

Written Testimony of

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before the

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

at the hearing

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

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Thank you for inviting me to testify today. My name is Jen Palmer, and I live with my husband and son in Hillsboro, Oregon. I'm here to tell you about my experiences with a non-disparagement clause and the company that tried to make my family pay \$3500 because I wrote a critical review online, and how they ruined my husband's credit when we refused to pay. My story shows what can happen when companies are allowed to use non-disparagement clauses in their contracts to bully consumers. And it shows why Congress should take action to prohibit the use of these clauses in consumer contracts.

Just before Christmas 2008, when we lived in Utah, my husband John Palmer placed an order from an online merchant called KlearGear. He ordered a desk toy and a keychain as Christmas gifts, and he paid for them when he ordered. The whole order cost less than \$20 including shipping.

The items never arrived. John and I both tried to call the company, but calling the numbers on the company's website only got us automated responses, never a human being. We tried emailing, and the customer service person claimed that the order was never paid for and they had ultimately cancelled the order.

We were incredibly frustrated by the shoddy service and the impossibility of reaching anyone. In February 2009, I posted a review expressing my opinions on the site RipoffReport.com. We went on with our lives and considered it a lesson learned never to deal with them again.

More than three years later, in May 2012, out of the blue, John received an email from KlearGear demanding that John have the review on RipoffReport.com removed within 72 hours, or pay KlearGear \$3500 for violations of their Terms of Sale and Use. We were shocked and scared by the demand. It seemed this could not be legal. KlearGear claimed that my review violated a "non-disparagement clause" in KlearGear's Terms of Sale and Use, the text of which barred the customer – who was John, not me, but that didn't matter to them – from "taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees." John did some research via the Internet Archive and was able to discover that the clause wasn't even present in the Terms of Sale when he placed his order back in December 2008. He found that the clause did not appear until February 2012.

I spent hours researching how to remove the report from RipoffReport.com, because we were scared and didn't know what else to do. But RipoffReport has a

policy of not removing reviews, so we were stuck. John tried explaining to KlearGear that the “non-disparagement clause” was not in the Terms of Sale and Use at the time of John’s order from KlearGear; that it was I, not John, who wrote the review; and RipoffReport.com’s policy of not removing reviews meant we had no control over whether the review remained online. The person claiming to be KlearGear’s legal representative just reiterated to us that “this matter will remain open until the published content is removed,” and threatened to report the \$3500 as a debt to the credit reporting agencies. We didn’t think they could do something so outrageous, but those emails had disturbed us enough that we purchased a credit monitoring service for John’s credit.

About three months later, our fears were realized. In August 2012, a negative report appeared on John’s credit reports from two of the three major credit reporting agencies, reflecting a \$3500 debt with KlearGear as creditor. We immediately called Experian and Equifax to dispute the debt. Then KlearGear emailed John again and said we owed yet another \$50 under its “Chargeback/Dispute Policy,” which said that we had to give KlearGear 30 days to resolve any billing dispute before going to a third party. We tried to tell KlearGear they couldn’t charge us any of this money, but they just repeated their position and even admitted that they confirmed to Experian that the debt was valid. I spent hours on the phone with the credit bureaus, contacting local law firms to help us, and even doing some legal research myself. Despite all the information I found, we couldn’t afford to hire an attorney and we didn’t know how to fix the credit report without legal help.

It took more than 18 months to remove the blemish from John’s credit, and not until after the non-profit organization Public Citizen filed a lawsuit on our behalf. In the meantime, that bad credit report caused us all kinds of problems. We have been very careful to live within our means, using financing only for large purchases like the house, cars, and medical bills that weren’t covered by insurance. We’d had no trouble getting loans to buy a car in 2008, our house in 2009, or another car in 2011.

