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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MATTHEW B. BURGOS, Individually and on Behalf of all Similarly Situated employees,

Plaintiff,

vs.

UBER TECHNOLOGIES, INC., and PORTIER, LLC,

Defendants.

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Index No: 16-cv-8512

CLASS AND COLLECTIVE ACTION COMPLAINT AND JURY DEMAND

Plaintiff Matthew B. Burgos, on behalf of himself and all other similarly situated foot and bike couriers in New York City who have worked or are currently working for defendants Uber Technologies, Inc. and Portier, LLC (collectively referred to herein as "UBER"), alleges the following:

INTRODUCTION

1. This is a suit brought on behalf of plaintiff and a putative class of all current and former bike and foot messengers employed by UBER in New York City (the "Putative Class or "Couriers"), asking the Court to properly reimburse plaintiff and the Putative Class: (i) all gratuities that were earned but stolen by UBER, (ii) all legal tools-of-the-trade expenses, and

(iii) minimum wages under 35 U.S.C. §§ 201 et seq., the Fair Labor Standards Act ("FLSA"); New York Labor Law Article 6 §§ 190 et seq. and Article 19, §§ 650 et seq., and the supporting New York State Department of Labor Regulations, 12 N.Y.C.R.R. Part 142 ("NYLL"); and the Fair Play Act.

2. With an estimated market capitalization in-excess of 50 billion dollars, UBER has rapidly grown into one of the wealthiest and largest companies in America. In or about April 2014, UBER launched UBERrush ("RUSH") in New York City, and on March 16, 2016 UBER launched UBEReats (EATS). Unlike the other UBER services, RUSH and EATS utilize bike and foot messengers (the "Couriers") to deliver packages.

3. The vast majority of the "packages" delivered through RUSH were food orders originating from GrubHub, Inc., and nearly all GrubHub deliveries received an on-line gratuity – none of which were passed onto the Couriers.

4. On March 16, 2016, UBER passed on a small part of the gratuities received from only three restaurants. UBER retained the majority of the gratuities from the three restaurants, and all of the gratuities from the hundreds of other restaurants which employed UBER.

5. UBER created EATS in an attempt to replace GrubHub, and deal directly with restaurants. While RUSH allows gratuities via GrubHub, EATS charges a purported "Service Fee" of $3.99. The purported "Service Fee" is a gratuity, and belongs to the Couriers.

6. UBER exploits its Couriers to bolster its bottom line and continue its rapid expansion to what now amounts to a presence in 482 global cities.

7. UBER also evades New York City safety laws. In New York City, bicycle delivery men and women are at a great risk of injury. New York City Bureau of Statistics

reports that between 1996 and 2005 there were 225 bicyclist deaths. Over seventy percent of those deaths were delivery workers, and 97% of the delivery who were killed were not wearing helmets.

8. While New York City law requires businesses to supply their delivery personnel with helmets and other safety devices, UBER circumvents its duty of supplying safety gear by misclassifying its Couriers as independent contractors. UBER, however, ignores the plain facts and the law which deems bicycle and foot delivery personnel employees.

PARTIES

9. Plaintiff Mathew B. Burgos ("BURGOS") is an individual and resident of the Bronx.

10. Upon information and belief, defendant Uber Technologies, Inc. is a Delaware corporation headquartered in San Francisco, California. Uber Technologies, Inc. is authorized to conduct business and does conduct business throughout New York, including in New York City.

11. Upon information and belief, Portier, Inc. is a wholly owned subsidiary of UBER and has no independent function.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction pursuant to the FLSA, 29 U.S.C. §216(b), 28 U.S.C. § 1331 and 1337 (federal question) and 28 U.S.C. § 2201 (declaratory judgment).

13. This Court has supplemental jurisdiction over the New York State law claims pursuant to 28 U.S.C. § 1367, as they are so related to the claims over which this Court has original jurisdiction that they form part of the same case or controversy under Article III of the

United States Constitution.

14. At all times relevant to this Complaint, Plaintiff and Defendants were engaged in commerce and/or the production of goods for commerce within the meaning of 29 U.S.C. §§ 206(a) and 207(a).

15. Defendants earned in excess of $500,000 per year in each year covered by this Complaint.

16. The statute of limitation under the FLSA for willful violations is three years pursuant to 29 U.S.C. § 255(a).

17. Plaintiff has consented in writing to be a party to this action, pursuant to 29 U.S.C. § 216(b).

18. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(a) as the residence of both Plaintiffs and Defendants and the forum which all of the operable facts took place.

CLASS AND COLLECTIVE ALLEGATIONS

19. Plaintiff brings FLSA claims on behalf of himself and all "bicycle and foot messengers employed by UBER in New York City from October 31, 2013 through January 1, 2017 who are not contracted with UBER through a separate business entity, and who elect to opt-in to this collective action" (the "FLSA Collective").

20. Defendant is liable under the FLSA for, inter alia, failing to properly compensate minimum wages to Plaintiff and the FLSA Collective, and as such, notice should be sent to the FLSA Collective. Upon information and belief, there are many similarly situated current and former employees of Defendants employed by UBER from November 1, 2013 through January 1, 2017 who have been underpaid in violation of the FLSA who would benefit from the issuance

of a court- supervised notice of the present lawsuit and the opportunity to join in the present lawsuit. Those similarly situated employees are known to Defendants, are readily identifiable, and can be located through Defendants' records.

21. Plaintiff also brings New York Labor Law claims on behalf of himself and a class of persons under Rule 23 of the Federal Rules of Civil Procedure consisting of "all bicycle and foot messengers employed by UBER in New York City from November 1, 2013 through January 1, 2017 who are not contracted with UBER through a separate business entity, and who elect to opt-into the class." (the "Rule 23 Class").

