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## Brawling with the Consumer Review Site Bully

Lori A. Roberts

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BRAWLING WITH THE CONSUMER REVIEW SITE BULLY

Lori A. Roberts\*

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**Abstract**

*John Palmer ordered two small items—totaling less than \$20—from KlearGear.com.<sup>1</sup> The items never arrived.<sup>2</sup> After he and his wife unsuccessfully attempted to contact KlearGear by phone and email to resolve the claim, KlearGear ultimately cancelled the order claiming that it had not been paid. Palmer’s wife posted a review on RipoffReport.com, criticizing the inaccessibility of KlearGear’s customer service and their handling of the claim.<sup>3</sup> More than three years later, the couple received a demand from KlearGear to remove the online review and to pay \$3,500 for violating a non-disparagement clause in its Terms of Use.<sup>4</sup> Palmer notified*

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\*Professor of Law at Western State College of Law. The Author wishes to extend deep gratitude to her colleagues for their conversation, comments and feedback on early versions of this Article: Professor Paula Manning, Professor Elizabeth Jones, and Professor Monica Todd. The Author also wishes to acknowledge the outstanding research assistance of reference librarian Scott Frey, and student research assistant (Western State ‘16) Larissa Parker.

1. Complaint at 4, *Palmer v. KlearGear* (D. Utah 2013) (No. 1:13-cv-00175).

2. *Id.*

3. *Id.* at 5.

4. *Id.* at 5-6 (To complete an order on KlearGear.com, the consumer was required to electronically “check” a box on the website next to the statement, “I have read and agree to the KlearGear.com Terms of Sale.” The Terms appeared on a separate webpage accessible via a web link.

*KlearGear that the subject clause had not appeared in the terms of service at the time he placed his order, and moreover that he did not write the review, his wife did. He also notified KlearGear that RipoffReport.com had a policy of not removing online reviews, so his wife did not have control over the current posting.<sup>5</sup> Palmer refused to pay the \$3,500 fine and KlearGear reported the debt to credit reporting agencies, ultimately marring Palmer's credit.<sup>6</sup> Palmer filed suit against KlearGear seeking a declaration that no debt was owed for violating the non-disparagement clause.<sup>7</sup> KlearGear did not respond to the lawsuit and in May 2014, the U.S. District Court for the District of Utah granted Palmer a default judgment. Palmer was awarded \$102,250 in compensatory damages, \$204,500 in punitive damages, plus costs and attorneys' fees.<sup>8</sup>*

#### INTRODUCTION

John Palmer has become the face of consumer justice and free speech on the Internet, and his story is at the center of nearly every news article decrying the perils of underhanded businesses slipping non-disparagement clauses into consumer contracts, effectively silencing consumers' "right to Yelp!" The Utah District Court's decision showcases the particularly unscrupulous business practice of inserting a new term into a consumer contract after the contract has been fulfilled, then suing to enforce the new term. In doing so, however, the court did not specifically address the validity of the non-disparagement clause itself.<sup>9</sup> Indeed, while non-disparagement clauses are typically analyzed under traditional contract law, limited judicial precedent has been amassed specifically addressing the validity of a non-disparagement agreement in this context. Nonetheless, John Palmer's case has spawned outrage at the idea of muzzling online consumer feedback and has inspired state and federal legislation to halt the use of non-disparagement clauses altogether in consumer contracts.

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The non-disparagement clause was found within those terms and forbade KlearGear's customers from "taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees").

5. *Id.* at 6.

6. Complaint, *supra* note 1, at 7, 6.

7. *Id.* at 11.

8. *Id.*

9. *See id.*

Unfortunately, the social media backlash against KlearGear’s novel attempt to silence consumer feedback has mostly failed to consider scenarios in which a non-disparagement clause in a consumer contract might be a justifiable business practice. That is, while KlearGear epitomized an unscrupulous business, little acknowledgement has been paid to the fact that unscrupulous consumers exist too: consumers who use the power to post a negative online review as leverage to negotiate free and discounted products or services or individuals who have never purchased the product or used the service write false or misleading online reviews to hurt competitors or because they have some other selfish motive with the business owner.

There is no question that consumer review sites<sup>10</sup> have had a profound effect on business practices and the impact of reviews posted on these sites can make-or-break a small business.<sup>11</sup> The derisive advice to a business owner plagued by negative reviews to “improve your product or service and you won’t get crappy reviews” is useless when a false or misleading review is posted anonymously or by a person that the business cannot confirm ever purchased the product or used the service. Business decisions are not based on one or two anonymous negative reviews; yet just one negative review can quickly devastate a small business’ overall rating. Moreover, dodgy customers hoping to make the most of a small grievance against a business—or perhaps no grievance at all—threaten to post a bad review in return for discounted or free products or services.

Few practical options exist for small businesses to effectively respond to false or misleading reviews or thwart those customers—who wield the power to write a bad review—seeking to blackmail small business owners. The internal policies of consumer review sites are generally designed to maximize the total number of users and reviews, and in-turn sell advertising at a profit, without regard to the accuracy of any particular review or even ensuring that the reviewer has purchased the

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10. For purposes of this Article, the term “consumer review sites” refers to the broad range of crowd-sourced online consumer review sites. Although not all consumer review sites have identical internal policies, many sites have similar policies for purposes of their use in this article. *See infra* Part I (outlining the internal policies of consumer review sites).

11. *See id.* (outlining the economic impact on businesses of consumer review site ratings); *see also HBS Study Finds Positive Yelp Reviews Boost Business*, HARV. MAG. (Oct. 5, 2011), <http://harvardmagazine.com/2011/10/hbs-study-finds-positive-yelp-reviews-lead-to-increased-business> (concluding that each one-star increase in Yelp! user ratings boost revenue from 5-9%); *see* Gregory Ferenstein, *Berkeley Study: Half-Star Change in Yelp Rating Can Make or Break a Restaurant*, TECH CRUNCH (Sept. 2, 2012), <http://techcrunch.com/2012/09/02/berkeley-study-half-star-change-in-yelp-rating-can-make-or-break-a-restaurant/> (noting that San Francisco restaurants are almost 50% more likely to sell out evening reservations with a half-star upgrade to their Yelp! rating); Judith A. Chevalier & Dina Mayzlin, *The Effect of Word of Mouth on Sales: Online Book Reviews*, 43 J. OF MKTG. RES. 345, 345 (2006) (finding that positive online reviews positively impact book sales).

product or used the service.<sup>12</sup> Indeed, many consumer review sites have no procedures at all to assure readers or the businesses being reviewed that the alleged consumer reviews are from actual customers.<sup>13</sup> Additionally, the sites have no motivation to vet these reviews since the broad immunity of the Communications Decency Act of 1996 (CDA) insulates them from claims related to content on their sites.<sup>14</sup> Furthermore, based on policy of protecting speech important to the public, a business cannot delist itself from a consumer review site.<sup>15</sup> While a reviewed business can generally respond in writing on the site, such response may serve only to draw more unwanted attention to the false or misleading negative posting.<sup>16</sup> Finally, once a review is posted on a consumer review site, its removal is nearly impossible.<sup>17</sup> With these internal policies in place, protection of anonymous defamation and libel under the guise of free speech is the effect.

Legal recourse for claims of defamation against an online reviewer is generally futile because reviewers post comments anonymously and unmasking the identify of an anonymous reviewer is a circular—often losing—battle with state procedures that require a business to prove the statement is false, without knowing the complainer's identity.<sup>18</sup> Anti-SLAPP laws<sup>19</sup> make legitimate claims against a reviewer treacherous

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12. See *infra* Part I (discussing typical internal policies of consumer review sites). Posting guidelines found on consumer review websites generally provide that only people who have purchased the product or used the service *should* write a review, and admonish people to not post false or misleading information, but the sites have no internal policies of ensuring that these guidelines are actually followed in practice. See, e.g., *Content Guidelines*, YELP!, <http://www.yelp.com/guidelines> (last visited Jan. 3, 2016); *How it works*, ANGIE'S LIST, [http://www.angieslist.com/how-it-works.htm?CID=HowItWorksSitelinkBing&s\\_kwid=AL137181101378998443120408574619&ef\\_id=U1GRmgAABZA-hMgz:20150706182201:s](http://www.angieslist.com/how-it-works.htm?CID=HowItWorksSitelinkBing&s_kwid=AL137181101378998443120408574619&ef_id=U1GRmgAABZA-hMgz:20150706182201:s) (last visited Jan. 3, 2016); *Guidelines*, TRIP ADVISOR, <https://www.tripadvisor.com/hc/en-us/categories/200056887> (last visited Jan. 3, 2016); *Review and photo policies*, GOOGLE, <https://support.google.com/business/answer/2622994?hl=en> (last visited Jan. 3, 2016); *Customer Review Creation Guidelines*, AMAZON, <http://www.amazon.com/gp/community-help/customer-reviews-guidelines> (last visited Jan. 3, 2016).

13. For an example of this, see the consumer review policies discussed in *supra* note 12.

14. 47 U.S.C. § 230(c) (1996).

15. See *supra* note 12.

16. See T.C., *What is the Streisand Effect?*, THE ECONOMIST: THE ECONOMIST EXPLAINS (Apr. 15, 2013, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect> (describing that efforts to suppress online information can backfire and end-up drawing more attention to the would-be-censored information; dubbed the "Streisand Effect" after the famous singer sued California Coastal Records for posting images of her Malibu home online, the suit drew attention and caused many more viewers to see the pictures that Streisand wanted to be kept private than otherwise would have bothered to browse through the CCRP's archives).

17. See e.g., Kenton Hutcherson, *How To Remove Ripoff Reports from Google, Not Just Bury Them*, SEARCH ENGINE LAND (Feb. 24, 2011), <http://searchengineland.com/how-to-remove-ripoff-reports-from-google-not-just-bury-them-65173> (explaining the frustrating and helpless feeling in trying to get a negative review removed from Ripoffreport.com).

18. See *infra* Part II(A)(3) (outlining the challenges in navigating states' unmasking statutes).

19. Strategic Lawsuits Against Public Participation (SLAPPs) are lawsuits brought to discourage

because, if unsuccessful, the losing plaintiff may be exposed to onerous costs and fees.<sup>20</sup> Litigation against the consumer review site has proven to be an imprudent response as well because consumer review sites are well insulated from liability under the CDA for the accuracy of information posted on their sites.<sup>21</sup> The only real option for many businesses is to resolve to “play along”—to pay for advertising on each consumer review site and thus “work with” the consumer review site itself to enhance positive feedback and remove negative reviews as just another cost of doing business in the Internet age. It is this reality that has earned Yelp! the moniker: “Billion Dollar Bully.”<sup>22</sup>

Frustrated by the internal policies of consumer review sites and the impracticability of legal recourse, some businesses have gone on the offensive to preempt negative reviews to which they cannot effectively respond by incorporating non-disparagement clauses to their terms and conditions for a purchase or service, effectively barring any negative consumer comments. In response to this tactic precluding negative reviews, California recently enacted legislation that voids most non-disparagement clauses in consumer contracts—even those that may be knowingly, voluntarily and intelligently entered into—and similar federal legislation is pending in a House of Representatives subcommittee.<sup>23</sup> In the meantime, an anti-SLAPP bill was introduced in Congress in May 2015.<sup>24</sup> Unsurprisingly, Yelp! supports these bills.<sup>25</sup>

Like *Wicked’s* rendition of *The Wizard of Oz*—where the playwright tells the well-known story from the perspective of the misunderstood witch from the Land of Oz<sup>26</sup>—the first goal of this Article is to reexamine the relationship between consumer review sites, reviewers, and the businesses being reviewed. Secondly, this Article outlines the obstacles to productive litigation as an option for a small business to respond to false or misleading online reviews, and also the difficulty in precluding false or misleading reviews from being circulated online in the first place. Acknowledging the critical importance of free speech and public debate, the policies behind anti-SLAPP laws, and the

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or keep people from speaking out on issues of public interest. See *infra* Part II(A)(3) (outlining state anti-SLAPP laws and penalties).