But now for the times we needed credit, we couldn’t get it. For instance, we were held up for a month on a car loan in late 2012. Even worse than the delay was the humiliation of having to explain everything and the anxiety of whether or not this was going to go through, especially because at that point, we really needed a second car. I specifically remember the Finance Manager at the dealership saying to us "Who is KlearGear and why do you owe them \$3,500?" John was also denied a

credit card around the same time, and we began to fear we'd never get a loan for anything again.

We were also hoping to sell our house and buy another one in the winter of 2013, because both of us were commuting more than 30 miles each, which was a particular hardship since our son, Damien, was just 3. We were scared to even try to get the credit we'd need to make necessary repairs on our home and to buy a new one. We didn't want to go through that humiliation again. Having the initial denials on the car froze us in our financial tracks and gave us a serious case of "once bitten, 17 times shy."

The worst consequence of KlearGear's retaliation against us occurred in October 2013, more than a year after KlearGear reported the supposed "debt." In July and September we had needed two major plumbing repairs on our home which had depleted our savings, and then our furnace broke at the beginning of October. We couldn't afford to buy a new one with cash and the weather was turning cold. I contacted several companies for financing, but no one could approve us. At that point we were desperate, wrapping Damien in blankets every night, when the weather was regularly dropping to around freezing. I was terrified – I had no idea how long this would go on. I was scared social services would come and take Damien, saying we were bad parents because we couldn't even keep the heat on. We cut as many expenses as we could that month. I dreaded each weather forecast. Between both our paychecks, after a few weeks we had saved enough money to buy the most basic furnace with cash.

By that point, we were tired of living in fear and not being able to get emergency credit for basic needs. We spoke to a reporter at KUTV in Salt Lake City who did a segment on our plight, and eventually got us in contact with Public Citizen, which represented us in suing KlearGear. Public Citizen helped us clear up John's credit, finally, and we won a default judgment against KlearGear, who after bullying us for years never even bothered to show up to defend itself in court.

Now that part of our lives is behind us. We were able to sell the house and move to Oregon for a work opportunity. Damien is a healthy and happy 5 year old.

Throughout our entire ordeal, we only wanted two things: that all traces of KlearGear's actions against us be cleared from John's credit, and to do everything we could to ensure nobody else ever had to experience the nightmare we endured.

We want Congress to ban non-disparagement clauses, which lead to the silencing of ordinary people and to bullying tactics like those KlearGear used to make us feel anxious, terrified, humiliated and helpless for more than a year. And we aren't the only victims of this type of conduct. If you read Public Citizen's website and its blog, you'll see that a Wisconsin woman was threatened with round-the-clock harassment by debt collectors for just telling an online retailer that she wanted to call her credit card company, a New Jersey woman was told she'd have to pay thousands of dollars in legal fees just to be able to post a critical online review of a website, and a New York hotel threatened couples holding weddings there that they'd be fined for negative reviews by their guests. The bullying and silencing of consumers needs to stop.

We applaud the Committee for proposing to address the problem of non-disparagement clauses. We like the idea of giving the Federal Trade Commission and state authorities the power to go after unscrupulous companies that use non-disparagement clauses. Companies should not have the power to restrict consumer speech or punish people who criticize them. Companies should have to earn their reputations honestly with good products and services, and fair dealing.

But we also believe that the bill as currently proposed must be strengthened. Specifically, one section prohibits state attorney general's offices from hiring outside attorneys to help enforce the prohibition on non-disparagement clauses. We don't think there ought to be restrictions on state enforcement powers, particularly because some smaller states might not have the resources to enforce every law with their own attorneys. We think states should be free to enforce this law however they can. There's no reason to limit the ways states can enforce it, particularly when states can hire outside lawyers for other purposes. Therefore I have been pleased to learn that the Committee intends to amend the bill to eliminate this restriction.

I'm grateful for the opportunity to share my experience with you. On behalf of my husband John, my son Damien, and all the consumers out there who are being bullied and silenced by companies wielding non-disparagement clauses, I urge you to pass a bill that both prohibits these clauses and provides for robust enforcement of the law.

Thank you.