SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ANIMAL LEGAL DEFENSE FUND, Plaintiff, v. HORMEL FOODS CORPORATION, Defendant.	Case No. 2016 CA 004744 Judge Fern Flanagan Saddler Next Event: Reply Briefs, Feb. 1, 2019

PLAINTIFF ANIMAL LEGAL DEFENSE FUND'S OPPOSITION TO DEFENDANT HORMEL FOODS CORPORATION'S OPPOSED MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

The D.C. Consumer Protection Procedures Act ("CPPA") was amended in 2012 to make indisputably clear that organizations can act as "private attorneys general," "suing on behalf of members of the general public" to protect consumers from false and misleading advertising that "would have [] injured" them. Yvette M. Alexander, *Report on Bill 19-0581, the "Consumer Protection Amendment Act of 2012,"* 2 (Nov. 28, 2012) ("Alexander Report").[1] This is exactly what ALDF seeks to do here. It seeks injunctive and declaratory relief (although Hormel only moves against the former) to prevent Hormel from deceiving consumers who wish to avoid inhumane and industrial meat into purchasing "Natural Choice" products. Notably, beyond asserting "ALDF has no evidence to support its claims," Hormel Statement of P. & A. in Supp. of Mot. for Summary J. ("Hormel MSJ") 2, Hormel does not address (let alone explain away) its own voluminous records demonstrating Hormel successfully crafted its Make the Natural Choice advertising campaign to cheat consumers in this manner. Hormel MSJ 35; ALDF Memo. in Supp. of its Mot. for Summary J. ("ALDF MSJ") § I(b)-(d). This failure to substantiate its factual claims in *its* summary judgment motion means Hormel's assertion must be treated as false, *i.e.*, the Court must presume Hormel is misleading D.C. consumers. *See* D.C. Super. Ct. Civ. R. 56(a). Hormel attempts to distract from this fact by claiming ALDF has been unable to locate harmed individuals. Hormel MSJ 10. That is irrelevant—the CPPA does not require ALDF to bring forth individual consumers, D.C. Code § 28-3904—and also incorrect. Hormel's records establish consumers have been misled just as ALDF describes. ALDF MSJ § I(d). Hormel's scheme is precisely what the CPPA empowers organizations like ALDF to stop.[2]

The arguments Hormel advances confirm its motion is baseless. Hormel seeks to re-litigate *legal* issues it already lost and grossly misstates the law in the process. Hormel insists

[1] The Alexander Report is available at http://lims.dccouncil.us/Download/26337/B19-0581-CommitteeReport1.pdf.
[2] ALDF has laid out its evidence at length in support of its Motion for Summary Judgment and incorporates that here by reference.

ALDF cannot pursue or remedy Hormel's CPPA violations because: (a) ALDF lacks standing to protect D.C. consumers, though the CPPA expressly provides for it to do so, D.C. Code § 28-3905(k)(1); (b) courts cannot enjoin ongoing violations of the law, though the CPPA expressly provides for them to do so, *id.* § 28-3905(k)(2)(D); (c) this Court must ignore Hormel's admissions and records, though the rules of evidence dictate they are weighty evidence; and (d) federal agencies' approval of Hormel's *labels* preempts *every* state law *advertising* claim, although this is plainly not the case. To construct such straw men, Hormel ignores a plethora of authority, including *from this very case*, which is law of the case. Its motion must be rejected.

I. Relevant Procedural History.

This is not the first time Hormel has raised the arguments that ALDF lacks standing, it cannot represent D.C. consumers, it cannot prevail on its CPPA claim, and its claims are preempted. Hormel initially attempted to remove this case to federal court, claiming that ALDF can only seek to protect "the general public" if the case proceeds as a class action and ALDF joins the public to the case. *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 64 (D.D.C. 2017); *see also* Hormel MSJ 2-3, 21-22 (arguing same). In remanding the case to this Court, the District Court explained that § 28-3905(k)(1)(C), under which ALDF proceeds, allows "a nonprofit organization" to bring an action "on behalf of itself … and on behalf of the general public," and "does not require class proceedings." *ALDF*, 249 F. Supp. 3d at 64. Section 28-3905(k)(1)(C) "is a separate and distinct procedural vehicle from a class action." *Id.* Therefore, D.C. law "undeniably does not require" ALDF, seeking only "injunctive relief" on behalf of the public, to "bring its case as a class action." *Id.* at 65.

On remand, Hormel moved to dismiss, contending ALDF lacks standing, failed to state a claim, and brought claims that are preempted. All of Hormel's arguments were rejected. *ALDF v.*

Hormel Foods Corp., 2017 WL 4221129 (D.C. Super. Ct. Sept. 22, 2017).

First, Judge Kravitz found "ALDF's allegations [] sufficient to establish its standing to bring its CPPA claim." *Id.* at *4. "When an organization is forced to divert resources to counteract the effects of another's unlawful acts, it has suffered a sufficiently concrete injury to bestow standing" so long as there is a "direct conflict between the defendant's conduct and the organization's mission." *Id.* at *3 (cleaned up). Judge Kravitz held that ALDF met these requirements by alleging: (1) it devoted "substantial additional organizational resources" to "educating consumers" about "natural" claims, advocating for stronger standards for the use of "natural" claims that align with consumer expectations, and "publicizing the truth about Hormel's farming practices"; (2) this diversion of resources injured ALDF's mission by "harming its ability to combat cruelty and evasiveness" in animal agriculture in other manners; (3) if Hormel's misleading advertisements ceased, ALDF would no longer have to divert resources to educating consumers about Hormel's products and practices; (4) part of ALDF's mission is to promote transparency and "truth in meat labeling and advertising"; and (5) indeed, ALDF has, for years, advocated for higher standards for "natural" and "organic" labeling, worked to stop misleading meat labels and advertising, and educated the public about the truth. *Id.* at *3-4 (citing Compl. ¶¶ 36-39). The order further lists the types of financial expenditures ALDF incurred that substantiate its standing, including expenditures on federal rulemaking comments and in connection with undercover investigations. *Id.* at 7. In short—despite Hormel's efforts to recast the organizational standing requirements, Hormel MSJ 14-21—Judge Kravitz held that, as a matter of law, if ALDF could prove these facts, as it did in its summary judgment motion and does below, it would demonstrate standing.

Second, Judge Kravitz held that ALDF had alleged facts sufficient to plausibly claim that

Hormel's advertisements are misleading, violating the CPPA. Specifically, while Hormel now fixates on a supposed need for another consumer survey, Hormel MSJ 29-31, Judge Kravitz denied Hormel's motion because ALDF had cited *already existing* consumer surveys indicating that consumers understand "natural" to mean "more than the mere absence of artificial ingredients and that nearly two-thirds of consumers believe 'no nitrates' means no nitrates whatsoever." *ALDF*, 2017 WL 4221129, at *3.[3]

Finally, Judge Kravitz held that ALDF's CPPA claims are not preempted because ALDF is challenging Hormel's advertising, *not* its labeling. *Id.* at *1-2. Relevant to Hormel's arguments here, Hormel MSJ 38-40, Judge Kravitz specifically rejected the suggestion that ALDF's claims are preempted under implied conflict preemption, explaining that a ruling in favor of ALDF would not "make Hormel's compliance with the Acts' labeling requirements impossible, or even present an obstacle to Hormel's compliance." *ALDF*, 2017 WL 4221129, at *2.

II. Law of the Case Doctrine.

Because courts have already ruled on several matters of law Hormel raises, this Court may not revisit those determinations. Law of the case doctrine precludes "one trial court from ruling on a question of law already decided in the same case by a different court of coordinate jurisdiction." *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1196 (D.C. 1984). It "serves to discourage 'judge-shopping' by ensuring that only a higher court can reverse or modify a settled point of law." *Id.* "[N]o benefit flows from having one trial judge entertain what is essentially a repetitious motion and take action which has as its purpose the overruling of prior action by another trial judge." *United States v. Davis*, 330 A.2d 751, 755 (D.C. 1975).

A trial court is precluded from reconsidering an earlier decision when three requirements

[3] Judge Kravitz also rejected Hormel's argument that ALDF had not sufficiently pled that the advertisements use misleading innuendo or omit the truth about Natural Choice. *ALDF*, 2017 WL 4221129, at *3.

are met. First, "the motion under consideration [must be] substantially similar to the one already raised before, and considered by, the first court." *Ehrenhaft*, 483 A.2d at 1196-97 (quoting *P.P.P. Prods., Inc. v. W&L, Inc.*, 418 A.2d 151, 152 (D.C. 1980)) (cleaned up). A later motion is "substantially similar" if it asks the court to decide the same legal question, even if the later motion raises different *arguments*—parties do not get a second chance to brief issues they lost. *See id.* at 1197 (issue substantially similar even though, on summary judgment, the party's arguments were "far more comprehensive"). Second, the prior court's ruling must be "sufficiently final." *Id.* at 1196-97. Though a denial of a motion may not be "final" for purposes of appeal, it still can be "sufficiently final" for purposes of law of the case doctrine where, as here, the decision is a matter of law that is not a "tentative" one, *i.e,* a decision that the court did not indicate it intended to revisit. *See id.* at 1197-98. Third, the prior ruling must not be "clearly erroneous in light of newly presented facts or a change in substantive law." *Id.* at 1196-97.

