

**IBA/IFA 34th
ANNUAL JOINT CONFERENCE**

* * * * *

A New Era in International Franchising

* * * * *

DISRUPTIVE NEW TECHNOLOGIES AND FRANCHISING

* * * * *

May 9, 2018

Washington, D.C. U.S.A.

**Kara K. Martin
The Franchise & Business Law Group
Salt Lake City, Utah
U.S.A.**

**Melissa Murray
Bird & Bird
Dubai
United Arab Emirates**

**Lee J. Plave
Plave Koch PLC
Reston, Virginia
U.S.A.**

DISRUPTIVE NEW TECHNOLOGIES AND FRANCHISING

In 2018, the emergence of new methods of connecting customers to businesses has become almost second-nature to many consumers as well as many businesses. In just one segment – the procedure by which consumers can place a delivery order with a restaurant – there are a multitude of options. These include relatively new powerhouse players such as DoorDash, Grubhub, Postmates, and UberEats. The emergence of Amazon as a potentially mammoth delivery force lurks as well.¹

The market is strong enough that there has already been consolidation: in 2017, Grubhub acquired its rival Eat24 business from Yelp for \$288 million.² Matt Maloney, the CEO of Grubhub, observed that “scale drives efficiency,” when announcing a second deal with Yelp to increase to over 80,000 the number of U.S. restaurants offering delivery through the Grubhub mobile app.³ He went on to note that “I see a point where we could conceivably have extremely low if not free delivery for consumers.”⁴ Uber’s entry, the UberEats platform, is already reported to be more profitable than its ubiquitous ride-hailing business, and has expanded in the U.S., Canada, and globally.⁵

What makes these services different is not the fact that they deliver food to customers or that they offer a wide range of restaurants’ menus to consumers. After all, local and national branded restaurants such as Chinese-take outs and pizzerias have delivered to customers for decades. Food delivery services – even franchised ones – long ago became a reliable go-to for consumers (such as “Takeout Taxi,” which began operating in the Washington, D.C. market in the late 1980’s⁶ and “Mr. Delivery” (which was started in South Africa and later expanded into the U.S.). Smaller regional food service establishments are also relying on delivery, such as Chicago’s “Foxtrot” concept, whose business is reported to be “divided evenly between in-store and delivery.”⁷ Global food service giants like McDonald’s have expanded with

¹ Jason Del Rey, “Amazon launches restaurant delivery in Manhattan with more than 350 eateries; Free delivery, but the fee for restaurants to participate is steep,” Recode (May 17, 2016) (<https://www.recode.net/2016/5/17/11687468/amazon-restaurant-delivery-manhattan>).

² Theresa Poletti, “Yelp bounces back as Grubhub deal gets good reviews,” MarketWatch (Aug. 6, 2017) (<https://www.marketwatch.com/story/yelp-bounces-back-as-grubhub-deal-gets-good-reviews-2017-08-03>).

³ Julie Jargon and Heather Haddon, “Grubhub Expands Pact With Yelp, Aiming for Cheaper Deliveries,” The Wall St. J. (Mar. 19, 2018) (<https://www.wsj.com/articles/grubhub-expands-pact-with-yelp-aiming-for-cheaper-deliveries-1521451921?mod=searchresults&page=1&pos=1>).

⁴ Id.

⁵ Mike Isaac, “UberEats Picks Up Steam Against Rivals,” The N.Y. Times (Sept. 25, 2017 at B1).

⁶ Kirstin Downey Grimsley, “The Takeoff of Takeout Taxi,” The Wash. Post (Nov. 21, 1994) (https://www.washingtonpost.com/archive/business/1994/11/21/the-takeoff-of-takeout-taxi/879b8c2a-3b90-4d3b-8807-d263b72035c6/?utm_term=.410ea0206bd3). Consolidation of the industry continued as Takeout Taxi and other delivery services were acquired in 2017 by BiteSquad of Minneapolis. See Dan DeBaun, “Bite Squad buys Md. food delivery firm as part of national expansion,” Washington Bus. J. (Oct. 10, 2017) (<https://www.bizjournals.com/washington/news/2017/10/10/bite-squad-buys-md-food-delivery-firm-as-part-of.html>).

⁷ Jane Black, “Welcome to the New Convenience Store,” The Wall St. J. (Apr. 25, 2018) (<https://www.wsj.com/articles/welcome-to-the-new-convenience-store-1524677133?mod=searchresults&page=1&pos=1>).

their own delivery platform, “McDelivery,” which it reports as being available (through UberEats and otherwise) in over 10,000 of its restaurants in 21 different countries.”⁸

What’s different about 2018 than the years past is volume and cost. The gig economy – as noted below – has generated a plethora of drivers who are able to conveniently and cheaply complete the last-mile journey between the restaurant and the consumer, and fulfill the delivery order while the food is (hopefully) still hot and to the consumer’s liking. The consumer-cost factor is undeniably a major consideration, as noted (above) by Grubhub’s CEO (suggesting that delivery may someday be low-cost or free to consumers). The issue is not trifling; in addition to Grubhub’s \$288 million acquisition of Eat24 noted above, DoorDash recently took in \$535 million in investments to fuel its expansion.⁹

The structure of the relationship that these growing delivery services have to restaurants is critical to understanding the impact that the phenomenon is having and the likely impact. Where the restaurants are franchised, additional facets also need to be considered.

These discussions about the impact on franchising arising from the rising gig economy are really not that different from the discussions held 10, 20, and 30 years ago in relation to new technologies and techniques. Each time a new technology emerges, or a system improvement or addition is considered, the implications and impact it may have on a franchise network needs to be considered. Clearly one major area in the franchise relationship that could be impacted by increased adoption of third-party delivery systems are the impact on royalties, delivery area considerations, how the technology will be managed, and by what party, data protection and brand damage issues.

1. Franchise Agreement Considerations

While delivery services are not new, the emergence of new methodologies suggest that the delivery segment of the food service industry will be far more prevalent over time. Because there are many ways to implement delivery, counsel should assess the issues, which include (among others):

1. Who sells what? Does the delivery company and its driver serve as an agent of the restaurant? Do they act as a reseller? Or do they act as agent of the customer?
2. What party is responsible for taking orders?
3. What party is responsible for delivery and in what area is delivery to be made?
4. What is the selling price upon which royalties (and other fees, such as marketing fees) are to be based? What is the contractual arrangement between the restaurant and the delivery entity? Which party is responsible for problems that occur during the delivery process, including exposure for torts?¹⁰

⁸ See McDonald’s Corp. 2017 Annual Report at 15.

⁹ Eliot Brown, “SoftBank Bets Big on Food Delivery,” The Wall St. J. (Mar. 1, 2018) (<https://www.wsj.com/articles/softbank-bets-big-on-food-delivery-1519912804?mod=searchresults&page=1&pos=7>).

¹⁰ An entire segment of the insurance industry caters to the pizza delivery slice of the economy. See, e.g., Trusted Choice’s website entitled “The Hidden Risks of a Pizza Delivery Business,” at <https://www.trustedchoice.com/small-business-insurance/restaurant-food/pizza-delivery/>. See also Progressive Paloverde Ins. Co. v. Bishop, 2012 WL 2399607 (S.D. Ind. June 25, 2012) (one of many cases involving a delivery driver who was involved in an auto accident).

5. Are there other aspects of already-existing franchisor – franchisee relationships that are implicated by expansion of delivery service?
6. Issues relating to the data protection and data ownership arising out of delivery transactions.

2. Who Sells What

A threshold legal consideration to understand is which party in the relationship actually makes the sale. There are various possibilities, including:

- the restaurant sells directly to the customer and engages a delivery person or delivery service as its agent to complete the order;
- the restaurant sells directly to the delivery person or company, which, in turn, resells the food to its customer; and
- the restaurant sells directly to the delivery person or company, which in effect acts as the customer’s agent.

