. For the foregoing reasons, Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110 and SM020001111 for violations of Santa Monica Municipal Code Section 2.16.100 are factually and legally substantiated. The total fine of \$11,500.00 was appropriately determined.

### FINDINGS OF FACT

1. On June 26, 2020, Appellant charged Sushi King a 20% commission fee on four orders.
2. On June 27, 2020, Appellant charged Sushi King a 20% commission fee on two orders.
3. On June 28, 2020, Appellant charged Sushi King a 20% commission fee on two orders.
4. On June 30, 2020, Appellant charged Sushi King a 20% commission fee on two orders.
5. On July 1, 2020, Appellant charged Sushi King a 20% commission fee on four orders.
6. On July 2, 2020, Appellant charged Sushi King a 20% commission fee on four orders.

7. On July 3, 2020, Appellant charged Sushi King a 20% commission fee on two orders.
8. On July 5, 2020, Appellant charged Sushi King a 20% commission fee on three orders.
9. On August 18, 2020, Code Enforcement Officer Samtavia Signor issued Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110 and SM020001111 to Appellant DoorDash, Inc. for twenty-three counts of violating SMMC § 2.16.100.
10. On September 17, 2020, Appellant timely filed a Request for Review of Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110 and SM020001111.
11. Any Finding of Fact, which should more appropriately be deemed a Conclusion of Law, shall be a Conclusion of Law.

#### **CONCLUSIONS OF LAW**

1. The Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency made it unlawful for a third-party food delivery service to charge a restaurant (a) a delivery fee that totals more than 15% of the purchase price of each online order or (b) any fee or fees other than a delivery fee for the use of its service greater than 5% of the purchase price of each online order.
2. From June 26, 2020 through July 5, 2020, Appellant violated the Sixteenth Supplement, enacted pursuant to SMMC § 2.16.100, by charging Sushi King a 20% commission fee on twenty-three orders.
3. The total fine amount of \$11,500.00 for 23 violations of SMMC § 2.16.100 is affirmed.
4. Any Conclusion of Law, which should more appropriately be deemed a Finding of Fact, shall be a Finding of Fact.



**DECISION**

Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110 and SM020001111 are affirmed. The total \$11,500.00 fine for twenty-three violations of SMMC § 2.16.100 is affirmed. The City shall retain the \$11,500.00 fine deposit amount.

Dated: December 3, 2020

*Azadeh Gowharrizi*

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**AZADEH GOWHARRIZI**  
**Hearing Officer**

Pursuant to Santa Monica Municipal Code Section 1.16.010, Appellant is advised that this decision is reviewable pursuant to California Code of Civil Procedure Section 1094.5, and that the time within which Appellant must seek such review is governed by California Code of Civil Procedure Section 1094.6.

## **EXHIBIT 4**

**Shibumi Grubhub Payment Ledger: September 2020 to March 2021**

Restaurant	Type	Date	Time	Subtotal	Service	Delivery	Tax	Tip	Restaurant Total	Commission	Delivery Commission	Processing Fee	Withheld Tax	Non-Delivery Fee %	Total Fee %
Shibumi - S Hill St	Prepaid Order	9/4/2020	6:55 PM	\$ 68.00	\$ -	\$ -	\$ 6.97	\$ -	\$ 74.97	\$ 10.20	\$ 6.80	\$ 2.59	\$ -	18.81%	28.81%
Shibumi - S Hill St	Prepaid Order	9/4/2020	7:49 PM	\$ 52.00	\$ -	\$ -	\$ 5.33	\$ -	\$ 57.33	\$ 7.80	\$ -	\$ 2.05	\$ -	18.94%	18.94%
Shibumi - S Hill St	Prepaid Order	9/23/2020	6:15 PM	\$ 72.00	\$ -	\$ -	\$ 7.38	\$ -	\$ 79.38	\$ 3.60	\$ 10.80	\$ 2.72	\$ -	8.78%	23.78%
Shibumi - S Hill St	Prepaid Order	9/30/2020	6:30 PM	\$ 86.00	\$ -	\$ -	\$ 8.82	\$ -	\$ 94.82	\$ 4.30	\$ 12.90	\$ 3.19	\$ -	8.71%	23.71%
Shibumi - S Hill St	Prepaid Order	10/7/2020	6:15 PM	\$ 36.00	\$ -	\$ -	\$ 3.69	\$ -	\$ 39.69	\$ 1.80	\$ 5.40	\$ 1.51	\$ -	9.19%	24.19%
Shibumi - S Hill St	Prepaid Order	10/22/2020	7:25 PM	\$ 22.00	\$ -	\$ -	\$ 2.26	\$ -	\$ 24.26	\$ 1.10	\$ 3.30	\$ 1.04	\$ -	9.73%	24.73%
Shibumi - S Hill St	Prepaid Order	11/12/2020	6:40 PM	\$ 64.00	\$ -	\$ -	\$ 6.56	\$ -	\$ 70.56	\$ 3.20	\$ 9.60	\$ 2.45	\$ -	8.83%	23.83%
Shibumi - S Hill St	Prepaid Order	11/12/2020	8:00 PM	\$ 36.00	\$ -	\$ -	\$ 3.69	\$ -	\$ 39.69	\$ 1.80	\$ -	\$ 1.51	\$ -	9.19%	9.19%
Shibumi - S Hill St	Prepaid Order	11/19/2020	6:38 PM	\$ 84.00	\$ -	\$ -	\$ 8.61	\$ -	\$ 92.61	\$ 4.20	\$ 12.60	\$ 3.12	\$ -	8.71%	23.71%
Shibumi - S Hill St	Prepaid Order	11/21/2020	7:57 PM	\$ 22.00	\$ -	\$ -	\$ 2.26	\$ -	\$ 24.26	\$ 1.10	\$ -	\$ 1.04	\$ -	9.73%	9.73%
Shibumi - S Hill St	Prepaid Order	12/10/2020	7:56 PM	\$ 24.00	\$ -	\$ -	\$ 2.46	\$ 1.32	\$ 27.78	\$ 1.20	\$ -	\$ 1.15	\$ -	9.79%	9.79%
Shibumi - S Hill St	Prepaid Order	12/11/2020	8:20 PM	\$ 22.00	\$ -	\$ -	\$ 2.26	\$ -	\$ 24.26	\$ 1.10	\$ 3.30	\$ 1.04	\$ -	9.73%	24.73%
Shibumi - S Hill St	Prepaid Order	12/12/2020	7:05 PM	\$ 99.00	\$ -	\$ -	\$ 10.15	\$ -	\$ 109.15	\$ 4.95	\$ 14.85	\$ 3.63	\$ -	8.67%	23.67%
Shibumi - S Hill St	Prepaid Order	12/19/2020	7:30 PM	\$ 40.00	\$ -	\$ -	\$ 4.10	\$ -	\$ 44.10	\$ 2.00	\$ 6.00	\$ 1.65	\$ -	9.13%	24.13%
Shibumi - S Hill St	Prepaid Order	1/28/2021	7:25 PM	\$ 87.00	\$ -	\$ -	\$ 8.92	\$ -	\$ 95.92	\$ 4.35	\$ -	\$ 3.23	\$ -	8.71%	8.71%
Shibumi - S Hill St	Prepaid Order	2/5/2021	6:30 PM	\$ 28.00	\$ -	\$ -	\$ 2.87	\$ -	\$ 30.87	\$ 1.40	\$ 4.20	\$ 1.24	\$ -	9.43%	24.43%
Shibumi - S Hill St	Prepaid Order	2/11/2021	6:20 PM	\$ 33.00	\$ -	\$ -	\$ 3.38	\$ -	\$ 36.38	\$ 1.65	\$ 4.95	\$ 1.41	\$ -	9.27%	24.27%
Shibumi - S Hill St	Prepaid Order	2/24/2021	6:15 PM	\$ 28.00	\$ -	\$ -	\$ 2.87	\$ -	\$ 30.87	\$ 1.40	\$ 4.20	\$ 1.24	\$ -	9.43%	24.43%
Shibumi - S Hill St	Prepaid Order	2/26/2021	6:30 PM	\$ 33.00	\$ -	\$ -	\$ 3.38	\$ -	\$ 36.38	\$ 1.65	\$ 4.95	\$ 1.41	\$ -	9.27%	24.27%
Shibumi - S Hill St	Prepaid Order	2/26/2021	6:30 PM	\$ 28.00	\$ -	\$ -	\$ 2.87	\$ -	\$ 30.87	\$ 1.40	\$ 4.20	\$ 1.24	\$ -	9.43%	24.43%
Shibumi - S Hill St	Prepaid Order	2/27/2021	7:15 PM	\$ 54.00	\$ -	\$ -	\$ 5.54	\$ -	\$ 59.54	\$ 2.70	\$ 8.10	\$ 2.12	\$ -	8.93%	23.93%
Shibumi - S Hill St	Prepaid Order	3/5/2021	6:37 PM	\$ 79.00	\$ -	\$ -	\$ 8.10	\$ -	\$ 87.10	\$ 3.95	\$ 11.85	\$ 2.96	\$ -	8.75%	23.75%
Shibumi - S Hill St	Prepaid Order	3/5/2021	7:44 PM	\$ 51.00	\$ -	\$ -	\$ 5.23	\$ -	\$ 56.23	\$ 2.55	\$ 7.65	\$ 2.02	\$ -	8.96%	23.96%
Shibumi - S Hill St	Prepaid Order	3/12/2021	7:14 PM	\$ 28.00	\$ -	\$ -	\$ 2.87	\$ 4.63	\$ 35.50	\$ 1.40	\$ -	\$ 1.38	\$ -	9.93%	9.93%
Shibumi - S Hill St	Prepaid Order	3/18/2021	7:26 PM	\$ 26.00	\$ -	\$ -	\$ 2.67	\$ 4.30	\$ 32.97	\$ 1.30	\$ -	\$ 1.31	\$ -	10.04%	10.04%
Shibumi - S Hill St	Prepaid Order	3/18/2021	7:41 PM	\$ 26.00	\$ -	\$ -	\$ 2.67	\$ -	\$ 28.67	\$ 1.30	\$ -	\$ 1.17	\$ -	9.50%	9.50%

## **EXHIBIT 5**



JOSEPH+GUGLIELMO

+ Via Overnight Mail +

March 19, 2021

Matt Maloney  
Chief Executive Officer  
Grubhub, Inc.  
111 W. Washington St., Suite 2100  
Chicago, IL 60602

**Re: Notice and Demand Pursuant to Chapter XX, Article 6  
of the Los Angeles Municipal Code**

Dear Mr. Maloney:

We represent Nueva and Shibumi ("Plaintiffs"), two restaurants in the City of Los Angeles that use Grubhub, Inc.'s ("Grubhub") food delivery platform. We are hereby notifying Grubhub, on behalf of Plaintiffs and other similarly situated Retail Food Establishments, pursuant to Chapter XX, Article 6 of the Los Angeles Municipal Code ("L.A.M.C."), that Grubhub has violated L.A.M.C. §200.71(1)-(6) and demand that Grubhub refund such amounts charged in excess of the amounts set forth in L.A.M.C. §200.71 and take other, necessary curative actions. To the extent Grubhub does not refund Plaintiffs and other similarly situated Retail Food Establishments, Plaintiffs intend to file an action in California Superior Court and pursue claims pursuant to L.A.M.C. §200.73 and Cal. Civ. Code §17200, *et seq.* (the "California Unfair Competition Law" or "UCL") against Grubhub on behalf of themselves and all other similarly situated Retail Food Establishments in the City of Los Angeles. Plaintiffs further intend to seek restitution and injunctive relief, pursuant to L.A.M.C. §200.73 and UCL, unless Grubhub agrees, within 15 days, to take all of the corrective actions demanded herein.

Plaintiffs hereby notify Grubhub that its conduct and actions, as described herein, violate L.A.M.C. §200.71 and constitute unlawful and unfair business acts and practices under the UCL. From June 10, 2020 until the present (the "Relevant Time Period"),<sup>1</sup> Grubhub has charged and continues to charge Plaintiffs and other similarly situated Retail Food Establishments unlawful and excessive delivery fees for each Online Order it fulfills. Under the express terms of L.A.M.C. §200.71,<sup>2</sup> it is unlawful for a "Third-party Food Delivery Service to charge a Retail Food Establishment any combination of fees, commissions, or costs for the Retail Food Establishment's use of the Third-party Food Delivery Service that is greater than 5 percent of the Purchase Price of each Online Order." L.A.M.C. §200.71(3). Importantly, "Fees, commissions, or costs do not include Delivery Fee." Despite this specific prohibition on excessive fees, commissions, and costs, Grubhub has routinely charged Plaintiffs non-delivery fees in excess of 5%, in violation of the L.A.M.C. and UCL. Plaintiffs also are informed and believe that Grubhub charges restaurants in the City of Los Angeles, including Shibumi, fees in excess of the combined 20% hard cap on delivery fees, commissions, costs, and other fees imposed by Chapter XX, Article 6 of the Los Angeles Municipal Code.

---

<sup>1</sup> The first effective date of Chapter XX, Article 6 of the Los Angeles Municipal Code was June 10, 2020. It was renewed on October 16, 2020.

<sup>2</sup> A true and correct copy of Chapter XX, Article 6 of the Los Angeles Municipal Code is attached hereto as Exhibit A.

Matt Maloney  
Chief Executive Officer  
March 19, 2021  
Page 2

L.A.M.C. §200.73 states, in pertinent part, that a violation of Chapter XX, Article 6 shall subject the violator to the following:

1. An action in the Superior Court of the State of California to recover all actual damages resulting from a violation of this article.
2. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails in an action against a Third-party Food Delivery Service. If plaintiff fails to prevail against a Third-party Food Delivery Service, a court may award reasonable attorneys' fees and costs to the Third-party Food Delivery Service upon a determination by the court that the plaintiff's action was frivolous.
3. A civil action alleging a violation of any provision of this article shall commence only after the following requirements have been met:
  - a. Written notice is provided to the Third-party Food Delivery Service of the provisions of the article alleged to have been violated and the facts to support the alleged violation; and
  - b. The Third-party Food Delivery Service is provided 15 days from the date of the written notice to cure any alleged violation.
4. The remedies in Subsections 200.73 1. through 3. are non-exclusive. A violation of this article is unlawful and may be prosecuted under state and City law, including, but not limited to, Section 396 of the California Penal Code or Section 47.12 of the Los Angeles Municipal Code.

As a direct and proximate result of Grubhub's unlawful and unfair acts and practices, Plaintiffs and similarly situated Retail Food Establishments were substantially overcharged for each Online Order and have been injured thereby. Pursuant to L.A.M.C. §200.73(3), Plaintiffs, on behalf of themselves and all similarly situated Retail Food Establishments in the City of Los Angeles, hereby demand that Grubhub immediately correct and rectify its violations, as described herein. Specifically, Plaintiffs demand that Grubhub undertake all of the following actions:

1. Immediately refund Plaintiffs and all Retail Food Establishments in the City of Los Angeles all non-delivery fees, commissions, and costs paid to Grubhub in excess of 5% of the Purchase Price of each Online Order, from June 10, 2020 through the present;
2. Immediately refund Plaintiffs and all Retail Food Establishments in the City of Los Angeles all fees, commissions, and costs paid to Grubhub in excess of 20% of the Purchase Price of each Online Order, from June 10, 2020 through the present;
3. Immediately cease and desist from Grubhub's present unlawful and unfair business practice of charging Retail Food Establishments in the City of Los Angeles non-delivery fees, commissions, and costs in excess of 5% of the Purchase Price of each Online Order and agree not to engage in such practices and instead comply with applicable law;
4. Immediately engage in a corrective advertising campaign to inform Retail Food Establishments in the City of Los Angeles that Grubhub engaged in the unlawful and unfair business practice of charging Los Angeles Retail Food Establishments non-delivery fees, commissions, and costs in excess of 5% of the Purchase Price of each Online Order; and
5. Pay Plaintiffs' counsel's attorney's fees and costs associated with the claim.

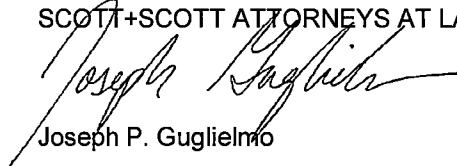
Matt Maloney  
Chief Executive Officer  
March 19, 2021  
Page 3

If Grubhub refuses to perform any of the above items immediately, it should state why it is unwilling or unable to do so. Plaintiffs intend to file an action and seek appropriate restitutionary and injunctive relief if Grubhub does not provide a full and adequate response to this letter showing compliance within 15 days. In the interim, Plaintiffs demand that Grubhub and its representatives take action to preserve all potentially relevant documents, evidence, writings, written and recorded information and "ESI" (electronically stored information) and to prevent the intentional or accidental deletion or spoliation of any evidence that in any manner relates to the allegations raised in this letter.<sup>3</sup>

Should you have any questions regarding this matter or wish to discuss or resolve Plaintiffs' claims, and those of similarly situated consumers, please have your attorney contact me.

Very truly yours,

SCOTT+SCOTT ATTORNEYS AT LAW LLP

A handwritten signature in black ink, appearing to read "Joseph P. Guglielmo", is written over the printed name.

Joseph P. Guglielmo

Encl.

---

<sup>3</sup> The ESI to be preserved includes, but is not limited to, all "writings" as defined by California Evidence Code section 250, which states: "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.



## **EXHIBIT A**

## ARTICLE 6

### LIMIT ON THIRD-PARTY FOOD DELIVERY SERVICE FEES

(Added by Ord. No. 186,790, Eff. 10/16/20.)

Section	
200.70	Definitions.
200.71	Prohibitions.
200.72	Disclosures.
200.73	Enforcement.
200.74	Operative Dates.
200.75	Severability.

