July 21, 2021

Lina Khan, Chair
Rohit Chopra, Commissioner
Christine S. Wilson, Commissioner
Noah Joshua Phillips, Commissioner
Rebecca Kelly Slaughter, Commissioner

Re: Memo on the deceptive and illegal practices of dominant delivery app corporations

Dear Chairwoman Khan and Commissioners:

We are writing to ask that the Federal Trade Commission initiate an investigation into delivery app corporations and apply remedies where appropriate for their anticompetitive, predatory, and fraudulent behavior. As outlined below, these corporations have engaged in a host of anticompetitive actions that likely clear the legal threshold for FTC action.

The coronavirus pandemic has significantly impacted small and independent American restaurants, more than 110,000 of which have shuttered permanently following shutdown orders and capacity curtailments.[1] Meanwhile, restaurants that remained open did so mostly due to an increase in deliveries.[2]

The pandemic has thus provided delivery app corporations with the opportunity to engage in anticompetitive practices to siphon money from restaurants. For many restaurants, delivery app commissions—which can total 30 percent or more of a given order—now exceed their budgets for rent and labor.[3] More than 70 cities, states, and municipalities temporarily capped the fees apps were allowed to charge restaurants during the pandemic as a way to aid those businesses.[4]

But caps can't curtail the anticompetitive practices, which enable these companies to charge restaurants monopolistic fees. As this memo explains, the delivery app companies, while superficially engaged in competition, have shown little interest in actually competing for the business of restaurants. Fees are extremely high, service is poor across the board, and delivery apps that distinguished themselves through superior training and service—Caviar, OrderUp, and Waitr all got high marks from restaurants in their early years—have all been either acquired by one of the big three or compelled to adopt their business model.

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[1] Gonzalez, Carolina, "Restaurant Closings Top 110,000 With Industry in 'Free Fall,'" Bloomberg News, Dec. 7, 2020, www.bloomberg.com/news/articles/2020-12-07/over-110-000-restaurants-have-closed-with-sector-in-free-fall.
[2] Sumagaysay, Levi, "The pandemic has more than doubled food-delivery apps' business. Now what?," Marketwatch, Nov. 25, 2020, 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.
[3] American Economic Liberties Project interviews.
[4] Protect Our Restaurants, list of state and local fee caps, www.protectourrestaurants.com/fee-caps.

Indeed, while each company began with its own individual strategy for conquering the meal delivery business, they were quick to adopt one another's tactics, and the most abusive and anticompetitive practices quickly became standard throughout the industry.

The Federal Trade Commission should investigate the anticompetitive and often illegal practices outlined below, including mergers, coercion based on deception, and contracts that limit competition, and propose remedies where appropriate. Each corporation uses slightly different strategies and practices, so this memo is divided into three sections, one on each of the dominant corporations in question. Each section itemizes specific practices that deserve attention.

Grubhub

Introduction:

Grubhub was founded in 2004 in Chicago as a location-based search engine for restaurants offering delivery services. Initially restaurants paid a flat monthly fee to advertise on the platform, but the site quickly migrated to a commission structure, and attracted its first round of venture capital in 2007. Seamless, the New York-based corporate catering interface with which it eventually merged, began offering similar services in 2005. Both companies began expanding rapidly in 2010 and ultimately merged in 2013; the company has subsequently acquired eight other competitors.[5]

Price Increases: Early Grubhub partner restaurants paid 5 percent commissions to feature their menus on the site.[6] After the merger in 2013 and the IPO in 2014, the company's revenue as a percentage of gross sales rose substantially. Net revenue went from 13.7 percent of gross food sales in 2013 to 22.3 percent of gross food sales in 2020.[7] This is evidence that the increasingly large company was able to raise prices on consumers while continuing to grow its business. This is a direct harm to consumers. We believe this is monopolization in violation of the law.

Deceptive Lead Generation Tactics: Grubhub touts itself as a "lead generator" for independent restaurants, helping to grow their businesses by connecting them with a new generation of device-dependent consumers.[8] Instead it uses deception to acquire restaurants' customers for

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[5] Tkacik, Maureen, "Rescuing Restaurants: How to Protect Restaurants, Workers, and Communities From Predatory Delivery App Corporations," American Economic Liberties Project, Sept. 2020, www.economicliberties.us/wp-content/uploads/2020/09/Working-Paper-Series-on-Corporate-Power_7.pdf.

