

Written Testimony of

**Scott Michelman**  
**Staff Attorney, Public Citizen**

before the

**U.S. Senate Committee on Commerce, Science & Transportation**

at the hearing

**“Zero Stars: How Gagging Honest Reviews Harms Consumers and the  
Economy”**

November 4, 2015



Mr. Chairman Thune, Ranking Member Nelson, and Members of the Committee —

My name is Scott Michelman, and I am a staff attorney at Public Citizen Litigation Group. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For more than 40 years, we have successfully advocated before Congress, the courts, and federal agencies for stronger measures to protect consumers from unscrupulous business practices. Public Citizen also stands for the free flow of information and ideas, including the rights of consumers to share their opinions and experiences in the marketplace and to learn from the opinions and experiences of others.

In my testimony today, I'll begin by explaining the problem that the Committee has called this hearing to examine: the gagging of consumers who try to write truthful reviews. I'll address the nature of the problem, the harms it causes, and its prevalence. I will then articulate Public Citizen's position: We support congressional action on this issue. Although we cannot support S.B. 2044 in its current form because of a clause that limits its enforcement by state officials, we have been informed by members of the committee that this clause will be removed. When that change is made, we will strongly support the bill.

### **The Non-Disparagement Clause and Its Harms**

Non-disparagement clauses are terms in consumer contracts — rarely, if ever, negotiated or knowingly agreed to and usually buried in the fine print — that purport to strip the consumer of his or her ability to criticize the company with whom he or she is doing business. Non-disparagement clauses usually specify monetary penalties for violations, penalties that can range from hundreds to thousands of dollars. Sometimes non-disparagement clauses apply specifically to “criticism” or “negative reviews”; in other instances, they prohibit public comment of any type. Sometimes non-disparagement clauses extend beyond reviews to prohibit other actions consumers may wish to take if they feel they are being dealt with unfairly: For instance, some clauses we have seen ban or restrict “disputes,” whether brought to a third-party such as a credit-card company or even the company imposing the non-disparagement clause itself. Sometimes non-disparagement clauses include provisions assigning to the company the intellectual property rights to any review the consumer may write, so that the company has the ability to force the consumer to remove any review it doesn't approve. One clause we encountered required the consumer to submit her opinions for “legal review” to the company, which claimed that it could force the consumer to submit to mediation and arbitration at her own expense to obtain the right to complain. Although the specifics can differ, non-disparagement clauses have three essential elements in common: (1) they are imposed by companies in the contract or terms of use as a condition of service or

sale; (2) they are rarely if ever up for negotiation and generally do not become known to a consumer until he or she is accused of breaching one and threatened with punitive action unless he or she retracts a review that the companies dislikes; and (3) they prohibit consumers from expressing their honest opinions or experiences with other people or entities.

We believe that these clauses are invalid under the contract law of most if not all states, but there is no precedential case law on the subject, and the possibility of invalidity does not deter companies from enforcing these clauses.

Non-disparagement clauses cause several types of harms to the consumers on whom they are imposed as well as harm to the marketplace as a whole:

- (1) **Consumers are disabled from expressing themselves.** Most obviously, non-disparagement clauses prohibit expression and thereby impinge upon a freedom that Americans take as a given in most aspects of their lives: the right to speak freely.
- (2) **Consumers are subject to bullying.** The non-disparagement clause gives the business that imposes it huge leverage over the consumer. The clauses are generally legalistic in phrasing and specify a monetary penalty, and companies usually invoke them when they believe consumers have already violated them. As a result, when a company demands that a consumer retract a truthful expression of his or her experience or opinion, the consumer is likely to feel a great deal of pressure to comply with the company's demands. Factors that compound the pressure on consumers include the fact that most Americans are not lawyers and may feel like they do not have the expertise or knowledge to assert their rights, most Americans do not have the ability to hire counsel in these circumstances, companies invoking non-disparagement clauses frequently use intimidating language or threaten that resistance on the part of the consumer will lead to larger monetary penalties either under the terms of the non-disparagement clause or because the consumers will allegedly become liable for attorneys' fees spent to enforce the clause.
- (3) **Consumers may be subject to retaliation if they don't retract their reviews.** Threats against consumers may generally be sufficient to achieve a company's ends, but when they are not, consumers may be subject to retaliation. In an extreme case, *Palmer v. KlearGear.com*, after online retailer KlearGear demanded \$3,500 from Jen and John Palmer for a three-year-old negative online review and they refused to pay, KlearGear falsely reported the money as a "debt" they owed, an action that ruined John Palmer's credit for more than a year and led to numerous denials of credit,