Consistent with those requirements, where, as here, a question of law is decided by one judge on a motion to remand or motion to dismiss, a subsequent judge is precluded from ruling on that same question again at summary judgment absent some change in the relevant law or facts. *See, e.g.*, *Harris v. Ladner*, 828 A.2d 203, 205 (D.C. 2003) (law of the case doctrine applies to case remanded from federal court, allowing Superior Court to only consider issues "left open"); *Ehrenhaft*, 483 A.2d at 1197-98 (holding on motion to dismiss that contract clause was ambiguous precluded later judge from holding contract clause unambiguous on summary judgment); *P.P.P. Prods.*, 418 A.2d at 152-53 (same, as to holding that claims were required to have been brought as compulsory counterclaims).

Therefore, Hormel's efforts to re-argue the legal standards for standing, ALDF's ability to represent D.C. consumers' interests in this case, the need for survey evidence, and preemption

are precluded under law of the case. These are all questions of law Hormel previously presented and other courts ruled on, without an intention to revisit. *ALDF*, 249 F. Supp. 3d 53; *ALDF*, 2017 WL 4221129. Hormel fails to cite any substantial change in the intervening law, or any facts that would alter the analysis and render the prior rulings "clearly erroneous." Regardless, as discussed below, Hormel's arguments fail on the merits.

III. ALDF Has Standing to Pursue Its CPPA Claims.

ALDF has standing to seek a declaratory judgment and injunction under the CPPA against Hormel's unlawful Natural Choice advertising campaign. It has more than adequately supported, with undisputed evidence, each element necessary to demonstrate its standing. Hormel's arguments rest on mischaracterizations of evidence and misstatements of law.

a. The CPPA provides for ALDF's standing.

The CPPA specifically empowers non-profit organizations like ALDF to bring actions to enjoin misleading advertising and thereby protect the general public. Moreover, D.C. courts and the D.C. Council have made abundantly clear that these provisions are to be construed liberally to allow such cases to proceed. Hormel ignores these facts.

With the 2012 amendment to the CPPA, the Council sought to clarify that non-profit organizations can pursue CPPA actions on behalf of themselves and the general public by replacing a single standing provision with "four separate, independent standing provisions" meant to "illuminate[] the differing situations in which … organizations acting on behalf of consumer interests might have standing to sue under the act." Alexander Report 4 (cleaned up); *see also Nat'l Consumers League v. Gerber Prods. Co.*, 2015 D.C. Super. LEXIS 10, *16-18 (D.C. Super. Ct., Aug. 5, 2015) (citing Alexander Report and affirming Council's intention to broadly confer standing for organizations); *Nat'l Consumers League v. Bimbo Bakeries USA*,

2015 WL 1504745, at *3-5 (D.C. Super. Ct. Apr. 2, 2015). This relief can be sought "whether or not measureable economic damages demonstrably result to any particular consumer," Alexander Report 3—hence why ALDF need not, and has not, sought to add individual consumers to this action. *See also* D.C. Code § 28-3904 ("It shall be a violation of this chapter for any person to engage in an unfair or deceptive trade practice, *whether or not any consumer is in fact misled, deceived, or damaged*." (emphasis added)).[4]

The Council made clear that § 28-3905(k)(1)(C)—the primary provision under which ALDF brings this action—is "intended to clarify that the CPPA allows for non-profit organizational standing to *the fullest extent* recognized by the D.C. Court of Appeals in its past and *future decisions* addressing the limits of constitutional standing under Article III." Alexander Report 5 (emphasis added). It "goes further than standing for testers" of products who show that the good does not meet the claims, and allows an organization to challenge unlawful activities if the unlawful advertising "interfered with one of [the organization's] many projects." *Id.* at 5-6.

Section 28-3905(k)(1)(D) goes further, allowing "public interest organizations" to pursue CPPA violations on "bases for standing that the D.C. courts have not yet had occasion to recognize at all." Alexander Report 6. It is "intended to explicitly and unequivocally authorize the court to find . . . standing . . . beyond what would be afforded in a federal case under a narrow reading of prior federal court decisions on federal standing." *Id.*

ALDF is a nonprofit seeking to remedy violations of the CPPA, providing it standing under § 28-3905(k)(1)(C). *See also* D.C. Code § 28-3901(14) (defining nonprofit). It also has standing under § 28-3905(k)(1)(D) because its work to protect consumers' interest in animal

[4] Although ALDF need not identify specific harmed consumers, Hormel has misrepresented the record in asserting that ALDF has failed to do so. While Hormel claims ALDF has been trying "[f]or years" to identify a misled consumer, Hormel MSJ 10, the evidence Hormel cites—a single email sent to a subset of ALDF members and supporters on a single day in 2015—fails to support this sweeping (and false) assertion. Hormel MSJ Exs. DDD (showing the email) & EEE at 3 (showing the date the email was sent: Dec. 18, 2015).

welfare and their ability to make meat and poultry purchasing decisions informed by truthful information about factory farming qualifies it as a "public interest organization." *Id.* § 28-3901(15) (defining public interest organization); Walden Decl. ¶¶ 8-9; *see* Dillard Decl. ¶ 7.[5] Hormel's only argument to the contrary is that ALDF does not fall within § 28-3905(k)(1)(C) because it did not purchase Natural Choice products "for testing/evaluation purposes," Hormel MSJ 12 n.8—the *exact* limited reading of § 28-3905(k)(1)(C) the D.C. Council rejected, *see* Alexander Report 5-6. This is made clear by the CPPA's text, which states a "nonprofit" has standing "including," *but not limited to*, when it purchases a product to test. D.C. Code § 28-3905(k)(1)(C); *see also Bimbo*, 2015 WL 1504745, at *4-5. Put simply, Hormel's challenge to ALDF's standing fails to engage with explicit provisions of the law, legislative history, and on-point case law.

b. ALDF has Havens *standing*.

Hormel focuses its standing challenge on whether ALDF can establish federal Article III standing as articulated in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). This is exactly what the D.C. Council sought to move beyond with the 2012 CPPA amendments. *See* Alexander Report 5-6. Regardless, this argument fails because ALDF has demonstrated *Havens* standing. Judge Kravitz already held that if ALDF proved its allegations, which he found supported standing at the pleading stage, ALDF would have standing and could proceed with its CPPA claims. *ALDF*, 2017 WL 4221129, at *4.

ALDF has now done so. *Compare* Compl. ¶¶ 36-39 (paragraphs cited by Judge Kravitz as successfully alleging standing), *with* A3253-54 (ALDF Dep. at 27:14-28:8); Hormel MSJ Ex. XX (Wells Dep. at 136:17-137:4); Dillard Decl. ¶¶ 5-8; Walden Decl. ¶¶ 10-13 (substantiating Compl. ¶ 36); *see also* A3258, 88-90, 97-98 (ALDF Dep. at 98:10-23, 199:4-201:15, 267:2-

[5] Unless otherwise noted, declarations cited herein were filed with ALDF's Motion for Summary Judgment.

268:1); Hormel MSJ Ex. B at 37-43 (ALDF First Supp. Resp. to Interrog. 6); ALDF SUF ¶¶ 17-41; Dillard Decl. ¶¶ 8-14, 19-20; Walden Decl. ¶¶ 19-21, 23-25; Putsché Decl. ¶ 6, 13-14 (substantiating Compl. ¶¶ 37-39).[6]

Hormel asks this Court to revisit and revise Judge Kravitz's controlling holding, contending that ALDF did not sufficiently divert resources to combat Hormel's conduct; that ALDF's mission is not sufficiently in conflict with Hormel's advertising messages; and that ALDF's injury is not sufficiently traceable to Hormel or redressable by this Court. Beyond being inconsistent with the law of the case, each contention is wrong on the law and the facts.

1. Hormel's illegal conduct compelled and continues to compel ALDF to divert organizational resources to counteract the Natural Choice campaign's misleading messages, satisfying Havens.

As Judge Kravitz held, "when an organization is forced to divert resources to counteract the effects of another's unlawful acts, it has suffered a sufficiently concrete injury to bestow standing" under *Havens*. *ALDF*, 2017 WL 4221129, at *3 (citing *Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 604 (D.C. 2015) (citing *Havens*, 455 U.S. 363)). Specifically, Judge Kravitz held that if ALDF could prove its allegations that (1) "it has had to 'devote substantial additional organizational resources to counteract the misinformation [by] educating consumers about this and other 'natural' claims, advocating for stronger standards for the 'natural' claim that fall in line with consumer expectations, and publicizing the truth about Hormel's farming practices,'" and (2) that "it has expended financial resources" in these efforts, including "in filing administrative petitions and lawsuits, preparing comments in response to federal rulemaking, conducting undercover investigations of factory farms, publishing email and print newsletters,

[6] ALDF's Statement of Undisputed Facts filed with its Motion for Summary Judgment is cited herein as "ALDF SUF"; likewise, Hormel's Statement of Undisputed Material Facts filed with its Motion for Summary Judgment is cited herein as "Hormel SUMF." Citations to "AXXX" refer to the appendices filed with ALDF's Motion for Summary Judgment (A1-A3176) and this Opposition (A3177-A3383).

producing online resources, and conducting social media campaigns," it would satisfy this element of standing. *Id.* at *3-4. For the reasons explained below and in ALDF's summary judgment motion, ALDF has now proven these allegations.

