SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND, Plaintiff, v. HORMEL FOODS CORPORATION, Defendant.	Case No. 2016 CA 004744 Judge Neal E. Kravitz Next Court Date: September 22, 2017 Event: Scheduling Conference

PLAINTIFF ANIMAL LEGAL DEFENSE FUND'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT HORMEL FOODS CORPORATION'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

Hormel Foods Corporation's (Hormel) "Make the Natural Choice" advertising campaign exploits consumers' beliefs to falsely market industrially farmed meat products as something far more bucolic. Hormel's Motion to Dismiss largely rests on the facetious notion that it is immune from all state laws prohibiting false advertising because the U.S. Department of Agriculture (USDA) reviewed and approved its labels, which do not appear in ads in the format in which they were approved. Hormel's arguments are as misleading and false as its promotional materials.

First, as the federal district court already found in its remand order, Plaintiff Animal Legal Defense Fund's (ALDF's) allegations challenge Hormel's "Make the Natural Choice" *advertising* campaign, not Hormel's federally approved *labels*. Hormel's arguments for preemption depend on erroneously conflating the two and grossly overstating the sweep of federal meat labeling laws. Federal meat labeling laws are limited to just that—labels—and they do not and cannot regulate the misleading advertising that ALDF alleges violates the District of Columbia Consumer Protection Procedures Act (CPPA). As such, ALDF's claims are neither expressly nor impliedly preempted by the federal laws governing meat labeling.

Second, because the USDA lacks jurisdiction to regulate advertising claims, it cannot possibly have primary jurisdiction over ALDF's CPPA challenge to Hormel's advertising claims, and, in any event, there is no anticipated agency action that would impact ALDF's claims.

Third, ALDF's Complaint easily states a claim under the CPPA by citing numerous studies demonstrating that the *majority* of consumers would be misled by Hormel's claims. —a statistic Hormel concedes is correct. In particular, the studies indicate consumers would understand the "natural" claims in Hormel's advertisements to mean the products were *not* industrially farmed—as Hormel's Natural Choice products absolutely are. Hormel then blames the victim for being

misled, instead of accepting responsibility for making misleading statements. Hormel's bizarre arguments must be rejected.

Fourth, as Hormel details in its own brief, ALDF has long sought to correct the disjunction—exploited by Hormel—between what consumers understand meat advertising to communicate and the true, industrialized practices that are often used to make the products, as is the case here. To this end, ALDF undertook efforts to correct the exact misleading statements at issue here, which is precisely why ALDF has standing to pursue these false-advertising claims.

ALDF respectfully requests that the Court deny Hormel's motion to dismiss.

BACKGROUND

1. Hormel's Advertisements, Practices, and Consumer Expectations

Looking to profit from increased consumer concern about the origins of meat products, Hormel launched its "Natural Choice" line of lunch meats and bacon in 2006, and recently reintroduced those products via an advertising campaign that uses the slogan "Make the Natural Choice." Compl. ¶¶ 10, 49, 50, 52-59. The advertising, which appears in print magazines, newspaper inserts, videos, and online, urges consumers to buy "Natural Choice" meats because they are "all natural," have "no preservatives," have no added nitrites or nitrates, and are healthier for pregnant women. Compl. ¶¶ 61-69, 77-78. Some of the advertisements include reproductions of the front of the product packaging, but in *every* instance at least some of the text on the front of the packaging is obscured or so small as to be illegible. *See* Compl. ¶¶ 65-67. On its "Natural Choice" website, www.makethenaturalchoice.com, Hormel brags that its products are "wholesome," "safe," "clean," "honest," and local, and made to meet "higher standards," and that "nothing is hiding." Compl. ¶¶ 70-74.

Studies consistently demonstrate that consumers believe a "natural" advertising claim concerning meat products—like Hormel's—means that the animals were not given artificial

growth hormones; that the animals' feed contained no artificial ingredients, colors, or GMO products; and that no antibiotics or other drugs were used. Half of consumers additionally expect "natural" to mean that the animals went outdoors. Compl. ¶¶ 44, 47. Not surprisingly, two-thirds of consumers expect "no-nitrate" claims to mean just that: no nitrates are present in any form. Compl. ¶ 43. The vast majority of consumers are willing to pay more for "natural" products if those products meet this expectation as to what "natural" means. Compl. ¶ 46.

Despite Hormel's advertising claims, there is no distinction between animals raised for Hormel's Natural Choice line and its other meat products, including Spam®, which are marketed without such representations. All the animals, regardless of product line, are raised in factory farms. This means they spend their lives completely indoors in cramped, caged conditions, where pharmaceuticals are required to ward off infections and disease that would otherwise run rampant in such claustrophobic conditions. Hormones are administered to cattle to increase growth rates. These animals, destined to be Natural Choice products, are then sent to the *same* processing facilities and subjected to *same* inhumane and unsanitary slaughter as the animals used in all of Hormel's other goods. Compl. ¶¶ 15-18. Hormel's "Natural Choice" lunch meats do not comply with what typical (indeed the majority) of consumers would expect.

Nor are Hormel's products preservative- and nitrate-free in a way that any reasonable consumer would understand those terms. Instead, most of Hormel's Natural Choice products contain cultured celery juice powder, which is—contrary to Hormel's advertising campaign—a preservative high in nitrates. Compl. ¶¶ 92, 94, 96. What is more, once the product is in the packaging, the nitrates in the celery juice powder will convert into nit*rite*, yet another preservative. Compl. ¶¶ 21, 95.

2. ALDF

ALDF is a national non-profit that has spent more than three decades advocating for improvement in animal welfare, including regarding the treatment of animals used for food. Compl. ¶ 29. This advocacy includes a long history of working to align meat production practices with consumer expectations of what certain label and advertising claims mean. Compl. ¶¶ 31-32, 37. In particular, ALDF has fought to ensure that "natural" is used to describe only meat and poultry from animals raised in natural and humane conditions with access to the outdoors, and not fed a steady diet of antibiotics and other drugs. Compl. ¶¶ 35-36; *see* Def.'s P. & A. Supp. Mot. Dismiss 1, 22, 24-25 (detailing ALDF's past efforts in this area). It has also worked to make sure that consumers are fully informed regarding the health and safety effects of the antibiotics and other chemicals used to produce meat products. Compl. ¶¶ 30-32, 36.

3. Regulation of Meat Advertising and Meat Labeling

Meat *advertising* is regulated *concurrently* by both state and federal law. The Federal Trade Commission Act (FCTA) empowers the Federal Trade Commission (FTC) to regulate unfair or deceptive acts or practices through enforcement actions, issuing interpretive rules and policies, and through promulgating trade regulation rules. *See* 15 U.S.C. §§ 45(a)(2), 57a(a)(1). Nevertheless, because "consumer protection laws have traditionally been in state law enforcement hands," the FTCA is designed to work in tandem with state consumer-protection statues—here, the CPPA—not to displace them. *Chae v. SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010); *see* 16 C.F.R. § 0.17. The FTC itself encourages states to pass their own consumer-protection statutes, and the FTCA contains no express preemption provision, does not create a private right of action, and specifies that consumer remedies obtained by the FTC are "in addition to, and not in lieu of, any other remedy or right of action provided by" state law. *See* 15 U.S.C. § 57b(e). Further, FTC enforcement policies, like the one Hormel cites here (at Def.'s P. & A. Supp. Mot. Dismiss 11)

are not enforceable in their own right, and do not have the force of law. Federal Trade Comm'n, Operating Manual Ch. 8, "Industry Guidence," 8.3.2, https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch08industryguidance.pdf (industry guide "does *not* have the force or effect of law and is not legally binding on the Commission or on the public in an enforcement action") (emphasis in original).

The CPPA, under which ALDF brings this suit, is the type of state consumer-protection statute the FTCA intended to preserve. Among other things, it makes it an unlawful trade practice to represent that goods have characteristics they do not; represent that goods are of a particular standard, quality, grade, or style if they are not; misrepresent as to a material fact which has a tendency to mislead; use innuendo or ambiguity as to a material fact, which has a tendency to mislead; and advertise or offer goods without the intent to sell them as advertised. D.C. Code § 28-3904. The statute permits a non-profit organization like ALDF to, "on behalf of itself or any of its members, or on any such behalf and on behalf of the general public bring an action seeking relief from the use of a trade practice in violation of the law of the District." D.C. Code § 28-3905(k)(1)(C).