Because there is no one single structure to these arrangements, all should be assessed. The variation among these structures impact all of the considerations raised below.

3. Order Taking

Questions to consider include which party is taking the orders, how the menu selections will appear, and whether the delivery service uses the restaurant’s intellectual property. In most systems, the menu, photos, and other intellectual property (e.g., the marks) are owned by the franchisor – and in those cases, the franchisee is unlikely to have the independent right to properly license a delivery company to use the franchisor’s IP.

4. Delivery

A fundamental issue to evaluating delivery service is to consider what party will actually complete the delivery service. In some systems, the restaurant itself employs the delivery personnel (e.g., a pizza shop), while other restaurants contract delivery out to a third-party service that performs that function on the restaurant’s behalf. As noted in this paper, the emergence of delivery providers such as Grubhub and UberEats means that local third-party drivers may execute the delivery, and while that should ostensibly be within the local delivery area, that zone may not correlate with the protected area under a franchise agreement. For example, a gig driver may accept the transaction and pickup an order in one territory for delivery along the route where the driver is otherwise headed. Where those territories are assigned to adjacent franchisees, would it be possible or even logical for the order-taker to direct the order in accordance with the terms governing the “protected area” of the franchisees’ unseen franchise agreements?

5. Royalty and Marketing Fund Considerations

It should come as no surprise that one area of potential conflict when introducing or utilizing third-party delivery is how the royalty will be handled,¹¹ will it be calculated based off the price the customer pays for the food, which is typically the same price they would pay if they were to order at the restaurant; or will it be calculated based on the amount remitted by the third-party delivery company; or will it be handled in an entirely different way?

To best understand how delivery fees work into the entire fee system, it is important to understand the overall fee structure as it relates to third-party delivery systems. Typically, an end-user or consumer will order food via the third-party's mobile app or website. The consumer will pay the third-party for the menu price of the food, along with a service and often additional delivery fee. Sometimes these fees can add an additional 40-50%¹² to the price of the actual order. The order is then sent directly to the restaurant, typically via a separate tablet or other POS system and fulfilled by the restaurant. On the restaurant's end, the order appears like an in-store purchase and logged in the system as a full-price menu order without any reductions related to service fees the restaurants must pay to the third-party delivery system. The third-party then remits the payment for the food, minus their service charge charged to the restaurant (which is in addition to the service charge to the consumer). From a pure POS facing and reporting perspective, the third-party delivery transaction should typically appear identical to an in-store transaction.

Third-party delivery services typically charge restaurants 12-40%¹³ of the menu price for each food order delivered. On the high end of the spectrum is Uber Eats, which can charge up to 30-40%¹⁴ of the sale price; Amazon Prime Now charges 27.5%; and DoorDash charges 20%. The amount of the charge can also depend on factors including the size of the order, the restaurant, and services provided such as additional advertising. Internationally these fees also appear to be widely negotiated and very much dependent on the bargaining power of the parties involved. However, on average, most of the other delivery companies charge around 20%.

In layman's terms, if a customer places a \$20 food order through Uber Eats or DoorDash, the restaurant will receive from \$12 to \$16 on that order. There is growing tension between franchisors and franchisees in systems engaged in using third-party delivery systems as to what amount is owed to the franchisor for these sales -is it based on the \$20 "menu price" or the \$12 to \$16 remitted and realized amount?

¹¹ Jennifer Kulyk and John Sotos, "Food Delivery Apps in Restaurant Franchising: How to Deal with Fees?," Lexology (Aug. 31, 2017) (<https://www.sotosllp.com/2017/08/food-delivery-apps-in-restaurant-franchising-how-to-deal-with-fees>).

¹² Tom Kaiser, Laura Michaels, and Nicholas Upton, "New Research Shows Who's Leading the Pack in Delivery," Franchise Times (Jan. 24, 2018) (<http://www.franchisetimes.com/February-2018/New-research-shows-whos-leading-the-pack-in-delivery>).

¹³ Id.

¹⁴ Peter Buckingham "How is Uber Changing the QSR Environment...And Are You Feeling the Effects?," Business Franchise (Oct. 10, 2017) (<http://www.franchisebusiness.com.au/news/how-is-uber-changing-the-qsr-environment-and-a>); see also James Covert "Uber, Amazon to Charge Eateries Steep Rates for Delivery," New York Post (Feb. 6, 2016) (<https://nypost.com/2016/02/06/tech-giants-start-getting-serious-about-food-delivery>).

Unless the franchise agreement explicitly deals with how royalty and marketing fund payments will be handled when the franchisee uses third-party delivery, the answer to what amount the franchisor can collect on comes down to the franchise agreement's definition of "gross sales" or "gross revenues." A typical franchise agreement will require that royalties and marketing/advertising fees be paid on "gross sales" or "gross revenues." Most often the definition will boil down to the total proceeds received by the franchisee for goods and services associated with the restaurant operations. So, the question becomes one of whether the definition allows the franchisor to capture royalty and marketing payments from the full menu price payment that the customer made, or from the remitted and realized amount actually received by the franchisee.

The following three definitions of Gross Sales are from restaurants utilizing third-party delivery.

- Section 7 of the McDonald's 2017 Franchise Agreement provides that: "For the purposes of this Franchise, the term 'Gross Sales' shall mean all revenues from sales of the Franchisee based upon all business conducted upon or from the Restaurant, whether such sales be evidenced by check, cash, credit, charge account, exchange, or otherwise, and shall include, but not be limited to, the amounts received from the sale of goods, wares, and merchandise, including sales of food, beverages, and tangible property of every kind and nature, promotional or otherwise, and for services performed from or at the Restaurant, together with the amount of all orders taken or received at the Restaurant, whether such orders be filled from the Restaurant or elsewhere." (emphasis added)
- The introductory definitions section of the Zaxby's 2017 License Agreement states that: "'Gross Sales' means the aggregate of all monies and receipts derived from (i) all products prepared and services performed at or through the Restaurant, (ii) sales and orders made, solicited or received at or through the Restaurant, (iii) all of the business whatsoever conducted or transacted at or through the Restaurant, (iv) all other revenue derived from the exploitation of the system and/or the marks, and (v) all insurance proceeds and/or condemnation awards for loss of sales, profits or business, and whether such payment is in cash, by check or debit card, by exchange or for credit (and, if for credit, regardless of collection therefor), less any sales taxes collected by you and transmitted to appropriate taxing authorities." (emphasis added)
- Section 3(d) of the Jason's Deli 2017 Franchise Agreement provides that: "As used in this Agreement, the term 'gross sales' will mean the amount of sales of all products and services sold in, on about or from the Deli by Franchisee, whether for cash or on a charge, credit or time basis, without reserve or deduction for inability or failure to collect, including, but not limited to, such sales and services (i) where orders originate and/or are accepted by Franchisee in the Deli, but delivery or performance thereof is made from or at any place other than the Deli, or (ii) pursuant to telephone or other similar orders received or filled at or in the Deli." (emphasis added)

Each of the above definitions contemplate that orders may be filled or fulfilled outside of the restaurant, but of the examples, Jason's Deli likely has the clearest definition to allow for the collection of royalties on the menu price in that it ties the payments to "amount of sales." Both Zaxby's and McDonalds leave some room for argument that the definition of gross sales does not include the actual menu price, but instead is tied to the amounts received by the franchisee. For example, McDonalds uses the term "all revenues from sales of the Franchisee." Arguably, the revenue of the franchisee is the revenue it gets from Uber Eats (or other third-party delivery vendor). Similarly, a franchisee could maintain that Zaxby's definition that includes "aggregate of all monies and receipts derived" excludes

the fee charged by the third-party delivery system since the money actually derived from the sale was not the full menu price.