[6] A POR member restaurant group in Boston that became one of Grubhub's inaugural "partner restaurants" in the region in 2009 reports that it paid a 5 percent commission until 2017.

[7] Grubhub booked $88.1 million in revenue on $645 million in gross food sales during the first nine months of 2013, and $363 million on $1.63 billion during the first three months of 2002. See Grubhub November 2014 10-Q, investors.grubhub.com/investors/sec-filings/sec-filings-details/default.aspx?FilingId=10287008, and May 2020 10-Q, d18rn0p25nwr6d.cloudfront.net/CIK-0001594109/ad9986d2-ca92-4cd1-b5d0-85ec3b6dd3a0.pdf.

[8] Ord, Rich, "We Are a Marketplace That Sells Demand Generation, Says Grubhub CEO," WebProNews, April 6, 2019, www.webpronews.com/grubhub-sells-growth.

itself. Grubhub's deceptive website creation, search advertising manipulation, and phone number spoofing position in between restaurants and their own customers, all of which are employed in the service of tricking customers into using Grubhub who otherwise wouldn't, is a Section 5 violation of the FTC Act.[9]

a. *Deceptive Website Creation*: Around 2011, Grubhub began buying URLs related to restaurants on its platform and building websites on them, without the knowledge of said restaurants. The sites had basic online ordering capabilities that fulfilled orders on the Grubhub platform, ensuring Grubhub would get a 30 percent cut of the transaction even though Grubhub could hardly take credit for generating the lead; if anything, the restaurants were generating leads for Grubhub.[10]
b. *Search Engine Manipulation*: Grubhub, like most lead generators and all the major delivery apps, derives much of its power from its frequent and heavy bidding on industry-related Google ad words. Grubhub regularly bids not simply on Google ad words for generic food searches like "pizza" or "sushi," but the names of specific restaurants, with the sole intention of deceiving a restaurant's existing customers into unwittingly using Grubhub. In July 2020, the owner of one restaurant with a unique Southeast Asian name found that of the first 10 search results displayed on Google when she searched the name of her restaurant, seven were owned or controlled by Grubhub; her own restaurant's website did not appear until the 11th search result.[11] Since signing up with Grubhub two months earlier, this restaurant owner said her order volume had risen roughly 5 percent, but Grubhub orders had soared to comprise 60 percent of her volume.
c. *Phone Number Spoofing*: Also around 2011, Grubhub began surreptitiously switching the phone numbers listed on its sites and sites it controlled or partnered with, such as Menupages and Yelp, to numbers directed to Grubhub call centers, in order to charge partner restaurants additional commissions for phone calls "generated" by those sites. Grubhub executives, including co-founder Mike Evans, insisted that algorithms were able to "predict with a high degree of accuracy which calls are orders" and any that seemed suspect did not result in charges, but in reality restaurants were charged for every call

[9] The conduct described here meets the three elements of a Section 5 deceptive practice: "[1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the circumstances, and [3], the representation, omission, or practice is material." *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 165 (1984); *accord FTC v. Tashman,* 318 F.3d 1273, 1277 (11th Cir.2003); *FTC v. World Travel Vacation Brokers, Inc.,* 861 F.2d 1020, 1029 (7th Cir.1988).
[10] Brown, H. Claire, "Grubhub is buying up thousands of restaurant web addresses," The Counter, June 28, 2019, thecounter.org/grubhub-domain-purchases-thousands-shadow-sites. See also Frank, Blair Hanley, "Thousands of rogue restaurant websites diverting customers to OrderAhead deliveries," GeekWire, May 6, 2015, www.geekwire.com/2015/exclusive-thousands-of-rogue-restaurant-websites-diverting-customers-to-orderahead-deliveries. Numerous POR member restaurants have reported finding similar phantom websites related to their restaurants, registered not only by Grubhub but BeyondMenu, a company that appears to acquire restaurant domain names and Google Business listings to sell to Grubhub and other delivery apps. See "Real Examples of Online Ordering Companies Screwing Merchants," Reforming Retail, Nov. 8, 2016, reformingretail.com/index.php/2016/11/08/real-examples-of-online-ordering-companies-screwing-merchants.
[11] Interview with POR member restaurant owner in Portland, Oregon, Aug. 2020.

