



March 21, 2018

Honorable Xavier Becerra
Attorney General
State of California
1300 I Street
Sacramento, CA 94244-2550

Dear Attorney General Becerra:

The 35 below-signed organizations, who together represent millions of consumers and workers, urge you to investigate the practices of private arbitration firms that operate in secret, in violation of California's Code of Civil Procedure. These firms are undermining justice in California, and we urge you to take all necessary and appropriate steps to ensure compliance with California's landmark arbitration disclosure law.

Such an investigation is now more crucial than ever. On November 1, 2017, President Trump signed legislation (with a tie-breaking vote by Vice President Mike Pence), overturning the pro-consumer rule issued by the Consumer Financial Protection Bureau to restore consumers' Constitutional right to protect themselves in a court of law through joint legal action, and to require private arbitration firms to provide basic data to the public about their operations.

Binding mandatory (or forced) arbitration clauses in contracts of adhesion have become all-too-pervasive for anyone who purchases a product or service, or as a condition of employment. Due to controversial 5-4 split decisions issued by the U.S. Supreme Court, forced arbitration has become a shield against any accountability, undermining our nation's system of justice and denying the American public access to their courts.

Former Fox News anchor Gretchen Carlson, Uber whistleblower Susan Fowler, and other leaders in the growing movement to end sexual harassment are actively seeking to end the veil of

secrecy that forced arbitration provides, allowing predators to perpetuate their crimes. As the *San Jose Mercury News* reported:

“Susan Fowler, the former Uber engineer whose viral blog post kicked off a storm that ultimately led to the ouster of CEO Travis Kalanick, is taking her fight to the Supreme Court.

Fowler’s lawyers are attacking Uber’s arbitration agreements — policies Uber has its employees sign that prevent them from suing the company in open court. Her legal team has filed a “friends of the court” brief specifically lashing out against the arbitration agreements’ class-action waivers — clauses that prevent groups of Uber employees from suing collectively, thereby denying them a shot at a bigger payout and broader policy change than if they sued individually.

‘Class action waivers take from these workers the concerted activity for which they are most likely to engage, and from which they are most likely to benefit: The right to engage in collective litigation,’ Fowler’s lawyers wrote.”¹

And as recently reported in *The Economist*:

“Gretchen Carlson, a former news anchor for Fox, a broadcaster, has called arbitration ‘the harasser’s best friend.’ Prevented by an arbitration clause from suing the network, Ms Carlson sued her boss and alleged harasser, Roger Ailes, instead.... Another criticism of arbitration agreements, voiced by Ms Carlson, the news anchor, is that they silence victims. Often the proceedings have confidentiality clauses attached that prevent the employee from speaking about the case, thereby protecting repeat offenders. Paula Brantner of Workplace Fairness, an employee-rights charity, contends that, without the threat of litigation and the negative publicity it brings, companies have less of an incentive to root out bad behaviour.”²

As Attorney General of California, you are in a position to take effective measures to shed light on the private, secret system of forced arbitration, and to protect the public from a panoply of illegal activity, by ensuring that California’s arbitration disclosure law is enforced.

Under that law, which has been in effect since 2003³, private arbitration firms are required to provide basic information about their operations to the public, by posting specific data on their websites. However, as authoritative studies conducted by the Public Law Research Institute at UC Hastings College of Law have repeatedly found, not one of the arbitration firms operating in California is fully complying with California’s arbitration disclosure law. In fact, many of these firms provide no information at all.

¹ “Uber whistleblower Susan Fowler heads to Supreme Court,” *San Jose Mercury News*, August 24, 2017, posted at: <https://www.mercurynews.com/2017/08/24/uber-whistleblower-susan-fowler-heads-to-supreme-court/>

² “When you cannot sue your employer,” *The Economist*, January 25, 2017, posted at: <https://www.economist.com/news/business/21735601-over-half-non-unionised-employees-are-now-covered-mandatory-arbitration-when-you-cannot?src=scn/tw/te/bl/ed/whenyoucannotsueyouremployerkeptoutofthecourthouse>

³ California Code of Civil Procedure § 1281.96 Et. Seq., as amended by AB 2656 (Corbett), which was enacted in 2002, and subsequently strengthened by AB 802 (Wieckowski), enacted in 2014.

Testimony about the widespread non-compliance was presented to the California Assembly Judiciary Committee, which held an oversight hearing on March 18, 2013, to delve into the practices of private arbitration firms. According to the Assembly Committee on the Judiciary's official legislative analysis of AB 802, authored by the Committee Chairman, then-Assemblymember Bob Wieckowski:

“This bill arises out of the Committee's recent oversight hearing on consumer arbitration. Existing law requires private arbitration companies to publish certain basic information about the consumer arbitration cases they administer or conduct.

Unfortunately, ten years after enactment of this obligation, the Committee heard that there has been widespread non-compliance with the law, generating continued controversy and skepticism about the fairness of consumer arbitration.

Code of Civil Procedure section 1281.96 requires private arbitration companies to periodically publish on their Internet web sites a handful of data points regarding their consumer arbitration proceedings. With the goal of improving the availability of hard data and the promotion of reasoned debate - and by transparency to deter any potential abuses - Section 1281.96 was designed to provide sunshine on the process and outcomes in these cases to better allow researchers and policymakers to evaluate the competing contentions; to deter potential abuses; determine what if any oversight might be needed to ensure that consumer arbitrations are fair and accord with established notions of due process; to reduce any potential incentives to favor business parties; and to help address mounting public skepticism about the integrity of the arbitration process. (See Assembly Judiciary Committee report on AB 2656 (Corbett) of 2002.)

