



COALITION TO SAVE LOCAL BUSINESSES

MARA FORTIN

**OWNER, NOTHING BUNDT CAKES
SAN DIEGO, CA**

**TESTIMONY BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE**

**SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND
PENSIONS**

**LEGISLATIVE HEARING ON H.R. 3459, "PROTECTING LOCAL
BUSINESS OPPORTUNITY ACT"**

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Good morning, Chairman Roe, Ranking Member Polis, and members of the Subcommittee. My name is Mara Fortin, the owner and operator of six, soon to be seven, Nothing Bundt Cakes locations in San Diego, California. Thank you very much for the invitation to appear before this Subcommittee to tell my small business story, and discuss the National Labor Relations Board's (NLRB) attempt to redefine what it means for me, and countless others, to be an employer.

As a small business owner and franchisee, I applaud the Subcommittee for its leadership in hosting today's hearing – especially Chairman Roe, as this is the third hearing in the past six weeks you've held to look at the NLRB's attempt to invent a new "joint employer" standard in the National Labor Relations Act and its impact on locally owned businesses like mine.

I am here today on behalf of my business, my team, and the many members of the Coalition to Save Local Businesses, of which I am a co-chair. The Coalition's diverse group of locally owned, independent small businesses, associations and organizations, comprise the face of local businesses that have fueled our nation's economic growth since the founding of our republic and continue to support all of our local communities today.

Mr. Chairman, I'm not asking for much today. I'm simply asking this Subcommittee and the Congress to reinstate the very successful joint employer legal standard that the NLRB chose to invent in its August 27 decision in *Browning-Ferris Industries*. The simple, one-sentence legislation contained in H.R. 3459 is the solution that can protect small businesses like mine and give us certainty that out-of-touch regulators are not going to threaten our business again in the future. I urge every member to support the bill.

I joined the Coalition because I was worried about my business, my employees, my family and our future. The day-to-day challenges we face as small business owners are many, not the least of which is just staying afloat. But for over a year, small businesses have had the threat of an NLRB decision in the Browning-Ferris case looming over them. Many of us have wondered, what will this case mean? And why would a government agency in

Washington decide that another employer may be liable for my employees? On August 27, the NLRB's decision was worse than many even expected. The NLRB's expansion of its definition of "joint employer" has the potential to dismantle the contractual relationship between franchisors and franchisees and strip me of my independence as a small business owner.

We will hear today from a couple members of the academic community; however, the real-world lessons I've learned as a small business owner are not experienced in a classroom. Mine is truly a small business story. To give you a better understanding of why I am so worried about the direction that the NLRB is pursuing, I'd like to tell you about my journey and how my dream of small business ownership became a reality.

I graduated from law school at age 26 and moved to Las Vegas and began a successful litigation practice. I loved what I did during my eight-year practice. My husband, also an attorney, and I had two daughters and built what seemed to be an ideal and financially comfortable life, but I was working around-the-clock at the expense of my family. When my eldest daughter was just two weeks old, I was pulling all-nighters to prepare for an oral argument before the Nevada Supreme Court. As my family grew to two young daughters, I seemed to be working even longer hours. I had little control over my life or career. The experience left me feeling helpless, defeated and constantly wondering if I was doing right by my family...and myself.

It forced me to reconsider my life's direction, my obligations to my family and myself, and I kept coming back to the idea of using my undergraduate business training to build a business in my hometown of San Diego. I contacted a then small, three-store bakery in Las Vegas that I loved and proposed a franchise idea because, let's face it, I'm a lawyer, not a baker, and not qualified to do what they were doing successfully. Fortunately, the timing was right for Nothing Bundt Cakes to grow and we formed a successful alliance.

In March 2007, I successfully negotiated for and opened the first franchise of the now popular brand in Poway, a suburb of San Diego. I left my legal career behind cold turkey

and boldly, but perhaps naively, moved with my two young daughters to San Diego. While ready to work hard, much as I had throughout my practice of law, I quickly came to realize that I was overconfident, under-qualified and had much to learn about running a successful franchise operation. The brand, also being new, had a long way to go, as well.

With pressure mounting to make my first bakery a success, I started having panic attacks during the day, sleepless nights, and lost all appetite for food, and life. I remember vividly a day my sister came to help me with my marketing. She looked shocked at my physical appearance as I stepped out the front door and firmly, but gently, told me that if I didn't unplug, rest and regroup, I was surely going to die. She and my mom, who is here and proudly made the trip from San Diego with me, began to remind me constantly that I was still a human being, and not a robot.

Unfortunately, there were few options for me. My future and my daughters' futures were on the line. My family had already sacrificed greatly to pursue this dream. My husband remained in Las Vegas to work and keep income flowing and only came out on the weekends. I had two young daughters to care for and a business to run, alone. I was working weekdays and all weekends, with no break in sight. I had given this business 100 percent, both financially and emotionally – it represented the future that I so badly wanted for my daughters – and I simply could not fail.

