STRIS & MAHER LLP
PETER K. STRIS (SBN 216226)
peter.stris@strismaher.com
BRENDAN S. MAHER (SBN 217043)
brendan.maher@strismaher.com
ELIZABETH BRANNEN (SBN 226234)
elizabeth.brannen@strismaher.com
DANA BERKOWITZ (SBN 303094)
dana.berkowitz@strismaher.com
VICTOR O'CONNELL (SBN 288094)
victor.oconnell@strismaher.com
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
T: (213) 995-6800 | F: (213) 261-0299

SHAUN P. MARTIN (SBN 158480)
smartin@sandiego.edu
University of San Diego School of Law
5998 Alcala Park, Warren Hall
San Diego, CA 92110
T: (619) 260-2347 | F: (619) 260-7933

Attorneys for Defendants
Clean & Sober Media LLC, et al.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

GRASSHOPPER HOUSE, LLC,

Plaintiff,

v.

CLEAN & SOBER MEDIA LLC, et al.,

Defendants.

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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: July 2, 2018
Time: 1:30 p.m.
Location: Courtroom 10A
Judge: Hon. Stephen V. Wilson

TABLE OF CONTENTS

STRIS | MAHER
725 S. FIGUEROA ST, STE 1830
LOS ANGELES, CA 90017

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Regulations

STRIS | MAHER
725 S. FIGUEROA ST, STE 1830
LOS ANGELES, CA 90017

STRIS | MAHER
725 S. FIGUEROA ST, STE 1830
LOS ANGELES, CA 90017

INTRODUCTION

Grasshopper dislikes the one-star treatment rating *The Fix* gave it in 2011. It has tried for years to have that rating increased or removed. When all of its other attempts failed, Grasshopper filed this lawsuit. But Grasshopper's case has a fundamental problem: the treatment rating it despises is not attributable to Defendants. The rating was issued by an unrelated owner of *The Fix* many years ago, has never changed, and as Grasshopper has finally acknowledged, is an unactionable opinion. Grasshopper's Opp. to Defs.' Mot. to Dismiss ("MTD Opp.") at 9, ECF No. 41 (conceding that the "one-star rating of Passages Malibu was stated as an opinion."). Any litigation over it is also time-barred. Order at 6, ECF No. 29.

This has left Grasshopper with a case in search of a cognizable legal theory. Grasshopper has pursued a series of creative claims that only tenuously connect to its one-star treatment rating. It has settled on two: the Process Statement theory—i.e., that Defendants misrepresented the source of Passages' one-star treatment rating when *The Fix* stated its reviews were based on written surveys, and (2) the Mission Statement theory—i.e., that Defendants misrepresented *The Fix* as an unbiased news source despite its shared common ownership with Cliffside. First Amended Complaint ("Amended Complaint" or "FAC") ¶¶ 4-5, ECF No. 29. But after considering these theories last time, the Court rejected them, reasoning that they too are time-barred, Order at 5-7, and caused Grasshopper no harm, *id*. at 7. Unable to plead facts that cure these defects, Grasshopper effectively seeks reconsideration. This Court got it right the first time. It should dismiss again for exactly the same reasons as before.

Although the Court need not go beyond the reasoning of its original dismissal order, it should also dismiss Grasshopper's complaint on the additional grounds Defendants have advanced, which the Court did not previously reach. Most notably, Grasshopper's current false advertising theories do not satisfy the necessary element of materiality. It is beyond implausible that anyone forewent treatment at Passages based on generic statements about *The Fix*'s review process and mission, rather than

the scathing review and rating itself—the facts of which Grasshopper has *never* disputed, and which it now, finally, recognizes is not itself actionable.

FACTUAL BACKGROUND

Grasshopper begins its opposition memorandum by painting a narrative of Defendants that has no basis in reality—or even in the Amended Complaint. This section briefly responds to its most serious factual inaccuracies.