Hormel argues that ALDF has not been forced to divert resources by Hormel's Natural Choice campaign for two reasons that are expressly contradicted by undisputed evidence. First, Hormel incorrectly asserts that ALDF's corporate designee and Executive Director "admitted that ALDF has not undertaken activities (beyond filing and maintaining this lawsuit) to challenge Hormel Foods' *Natural Choice*® advertising." Hormel MSJ 15. In fact, the *undisputed evidence* from ALDF's corporate designee shows ALDF was and is compelled to divert organizational resources to counteract Hormel's unlawful conduct. ALDF's Chief Programs Officer, Mark Walden, testifying individually and as ALDF's corporate witness, specifically discussed the diversions ALDF was forced to make to address Hormel's unlawful conduct. A3288-90 (ALDF Dep. at 199:4-201:15). *See* ALDF MSJ 32-34.[7]

Second, in an internally inconsistent fallback, Hormel argues that although ALDF spent resources to counteract the Make the Natural Choice campaign, ALDF would have engaged in this *Natural Choice-specific* advocacy "even if Hormel Foods had never run the [Natural Choice] Advertisements." Hormel MSJ 17. These assertions are false and negated by ALDF's corporate testimony and evidence. As part of ALDF's comments to FDA regarding use of the term "natural" on food products, ALDF *specifically researched and addressed Hormel's Natural Choice marketing* as an example of how "natural" claims can mislead consumers. A3263 (ALDF

[7] Hormel cherry-picks portions of testimony from ALDF's Executive Director, Stephen Wells, to misrepresent his lack of familiarity with the details of all organizational activity undertaken in the last several years as a definitive statement of all of ALDF's conduct related to Hormel. As ALDF explained, and as Mr. Wells stated in his declaration, he was and is not involved in the day-to-day program operations of ALDF, and thus lacks insight into the work relevant to the claims here. ALDF Memo. Supp. Its Mot. for a Protective Order 10-11 (Aug. 2, 2018); Wells Decl. ¶¶ 5-7. Mr. Wells' testimony does nothing to undermine the substantial record demonstrating that ALDF diverted resources as a result of Hormel's misleading marketing. ALDF MSJ 32-34. Mr. Wells' declaration is attached hereto for the Court's convenience; it was previously filed with ALDF's Motion for a Protective Order.

Dep. at 153:2-11); ALDF SUF ¶¶ 17-19; Dillard Decl. ¶¶ 9-10; Putsché Decl. ¶ 6; A2627, 30 (ALDF's comment to FDA); A2767; A2769. As part of ALDF's work on its investigation of The Maschhoffs, a Hormel pig supplier, ALDF engaged in *"research and analysis" regarding Hormel*, which it publicized with the goal of informing consumers about Hormel's production practices. A3275 (ALDF Dep. at 174:14-23); ALDF SUF ¶¶ 22-23; A2645, 46; A2653-56; A2658-59; A2661-64; A2748; A2744; Dillard Decl. ¶¶ 11-14; Putsché Decl. ¶¶ 9-10. ALDF specifically focused on connecting the inhumane and unsanitary factory farm conditions documented in the investigation with Hormel. Putsché Decl. ¶¶ 9-11. For example, ALDF paid a graphic designer to develop a *Hormel-specific* graphic to be used in media associated with the investigation. A3181-82; Putsché Decl. ¶ 11; A3328 (Holtz Dep. 111:7-24). After the release of the investigation, ALDF further targeted Hormel (and its potential consumers) through an action alert hosted on ALDF's website, newsletters, a blog, and social media posts. Putsché Decl. ¶ 10.

Additionally, as discussed at ALDF MSJ 31-32, ALDF was and continues to be forced to divert additional resources to other forms of advocacy as a result of Hormel's unlawful conduct. Under *Havens*, an organization is injured when it "devote[s] significant additional resources" to counteract a defendant's unlawful conduct. *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins.*, 54 A.3d 1188, 1208. ALDF's advocacy to oppose an inhumane, unsafe high-speed hog slaughter program in which Hormel is a major participant highlighted its inconsistency with the Natural Choice representations; and ALDF expanded its work against Ag-Gag laws so that it can undertake and have access to the investigations needed to hold Hormel and others accountable for misleading marketing of factory-farmed products. Both efforts are, in part, aimed at counteracting the misleading impressions related to Hormel's products *caused by the Natural Choice advertising campaign*. A3289-91 (ALDF Dep. at 200:14-202:5); ALDF SUF ¶¶ 28-30;

A2661-64 & A2742; Walden Decl. ¶ 14-16, 23-24.

Hormel's case law demonstrates how distinct this case is from those where courts have rejected *Havens* standing. In *National Fair Housing Alliance v. Carson*, the plaintiff organization "admit[ted]" it did not change its work in response to the challenged conduct. 330 F. Supp. 3d 14, 49 (D.D.C. 2018). Similarly, in *National Association of Home Builders v. E.P.A.*, the plaintiffs did not suggest any of its expenditures were different as a result of the unlawful conduct. 667 F.3d 6, 12 (D.C. Cir. 2011). Hormel's other cases concern instances where the plaintiff's *only* expenditures were on the lawsuit itself, and did not demonstrate any broader diversion of resources. *Equal Rights Ctr.*, 110 A.3d at 605 (citing *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1207 (D.C. 2002)); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995). Judge Kravitz already held that ALDF's regulatory and investigation work is different. *ALDF*, 2017 WL 4221129, at *3-4. ALDF's extensive, non-litigation expenses that respond to the unlawful aspects of the Make the Natural Choice campaign show ALDF has been forced to divert resources to Natural Choice-related activities.

2. Hormel's unlawful conduct directly conflicts with and frustrates ALDF's mission and its mission-driven advocacy, satisfying Havens.

As Judge Kravitz held, for expenditures to establish *Havens* standing, D.C. courts require a "direct conflict between defendant's conduct and the organization's mission." *Equal Rights Ctr.*, 110 A.3d at 604 n.3; *see also Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) ("*ASPCA*"). While Hormel attempts to make an issue out of this test, it omits that the sole question is whether "the challenged conduct affects an organization's activities but is *neutral with respect to its substantive mission*." *Id.* at 25 (emphasis added). Thus, the only test is whether ALDF's mission is "neutral" with respect to Hormel's illegal conduct. Judge Kravitz held ALDF's allegations that Hormel's misleading

advertising conflicts with ALDF's mission to "promot[e] transparency in animal agriculture and truth in meat labeling and advertising" satisfied that standard. *ALDF*, 2017 WL 4221129, at *4.

ALDF's mission to protect the lives and advance the interests of animals is far from "neutral" in relation to Hormel's conduct. ALDF has now proved what it alleged in its Complaint: that ALDF pursues its mission by working to reduce demand for factory-farmed products through increased transparency and advocacy designed to empower consumers with truthful information about factory farming. ALDF MSJ 31. This work directly conflicts with Hormel's unlawful inflating of demand for factory-farmed products by obscuring those products' origins. A3254-55, 94-95, 97-98 (ALDF Dep. at 28:5-29:4, 264:17-265:1, 267:15-268:1); A3311-13 (Walden Dep. at 121:20-122:7); Dillard Decl. ¶¶ 5-8; Walden Decl. ¶¶ 10-11.

Hormel's argument that ALDF has "repeatedly admitted" there is no conflict with ALDF's mission, Hormel MSJ 14, is premised on a sleight-of-hand. ALDF has consistently asserted, and now demonstrated, that Hormel's *illegal conduct*—Hormel's misleading marketing of its factory-farmed meat and poultry products—conflicts with ALDF's organizational mission to protect animals (causing it to divert resources). ALDF MSJ § III(a)(ii)(1)-(3). Throughout this litigation, Hormel has repeatedly asked ALDF to state how the *claims themselves*—the words "100% Natural" and "No Preservatives"—conflict with ALDF's mission. *See, i.e.*, Hormel MSJ Ex. D (ALDF's Second Suppl. Resp. to Hormel's Interrog. 1, at 5) (asking ALDF to "Describe how each of the Product Claims at issue in this action conflict with ALDF's organizational mission"); Hormel MSJ Ex. I (ALDF's Objs. & Resp. to Hormel Foods' First Am. Notice of Rule 30(b)(6) Dep., at 6) (seeking testimony on "the basis of ALDF's contention that Hormel Foods' Product Claims conflict with ALDF's mission"). The claims, in a vacuum, are not harmful to ALDF's mission. What is harmful are Hormel's efforts to use those words to mislead

consumers about its products. The Court should reject Hormel's word games because its unlawful conduct to hide the factory-farmed origin of its products through misleadingly advertising them directly conflicts with ALDF's mission. Dillard Decl. ¶¶ 5-8.