Franchisors seeking to collect on the menu price, will likely argue that the fees associated with utilizing a third-party delivery system are normal expenses that are figured into the net profits and are a cost of doing business. Franchisees do not deduct labor or small ware costs associated with the sale of each food item prior to calculating the royalties owed, so why would they be allowed to deduct the cost of doing business with a third-party delivery system?

Franchisees however will argue that unlike sales that originate in and culminate in the actual restaurant, they never realize or see the actual payment for the full amount of the order. Many franchisees could point out that their already narrow margins make it nearly impossible for them to net any profit if the franchisor takes a royalty and marketing fee percentage on the menu price as opposed to the remitted and realized amount.

By way of example, a franchisee in a system that charges a 7% royalty and 3% marketing fee, and pays a 20% fee to the third-party delivery company, could have a modified profit and loss statement similar to the below. The below assumes identical “menu price” ordering and payment by the customer.

	Before Third-Party Delivery	After Third-Party Delivery
Sales	\$75,000	\$75,000
Less:		
Delivery Charge @ 20%*	\$0	\$1,500
COGS at 30%	\$22,500	\$22,500
Royalties at 7%	\$5,250	\$5,250
Marketing Fees @ 3%	\$2,250	\$2,250
Rent @ 15%	\$11,250	\$11,250
Labor @ 30%	\$22,500	\$22,500
Net Profit	\$11,250	\$9,750

*The 20% charge is based on 10% of total sales attributed to third-party delivery.

Based on the above, even if the franchise agreement allows collecting on the “menu price,” the franchisor would be wise to consider whether it is in the system’s best interest to do so, or will they be crippling the franchisees to the point where franchisees ultimately fail because they are unable to profit in an industry with already tight margins.

It could be that these emerging technologies require franchisors to completely rethink the way they calculate royalties and marketing fees. Is a simple “on gross sales” sufficient to capture and navigate the nuances created by emerging technologies? It is quite possible that the definition of gross sales employed by most systems will need to be modified to create clear exclusions and carve-outs for situations that were not contemplated when the definition of gross sales was drafted. Should the franchise agreement address these new technologies head-on by creating clear terms of use and a designation of risks and liabilities? One possibility is to rethink how royalties and marketing fees are collected and on what terms, including a sliding scale, reduced percentage or dollar cap.

From an international perspective, where the franchisor’s template “home base” documents are being used in another country, the authors are seeing quite extensive negotiation on the attempted exclusion by franchisees of third party delivery fees from the definition of “Gross sales/revenues” for the purposes of calculating royalties. The success of such attempts appears very much dependent on the

franchisor's view of whether such third party delivery costs are considered a usual cost of doing business or not.

6. Outsourcing Issues and Considerations

There are a number of issues a franchisor should consider when looking to allow franchisees to utilize third-party delivery. First and foremost is which party should contract with the third-party delivery vendors. In a typical franchise system-vendor relationship, the franchisor will enter into an agreement with the third-party for advantageous pricing, which is then passed along to the franchisee, who is, in turn, required to use the vendor.¹⁵ Then, the franchisee will enter into their own agreement upon using or ordering from the vendor. The same type of relationship would likely be established in a third-party delivery situation.¹⁶ Of course, some franchisees will also make arrangements on their own with third party delivery services (whether with or without the franchisor's approval), and they will also face similar concerns. Similar to a standard vendor-franchisor relationship, there are certain considerations that need to be examined before entering into any master vendor relationship.

Some of these considerations include:

- Is the product one that can be reliably and safely delivered to a customer's home for offsite consumption consistent with brand standards?
- Are there requirements (e.g., refrigeration, freshness standards, or heating) that the delivery vendor demonstrates it can properly meet?
- Is the vendor properly established in how it will handle ordering and delivery?
- Does the vendor carry proper and adequate insurance to protect the franchisor and its franchisees?
- Where will the vendor deliver?
- Will the delivery vehicle bear any marks – whether those of a third party (e.g., UberEats) or those of the restaurant from which the food is ordered?
- Might the franchisor be exposed to liability if it approves a delivery vendor for some areas but that vendor cannot provide service to all markets?
- What if the delivery options and pricing options are not as good in one market as in another? Is there any risk assumed by the franchisor?

¹⁵ Joyce G. Mazero and Leonard H. MacPhee "Setting the Stage for a 'Best in Class' Supply Chain," Franchise Law Journal (Vol. 36 No. 2 Fall 2016, 219); see also Danny Goldberg "Locating the Best Vendors for Your Franchise," Franchising World (Oct. 2007) (<https://www.franchise.org/locating-the-best-vendors-for-your-franchise>).

¹⁶ Rick Grossman "What Franchisees Need to Know About Vendor Contracts," excerpt from Franchise Bible: How to Buy a Franchise or Franchise Your Own Business (Jan. 20, 2017) (<https://www.entrepreneur.com/article/286682>).

- Would the franchisor need to bring on additional staff specifically to evaluate and conduct surveys on each possible third-party delivery option?
- Is there any added risk if the required or specified vendor(s) are sub-par and damage the reputation of the franchisee in their market?
- What if the franchisor cannot negotiate the same rates with each delivery company so that some franchisees are realizing higher net profits than other franchisees?

It should be cautioned that if the franchisor is making any assurances related to the availability, quality, or pricing, there is an increased risk for liability. One suggestion in setting up a third-party delivery vendor program is to clearly articulate that not every market has the same opportunities for engaging third-party delivery services, but that the franchisor will work with franchisees who wish to engage in delivery services to find and, where appropriate, approve appropriate third-party delivery vendors. Such approvals may need to consider the possibility that the relationship may need to be with smaller and burgeoning delivery companies that may not have the same infrastructure or name recognition as larger companies such as Uber Eats and DoorDash, and minimum specifications should reflect this possibility.

Outside the scope of this paper are broad and wide-ranging supply issues, which include among other things what role and responsibility there is for a franchisor in reviewing and approving suppliers (whether nominated by franchisees or otherwise), and related issues. Suffice it to say that franchisors and franchisees will need to be mindful of those considerations when reviewing and approving transactions with third-party delivery services.

7. Data protection and data ownership

Given the numerous data breaches that have occurred across many outsourced service providers, together with updated and enhanced data protection and privacy laws coming into play, careful consideration needs to be had as to the protection, ownership, and use of customer data.

Although larger brands are likely to conduct thorough due diligence covering such matters when negotiating outsourcing contracts, it is unlikely that individual franchisees have the ability or inclination to do so when contracting with outsourced delivery providers and/or platforms. This raises further issues around the “Who Sells What” considerations discussed above – as obviously from a brand protection perspective it would be preferable that the franchisor enters into these agreements in order to appropriately consider such issues and ensure conformity across the franchised network.

Clearly a data breach is going to have a large impact on customer sentiment. The Uber data breach of 2016, which was not announced to the market until November 2017,¹⁷ extended to the UberEats customer data in many locations across the world including Singapore¹⁸. This has led to various questions being raised about the security of such data versus the convenience of using such platforms. A survey conducted by UK-based fraud prevention company Semafone found that an overwhelming majority of

17 Dara Khosrowshahi, CEO Uber, 2016 Data Security Incident, (Nov. 21, 2017) (<https://www.uber.com/newsroom/2016-data-incident/>).

18 Tan Weizhen, Toh Ee Ming (Apr. 26, 2018) “Not just ‘phantom rides’, UberEATS customers also charged for food orders they didn’t make” (<https://www.todayonline.com/singapore/not-just-phantom-rides-ubereats-customers-also-charged-food-orders-they-didnt-make>).

individuals screened would not conduct business with an organization that had experienced a data breach. In the survey, “86.55 percent of 2,000 respondents stated that they were “not at all likely” or “not very likely” to do business with an organization that had suffered a data breach involving credit or debit card details.”¹⁹ Consumer sentiment shown through surveys like this however, seems at odds with the ever-growing public use of such platforms. Convenience appears to be winning over such data breach concerns.