First, Grasshopper falsely asserts that Defendants "lied" about the source of Passages' one-star treatment rating, which is "said to come from real clients who have used the service, rather than from a competitor's undisclosed affiliate." MTD Opp. at 1. It is undisputed that *The Fix* published a one-star treatment rating of Passages Malibu in March 2011. FAC ¶ 14. At that time, *The Fix* was owned by Recovery Media LLC, which had no affiliation with any treatment center. FAC ¶¶ 14, 17.

Second, Grasshopper reiterates its false assertion that "[t]he prior owner of The Fix . . . did not make any representations about the methodology used to create the review." MTD Opp. at 11. As Defendants have repeatedly shown by judicially noticeable documents, the prior owner of *The Fix* stated that it "offer[ed] rigorously reported reviews of top treatment centers across the US, with input from thousands of alumni." Defs.' Request for Judicial Notice ("Defs.' RJN") Ex. A at 17, ECF No. 35-1; *see also* Defs.' Reply in Support of Request for Judicial Notice, Ex. G at 3, ECF No. 24-2.

Third, Grasshopper claims the 2011 Passages Review was "largely positive." MTD Opp. at 3. That is delusional: among other criticisms, the 2011 Passages Review actually states that "few rehabs in America are more reviled" than Passages. Defs.' RJN Ex. A at 6. And it proposes that rather than go to Passages, one could simply check into a luxury resort for less than half the price. *Id.* It even punctuates that proposal with the tongue-in-cheek quip: "Just remember to bring along Chris Prentiss's book on curing alcoholism and addiction, and a copy of A.A.'s *Big Book*—just in case." *Id.*

STRIS | 725 S. FIGUEROA ST, STE 1830
MAHER | LOS ANGELES, CA 90017

Finally, Grasshopper falsely claims that "The Verge did *not* say that Taite's ownership of both The Fix and Cliffside were 'well-known in the industry,' as that line in the article did not refer specifically to Defendants." MTD Opp. at 6. That claim is utterly baseless and misleading. *The Verge* article says that "the connections between *the* rehabs and *the* sites are relatively well-known within the industry." Defs.' RJN Ex. C at 1 (emphasis added). "The rehabs" and "the sites" refer to the rehab centers (Cliffside Malibu and Windward Way) and the websites (*The Fix*, Rehab Reviews, and *Addiction Unscripted*) that are the subject of the article. *Id.* And contrary to Grasshopper's assertion, that same sentence *does* specifically reference industry knowledge of the connection with Cliffside. Grasshopper's reading thus lacks any basis whatsoever in what the article actually says.[1]

[1] Here is the full passage from the article:

> According to an investigation by *The Verge*, several popular publications covering addiction and treatment double as marketing operations for treatment centers. Rehab Reviews and *The Fix* are controlled by Cliffside Malibu founder Richard Taite, while *Addiction Unscripted*—a group promoted by Mark Zuckerberg this summer for its use of Facebook—is owned and staffed by the CEO and marketers of Windward Way, a treatment center in Costa Mesa, California.
>
> All three sites have phone numbers that refer callers to the affiliated rehabs, as well as to partner facilities. On *The Fix* and Rehab Reviews, there's a note that the phone number routes you to Service Industries, a "network of commonly owned rehabilitation service providers," but it doesn't say which rehabs are in the network, or that Taite owns both the publishers and the providers. Users browsing with an ad blocker will not see the note, just the helpline.
>
> While the connections between the rehabs and the sites are relatively well-known within the industry—*Addiction Unscripted* even used the Rehab Reviews practice of generating leads for Cliffside Malibu as an example to emulate in an early business plan obtained by *The Verge*—people reading the sites had no way to know the connection (until disclaimers appeared after *The Verge* approached the sites for comment).

Defs.' RJN Ex. C at 1.

