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Prepared Remarks of Gregory A. Frank For The Small Business Committee of the New York City Council, June 27, 2019

Good afternoon. My name is Gregory Frank. I am an attorney and an expert in antitrust and consumer law. I am a partner at the law firm Frank LLP. Unlike others who have testified here today, I am not a stakeholder. I have been asked by the committee to give testimony concerning the various antitrust implications of Grubhub's market power in the New York City marketplace.

Our system assumes that fair competition between service providers benefits everyone. Competition lowers prices, fosters better consumer choice, encourages innovation, and rewards hard work.

However, in highly concentrated marketplaces, companies may use their power to dominate the marketplace instead of competing fairly. This can lead to outsized and unfair prices, limited consumer choice, the restriction of fair competition, the debilitation of labor markets, and unsustainable prices that can drive downstream customers out of business.

Evidence demonstrates that Grubhub has substantial monopoly power in the highly concentrated New York City online ordering marketplace. Grubhub's overwhelming market power in the New York City marketplace raises serious concerns from an antitrust perspective.

The Federal Trade Comission uses a formula called the Herfindahl-Hirschman Index, or HHI, to estimate when the concentration of market power in a marketplace is so dangerous as to be harmful to that marketplace. The FTC uses HHI when evaluating whether to block mergers. In essence, the FTC does not allow mergers in high HHI marketplaces, because the negative externalities of a concentrated marketplace outweigh the benefits.

HHI is calculated by squaring the percentage of the market of each market player, and adding them. Thus the HHI for a marketplace with 12 firms, each of whom has 8% of the marketplace is 12 times 8 squared, or 12 times 64 for an HHI of 768.

In order to understand the HHI scale, an HHI above 2,500 is considered "highly concentrated" leading to substantial regulatory scrutiny. A market with an HHI between 1,500 and 2,500 is considered "moderately concentrated"; and a market with an HHI below 1,500 is considered "unconcentrated."

Furthermore, a merger that results in "highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." In one case an appeals court observed that an increase in HHI by 510 points "creates, by a wide margin, a presumption that the merger will lessen competition."

Just a few days ago, the data firm Second Measure posted evidence that Grubhub controls 69% of the New York City Marketplace, UberEats controls 14% of the marketplace, and Doordash controls 10%. Such a market concentration would indicate an HHI of over 5,000 for New York's online ordering marketplace. Even 5,000 is generous. Data provided by Restaurant Business Online last year indicates Grubhub may have a market concentration in New York of almost 85%, which would mean an HHI of over 7,200.

By way of comparison, the famous breakup of AT&T with a pre-breakup HHI of about 8,000. The FTC has not allowed the telecom marketplace to have an HHI above 3,000 ever since.

Indeed, the Justice department blocked the merger of ATT & T-mobile in 2011, because it would have resulted in a nation-wide HHI above 3100 nationwide, with an HHI above 2,500 in 96 of the largest 100 marketplaces.

Among the dangers of a concentrated marketplace is outsized pricing power for market participants. Pricing power is the ability to raise prices without risk of losing business to competition. High pricing power exists in monopoly markets. High pricing power for monopolists places a heavy financial burden on both consumers and restaurants.

The burdensome pricing power in the online ordering marketplace is demonstrated by the testimony we have heard testimony today. We have heard how the often 30% in fees devastate modern restaurant economics, which involve inflexible budgets anchored by mostly fixed costs such as food costs, labor costs, and rent.

Further, online ordering customers are willing to pay the premium to participate in such a marketplace, demonstrating what antitrust regulators call “pricing power.” As the Supreme Court has observed: “"Market power is the power to force a purchaser to do something that he would not do in a competitive market. It has been defined as the ability of a single seller to raise price.” The substantial fees demonstrate pricing power.

Lastly, I would like to draw attention to Grubhub’s recent growth in market power in the physical ordering business.

Grubhub’s revenue model has been historically focused on its online digital platform, which connects customers and restaurants. However, in recent years, Grubhub has increased its market presence in the ancillary business of providing physical delivery services of restaurant delivery orders.

The leveraging of grubhub’s online ordering near monopoly into the separate product marketplace for physical delivery of orders creates other causes for concern.

Reports indicate that Grubhub has grabbed substantial market share of the New York delivery market. Many of its customers use both the marketing and delivery services.
Further investigation is merited to determine the effects on this labor marketplace and also the effects on the restaurant marketplace.

Consolidation of the delivery labor market can result in depressed wages and employment options for workers. Moreover, it can ultimately lead to less restaurant choice for consumers as Grubhub can use its power in the labor marketplace against restaurants.