Sample agreements reviewed by the authors ran from 5 to 7 pages and contained little to no provisions in relation to use, security, control, and processing of personal data. A sample UberEats²⁰ agreement provided a definition of Personal Data and an obligation on the restaurant to “*retain personal data provided solely by using the software and tools provided by Uber.*” The indemnity provisions provide the restaurant is to indemnify and hold Uber harmless against data breaches and/or non-compliance with EU data protection legislation. Here Uber are by implication, the owner of the customer data although the agreement makes it clear that “customers” are the restaurants customers not “Uber’s” customers. This concept has raised concerns with restaurant operators as to:

- the ownership and marketing to such “customers” who through using the platform may be “pushed” towards competitor restaurants simply through use of the platform; and
- how is a restaurant to identify, and therefore market to and understand, its customers without the customer’s data.

Questions have also been raised as to the use by the platforms themselves of such customer’s personal data. In the United Arab Emirates, a Deliveroo representative stated at a restaurant conference in 2016 that they were looking into launching their own restaurant concepts (in direct competition with their restaurant clients who use the Deliveroo platform). Deliveroo’s new restaurant concept was launched in October 2017²¹. This raises questions as to the true benefit to restaurants in signing up to such service providers where in the end, customers could be pushed to the platform’s own restaurants. Sample delivery provider agreements reviewed did not in any way discuss non-compete clauses, with most agreements reviewed having only clear breach provisions for the restaurant’s activities, with none on the service provider. Two sample agreements reviewed also placed a restriction on the restaurant from using any other outsourced delivery providers. One contained wording which imposed the restriction “*for the term of the Agreement plus a period of 12 months after its expiry or termination,*” the other contained a restriction for the term of the Agreement.

The European Union General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) (“GDPR”) comes into effect on 25 May 2018 and the proposed ePrivacy Regulation²² (which will regulate electronic/location marketing and the use of tracking technology) shows the focus legislators have on the protection of personal data. Online delivery platforms may also be caught by the NIS Directive²³ when it is implemented across the EU (which must happen by 9 May 2018). The NIS

¹⁹ Semafone (Mar 27, 2014) (<https://semafone.com/press-releases/86-customers-shun-brands-following-data-breach/>).

²⁰ A sample copy can be found at <https://www.documentcloud.org/documents/4443736-Uber-Contract.html> attached as Annexure A.

²¹ Felicity Campbell (Oct. 9, 2017), “Deliveroo brings its new kitchen concept to Dubai” (<https://www.thenational.ae/lifestyle/food/deliveroo-brings-its-new-kitchen-concept-to-dubai-1.665633>).

²² Repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications).

²³ Directive (EU) 2016/1148 on the security of Networks and Information Systems.

Directive will impose similar – but separate – obligations to the GDPR in terms of implementation of appropriate security measures and the notification of security incidents. The fines under the GDPR can go as high as 4% of annual global turnover or €20 Million (whichever is greater) and therefore, it will be interesting to see the implementation of such fines to outsourced service providers in the restaurant industry in the event of a data breach and how franchisee’s and/or franchisors are implicated. Careful consideration is therefore recommended when entering into such delivery services agreements concerning the key issues of the ownership, use, disclosure, and transfer of customer personal data, together with clear allocation of roles and responsibilities - such as who is the data controller as opposed to a data processor.

8. Brand Protection & Reputation Damage

One major cause of concern for restaurants who sign up to the various outsourced providers involves protection of the restaurant/brand’s reputation. Clearly this is an issue for all outsourced services, but where a customer receives food which is “not quite right” (or worse), many customers tend to blame the restaurant rather than the delivery provider. With the ease in being able to complain via social media, such complaints can quickly spiral from a single customer complaint into a much larger brand damage issue.

Sample agreements reviewed by the authors for multiple delivery providers have no service levels imposed on the providers when undertaking their services, although clear obligations are placed on restaurants as to the availability, quantity, and quality of the meals provided to customers through the platform. A sample UberEats agreement reviewed provides that despite delivery being through the UberEats platform, the meal is in the control of the restaurant at all times. The UberEats agreement makes it clear it is a platform for connecting restaurants with individual drivers and for processing payments, they are not a delivery or logistics services provider (despite what the public may perceive). A sample Deliveroo agreement however clearly provides that Deliveroo will “*collect the food from the restaurant and deliver it to the customers using its fleet of delivery drivers.*”

Franchisors are usually aware of the reputation risks involved with outsourced providers however franchisee’s themselves may not be so clued in. Franchisee’s however are rarely the ones directly on the receiving end of bad publicity as media outlets often focus on the consumer interest perspective and therefore the brand is usually the one brought under scrutiny. Although it may be possible to mitigate some brand damage through various practical and legal steps, if for example the brand/restaurant is tipped off prior to public release, often the case is there is no prior warning. Further most media outlets, and consumers, are not concerned with the internal allocation responsibilities among franchisors, franchisees, and outsourced providers.

Provisions around protection of the restaurant’s brand are common in franchise agreements and outsourcing agreements entered into by Franchisors, however in the sample agreements reviewed by the authors, one agreement had no provisions on intellectual property, one simply had a license for the service provider to use the restaurant’s brand on the platform and another agreement had a very one sided intellectual property rights clause dealing with the restaurant’s obligations to the service provider for third party IP claims. As discussed above under the heading “Order Taking,” there are questions as to whether a franchisee even has the right to license the franchisor’s brand for use on such websites/platforms without the franchisor’s prior consent.

9. Conclusion

Outsourcing certain services is not a new concept in the franchising sector and delivery service providers are not a recent development. Advances in technology however, while allowing for greater volume, lower costs, relatively easy international application and quick implementation times, means businesses have to move fast to keep up with consumer expectations. Some franchise agreements and manuals may require tailoring for such emerging technologies, but it is always difficult to anticipate what the next big technological advancement may be. When looking into the implementation of such new systems, the issues are varied and complex and very much dependent on the particular technology, the proposed agreement with the service provider, and how it interplays with the existing franchised system.

Author Biographies

Kara K Martin

Ms. Martin is a co-founder of the Franchise & Business Law Group where she is a partner and shareholder. The firm is based out of a Salt Lake City, Utah based law firm. Her practice is in the Kansas City, Kansas metro-area office.

Ms. Martin has gained vast experience in helping start-up and existing companies distribute their products and services through franchising, licensing and other methods of distribution. Assisting startup companies and entrepreneurs along with mid-size and growing companies is the focus of her legal practice. She advises clients on all areas of franchise law, including structuring the franchise relationship, registration and disclosure requirements, communicating and dealing with state regulators and the FTC, the ongoing franchisor-franchisee relationship and system issues, and terminating the franchise relationship. Along with her experience with franchising and licensing, Ms. Martin heads the law firm's trademark and copyright section. Protecting the valuable intellectual property of a business is a hallmark of her practice.

Ms. Martin is a member of the American Bar Association and is active with the ABA Forum on Franchising. In addition, Ms. Martin is a member of the Kansas Bar and the Utah Bar. She has served on a number of Utah Bar's section committees, including serving as the Chair of the Utah Bar Franchise Law Section for both the 2014-2015 and 2013-2014 year, the Vice Chair for the 2012-2013 year; and a 2013 Utah Bar Spring Convention Committee Member. She is a frequent speaker and author on various franchise and business law related topics. Ms. Martin is recognized by Super Lawyers as a Rising Star.

In addition to her J.D. degree, Ms. Martin has also obtained her Master of Arts in Government and Political Management.

Melissa Murray

Melissa Murray is a partner and the head of the Bird & Bird IP practice in the Middle East, based in Dubai.