#### SEC. 200.70. DEFINITIONS.

For purposes of this ordinance, the following definitions apply:

1. **"City"** means the City of Los Angeles.
2. **"Delivery Fee"** means a fee charged by a Third-party Food Delivery Service for providing a Retail Food Establishment with a service that delivers food and beverages from such establishment to customers. The term does not include any other fee or cost that may be charged by a Third-party Food Delivery Service to a Retail Food Establishment, such as fees for listing or advertising the Retail Food Establishment on the Third-party Food Delivery Service platform or fees related to processing the Online Order, including, but not limited to, service fees, fees for facilitating Online Orders for pick-up, and credit card processing fees.
3. **"Online Order"** means an order placed by a customer through or with the assistance of a platform provided by a Third-party Food Delivery Service, including a telephone order, for delivery or pick-up within the City.
4. **"Purchase Price"** means the price, as listed on the menu, for the items contained in an Online Order, minus any applicable coupon or promotional discount provided to the customer by the Retail Food Establishment through the Third-Party Food Delivery Service. This definition does not include taxes, gratuities, and any other fees or costs that may make up the total amount charged to the customer of an Online Order.
5. **"Retail Food Establishment"** means a restaurant, delicatessen, bakery, coffee shop, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat food or beverages.
6. **"Third-party Food Delivery Service"** means any website, mobile application, or other internet service that offers or arranges for the sale of food and beverages prepared by, and the delivery or pick-up of food and beverages from, no fewer than 20 Retail Food Establishments located in the City that are each owned and operated by different persons.

#### SEC. 200.71. PROHIBITIONS.

1. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment a Delivery Fee that totals more than 15 percent of the Purchase Price of each Online Order.
2. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any amount designated as a Delivery Fee for an Online Order that does not involve the delivery of food or beverages.
3. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any combination of fees, commissions, or costs for the Retail Food Establishment's use of the Third-party Food Delivery Service that is greater than 5 percent of the Purchase Price of each Online Order. Fees, commissions, or costs do not include Delivery Fee.
4. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any fee, commission, or cost other than as permitted in Subsections 1. through 3., above.
5. It shall be unlawful for a Third-party Food Delivery Service to charge a customer any Purchase Price for a food or beverage item that is higher than the price set by the Retail Food Establishment on the Third-party Food Delivery Service or, if no price is set by the Retail Food Establishment on the Third-party Food Delivery Service, the price listed on the Retail Food Establishment's own menu.
6. It shall be unlawful for a Third-party Food Delivery service to retain any portion of amounts designated as a tip or gratuity. Any tip or gratuity shall be paid by the Third-party Delivery Service, in its entirety, to the person delivering the food or beverages.

**SEC. 200.72. DISCLOSURES.**

The Third-party Food Delivery Service shall disclose to the customer an accurate, clearly identified, and itemized cost breakdown of each transaction, including, but not limited to, the following:

- (a) the Purchase Price of the food and beverages at the cost listed on the Retail Food Establishment's menu;
- (b) the Delivery Fee charged to the Retail Food Establishment;
- (c) each fee, commission, or cost, other than a Delivery Fee, charged to the Retail Food Establishment;
- (d) each fee, commission, or cost, other than the Delivery Fee or the Purchase Price of the food, charged to the customer by the Third-party Food Delivery Service; and
- (e) any tip or gratuity that will be paid to the person delivering the food or beverages.

**SEC. 200.73. ENFORCEMENT.**

A violation of this article shall subject the violator to the following:

- 1. An action in the Superior Court of the State of California to recover all actual damages resulting from a violation of this article.
- 2. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails in an action against a Third-party Food Delivery Service. If plaintiff fails to prevail against a Third-party Food Delivery Service, a court may award reasonable attorneys' fees and costs to the Third-party Food Delivery Service upon a determination by the court that the plaintiff's action was frivolous.
- 3. A civil action alleging a violation of any provision of this article shall commence only after the following requirements have been met:
  - (a) Written notice is provided to the Third-party Food Delivery Service of the provisions of the article alleged to have been violated and the facts to support the alleged violation; and
  - (b) The Third-party Food Delivery Service is provided 15 days from the date of the written notice to cure any alleged violation.
- 4. The remedies in Subsections 200.73 1. through 3. are non-exclusive. A violation of this article is unlawful and may be prosecuted under state and City law, including, but not limited to, Section 396 of the California Penal Code or Section 47.12 of the Los Angeles Municipal Code.

**SEC. 200.74. OPERATIVE DATES.**

This article shall be operative at any time during which a federal, state, or local order, resulting from the COVID-19 pandemic, limits customer capacity to less than full capacity at Retail Food Establishments in the City of Los Angeles, and for a period of 90 days after any such federal, state, or local order is lifted.

**SEC. 200.75. SEVERABILITY.**

If any subsection, sentence, clause or phrase of this article is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this article. The City Council hereby declares that it would have adopted this article and each and every subsection, sentence, clause, and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the article would be subsequently declared invalid or unconstitutional.

# **EXHIBIT C**

**COPY**

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*Counsel for Plaintiff Za-Zen Enterprises, LLC  
dba Shibumi*

**CONFORMED COPY  
ORIGINAL FILED**  
Superior Court of California  
County of Los Angeles

**APR 12 2021**

Sheri R. Carter, Executive Officer/Clerk of Court  
By: Tanya Herrera, Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

ZA-ZEN ENTERPRISES, LLC dba SHIBUMI,  
Individually and on Behalf of All Others  
Similarly Situated,

Plaintiff,

vs.

GRUBHUB INC.; and DOES 1 through 100,  
Defendants.

Case No. **21STCV13874**

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

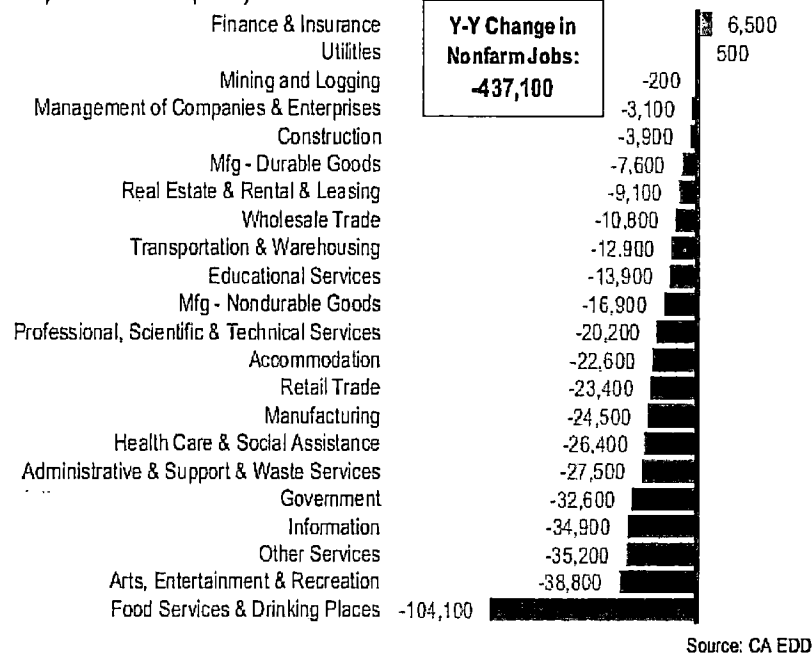
Plaintiff Za-Zen Enterprises, LLC dba Shibumi (“Shibumi” or “Plaintiff”) brings this complaint on behalf of itself and all other similarly situated restaurants in the City of Los Angeles (the “Class”), against Defendants Grubhub Inc. (“Grubhub”) and DOES 1 through 100 (Grubhub and DOES 1 through 100 are collectively referred to herein as “Defendants”), alleging as follows upon information and belief and investigation of counsel, except as to the allegations specifically pertaining to Plaintiff, which are based on personal knowledge:

### INTRODUCTION

1. This case challenges Grubhub’s unlawful and unfair conduct directed towards the hospitality industry of Los Angeles, whereby Grubhub overcharged Plaintiff and the Class fees for the use of its technology platform.

2. The COVID-19 pandemic has devastated the economy of Los Angeles County – 716,000 jobs were lost in March and April 2020, and unemployment reached 21.1 percent by May 2020. No business sector in Los Angeles County has been hit harder by COVID-19 than hospitality.<sup>1</sup> Restaurants

**Year-Over-Year Change in Jobs by Industry  
September 2020 (NSA)**



<sup>1</sup> LA County Department of Workforce Development, Aging and Community Services, *Pathways for Economic Resiliency: Los Angeles County 2021-2026*, at 4.

1 and drinking establishments lost 104,100 jobs by September 2020, far outpacing any other sector.<sup>2</sup>

2 3. The hospitality industry is not expected to recover anytime soon. The Los Angeles  
3 County Department of Workforce Development, Aging and Community Services (“WDACS”) projects  
4 124,300 lost jobs in accommodation and food services between 2019 and 2022.<sup>3</sup>

5 4. Despite COVID-19’s impact, not all industries have fared so badly. Technology  
6 companies, particularly those without brick-and-mortar stores, have benefitted from people working and  
7 staying at home during the COVID-19 pandemic. According to the Brookings Institute, “the COVID-19  
8 recession has crushed certain industries—those that depend on the movement of people—while leaving  
9 others relatively unscathed—those that depend on the movement of information.”<sup>4</sup>

10 5. Some of the biggest beneficiaries of the work-from-home economy are the four major  
11 third-party food delivery platforms, DoorDash, Inc. (“DoorDash”), Uber Technology, Inc. (“Uber  
12 Eats”), Postmates, Inc. (“Postmates”) and Grubhub (collectively, the “Delivery Platforms”). Together,  
13 these four platforms generated approximately \$5.5 billion in combined revenue from April through  
14 September 2020, more than double their combined revenue during the same period in 2019.<sup>5</sup> According  
15 to Grubhub’s 2020 Form 10-K, COVID-19 was a key driver of its year-over-year revenue growth:

16 Compared to 2019, our revenues increased by \$507.8 million, or 39%, to \$1.8 billion for  
17 the year ended December 31, 2020. The increase was primarily related to a 26% increase  
18 in Daily Average Grubs and a 16% higher average order size. Daily Average Grubs  
19 increased to 622,700 during the year ended December 31, 2020 from 492,300 during  
20 2019 driven by improved diner retention and frequency as well as significant growth in  
21 Active Diners, which increased from 22.6 million to 31.4 million at the end of each year.  
22 The growth in Active Diners and Daily Average Grubs was primarily as a result of  
23 increased product and brand awareness by diners largely driven by accelerated adoption  
24 of online food ordering as a result of COVID-19, marketing efforts and word-of-mouth  
25 referrals, better restaurant choices for diners in our markets and technology and product  
26 improvements. The higher average order size was primarily driven by changing diner  
27 behavior as a result of COVID-19 including family or group orders.”<sup>6</sup>

24 <sup>2</sup> *Id.*

25 <sup>3</sup> *Id.* at 5.

26 <sup>4</sup> <https://www.brookings.edu/research/explaining-the-economic-impact-of-covid-19-core-industries-and-the-hispanic-workforce/>

27 <sup>5</sup> <https://www.marketwatch.com/story/the-pandemic-has-more-than-doubled-americans-use-of-food-delivery-apps-but-that-doesnt-mean-the-companies-are-making-money-11606340169>

28 <sup>6</sup> Grubhub Inc., Annual Report (Form 10-K) (Dec. 31, 2020) (“Form 10-K”), at 28, available at: [https://www.sec.gov/ix?doc=/Archives/edgar/data/1594109/000156459021009522/grub-10k\\_20201231.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1594109/000156459021009522/grub-10k_20201231.htm).



1           6.       The Delivery Platforms' spike in business was fueled by stay-at-home orders that gave  
2 retail food establishments no reasonable alternative to the Delivery Platforms. Because in-person dining  
3 has been prohibited at various points during the pandemic, the Delivery Platforms provided restaurants  
4 with an alternative to selling their food and beverages to remain in business during the pandemic.

5           7.       Restaurants quickly realized that the benefits of third-party delivery services came at a  
6 price. The Delivery Platforms charged restaurants steep fees and commissions for every order, usually  
7 around 30 percent of the order price. Restaurants had no meaningful bargaining power to negotiate  
8 lower fees and commissions. The Delivery Platforms' fees and commissions wiped out profits for many  
9 restaurants, which were already operating on thin margins prior to the pandemic.

10          8.       When State and local lawmakers became aware of this problem, they took steps to level  
11 the playing field. Legislatures in a number of cities, including Chicago, Massachusetts, San Francisco,  
12 Los Angeles, Portland, New York City, and Washington all instituted temporary caps on food delivery  
13 fees for restaurants, typically around 15 percent of the order price.

14          9.       In Los Angeles, the City Council introduced Ordinance No. 186665 ("Ordinance"). The  
15 Ordinance makes it unlawful for third-party food delivery services to charge restaurants in the City of  
16 Los Angeles a delivery fee that totals more than 15 percent of the purchase price of each online order.

17          10.       The Ordinance also makes it unlawful for third-party food delivery services to charge  
18 restaurants any combination of fees, commissions, or costs for the restaurant's use of the third-party  
19 food delivery service that is greater than 5 percent of the purchase price of each online order.  
20 Importantly, fees, commissions, or costs are not included in the delivery fee. The Ordinance further  
21 prohibits third-party food delivery services from charging restaurants in the City of Los Angeles any  
22 combination of fees, commissions, or costs (including delivery fees) that exceed 20 percent of the  
23 purchase price of each online order.

24          11.       The Ordinance was passed by the Los Angeles City Council on May 20, 2020. It was  
25 approved as to form and legality by the Los Angeles City Attorney on May 26, 2020, and then certified  
26 by the City Clerk on June 3, 2020. The Ordinance was signed into law by the Mayor of Los Angeles on  
27 June 5, 2020, with an effective date of June 10, 2020. The Ordinance was added to the COVID-19  
28

1 Protection and Recovery Chapter (Chapter XX) of the Los Angeles Municipal Code, as Article 6 (the  
2 “COVID-19 Fee Cap”). The first COVID-19 Fee Cap was set to expire on August 31, 2020.

3 12. On August 14, 2020, the Chief Legislative Analyst (“CLA”) of the City of Los Angeles  
4 presented a report to the City Council regarding the impact of the COVID-19 Fee Cap (the “Report”).<sup>7</sup>

5 13. According to the Report, on July 9, 2020, almost a month after the COVID-19 Fee Cap  
6 went into effect, the restaurant industry blog, Eater.com, published a story stating that numerous  
7 restaurants in the City of Los Angeles were being charged more than what was permissible under the  
8 COVID-19 Fee Cap. In order to better understand the impact of the COVID-19 Fee Cap on the City’s  
9 restaurant industry, the CLA enlisted the assistance of the City’s Economic and Workforce Development  
10 Department to create a survey. The purpose of the survey was to “query restaurants on their awareness  
11 of the [COVID-19 Fee Cap] and their experience with third-party food delivery companies.”<sup>8</sup>

12 14. Incredibly, the survey results showed that the Delivery Platforms were largely ignoring  
13 the COVID-19 Fee Cap: 72.9 percent of restaurants reported being charged more than the 15 percent  
14 Delivery Fee; 55.9 percent of restaurants reported being charged more than the 5 percent Additional  
15 Benefits Fee; 72.9 percent of restaurants reported that the COVID-19 Fee Cap was beneficial during  
16 COVID-19; and 94.9 percent of restaurants wanted the COVID-19 Fee Cap to be extended past August  
17 31, 2020.<sup>9</sup> Additionally, “*most restaurants* reported being overcharged by third-party food delivery  
18 companies that are *failing or refusing to comply* with the [COVID-19 Fee Cap].”<sup>10</sup>

19 15. Plaintiff brings this action on behalf of itself and the Class that have been unlawfully and  
20 unfairly charged fees and costs in excess of the COVID-19 Fee Cap by Defendants, during the Class  
21 Period (defined in ¶52, *infra*).

22 16. Plaintiff seeks public injunctive relief and restitution on behalf of itself and the Class,  
23 resulting from Defendants’ unfair and unlawful conduct, which violates California Business &  
24 Professions Code §17200, *et seq.*, and Chapter XX, Article 6, of the Los Angeles Municipal Code.

26 <sup>7</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_rpt\\_CLA\\_08-14-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_rpt_CLA_08-14-2020.pdf).

27 <sup>8</sup> *Id.* at 3.

28 <sup>9</sup> *Id.*

<sup>10</sup> *Id.* [emphasis added].

17. Plaintiff further seeks a public injunction under California's Unfair Competition Law (Bus. & Prof. Code §17200, *et seq.*) ("UCL") for the benefit of restaurants in the City of Los Angeles, their employees, customers, and all members of the general public who are impacted by Defendants' unlawful and unfair business practices.

#### **JURISDICTION AND VENUE**

18. This Court has jurisdiction over all causes of action asserted herein pursuant to the California Constitution, Article VI, Section 10, because this case is a cause not given by statute to other trial courts. This Court also has jurisdiction pursuant to Business & Professions Code §§17203 and 17204, which allow enforcement in any Court of competent jurisdiction.

19. This Court has jurisdiction over Defendants because each of them is a corporation or other entity that has sufficient minimum contacts in California, is a citizen of California, or otherwise intentionally avails itself of the California market, either through the distribution, sale, or marketing of its products and services in the State of California, or by having a facility located in California so as to render the exercise of jurisdiction over it by the California courts consistent with traditional notions of fair play and substantial justice.

20. Venue is proper in this Court because the actions at issue occurred in Los Angeles County. Venue is also proper in this Court under California Bus. & Prof. Code section 17203 and Code of Civil Procedure sections 395(a) and 395.5 because Defendants do business in the State of California and in the County of Los Angeles. Plaintiff's business also operates in Los Angeles County. The unlawful acts alleged occurred within Los Angeles County and have a direct effect on Plaintiff and others similarly situated within the City of Los Angeles.

#### **PARTIES**

21. Plaintiff Shibumi is a California Limited Liability Company. Shibumi is a highly acclaimed, Michelin-star Japanese restaurant located in the heart of downtown Los Angeles. Shibumi is a "Retail Food Establishment" within the meaning of the COVID-19 Fee Cap.

22. Defendant Grubhub is a publicly-traded Delaware corporation. Its principal place of business is located in Chicago, Illinois. Grubhub holds itself out as a "leading online and mobile platform for restaurant pick-up and delivery orders" which "connects more than 300,000

1 restaurants...with hungry diners in thousands of cities across the United States” with a focus on  
2 “transforming the takeout experience.”<sup>11</sup>

3 23. DOES 1 through 100 are persons or entities whose true names and capacities are  
4 presently unknown to Plaintiff, and who therefore are sued by such fictitious names. Plaintiff is  
5 informed and believes, and on that basis alleges, that each of the fictitiously-named defendants  
6 perpetrated some or all of the wrongful acts alleged herein and is responsible, in some manner, for the  
7 matters alleged herein. Each fictitiously named defendant is a “Third-party Food Delivery Service”  
8 within the meaning of the COVID-19 Fee Cap. Plaintiff will amend this Complaint to state the true  
9 names and capacities of such fictitiously-named defendants when ascertained.

