November 7, 2017

Hon. Charles Grassley, Chairman
Hon. Dianne Feinstein, Ranking Member
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510-6050

Re: Statement of National Association of Consumer Advocates for the Nov. 8, 2017 hearing entitled: *The Impact of Lawsuit Abuse on American Small Businesses and Job Creators*

Dear Chairman Grassley and Ranking Member Feinstein:

Access to justice is a fundamental right of the American people and small businesses. Yet overwhelmingly, harmed consumers and small businesses face impenetrable obstacles when they seek to go to court to obtain remedies. These barriers to justice, including the use of restrictive arbitration clauses in one-sided, fine-print contracts, also remove critical incentives for corporations to comply with laws and treat people and small businesses fairly. The Committee should reject any proposals that would further delay and deny ordinary people and small businesses of the right to use the public court system or that would interfere with the ability of judges and juries to do their jobs. Instead, the Committee should examine ways to restore meaningful remedies and access to court for individuals and small merchants.

A line of U.S. Supreme Court decisions over the last decade have vastly expanded the interpretation of an obscure federal law, the Federal Arbitration Act, to permit large corporate players' use of arbitration clauses to regularly block legal claims of individuals and small businesses. In 2011, in one of its most impactful decisions on forced arbitration, the Court permitted the use of terms in arbitration clauses to eliminate participation in class actions, which has hurt small businesses.[1]

Small businesses are blocked from challenging big business in court

In 2013, the Court enforced a class action ban against a group of small business merchants and restaurant owners, holding that their federal antitrust claims against one of the largest credit card companies in the world would have to be pursued individually in private arbitration.[2] The small business owners had proved in court that arbitration was not economically feasible. They demonstrated through expert witness testimony that the costs of an individual arbitration would have been many times more than the possible maximum amount of damages that each would

[1] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011).
[2] *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

recover. Yet, it did not matter. The small businesses were prohibited from joining their claims together in a class action to vindicate their rights under federal antitrust laws.

Class action bans harm small businesses as competitors

Fine-print big-business contracts that prohibit class actions also harm small businesses as competitors in the marketplace. In a case currently before the Supreme Court that could decide the validity of class or collective action bans in employment, a network of 30,000 small business owners, the Main Street Alliance, submitted an amicus brief to the Court stating that class action bans in employment contracts decrease incentives for competitors to comply with employment laws.[3]

Their brief noted that: (1) Small businesses rely on workplace protections, including those granted in state and federal laws, to avoid expenses associated with turnover and to increase employee productivity. (2) Collective actions that permit workers to band together encourage employers to comply with workplace laws. (3) Without a collective action device, unlawful conduct will go unchallenged. (4) Every year, responsible, law-abiding firms lose billions of dollars to corporations that violate workplace protections. [4]

In sum, "[when class action bans in arbitration clauses] are permitted, responsible businesses are forced to compete on a tilted playing field; lawbreakers are advantaged; and the viability of small firms in particular is threatened," they argued.[5]

It is clear that undue restrictions on corporate liability and access to court are a major cause of harm to small businesses rather than so-called "lawsuit abuse." Indeed, small businesses, consumers, and workers share similar fates – barred from courts and remedies – when harmed by large corporate bad actors. And small businesses have the added competitive interest to ensure that bad actors can be held accountable in court when they break the law because small merchants are disadvantaged when they are forced to compete against large corporations that profit from unlawful conduct.

Individual Americans and small businesses deserve a functioning civil justice system where they have the ability to stand up and enforce their rights in court. The Committee must abandon the premise of "lawsuit abuse," and reject proposals that would further block access to justice and shield large corporate interests from accountability.

Sincerely,

Christine Hines
Legislative Director

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[3] *Brief of the Main Street Alliance, The American Sustainable Business Council, and Nick Hanauer as Amici Curiae In Support Of Respondents In Nos. 16-285 & 16-300, and of Petitioner in No. 16-307*, *Epic Systems Corp. v. Lewis*, Nos. 16-285, 16-300 & 16-307.

[4] Id.

[5] Id. at 2.