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Statement for the Record
Submitted to

The House Subcommittee on
Antitrust, Commercial and Administrative Law

For the Hearing Entitled:

Justice Denied: Forced Arbitration and the
Erosion of our Legal System

May 16, 2019

My name is Alan Carlson and I am the chef and owner of Italian Colors Restaurant, a small business located in Oakland, California. I respectfully submit this statement for the record of the hearing held on May 16, 2019 in the House Subcommittee on Antitrust, Commercial and Administrative Law entitled, “Justice Denied: Forced Arbitration and the Erosion of our Legal System.”

The Italian Colors Restaurant was the lead plaintiff in *Italian Colors v. American Express*, a class action lawsuit on behalf of merchants across the country who allege we are harmed by anti-competitive conduct engaged in by American Express in violation of the U.S. antitrust laws. In 2013, the Supreme Court held that we could not bring our antitrust claim because American Express used a forced arbitration clause in its contracts that prohibits its business customers from joining together to hold American Express accountable through the public court system. I strongly urge Congress to pass H.R. 1423, the Forced Arbitration Injustice Repeal Act (FAIR Act), to ensure that small businesses like Italian Colors have recourse when we are victims of predatory and illegal behavior by large corporations that take advantage of our situation.

I was born in suburban Detroit and have been working in the restaurant business in one way or another since I was 14 years old, when I started out washing dishes at a Greek diner. My passion for food grew into a career. In 1979, I graduated from the Culinary Institute of America in New York City. Afterwards, I traveled across America and worked with a number of chefs, absorbing new knowledge and skills from each opportunity. In the early 1980s, I settled in Oakland, California, and opened my first restaurant in 1986. Since then, I have started and run several restaurants in and around the San Francisco Bay area.

Twenty-six years ago I opened Italian Colors with my wife, Dee Carlson-Cohen, and business partner, Steve Montgomery. Our goal was to create the quintessential neighborhood restaurant, geared toward community, quality food, and great customer service. I am incredibly proud to say that over two decades later, we are still open, serving our community and employing more than 30 people.

However, like most local restaurants, our profit margins are razor thin. We survive through fostering client loyalty, keeping prices low, and cooking high

quality food. Like so many other communities in the United States, we operate in a charge card and credit card-driven world and could not survive without accepting credit cards as payment.

To customers, one form of payment is as good as another, but for small businesses, that is far from the reality. In fact, American Express cards are pretty much the most expensive form of payment we must accept to survive.

A significant percentage of my restaurant's earnings comes from clients who use American Express cards. They are an extremely popular form of payment especially for diners who spend a lot of money at the restaurant because of all of the perks they offer. American Express imposes special rules and restrictions on restaurants and small businesses who must accept their cards as payment. For example, in order to accept *any* American Express card, my restaurant has to accept *all* types of American Express cards – even cards that carry rates and fees that are higher than all other forms of payment. In addition, American Express does not allow me to offer cash discounts or to encourage customers to pay with a form of payment that actually works better for my business. I cannot encourage my customers to pay in cash or debit cards by offering discounts or other incentives.

If I could offer discounts to my customers who use cash or their debit cards, or be able to say which cards make sense for me to accept, without being forced to accept all cards, I would be able to increase my earnings and decrease my costs – which means providing more services, having more employees.

Being forced to make a decision that is bad for my business isn't right. A number of years ago, after talking about what I was facing with a long-time customer, friend, and attorney, Edward Zusman, he talked to other anti-trust attorneys with whom he was acquainted and they decided to take up the cause. They believed that American Express was engaging in anti-competitive practices in violation of the antitrust laws.

When I started with American Express in the early 90's my first agreement did not have a forced arbitration clause. To this day, I have not actually seen a forced arbitration clause, but I have been told that in the late 90's they included

forced arbitration as a term and condition of continued use of their cards. I did not know until the litigation commenced that that provision even existed.

Edward explained that forced arbitration means American Express cannot be held accountable in court, and that I will not be able to join with other small business owners to help defray the costs of enforcing our rights. Instead, if I want to hold American Express accountable, I would have to try to do it in an individual, private arbitration tribunal designed by American Express.

Needless to say, I was shocked. I honestly cannot recall *ever* even reading a forced arbitration clause, and certainly do not remember signing a contract that included one. But even if I knew the clause was in the fine print of the contract, my American Express contract was offered on a take-it-or-leave-it basis.

As we figured out how to move forward, we discovered that the cost of individual forced arbitration was so high that even if a small business won, it would lose. An expert economist explained in testimony that it would not be cost-effective for any small business owner in the same situation as me to pursue an individual arbitration claim against American Express. In fact, it would cost more to bring their claim than they could recover. This cost prohibitive system means that there is no way one small business can get justice alone.

Every American should have the right to join with others to fight to hold corporate giants accountable. But I don't, because of a forced arbitration clause buried in the fine print of terms and conditions imposed upon me years after I started taking American Express cards. And I have learned that the majority of consumers and workers have also signed forced arbitration clauses in just about every aspect of their lives. If we cannot be part of a class action to enforce our rights against companies like American Express, we have no way of enforcing those rights. I certainly don't have the money to take on American Express by myself.

I tracked my case through the courts and I was very pleased with the results at the lower courts. The case went all the way to the U.S. Supreme Court, where I thought surely justice would prevail. However, as you probably know, the Supreme Court ruled that I had to take my case to individual arbitration, even though the evidence presented showed that I would have to pay more in arbitration

than I could ever recover, making that choice impossible for me and other small businesses. When the Supreme Court issued its decision in favor of American Express and forced arbitration, you can imagine my disappointment and shock. Essentially the Supreme Court was saying that it didn't matter that a small business couldn't pursue important rights against a big business.

I was surprised to learn recently that a number of very large companies, including Walgreens, CVS and Safeway, are taking American Express to trial this summer over the same issues I was not allowed to bring to court. It turns out that these huge corporations had enough bargaining power with American Express that they were able to negotiate contracts that did not include forced arbitration clauses. They will get their day in court. But small businesses throughout America, who are suffering from the exact same harmful business practices, do not have the same rights. We will never get our day in court because of forced arbitration. I believe this is unAmerican.

Because forced arbitration makes it impossible for small businesses to hold large corporations publicly accountable, those companies are able to continue their unfair business practices and small firms like mine continue to be harmed with no recourse. I have heard that there will be a "litigation explosion" if we end forced arbitration. I do not believe that. If we end forced arbitration, more companies will follow the law and everyone will benefit.

It has become clear to me that certain congressional actions can and must be taken to help protect the small businesses on "Main Streets" across America. Small businesses and consumers should have the same access to the justice system as large corporations, like American Express and Walgreens and CVS. And corporate Goliaths should never be able to take away our ability to hold them responsible for their actions.

Small businesses are the lifeblood of America and we play an essential role in creating good jobs. Small businesses, our customers, and really, our neighborhoods and communities are the ones who lose when big business gets to violate the law and get away with it.

There are many small business owners like me across the country who are struggling to stay in business and live the American dream. The FAIR Act would

give back to small businesses the right to go before a judge and jury against big corporations instead of being locked into a forced arbitration system that is too expensive to use. I urge you to pass the FAIR Act to restore equal access to justice for small businesses and consumers.