### 10 **FACTUAL BACKGROUND**

#### 11 **A. Grubhub Charges Delivery Fees to Consumers, Not Retail Food Establishments.**

12 24. Grubhub’s Terms of Use state that it “is not a restaurant or food preparation entity.”<sup>12</sup>  
13 Rather, it is a “virtual marketplace Platform that connects hungry diners with third-party service  
14 providers, including local restaurants and independent delivery service providers.”<sup>13</sup> Grubhub is also  
15 “not a delivery company or a common carrier...[its] deliveries are provided by Grubhub’s network of  
16 independent delivery service providers” called “Delivery Partners.”<sup>14</sup> A consumer ordering through  
17 Grubhub can pick up their order from a restaurant or have it delivered by a Delivery Partner. For this  
18 service, Grubhub charges both parties to the transaction (the restaurant and the consumer) an assortment  
19 of fees and costs. Grubhub charges consumers a delivery fee, while it charges restaurants commissions  
20 and other fees and costs. This is illustrated by the following graphic that Grubhub included in its  
21 February 5, 2020 Shareholder Letter, which is based on actual (redacted) Grubhub consumer receipts:<sup>15</sup>

22  
23  
24  
25 <sup>11</sup> Form 10-K, at 28.

26 <sup>12</sup> Grubhub Terms of Use (Effective December 14, 2020), available at:  
<https://www.Grubhub.com/legal/terms-of-use>.

27 <sup>13</sup> *Id.*

28 <sup>14</sup> *Id.*

<sup>15</sup> Grubhub Shareholder Letter (February 5, 2020), available at:  
[https://www.sec.gov/Archives/edgar/data/0001594109/000156459020003495/grub-ex992\\_91.htm](https://www.sec.gov/Archives/edgar/data/0001594109/000156459020003495/grub-ex992_91.htm)

Partnered Independent Restaurant Order	Partnered QSR Restaurant Order	Non-Partnered Restaurant Order
<p>Cancel      Review order</p> <p>Your order</p> <p>Estimated delivery: 25-35 mins</p> <p>1 Chicken Wings, Regular, Grilled, Buffalo S... \$9.65</p> <p>1 Reuben, Mac and Cheese \$14.20</p> <p>1 Side Salad, With Ranch Dressing On The... \$2.20</p> <p>Subtotal \$26.05</p> <p>Delivery fee \$2.49</p> <p>Driver tip \$5.00</p> <p>Tax and fees 0 \$4.19</p> <p>Total \$37.73</p> <p>Place your order \$37.73</p> <p>By placing your order, you agree to Grubhub's terms of use and privacy agreement</p>	<p>Cancel      Review order</p> <p>Your order</p> <p>Estimated delivery: 25-35 mins</p> <p>3 Chicken Breast, Spicy \$10.47</p> <p>1 Onion Rings , 12 Piece \$4.99</p> <p>Subtotal \$15.46</p> <p>Delivery fee \$1.99</p> <p>Driver tip \$3.00</p> <p>Tax and fees 0 \$4.31</p> <p>Total \$24.76</p> <p>Place your order \$24.76</p> <p>By placing your order, you agree to Grubhub's terms of use and privacy agreement</p>	<p>Cancel      Review order</p> <p>Your order</p> <p>Estimated delivery: 60-70 mins</p> <p>1 Chicken Breast Kebabs \$11.65</p> <p>1 Tuna Salad \$8.95</p> <p>1 Eggplant Dip &amp; Pita \$5.95</p> <p>Subtotal \$26.55</p> <p>Delivery fee \$5.99</p> <p>Driver tip \$5.00</p> <p>Tax and fees 0 \$9.90</p> <p>Total \$47.74</p> <p>Place your order \$47.74</p> <p>By placing your order, you agree to Grubhub's terms of use and privacy agreement</p>

Commission from restaurant	\$6 - \$8	\$2 - \$4	\$0
Delivery & service fee from diner	\$4	\$5	\$11
<b>Grubhub revenue</b>	<b>\$11</b>	<b>\$8</b>	<b>\$11</b>
Credit card & care contact costs	\$1	\$1	\$2
Delivery costs	\$6	\$7	\$8
<b>Variable order costs</b>	<b>\$7</b>	<b>\$8</b>	<b>\$10</b>
<b>Contribution profit per order</b>	<b>\$4</b>	<b>\$0</b>	<b>\$1</b>

25. The itemized payment reports Grubhub provides to restaurants include columns showing charges for "Commission," "Delivery Commission," "Processing Fee," and "Targeted Promotion." In its Restaurant Terms,<sup>16</sup> Grubhub collectively refers to these charges as "Commissions."

**Payment Terms** In consideration for Restaurant's access to the applicable Systems and Services, Restaurant will pay to [Grubhub] the commissions and other fees set forth in the Services Form (collectively, the "Commissions").

#### B. The COVID-19 Fee Cap was Enacted for Public Benefit.

26. On April 22, 2020, Mitch O'Farrell, Councilmember for Los Angeles' 13th District, introduced a motion ("Motion") to curb runaway fees and costs charged to retail food establishments by third-party food delivery services, including Defendants.<sup>17</sup> The Motion was seconded by Paul Krekorian, Councilmember for Los Angeles' 2nd District. It stated, in pertinent part:

Third-party food delivery companies such as Grubhub, Uber Eats, DoorDash, and Postmates provide residents with delivery from local restaurants. However, these companies charge restaurants commissions that can reach 30 percent, potentially wiping out any profit that a local business might make from a delivery order. With an increasing amount of food delivery business being performed through online third-party services, restaurants must comply with these companies' steep fees or risk losing customers.

<sup>16</sup> Grubhub Restaurant Terms (October 15, 2018), available at: <https://get.Grubhub.com/legal/restaurant-terms>.

<sup>17</sup> [https://clkrep.lacity.org/onlinedocs/2020/20-0470\\_mot\\_04-22-2020.pdf](https://clkrep.lacity.org/onlinedocs/2020/20-0470_mot_04-22-2020.pdf).

1 The COVID-19 pandemic has forced profound changes on the way residents and  
 2 businesses access food. As of April 16, 2020, the virus has accounted for 10,496  
 3 identified cases and 402 deaths in Los Angeles County. On March 4, 2020, Mayor Eric  
 4 Garcetti declared a local public health emergency in response to increased spread of  
 COVID-19 across the country. To slow the proliferation of the virus, on March 19, 2020,  
 Governor Gavin Newsom issued a Stay-at-Home order that forced residents to stay  
 sheltered in place outside of essential needs.

5 Among other restrictions, the Stay-at-Home order barred restaurants from dine-in service,  
 6 compelling numerous local food preparation businesses to either close or convert to  
 7 delivery-only service. With fewer available options for the purchase and sale of meals,  
 8 food delivery has become an even more essential service for residents and restaurants.  
 Local businesses already in peril of financial collapse due to the COVID-19 pandemic are  
 now reliant on food delivery companies that are charging exorbitant rates to get their food  
 to customers.

9 ...

10 Countless Los Angeles restaurants are in danger of closing due to the COVID-19  
 11 pandemic, and the exorbitant rates charged by third-party food delivery companies  
 12 provide an additional unnecessary obstacle during this profoundly difficult international  
 emergency. Swift action is required to protect our local businesses and residents from  
 economic catastrophe.

13 I THEREFORE MOVE that the Council request the City Attorney to prepare and present  
 14 an Ordinance that will make it unlawful for a third-party food delivery service to charge a  
 15 restaurant a fee per online order for the use of its services that totals more than 15 percent  
 of the purchase price of such online order during the local public health emergency  
 related to COVID-19 as declared by the Mayor.

16 27. During a public comment period, O'Farrell's Motion received support from groups  
 17 representing a broad spectrum of public interests impacted by the Delivery Platforms. The Motion was  
 18 supported by restaurant owners and operators, the Independent Hospitality Coalition, the City of South  
 19 Pasadena, the Hollywood Chamber of Commerce, UFCW Local 770, and Teamsters Local Union No.  
 20 396, among others.<sup>18</sup>

21 28. On May 21, 2020, 14 out of 15 City Councilmembers voted to approve the Motion as  
 22 amended and referred it to the Economic Development Committee ("EDC") for consideration. One  
 23 Councilmember was absent and did not vote.<sup>19</sup>

24 29. On May 26, 2020, the City Attorney prepared a draft ordinance to establish a temporary  
 25 limit on the charges imposed by third-party delivery services on retail food establishments and submitted  
 26 it to the City Council.<sup>20</sup>

27 <sup>18</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_pc\\_052020b.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_pc_052020b.pdf).

28 <sup>19</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_CAF\\_05-21-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_CAF_05-21-2020.pdf).



30. On May 28, 2020, the EDC considered the draft ordinance and provided an opportunity for public comment. After discussion, the EDC unanimously approved the draft ordinance and forwarded it to the City Council.<sup>21</sup>

31. On June 3, 2020, 14 out of 15 City Councilmembers voted to adopt the draft ordinance and EDC report. One Councilmember was absent and did not vote.<sup>22</sup>

32. The draft ordinance and EDC report were approved by Mayor Eric Garcetti on June 5, 2020. The draft ordinance was made into Ordinance No. 186665.<sup>23</sup> It was published on June 10, 2020 and made effective the same day.<sup>24</sup>

33. Ordinance No. 186665, which was added to the Los Angeles Municipal Code as Chapter XX, Article 6, included the following pertinent provisions:<sup>25</sup>

**SEC. 200.70. DEFINITIONS.**

For purposes of this ordinance, the following definitions apply:

1. "City" means the City of Los Angeles.
2. "Delivery Fee" means a fee charged by a Third-party Food Delivery Service for providing a Retail Food Establishment with a service that delivers food and beverages from such establishment to customers. The term does not include any other fee or cost that may be charged by a Third-party Food Delivery Service to a Retail Food Establishment, such as fees for listing or advertising the Retail Food Establishment on the Third-party Food Delivery Service platform or fees related to processing the Online Order, including, but not limited to, service fees, fees for facilitating Online Orders for pick-up, and credit card processing fees.
3. "Online Order" means an order placed by a customer through or with the assistance of a platform provided by a Third-party Food Delivery Service, including a telephone order, for delivery or pick-up within the City.
4. "Purchase Price" means the price, as listed on the menu, for the items contained in an Online Order, minus any applicable coupon or promotional discount provided to the customer by the Retail Food Establishment through the Third-Party Food Delivery Service. This definition does not include taxes, gratuities, and any other

<sup>20</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_rpt\\_ATT\\_05-26-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_rpt_ATT_05-26-2020.pdf).

<sup>21</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_rpt\\_edc\\_5-28-20.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_rpt_edc_5-28-20.pdf).

<sup>22</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_CAF\\_06-08-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_CAF_06-08-2020.pdf).

<sup>23</sup> *Id.*

<sup>24</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_ORD\\_186665\\_06-10-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_ORD_186665_06-10-2020.pdf).

<sup>25</sup> A true and correct copy of the COVID-19 Fee Cap is attached hereto as Exhibit 1.



1 fees or costs that may make up the total amount charged to the customer of an  
2 Online Order.

- 3 5. "Retail Food Establishment" means a restaurant, delicatessen, bakery, coffee  
4 shop, or other eat-in or carry-out service of processed or prepared raw and ready-  
5 to-eat food or beverages.
- 6 6. "Third-party Food Delivery Service" means any website, mobile application, or  
7 other internet service that offers or arranges for the sale of food and beverages  
8 prepared by, and the delivery or pick-up of food and beverages from, no fewer  
9 than 20 Retail Food Establishments located in the City that are each owned and  
10 operated by different persons.

#### 11 **SEC. 200.71. PROHIBITIONS.**

- 12 1. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail  
13 Food Establishment a Delivery Fee that totals more than 15 percent of the  
14 Purchase Price of each Online Order.
- 15 2. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail  
16 Food Establishment any amount designated as a Delivery Fee for an Online Order  
17 that does not involve the delivery of food or beverages.
- 18 3. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail  
19 Food Establishment any combination of fees, commissions, or costs for the Retail  
20 Food Establishment's use of the Third-party Food Delivery Service that is greater  
21 than 5 percent of the Purchase Price of each Online Order. Fees, commissions, or  
22 costs do not include Delivery Fee.
- 23 4. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail  
24 Food Establishment any fee, commission, or cost other than as permitted in  
25 Subsections 1. through 3., above.

#### 26 **SEC. 200.73. ENFORCEMENT.**

27 A violation of this article shall subject the violator to the following:

- 28 1. An action in the Superior Court of the State of California to recover all actual  
damages resulting from a violation of this article.
2. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails  
in an action against a Third-party Food Delivery Service. If plaintiff fails to  
prevail against a Third-party Food Delivery Service, a court may award  
reasonable attorneys' fees and costs to the Third-party Food Delivery Service  
upon a determination by the court that the plaintiff's action was frivolous.
3. A civil action alleging a violation of any provision of this article shall commence  
only after the following requirements have been met:

1 a. Written notice is provided to the Third-party Food Delivery Service of the  
2 provisions of the article alleged to have been violated and the facts to  
3 support the alleged violation; and

4 b. The Third-party Food Delivery Service is provided 15 days from the date  
5 of the written notice to cure any alleged violation.

6 4. The remedies in Subsections 200.73 1. through 3. are non-exclusive. A violation  
7 of this article is unlawful and may be prosecuted under state and City law,  
8 including, but not limited to, Section 396 of the California Penal Code or Section  
9 47.12 of the Los Angeles Municipal Code.

10 34. The COVID-19 Fee Cap was extended by way of Ordinance No. 186790, which was  
11 made effective on October 19, 2020. The COVID-19 Fee Cap has been continuously in effect from June  
12 10, 2020 through the present.<sup>26</sup>

13 **C. The Santa Monica Code Enforcement Action and Appeal.**

14 35. On May 19, 2020, the Director of Emergency Services for the City of Santa Monica  
15 issued the Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring  
16 the Existence of a Local Emergency, based on the COVID-19 pandemic ("Sixteenth Supplement").<sup>27</sup>  
17 The Sixteenth Supplement includes a 15 percent cap on delivery fees and a 5 percent cap on other fees  
18 charged to restaurants by third-party food delivery companies, like the COVID-19 Fee Cap. It states, in  
19 pertinent part:

20 It shall be unlawful for a third-party food delivery service to charge a restaurant (a) a  
21 delivery fee that totals more than 15% of the purchase price of each online order or (b)  
22 any fee or fees other than a delivery fee for the use of its service greater than 5% of the  
23 purchase price of each online order.

24 36. The Sixteenth Supplement defines a "delivery fee" as "a fee charged by a third-party food  
25 delivery service for providing a restaurant with a service that delivers food from such restaurants to  
26 customers in the City." It also states: "The term does not include any other fee that may be charged by a  
27 third-party food delivery service to a restaurant, such as fees for listing or advertising the restaurant on  
28 the third-party food delivery service platform or fees related to processing the online order."

<sup>26</sup> [https://clkrep.lacity.org/online/docs/2020/20-0470\\_ORD\\_186790\\_10-16-2020.pdf](https://clkrep.lacity.org/online/docs/2020/20-0470_ORD_186790_10-16-2020.pdf).

<sup>27</sup> A true and correct copy of the Sixteenth Supplement is attached hereto as Exhibit 2.

1           37. On July 1, 2020, a City of Santa Monica Code Enforcement Supervisor received a call  
 2 from the owner of a Santa Monica restaurant. The restaurant owner was concerned that DoorDash was  
 3 violating the Sixteenth Supplement by charging her restaurant a 20 percent delivery fee on its orders.  
 4 She forwarded the Code Enforcement Supervisor email correspondence between her and DoorDash,  
 5 including an Excel spreadsheet outlining the fees incurred from the restaurant's orders between June 23,  
 6 2020 and June 28, 2020.<sup>28</sup>

7           38. The email correspondence showed a disagreement between the restaurant owner and a  
 8 DoorDash representative about how to interpret the Sixteenth Supplement. Upon receiving a copy of the  
 9 Sixteenth Supplement from the restaurant owner, a DoorDash employee wrote back and stated: "The  
 10 document you sent is referring to *Delivery fees, which is the fee the customer pays* when ordering an  
 11 item online and *commission rate is a percentage of the pre-tax total that is paid to DoorDash for using*  
 12 *the services*, usually based on area determinations."<sup>29</sup>

13           39. Based on the information provided by the restaurant owner and DoorDash's Terms of  
 14 Service, the City of Santa Monica determined that DoorDash violated the Sixteenth Supplement because  
 15 DoorDash's Terms of Services define a "commission rate" as "the commission fees collected by  
 16 DoorDash in exchange for promoting and featuring the Merchant and Merchant Store(s) on the DoorDash  
 17 platform, which is charged as a percentage of revenues transacted on the DoorDash Platform." The Code  
 18 Enforcement Supervisor directed a Code Enforcement Officer to issue eight Administrative Citations to  
 19 DoorDash for 23 violations of Santa Monica Municipal Code §2.16.100, from June 26, 2020 through July  
 20 5, 2020, and assessed a total fine of \$11,500.00.<sup>30</sup> On September 17, 2020, DoorDash timely requested  
 21 review of the Administrative Citations.<sup>31</sup>

22           40. On appeal, DoorDash argued there was no violation, "because Santa Monica's temporary  
 23 cap 'does anticipate that a total of 20% may be applied to delivery orders (up to 15% for the delivery fee  
 24

25 <sup>28</sup> See a true and correct copy of the December 3, 2020 Hearing Officer's Decision on Appeal of  
 26 Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107,  
 SM020001108, SM020001109, SM020001110, and SM020001111, at 5, which is attached hereto as  
 Exhibit 3.

27 <sup>29</sup> *Id.* at 5-6 [emphasis added].

28 <sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 1.