20. See *infra* Part II(A)(3) (outlining state anti-SLAPP laws and penalties).

21. See *infra* Part II(A)(2) (outlining the CDA); see also 47 U.S.C. § 230(c) (1998).

22. See *infra* Part I.

23. H.R. 2110, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/2110/text>; see also CAL. CIVIL CODE § 1680 (2015).

24. The SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/2304/text>.

25. Laurent Crenshaw, *Freedom of Speech Deserves Better Federal Protection*, YELP! OFFICIAL BLOG (May 15, 2015, 10:48:03 AM), <http://officialblog.yelp.com/2015/05/freedom-of-speech-deserves-better-federal-protection.html>.

26. WICKED, THE MUSICAL, <http://media.wickedthemusical.com> (last visited July 11, 2016).

universally bad public policy of enabling businesses to offer inferior products and service while secretly tucking non-disparagement clauses into their terms of service, this Article proposes a solution that includes enforcement of non-disparagement clauses in consumer contracts. Such clauses can be analyzed under traditional contract law and do not violate public policy where concrete procedural and substantive safeguards exist, such as those found in other contexts where constitutional rights are contractually waived. This Article concludes that a blanket void of non-disparagement clauses in consumer contracts is a mistaken legislative response as it leaves small businesses with few responsive, and even fewer preemptive, options to deal with the issues of false and misleading reviews posted on consumer review sites.

Part I of this Article explores the seedy underbelly of crowd-sourced consumer review sites through an examination of the general business models and common internal policies of consumer review sites, including allegations of extortionist advertising policies, review manipulation, and review fabrication. As a particular example, Yelp!'s nefarious relationship with small businesses is detailed.<sup>27</sup>

Part II of this Article outlines the treacherous legal landscape and the limited responsive and preemptive options for businesses brawling with the consumer review site bullies. Litigation to quell false or misleading reviews is staged against the backdrop of seemingly insurmountable procedural safeguards to protect the identity of anonymous reviewers, anti-SLAPP laws, the CDA, and recently enacted and proposed state and federal legislation that void non-disparagement provisions in consumer sales and service agreements, as against public policy. This Article demonstrates that attempting litigating against often anonymous reviewers making false or misleading statements about products and services on consumer review sites, or against the consumer review sites themselves, is futile. In some cases, legislative protections of free speech and open debate are stifling litigation intended to impede destructive defamation. Instead, these legislative measures facilitate a business model reliant on dissemination of content, regardless of its accuracy. Small businesses are particularly vulnerable to the consumer review site bullies. Suing an online reviewer for defamation, while an option, is often challenging, cost prohibitive for small businesses, and too time consuming to offer relief from the immediate effect of a negative online review. Small businesses, with perhaps only a few reviews overall, cannot bury a false or misleading review with hundreds of others the way larger business can.

Part III of this Article proposes that non-disparagement clauses in

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27. Prost Prods., Inc., *Billion Dollar Bully Trailer*, YOUTUBE (Mar. 7, 2015), <https://www.youtube.com/watch?v=l2dkJctUDIs> [hereinafter *Billion Dollar Bully Trailer*].

consumer contracts that preclude consumers from posting negative reviews on consumer review sites should not be subject to a blanket legislative void as against public policy. In light of the current legal landscape and the reality of the relationship between consumer review sites, individual reviewers, and the businesses being reviewed, such legislation is too broad in prohibiting non-disparagement clauses in all circumstances. This Article examines conventional contract principles that typically uphold contracts of silence, including contracts that waive constitutional rights in other contexts in order to support the right of consumers and businesses to contract for silence as part of a consumer contract. The business justifications for non-disparagement clauses are explored and this Article suggests that concrete standards for such clauses in consumer contracts would be practical to both implement and enforce.

This Article concludes the legal landscape for small businesses attempting to respond to or preclude false or misleading online reviews should reflect the practical business landscape. The effect of permitting non-disparagement clauses in consumer contracts will not further the unsavory public policy of enabling unscrupulous businesses to offer inferior service while secretly tucking a non-disparagement agreement into their terms of service. Rather, by evaluating these clauses under standard contract principles, and in tandem with other suggested changes, it will improve the integrity of consumer review sites. In this way, consumers' rights to share honest experiences can be maintained and small businesses can be released from the consumer review sites' bullying scheme.

### I. "BILLION DOLLAR BULLY"

In March 2015, Prost Films launched a Kickstarter campaign to develop a documentary titled *Billion Dollar Bully*, exposing Yelp!'s "\$3.6 billion racket" of aggressive advertising techniques, and review manipulation and fabrication, amounting to what the film's developer calls "extortion against small business owners."<sup>28</sup> The two-minute Kickstarter campaign video alleges that Yelp!'s business model includes a practice of manipulating consumer reviews by hiding businesses' positive reviews and highlighting negative ones in an effort to extort advertising money from the reviewed businesses, and ultimately holding the businesses' reputation hostage via their privileged algorithmic filters.<sup>29</sup>

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28. Prost Productions, Inc., *The Billion Dollar Bully*, KICKSTARTER (May 19, 2015), <https://www.kickstarter.com/projects/1299637435/billion-dollar-bully>.

29. See *Billion Dollar Bully Trailer*, *supra* note 27.



The cry from many small businesses supports the premise of the documentary: If a business does not pay for advertising on a consumer review site, positive reviews are filtered out and mysterious negative reviews appear; if a business does advertise, positive reviews are highlighted and the negative reviews disappear; reviewers “shake down” businesses for discounts and freebies with the threat of negative reviews; consumer review sites do not ensure that reviews are written by actual customers; an anonymous negative review will remain, even if it appears to be written by someone who has never purchased the product or used the service. Indeed, social media, blogs, and article comments indicate an untold number of small businesses suffering from false or unfair reviews and conducting business under the constant veiled threats of a “bad review.”<sup>30</sup> The legal protections that insulate dishonest anonymous reviewers and dis-incentivize consumer review sites from implementing protections to avoid misuses of the site, further corroborate these complaints.<sup>31</sup> Prost’s Kickstarter campaign went “viral” in part by small businesses that were fed-up with Yelp!’s manipulation of their businesses’ online reputation.<sup>32</sup> Yelp! shares were down 4% in afternoon trade on March 19, 2015, just three days after the Kickstarter campaign launched.<sup>33</sup> The film’s developer met and exceeded the \$90,000 goal in less than two weeks.<sup>34</sup>

However, even if Prost’s claims in *Billion Dollar Bully* are accurate, they do not amount to extortion according to the Ninth Circuit.<sup>35</sup> The Ninth Circuit recently upheld a district court’s “dismissal of an action by

30. See Lauren Orsini, *Yelp’s Rocky Relationship With Small Businesses*, MEDIA SHIFT (Jan. 29, 2013), <http://mediashift.org/2013/01/yelps-rocky-relationship-with-small-business029/>; see also L. David Russell, *Fake It Until You Make It, Battling Fake Online Reviews*, LAW 360 (June 9, 2014, 12:17 PM), <http://www.law360.com/articles/545366/fake-it-until-you-make-it-battling-fake-online-reviews>.

31. See *infra* Part II (outlining the challenges faced by businesses in overcoming the CDA, anti-SLAPP laws, and unmasking statutes to sue individual reviewers or consumer review sites for false or misleading reviews.).

32. See e.g., BOTTO BISTRO, [www.bottobistro.com](http://www.bottobistro.com) (last visited Feb. 24, 2016). A Richmond, California restaurant with a tag line: “Authentic Tuscan cooking with attitude, also specializing in getting the worst reviews on Yelp!” promotes Prost’s campaign on their website; the restaurant proudly advertises that they are: “the shame and the disgrace of the Yelp[!] community. Our restaurant is so awful that Yelp[!] has decided to remove over 2200 one star reviews from our account because we made their site look bad. Yes we are that bad. Shame on us! Still, we made mama proud!” The restaurant even promotes: “HATE US ON YELP[!]; Give us a ONE star on Yelp[!] and get 50% OFF any pizza. (Take a screenshot with your phone to show it to us and redeem your discount) . . . We also reward the most funny and sarcastic one star review of the month with Free ticket for our cooking class!”).

33. See Myles Udland, *Yelp Shares are Getting Whacked and Traders are Pointing to this Documentary Project on Kickstarter*, BUS. INSIDER (Mar. 19, 2015, 2:22 PM), <http://www.businessinsider.com/yelp-billion-dollar-bully-documentary-2015-3#ixzz3ZCG1aRqB>.

34. Prost Productions, Inc., *Billion Dollar Bully: About this project*, KICKSTARTER, <https://www.kickstarter.com/projects/1299637435/billion-dollar-bully/description> (last visited Apr. 26, 2016).

35. See *Levitt v. Yelp!*, 765 F.3d 1123, 1126 (9th Cir. 2014).

small business owners alleging that Yelp! Inc. extorted advertising payments from them by manipulating user reviews and penning negative reviews of their business.”<sup>36</sup> Thus, in *Levitt v. Yelp!*, a group of small business owners each alleged that Yelp! created negative reviews of their businesses and manipulated review and rating content to induce them to purchase advertising on the site.<sup>37</sup> For example, one business alleged that after declining advertising services, certain positive ratings were removed from the site.<sup>38</sup> Another business alleged that anonymous negative reviews started appearing on the site, accompanied by aggressive advertising sales calls by Yelp! offering to “hide negative reviews” if the business purchased advertising.<sup>39</sup> One business owner, after purchasing advertising, found that her business’s positive reviews were restored days later.<sup>40</sup> However, explaining the “stringent requirements” of stating a claim for extortionate business practices under California’s Unfair Competition Law, the court stated that “unless a person has a pre-existing right to be free of the threatened economic harm, threatening economic harm to induce a person to pay for a legitimate service is not extortion.”<sup>41</sup> The court reasoned that “Yelp[!]’s manipulation of user reviews, assuming it occurred, was not wrongful use of economic fear”<sup>42</sup> even though “[b]usinesses cannot opt out of being listed on Yelp.”<sup>43</sup> The Ninth Circuit further held that business owners had insufficient specific facts from which the court could infer that Yelp! actually penned the negative reviews.<sup>44</sup> The business owners claimed no records of doing the work cited in the review and that the names of the users did not match the names of customers.<sup>45</sup> However, the court held “even if a particular review was not accurate as to the work done or the customer’s name, the inaccuracy does not make it plausible that it was Yelp!—as opposed to a competitor, or a disgruntled customer hiding behind an alias, or an angry neighbor, just to give a few possibilities—that authored the offending review.”<sup>46</sup> The court also noted that since “Yelp! has the right to charge for legitimate advertising services, the [alleged] threat of economic harm . . . is, at most, hard bargaining.”<sup>47</sup>

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36. *Id.*

37. *Id.* at 1127.

38. *Id.*

39. *Id.* at 1127-28.

40. *Levitt*, 765 F.3d at 1128.

41. *Id.* at 1131.

42. *Id.*

43. *Id.* at 1126.

44. *Id.* at 1135.

45. *Levitt*, 765 F.3d at 1136.

46. *Id.*

47. *Id.* at 1134.

Yelp! is a behemoth in the consumer review site arena. Founded in 2004, Yelp! has 142 million unique monthly visitors, over 77 million user reviews, and 2.1 million claimed local businesses.<sup>48</sup> Over 90,000 local businesses advertise on Yelp!<sup>49</sup> bringing the total revenue for the first quarter of 2015 to over \$118 million.<sup>50</sup> With these distinctions, Yelp! has an impact on a business' bottom line that cannot be understated: a Harvard Business School study found that "a one-star increase in [a] Yelp! rating leads to [between] a five-to-nine percent increase in revenue."<sup>51</sup> Yelp! itself publicizes that "[a]n extra half-star rating causes restaurants to sell out 19 percentage points more frequently (increase from 30% to 49% of the time), and up to 27 percentage points more frequently when alternate information is more scarce (e.g., Yelp! is the only source of information about the business.)"<sup>52</sup> Confirming the disproportionate impact that consumer review sites have on small businesses, the study further showed that although such ratings had no appreciable effect on large businesses such as chain restaurants, the ratings had a very significant impact on small businesses.<sup>53</sup>

Despite fiscal influence on small businesses, the internal policies of many consumer review sites do not demonstrate responsible control over their processes. Philosophically, the business model of most consumer-sourced review sites is admirable: the majority center around an online hosted site that allows visitors to search a directory of local businesses and read reviews written by other people, post their own reviews of businesses, and rank businesses.<sup>54</sup> While some consumer review sites require registration prior to posting a review, it is generally free for a customer to submit a review—positive or negative—and can be submitted anonymously, with no process for confirming that the reviewer has actually purchased the product or used the service being reviewed.<sup>55</sup> Businesses cannot opt-out of being listed and reviewed on

48. Craig Smith, *By the Numbers: 45 Amazing Yelp Statistics*, DMR (Nov. 24, 2015), <http://expandedramblings.com/index.php/yelp-statistics/>.

