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**ENDORSED
FILED**
 San Francisco County Superior Court

MAY 03 2021

CLERK OF THE COURT
 BY: **ANGELICA SUNGA**
 Deputy Clerk

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

11 JESSE STOUT, on behalf of himself and all
 12 others similarly situated,

13 Plaintiff,

14 v.

15 GRUBHUB INC., and DOES 1- 50, inclusive,

16 Defendant.

Case No.

CCC-21-591204

CLASS ACTION COMPLAINT

[DEMAND FOR JURY TRIAL]

1 Plaintiff JESSE STOUT, on behalf of himself and all others similarly situated, complains and
2 alleges upon information and belief based, among other things, upon the investigation made by Plaintiff
3 and through his attorneys as follows:

4 **NATURE OF ACTION**

5 1. This is a proposed class action seeking monetary damages, restitution, and injunctive and
6 declaratory relief from Defendant Grubhub Inc. (“Defendant” or “Grubhub”), arising from Grubhub’s
7 deceptive and untruthful advertising related to Grubhub’s promise to provide “Unlimited Free Delivery”
8 to Grubhub+ subscribers.

9 2. Since it began offering the service in 2020, Grubhub has marketed its Grubhub+ monthly
10 subscription service as a flat, low-cost way to receive “Unlimited Free Delivery.” For \$9.99/month,
11 Grubhub promised users that if they signed up for Grubhub+, they would receive unlimited free delivery
12 on Grubhub orders over \$12.

13 3. Thousands of Californians availed themselves of that offer and continue to do so every
14 day.

15 4. However, in December 2020, Grubhub began adding additional delivery fees to the orders
16 placed by Grubhub+ users.

17 5. To conceal the true nature of these additional delivery fees, Grubhub styled the fee a “CA
18 Driver Benefits Fee,” which it began adding to every Grubhub+ order in December 2020.

19 6. The CA Driver Benefits Fee is a delivery fee. This fee, which is tacked on to every
20 delivery order (but not to orders through Grubhub that are picked up in store) is, by definition, a delivery
21 fee.

22 7. But for Plaintiff and other Grubhub+ subscribers, who signed up for Grubhub+ based on
23 the promise of “Unlimited Free Delivery,” the imposition of a delivery fee to every order fundamentally
24 undermines the benefit of their bargain and amounts to a bait & switch.

25 8. Plaintiff and other Grubhub+ subscribers were lured into signing up for a Grubhub+
26 subscription based on the promise of Unlimited Free Delivery. Grubhub failed to honor that promise,
27 however, by adding a CA Driver Benefits Fee to every Grubhub order.
28

1 16. When AB5 passed in September 2019, app-based food delivery companies, including
2 Grubhub, publicly protested in every forum available to them, decrying the law as incompatible with
3 their business model.

4 17. Desperate to avoid the profit-cutting implications of AB5, the app-based food delivery
5 companies devised Proposition 22.

6 18. Proposition 22 aimed to exempt app-based food delivery companies from the scope of
7 AB5. But in a concession to labor advocates, and in an effort to gain public buy-in, the Proposition also
8 provided certain minimum protections and benefits to drivers. Those protections—while not nearly as
9 extensive as those which would have been afforded to drivers had they been deemed employees—did
10 guarantee drivers a higher level of benefits than they had been receiving as independent contractors prior
11 to the passage of AB5. For example, under Proposition 22, drivers would receive 120% of the local
12 minimum wage for each hour spent driving. Drivers would also receive limited expense reimbursement
13 as well as a health insurance stipend, among other benefits.

14 19. Grubhub and other app-based food delivery companies poured millions of dollars into the
15 Proposition 22 campaign. Proposition 22 quickly became the most expensive measure in California
16 history, with over \$200 million contributed to the campaign effort.

17 20. Grubhub and other app-based food delivery companies sold California voters on the idea
18 that Proposition 22 was a “compromise” that would “create a third employment classification” allowing
19 drivers “more perks than the average independent contractor but wouldn’t entitle workers to the full
20 benefits of an employee” that they otherwise would have been entitled to under AB5.¹ Proposition 22,
21 these companies argued, was the way to ensure adequate protections to drivers, while also keeping their
22 businesses afloat.