Meat *labeling* is regulated by the USDA under the authority granted to it by the Federal Meat Inspection Act (FMIA), 21 U.S.C § 601(n)(1), and Poultry Products Inspection Act (PPIA), 21 U.S.C §§ 451, 453(h)(1). The FMIA and PPIA define "label" as "a display of written, printed, or graphic matter *upon the immediate container* . . . of any article," 21 U.S.C § 601(o) (emphasis added); 21 U.S.C § 453(s), and "labeling" as "all labels and other written, printed or graphic matter (1) upon any article or any of its *containers or wrappers*, or (2) accompanying such article," 21 U.S.C § 601(p) (emphasis added); 21 U.S.C § 453(s). Courts and the USDA's Food Safety and Inspection Service (FSIS) have adopted a slightly more expansive definition of "label" that

includes in-store promotional materials and brochures distributed simultaneously with the product—for example, fliers with cooking ideas and instructions available at the store or inside the package. *Kordel v. United States*, 335 U.S. 345, 349-50 (1948) (interpreting the same definition in the Federal Food, Drug and Cosmetic Act); *Meaunrit v. ConAgra Foods, Inc.*, No. C 09-02220 CRB, 2010 U.S. Dist. LEXIS 73599, at *21-22 (N.D. Cal. July 20, 2010) (applying *Kordel* in the FMIA context); FSIS, A Guide to Federal Food Labeling Requirements for Meat, Poultry, and Egg Products, 5 (2007) https://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling_ Requirements_Guide.pdf?MOD=AJPERES ("label" includes accompanying and point-of-purchase materials).

The FMIA and PPIA contain identical express preemption provisions that make clear the authority they provide solely relates to meat labels; those preemption provisions state that "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State or Territory or the District of Columbia." 21 U.S.C. § 678; 21 U.S.C. § 467e. Nothing in the FMIA or PPIA grants USDA any authority to regulate non-label meat advertising.

Under the USDA's regulations, the FSIS administers a meat-labeling pre-approval program. *See* Nutrition Labeling of Meat and Poultry Products, 58 Fed. Reg. 632 (Jan. 6, 1993). Manufacturers submit mock-ups of their proposed label, including any disclaimers, and the size and color of any text. *See* Def.'s P. & A. Supp. Mot. Dismiss, Exhs. 1-3. FSIS then determines whether to approve the label as a whole; FSIS makes no determination as to whether any descriptors on the label would be misleading in any other context. *See* FSIS Labeling/Label Approval, http://www.fsis.usda.gov/labels (last visited July 10, 2017).

Indeed, USDA itself underscores that approval of "natural" on *labels* is dependent on the specific context in which those terms appear on the label because it recognizes that those terms used in other contexts are likely to be misleading to consumers. To assist manufacturers, USDA has issued *non-binding* guidelines indicating when the use of certain claims will be approved. USDA guidelines stipulate that, for FSIS to approve the use of "natural" on a label, it *must* appear alongside "a brief statement which explains what is meant by the term natural." Motion to Take Judicial Notice Exhibit 8 at 3, Animal Legal Defense Fund v. Hormel Foods Corp., No. 16-1575 (CKK), 2017 U.S. Dist. LEXIS 51629 (D.D.C. Apr. 5, 2017). The guidance also states that, when celery powder is used as a source of the curing agent nitrite, "the label *must* also contain the statement 'no nitrates or nitrites added' per 9 CFR 317.17 that is qualified by the statement 'except for those naturally occurring in [name of natural source of nitrite such as celery powder]' in order to not be considered false and misleading." Motion to Take Judicial Notice Exhibit 9, Animal Legal Defense Fund v. Hormel Foods Corp., No. 16-1575 (CKK), 2017 U.S. Dist. LEXIS 51629 (D.D.C. Apr. 5, 2017). (emphasis added). Hormel's *advertising* does neither.

4. This Lawsuit

ALDF brought suit against Hormel seeking declaratory and injunctive relief and alleging that its Natural Choice advertising campaign violates the CPPA's prohibition on misleading advertising, D.C. Code § 28-3904(a), (d), (e), (f), (f-1), and (h); Compl. ¶¶ 218, 221. ALDF alleges that Hormel's descriptions of its factory-farmed products as "natural" and nitrate- and nitrite-free in its "Make the Natural Choice" campaign do not comport with consumers' reasonable understanding of those terms and are, therefore, misleading. Compl. ¶¶ 212-217. In particular, the Complaint lays out how a reasonable consumer would read Hormel's "natural" and "nitrate-free" claims to mean that the lunch meats came from a "source," were of a particular "quality" and "style," and possessed certain "characteristics," or "benefits" they do not because—based on

Hormel's advertisements—a consumer would believe they were sustainably raised and nitrate-free, when they are not. D.C. Code § 28-3904(a), (d). In this manner, Hormel misrepresented a material fact about its products that has a tendency to mislead and advertised its goods without an intent to sell them as advertised. D.C. Code § 28-3904(e), (h). By wielding "natural" and "nitrate-free" claims as part of its "Make the Natural Choice" campaign without ever clarifying that by "natural" and "nitrate-free," Hormel was referencing only processing technicalities, and not using those terms in the way a reasonable consumer would understand them, Hormel's advertising campaign also failed to state material facts and relied on ambiguity and innuendo to mislead consumers regarding material facts. D.C. Code § 28-3904(f), (f-1).

Though ALDF raised no federal-law claims in its complaint, Hormel removed the case to federal district court on theories of federal-question and diversity jurisdiction. *See Animal Legal Defense Fund v. Hormel Foods Corp.*, __ F. Supp. 3d __, No. 16-1575 (CKK), 2017 U.S. Dist. LEXIS 51629 (D.D.C. Apr. 5, 2017) (*ALDF v. Hormel*). In opposing ALDF's motion to remand the case back to this Court, Hormel contended ALDF's CPPA claims "necessarily raised" federal-law questions because they were somehow an "attempt to subvert the federal system of regulation" of meat production, labeling, and advertising. *ALDF v. Hormel* at *7.

In granting remand, the federal district court held that ALDF's state-law advertising claim was *not* a challenge to Hormel's FSIS-approved labels: "[I]t is not at all clear that there is any real conflict between the false advertising claims in this case and the federal laws Defendant cites. Defendant has directed the Court to certain federal laws and regulations related to meat *labelling* and *packaging*. But this case is not about labels or packages on particular meat products produced by Defendant. It is about a national *advertising* campaign." *ALDF v. Hormel*, at *7-8 (emphasis in original). The district court further explained that the FMIA, PPIA, and related USDA

regulations "may grant Defendant the right to use various terms on its meat labels—when accompanied by certain disclaimers—but they do not appear to have given Defendants any sort of approval to produce the *advertisements* challenged in this case." *ALDF v. Hormel*, at *8 (emphasis in original).

LEGAL STANDARD

In evaluating a motion to dismiss, this court construes "the complaint in the light most favorable to the plaintiff and take[s] [its] factual allegations as true." *Poola v. Howard Univ.*, 147 A.3d 267, 276 (D.C. 2016). To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "[T]his standard does not require detailed factual allegations," and "at the pleading stage, the plaintiff's burden is not onerous." *Id.* (internal quotation marks omitted). As for standing, "the examination of standing in a case that comes to us on a motion to dismiss is not the same as in a case involving a summary judgment motion," with the plaintiffs' burden satisfied if the allegations, taken as true *could* be read to establish standing. *Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 605-06 (D.C. 2015) (internal quotations omitted) (holding that "scanty" description of organization's resources diverted was sufficient to plead standing).

ARGUMENT

I. ALDF's False Advertising Claims Can Proceed Because They Are Not Preempted by Federal Law.

ALDF challenges Hormel's false advertising—and *only* the advertising. As the federal district court already determined in its remand order, ALDF's claims are limited to Hormel's *advertising*, which is simply not regulated by the USDA. The remand order stated that Hormel's reliance on "federal laws and regulations related to meat *labelling* and *packaging*" are a misdirection because "this case is not about the labels or packages on particular meat products

. . . . It is about a national *advertising* campaign[.]" *ALDF v. Hormel*, at *8 (emphasis in original). As such, ALDF's claims are not expressly or impliedly preempted.

