

**Testimony of Jacob Weiss,
President and CEO
OJCommerce LLC**

Before the

**Subcommittee on Antitrust, Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives**

Hearing on

**Justice Restored: Ending Forced Arbitration and
Protecting Fundamental Rights**

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Good morning Chairman Cicilline, Ranking Member Buck, and members of the Subcommittee. Thank you for inviting me to testify today. My name is Jacob Weiss. I have been a business owner for the last 20 years, specializing in e-commerce. In 2010, I started a company called OJ Commerce, named for my wife “Odelia” and myself, “Jacob.”

OJ Commerce sells home goods online through a variety of online marketplaces and our own website. We sell thousands of different brands with a catalogue of over half-a-million items. As you can imagine, like many other online retailers, a significant amount of our business is conducted through Amazon.com’s marketplace as a third-party seller.

I am here today to share the experiences I’ve had trying to hold Amazon responsible for the harm it’s caused my business.

OJ Commerce has a team of dedicated and hardworking employees who have grown OJC into a successful business with a modest amount of resources at its disposal. Despite that success and those resources, it’s been impossible to get a fair shake against Amazon in light of forced arbitration. The system is completely rigged against us and other small to mid-sized business owners.

There’s no way for an e-commerce company to be successful today without selling on Amazon’s marketplace – it simply has too much of the online retail market under its control. But before Amazon would let me sell anything on its marketplace, it forced me to sign what it calls a Business Seller Agreement. I had no ability to negotiate the terms of that agreement and I had no ability to sell on Amazon without signing that agreement. And as I just mentioned, you simply can’t survive in e-commerce without access to Amazon’s marketplace. Obviously, this left me, and thousands of others like me, with only one choice: to sign Amazon’s agreement.

Amazon’s seller agreement forbids lawsuits and, instead, forces arbitration as the only method to resolve any dispute between a seller like us and Amazon. The seller agreement also forbids any class arbitration or class actions, which means that we cannot join together with other businesses to share the cost of arbitrating against Amazon. This provision alone means many cases

are never even brought to arbitration because it's cost prohibitive. It simply makes no sense for a business to risk tens of thousands of dollars in arbitration, legal, and expert fees to recover a few thousand dollars. But as a business owner, recovering a few thousand dollars can sometimes be the difference between making payroll or having to shut down. In sum, Amazon's class action waiver effectively insulates Amazon from ever even having to face justice.

Forced arbitration also puts businesses like OJC at a severe disadvantage. First, forced arbitration is much more expensive than filing a court case because the filing fee is thousands of dollars. Second, you have to pay one to three arbitrators four to six hundred dollars an hour to hear your case. Third, arbitration severely limits the scope of discovery, which makes obtaining the evidence or data you need to prove your case against a massive company all but impossible. Fourth, Amazon has mastered the art of driving up the cost of this process through motions, objections, and hearings to drive the cost of arbitration outside the reach of its online sellers like my company. Of course, while proponents of arbitration tout its "speed and efficiency," my experience shows the process is slow, expensive, and financially infeasible for many claims. Finally, arbitration rulings are not published, which means there is no transparency into what Amazon has done to other businesses or how those businesses have fared in the arbitration process. That lack of transparency means that businesses are left with no insight into whether initiating arbitration is a sound recourse in any particular situation. In essence, every third-party seller is forced to start from scratch in its arbitration against Amazon, with little to no precedent from previous rulings, while Amazon holds all the information and all of the cards.

At the end of the day, forced arbitration puts third-party sellers in a lose / lose situation, where we are left with the dismal choice of doing nothing in response to Amazon's wrongful actions or being subjected to the issues I've just described.

For Amazon, this creates the perfect storm. Companies generally don't have the budget to go through this expensive process, especially when the risks outweigh the potential gains. It therefore didn't surprise me that the excellent report on digital markets issued by this subcommittee reported that *only 163* sellers, out of the *millions* of businesses that sell on the site, have initiated forced arbitration proceedings against Amazon during the five years from 2014-

2019. That is an incredible statistic – only 163 sellers out of many millions over five years! And yet, if you go on the Internet chat sites, there are hundreds and hundreds of businesses complaining about Amazon’s business practices. But they are left with no recourse because of forced arbitration.

Unfortunately, I’ve had the opportunity to learn these facts firsthand. OJ Commerce has been in two forced arbitrations against Amazon.

The first forced arbitration arose because Amazon charged OJC more for shipping than my agreement with Amazon allowed. By the time I realized this had happened, OJC had been wrongfully overcharged by quite a bit of money. Amazon agreed to fix the problem going forward, but refused to reimburse OJC for wrongful overcharges. Left with no other choice, OJC initiated a forced arbitration to recover the improper overcharges. Amazon took the case all the way through an expensive arbitration proceeding. OJC eventually prevailed on some of its claims in the arbitration, but the arbitrator only awarded OJC half of its actual damages because he ruled OJC should have realized the error earlier. This process cost OJ Commerce about \$50,000 in arbitration-related fees – not counting attorney fees – which we had to pay in advance. In other words, OJC had to risk \$50,000 to make itself whole under Amazon’s forced arbitration system. And even after the arbitration, Amazon played games with payment that eventually forced me to go to court to enforce the arbitration award. After arbitration and legal fees, I’d recovered very little of what I’d lost.

The second forced arbitration against Amazon is currently active and I’m therefore not at liberty to discuss the details. I can say that it was initiated in May 2020 and is still ongoing. So much for quick and efficient resolutions.

The system for choosing forced arbitration providers also inherently favors Amazon, because Amazon is a more likely repeat player than OJC. Under the rules Amazon chose, the parties can strike certain arbitrators from the list. Then the parties rank the arbitrators in order of preference. Arbitrators have an enormous financial incentive to rule in favor of Amazon so they

can rank high on the list, and to ensure they are not struck entirely. Since previous arbitration awards are not published, only Amazon knows who has ruled in its favor and who has not.

Small businesses are the lifeblood of the American economy. But, increasingly, mega-companies like Amazon are exploiting their market power to suppress competition and prevent smaller companies from reaching our full potential. Once upon a time, a company like ours could use the nation's powerful antitrust laws and open access to the courts to bring an unfair competition claim against a marketplace bully like Amazon. That time has ended because of forced arbitration and class action waivers. Forced arbitration allows Amazon to write the rules under which it is judged, and to prevent small businesses from banding together to fight back. It is a license to steal.

I urge you to pass the Forced Arbitration Injustice Repeal Act as soon as you can. The FAIR Act will restore the right of small businesses to stand up for ourselves, and win back the right to compete in a fair marketplace. We aren't looking for any handouts. We just want a fair system.