1 and up to 5% for additional services,' and the customer orders that were subject of the Administrative  
2 Citations were subject to a 20% total fee."<sup>32</sup>

3 41. The presiding Hearing Officer rejected DoorDash's argument, citing well-settled  
4 California law on statutory interpretation. DoorDash's own employees referred to DoorDash's  
5 restaurant fee as a "commission rate." One of DoorDash's employees also stated that delivery fees are  
6 paid by customers, while the commission rate is a percentage of the pre-tax total that is paid by  
7 restaurants for using DoorDash services.<sup>33</sup>

8 42. The Hearing Officer also relied on the definition of "Commission Rate" in DoorDash's  
9 Terms of Use (quoted in ¶39, *supra*). The Hearing Officer stated that the "Commission Rate" definition  
10 "would seem to fall squarely within the type of fee expressly excluded from the definition of 'delivery  
11 fee' in the Sixteenth Supplement (i.e. 'fees for listing or advertising the restaurant on the third-party food  
12 delivery service platform')."<sup>34</sup>

13 43. The Hearing Officer concluded her analysis by stating:

14 [T]he 20% fee charged by Appellant on the customer orders subject to the Administrative  
15 Citations is labeled 'commission' and not broken out into two or more fees, suggesting  
16 that [DoorDash] did not view this fee as an aggregate of several fees. Simply because  
17 adding the two fee restrictions under the Sixteenth Supplement results in an aggregate fee  
of 20% does not mean that [DoorDash] was entitled to charge [the restaurant] a 20% total  
fee, where [DoorDash] has defined its commission fee as being in exchange for  
promoting and featuring a merchant.<sup>35</sup>

18 **D. Shibumi's Agreement with Grubhub.**

19 44. Shibumi entered into an agreement with Grubhub on or about December 1, 2020  
20 ("Shibumi Agreement"). The monthly account statements Grubhub provided to Shibumi state that  
21 Shibumi pays 15 percent commission on delivery orders, and an additional 5 percent for marketing  
22 services on standard orders. But these rates are not consistent with the commissions and fees Grubhub  
23 retained, as detailed on the same account statements.

24 45. On September 4, 2020, Shibumi received one Marketplace order and one Partner order  
25 through the Grubhub platform. The subtotal of the Marketplace order was \$68.00. Grubhub charged

26 <sup>32</sup> *Id.* at 7.

27 <sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* at 7-8.

28 <sup>35</sup> *Id.* at 9.

1 \$10.20 for Marketing, \$6.80 for Delivery, and \$2.59 for Processing.<sup>36</sup> Grubhub's total charges to  
 2 Shibumi amount to 28.8 percent of the subtotal, which exceeds the maximum 20 percent of combined  
 3 fees under the COVID-19 Fee Cap. The Marketing and Processing fees alone amounted to 18.8 percent  
 4 of the subtotal. Had Grubhub charged Shibumi the maximum 5 percent fee on non-delivery charges  
 5 under the COVID-19 Fee Cap, the Marketing and Processing fees would have been no more than \$3.40.

6 46. The subtotal of the Partner order was \$52.00. Grubhub charged Shibumi \$7.80 for  
 7 Marketing and \$2.05 for Processing, which amounts to 18.9 percent on a pickup order. Grubhub should  
 8 have charged Shibumi a maximum 5 percent fee on this order under the COVID-19 Fee Cap, which  
 9 amounts to \$2.60.<sup>37</sup>

10 47. For each Grubhub pick-up order between September 2020 and the present, Shibumi was  
 11 charged commissions and fees that exceeded the five percent cap on non-delivery fees. For each  
 12 Grubhub delivery order between September 2020 and the present, Shibumi was charged commissions  
 13 and fees that exceeded the twenty percent combined cap on delivery and non-delivery fees under the  
 14 COVID-19 Fee Cap.

15 48. Shibumi is informed and believes that Grubhub also charged the Class (as defined below)  
 16 commissions and fees in relation to the Purchase Price that exceeded the five percent cap on non-  
 17 delivery fees and the twenty percent combined cap on delivery and non-delivery fees under the COVID-  
 18 19 Fee Cap for each Online Order, in violation of Section 200.71(3) of the COVID-19 Fee Cap. The  
 19 non-delivery commissions and fees charged to Shibumi and the Class are unfair and unlawful as they  
 20 exceed the maximum 5 percent fee for non-delivery fees and the combined 20 percent maximum fee on  
 21 the Purchase Price for each Online Order.

22 49. On March 19, 2021, pursuant to Section 200.73(3) of the COVID-19 Fee Cap, Shibumi  
 23 provided written notice to Grubhub that its commissions and fees violate the COVID-19 Fee Cap.  
 24 Shibumi requested that Grubhub provide a refund for itself and the Class for all non-delivery  
 25 commissions and fees charged in excess of the maximum 5 percent fee for non-delivery fees and the  
 26

27 <sup>36</sup> A true and correct copy of an Excel spreadsheet showing Grubhub's payments to Shibumi during  
 the Class Period is attached hereto as Exhibit 4.

28 <sup>37</sup> *Id.*

1 combined 20 percent maximum fee on the Purchase Price for each Online Order. More than fifteen days  
2 have elapsed and no corrective action has been taken by Grubhub.<sup>38</sup>

### 3 CLASS ACTION ALLEGATIONS

4 50. Plaintiff and the Class have suffered injury-in-fact as a result of Grubhub charging non-  
5 delivery commissions and fees that exceed the maximum 5 percent fee for non-delivery fees and the  
6 combined 20 percent maximum fee on the Purchase Price for each Online Order allowed under Section  
7 200.71(3) of the COVID-19 Fee Cap.

8 51. Grubhub has charged Plaintiff and the Class (as defined below) these unlawful  
9 commissions and fees from June 10, 2020 until the present (the “Class Period”).

10 52. Plaintiff brings this lawsuit on behalf of itself and other similarly-situated restaurants in  
11 the City of Los Angeles, pursuant to the Code of Civil Procedure §382. Subject to additional  
12 information obtained through further investigation and/or discovery, Plaintiff brings this lawsuit on  
13 behalf of the following proposed Class:

14 All restaurants in the City of Los Angeles who Grubhub charged: (a) non-delivery commissions  
15 and fees that exceed the maximum 5 percent of the Purchase Price of each Online Order, or (b)  
16 combined delivery fees and non-delivery fees and commissions that exceed 20 percent of the  
17 Purchase Price of each Online Order during the Class Period (the “Class”).

18 53. Excluded from the Class is Defendants, their subsidiaries and affiliates, their officers,  
19 directors, and members of their immediate families and any entity in which any Defendant has a  
20 controlling interest, the legal representative, heirs, successors, or assigns of any such excluded party, the  
21 judicial officer(s) to whom this action is assigned, and the members of their immediate families and  
22 judicial staff.

23 54. Plaintiff reserves the right, under California Rules of Court, Rule 3.765(b) and other  
24 applicable law, to amend or modify the Class definitions. Plaintiff is the Named Representative and is a  
25 member of the Class. Plaintiff seeks class-wide recovery based on the allegations set forth in this  
26 Complaint. The Court can define the Class and create additional subclasses as may be necessary or

27 <sup>38</sup> A true and correct copy of the written notice Shibumi provided to Grubhub is attached as Exhibit  
28 5.

1 desirable to adjudicate common issues and claims of the members of the Class, if necessary, based on  
2 discovery of additional facts.

3 55. **Ascertainability.** The members of the Class are readily ascertainable from Defendants'  
4 business records during the Class Period, and the specific transactions, terms, and parties identified  
5 therein.

6 56. **Numerosity.** The Class described above is so numerous that joinder of all individual  
7 members in one action would be impracticable. The disposition of the individual claims of the  
8 respective class members through this class action will benefit both the parties and this Court. The exact  
9 size of the Class and the identities of the individual members thereof are ascertainable through  
10 Defendants' records, but based on public information, the Class includes hundreds of restaurants.

11 57. **Existence and Predominance of Common Questions of Law and Fact.** There is a  
12 well-defined community of interest and there are common questions of fact and law affecting members  
13 of the Class. All members of the Class have been subject to the same unlawful conduct and their claims  
14 are based on violations by Defendants of the COVID-19 Fee Cap. The questions of fact and law  
15 common to the Class predominate over questions which may affect individual members and include the  
16 following:

- 17 a. The nature, scope, and operations of Defendants' unlawful practices;
- 18 b. Whether Defendants engaged in a course of unfair and unlawful conduct with  
19 respect to their food delivery fees;
- 20 c. Whether Defendants' business practices were unfair under the UCL;
- 21 d. Whether Defendants knew or should have known that their business practices  
22 were unfair and unlawful and violated the COVID-19 Fee Cap and the UCL;
- 23 e. Whether Plaintiff and the other members of the Class are entitled to damages and  
24 restitution to redress Defendants' wrongful conduct, and the amount of such  
25 damages and restitution; and
- 26 f. Whether Plaintiff and the Class are entitled to injunctive relief to redress the  
27 imminent and currently ongoing harm faced as a result of Defendants' wrongful  
28 conduct.





1           62. Prior to filing this action, Shibumi provided Defendants notice of their unlawful conduct  
2 and requested refunds on behalf of itself and the Class. More than fifteen days have elapsed and no  
3 corrective action has been taken by Defendants.

4           63. Shibumi is a "Retail Food Establishment" within the meaning of Section 200.71 of the  
5 COVID-19 Fee Cap.

6           64. Each Defendant is a "Third-party Food Delivery Service" within the meaning of Section  
7 200.71 of the COVID-19 Fee Cap.

8           65. Section 200.71(1) of the COVID-19 Fee Cap states, "[i]t shall be unlawful for a Third-  
9 party Food Delivery Service to charge a Retail Food Establishment a Delivery Fee that totals more than  
10 15 percent of the Purchase Price of each Online Order." Section 200.71(3) of the COVID-19 Fee Cap  
11 states, "[i]t shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food  
12 Establishment any combination of fees, commissions, or costs for the Retail Food Establishment's use  
13 of the Third-party Food Delivery Service that is greater than 5 percent of the Purchase Price of each  
14 Online Order. Fees, commissions, or costs do not include Delivery." Thus, the total combination of  
15 delivery and non-delivery fees charged to a restaurant may not exceed 20 percent of each Online Order.

16           66. Section 200.71(2) of the COVID-19 Fee Cap states, "[i]t shall be unlawful for a Third-  
17 party Food Delivery Service to charge a Retail Food Establishment any amount designated as a  
18 Delivery Fee for an Online Order that does not involve the delivery of food or beverages."

19           67. Section 200.73(1) of the COVID-19 Fee Cap provides a private right of action by a  
20 Retail Food Establishment injured by a Third-Party Food Delivery Service that charges fees in violation  
21 of the COVID-19 Fee Cap, provided that the Retail Food Establishment issues notice to the Third-party  
22 Food Delivery Service as required by Section 200.73(3). Plaintiff has complied with the notice and  
23 cure provisions of Section 200.73(3), and Defendants have not provided refunds to Plaintiff and the  
24 Class as requested after fifteen days.

25           68. Defendants violated and continue to violate Section 200.71(3) of the COVID-19 Fee Cap  
26 by charging Plaintiff and the Class non-delivery fees and commissions greater than the 5 percent of the  
27 Purchase Price of each Online Order allowed by the COVID-19 Fee Cap. Defendants violated and  
28 continue to violate the COVID-19 Fee Cap by charging Plaintiff and the Class total fees and

1 commissions greater than the 20 percent of the Purchase Price of each Online Order allowed by the  
2 COVID-19 Fee Cap.

3 69. Defendants violated and continue to violate Section 200.71(2) of the COVID-19 Fee Cap  
4 by charging Plaintiff and the Class "Delivery Commissions," which, on information and belief, amount  
5 to a commission that does not involve the delivery of food or beverages.

6 70. Plaintiff and the Class are the types of businesses the COVID-19 Fee Cap was designed  
7 to protect, and the harm that occurred is the type of harm that the COVID-19 Fee Cap was meant to  
8 guard against.

9 71. As a direct result of Defendants' violations of the COVID-19 Fee Cap, Plaintiff and the  
10 Class have been injured as described herein, and are entitled to damages and injunctive relief according  
11 to proof.

12 Wherefore, Plaintiff prays for judgment against Defendants, as set forth hereafter.

13 **SECOND CAUSE OF ACTION**  
14 **VIOLATIONS OF CALIFORNIA'S UNFAIR COMPETITION LAW BASED ON**  
15 **COMMISSION OF UNLAWFUL ACTS**  
**(Alleged by Plaintiff and the Class against all Defendants)**

16 72. Plaintiff restates and realleges all preceding factual allegations above as if fully set forth  
17 herein.

18 73. The violation of any law constitutes an unlawful business practice under Cal. Bus. &  
19 Prof. Code §17200.

20 74. Plaintiff and each Defendant is a "person" as that term is defined by Cal. Bus. & Prof.  
21 Code §17201.

22 75. Defendants violated the UCL's prohibition against engaging in unlawful acts and  
23 practices by, inter alia, routinely charging Shibumi and the Class non-delivery fees and commissions  
24 greater than the maximum 5 percent fee, and by charging fees and commissions greater than the  
25 combined 20 percent maximum fee on the Purchase Price for each Online Order during the Class  
26 Period. Defendants also violated the UCL's prohibition against engaging in unlawful acts and practices  
27 by, inter alia, routinely charging Shibumi and the Class non-delivery fees and commissions greater than  
28 the maximum 5 percent fee, and by charging fees and commissions greater than the combined 20

1 percent maximum fee on the Purchase Price for each Online Order during the Class Period. In doing  
2 so, Defendants violated the COVID-19 Fee Cap and thus engaged in unlawful business practices.

3 76. Plaintiff and the Class each suffered actual monetary injury and ascertainable loss and  
4 are entitled to equitable and other such relief the Court considers necessary and proper resulting from  
5 Defendants' conduct of charging fees and commissions in excess of the amount allowed by law.  
6 Plaintiff and the Class have thus suffered injury-in-fact and lost money or property as a direct result of  
7 Defendants' unlawful business practices.

8 77. An action for injunctive relief and restitution is specifically authorized under Cal. Bus. &  
9 Prof. Code §17203.

10 Wherefore, Plaintiff prays for judgment against Defendants, as set forth hereafter.

11 **THIRD CAUSE OF ACTION**  
12 **VIOLATIONS OF CALIFORNIA'S UNFAIR COMPETITION LAW BASED ON**  
13 **COMMISSION OF UNFAIR ACTS**  
**(Alleged by Plaintiff and the Class against all Defendants)**

14 78. Plaintiff restates and realleges all preceding factual allegations above as if fully set forth  
15 herein.

16 79. Under the UCL, any business act or practice that is unethical, oppressive, unscrupulous,  
17 and/or substantially injurious to consumers, or that violates a legislatively declared policy, constitutes  
18 an unfair business act or practice.

19 80. Defendants have engaged and continue to engage in conduct which is immoral,  
20 unethical, oppressive, unscrupulous and substantially injurious to small businesses, their employees,  
21 and consumers who are forced to pay higher costs for food deliveries. By taking advantage of small  
22 businesses, their employees, and their consumers during a global pandemic, Defendants' conduct, as  
23 described herein, far outweighs the utility, if any, of such conduct.

24 81. The business practices describe herein are also "unfair" because they violate the  
25 legislatively declared policy of the City of Los Angeles, and offend public policy, particularly during a  
26 public health crisis. The COVID-19 Fee Cap and other laws like it were passed precisely because  
27 restaurants have limited bargaining power to negotiate lower commission fees with third-party food  
28

1 delivery services, and have no reasonable alternatives because take-out and delivery are the only  
2 options available while dining restrictions remain in place.

3 82. Defendants' conduct harmed competition. Defendants charged fees which exceeded the  
4 amount that was lawfully allowed to be charged. The injuries suffered by Plaintiff and the Class are not  
5 outweighed by any countervailing benefits to consumers or competition.

6 83. Plaintiff and the other members of the Class each suffered actual monetary injury and  
7 ascertainable loss and are entitled to equitable and other such relief the Court considers necessary and  
8 proper resulting from Defendants' unfair business practice of charging fees in excess of the amount  
9 allowed by law. Plaintiff and the Class have thus suffered injury-in-fact and lost money or property as  
10 a direct result of Defendants' unfair business practices.

11 84. An action for injunctive relief and restitution is specifically authorized under Cal. Bus. &  
12 Prof. Code §17203.

**FOURTH CAUSE OF ACTION**  
**DECLARATORY RELIEF**

**(Alleged by Plaintiff and the Class against all Defendants)**

15 85. Plaintiff restates and realleges all preceding factual allegations above as if fully set forth  
16 herein.

17 86. An actual controversy has arisen and now exists between Plaintiff, and the Class, on the  
18 one hand, and Defendants on the other hand. Plaintiff and the Class contend that Defendants violated  
19 and continue to violate the COVID-19 Fee Cap. A judicial determination of this issue, and of the  
20 respective duties of Plaintiff and the Class and Defendants, is necessary and appropriate under the  
21 circumstances because the COVID-19 Fee Cap was promulgated by the Los Angeles City Council,  
22 approved by the Los Angeles City Attorney as to form and legality, signed into law by the Mayor of  
23 City of Los Angeles, and added to the Los Angeles Municipal Code as Chapter XX, Article 6.

24 87. A judicial determination that Defendants violated the COVID-19 Fee Cap is necessary to  
25 ensure that Plaintiff and the Class are protected from the unlawful and unfair conduct of Defendants,  
26 because the City of Los Angeles has not instituted an enforcement scheme for the COVID-19 Fee Cap.  
27 This has allowed Defendants to flout the COVID-19 Fee Cap and continue to overcharge Plaintiff and  
28 the Class.

Wherefore, Plaintiff prays for judgment against Defendants, as set forth hereafter.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of itself and all others similarly situated, prays for relief as follows:

A. That this action be certified as a Class Action, Plaintiff be appointed as the representative of the Class, and Plaintiff's attorneys be appointed as Class counsel;

B. That Defendants' wrongful conduct alleged herein be adjudged and decreed to violate the laws alleged herein;

C. A temporary, preliminary, and/or permanent order for public injunctive relief requiring that Defendants: (i) cease charging Retail Food Establishments in the City of Los Angeles more than permitted by the COVID-19 Fee Cap; and (ii) institute corrective advertising and provide written notice to the public of its unlawful fees;

D. An order requiring imposition of a constructive trust and to pay damages and restitution to Plaintiff and all members of the Class and, also, to restore to Plaintiff and members of the Class all funds acquired by means of any act or practice declared by this Court to be an unlawful or unfair business act or practice, or in violation of laws, statutes, or regulations, or as constituting unfair competition;

E. Awarding costs necessary to perform accounting and/or administration costs for distribution of damages and restitution to the proposed Class;

F. Prejudgment and post judgment interest;

G. For actual damages and restitutionary relief in an amount according to proof;

H. Reasonable attorneys' fees and costs pursuant to the COVID-19 Fee Cap, Cal. Code of Civil Procedure §1021.5, the common fund doctrine, or any other appropriate legal theory;

I. Public injunctive relief prohibiting Defendants' unlawful and unfair practices as described herein, pursuant to Cal. Bus. & Prof. Code §17204; and

J. Awarding any and all other relief that this Court deems necessary, just, equitable, and proper.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury.