Fortunately, within a year of opening, our traffic increased. I was able to expand my team, hire a manager, step back, sort of, take a breath, reflect on my efforts, and continue to plan for my family's future. Within two years, my husband and I were ready to open a second bakery. I selected the upscale, recession-proof San Diego suburb Del Mar, and the new bakery opened in 2009 to immediate success.

Soon, though, the pressures of being physically separated took their toll, and my husband and I divorced. Facing this personal crisis, my new bakeries began to suffer as well. I was mentally and emotionally numb, but I refused to give up. That summer of 2010, I did the almost unthinkable as a mother; I sent my two babies away for the summer to live

with their father in Las Vegas, while I devoted all of my time to rebuilding both myself, and my business. I had only three months to pull it together, and that is exactly what I did.

I immediately added a key administrative position to my team so I could focus on operations. Her name is Jennifer Malcangio and she is here with me today, and is now, a little over five years later, a director and my right hand. Together with Jennifer and other talented and reliable colleagues, we began to put our enterprise back on track. I hired additional needed staff and implemented systems and procedures that would help us run a more efficient business. I recognized my weaknesses and set out to bring talent on board to fill those gaps.

Within 12 months, my company completely turned around and I rediscovered, but deeper now and stronger, that unfaltering spirit and grit that started me down this road. Since both bakeries were now on a promising path, in late 2011, I took another risk and opened a third successful store in the San Diego suburb of Mission Valley. These efforts allowed me to create additional jobs. I had built something very special in my community. We weren't just a business providing a service; we were a family supporting each other, something I've never forgotten, and we've carried that family atmosphere forward through many charitable partnerships and through the relationships we have with each other. Any smart entrepreneur knows that he/she cannot succeed and grow without great people. Our employees who work hard in the trenches with us matter, and we care about them.

A few weeks ago on my way to speak with Congressman Scott Peters, I decided to stop by two of my bakeries, spontaneously. At one, it was the assistant manager's last day as she was leaving to travel to Florida to be with her husband who had been relocated. She stood in the front of that bakery, promising not to lose it, and cried, and thanked me for a wonderful experience. She told me what it meant to be part of such a great organization and that she would be honored to someday return to us. At the next bakery, I congratulated the staff member, who had just returned from maternity leave, on her beautiful, healthy new baby. And just this September 17th, after leaving us on not the best of terms, I received the following email from an assistant manager: "Hi Mara. I know I may not have left on the

best of terms, but I need help. Not help with work, but with my children. I remember having a conversation with you at my first Leadership Training about my kids and a little of my situation. You told me that when I was ready, to talk to you and you can point me in the right direction. I know you're not a family law attorney, but I also know you know enough. I need advise [sic] and right now you are my only hope." I responded back to her the next day that I would do whatever I could to help her. Why? Because that is what we, small business owners, do – we rally and protect those who have been in the trenches working hard with us, in both good and bad times.

My story doesn't end there. From October 2013 through October 2014, the company continued to grow as my team and I opened four more bakeries in San Diego County. We now operate six bakeries, with one under construction set to open in a month and, until recently, I could see no reason why I wouldn't continue expanding.

Here are a few invaluable lessons I learned through my experiences:

- Being smart and capable is a plus in business, but it's even better when one empowers and trains others who are equally capable.
- The best days of a business leader comes when one actually practices the highly-touted commitment to serve the company and its team members.
- Value does not come from the ability to perform every role in the business, but from one's drive to develop future leaders and to be a resource for them.
- We can be strong on our own, but a better indicator of true success is having a strong team working to achieve a shared dream.

So as you've heard, building and operating a small business comes with many challenges – both personal and professional – and my story is far from unique. In dealing with the highs and lows of building my business, and overcoming so many obstacles along the way that can sink a new small business, the very last thing I thought I would encounter at this stage was having to defend myself to my government.

Mr. Chairman, I thank you for the opportunity to meet with you today on behalf of my business and my team – it has been a life-long dream of mine to appear before Congress – but I regret that we are here to discuss the unnecessary challenges businesses like mine face as a result of the NLRB’s decision to redefine “joint employer.”

I am wholly invested in every aspect of my business. My team and I thrive on the opportunity to build something that represents the happiest of times in our lives, all while contributing to our community in terms of jobs and economic opportunities. But under the NLRB’s ruling in *Browning-Ferris Industries*, my franchisor could be found to be the joint employer of my employees. Nothing could be farther from the truth. I was granted the opportunity to open a franchise location of Nothing Bundt Cakes and use their brand, but my hard work and sacrifice are what built my business into what it is today. My franchisor had nothing to do with hiring my employees or setting their wages and benefits. My franchisor has nothing to do with the day-to-day operations of my small business. But if they are to be considered a joint employer, my franchisor may decide to exert more control over my business, relegating me to a middle manager role for which I did not sign up. I cherish the opportunity to run my small business and help my community prosper, but the NLRB’s vastly expanded joint employer definition could force my franchisor to take control of my business away from me. I’ve worked far too hard and made too many sacrifices to have that happen to me, my family, and my employees.

