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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

PURPLE INNOVATIONS, LLC, a Delaware limited liability company, Plaintiff, v. HONEST REVIEWS, LLC, a Florida Corporation, RYAN MONAHAN, an individual, and GHOSTBED, INC., a Delaware corporation, Defendants.	**DEFENDANTS HONEST REVIEW, LLC AND RYAN MONAHAN'S EMERGENCY MOTION TO STAY AND DISSOLVE TEMPORARY RESTRAINING ORDER (AMENDED)** Case No.: 2:17-cv-00138-PMW Honorable Dee Benson

Defendants Honest Reviews, LLC, and Ryan Monahan (collectively "Defendants") hereby request this Honorable Court issue an order staying and dissolving the Temporary Restraining Order ("TRO") issued on March 2, 2017 (Doc. No. 16).[1]

This Honorable Court erred in issuing an *Ex Parte*[2] Temporary Restraining Order (TRO) enjoining the publication of consumer reviews about the Plaintiff's products. This TRO is a breathtakingly unconstitutional prior restraint on First Amendment protected activity, and it is drafted so broadly that no person of ordinary intelligence (nor even of superior intelligence) could fully understand it or comply with it. Presumably, the Court signed an Order placed before it by the Plaintiff, trusting that the Plaintiff would not over-reach, and trusting that the Plaintiff would disclose contrary authority, and that the Plaintiff would not knowingly misrepresent the facts. With some opportunity to review the facts, the law, and to realize the constitutional transgression that this Order represents, Defendants trust the Court will see that this TRO must be lifted.

Defendant Honest Reviews, LLC independently reviews *inter alia* mattresses. In providing these consumer reviews, the Defendants call them like they see them. In fact, in the past, they wrote reviews that were *complimentary* of Plaintiff's business. *See* Declaration of Ryan Monahan ("Monahan Decl.") at ¶ 14. But, no company is entitled to perpetually positive reviews. That is not how the marketplace for mattresses works – nor is it how the marketplace of ideas works.

Defendants are now wrongfully accused of defamation and false advertising because Plaintiff refused, time and again, to address the safety issues surrounding its "plastic powder"

[1] The original filing (Dkt. 27) was an erroneously filed improper draft, and it should be disregarded and superseded by this Motion. It has been noted as "Entry Error" on the docket.

[2] There was no evasion of service. Honest Reviews, LLC is a by appointment only business, which operates on the second floor of a commercial building with many other offices. Most of the businesses are not open to the public and by default, the doors of the building are locked. When Defendant Monahan realized that process servers might be trying to deliver papers relating to this lawsuit, he unlocked the doors specifically to allow for service to occur. Monahan Decl. at ¶ 15.

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coating.[3] Plaintiff misled the Court and abused the First Amendment to procure an unconstitutional order. It now makes misleading allegations regarding Defendants' efforts to comply with the TRO, attempting to convert it into a gag order regarding the litigation itself. *See* Dkt. Nos. 17, 18 & 20. Such abuse cannot be permitted to chill Defendants' speech and the public's right to know. The TRO must be lifted. Given the violence it causes to the First Amendment, and the health risks that the public needs to know about, the TRO should be lifted immediately, and on an emergency basis.

1.0 Facts

The action is a quintessential SLAPP[4] suit designed to suppress negative consumer journalism. Plaintiffs have cleverly attempted to disguise this defamation claim as a Lanham Act claim – presumably to ensure the availability of Federal Court jurisdiction and to try to side-step the clear case law that cuts against them in defamation actions. But, no matter how eloquently someone may call a "dog" a "chicken," it will never lay eggs. And styling a specious defamation claim as a Lanham Act claim does not remove the underlying speech from the protections afforded by the First Amendment.

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[3] Plaintiff sells mattresses that are made of a rubber honeycomb, which they then dust with a powder that they claim is made of plastic and has been shown to be polyethylene microspheres. In other words, someone who sleeps on these mattresses would be expected to inhale these microspheres. The Plaintiff claims that it is "non toxic" and "food grade" plastic – but this does not assuage the concerns. After all, a plastic fork is "food grade" and "non toxic" but you most certainly would not want to actually *eat it.* The same goes for what a person wants to put in their lungs. It was reasonable to be concerned about this "plastic powder" since (a) if the particles that make up this plastic "powder" are of a certain size, they will pass through the alveoli into the bloodstream; or (b) if they are a bit larger, they will simply lodge themselves inside the lungs. Since the inception of this litigation, Defendants retained an expert in inhaled particles and public health, who studied the powder. Now, we know that the polyethylene microspheres are, in fact, inhalable lung irritants linked to asthma and respiratory irritation. *See* Preliminary Report of Dr. John J. Godleski, M.D. ("Godleski Report"), attached hereto as **Exhibit 1**. Given the recognized health hazards, it is of little surprise that the Plaintiff is seeking to suppress any discussion of this substance and its possible health effects. However, this Court should not be complicit in this suppression.

[4] SLAPP is an acronym for strategic lawsuit against public participation.