22. The persons in the Rule 23 Class identified above are so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, the facts on which the calculation of that number can be based are presently within the sole control of the Defendants.

23. The claims of Plaintiff are typical of the claims of the Rule 23 Class.

24. Plaintiff will fairly and adequately protect the interests of the Rule 23 Class.

25. Defendants have acted or have refused to act on grounds generally applicable to the Plaintiff and the Rule 23 Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Rule 23 Class as a whole.

26. There are questions of law and fact common to the Plaintiff and the Rule 23 Class that predominate over any questions solely affecting individual members of the Rule 23 Class, including but not limited to:

a) whether Defendants are employers under the NYLL;
b) whether Defendants are a unified employer:
c) whether Defendants have failed to keep true and accurate time records for all hours worked by Plaintiff and the Rule 23 Class;
d) what proof of hours worked is sufficient where employer fails in its duty to maintain true and accurate time records;

e) whether Defendants have failed and/or refused to pay Plaintiff and the Rule 23 Class minimum wage as defined by the New York Labor Law Article 6 §§ 190 et seq. and Article 19, §§ 650 et seq., and the supporting New York State Department of Labor Regulations, 12 N.Y.C.R.R. Part 142;
f) whether Defendants illegally retained gratuities which rightfully belong to Plaintiff and the Putative Class;
g) whether Defendants illegally retained gratuities improperly classified as "Service Fees" which rightfully belong to Plaintiff and the Putative Class
h) whether Defendants must reimburse Plaintiff and the Rule 23 all "Tools-of-the-Trade" expenses; and,
i) the nature and extent of Plaintiffs and the Rule 23 Class-wide injury and the appropriate measure of damages for the class.

27. The claims of the Plaintiff are typical of the claims of the Rule 23 Class he seeks to represent. Plaintiff and the Rule 23 Class work or have worked for Defendants and have not been paid: (i) at the minimum wage for all hours worked, (ii) their gratuities from RUSH deliveries; (iii) their gratuities from EATS deliveries surreptitiously called "Service Fees", and (iv) reimbursement of their Tools-of-the Trade expenses.

28. Defendants have acted and refused to act on grounds generally applicable to the Rule 23 Class, thereby making declaratory relief with respect to the Rule 23 Class appropriate.

29. Plaintiff will fairly and adequately represent and protect the interests of the Rule 23 Class.

30. Plaintiff has retained counsel competent and experienced in complex class actions and in employment litigation.

31. A class action is superior to other available methods for the fair and efficient adjudication of this litigation - particularly in the context of a wage and hour litigation like the present action, where individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendant. The members of the Rule 23 Class have been damaged and are entitled to recovery as a result of Defendants' common and

uniform policies, practices, and procedures. Although the relative damages suffered by individual Rule 23 Class Members are not de minimis, such damages are small compared to the expense and burden of individual prosecution of this litigation. In addition, class treatment is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about Defendants' practices.

FACTS SPECIFIC TO UBER, RUSH, and EATS

32. UBER is a privately held company known for providing livery drivers in the 452 cities it operates. On April 14, 2014, UBER launched RUSH, a bicycle and foot messenger service. RUSH was originally launched in three cities, San Francisco, Chicago, and New York and was rolled out to an additional 16 cities as of the date of this Complaint.

33. RUSH is a service whereby individuals/restaurants/corporations in need of a courier can request one of UBER's Couriers through an "on-line" website or through the RUSH cellular phone application. The Courier is then sent his/her assignment and rides to the location.

34. Upon information and belief, UBER recognized approximately 70% of all RUSH deliveries where from restaurants, and originated from GrubHub, Inc. ("GrubHub") orders.

35. GrubHub is an internet food-delivery company that was created in 2013 when GrubHub Inc. and Seamless North America LLC merged creating the nation's leading online and mobile food ordering company. The company's online and mobile ordering platforms allow users to order directly from more than 45,000 restaurants in over 1,100 U.S. cities and London.

36. On March 16, 2016, UBER launched EATS in NYC which was an attempt to

usurp GrubHub's share of the market.

37. UBER hired, almost exclusively, bicycle messengers to deliver for RUSH and EATS.

38. Generally, all Couriers can deliver for RUSH and EATS simultaneously. In fact, the Courier doesn't even know whether he is delivering for RUSH or EATS.

39. Substantially all GrubHub orders involve gratuities. GrubHub reports its average national tip as 13.9 percent per order, with New York City falling below average at 13.1 percent.

40. EATS, on the other hand, is a service whereby the user is charged a $3.99 "Service Fee" in lieu of a gratuity. The user or purchaser, however, would never know the Service Fee is not a gratuity.

FACTS AS TO PLAINTIFF BURGOS

41. In or around October 2015, plaintiff BURGOS submitted an application to UBERrush ("RUSH"), and provided all personal information allowing UBER to conduct a background check.

42. On December 10, 2015, plaintiff went to an orientation held at the UBER office, located on 633 W. 27th Street, New York. The orientation was under an hour, and 20-30 couriers attended.

