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May 10, 2024

Hon. Rob Bonta, Attorney General
c/o Benjamin Glickman, *Esq*.
Supervising Deputy Attorney General
Government Law Section
1300 I Street, 17th Floor
Sacramento, CA 95814

By email: *benjamin.glickman@doj.ca.gov*

Re: <u>Inapplicability of Civil Code Section 1770 to Restaurant Menu Items</u>

Dear General Bonta:

This law firm represents the California Restaurant Association. I am writing to request the Attorney General's office update its interpretation of Civil Code section 1770 following the adoption of SB 478. Civil Code section 1770 is part of the Consumer Legal Remedies Act ("CLRA"). This letter constitutes an effort to administratively resolve my client's concerns in order to avoid a court challenge regarding the proper interpretation of section 1770 of the CLRA.

As you know, SB 478 amends section 1770, adding subdivision (a)(29), which reads:

> (a) The unfair methods of competition and unfair or deceptive acts or practices listed in this subdivision undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful:
> ***
> (29) Advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges….

The amendment goes into effect on July 1, 2024.

On May 8, 2024, the Attorney General's office published FAQ's regarding its interpretation of the CLRA. Those FAQs state:

> The law applies to the sale or lease of most goods and services that are for a consumer's personal use. For example, it applies to event tickets, short-term rentals, hotels, **restaurants**, and food delivery, just to name a few prominent industries.

(Exh. A (emphasis added).)

The AG's FAQs continue: "If a restaurant charges a mandatory fee, it must be included in the displayed price. Under the law, a restaurant cannot charge an additional surcharge on top of the price listed." (Exh. A.)

The Attorney General's attempted application of subdivision (a)(29) to restaurant menu items is not supported by the plain language of the statute, the statute's legislative intent or prior judicial interpretations of the CLRA.

This correspondence is a formal demand that the AG update its FAQs and remove references of section 1770 as applying to restaurant menu items.

A. Civil Code Section 1770 Does Not Apply to Restaurant Menu Items.

The CLRA prohibits advertising "goods" or "services" at a specific price unless "all mandatory fees or charges" are set forth in the advertisement. (Civ. Code, § 1770(a)(29).)

1. Plain Language of the CLRA.

As an initial matter, neither restaurants nor restaurant menu items are specifically referenced in the amended section 1770. The only mention of food facilities in section 1770 is made in reference to an exception for food delivery services, not restaurant menu items.

Second, the introductory sentence to section 1770 confirms that the scope of the statute is limited to "the sale or lease of goods or services to any consumer." (Civ. Code, § 1770(a).) Civil Code section 1761(a) provides that "'Goods' means tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a party of real property, whether or not they are severable from the real property." Civil Code section 1761(b) defines "Services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." As shown by the statue's definitions, restaurant menu items are neither "goods" nor "services." (See, e.g., *Vespi v. Galaxy Taco*, 2018 Cal. Super. LEXIS 51287, *26 ["CLRA claim lacks merit since…**a taco is neither a 'good' nor 'service' under the CLRA**"] (emphasis added).

Restaurant Menu Items Are Not "Goods": There is no language in the CLRA to suggest that "goods" are meant to include food cooked and served to a customer in a restaurant. Food that is prepared in a restaurant for immediate consumption is not "tangible chattel" as that term is understood. Black's Law Dictionary defines chattel as "moveable or transferable property, esp. personal property." (Black's Law Dict. (76 Ed. 1999).) Merriam-Webster's dictionary defines chattel as "an item of tangible movable or immovable property except real estate and things (such as buildings) connected with real property." There is no language establishing food cooked and served in a restaurant is a "tangible chattel" bought or leased for use primarily for "personal, family

or household purposes." The eating of cooked food in a restaurant does not fit the definition of "tangible chattel" or a product "for use primarily for personal, family or household purposes." Therefore, "goods" does not include restaurant menu items under section 1770.

Restaurant Menu Items Are Not "Services": "Services" similarly does not describe restaurant food items. As the court in *Vespi* recognized "a taco cannot be construed as a 'service' under the CLRA [because] it is not 'work, labor, and services for other than a commercial or business use.'" (*Vespi, supra*, 2018 Cal. Super. LEXIS 51287, *26.)

Additionally, The California Supreme Court has held that the Legislature's omission of particular categories of businesses within the CLRA's definition of "services" means those businesses are excluded from CLRA Regulation. (*Fairbanks v. Superior Court* (2009) 46 Cal. 4th 56.) In *Fairbanks*, the Court explained that the CLRA was "adapted" from a model National Consumer Act. (*Fairbanks*, 46 Cal. 4th at 61.) Importantly, the model act defined "services" as "(a) work, labor, and other personal services, (b) privileges with respect to transportation, hotel and **restaurant** accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery, accommodations, and the like and (c) insurance." (*Id*. (quoting National Consumer Act (Nat. Consumer L. Center 1970) § 1.301, subd. (37), pp. 23-24, emphasis added).) The court noted that the legislature excluded the term "insurance" from the definition of services, which demonstrated an "intent *not* to treat all insurance as a service under" the CLRA. (*Id*. (emphasis in original).)