Dated: April 12, 2021

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dba Shibumi*



## **EXHIBIT 1**

## ARTICLE 6

### LIMIT ON THIRD-PARTY FOOD DELIVERY SERVICE FEES

(Added by Ord. No. 186,790, Eff. 10/16/20.)

Section
200.70 Definitions.
200.71 Prohibitions.
200.72 Disclosures.
200.73 Enforcement.
200.74 Operative Dates.
200.75 Severability.

#### SEC. 200.70. DEFINITIONS.

For purposes of this ordinance, the following definitions apply:

1. "City" means the City of Los Angeles.
2. "Delivery Fee" means a fee charged by a Third-party Food Delivery Service for providing a Retail Food Establishment with a service that delivers food and beverages from such establishment to customers. The term does not include any other fee or cost that may be charged by a Third-party Food Delivery Service to a Retail Food Establishment, such as fees for listing or advertising the Retail Food Establishment on the Third-party Food Delivery Service platform or fees related to processing the Online Order, including, but not limited to, service fees, fees for facilitating Online Orders for pick-up, and credit card processing fees.
3. "Online Order" means an order placed by a customer through or with the assistance of a platform provided by a Third-party Food Delivery Service, including a telephone order, for delivery or pick-up within the City.
4. "Purchase Price" means the price, as listed on the menu, for the items contained in an Online Order, minus any applicable coupon or promotional discount provided to the customer by the Retail Food Establishment through the Third-Party Food Delivery Service. This definition does not include taxes, gratuities, and any other fees or costs that may make up the total amount charged to the customer of an Online Order.
5. "Retail Food Establishment" means a restaurant, delicatessen, bakery, coffee shop, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat food or beverages.
6. "Third-party Food Delivery Service" means any website, mobile application, or other internet service that offers or arranges for the sale of food and beverages prepared by, and the delivery or pick-up of food and beverages from, no fewer than 20 Retail Food Establishments located in the City that are each owned and operated by different persons.

#### SEC. 200.71. PROHIBITIONS.

1. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment a Delivery Fee that totals more than 15 percent of the Purchase Price of each Online Order.
2. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any amount designated as a Delivery Fee for an Online Order that does not involve the delivery of food or beverages.
3. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any combination of fees, commissions, or costs for the Retail Food Establishment's use of the Third-party Food Delivery Service that is greater than 5 percent of the Purchase Price of each Online Order. Fees, commissions, or costs do not include Delivery Fee.
4. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any fee, commission, or cost other than as permitted in Subsections 1. through 3., above.
5. It shall be unlawful for a Third-party Food Delivery Service to charge a customer any Purchase Price for a food or beverage item that is higher than the price set by the Retail Food Establishment on the Third-party Food Delivery Service or, if no price is set by the Retail Food Establishment on the Third-party Food Delivery Service, the price listed on the Retail Food Establishment's own menu.
6. It shall be unlawful for a Third-party Food Delivery service to retain any portion of amounts designated as a tip or gratuity. Any tip or gratuity shall be paid by the Third-party Delivery Service, in its entirety, to the person delivering the food or beverages.

**SEC. 200.72. DISCLOSURES.**

The Third-party Food Delivery Service shall disclose to the customer an accurate, clearly identified, and itemized cost breakdown of each transaction, including, but not limited to, the following:

- (a) the Purchase Price of the food and beverages at the cost listed on the Retail Food Establishment's menu;
- (b) the Delivery Fee charged to the Retail Food Establishment;
- (c) each fee, commission, or cost, other than a Delivery Fee, charged to the Retail Food Establishment;
- (d) each fee, commission, or cost, other than the Delivery Fee or the Purchase Price of the food, charged to the customer by the Third-party Food Delivery Service; and
- (e) any tip or gratuity that will be paid to the person delivering the food or beverages.

**SEC. 200.73. ENFORCEMENT.**

A violation of this article shall subject the violator to the following:

- 1. An action in the Superior Court of the State of California to recover all actual damages resulting from a violation of this article.
- 2. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails in an action against a Third-party Food Delivery Service. If plaintiff fails to prevail against a Third-party Food Delivery Service, a court may award reasonable attorneys' fees and costs to the Third-party Food Delivery Service upon a determination by the court that the plaintiff's action was frivolous.
- 3. A civil action alleging a violation of any provision of this article shall commence only after the following requirements have been met:
  - (a) Written notice is provided to the Third-party Food Delivery Service of the provisions of the article alleged to have been violated and the facts to support the alleged violation; and
  - (b) The Third-party Food Delivery Service is provided 15 days from the date of the written notice to cure any alleged violation.
- 4. The remedies in Subsections 200.73 1. through 3. are non-exclusive. A violation of this article is unlawful and may be prosecuted under state and City law, including, but not limited to, Section 396 of the California Penal Code or Section 47.12 of the Los Angeles Municipal Code.

**SEC. 200.74. OPERATIVE DATES.**

This article shall be operative at any time during which a federal, state, or local order, resulting from the COVID-19 pandemic, limits customer capacity to less than full capacity at Retail Food Establishments in the City of Los Angeles, and for a period of 90 days after any such federal, state, or local order is lifted.

**SEC. 200.75. SEVERABILITY.**

If any subsection, sentence, clause or phrase of this article is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this article. The City Council hereby declares that it would have adopted this article and each and every subsection, sentence, clause, and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the article would be subsequently declared invalid or unconstitutional.

## **EXHIBIT 2**



**Lane Dilg**  
*Interim City Manager*

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1685 Main Street  
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## **SIXTEENTH SUPPLEMENT TO THE EXECUTIVE ORDER OF THE DIRECTOR OF EMERGENCY SERVICES DECLARING THE EXISTENCE OF A LOCAL EMERGENCY**

WHEREAS international, national, state, and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus named “SARS-CoV-2,” and the disease it causes has been named “coronavirus disease 2019,” abbreviated COVID-19, (“COVID-19”); and

WHEREAS, on March 4, 2020, the Los Angeles County Board of Supervisors and Department of Public Health declared a local emergency and local public health emergency to aid the regional healthcare and governmental community in responding to COVID-19; and

WHEREAS, on March 4, 2020, the Governor of the State of California declared a state of emergency to make additional resources available, formalize emergency actions already underway across multiple state agencies and departments, and help the State prepare for broader spread of COVID-19; and

WHEREAS, on March 12, 2020, in response to social distancing guidance issued by the Centers for Disease Control and Prevention, the California Department of Public Health, and the Los Angeles County Department of Public Health, the City of Santa Monica (“the City”) cancelled all social gatherings (events, activities, programs, and gatherings) in City facilities that were scheduled to occur through permit or license between March 12, 2020, and March 31, 2020, absent a persuasive showing by the permittee or licensee that the gathering could take place in accordance with the guidance and directives of public health authorities; and

WHEREAS, on March 12, 2020, in response to social distancing guidance issued by the Centers for Disease Control and Prevention, the California Department of Public Health, and the Los Angeles County Department of Public Health, and to protect the health and safety of the City workforce, the City announced that Santa Monica City Hall would be closed to the public and open only to City employees from March 16, 2020, to March 31, 2020; and

WHEREAS, on March 13, 2020, the President of the United States of America declared a national emergency and announced that the federal government would make emergency funding available to assist state and local governments in preventing the spread of and addressing the effects of COVID-19; and

WHEREAS, on March 13, 2020, the City Manager, in his role as the Director of Emergency Services, ("Director of Emergency Services") proclaimed the existence of a local emergency pursuant to Chapter 2.16 of the Santa Monica Municipal Code to ensure the availability of mutual aid and an effective the City's response to the novel coronavirus ("COVID-19") and this local emergency was restated on March 14, 2020, through a revised declaration of local emergency to ensure compliance with all digital signature requirements; and

WHEREAS, on March 14, 2020, the Director of Emergency Services issued a first supplemental emergency order placing a temporary moratorium on evictions for non-payment of rent and temporarily suspending (a) the discontinuation or shut off of water service for residents and businesses in the City for non-payment of water and sewer bills; (b) the imposition of late payment penalties or fees for delinquent water and/or sewer bills; and (c) the imposition of late payment penalties or fees for parking violations; and

WHEREAS, on March 15, 2020, the Director of Emergency Services issued a second supplemental emergency order temporarily closing the Santa Monica Pier to the general public; and

WHEREAS, on March 16, 2020, the Los Angeles County Department of Public Health issued a Health Officer Order for the Control of COVID-19 temporarily prohibiting group events of 50 or more people, requiring certain social distancing measures, and ordering the closure of certain businesses; and

WHEREAS, on March 16, 2020, the Director of Emergency Services issued a third supplemental emergency order that ordered the temporary closure of bars and nightclubs that do not serve food, movie theaters and entertainment venues, bowling alleys and arcades, gyms and fitness centers, and non-medical physical health and beauty businesses; temporarily prohibited restaurants, bars, and retail food facilities from serving food on-premises; and strongly urged houses of worship to limit large gatherings on their premises and to observe social distancing practices in their services; and

WHEREAS, on March 16, 2020, the Governor of the State of California issued Executive Order N-28-20, suspending any and all provisions of state law that would preempt or otherwise restrict a local government's exercise of its police powers to impose substantive limitations on residential and commercial evictions with respect to COVID19-related rent payment issues; and

WHEREAS, on March 17, 2020, the Director of Emergency Services issued a Revised Fourth Supplement to the Executive Order to permit public safety facilities, hospitals, clinics, and emergency shelters in all zoning districts and allow the Director of the Department of Planning and Community Development or designee to waive development standards, design review, parking and access requirements, and sign standards related to such uses; to permit limited service and take-out restaurant uses in any zoning district that allows full-service restaurants; to allow drive-through facilities for clinics, convenience markets, farmers markets, general markets, hospitals, pharmacies, and restaurants; to suspend planning deadlines and automatic approvals; to extend interim zoning ordinances now in effect; to direct that street sweeping not be conducted unless essential for public health and safety and suspend parking citations related thereto; to suspend preferential parking rules; to suspend certain regulations relating to the operation of oversize vehicles; and to suspend Breeze bike share fees; and

WHEREAS, on March 17, 2020, the Governor of the State of California issued Executive Order N-29-20 which, among other things, amended Paragraph 11 of earlier Executive Order N-25-20 to suspend and waive certain provisions of state and local law, including but not limited to those provisions in the Bagley-Keene Act and the Brown Act related to the notice and accessibility requirements for the conduct of public meetings where the physical presence of public attendees or members of the public body seeking to meet are impliedly or expressly required; and

WHEREAS, on March 18, 2020, the Director of Emergency Services issued a Revised First Supplement to the Executive Order of the Director of Emergency Services implementing eviction protections for residential and commercial tenants and suspending removals of rental property from the market under the Ellis Act; and

WHEREAS, on March 18, 2020, the Director of Emergency Services issued a Revised Fifth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency implementing a rear-door boarding policy for all Big Blue Bus (BBB) customers, with the exception of Americans with Disabilities Act customers traveling in mobility devices; suspending all passenger fares on the BBB; suspending discontinuation or shut-off of water services for residents and businesses based on non-payment of water or sewer bills; suspending late payment penalties for (a) water and/or sewer bills; (b) parking citations; (c) refuse and recycling collection bills; (d) Certified Unified Program Agency (CUPA) charges; (e) Fire Prevention inspection charges; (f) Transient Occupancy Taxes; (g) Utility Users Taxes; and (h) Parking Facility Taxes; suspending parking restrictions and limitations in many City parking lots, parking zones, and parking spaces; and suspending penalty assessments related to business licenses and business improvement district assessments; and

WHEREAS, on March 19, 2020, the City Council ratified the proclamation of local emergency made by the Director of Emergency Services, as well as the Revised First, Second, Third, Revised Fourth, and Revised Fifth Supplements thereto, and resolved that the proclamation and the aforementioned Supplements shall be operative and in effect through April 30, 2020; and

WHEREAS, on March 19, 2020, the Governor of the State of California issued Executive Order N-33-20 directing all residents of the State of California to heed directives issued by the State Health Officer on the same date instructing all Californians to stay home except as needed to maintain continuity of operations of the federal critical infrastructure sectors; and

WHEREAS, on March 19, 2020, the Los Angeles County Department of Public Health issued an enhanced Health Officer Order, the Safer at Home Order for Control of COVID-19, amending and superseding its March 16, 2020, Order, closing all nonessential businesses, and limiting gatherings to 9 people or less; and



WHEREAS, on March 20, 2020, the Director of Emergency Services issued a Sixth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency suspending labor negotiations through April 30, 2020, so that the City may assess the financial impacts of COVID-19 prior to engaging in collective bargaining, and suspending various human resources processes in order to decrease in-person meetings and enable effective emergency response, including suspending requirements associated with the administration of competitive examinations and the appointment of individuals from eligibility lists; suspending certain requirements and minimum qualifications associated with the appointment of temporary, limited-term, and as-needed employees; and modifying the Municipal Code to state that certain additional appointments will be subject to a probationary period; and

WHEREAS, on March 21, 2020, the Director of Emergency Services issued a Seventh Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency aligning the Santa Monica Municipal Code with a California Department of Alcoholic Beverage Control (“ABC”) “Notice of Regulatory Relief” permitting restaurants and retailers holding valid ABC licenses to sell alcoholic beverages for off-site consumption via delivery and take-out; and

WHEREAS, on March 21, 2020, the Los Angeles County Department of Public Health issued an enhanced Health Officer Order, the Safer at Home Order for Control of COVID-19, amending and superseding its March 16, 2020, and March 19, 2020 Orders, closing all nonessential businesses and prohibiting gatherings of non-household members; and

WHEREAS, on March 22, 2020, the Director of Emergency Services issued an Eighth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency adopting as rules and regulations of the City of Santa Monica the Executive Order N-33-20, issued by the Governor of the State of California on March 19, 2020 (the “Governor’s Stay at Home Order”) and the Safer at Home Order for Control of COVID-19, issued by the Los Angeles County Department of Public Health on March 21, 2020 (the “County Department of Public Health’s Safer at Home Order”), including any later amendments or successors thereto, the stricter of which shall apply if there is any conflict between the Governor’s Stay at Home Order and the County Department of Public Health’s Safer at Home Order; and authorizing the City to issue administrative citations to enforce this and the previously issued supplements to its emergency declaration; and

WHEREAS, on March 27, 2020, the Governor of the State of California issued Executive Order N-37-20, building on Executive Order N-28-20 by extending the time for a tenant to respond to a summons and prohibiting the enforcement of a writ for tenants unable to pay due to reasons related to COVID-19; and

WHEREAS, on March 27, 2020, the Los Angeles County Department of Public Health issued an Addendum to the County Department of Public Health’s Safer at Home Order closing all public trails and trailheads, as well as all public beaches, piers, public beach parking lots, beach bike path that traverse that sanded portion of the beach, and beach access points; and



WHEREAS, on March 27, 2020, the Director of Emergency Services issued a Ninth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency closing certain City facilities, waiving late payment fees for City leases and licenses during the effective period of the order, suspending rent payments for City tenants on the Santa Monica Pier for the month of April, suspending outdoor dining licenses and outdoor dining license payments for City licensees for the month of April, granting the Director of the Department of Housing and Community Development discretion to suspend additional rent or license payments for the month of April for City tenants and licensees whose operations have been closed pursuant to emergency orders issued by the City, the County of Los Angeles Department of Public Health, or the Governor of California, authorizing the City to delay responses and productions of records in response to public record requests under specified circumstances, and extending by one month Santa Monica Fire Department annual permits of operation set to expire on May 1, 2020; and

WHEREAS, on March 31, 2020, the Los Angeles County Department of Public Health issued Addendum No. 2 to the County Department of Public Health's Safer at Home Order clarifying that all government employees are essential workers during the pandemic; and

WHEREAS, on April 1, 2020, the Director of Emergency Services issued a Tenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency imposing requirements specific to construction sites and projects to ensure their compliance with the social distancing and hygiene directives imposed by the County Department of Public Health's Safer at Home Order; and

WHEREAS, on April 6, 2020, the Judicial Council of the State of California adopted an emergency court rule that effectively delays all evictions, other than those necessary to protect public health and safety, for the duration of the COVID-19 emergency; the rule is applicable to all courts and to all eviction cases, whether they are based on a tenant's missed rent payment or another reason; among other things, the rule temporarily prohibits a court from issuing a summons after a landlord files an eviction case, unless necessary to protect public health and safety; as a result, even if a landlord files an eviction case, he or she will not have a summons to serve on the tenant until 90 days after the emergency passes; and

WHEREAS, on April 6, 2020, the City Council ratified the proclamation of local emergency made by the Director of Emergency Services, as well as the Revised First, Second, Third, Revised Fourth, Revised Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Supplements thereto, and resolved that the proclamation and the aforementioned Supplements shall be operative and in effect through April 30, 2020; and

WHEREAS, on April 8, 2020, the Director of Emergency Services issued a Second Revised First Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency enhancing eviction protections to require landlords to provide notice of local eviction protections to tenants, prohibiting no-fault residential evictions, prohibiting certain evictions based on a tenant's refusal of landlord entry into a residential unit, prohibiting certain evictions of residential tenants based on the presence of unauthorized pets or occupants, prohibiting use of the eviction process to seek rent delayed under the Supplement if the landlord has already obtained compensation for the delayed rent through governmental relief, and temporarily enhancing penalties under the City's Tenant Harassment Ordinance to \$15,000; and

WHEREAS, on April 8, 2020, the Director of Emergency Services issued an Eleventh Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency requiring workers and customers at covered businesses (including but not limited to grocery stores, farmers markets, restaurants, hardware stores, transportation providers, and plumbing and similar businesses) to wear face coverings; and

WHEREAS, on April 10, 2020, the Los Angeles County Department of Public Health issued a revised Safer At Home Order for Control of COVID-19 that amended and superseded the earlier March 16, 19, 21, 27, and 31 County Health Officer Orders and Addendums and continued to prohibit all indoor and outdoor public and private gatherings and events; require all businesses to cease in-person operations and remain closed to the public, unless defined as an Essential Business by the order; require the closure of all indoor malls and shopping centers, all swap meets and flea markets, indoor and outdoor playgrounds, public beaches, piers, public beach parking lots, beach access points, and public trails and trailheads; and prohibit in-person operations of all non-essential businesses; and