49. *Id.*

50. *Id.*

51. *HBS Study Finds Positive Yelp Reviews Boost Business*, HARV. MAG. (Oct. 5, 2011), <http://harvardmagazine.com/2011/10/hbs-study-finds-positive-yelp-reviews-lead-to-increased-business>.

52. Darnell, *New Study Reinforces the Value of Yelp for Businesses*, YELP! OFFICIAL BLOG (Sept. 17, 2012), <http://officialblog.yelp.com/2012/09/new-study-reinforces-the-value-of-yelp-for-businesses.html>.

53. *Id.*

54. *See, e.g.*, YELP!, *supra* note 12 (guidelines do not require any evidence of purchase of product or use of service being reviewed); ANGI'S LIST, *supra* note 12 (guidelines do not require any evidence of purchase of product or use of service being reviewed); TRIPADVISOR SUPPORT, *supra* note 12 (guidelines do not require any evidence of purchase of product or use of service being reviewed); GOOGLE, *supra* note 12; AMAZON, *supra* note 12 (guidelines require evidence of some purchase of product on Amazon, but not the actual product or service being reviewed).

55. *See* YELP!, *supra* note 12.

these for-profit consumer review sites.<sup>56</sup> Some consumer-review sites do not have policies that permit removal of reviews, even by the original poster, and even where the business can demonstrate a high likelihood that the review is false or misleading.<sup>57</sup>

There is no motivation for online consumer review sites to improve their policies to ensure only honest feedback by actual customers because the CDA insulates the consumer review site from liability for any statements made on their site.<sup>58</sup> The motivation of a consumer review site is profit garnered from advertising, and advertising prices are increased by the number of visitors, reviews, and site members, not the accuracy of the information on the site. However, fueled by the media splash of *Billion Dollar Bully*, the seedy underbelly of crowd-sourced user review websites is gradually being acknowledged.

The Internet is littered with informal complaints by businesses alleging shakedown-type advertising tactics, corrupt filtering of positive reviews unless and until a business agrees to pay for premium advertising, and complaints that Yelp! is resistant to implementing policies to deal with consumer-led intimidation and blackmailing. To say that Yelp! has a rocky relationship with small businesses is an understatement.<sup>59</sup> There is a Facebook page “presented as a place for businesses who have been harmed by Yelp!’s malicious review policies” with over 1500 “likes” and a myriad of business owners claiming that same story of sabotage over and over: “Yelp! offers to hide negative customer reviews of their businesses on its web site . . . for a price.”<sup>60</sup> Moreover, Yelp! has been referred to as a “Modern Day Digital Mafia,”<sup>61</sup> there is a YouTube video “dedicated to businesses expressions that Yelp sucks”<sup>62</sup> and another satirical video depicts “what if Yelp were

56. *See id.*

57. *Id. See also Arbitration Program, RIPOFF REPORT*, <http://www.ripoffreport.com/Arbitration.aspx> (last visited Feb. 24, 2016). Ripoffreport.com does not allow edit or removal of a review, even by the original author; a business who wishes to challenge a posted review as false must agree to the “VIP Arbitration” rules that require the business to provide Ripoff Report with three things “1.) a signed copy of the Arbitration Agreement; 2.) a complete copy of your Arbitration Statement including any and all supporting evidence, such as documents or Witness Statements (subject to limitations which are discussed in detail in the Program Rules) you want the Arbitrator to review; and 3.) a check for the [\$2,000] arbitration fee . . . . No arbitration matter will begin until we receive all of these things.”

58. 47 U.S.C. § 230(c)(1)-(2) (2015).

59. *See generally* Orsini, *supra* note 30; *see also* L. David Russell, *supra* note 30.

60. *Yelp Sucks! Businesses Fight Back*, FACEBOOK (Apr. 24, 2013), <https://www.facebook.com/pages/YELP-Sucks-Businesses-Fight-Back/263402807082326>.

61. Alexandra Myers, *Does Yelp Advertising Suck? The Modern Day Digital Mafia*, THE SERV. COACH (Oct. 21 2013), <http://theservicecoach.com/does-yelp-suck-the-modern-day-digital-mafia/>.

62. *Yelp Sucks - Yelp Really Sucks!*, *Yelp Review Filter VS. Yelp Filters Reviews*, YOUTUBE (June 16, 2012), <https://www.youtube.com/user/YelpSucks>.

real life.”<sup>63</sup>

The great irony of potential consumers looking to consumer review sites for honest reviews is that their trust is misplaced. Reports indicate that about 20% of all Yelp reviews are fake.<sup>64</sup> There is a thriving business of “reputation management firms” posting paid-for positive reviews as well. Despite their lack of response to the problem of fake negative reviews, consumer review sites have taken great pains to make sure that the fake positive reviews are removed.<sup>65</sup> Yelp! touts an “astroturfing filter,” a proprietary algorithm to filter-out fake reviews—kept secret to avoid “gaming the system”—but the algorithm itself is the source of much controversy. Businesses claim that it in some cases simply filters out positive reviews as a guise to convince small businesses to advertise with Yelp!.<sup>66</sup>

Perhaps most egregious is that the value of a business’ online reputation, coupled with the lack of procedures assuring only honest reviews by actual customers on consumer review sites, gives unscrupulous individuals the opportunity to intimidate and blackmail businesses for free or discounted products or services with the threat of a poor review.<sup>67</sup> Consumers are well aware of their social media clout and the lengths businesses will go to avoid a negative review, with some willing to take advantage of that position.<sup>68</sup> Social media blackmailing is a real problem for businesses, particularly small businesses whose ratings would be vulnerable to just one or two negative postings and

63. Adyrenn Ashley, *What If Yelp! Were Real Life*, YELP-SUCKS.COM, <http://yelp-sucks.com/what-if-yelp-were-real-life.html> (last visited Apr. 27, 2016).

64. Jacob Siegel, *20% of All Yelp Reviews are Reviews Are Written by Paid Shills*, BGR (Sept. 25, 2013, 11:15 PM), <http://bgr.com/2013/09/25/fake-yelp-reviews/>.

65. See Kaitlin A. Dohse, Note, *Fabricating Feedback: Blurring the Line Between Brand Management and Bogus Reviews*, 13 U. ILL. J.L. TECH. & POL’Y 363, 374 (2013).

66. See *id.* See also *Levitt v. Yelp*, 765 F.3d 1123, 1126 (9th Cir. 2014) (a group of small business owners each alleged that Yelp! created negative reviews of their businesses and manipulated review and rating content to induce them to purchase advertising on the site); *Yelp Inc. v. Catron*, 70 F. Supp. 3d 1082 (N.D. Cal. 2013); Beth Winegarner, *Yelp[!] Must Pay Law Firm’s Fees In Fake-Review Case*, LAW360 (Nov. 25, 2013, 5:04 PM), <http://www.law360.com/articles/491464/yelp-must-pay-law-firm-s-fees-in-fake-review-CASE> (discussing *Yelp Inc. v. McMillan Law Group Inc.*, No. CGC 13-533654 (Cal. App. Dep’t Super. Ct. Aug. 20, 2013)).

67. See Charles Passey, *I Complained Online and Got \$1200 Back*, MKT. WATCH (Aug. 28, 2014, 2:47 PM), <http://www.marketwatch.com/story/i-complained-online-and-got-1200-back-2014-07-31>.

68. See Jill Kransey, *Restaurant Goers Are Turning To Yelp To Blackmail Owners For Lousy Service*, BUS. INSIDER, <http://www.businessinsider.com/restaurant-goers-are-using-yelp-to-blackmail-owners-for-lousy-service-2012-5#ixzz3hy2rN1Zk>; see also *Yelp Extortion: Sacramento Man Tries To Blackmail Restaurant With Bad Review*, HUFFINGTON POST (May 30, 2012, 1:04 PM), [http://www.huffingtonpost.com/2012/05/30/yelp-extortion-sacramento\\_n\\_1556207.html](http://www.huffingtonpost.com/2012/05/30/yelp-extortion-sacramento_n_1556207.html). A customer threatened to post a negative review on Yelp! of Red Rabbit Kitchen and Bar unless the owner agreed to pay him \$100; the customer alleged that he got food poisoning after dining at the restaurant. The owner said that although there was no way to substantiate the man’s claim, he had, at which point the man demanded \$100.

lack a legal department to respond.

After involuntarily being listed and reviewed, with no assurances that reviews are by individuals who have actually purchased the product or used the service, and no assurance that other real reviews have not been filtered from view by the consumer review site's secret astroturfing program, a business has few out-of-court responsive options<sup>69</sup> including: changing the product or business practices complained of online, responding to the reviewer on the consumer review site, or paying for advertising on the consumer review site and hope for the best.

A valid justification for the current consumer review site business model is that online reviews can help businesses gain valuable insight into the consumer experience and even strengthen customer relationships through the online exchange.<sup>70</sup> Reasoning that online feedback is valuable and relevant, the contention is that “[a] major purpose of reviews is to create an effective consumer feedback loop: consumers use a product or service, and then review it online or elsewhere, so that other consumers can take those reviews into consideration.”<sup>71</sup> That is, a business can respond to negative online feedback with changes and improvements that can then be reviewed again, with improved ratings. However, that goal is undermined when the reviewer is anonymous and the feedback is possibly not from a real customer. A rational business does not make truly meaningful changes to its products, service, or policies based on one or two anonymous negative reviews, even though those reviews can have a devastating effect on a small business's reputation and revenue.<sup>72</sup> In a large company with thousands of reviews, a few false—and perhaps negative—reviews are lost in the sea of honest reviews, giving consumers an overall more honest view of the product or service. But for a small business, with few reviews, one negative review can make a big difference. Thus, advising a business to simply provide an excellent product or service so that it need not worry about negative online reviews, fails to take into account the reality of the consumer review sites' policies.

Some businesses may respond in writing to reviewers' ratings and reviews on the site. The drawbacks to this are many, including that a

69. See *infra* Part II (discussing litigation options).

70. Ann Marie Marciarille, *How's My Doctoring? Patient Feedback Role In Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 367, 370-71 (2012) (exploring concepts of whether patients are consumers and doctors are service providers, arguing that online patient feedback is valuable and relevant because the modern patient-physician relationship is sufficiently commercial such that reputational information is amenable to information in this format).

71. Daniel Castro & Laura Drees, *Why We Need Federal Legislation To Protect Public Speech Online* at 4, INFO. TECH. & INNOVATION FOUND. (2015), <http://www2.itif.org/2015-anti-slapp.pdf>.

72. See Part I (outlining the fiscal effect of consumer review site ratings on small businesses).

response to a negative or misleading review may draw more unwanted attention to that review.<sup>73</sup> Ironically, while consumer review sites generally have no policy for ensuring that a review is written by an actual customer, a business can only respond to a review if the business is “claimed” and the consumer review site is able to authenticate that the person leaving the response is actually permitted to do so.<sup>74</sup> Thus, before a business can respond to a review, a business must be “claimed” by providing identifying information and confirming that the responder has the right to represent the business, and “click the button” to agree to the consumer review site’s Terms of Service,<sup>75</sup> including choice of law, indemnity, disclaimer and use restrictions.<sup>76</sup>

Some businesses are not permitted to respond to online criticism at all because, unlike restaurants and hotels, businesses that employ physicians, lawyers and other professionals may not be able to discuss a particular client’s care due to confidentiality concerns. For example, while doctor review sites permit the possibility that anonymous and damaging comments to their reputation and practice may be written by “[a] competitor[], disgruntled ex-employees, or anyone else with an axe to grind,”<sup>77</sup> a doctor generally cannot discuss a patient’s care due to medical privacy laws.<sup>78</sup> This limits a physician’s ability to respond to

73. See T.C., *supra* note 16 (discussing the Streisand effect).

74. *Id.*

75. *Terms of Service*, YELP! (Nov. 27, 2012), <https://www.yelp.com/static?country=US&p=tos>.