43. No safety training occurred at the December 10, 2015 orientation.

44. At the orientation the Couriers were given UBER labelled messenger bags, and iPhones.

45. BURGOS started work a week after orientation because he had to purchase a bike.

46. BURGOS often worked without being paid statutory minimum wage.

47. BURGOS received gratuities in approximately 70% of his assignments, prior to the launch of EATS. See **Exhibit A**.

48. After EATS was launched, the RUSH assignments slowly decreased.

49. As of the date of this Complaint only approximately 30% of BURGOS assignments are RUSH deliveries.

50. EATS charges a $3.99 Service Charge.

51. At no time has BURGOS received the $3.99 EATS Service Charge.

52. BURGOS does not wear safety equipment, and has observed most other Couriers also do not wear safety equipment.

53. BURGOS was forced to spend $700 on a new bike in April 2016, and has paid for numerous flat tires.

54. Due to the over hiring of Couriers, Plaintiff and other Couriers were, and are, forced to wait at "hot spots". Hot spots are area by busy restaurants.

55. For example, Gotham Market located at 600 11th Ave. contains numerous restaurants that use both RUSH and EATS.

56. If the Courier is not at or around Gotham Market, there is very little chance of getting an order.

UBER EVADED NYC SAFETY LAWS

47. Between 1996 and 2005, there were 225 bicyclist deaths in New York City. An average of 23 bicyclists died per year. In NYC, 97% of biking fatalities were due to people who were not wearing helmets. **Exhibit B**.

48. Per the 2014 Bureau of Labor Statistics report, the transportation industry

accounts for 40 percent of all fatal occupational injuries, making it the second most dangerous occupation (construction ranks #1). Service providers, including delivery drivers, account for most transportation deaths.

49. A 2015 report based on traffic data from NYC's Open Data portal revealed that 77.5 percent of bicycle crashes resulted in an injury, and recent years have seen NYC cyclist deaths increase despite efforts to improve safety. See http://www.tastetalks.com/seamless-grubhub-delivery-tipping-1873154639.html.

50. What UBER has done is shifted the decision to wear, and the burden and expense of safety equipment onto the food delivery personal; historically one of the lowest compensated and least educated group of employees in ant industry.

51. UBER did not even offer safety training before turning these kids out onto the street to make deliveries.

52. New York City law regarding bicycle safety is written very generally, and includes: every person, firm, partnership, joint venture, association or corporation which engages during its business, either on behalf of itself or others, in delivering packages, parcels, papers or articles of any type by bicycle shall post one or more bicycle safety posters at each employment site.

53. Undoubtedly UBER "engages [couriers] in the course of its business, either on behalf of itself or others". As such UBER was, and is, obligated to provide their bicycle couriers with the following: • A bicycle helmet in good condition, which fits properly [fits the operator]; • Upper body apparel with the business' name and operator's identification number; • Numbered business ID card with the operator's photo, name, home address and the business' name, address and phone number; • A white headlight and red taillight; • A

bell or other audible signal (not whistle); • Working brakes; • Reflective tires and/or other reflective devices on new bicycles. Businesses must maintain a log book, which must be available for inspection during regular and usual business hours.

UBER IS THE COURIERS' EMPLOYER

47. By law, a person is an independent contractor only when free from control and direction in the performance of such services; that is not the case here.

48. This right of control need not extend to every possible detail of the work.

49. Rather, the relevant question is whether the entity retains "all necessary control" over the worker's performance.

50. The fact that a certain amount of freedom is allowed or is inherent in the nature of the work involved does not preclude a finding of employment status.

51. The pertinent question is not how much control UBER exercises, but how many rights does UBER retain to exercise.

52. UBER controls nearly every aspect of the Couriers' employment.

53. "Within the messenger industry, it is standard practice that bike and foot messengers (messengers) are considered to be employees of the messenger company providing delivery services to its customers." See The New York State Department of Labor Guidelines for Determining Worker Status Messenger Courier Industry. See **Exhibit C.**

54. While UBER calls itself a "technology platform" in order to avoid being deemed an employer. It is impossible to believe a "technology platform" demands the following in its application before an individual is allowed to use it:

> Uber (the "Company") may obtain information about you from a third party consumer reporting agency for employment purposes. You may be the subject of a "consumer report" and/or an "investigative consumer

> report" which may include information about your character, general reputation, personal characteristics, and/or mode of living, and which can invoke personal interviews with sources such as your neighbors, friends, or associates. These reports may contain information regarding your criminal history, social security verification, motor vehicle records ("driving records"), verification of your education or employment history, or other background checks.

55. UBER also controls all fares charged, incentive pay, and bonuses.

56. For example, in or about June 2016 UBER reduced the fees paid to the Couriers, and instituted a policy whereby the Couriers had to complete 85% of the assignments in order to get "incentive pay", which was the equivalent of approximately 60-70% of the Couriers' pay.

57. UBER utilizes "bonus pay" in the same way as the incentive pay to manipulate schedules. Bonus pay is compensation based on daily offers made by UBER.

58. For each Courier to even hope to earn a livable rate, he or she must comply with the rules for the bonus and incentive pay rules.

59. The incentive and bonus pay is the way UBER controls the Couriers schedule.

60. UBER has attempted to misclassify the Couriers as "Independent Contractors". Independent Contractors are persons who are in business for themselves and hold themselves and available to the general-public to perform similar services.

61. The New York State Commercial Goods Transportation Industry Fair Play Act ("Fair Play Act"), which went into effect as of April 10, 2014, offers guidance on the issue of whether the Couriers are employees.

62. Because the Couriers fall under the provisions of the Fair Play Act, that Act's provisions take precedence.

63. Under the Fair Play Act, Plaintiff or any member of the Putative Class must be a separate business entity to be classified as an independent contractor, or they must be:

i. free from the control and direction of the hiring company in performing the work; and,

ii. the service provided by the driver is different than the services provided by the company or is otherwise not part of the usual business of the company; and,

iii. the driver is customarily engaged in carrying out such same services as an independent established trade or profession, rather than simply working for the company.