23 21. After months of extensive campaigning, advertising, and lobbying, Grubhub and the other
24 app-based food delivery companies ultimately got their way, and California voters passed Proposition 22,
25 exempting Grubhub and other companies from AB5.

26
27
28 ¹ <https://www.wired.com/story/uber-lyft-fight-law-say-doesnt-apply/>

22. Shortly after the passage of Proposition 22, however, Grubhub was faced with a problem. Proposition 22—hailed as the “compromise” that would largely exempt Grubhub from paying for the extensive benefits that otherwise would be required under California employment law—still required Grubhub to pay for certain benefits and protections that it had not previously been covering. These benefits posed a threat to Grubhub’s profit margin.

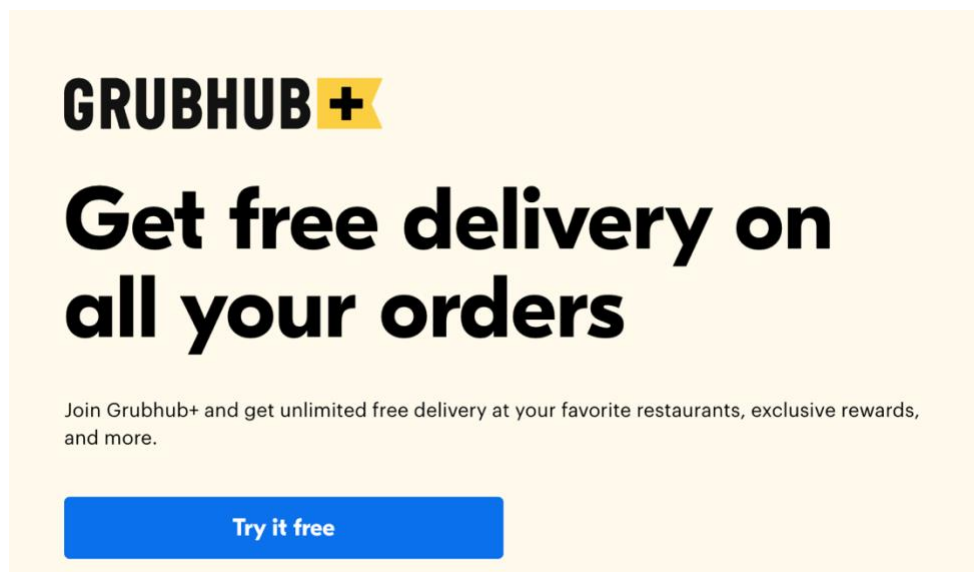
23. Despite spending millions of dollars campaigning for the passage of Proposition 22, Grubhub didn’t want to pay the costs associated with its passage.

24. That is why, in December 2020, one month after the passage of Proposition 22, Grubhub began charging a “CA Driver Benefits Fee.” The CA Driver Benefits Fee is \$2.50 and is added to all California orders. Consumers have no option to opt out of paying the CA Driver Benefits Fee. Grubhub does not add the CA Driver Benefits Fee to orders made through Grubhub that are picked up in-store.

B. California Consumers Subscribe to Grubhub+ Based on the Promise of Free Delivery

25. Grubhub markets its Grubhub+ monthly subscription service as a flat, low-cost way to receive “Unlimited Free Delivery.” For \$9.99/month, Grubhub promises users that if they sign up for Unlimited, they will receive “unlimited free delivery at your favorite restaurants” so long as the order size met a certain monetary minimum. Thousands of Californians availed themselves of that offer, and continue to do so every day.

26. Grubhub prominently advertises Grubhub+ as a way to “Get free delivery on all your orders.” On its website, <https://www.grubhub.com/plus>, Grubhub promises:



27. That same homepage further states:



Unlimited free delivery

Get free delivery on orders of +\$12 from GH+ restaurants

28. Grubhub plasters its “Unlimited Free Delivery” promise in every advertisement on its website and on its app discussing Grubhub+. Indeed, Grubhub advertised its program consistently across all marketing channels.