Hormel also confuses precedents stating that mere "frustration" of an organization's "abstract social interests" is insufficient to convey standing with the wholly unsupported notion that only conduct severe enough to prohibit an organization from functioning is sufficient. *See* Hormel MSJ 13-14. But, a conflict resulting in an organization *diverting* resources (short of being rendered entirely impotent) is exactly what courts consistently have held confers *Havens* standing—and exactly what ALDF has demonstrated. *See, e.g.*, *Organic Consumers Assoc. v. Hain Celestial Grp., Inc.*, 285 F. Supp. 3d 100, 102-03 (D.D.C. 2018) (finding standing under CPPA when defendant's alleged violation perceptibly impaired plaintiff organization's advocacy and necessitated spending resources to counteract assertedly illegal practices). Moreover, the amendments to the CPPA—namely § 28-3905(k)(1)(C)—were expressly intended to avoid this sort of parsing of an organization's work. As the D.C. Council put it, the section "addresses" case law suggesting organizations do not "have standing if the alleged violation only sets back the organization's abstract social interests," making clear that if the conduct "interfere[s]" with the organization's "projects" *at all*, that organization has standing. Alexander Report 6.

Where courts have stated "mere frustration" is insufficient to establish standing, that is because the challenged conduct did *not* cause the plaintiff organization to change its activities at all; the cases do not suggest an organization has to have ceased its other work. *Elec. Privacy Info. Ctr. v. U.S. Dep't of Educ.*, 48 F. Supp. 3d 1, 24 (D.D.C. 2014) (organization lacked standing because "nothing" "impaired" its work); *Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 136 (D.D.C. 2010) (finding no Article III standing when "NCL d[id] not

claim that General Mills' conduct harmed NCL or inhibited its activities").

Hormel's repeated citations to the Food and Water Watch cases, Hormel MSJ 13-15, 17-18, fail to demonstrate that ALDF lacks standing. In *FWW I*, the court noted that the plaintiff organization and the defendant government agency "are [both] striving to improve food safety" and therefore, while there may have been a conflict of methodology, there was no conflict between the plaintiff's mission and the agency's action. *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 201 (D.D.C. 2015) ("*FWW I*"). Here, Hormel cannot plausibly argue that it and ALDF share the same goal and merely differ on methodology, as ALDF's mission and Hormel's misleading marketing are diametrically opposed. *Id.*; ALDF MSJ § III(a)(ii)(1).

In *FWW II*, meanwhile, the court found FWW did not have standing because it failed to allege that the agency's action "restricts the flow of information that [plaintiff] uses to educate it members" or that "organizational activities have been perceptibly impaired in any way." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 921 (D.C. Cir. 2015) ("*FWW II*"). In contrast, ALDF has shown that Hormel's unlawful conduct *materially impairs* ALDF's advocacy through marketing messages that hide that Natural Choice products are produced on the exact factory farms that ALDF advocates against, misleading consumers and drowning out ALDF's work. ALDF MSJ § III(a)(ii)(1). Both *FWW* cases are thus readily distinguishable from the present one.

As the D.C. Court of Appeals explained in a Hormel-cited case, a plaintiff organization *does* have *Havens* standing when the defendant's conduct "would undo [] dogged and concrete work," leading it to spend more resources on advocacy against those efforts. *D.C. Appleseed*, 54 A.3d at 1208. This is exactly the case here: Hormel's campaign has increased sales of its factory-farmed meat by peddling the false impression that its products are pastoral and artisanal, which conflicts with ALDF's mission and advocacy to inform consumers about the true nature of

industrial meat production, and has led ALDF to alter its activities to counter the campaign.[8]

3. ALDF's injuries are traceable to Hormel's unlawful conduct, and a favorable ruling by this Court would redress them, satisfying Havens.

ALDF's injuries—its diversion of its limited resources because Hormel's ads frustrate ALDF's efforts to educate and empower consumers—are traceable to Hormel's unlawful conduct. In applying the CPPA, federal courts have found that "the traceability requirement of Article III does not require that the defendant's actions be the very last step in a chain of causation leading to the plaintiff's injury. Rather, it is enough that the injury be 'fairly traceable to the challenged conduct of the defendant.'" *Mann v. Bahi*, 251 F. Supp. 3d 112, 119 (D.D.C. 2017) (cleaned up) (citing *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547-48 (2016)).

The Make the Natural Choice campaign is clearly part of the "chain" in ALDF's diversion of resources. ALDF's expenditures on advocacy to the FDA regarding the misleading use of the "natural" claim on meat products included work on Natural Choice and thus can be traced, at least in part, to Hormel's marketing. *See* § III(b)(1), *supra*; ALDF MSJ § I(a). Likewise, Hormel's particularly broad marketing reach was a factor in ALDF's devoting resources to calling out Hormel's inhumane practices through ALDF's investigation of pig supplier The Maschhoffs; because Hormel is a household name for consumers, ALDF expended particularly substantial resources in communicating about Hormel. *See* § III(b)(1), *supra*; ALDF MSJ § I(a). Finally, other ALDF efforts, including its regulatory and public advocacy against the high-speed pig slaughter program in which Hormel plays a leading role, is traceable, in part, to Hormel's unlawful conduct. *See* § III(b)(1), *supra*.

[8] Hormel notes that "[o]ne court" has found ALDF lacked standing to bring a lawsuit under *Havens*. Hormel MSJ 15. However, that court found that, unlike here, ALDF's only expended funds to challenge the conduct on the litigation itself, with no evidence of non-litigation expenses. *See Animal Legal Def. Fund, Inc. v. Aubertine*, 119 A.D.3d 1202, 1205 (N.Y. App. Div. 2014). Numerous other courts have found that ALDF did have *Havens* standing under circumstances analogous to those presented here. *E.g.*, *ALDF v. Great Bull Run, LLC*, 2014 WL 2568685, at *4-5 (N.D. Cal. June 6, 2014); *ALDF v. U.S. Dep't of Agric.*, 223 F. Supp. 3d 1008, 1017-18 (C.D. Cal. 2016); *ALDF v. Reynolds*, 297 F. Supp. 3d 901, 916-17 (S.D. Iowa 2018).

Hormel's position that its illegal conduct did not cause or contribute to ALDF's injury boils down to two points: ALDF is also injured by other misleading "natural" marketing in the meat industry; and ALDF did not show that Hormel's misleading marketing in fact did increase demand for "natural" meat products. Both are irrelevant, and the second is disproven by ample evidence. *See* § VI, *infra*. First, ALDF does not claim that Hormel is solely to blame for any and all consumer confusion around "natural" mis-marketing of factory-farmed meat and the resulting harm to ALDF's advocacy. ALDF is stating that the resources it has diverted in highlighting *Hormel's* factory farming and combatting *Hormel's* misleading "natural" claims, injuring ALDF's advocacy, is traceable to Hormel's unlawful conduct.

Second, a party need not prove its claims on the merits to establishing standing. *Richardson v. D.C. Redevelopment Land Agency*, 453 A.2d 118, 127 (D.C. 1982). *ASPCA*, on which Hormel relies, merely states that an organization cannot have *Havens* standing where it fails to suggest it did any work to "counteract" the activity it believed to be unlawful. *ASPCA*, 659 F.3d at 27-28. Indeed, ASPCA conceded it did not even have evidence that the challenged activity *could* impact and alter its advocacy. *Id.* Beyond the fact that ALDF has clearly acted against Hormel's false messages, Hormel's own documents show that its conduct of engaging in false and misleading marketing affected consumers' impressions of its factory-farmed products—and their decisions to buy them. ALDF MSJ § I(c)-(d). Indeed, the record shows that ALDF's worst fears about Hormel's marketing were true: Hormel was and is persuading consumers to buy more Natural Choice products by conveying false messages to those consumers about the "natural-ness" of those products, while actually selling meat from unnatural factory-farmed animals. *Id.*; *see also* § I(g)-(i). As Hormel put it, "Animal Transparency is a driving factor in meat sales." ALDF SUF ¶ 99; A1204-05. ALDF alleges—and Hormel

acknowledges—consumers care about "animal safety and cruelty," and "natural" claims can drive views about "animal treatment." *Id.* Hormel's campaign was a tool to increase sales through the exact deception ALDF fights against. *See, e.g.*, ALDF MSJ § I(c).

4. ALDF's fundraising efforts are also irrelevant to its standing.

Hormel's last-ditch effort to attack ALDF's standing is to claim the organization has made "tens of thousands of dollars" off its Hormel-related advocacy and therefore is "profiteering" off this case and cannot have been injured. Hormel MSJ 18. Judge Kravitz specifically rejected the relevance of ALDF's fundraising to ALDF's standing. *See* Hormel MSJ Ex. J (Hr'g Tr. at 20:5-13) ("I think [ALDF's] COO does not [have relevant information], given that the only subject that the defense wants to question her about is fundraising[.]").

As Judge Kravitz held, whether an organization fundraises is *not* part of the standing inquiry, *ALDF*, 2017 WL 4221129, at *3-4, and Hormel's claim otherwise has no precedent in D.C. courts. Hormel cites only *FWW I* to support this argument, which has never been cited in support of a D.C. court opinion and is distinguishable. There, the plaintiff organization was engaged in advocacy that the court considered its "raison d'être," leading the court to conclude FWW's expenditures on it did not constitute an injury. *FWW I*, 79 F. Supp. 3d at 202. Setting aside that *FWW I* wrongly applied *Havens* precedent, Hormel has put forth no evidence to support the notion that this case is a cause celébre for ALDF. Quite to the contrary, as Hormel notes, the core of ALDF's mission is to protect and advance the interests of *animals*. *See* Hormel MSJ 4; Hormel SUMF ¶¶ 5, 7-9. Defensive work—stopping companies from misleading consumers about factory farming so ALDF can discourage further harm—is not ALDF's raison d'etre, but instead diverts it from activities ALDF could pursue to more directly advance its mission. *See* § III(b)(1), *supra*; ALDF MSJ § III(a)(ii)(2); *see also* Hormel MSJ Ex. XX (Wells

Dep. 22:2-9) (characterizing work on false advertising as "a reactive distraction from our core mission" of "looking for ways to improve the laws that protect animals or to make sure those laws are adequately enforced").