She provides advice to international businesses on commercial, corporate and general litigation matters relating to their operations in the UAE and the wider Middle East region. Her experience includes advising on: hospitality; IT; IP; franchising; media; data protection; privacy; consumer protection; food; sports; healthcare; and regulatory matters.

Melissa is admitted to the Supreme Court of Queensland and holds an LLB from the Queensland University of Technology, Australia and a Graduate Diploma of Applied Corporate Governance. She is a member of INTA, American Bar Association, she is the Middle East representative for the Franchising

Section of the International Bar Association, and is a member of a number of UAE, UK, USA, Australian and women's business associations.

Melissa is ranked in Chambers and Partners for Global Wide Franchising and Intellectual Property for the United Arab Emirates, is ranked in *Who's Who Legal* as a global Franchising Thought Leader (2017 & 2018) and ranked in Legal 500 and World Trademark Review both for Intellectual Property.

Lee Plave

Lee Plave is a co-founding partner of Plave Koch PLC, an entrepreneurial law firm in Reston, Virginia. He counsels franchisors and distributors, drafts and negotiates agreements for international and domestic transactions, and advises clients on all aspects of franchise and distribution law.

Lee also works with clients on how to apply technology in franchise and distribution systems, including cybersecurity, social networking and media issues, and e-business policies, cybersquatting and domain name disputes, as well as cybersmear/complaint sites. He also represents clients before the Federal Trade Commission, where he began his career.

Chambers & Partners of London ranks Lee as one of the leading franchise lawyers in the US, and another London-based publication, *Who's Who Legal*, has named Lee the top franchise lawyer in North America, as ranked by his peers, for 4 of the last 5 years.

Date: _____

Restaurant registered name: _____

ABN/ACN: _____

Address: _____

This Master Framework Letter Agreement ("Letter") constitutes a legal agreement between:

_____ 's ("Restaurant" or "you"), Uber Portier B.V., a private limited liability company established in the Netherlands, having its offices at Meester. Treublaan 7, 1097 DP Amsterdam, The Netherlands ("Uber") and Portier Pacific Pty Limited, an Australian company registered in New South Wales under ACN 622 365 459 (Portier Pacific). Portier Pacific will procure and facilitate the provision of lead generation services, being on-demand intermediary and related services rendered via a digital technology network ("Uber Services") to you, an independent provider of Meals, and Uber will license you a tablet, mobile and web application (the "Uber Tool"). The Uber Services and Uber Tool enable you to seek, receive and fulfill requests for Meals from your customers via the mobile application provided by Uber to authorised end users ("UberEATS App") and to connect with independent providers of delivery services ("Delivery Partners"). In order to use the Uber Services and Uber Tool, you must agree to the terms and conditions that are set forth below. Upon your execution (electronic or otherwise) of this Agreement, you, Uber and Portier Pacific shall be bound by the terms and conditions set forth herein as of the date set forth above ("Effective Date").

The terms of our agreement are as follows:

1. **Structure of Agreement.** This agreement shall consist of this Letter, together with any addendums (individually, an "Addendum") addressing areas of collaboration agreed to by the parties (this Letter and any and all such Addendums are collectively the "Agreement"). Each such Addendum that references this Letter, once executed by all parties, will be incorporated into this Letter by reference. In connection with each Addendum, Uber and/or Portier Pacific will designate the actions, responsibilities and services to be respectively provided by each of the parties. In the event of a conflict, mutually agreed terms contained in an Addendum will supersede conflicting terms contained in this Letter, but only with respect to the activities designated in such Addendum.

2. **Intended Projects.** The parties agree to work in good faith with one another on certain collaborative projects, which may include those outlined below in section 2(a) or other projects as mutually agreed by the parties, in connection with the meals you make available (each, a "Meal") via the Uber Tool. Each project will be further specified in an Addendum, and any such project will only be undertaken once the parties mutually execute such Addendum.

a. **UberEATS App.** The general availability of Meals to end users of the UberEATS App during your normal business hours. Your customers may select Meals from your menu.

3. **Uber Tool and Intellectual Property.** Subject to the terms and conditions of this Agreement, Uber hereby grants you, for no consideration, a non-exclusive, royalty-free, non-transferable, non-sublicensable, non-assignable license, during the term of this Agreement, to use the Uber Tool in connection with the provision of the Uber Services by Portier Pacific, solely for the purpose of providing Meals to customers, tracking resulting Meal Payments and fees, and connecting with Delivery Partners. Uber, its affiliates and respective licensors reserve all rights not expressly granted in this Agreement. The Uber Tool and all related data (including all intellectual property rights in all of the foregoing) are and remain the property of Uber, its affiliates and respective licensors. You shall not improperly use the Uber Services or Uber Tool. You shall not use any of Uber's names, logos or marks for any commercial purpose except as Uber expressly allows, nor shall you try to register or otherwise use or claim ownership over any of Uber or its affiliates' names, logos or marks. You shall not copy, modify, distribute, sell or lease any part of the Uber Tool or related data, nor shall you reverse engineer or attempt to extract the source code of Uber's software, except if allowed by law. You acknowledge and agree that Uber is a technology services provider and that neither Uber, Portier Pacific nor its affiliates provide any delivery or logistics services. You agree that Portier Pacific may make available to your customers a receipt and/or tax invoice for Meal(s) they purchased from you via the UberEATS App.

You: (i) appoint Portier Pacific as your limited payment collection agent solely for the purpose of accepting payments from your customers on your behalf via the payment processing functionality facilitated by the Uber Services; and (ii) agree that payment made by your customer to Portier Pacific (or to an affiliate of Portier Pacific) shall be considered the same as payment made directly by your customer to you.

4. **Delivery Services.** For purposes of delivery of the Meals, Uber, Portier Pacific and the Delivery Partners shall operate under cover of your retail license privileges and control, as your agent, and not employee. For the sake of clarity, as between you, Uber and Portier Pacific, you, through the services provided by Delivery Partners, are responsible for the delivery of Meals and you maintain possession, control and care of the Meals at all times.

5. **Availability of Meals.**

a. **Meals.** Portier Pacific may provide you with reasonable advice regarding demand prediction, which you may use in connection with your determination of the quantity and type of Meals you make available via the Uber Tool. You will provide all hot Meals at a temperature of at least 60 °C and all cold Meals at a temperature of less than 5 °C (the "Safe Temperature Range"). You will determine any quality, portion, size, ingredient or other criteria that apply to the Meals ("Criteria") and you are solely responsible for ensuring that your Meals meet such Criteria when they are made available via the Uber Tool. In the event you fail to prepare Meals within the Safe Temperature Range or if any Meals are inconsistent with the Criteria (each, a "Substandard Meal"), Portier Pacific is under no obligation to make such Substandard Meals available for sale via the Uber Tool. Meals that contain or may contain an endangered species will be removed from the UberEATS App.

b. **Taxes.** You are responsible for determining and setting the retail price ("Retail Price") for each Meal to be made available for sale via the Uber Tool. You shall be the "retailer", "provider" or "seller" of all Meals (including delivery services related to such Meals) for GST purposes and the responsible party for collection and remittance of the applicable taxes. For the sake of clarity, the retail price for each Meal shall include GST, but you are solely responsible for determining all applicable taxes and identifying and informing Portier Pacific of the appropriate tax amount for Portier Pacific to charge on your behalf for Meals sold under this Agreement. Except as may be expressly agreed in this Agreement, each party shall be responsible for its expenses and costs during its performance under this Agreement.