STRIS | 725 S. FIGUEROA ST, STE 1830
MAHER | LOS ANGELES, CA 90017

ARGUMENT

I. Grasshopper's Amended Complaint Fails to Cure the Defects This Court Identified in Its Lanham Act Claim.

This Court dismissed Grasshopper's false advertising claims on the grounds they are time-barred and do not involve actionable harm. Order at 5-7. Unsurprisingly, Grasshopper could not remedy these defects. As explained below, Grasshopper has not alleged facts showing the discovery rule applies to its facially time-barred claims. *See infra* pp. 4-8. Nor has it alleged facts showing *Defendants* are responsible for the harm Grasshopper seeks to remedy here. *See infra* pp. 8-9.

A. Grasshopper's Process Statement Theory Is Time-Barred.

In dismissing the original complaint, this Court found Grasshopper's Process Statement theory to be facially time-barred. Order at 6. It next determined that the discovery rule does not apply because "Passages knew or reasonably could have discovered whether *The Fix* ever sent surveys to Passages' alumni," meaning Grasshopper had "constructive notice of the review policy on October 1, 2014." *Id.* Nothing in Grasshopper's FAC corrects this fundamental problem. So Grasshopper offers several flawed arguments to contest the grounds for this Court's dismissal order.

As an initial matter, Grasshopper grossly mischaracterizes the discovery rule. After selectively quoting a sentence from *V.C. v. Los Angeles Unified School District*, 139 Cal. App. 4th 499 (2006), Grasshopper contends that courts perform an element-by-element analysis to determine if the plaintiff had knowledge or suspicion of each of element of its claim. MTD Opp at 14. Not so. Grasshopper has misleadingly omitted the next two sentences from that case, which explain the inquiry:

> Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. **In so using the term 'elements,' we do not take a hypertechnical approach to the application of the discovery rule. Rather than examining whether the**

STRIS | MAHER 725 S. FIGUEROA ST, STE 1830 | LOS ANGELES, CA 90017

> **plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.**

Id. (sentences omitted by Passages in bold).

Properly applied, the discovery rule does not help Grasshopper, which now admits that "Passages knew or should have known that it had never been solicited and had not itself handed out surveys to patients." MTD Opp. at 16 (emphasis removed). Grasshopper's admission is dispositive because the Process Statement expressly states: "To create our reviews, *we invite selected centers to solicit former clients* to complete a detailed, 20-question survey." FAC ¶ 21 (emphasis added). Thus Grasshopper admits it had knowledge that the Process Statement was false at the time of its publication. At a minimum, Grasshopper's admission shows it had "reason to at least *suspect* that a type of wrongdoing"—indeed, the very wrongdoing alleged in the complaint—"ha[d] injured [it]." *V.C.*, 139 Cal. App. 4th at 516 (emphasis added).[2]

Grasshopper tries to get around this problem by arguing, without apparent irony: "The Fix never stated that facility-solicited surveys would be the *only* surveys considered," and "Plaintiff reasonably believed The Fix was basing the Passages Malibu rating upon survey responses provided by the former clients quoted in the narrative evaluation." MTD Opp. at 16. These arguments are impossible to reconcile with the central theory of Grasshopper's case: that the Process Statement describes an "objective methodology" for producing facility ratings that Defendants did not follow. MTD Opp. at 3. Nor can they be squared with other arguments that Grasshopper has advanced—e.g., that the 2011 Passages Review "merely refers to *comments* by some purported former residents; it says nothing about surveys, much less surveys performed according to the claimed methodology," and "since the review does not identify the

[2] Particularly in light of this admission, the Court should decline to accept Grasshopper's conclusory and implausible allegations about lack of knowledge and inability to discover the facts. MTD Opp. at 15-16.