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Honest Reviews, LLC is a consumer review publication. Monahan Decl. at ¶¶ 2, 13-14. It receives no revenue from affiliate sales of products discussed or reviewed on the website. *Id*. at ¶¶ 11-13; *see also*, Declaration Marc Werner ("Werner Decl.") at ¶ 9. Its sole source of revenue is from Google Adsense, which places ads on each page, keyed to each individual user's browser history. *Id*. at ¶ 11. The revenue that Honest Reviews earns has absolutely no tie to the content of any particular review. *Id*. at ¶ 13. Currently, Honest Reviews serves six industries: beauty, home & kitchen, fitness & wellness, business, electronics, and sleep. *See* Honest Reviews Company Homepage, attached to the Declaration of Trey A. Rothell ("Rothell Decl.") as *Exhibit N*. The sleep category operates at <honestmattressreviews.com> which began operations in October of 2016. *See* Homepage of Honest Mattress Reviews, Rothell Declaration as *Exhibit O*. Honest Reviews, LLC has never received any consideration from GhostBed or any other sleep industry company. Monahan Decl. at ¶ 12; Werner Decl. at ¶ 7.

The Plaintiff falsely claims that Defendants Monahan and Honest Reviews, LLC are agents of GhostBed. They try and piece together innuendo and false information to create a conspiracy where none exists. If their version of the facts is to be believed, this vast consumer review website, serving multiple industries, with hundreds of reviews, is all a *Count of Monte Cristo*-level ruse to somehow promote GhostBed over Purple Mattress. The only thing that could measure up to such an elaborate and impossible plan is the Plaintiff's collective ego – in believing that their one company would warrant such an elaborate attack.

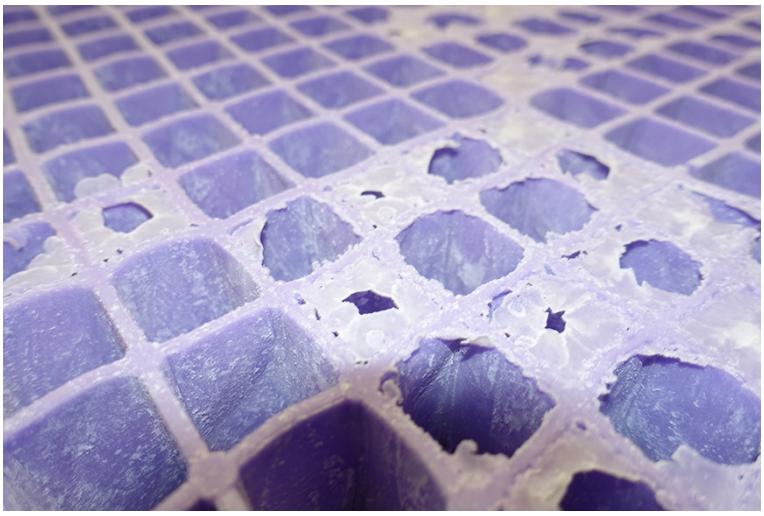
1.1 Nature of articles.

Plaintiff filed a Complaint and Motion for Temporary Restraining Order that characterize <honestmattressreviews.com> as a site with a specific focus on attacking Purple Innovations, LLC to obtain a competitive advantage. Even a cursory review of the screen captures Plaintiff submitted show that this is dishonest. Even these cherry-picked exhibits, which were calculated to help the Plaintiff's case, show that GhostBed is one of many companies featured, reviewed, and discussed

on <honestmattressreviews.com>. *See, e.g.,* Motion for TRO, Dkt. No. 8 at p. xxx. Moreover, on numerous occasions <honestmattressreviews.com> has published articles that portrayed Purple in a positive light. Monahan Decl. at ¶ 14; Rothell Decl. at *Exhibits A–L*. Honest Reviews is a consumer review site – not a public relations site for any of the companies whose products are reviewed.

1.2 Powdery Substance

Purple Innovations coats the inside of its mattresses with a powdery substance. Monahan Decl. at ¶¶ 16-17. The substance is not visible from the outside. One must open up the mattress to see the substance. Accordingly, consumers who buy the mattress cannot remove the substance in order to mitigate the risk of being exposed to it. *Id*. at ¶17.



Monahan Decl. at *Exhibit A*.

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However, images of the inside of the mattress that Purple uses for marketing and advertising purposes do not show the powdery substance. Monahan Decl. at ¶19.

Rothell Decl. at *Exhibit M*.

It is remarkable that a company with such demonstrably deceptive advertising accuses someone else of violating the Lanham Act. Note how pristine and clear the mattress looks in the Plaintiff's marketing materials. Meanwhile, the real product is sloppy, with plastic flashing left all over, and it is coated in this (until now) mysterious powder-like substance.

The reason the "powder" is there is a design flaw. The Purple mattress is made of a rubber honeycomb. But, rubber sticks to itself. Therefore, after Purple designed the mattress, it recognized that it used a poor material and design. The workaround was to coat it in powder. However, Plaintiff never thought to study the health effects of the powder. The Defendant commissioned a renowned physician-scientist to do just that.[5] With a preliminary study conducted

[5] As found by the U.S. District Court for the District of South Dakota:

> Dr. Godleski is the head of Pulmonary Pathology at Brigham and Women's Hospital, a major teaching hospital of Harvard Medical School. He also leads a research group at the Harvard School of Public Health. He earned his medical degree from the University of Pittsburgh School of Medicine where he did research using electron microscopy. He has published more than 140 papers related to

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by Dr. John Godleski, at Harvard University's Medical School and School of Public Health, **the powder does appear to be a health hazard**. Dr. Godleski determined that the powder is a form of atomized polyethylene, reporting:

> In studying the particles by SEM/EDS, it was found that the particles were in the form of microspheres with an average diameter of 5.8 microns. X-ray analysis showed the major chemical component of the particles to be carbon, with no mineral elements present. There were no micro-organisms found in the samples. By Fourier Transformed Infrared spectroscopy (FTIR), the white powder particles were shown to be polyethylene, and the purple frame was found to be polyethylene-polypropylene copolymer. The foam portion of the mattress is still understudy, but has characteristics of butadiene, and may be a form of butadiene polymer.
>
> Polyethylene is a common plastic formed into many structures. As inhalable microspheres, these have the potential to cause respiratory irritation especially when inhaled in large numbers as shown in my laboratory (1-4). In addition, polyethylene has been associated with allergy in the form of either asthma or contact dermatitis in sensitized individuals (5-7). Based on this assessment, it is important for consumers to be aware of the composition of this fine particulate matter in the mattress which may be released into the air and has the potential for the development of respiratory or dermal hypersensitivity in some individuals.