There are "two cornerstones" of federal preemption jurisprudence: (1) the "purpose of Congress is the ultimate touchstone in every pre-emption case," and (2) the presumption against preemption—that courts "start with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless it was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008). Here, all of Hormel's preemption arguments run into the same basic problem: ALDF challenges only Hormel's advertising, and the FMIA and PPIA do not give the USDA the power to regulate, much less preempt, state laws about advertising. Advertising is simply out of the purview of the Congressionally authorized labeling scheme.

A. The Federal District Court Found That ALDF's Claim Relate to Advertising, Not Labeling, and Hormel Cannot Relitigate that Issue.

Principles of issue preclusion prohibit Hormel from seeking to relitigate what the district court already decided: that ALDF's claims relate solely to advertising and thus the PPIA and FMIA, which govern labeling, do not control ALDF's claims. Though the district court did not decide the legal question of preemption, it did conclude there was no federal-question jurisdiction over ALDF's claims. In doing so, the district court necessarily grappled with the arguments Hormel now re-raises. Hormel does not get a second bite at those apples.

Because the district court already decided that ALDF's advertising claims are not governed by the PPIA, Hormel is precluded from relitigating it under principles of collateral estoppel, i.e., issue preclusion, which "prohibits the relitigation of factual or legal issues decided in a previous proceeding and essential to the prior judgment." *Franco v. District of Columbia*, 3 A.3d 300, 303-04 (D.C. 2010) (internal quotations omitted). Issue preclusion, like law-of-the-case and other

estoppel doctrines, protects against the expense and headache inherent in revisiting the same already-settled legal disputes, "conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotations omitted). For those reasons, issue preclusion applies "even if the issue recurs in the context of a different claim." *Id.*

The District of Columbia Court of Appeals has explained that an issue is precluded when "(1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum." *Franco*, 3 A.3d at 304. Though the procedural posture here—looking to a federal court's remand order—is atypical, it meets the essential elements for issue preclusion. The question of whether ALDF's suit necessarily raised a federal question—and whether the PPIA and FMIA reach advertisements—was vigorously and actually litigated in the federal district court and was essential to the district court's final determination on the merits of federal-court jurisdiction. *See* 28 U.S.C § 1447(d) (remand orders for lack of subject-matter jurisdiction not appealable).

The district court wholly rejected what it characterized as Hormel's "extreme" attempt to repackage ALDF's claims as attacking "the federal system of regulation." *ALDF v. Hormel*, 2017 U.S. Dist. LEXIS 51629, at *7. The district court explained that Hormel has pointed to "certain federal laws and regulations related to meat *labelling* and *packaging*" (the PPIA and FMIA), and suggested that they governed this matter. *Id.* But the court held that, to the contrary, "this case is not about the labels or packages on particular meat products produced by Defendant. It is about a national *advertising* campaign." *ALDF v. Hormel*, at *8. (emphasis in original). The district court explained that while federal regulators might have given Hormel "the right to use various terms

on its meat labels—when accompanied by disclaimers—they do not appear to have given Defendant any sort of approval to produce the *advertisements* challenged in this case." *Id.* (emphasis in original). Nor does Hormel's purported compliance with federal laws regarding animal production in any way speak to (let alone govern) ALDF's allegation that Hormel's advertising describes those practices in a misleading way. *Id.* Because ALDF's claims solely relate to Hormel's advertising, the district court concluded that Hormel failed to satisfy the threshold requirement for federal-question jurisdiction, that a federal question be necessarily raised. *Id.* Put another way, the federal district court has already ruled in this matter that the PPIA and FMIA do not govern ALDF's claims. Hormel raising this issue again is simply seeking a different result with a second roll of the dice.

B. ALDF's CPPA Claims Challenging Hormel's Advertising Campaign Are Not Preempted by Federal Meat and Poultry Labeling Guidelines.

1. ALDF's claims are not expressly preempted by the PPIA or FMIA.

Advertising is historically relegated to a state's police powers. *Nat'l Consumer's League v. Doctor's Assocs.*, 2014 D.C. Super. LEXIS 15, *11 (D.C. Super. Ct. Sept. 12, 2014) ("Courts are well-suited to resolve such claims, which do not require the type of scientific or specialized expertise possessed by the [federal agency]."). Attempting to avoid this outcome here, Hormel recharacterizes ALDF's advertising claims as a non-existent challenge to Hormel's labeling. *See* Def.'s P. & A. Supp. Mot. Dismiss 13-19. Each of ALDF's allegations that Hormel's "natural," "no preservatives," and other claims are false and misleading in violation of the CPPA is based on the use of those claims in Hormel's *advertisements*, including the print, web, and video advertisements that comprise its "Make the Natural Choice" ad campaign. Compl. ¶¶ 60-78. Because the FMIA and PPIA expressly preempt only "[m]arking, labeling, packaging, or

ingredient requirements," and grant USDA *no* authority over advertising, ALDF's advertising claims cannot be preempted by the FMIA or PPIA. 21 U.S.C. § 678; 21 U.S.C. § 467e.

The magazine, newspaper insert, video, and internet advertisements that ALDF challenges are not "labels" under the FMIA and PPIA. The FMIA and PPIA define "label" as "a display of written, printed, or graphic matter upon the immediate container . . . of any article," 21 U.S.C § 601(o); 21 U.S.C § 453(s), and "labeling" as "all labels and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article," 21 U.S.C § 601(p); 21 U.S.C § 453(s). The advertisements at issue are not on the product container and do not come with it.

Nor do the advertisements ALDF challenges fall within the slightly more expansive definition of "label" that has been adopted by courts and USDA: that the statutory definition of "label" includes in-store promotional materials and brochures distributed with purchase of the product. *Kordel v. United States*, 335 U.S. 345, 349-50 (1948) (interpreting the same definition in the Federal Food, Drug and Cosmetic Act); *Meaunrit v. ConAgra Foods, Inc.*, No. C 09-02220 CRB, 2010 WL 2867393 (N.D. Cal. July 20, 2010) (applying *Kordel* in the FMIA context); FSIS, A Guide to Federal Food Labeling Requirements for Meat, Poultry, and Egg Products, 5 (2007) https://www.fsis.usda.gov/wps/wcm/connect/f4af7c74-2b9f-4484-bb16-fd8f9820012d/Labeling_Requirements_Guide.pdf?MOD=AJPERES ("label" includes accompanying and point-of-purchase materials). For these reasons, it is no wonder Hormel relies on authority concerning challenges to labels, Def.'s P. & A. Supp. Mot. Dismiss 22, but never pauses to explain how the definition of "label" could cover its advertising campaign.[1]

[1] That ALDF has, at other times and in other proceedings, also sought to change the USDA labeling standards is irrelevant to the question of what conduct ALDF is challenging in *this*

Contrary to Hormel's position, FSIS approval is not a general approval to use claims like "natural" and "no nitrates" however Hormel chooses. FSIS approves the use of those words in the context of specific *labels*. *See* FSIS Labeling/Label Approval, http://www.fsis.usda.gov/labels (last visited July 10, 2017). Exhibits 1-3 attached to Hormel's briefing are applications for approval of certain labels, with certain font size, word placement, colors, and images—FSIS approved the claims *only* in this context. Def.'s P. & A. Supp. Mot. Dismiss, Exhs. 1-3. Indeed, FSIS *could not* have approved the advertisements ALDF challenges. Agency guidelines stipulate that, for FSIS to approve the use of "natural" on a label, the claim must be accompanied and qualified by "a brief statement which explains what is meant by the term natural"—which must be positioned and sized in a way satisfactory to FSIS. Motion to Take Judicial Notice Exhibit 8 at 3, Animal Legal Defense Fund v. Hormel Foods Corp., No. 16-1575 (CKK), 2017 U.S. Dist. LEXIS 51629 (D.D.C. Apr. 5, 2017). USDA's guidance on the use of celery powder as a curing agent states that, when celery powder is used as a source of the curing agent nitrite, "the label must also contain the statement 'no nitrates or nitrites added' … that is qualified by the statement 'except for those naturally occurring in [name of natural source of nitrite such as celery powder]' in order to not be considered false and misleading." Motion to Take Judicial Notice Exhibit 9, Animal Legal Defense Fund v. Hormel Foods Corp., No. 16-1575 (CKK), 2017 U.S. Dist. LEXIS 51629 (D.D.C. Apr. 5, 2017). Thus, FSIS approval of Hormel's use of the challenged claims on its labels, accompanied by particularly placed disclaimers, could not possibly authorize the use of those claims in advertising more broadly, without the disclaimers specifically placed.

litigation and whether the claims *here* are preempted. *See* Def.'s P. & A. Supp. Mot. Dismiss 13 (mentioning ALDF's prior challenges to federal labeling standards).