76. See e.g., *Guidelines for Business Owners*, YELP!, <https://biz.yelp.com/> (guidelines permit business written response to online reviews after the business is “claimed”); *ANGIE’S LIST*, *supra* note 12 (guidelines permit business written responses to online reviews, but must be submitted through the Business Center website and can be done after the business has created a free account and logged in); *Management Response Guidelines*, TRIP ADVISOR SUPPORT, <https://www.tripadvisorsupport.com/hc/en-us/articles/200614337-Management-Response-Guideline> (last visited Feb. 25, 2016) (guidelines permit written response to online reviews after business is “claimed” and an account is set up through the Management Center); *Reply to Reviews*, GOOGLE, [https://support.google.com/business/answer/6001256?hl=en&ref\\_topic=6001257](https://support.google.com/business/answer/6001256?hl=en&ref_topic=6001257) (last visited Feb. 25, 2016); *Customer Review Creation Guidelines*, AMAZON, [http://www.amazon.com/gp/help/customer/display.html/ref=amb\\_link\\_47889982\\_1?ie=UTF8&nodeId=201602680&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_s=center-1&pf\\_rd\\_r=10FWHQ83SC0AAAVTDCT8&pf\\_rd\\_t=7001&pf\\_rd\\_p=2338627022&pf\\_rd\\_i=customer-reviews-guidelines](http://www.amazon.com/gp/help/customer/display.html/ref=amb_link_47889982_1?ie=UTF8&nodeId=201602680&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-1&pf_rd_r=10FWHQ83SC0AAAVTDCT8&pf_rd_t=7001&pf_rd_p=2338627022&pf_rd_i=customer-reviews-guidelines) (guidelines permit anyone to respond in writing to online reviews, and “a person officially associated with a product, such as the manufacturer, has the additional ability to add a highlighted comment,” but this is permitted only if Amazon can verify that it comes from “an authenticated creator of the product”).

77. Sean D. Lee, *I Hate My Doctor: Reputation, Defamation, and Physician Review Websites*, 23 HEALTH MATRIX 573, 574 (2013) (acknowledging the practice of false and misleading reviews of physicians, and arguing for extrajudicial solution of monitoring online profiles, establishing a positive online identity and accepting the realities of negative online reviews).

78. Marciarille, *supra* note 70, at 361, 402 (citing AMA Code of Medical Ethics Opinion 8.03: Conflict of Interest (“Under no circumstances may physicians place their own financial interests above the welfare of their patients. The primary objective of the medical profession is to render service to humanity: reward or financial gain is a subordinate consideration.”)).

online criticism.<sup>79</sup> Other professional services like lawyers similarly bear the same impact of false, negative, or misleading reviews with limited responsive options.<sup>80</sup> While an attorney is not wholly precluded from responding to online criticism, they are barred from disclosing confidential information about the client's matter, seriously restricting the detail with which a response can be formulated.<sup>81</sup>

A final option for businesses imperiled by false or misleading negative reviews is to "play along" with the consumer review site's profit model as just another cost of doing business. Indeed, businesses have the option of entering into advertising agreements with the consumer review sites, making their ad appear on competitors' pages, and removing ads purchased by other businesses from their review page.<sup>82</sup> Consumer review sites do not suggest that paid advertising with them will result in better customer service for purposes of removing false negative reviews and making positive ones reappear, but the implication from untold number of online bloggers with firsthand experience suggests that is precisely the sales strategy of their advertising agents.<sup>83</sup>

Consumer review sites may be sorely misunderstood giants who cannot shake the persistent extortionist mafia persona. Regardless, the

79. *See id.* at 402.

80. *Id.* at 364, 377 (discussing that doctors, like other small business owners looking to protect their reputation and practice, are increasingly suing and being met with the same road-blocks to justice; defamation suits are as unpractical in a patient-doctor context as in any other business-customer context because the same issues of reviewer anonymity and strong free speech protections win out); *see also* Laurel A. Rigertas, *How Do You Rate Your Lawyer? Lawyers' Responses to Online Reviews of Their Services*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 242, 250 (2014); John G. Browning, *The Digital Detractor*, 77 TEX. B.J. 610, 613 (2014).

81. *See, e.g., In re Betsy Tsamis, Joint Stipulation and Recommendation for a Reprimand Before the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission*, Commission No. 2013PR00095 at ¶ 10 (Jan. 15, 2014), [http://www.iardc.org/HB\\_RB\\_Dispatch\\_Html.asp?id=11221](http://www.iardc.org/HB_RB_Dispatch_Html.asp?id=11221) (a Chicago lawyer was accused of disclosing confidential information about a client in response to a negative Avvo review and was reprimanded for his action); N.Y. Bar Ass'n Ethics Op. 1032 (Oct. 30, 2014), <https://www.nysba.org/CustomTemplates/Content.aspx?id=52969> ("A lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a website that includes client reviews of lawyers."); Cal. Bar Ass'n Advisory Op. 2014-1 (Jan. 2014), [https://www.sfbbar.org/ethics/opinion\\_2014-1.aspx](https://www.sfbbar.org/ethics/opinion_2014-1.aspx) ("An attorney is not ethically barred from responding generally to an online review by a former client where the former client's matter has concluded . . . [but] Attorney's ongoing] duty of confidentiality [prohibits Attorney] from disclosing [any] confidential information about the prior representation absent the former client's informed consent or [a] waiver of confidentiality."); *but see* LA. RULES OF PROF'L CONDUCT 1.6(b)(5) r. 1.6(b)(5) (permitting a lawyer to disclose confidential information in self-defense, though such a disclosure must not only be "reasonably . . . necessary," but also attendant to an ongoing or imminent formal "proceeding").

82. *Full Service Advertising*, YELP!, [https://biz.yelp.com/support/full\\_service\\_advertising](https://biz.yelp.com/support/full_service_advertising) (last visited Feb. 29, 2016).

83. It is beyond the scope of this article to delve into the veracity of the accusations of the extortionist advertising practices, but anti-Yelp! sentiment is rampant on social media; *see, e.g.,* YELPLAWSUIT.COM: REAL CLASS ACTION SUIT BY REAL PEOPLE, [YelpLawsuit.com](http://YelpLawsuit.com) (last visited Feb. 29, 2016).



realities of the relationship between consumer review sites, reviewers, and the businesses being reviewed demonstrate real inequities that must be considered in formulating a solution to ensure the goals of the consumer review site are met—honest and accurate feedback, not legalized defamation.

## II. BRAWLING WITH THE BULLY

Consumer review site bullies are well insulated on many levels, ultimately leaving the reviewed businesses with futile litigation options and the inability to proactively preclude false or misleading reviews. Suing a user review website based on the accuracy of the content on the site is pointless as the CDA provides a safe harbor for consumer review sites from allegations of extortion, defamation, or failure to remove any reviews.<sup>84</sup> This, of course, leaves the consumer review sites with no motivation to change their internal policies to ensure the accuracy of the information posted on their sites. While businesses are not generally interested in suing individual reviewers, since the website host likely has deeper pockets, the reviewer is left as the sole target. This avenue is often pointless, as individual reviewers are shielded from most claims because they can act anonymously and unmasking a reviewer's identity is fraught with procedural and constitutional challenges.<sup>85</sup> Furthermore, attempts to quell individual reviewer comments can result in the business being subject to state anti-SLAPP laws.<sup>86</sup> Frustrated by the

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84. 47 U.S.C. § 230(c)(1); see, e.g., *Fair Hous. Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d 1157, 1161-62 (9th Cir. 2008) (en banc); *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (circuit courts have interpreted the CDA to broadly immunize almost all interactive website operators from defamation actions stemming from third-party content).

85. Suing an online reviewer for defamation is an often unproductive claim for several other reasons as well, but the issue of reviewer anonymity is the focus of this article. Exemplifying other complexities of a defamation claim against an online review, see *Seaton v. TripAdvisor*, 728 F.3d 592 (6th Cir. 2013). The plaintiff-hotel brought suit against TripAdvisor for defamation and false-light invasion of privacy for defendant's inclusion of plaintiff's hotel on a top ten list titled "2011 Dirtiest Hotels." *Id.* at 594-95. The court held that the plaintiff failed to state a claim for defamation because the placement on the list was protected opinion due to the list "employ[ing] loose, hyperbolic language and its general tenor undermin[ing] any assertion by [the plaintiff] that the list communicates anything more than the opinions of TripAdvisor's users," and also held that Seaton failed on the false light cause of action because "he did not allege that he was personally named on the list." *Id.* at 596. Finally, the court opined that "'top ten' lists and the like appear with growing frequency on the web," and it is unreasonable that people reading these lists would expect them to be scientific fact because TripAdvisor's "method of compiling its user reviews and surveys . . . is 'inherently subjective.'" *Id.* at 600-01.

86. Robyn Hagan Cain, *Internet Commenter Beats Defamation Suit with Anti-SLAPP Motion*, FINDLAW (Oct. 8, 2012, 3:02PM), [http://blogs.findlaw.com/california\\_case\\_law/2012/10/internet-commenter-beats-defamation-suit-with-anti-slapp-motion.html](http://blogs.findlaw.com/california_case_law/2012/10/internet-commenter-beats-defamation-suit-with-anti-slapp-motion.html). See also *supra* notes 19-20 and accompanying text.

predicament of the seemingly unfair position they are in, some businesses have attempted to proactively preclude such issues from arising by contracting with their customers to prohibit the customer from disseminating negative reviews, but this option too is slowly being dismantled by state and proposed federal legislation.

### *A. Futile Responsive Litigation Tactics*

Small businesses face a treacherous legal landscape when contemplating legal action in the face of false or misleading reviews posted on consumer review sites. Currently, the CDA insulates the consumer review sites from liability for nearly any content on their sites. Additionally, unmasking statutes make identifying anonymous reviewers for purposes of defamation claims almost impossible. Lastly, the prospect of being on the hook for attorney fees and costs via state anti-SLAPP laws make the prospect of any litigation at all particularly risky.

#### 1. The Communications Decency Act of 1996: Safe Harbor to the Bully

While the internal operating policies of most consumer review sites provide ample opportunity for abuse, consumer review sites have little motivation to incorporate policies to prevent these abuses because they are insulated from publisher liability by the CDA.<sup>87</sup> The CDA provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>88</sup> The protected intermediaries include not only Internet Service Providers (ISPs), but also “interactive computer service providers,”<sup>89</sup> including online services that publish third-party content, like a consumer review site host.<sup>90</sup> Thus, third-party

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87. 47 U.S.C. § 230(c)(1) (1998). *See also* Paul Ehrlich, *The Communications Decency Act*, 17 BERKLEY TECH. LAW J. 401, 409-10 (2002).

88. 47 U.S.C. § 230(c)(2) (1998).

89. *Id.* § 230(f)(2) (“[‘]Interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions” and “[t]he term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service”).

90. *Id.* § 230(f)(3). *But see* 47 U.S.C. § 230(e) for exceptions for certain criminal and intellectual property:

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

content providers may be held liable for claims arising from statements they publish, but liability is not imputed to interactive computer services' hosts, acting merely as intermediaries, facilitating the publication of such content.<sup>91</sup> Therefore, consumer review sites that accept user-generated content are not liable for defamation claims or claims of extortion for failure to remove any reviews stemming from that content, provided these reviews are submitted by a third-party user.<sup>92</sup> Even amidst allegations of content creation and manipulation, courts appear unwilling to find consumer review site's liable.<sup>93</sup> The result of such immunity is that it would be highly impractical for online intermediaries to prevent objectionable content from appearing on their sites, and the potential liability for their users' actions would disincentivize sites from hosting any user content at all or compel them to continuously censor the site content.<sup>94</sup>

For example, in *Schneider v. Amazon.com, Inc.*, the plaintiff was an author with books for sale on the defendant's website, which also allowed for visitors to the website to post books reviews.<sup>95</sup> Plaintiff sued Amazon.com for defamation and tortious interference with business expectancy for negative comments posted by a third-party reviewer on the site in violation of Amazon's posting guidelines.<sup>96</sup> While Amazon's terms of service provide that Amazon reserves the right to edit or remove postings, it ultimately did not remove the offending postings.<sup>97</sup> The Washington Court of Appeals affirmed the lower court's decision that the Amazon was immune from suit under the CDA.<sup>98</sup> The court noted that the posting originated from a third-party

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

91. See, e.g., *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (website host was immunized from liability for comments posted by its users when it provided open fields for their "additional comments" but lost Section 230 immunity when it provided "drop-down" menus with answers for users' responses); *Shiamili v. Real Estate Group of N.Y., Inc.*, 952 N.E.2d 1011, 1020 (N.Y. 2011) (section 230 immunity immunized a company from defamation claim where employees blogged a comment that included allegations that a competitor was racist and anti-Semitic as a stand-alone blog post and added a headline and photo of Jesus Christ with the competitor's face superimposed on the image and wrote a caption describing him as "King of the Token Jews"); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (distinguishing *Roommates*, where the structure and design of the website did not sufficiently contribute to the illegal content)

92. *Levitt v. Yelp Inc.*, No. C 10-1321 MHP, 2011 U.S. Dist. LEXIS 99372, at \*\*29-31 (N.D. Cal. Mar. 22, 2011) (discussing Yelp's potential liability for deliberate manipulation of customer reviews); see also *Hare v. Richie*, No. ELH-11-3488, 2012 WL 3773166, at \*\*18-19 (D. Md. Aug. 29, 2012) (discussing potential liability of the website for derogatory remarks made by a third party).