64. Defendants woefully fail the above standard.

65. First, Plaintiff and the Putative Class are not separate business entities by class definition.

66. Second, as described below, the Couriers are not remotely free from the direction and control of UBER.

67. Third, the service provided by UBER is the same service offered by Plaintiff and the Putative Class.

68. Fourth, Plaintiff and the Putative Class are not customarily engaged in carrying out the same services as an independent trade. In fact, UBER warns the Couriers at orientation that they will be terminated if they are found to be working for another courier service.

69. All of the above conditions must be met in order for UBER to rebut the presumption of an employer-employee relationship with its driver; they cannot.

70. In fact, a Court of competent jurisdiction has already found the livery drivers are employees. See *O'Conner v. Uber Technologies, Inc.*, 3:13-cv-03826-EMC (N.D. Cal. March 11, 2015).

71. Similarly, the UBER livery drivers were found to be employees in the United Kingdom. See **Exhibit D**.

DOL INDICATORS OF AN EMPLOYMENT RELATIONSHIP

72. The United States Department of Labor ("US DOL") offers nine common-law indicators to determine if there is an employment relationship. All nine indicators heavily favor a finding that the Couriers are employees of UBER.

73. **DOL Indicator 1**: *The messenger company makes standard withholding deductions from the messenger's earnings.* The agreement between Defendants and the Couriers (the "Agreement") provides: "Notwithstanding anything to the contrary in this Agreement, Company may in its reasonable discretion based on applicable tax and regulatory considerations, collect and remit taxes resulting from your provision of Delivery Services and/or provide any of the relevant tax information you have provided pursuant to the requirement mentioned above, directly to the applicable governmental tax authorities on your behalf or otherwise." See **Exhibit E**.

74. **DOL Indicator 2**: *The messenger company may provide fringe benefits to the messenger*. This factor weighs in favor of plaintiff and the putative class. Couriers get bonuses and incentives, which formed, and form, as much as 70% of the Couriers salary. UBER also provides iPhones, and messenger bags marked UBER.

75. **DOL Indicator 3**: *The messenger company sets the rate of pay, which is normally based on the higher of an hourly rate or fee basis.* This factor weighs in favor of Plaintiff and the Putative Class, UBER sets the rates of pay.

76. **DOL Indicator 4**: *The messenger company sets the work schedule.* Couriers may choose which days they work. However, once a courier enables the application to receive assignments, UBER then controls the schedule through the incentive and bonus pay.

For example, as the below shows that UBER offers a bonus which changes, offering more money to keep the couriers on the road "all day".

The incentive and bonus pay form approximately 40-70% of the couriers' salary. To earn a livable wage, the courier had to accept the daily bonus offers and must fulfill 85% of the orders to get the incentive pay. This forces the Couriers to stay on-line and is tantamount to setting a work schedule.

77. **DOL Indicator 5**: *The messenger company requires the services to be performed personally, and the messenger is not able to provide his/her own substitute.* This factor weighs in favor of plaintiffs and the putative class. The Agreement provides at § 2.6.1: "Company Devices may not be transferred, loaned, sold or otherwise provided in any manner to any party other than you. Couriers must deliver package and may not substitute."

78. **DOL Indicator 6**: *The messenger company covers the messenger under the company's Workers' Compensation policy*. This factor weighs in favor of UBER; Defendants' do not cover the Couriers under its Workers Compensation policy.

79. **DOL Indicator 7**: *The messenger company sets the order and priority of*

delivery. This factor weighs in favor of Plaintiffs and the Putative Class. Couriers get notices of the next assignment from UBER, and have no ability to choose which deliveries they want. The Courier either takes the assignment, or it is deemed a miss-delivery.

80. **DOL Indicator 8**: *The messenger company requires the messenger to accept an assignment.* This factor weighs in favor of plaintiffs and the putative class. If the messenger misses more than a 15% of the pushes to your phone, for any reason, the courier losses a significant portion of the compensation for that day.

81. **DOL Indicator 9**: *The messenger company requires the messenger to follow all company rules and regulations.* Section 3.1 of the Agreement states: "You acknowledge and agree that Company reserves the right, at any time in Company's sole discretion, to deactivate or otherwise restrict you from accessing or using the Provider App or the Uber Services if you fail to meet the requirements set forth in this Agreement."

Further, to earn a livable wage, Plaintiff and the Putative Class must follow all rules and regulations once they enable the application (which is the equivalent of clocking into work). The Couriers must take the assignments given, and complete them in time frames set by UBER. Also, if the Courier receives unfavorable ratings, they must receive favorable ratings or they will be "deactivated". This factor weighs in favor of a finding that the Plaintiffs and the Putative Class have at all times relevant to this Complaint been employees of Defendants.

82. UBER fails every US DOL Indicator, and is the employer of the Couriers.

ADDITIONAL PROOF OF EMPLOYMENT

83. While the agreements between Defendants and the Couriers specifically states the Couriers have the unfettered right to work for other delivery companies like Caviar, Postmates, AndoFood.com, Delivery.com, or Amazon Prime; that is not the reality of the relationship.

84. At the orientation held in December 2015, UBER told the Couriers including plaintiff BURGOS, that the Couriers would not be able to handle working for multiple services, and UBER would be able to tell if they did. The Couriers were then informed that if any of them were found to be working at another service, that Courier would be "deactivated" from UBER.

85. Deactivation is yet another method to control the Couriers and is the equivalent of termination. The employer's "right to discharge at will, without cause" is "strong evidence in support of an employment relationship."