Godleski Report, **Exhibit 1**, at 2.

As Defendants contended in their now temporarily-censored articles, consumers have a right to know what this substance is, where it is, what the Purple Mattress really is, and the potential health hazards of the polyethylene microspheres. This esteemed Doctor's findings are troubling – but, taken to the limits the Plaintiff seeks, the TRO seems to prohibit even sharing this scientific

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> pulmonary pathology including a number using analytical electron microscopy. He is a "recognized expert whose opinion is sought by pathologists from other hospitals in the diagnosis of foreign material in tissues throughout the body using scanning electron microscopy and energy dispersive X-ray analyses."

Berg v. Johnson & Johnson, 940 F. Supp. 2d 983, 998-99 (D.S.D. 2013). *See also Carl v. Johnson & Johnson*, 2016 N.J. Super. Unpub. LEXIS 2102, *7-8 (Law Div. Sept. 2, 2016) ("Dr. Godleski has published more than 160 papers related to pulmonary/environmental pathology including a number using analytical electron microscopy. He currently leads the Particles Research Core in the Harvard-NIEHS Environmental Research Center and serves as Associate Director of the Harvard Clean Air Research Center supported by the US Environmental Protection Agency.").

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evidence with the public. Given that the Plaintiff has inundated the Internet with their advertising, the press should be able to freely report on these findings. In fact, the press not only *should* be able to do so, but has a *responsibility* to do so. That information should not be kept from the public through the operation of a prior restraint.

2.0 Legal Standard

In considering a motion for stay of a preliminary injunction, with attention to one pending appeal, the Court considers "(1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay or injunction is not granted; (3) the absence of harm to opposing parties if the stay or injunction is granted; and (4) any risk of harm to the public interest." *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001). Here, with respect both to a forthcoming motion to dissolve the TRO and, if necessary, appeal, Defendants can demonstrate all four elements.

3.0 Argument

3.1 Any Prior Restraint is Itself an Irreparable Harm

Plaintiff falsely stated that "Defendants are likely to suffer very little harm, if any." Dkt. No. 8 at 64. Plaintiff misled the Court and ignored its duty to address controlling authority regarding prior restraints; tellingly, the terms "prior restraint" and "First Amendment" appear nowhere in the motion or the supplement thereto. *See* Dkt. No. 8 & 11. The TRO is an unconstitutional prior restraint, which runs roughshod over the core First Amendment freedoms of speech and of the press. Specifically, TRO ¶ 9(g) states that:

> Defendants are hereby restrained from making false, misleading, or confusing posts or discussions on social media or otherwise about the existence of this lawsuit, the Court's temporary restraining order or other any other orders that may be issued by the Court, or about Purple's efforts in this lawsuit to restrain Defendants from continuing to engage in the conduct at issue, in an attempt to circumvent the purpose of the injunctive relief sought by Purple.

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Despite its invalidity, Defendants have sought to comply with the TRO on the theory that even an unconstitutional court order is still a court order. Plaintiff, however, has sought to use it as an expansive bludgeon, even using it to attempt to preclude Defendants from raising defense funds. In fact, read the way that Plaintiffs insist, the TRO would prevent Defense counsel from even filing this motion as it discusses the existence of the lawsuit and the TRO. It is so unconstitutionally expansive that one must guess at what it means. What is "misleading" or "confusing?" What do those words mean in this context? According to the Plaintiff, these words are synonymous with "unflattering."

Given that nobody can reasonably agree upon what the TRO actually prohibits, Defendants have been forced to completely censor their consumer journalism from publication, and to avoid sharing any information about this company or its health-hazard product. "*The clearest definition of prior restraint is an administrative system or a judicial order that prevents speech from occurring.*"[6] Any movant seeking a prior restraint must overcome a monumental burden, and the entry of a prior restraint to prevent a public publication is almost never appropriate. *Near v. Minnesota*, 283 U.S. 697 (1931); *see also New York Times v. United States*, 403 U.S. 713 (1971); *Nebraska Press Association v. Stuart*, *supra*; *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *and see New York Times v. Sullivan*, 376 U.S. 254 (1964) (… "debate on public issues should be uninhibited, robust, and wide open…"). This is such a fundamental principle that it should almost require no citation at all. Prior restraints are appropriate, perhaps, to stop reporting on troop movements or sensitive hostage negotiations – never to suppress consumer journalism.

As this Court has observed, "[a] scheme of prior restraint gives 'public officials the power to deny use of a forum in advance of actual expression.'' While not unconstitutional *per se*, "any system of prior restraint comes to the Court bearing a heavy presumption against its constitutional validity." *England v. Hatch*, 43 F. Supp. 3d 1233, 1240 (D. Utah 2014) quoting *Am. Target Adver.,*

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[6] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* at 918 (2002).

