Written Testimony

of

Ira Rheingold

Executive Director

National Association of Consumer Advocates

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"Zero Stars: How Gagging Honest Reviews Harms Consumers and the Economy"

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Mr. Chairman Thune, Ranking Member Nelson, and Members of the Committee, thank you for inviting me to testify today about "non-disparagement clauses," and why these contract terms do great harm, not only to consumers, but to honest and ethical businesses attempting to compete in the consumer market place.

I offer my testimony today as the Executive Director of the National Association of Consumer Advocates (NACA). NACA is a non-profit organization whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers.

In my testimony, I will first talk about the importance of consumer protection laws, not just as a means to shield consumers from bad business behavior, but as market protection statutes that allow honest businesses to compete on a level playing field. Next, I'll look at the consumer "gag" clauses that are a focus of this hearing, in the context of a decades-long effort by corporations to hide their conduct from public scrutiny through the fine print of form contracts. Finally, I'll explain that while we are very pleased that the Senate is taking up this very issue, we are unable to support S. 2044 in its present form because it seeks to limit the enforcement rights of state and federal officials.

1. **Consumer Protection is Marketplace Protection**

As someone who has been a consumer advocate for almost thirty years, I am often dismayed at the misperception, as well as the battles fought over the need for both creation and enforcement of strong consumer protection laws. Simply, consumer protection laws are market protection laws. They do not merely protect consumers, they also protect honest businesses.

Consumer protection laws in a free market economy by definition protect the market itself and all of its participants. The Supreme Court stated the guiding principle of this philosophy nearly 40 years ago: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Serv., Inc*., 411 U.S. 356, 364 (1973). Congress and state legislatures have recognized this fact on countless occasions and have passed a wide variety of laws on these very grounds. The FTC Act and its progeny, state Unfair and Deceptive Acts and Practices laws were created with the understanding that our market economy would not function properly if unscrupulous businesses were allowed to profit from unfair and deceptive trade practices and inevitably gain competitive advantages over honest businesses. Federal and state disclosure regimes, like the Truth in Lending Act, exist in large part because of our understanding that a fair and functioning marketplace is

dependent on consumers making informed and knowledgeable decisions. The Fair Credit Reporting Act, a statute that this committee is intimately familiar, was passed with the full recognition that credit decisions made on the basis of faulty information, whether by credit grantors or consumers, undermine the vitality of the consumer economy.

S. 2044 - looking past its serious flaw of limiting enforcement of the very protections it hopes to create (which I will address below) – stands in the long line of these fundamental consumer/ market place protection statutes. Simply, our market economy only functions properly, when unfair practices are exposed and consumers do not make decisions based on faulty information, but instead all information – whether disclosed by law or shared by others - is made available for consumers to use and/or ignore in their decision making process.

2. **Non-Disparagement Clauses – just another attempt to strip consumers of a fundamental right**

When I look at non-disparagement clauses – a contract term designed to prevent consumers from freely expressing a negative opinion about a business - being imposed on consumers by a "form" contract, by the click of a button, or by

the mere notice on a web page, I simply see the logical conclusion of a decades long corporate effort to strip consumers of yet another fundamental right.

Buried in the fine print of everything from consumer "contracts," including credit cards, cell phones, car purchase, student loans, and new homes, to employee handbooks and nursing home admissions contracts, consumers are typically required to waive all sorts of rights, including the right to hold businesses liable for their bad acts, to enforce consumer protection statutes, to gain access to our public justice system, and now even the right to speak. The trend is obvious. Through the use of indecipherable language in non-negotiable form contracts and in unnoticed disclaimers, corporations have successfully stripped consumers of their 7th Amendment right to a jury trial. Why should we be surprised when corporations want to do the same to consumers' 1st Amendment right of free speech?

The parallel between denying consumers a public day in court to denying their right to speak out is undeniable. Like non-disparagement clauses, pre-dispute binding mandatory arbitration clauses force consumers to surrender a fundamental right. Forced arbitration terms, like non-disparagement clauses, are designed to keep complaints private, out of view of the public and the press. In the same way both types of clauses limit the ability of consumers to hold

corporate wrongdoers accountable and does damage to both honest businesses and our market economy by limiting the information available to consumers attempting to make informed choices.

During the first half of my professional life, I represented clients in some of the poorest communities in our country and for the last 14 years, I have been the executive director of NACA, spending each of my days working with and talking to private and public attorneys deeply committed to seeking justice for the least powerful consumers. In my early years as an attorney, I would have believed that these "contract" clauses – that waive fundamental constitutional rights – would have been deemed unconscionable and unenforceable.