STRIS | 725 S. FIGUEROA ST, STE 1830
MAHER | LOS ANGELES, CA 90017

individual alumni (even anonymously), it is not apparent how many separate former residents actually commented." Grasshopper's Opp. to Defs.' Mot. to Dismiss ("First MTD Opp.") at 5, ECF No. 17.[3]

Furthermore, Grasshopper cites no cases for the notion that a plaintiff need not investigate if it can conceive of some innocent explanation for suspicious circumstances. That is because the law is directly to the contrary. The California Supreme Court has stated unequivocally that "a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of *all potential causes* of that injury." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 808 (2005) (emphasis added). Given that a plaintiff must investigate "all potential causes" of its injury, Grasshopper was not at liberty to ignore the very information that now forms the basis of its claims in this case.[4]

B. Grasshopper's Mission Statement Theory Is Time-Barred.

This Court has already rejected Grasshopper's argument that ignorance of *The Fix* and Cliffside's common ownership, standing alone, permits it to invoke the discovery rule. Order at 7. Rather, "the Plaintiff must also plead that it could not have

[3] Grasshopper also now appears to embrace Defendants' argument that the review shows surveys were considered. MTD Opp. at 16. This simply serves to highlight the implausibility of their allegation that "these purported survey responses don't exist." *Id.* And in any event, it does not excuse the fact that they are trying to take two litigation positions (one for statute of limitations purposes, another for merits purposes) that are fundamentally at odds with one another.

[4] To the extent Grasshopper argues it did not believe the Process Statement was being made in commercial advertising, that argument is disingenuous at best. *See* MTD Opp. at 17-19. Under Grasshopper's *own theory of the case*, Sober Media had an overt commercial advertising motive for issuing the Process Statement. As Grasshopper itself put it:

> It was important for CSM to tout the reliability of its reviews and ratings. The Fix can track the number of people who visit the reviews and ratings, and the greater the traffic, the more The Fix can charge for advertising. (*Id.* ¶ 20.) CSM realized that consumers would not browse or share a review website they did not trust, so it was important for CSM to establish The Fix's trustworthiness.

MTD Opp. at 3. As such, Grasshopper had "a duty to conduct a reasonable investigation of all potential causes of that injury." *Fox*, 35 Cal. 4th at 808. Grasshopper does not even try to allege it conducted such an investigation.

STRIS | MAHER 725 S. FIGUEROA ST, STE 1830 | LOS ANGELES, CA 90017

discovered this relationship through reasonable diligence or that this information was not otherwise publicly available." *Id.* This requirement was fatal to the original claim because "[t]here [were] no such allegations in the . . . complaint." *Id.*

So too with the Amended Complaint. Indeed, Grasshopper now *admits* that it undertook no investigation, and that it did not even *attempt* to exercise reasonable diligence. It instead argues that the Court was wrong about Grasshopper's obligation to exercise reasonable diligence, and that in fact it had no duty to investigate at all. MTD Opp. at 19. But this Court's analysis was correct. Once a plaintiff is aware it is suffering harm—as Grasshopper was here—the exercise of reasonable diligence is the plaintiff's *central obligation* if it later seeks to invoke the discovery rule.

California law could not be clearer on this point. As the California Supreme Court has explained, "plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury." *Fox*, 110 P.3d at 920. "In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer,'" even under the more lenient pleading standards of California law. *Id.* "In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." *Id.* Thus Grasshopper unequivocally had a duty to investigate. Its admission that it undertook no investigation at all is fatal.

Moreover, Grasshopper has not adequately alleged that it could not have learned of the common ownership had it undertaken the required investigation. As explained above, *The Verge* article that Grasshopper relies on to invoke the discovery rule reported that *The Fix* and Cliffside's common ownership was "relatively well-known within the industry." Defs.' RJN Ex. C at 1; *see also supra* p. 3. Grasshopper has never even tried to explain why *other* people in the industry knew of *The Fix* and Cliffside's common ownership, but it did not. Grasshopper does not, for example, allege that other

STRIS | 725 S. FIGUEROA ST, STE 1830
MAHER | LOS ANGELES, CA 90017

people in the industry were privy to information it was not; that Grasshopper asked other industry insiders but still did not learn of the common ownership; or even that *The Verge* article was incorrect that the information was common knowledge. Allegations that the website did not disclose common ownership, and a conclusory assertion that it "was not on inquiry notice," are patently insufficient. MTD Opp. at 18 (citing FAC ¶¶ 31-33).