Inc. v. Giani, 199 F.3d 1241, 1250 (10th Cir. 2000) (quoting *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975)). The essence of a prior restraint is that is places specific communications under the personal censorship of a judge. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 468 (5th Cir. 1980). That is where we are now.

"The usual rule is that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages." *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672, 259 U.S. App. D.C. 134 (D.C. Cir. 1987). "The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties [… A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free wheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).

Furthermore, as Justice Blackstone eloquently wrote:

> The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matters when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity, thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments destructive of the ends of society, is the crime which society corrects.

Blackstone's Commentaries 34, pp. 1326-27.

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Supreme Court struck down an injunction prohibiting the petitioners' distribution of leaflets criticizing respondent's business practices. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets

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warrants use of the injunctive power of a court." *Id*. at 419. Furthermore, the Supreme Court has repeatedly recognized that government restriction of speech in the form of a prior restraint against the media constitutes "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 96 S. Ct. 2791, 49 L. Ed. 2d 693 (1976).

Yet here we are…

Not that any of the censored articles are false, but it is worth noting that **even false statements** are protected speech. *See United States v. Alvarez*, 567 U.S. 709, 132 S. Ct. 2537, 2547 (2012). "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id*. at 2550. Defendants do not concede they made any false statements; rather they provided truthful facts, opinion, and perhaps spoke hyperbolically. But even if false, they are constitutionally permitted to publish falsehoods without being subject to a prior restraint – the correct action would be to punish those statements with damages, after a trial proves them false. Of course, given the factual development even at this point, that has been rendered a legal impossibility.

A dissolution of the TRO is a matter of great urgency. Plaintiff is seeking to hold Defendants in contempt *now* because they explained why they are raising funds to support their defense and why they removed the pages they were ordered to remove.[7] Taken to the Plaintiff's interpretation of the TRO to its logical conclusion, it would even interpose in the attorney-client

[7] Even such removal as ordered is unconstitutional. Some courts have agreed that there may be injunctions against speech, where there has been a "continuing course of repetitive speech" but even then, injunctive relief will only be granted after a final adjudication on the merits, and a finding that the speech is unprotected. *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993). *See also Wagner Equip. Co. v. Wood*, 893 F. Supp. 2d 1157, 1160 (D.N.M. 2012) (declining to dismiss a request for permanent post-trial injunctive relief as wholly barred as a matter of law). *U.S. v. Brown*, 218 F.3d 415, 424 (5th Cir. 2000) (prior restraint directed at the press will be upheld only if the government can establish that the activity restrained poses either a "clear and present danger or a serious and imminent threat to a protected competing interest").

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relationship. It chills all speech by Defendants that in any way discusses Plaintiff. In fact, it would bar Defendants from filing this motion, filing an appeal (if necessary), and responding to Plaintiff's motion for contempt. The First Amendment will not abide this prior restraint, and in the last century, no appellate court has upheld such a broad injunction against speech.

3.2 Plaintiffs do not possess a substantial likelihood of success on the merits

Contrary to the unilateral arguments presented by Plaintiff, its prospects for success in this action are dim at best, thus, Purple cannot show a likelihood of success on the merits, as Defendants' statements range from provably true[8] to opinion.

3.2.1 Lanham Act Claims

There is nothing false or misleading in the articles to support a claim under Section 43(a) of the Lanham Act. In order to succeed on a false advertising claim under § 43(a) of the Lanham Act, the plaintiff must demonstrate:

> (1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to (a) the origin, association or approval of the product with or by another, or (b) the characteristics of the goods or services; and (4) injure the plaintiff.

Cottrell, Ltd. v. Biotrol Int'l, Inc., 191 F.3d 1248, 1252 (10th Cir. 1999) (citations omitted). Plaintiff cannot meet these elements.

At the outset, Defendants are not engaged in commercial speech and the Lanham Act thus does not apply. As the Tenth Circuit has recognized:

> The Supreme Court has defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas &*

[8] It is important to note that the Plaintiff must prove the Defendants' statements as false in order to prevail on a defamation claim – the Defendants need not prove them true. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) ("the plaintiff [must] bear the burden of showing falsity, as well as [the defendant's] fault, before recovering damages" whether or not plaintiff is a public figure); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990) (requiring plaintiff to prove statements false in a defamation case).

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> *Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). Speech that does no more than propose a commercial transaction, for example, is commercial speech. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 762. Thus, commercial speech is best understood as speech that merely advertises a product or service for business purposes, *see 44 Liquormart, Inc. v. Rhode Island*, 134 L. Ed. 2d 711, 116 S. Ct. 1495, 1504 (1996) (plurality opinion) (outlining a brief history of commercial speech that is, essentially, a history of advertising). As such, commercial speech may receive something less than the strict review afforded other types of speech. *Id*. at 1507.

Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 970 (10th Cir. 1996).

Here, there is no proposed transaction. Defendants are not selling anything to the public and are not engaged in commercial competition with Plaintiff. Mr. Monahan is not an employee of GhostBed and is not acting to sell GhostBed's products by writing negative reviews about Purple.[9] Monahan Decl. at ¶¶7-10; Warner Decl. at ¶¶11-19. In fact, Defendants promote Purple elsewhere on the website, and have also written positive articles about Purple. *See* Monahan Decl. at ¶14; Rothell Decl. at *Exhibits A–L*. If the intent was to defame Purple, Defendants have done a terrible job of it.