A new study by the Public Law Research Institute at UC Hastings College of Law shows that the longstanding and pervasive issues of arbitration company compliance with the consumer data law appear to persist.⁴ [Among the findings:]

- *Roughly half of the private arbitration companies that appear to be conducting business in California fail to post any of the required information. (Report, pages 5-7.)*
- *Of the remaining half, no arbitration company complies fully. (Report, page 1.)*

In addition - apart from the problem of tolerating violations of a legal obligation - the failure of arbitration companies to provide the legally required data may also have the effect of skewing the conduct of consumer arbitrations by permitting unscrupulous arbitration companies to gain an unfair competitive advantage over their law-abiding competitors. Like other providers of services, arbitration companies compete with each other to attract business. This competition can take a variety of forms, giving rise to the criticism that it gives arbitration companies an incentive to structure the arbitration process to favor businesses, which are more likely than consumers and employees to be repeat players in arbitration.”⁵

⁴ Jung, et al, Reporting Consumer Arbitration Data in California (published March 18, 2013, and updated in December, 2013), posted at <http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update>

The results of the initial March, 2013 UC Hastings report cited by the Assembly Judiciary Committee and an update published in December, 2013 were subsequently confirmed by an in-depth investigation conducted by Al Jazeera, which announced in a major report broadcast in 2016, that out of 28 arbitration firms operating in California, only 4 appeared to be complying with the disclosure law.⁶

Despite enactment of AB 802 (Wieckowski) in 2014, private arbitration firms continue to violate the law. Another updated report by the Public Law Research Institute at UC Hastings College of Law⁷ issued in 2017 found, based on months of in-depth research, that these firms continue to flout their obligations under California law. Among the findings:

- *No firm discloses all of the required information for all of its cases.*
- *Out of the 32 firms that apparently offer arbitration services in California, only 3 provide information that is readily accessible on the home page of their website, and is searchable and sortable, as required by law.*
- *9 arbitration firms do not provide any data at all, and claim they are not required to comply with the law. However, at least one of those firms' websites promotes its arbitration services as an alternative to small claims court.*
- *The American Arbitration Association, which has closed 1021 cases in California since 2015, fails to provide required information about the prevailing party in most cases where there was a hearing and an award, reporting the prevailing party in only 46% of such cases.*

Given the persistence of non-compliance with the law, and ever-increasing stakes for the public, with fundamental Constitutional and state rights of every Californian now hanging in the balance, we urge your office to take immediate steps to ensure compliance, taking action to investigate the practices of arbitration firms, and enforcing the existing protections that our lawmakers have repeatedly affirmed.

Thank you for your attention to this matter. Should you or your staff have any questions regarding this letter, or wish to meet to discuss the issues involved, please contact: Rosemary Shahan, President of Consumers for Auto Reliability and Safety, for further information.

⁵ Analysis of AB 802: California Assembly Judiciary Committee, April 8, 2013, posted at: http://leginfo.ca.gov/pub/13-14/bill/asm/ab_0801-0850/ab_802_cfa_20130408_111616_asm_comm.html

⁶ "Buried in the Fine Print," Al Jazeera, March 9, 2016, posted at: https://www.youtube.com/watch?v=QM_VX3cFtN0&sns=em

⁷ "Arbitration Reporting in California: Compliance with CCP 1281.96," Public Law Research Institute at UC Hastings College of Law (Commissioned by the Consumers for Auto Reliability and Safety (CARS) Foundation), released June 28, 2017, posted at: http://carsfoundation.org/pdf/arbitration_UC-Hastings-report_final.pdf

Sincerely,

American Family Voices
Americans for Financial Reform
California Employment Lawyers Association
California Reinvestment Coalition
CALPIRG
Center for Justice & Democracy
Center for Public Interest Law
Consumer Action
Consumer Attorneys of California
Consumer Federation of America
Consumer Federation of California
Consumer Watchdog
Consumers for Auto Reliability and Safety
Consumers Union
East Bay Community Law Center
The Greenlining Institute
Homeowners Against Deficient Dwellings
Housing and Economic Rights Advocates
Impact Fund

Level Playing Field
National Association of Consumer Advocates
National Consumer Law Center (on behalf of
its low income clients)
National Consumers League
National Employment Law Project
National Employment Lawyers Association
Privacy Rights Clearinghouse
Public Citizen
Public Good Law Center
Public Justice
The D.C. Consumer Rights Coalition
Trauma Foundation
The Utility Reform Network
U.S. PIRG
UnidosUS (formerly National Council of La
Raza)
Workplace Fairness

Please note the following additional exhibits attached to this letter:

[Wells Fargo and Forced Consumer Arbitration](#). Report issued by Level Playing Field, March 2017.
(Commissioned by the Consumers for Auto Reliability and Safety Foundation)

[“Here’s why Wells Fargo forces its customers into arbitration: It wins most of the time.”](#) Los Angeles
Times, by Michael Hiltzik, April 7, 2017.