Moreover, Hormel's claim that ALDF has "profited handsomely" is simply false. The documents Hormel cites in support of this assertion primarily (a) are not fundraising documents or (b) do not mention Hormel or this lawsuit. *See* Hormel MSJ 18 (citing Hormel SUMF ¶ 213). Hormel's argument appears to be that ALDF's mention of Hormel in a minor set of documents, or descriptions of certain categories of its work in communications, such as work against factory farming and Ag-Gag laws, means many donations must have followed (and that those donations were specifically driven by this case). Fundraising is not so direct, and nothing in the record substantiates Hormel's wishful thinking on this (irrelevant) issue.

IV. ALDF Did Not Need To "Join" the Public to This Case.

As the discussion of statutory standing highlights, Hormel's assertion—made without any supporting authority—that ALDF needed to "join" the public to this case, and proceed with a class action in order to seek injunctive relief to protect consumers, is incorrect. Hormel MSJ 21-22. In fact, as noted above (at §§ I-II), this argument has been explicitly considered and rejected in this case, which is law of the case. Thus, this Court is precluded from revisiting the question. At any rate, Hormel is wrong as a matter of law.

The CPPA "permit[s] representative actions on behalf of consumers, broadly defined as the general public." *Rotunda v. Marriott Int'l, Inc.*, 123 A.3d 980, 984 (D.C. 2015) (cleaned up); *Grayson v. AT&T Corp.*, 15 A.3d 219, 248-49 (D.C. 2011) (stating "a violation or an invasion of [] statutory legal rights created by the CPPA" allows a plaintiff to "bring [a] cause of action for the interests of [themselves] and the general public" (cleaned up)). Under D.C. Code § 28-

3905(k)(1)(C), a "nonprofit organization may" proceed "on behalf of the general public." Under § 28-3905(k)(1)(D)(i), "a public interest organization may, on behalf of the interests of a consumer or a class of consumers," *e.g.*, the general public, "bring an action seeking relief" "if the consumer or class could bring an action." As has already been affirmed in this case, the purpose of these provisions is to allow organizations to act as "private attorneys general" to promote the purpose of the statute and protect the public "where it is not feasible for the affected consumers" to be in the action. Alexander Report 6; *see also ALDF*, 249 F. Supp. 3d at 64; *Smith v. Abbott Labs., Inc*., 2017 WL 3670194, at *1 (D.D.C. Mar. 31, 2017).

Consistent with this, courts have repeatedly concluded organizations seeking injunctive relief on behalf of the general public do *not* need to do so by "joining" the public to the case via a class action. *Rotunda* explains CPPA plaintiffs must use the class action "framework" only in "suits for *damages*," so as to protect consumers' right to recovery. 123 A.3d at 995-98 (emphasis added). Because these concerns do not apply to injunctive actions, courts have consistently rejected effects to expand *Rotunda* to suits "for the type of injunctive relief sought here." *ALDF*, 249 F. Supp. 3d at 65; *Organic Consumers Ass'n v. General Mills, Inc.*, 2017 D.C. Super. LEXIS 4, *9 (D.C. Super. July 6, 2017) ("*Rotunda* does not necessarily require plaintiffs [seeking an injunction] to seek class certification before proceeding with a representative action under the CPPA."); *Abbott Labs*, 2017 WL 3670194, at *1 ("Although [plaintiff] seeks money damages for himself, he asks for injunctive relief on behalf of the general public. Courts in this District have repeatedly held that representative DCCPPA actions are not removable as class actions."); *see also, e.g.*, *Margolis v U-Haul Int'l, Inc.*, 2009 WL 5788369 (D.C. Super. Ct. Dec. 17, 2009) (finding "plaintiff may maintain claims under the CPPA for damages in his individual capacity and for injunctive relief both as an individual and in a representative capacity as a

private attorney general"); *Nat'l Consumers League v. Bimbo Bakeries*, 46 F. Supp. 3d 64, 76 (D.D.C. 2014) (CPPA "private attorney general actions are not class actions").

Hormel made the *exact* same argument it does here—that ALDF can only proceed with this case as a class—when it sought to remove this case to federal court, Hormel Remand Opp. at 27-38. The District Court rejected it, explaining that as a matter of law ALDF need not engage in "class proceedings" to seek equitable relief on behalf of the general public. *ALDF*, 249 F. Supp. 3d at 64-65. This Court should, and under law of the case is bound to, reach the same result.

V. Hormel's Ongoing Violations of the CPPA Should Be Enjoined.

Hormel's request for summary judgment because ALDF cannot obtain relief, Hormel MSJ 22-27, fails both because Hormel does not address ALDF's entitlement to a declaratory judgment, Compl., Prayer (A), and also because this is exactly the sort of case warranting an injunction.[9] The CPPA expressly provides for injunctive relief to prevent recurring violations of the statute. D.C. Code § 28-3905(k)(1)(A)(2)(D); *Rotunda*, 123 A.3d at 984-85. This is one reason the statute was enacted. *Grayson*, 15 A.3d at 240-41 ("drafters appeared to focus on preventive enforcement through injunctive action," and in particular that "public interest organizations … will advance public priorities"); D.C. Code § 28-3901(b)-(c) (CPPA about "deter[ring]" unwanted practices and "promoting … fair business practices" to prevent misrepresentations about goods that "*would be* purchased" (emphasis added, cleaned up)). Injunctions are also typical relief where there is ongoing harm, to the point that the leading treatise explains a "court must be satisfied that there is no reasonable expectation of future injurious conduct" before it denies an injunction. Charles A. Wright et al. *Federal Practice & Procedure* § 2942 (3d ed. West 2019); *see also* J. Thomas McCarthy, 5 *McCarthy on*

[9] The CPPA makes clear that ALDF is entitled to a declaratory judgement. D.C. Code § 28-3901(d) cross-references 15 U.S.C. § 45(a), which provides for declaratory relief. *See also* D.C. Code § 28-3905(k)(2)(F) (providing for any relief "the court determines proper").

Trademarks & Unfair Competition § 30:1 (5th ed. West 2019) ("usual historical practice" is for "prevailing plaintiff in a case of trademark infringement or false advertising" to "receive permanent injunctive relief of some kind").

Nonetheless, Hormel claims that even if ALDF proves Hormel's ongoing campaign is violating the law, the Court cannot stop it. This specious argument depends on four misstatements of law. First, while Hormel insists ALDF must satisfy a federal test requiring "irreparable harm" to obtain an injunction, Hormel MSJ 23, the Court of Appeals has articulated a different standard, which is binding on this Court. *Ifill v. District of Columbia*, explains that under D.C. law, "irreparable harm" is a factor in "whether a *preliminary* injunction is appropriate," and is *not* required for *permanent* injunctions. 665 A.2d 185, 187 (D.C. 1995) (emphasis added). "A permanent injunction … requires the trial court to find that there is no adequate remedy at law, the balance of equities favors the moving party, and success on the merits has been demonstrated." *Id*. at 189 (cleaned up); *see also District of Columbia v. ExxonMobil Oil Corp.*, 172 A.3d 412, 425 n.22 (D.C. 2017) (affirming *Ifill*'s test for a permanent injunction). In fact, the Court of Appeals recently elaborated that in deciding whether to issue a permanent injunction, D.C. courts should *not* just consider the extent of the harm evinced by the case, but the way in which the activities at issue could manipulate the market more broadly. *Exxon Mobil*, 172 A.3d at 425-27. Thus, that Hormel set out, has been able, and will continue to take market share from brands that accurately market to consumers who care about animal welfare and industrial practices, by misleading consumers into purchasing Natural Choice, can justify injunctive relief under D.C. law. *See* ALDF MSJ § I.

Second, Hormel incorrectly narrows the harms that are established in this case. As explained above, the CPPA empowers ALDF to vindicate the interests of the public who will be

deceived by Hormel's campaign. § III(a), *supra*. Moreover, ALDF can (and has) pursued an injunction to remedy the injury Hormel is causing to itself. Hormel cherry picks quotes from a hearing transcript to argue otherwise, but ALDF has consistently explained it is diverting resources to counteract Hormel's illegal conduct and will continue to do so unless Hormel's advertising is enjoined. Hormel MSJ Ex. B at 31-35, 37-43 (ALDF's First Supp. Resp. to Hormel's Interrogs. 5 & 6). As the discovery hearing transcript reveals, Hormel tried to wriggle a concession on this point during a discussion of ALDF's standing. Hormel MSJ Ex. J (Hr'g Tr. at 17:9-18:7). ALDF did not bite, reiterating that "our standing" is based on the organization's continuing diversion of resources, which ALDF seeks to redress, and that ALDF is also "suing on behalf of the public." *Id.* at 18:18-24.

