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13
14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**
16 **WESTERN DIVISION**

17 GRASSHOPPER HOUSE, LLC,

18 Plaintiff,

19 v.

20 CLEAN & SOBER MEDIA
LLC, et al.,

21 Defendants.
22

Case No. 2:18-CV-923 SVW (RAOx)

**REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

Date: April 16, 2018
Time: 1:30 p.m.
Location: Courtroom 10A
Judge: Hon. Stephen V. Wilson

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1 INTRODUCTION

2 Grasshopper brought this lawsuit because it dislikes a negative review and star
3 rating of Passages that *The Fix* published and has maintained for over 7 years. That
4 review and rating contain no false statement of fact and otherwise constitute protected
5 opinion. Grasshopper concedes as much. To avoid dismissal, Grasshopper now
6 characterizes its entire case as only challenging two supposedly “provably false *factual*
7 assertions about the source, nature, or basis of the opinions expressed.” Grasshopper’s
8 Opp. to Mot. to Dismiss (“MTD Opp.”) at 9, ECF No. 17 (emphasis in original).

9 They are:

- 10 1. That *The Fix* possessed at least five completed 20-question surveys from
- 11 alumni of Passages Malibu and Cliffside Malibu whose individual star ratings
- 12 were averaged to form the exclusive basis for the star ratings posted on *The Fix*.
- 13 MTD Opp. at 3–5 (the “Process Statement”), and
- 14 2. That *The Fix*’s “stated editorial mission—and sole bias—is to
- 15 destigmatize all forms of addiction and mental health matters, support recovery,
- 16 and assist toward humane policies and resources.” MTD Opp. at 6–7 (emphasis
- 17 in original) (the “Mission Statement”).

18 Grasshopper introduces evidence that the Process and Mission Statements appeared on
19 *The Fix* in the fall of 2014. McCauley Decl. ¶¶ 2–3, ECF No. 20. According to
20 Grasshopper, these statements transformed the earlier rating and review of Passages
21 from non-actionable opinions into false statements of fact. MTD Opp. at 3.

22 Grasshopper’s new theory is as tortured as it sounds. The transformation theory
23 requires magical thinking. No one believes that anyone relied on the Process and
24 Mission Statements instead of the unfavorable review and low star rating of Passages.
25 See Defs.’ Mem. Supp. Mot. to Dismiss (“MTD”) at 17, ECF No. 11-1. By refusing to
26 participate in the re-review process, Grasshopper rejected the opportunity to correct
27 the precise defect in attribution it now alleges. See MTD at 2–3, 8, 17. And even if
28 Grasshopper prevailed, its remedy would be corrective disclosures about process and

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1 ownership, which Grasshopper *concedes have already been made*. Compl. ¶¶ 17, 22.
 2 This case is now precisely the kind of “most silly” case that Grasshopper concedes
 3 should be dismissed. *See* MTD Opp. at 16.

4 As explained below, no cause of action in the complaint can be predicated on
 5 either the Process Statement or the Mission Statement. Dismissal is warranted.

6 FACTUAL BACKGROUND

7 The Opposition is most notable for the facts it does not dispute, including that
 8 all factual content in the Cliffside Malibu and Passages Malibu reviews is true, *see*
 9 MTD Opp. at 2; that the alumni comments in the Passages Malibu review are authentic,
 10 *see* MTD Opp. at 4–5; and that *The Fix* invited Grasshopper to participate in a genuine
 11 re-review process, which Grasshopper abandoned, *see* MTD Opp. at 24; McCauley
 12 Decl. ¶ 4. The Opposition nevertheless misstates the facts in key ways.

13 **Process Statement.** Grasshopper mischaracterizes the disclosures on *The Fix*
 14 about its process. *See* MTD Opp. at 3–5. According to Grasshopper, for a review
 15 process to be consistent with the Process Statement, *The Fix* must possess at least five
 16 completed 20-question surveys from alumni, where “the surveyed alumni, on average,”
 17 gave the facility the star rating for treatment given in the review. MTD Opp. at 4. But
 18 the rating for treatment is *not* the arithmetic average of survey ratings. To the contrary,
 19 *The Fix* disclosed that it reviewed each center along each metric “based on the alumni’s
 20 chosen star ratings *and comments*.” Compl. ¶ 18 (emphasis added). The star rating was
 21 not a simple aggregation of the survey ratings. *See* MTD at 15–16.

