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U.S. Senate Committee on the Judiciary
Hearing:
“The Federal Arbitration Act and Access to
Justice: Will Recent Supreme Court
Decisions Undermine the Rights of
Consumers, Workers, and Small
Businesses?”
Tuesday, December 17, 2013
2:00 p.m.

Good afternoon Chairman Franken, Ranking Member Grassley and members of the committee. I would like to thank the Committee for the opportunity to share my story here today. My name is Alan Carlson and I am the chef and owner of Italian Colors Restaurant, a small business located in Oakland, California.

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.

Nearly 20 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 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. After talking about what I was facing with a long-time customer, friend, and attorney, Edward Zusman, he coordinated with 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 an arbitration clause. To this day, I have not actually seen an arbitration agreement, but I have been told that in the late 90's they included an arbitration agreement 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, American Express contracts are 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.

Normally, every American has 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. If I cannot be part of a class action to enforce my rights against American Express, I have no way of enforcing those rights. I don't have the money to take on American Express by myself.

I tracked this case through the courts and I was very pleased with the results at the lower courts. Our case went all the way to the U.S. Supreme Court, where I thought surely justice would prevail. However, 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 businessman couldn't pursue important rights against a big business.

Coming here today to testify before the Committee was difficult because I am in the process of opening a new restaurant. But the more I thought about it, the more I realized how

important it was for me to be here, to speak on behalf of small business owners like me who are struggling to stay in business and live the American dream.

This doesn't have to be the end of the story. 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 corporate Goliaths should never be able to take away our ability to hold them responsible for their actions.

Sen. Franken has introduced a bill, the Arbitration Fairness Act, that would give back to small businesses like mine the right to go to court against big corporations instead of being locked into an arbitration system that is too expensive to use. I urge you to pass this bill to restore equal access to justice for small businesses and consumers.

In speaking to you, I hope I have been able to shed some light on just how critically important this issue is nationwide. 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 push us around. Please be assured that this is an issue that affects all small businesses.

Everyone in D.C. says that small businesses are important, and here is a real opportunity for Congress to actually do something to protect small businesses.

Please act swiftly to address these issues and know that I look forward to engaging in a meaningful conversation with the Committee members today. Thank you for your time and consideration.