lasting longer than 45 seconds. Restaurants across the country reported paying Grubhub an average of $8 for phone calls generated from Grubhub-controlled sites. Grubhub continued this practice even after a Philadelphia restaurant owner filed a class-action lawsuit in 2019 exposing it, but the corporation did enable restaurants to access recordings of the calls so they might dispute the charges. A restaurant owner, interviewed by Economic Liberties staff, who surveyed those recordings said that virtually none of the calls for which he was charged consisted of an order. In contrast to virtually every other deceptive practice discussed in this letter, this brazenly deceptive tactic is unique to Grubhub, and Economic Liberties has not learned of attempts by other delivery apps to emulate it.[12] Notably, a recent report by a tech industry podcast suggests that Grubhub may be continuing this practice in part to intimidate and deter restaurant partners who place inserts into delivery bags asking customers to place orders over the phone.[13]

The common theme uniting all these tactics is Grubhub's unfair and deceptive strategy of usurping restaurants' customers for its own purposes and inserting itself as an often hidden tollbooth operator in the independent restaurant industry's internet ecosystem. We believe these practices violate Section 5 of the FTC Act, specifically its prohibition on unfair and deceptive practices, and Section 43(a) of the Lanham Act, 15 U.S.C. § 1125.[14]

Deceptive or Fraudulent Search Fees: In 2013 guidance, the FTC directed search engines like Grubhub to establish clear, readily apparent distinctions between information and paid advertising in the display of search results.[15] But while Grubhub has publicly stated that its search algorithms grant preference to partners who pay larger commissions, its formula for awarding preference is unknown to restaurants, which regularly report uncertainty as to how much they are paying Grubhub and what those fees are allegedly "buying" them.[16] Restaurants that have tried to limit their commissions by opting out of promotions report being "buried" in search results, while restaurants that do a large volume of business on Grubhub often report finding on their invoices unexpected commission and promotional charges , which severely

[12] Jeffries, Adrianne, "Yelp Is Screwing Over Restaurants By Quietly Replacing their Phone Numbers," Vice, Aug. 6, 2019, www.vice.com/en/article/wjwebw/yelp-is-sneakily-replacing-restaurants-phone-numbers-so-grubhub-can-take-a-cut.

[13] "Recode's Land of the Giants Podcast Launches 'Delivery Wars' in Collaboration with Eater," Vox Media, June 15, 2021, www.voxmedia.com/2021/6/15/22534848/recodes-land-of-the-giants-podcast-launches-delivery-wars-in-collaboration-with-eater.

[14] Clark, David, "Bait and Switch Advertising in 2020: Is Grubhub violating the Lanham Act?," May 19, 2020, www.genericfairuse.com/2020/05/19/bait-and-switch-advertising-in-2020-is-grubhub-violating-the-lanham-act.

[15] "FTC Consumer Protection Staff Updates Agency's Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results," Federal Trade Commission, June 5, 2013, www.ftc.gov/news-events/press-releases/2013/06/ftc-consumer-protection-staff-updates-agencys-guidance-search.

[16] Grubhub Prospectus, 2014, www.sec.gov/Archives/edgar/data/1594109/000119312514075544/d647121ds1.htm.

impact their profit margins.[17] Numerous restaurants have shared correspondence with Economic Liberties suggesting that Grubhub systematically enrolls restaurants in expensive promotions without their consent, only to learn at the end of the month that the platform has usurped as much as 65 percent of their top line revenue.[18] Some restaurant operators and small business advocates say Grubhub representatives appear to deliberately target restaurant operators who do not speak English fluently or who appear less familiar with marketing and technology to sell these higher tiers of service.[19] This violation of FTC guidance and the reportedly coercive search promotion fees are potentially unfair or deceptive practices.

Price Restraints: Grubhub explicitly prohibits restaurants from pricing according to their costs through a No Price Competition Clause (NPCC) in its standard contract. Grubhub's NPCC requires restaurants to not only agree to charge the same price on its platform as it does in-house, but to guarantee that the price it charges will be uniform across *all* delivery app platforms. This deprives restaurants of the most straightforward mechanism by which they might attempt to incentivize customers to find alternatives to the dominant delivery apps: offering lower prices for pickup or on-premises dining. The clauses also absolve the apps from competing with one another on the basis of price to woo restaurants.[20] Courts have found most favored nation clauses (MFNs) to violate Section 1 of the Sherman Act when they eliminate price competition and raise prices.[21] The District of Columbia recently initiated a complaint against Amazon for a similar

[17] See Brown, "Grubhub is buying": "Shivane says she feels like the platform is increasingly pay to play: Spend more to promote your restaurant, and see your search rankings rise. Cut down on marketing spend, and watch your restaurant fall to the bottom of the page and lose sales."