22 Grasshopper also advances an even more extreme interpretation, “that *every*
 23 alumni reviewer had given its treatment a one-star review.” MTD Opp. at 1 (emphasis
 24 added). *See also* MTD Opp. at 2 (“Defendants told readers . . . one-star was the rating
 25 provided in surveys by at least five former Passages Malibu patients.”). This unanimity
 26 requirement is found nowhere in the actual disclosures.

27 Nor is the review process strictly limited to whatever responses the written
 28 alumni surveys contain, as Grasshopper insists. *See* MTD Opp. ¶¶ 8, 14. Instead, the

1 disclosure describes a “survey process” through which *The Fix* consulted “other
2 information.” Compl. ¶ 18. The suggestion that *The Fix* was required to ignore other
3 sources is as false as it is misguided. But it is consistent with a mistake that infects
4 virtually all of Grasshopper’s arguments: that the reviews and ratings on *The Fix* were
5 required to be “objective.” MTD Opp. at 7 (alleging that *The Fix* represented that it
6 “presented only unbiased reviews and ratings prepared according to an objective
7 methodology”). They were not: *The Fix* offered opinions, not algorithms.

8 **Mission Statement.** Grasshopper similarly asserts that the Mission Statement
9 “declared [Defendants’] objectivity” with respect to reviews of treatment facilities.
10 MTD Opp. at 6. But as Grasshopper’s own filing makes clear, the Mission Statement
11 does not apply to the reviews, but rather to the website in its entirety. *See* Grasshopper’s
12 Request for Judicial Notice (“Grasshopper’s RJN”) Ex. B at 1, ECF No. 19 (“*The Fix*
13 . . . feature[s] a daily mix of breaking news, exclusive interviews, investigative reports,
14 essays and blogs on sober living, lifestyle and cultural resources, as well as knowledge
15 and wisdom from expert counsel.”). *See also* McCabe Decl. ¶ 3, ECF No. 13-7. In
16 context, it is even more apparent that the Mission Statement is exactly what it claims
17 to be—a statement of the mission of the website—and not a guarantee of abstract
18 neutrality.

19 **July 2016 Emails.** Grasshopper continues to mischaracterize its emails with
20 Allison McCabe in July 2016. According to Grasshopper, those emails disclosed that
21 “[t]here are no completed 20-question surveys from former alumni of Passages
22 Malibu.” MTD Opp. at 4. But as Defendants have explained, that cannot be reconciled
23 with the documents, which Grasshopper concedes are properly before the Court.
24 Grasshopper’s Resp. to Request for Judicial Notice (“RJN Resp.”) at 1, ECF No. 21.
25 *See* MTD at 15. Ms. McCabe did not say there were no surveys; she only said that the
26 survey process may have evolved. *See* McCabe Decl. ¶ 12, Ex. B.

27 As is clear from these materials, Grasshopper’s allegation that there were no
28 surveys is false. The reviews themselves bear that out, as they describe and quote from

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1 at least five patients. Defs.’ Mem. Supp. Special Mot. to Strike (“Anti-SLAPP Mot.”)
2 at 18, ECF No. 12-1. Moreover, *The Fix* indisputably adheres to that process *now*, as
3 Grasshopper implicitly admits by introducing the survey it received as part of *The Fix*’s
4 offer to re-review the facility. McCabe Decl. ¶¶ 7–27; McCauley Decl. ¶ 4;
5 Grasshopper’s RJN Ex. A. Grasshopper’s repeated claims that there is no “survey
6 process” are baseless. *See, e.g.*, MTD Opp. at 1, 5, 8, 13, 24.