Third, even though ALDF does *not* need to show "irreparable harm," contrary to Hormel's insistence, the harms presented by this case are "irreparable." Courts regularly hold that evidence of ongoing illegal activity, such as Hormel's campaign to deceive consumers, presents a harm warranting an injunction. *See, e.g.*, *District of Columbia v. Student Aid Ctr., Inc.*, 2017 WL 9532847, at *2 (D.C. Super. Ct. Nov. 29, 2017) (awarding injunctive relief in CPPA case involving misrepresentations); *see also U.S. DOJ v. Daniel Chapter One*, 650 Fed. App'x 20, 24 (D.C. Cir. 2016) ("broad injunction" proper to prevent continued violation of FTC statute); *F.T.C. v. One or More Unknown Parties*, 2003 WL 26121557, at *1 (D.D.C. Jan. 9, 2003) (violation of FTC Act shows "irreparable harm … unless Defendants are restrained and enjoined"); *F.T.C. v. R.A. Walker & Assocs.*, 1991 WL 185162, at *2 (D.D.C. July 26, 1991) (injunction warranted to ensure defendants will not "engage in further unfair or deceptive acts or practices in violation of Section 5 of the FTC Act").

Moreover, where the nature of the plaintiff's loss would make damages "difficult to

ascertain"—such as where a public interest organization has to divert resources from one set of activities to another—courts have explained that injury warrants an injunction. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Schultz*, 2001 WL 1681973, at *4 (D.D.C. Feb. 26, 2001). Even Hormel's purported expert testified consumers' damages would be exceptionally difficult to calculate in this case. A3340-41 (Dhar Dep. 341:22-342:24). The evidence demonstrates "irreparable harm."[10]

Fourth, Hormel errs in suggesting that if, once harmed, consumers can sue for damages, no injunction is warranted. Hormel MSJ 25. Courts have repeatedly stated injunctions are appropriate to "prevent [a defendant] from continuing to deceptively market" its goods, as the potential to obtain damages in the future does not amount to adequate alternative relief. *Smart Vent, Inc. v. Crawl Space Door Sys. Inc.*, 2017 WL 4948063, at *7 (D.N.J. Nov. 1, 2017); *see also Falcon Stainless, Inc. v. Rino Cos.*, 2011 WL 13130487, at *23 (C.D. Cal. Aug. 2, 2011) ("As to Falcon's false advertising claims, an injunction should be tailored to prevent ongoing violations" (cleaned up)); Wright & Miller, *supra*, § 2944 ("legal remedy may be deemed inadequate if … injury is of a continuing nature" (citing cases)); *accord HTS, Inc. v. Boley*, 954 F. Supp. 2d 927, 960 (D. Ariz. 2013) ("[T]here is no adequate remedy at law for the injury caused by a defendant's continuing infringement."(cleaned up)).

Unsurprisingly, a defendant cannot continue to illegally exploit the public by claiming that people who are injured in the future can seek damages. A damages remedy that accrues

[10] Hormel's citations for the proposition that "economic harms … do not give rise to injunctive relief" says nothing of the kind. Hormel MSJ 25-26. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), merely articulates the four-factor *federal* test for injunctive relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), and *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987), simply state that "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies." *Beck v. Test Masters Educ. Servs. Inc.*, 994 F. Supp. 2d 98, 101-02 (D.D.C. 2014), denied an injunction because there was no ongoing violation, but suggested evidence of ongoing harm *would* warrant an injunction. Similarly, *Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003), concerned an injury that had already occurred, but the court indicated evidence of the risk of future harm *could* have justified an injunction.

"long after this suit" cannot be basis to deny an injunction because "there is no [existing] right" to pursue that relief. *Lincoln Elec. Co. v. Knox*, 56 F. Supp. 308, 310 (D.D.C. 1944). Moreover, courts should not require "thousands of customers" to separately litigate when injunctive relief could stop the harm. *Id*; *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (courts may consider whether proposed alternative remedy is "realistic").[11]

VI. The Evidence Overwhelmingly Establishes Hormel Is Violating the CPPA.

Hormel's contention that it should prevail on the merits depends on it artificially narrowing the scope of the CPPA in ways that have been rejected by established law. Contrary to Hormel's suggestions, D.C. Code § 28-3904(a) and (d) *do* apply to *true, but misleading* statements, not just "literally false" ones. *See* Hormel MSJ 27. And, despite Hormel's claim, ALDF *can* prove its claims under D.C. Code § 28-3904(a), (d), (e), (f), (f-1), & (h), with the full spectrum of evidence, not just surveys. *See* Hormel MSJ 29-30.[12] Further still, ALDF has demonstrated Hormel's conduct is unlawful even under Hormel's erroneous standards. Indeed, as noted above, Judge Kravitz already held that ALDF, at the motion to dismiss stage, had sufficient survey evidence. *ALDF*, 2017 WL 4221129, at *3.[13]

a. Hormel misstates the CPPA's requirements.

1. Subsections 28-3904(a) and (d) apply to false or misleading statements.

The Court of Appeals has expressly rejected Hormel's reading of § 28-3904(a) and (d) as applying only to "literally false" statements. *Floyd v. Bank of America Corp.* held that courts interpreting § 28-3904(a) and (d) should look to California's Consumers Legal Remedies Act

[11] As with "irreparable harm," courts are also clear that damages are not a substitute for injunctive relief where they "would be difficult to calculate." *United Black Fund, Inc. v. District of Columbia*, 2004 WL 2579437, at *5 (D.C. Super. Ct. Nov. 9, 2004); *Nestle USA, Inc. v. Gunther Grant, Inc.*, 2014 WL 12558008, at *17 (C.D. Cal. May 13, 2014) (same). Again, Hormel's own expert explains that is the case here. A3340-41 (Dhar Dep. at 341:22-342:24).

[12] As noted in ALDF's MSJ, ALDF did not move under § 28-3904(h) to simplify matters, as (h) contains a scienter requirement the other provisions do not. But, the following discussion of the CPPA applies across the statute.

[13] In its Complaint ¶¶ 42-46, ALDF relied on the Consumer Reports surveys, including the 2015 survey Hormel itself adopted as reflecting consumers' understanding of "natural." ALDF SUF ¶ 97; A191.

("CLRA"), not federal Lanham Act case law, on which Hormel relies. 70 A.3d 246, 254-55 (D.C. 2013) (citing Cal. Civ. Code § 1770(a)(5), (a)(7)). In applying equivalent CLRA provisions, California courts explain they cover "deceptive or misleading" advertising. *Buso v. Vigo Importing Co.*, 2018 WL 6191390, at *3 (S.D. Cal. Nov. 28, 2018) (citing Cal. Civ. Code § 1770(a)(5) among other provisions). Under the CLRA, "a true representation can mislead a reasonable consumer." *Alvarez v. Ashley Furniture Indus., Inc.*, 2017 WL 4785970, at *4 (C.D. Cal. Sept. 20, 2017) (cleaned up); *see Dachauer v. NBTY, Inc.*, __ F.3d __, 2019 WL 150016, *1 (9th Cir. Jan. 10, 2019) (CRLA prohibits "advertising that is literally true, but which is 'actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public'"). Because the CLRA, like the CPPA, is "intentionally broad to promote the underlying purpose of consumer protection," courts applying it "stress[] that, while a statement may be accurate on some level, it may nonetheless tend to mislead or deceive," making it actionable. *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 894 (N.D. Cal. 2016) (cleaned up). *Cf.* D.C. Code § 28-3901(b).

Any other reading would be inconsistent with the CPPA's text. Section 28-3904(a) and (d) do not speak in terms of falsity, but rather about making a "represent[ation]" about goods that the goods "do not have." In other words, a misleading misrepresentation. *See Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) (CPPA prohibits all "unfair trade practices" if they could deceive "a reasonable consumer").[14] A court analyzes § 28-3904(a) and (d) just as it would the other CPPA claims at issue, inquiring whether ALDF has shown, by a preponderance of the evidence, that Hormel is misleading reasonable consumers. *Jackson ex rel.*

[14] Consistent with this, ALDF has been unable to locate a single case using the Lanham Act to interpret the CPPA or demanding "literal falsity." The single decision Hormel cites, *National Consumers League v Gerber Products Co.*, 2015 WL 4664213 (D.C. Super. Aug. 5, 2015), makes no mention of the Lanham Act. Instead, *Gerber* holds the Plaintiffs there survived a motion to dismiss because they pled that the scientific health benefit claims at issue were "literally false," a holding that does not preclude a more expansive interpretation. *Id.* at *7.

Smith v. Byrd, 2004 WL 3130653, at *12 & n.54. (D.C. Super. Ct. May 11, 2004).[15]

2. A CPPA claim can be proven without survey evidence.

Hormel's insistence that its claims can only be shown to be misleading, ambiguous, or material with survey evidence finds no support in the law. Hormel MSJ 31-35. The CPPA instructs courts to look to certain provisions of the FTC Act when interpreting the CPPA. D.C. Code § 28-3901(d); *see also* D.C. Council, Rep. on Bill 1-197, at 1-2 (Nov. 19, 1975). As Hormel's key case explains, the FTC Act is distinct from the Lanham Act (on which Hormel relies), in that the former does *not* require survey evidence to substantiate a violation, with numerous courts granting relief without it. *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 130 (3d Cir. 1994); *see also Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 319 (7th Cir. 1992) (upholding enforcement action without a survey because "[c]ourts, including the Supreme Court, have uniformly rejected imposing [] a [survey] requirement on the FTC[.]" (citing cases upholding enforcement without surveys)); *F.T.C. v. Adept Mgmt. Inc.*, 2018 WL 4623152, at *1 (D. Or. Sept. 25, 2018) (granting summary judgment without a survey for same reasons). Instead, any "reasoned analysis" suffices to prove a violation of the FTC Act. *Kraft*, 970 F.2d at 319.