[9] Part of Plaintiff's dishonest ruse to get this TRO issued was to claim that Monahan is employed by GhostBed. Indeed, even if he was, that would not warrant the TRO. However Monahan does not wish to hide any facts from this Court. Defendant Ryan Monahan is the CEO of Social Media Sharks, a company that provides high-level strategic/deployment marketing through existing marketing agencies. One of the agencies it contracts with is Achieve Agency. *Id*. at ¶ 3. Defendant GhostBed currently contracts with Achieve Agency to perform social media marketing. *Id*. at ¶ 6. Achieve Agency in turn engages Social Media Sharks to provide a portion of those services. *Id*. None of those services Social Media Sharks provides involve Honest Reviews, LLC. which is a separate company. *Id*. The connections that Plaintiff tries to allege are disingenuous, at best. A recording of the telephone call Plaintiff's private investigator made to GhostBed's customer service line demonstrates that he got creative with his interpretation of the statements made during the call to conform to Plaintiff's arguments that Monahan was an employee of GhostBed. Warner Decl. at ¶¶ 22-32. There is no proper allegation, argument, or evidence that Mr. Monahan and Honest Reviews are alter egos of each other, or even that they have a close relationship, and none should be imputed. Plaintiff failed to disambiguate the defendants and show why each Defendant should be subject to a TRO. Importantly, it failed to show a likelihood of success as to either Defendant or that the standard for a TRO was met for each.

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Defendants are independent consumer review authors expressing opinion and asking investigative questions. In fact, this case bears a very strong resemblance to one recently decided by the Eleventh Circuit Court of Appeals. *Tobinick v. Novella*, No. 15-14889, 2017 U.S. App. LEXIS 2637, at *31 (11th Cir. Feb. 15, 2017). In *Tobinick,* the plaintiff was a physician who claimed a novel approach to treating stroke and Alzheimer's Disease. The defendants were a neurologist and a blog that questioned the validity of the plaintiff's claims. *Id*. The plaintiff made Lanham Act and libel claims, just like Purple. The Eleventh Circuit saw no proposed commercial transaction and agreed they were not "advertisements," concluding "Dr. Novella's discussion of Dr. Tobinick's use of etanercept, which resembles a medical peer review of a treatment's viability, therefore, does not render the articles commercial speech." *Id.* Like Dr. Novella, Defendants' articles resemble a peer review, not commercial speech.

To the extent that the statements were hyperbolic, that puts no layer of dust on their First Amendment protection. It is "clearly established in this circuit that speech, such as parody and rhetorical hyperbole, which cannot reasonably be taken as stating actual fact, enjoys the full protection of the First Amendment." *Mink v. Knox*, 613 F.3d 995, 1011 (10th Cir. 2010). Defendants' articles hyperbolically address questions about the safety of inhaling plastic powder, really polyethylene microspheres, and Plaintiff's apparent refusal to explain if and why it may be safe to inhale. Rather than answer these questions, Plaintiff chose to come to this court, failing to give the court the full truth about the law and the facts, in order to censor speech.

Assuming *arguendo* the articles contain a factual allegation rather than being rhetorical hyperbole, Plaintiff fails to show falsehood. All reference by Plaintiff to the "powder" coating being "nontoxic" was unresponsive to Defendants' inquiry. Even in the affidavit from Plaintiff's CEO, and the pleadings themselves, no attention is paid to the question of inhalation. *See* Dkt. No. 8-2 at ¶ 11. Water is nontoxic, but its inhalation is fatal. This plastic "anti-tack powder", really polyethylene microspheres, may be nontoxic to touch but nothing in any of the materials

provided by Plaintiff demonstrates it is safe to inhale.[10] In fact, common sense would suggest that inhaling tiny plastic particles would be unpleasant, if not unhealthy. If the "powder" is, as Plaintiff seems to claim, made of plastic, and, as Dr. Godleski confirms, polyethylene microspheres, shouldn't consumers be advised that they might be inhaling plastic if they sleep on this mattress? Why does Purple want even *questions* about the composition of their plastic "powder" suppressed? Most likely because it realizes no one would want to sleep on a mattress that would cause them to inhale aerosolized plastic. Anyone analyzing this should ask themselves – "*would you choose to inhale aerosolized polyethylene?*" Or, better yet, "*would you be happy if you inhaled it, and nobody warned you that you might be doing so?*"

Moreover, as Plaintiff recognizes, for a Lanham Act case to succeed, consumers must be deceived. But, any "deception" here is on the part of the Plaintiff – first when it deceived the consumers, and then when it deceived this court.

First, contrary to what some uninformed receptionist told an investigator, Mr. Monahan is not employed by GhostBed nor are Defendants acting on their behalf. *See* Monahan Decl. at ¶¶ 6-10. Even if he was, that does not mean that the articles are "advertising," nor even that they lack full First Amendment protection. One can work for Chevrolet and still write automotive journalism. Anthony Bourdain has his own restaurant, yet still manages to cover food as a journalist. Second, there is unlikely to be any confusion, with none actually demonstrated, where Defendants also *promote* Plaintiff on their website. *Id*. at ¶14; Rothell Decl. at *Exhibits A–L*. Plaintiff cannot prevail on its Lanham Act claim. In fact, if anything, the censored articles *cure consumer confusion.* The court should draw its attention to the graphics above – with Purple's marketing materials showing a pristine and clean rubber grid – with the reality shown to be far

[10] Polyethylene is used in shopping bags, water pipes, and cling-wrap, none of which the average person would ordinarily ingest or inhale. *See* "Polyethylene", The Essential Chemical Industry Online, attached as **Exhibit 2**, and available online at: <http://www.essentialchemicalindustry.org/polymers/polyethene.html> (last accessed Mar. 9, 2017).