29. In the app, Grubhub advertises its offer in the same way:

GRUBHUB+

Monthly membership **\$9.99/month**

2 weeks free!

- Unlimited free delivery on orders of \$12+
- Save \$10 or get the difference back in Perks
- Get a free pickup Perk up to \$10 every month
- Cancel anytime-it's quick, easy and fee free!

We'll automatically renew your Grubhub+ membership each month.

30. In short, in every advertisement and description of the service, Grubhub always uses the same “Unlimited free delivery” promise.

C. Grubhub’s Assessment of a CA Driver Benefits Fee Amounts to a Bait & Switch

31. The CA Driver Benefits Fee undermines Grubhub promise to provide “Unlimited Free Delivery” and amounts to a bait & switch.

32. Grubhub+ users signed up for, and Grubhub promised to provide, Unlimited Free Delivery for \$9.99/month. The promise of “unlimited free delivery” is material to all Grubhub+ subscribers because that is the entire point of the subscription.

33. But Grubhub fails to honor its promise of unlimited free delivery by charging CA Driver Benefits Fees.

34. The CA Driver Benefits Fee is a delivery fee. Indeed, Grubhub does not charge this fee to orders placed through the app and picked up in store. As indicated by its name, the CA Driver Benefits Fee is used to pay drivers for the benefits they are afforded under Proposition 22. A fee that is tacked on to every order to compensate drivers in exchange for their delivery of food is, by definition, a delivery fee.

35. In luring Unlimited consumers into the promise of Unlimited Free Delivery, and then reneging on that promise by adding a CA Driver Benefits Fee to every order, Grubhub deceives consumers and is unjustly enriched.

D. Grubhub’s App Fails to Bind Users to the Terms of Service.

36. When a consumer downloads the Grubhub app, or uses the Grubhub website, he or she is required to create an account in order to sign up for Grubhub+.

37. In order to do so, a user enters in a name and contact information.

38. While the account creation screen contains a small hyperlink to view Grubhub’s Membership Terms, users are not required affirmatively consent to such terms, such as by clicking a check box.

39. Moreover, the Membership Terms is a contract that exists separate and apart from Grubhub’s Terms of Use, and supersede Grubhub’s Terms of Use to the extent there is a conflict between them.

40. When signing up for Grubhub, consumers never agree to Grubhub's Terms of Service or any arbitration clause therein.

41. Grubhub+ subscribers are also never emailed the Terms of Service after signing up for the program.

42. Moreover, the Terms of Service are unenforceable to the extent they attempt to prohibit users from seeking public injunctive relief in any forum, in violation of the California Supreme Court's holding in *McGill v. Citibank*, N.A., 2 Cal. 5th 945 (2017). For avoidance of doubt, by way of this action, Plaintiff seeks public injunctive relief in order to prevent Grubhub from continuing to deceive California consumers.

E. Plaintiff's Experience

43. Plaintiff signed up for the Grubhub+ service based on the representations described above, and specifically based on the promise that he would receive "Unlimited Free Delivery" with a Grubhub+ subscription.

44. Plaintiff has since paid the CA Driver Benefits Fee on several occasions, including for example, in March 2021.

45. Plaintiff would not have signed up for Grubhub+ if he knew he would not really be receiving unlimited free delivery.

CLASS ALLEGATIONS

46. Pursuant to California Code of Civil Procedure § 382, Plaintiff brings this action on behalf of himself and a Class of similarly situated persons defined as follows:

All consumers in California who, within the applicable statute of limitations preceding the filing of this action to the date of class certification, signed up for Grubhub+ and paid a CA Driver Benefits Fee.

47. Excluded from the Class are Defendants, any entities in which they have a controlling interest, any of their parents, subsidiaries, affiliates, officers, directors, employees and members of such persons' immediate families, and the presiding judge(s) in this case, and their staff. Plaintiff reserves the right to expand, limit, modify, or amend this class definition, including the addition of one or more

subclasses, in connection with his motion for class certification, or at any other time, based upon, *inter alia*, changing circumstances and/or new facts obtained during discovery.