c. **GST.** Unless expressly stated otherwise in this Agreement, all amounts payable or consideration to be provided under this Agreement by you to Portier Pacific are exclusive of GST. If GST is payable on any supply by Portier Pacific made under this Agreement, for which the consideration is not expressly stated to include GST, you agree to pay Portier Pacific an additional amount equal to the GST at the same time that the consideration for the supply, or the first part of the consideration for the supply (as the case may be), is to be provided. In this Agreement, GST that is payable by Portier Pacific includes GST that is payable by the representative member of Portier Pacific's GST group.

d. **GST Law.** The parties agree that, for the purposes of the GST law, Portier Pacific supplies to you the Uber Services in sole consideration for the Service Fee. In addition, Uber supplies to you a licence to use the Uber Tool under section 3 for no consideration.

e. **Meal Inventory.** You maintain title to all Meal inventory until each Meal is delivered to your customer. You are responsible for the costs of all Substandard Meals. You are responsible for costs related to reimbursement to your customers in the event any such customer(s) request a refund for unsatisfactory Meal(s) (including, without limitation, any costs associated with retrieving any such unsatisfactory Meal(s), if applicable). Portier Pacific may deduct refunds from the payment made to you under this Agreement.

f. **Service Fee.** In consideration of Portier Pacific's provision of the Uber Services, you agree to pay Portier Pacific a service fee as specifically set forth on each applicable Addendum (the "Service Fee"). All fees under this Agreement shall be paid in Australian dollars.

g. **Nutritional Information.** If you choose to make nutritional information for Meals, such as calorie count or allergen information, available to view in the UberEATS App, you represent and warrant that such information is accurate.

6. Promotional Activities.

a. Marketing. Uber and/or Portier Pacific may showcase the availability of your Meals via the UberEATS through various promotional activities App (e.g., Uber's or Portier Pacific's social media channels, websites, advertisements or blogs).

b. Marks. Subject to the terms and conditions of this Agreement, Uber and you hereby grant to each other (and, in the case of Uber, to its affiliates) for no consideration, a limited, non-exclusive and non-transferable license during the Term to use such party's respective Marks (as defined below), on a royalty-free basis, for the sole purpose of performing the promotional activities as set forth in an applicable Addendum. For purposes of this Agreement, the term "Marks" will mean the trademarks, service marks, trade names, copyrights, logos, slogans and other identifying symbols and indicia of the applicable party. All uses of a party's marks by the other party will be in the form and format specified or approved by the owner of such marks. Neither party will use the other party's marks without the prior, express, written consent of the other party. All goodwill related to the use of a party's marks by the other party shall inure to the benefit of the owner of such marks. Each Mark licensor reserves the right to revoke the licensee's permission to use the licensor's Marks should the quality of the licensee's services fall below a standard deemed acceptable by the licensor. Except as expressly set forth herein, neither party shall be deemed to grant the other party any license or rights under any intellectual property or other proprietary rights. All rights not granted are expressly reserved.

c. Publicity. Except as may be expressly set forth in this Agreement or an applicable Addendum, or agreed by the parties in writing, the parties may not issue a press release or otherwise refer to the other parties in any manner with respect to this Agreement or otherwise, without the prior written consent of such other party.

7. Confidential Information.

a. Definition. "Confidential Information" means any confidential, proprietary or other non-public information disclosed by one party (the "Discloser") to the other (the "Recipient"), whether disclosed verbally, in writing, or by inspection of tangible objects. Confidential Information will not include information that (a) was previously known to the Recipient without an obligation of confidentiality; (b) was acquired by the Recipient without any obligation of confidentiality from a third party with the right to make such disclosure; or (c) is or becomes publicly available through no fault of the Recipient. Each Recipient agrees that it will not disclose to any third parties, or use in any way other than as necessary to perform this Agreement, the Discloser's Confidential Information. Each Recipient will ensure that Confidential Information will only be made available to those of its employees and agents who have a need to know such Confidential Information and who are to be bound by written obligations of confidentiality at least as protective of the Discloser as this Agreement before such individual has access to the Discloser's Confidential Information. Each Recipient will not, and will not authorize others to, remove, overprint or deface any notice of copyright, trademark, logo, legend, or other notices of ownership from any originals or copies of the Discloser's Confidential Information. The foregoing prohibition on disclosure of Confidential Information will not apply to the extent the Discloser has authorized such disclosure, nor to the extent a Recipient is required to disclose certain Confidential Information of the Discloser as a matter of law or by order of a court, provided that the Recipient gives the Discloser prior written notice of such obligation to disclose and reasonably assist in obtaining a protective order prior to making such disclosure. Upon expiration or termination of this Agreement and as requested by a Discloser, each Recipient will deliver to the Discloser (or destroy at the Discloser's election) any and all materials or documents containing the Discloser's Confidential Information, together with all copies thereof in whatever form.

b. Privacy. You agree to use, disclose, store, retain or otherwise process Personal Data solely for the purpose of providing Meals under this Agreement. You shall maintain the accuracy and integrity of any Personal Data provided by Uber in its possession, custody or control. You agree to retain Personal Data provided to you by Uber solely by using the software and tools licensed to you for no consideration by Uber. For the purposes of this Agreement, "Personal Data" means any information obtained in connection with this Agreement (i) relating to an identified or identifiable natural person; (ii) that can reasonably be used to identify or authenticate an individual, including but not limited to name, contact information, precise location information, persistent identifiers, and (iii) any information that

may otherwise be considered "personal data" or "personal information" under the applicable law.

Notwithstanding anything to the contrary in this Agreement, you shall, at your expense, defend, indemnify and hold harmless Uber, its affiliates and their respective directors, officers, employees and agents from and against all liability and loss in connection with (a) any loss, unauthorized disclosure, theft, or compromise of personal data by or from you and/or your sub-processors and (b) any breach of and/or non-compliance with the Agreement or where appropriate, any EU data protection legislation by you and/or your sub-processors. The foregoing indemnification shall be subject to notice, claim defense, cooperation and other requirements set forth in section 9(b) of this Agreement. **Onward Transfers.** To the extent that Uber and/or you transfers the other party's Personal Data outside the European Economic Area or to a jurisdiction where a European Commission positive adequacy decision under Article 25(6) of Data Protection Directive is not in force and covers such a transfer, the respective party shall be responsible for ensuring that any such onward transfer to third parties, including affiliates, employees, officers and/or consultants of such parties, takes place with an adequate level of protection as required by the Data Protection Directive.

8. Representations and Warranties; Disclaimer.

a. Each party hereby represents and warrants that: (a) it has full power and authority to enter into this Agreement and perform its obligations hereunder; (b) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its origin; (c) it has not entered into, and during the Term will not enter into, any agreement that would prevent it from complying with or performing under this Agreement (in your case, including without limitation, any exclusive agreements with any third parties for the availability of food via a technology platform); (d) it will comply with all applicable laws and regulations in its performance of this Agreement (including without limitation all applicable data protection laws); and (e) the content, media and other materials used or provided as part of this Agreement shall not infringe or otherwise violate the intellectual property rights, rights of publicity or other proprietary rights of any third party.

b. THIS SECTION 8(b) APPLIES ONLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AND DOES NOT (AND IS NOT INTENDED TO) OVERRIDE ANY RIGHTS THAT A PARTY MAY HAVE PURSUANT TO APPLICABLE LAW. EXCEPT AS SET FORTH HEREIN, EACH PARTY MAKES NO REPRESENTATIONS, AND HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, REGARDING ITS SERVICES OR PRODUCTS OR ANY PORTION THEREOF, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND IMPLIED WARRANTIES ARISING FROM COURSE OF DEALING OR COURSE OF PERFORMANCE.