7 ***Other Inaccuracies.*** The opposition is riddled with other errors. For example,
8 Grasshopper asserts that the prior owner of *The Fix* “did not make any representations
9 about the methodology used to create the review.” MTD Opp. at 3. Not true. The
10 disclosure of Recovery Media LLC stated, “We offer rigorously reported Rehab
11 Reviews, with input from thousands of alumni.” Second Seymour Decl. Ex. G at 1
12 (filed with Defendants’ Reply Mem. Supp. RJN). That matters because it makes
13 Grasshopper’s theory even less tenable: that the disclosure of “input from thousands of
14 alumni” did not make the reviews on *The Fix* misleading, but disclosure of “five
15 completed surveys” did. It also underscores that the statute of limitations ran long ago.
16 *See infra* Section II.

17 Grasshopper also suggests that there was a relationship between Cliffside
18 Malibu and *The Fix* when the reviews of Cliffside Malibu and Passages Malibu were
19 published. *See e.g.*, MTD Opp. at 1 (“All the while it was promoting Cliffside, The Fix
20 didn’t disclose that Cliffside was its corporate cousin.”). There was not, as both the
21 complaint itself and judicially noticeable bankruptcy filings make clear. Compl. ¶¶ 13–
22 14; Defs.’ RJN Ex. D at 16, 31, ECF No. 13. That matters because it renders the entire
23 “bias” narrative nonsensical: Grasshopper admits that *The Fix* maintained the original
24 reviews exactly as they had been written under prior editorial control. *See* Compl.
25 ¶¶ 16, 20–23; MTD Opp. at 2. And its only changes to the star ratings were to increase
26 them for *both* Cliffside Malibu *and* Passages Malibu. Compl. ¶ 16; MTD Opp. at 2, 7.

27
28

ARGUMENT

I. Grasshopper Now Concedes That None of Its Claims Are or Could Be Predicated on the Publication or Maintenance of the 2011-12 Reviews.

The complaint that Grasshopper describes in its Opposition is a far cry from the one that it actually filed. The actual complaint takes issue with the substance of the reviews of Passages Malibu and Cliffside Malibu. *See, e.g.*, Compl. ¶ 25; *id.* ¶ 26 (malice from “maintaining the review of Passages Malibu, including the false one-star ‘Treatment’ rating and other false and misleading statements”); *id.* ¶ 27 (“Defendants’ false and misleading statements about Passages Malibu, particularly in comparison to the glowing review and rating for Cliffside Malibu, have caused Plaintiff to suffer a decline in business.”). The complaint does not *even mention* the Mission Statement.

In their moving papers, Defendants attacked the charges leveled in the actual complaint. Among other things, they showed why there is no reason to believe the facts asserted in the 2011 review of Passages Malibu (“2011 Passages Review”) and the 2012 review of Cliffside Malibu (“2012 Cliffside Review”) are false. *See* MTD at 2, 6–7. What Grasshopper now decries as *ad hominem* attacks bore directly on the complaint as it was actually pleaded. *See* MTD Opp. at 1, 24. That Grasshopper has now offered a tortured reading of its own complaint that *concedes the main points in Defendants’ motion papers* does not render those points “irrelevant.” *Cf.* MTD Opp. at 24.

In any event, Grasshopper now admits that its allegations based on the 2011 Passages Review and 2012 Cliffside Review are not actionable, presumably for the reasons Defendants have articulated. *See* MTD at 10–15. Grasshopper specifically disavows any theory of relief based on its allegations about the 2011 Passages Review. *See, e.g.*, MTD Opp. at 9 (“The problem is not whether the reviews are true or whether the star ratings are opinions”); MTD Opp. at 18 (“[T]he ‘actionable statement’ is not the Passages Malibu review”). It even concedes that the 2011 Passages Review was “opinion.” *See, e.g.*, MTD Opp. at 3 (“The prior owner of The Fix had given a one-star rating to Passages Malibu, but that was its opinion”).