86. The Agreement provides:

> Company retains the right to deactivate or otherwise restrict you from accessing or using the Provider App or the Uber Services in the event of a violation or alleged violation of this Agreement, your disparagement of Company or any of its Affiliates, or your act or omission that causes harm to Company's or its Affiliates' brand, reputation or business as determined by Company in its sole discretion.

87. Section 3.1 of the Agreement states:

> You acknowledge and agree that you may be subject to certain background and driving record checks from time to time in order to qualify to provide, and remain eligible to provide, Delivery Services. You acknowledge and agree that Company reserves the right, at any time in Company's sole discretion, to deactivate or otherwise restrict you from accessing or using the Provider App or the Uber Services if you fail to meet the requirements set forth in this Agreement.

88. Section 2.5.2 of the Agreement provides:

> If you do not increase your average rating above the Minimum Average Rating within the time period allowed (if any), Company reserves the right to deactivate your access to the Provider App and the Uber Services.

89. Section 12.2 of the Agreement states:

> Company may terminate this Agreement or deactivate your Provider ID immediately, without notice, with respect to you in the event you no longer qualify, under applicable law or the standards and policies of Company and its Affiliates, to provide Delivery Services or to operate your Transportation Method, or as otherwise set forth in this Agreement.

90. UBER has discharged members of the Putative Class at-will, and for no apparent cause.

91. Other indicia of employment include: (i) the Plaintiff's and Putative Class' lack of investment in equipment or materials required for his task, or his employment of helpers, (2) the fact that the services rendered do not require a special skill; and (3) the services rendered by Plaintiff and the Putative Class are an integral part of the alleged employer's business.

92. UBER also reserves the right to disclose Plaintiff's and the Putative Class' private information. Section 4.6 of the Agreement states:

> Receipts include the breakdown of amounts charged to the User for Delivery Services and may include specific information about you, including your name, contact information and photo, as well as a map of the route you took.

93. Based on the forgoing, the fact that plaintiff and the putative class are properly classified as employees is irrefutable.

DEFENDANT'S ARE A UNIFIED EMPLOYER

94. Each of the individual Defendants form UBER, and is run pursuant to a unified plan and management.

95. The control and direction of every aspect of Portier, Inc., from general policies to hiring and firing, wages, and policies, is centralized at the UBER headquarters.

96. Further, each Defendant shares the same back-end bookkeeping, upper-

management, human resources, accounting, payroll and banking, all of which is controlled by UBER.

Defendants' General Employment Practices Applicable to the Plaintiff and All Similarly Situated Employees

97. At all relevant times, Defendants were the Plaintiff and Putative Class's employers within the meaning of the FLSA and New York Labor Law. Defendants had the power to hire and fire Plaintiff and the Putative Class, control their terms and conditions of employment, and determine the rate and method of any compensation in exchange for Plaintiff and the Putative Class's services.

98. All decisions complained of here came directly from UBER headquarters.

99. At all times relevant to this complaint, Defendants maintained a policy and practice of failing to pay Plaintiff and all similarly situated employees at the prevailing minimum wage as required by federal and state laws.

100. Defendants have engaged in its unlawful conduct pursuant to a corporate policy of minimizing labor costs and denying employees compensation by knowingly violating the FLSA and NYLL.

101. Defendants' unlawful conduct was intentional, willful, in bad faith, and caused significant damages to Plaintiff and other similarly situated and current and former workers.

102. Defendants failed to inform Plaintiff and the Putative Class that Defendants intended to take a deduction against Plaintiff' earned wages for tip income, as required by the NYLL before any deduction may be taken.

UBER, VIA EATS, ILLEGALLY RETAINED PURPORTED SERVICE FEES

103. Upon information and belief, UBER charges the restaurants as much as 30 percent of the restaurant bill prior to taxes. The team behind EATS says charging any less would

be “unsustainable”.

104. A spokesperson for UBER provided the following statement to EATER.com:

> UberEats delivers delicious meals at menu price, plus a clearly marked delivery fee. In exchange we charge the restaurant a modest service that in most cases is less than the cost of operating their own delivery service. Our goal is to grow the pie for everyone, rather than servicing a narrow niche of customers willing to pay stunning high mark-ups." See http://www.eater.com/2016/2/9/10940754/ubereats-amazon-restaurant-delivery-charges.

105. UBER then charges the Couriers 20% of their fares.

106. The restaurants charge the user a purported $3.99 Service Charge.

107. In order for the Service Charge to properly be a charge and not a gratuity, UBER must provide adequate notification including a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the charge is not purported to be a gratuity.

108. The statement must also be in ordinary language readily understood and shall appear in a font size on the receipt similar to surrounding text, but no smaller than a 12-point font.

109. UBER provides no notification what-so-ever that the $3.99 Service Fee is not gratuity. Further, no receipt is included with EATS deliveries.

110. The EATS Service Charge is a gratuity and must be passed on to the Couriers.

UBER, VIA RUSH, ILLEGALLY RETAINED GRATUITIES

111. Until March 16, 2016, a significant percentage of RUSH assignments entailed gratuities via Grubhub. After March 16, the percent of gratuities via GrubHub has slowly decreased from approximately 70% to approximately 30%.

112. Under Federal Department of Labor Guidelines:

> Retention of Tips: A tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit. The FLSA prohibits any arrangement between the employer and the tipped employee whereby any part of the tip received becomes the property of the employer. For example, even where a tipped employee receives at least $7.25 per hour in wages directly from the employer, the employee may not be required to turn over his or her tips to the employer. US Dept. of Labor, Fact sheet No. 15.