WHEREAS, on April 14, 2020, the City Council ratified the proclamation of local emergency made by the Director of Emergency Services, as well as the Second Revised First, Second, Third, Revised Fourth, Revised Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Supplements thereto, and resolved that the Second Revised First Supplement shall be operative and remain in effect through May 31, 2020, and that the other aforementioned Supplements shall be operative and in effect through May 15, 2020; and

WHEREAS, on April 24, 2020, the Director of Emergency Services issued a Twelfth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency tolling deadlines for reviewing and acting on planning applications, exercising rights under planning entitlements, and expiration of building permits; permitting lodging establishments operating as hotels and motels under Santa Monica's zoning rules to allow stays of greater than 30 days, and waiving the City's rule precluding employees from accepting gifts of any sort to allow City first responders and disaster workers to take advantage of City-approved public or private discount, specials, and subsidies programs; and

WHEREAS, on April 30, 2020, the Director of Emergency Services issued a Third Revised First Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency extending the eviction moratorium to June 30 and modifying it by limiting the commercial tenants subject to the protections of the order to exclude multinational companies, public companies, and companies with more than 500 employees; making clear that notice and documentation that indicates any loss of income or increase in expenses due to COVID-19 is sufficient to trigger the moratorium on eviction for non-payment of rent due to financial impacts related to COVID-19, and that a statement written by the tenant in a single communication may constitute both notice and documentation; and extending the protection against eviction based on rent unpaid due to financial impacts related to COVID-19 from 6 to 12 months; in addition, the Third Revised First Supplement, in accordance with the Governor's Executive Order suspending state law provisions, suspends SMMC 5.45.020 and 5.45.030 to the extent they prohibit retail establishments from providing without charge reusable grocery bags or recycled paper bags or single-use plastic carryout bags to customers at point of sale and adds language to the City's Housing Trust Fund and Affirmative Housing Production Program Guidelines to extend eligibility to individuals who were working in Santa Monica prior to March 1, 2020, but lost employment due to COVID-19 related reasons; and

WHEREAS, on May 7, 2020, the California State Public Health Officer issued an order that stated that COVID-19 continues to present a significant risk to the health of individuals throughout California, but, consistent with Californians' mitigation efforts and other factors determined that the statewide data supported the gradual movement of the entire state from Stage 1 to Stage 2 of California's Pandemic Resilience Roadmap, while authorizing local health jurisdictions to implement or continue more restrictive public health measures if warranted; and

WHEREAS, on May 8, 2020, the Los Angeles County Department of Public Health issued Addendum No. 2 to the April 10 revised County Department of Health Safer at Home Order amending that order to permit, subject to specific conditions, the reopening of certain specified types of lower-risk retail business for sales and service transactions made via curbside pick-up or delivery only, and the reopening of all previously closed public trails and trailheads, public and private golf courses, and new and used auto sales dealerships and operations; and

WHEREAS, on May 8, 2020, the Director of Emergency Services issued a Fourth Revised First Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency restating the eviction moratorium and modifying it to define a set of "non-retail commercial tenants" consisting of commercial tenants, other than non-profits, that are tenants in an office building, do not collect sales tax on greater than 50% of their revenue, and do not provide medical, dental, veterinary, fitness, educational, or child, marriage, family, mental health, or substance abuse counseling services; specify that, for non-retail commercial tenants, the protection against eviction will extend only for 30 days after the expiration of the Order; and specify that, with respect to rent unpaid due to financial impacts related to COVID-19, landlords may not charge residential tenants interest on that unpaid rent for a period of 12 months following the expiration of the Order, may not charge commercial tenants (other than non-retail commercial tenants) interest on that unpaid rent for a period of 90 days following the expiration of the Order, and may not charge non-retail commercial tenants interest on that unpaid rent during the duration of the Order; and

WHEREAS, on May 8, 2020, the Director of Emergency Services issued a Thirteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency incorporating the provisions of the Third Revised First Supplement that add language to the City's Housing Trust Fund and Affirmative Housing Production Program Guidelines to extend eligibility to individuals who were working in Santa Monica prior to March 1, 2020, but lost employment due to COVID-19 related reasons; incorporating the provisions of the Third Revised First Supplement that, in accordance with the Governor's Executive Order suspending state law provisions, suspend SMMC 5.45.020 and 5.45.030 to the extent they prohibit retail establishments from providing without charge reusable grocery bags or recycled paper bags or single-use plastic carryout bags to customers at point of sale; further extending to July 1, 2020 the expiration of Fire Department annual permits of operation; and limiting to between the hours of 10:00 am and 3:00 pm on weekdays the conduct of certain loud construction activities, including cement cutting or grinding, sandblasting, and the use of pile drivers, jackhammers, or pavement breakers, at construction projects other than public works construction; and

WHEREAS, on May 12, 2020, the City Council ratified the proclamation of local emergency made by the Director of Emergency Services, as well as the Third and Fourth Revised First, Second, Third, Revised Fourth, Revised Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth Supplements thereto; resolved that the local emergency shall be deemed to continue and exist until its termination is proclaimed by the City Council; and resolved that the Fourth Revised First and Second through Thirteenth Supplements shall be operative and remain in effect through May 15, 2020, or any later date expressly stated within the text of an individual supplement; and

WHEREAS, on May 13, 2020, the Los Angeles County Department of Public Health issued a revised Safer At Home Order for Control of COVID-19 that amended and superseded the earlier March 16, 19, 21, 27, 31, April 10, May 3, and May 9, 2020 County Health Officer Orders and Addendums; recognized that existing community transmission of COVID-19 in Los Angeles County continues to present a substantial and significant risk of harm to residents' health; but took a limited and measured step to partially move the County into Stage 2 of its phased approach to reopening while keeping a low incidence of person-to-person contact and ensuring continued social distancing and adherence to other infection control procedures – accordingly, the order continued to prohibit indoor and outdoor public and private gatherings and events; continued to require the continued closure of higher-risk businesses, recreational sites, commercial properties, and activities, where more frequent and prolonged person-to-person contacts are likely to occur; continued to allow Essential Businesses to operate subject to social distancing requirements; allowed two categories of lower-risk businesses to reopen subject to specified social distancing protocols, retailers not located within an indoor mall or shopping center and manufacturing and logistics sector businesses that supply lower-risk retail businesses; and permitted the reopening of beaches, while retaining closures of beach parking lots, beach bike paths, and piers; and

WHEREAS, on May 13, 2020, the City of Los Angeles issued a revised version of its safer at home order including requirements that all individuals engaging in outdoor activities, except for water activities, and all individuals engaging in essential activities whenever there is or can be contact with other who are non-household members in both public and private places, must wear a cloth face covering; and

WHEREAS, on May 14, 2020, the Director of Emergency Services issued a Fourteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency extending the effective dates of the Fourth Revised First, Second, Third, Revised Fourth, Revised Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth supplements to June 30, 2020, or any later date expressly stated within the text of an individual supplement; and requiring all persons leaving their residences for the limited purposes allowed by the County Department of Public Health's Safer at Home Order to strictly comply with the social (physical) distancing requirements stated in that Order or County Department of Public Health guidance or protocols, including in particular the requirement that cloth face masks must be worn whenever there is or may be contact with others who are non-household members, including while engaging in permitted outdoor activities other than water activities; and



WHEREAS, on May 15, 2020, the Director of Emergency Services issued a Fifteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency authorizing enforcement of preferential parking rules to resume in Zone 3 only beginning May 22, 2020 and authorizing street sweeping to resume with individuals encouraged to comply with posted signs regarding parking prohibitions for street sweeping during the days and times indicated, but only during the first full week of each month, which is when the street sweeping will occur; and

WHEREAS, as of May 18, 2020, the Los Angeles County Department of Public Health has confirmed 38,451 cases of COVID-19 in Los Angeles County and has continued to advise that bold and aggressive measures are required to be put in place to prevent the further spread of COVID-19; and

WHEREAS, the City has a number of Boards, Commissions, and other appointed bodies, many of which serve a primarily or wholly advisory function, and all of which are required to conduct public meetings in accordance with the Brown Act; and

WHEREAS, meetings of the majority of the Boards, Commissions, and other appointed bodies have been suspended during the COVID-19 public health emergency pursuant to a directive from the City Manager for purposes of complying with social distancing requirements and due to the amount of staff time necessary to conduct public meetings either in person or via teleconference; and

WHEREAS, to reduce the spread of the virus and protect the public health, the Governor's Stay at Home Order and the County Department of Public Health's Safer at Home Order prohibit restaurants from offering dine-in service and limits restaurants to delivery and takeout offerings only; and

WHEREAS, during the COVID-19 emergency, it is critical that restaurants stay open because they are performing essential services, along with grocery stores and other food services, to provide the public with access to food; and

WHEREAS, the social/physical distancing measures required to reduce the spread of COVID-19 means that delivery and takeout offerings from restaurants are critical to the public's accessibility of food; and

WHEREAS, many consumers in the City are eager to support local restaurants and use third-party food delivery services to place orders with those restaurants and, as a result, these third-party food delivery services have experienced an uptick in the use of their services during the COVID-19 emergency; and

WHEREAS, third-party food delivery services utilize various commission models that can charge a restaurant as high as 30% or more per order, including delivery, marketing and promotion, subscription, and processing fees; and

WHEREAS, restaurants, and particularly small family-owned restaurants with few locations, have limited bargaining power to negotiate lower commission fees with third-party food delivery services, especially given that only a few companies in the marketplace provide such delivery services, and face dire financial circumstances during this COVID-19 emergency because take-out and delivery are the only options to keep these essential services in operation; and

WHEREAS, capping the maximum fees that third-party food delivery services are permitted to charge restaurants to no more than 15% of the purchase price per order for delivery fees and to no more than 5% of the purchase price per order for all other fees will further the significant and legitimate public purpose of easing the financial burden on struggling restaurants during this public health emergency so that they may remain open and provide essential services to the public while not unduly burdening third-party food delivery services, as up to a 20% fee in aggregate of the purchase price for each order placed through a third-party food delivery service is reasonable and third-party food delivery services are experiencing increased demand for their services during this COVID-19 emergency; and

WHEREAS, California Government Code 8634 empowers the City to promulgate orders and regulations necessary to provide for the protection of life and property during a local emergency, and

WHEREAS, in the interest of public health and safety, as affected by the emergency caused by the spread of COVID-19, it is necessary to exercise my authority pursuant to Section 2.16.060 of the Santa Monica Municipal Code to issue this regulation related to the protection of life and property.

NOW, THEREFORE, I, Lane Dilg, the Director of Emergency Services for the City of Santa Monica, do hereby issue the following order to become effective immediately, subject to ratification as soon as practicable by the City Council:

IT IS HEREBY ORDERED THAT:

Boards, Commissions, and Other Appointed Bodies

1. While this Order remains in effect, the Planning Commission, which is established by the City Charter, may resume meetings but should limit its meetings to those absolutely necessary to perform the legislative, quasi-legislative, adjudicative, and quasi-adjudicative duties set forth in City Charter Section 1008(a)-(d).

2. While this Order remains in effect, the following City Boards and Commissions established by the City Charter may resume meetings but should limit their meetings to those absolutely necessary to perform the adjudicative and quasi-adjudicative duties set forth in the following sections of the City Charter:

- a. Airport Commission: Section 1016(b).
- b. Library Board: Section 1010(a), (b).

- c. Personnel Board: Section 1012(a)-(c).
- d. Recreation & Parks Commission: Section 1014(b).

3. While this Order remains in effect, the following City Boards and Commissions shall not conduct meetings except as absolutely necessary to perform the adjudicative and quasi-adjudicative duties set forth in the following sections of the Santa Monica Municipal Code (“SMMC”):

- a. Architectural Review Board: SMMC Section 9.55.120(A)-(D)
- b. Arts Commission: SMMC Sections 2.64.040(g), 9.30.170.
- c. Building & Fire-Life Safety Commission: SMMC Section 8.08.040(c).
- d. Landmarks Commission: SMMC Sections 9.56.060(A)-(H) and 9.56.070.

4. While this Order remains in effect, meetings of the following City Boards, Commissions, and other appointed bodies shall remain suspended: Audit Subcommittee, Clean Beaches & Ocean Parcel Tax Citizens Oversight Committee, Commission for the Senior Community, Commission on the Status of Women, Disabilities Commission, Housing Commission, Social Services Commission, Task Force on the Environment, and Urban Forest Task Force.

5. While this Order remains in effect, meetings of the following Boards of City-related non-profits may continue to be conducted: Santa Monica Travel and Tourism, Inc.; Santa Monica Pier Corporation; and Downtown Santa Monica, Inc.

6. All meetings of City Boards, Commissions, and appointed bodies conducted while this Order remains in effect shall be conducted remotely via teleconferencing until such time as the City expressly authorizes such meetings to be conducted in person, after which time any meetings conducted in person shall be conducted in compliance with all social distancing requirements imposed by the stricter of the Governor’s Stay at Home Order and the County Department of Public Health’s Safer at Home Order, including any later amendments or successors thereto.

7. This Order does not affect in any way the meetings of the Rent Control Board, an elected City Board.

#### Third-Party Food Delivery Service Charges

- 8. As used in this Order, the following terms are defined as follows:
  - a. “Delivery fee” means a fee charged by a third-party food delivery service for providing a restaurant with a service that delivers food from such restaurants to customers in the City. The term does not include any other fee that may be charged by a third-party food delivery service to a restaurant, such as fees for listing or advertising the restaurant on the third-party food delivery service platform or fees related to processing the online order.



- b. “Online order” means any order placed by a customer through or with the assistance of a platform provided by a third-party food delivery service, including a telephone order, for delivery or pickup within the City.
- c. “Purchase price” means the total price of the items contained in an online order that are listed on the menu of the restaurant where such order is placed. Such term does not include taxes, gratuities, and any other fees that may make up the total cost to the customer of an online order.
- d. “Restaurant” means an Eating and Drinking Establishment, as that term is defined by Santa Monica Municipal Code Section 9.51.030(B)(8), in the City.
- e. “Third-party food delivery service” means any website, mobile application, or other internet service that offers or arranges for the sale of food and beverages prepared by, and the same- or next-day delivery or same- or next-day day pickup of food and beverages from, no fewer than five restaurants located in the City that are owned and operated by different persons.

9. It shall be unlawful for a third-party food delivery service to charge a restaurant (a) a delivery fee that totals more than 15% of the purchase price of each online order or (b) any fee or fees other than a delivery fee for the use of its service greater than 5% of the purchase price of each online order.

10. The Director of Emergency Services or designee may promulgate regulations to implement the provisions of Sections 8 and 9 of this Order. No person shall fail to comply with any such regulation.

11. Sections 8 and 9 of this Order and any regulations promulgated under Section 10 of this Order shall be enforceable as follows:

- a. By a restaurant injured by a third-party delivery service that charges fees in violation of this Order, provided that the restaurant issues notice to the third-party delivery service as required by this Subsection 11(a). If a third-party delivery service charges a restaurant a fee that violates Section 9 of this Order or any regulations promulgated under Section 10 of this Order, the restaurant shall provide written notice to the third-party food delivery service requesting a refund within seven days. If the third-party food delivery service does not provide the refund requested after seven days or the third-party food delivery service continues to charge fees in violation of this Order after the initial notice and seven-day cure period, a restaurant may enforce this Order by means of a civil action seeking damages and injunctive relief. The prevailing party in any such action shall be entitled to an award of reasonable attorney fees. For the purposes of clarity, the requirement of providing notice under this Subsection 11(a) does not apply to any enforcement action taken pursuant to Section 11(b) of this Order.

- b. By the Santa Monica Police Department and any City Officer or employee granted authority to issue written notices to appear pursuant to Santa Monica Municipal Code Section 3.36.090 as misdemeanors pursuant to Government Code Section 8665 and Santa Monica Municipal Code Section 2.16.100 or through the issuance of administrative citations in accordance with Chapter 1.09 of the Santa Monica Municipal Code. Pursuant to Section 1.09.040 of the Santa Monica Municipal Code, the amount of the fine for a violation of any provision of Sections 8 and 9, or any regulations issued under Section 10, of this Order shall not exceed a maximum of \$1,000 per violation. Each day or portion of a day that any person violates or continues to violate any provision of Sections 8 and 9, or any regulations issued under Section 10, of this Order constitutes a separate violation and may be charged and punished separately. Pursuant to Santa Monica Municipal Code 1.09.040(c), a late payment charge of 10% of the applicable fine shall be imposed for the payment of an administrative fine imposed pursuant to this Section after its due date.

12. The City Attorney may initiate an investigation to ascertain facts as may be necessary to bring an enforcement action pursuant to Section 11(b) of this Order and, in connection therewith, shall have the investigatory powers as provided in Santa Monica Municipal Code Section 2.32.040.

#### General Provisions

13. Sections 8 through 12 of this Order shall take effect at 12:01 a.m. on May 26, 2020, and shall remain in effect while the County Department of Public Health's Safer at Home Order, including any later amendments or successors thereto, is in place, unless extended or expressly superseded by a duly enacted Ordinance of the City Council or by a further Order by the Director of Emergency Services.

14. Sections 1 through 7 of this Order shall take effect immediately and shall remain in effect until June 30, 2020, unless extended or expressly superseded by a duly enacted Ordinance of the City Council or by a further Order by the Director of Emergency Services.

15. If any section, subsection, sentence, clause, or phrase of this Order is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Order. The Interim City Manager hereby declares that she would have issued this Executive Order, and any Supplement or Revised Supplement to this Executive Order, and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of the ordinance would be subsequently declared invalid or unconstitutional.

ADOPTED this 19th day of May 2020.