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from it. No, far from curing consumer confusion, the TRO virtually ensures that consumers will be deceived, with respect to what they will actually be buying and its potential health effects.

3.2.2 Tortious Interference with Economic Relations

In addition to being unlikely to succeed on its Federal, Lanham Act claim, Plaintiff cannot prevail on its state law claims.[11] With respect to the claim of tortious interference, Plaintiff has shown neither improper purpose, improper means, nor injury. As this Court observed:

> Under Utah law, the tort of intentional interference with economic relations requires proof of three elements: (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff. The Utah Supreme Court has recently explained that a plaintiff satisfies the second requirement by establishing either improper purpose or improper means. A plaintiff seeking to show improper purpose must show that defendant's predominant purpose of interfering was to injure the plaintiff.

Trugreen Cos., L.L.C. v. Scotts Lawn Serv., 508 F. Supp. 2d 937, 951 (D. Utah 2007) (internal citations omitted).

As set forth above, Defendants' speech is not actionable falsehood, and thus not improper means. Neither is any alleged "fact" false—it is factually accurate that Plaintiff has not shown that it is safe to inhale polyethylene microspheres. Neither is there any evidence of improper purpose—Plaintiff cannot demonstrate Defendants had a motivation to harm Plaintiff, especially where Defendants otherwise promote Plaintiff's products. Monahan Decl. at ¶14; Rothell Decl. at *Exhibits A–L*.

Further, all of the alleged injury is speculative. Plaintiff has not shown a single lost sale. Though Plaintiff speaks of "voluminous customer inquiries", none of which are evidenced, there is nothing to suggest any of those customers then opted not to purchase the Plaintiff's mattress

[11] Of course, once the Federal question jurisdiction is eliminated, there is incomplete diversity of citizenship. Plaintiff and GhostBed are both citizens of Delaware. "Incomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 554, 125 S. Ct. 2611, 2618 (2005).

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because of Defendants' articles. Dkt. No. 8 at p. 18. There cannot be an interference with an economic relationship where no such relationship exists.

3.2.3 Defamation

Plaintiff must prove the Defendant's statements as false in order to prevail on a defamation claim—the Defendants not need prove them as true. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) ("the plaintiff [must] bear the burden of showing falsity, as well as [the defendant's] fault, before recovering damages" whether or not Plaintiff is a public figure); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990) (requiring plaintiff to prove statements false in a defamation case). As set forth above, Defendants' statements are true, and to the extent they might be hyperbolic statements of opinion, that makes them more protected, not less. Though Plaintiff says it has "extensively tested its products for safety," it has published no inhalation studies and likely has not conducted any. *See* Dkt. No. 8 at p. 16. With Dr. Godleski's report, it has been scientifically shown that Defendants' statements were true. Godleski Report, **Exhibit 1**. Where Defendants were simply asking reasonable questions, there was no defamation. But, now that Plaintiff has forced Defendants' hands through this litigation, Defendants have an authoritative report that this substance is worthy of concern. With that alone, the defamation claim is rendered so impossible to prevail that it should be stricken from the complaint – not the foundation for a prior restraint.

Based upon the hype Plaintiff has sought to generate, it is, at a minimum, a limited purpose public figure. *See, e.g.,* David Perry, "Purple's clever egg test racks up online views, wins fans", Furniture Today (Mar. 14, 2016),[12] attached hereto as **Exhibit 3**. "Utah employs a two-part test to determine whether the plaintiff is a limited-purpose public figure. First, the court must isolate the specific public controversy related to the defamatory remarks. Next, the court should examine

[12] Available at: <http://www.furnituretoday.com/blogpost/14157-purples-clever-egg-test-racks-online-views-wins-fans> (last accessed Mar. 9, 2017).

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the type and extent of the plaintiff's participation in that public controversy to determine whether, under *Gertz*, he has "thrust [himself] to the forefront of [the] controvers[y] in order to influence the resolution of the issues involved." *World Wide Ass'n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132, 1136-37 (10th Cir. 2006) (internal citations omitted) quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 351 (1974)). Here, Plaintiff highlights its "patent pending" technique. In fact, the Plaintiff's ads are so ubiquitous on the Internet that they are annoying. *See* Complaint, Dkt. No. 8 at ¶86. This marketing campaign shows it thrust itself into the discussion and is a public figure. Furthermore, at least three other websites raised the issue before Defendants did. *See* "Powder used in Purple mattress?", THE MATTRESS UNDERGROUND (Jun. 30, 2016), attached hereto as **Exhibit 4**;[13] Andrew, "GhostBed vs Purple Mattress Review", MEMORY FOAM TALK, attached hereto as **Exhibit 5**;[14] and "Purple Mattress Unboxing", SLEEPOPOLIS (Feb. 1, 2016), attached hereto as **Exhibit 6**.[15] Before Defendants wrote about this company and its "powder", i.e., polyethylene microspheres, this was already the subject of other sources of consumer journalism. A public controversy already existed. There is no question that this plaintiff is a public figure.

Plaintiff fails to show Defendants spoke with actual malice. "If the plaintiff is a public figure, he must demonstrate by a standard of clear and convincing evidence that the defamatory statement was made with 'actual malice.'" *Id. quoting Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510-11 (1991). Actual malice is defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964). All of the articles are questions about whether the plastic "powder", *i.e.*

[13] Available at: <https://www.themattressunderground.com/mattress-forum/general-mattresses/19800-powder-used-in-purple-mattress.html> (last accessed March 7, 2017).
[14] Available at: <http://www.memoryfoamtalk.com/ghostbed-vs-purple-review/> (last accessed March 7, 2017).
[15] Available at: <http://sleepopolis.com/blog/purple-mattress-unboxing/> (last accessed March 7, 2017).