[18] In May, a consultant in Chicago shared on Facebook a monthly invoice from a pizzeria showing Grubhub had taken 64 percent of the total value of orders it had processed in commissions and fees, while a Pittsburgh bar owner showed a local news station an invoice showing that the service had deducted $8,528 in commissions and fees from $15,385 worth of orders. And in July, a Vietnamese restaurant in Portland shared an invoice showing that Grubhub had charged $12.50 in fees for a $19 order, despite an ordinance the city council had passed weeks earlier capping at 10 percent the commissions the apps were legally permitted to charge restaurants. See Moreschi, Angie, "Grubhub marketing fees leave Pittsburgh restaurant owner shocked, upset," WPXI, May 18, 2020, www.wpxi.com/news/investigates/grubhub-marketing-fees-leave-pittsburgh-restaurant-owner-shocked-upset/T5KGE43FA5BJHAGSK6QCWTGRIU; Saxena, Jaya, "Viral Facebook Post Shows Just How Little Some Restaurants Make From Grubhub Orders," Eater, May 1, 2020, www.eater.com/2020/5/1/21243966/giuseppe-badalamenti-chicago-pizza-boss-shares-grubhub-earning-statement-on-facebook; and Forster, Tim, "Grubhub and Postmates Are Actively Defying Portland's New Delivery Fee Law," Eater Portland, July 29, 2020, pdx.eater.com/2020/7/29/21346985/portland-delivery-app-fee-cap-law-postmates-grubhub.

[19] Various interviews with market participants in Portland, Oregon; Atlanta, Georgia; and Boston, Massachusetts, 2020.

[20] For more information on the No Price Competition Clauses, see the federal antitrust lawsuit *Davitashvili v. Grubhub et al.*, secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-doordash-postmates.

[21] For a prominent recent example, see *United States v. Apple, Inc.*, 791 F.3d 290, 320 (2d Cir. 2015) ("In any event, we are breaking no new ground in concluding that MFNs, though surely proper in many contexts, can be 'misused to anticompetitive ends in some cases.'" *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir.1995); see Starr, 592 F.3d at 324 (finding MFN evidence of conspiracy). Under the right circumstances, an MFN can "facilitate anticompetitive horizontal coordination" by "reduc[ing] [a company's] incentive to deviate from a coordinated horizontal arrangement.") See also Baker, Jonathan B., and Fiona Scott Morton, "Antitrust Enforcement Against Platform MFNs," The Yale Law Journal, May 2018, www.yalelawjournal.org/feature/antitrust-enforcement-against-platform-mfns.

contracting practice as a violation of competition law. We believe these clauses constitute a form of price-fixing and monopolization that violates Sections 1 and 2 of the Sherman Act.

Deceptive and Retaliatory Listings: Grubhub retaliates against restaurants that discontinue its services or attempt to opt out of promotions using a variety of questionable or illegal tactics, most often posting the fraudulent disclaimer “This restaurant is not accepting orders right now” or “This restaurant is not accepting online orders right now” at the top of their profiles not only on Grubhub but on Yelp, AllMenus, MenuPages, Eat24, and others, misleading customers into believing the restaurant is closed or exclusively accessible to on-premise diners. This deceptive practice, which is also used by DoorDash, is the subject of a federal class-action lawsuit filed in federal court in Illinois.[22] We believe this is a deceptive practice under the FTC Act.

Anticompetitive Mergers and Acquisitions: In response to competition from Postmates, DoorDash, and Uber Eats, Grubhub began acquiring regional delivery services and building its own network of delivery drivers around 2014 and 2015. In July 2017, Grubhub purchased the delivery service assets of 27 markets controlled by the delivery network OrderUp and immediately informed that service’s customers it would be raising commissions to 30 percent, a 200 percent price hike in some cases.[23] The FTC is pursuing a case against Facebook for similar acquisitions. We believe Grubhub’s mergers and price increases likewise violate Section 2 of the Sherman Act and Section 5 of the FTC Act.