accompanied by humiliation, anxiety, and fear. Worst of all, the Palmers could not obtain credit to replace their furnace when it broke and as a result spent weeks' worth of nights, with temperatures around freezing, wrapping their three-year-old son in blankets until they could save up enough money to buy a new furnace with cash.

- (4) **Consumers who are the intended audience of reviews suppressed by non-disparagement clauses receive a distorted view of businesses using the clauses.** Today's consumers increasingly rely on online review sites such as Yelp, TripAdvisor, and Angie's List to research businesses before they decide to buy goods or services. When a business succeeds in using a non-disparagement clause to suppress honest negative reviews, the result is that the business appears more attractive and trustworthy than it would if the full range of reviews were available. In this way, non-disparagement clauses harm even consumers who are not subject to them, by limiting the reviews available to all consumers and inhibiting the free exchange of information and opinions among consumers.
- (5) **Scrupulous businesses that don't employ non-disparagement clauses are disadvantaged by the skewing of available reviews.** When a company using a non-disparagement clause to suppress critical reviews is successful in improving its overall image, honest businesses that don't try to gag their consumers seem worse by comparison. Thus, the use of non-disparagement clauses warps the marketplace for businesses as well as consumers.

In sum, non-disparagement clauses impose significant harms on consumers, businesses, and the marketplace as a whole, all by inhibiting a core American value: free expression.

### **Non-Disparagement Clauses Serve No Legitimate Purpose**

The obvious reason that a company would use a non-disparagement clause is to artificially enhance its own reputation by silencing its critics. No one argues that this purpose is a legitimate one that deserves consideration or respect.

A defender of non-disparagement clauses might argue instead that they are a reasonable tool for businesses to protect their reputation in the Internet age, because a negative online review can be very detrimental. This rationale is a canard.

First, most online review sites already provide an avenue for businesses to defend their reputation — by responding to the criticism and pointing out, for instance, how the business's practices have changed from what a consumer is criticizing or why a consumer's concern is unreasonable. Many businesses take advantage of these

features on sites like Yelp. As Justice Brandeis famously explained in interpreting the First Amendment, “If there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence.”<sup>1</sup>

Second and more fundamentally, most criticism is lawful and indeed protected by the First Amendment. The only type of review about which businesses have any legitimate ground for complaint is the false and defamatory review — which is unprotected by the First Amendment and which is already subject to a cause of action under ordinary tort law for defamation. Accordingly, non-disparagement clauses are unnecessary to defend against *unlawful* reviews (i.e., defamation) and thus serve only to suppress *lawful* reviews.

### **The Extent of Non-Disparagement Clauses**

Public Citizen has litigated three cases concerning non-disparagement clauses and assisted (in a non-litigation capacity) several other individuals in successfully resisting bullying tactics arising out of non-disparagement clauses. In our work, we have become aware that non-disparagement clauses are used by businesses in a number of industries, including online retail, medical services, hospitality (including hotels and vacation home rentals), wedding services, and more.

The website TechDirt compiled a list of such clauses it found online as of December 2014.<sup>2</sup> That list includes a textbook rental company; a seller of wine storage mechanisms; a tour company; a marketing company; and a collection company. Several more companies appear to have simply copied and pasted the non-disparagement clause used by KlearGear.com (described in more detail below). The clauses cited include stated penalties ranging from \$2,500 to \$100,000 for violations.