More fundamentally, "[t]he USDA has not and cannot approve Defendant's non-label advertising" because the USDA (and, in turn, FSIS) "has no congressional authority" to regulate advertising. *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 549 F. Supp. 2d 708, 720 (D. Md. 2008). USDA lacks the power to have any direct say as to whether Hormel's advertisements are misleading. *See also ALDF v. Hormel*, 2017 U.S. Dist. LEXIS 51629, at *8 ("The federal laws and regulations cited by Defendant . . . do not appear to have given Defendant any sort of approval to produce the *advertisements* challenged in this case.") (emphasis in original); *accord*; *Nat'l Consumers League v. Bimbo Bakeries USA*, 2015 D.C. Super. LEXIS 5, *17 (D.C. Super. Ct. Apr. 2, 2015) ("The court agrees with NCL's argument that BBUSA 'wrongly recasts NCL's claims as attempts to impose additional or different labeling requirements[.]'"). As such, neither the USDA approvals nor guidelines, as a legal matter, can reach the magazine, newspaper insert, video, and web advertisements at issue.

That some of the advertisements contain partial, obscured, and tiny reproductions of their product labels is of no help to Hormel. First, even if Hormel's spurious characterization of its ads as merely reproducing the product labels were correct, as the federal district court pointed out, Hormel has not "pointed to any federal law that would permit advertisements for meat products simply because those advertisements contain pictures of federally-approved meat labels." *ALDF v. Hormel*, 2017 U.S. Dist. LEXIS 51629, at *8. Second, even if Hormel were to now suggest such authority exists, not all of its advertisements contain such pictures of the labels and, where they do, the reproductions of the labels are incomplete, obscured, or so small as to be illegible. *See* Compl. ¶ 64 (other than on package reproductions in some advertisements, no definitions of "natural" or other terms in advertisements); Motion to Take Judicial Notice Exhibit 1, Animal Legal Defense Fund v. Hormel Foods Corp., No. 16-1575 (CKK), 2017 U.S. Dist. LEXIS 51629

(D.D.C. Apr. 5, 2017) (disclaimers illegibly small); Motion to Take Judicial Notice Exhibit 2, Animal Legal Defense Fund v. Hormel Foods Corp., No. 16-1575 (CKK), 2017 U.S. Dist. LEXIS 51629 (D.D.C. Apr. 5, 2017) (disclaimers obscured and not readable); Motion to Take Judicial Notice Exhibit 3, Animal Legal Defense Fund v. Hormel Foods Corp., No. 16-1575 (CKK), 2017 U.S. Dist. LEXIS 51629 (D.D.C. Apr. 5, 2017) (disclaimers illegibly small); Compl. ¶¶ 75-76 (described video advertisement does not include disclaimers); Compl. ¶¶ 77-78 (same). As discussed above, FSIS only approves the use of "natural" and "no preservatives"—and only considers those claims to not be misleading—if they are accompanied by certain legible disclaimers.

That this case does not challenge Hormel's labeling distinguishes it from Hormel's citations on page 15 of its brief—all of which involved allegations that a product's FSIS-approved *label* was false or misleading under state law. In particular, *Kuenzig v. Kraft Foods, Inc.*, a series of decisions Hormel returns to throughout its brief, highlights the fallacy of Hormel's contention. When that case was first decided, the district court correctly explained, as ALDF does here, that a claim "based on Defendants' websites and non-label advertising" is "not preempted under the FMIA or the PPIA," and therefore the court provided the plaintiff an opportunity to amend. *Kuenzig v. Kraft Foods, Inc.*, No. 8:11-cv-838-T-24 TGW, 2011 U.S. Dist. LEXIS 102746, at *32 (M.D. Fla. Sep. 12, 2011). That claim was later dismissed because the amended complaint alleged *only* that the advertisements were misleading because they completely *reproduced* the labels *and* the Florida consumer protection law contained a "safe harbor provision" that is not present in the CPPA. *Kuenzig v. Hormel Foods Corp.*, 505 F. App'x 937, 939 (11th Cir. 2013). *Kuenzig* is inapplicable here because ALDF challenges Hormel's advertising based on the independent claims

in those ads, which also fail to fully reproduce Hormel's labels, *and* it does so under the CPPA, which contains no safe harbor provision.

Phelps v. Hormel Foods Corp., No. 16-CV-62411, 2017 U.S. Dist. LEXIS 45598 (S.D. Fla. Mar. 24, 2017), which also arose under Florida law, challenged the "natural" and "no preservatives" claims on the *label itself*. *See, e.g.*, *id.* at *4 ("Plaintiff's challenges to the '100% Natural' and 'No Preservatives' claims on the Product labels are expressly preempted[.]"); *id.* ("FSIS has preapproved all of the labels at issue[.]"). The only discussion of non-label advertising appears in a footnote, which relies on *Kuenzig* because the plaintiff was suing under the same Florida consumer protection law. *Id.* at *7 n.2. *Phelps* too dismisses these claims because of the particularities of Florida law. *Id.* Indeed, the *Phelps* plaintiff seemingly made no arguments as why the advertising claims are not preempted, and the court itself recognized that the PPIA and FMIA in general do *not* preempt state-law claims about non-label advertising. *Id.* at *10 n.3.

The FMIA and PPIA have nothing at all to say about non-label advertising, nor do they purport to restrict state-law requirements regarding it. For that simple reason, ALDF's claims are not expressly preempted.

2. ALDF's CPPA claims do not conflict with federal law and are not impliedly preempted.

Nor are ALDF's claims impliedly preempted. Hormel contends that, even if the PPIA and FMIA express-preemption provisions do not apply, ALDF's state-law challenge to Hormel's advertising is impliedly preempted because it conflicts with federal law. Hormel's argument is that because state consumer protection law applies a reasonable-consumer understanding of "natural" and "no nitrates," which differs from the "definitions" the USDA labeling guidelines give those terms, the schemes are irreconcilable. But the fact that state and federal law allow for different

interpretations of a term in two different contexts—advertising and labeling—does not mean the state law is preempted.

As explained above, the preemption analysis begins from the presumption that the state law is *not* preempted, and only if it is the clear purpose of Congress is the state law preempted. *See Wyeth*, 555 U.S. at 565. In the context of implied conflict preemption, that means that a state law is preempted "[1] where is it impossible for a private party to comply with both state and federal requirements or [2] where state law stands as an obstacle to" Congressional purposes and objectives. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)*; see also Wyeth*, 555 U.S. at 573. Neither is true with ALDF's CPPA claim.

First, it is obvious that Hormel can easily comply with both state and federal law. As explained above, the USDA FSIS approval program governs only labeling, and it requires that, to use "natural" and "no nitrates" on a label, those claims must be accompanied by qualifying text. In context of each particular label, FSIS examines font size, placement, color, and overall design of the statements. Unrelated to that process, ALDF alleges that the blanket, unqualified use of "natural" and "no nitrates" claims in Hormel's advertising campaign—with illegible or missing disclaimers—is false or misleading to consumers. Hormel can comply with both state and federal law by not including unqualified "natural" and "no nitrates" claims in its advertisements. Moreover, state law does not speak to Hormel's labels. Hormel claims that it is "untenable" to be "prohibited from repeating pre-approved claims . . . in its advertising." Def.'s P. & A. Supp. Mot. Dismiss 19. What would be untenable is allowing Hormel to violate state law governing *advertising* based on its asserted compliance with a federal regulatory scheme that does not even touch on advertising. In short, Hormel's continued assertion that FSIS regulates Hormel's *claims* is incorrect; it has only approved Hormel's *labels*.