93. See *Levitt*, 2011 U.S. Dist. LEXIS 99372, at \*\*20-21.

94. *Id.* See *Hare*, 2012 WL 3773166, at \*\*17, 19.

95. *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 38 (Wash. Ct. App. 2001).

96. *Id.* at 39.

97. *Id.* at 38.

98. *Id.* at 43.

reviewer, notwithstanding Amazon's right to edit or remove the postings.<sup>99</sup> Amazon accordingly was immunized because the accusations were based on Amazon's alleged failure to timely remove the offending postings from its site, a liability for which the CDA provides immunity.<sup>100</sup> It held that "assuming Schneider could prove existence of an enforceable promise to remove the comments, Schneider's claim is based entirely on the purported breach—failure to remove the posting—which is an exercise of editorial discretion. This is the activity the statute seeks to protect."<sup>101</sup>

Similarly, in *Reit v Yelp!, Inc.*, the plaintiff, a dentist, alleged that his practice was defamed by an anonymous poster on Yelp!.<sup>102</sup> The New York Supreme Court dismissed the dentist's claims on the grounds that Yelp! was immune from liability for the defamation claim because of its status as an interactive computer service.<sup>103</sup> Plaintiff also claimed that Yelp! used deceptive acts and practices because of Yelp!'s "procedure of removing positive reviews and highlighting negative ones" being "used as leverage to coerce businesses and professionals into paying for advertising."<sup>104</sup> The court held that Yelp!'s decision to remove positive reviews and maintain only the negative review under dentist's listing was an exercise of a publisher's traditional editorial functions.<sup>105</sup> The court held that "Yelp[!]'s statement [was] not materially misleading to a reasonable consumer seeking dentistry, and [was] not a deceptive practice[.]" because the "allegation that Yelp[!] deletes postings for the purpose of selling advertising, if true, is business conduct, not consumer-oriented conduct."<sup>106</sup>

The CDA was not intended "to create a lawless no-man's-land on the Internet."<sup>107</sup> Instead, the CDA was introduced to incentivize service providers to delete or otherwise monitor content, particularly "obscene, lewd, lascivious, filthy, exceedingly violent, harassing, or otherwise objectionable," without them becoming publishers, and thus subject to liability.<sup>108</sup> The law was written to permit, but not require, site hosts to

99. *Id.* at 42-43.

100. *Schneider*, 31 P.3d at 43.

101. *Id.* at 41.

102. 907 N.Y.S.2d 411, 412 (N.Y. Sup. Ct. 2010)

103. *Id.* at 415.

104. *Id.* at 413.

105. *Id.* at 413-14.

106. *Id.* at 415.

107. *Fair Hous. Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

108. 47 U.S.C. § 230(c)(2)(A) (2015). *See also* 47 U.S.C. § 230(b):

Policy. It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

remove certain content,<sup>109</sup> and some consumer review sites have used this as justification for not removing content from their websites.<sup>110</sup> While many of the provisions regulating content on the Internet for “decency” have been struck from the Act as violations of the First Amendment, the grant of immunity to ISPs and other interactive computer services for content originating with third-parties has survived.<sup>111</sup> As a result, the CDA has been interpreted broadly to “immunize almost all interactive website operators from defamation actions stemming from third-party content.”<sup>112</sup>

Attempts to sidestep the CDA have been mostly unsuccessful. Businesses have in some cases attempted to avert false or misleading negative reviews through copyright assignments so businesses can go directly to the ISP with copyright infringement claims to issue copyright violation takedown notices, a simpler process compared to other litigation.<sup>113</sup> For example, Medical Justice, an online reputation protection firm touting a “pioneering combination of medico-legal expertise, resources, and medical reputation management services[,]” produced for sale a form contract to assign all intellectual property rights in patient reviews to the physician, in consideration for confidentiality of patient medical information.<sup>114</sup> The Center for Democracy & Technology filed a complaint with the Federal Trade Commission regarding Medical Justice’s sale of the form contract, alleging deceptive and unfair business practices and Medical Justice

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

109. Ehrlich, *supra* note 87, at 407-08; *see also* Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (holding that Congress intended § 230’s broad immunity to internet providers because when “[f]aced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.”).

110. *See Arbitration Program, supra* note 57 (policy to consider removal of certain content from its website only when presented with a court order declaring information in a Report defamatory).

111. Ehrlich, *supra* note 87, at 408. *See also* Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 849 (1996) (holding portions of the CDA unconstitutional for its overbroad limitations on protected speech).

112. *See* Andrew Bluebond, Note, *When the Customer is Wrong: Defamation, Interactive Websites, and Immunity*, 33 REV. LITIG. 679, 684 (2014) (debate regarding whether the CDA is suitable for the Internet in 2014 and beyond).

113. Lee, *supra* note 77, at 593 n.139.

114. *See* “What We Do”, MEDICALJUSTICE.COM, <http://www.medicaljustice.com/services/what-we-do/> (last visited Mar. 1, 2016). *See also* Lee, *supra* note 77, at 605.

stopped selling these forms in 2012.<sup>115</sup>

With no requirement to remove content and no legal repercussions for the accuracy of the content, a consumer review site can shelter in the safe harbors of the CDA and businesses are thwarted from brawling with the consumer review site bullies.

## 2. Unmasking the Identity of Anonymous Reviewers

In theory, individual reviewers are liable for defamation for false or misleading reviews posted online. However, in practice, reviewers are mostly shielded from the legal repercussions from such postings. While the CDA immunizes consumer review sites from claims based on the content posted by third parties on their sites, reviewers themselves are liable for the accuracy of the content. To be sure, while the First Amendment ensures free speech, it does not protect false or untruthful comments that defame a company's reputation.<sup>116</sup> Defamatory and libelous speech "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>117</sup> Thus, in deciding whether a company can sue individual reviewers for their negative comments online, it comes down to the ability of the reviewed business to prove that the statements made were untrue. That is, claims for defamation are unwarranted unless the statements are factually false because the First Amendment prevents opinions from serving as the basis of defamation actions.<sup>118</sup> However, where the online reviewer is anonymous, proving that an online review is false is problematic because the reviewed business does not know what the consumer's experience actually was until the identity of the consumer is revealed.

The United States Supreme Court has recognized that a speaker's decision to remain anonymous is "an aspect of the freedom of speech protected by the First Amendment"<sup>119</sup> and online speech has as much

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115. *Id.* Lee, *supra* note 77, at 599.

116. *Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials.").

117. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

118. *Milovich v. Lorain Journal Co.*, 497 U.S. 1, 17-18 (1990) (addressing the constitutional limits of fact versus opinion); *see also* *Brompton Bldg., LLC v. Yelp!, Inc.*, No. 1-12-0547, 2013 WL 416185, at \*\*2, 10 (Ill. Ct. App. Jan. 31, 2013) (applying the fact versus opinion doctrine in consumer case; broadly construing "opinion" to include reviewer's specific online allegations that plaintiff lied about the date it received her rent check and that plaintiff "is illegally charging tenants late fees for their rent").

119. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (anonymity is generally protected under the first amendment, though commercial speech is subject to lesser protections).

First Amendment protection as offline speech.<sup>120</sup> Accordingly, in many states, identifying an anonymous user's identity is challenging because a business seeking documentation via subpoena to the user review website must essentially prove a case against an anonymous reviewer on the merits before forcing the disclosure of the reviewer's identity.<sup>121</sup> The test used to balance a person's right to anonymously speak on the Internet against the right to protect one's identity is the *Dendrite-Cahill* test.<sup>122</sup> This requires a plaintiff who seeks to unmask anonymous users to: (1) provide sufficient notice to the anonymous posters that they are the subject of an application to disclose their identity; (2) identify the exact statements, which purportedly constitute actionable speech; and (3) provide the court with sufficient evidence to establish a prima facie case.<sup>123</sup> Thereafter, the court must balance the defendant's First Amendment right against the strength of the prima facie case presented.<sup>124</sup> Therefore, a plaintiff must often have substantial evidence before bringing a lawsuit.<sup>125</sup>

For example, in *Independent Newspapers, Inc. v. Brodie*,<sup>126</sup> a Maryland appellate court held that the trial court abused its discretion by compelling the identification of an online reviewer because the reviewed business failed to prove a valid defamation claim.<sup>127</sup> The court devoted much of the opinion to reviewing the history of anonymity on the Internet, focusing on the fact that anonymity has historically been part of Internet culture<sup>128</sup> and has "played an important role in the progress of mankind."<sup>129</sup> Applying the *Dendrite* rule, the court recognized that protection of anonymous speech is not absolute when defamatory,<sup>130</sup> but held the following remarks were protected speech: "dirty and

120. See *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 868 (1997).

121. See e.g., *Dendrite Intern., Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (rejecting an attempt to compel Yahoo to disclose the identity of the person who posted negative comments on an online bulletin board about a business because evidence of damage, an element of a claim for defamation, was not shown); see also Erik P. Lewis, Note, *Unmasking "Anon12345": Applying An Appropriate Standard When Private Citizens Seek The Identity Of Anonymous Internet Defamation Defendants*, U. ILL. L. REV. 947, 955 (2009).

122. *John Doe No. 1 v. Cahill*, 884 A.2d 451, 460 (Del. 2005); see also *Dendrite Intern., Inc.*, 775 A.2d at 770.

123. *John Doe No. 1*, 884 A.2d at 460.

124. *Id.*

125. See *id.* at 461; *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 244-45 (Cal. Ct. App. 2008). The plaintiff, president of a publicly traded "global development drug service company," sued ten "Doe" defendants for anonymous defamatory remarks made on internet message boards and served a subpoena on the custodian of records at Yahoo! The court found that the online postings did not constitute "assertions of actual fact and therefore were not actionable."

126. *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 419 (Md. 2009).

127. *Id.* at 440.

128. *Id.* at 438-39.

129. *Id.* at 440.

130. *Id.* at 441-42.

unsanitary-looking food-service plates . . . allowing trash from those establishments to ‘waft’ into the nearby waterway,”<sup>131</sup> and claims accusing the plaintiff of committing arson.<sup>132</sup> The Court explained that the plaintiff was not able to establish a sufficient claim for defamation against any of the online reviewers to justify revealing their actual identities.<sup>133</sup>

Highlighting the further difficulty of enforcing a subpoena, the Virginia Supreme Court recently vacated a state appellate order requiring Yelp! to comply with a subpoena to reveal the identities of certain reviewers a local business claimed had posted false negative reviews.<sup>134</sup> In *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, Hadeed filed a defamation action against three anonymous defendants, alleging they falsely represented themselves as customers and posted false negative reviews regarding Hadeed’s business on Yelp!.<sup>135</sup> Each of the reviews in question made similar disparaging claims, including price gouging, charging double the estimate, or damaging and shrinking rugs. One of the reviews came from an individual claiming to be in New Jersey, a state in which Hadeed does not operate.<sup>136</sup> Hadeed compared the reviewers’ claims with customer records and found that none matched, demonstrating that the reviewers were not actual customers. Hadeed issued a subpoena to Yelp!, seeking the author’s identifying information.<sup>137</sup> After complying with Virginia’s procedural requirements for a subpoena seeking to unmask the anonymous speaker, the trial court held that Yelp! must comply with the subpoena to reveal the reviewers identities.<sup>138</sup> The trial court issued an order enforcing the subpoena and eventually held Yelp! in civil contempt when it refused to comply.<sup>139</sup> The Court of Appeals affirmed the trial court decision<sup>140</sup> and the Virginia Supreme Court ultimately reversed and vacated the order, finding “the circuit court was not empowered to enforce the subpoena

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131. *Indep. Newspapers*, 966 A.2d at 442.