In reaching its conclusion, the *Fairbanks* court relied on the principle that "[t]he rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." (*Berry v. American Express Publishing, Inc.* (2007) 147 Cal. App. 4th 224, 230; see also *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal. App. 4th 251, 268 ["Typically, when a Legislature models a statute after a uniform act, but does not adopt the particular language of that act, courts conclude the deviation was deliberate and that the policy of the uniform act was rejected"].) Cases decided subsequent to *Fairbanks* have expanded the Supreme Court's holding beyond the insurance context. (See, e.g. *High v. Choice Mfg. Co.*, 2012 U.S. Dist. LEXIS 103161, *2-3, 32-35 (N.D. Cal. 2012) [vehicle service contract promising to pay the cost of vehicle repair is not a service under the CLRA; court is not persuaded by argument that Fairbanks should be limited to insurance contracts]; *Ferrington v. McAfee, Inc.*, 2010 U.S. Dist. LEXIS 106600, *57-58 (N.D. Cal. 2010) [anti-virus software subscription is not a service for purposes of the CLRA].)

A similar result follows here. Because the legislature excluded subsection (b) of the model act from the CLRA, it did not intend for "privileges with respect to…restaurant accommodations… and the like," to fall within the CLRA's definition of "services."

Legislative History of SB 478: Of the dozens of pages of legislative analysis in support of SB 478, *no mention* is made that the legislation, or section 1770 itself, applies to restaurant food items. The only mention made to "restaurants" in the legislative materials for SB 478 is the Attorney General's own "arguments in support" of SB 478, where the AG apparently attempts to

unilaterally expand the scope of section 1770 to include restaurant food items. Moreover, the AG's reference to "restaurants" in SB 478's legislative materials concerns "advertising." However, numerous courts in California have rejected the view that restaurant menus are "advertisements.

B. A Restaurant Menu is Not "Advertising."

In his arguments in support of SB 487, the Attorney General suggests that the CLRA's advertising provisions should apply to restaurant menu items. The CLRA prohibits advertising a product offered at a specific price plus specific percentage of that price unless (A) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (B) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product. (Civ. Code § 1770(a)(20).)

However, the plain language of section 1770(a)(20) confirms it does not apply to restaurant transactions involving both service and food. Instead, a common-sense reading of section 1770(a)(20) reveals it only applies to the advertisement of *products*. If a customer orders a meal at a restaurant composed of different selections from a menu and is customarily billed at the individual prices for the selected items, and the bill is added up at the presentation of the completed order, with the addition of a disclosed service charge and other items such as taxes, this scenario does not fit within the statutory language of Civil Code section 1770, subdivision (a)(20). A plain reading of that section indicates that this statutory scheme was intended to deal with a different situation, such as when a consumer may be unduly confused about the price of a certain product by misleading "shelf tags," "displays," and "media advertising." (Civ. Code § 1770(a)(20).) Further support for this interpretation is provided by Civil Code section 1755, which explains that "advertising" includes "newspapers, magazines, broadcast stations, billboards, and transit ads."

Section 1770(a)(20)'s inapplicability to restaurant menu items is further supported by multiple superior court rulings. For example, in *Holt v. Noble House Hotels & Resorts, Ltd*. (S.D. Cal. 2019) 370 F. Supp.3d 1158, the court held that "[r]estaurant menus are not public announcements which are published or disseminated to the general public in an effort to arouse a desire to buy or patronize; rather, they are lists of offerings of items available at a restaurant." (*Id*. at 1166.) The *Holt* court held that as a matter of law, there was no *per se* violation of Civil Code section 1770(a)(20) "because menus are not advertisements under the plain language of the statute." (*Id*. at 1167; see also *Mullins v. Sizzler United States Rests*., 2023 Cal. Super. LEXIS 41152, *3 ["menus are not advertisements"]; *Vespi, supra,* 2018 Cal. Super. LEXIS 51287, *26 ["CLRA claim lacks merit since as a matter of law, defendant's menu is not 'advertising' under the CLRA"].)

Thus, the purchase of meals at a restaurant does not raise subdivision (a)(20) of section 1770. Food and the service are separate components of a customer's order and therefore are appropriately charged separately. 1770(a)(20) by its terms does not regulate such transactions. It is therefore not a violation of section 1770 for a restaurant, upon completion of a customer's meal or, sometimes, completion of the customer's order, to add-up the prices of all items ordered, apply

a disclosed surcharge and/or other charges to a subtotal of the bill, and then apply taxes and present the customer with a final total bill disclosing each item charged.

We request the Attorney General immediately update its FAQs relating to the CLRA and specifically section 1770, to exclude the Attorney General's unfounded opinion that the statute applies to restaurant menu items. Failure to correct the erroneous FAQs will result in our client seeking declaratory and injunctive relief seeking a proper interpretation of the law, and to compel the AG to correct his FAQs. Thank you for your time and attention to this matter.

Very truly yours,

Brian T. Hildreth