113. Section 196-d of the New York Labor Law states

> Gratuities. No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee.

114. When tips are given by customers via credit card, the employer must pay the employee the amount due no later than the next regularly scheduled pay day. The employer may subtract from the employee's tips the pro-rated share of the charge levied by the credit card company. An employer remitting tips to an employee must include a breakdown between the tips and the wages on the employee's wage statement, which must meet all other requirements for wage statements.

115. This position reflects a change in DOL policy as set forth in DOL opinion RO-08-0032 related to this issue.

116. Section 4.7 of the Agreement states: "In the event that a User pays Company a valid gratuity on your behalf, Company will transmit such gratuity to you and will not retain

any portion of that gratuity."

117. Based on past practices of failing to remit gratuities, UBER knew that it was going to retain the tips for itself when it misrepresented that tips would be passed on to the drivers.

118. In March 2016, UBER contacted the active Couriers by text and informed them it would pay out all gratuities for three restaurants - Blockheads, Genuine Superette, and Big Daddy's.

119. Upon information and belief, UBER deliberately sent vital information pertaining to the individual couriers like plaintiff and the putative class by ephemeral messages like text messages rather than email to cover-up what is clearly an artifice to cover-up a clear plan to deprive the bicycle couriers of the gratuities that were earned from March 2015 – March 2016.

120. The March UBER text also asked BURGOS and part of the Putative Class to verify whether the amount in the text was equal to the gratuities for Blockheads, Genuine Superette, and Big Daddy's from March 2015 to March 2016.

121. At no time, however, did the receipts on the deliveries from Blockheads, Genuine Superette, and Big Daddy's list the amount of the gratuities, or any other number for that matter. Instead, the receipt just identified the food order.

122. There was no possible way to calculate the gratuities from Blockhead's, Genuine Superette, and Big Daddy's.

123. Upon information and belief, the amount offered for the Blockhead's, Genuine Superette, and Big Daddy's was radically below the gratuities actually paid to UBER on behalf of BURGOS and part of the Putative Class.

124. Further, due to the over hiring of couriers, the competition for orders become

fierce. BURGOS and other members of the Putative Class were forced to sit at "hot spots", which are spots outside high-volume restaurants, and wait for a push notification.

125. At any given point during lunchtime there is a line of Couriers waiting.

126. What the restaurants did, with UBER's help, was move their delivery workers outside and misclassify independent contractors. The Couriers were then denied gratuities, safety gear, minimum and overtime wages, Worker's Compensation, Unemployment Insurance, etc.

127. Further, GrubHub is responsible for making sure all tips it receives are properly distributed.

128. On April 16, 2014 New York Attorney General Eric Schneiderman reached an agreement with GrubHub Inc.:

129. Our settlement with GrubHub changes a billing formula that may have been used by restaurants to shortchange workers out of their hard-earned tips — tips that customers intended for them," Attorney General Schneiderman said. "In addition, this agreement will leave no doubt among the thousands of restaurants doing business through GrubHub about what their legal obligations are—not only with regard to tips, but also for all laws that protect the rights of workers. Today's agreement addresses a problem that may have affected thousands of delivery workers, and the industry will be better off for it.

130. The Attorney General further stated: Beyond changes to the fee structure, the company will send all New York restaurant partners, which number well into the thousands, a notice informing them of their labor law obligations, with particular focus on issues related to delivery workers. The company will also include a new requirement in its standard contract that restaurants must comply with all laws applicable to delivery workers, including wage and hour laws and laws requiring timely and full distribution of tips. Finally, GrubHub will include a new notification in the billing invoices it sends to restaurants, stating that tips are the property of the delivery workers.

131. Defendants' unlawful conduct was intentional, willful, in bad faith, and caused significant damages to Plaintiff and other similarly situated and current and former workers.

132. Defendants failed to inform Plaintiff and the Putative Class their tips would be credited towards the payment of the minimum wage.

133. Plaintiff and the Putative Class has been victims of Defendants' common policy and practices violating their rights under the FLSA and New York Labor Law by *inter alia*, willfully denying them their earned tips and not paying them the wages they were owed for the hours they had worked.

134. Defendants' pay practices resulted in Plaintiff and the Putative Class not receiving payment for all their hours worked, resulting in Plaintiff's and the Putative Class' effective rate of pay falling below the required minimum wage.

135. As part of its regular business practice, Defendants intentionally, willfully, and repeatedly harmed Plaintiff and the Putative Class by engaging in a pattern, practice, and/or policy of violating the FLSA and the NYLL. This pattern, practice and/or policy included depriving delivery workers of a portion of the tips earned during the course of employment, illegally retaining the Service Charges, and failing to pay all hours at the prevailing minimum wage.

136. Defendants unlawfully misappropriated charges purported to be gratuities, received by delivery workers in violation of New York Labor Law § 196-d (2007).

FAILURE TO PROVIDE WAGE STATEMENTS ACCESS TO WAGE POSTERS

137. Defendants failed to provide Plaintiff and the Putative Class with wage statements at the time of payment of wages, containing: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or

rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; net wages; the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked, and the number of overtime hours worked, as required by NYLL § 195(3).

138. Defendants failed to provide Plaintiff and the Putative Class, at the time of hiring, a statement in English and the employees' primary language, containing: the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowance, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; and the telephone number of the employer, as required by New York Labor Law § 195(1).

139. Upon information and belief, until this lawsuit was filed, Defendants did not post the notices required by the FLSA and NYLL and/or did not otherwise inform Plaintiff and the Putative Class of the requirements of the tip credit.