132. *Id.*

133. *Id.* at 430.

134. *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440, 441 (Va. 2015).

135. *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554, 558 (Va. Ct. App. 2014), vacated, 770 S.E.2d 440, 441 (Va. 2015).

136. *Id.* at 567.

137. *Id.* at 558.

138. VA. CODE ANN. § 8.01-407.1(A) (a person seeking a subpoena to unmask the anonymous Internet speaker must demonstrate: speech that actually is or may be tortious or illegal; other efforts to identify the speaker have proved fruitless; identity of the speaker is needed; no case-ending (summary judgment, demurrer, etc.) motion is pending; the individual subpoenaed have or are likely to have the information. There is also a notice to the speaker provision, which allows the speaker to contest the unmasking”).

139. *Hadeed Carpet Cleaning*, 752 S.E.2d at 557.

140. *Id.*



*duces tecum* against Yelp.”<sup>141</sup> The court explained the circuit court was not empowered to enforce the non-party subpoena *duces tecum* directing Yelp to produce documents located in California in connection with Hadeed’s underlying defamation action against the John Doe defendants in the Virginia circuit court [because] [t]he information sought by Hadeed is stored by Yelp in the usual course of its business on administrative databases within the custody or control of only specified Yelp employees located in San Francisco, and thus, beyond the reach of the circuit court.<sup>142</sup>

The practical application of these constitutional safeguards for anonymous speech in defamation claims in the context of review posted on consumer review sites, coupled with the CDA’s immunity of the consumer review site, is that legal recourse against an individual reviewer or the consumer review site itself is inconsequential.

### 3. Anti-SLAPP Laws

Even if a business is able to state a claim against an online reviewer or consumer review site, anti-SLAPP laws make litigation particularly risky.<sup>143</sup> Strategic Lawsuits Against Public Participation (SLAPPs) are lawsuits brought against people who speak out on issues of public interest.<sup>144</sup> Most states have anti-SLAPP laws to protect people from harassment or intimidation from speaking out on matters of public concern.<sup>145</sup> The laws are grounded in the constitutional right of free

141. *Id.*

142. *Hadeed Carpet Cleaning*, 770 S.E.2d at 445.

143. Robert D. Richards, *A SLAPP In the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites*, 21 DEPAUL J. ART, TECH. & IP LAW 221, 223 (2011).

144. *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940 (Mass. 1998) (anti-SLAPP cases are “generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so”).

145. While no current federal anti-SLAPP legislation exists, a federal anti-SLAPP bill was introduced in Congress in May, The Speak Free Act, 2015 H.R. 2304, 114th Cong. (2015). State statutes exist in: Arizona (ARIZ. REV. STAT. §§ 12-751-752 (2006)); Arkansas (ARK. CODE ANN. §§ 16-63-501--508 (2005)); Delaware (10 DEL. CODE ANN. §§ 8136-8138 (1992)); District of Columbia (D.C. CODE 16-5502 (2011)); Florida (FLA. STAT. §§ 720.304, 768.295 (2000)); Georgia (GA. CODE ANN. § 9-11-11.1 (1996)); Hawaii (HAW. REV. STAT. §§ 634F-4 (2002)); Illinois (735 ILL. COMP. STAT. 110/1-110/99 (2007)); Indiana (IND. CODE ANN. § 34-7-7-1-10 (1998)); Louisiana (LA. CODE CIV. PROC. ANN. art. 971 (1999)); Maine (14 ME. REV. STAT. ANN. § 556 (1995)); Maryland (MD. CTS. & JUD. PROC. CODE ANN § 5-807 (2004)); Massachusetts (MASS. GEN. LAWS ANN. ch. 231, § 59H (1994)); Minnesota (MINN. STAT. §§ 554.01-05 (1994)); Missouri (MO. REV. STAT. § 537.528 (2004)); Nebraska (NEB. REV. STAT. §§ 25-21,241-246 (1994)); Nevada (NEV. REV. STAT. §§ 41.635-670 (1993)); New Mexico (N.M. STAT. §§ 38-2-9.1-9.2 (2001)); New York (N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (2008); N.Y. C.P.L.R. § 3211); Oklahoma (12 OKLA. STAT. § 1443.1 (1994)); Oregon (OR. REV. STAT. §§ 31.150-.152 (2001)); Pennsylvania (27 PA. CONS. STAT. §§ 7707, 8301-8303 (2000)); Rhode Island (R.I. GEN.

speech and petition and the harm to public interest if critics are silenced from sharing their experiences in a public forum.<sup>146</sup> Anti-SLAPP laws are not intended to protect false criticism or speech intended solely to harm competitors; yet, reviewers and consumer review sites shelter here as well.

To protect public participation, anti-SLAPP laws give defendants the option to file a special motion to dismiss a SLAPP claim and recover costs and attorneys' fees.<sup>147</sup> To succeed on an anti-SLAPP motion, a defendant must generally show that (1) the statement in question was made in a public forum and concerned an issue of public interest and (2) the plaintiff is not likely to succeed on the merits of the claim.<sup>148</sup> "Online reviews, courts generally hold, are statements made in a public forum and do sometimes concern an issue of public interest."<sup>149</sup> However, requiring a plaintiff to provide proof demonstrating the likelihood of success on their defamation claim is a difficult task early in litigation, especially if the review's author is anonymous.

For example, in *Davis v. Avvo, Inc.*, the plaintiff, a board certified attorney in health law, brought suit for false advertising, misrepresentation, and use of his photograph, against Avvo, Inc., a website operator that provides professional profiles and rankings to the public.<sup>150</sup> Among other allegations, Davis claimed, that Avvo listed him as an employment lawyer when in fact he was a board-certified health law practitioner. The plaintiff alleged that the defendant "coerced lawyers by illegal and tortious conduct, on an epidemic scale, to correct mislistings" by intentionally misstating lawyers' practice areas as a way to force lawyers to "claim" their profile (to correct it) and then Avvo induces them to buy a premium membership to prevent competitors' ads from appearing on their profile pages.<sup>151</sup> Davis also alleged that a potential client who had used Avvo contacted him upon concluding that

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LAWs §§ 9-33-1-4 (1995)); Tennessee (TENN. CODE ANN. §§ 4-21-1001-1004 (1997)); Texas (TEX. CIV. PRAC. & REM. CODE §§ 27.001-.011 (2011)), Utah (UTAH CODE ANN. §§ 78B-6-1401-1405 (2001)); Vermont (12 V.S.A. § 1041 (2005)); and Washington (WASH. REV. CODE (ARCW) §§ 4.24.500-.525 (2010)). Judicially adopted protections against SLAPPs exist in: Colorado, see *Protect Our Mountain Env't, Inc. v. District Court of Cty. of Jefferson*, 677 P.2d 1361 (Colo. 1984), and West Virginia, *Harris v. Adkins*, 432 S.E.2d 549 (W. Va. 1993). The following states do not have anti-SLAPP laws: Wyoming, Alabama, Alaska, Connecticut, Idaho, Iowa, Kansas, Kentucky, Mississippi, Montana, Michigan, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, **South Carolina**, South Dakota, Virginia, and Wisconsin.

146. Richards, *supra* note 143, at 222.

147. *Id.* at 243.

148. See, e.g., *Wong v. Jing*, 117 Cal. Rptr. 3d 747, 759 (Cal. Ct. App. 2010) (citing CAL. CODE CIV. PRO. § 425.16 (2009)).

149. See *Bently Reserve LP v. Papaliolios*, 160 Cal. Rptr. 3d 423 (Cal. Ct. App. 2013); see also *Wong*, 117 Cal. Rptr. 3d at 759.

150. No. C11-1571RSM, 2012 U.S. Dist. LEXIS 43743, at \*\*1-3, 7 (W.D. Wash. Mar. 28, 2012).

151. *Id.* at \*14.

because he was the “lowest rated employment lawyer” he must be “desperate for employment.”<sup>152</sup> Avvo subsequently filed and met its burden for an anti-SLAPP motion,<sup>153</sup> finding reasoning that the Avvo website is “an action involving public participation” that qualifies for anti-SLAPP protection under Washington State law. The U.S. District Court for the Western District of Washington found that the profile pages on Avvo's website constituted a vehicle for discussion of public issues, pointing out that the website provides potentially helpful information to the public and that the public could participate in the forum by providing reviews of lawyers. Protected by the anti-SLAPP law, the burden then shifted to Davis to show, by clear and convincing evidence, a probability of prevailing on his claims. The court concluded that Davis did not meet that burden and held that the plaintiff provided no evidence in his complaint “to demonstrate that there is any probability of prevailing” on his claim because he only presented firsthand knowledge of the allegations and did not explain “how [the] allegedly deceptive act of Avvo induced him to act or refrain from acting in some manner” or allege actual damages.<sup>154</sup> The court granted defendant's motion to strike and held that Avvo, protected by Washington's anti-SLAPP law, was entitled to attorneys' fees and costs, as well as a \$10,000 statutory penalty.<sup>155</sup>

While the procedures and protections of anti-SLAPP laws vary, they are all meant to “protect[] citizens from David and Goliath power difference” that exist between SLAPP parties.<sup>156</sup> The reality of the relationship between consumer review sites, individual reviewers, and businesses is that small businesses have no recourse against individual reviewers or consumer reviews sites. Consequently, the admirable policies behind anti-SLAPP laws are often not upheld.

### *B. Futile Proactive Preclusion Tactics*

Against the backdrop of the CDA, unmasking statutes, and anti-SLAPP laws, legal recourse to rebuff false or misleading reviews posted on consumer review sites is often futile. Because the internal policies of consumer review sites are equally unproductive, some businesses have attempted to proactively preclude such issues from arising by contracting directly with their customers to prohibit the customer from disseminating negative reviews. Little litigation has been amassed on

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152. *Id.*

153. *Id.* at \*8.

154. *Id.* at \*\*20-22.

155. *Id.* at \*25.

156. See *Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 314 (D. Mass. 2003).

the enforceability of such non-disparagement clauses in consumer contracts, but California's A.B. 2365 and the proposed Consumer Review Freedom Act of 2014 (CRFA) contribute to the seemingly insurmountable laws stacked against small businesses in attempting to brawl with the bullies.

### 1. California A.B. 2365

The rhetoric surrounding *Palmer v. KlearGear*—addressing the need to protect customers from unwittingly being silenced from posting honest reviews about shoddy products and service—was the impetus for California Assembly Member John A. Pérez to introduce California A.B. 2365 in February 2014.<sup>157</sup> With its passage, California became the first state to codify legislation specifically targeting non-disparagement clauses in consumer contracts. Dubbed the “Yelp! Bill,” the new law effectively prohibits all non-disparagement provisions in consumer sales and service agreements as against public policy.<sup>158</sup> Unaware, perhaps, of the CDA, the challenges in navigating unmasking statutes, and anti-SLAPP laws, Perez queried:

[s]uch clauses also arguably raise a question as to why defamation actions are not sufficient to address harms where the statements are false and harm the other party's business reputation as that recourse would not impose a gag order on customers for honest reviews based not only on their perception of their experience, but also based potentially on the objective facts.<sup>159</sup>

Supporting the ban on non-disparagement clauses, the Bill's introduction further provides that “[e]xisting law generally regulates formation and enforcement of contracts, including what constitutes an unlawful contract. Under existing law a contract is unlawful if it is

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157. *Assembly Floor Analysis for Assembly Bill 2365 from May 9, 2014*, 2013-14 Regular Sess. 3, [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140AB2365](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB2365) (“Although this particular example happened to not originate in California, in the age of Internet commerce it just as easily could have, since the physical location of online businesses is largely irrelevant because online consumers can typically purchase goods regardless of where they live. Indeed, an Internet search shows that non-disparagement clauses have recently emerged in consumer contracts in several contexts, including at least one involving a California company.”).