48. **Numerosity:** At this time, Plaintiff does not know the exact size of the Class; however, due to the nature of the trade and commerce involved, Plaintiff believes that the Class members are well into the thousands, and thus are so numerous that joinder of all members is impractical. The number and identities of Class members is administratively feasible and can be determined through appropriate discovery in the possession of the Defendant.

49. **Commonality:** There are questions of law or fact common to the Class, which include, but are not limited to the following:

- a. Whether during the class period, Defendant deceptively represented its Grubhub+ program;
- b. Whether Defendant's alleged misconduct misled or had the tendency to mislead consumers;
- c. Whether Defendant engaged in unfair, unlawful, and/or fraudulent business practices under the laws asserted;
- d. Whether Defendant's alleged conduct constitutes violations of the laws asserted;
- e. Whether Plaintiff and members of the Class were harmed by Defendant's misrepresentations;
- f. Whether Defendant was unjustly enriched;
- g. Whether Plaintiff and the Class have been damaged, and if so, the proper measure of damages; and
- h. Whether an injunction is necessary to prevent Defendant from continuing to engage in the wrongful conduct described herein.

50. **Typicality:** Like Plaintiff, many other consumers signed up for Grubhub+ based on Defendant's representations. Plaintiff's claims are typical of the claims of the Class because Plaintiff and each Class member was injured by Defendant's false representations Plaintiff and the Class have suffered the same or similar injury as a result of Defendant's false, deceptive and misleading representations.

Plaintiff's claims and the claims of members of the Class emanate from the same legal theory, Plaintiff's claims are typical of the claims of the Class, and, therefore, class treatment is appropriate.

51. **Adequacy of Representation:** Plaintiff is committed to pursuing this action and has retained counsel competent and experienced in prosecuting and resolving consumer class actions. Plaintiff will fairly and adequately represent the interests of the Class and does not have any interests adverse to those of the Class.

52. **The Proposed Class and Satisfies the Rule 23(b)(2) Prerequisites for Injunctive Relief.** Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole. Plaintiff remains interested in remaining a Grubhub+ subscriber, provided he is actually provided the Unlimited Free Delivery, as promised.

53. Defendant's ongoing and systematic practices make declaratory relief with respect to the Class appropriate.

54. **The Proposed Class Satisfies the Rule 23(b)(3) Prerequisites for Damages.** The common questions of law and fact enumerated above predominate over questions affecting only individual members of the Class, and a class action is the superior method for fair and efficient adjudication of the controversy. The likelihood that individual members of the Class will prosecute separate actions is remote due to the extensive time and considerable expense necessary to conduct such litigation, especially when compared to the relatively modest amount of monetary, injunctive, and equitable relief at issue for each individual Class member.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

Violation of California's Unfair Competition Law ("UCL") Cal. Bus. & Prof. Code § 17200, *et seq.*

55. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

56. California Business & Professions Code § 17200 prohibits acts of "unfair competition," including any "unlawful, unfair or fraudulent business act or practice." Grubhub's conduct related to deceptively representing that it would provide "unlimited free delivery" to Grubhub+ subscribers violates each of the statute's "unfair," "unlawful," and "fraudulent" prongs.

57. The UCL imposes strict liability. Plaintiff need not prove that Grubhub intentionally or negligently engaged in unlawful, unfair, or fraudulent business practices—but only that such practices occurred.

58. A business act or practice is “unfair” under the UCL if it offends an established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, and that unfairness is determined by weighing the reasons, justifications, and motives of the practice against the gravity of the harm to the alleged victims.

59. A business act or practice is “fraudulent” under the UCL if it is likely to deceive members of the public.

60. A business act or practice is “unlawful” under the UCL if it violates any other law or regulation.

61. Grubhub committed unfair and fraudulent business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, by affirmatively and knowingly misrepresenting on its website and mobile app that it would provide Unlimited Free Delivery to Grubhub+ subscribers, when, in reality, it adds a delivery fee through the assessment of the CA Driver Benefits Fee to every order.