Second, the Supreme Court has made clear that an agency's decision to implement a federal regulatory scheme is insufficient to establish that state laws would pose an obstacle to carrying out congressional intent. In *Wyeth v. Levine*, the Court held that FDA's pre-approval of a drug label did not preempt a state-law failure-to-warn claim challenging a drug label's contents. *Wyeth*, 555 U.S. at 573. Much like Hormel here, the drug manufacturer in *Wyeth* argued that the plaintiff's claims were preempted because they "interfere with Congress's purpose to entrust an expert agency to make drug labeling decisions." *Id.* In rejecting that argument, the Court emphasized that the key was to look to congressional intent, not the agency regulations. *Id.* There is no indication from Congress whatsoever that it intended USDA labeling regulations to reach advertising, or that it viewed *advertising* regulation as a problem related to uniform *labeling* regulation.[2]

C. Because ALDF Is Not Alleging That Hormel Violated Any Law Governing Animal Raising or Production, Compliance With Federal Meat Production Law Is Irrelevant and Not a Basis for Preemption.

Although the Complaint details Hormel's horrific factory farming practices, it does not allege that those practices are per se illegal. *See* Def.'s P. & A. Supp. Mot. Dismiss 20-23 (arguing that ALDF's claims are preempted to the extent they challenge Hormel's meat production practices). The federal district court summed it up best: "[T]he Complaint in this case does not

[2] Hormel's remaining citations do not support implied conflict preemption, as in each case, the goal of the lawsuit thwarted the express goal of the agency decision. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), a state-law claim that an automobile should have been equipped with an airbag was preempted by a federal Department of Transportation standard permitting car manufacturers to choose what type of passive restraints, i.e., airbags and automatic seat belts, to install. *Id.* at 877-81. The agency had expressly rejected the very standard the state-law suit sought to impose over concerns that such a standard would do more harm than good. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), dealt with interstate water pollution—uniquely a creature of federal law. Congress had expressed its intention to dominate that field and provided federal-law remedies, and the only question in the case was whether the state-law action fell under an exception to that field preemption. The Court concluded the claims were preempted because, as in *Geier*, the state-law suit was a direct attack on a deliberate federal agency decision. *Id.* at 494-95.

allege that Defendant's treatment of animals is necessarily *illegal*. It merely alleges that such treatment is misleadingly portrayed." *ALDF v. Hormel,* 2017 WL 1283411, *8-9 (emphasis in original) (internal citations omitted). Because ALDF is not challenging Hormel's production methods themselves—just how the products are advertised—the sparse federal regulations that cover farmed animal raising and production cannot be the basis for preemption.[3]

II. ALDF's False Advertising Claims Can Proceed in This Court Because the USDA Does Not Have Any, Much Less Primary, Jurisdiction Over Advertising.

Hormel's argument that ALDF's claims are precluded under the doctrine of primary jurisdiction is way off the mark, for a couple reasons. For starters, in its recitation of the standard for primary jurisdiction, Hormel leaves out an important aspect: that the role of primary jurisdiction is to *stay* the litigation while the agency takes the first pass at the question. The Court of Appeals has explained that the prudential doctrine of primary jurisdiction "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special expertise of an administrative body; in such a case *the judicial process is suspended pending referral of such issues to the administrative body for its views*." *Lawlor v. District of Columbia*, 758 A.2d 964, 973 (D.C. 2000) (quoting *Drayton v. Poretsky Mgmt., Inc.*, 462 A.2d 1115, 1118 (D.C. 1983)) (emphasis added); *see also United States v. W. Pac. R. Co.*, 352 U.S. 59, 64 (1956); *Jones v. Conagra Foods, Inc*., 912 F. Supp. 2d 889, 898 (N.D. Cal. 2012) (primary jurisdiction is prudential, not jurisdictional). Because proceedings are stayed or suspended while waiting for the agency to act, invoking primary jurisdiction is not

[3] That, more than 30 years ago, ALDF brought a case about antibiotics under a different legal theory and those claims were preempted says nothing about whether these claims are preempted. But it does demonstrate that ALDF has consistently worked to counteract the harmful public health and safety effects of meat products, providing it standing to bring its claims in this case. *See* Def.'s P. & A. Supp. Mot. Dismiss 22; *see infra*.

appropriate where the agency has already addressed the issue, there is already a "rule on the books," and there is no indication that the agency will change it anytime soon. *Reid v. Johnson & Johnson*, 780 F.3d 952, 966 (9th Cir. 2015). Where the proffered agency lacks jurisdiction with regard to advertising, as USDA does here, there is nothing to wait for. USDA has no special expertise over whether advertisements are false and misleading to consumers—on the contrary, that question of state law is routinely resolved in litigation and is especially suited to being resolved by a jury.

Indeed, the Superior Court has repeatedly rejected primary jurisdiction arguments in similar circumstances. *Doctor's Assocs*., 2014 D.C. Super. LEXIS 15, *11 ("because NCL's claim involves application of District of Columbia law, the [agency] is unlikely to issue guidance which would resolve this dispute, and there is little concern about uniformity in administration across different jurisdictions."); *Bimbo Bakeries*, 2015 D.C. Super. LEXIS 5, *21-22 ("[p]laintiff's claims rest on the determination of whether [defendant's] advertisements are likely to deceive a reasonable consumer…"); *Nat'l Consumers League v. Gerber Prods. Co*., 2015 D.C. Super. LEXIS 10 *8-9 (D.C. Super. Ct. Aug. 5, 2015) ("plaintiff's claims are not confined to labeling practices but more generally take issue with representations made about the disputed products…").

Even assuming USDA *could* weigh in on and regulate meat advertising (which it cannot), Hormel points to no anticipated USDA action that would clarify whether Hormel's advertisements are false or misleading. Indeed, the only agency action Hormel points to is the approval of its labels, which is both irrelevant for the reasons already discussed and has already happened. Where there is no *anticipated* regulation or ruling, primary jurisdiction does not apply.[4] Even if USDA

[4] This argument is equally true with regard to the FTC, which has authority to regulate advertising, and has announced no upcoming regulations or enforcement actions regarding meat advertising.

had jurisdiction over advertising, courts need not defer to agency expertise to decide whether "a reasonable consumer would be misled by . . . marketing." *Reid*, 780 F.3d at 967; *see also United States v. Philip Morris USA, Inc.*, 686 F.3d 832, 838 (D.C. Cir. 2012) ("courts consistently have refused to invoke the primary jurisdiction doctrine for claims based upon fraud or deceit") (internal quotations omitted); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp.2d 1111, 1124 (N.D. Cal. 2010) (courts are "well-equipped to handle" claims involving whether consumers were misled by marketing).[5]

III. ALDF Plainly States a Claim That Hormel's "Make the Natural Choice" Campaign Violates the CPPA.

The CPPA "establishes an enforceable right to truthful information from merchants about consumer goods." D.C. Code § 28-3901(c). Hormel advertises its factory-farmed meats as "natural" when a reasonable consumer—indeed, Hormel acknowledges, the *majority* of consumers, Def.'s P. & A. Supp. Mot. Dismiss, 28 n.9—would not understand them as such, and would have found Hormel's misrepresentations to be material. Hormel states that its products have "zero preservatives" and "no nitrates" when they have nitrate preservatives. And Hormel developed the entire "Make the Natural Choice" advertising campaign intending to communicate that its lunch meats are special products, ethically raised on sustainable farms so consumers would purchase them on that basis, when, in fact, they are produced in the same horrifying manner, using the same factory-farming methods, and from the same animals as used in Hormel's Spam products. Compl. ¶¶ 97-99. No more is required to state a claim under the CPPA § 28-3904 (a), (d), (e), (f), (f-1), & (h). *See, e.g., Saucier v. Countrywide Home Loans*, 64 A.3d 428, 445 (D.C. 2013)

[5] Hormel's references to ALDF's prior work in eliminating false and misleading information about meat production only bolsters that ALDF has standing to pursue this action. Def.'s P. & A. Supp. Mot. Dismiss 24-25.