Unfortunately, my early naiveté has been worn away by having borne witness to the relentless - and all too often successful effort - of powerful corporations to strip away fundamental consumer rights from those far less powerful. Whether it's been through deregulation, preemption, defunding or ultimately through unconscionable contract terms, the goal and the result has been the same. Avoid corporate accountability by taking power away from anyone who might have the ability to actually hold them accountable for misconduct.

Years ago, when I saw my first arbitration clause in a consumer contract, I gave it little thought.

Surely there was no consent by my client;

Surely it was unconscionable for powerful businesses to deny my clients the right to tell their story in our public courts;

Surely my clients right to join with others in a class action – a right established by state law and federal rule - could not be taken away by an indecipherable form contract, a mere click of a button, or an unread bill stuffer;

Surely, if we proved – as we have – that forced arbitration prevents consumers from getting legal help, from getting proper redress, the clause would be unenforceable;

Surely I would be wrong . . .

While I was wrong in expecting the courts – particularly the Supreme Court – from stopping corporations from stripping a fundamental right from consumers, I/ we should not repeat that mistake. Therefore, Congress should pass a bill that prohibits "non-disparagement" clauses, as well as pass the Arbitration Fairness Act[1]. These proposals would restore critical rights and help level the playing field for both consumers and businesses.

[1] For a full exploration of the damage done by Forced Arbitration clauses, see the New York Times series, "Beware the Fine Print," published November 1-3.

3. Why Non Disparagement Clauses should be banned

As I discussed earlier, a fair and functioning marketplace is dependent on consumers making informed and knowledgeable decisions, and using their right to speak publicly to share their views and assist other consumers. Their ability to speak out publicly and to seek accountability facilitates an open and thriving marketplace. Non-disparagement clauses go to the heart of this fundamental principle by prohibiting consumers from exercising the freedom of sharing their thoughts and opinions with other consumers in the American marketplace. Today, in our modern and interconnected economy, this information sharing is even more essential than ever before.

I know for myself, I can no longer decide to go to a restaurant with my family without one of my sons searching Yelp for the latest consumer reviews and ratings. Other family decisions, whether it's buying a car (Consumer Reports), a bathroom vanity (Costco), taking a vacation (TripAdvisor) or booking a hotel (too many to name) are all informed by reading reviews provided by previous customers. Simply, the presence and growth of non-disparagement clauses would prevent the marketplace from working as it should for most American consumers. This limitation on the fundamental right of free speech as well as the impact it would have on the American market as we know it should be grounds enough

from banning the imposition of non-disparagement clauses. Yet, these clauses should also be banned because companies should not have the power to threaten and punish consumers who want to express their criticism of a product; and companies should not have the power to retaliate against consumers who don't act as a company demands. Further, a law barring non-disparagement clauses would publicly declare that non-negotiated form contracts cannot and should not be used to take away fundamental American rights.

4. **Attorneys General should have full enforcement authority**

As I discussed above, and as Congress has repeatedly recognized, consumer/ market protection statutes as proposed in S. 2044 are essential for our consumer marketplace to function fairly and efficiently. But the mere existence of these statutes is not nearly enough to ensure that the rule of law is complied with. Strong enforcement of those statutes – by public regulators or by private consumers – is essential for laws to have their full effect.

Attorneys General across this country have, over the past decades, done yeoman's work in enforcing state and federal consumer protections. With limited – and ever shrinking budgets – and small - and ever shrinking staffs, these important public servants have sought ways to maximize their ability to protect

their state's citizens and their state's economy. Their efforts – including collectively working across state lines in a bi-partisan manner- have been essential in obtaining justice for consumers far beyond what might be possible if their work was limited to what was achievable by their own limited staff and advocacy tools.

Similarly, the partnership that some attorneys general have formed with experienced and capable private attorneys – particularly in instances when they are attempting to enforce the law against big and deep pocketed corporations (like mortgage servicers who break the law) - has led to a measure of justice and consumer relief for harm caused by wrongdoing otherwise completely unattainable. Simply, if we want attorneys general to enforce the law – Congress should not limit these state officials from choosing how they best can protect consumers in their own state.

5. Conclusion

We fully support the idea behind S. 2044, the Consumer Review Freedom Act of 2015. There is no place in the American economy for denying consumers, like Jen Palmer, the right to speak freely about their experiences in the consumer marketplace. However, for a consumer/market protection statute to be fully effective, it must be fully enforceable. Because this bill limits the ability of public

regulators from using all of their necessary enforcement tools we cannot currently support it. If this provision is removed from the bill, we would be pleased in offering our full support for this important legislative effort.