158. California A.B. 2365 was codified as CAL CIV. CODE § 1670.8(a)(1) (2015) (“A contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer’s right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.” It is also “unlawful to threaten or to seek to enforce such non-disparagement clause, or to otherwise penalize a consumer for making any statement protected under this section, and subjects any person violating this provision to a \$2,500 civil penalty for the first violation, and \$5,000 for each violation thereafter.”).

159. *Sen. Judiciary Comm. Analysis for Assembly Bill 2365 from June 23, 2014*, 2013-14 Reg. Sess. 5, [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140AB2365](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB2365).

contrary to an express provision of law, contrary to the policy of express law, though not expressly prohibited, or otherwise contrary to good morals.”<sup>160</sup>

Indeed, the stated public policy underlying the proposed legislation was admirable: it aimed to protect customers from unscrupulous businesses seeking to hide shoddy products and substandard service behind non-disparagement clauses hidden deep within the boilerplate of the terms and services. The Senate Judiciary Committee described the Bill as one that would outlaw a contract for the sale of consumer goods or services if it “includes a provision requiring the consumer to waive his or her right to make any statement regarding the consumer’s experience . . . unless the waiver of this right was knowing, voluntary, and intelligent.”<sup>161</sup> Perez, explaining the stated need for the Bill, wrote:

Consumers should not be financially penalized for providing honest online statements relative to their on line retail transaction experience. Honest feedback i[s] crucial to assure consumer confidence in the on line retail environment. Therefore consumers should not unknowingly or unwillingly give up this right to speak freely about their online retail experience. Such non-disparagement clauses go beyond an embargo on business-oriented “trade secrets,” but instead represent an unreasonable limitation on individual freedom. AB 2365 helps to ensure this free flow of communication.<sup>162</sup>

Based on this, California A.B. 2365 was passed with near universal approval, and no record of voiced opposition is found in the Assembly or Senate Committees.<sup>163</sup>

Despite its admirable stated purpose, the actual language and reach of the legislation is much broader than the narrow set of circumstances for which it was intended. While the legislative history and proposed language of the Bill reflected concern with a scenario like Palmer’s, in which a non-disparagement clause was secretly inserted into a consumer contract, the proposed language allowing for a “knowing, voluntary and intelligent” waiver was stricken leaving the codified law voiding any non-disparagement clause in a consumer contract.<sup>164</sup> Thus, the text of

160. California A.B. 2365, codified at CAL CIV. CODE § 1670.8(a)(1) (2015), [http://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201320140AB2365](http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201320140AB2365).

161. *Sen. Judiciary Comm. Analysis for Assembly Bill 2365 from June 23, 2014*, 2013-14 Reg. Sess. 5, [http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140AB2365](http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB2365).

162. *Id.*

163. *Assembly Floor Vote for Assembly Bill 2365 from May 15, 2014*, 2013-14 Reg. Sess. 5, [http://leginfo.ca.gov/faces/billVotesClient.xhtml?bill\\_id=201320140AB2365](http://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201320140AB2365).

164. CAL. CIV. CODE § 1670.8(a) (2015) provides that “A contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer’s right to

the codified law—California Civil Code Section 1680.8(a)—is not consistent with its own underlying public policy.

Accordingly, in California, a consumer cannot contract with a business—even in a knowing, voluntary, and intelligent manner—to waive their right to disparage a business. It shields not only unscrupulous businesses seeking to protect shoddy products and substandard service from review, but also legitimate businesses trying to protect themselves against unscrupulous customers or competitors who may anonymously, unfairly, or falsely disparage the business product or services. This effectively opens the floodgates for dodgy customers hoping to make the most of a small grievance against a business—or perhaps no grievance at all—to threaten posting a bad review in return for discounted or free products or services.

California remains the only state to pass legislation directly on point, but it has reinforced the growing sentiment against non-disparagement clauses in consumer contracts. Other states and the federal government are currently considering similar legislation.

## 2. The Consumer Review Freedom Act of 2014

The Consumer Review Freedom Act of 2014 (CRFA) was introduced into the United States House of Representatives in September of 2014 based on suggestions that “Congress should pass legislation that would void anti-disparagement clauses in consumer contracts that restrict consumers from making public comments on businesses . . . [and] authorize the Federal Trade Commission to take action against businesses [who insert such clauses into consumer contracts].”<sup>165</sup>

Supporting the CRFA, Representative Eric Swalwell noted “[i]t’s un-American that any consumer would be penalized for writing an honest review.”<sup>166</sup> Mostly paralleling California’s law, the CRFA bars certain contract provisions that prohibit consumers from commenting publicly about businesses. The CRFA provides:

a provision of a form contract is void from the inception of such contract if [it]: (1) prohibits or restricts the ability of a person who is a party to the form contract to engage in [written, verbal, or pictorial reviews, or other similar performance assessments or analyses of, the products, services, or conduct of a business that is a

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make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.”

165. Castro & Drees, *supra* note 71, at 10.

166. Laura Ryan, *Congress’s Right for Your Right to Yelp*, NAT’L J. (Sept. 17, 2014), <https://swalwell.house.gov/media-center/in-the-news/congresss-fight-your-right-yelp>.

party to the contract]; (2) imposes a penalty or fee against [such a person] for engaging in [such communications]; or (3) assigns or provides an exclusive license, or requires [such a person] to assign or provide an exclusive license, to any of the person's intellectual property rights that such party has or may have [in such communications].<sup>167</sup>

Unlike California's legislation, the proposed federal legislation does not specify statutory penalties or create a private cause of action for use of non-disparagement clauses, but rather provides for enforcement by the Federal Trade Commission and state attorneys general.<sup>168</sup> Notably, in the legislation's definitions sections, the Bill defines "form contract" as "a standardized contract used by a business and imposed on a party without a meaningful opportunity for said party to negotiate the standardized terms."<sup>169</sup> This language implies that if a party were provided a meaningful opportunity to negotiate the standardized terms, the law would not prohibit the parties from including a non-disparagement clause as part of a consumer contract. Yet, the actual language of the law remains unknown and—if following in California's precedent—the legislature could still back-step on this too.

### III. A PROPOSAL TO ENFORCE NON-DISPARAGEMENT CLAUSES IN CONSUMER CONTRACTS

*Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.*<sup>170</sup>

The extension of rules declaring that a given contract clause void as a matter of public policy requires scrutiny of those underlying public policies themselves. The recently enacted state, and proposed federal, legislation voiding non-disparagement clauses in consumer contracts fail to consider scenarios where such clause may be a justifiable business practice. In particular, California Civil Code Section 1680.8(a)—the text of which extends far beyond the original underlying policy—exemplifies the need to closely examine the underlying public policies as the other states and the federal government consider this same

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167. H.R. 5499, 113th Cong. § 2(a) (2014). *But see id.* § 2(c) (the law sets forth a few exceptions for the prohibition: a provision shall not be considered void under this Act if the provision prohibits disclosure of certain: (1) trade secrets or commercial or financial information, (2) personnel and medical files, or (3) law enforcement records).

168. *Id.* § 2(e)-(f).

169. *Id.* § 2(g)(3).

170. *Printing & Numerical Registering Co. v. Sampson*, [1875] EWCA (Civ) 19 L.R.-. Eq. at 465 (Eng.).

concern.

Stemming from *Palmer v. KlearGear* is the mistaken rhetoric that any business seeking to incorporate a non-disparagement clause into a consumer contract is solely trying to silence online feedback while it sells shoddy products and service. That court did not scrutinize the non-disparagement clause under traditional contract law theories; yet, the default judgement in that case inspired the “public policy” upon which the California legislation and the proposed federal legislation was based, declaring non-disparagement clauses in consumer contracts to be unenforceable.<sup>171</sup> While little case law has been amassed on the enforceability of such clauses in this context, the issue is ripe for analysis and courts must acknowledge that scenarios exist in which a non-disparagement clause in a consumer contract is a justifiable business practice. These clauses can properly be analyzed under traditional contract law to give effect to those agreements entered into in a knowing, voluntary and intelligent manner.

The public policy contract defense has played a crucial role in a wide range of contract cases and can be based on constitutions, statues, local ordinances, administrative regulations, case precedent, and a judge’s personal view of “what public interest or morality requires to overrule market choices.”<sup>172</sup> This doctrine has been applied to various scenarios such as illegal contracts and those that obstruct the administration of justice.<sup>173</sup> Moreover, this doctrine, although having no precise definition,<sup>174</sup> allows courts to “subjugate private ordering to a system of state regulation, override the expressed preferences of private parties, and substitute their own judgment for that of the market.”<sup>175</sup>

Courts often use public policy as a justification to not enforce a contract.<sup>176</sup> However, this may create the risk that public policy defenses are used too liberally, making it a rule instead of the

171. See *Senate Judiciary Committee Hearing*, *supra* note 159, at 6.

172. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 442 (1993). See also Benjamin P. Cooper, *Taking Rules Seriously: The Rise of Lawyer Rules As Substantive Law and the Public Policy Exception in Contract Law*, 35 CARDOZO L. REV. 267, 276 (2013) (“In weighing a public policy against enforcement of a term, the Restatement directs courts to consider: (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.”).

173. Shell, *supra* note 172, at 441.

174. See, e.g., *Allen v. Commercial Cas. Ins. Co.*, 37 A.2d 37, 38-39 (N.J. 1944); Brawner v. Brawner, 327 S.W.2d 808, 812 (Mo. 1959) (explaining that public policy is synonymous with social welfare or the good of the collective body).

175. Shell, *supra* note 172, at 438 (this ability to overrule market choices can “add[] a degree of uncertainty to commercial transactions”).

176. See John Bernard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647, 660 (1985).



exception.<sup>177</sup> This power makes it difficult to predict scenarios in which public policy will be applied by a court,<sup>178</sup> frustrates the expectations of the non-breaching party, and could unjustly enrich the breaching party.<sup>179</sup> Some courts have remedied this by requiring a “substantial” public policy.<sup>180</sup> A similar approach has been taken in the limited public policy exception to the general arbitration deference.<sup>181</sup> For example, the Restatement (Second) suggests that public policy defenses should only be used to justify the non-enforcement of a contract when “public policies against enforcement ‘clearly outweigh’ the interests in favor of enforcement.”<sup>182</sup>

Non-disparagement clauses have long appeared as negotiated terms of business-to-business contracts, settlement agreements, and employment contracts, and sound public policies, including the freedom to contract, have upheld these clauses as justifiable business practices. Indeed, the policing of contract terms must always be balanced with the right to contract, guaranteed by the Fifth Amendment of the United States Constitution.<sup>183</sup> Courts have developed a framework to analyze terms in consumer contracts, particularly those purporting to waive constitutional rights. A similar framework could be applied to non-disparagement clauses in consumer contracts.

A contract must be entered into in a voluntary, knowing, and intelligent manner<sup>184</sup> so as not to violate public policy.<sup>185</sup> Under section 178 of the Restatement of Contracts, a contract term is unenforceable on public policy grounds “if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances

177. *Id.*

178. *Id.*

179. Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 298-99 (1998).

180. *Feliciano v. 7-Eleven Inc.*, 559 S.E.2d 713, 718 (W. Va. 2001).

181. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (establishing a framework for courts reviewing public policy claims; the court must determine whether there is an explicit, well defined, and dominant public policy that is “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests, then determine whether the arbitration award itself is clearly shown to be ‘contrary’ to the explicit, well-defined, and dominant public policy”). See also *In re Grievance Arbitration Between State Org. of Police Officers*, 353 P.3d 998, 1007-09 (Haw. 2015).

182. Garfield, *supra* note 179, at 299.

183. *Freedom of Contract*, CCH-TRR ¶ 630.40, 2010 WL 204453 (Wolters Kluwer).

184. See Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 409 (1964).

185. Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall,”* 79 B.U.L. REV. 263, 281 (1999) (in determining whether a contract violates public policy, “[t]he question is: ‘Is the reduction of individual freedom caused by the regulation or decision outweighed by either the need to protect the health and welfare of members of society or by such considerations as equality, fairness, or community?’”).

by a public policy against the enforcement of such terms.” Thus, if legislation does not specifically address a public policy basis for non-enforcement, the Restatement provides that a court can deny enforcement to a contract term if, under the circumstances, public policy outweighs the interests in favor of enforcing the term. These bases for enforcing contracts clarify the importance of the legislature being informed of both sides of a public policy before enacting law that will be used as the basis to void contracts. It also suggests that courts should be reluctant to deny enforcement on public policy grounds unless enforcement is clearly outweighed by public policy for non-enforcement.