(describing the CPPA as designed to allow a jury to determine whether statements or omissions in advertising "would be relevant to a reasonable consumer") (cited in Def.'s P. & A. Supp. Mot. Dismiss 28-29).

Contrary to Hormel's assertion, ALDF's allegations do not seek to hold Hormel accountable for consumers' "pre-existing" confusion. *See* Def.'s P. & A. Supp. Mot. Dismiss 30. Instead, the allegations charge Hormel for causing the confusion and capitalizing on it. *Accord Bimbo Bakeries*, 2015 D.C. Super. LEXIS 5, *2, 20 ("BBUSA's packaging of its products and advertising them on its website contribute to consumers' confusion about its products."). Hormel's notion that the sum and substance of its advertising campaign is un-actionable "puffery" is simply incorrect, ignoring the fact that the statements it cites are objectively verifiable. The language also demonstrates Hormel intentionally mislead consumers into believing its lunch meats are sustainably raised and preservative free.

Likely for these reasons, Hormel's central argument for why ALDF fails to state a claim is not truly an attack on ALDF's pleading, but simply a re-hash of its preemption argument: that because its labels have been approved by the federal government, it is immune from liability for all of its advertising. Def.'s P. & A. Supp. Mot. Dismiss 26-29. Yet, Hormel cannot explain why USDA's approval of qualified claims (with required disclosures) on its labels should insulate it from making unqualified, misleading claims in its advertising. *Id.* at 26-29. Indeed, in *Gerber*, the defendant received permission to make a qualified health claim on its label—one that required Gerber to affirmatively state that there was no credible evidence that the primary ingredient had any impact on the reduction of allergies in infants. *Gerber Prods. Co.*, 2015 D.C. Super. LEXIS 10. In subsequent advertising, Gerber misused that qualified health claim, aggrandizing and misrepresenting its reach to mislead consumers into believing that a "qualified health claim" meant

a "degree of FDA support for its claims on its website and in its advertising." *Id.* at *11. There, unlike here, plaintiff, who survived dismissal, challenged the misuse of the label in the advertisements.

Hormel suggests that the Court should ignore that *more than half* of consumers were misled by Hormel's "natural" and "no nitrates" advertisements, since those consumers are simply "wrong" about how "natural" or "no nitrates" should be understood in light of USDA's guidance on *labels.* Def.'s P. & A. Supp. Mot. Dismiss, 28 n.9. Essentially, Hormel's position is that any consumer who has not memorized and adopted USDA's labeling guidance for these terms is unreasonable. This is absurd. *See, e.g., Brenner v. Procter & Gamble Co.*, No. SACV 16-1093-JLS (JCGx), 2016 U.S. Dist. LEXIS 187303, at *7 (C.D. Cal. Oct. 20, 2016) ("Defendant's argument implies that any reasonable consumer who was allegedly misled by a 'natural' label would, without question, research every ingredient found in any similar 'natural'-branded products to check for synthetic or potentially harmful chemicals before making a purchase. The Court cannot adopt such a sweeping proposition as a matter of law.").

Putting aside Hormel's preemption arguments, which have been extensively addressed, Hormel's two actual attacks on the Complaint fail as a matter of law and fact.

A. The Complaint Is Based on Hormel's Misleading Statements.

ALDF's Complaint focuses on Hormel's affirmative misrepresentations. For instance, Hormel advertises its products as having "zero preservatives" or "no preservatives," or being "preservative free," even though Hormel adds celery juice powder to its lunch meats, which is a preservative and which in turn reacts with other ingredients to produce another preservative. Compl. ¶¶ 19-22, 65, 67, 75-77. Accordingly, Hormel now admits the only truthful statement it can make is that its products contain no *chemical* preservatives, even though it advertisements

actually state the products contain no preservatives at all, chemical or otherwise. Def.'s P. & A. Supp. Mot. Dismiss 33.

Nonetheless, Hormel cites to inapplicable cases regarding material *omissions* so as to contend ALDF is suing over consumers' "pre-existing" confusion. In *Mostofi v. Mohtaram, Inc.*, No. 2011 CA 163 B, 2013 D.C. Super. LEXIS 12 (D.C. Super. Ct. Nov. 12, 2013), Judge Holeman granted summary judgment where the plaintiff alleged that because "consumers presume that any olive oil comes from Italy," advertising olive oils produced anywhere other than Italy without stating the oil's country of origin was misleading. *Id.* at *22. Of importance, Mostofi alleged "no representation" by the defendant that "create[d] an erroneous impression." *Id.* The entire premise of the claim was that, independent of the defendant's representations, consumers *automatically* associate olive oil as coming from Italy, and thus the producer needed to correct that innate association, regardless of how it marketed its goods.

Hoyte v. Yum! Brands, Inc., 489 F. Supp. 2d 24 (D.D.C. 2007), decided prior to the 2012 Amendments to the CPPA—and hence without the additional consumer protection mechanisms contained therein— did not even dismiss that suit because it was based on consumer's pre-existing conceptions, but simply refused to state whether or not KFC could be liable because its advertising was "silen[t]" on the issue of transfats. *Id.* at 29. The plaintiff there even admitted consumers were likely aware the fast food contained transfats without any statement by KFC. *Id.* at 29 n.6.

ALDF, by contrast, provides extensive allegations regarding how Hormel affirmatively takes advantage of consumers' understanding of what it means for meat and poultry products to be "natural," advertising its lunch meats so as to erroneously associate them with that understanding, and to cause consumers to purchase them after relying on that false impression. Hormel states that "Make the Natural Choice" means the products are "simpl[y]" produced, by

local farmers, using environmentally sustainable methods. *See, e.g.*, Compl. ¶¶ 60-61, 66, 71-73. Hormel combines these written advertisements with videos describing how one "shar[es] the bounty" by serving Hormel's "Natural Choice" lunch meat to people who are part of the slow food movement, i.e., those who forage in the wild for their own food. *See* Compl. ¶ 76. The campaign does not merely rely on consumer understanding that "natural" means sustainably raised, but seeks to reinforce that misconception in a variety of manners so that consumers will incorrectly distinguish Hormel's meats from the factory farmed products they are. This is the very essence of what the CPPA prohibits, erroneously playing on how a reasonable consumer would understand an advertisement, without any effort to correct that misimpression.

To the extent consumers believe Hormel's products are not factory farmed or chemical-dependent, this is because Hormel specifically promotes such through its "Make the Natural Choice" advertising campaign. By not clarifying that by "natural" and "no preservatives" it means something different than how a reasonable consumer understands those advertising claims, Hormel violates § 28-3904(a), (d), (e), (f), (f-1), & (h).

B. Hormel's False Advertising Is Actionable, Not "Puffery."

Confirming that Hormel's "Make the Natural Choice" campaign actively works to deceive consumers, Hormel combines the claims described above with language saying that its lunch meats are "safe," "clean," of a "higher standard," "wholesome," and "honest." Compl. ¶ 70-71. While Hormel states that these claims, on their own, are un-actionable "puffery," Def.'s P. & A. Supp. Mot. Dismiss 34, in fact they are exactly the sorts of claims consumers latch onto and which can create an unlawful false impression if, as here, they are not true.

The Court of Appeals first applied the puffery doctrine to the CPPA in *Pearson v. Chung*, 961 A.2d 1067 (D.C. 2008). When *Pearson* is fully analyzed and faithfully applied, Hormel's puffery arguments easily fall. In *Pearson*, Judge Bartnoff, *after a bench trial*, held that

"Satisfaction Guaranteed" and similar descriptions of business were not statements on which a reasonable person would rely. *Id.*, 961 A.2d, at 1076. The Court of Appeals affirmed and defined puffery as "exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." *Id.* (collecting cases). Thus, for the puffery doctrine to apply to the specific language identified by Hormel, Hormel would need to convince the Court—at the pleading stage, and as a matter *of law*—that in the context of the "Make the Natural Choice" campaign, Hormel's statements that its lunch meats are "safe," "clean," of a "higher standard," "wholesome," and "honest" are "exaggerations reasonably to be expected" and on which "no reasonable person would rely." What a reasonable consumer would believe, however, is a question of fact. *Saucier*, 64 A.3d at 442; *Doctor's Assocs*., 2014 D.C. Super. LEXIS 15, at *19-21 ("the whole grain content of the breads must influence consumers' decisions—it need not determine them").