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1 Grasshopper also disavows any theory of relief based on its allegations about the
2 2012 Cliffside Review. Nor does Passages try to defend its allegations based on the
3 “maintenance” of the 2011 Passages Review and 2012 Cliffside Review on the website
4 or increasing the star rating for Cliffside Malibu.

5 **II. Because Grasshopper Now Relies Exclusively on the Process and Mission**
6 **Statements, All of Its Claims Are Time-Barred.**

7 All claims based on the Process or Mission Statements are barred by the statutes
8 of limitations. As Grasshopper’s own witness admits, both statements were published
9 on or before October 3, 2014. McCauley Decl. ¶ 2 (authenticating screenshot of “About
10 Reviews” webpage captured on October 3, 2014); *id.* ¶ 3 (authenticating screenshot of
11 “About Us” webpage captured on September 8, 2014). All applicable limitations
12 periods ran long before Grasshopper filed suit.

13 **Lanham Act and False Advertising Claim.** Grasshopper concedes that the
14 statute of limitations for its Lanham Act claim is three years. MTD Opp. at 18. The
15 statute of limitations for the False Advertising Law (“FAL”) is also three years. Cal.
16 Civ. Proc. Code § 338(a); *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1130
17 (C.D. Cal. 2010). Grasshopper does not dispute that the limitations period begins to
18 run with an initial publication. *See* Anti-SLAPP Opp. at 20. Because both Statements
19 were published by October 3, 2014, the limitations period ran by October 3, 2017.

20 Grasshopper first tries to defend its delay by feigning ignorance of when the
21 publication of these statements occurred. *See* MTD Opp. at 18 (“[T]he actionable
22 statement is . . . the false rating methodology first published by Defendants *sometime*
23 *years later*” (emphasis added)). But Grasshopper attorney Michael McCauley testified
24 in a declaration in support of *the opposition* that “sometime” was specifically October
25 3, 2014. McCauley Decl. ¶ 2. On its face, that date renders the Lanham Act claim
26 untimely, and it was disingenuous to conceal that fact.

27 Grasshopper also tries to invoke the discovery rule. MTD Opp. at 19. As
28 Grasshopper’s own authority makes clear, however, this attempt fails. In addition to

1 showing lack of knowledge, Grasshopper must show “lack of means of obtaining
2 knowledge (in the exercise of reasonable diligence the facts could not have been
3 discovered at an earlier date).” *Baby Trend, Inc. v. Playtex Prods., LLC*, No. 5:13-CV-
4 00647, 2013 WL 4039451, at *4 (C.D. Cal. Aug. 7, 2013) (citing *Gen. Bedding Corp.*
5 *v. Echevarria*, 947 F.2d 1395, 1397 (9th Cir. 1991)).¹

6 But here Grasshopper alleges no facts to suggest that it could not have
7 discovered any alleged lack of surveys (or who owned *The Fix*) before February 2,
8 2015—i.e., more than three years before this action was filed. On the contrary, the
9 complaint is replete with allegations showing that Grasshopper knew or could readily
10 have learned whatever it wanted about the website, its process, and its owner at any
11 time. To illustrate:

- 12 • As of October 3, 2014, the disclosure on *The Fix* about the review process
13 stated, “To create our reviews, we invite selected centers to solicit former clients
14 to complete a detailed, 20-question survey.” Compl. ¶ 18. Grasshopper knew *at*
15 *that time* whether or not it received a survey invitation, and whether it solicited
16 former clients to complete *The Fix*’s survey.
- 17 • Grasshopper also had ready access to *The Fix*’s staff, and in fact discussed
18 the 2011 Passages Review with them, both before and after Sober Media
19 purchased the site in 2013 and posted the Process Statement in 2014. Compl.
20 ¶¶ 20–21. It thus “ha[d] the opportunity to obtain knowledge” of the facts
21