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polyethylene microspheres, is safe to inhale. Plaintiff never unequivocally demonstrated that such inhalation is safe, even if touching it might be non-toxic. There are plenty of substances that are safe to touch, but are unsafe to inhale. Thus, Defendants neither had knowledge of falsity or spoke with reckless disregard, especially where they requested the very information from Plaintiff. Moreover, the lack of malice is also demonstrated by the fact that Honest Reviews has published numerous articles on <honestmattressreviews.com> which cast a favorable light on Purple. Monahan Decl. at ¶14; Rothell Decl. at *Exhibits A–L*. And, with Dr. Godleski's report, any future discussion by Defendants, or anyone else, of the polyethylene microspheres and their potential health hazards could not be with reckless disregard.

As set forth above, Plaintiff has failed to show any damages, let alone specific damages to support a defamation claim. Plaintiff asserts *per se* libel, but "[l]ibel is classified per se if it contains "defamatory words specifically directed at the person claiming injury, which words must, on their face, and without the aid of intrinsic proof, be unmistakably recognized as injurious." *See Miller v. KSL, Inc*., 626 P.2d 968, 977 n.7 (Utah Sup.Ct. 1981) quoting *Lininger v. Knight*, 123 Colo. 213, 221, 226 P.2d 809, 813 (1951). Although at common law, no proof of special damages was required, Defendants are media defendants the Constitution requires there must be actual damages. *See id. citing Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1975). Moreover, Defendants' words are not otherwise recognized as injurious—they merely raise questions—they do not state it is, in fact, harmful to breathe the plastic "powder". Indeed, there is an ongoing debate whether breathing in even otherwise harmless substances, such as corn starch, is dangerous. *See* Holly Fletcher, "Is the ColorRun Hazardous to Your Health", May 8, 2014, attached hereto as **Exhibit 7**.[16] Thus, no defamation claim is cognizable. However, Godleski's report, these questions are not only supportable, but it seems that they were too generous to the Plaintiff by far.

[16] Accessible at <https://younghygienist.com/2014/05/08/is-the-colorrun-hazardous-to-your-health/> (last accessed March 9, 2017).

Had Defendants possessed this study before publishing, they would have published an article raising alarm and warning – because with these preliminary findings before us, it would be reasonable to say that *nobody* should subject themselves to the risks inherent in breathing in aerosolized polyethylene.

3.2.4 Trade Libel / Injurious Falsehood

As Plaintiff cannot show libel, it cannot show trade libel or injurious falsehood. To prevail, Plaintiff "must prove (a) falsity of the statement made, (b) malice by the party making the statement, and (c) special damages. To sustain a claim for injurious falsehood, the plaintiff must demonstrate an economic interest that has been harmed by the allegedly false statement." *Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.*, 505 F. Supp. 2d 1178, 1191 (D. Utah 2007) (internal citation omitted).

First, the statements are not shown to be false, let alone assertions of fact. In fact, they have been shown to be true. Second, as noted above, there is a lack of actual malice. And third, there is no evidence of pecuniary losses. Nothing in the TRO motion demonstrated any actual losses, despite a naked allegation of having "adequately demonstrated" such. Dkt. No. 8 at p. 20. Thus, Plaintiff is unlikely to succeed on the merits.

3.3 Plaintiff has Suffered No Harm

There is no identifiable harm, let alone irreparable harm, suffered by Plaintiff. Monetary damages would be sufficient to compensate a defamed plaintiff and will be available to Purple, should Plaintiff prevail in this matter. Plaintiff makes only vague, general, unsupported allegations that Defendants' speech causes harm. *See* Declaration of Sam Bernards, Dkt. No. 8-2 at ¶ 45. In fact, Defendants are not the only ones questioning the safety of inhaling polyethylene. At least three other generally-available websites raised the issue before Defendants did. *See* **Exhibit 4**; **Exhibit 5**; and **Exhibit 6**. Accordingly, how can Plaintiff claim that the Defendants' come-lately articles are the ones that caused harm? They can not.

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Not a single lost sale or lost investment is specifically identified from Defendants' prior postings, nor is there any suggestion that Plaintiff would be harmed by discussion about this publicly accessible lawsuit. Even if Defendants are unconstitutionally gagged, others will continue to write about this lawsuit. This case is a matter of public interest, and there is no constitutional reason why Defendants should be the only members of the media not allowed to exercise their rights. *See* Tim Cushing, "Utah Judge Won't Let The Constitution Get In The Way Of A Little Prior Restraint", TECHDIRT (Mar. 6, 2017), attached hereto as **Exhibit 8**.[21] Thus, there is no purpose for the TRO but to harm Defendants alone, and it should be stayed.