140. Defendants have not informed Plaintiff and the Putative Class about the tip credit, or the employment laws generally, in Spanish or other languages spoken by the employees, even though other rules and guidelines are posted in Spanish.

141. Defendants' policy, pattern and/or practice of paying Plaintiff and the Putative Class a tipped wage despite their substantial work unrelated to a tipped occupation and failing to maintain and/or preserve accurate records of the hours Plaintiff and similarly situated employees perform tipped work and/or non-tipped wo0rk, along with the corresponding wages received, for

the purposes of determining pay, is a violation of the requirements of the FLSA and the NYLL.

Illegal deductions – "Tools of the Trade"

142. Defendants required Plaintiff, and the Putative Class to purchase their own tools of the trade including their own bicycles, helmets and reflectors in making deliveries for Defendants.

143. Until this lawsuit was filed, Plaintiff and the Putative Class bore all costs associated with the maintenance of the bicycles.

144. The bicycles used by Plaintiffs and the Putative Class are tools-of-the-trade that are specifically required for the performance of their duties.

145. Plaintiff BURGOS was forced to purchase and replace his bike, as well as pay for repairs.

146. Defendants' policy, pattern and/or practice of requiring that Plaintiff and the Putative Class bear the cost of a bicycle, helmet and reflectors and maintenance, brings Plaintiff and the Putative Class' wages below the prevailing minimum wage rate and is a violation of the FLSA and the NYLL.

FIRST CAUSE OF ACTION
(Fair Labor Standards Act – Failure to Pay Minimum Wage)
(Brought on Behalf of Plaintiffs and all FLSA Class Members)

147. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

148. At all times during their employment, Plaintiff and the Putative Class were employed by Defendants from November 1, 2013 through the term of the trial and were required to be paid a minimum hourly wage for every hour worked for Defendants.

149. Since on or about April 16, 2014 through the present, Defendants have violated the provisions of the FLSA, 29 U.S.C. § 206 and §215(a)(2) by failing to pay the Plaintiffs and other similarly situated employees a minimum hourly wage.

150. Defendants knew or showed a reckless disregard for the provisions of the FLSA concerning the payment of minimum wages and remains owing the named Plaintiff and other similarly situated employees a minimum wage for every hour worked during the three year period preceding this lawsuit.

151. Accordingly, both named and represented Plaintiff are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees and costs.

SECOND CAUSE OF ACTION
(Violation of the NYLL § 196-d – Illegal Retention of Gratuities)
(Brought on Behalf of Plaintiff and all Rule 23 Class Members)

152. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

153. At all times during their employment, Plaintiff and the Putative Class were employed by Defendants from November 1, 2013 through the term of the trial and were required to be paid their gratuities.

154. Defendants violated NYLL § 196-d by retaining gratuities that rightfully belong to Plaintiff and the Rule 23 Class.

155. Defendants violated NYLL § 196-d by retaining gratuities mislabeled Service Charges that rightfully belong to Plaintiff and the Rule 23 Class.

156. Defendants knew or showed a reckless disregard for the provisions of the FLSA concerning the payment of minimum wages and remains owing the named Plaintiff and other

similarly situated employees a minimum wage for every hour worked during the three year period preceding this lawsuit.

157. Accordingly, both named and represented Plaintiff are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees and costs.

158. Accordingly, both named and represented Plaintiff are entitled to recovery of such amounts, liquidated damages, prejudgment interest, attorneys' fees and costs.

THIRD CAUSE OF ACTION
(Breach of Contract)
(Brought on Behalf of Plaintiff and all Rule 23 Class Members)

159. Plaintiff incorporates herein the allegations contained in the preceding paragraphs.

160. Defendants and Plaintiff and the Rule 23 Class entered into an agreement.

161. Plaintiff and the Rule 23 Class agreements stated: “In the event that a User pays Company a valid gratuity on your behalf, Company will transmit such gratuity to you and will not retain any portion of that gratuity. With regard to cash gratuities provided by a User or Delivery Recipient directly to you, no portion of that gratuity is owed to or should be paid to Company.”

162. Defendant retained the gratuities in direct contravention to the express wording of the Agreement.

163. Accordingly, both named and represented Plaintiff are entitled to recovery of such amounts.

FOURTH CAUSE OF ACTION
(New York Labor Law: Unpaid Minimum Wages)
(Brought on Behalf of Plaintiff and all Rule 23 Class Members)

164. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

165. At all times relevant to this action, Plaintiff and the Rule 23 Class were employees of Defendants who fall within the meaning of employer under the New York Labor Law.

166. The minimum wage and over-time wage provisions of Article 19 of the New York Labor Law and its supporting regulations apply to Defendants.

167. Defendants have failed to pay Plaintiff and the Rule 23 Class the over-time wages to which they were entitled under the New York Labor Law.

168. By Defendant's failure to pay Plaintiff and the Rule 23 Class Members minimum wages, Defendants have willfully violated the New York Labor Law Article 19, §§ 650 et seq., and the supporting New York State Department of Labor Regulations, including but not limited to the regulations in 12 N.Y.C.R.R. Part 142.

169. Due to Defendants' violations of the New York Labor Law, Plaintiff and the Rule 23 Class Members are entitled to recover from Defendants their unpaid minimum and over-time wages, reasonable attorneys' fees and costs of the action, pre-judgment and post-judgment interest, and notice and an opportunity for class members, after the determination of class-wide liability and of individual back pay and interest, to intervene in this action or to file their own suits and petition individually for liquidated damages, and other relief pursuant to New York Labor Law Article 19, §§ 650 et seq.