There is no question that contracts of silence warrant careful judicial scrutiny. Of concern is when the accuracy of the information forming the basis of the public policy itself is questionable, because then the legitimate interest in its dissemination is diminished. That is, legislation as a basis for non-enforcement based on public policy raises concern over the accuracy of the legislative analysis itself. For example, where the honesty of a review found on consumer review sites cannot be assured, and the potential harm to the reviewed businesses is so grave, there seems questionable overriding public interest in the speech.

Speech, of course, is permissibly restricted by contract in many contexts. For example, non-disparagement clauses are common to employment separation agreements.<sup>186</sup> In this context, employees typically agree to not “defame, disparage, or criticize the reputation, practices, or conduct of the company and its employees, directors, and officers” in order to receive a benefit, such as severance pay,<sup>187</sup> and are often created to preclude badmouthing by former employees.<sup>188</sup> Society accepts that this is beneficial to a business because it allows loss prevention when a business must terminate an employee, and decreases the risk and cost of litigation.<sup>189</sup> Based on similar sound public policies, permissible speech restrictions are also found in confidentiality and non-compete covenants. For example, “anticompetitive covenants have been included in contracts for the sale of a business or practice, in employment contracts, in partnership agreements, and in lease

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186. See, e.g., Joe English, *EEOC Takes Aim at Nondisparagement Clauses*, 26 No. 7 Ga. Emp. L. Letter 1 (2014).

187. *Id.*

188. *Id.*

189. Megan M. Belcher, *A Clean Break: Best Practices in Negotiating and Drafting Severance Agreements*, ASS'N OF CORP. COUNSEL DOCKET 36-37 (Mar. 2008) (non-disparagement clauses are necessary in the modern world where there is ever-increasing “employee mobility,” litigation costs, and a need to protect proprietary information).

agreements.”<sup>190</sup> Since the 1960s, physician restrictive covenants have also steadily gained in use and importance within the medical community.<sup>191</sup>

Substantive standards for non-disparagement clauses could be crafted to ensure the policies behind the CDA and anti-SLAPP laws are upheld, so that people with honest criticisms are not silenced by unscrupulous businesses seeking to shield themselves from reproach. For example, the law presumes that customers have read and understand the terms of their product or service agreement; yet, there is no question that courts should safeguard the sound public policy of ensuring that unscrupulous businesses do not hide clauses deep in the fine print of a long contract.<sup>192</sup> As such—acknowledging that consumers have become accustomed to ignoring the boilerplate text contained online and that most consumers simply “click through” the terms and conditions to complete a purchase<sup>193</sup>—current contract law voids any such contracts of adhesion.<sup>194</sup> Under this existing framework, a non-disparagement clause not entered into in a knowing, voluntary and intelligent manner would not be enforced. On the flip side, courts should permit enforcement of ones where the consumer explicitly acknowledges and agrees to such terms.

For example, courts routinely enforce contracts between businesses and sales or service customers where customers relinquish their right to a trial before their peers.<sup>195</sup> Given the potential for abuse with this business practice, courts have developed strict standards to ensure that arbitration clauses are agreed to in a knowing, voluntary, and intelligent manner by requiring certain formatting characteristics to make the arbitration provision obvious, often requiring consumers to sign or initial right next to the arbitration provision itself.<sup>196</sup> Contractual

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190. Francis M. Dougherty, *Anticompetitive covenants: aerial spray dust business*, 60 A.L.R.4th 965 (1988) (footnotes omitted).

191. Joey D. Havens & Roy W. Breitenbach, *Non-Competes: Enforceable or Not?*, AHLA-PAPERS P02050716 (2007).

192. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

193. See *supra* note 163.

194. See, e.g., *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 985 (9th Cir. 2007) (an agreement may be unconscionable “when the party with substantially greater bargaining power presents a take-it-or-leave it contract to a customer,” or if the terms are overly one-sided or if its terms have an overly harsh effect); *Kilgore v. Key Bank, Nat’l Ass’n*, 718 F.3d 1052 (9th Cir. 2013); *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229 (Cal. Ct. App. 2005), *abrogated in part by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

195. See, e.g., *Kilgore*, 718 F.3d 1052.

196. Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882-83 (2008) (finding that over seventy-five percent of consumer contracts contain mandatory arbitration clauses).

arbitration has become quite common in consumer settings<sup>197</sup> and due to the enactment of the Federal Arbitration Act of 1925 (FAA), arbitration agreements are given the same treatment by courts as other contractual provisions.<sup>198</sup> These arbitration clauses have been increasingly enforced in consumer related disputes<sup>199</sup> in consumer contracts involving the “average American consumer.”<sup>200</sup>

Somehow, once a waiver of constitutional rights is clothed as a binding arbitration clause, the courts evaluate it like any other contractual provision. Some courts even give preference to arbitration clauses, construing them more broadly and holding them valid more often than if they were dealing with basic contract terms . . . . Rather than require that binding arbitration clauses be entered into knowingly, voluntarily, and intentionally, the Court has said that arbitrability questions should be resolved in favor of arbitration, regardless of the events surrounding the agreement.<sup>201</sup>

Thus, contractual arbitration agreements are “valid, irrevocable, and enforceable,” except upon grounds sufficient to revoke any contract.<sup>202</sup> “No longer must a court ask if the party knowingly, voluntarily, and intentionally waived its rights, but rather it must work against a presumption of arbitrability and ask if the arbitration clause shows fraud, duress, or unconscionability.”<sup>203</sup> Arbitration agreements are also subject to common law contract defenses.<sup>204</sup> Courts have further developed procedural safeguards for arbitration including mandatory clauses, guaranteed access to courts for common law negligence and damages, party consent, voluntary commitment, and party agreement,

197. Richard C. Reuben, *Constitutional Gravity: a Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 966-67 (2000) (citing to examples in banking, health care, insurance, cell phone and credit card agreements, and retail purchases).

198. Michelle L. Caton, Comment, *Form Over Fairness: How the Supreme Court's Misreading of the Federal Arbitration Act Has Left Consumers in a Lurch*, 21 GEO. MASON L. REV. 497, 498-99 (2014).

199. Reuben, *supra* note 197, at 963.

200. *Id.*

201. Marissa Dawn Lawson, *Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facie Unconscionable*, 23 REV. LITIG. 463, 472-73 (2014).

202. Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91, 100-01 (2000) (there are two different views of the public policy standard of arbitration agreements: “Under one interpretation, an arbitration award can be vacated on public policy grounds only if the arbitration award itself violates positive law or requires the employer to violate positive law. This standard has been denominated the narrow or *limitist* exception. The alternative view, the broad public policy exception, does not require a demonstration that the arbitration award either violates positive law . . . but rather looks for a conflict with public policy more broadly defined”) (emphasis in original).

203. Lawson, *supra* note 201, at 479.

204. Reuben, *supra* note 197, at 1005.

and that no party is egregiously favored.<sup>205</sup> And although many have expressed concern for due process in regards to arbitration, the Supreme Court “has demonstrated an extremely flexible approach to determining whether a situation constitutionally satisfies” due process.<sup>206</sup>

Procedural and substantive regulation of non-disparagement clauses in consumer contracts can both ensure that the terms are entered into in a knowing, voluntary, and intelligent manner. Any claim of trickery can be avoided by requiring the business to make the non-disparagement clause conspicuous—through the provision’s placement, other formatting, or both—and requiring the consumer to sign or initial right next to the clause to ensure that the consumer has read the term. If concrete standards for non-disparagement agreements in consumer and sales contracts were both practical to implement and enforce, they would protect businesses from the stranglehold of online reviews and protect consumers from being tricked into silencing terms of service to which they did not agree. The same policies facing arbitration can fairly be applied to non-disparagement agreements and would permit small businesses to protect their reputations online, while also ensuring that customers are not tricked into a contract for bad service and no speech outlet.

The ideal scenario would be to preserve the integrity of consumer review sites as a forum for sharing honest and accurate consumer experiences. However, incorporating non-disparagement clauses into consumer contracts would not wholly solve all issues surrounding the consumer review site bullies, but rather will give some businesses some leverage. Returning to the CDA’s original goal of incentivize service providers’ to delete or otherwise monitor content, the CDA could require consumer review sites to maintain a straightforward and immediate option for a reviewed business to remove—or hide from public view temporarily—any negative review until it confirms that reviewer actually purchased product or used service. At a minimum, consumer review sites could conspicuously identify which reviews are created by “verified users” of the product or service being reviewed, and which are not. A proof of purchase requirement or receipt code could be implemented. This process could be wholly anonymous for the reviewer, thus not interfering with the reviewer’s right to anonymous speech.

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205. Zahed Amin, *Exposing Dead Air: Challenging the Constitutional Sufficiency of Uninsured Motorist Arbitration Procedures*, 22 OHIO ST. J. ON DISP. RESOL. 527, 553-54 (2007) (other suggested safeguards are: “(1) adequate and reasonable notice, (2) an impartial decision maker, (3) the opportunity to present evidence, (4) an opportunity to have witnesses testify under oath, (5) judicial review, and (6) the opportunity to have legal representation,” and (7) discovery to allow claimants to establish a prima facie claim).

206. *Id.* at 554-55 (observing the modern trend of a presumption of a valid arbitration award).

Furthermore, a user review website would not be prohibited from noting—even highlighting, perhaps with a prominent symbol, flag, or phrase—that a listed business has a non-disparagement clause in its terms of service. That acknowledgment may work to delegitimize the solely positive reviews posted to that business, and solve the underlying issue of misleading the public. Facebook, Twitter, and social media would also ensure that the public was well aware of any egregious non-disparagement clauses—while a customer could not post a negative review, potential customers who were offered the service or product and refused based on the non-disparagement agreement, could certainly share their experience of being offended by such a contract term. People reading the reviews would know that the negative reviews were not of the actual product or service, but the reviewers distaste for the business practices. Public perception of a business incorporating a non-disparagement clause as part of its terms and service is bound to make some businesses pause.

The use of non-disparagement clauses may change the reliability of consumer review sites but not the reliability of information that actually reaches the consumer. That is, while businesses that require their customers to consent to non-disparagement clauses will only have positive reviews on consumer review sites, with a simple designation notifying readers that a certain business uses this type of clause in its terms of service, customers will question why some businesses only have positive reviews. Better yet, with practical regulations and contract standards in place to limit the effects of truly false reviews, and real-world response mechanisms to unfair reviews, user review websites will be motivated to alter their business model.

#### IV. CONCLUSION

Consumer review sites have not heeded the adage, “with great power comes great responsibility.” Instead, they shelter behind the CDA, anti-SLAPP laws, unmasking statutes, and the rhetoric of free speech and public debate. These justify their policies of inaction in ensuring that reviews are written by actual customers or their failure to stop abuses by consumers seeking to intimidate and blackmail small businesses. Against this backdrop, the commendable objectives of providing a public stage for individuals to share their experiences with other consumers and provide honest feedback to businesses have been distorted, and small businesses are held hostage by the clout that the anonymous reviewers and consumer review site bullies hold. It is not that policies of public debate, petition, and an honest customer feedback loop are not admirable ones worthy to be maintained, but those policies

are lost in a sea of laws and financial influence stacked against small businesses. Small businesses have been conscripted into participating in consumer review sites' profit-model. Permitting these profitable consumer review sites to host anonymous reviews with no attempt at ensuring reviews are written by actual customers of the business being reviewed is not a public policy to preserve.

Given the legal landscape for small businesses attempting to brawl with the consumer review site bullies, non-disparagement clauses should not be subject to a blanket legislative void. Such clauses do not violate public policy so long as concrete procedural and substantive safeguards exist, such as those found in other contexts where constitutional rights are contractually waived. Recently enacted and proposed legislation that voids non-disparagement provisions in consumer contracts fails to consider scenarios where a non-disparagement clause in a consumer contract is a justifiable business practice. Acknowledging the importance of free speech, the policies behind the CDA and anti-SLAPP laws, and the agreed bad public policy of enabling businesses to offer inferior service while secretly tucking a non-disparagement clause into their terms of service, non-disparagement clauses in consumer contracts can be judicially analyzed and enforced under traditional contract law.