I am proud to have been part of starting a successful franchise operation, but from a legal, business and cultural perspective, the expanded joint employer standard is harmful to the future of my locally-owned business. The real world consequence of the NLRB’s decision is that it will lead to consolidation among our franchisors and a loss of autonomy for local franchise business owners. Franchisors will grant fewer new franchises or stop franchising altogether, opting only to open corporate-owned stores so that they can better manage increasing liabilities. This squeezes out the small business franchise owners like myself who have deep ties to their local communities through the businesses they have built there. Under the new regulation, we would no longer be in charge of the businesses we built and in which we invested all we had. In the end, we may be forced out of business

altogether, and that would harm not only our business but our community and the economy of our nation.

To consider my franchisor a joint employer of my employees is to completely misunderstand how franchising works. When I entered into a franchise agreement with Nothing Bundt Cakes, I signed up to independently operate my business, and that is what I have done for more than eight years. My franchisor provides the recognized brands and trademarks, a set of business practices to ensure consistency and quality across all franchised locations, and support for marketing and advertising. Everything else is up to me – I hire my workers and set their wage and benefit rates. I manage my inventory and purchase equipment. I pay taxes as my own small business, with my own identification number. And I help my employees when they are in need of assistance. My franchisor plays no part in any of these key functions that only a true and sole employer performs. The suggestion that my franchisor is in any way an “employer” of my workers is insulting, and takes away from all the effort I have put in over the years to build a successful small business.

While the NLRB did not consider how their actions would impact thousands of local businesses, I am fortunate that many of our representatives in Washington understand the danger this decision places on my business and other small business owners.

Members of Congress, you love your communities, too. In that way, we are no different in our desire to serve others. In your own districts, you represent communities and businesses like mine, and you know what we have invested in order to contribute to them. I am optimistic that together, we can find a solution that supports all of our local businesses and allows us to continue to live our American dream. We must work together to reverse this ruling.

I ask you to consider these words that were recently spoken here on Capitol Hill:

“I am happy that America continues to be, for many, a land of ‘dreams’. Dreams which lead to action, to participation, to commitment. Dreams which awaken what is deepest and truest in the life of a people. ... It is my desire that this spirit continue to develop and grow, so that as many young people as possible can inherit and dwell in a land which has inspired so many people to dream.”

These words were spoken by Pope Francis in his address to Congress just last week. In his remarks, he discussed the importance of sacrificing in order to share while building the greatest common good, principles that have driven my business from a simple dream to reality. This is the question The People ask of the Committee: After all that we have invested in our businesses for both our families and our communities, how does transferring our freedom to run our businesses to a major corporation align with the greater good? How will putting me at the bottom help my employees get ahead? How does committing an injustice against small business owners like me to the benefit of big business help *anyone* get ahead?

I am what Pope Francis called a “dreamer.” I am the dreamer who has achieved that dream and works hard to pay forward my good fortune to my children, my team and their children, and my community at large. Why not give my business the chance to continue serving my community in a way that only a member of that community cares to do? Why limit my ability to connect with the members of my community and help them achieve their dreams, as well?

The NLRB’s *Browning-Ferris* ruling and its negative impact on my business not only affects me, but it will discourage so many others from even starting to chart a course like mine. How can we continue to grow as a society by taking the reins away from so many dreamers and doers like me and returning them to the hands of a few corporations?

Mr. Chairman, as any small business owner or entrepreneur would understand, I have sacrificed a lot for my employees and my business. My hands are sore from all of the personal guarantees I have signed and my children fortunately don’t know that I have

pledged them time and time again to banks. I have had countless sleepless nights; I have had panic attacks; and I have worked myself to exhaustion. And I would do it all over again in a heartbeat to truly live out my dream. However, nothing exasperates me more than this manufactured joint employer threat by unelected regulators who have never faced the stress of a small business owner.

Why can't we have a government that supports small businesses? Why are small business owners, who meet countless demands and compete against colossal corporations every day, under attack by Washington bureaucrats? Why are we facing this artificial threat of losing our businesses because of the NLRB? How can anyone support what the NLRB is doing here?

Each and every one of the Committee members here today has an opportunity to stand up for small businesses and the teams like mine. And I am far from alone. Tomorrow, more than 300 franchise business people will visit Capitol Hill to urge their senators and representatives to defend small businesses and support H.R. 3459. We need your help in stopping the NLRB's overreach. Mr. Chairman and members of the Subcommittee, when you are faced with the question of whether to support small business owners or out-of-touch regulators, it should be an easy decision. We plead with you for this simple concession. Please support H.R. 3459, the "Protecting Local Business Opportunity Act," which would clarify the definition of a joint employer and bring necessary clarity to small businesses like mine.

The importance of H.R. 3459 cannot be overstated, not just as a means to help my small business, but also as a means to encourage others with an entrepreneurial spirit to take similar risks and ultimately contribute to their employees' lives and communities.

Thank you, Mr. Chairman, for calling today's hearing. I would be happy to answer any of your questions.