22 ¹ In *Baby Trend*, the court dismissed where plaintiff “fail[ed] to show that it took
23 steps to investigate the validity” of a claim that a Playtex product was “Proven #1 in
24 Odor Control.” 2013 WL 4039451, at *4. The plaintiff had also failed to allege “any
25 explanation for how they lacked means of obtaining that knowledge or how the facts
26 could not have been discovered at an earlier date.” *Id.* Other cases impose a similarly
27 stringent burden. *See, e.g., Yumul*, 733 F. Supp. 2d at 1133 (dismissing where plaintiff
28 failed to prove that “she had no actual or constructive knowledge of facts sufficient to
put her on inquiry” before discovery of defendant’s fraudulent action); *Saaremets v.*
Whirlpool Corp., No. 2:09-CV-02337, 2010 WL 11571214, at *5 (E.D. Cal. Mar. 19,
2010) (“[W]hen the plaintiff . . . has the opportunity to obtain knowledge from sources
open to his investigation . . . the statute commences to run.”).

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1 underlying its claim well before 2015. *Saaremets v. Whirlpool Corp.*, No. 2:09-
2 CV-02337, 2010 WL 11571214, at *5 (E.D. Cal. Mar. 19, 2010).

3 If the allegations in the complaint are accepted as true, then Grasshopper had ample
4 reason to suspect that something was amiss years before it filed suit.

5 **Libel.** For the purposes of the statute of limitations, Grasshopper characterizes
6 its claim as one for *trade libel* and not libel *per se*. MTD Opp. at 20. It does not matter.
7 Even assuming that the longer two-year period applies, the limitations period ran by
8 October 3, 2016 at the latest, i.e., two years after the publication of the two 2014
9 statements. Again, the discovery rule does not save Grasshopper because there are no
10 facts to suggest that Grasshopper could not reasonably have learned of these statements
11 or their alleged falsity before February 2, 2016—i.e., two years before it filed suit.²

12 **Unfair Competition.** The four-year statute of limitations bars the unfair
13 competition claim. Cal. Bus. & Prof. Code § 17208. Grasshopper knew the gravamen
14 of its no-surveys claim by February 25, 2012, when the website disclosed that reviews
15 were based on “input from thousands of alumni.” Second Seymour Decl. Ex. G at 1.

16 **III. In Any Event, No Cause of Action Based on the Process and Mission**
17 **Statements Could Possibly State a Claim on the Merits.**

18 Grasshopper does not state a claim for relief based on the two alleged 2014
19 statements under the Lanham Act or state law. Consider for a moment just how narrow
20 those claims are. They boil down to the assertion that some prospective clients of
21 Grasshopper read *The Fix’s* 2011 Passages Review *and the disclosure about process*
22 *or “sole bias,”* and that relying on the disclosure they chose not to receive treatment
23 at Passages Malibu. But it is implausible that anyone relied on the Process or Mission
24 Statements rather than the negative review and low star rating of Passages Malibu. This

25 _____
26 ² Grasshopper wants it both ways on its libel claim. As to the merits, it wants to
27 assert libel *per se* because it would not have to prove harm or malice. MTD Opp. at 17,
28 Anti-SLAPP Opp. at 19. But it also hopes to avoid the one-year statute of limitations
for libel *per se* in favor of the two-year period that some courts have applied to trade
libel claims.

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1 case is about spite, and the Court should not play along.

2 **A. The Allegations Against Mr. Taite and Cliffside Are Insufficient.**

3 The Court must dismiss the claims against Richard Taite and Cliffside Malibu.
4 Grasshopper admits that it must satisfy Rule 9(b). MTD Opp. at 21. But it has not come
5 close to that standard. Grasshopper makes no effort to distinguish Defendants’ cases or
6 to identify any new reason to believe that either Mr. Taite or Cliffside Malibu had any
7 role in the challenged conduct. Instead, it continues to recite boilerplate legal
8 conclusions. *See* MTD Opp. at 21 (citing allegations of control incident to ownership,
9 agency, and conspiracy). Form allegations do not suffice. *See* MTD at 23.