Unauthorized Deliveries: In 2019 Grubhub began engaging in another practice already widely in use among its peers: promoting and accepting online orders from about 150,000 unaffiliated restaurants on its platforms. This practice, pioneered by Postmates and DoorDash, was recently banned in California.[24] It involves promoting a restaurant’s menu items on one’s platform without the restaurant’s permission or knowledge, dispatching customer service representatives to phone the restaurants to order the items for takeout, then dispatching delivery drivers with specific instructions to refrain from disclosing the name of the delivery app or brandishing branded takeout bags while fulfilling the order.

In a letter explaining the practice to shareholders, Grubhub described these unauthorized deliveries as “a suboptimal diner experience rife with operational challenges.”[25] Yet Grubhub engages in them in order to drive new users to its platform by diverting demand for popular

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[22] “Grubhub Fraudulent Restaurant Listing Lawsuit,” Gibbs Law Group, www.classlawgroup.com/grubhub-fraudulent-restaurant-listing-lawsuit.

[23] Tkacik, “Rescuing Restaurants.”

[24] Guszkowski, Jim, “California puts end to questionable third-party delivery practice,” Restaurant Business, Sept. 25, 2020, www.restaurantbusinessonline.com/technology/california-puts-end-questionable-third-party-delivery-practice.

[25] Ott, Matt, “Grubhub’s stock plunges as food delivery competition grows,” ABC News, Oct. 29, 2019, abcnews.go.com/Technology/wireStory/grubhub-valuation-tumbles-rivals-encroach-66607851; Saxena, Jaya, “Grubhub’s New Strategy Is to Offer Deliveries Without Restaurants’ Permission,” Eater, Oct. 30, 2019, www.eater.com/2019/10/30/20940107/grubhub-to-add-restaurants-without-permission-like-postmates.

restaurant brands and then coercing restaurants into signing up in order to to avoid the reputational damage that results from unauthorized deliveries, or in Grubhub's charitable characterization, "to try to convert these restaurants to partners, because it's a better experience for anyone involved."[26] We believe this practice violates the Lanham Act as false advertising and Section 5 of the FTC Act as a deceptive practice likely to mislead consumers and harm businesses.

Stealing Restaurant Identities: Grubhub also fraudulently profits from the names of existing restaurants. For example, Grubhub listed the name and address of a Michelin-starred San Francisco Thai restaurant without its consent, but directed orders to a "ghost kitchen" operated from a food truck in a nearby parking lot.[27] (Yelp also directed users browsing the restaurant's Yelp page to the ghost kitchen's menu on Grubhub.) The food truck failed to fulfill the orders, and the restaurant was bombarded with angry telephone calls from customers,[28] leading its owner to discover that Grubhub's fraudulent order form appeared ahead of her own restaurant's website. A Grubhub spokesperson claimed that the company had deliberately added the Michelin-starred restaurant to its platform after its search data identified its brand as being in "high demand" among users, but inadvertently "referenced the incorrect menu" in the process of doing so.

This practice—alongside the unauthorized deliveries mentioned above—entrenches Grubhub's unfairly achieved power to set artificially high commissions by stripping restaurants of their sole form of leverage for negotiating lower fees: the ability to boycott the platform.[29] We believe it also constitutes a deceptive practice under Section 5 of the FTC Act.

Postmates/Uber Eats

Unauthorized Deliveries: Founded in 2011 under the name Get It Now, Postmates pioneered the now-ubiquitous delivery app practice of offering delivery service from merchants without their knowledge or consent. In 2013, the company raised $16 million in venture capital led by a firm called Spark Capital and entered into a relationship with the Spark-controlled social networking app Foursquare, which gave its platform access to menu and merchant information and traffic

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[26] As Grubhub CEO Matt Maloney explained on a conference call with investors, unauthorized deliveries successfully convert restaurants into paying partners "because the diner experience sucks" and signing up to pay a commission was "a better experience for anyone involved." See Gibbs Law Group, "Grubhub Fraudulent Restaurant Listing Lawsuit."

[27] Barmann, Jay, "[Update] Imposter Impersonates Kin Khao On Seamless, Grubhub," SFist, Jan. 26, 2020, sfist.com/2020/01/26/imposter-impersonates-kin-khao-on-seamless-grubhub.

[28] Pershan, Caleb, "Delivery Apps Keep Adding Restaurants Without Their Consent," Eater, Jan. 29, 2020, www.eater.com/2020/1/29/21113416/grubhub-seamless-kin-khao-online-delivery-mistake-doordash.