Indeed, unlike statements that have been held to be "puffery" such as "You're in good hands with Allstate," *Wells v. Allstate Ins. Co.*, 210 F.R.D. 1, 3 n.3 (D.D.C. 2002) or "satisfaction guaranteed," *Pearson*, 961 A.2d at 1075-76, statements that Hormel's products are "safe" "clean" and of a "higher standard" are objectively verifiable. The statements that a meat product is "safe" or "clean," may be misleading when, as is the case here, the product is actually sourced from animals raised with hormones and antibiotics that threaten public health. Similarly, "higher standard" is not a mere exaggeration but a comparative statement regarding the ethical and environmental standards Hormel claims its meats adhere to as compared to other industrially raised animal products.[6] Moreover, particularly in the context of Hormel's campaign, consumers do not

[6] *See Fraker v. KFC Corp.*, No. 06-CV-01284-JM (WMC), 2007 U.S. Dist. LEXIS 32041, at *4-5 (S.D. Cal. Apr. 27, 2007) (case cited by Hormel explaining that "highest quality" will only be

merely dismiss these words, but instead use them to conclude that they are purchasing a product made in a more responsible, humane, sustainable manner than Hormel's actual factory-farm production techniques..

That these claims reinforce the fallacy Hormel generates by claiming its products are "natural" and "preservative free" makes them all the more relevant to this litigation. Contrary to Hormel's assertion, Def.'s P. & A. Supp. Mot. Dismiss 29 n.10, ALDF does not need direct evidence of Hormel's malice, especially at this stage. An intent to mislead can be established under CPPA through the context within which a representation is made. *Wetzel v. Capital City Real Estate, LLC*, 73 A.3d 1000, 1005 (D.C. 2013). The fact that Hormel couples "natural" and "no preservatives" claims with statements that its products are "wholesome," "honest," "safe," and "clean" establishes that the "Make the Natural Choice" campaign is intending to give the false and misleading impression that the products are not sourced from factory farms.

IV. ALDF Has Standing Because Hormel's False Advertising Caused ALDF to Divert Resources To Address Hormel's Unlawful Activity.

In the Complaint, ALDF alleges, in detail, that as part of its efforts to reform the industrial animal agricultural system it regularly works to combat false and misleading advertising of animal products, and that ALDF has specifically expended resources to correct Hormel's advertisements at issue in this case. Compl. ¶¶ 28-40. Absolutely no more, and, in fact, less, is required to establish standing at this pleadings stage.

Indeed, while organizations always have standing to challenge unlawful conduct that drains their resources and frustrates their missions, *cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363,

considered puffery when "viewed in the context" of the statement at issue in that case, "We still take pride in doing things The Colonel's way, utilizing only the highest quality ingredients," with the court noting that in that sentence, unlike with Hormel's claim, the statement did not have a "definitive positive assertion[] of fact").

379 (1982), the CPPA is explicit in allowing for "non-profit organizational standing to the fullest extent recognized by the D.C. Court of Appeals *in its past and future decisions*." Committee on Public Services and Consumer Affairs, Committee Report on Bill 19-0581, the "Consumer Protection Amendment Act of 2012," 5 (Nov. 28, 2012) (Ex. A) (emphasis added). In 2012, the D.C. Council amended the CPPA to provide that "[a] nonprofit organization may" proceed under the statute as a private attorney general to defend the rights of "the general public." D.C. Code § 28-3905(k)(1)(C). That is exactly what ALDF has done here: brought an action on its own behalf and on behalf of the general public for violations of § 28-3904. The D.C. Council explained § 28-3905(k)(1)(C) "goes farther" than providing standing "for non-profit organizations who test consumer goods or services" to reveal the goods' defects. Ex. A, at 5. The CPPA's non-profit standing provision is designed to ensure an organization "may bring a CPPA action seeking relief against violations that significantly impair its ability to effectively serve consumers." *Id.*; *see also Gerber Prods. Co.*, 2015 D.C. Super. LEXIS 10 at *17-*18; *Nat'l Consumers League v. Bimbo Bakeries USA*, 46 F. Supp. 3d 64, 76 n.5 (D.D.C. 2014) (explaining the CPPA is designed so organizations do not have to "jump through procedural hoops to manufacture a particular type of standing"). Even putting aside the expansive non-profit standing provided for under the CPPA, the Court of Appeals has explained that when an alleged violation causes a "drain on [an] organization's resources," that is sufficient to establish an Article III injury-in-fact at the hands of the defendant. *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Sec., & Banking*, 54 A.3d 1188, 1206-07 (D.C. 2012); *see also Zuckman v. Monster Bev. Corp.*, No. 2012 CA 008653 B, 2016 D.C. Super. LEXIS 10, *7-8 (D.C. Super. Ct. 2016) ("[A] legislature has the power to identify intangible harms that meet minimum Article III requirements.").

The Court of Appeals has imposed only two limitations on such organizational standing. First, the alleged unlawful conduct must frustrate the plaintiff's "mission" so that it was appropriate for the plaintiff to respond to the defendant's conduct. *D.C. Appleseed Ctr. for Law & Justice, Inc.*, 54 A.3d at 1209. That is, the plaintiff-organization's goals cannot be "neutral" with regard to the alleged unlawful activities. *Id.* (quotation marks omitted). And second, the drain on the organization's resources cannot come from "expenditure of resources on th[e] very suit," but rather must result from the organization spending other monies to combat the defendant's misconduct. *Id.* (quotation marks omitted).

On this basis, the D.C. Court of Appeals held that where unlawful conduct forces an organization "to counteract" the defendant's "message" with additional expenditures to advocate for the organization's viewpoint, that is concrete and direct "frustration of [the organization's] purpose" and a drain on its resources brought about by the defendant, establishing standing. *Molovinsky v. Fair Employment Council, Inc.*, 683 A.2d 142, 147 (D.C. 1996). Accordingly, D.C. Appleseed, an organization that advocates for "District residents' access to better healthcare" and relatedly "conduct[s] research and issue[s] reports," could challenge the city's determination that a medical facility did not have an "excessive surplus"—a determination which allowed the facility to hold the funds, rather than invest them in additional medical care for needy residents. *D.C. Appleseed Ctr.*, 54 A.3d 1188, at 1210. The Court of Appeals emphasized that Appleseed did not provide medical treatment and thus would not be a direct beneficiary from any order requiring the facility to spend down its funds. *Id.* Nonetheless, because Appleseed advocated for how the facility's money should be spent, the court concluded Appleseed suffered an injury stemming from the facility's being allowed to hold onto the money, and this entitled Appleseed to seek equitable relief. *Id.* 1210. This was the case even though Appleseed acknowledged that the city's decision

to allow the facility to keep the money merely "reduced the effectiveness" of efforts Appleseed would have undertaken anyway. *Id.* at 1210.[7]

Given this backdrop, it is unsurprising that Hormel challenges ALDF's standing only by ignoring the well-pled allegations in the Complaint and presenting a caricature of ALDF's mission and activities. Hormel's approach flies in the face of the standard of review at this motion to dismiss stage. *Grayson v. AT&T Corp.*, 15 A.3d 219, 232 (D.C. 2011) ("[T]he examination of standing in a case that comes to [the court] on a motion to dismiss is not the same as in a case involving a summary judgment motion," and "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998) (courts "must presume that the general allegations in the complaint encompass the specific facts necessary to support" standing).