3.4 The TRO Heavily Harms the Public Interest

"Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 530, 559 (1976). "The Supreme Court has roundly rejected prior restraint." *Kinney v. Barnes*, 443 S.W.3d 87, 91 n.7 (Tex. 2014) (citing Sobchak, W., THE BIG LEBOWSKI, 1998). Prior restraints "bear a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

There is a good reason for this: Even temporary deprivations of First Amendment rights are constitutionally intolerable. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of First Amendment rights even for a short period of time constitutes irreparable harm); *Jacobsen v. United States Postal Serv.*, 812 F.2d 1151, 1154 (9th Cir. 1987). There is a greater public interest in upholding free speech principles. *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128-29 (9th Cir. 2011); *Kline v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

Because the desired injunction's harm to Defendants and the broader public involves their sacrosanct First Amendment rights, enjoining Defendants' speech in this case inflicts the most

[21] Available at: <https://www.techdirt.com/articles/20170304/17525336840/utah-judge-wont-let-constitution-get-way-little-prior-restraint.shtml> (last accessed March 7, 2017).

egregious harm to free expression itself. Silencing Defendants automatically implicates—and harms—public interest because of the censorship inherent in that relief. The truth is that Purple has refused to engage in a public discussion about whether the material used in the packing of its product might be harmful.

The recently enacted Consumer Review Fairness Act of 2016 underscores the public's interest in the free flow of consumer information. 15 U.S.C. § 45(b) (2016). The new law voids even private contracts that might impede product reviews. *CrowdStrike, Inc. v. NSS Labs. Inc.*, 2017 U.S. Dist. LEXIS 19777, *17-18 (D. Del. Feb. 13, 2017). If Purple believes that Honest Reviews' content is inaccurate or unfair, it can refute that information either in the marketplace or at trial, but it is not entitled to a presumption that its version of the truth is the one that consumers should believe.

Although Plaintiff invokes business goodwill and preventing public deception, there is no indication that the public has been deceived by Defendants' questions about the safety of inhaling the polyethylene microspheres. Given Dr. Godleski's preliminary findings, it is imperative that the public receives this information. The TRO harms the public by acting as a gag order, prohibiting the dissemination of information that consumers have a right to know. "[*I*]*t is important for consumers to be aware of the composition of this fine particulate matter in the mattress which may be released into the air and has the potential for the development of respiratory or dermal hypersensitivity in some individuals*." Godleski Report, **Exhibit 1**, at 2 (emphasis added).

4.0 Unlikely that this Court even has jurisdiction

Plaintiff is suing three defendants who are residents of Florida, but rather then suing them in Florida where personal jurisdiction would be proper, Plaintiff elected to sue in Utah, in a likely attempt to avoid Florida's recently enacted anti-SLAPP statute. As this Court is aware, "[t]he proper question [to determine personal jurisdiction] is not where the plaintiff experienced a

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particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Younique, L.L.C. v. Youssef*, No. 2:15-cv-00783-JNP-DBP, 2016 U.S. Dist. LEXIS 165522, at *25 (D. Utah Nov. 30, 2016) quoting *Walden v. Fiore*, 134 S.Ct. 1115, 1125, 188 L. Ed. 2d 12 (2014). Here, assuming Plaintiff even suffered any injury, Defendants are not connected to Utah in any meaningful way. Neither was Defendants' conduct "aimed" at Utah in any way beyond Purple, a Delaware company, allegedly doing business in Utah. *Racher v. Lusk*, No. 16-6055, 2016 U.S. App. LEXIS 23417, at *10 (10th Cir. Dec. 30, 2016).

Plaintiffs assert personal jurisdiction based on the claim that "Defendants have conducted continuous and systematic business in the state of Utah, have numerous contacts with the state of Utah, and have committed and continue to commit acts of false advertising and related tortious acts in this district, as alleged herein." Complaint at ¶ 12. Plaintiff makes no distinction between Defendant Honest Reviews, LLC, Defendant Ryan Monahan, and Defendant GhostBed, Inc. However true the allegations of personal jurisdiction as to GhostBed, Inc. they certainly are not true for Monahan or Honest Reviews, LLC.

Ryan Monahan has no contacts with the state of Utah whatsoever. Monahan Decl. at ¶ 4. None of the writings that form the basis of this action are attributable to Monahan. Honest Reviews, LLC is based in Florida and operates an informational website that makes no sales anywhere including Utah. Monahan Decl. at ¶ 5. *Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.*, 505 F. Supp. 2d 1178, 1191 (D. Utah 2007).

5.0 Conclusion and Relief Sought

Because Defendants are likely to succeed on a motion to vacate the TRO, before this Court or on appeal, a stay of the TRO is warranted. Defendants' fundamental First Amendment rights must not be stymied by the speculations of a Plaintiff who wishes to shut down discussion rather than answer legitimate questions, no matter how hyperbolically raised. Plaintiff has no likelihood of success on its underlying claims and was not entitled to the TRO.

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The exigency and urgency of dissolving this temporary restraining order can not be overstated. Even a temporary suppression of First Amendment rights is itself irreparable harm. However, given that this is information consumers need to make an informed decision about the health risks inherent in use of the Purple Mattress, even a temporary suppression of this information could be the proximate cause of actual illness or injury.

This is what the press is here to do. The public needs to be informed about public health hazards, and when manufacturers of potentially harmful products refuse to be transparent and forthcoming about those products and their deleterious effects, it is the press's job to pry back the shutters and let the sunshine in. Plaintiff is clearly aggressively intent on suppressing this information. At this point, the reporting has been shored up by the expert report of Dr. Godleski. The Purple Mattress, as currently manufactured, appears to be a public health hazard. This Court should abide no further censorship.

WHEREFORE, Defendants respectfully requests this Honorable Court stay the TRO immediately.

DATED this 9th day of March, 2017.

Respectfully submitted,

/s/ W. Andrew McCullough

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Case No. 2:17-cv-00138-PMW

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 9, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ W. Andrew McCullough
W. Andrew McCullough

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