[29] Economic Liberties spoke separately with representatives of three different restaurant coalitions that had attempted to negotiate lower commissions with the delivery apps: the Golden Gate Restaurant Association in San Francisco, the Portland Independent Restaurant Alliance in Portland, and the Dining Alliance group purchasing organization in Waltham, Massachusetts. All three groups reported that all the delivery apps they approached had flatly refused to discuss terms with any group larger than a single restaurant corporation.

data Foursquare users had produced in the process of “checking in” at favorite establishments.[30] The menus helped Postmates rapidly build comprehensive platforms for ordering from hundreds of different establishments whenever it entered a new market. In 2016, Postmates acquired a startup called Hey Inc. that served many of the same purposes.

As discussed in the above section on Grubhub, the immediate goals of the unauthorized deliveries were to 1) attract new users to its platform by exploiting existing demand for meals produced by popular restaurants and then 2) induce those restaurants to formalize the partnership by agreeing to give the apps a substantial percentage of revenues processed over their platforms. Restaurant owners who approached Postmates to remove their menus from its platform were told it was “impossible to take the restaurant off because of its Foursquare-linked design.”[31] We believe it is a violation of Section 5 FTC Act to deceptively list restaurants on the platform and unfairly force businesses to engage on the platform.

Increased Prices: Uber, which acquired Postmates in December of 2020, launched its delivery service Uber Eats in the United States in 2015 and began rolling out in most major markets in 2017. Unlike DoorDash and Grubhub, which launched their services with commissions ranging from 5–15 percent, Uber Eats set independent restaurant commissions at 30–35 percent, a **substantially higher fee than was being charged by competitors**. Within three weeks of Uber Eats’ May 2017 debut in the Boston market, multiple restaurants known to Economic Liberties received emails from DoorDash informing them that their commissions would be rising, with the explanation that “the market rate for online/mobile delivery ordering where drivers are provided like DoorDash is now 30 percent, a level which is significantly higher than when we initially structured our partnership.” Those emails were closely followed by similar emails from Grubhub. While more competition is intuitively associated with lower prices, the introduction of Uber Eats into the delivery app market seems to have had the effect of raising prices for restaurants joining delivery app platforms. We believe this is direct evidence of monopoly power and monopolization of local delivery markets.

DoorDash/Caviar/OrderAhead

Unauthorized Deliveries: DoorDash attained its 50 percent share[32] of the American food delivery business in large part by spending more aggressively on the practice pioneered by Postmates: unauthorized deliveries. But instead of focusing its efforts solely on independent restaurants, DoorDash aggressively courted a mass market audience by introducing fraudulent delivery

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[30] Jones, Sara, “The Postmates Problem: Why Some Restaurants Are Forced to Fight the Delivery App,” Eater, July 31, 2015, www.eater.com/2015/7/31/9074491/postmates-delivery-problems.
[31] Ibid.
[32] Durbin, Dee-Ann, “Controlling half of the US food delivery market, DoorDash shares soar 78% in stock market debut,” USA Today, Dec. 9 2020, www.usatoday.com/story/money/markets/2020/12/09/doordash-stock-maket-shares-soar-debut/3865709001.

service to well-known chains like In-N-Out Burger and Legal Sea Foods, on websites that used slightly altered versions of those companies' logos to give users the impression of formal endorsements. Both chains sued DoorDash for trademark infringement after alleging the company had failed to respond to cease and desist letters.[33] We believe this unfair and deceptive practice violates Section 5 of the FTC Act. Further, given its market share and the effect this practice has on further gaining market power, we believe it may constitute monopolization under Section 2 of the Sherman Act.

Deceptive Lead Generation Practices: In 2015, OrderAhead, a delivery app that would ultimately be acquired by DoorDash, began registering thousands of domain names related to popular restaurants in markets it planned to enter, and also claiming the Google Business and Google+ profiles of those restaurants. The company would build rudimentary websites with basic online ordering capabilities at the URLs it had registered and use search engine optimization tactics to elevate their standings in the search rankings. But where Grubhub had built its phantom websites on "behalf" of its partner restaurants, OrderAhead created websites related to restaurants that were not aware of their existence.[34] We believe this is a violation of Section 5 of the FTC Act, specifically its prohibition on deceptive practices.