10 Grasshopper urges this Court to overlook the scarcity of details (the “who, what,
11 when, where, and how”) because, in its view, the narrative of the complaint is
12 “consistent with collective action.” MTD Opp. at 21. To support that charge,
13 Grasshopper cites only the increase of Cliffside’s star ratings when Sober Media bought
14 *The Fix*—ignoring the fact that the star rating of Passages Malibu *also increased*.
15 *Compare* MTD Opp. at 21–22, *with* MTD at 7–8. Assuming that an isolated action that
16 benefits someone else could *ever* satisfy Rule 9(b), it cannot do so here.³

17 **B. The Court Should Dismiss the Lanham Act Claim.**

18 Grasshopper recognizes the five elements that it must satisfy to survive this
19 motion with respect to the Lanham Act claim. MTD Opp. at 8. But it cannot meet them.
20 Among other things, Grasshopper has not adequately alleged that either of the alleged
21 misstatements was false, occurred in commercial advertising, or was material.

22
23 ³ Grasshopper also suggests that the Court should allow it to go fishing in
24 discovery to establish individual misconduct that it cannot adequately allege now.
25 MTD Opp. at 23. But its own cases do not support that extraordinary proposition. *See*
26 *Lomeli v. Jackson Hewitt, Inc.*, No. 2:17-CV-02899, 2017 WL 4773099, at *6 (C.D.
27 Cal. Oct. 19, 2017) (granting motion to dismiss where plaintiff impermissibly lumped
28 all defendants together); *Aquamen Entm’t, LLC v. Pigmental, LLC*, No. 2:17-CV-
00058, 2017 WL 7806619, at *8 (C.D. Cal. May 8, 2017) (granting motion to dismiss
where plaintiff had “not provided ‘the who, what, when, where and how of the
misconduct charged’ required by Rule 9(b)”).

1 **No false statement of fact.** Despite its best efforts to rewrite the complaint,
 2 Grasshopper still cannot articulate any false statement of fact. As explained above, *The*
 3 *Fix* never represented that it possessed at least five completed 20-question surveys
 4 from alumni whose star ratings averaged the star ratings given in their reviews. *See*
 5 *supra* at 2–3. At times, Grasshopper acknowledges that its real claim is even narrower:
 6 that *The Fix* has no survey process at all. *See, e.g.*, MTD Opp. at 5 (“The absence of
 7 any such survey process rendered Defendants’ statements false and misleading.”). But
 8 Grasshopper’s only foundation for that claim does not support it.

9 At most, the July 2016 emails show that *The Fix* said nothing about the survey
 10 process under prior editorial control. *See supra* at 3–4. Meanwhile, Grasshopper has
 11 introduced other evidence showing that the survey process exists. *See* McCauley Decl.
 12 ¶ 4, Ex. A. And Grasshopper does not dispute the authenticity of the patient comments
 13 quoted in the 2011 Passages Review. MTD Opp. at 4–5. If patients did not provide that
 14 input to *The Fix* through a “survey process,” where did it come from?

15 The unpublished cases from other jurisdictions that Grasshopper cites do not
 16 support its position. *See* MTD Opp. at 9–10. This is not a case about fake or
 17 manipulated reviews. *See Vitamins Online, Inc. v. Heartwise, Inc.*, No. 2:13-CV-00982,
 18 2016 WL 538458, at *6 (D. Utah Feb. 9, 2016) (manipulation); *Interlink Prods. Int’l v.*
 19 *F&W Trading LLC*, No. 3:15-CV-01340, 2016 WL 1260713, at *2 (D.N.J. Mar. 31,
 20 2016) (same); *iYogi Holding PVT Ltd. v. Secure Remote Support*, No. 4:11-CV-00592,
 21 2011 WL 6291793, at *15 (N.D. Cal. Oct. 25, 2011) (“shill reviews”). It is undisputed
 22 that the 2011 Passages Review and the 2012 Cliffside Review are real reviews written
 23 by independent third party Recovery Media.