DocuSigned by:  
By: FEC6DBA8A0D3460  
LANE DILG  
Interim City Manager  
Director of Emergency Services

ATTEST:

DocuSigned by:  
Denise Anderson-Warren  
E2F85B056A714C3...  
DENISE ANDERSON-WARREN  
City Clerk

APPROVED AS TO FORM:

DocuSigned by:  
George S. Cardona  
ECB444B01A56432...  
GEORGE S. CARDONA  
Interim City Attorney

## **EXHIBIT 3**

**BEFORE A HEARING EXAMINER  
OF THE  
CITY OF SANTA MONICA**

**In the Matter of the Appeal of  
DOORDASH, INC.**

**HEARING OFFICER'S DECISION ON  
APPEAL OF ADMINISTRATIVE  
CITATION NOS. SM020001103,  
SM020001104, SM020001105,  
SM020001107, SM020001108,  
SM020001109, SM020001110,  
SM020001111**

Review by submission of written materials only

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**BACKGROUND**

On August 18, 2020, Samtavia Signor, a Code Enforcement Officer for the City of Santa Monica (the "City"), issued DoorDash, Inc. (the "Appellant") Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, SM020001111 (the "Administrative Citations") for violating Santa Monica Municipal Code ("SMMC") § 2.16.100 – Violating an Emergency Order (Business). (Exhibit 1, pp.3-18). The Administrative Citations listed the required corrective action as: "Immediately comply with the City's Emergency Order 16th Supplement Section 8, Subsection 9, by reducing your 'delivery fee' charge to no more than 15% and no more than 5% for all other fees. See City's Emergency Order 16th Supplement for as-applied definition of 'delivery fee.'" (*Id.*) Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, SM020001111 (the "Administrative Citations") assessed a total fine of \$11,500.00. (*Id.*)

On September 17, 2020, Appellant timely requested a review of the Administrative Citations and deposited the total fines assessed by the Administrative Citations. (Exhibit 1,

pp. 20-43). Appellant sought review by written materials only and submitted a one-page letter.<sup>1</sup> (Exhibit 1, p. 1; Exhibit 2). Appellant indicated that its basis for the Request for Review was that there was no violation as charged. (Exhibit 1, p.1). On November 6, 2020, the Hearing Officer advised Appellant that any additional documents it intended to submit in support of the Request for Review were due by November 16, 2020. (Exhibit 3). On November 6, 2020, Appellant sent an email to the Hearing Officer, attaching a copy of its one-page letter originally submitted on September 17, 2020. (Exhibit 4).

### EVIDENCE CONSIDERED

The following exhibits comprise the record in this case:

1. Request for Review of Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, SM020001111, dated September 17, 2020;
2. Letter from Appellant, dated September 17, 2020;
3. The Investigative Report of Maurice Cochee, and Attachments A through I, inclusive, dated November 5, 2020 (“Cochee Investigative Report”);
4. The Supplemental Investigative Report of Santavia Signor, including Attachment A, dated November 5, 2020 (“Signor Investigative Report”);
5. Letter from Hearing Officer, dated November 6, 2020, regarding additional documents;
6. Email from Appellant to Hearing Officer, dated November 6, 2020, attaching a one-page letter dated September 17, 2020.

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<sup>1</sup> SMMC § 1.09.060(e) provides that the recipient of an administrative citation may at the time of contesting the citation waive the right to a hearing and elect instead to have the administrative review based exclusively on written materials submitted to the Hearing Officer.

Administrative notice is taken of the Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency and the Santa Monica Municipal Code (“SMMC”) as referenced below.<sup>2</sup>

## **RELEVANT LAW**

### COVID-19 Emergency Orders

On March 4, 2020, the Governor of the State of California declared a state of emergency in response to an outbreak of respiratory disease caused by a novel coronavirus commonly abbreviated as COVID-19. That same day, the Los Angeles County Board of Supervisors and the Los Angeles Department of Public Health declared a local emergency to aid the regional community in responding to COVID-19. On March 13, 2020, the President of the United States of America declared a national emergency in response to COVID-19. Also, on March 13, 2020, 2020, the City of Santa Monica’s Manager, in his role as Director of Emergency Services, proclaimed the existence of a local emergency pursuant to Chapter 2.16 of the SMMC.

Chapter 2.16 of the SMMC states:

The declared purposes of this chapter are to provide for the preparation and carrying out of plans for the protection of persons and property within this City in the event of an emergency; the direction of the emergency organization; and the coordination of the emergency functions of this City with all other public agencies, corporations, organizations, and affected private persons.

In the event of the proclamation of a local or state emergency, the Director is “empowered to...[m]ake and issue rules and regulations on matters reasonably related to the protection of life and property as affected by such emergency...” SMMC § 2.16.060(f).

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<sup>2</sup> The Santa Monica Municipal Code is found at <http://www.qcode.us/codes/santamonica/>. Reference to code sections are to the SMMC unless otherwise noted.



From March 14, 2020 through May 15, 2020, the Director of Emergency Services issued fifteen supplements to the Executive Order. On May 19, 2020, the Director of Emergency Services issued the Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency (“Sixteenth Supplement”), which imposed a 15% cap on delivery fees and a 5% cap on other fees charged to restaurants by third-party food delivery companies. (Exhibit 3, Attachment B). Per the Sixteenth Supplement:

It shall be unlawful for a third-party food delivery service to charge a restaurant (a) a delivery fee that totals more than 15% of the purchase price of each online order or (b) any fee or fees other than a delivery fee for the use of its service greater than 5% of the purchase price of each online order.

*(Id.)*

The Sixteenth Supplement defines a “delivery fee” as “a fee charged by a third-party food delivery service for providing a restaurant with a service that delivers food from such restaurants to customers in the City.” *(Id.)* It goes on to state: “The term does *not* include any other fee that may be charged by a third-party food delivery service to a restaurant, *such as fees for listing or advertising the restaurant* on the third-party food delivery service platform or fees related to processing the online order.” *(Id.)* (Emphasis added).

One of the manners in which the Sixteenth Supplement shall be enforceable is “through the issuance of administrative citations in accordance with Chapter 1.09 of the Santa Monica Municipal Code.” The amount of the fine for a violation of the Sixteenth Supplement was not exceed a maximum of \$1,000 per violation.

## ANALYSIS

### Summary of Evidence

SMMC Section 1.09.090(e) provides that the administrative citation and any additional report submitted by City staff shall constitute prima facie evidence of the respective facts

contained in those documents. Due process considerations allow the person seeking review of the citation to offer evidence or argument to refute the City's prima facie evidence.

The Investigative Report of Maurice Cochee details the events that led to the issuance of Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, SM020001111. (*See* Exhibit 3). On July 1, 2020, at approximately 9:00 a.m., Code Enforcement Supervisor Maurice Cochee received a call from Erika Saito, the owner of Sushi King, a restaurant located at 1330 Wilshire Boulevard in Santa Monica. (*Id.* at p. 1). Ms. Saito expressed concern that Appellant was violating the City's Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency, which outlined restrictions on delivery service fees. According to Ms. Saito, Appellant was charging her a 20% delivery fee. Ms. Saito forwarded to Mr. Cochee email correspondence between her and Appellant, including an Excel spreadsheet outlining the fees incurred from Ms. Saito's orders between June 23, 2020 and June 28, 2020. (*See* Exhibit 3, Attachment C).

According to the emails submitted by Ms. Saito, on June 28, 2020, one of Appellant's employees asked Ms. Saito to provide documentation indicating that she could not be charged more than 15% on deliveries and 5% on pick up orders. (*Id.* at p. 31). On June 29, 2020, another DoorDash employee stated: "I have went ahead and submitted a request to our Account Development Team for commission negotiation." (*Id.* p. 27). Ms. Saito responded to this email by stating: "This is not to do with negotiation." (*Id.*). She explained that DoorDash "ha[d] to honor" the City of Santa Monica's Ordinance, and that she had been contacting DoorDash about this issue since June 24. (*Id.*). Ms. Saito stated her intention to contact City staff if DoorDash did not correct its action. (*Id.*).

A follow up email from a DoorDash employee, sent on June 30, 2020, which seems to be in response to a copy of the Sixteenth Supplement sent by Ms. Saito stated: "The document you sent is referring to Delivery fees, which is the fee the customer pays when ordering an item online and commission rate is a percentage of the pre-tax total that is paid to DoorDash for using

the services, usually based on area determinations.” (*Id.* at p. 26). Earlier on June 30, 2020, a different employee at DoorDash sent an email to Appellant, stating: “We have lowered the commission based on the order passed 5/31/20, to 20% for regular orders and 5% for pick up orders. Reimbursements will be sent out shortly.” (*Id.* at p. 29). On July 2, 2020, a DoorDash employee wrote: “Thank you for sending in that supporting documentation. We have the cap for all merchants in Santa Monica at 20%. The documentation you have provided shows 15%. I am currently in contact with the team that is handling caps.” (*Id.* at p. 35).

On July 6, 2020, Ms. Saito sent Mr. Cochee an email explaining that she had continued to be charged “a 20% delivery fee/commission” from June 29, 2020 to July 5, 2020 and included four excel spreadsheets separated out into cancelled deliveries, overview, adjustments and deliveries. (*Id.* at p. 3). Ms. Saito also explained that some of the charges were 5% because those orders were picked up by customers at the restaurants and not delivered, using the DoorDash platform that allows food for “pick up”. (*Id.*). On August 11, 2020, at Mr. Cochee’s request, Ms. Saito emailed Mr. Cochee transaction spreadsheets from DoorDash for various dates between June 26, 2020 through August 9, 2020. (*Id.* at Attachment F).

The City argues that based on the information provided by Ms. Saito and Appellant’s Terms of Services, Appellant violated the Sixteenth Supplement because its Terms of Services defines a “commission rate” as “the commission fees collected by DoorDash in exchange for promoting and featuring the Merchant and Merchant Store(s) on the DoorDash platform, which is charged as a percentage of revenues transacted on the DoorDash Platform.” (*See id.* at Attachment G). As a result, Mr. Cochee directed Code Enforcement Officer Samtavia Signor to issue Administrative Citations SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110, and SM020001111 (the “Administrative Citations”) to Appellant for 23 violations of Santa Monica Municipal Code § 2.16.100 from June 26, 2020 through July 5, 2020. (*See* Exhibit 3, Attachment I). According to the Supplemental Investigative Report of Officer Signor, the Administrative Citations were mailed to Appellant’s mailing address as found on the California Secretary of State website. (Exhibit 4, p. 1).

Appellant DoorDash contends there was no violation as charged. (Exhibit 1, p. 1). In its appeal, Appellant states that it has reviewed the customer orders referenced in the citations and has discussed the matter with its contacts at Sushi King, and they have “resolved and agreed with Sushi King that going forward, a total commission of 20% will be applied to deliver orders placed with Sushi King while Santa Monica’s temporary cap is in place, which combines the 15% cap on delivery fees and the 5% cap on other fees that may be charged for additional services, such as listing the restaurant on our platform.” (Exhibit 2). Appellant appears to argue that it was not in violation of the Sixteenth Supplement because Santa Monica’s temporary cap “does anticipate that a total of 20% may be applied to delivery orders (up to 15% for the delivery fee and up to 5% for additional services,” and the customer orders that were subject of the Administrative Citations were subject to a 20% total fee.

### Discussion

It is a well settled rule of statutory interpretation that a statute must be construed so as to give effect and meaning, if possible, to every clause and word. *Souter v. The Sea Witch* (1850) 1 Cal. 162, 164. Here, Section 9 of the Sixteenth Supplement makes it “unlawful for a third-party food delivery service to charge a restaurant (a) a delivery fee that totals more than 15% of the purchase price of each online order or (b) any fee or fees other than a delivery fee for the use of its service greater than 5% of the purchase price of each online order.” (Exhibit 3, p. 12). Section 8(a) of the Sixteenth Supplement defines “delivery fee” as “a fee charged by a third-party food delivery service for providing a restaurant with a service that delivers food from such restaurants to customers in the City.” It expressly excludes from the definition of “delivery fee” “any other fee that may be charged by a third-party food delivery service to a restaurant, *such as fees for listing*

*or advertising the restaurant on the third-party food delivery service platform or fees related to processing the online order.” (Id. at p. 11) (Emphasis added).*

Appellant concedes that it charged Sushi King a “20% total fee” on the customer orders that are the subject of the Administrative Citations. (Exhibit 2). Appellant seems to argue that it was within its right to charge Sushi King an aggregate 20% fee because Santa Monica’s cap allows “a total of 20% [being] applied to delivery orders (up to 15% for the delivery fee and the 5% for additional services.)” (*Id.*) While Appellant is correct that those two types of fees, when combined, may make up a total of 20%; the Sixteenth Supplement places restrictions on two types of fees, one of which is defined in detail as a “delivery fee.” The evidence here does not support Appellant’s argument that 15% of its commission rate may be construed as a “delivery fee,” as defined in the Sixteenth Supplement.

First, in correspondence from Appellant’s employees to Sushi King, Appellant’s employees regularly refer to the fee being deducted from the customer orders as a “commission rate.” (*See* Exhibit 3, pp. 26, 27, 29, 36). One of Appellant’s own employees notes a distinction between a delivery fee and a commission rate, defining delivery fees as “the fee the customer pays when ordering an item online” while explaining that “a commission rate is a percentage of the pre-tax total that is paid to DoorDash for using the services, usually based on area determinations.” (*Id.* at p. 26).

This understanding is further supported by Appellant’s Terms of Use, which defines “Commission Rate” as “the commission fees collected by DoorDash in exchange for promoting and featuring the Merchant and Merchant store(s) on the DoorDash Platform, which is charged as a percentage of revenue transacted on the DoorDash

platform.” (*Id.* at p. 67). This definition would seem to fall squarely within the type of fee expressly excluded from the definition of “delivery fee” in the Sixteenth Supplement (i.e. “fees for listing or advertising the restaurant on the third-party food delivery service platform”).

Moreover, the 20% fee charged by Appellant on the customer orders subject to the Administrative Citations is labeled “commission” and not broken out into two or more fees, suggesting that Appellant did not view this fee as an aggregate of several fees. (*See id.* at pp. 33, 42, 45, 57-64). Simply because adding the two fee restrictions under the Sixteenth Supplement results in an aggregate fee of 20% does not mean that Appellant was entitled to charge Sushi King a 20% total fee, where Appellant has defined its commission fee as being in exchange for promoting and featuring a merchant. For the foregoing reasons, Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110 and SM020001111 for violations of Santa Monica Municipal Code Section 2.16.100 are factually and legally substantiated. The total fine of \$11,500.00 was appropriately determined.

### FINDINGS OF FACT

1. On June 26, 2020, Appellant charged Sushi King a 20% commission fee on four orders.
2. On June 27, 2020, Appellant charged Sushi King a 20% commission fee on two orders.
3. On June 28, 2020, Appellant charged Sushi King a 20% commission fee on two orders.
4. On June 30, 2020, Appellant charged Sushi King a 20% commission fee on two orders.
5. On July 1, 2020, Appellant charged Sushi King a 20% commission fee on four orders.
6. On July 2, 2020, Appellant charged Sushi King a 20% commission fee on four orders.

7. On July 3, 2020, Appellant charged Sushi King a 20% commission fee on two orders.
8. On July 5, 2020, Appellant charged Sushi King a 20% commission fee on three orders.
9. On August 18, 2020, Code Enforcement Officer Samtavia Signor issued Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110 and SM020001111 to Appellant DoorDash, Inc. for twenty-three counts of violating SMMC § 2.16.100.
10. On September 17, 2020, Appellant timely filed a Request for Review of Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110 and SM020001111.
11. Any Finding of Fact, which should more appropriately be deemed a Conclusion of Law, shall be a Conclusion of Law.

#### **CONCLUSIONS OF LAW**

1. The Sixteenth Supplement to the Executive Order of the Director of Emergency Services Declaring the Existence of a Local Emergency made it unlawful for a third-party food delivery service to charge a restaurant (a) a delivery fee that totals more than 15% of the purchase price of each online order or (b) any fee or fees other than a delivery fee for the use of its service greater than 5% of the purchase price of each online order.
2. From June 26, 2020 through July 5, 2020, Appellant violated the Sixteenth Supplement, enacted pursuant to SMMC § 2.16.100, by charging Sushi King a 20% commission fee on twenty-three orders.
3. The total fine amount of \$11,500.00 for 23 violations of SMMC § 2.16.100 is affirmed.
4. Any Conclusion of Law, which should more appropriately be deemed a Finding of Fact, shall be a Finding of Fact.



**DECISION**

Administrative Citation Nos. SM020001103, SM020001104, SM020001105, SM020001107, SM020001108, SM020001109, SM020001110 and SM020001111 are affirmed. The total \$11,500.00 fine for twenty-three violations of SMMC § 2.16.100 is affirmed. The City shall retain the \$11,500.00 fine deposit amount.

Dated: December 3, 2020

*Azadeh Gowharrizi*

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**AZADEH GOWHARRIZI**  
**Hearing Officer**

Pursuant to Santa Monica Municipal Code Section 1.16.010, Appellant is advised that this decision is reviewable pursuant to California Code of Civil Procedure Section 1094.5, and that the time within which Appellant must seek such review is governed by California Code of Civil Procedure Section 1094.6.