Were that not enough (and it is), courts applying the CLRA, to which D.C. courts look on other matters, have also held "Surveys and expert testimony regarding consumer assumptions and expectations may be offered but are not required; anecdotal evidence may suffice." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008) (citing cases). Moreover, the

[15] Even if the Court were to apply Lanham Act case law, § 28-3904(a) and (d) need not be interpreted as only applying to "literally false" statements. The Lanham Act covers "false *or* misleading description[s] of fact, or false *or* misleading representation[s] of fact." 15 U.S.C.A. § 1125(a) (emphasis added). As Hormel's lead authority on the Lanham Act explains, to prevail "A plaintiff must allege *either* (i) that the challenged representation is literally false or (ii) that it is literally true but nevertheless misleading." *In re GNC Corp.*, 789 F.3d 505, 514 (4th Cir. 2015) (emphasis added).

Court of Appeals has expressly rejected the need for survey evidence in at least once instance, explaining a representation is material if "the maker … ha[d] reason to know" consumers would regard it as material, whether or not a consumer actually did so. *Saucier*, 64 A.3d at 442.[16]

Hormel's strategy documents, commentary, actions—including its [redacted] are relevant and can prove ALDF's claims under D.C. Code § 28-3904(a), (d), (e), (f), (f-1), & (h). So too can third-party research on "natural" claims. Hormel makes no efforts to address this evidence, which overwhelmingly demonstrates the campaign misleads consumers in the manner ALDF contends, and establishes Hormel should have known these misrepresentations were material. ALDF MSJ § I(b)-(e). Therefore, Hormel cannot prevail against its liability.

b. ALDF prevails even under Hormel's mistaken view of the law.

1. Hormel's ads are "literally false."

Though ALDF can proceed under § 28-3904(a) and (d) on the basis that Hormel's ads are true but misleading, ALDF has also shown they are "literally false." Hormel states that if ALDF (1) establishes that there is "no reasonable difference of opinion" regarding the nature of Hormel's products, and (2) separately shows Hormel's ads lead reasonable consumers to believe the products have attributes that they do not have, Hormel has violated the CPPA. Hormel MSJ 27-28. The evidence more than satisfies this test.

Although Hormel analogizes the evidence required to show the advertisements are "literally false" to establishing a "consensus" view on the nature of the products, Hormel MSJ 28, its cases explain such a test would improperly "elevate[] [the plaintiff's] burden." *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018). "[I]t has never been the standard for weighing conflicting evidence" that the plaintiff must not only "produce affirmative evidence,

[16] Section 28-3904(a) and (d) have no materiality requirement whatsoever.

but also fatally undermine the defendant's evidence." *Id.* at 993. As another of Hormel's cases states, a plaintiff's "burden is only to establish falsity by a preponderance," which it can accomplish by "developing the most persuasive argument possible to support her position as to the truth or falsity of the disputed fact," regardless of whether defendants put forward someone to "disagree." *Hobbs v. Gerber Prod. Co.*, 2018 WL 3861571, at *7 (N.D. Ill. Aug. 14, 2018).

Likewise, while Hormel implies ALDF must produce "scientific" evidence to prove advertisements are "literally false," Hormel MSJ 28 & n.12, its authority explains this too is inaccurate. ALDF can prove "literal falsity" by showing there is no "reasonable disagreement" regarding the aspects of Natural Choice products based on any "commonly-applicable evidence." *Racies v. Quincy Bioscience, LLC*, 2017 WL 6418910, at *4 (N.D. Cal. Dec. 15, 2017). As four cases Hormel cites demonstrate, courts only require scientific evidence to establish "literal falsity" where the challenged claim concerns "a scientific proposition." *In re GNC Corp.*, 789 F.3d 505, 515 (4th Cir. 2015); *see also Beyond Pesticides v. Monsanto Co.*, 311 F. Supp. 3d 82, 89-90 (D.D.C. 2018) (scientific evidence is not needed because "Plaintiffs are not making a scientific claim"); *Hobbs,* 2018 WL 3861571, at *7 (stating same); *Blitz v. Monsanto Co.*, 317 F. Supp. 3d 1042, 1051 (W.D. Wis. 2018) (requirement for scientific evidence developed in a case with "scientific claims at issue").

ALDF has produced "commonly-applicable evidence" demonstrating no person could disagree Natural Choice products lack the features consumers expect of them because Hormel admits as much—meaning ALDF has not only proven "literal falsity" by a preponderance of the evidence, but also shown "consensus" on the matter. *See* ALDF MSJ § I(b)-(c), (g). Hormel admits that, [redacted] *id.* § I(b)-(c), [redacted]

[redacted] *id.* § I(g)(i). Hormel admits that [redacted], *id.* § I(g)(ii), [redacted] *id.* § I(c). [redacted], *id.* § I(g)(iii), [redacted], *id.* § I(c). [redacted] *id.* § I(g)(iv), [redacted] *id.* § I(c). [redacted], *id.* § I(g)(v), [redacted], *id.* § I(c). Hormel admits that it adds nitrates and nitrites to its products, which are preservatives, *id.* § I(g)(i), yet advertises Natural Choice as having no added nitrates, nitrites or preservatives, *id.* § I(b)-(c); *see also* Hormel MSJ 7 (claiming the nitrates and nitrites "do not have any preservative effect" in Natural Choice, not that they are not "preservatives").

2. ALDF has *submitted surveys showing Hormel's ads are false and misleading.*

Similarly, although ALDF can rely on the full panoply of admissible evidence to prove its case, were it required to produce survey evidence, it could carry that burden by pointing to "[the defendant's] own market research data." *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 37 (1st Cir. 2000) (Hormel's authority). Indeed, although Hormel particularly focuses on litigation-generated surveys, Judge Kravtiz held already in this case non-litigation surveys are competent evidence (although he never suggested surveys are required). *ALDF*, 2017 WL 4221129, at *3.

As ALDF's summary judgment brief demonstrates at length, Hormel's market research establishes consumers are misled by the Natural Choice campaign in the manner ALDF describes, and that these misrepresentations are material. Therefore, were Hormel's "survey evidence requirement" to exist (and it does not), ALDF has met it.[17] Hormel's unsupported statement that its records do not "prove[] anything," Hormel MSJ 35, should be dismissed because Hormel has to come forward with evidentiary proof to support such assertions in *its* motion for summary judgment. *See* D.C. Super. Ct. Civ. R. 56.

To the extent Hormel suggests ALDF needs to prove the validity of Hormel's own surveys before it can rely on them, this is incorrect. Hormel MSJ 31. An opposing party's statements are weighty evidence because they are innately reliable. Fed. R. Evid. 801(d)(2); *see also Clorox Co.*, 228 F.3d at 37. As multiple courts have concluded regarding defendants' survey evidence, a defendant "cannot walk back evidence contained in its own documents." *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 614 (N.D. Cal. 2018). Indeed, *Mullins* held "[Defendant's] own marketing research is sufficient evidence of the existence of an implied message." 2016 WL 1535057, at *3 (N.D. Cal. Apr. 15, 2016)). Likewise, Hormel's authority states a defendant's "market research" into its "100% natural" claim can be used to show the claim was "material to [consumers'] purchasing decisions." *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1018 (C.D. Cal. 2015).

Hormel's suggestion that ALDF must point to a survey related to *every* advertisement and *every* formulation of the "natural claim" ALDF challenges is fantasy. Hormel MSJ 32.

[17] Hormel's statement that courts "require[] plaintiffs to show that more than 20% of consumers will be misled," is not correct. Hormel MSJ 30 n. 14. Its authority states courts have deemed this "sufficient," *not* necessary. *Rhone-Poulenc*, 19 F.3d at 135 n.14. Dr. Thomas Maronick, ALDF's expert who examined survey research for the FTC for seventeen years, explained that 20% was the "bright line" standard for when the FTC believed it was appropriate to spend public resources to stop false and misleading activities, but even the FTC would sometimes act if fewer consumers were being harmed. Hormel MSJ Ex. TT (Maronick Dep. 50:23-51:15). D.C. courts have established no numerical threshold to prove a violation. Nonetheless, [redacted] ALDF MSJ § I(c)

Hormel cites no authority in support of this statement, and ALDF can locate none. To the contrary, courts have explained there is "no reason [] to test every iteration of the allegedly false and misleading statements." *Select Comfort Corp. v. Tempur Sealy Int'l, Inc.*, 2016 WL 5496340, at *16 (D. Minn. Sept. 28, 2016). "Where there are similar advertisements in similar formats involving similar types of alleged misrepresentations, evidence related to one product might reasonably be considered by the fact-finder when examining advertisements for other similar products. To find otherwise would completely ignore the role of circumstantial evidence." *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 829 F. Supp. 2d 802, 809 (D. Minn. 2011)[18]; *Steroid Hormone Prod. Cases*, 104 Cal. Rptr. 3d 329, 338 (Cal. Ct. App. 2010) (evidence can establish "inference" of common effect on consumers defendant then must rebut). Put another way, Hormel's argument once again depends on altering the burden of proof and rules of evidence, rather than addressing the record. *Racies*, 2017 WL 6418910, at *2.[19]

Hormel's critique of ALDF's experts is peculiar. The vast majority is an attack on their approach, which has no place in a summary judgment brief that must treat all facts in the light most favorable to the non-moving party. *Sibley v. St. Albans Sch.*, 134 A.3d 789, 809 (D.C. 2016).[20] When Hormel addresses the evidence, it undermines its own contentions. Hormel states consumers' responses to Dr. Maronick's "open-ended questions" are "meaningful." Hormel MSJ

[18] *Aviva* states that a survey on the impact of each advertisement was needed to prove "the heightened evidentiary requirements for recovering monetary damages" in that case—which was between competitors, where the advertisement did not make a comparison between products, making it difficult to determine the precise dollar harm created by the ads—but held this evidence was *not* needed "to obtain injunctive relief[.]" 829 F. Supp. 2d at 815-17.