A plaintiff must meet an onerous burden to assert the discovery rule, specifically explaining the steps it took to investigate and the reasons those steps failed to reveal the source of its injury. Grasshopper has come nowhere close to doing so here.

C. Grasshopper Has Failed to Allege Facts Showing It Was Harmed.

This Court faulted the original complaint because its "factual allegations of harm are vague and conclusory." Order at 7. The Court questioned how adding a single star to Cliffside's overall rating caused a "'diversion of sales from [Passages] to [Cliffside] or . . . a lessening of the goodwill associated with [Plaintiff's] products' when *The Fix* had always given Cliffside a substantially higher rating than Passages." *Id.*

Grasshopper has failed to remedy this basic defect. Grasshopper contends that the Amended Complaint now makes its theory of harm clear: "[Passages] was harmed when readers of The Fix compared the low treatment rating of Passages Malibu with the high treatment rating of Cliffside." MTD Opp. at 2. But this theory of harm is *identical* to its original theory. *See* Complaint ¶ 27, ECF No. 1 ("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 of business, diversion of clients, loss of goodwill, and injury to business reputation, causing damages in excess of $50 million.). And as Defendants have explained, the Amended Complaint's allegations in support of this theory are identical in *all* material respects to the original complaint's. MTD at 15-16.

Because Grasshopper's allegations and theory of harm are precisely the same, they fail for the same reason this Court previously identified: "*The Fix* had always

STRIS | 725 S. FIGUEROA ST, STE 1830
MAHER | LOS ANGELES, CA 90017

given Cliffside a substantially higher rating than Passages." Order at 7. The one-star treatment rating for Passages was created by prior ownership, has existed for the better part of a decade, and *was never changed by any Defendant*. That means any harm based on comparison of the two ratings cannot be attributed to Defendants.

II. Grasshopper's Process and Mission Statement Theories Cannot Possibly State a Lanham Act Claim on the Merits.

A. Grasshopper Has Not Alleged Facts that Establish Materiality.

No one seriously believes that anyone relied on the Process Statement or the Mission Statement in deciding to forego treatment at Passages Malibu. As Grasshopper admitted in opposing dismissal of the original complaint, it is the *ratings* and not any disclosures about process or bias that might influence purchasing decisions. *See, e.g.*, First MTD Opp. at 14 ("terrible rating" would "alter purchasing decisions"); Hrg. Tr. at 16, ECF No. 31 ("Very frequently [consumers] don't even read reviews or whatever additional information is contained within an advertisement beyond the rating itself.").

Grasshopper now abandons any attempt to argue that its factual allegations establish materiality. *Cf.* First MTD Opp. at 13-14. Instead, it asserts that because "the alleged statements are literally false, the statements are *presumed* to have deceived customers." MTD Opp. at 13 (citing *Strategic Partners, Inc. v. Vestagen Protective Techs., Inc.*, 2017 WL 5951881, at *2 (C.D. Cal. Nov. 13, 2017); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997)) (emphasis added). Grasshopper also argues that materiality cannot be decided on a motion to dismiss. MTD Opp. at 13. Not so.

Grasshopper confuses two different and independent elements of a Lanham Act claim. As Grasshopper acknowledges, it must allege facts showing both that "the statement actually deceived or has the tendency to deceive a substantial segment of its audience," and that "the deception is material, in that it is likely to influence the purchasing decision." MTD Opp. at 7 (citing *Skydive Ariz., Inc. v. Quattrocchi*, 673

STRIS | 725 S. FIGUEROA ST, STE 1830
MAHER | LOS ANGELES, CA 90017

F.3d 1105, 1110 (9th Cir. 2012)). In other words, "deception" is a distinct inquiry from "materiality," which turns on the likely impact on consumers.