62. Defendant’s acts and practices offend an established public policy of fee transparency in the marketplace, and constitute immoral, unethical, oppressive, and unscrupulous activities that are substantially injurious to consumers.

63. The harm to Plaintiff and the Class outweighs the utility of Defendant’s practices. There were reasonably available alternatives to further Defendant’s legitimate business interests, other than the misleading and deceptive conduct described herein.

64. Defendant’s conduct also constitutes an “unlawful” act under the UCL because, as detailed in Plaintiff’s Second Claim for Relief below, it also constitutes a violation of sections 1770(a)(5) and (a)(9) of the California Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.*, *infra*, in that Grubhub deceptively represents that it provides Unlimited Free Delivery to Grubhub+ subscribers; in reality, however, this marketing message is false because Grubhub charges a CA Driver Benefits Fee which is a fee meant to compensate drivers for delivering food, i.e. a delivery fee

65. Grubhub's business practices have misled Plaintiff and the proposed Class and will continue to mislead them in the future.

66. Plaintiff relied on Defendant's misrepresentations about the Grubhub+ subscription program, believing he would receive "Unlimited Free Delivery" as promised, while a Grubhub+ subscriber.

67. By falsely marketing "Unlimited Free Delivery," Grubhub deceived Plaintiff and Class members into signing up for Grubhub+, only to renege on that promise by charging a CA Driver Benefits Fee. Grubhub's conduct amounted to a bait & switch.

68. Had Plaintiff known the truth, he would not have become a Grubhub+ subscriber.

69. As a direct and proximate result of Grubhub's unfair, fraudulent, and unlawful practices, Plaintiff and Class members suffered and will continue to suffer actual damages. Defendant's fraudulent conduct is ongoing and present a continuing threat to Class members that they will be deceived into signing up for Grubhub+ under the false belief that they will receive "Unlimited Free Delivery."

70. As a result of its unfair, fraudulent, and unlawful conduct, Grubhub has been unjustly enriched and should be required to disgorge its unjust profits and make restitution to Plaintiff and Class members pursuant to Cal. Bus. & Prof. Code § 17203 and 17204.

71. Pursuant to Business & Professions Code §§ 17203 and 17500, Plaintiff and the members of the Class, on behalf of the general public, seek an order of this Court enjoining Defendant from continuing to engage, use, or employ their unfair, unlawful, and fraudulent practices.

SECOND CLAIM FOR RELIEF
Violation of California's Consumer Legal Remedies Act ("CLRA")
Cal. Civ. Code § 1750, *et seq.*

72. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

73. This cause of action is brought pursuant to the Consumers Legal Remedies Act (CLRA), California Civil Code § 1750, *et seq.* Plaintiff and each member of the proposed Class are "consumers" as defined by California Civil Code § 1761(d). Defendant's sale of food products to consumers for delivery ordered through its website and mobile app were "transactions" within the meaning of California Civil Code § 1761(e). Grubhub+ is a "service" within the meaning of California Civil Code § 1761(b).

74. Defendant violated and continues to violate the CLRA by engaging in the following practices proscribed by California Civil Code § 1770(a) in transactions with Plaintiff and the Class which were intended to result in, and did result in, the sale of the Grubhub+ service:

a. “Representing that goods or services have . . . characteristics . . . that they do not have” (a)(5); and

b. “Advertising goods or services with intent not to sell them as advertised” (a)(9).

75. Specifically, Grubhub advertised to customers that it would provide Unlimited Free Delivery to Grubhub+ subscribers, when, in reality, it adds a delivery fee through the assessment of the CA Driver Benefits Fee to every order.

76. By falsely marketing “Unlimited Free Delivery,” Grubhub deceived Plaintiff and Class members into signing up for Grubhub+, only to renege on that promise by charging a CA Driver Benefits Fee. Grubhub’s conduct amounted to a bait & switch.

77. Grubhub continues to violate the CLRA and continues to injure the public by misleading consumers about its delivery fees. Accordingly, Plaintiff seeks injunctive relief on behalf of the general public to prevent Grubhub from continuing to engage in these deceptive and illegal practices. Otherwise, Plaintiff, the Class members, and members of the general public may be irreparably harmed and/or denied effective and complete remedy if such an order is not granted.