Menu Price Misrepresentations: DoorDash does not offer unauthorized deliveries to a restaurant indefinitely; the practice is a sales tactic. Several market participants who spoke with Economic Liberties speculated that DoorDash deliberately advertised outdated and incorrect menu information on its platform as a means of incentivizing restaurant operators to officially partner with DoorDash. The company has conceded that it deliberately under-prices certain items on restaurants' menus and writes off the difference as a means of testing the demand for those items.[35] We believe this is a Section 5 deceptive practices violation.

Deceptive and Retaliatory Listings: Restaurants that refuse to partner with DoorDash widely report facing retaliation. For instance, DoorDash will allow users to go through with the process of ordering a meal from the establishment, only to inform them at checkout that the restaurant is "too far away." One Missouri restaurant that had never signed a contract with DoorDash because it employs its own delivery drivers kept screengrabs of attempts to order meals from an address across the street and used them to sue DoorDash for deceptive practices in federal court.[36] We believe this deceptive practice is a Section 5 FTC Act violation.

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[33] See the federal trademark infringement cases *In-N-Out Burgers v. DoorDash Inc.,* filed November 2015 in California's central district, and *Legal Sea Foods LLC v. DoorDash Inc.*, filed March 2016 in Massachusetts.
[34] Frank, "Thousands of rogue restaurant websites."
[35] See Ming, Christopher, "How to get your restaurant removed from DoorDash," Christopher Ming Blog, Oct. 21, 2018, christopherming.com/2018/10/how-to-get-your-restaurant-removed-from-doordash.
[36] Kelso, Alicia, "DoorDash accused of providing 'deceptive information' about non-partners on its platform," Restaurant Dive, Sept. 28, 2020, www.restaurantdive.com/news/doordash-accused-of-providing-deceptive-information-about-non-partners-on/585957.

Deceptive Lead Generation Tactics: Fearing such retaliation, many restaurants with the resources to do so choose to simultaneously maintain a partnership with DoorDash while managing their own online marketing efforts and courier teams. Even then, however, restaurant owners and marketers have told us they are regularly outbid by the delivery app for multiple variations on their own Google ad words, effectively rendering it impossible for those establishments to elevate their own websites into the top results that appear when a user searches specifically for their brand name. The marketing director of a small restaurant group told Economic Liberties that cracking the top search results was a constant struggle, and that the group was spending $20,000 a month simply to avoid losing its own customers—and the attendant 30 percent of its revenues—to DoorDash.[37] The FTC should consider a rule to prevent third parties from bidding on brand name and trademarked ad words.

Anticompetitive Mergers and Acquisitions: By the middle of the last decade, a few smaller startups attempted to carve out a niche focusing on high standards of service and catering to the desires of restaurant operators. The most successful of these indie delivery apps, Caviar, was highly regarded by restaurants for carefully screening its couriers, dispatching photographers to create enticing microsites, and employing diligent customer service representatives. But after DoorDash purchased Caviar in 2019, restaurants that had done substantial volume over the Caviar platform reported a steep and sudden falloff in their business following the integration of the two companies' systems, leading some to speculate that DoorDash had acquired the company primarily to eliminate a competitor, in violation of the Clayton Act prohibition on anticompetitive mergers.[38] We believe DoorDash's acquisition also likely violates Section 2 of the Sherman Act in a way that parallels the FTC's complaint against Facebook.

Conclusion

None of the companies described above are currently profitable, but they have successfully extracted billions of dollars from small businesses at the very moment when those businesses could least afford it. They attained their market power by using a variety of aggressive tactics—some merely clever, to be sure—but others deceptive, predatory, and dangerous to the integrity of American commerce. But in a deeply competitive, low-margin industry like restaurants, the delivery apps are unlikely to convert their market power into the windfall profits their financial backers expect without radically restructuring the landscape of American dining. We hope the Commission will take swift action to investigate this fast-growing industry and

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[37] Interview with online marketing executive, Dec. 2020. Notably, the marketer provided Economic Liberties with an email from a DoorDash representative apologizing for the practice and explaining that DoorDash ad buyers were simply under strict orders to blanket the search engines with advertising dollars in a bid to hold its own against Grubhub and Uber Eats.

[38] Adams, Erika, "NYC Restaurants Are Having Issues With Caviar Orders Following DoorDash Integration," Eater New York, Aug. 20, 2020, ny.eater.com/2020/8/20/21377218/caviar-doordash-integration-issues-restaurants-nyc.

establish clear guidelines regarding which of its aggressive practices constitute legal disruption and which cross the line into illegal deception, predation, and old-fashioned cheating.

Sincerely,

Protect Our Restaurants