9. Indemnification.

a. Indemnified Claims. Each party (the "Indemnifying Party") will indemnify, defend (at the other party's option) and hold harmless the other party, its affiliates and their respective directors, officers, employees and agents (the "Indemnified Party") from and against any and all claims, damages, losses and expenses (including reasonable legal fees) (collectively, "Losses") with respect to any third party claim arising out of or related to: (a) the negligence or willful misconduct of the Indemnifying Party and its employees or agents (in your case, excluding Uber, Portier Pacific and Delivery Partners to the extent they are your agents pursuant to Section 4) in their performance of this Agreement; (b) any claims that the Indemnifying Party breached its representations and warranties in this Agreement; (c) any claims that the Indemnifying Party's Marks infringe a third party's intellectual property rights, as long as such Marks have been used in the manner approved by the Indemnifying Party; or (d) any breach of and/or non-compliance with applicable data protection laws. In addition, you will indemnify, defend and hold harmless the Uber and Portier Pacific Indemnified Parties from and against any and all Losses with respect to any third party claim arising out of or related to any harm resulting from your violation or alleged violation of any applicable retail food or other health and safety code, rule or regulation, except to the extent such harm was directly caused by the gross negligence or willful misconduct of Uber, Portier Pacific or their employees, agents or Delivery Partners.

b. Procedure. Each Indemnified Party shall provide prompt notice to the Indemnifying Party of any potential claim subject to indemnification hereunder. The Indemnifying Party will assume the defense of the claim through counsel designated by it and reasonably acceptable to the Indemnified Party. The Indemnifying Party will not settle or compromise any claim, or consent to the entry of any judgment, without written consent of the Indemnified Party, which will not be unreasonably withheld. The Indemnified Party will reasonably cooperate with the Indemnifying Party in the defense of a claim, at Indemnifying Party's expense.

10. **Limitations of Liability.** THIS SECTION 10 APPLIES ONLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AND DOES NOT (AND IS NOT INTENDED TO) OVERRIDE ANY RIGHTS THAT A PARTY MAY HAVE PURSUANT TO APPLICABLE LAW, INCLUDING THE AUSTRALIAN CONSUMER LAW. EXCEPT FOR A PARTY'S INDEMNIFICATION OBLIGATIONS OR A BREACH OF CONFIDENTIALITY, (A) IN NO EVENT SHALL A PARTY BE LIABLE FOR ANY CLAIM FOR ANY INDIRECT, WILLFUL, PUNITIVE, INCIDENTAL, EXEMPLARY, SPECIAL OR CONSEQUENTIAL DAMAGES, FOR LOSS OF BUSINESS PROFITS, OR DAMAGES FOR LOSS OF BUSINESS OF RESTAURANT OR ANY THIRD PARTY ARISING OUT OF THIS AGREEMENT, OR LOSS OR INACCURACY OF DATA OF ANY KIND, WHETHER BASED ON CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES; AND (B) UBER AND PORTIER PACIFIC'S COMBINED TOTAL CUMULATIVE LIABILITY OF EACH AND EVERY KIND TO RESTAURANT UNDER THIS AGREEMENT SHALL NOT EXCEED AU\$100,000, AND RESTAURANT'S TOTAL CUMULATIVE LIABILITY OF EACH AND EVERY KIND TO UBER AND PORTIER UNDER THIS AGREEMENT SHALL NOT EXCEED AU\$100,000. THE FOREGOING LIMITATION OF LIABILITY AND EXCLUSION OF CERTAIN DAMAGES SHALL APPLY REGARDLESS OF THE SUCCESS OR EFFECTIVENESS OF OTHER REMEDIES. THESE LIMITATIONS DO NOT PURPORT TO LIMIT LIABILITY THAT CANNOT BE EXCLUDED UNDER APPLICABLE LAW.

11. **Insurance.** During the Term and for one (1) year thereafter, each party shall maintain General Commercial Liability and, if required by law, Workers' Compensation insurance. The General Commercial Liability insurance policy limits shall be not less than One Million Australian Dollars (AUD\$1,000,000) combined single limit per occurrence for bodily injury, death and property damage liability, and Two Million Australian Dollars (AUD\$2,000,000) in aggregate. All policies shall be written by reputable insurance companies authorised to do business in Australia and hold a Best's policyholder rating of not less than A VII or otherwise regulated under the Insurance Act 1973 (Cth). The insurance held by you under this section 11 shall be primary and non-contributing to any insurance maintained or obtained by Uber or Portier Pacific and all such insurance shall not be cancelled or materially reduced without thirty (30) days prior written notice to Portier Pacific. Upon a party's request, the other party subject to the request shall provide evidence of the insurance required herein. In no event shall the limits of any policy be considered as limiting the liability of a party under this Agreement.

12. **Term and Termination.** This Agreement shall commence on the Effective Date and, unless earlier terminated as provided below, shall continue for a period of one (1) year from the Effective Date ("Initial Term") and shall automatically renew for successive one (1) year periods (each, a "Renewal Term" and together with the Initial Term, the "Term"). Each party may terminate this Agreement in the event of a material breach by any other party if the breach is not cured by the other party within two (2) days' notice thereof by the non-breaching party. Each party may terminate this Agreement in its entirety at any time without cause by giving seven (7) days' prior written notice of termination to the other parties. In addition, Uber or Portier Pacific may terminate this Agreement immediately on providing written notice to you in the event of (a) a Brand Matter; or (b) in the event of a violation of the UberEATS Community Guidelines. A "Brand Matter" means an event that, in Uber's or Portier Pacific's reasonable judgment, causes Uber and/or Portier Pacific and/or their affiliates to have significant concerns for the reputation of Uber's Marks or brand (including but not limited to matters of safety). Sections 1, 5(b), 7, 8, 9, 10 and 11 (for the period specified), this last sentence of section 12, and sections 13 and 14 shall survive the expiration or termination of this Agreement.

13. **Notice.** Any and all notices permitted or required to be given hereunder shall be sent to the address listed below, or such other address as may be provided, and deemed duly given: (a) upon actual delivery, if delivery is by hand; or (b) one (1) day after being sent by overnight courier, charges prepaid; or (c) by electronic mail to the designated recipient. Notices to Portier Pacific should be provided to Unit 8, 1 O'Connell Street, NSW 2000 with a copy to eats@uber.com. Notices to Uber should be provided to Meester, Treublaan 7, 1097 DP Amsterdam, The Netherlands with a copy to eats@uber.com. Notices to Restaurant should be provided to

_____, with
a copy to

_____.

14. **Modification.** You hereby acknowledge and agree that, by using the Uber Services, or downloading, installing or using the Uber Tool, you are bound by any future amendments and additions to this Agreement, information referenced at hyperlinks herein, or documents incorporated herein, including with respect to Delivery Fee Calculations. Continued use of the Uber Services or UberEATS Tool after any such changes shall constitute your consent to such changes.