## **EXHIBIT 4**

## Shibumi Grubhub Payment Ledger: September 2020 to March 2021

Restaurant	Type	Date	Time	Subtotal	Service	Delivery	Tax	Tip	Restaurant Total	Commission	Delivery Commission	Processing Fee	Withheld Tax	Non-Delivery Fee %	Total Fee %
Shibumi - S Hill St	Prepaid Order	9/4/2020	6:55 PM	\$ 68.00	\$ -	\$ -	\$ 6.97	\$ -	\$ 74.97	\$ 10.20	\$ 6.80	\$ 2.59	\$ -	18.81%	28.81%
Shibumi - S Hill St	Prepaid Order	9/4/2020	7:49 PM	\$ 52.00	\$ -	\$ -	\$ 5.33	\$ -	\$ 57.33	\$ 7.80	\$ -	\$ 2.05	\$ -	18.94%	18.94%
Shibumi - S Hill St	Prepaid Order	9/23/2020	6:15 PM	\$ 72.00	\$ -	\$ -	\$ 7.38	\$ -	\$ 79.38	\$ 3.60	\$ 10.80	\$ 2.72	\$ -	8.78%	23.78%
Shibumi - S Hill St	Prepaid Order	9/30/2020	6:30 PM	\$ 86.00	\$ -	\$ -	\$ 8.82	\$ -	\$ 94.82	\$ 4.30	\$ 12.90	\$ 3.19	\$ -	8.71%	23.71%
Shibumi - S Hill St	Prepaid Order	10/7/2020	6:15 PM	\$ 36.00	\$ -	\$ -	\$ 3.69	\$ -	\$ 39.69	\$ 1.80	\$ 5.40	\$ 1.51	\$ -	9.19%	24.19%
Shibumi - S Hill St	Prepaid Order	10/22/2020	7:25 PM	\$ 22.00	\$ -	\$ -	\$ 2.26	\$ -	\$ 24.26	\$ 1.10	\$ 3.30	\$ 1.04	\$ -	9.73%	24.73%
Shibumi - S Hill St	Prepaid Order	11/12/2020	6:40 PM	\$ 64.00	\$ -	\$ -	\$ 6.56	\$ -	\$ 70.56	\$ 3.20	\$ 9.60	\$ 2.45	\$ -	8.83%	23.83%
Shibumi - S Hill St	Prepaid Order	11/12/2020	8:00 PM	\$ 36.00	\$ -	\$ -	\$ 3.69	\$ -	\$ 39.69	\$ 1.80	\$ -	\$ 1.51	\$ -	9.19%	9.19%
Shibumi - S Hill St	Prepaid Order	11/19/2020	6:38 PM	\$ 84.00	\$ -	\$ -	\$ 8.61	\$ -	\$ 92.61	\$ 4.20	\$ 12.60	\$ 3.12	\$ -	8.71%	23.71%
Shibumi - S Hill St	Prepaid Order	11/21/2020	7:57 PM	\$ 22.00	\$ -	\$ -	\$ 2.26	\$ -	\$ 24.26	\$ 1.10	\$ -	\$ 1.04	\$ -	9.73%	9.73%
Shibumi - S Hill St	Prepaid Order	12/10/2020	7:56 PM	\$ 24.00	\$ -	\$ -	\$ 2.46	\$ 1.32	\$ 27.78	\$ 1.20	\$ -	\$ 1.15	\$ -	9.79%	9.79%
Shibumi - S Hill St	Prepaid Order	12/11/2020	8:20 PM	\$ 22.00	\$ -	\$ -	\$ 2.26	\$ -	\$ 24.26	\$ 1.10	\$ 3.30	\$ 1.04	\$ -	9.73%	24.73%
Shibumi - S Hill St	Prepaid Order	12/12/2020	7:05 PM	\$ 99.00	\$ -	\$ -	\$ 10.15	\$ -	\$ 109.15	\$ 4.95	\$ 14.85	\$ 3.63	\$ -	8.67%	23.67%
Shibumi - S Hill St	Prepaid Order	12/19/2020	7:30 PM	\$ 40.00	\$ -	\$ -	\$ 4.10	\$ -	\$ 44.10	\$ 2.00	\$ 6.00	\$ 1.65	\$ -	9.13%	24.13%
Shibumi - S Hill St	Prepaid Order	1/28/2021	7:25 PM	\$ 87.00	\$ -	\$ -	\$ 8.92	\$ -	\$ 95.92	\$ 4.35	\$ -	\$ 3.23	\$ -	8.71%	8.71%
Shibumi - S Hill St	Prepaid Order	2/5/2021	6:30 PM	\$ 28.00	\$ -	\$ -	\$ 2.87	\$ -	\$ 30.87	\$ 1.40	\$ 4.20	\$ 1.24	\$ -	9.43%	24.43%
Shibumi - S Hill St	Prepaid Order	2/11/2021	6:20 PM	\$ 33.00	\$ -	\$ -	\$ 3.38	\$ -	\$ 36.38	\$ 1.65	\$ 4.95	\$ 1.41	\$ -	9.27%	24.27%
Shibumi - S Hill St	Prepaid Order	2/24/2021	6:15 PM	\$ 28.00	\$ -	\$ -	\$ 2.87	\$ -	\$ 30.87	\$ 1.40	\$ 4.20	\$ 1.24	\$ -	9.43%	24.43%
Shibumi - S Hill St	Prepaid Order	2/26/2021	6:30 PM	\$ 33.00	\$ -	\$ -	\$ 3.38	\$ -	\$ 36.38	\$ 1.65	\$ 4.95	\$ 1.41	\$ -	9.27%	24.27%
Shibumi - S Hill St	Prepaid Order	2/26/2021	6:30 PM	\$ 28.00	\$ -	\$ -	\$ 2.87	\$ -	\$ 30.87	\$ 1.40	\$ 4.20	\$ 1.24	\$ -	9.43%	24.43%
Shibumi - S Hill St	Prepaid Order	2/27/2021	7:15 PM	\$ 54.00	\$ -	\$ -	\$ 5.54	\$ -	\$ 59.54	\$ 2.70	\$ 8.10	\$ 2.12	\$ -	8.93%	23.93%
Shibumi - S Hill St	Prepaid Order	3/5/2021	6:37 PM	\$ 79.00	\$ -	\$ -	\$ 8.10	\$ -	\$ 87.10	\$ 3.95	\$ 11.85	\$ 2.96	\$ -	8.75%	23.75%
Shibumi - S Hill St	Prepaid Order	3/5/2021	7:44 PM	\$ 51.00	\$ -	\$ -	\$ 5.23	\$ -	\$ 56.23	\$ 2.55	\$ 7.65	\$ 2.02	\$ -	8.96%	23.96%
Shibumi - S Hill St	Prepaid Order	3/12/2021	7:14 PM	\$ 28.00	\$ -	\$ -	\$ 2.87	\$ 4.63	\$ 35.50	\$ 1.40	\$ -	\$ 1.38	\$ -	9.93%	9.93%
Shibumi - S Hill St	Prepaid Order	3/18/2021	7:26 PM	\$ 26.00	\$ -	\$ -	\$ 2.67	\$ 4.30	\$ 32.97	\$ 1.30	\$ -	\$ 1.31	\$ -	10.04%	10.04%
Shibumi - S Hill St	Prepaid Order	3/18/2021	7:41 PM	\$ 26.00	\$ -	\$ -	\$ 2.67	\$ -	\$ 28.67	\$ 1.30	\$ -	\$ 1.17	\$ -	9.50%	9.50%

## **EXHIBIT 5**



JOSEPH+GUGLIELMO

+ Via Overnight Mail +

March 19, 2021

Matt Maloney  
Chief Executive Officer  
Grubhub, Inc.  
111 W. Washington St., Suite 2100  
Chicago, IL 60602

**Re: Notice and Demand Pursuant to Chapter XX, Article 6  
of the Los Angeles Municipal Code**

Dear Mr. Maloney:

We represent Nueva and Shibumi ("Plaintiffs"), two restaurants in the City of Los Angeles that use Grubhub, Inc.'s ("Grubhub") food delivery platform. We are hereby notifying Grubhub, on behalf of Plaintiffs and other similarly situated Retail Food Establishments, pursuant to Chapter XX, Article 6 of the Los Angeles Municipal Code ("L.A.M.C."), that Grubhub has violated L.A.M.C. §200.71(1)-(6) and demand that Grubhub refund such amounts charged in excess of the amounts set forth in L.A.M.C. §200.71 and take other, necessary curative actions. To the extent Grubhub does not refund Plaintiffs and other similarly situated Retail Food Establishments, Plaintiffs intend to file an action in California Superior Court and pursue claims pursuant to L.A.M.C. §200.73 and Cal. Civ. Code §17200, *et seq.* (the "California Unfair Competition Law" or "UCL") against Grubhub on behalf of themselves and all other similarly situated Retail Food Establishments in the City of Los Angeles. Plaintiffs further intend to seek restitution and injunctive relief, pursuant to L.A.M.C. §200.73 and UCL, unless Grubhub agrees, within 15 days, to take all of the corrective actions demanded herein.

Plaintiffs hereby notify Grubhub that its conduct and actions, as described herein, violate L.A.M.C. §200.71 and constitute unlawful and unfair business acts and practices under the UCL. From June 10, 2020 until the present (the "Relevant Time Period"),<sup>1</sup> Grubhub has charged and continues to charge Plaintiffs and other similarly situated Retail Food Establishments unlawful and excessive delivery fees for each Online Order it fulfills. Under the express terms of L.A.M.C. §200.71,<sup>2</sup> it is unlawful for a "Third-party Food Delivery Service to charge a Retail Food Establishment any combination of fees, commissions, or costs for the Retail Food Establishment's use of the Third-party Food Delivery Service that is greater than 5 percent of the Purchase Price of each Online Order." L.A.M.C. §200.71(3). Importantly, "Fees, commissions, or costs do not include Delivery Fee." Despite this specific prohibition on excessive fees, commissions, and costs, Grubhub has routinely charged Plaintiffs non-delivery fees in excess of 5%, in violation of the L.A.M.C. and UCL. Plaintiffs also are informed and believe that Grubhub charges restaurants in the City of Los Angeles, including Shibumi, fees in excess of the combined 20% hard cap on delivery fees, commissions, costs, and other fees imposed by Chapter XX, Article 6 of the Los Angeles Municipal Code.

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<sup>1</sup> The first effective date of Chapter XX, Article 6 of the Los Angeles Municipal Code was June 10, 2020. It was renewed on October 16, 2020.

<sup>2</sup> A true and correct copy of Chapter XX, Article 6 of the Los Angeles Municipal Code is attached hereto as Exhibit A.

Matt Maloney  
Chief Executive Officer  
March 19, 2021  
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L.A.M.C. §200.73 states, in pertinent part, that a violation of Chapter XX, Article 6 shall subject the violator to the following:

1. An action in the Superior Court of the State of California to recover all actual damages resulting from a violation of this article.
2. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails in an action against a Third-party Food Delivery Service. If plaintiff fails to prevail against a Third-party Food Delivery Service, a court may award reasonable attorneys' fees and costs to the Third-party Food Delivery Service upon a determination by the court that the plaintiff's action was frivolous.
3. A civil action alleging a violation of any provision of this article shall commence only after the following requirements have been met:
  - a. Written notice is provided to the Third-party Food Delivery Service of the provisions of the article alleged to have been violated and the facts to support the alleged violation; and
  - b. The Third-party Food Delivery Service is provided 15 days from the date of the written notice to cure any alleged violation.
4. The remedies in Subsections 200.73 1. through 3. are non-exclusive. A violation of this article is unlawful and may be prosecuted under state and City law, including, but not limited to, Section 396 of the California Penal Code or Section 47.12 of the Los Angeles Municipal Code.

As a direct and proximate result of Grubhub's unlawful and unfair acts and practices, Plaintiffs and similarly situated Retail Food Establishments were substantially overcharged for each Online Order and have been injured thereby. Pursuant to L.A.M.C. §200.73(3), Plaintiffs, on behalf of themselves and all similarly situated Retail Food Establishments in the City of Los Angeles, hereby demand that Grubhub immediately correct and rectify its violations, as described herein. Specifically, Plaintiffs demand that Grubhub undertake all of the following actions:

1. Immediately refund Plaintiffs and all Retail Food Establishments in the City of Los Angeles all non-delivery fees, commissions, and costs paid to Grubhub in excess of 5% of the Purchase Price of each Online Order, from June 10, 2020 through the present;
2. Immediately refund Plaintiffs and all Retail Food Establishments in the City of Los Angeles all fees, commissions, and costs paid to Grubhub in excess of 20% of the Purchase Price of each Online Order, from June 10, 2020 through the present;
3. Immediately cease and desist from Grubhub's present unlawful and unfair business practice of charging Retail Food Establishments in the City of Los Angeles non-delivery fees, commissions, and costs in excess of 5% of the Purchase Price of each Online Order and agree not to engage in such practices and instead comply with applicable law;
4. Immediately engage in a corrective advertising campaign to inform Retail Food Establishments in the City of Los Angeles that Grubhub engaged in the unlawful and unfair business practice of charging Los Angeles Retail Food Establishments non-delivery fees, commissions, and costs in excess of 5% of the Purchase Price of each Online Order; and
5. Pay Plaintiffs' counsel's attorney's fees and costs associated with the claim.

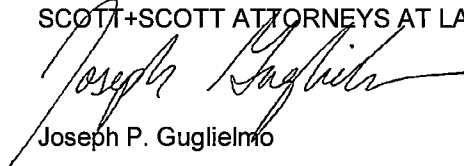
Matt Maloney  
Chief Executive Officer  
March 19, 2021  
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If Grubhub refuses to perform any of the above items immediately, it should state why it is unwilling or unable to do so. Plaintiffs intend to file an action and seek appropriate restitutionary and injunctive relief if Grubhub does not provide a full and adequate response to this letter showing compliance within 15 days. In the interim, Plaintiffs demand that Grubhub and its representatives take action to preserve all potentially relevant documents, evidence, writings, written and recorded information and "ESI" (electronically stored information) and to prevent the intentional or accidental deletion or spoliation of any evidence that in any manner relates to the allegations raised in this letter.<sup>3</sup>

Should you have any questions regarding this matter or wish to discuss or resolve Plaintiffs' claims, and those of similarly situated consumers, please have your attorney contact me.

Very truly yours,

SCOTT+SCOTT ATTORNEYS AT LAW LLP

A handwritten signature in black ink, appearing to read "Joseph P. Guglielmo", is written over the printed name.

Joseph P. Guglielmo

Encl.

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<sup>3</sup> The ESI to be preserved includes, but is not limited to, all "writings" as defined by California Evidence Code section 250, which states: "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.



## **EXHIBIT A**

## ARTICLE 6

### LIMIT ON THIRD-PARTY FOOD DELIVERY SERVICE FEES

(Added by Ord. No. 186,790, Eff. 10/16/20.)

Section	
200.70	Definitions.
200.71	Prohibitions.
200.72	Disclosures.
200.73	Enforcement.
200.74	Operative Dates.
200.75	Severability.

#### SEC. 200.70. DEFINITIONS.

For purposes of this ordinance, the following definitions apply:

1. **"City"** means the City of Los Angeles.
2. **"Delivery Fee"** means a fee charged by a Third-party Food Delivery Service for providing a Retail Food Establishment with a service that delivers food and beverages from such establishment to customers. The term does not include any other fee or cost that may be charged by a Third-party Food Delivery Service to a Retail Food Establishment, such as fees for listing or advertising the Retail Food Establishment on the Third-party Food Delivery Service platform or fees related to processing the Online Order, including, but not limited to, service fees, fees for facilitating Online Orders for pick-up, and credit card processing fees.
3. **"Online Order"** means an order placed by a customer through or with the assistance of a platform provided by a Third-party Food Delivery Service, including a telephone order, for delivery or pick-up within the City.
4. **"Purchase Price"** means the price, as listed on the menu, for the items contained in an Online Order, minus any applicable coupon or promotional discount provided to the customer by the Retail Food Establishment through the Third-Party Food Delivery Service. This definition does not include taxes, gratuities, and any other fees or costs that may make up the total amount charged to the customer of an Online Order.
5. **"Retail Food Establishment"** means a restaurant, delicatessen, bakery, coffee shop, or other eat-in or carry-out service of processed or prepared raw and ready-to-eat food or beverages.
6. **"Third-party Food Delivery Service"** means any website, mobile application, or other internet service that offers or arranges for the sale of food and beverages prepared by, and the delivery or pick-up of food and beverages from, no fewer than 20 Retail Food Establishments located in the City that are each owned and operated by different persons.

#### SEC. 200.71. PROHIBITIONS.

1. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment a Delivery Fee that totals more than 15 percent of the Purchase Price of each Online Order.
2. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any amount designated as a Delivery Fee for an Online Order that does not involve the delivery of food or beverages.
3. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any combination of fees, commissions, or costs for the Retail Food Establishment's use of the Third-party Food Delivery Service that is greater than 5 percent of the Purchase Price of each Online Order. Fees, commissions, or costs do not include Delivery Fee.
4. It shall be unlawful for a Third-party Food Delivery Service to charge a Retail Food Establishment any fee, commission, or cost other than as permitted in Subsections 1. through 3., above.
5. It shall be unlawful for a Third-party Food Delivery Service to charge a customer any Purchase Price for a food or beverage item that is higher than the price set by the Retail Food Establishment on the Third-party Food Delivery Service or, if no price is set by the Retail Food Establishment on the Third-party Food Delivery Service, the price listed on the Retail Food Establishment's own menu.
6. It shall be unlawful for a Third-party Food Delivery service to retain any portion of amounts designated as a tip or gratuity. Any tip or gratuity shall be paid by the Third-party Delivery Service, in its entirety, to the person delivering the food or beverages.

**SEC. 200.72. DISCLOSURES.**

The Third-party Food Delivery Service shall disclose to the customer an accurate, clearly identified, and itemized cost breakdown of each transaction, including, but not limited to, the following:

- (a) the Purchase Price of the food and beverages at the cost listed on the Retail Food Establishment's menu;
- (b) the Delivery Fee charged to the Retail Food Establishment;
- (c) each fee, commission, or cost, other than a Delivery Fee, charged to the Retail Food Establishment;
- (d) each fee, commission, or cost, other than the Delivery Fee or the Purchase Price of the food, charged to the customer by the Third-party Food Delivery Service; and
- (e) any tip or gratuity that will be paid to the person delivering the food or beverages.

**SEC. 200.73. ENFORCEMENT.**

A violation of this article shall subject the violator to the following:

- 1. An action in the Superior Court of the State of California to recover all actual damages resulting from a violation of this article.
- 2. Reasonable attorneys' fees and costs awarded by a court to a plaintiff that prevails in an action against a Third-party Food Delivery Service. If plaintiff fails to prevail against a Third-party Food Delivery Service, a court may award reasonable attorneys' fees and costs to the Third-party Food Delivery Service upon a determination by the court that the plaintiff's action was frivolous.
- 3. A civil action alleging a violation of any provision of this article shall commence only after the following requirements have been met:
  - (a) Written notice is provided to the Third-party Food Delivery Service of the provisions of the article alleged to have been violated and the facts to support the alleged violation; and
  - (b) The Third-party Food Delivery Service is provided 15 days from the date of the written notice to cure any alleged violation.
- 4. The remedies in Subsections 200.73 1. through 3. are non-exclusive. A violation of this article is unlawful and may be prosecuted under state and City law, including, but not limited to, Section 396 of the California Penal Code or Section 47.12 of the Los Angeles Municipal Code.

**SEC. 200.74. OPERATIVE DATES.**

This article shall be operative at any time during which a federal, state, or local order, resulting from the COVID-19 pandemic, limits customer capacity to less than full capacity at Retail Food Establishments in the City of Los Angeles, and for a period of 90 days after any such federal, state, or local order is lifted.

**SEC. 200.75. SEVERABILITY.**

If any subsection, sentence, clause or phrase of this article is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this article. The City Council hereby declares that it would have adopted this article and each and every subsection, sentence, clause, and phrase thereof not declared invalid or unconstitutional, without regard to whether any portion of the article would be subsequently declared invalid or unconstitutional.

# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Class Action: Grubhub Overcharged Los Angeles Restaurants to Use Online Delivery Platform Amid Pandemic Despite Fee Cap](#)

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