Specific examples are useful to show how non-disparagement clauses are used and the various contexts in which they arise:

- In *Palmer v. KlearGear.com*, online retailer KlearGear invoked a non-disparagement clause in 2012 to try to fine Utah couple Jen and John Palmer \$3,500 for a critical online review posted in 2009. KlearGear’s non-disparagement clause, which was not inserted into the company’s Terms of Sale and Use until years *after* Jen Palmer posted the review at issue, forbade KlearGear’s customers from “taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees.” When the couple wouldn’t pay the fine and couldn’t remove

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<sup>1</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring in the judgment).

<sup>2</sup> See <https://www.techdirt.com/articles/20141214/16102629441/here-are-companies-that-want-to-charge-you-2500-100000-negative-reviews.shtml>.

the posting, KlearGear falsely reported the \$3,500 as a “debt” they owed, an action that ruined John Palmer’s credit for more than a year and led to numerous denials of credit. On behalf of the Palmers, Public Citizen sued KlearGear in 2013 under the Fair Credit Reporting Act and state tort and contract law. KlearGear never appeared in court to defend itself, and in 2014, we won a default judgment declaring the debt invalid and awarding compensatory and punitive damages to the Palmers.<sup>3</sup>

- In *Lee v. Makhnevich*, a New York dentist’s service contract provided that each patient gave up the right to criticize the dentist publicly and assigned to the dentist the copyright in anything that the patient may later write about the dentist. When a patient later posted an online review complaining about being overcharged, the dentist sent a “takedown” notice to the review sites, claiming that the posting violated her copyright. The dentist also sent the patient a series of invoices demanding payment of \$100 for each day the “copyrighted” complaints continued to appear online. Representing the patient, Public Citizen sued the dentist in 2011. In response, the company that created the dentist’s contract recommended that its customers stop using it. After the court denied a motion to dismiss the case, the dentist moved abroad and stopped communicating with her lawyer.<sup>4</sup>
- In *Cox v. Accessory Outlet* (later *Cox v. Blue Professional*) a Wisconsin consumer who hadn’t received her order from an online retailer told the company she was going to contact her credit card company. In response, the company demanded that Cox pay \$250 under its fine-print “Terms of Sale,” which prohibited “any complaint, chargeback, claim, dispute,” the making of “any public statement,” or threats to take any of these actions, within 90 days of purchase. The company threatened to report the \$250 “debt” to credit reporting agencies, to damage Cox’s credit score, and to have a collections agency call Cox’s home, cell, and work phones “continuously.” The company ominously warned Cox that that it had enforced the terms of sale against “many individuals” and that Cox was “playing games with the wrong people and [had] made a very bad mistake.” Public Citizen represented Cox in filing suit in 2014. We discovered that the business that threatened Cox was part of a larger company that did business using four different names and websites, all of which had reportedly engaged in similar practices or imposed similar terms. The company never appeared in court but in response to our

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<sup>3</sup> For key case documents, see <http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=851>. The case is No. 1:13-cv-00175 (D. Utah).

<sup>4</sup> For key case documents, see <http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=706>. The case is No. 11-civ-8665 (S.D.N.Y.).

lawsuit, all four websites went dark and remain so today. We won a default judgment.<sup>5</sup>

- The Union Street Guest House, a hotel in Hudson, N.Y., included terms in its wedding contracts providing that the wedding couple could be fined if a guest leaves a negative review. After this clause, which apparently had been used to threaten at least one customer, was reported widely in the press in August 2014, the business changed its terms.<sup>6</sup>
- The egg-donor matching site Fertility Bridges, based in Illinois and California, tried to bully a dissatisfied consumer into silence using a non-disparagement clause earlier this year. The company backed down after Public Citizen confronted the company with the ambiguous language of its clause and its illegality under applicable California law.<sup>7</sup>

Public Citizen has received several other complaints concerning non-disparagement clauses, the details of which cannot be disclosed on account of attorney-client privilege.