The Ninth Circuit does not presume that deceptive statements are material. In *William H. Morris Co. v. Group W. Inc.*, 664 F.3d 255, 257 (9th Cir. 1995), the Court reversed a finding of a Lanham Act violation based on a manufacturer's notice stating that it had filed three lawsuits challenging a rival's unfair trade practices. The statement was literally false because the manufacturer had filed only *two* such lawsuits. *Id.* But as the Ninth Circuit explained, the false statement was immaterial:

> The fact that Omicron filed two rather than three enforcement suits would be unlikely to influence pharmacists' purchasing decisions—the message that Omicron was willing to defend its intellectual property rights in its products, including Food Source One, would be the same in either case.

Id. So too here. Whether Recovery Media collected exactly five completed 20-question surveys or solicited feedback in some other format would be unlikely to influence the decisions of people seeking treatment. The message that *The Fix* relied on the input of alumni of the reviewed facilities would be the same in either case.[5]

Finally, courts routinely dismiss complaints that inadequately allege materiality, Grasshopper's naked assertion to the contrary notwithstanding. *See, e.g.*, *Wysong Corp. v. APN, Inc.*, 266 F. Supp. 3d 1058, 1072 (E.D. Mich. July 20, 2017) (granting motion to dismiss Lanham Act claims when for failure to allege materiality), *aff'd sub nom. Wysong Corp. v. APN, Inc. (17-1975)*, 889 F.3d 267 (6th Cir. 2018); *Martin v. FRS Co.*,

[5] Grasshopper's case law does not hold otherwise. In *Strategic Partners*, the district court presumed that literally false statements were deceptive, not that they were material. 2017 WL 5951881, at *1. And in *Southland Sod Farms*, the Ninth Circuit recognized a presumption of actual deception and reliance for deliberately false comparative advertising claims (i.e., claims that the speaker's product is better than a competitor's product). *See* 108 F.3d at 1146 (quoting *U-Haul Int'l v. Jartran, Inc.*, 793 F.2d 1034, 1040-41 (9th Cir. 1986)) ("'[P]ublication of *deliberatively false comparative claims* gives rise to a presumption of actual deception and reliance.'") (emphasis added). That context is unique because competitors are unlikely to spend "substantial funds" comparing attributes consumers do not care about. *See U-Haul*, 793 F.2d at 1041.

STRIS | MAHER
725 S. FIGUEROA ST, STE 1830
LOS ANGELES, CA 90017

No. 13-cv-01456, 2014 WL 12588639, at *10 (C.D. Cal. Feb. 25, 2014) (granting motion to dismiss unfair competition claims where alleged omission was "not material"); *Chapdelaine Corp. Sec. & Co. v. Depository Tr. & Clearing Corp.*, No. 05-cv-10711, 2006 WL 2020950, at *6 (S.D.N.Y. July 13, 2006) (granting motion to dismiss Lanham Act claim where "[the allegedly misleading] statement was not material").

B. The Allegations Against Mr. Taite and Cliffside Are Insufficient.

At a minimum, the Court should dismiss the claims against Richard Taite and Cliffside Malibu. Grasshopper admits that it must satisfy Rule 9(b). MTD Opp. at 20. It has not come close. Grasshopper again relies only on boilerplate legal conclusions. It makes no effort to distinguish Defendants' cases or identify any new reason to believe Mr. Taite or Cliffside had any specific role. *See id.*

C. The Lanham Act Claim Should Be Dismissed for Additional Reasons.

Grasshopper also has not adequately alleged that either of the alleged misstatements were false or that they occurred in commercial advertising.