Contrary to Hormel's suggestion that ALDF's sole objective is to protect animals and ALDF is unconcerned with the contaminants and health risks of animal products, Def.'s P. & A. Supp. Mot. Dismiss 37, the Complaint details that ALDF's mission includes "[a]dovacting for transparency in the meat industry and truth in meat and poultry advertising" related both to "animal welfare" *and* "consumer safety." Compl. ¶¶ 30-31. Indeed, ALDF explains it regularly devotes its resources to "educating consumers about the truth behind meaningless and misleading labels and advertising by meat companies," whether those false representations concern how the animals in

[7] The D.C. Circuit's case law on which Hormel primarily relies is no different. The D.C. Circuit has held that an organization suffers an injury establishing standing where it alleges "expenditures on education and counseling programs designed to counteract" the defendant's unlawful statements. *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140-41 (D.C. Cir. 2011) (citing *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27-29 (D.C. Cir. 1990)). Even merely investigating an alleged unlawful practice will establish injury, regardless of whether that investigation led to specific advocacy. *Id.*

the products were treated or the antibiotics and other drugs administered to make the products. *Id.* ¶ 32. In this manner, ALDF's effort to counteract Hormel's "Make the Natural Choice" campaign, which indicated those products are humanely raised and produced in a sustainable manner, without undesirable chemicals, is consistent with ALDF's goals. ALDF is certainly not "neutral" regarding Hormel's efforts to "greenwash" its products, as ALDF's agenda includes combatting these exact types of consumer manipulations.[8]

Hormel essentially concedes that it has erroneously presented ALDF's objectives, further contending that this suit cannot advance ALDF's mission because Hormel's advertising was lawful and therefore ALDF was not reasonable in counteracting Hormel's message. Def.'s P. & A. Supp. Mot. Dismiss 38. However, the Court of Appeals has long held that the standing inquiry is independent of the merits and thus a merits defense cannot undermine standing. *See Grayson* 15 A.3d at 229. Moreover, the extensive research detailed in the Complaint suggesting that consumers purchase so-called "natural" meat and poultry products because they believe they are avoiding factory-farmed, chemical-dependent goods certainly establishes it was appropriate for ALDF to address Hormel's advertising, because it undermines ALDF's goals of transparency and truthfulness in meat advertising.

The Complaint also details costs ALDF has incurred because of the advertising campaign at issue here, and which it will continue to incur if it cannot vindicate consumers' rights through this action. Compl. ¶¶ 34-38. ALDF explains that because of Hormel's campaign, ALDF devoted

[8] Indeed, there is a particular irony in Hormel's claiming ALDF lacks standing because it has no institutional interest in the outcome of this action, as Hormel elsewhere tries to impugn ALDF's motive in bringing this suit by characterizing the litigation as an end-run to accomplish ALDF's long-time regulatory goals. Def.'s P. & A. Supp. Mot. Dismiss 1 (claiming that this suit results from ALDF "[h]aving failed to obtain the regulatory results it desires"), 24-25 (listing ALDF's activities that Hormel believes relate to this suit).

additional resources to combating false and misleading claims that factory farmed meat is natural and specifically to combatting Hormel's false and misleading claims in its "'Make the Natural Choice' advertising blitz." Compl. ¶¶ 34, 37 ("Because of Hormel's 'Make the Natural Choice' advertising blitz, ALDF has had to devote substantial additional organizational resources to counteract the misinformation, educating consumers about this and other 'natural' claims[.]"). If Hormel were to comply with the law, ALDF explains, it would be able to reduce the resources it devotes to that work. Compl. ¶ 37 ("This misleading advertising of 'Natural Choice' products has caused ALDF to divert its organizational resources away from other priorities and campaigns that could have protected more animals."). ALDF could then put these resources towards other activities. Compl. ¶¶ 37-39. ALDF alleges a specific, concrete, and clearly identified monetary harm independent of this suit that has resulted from the precise false advertising at issue here. This far exceeds what the D.C. Council explained it intended to require for non-profit standing under the CPPA, that the advertising only needed to stand as an obstacle to ALDF's objectives.

Of no consequence is Hormel's claim that ALDF would have expended *some* resources to counteract false advertising even if Hormel never ran its campaign (or, as Hormel argues in the alternative, even if Hormel had not made its "no nitrates" or "no preservatives" claims). Def.'s P. & A. Supp. Mot. Dismiss 40. It is error to focus "on the voluntariness or involuntariness of the plaintiff['s] expenditures. Instead, [the courts have] focused on whether [the plaintiff] undertook the expenditures in response to, and to counteract, the effects of the defendant['s] alleged" misconduct. *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011). ALDF alleges that the specific advertising campaign conducted by Hormel—including both its misleading "natural" claims and false "no preservative" claims—garnered ALDF's attention and that ALDF has employed its resources to correct that ongoing campaign's misrepresentations,

preventing those resources from being used for other activities. Even without the lightened requirements for non-profit standing under the CPPA, ALDF has suffered an injury because of Hormel's misconduct. This would be the case even if, as Hormel suggests, ALDF would have combatted other companies' false advertising. *See* Def.'s P. & A. Supp. Mot. Dismiss 40.

Consistent with its approach of only addressing the complaint it wishes was filed, rather than ALDF's actual allegations, Hormel's attacks on ALDF's standing rely on plainly inapposite case law. It does not cite a single decision concerning non-profit standing under the CPPA, let alone one that post-dates the 2012 Amendments providing non-profits the right to act as private attorneys general on behalf of the general public. In the only case Hormel cites from the D.C. courts, the plaintiff entirely failed to contend "its programmatic activities had been harmed" by the alleged unlawful activity. *Friends of Tilden Park, Inc. v. D.C.*, 806 A.2d 1201, 1212–13 (D.C. 2002). Friends of Tilden Park argued its advocacy would have been enhanced had the city obtained an Environmental Impact Statement. *Id.* It did not claim that the absence of the statement (the alleged violation) forced it to expend any additional resources "to educate and organize its neighbors." *Id; see also Nat'l Veterans Legal Servs. Program v. United States Dep't of Def.*, No. 14-CV-01915 (APM), 2016 U.S. Dist. LEXIS 110492, at *24 (D.D.C. Aug. 19, 2016) (plaintiff merely said it "had to 'divert and devote' scare resources" because of defendant's conduct and such "vague" allegations are insufficient). *American Society for Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 659 F.3d 13, 27-28 (D.C. Cir. 2011), held that the plaintiff had failed to introduced sufficient evidence *at trial* to prove its allegations—but also explained that, had the case come up at the pleadings stage, "logic" would have been sufficient to establish the plaintiff's standing.

In *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920–21 (D.C. Cir. 2015), *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1425–27 (D.C. Cir. 1996), and *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 937 (Fed. Cir. 1991), each plaintiff alleged only the potential for *future* injury. In fact, in *Food & Water Watch* and *National Treasury Employees Union*, the activity the plaintiffs were challenging had not yet occurred. *See also La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (plaintiff "failed to assert any factual allegations in its complaint that it was forced to divert resources . . . because of the defendants' action, and never sought leave to add them").

ALDF's complaint contains a dozen paragraphs explaining how the organization is dedicated to working against false advertising like that at issue here in order to further ALDF's mission and, accordingly, that it spent specific resources to counteract Hormel's false advertising campaign. The "Make the Natural Choice" campaign interferes with ALDF's goal to inform consumers about the true qualities of the meat products they purchase. Under any test for standing, ALDF can proceed.

CONCLUSION

Because ALDF's allegations concern only Hormel's advertising, Hormel's preemption and primary jurisdiction arguments should be rejected. Further, ALDF alleges that most consumers are misled by Hormel's advertising claims, as Hormel intended, so as to encourage consumers to purchase its factory farmed meats under the erroneous belief that they were sustainably raised. That is sufficient to state a claim under the CPPA. Finally, ALDF's detailed allegations of its resource expenditures caused by Hormel's advertising are more than sufficient to demonstrate standing at the pleading stage. For these reasons, Hormel's motion to dismiss should be denied.

Respectfully submitted,

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THE REZVANI LAW FIRM LLC

/s/ Tracy D. Rezvani
Tracy D. Rezvani (No. 464293)
tracy@rezvanilaw.com
199 E. Montgomery Ave., Suite 100
Rockville, MD 20850
Telephone: (202) 350-4270 x101
Facsimile: (202) 351-0544

Kim E. Richman
krichman@richmanlawgroup.com
THE RICHMAN LAW GROUP
81 Prospect Street
Brooklyn, NY 11201
Telephone: (212) 687-8291
Facsimile: (212) 687-8292

David S. Muraskin (No. 1012451)
dmuraskin@publicjustice.net
Leah Nicholls (No. 982730)
lnicholls@publicjustice.net
PUBLIC JUSTICE
1620 L Street NW, Suite 630
Washington, DC 20036
Telephone: (202) 797-8600
Facsimile: (202) 232-7203

Attorneys for Plaintiff