To date, only one jurisdiction, California, has banned non-disparagement clauses.<sup>8</sup>

Just as troubling as the cases we know about are the instances we don't know about — instance in which a consumer does not contact a lawyer but instead backs down and retracts a critical review in the face of a business's threats. Given the aggressive behavior in the instances documented above, along with the high fines companies seek to enforce and the fact that companies are asserting consumers are already in the wrong when the companies demand retractions, most people likely feel strong pressure to cooperate and therefore understandably acquiesce to a business's demands. Accordingly, the harm from non-disparagement clauses almost certainly extends beyond the instances we know about.

Current legal tools are insufficient to address the problem of non-disparagement clauses because many consumers do not have the resources to hire a lawyer and do not feel empowered to assert their rights in the face of bullying tactics and legalistic language. Additionally, as illustrated by the websites that have copied KlearGear's non-disparagement clause, KlearGear's loss in court has not prevented other

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<sup>5</sup> For key case documents, see <http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?CID=893>. The case is No. 652643 / 2014 (N.Y. Sup. Ct.).

<sup>6</sup> See <http://pubcit.typepad.com/clpblog/2014/08/internet-shames-new-york-hotel-into-removing-non-disparagement-clause-fining-wedding-couple-for-thei.html>.

<sup>7</sup> See <http://pubcit.typepad.com/clpblog/2015/10/fertility-bridges-use-of-a-nondisparagement-clause-to-bully-dissatisfied-customers.html>.

<sup>8</sup> See Cal. Civil Code 1670.8.

businesses from following its model. And KlearGear itself continues to evade efforts to collect on the judgment against it. Legislation and robust enforcement by federal and state authorities are likely to be the most powerful weapons against non-disparagement clauses.

### **Public Citizen's Position on S.B. 2044**

Public Citizen strongly supports a legislative response to the problem of non-disparagement clauses. As explained below, we cannot support S.B. 2044 in its current form, but we understand that there is an agreement to amend it to a version we would support, and we look forward to supporting it after amendment.

S.B. 2044 rightly bans non-disparagement clauses and provides for both federal and state enforcement of this new prohibition. However, Section 2(e)(7) of the proposed bill needlessly hinders state enforcement by barring state attorneys general from working with outside counsel on a contingency fee basis.

Government enforcement is vital to the enforcement of consumer protection laws. Many state enforcement offices are under-resourced and are unlikely to enforce these laws if they cannot do it in partnership with outside counsel. Public Citizen therefore categorically opposes any provisions barring states from hiring outside counsel for enforcement purposes because such provisions serve no purpose but to weaken enforcement. Additionally, states hire outside counsel all the time for all kinds of legal work. Carving out consumer protection measures for special restrictions on outside enforcement consigns these important laws to a second-class status in terms of states' ability to enforce them.

Specific to the context of non-disparagement clauses, effective enforcement against the types of companies using these provisions can be difficult; in all three cases Public Citizen has brought to court, we have encountered problems with defendants fleeing abroad or hiding their assets. Bringing in private counsel might be the best way to enforce the ban on non-disparagement clauses without unduly detracting from states' other important law enforcement work.

For these reasons, we cannot support the bill in its current form, but we are pleased to have learned that the committee has agreed to remove Section 2(e)(7), and we look forward to supporting the bill once that has occurred.

### **Conclusion**

Non-disparagement clauses harm consumers, honest businesses, and the marketplace in general. They lead to the bullying of consumers and the chilling or suppression of speech on which consumers rely to make informed decisions in the marketplace. In



recent years, non-disparagement clauses have appeared in a variety of contexts. Litigation under current laws is insufficient to address the problem.

Public Citizen therefore believes that congressional action is needed to address the significant problem of non-disparagement clauses. We cannot support S.B. 2044 in its current form because of the restriction on state enforcement contained in Section 2(e)(7), but once that provision is removed, we will strongly support the bill.

I thank you for the opportunity to address the Committee.