24 The newly minted Mission Statement theory fares no better. *The Fix* said nothing
 25 false in stating that its “sole bias” was to destigmatize, support, and assist people in
 26 recovery. “Bias” means “an inclination of temperament or outlook.” *Bias*, *Merriam-*
 27 *Webster Online Dictionary* (updated Mar. 23, 2018). Grasshopper has offered no reason
 28 to believe that the “inclination” of *The Fix* was something other than what it stated—

1 to help people without judging them. *Cf.* MTD Opp. at 14–16.

2 In any event, this disclosure is classic non-actionable puffery. *See, e.g., Prager*
 3 *Univ. v. Google LLC*, No. 5:17-CV-06064, 2018 WL 1471939, at *11 (N.D. Cal. Mar.
 4 26, 2018) (“statements about YouTube’s viewpoint neutrality . . . [we]re non-
 5 actionable puffery under the Lanham Act.”); *Boca Raton Firefighters v. Bahash*, 506
 6 F. App’x 32, 34 (2d Cir. 2012) (representations that company used “‘transparent and
 7 independent decision-making’ to produce ‘independent and objective analysis,’ and
 8 that ‘excelled’ in its role . . . [we]re mere commercial puffery”).

9 ***No commercial advertising or promotion.*** Grasshopper recognizes that the
 10 disclosures by *The Fix* were at most “hybrid” communications combining commercial
 11 and non-commercial elements, and that to prevail it must show that the communication
 12 (1) is an advertisement, (2) refers to a specific product or service, and (3) the speaker
 13 has an economic motivation for the speech. MTD Opp. at 11 (citing *Enigma Software*
 14 *Grp. USA, LLC v. Bleeping Comput. LLC*, 194 F. Supp. 3d 263, 293–94 (S.D.N.Y.
 15 2016)). But the challenged statements had none of these features. On the contrary, the
 16 statements do not advertise anything and do not refer to any specific product. This case
 17 is thus unlike *Enigma*, where posts “unmistakably constitute[d] advertisements for the
 18 Affiliate products” and where the poster earned a commission on directed sales of those
 19 products. *Enigma*, 194 F. Supp. 3d at 294.

20 ***No materiality.*** No one seriously believes that anyone relied on the Process
 21 Statement or the Mission Statement in deciding to forego treatment at Passages Malibu.
 22 Grasshopper offers two unsatisfactory responses. First, Grasshopper posits that a
 23 “terrible rating” would “alter purchasing decisions.” MTD Opp. at 14. But to prevail,
 24 Grasshopper must prove that it was the *disclosures about process or bias* that dissuaded
 25 potential clients, not the review or rating. Second, Grasshopper argues that *The Fix*
 26 must think that the Process and Mission Statements are material, or it would not have
 27 made them at all. *See* MTD Opp. at 14. If speech itself sufficed to prove materiality,
 28 then the inquiry would be pointless. Materiality depends on the impact on the listener,

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1 not the motive of the speaker. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988)
2 (materiality for securities fraud “depends on the significance the reasonable investor
3 would place on the withheld or misrepresented information”).

4 **C. The Court Should Dismiss the State-Law Claims.**

5 As explained in detail in the reply brief in support of the anti-SLAPP motion,
6 the Court should dismiss the false advertising, unfair competition, and libel claims. The
7 FAL claim fails with the “substantially congruent” Lanham Act claim and for the
8 independent reasons that Grasshopper did not adequately plead scienter and seeks only
9 corrective disclosures that have already been made. Defs.’ Reply Mem. Supp. Special
10 Mot. to Strike (“Anti-SLAPP Reply”) at 10–11. The unfair competition claim also fails
11 with the Lanham Act claim and for the independent reasons that Grasshopper lacks
12 standing in its own right and cannot prove reliance by consumers. Anti-SLAPP Reply
13 at 11–12. And as Grasshopper concedes in its statute of limitations argument, its libel
14 claim is really a trade libel claim that cannot prevail because Grasshopper cannot plead
15 and prove specific losses or malice. Anti-SLAPP Reply at 9–10.

16 **CONCLUSION**

17 For the foregoing reasons, the Court should dismiss the complaint.

18 Respectfully submitted,

19 Dated: April 2, 2018 **STRIS & MAHER LLP**

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