No false statement of fact. Grasshopper still has not articulated any false statement of fact. Grasshopper has finally acknowledged its Process Statement theory is based on the idea that *The Fix* has no survey process at all. *See, e.g.*, MTD Opp. at 11 ("there was no "survey process" as to Passages Malibu"). But Grasshopper's only foundation for that claim does not support it: Ms. McCabe did not say there were no surveys; she said only that the survey process may have evolved. MTD Opp. at 5. Meanwhile, Grasshopper has introduced other evidence showing that the survey process exists. *See* First McCauley Decl. ¶ 4, Ex. A (describing patient comments).[6]

The Mission Statement theory fares no better. Grasshopper essentially concedes that this statement is "an opinion or puffery." MTD Opp. at 9 (noting this "may be true

[6] Grasshopper's unpublished cases from other jurisdictions miss the mark. *See* MTD Opp. at 8-9 (citing cases). This is not a case about manipulated or fake reviews. The 2011 Passages Review is concededly a real review written by independent third party Recovery Media.

STRIS | 725 S. FIGUEROA ST, STE 1830
MAHER | LOS ANGELES, CA 90017

in the abstract"). To be sure: Grasshopper contends that Defendants were not allowed to take "advantage of their purported lack of bias to disseminate false or misleading information." *Id.* And it also contends that *The Fix* is an "endorser" of Cliffside that needed to disclose its common ownership under FTC regulations. *Id.* (citing 16 C.F.R. § 255.5). But both of these arguments turn on whether the purported lack of bias rendered *some other statement* false or misleading. Here, no statement of Defendants was rendered false or misleading: Grasshopper has conceded that the 2011 Passages Review was written by an unbiased, independent reviewer, and Grasshopper's claim that the Process Statement was not followed is wrong and implausible. MTD at 18-20.

No commercial advertising or promotion. Grasshopper recognizes that the Process and Mission Statements were at most "hybrid" communications combining commercial and non-commercial elements, and that to prevail it must show that the communication (1) is an advertisement, (2) refers to a specific product or service, and (3) the speaker has an economic motivation for the speech. MTD Opp. at 12 (citing *Enigma Software Grp. USA, LLC v. Bleeping Comput. LLC*, 194 F. Supp. 3d 263, 293-94 (S.D.N.Y. 2016)). The challenged statements had none of these features. Unlike *Enigma*, the Process and Mission Statements advertised nothing and referred to no specific product or service. *Cf. Enigma*, 194 F. Supp. 3d at 294.

III. The Court Should Dismiss the State-Law Claims.

As detailed in the concurrently filed anti-SLAPP reply brief, the Court should dismiss Grasshopper's state law claims. The FAL claim fails with the "substantially congruent" Lanham Act claim and for the independent reasons that Grasshopper did not adequately plead scienter and seeks only corrective disclosures that have already been made. Defs.' Reply in Supp. of Special Mot. to Strike ("MTS Reply") at 11. The unfair competition claim also fails with the Lanham Act claim and for the independent reasons that Grasshopper lacks standing and cannot prove reliance by consumers. MTS Reply at 11-12. And Grasshopper's libel claim fails because Grasshopper cannot plead and prove specific losses or malice. MTS Reply at 10.

STRIS | 725 S. FIGUEROA ST, STE 1830
MAHER | LOS ANGELES, CA 90017

CONCLUSION

The Court should dismiss the Amended Complaint with prejudice.

Respectfully submitted,

Dated: June 18, 2018

STRIS & MAHER LLP

/s/ Peter K. Stris

Peter K. Stris
Brendan S. Maher
Elizabeth Rogers Brannen
Dana Berkowitz
Victor O'Connell

725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
T: (213) 995-6800 | F: (213) 261-0299

Shaun P. Martin

University of San Diego School of Law
5998 Alcala Park, Warren Hall
San Diego, CA 92110
T: (619) 260-2347 | F: (619) 260-7933

Attorneys for Defendants
Clean & Sober Media LLC, et al.