FIFTH CAUSE OF ACTION
(Violation of the Notice and Recordkeeping Requirements of the New York Labor Law)
(Brought on Behalf of Plaintiff and all Rule 23 Class Members)

170. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

171. Defendants failed to provide Plaintiff and the Rule 23 Class with a written notice, in English and/or Spanish, of their rate of pay, regular pay day, and such other information as required by NYLL § 195(1).

172. Defendants are liable to the Plaintiff and the Rule 23 Class in the amount of $2,500, together with costs and attorney's fees.

SIXTH CAUSE OF ACTION
(New York Labor Law: Unpaid Minimum Wages)
(Brought on Behalf of Plaintiff and all Rule 23 Class Members)

173. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

174. At all times relevant to this action, Plaintiff and the Rule 23 Class were employees of Defendants who fall within the meaning of employer under the New York Labor Law.

175. The minimum wage and over-time wage provisions of Article 19 of the New York Labor Law and its supporting regulations apply to Defendants.

176. Defendants have failed to pay Plaintiff and the Rule 23 Class the over-time wages to which they were entitled under the New York Labor Law.

177. By Defendant's failure to pay Plaintiff and the Rule 23 Class Members minimum wages, Defendants have willfully violated the New York Labor Law Article 19, §§ 650 et seq., and the supporting New York State Department of Labor Regulations, including but not limited to the regulations in 12 N.Y.C.R.R. Part 142.

178. Due to Defendants' violations of the New York Labor Law, Plaintiff and the Rule 23 Class Members are entitled to recover from Defendants their unpaid minimum and over-time wages, reasonable attorneys' fees and costs of the action, pre-judgment and post-judgment

interest, and notice and an opportunity for class members, after the determination of class-wide liability and of individual back pay and interest, to intervene in this action or to file their own suits and petition individually for liquidated damages, and other relief pursuant to New York Labor Law Article 19, §§ 650 et seq.

SEVENTH CAUSE OF ACTION
(Violation of the Wage Statement Provisions of the New York Labor Law)
(Brought on Behalf of Plaintiff and all Rule 23 Class Members)

179. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

180. Defendants did not provide Plaintiff and the Rule 23 Class with wage statements upon each payment of wages, as required by NYLL § 195(3).

181. Defendants are liable to the Plaintiff and the Rule 23 Class in the amount of $2,500, together with costs and attorney's fees.

EIGTH CAUSE OF ACTION
(Violation of NYLL – Unpaid Wages)
(Brought on Behalf of Plaintiff and all Rule 23 Class Members)

182. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs

183. The NYLL requires employers to pay promised wages for every hour worked. NYLL §§ 190(10, *et seq*.

184. Defendant failed to pay Plaintiff and the Rule 23 Class the promised wage for every hour worked.

185. Defendants' failure to pay Plaintiff and the Rule 23 Class the promised wage for every hour worked was not in good faith.

186. Plaintiff and the Rule 23 Class are entitled to all unpaid wages, attorneys' fees, liquidated damages and costs.

NINTH CAUSE OF ACTION
(Violation of NYLL – Failure to Provide Notice and Information about Employment Laws)
(Brought on Behalf of Plaintiff and all Rule 23 Class Members)

187. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

188. The NYLL requires employers to maintain adequate and accurate written records of the actual hours worked and the true wages earned by employees. NYLL § 195(4); 12 N.Y.C.R.R. §§ 142-2.6, 146-2.1.

189. Defendant failed to maintain adequate and accurate written records of the actual hours worked and true wages earned by Plaintiff and the Rule 23 Class.

190. Defendants' failure to maintain adequate and accurate written records of the actual hours worked and true wages earned by Plaintiff and the Rule 23 Class was not in good faith.

DEMAND FOR TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury on all questions of fact raised by the Amended Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all other similarly situated past and present employees, prays for the following relief:

A. That, at the earliest possible time, Plaintiffs be allowed to give notice, or that the

Court issue such notice to all persons who are presently, or have at any time during the three years immediately preceding the filing of this suit, been employed by Defendants as bicycle or foot messengers in New York City. Such notice shall inform them that this civil action has been filed, of the nature of the action, and of their right to join this lawsuit if they believe they were denied proper wages.

B. Unpaid wages and an additional and equal amount as liquidated damages pursuant to 29 U.S.C. §§ 201 et seq. and the supporting United States Department of Labor regulations;

C. Certification of this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

D. All gratuities illegally retained by Defendants, plus an equal amount in liquidated damages;

E. All Service Charges illegally retained by Defendants plus an equal amount in liquidated damages;

F. Designation of Plaintiff as representative of the Rule 23 Class, and counsel of record as Class Counsel;

G. Issuance of a declaratory judgment that the practices complained of in this Complaint are unlawful under New York Labor Law, Article 19, § 650 et seq., and the supporting New York State Department of Labor regulations;

H. Unpaid minimum wages pursuant to N.Y. Lab. Law Article 19, § 650 et seq., and the supporting New York State Department of Labor regulations;

I. All costs related to of tools-of-the-trade and

J. New York Labor Law Section 195 and 196 damages;

K. All damages from Defendants breach of contract;

L. Pre-judgment interest;

M. After the determination of class-wide liability, of individual damages, and of Defendants' liability for back pay, notice to class members of the opportunity to intervene in this action or to file separate actions to recover liquidated damages under Article 19, § 68 1(1) of the New York Labor Law.

N. Attorneys' fees and costs of the action; and,

O. Such other relief as this Court shall deem just and proper.

Dated: November 1, 2016
New York, New York

GARBARINI FITZGERALD P.C.

By: _____

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