15. **General.** This Agreement shall be governed by and construed in accordance with the laws of New South Wales, excluding its rules on conflicts of laws. The Vienna Convention on the International Sale of Goods of 1980 (CISG) shall not apply. The failure of any party to enforce, at any time or for any period of time, the provisions hereof, or the failure of any party to exercise any option herein, shall not be construed as a waiver of such provision or option and shall in no way affect that party's right to enforce such provisions or exercise such option. In the event any provision of this Agreement is determined to be invalid or unenforceable by ruling of an arbitrator or court of competent jurisdiction, the remainder of this Agreement (and each of the remaining terms and conditions contained herein) shall remain in full force and effect. Any delay in or failure by any party in performance of this Agreement shall be excused if and to the extent such delay or failure is caused by occurrences beyond the control of the affected party including, but not limited to, decrees or restraints of Government, acts of God, strikes, work stoppage or other labor disturbances, war or sabotage (each being a "Force Majeure Event"). The affected party will promptly notify the other parties upon becoming aware that any Force Majeure Event has occurred or is likely to occur and will use commercially reasonable efforts to minimize any resulting delay in or interference with the performance of its obligations under this Agreement. Each of Portier Pacific and Uber may assign or transfer this Agreement or any or all of their respective rights or obligations hereunder, in whole or in part, without your prior consent (you may not, however, as the Agreement needs to remain with you). Should Portier Pacific or Uber do so, you have the right to terminate this Agreement immediately, without prior notice. Each of Portier Pacific and Uber may subcontract its rights and obligations under this Agreement. Subject to the foregoing, this Agreement shall be binding upon and shall inure to the benefit of each party hereto and its respective successors and assigns. Nothing in this Agreement shall be deemed to create any joint venture, joint enterprise, or agency relationship among the parties (except as specifically set forth in Section 4 above), and no party shall have the right to enter into contracts on behalf of, to legally bind, to incur debt on behalf of, or to otherwise incur any liability or obligation on behalf of, the other parties hereto, in the absence of a separate writing, executed by an authorized representative of the other party. Each party shall be solely responsible for its employees and contractors used in connection with this Agreement. This Agreement contains the full and complete understanding and agreement between the parties relating to the subject matter hereof and supersedes all prior and contemporary understandings and agreements, whether oral or written, relating such subject matter hereof. This Agreement may be executed in one or more counterparts and by exchange of electronically signed counterparts transmitted by pdf format, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same original instrument. Nothing herein limits or excludes (nor is intended to limit or exclude) any statutory rights that you may have under applicable law that cannot be lawfully limited or excluded.

Sincerely,

By:

A large black rectangular redaction box covering the signature of the person on behalf of Uber Portier B.V.

On behalf of Uber Portier B.V.
Name: Uber Management B.V.
Title: Managing Director
On behalf of Uber Management B.V.
Name: Pierre-Dimitri Gore-Coty
Title: Managing Director A

[Redacted signature]

Portier Pacific Pty Ltd
Signed by its duly authorised officer [Redacted]
Title: Director

Accepted and Agreed on behalf of Restaurant:

By: [Redacted signature]

Name: [Redacted]

Title: [Redacted]

Date: [Redacted]

**Marketplace Addendum
to UberEATS Master Framework Agreement**

This Marketplace Addendum ("Addendum") is subject to the UberEATS Master Framework Letter Agreement between

_____ ("Restaurant" or "you"), Uber Portier B.V. ("Uber") and Portier Pacific Pty Limited ("Portier Pacific") with a date of _____

(the "Letter"). This Addendum is effective as of the date last set forth below ("Addendum Effective Date"). All undefined, capitalized terms in this Addendum will have the meaning set forth in the Letter.

1. **UberEATS App.** This Addendum governs the general availability of your Meals via the UberEATS App. You agree to make items from your menu available via the UberEATS App during your normal business hours, and as further set forth in this Addendum or as mutually agreed between the parties.

2. **Reporting.** Portier Pacific will give you aggregate information regarding the number of Meals picked up by Delivery Partners and sold by you to your customers pursuant to this Addendum. Portier Pacific will also provide information regarding any refunds given to your customers, including the date of the transaction, the Meal ordered, the reason for the refund and any other information Portier Pacific is permitted to provide under applicable privacy laws.

3. **Payment.**

a. Pricing. Notwithstanding Section 5(b) of the Letter, you agree that you will not make a Meal available under this Addendum at a price higher than the eat-in price of a similar meal at your restaurant.

b. Service Fee. In consideration for Portier Pacific's provision of the Uber Services to you, you agree to pay Portier Pacific a Service Fee of 35.00% (unless otherwise specified in the Other Notes section below) for each Meal sold by you via the UberEATS App. Portier Pacific calculates the Service Fee as follows: the Retail Price of the Meal(s) sold by you via the UberEATS App (including any GST) (the "Meal Payment") multiplied by the above Service Fee percentage less any Discount as defined by Section 3(c) of this Addendum (Delivery Services).

c. Delivery Services. You will pay a "Delivery Fee" to Delivery Partners for each applicable order of Meal(s) based on a specified fee in respect of: (i) each delivery made; and/or (ii) the distance traveled to deliver each applicable order of Meal(s) and/or time amounts ("Delivery Fee Calculation"). Distance and time amounts may be based on the expected, not actual, trip distance and duration as reasonably determined by Uber. Delivery Partners, via the Uber Services, will invoice you for the delivery services they provide to you. If you are paid for a Meal, you are responsible for the Service Fee and for the Delivery Fee even if a Delivery Partner is unable to complete the delivery, and an order of Meal(s) will be deemed to have been delivered for the purpose of determining the Delivery Fee. You authorize Portier Pacific or a Portier Pacific affiliate to (i) collect a delivery charge from your customers on your behalf (the "Delivery Charge") and (ii) remit the applicable Delivery Fee earned by a Delivery Partner on your behalf. In the event the Delivery Fee exceeds the Delivery Charge, Portier Pacific will give you a discount on your Service Fee equal to the difference between the GST exclusive Delivery Fee and the GST exclusive Delivery Charge (such amount being the "Discount").

d. Remittance. Portier Pacific will remit to you the total (i) Meal Payment earned by you, (ii) less (1) the Service Fee; and (2) any refunds given to your customers (such final remitted amount being the "Meal Revenue"). The Meal Revenue will be remitted on weekly basis.

e. Activation Fee. In consideration of Portier Pacific's provision of the Uber Services, you agree to pay Portier Pacific an Activation Fee of AUD\$ 750.00 ("Activation Fee") per restaurant venue. You agree that Portier Pacific may deduct from the Meal Revenue the Activation Fee (or a portion thereof) prior to remitting such Meal Revenue to you until you have paid the full Activation Fee.

f. Payment Processing Errors. Portier Pacific reserves the right, in its sole discretion, to seek reimbursement from you if Portier Pacific discovers payment processing errors. Portier Pacific may deduct from the Meal Revenue

prior to remitting such Meal Revenue to you until you have paid the correct amount, debit your card on file or your bank account on record or seek reimbursement from you by any other lawful means. You authorise Portier Pacific to use any or all of the above methods to seek reimbursement.

4. **Restrictions.** Delivery Partners are independent providers of delivery services, and as such, they reserve the right to refuse to accept any item for delivery in their sole discretion. Orders cannot weigh (in the aggregate) more than 13kg. The following restricted items may not be sent for delivery: people or animals of any size, illegal items, alcohol (unless otherwise agreed in writing with Portier Pacific), fragile items, dangerous items (like weapons, explosives, flammables, etc.), stolen goods, or any items that you do not have permission to send.

5. **Device.** If Portier Pacific or a Portier Pacific affiliate supplies a tablet or other mobile device ("Device") to you to use in connection with the availability of your Meals via the Uber Tool, you agree that: (i) Device(s) may only be used for the purpose of accepting orders via the Uber Tool, and (ii) Device(s) may not be transferred, loaned, sold or otherwise provided in any manner to any third party. Devices(s) shall at all times remain the property of Portier Pacific or the Portier Pacific affiliate, and upon expiration or termination of the Agreement or this Addendum, or the extended absence of Restaurant from the Uber Tool for longer than forty-five (45) days, you shall return all applicable Device(s) to Portier Pacific or the Portier Pacific affiliate within ten (10) days. You agree that the loss or theft of a Device, the failure to return any Device within the required time period, or any damage to the Device outside of normal wear and tear, will result in a AUD\$ fee ("Damage Fee"). In such event, you agree that Portier Pacific or the Portier Pacific affiliate may invoice you for the Damage Fee and/or deduct from the Meal Revenue the Damage Fee per Device that is lost, stolen, damaged or not returned within the required time period, prior to remitting such Meal Revenue to you.

6. **Other Notes.** Additional terms and conditions that apply:

Sincerely,

By:



On behalf of Uber Portier B.V.
Name: Uber Management B.V.
Title: Managing Director
On behalf of Uber Management B.V.
Name: 
Title: Managing Director A