78. In accordance with Cal. Civ. Code § 1780(a), Plaintiff and the Class members seek injunctive and equitable relief on behalf of the general public for violations of the CLRA, including restitution and disgorgement.

79. Pursuant to § 1782(a) of the CLRA, Plaintiff’s counsel notified Defendant in writing by certified mail of the particular violations of §1770 of the CLRA and demanded that it rectify the problems associated with the actions detailed above and give notice to all affected consumers of Defendant’s intent to act. If Defendant fails to respond to Plaintiff’s letter or agree to rectify the problems associated with the actions detailed above and give notice to all affected consumers within 30 days of the date of written notice, as proscribed by §1782, Plaintiff will move to amend his Complaint to pursue claims for actual, punitive and statutory damages, as appropriate against Defendant. As to this cause of action, at this time, Plaintiff seeks only injunctive relief.

THIRD CLAIM FOR RELIEF
False and Misleading Advertising
[Business & Professions Code §§ 17500, *et seq.*]

80. Plaintiff re-alleges and incorporates the foregoing paragraphs as though fully set forth herein.

81. California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, states that "[i]t is unlawful for any ... corporation ... with intent ... to dispose of ... personal property ... to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated ... from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement...which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading...."

82. Defendant's material misrepresentations and omissions alleged herein violate Bus. & Prof. Code § 17500.

83. Defendant knew or should have known that its misrepresentations and omissions were false, deceptive, and misleading.

84. Pursuant to Business & Professions Code §§ 17203 and 17500, Plaintiff and the members of the Class, on behalf of the general public, seek an order of this Court enjoining Defendant from continuing to engage, use, or employ their practice of misrepresenting their delivery fees.

85. Further, Plaintiff and the members of the Class seek an order requiring Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiff restitution of the money wrongfully acquired by Defendants by means of said misrepresentations.

86. Additionally, Plaintiff and the Class members seek an order requiring Defendant to pay attorneys' fees pursuant to Cal. Civ. Code § 1021.5.

FOURTH CLAIM FOR RELIEF
Unjust Enrichment

87. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

1 88. To the detriment of Plaintiff and the Class, Defendant has been, and continues to be,
2 unjustly enriched as a result of its wrongful conduct alleged herein.

3 89. Plaintiff and the Class conferred a benefit on Defendant when they paid Defendant the CA
4 Driver Benefits Fee, when they were promised unlimited free delivery as Grubhub+ subscribers.

5 90. Defendant unfairly, deceptively, unjustly, and/or unlawfully accepted said benefits, which
6 under the circumstances, would be unjust to allow Defendant to retain.

7 91. Defendant's unjust enrichment is traceable to, and resulted directly and proximately from,
8 the conduct alleged herein.

9 92. Plaintiff and the Class, therefore, seek disgorgement of all wrongfully obtained fees
10 received by Defendant as a result of its inequitable conduct as more fully stated herein.

11 **PRAYER FOR RELIEF**

12 **WHEREFORE**, Plaintiff on behalf of himself and the Class seeks judgment in an amount to be
13 determined at trial, as follows:

- 14 (a) For public injunctive relief, enjoining Defendant from continuing the unlawful practices
15 set forth above;
- 16 (b) For declaratory and injunctive relief as set forth above;
- 17 (c) For an order requiring Defendant to disgorge and make restitution of all monies it
18 acquired by means of the unlawful practices set forth above;
- 19 (d) For compensatory damages according to proof;
- 20 (e) For punitive damages according to proof;
- 21 (f) For reasonable attorneys' fees and costs of suit;
- 22 (g) For pre-judgment interest; and
- 23 (h) Awarding such other and further relief as this Court deems just, proper and equitable.

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JURY DEMAND

Plaintiff hereby demands a jury trial on all claims so triable.

Dated: April 22, 2021

KALIEL GOLD PLLC

By:  _____
Jeffrey D. Kalie
Sophia G. Gold

Attorneys for Plaintiff and the Putative Class