[19] Hormel's statement that no survey tests the claims that Natural Choice products are "safe," "wholesome," "clean," "honest," of "higher standard," or had "no nitrates or nitrites added" misses the point. Hormel MSJ 32. Courts can conclude that "context" contributes to the misleading nature of a claim. *Perkins v. Philips Oral Health Care, Inc.*, 2012 WL 12848176, at *4 (S.D. Cal. Dec. 7, 2012). This is exactly how these terms and phrases were meant to operate within the Make the Natural Choice campaign, making clear the meaning consumers should take away from Hormel's natural and no preservative claims. SUF ¶¶ 53, 65; A657; A559. Therefore, this Court can consider Hormel's use of this color commentary in assessing Hormel's advertisements (and has before it relevant evidence showing the commentary's impact) and can enjoin Hormel's primary claims on their own and/or in conjunction with this other language.

[20] ALDF responds to Hormel's critique in their oppositions to Hormel's *Daubert* motions, incorporated herein by reference.

34. What those responses demonstrate is that consumers consistently interpret Hormel's ads as communicating Natural Choice products are "natural" and preservative free, Maronick Decl. ¶¶ 17-18—a finding also supported by Hormel's records. [redacted] (as well as third-party studies) do the rest of the work, showing consumers understood these claims to communicate each of the false and misleading concepts that ALDF contends. ALDF MSJ § I(c). While Hormel attempts to discredit Dr. Maronick's efforts to extract consumers' understanding of "natural" and "no preservatives," Hormel MSJ 34-35, as explained in ALDF's *Daubert* opposition, Dr. Maronick's approach was appropriate. Regardless, the Court need not take Dr. Maronick's word for those results, as it can rely on Hormel's.

In sum, Hormel is incorrect ALDF must prove "literal falsity" to prevail under § 28-3904(a) and (d), or submit survey evidence to prevail at all. The CPPA holds Hormel accountable for all false and misleading statements, omissions or innuendo, and does not artificially narrow the evidence on which ALDF can rely. § 28-3904(a), (d), (e), (f), (f-1), (h). Regardless, ALDF's evidence more than passes Hormel's false tests.

VII. ALDF's Claims Are Not Preempted.

a. The holding that ALDF's claims are not preempted may not be revisited under law of the case.

In denying Hormel's motion to dismiss, Judge Kravitz held that, as a matter of law, ALDF's allegations that Hormel's Make the Natural Choice advertising campaign violates the CPPA were not preempted by federal law, either expressly or impliedly. *ALDF*, 2017 WL 4221129, at *1-2. That decision governs and precludes Hormel re-raising the issue here.

In support of its motion to dismiss, Hormel made nearly identical arguments to the ones it advances here: that ALDF's claims that Hormel's Natural Choice advertising campaign violates the CPPA impliedly conflict with the federal Poultry Products Inspection Act (PPIA) and Federal

Meat Inspection Act (FMIA), which regulate labeling of meat and poultry products and require USDA to approve Natural Choice labels, including labels using terms that also appear in Hormel's ads. Hormel MTD 18-19; Hormel MSJ 37-40. In both motions, Hormel argued that a state-law determination that its use of certain claims in its *advertisements* would somehow upend the federal meat *labeling* scheme—and in both, Hormel even tossed in the (irrelevant) fact that the FTC, the federal advertising regulator, has a policy of deferring to other agencies. Hormel MTD 18-19 & 19 n.6; Hormel MSJ 37-40. Judge Kravitz rejected all of this, holding as a matter of law that ALDF's claims are not impliedly conflict preempted by the federal regulatory scheme. *ALDF*, 2017 WL 4221129, at *2. That is more than sufficient to satisfy the three-part standard governing law of the case doctrine.[21]

First, Hormel's summary judgment motion is "substantially similar" to its motion to dismiss on preemption. *See Ehrenhaft*, 482 A.2d at 1196-97. In both, Hormel asked the Court to hold that ALDF's CPPA claims are impliedly conflict preempted. *Id.* Whether or not Hormel's current motion is a "more comprehensive statement" of its position is irrelevant. *Id.* at 1197. Second, nothing about Judge Kravitz's preemption decision indicates it might be tentative. *See id.* at 1196-97. Judge Kravitz treated preemption as a question of law that he finally decided on the motion to dismiss. *Id.* (motion to dismiss decision was law of the case on questions of law).

Third, Judge Kravitz's ruling is not "clearly erroneous in light of newly presented facts or a change in substantive law." *Id.* While ALDF must muster evidence to prevail on its CPPA claims at summary judgment, no such evidence is required regarding preemption, which is a

[21] In granting ALDF's motion to remand, the U.S. District Court also rejected what it characterized as Hormel's "extreme" attempt to repackage ALDF's claims as attacking "the federal system of regulation." *ALDF*, 249 F. Supp. at 57. 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). Thus, not only has Hormel's argument been rejected by this Court already, for all intents and purposes, it has also been rejected by the federal district court. That is all the more reason for this Court to reject Hormel's *third* bite at the apple.

question of law as to whether the state-law judgment ALDF seeks (which has not changed) creates a "conflict" with the PPIA and FMIA. *See Kennedy v. City First Bank of D.C., N.A.*, 88 A.3d 142, 144 (D.C. 2014) (holding question of implied conflict preemption is one of law). Moreover, Hormel has pointed to no change in the law. In fact, all the authority it relies on here also appeared in its motion to dismiss. Hormel MTD 13-16; Hormel MSJ 37-40. And, there has been no change in Congressional intent (the PPIA and FMIA have not been amended), the key fact in determining preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623 (2011) (question of implied conflict preemption depends on the "ordinary meaning" of federal law, and does not depend on factual contingencies). As such, this Court is precluded from revisiting Judge Kravitz's ruling, and Hormel does not get the opportunity to relitigate this issue it already lost.

b. ALDF's CPPA Claims Are Not Preempted by Federal Law.

Even if this Court were to address Hormel's preemption arguments on the merits, they should be rejected, just as they were in 2017. As before, the fundamental problem with Hormel's preemption argument is that USDA does not regulate *advertising*—only meat and poultry *labeling*. USDA has no authority over *advertising* whatsoever. Since this case exclusively challenges Hormel's *advertising*, it does not and cannot interfere with the federal scheme regulating *labels*. *See ALDF*, 249 F. Supp. 3d at 57 (because ALDF is challenging Hormel's advertising, and not its labeling, no federal issue is raised by ALDF's claims).

There are "two cornerstones" of federal preemption jurisprudence: (1) the "purpose of Congress is the ultimate touchstone," and (2) the presumption against preemption—that courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S.

at 565; *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008). Advertising is historically relegated to a state's police powers. *Nat'l Consumer's League v Doctor's Assocs.*, 2014 WL 4589989, at *4 (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]."); *see Altria*, 555 U.S. at 79 n.6 (noting "the States' historic regulation of deceptive advertising practices"). Thus, to prevail on its preemption argument, Hormel needs to overcome the presumption *against* preemption and demonstrate that it was the "clear and manifest purpose of Congress" to preempt long held state-law governing meat and poultry advertising.

Whether consumers view ads and labels similarly is entirely irrelevant to the inquiry. *See* Hormel MSJ 38. What matters, as the Supreme Court has repeatedly stressed, *see supra*, is whether it is clear that *Congress* intended to preempt state law in the area of question. Facts about consumer perception do not alter the Congressional intent evinced by the statute. That there may be some differences between the way in which state and federal law treat the same language or action (here, in two different settings) is an inherent characteristic of our federal system, but where Congress has not expressed intent to preempt state law, the state law nevertheless stands. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-29 (1992) (federal *advertising* law did not preempt other types of state-law claims, including intentional fraud or misrepresentation, where those claims alleged the defendant should have communicated the truth via means *other than advertising*); *Murray v. Motorola, Inc.*, 982 A.2d 764, 782-83 (D.C. 2009) (CPPA claims not preempted even if underlying product met federal approval).

Because the preemption provisions in the FMIA and PPIA—the statutory bases for USDA oversight of meat and poultry labeling—expressly preempt only state laws purporting to govern "[m]arking, labeling, packaging, or ingredient requirements," Hormel has wisely

abandoned its prior argument that ALDF's challenges to Hormel's advertising are *expressly* preempted. 21 U.S.C. § 678; 21 U.S.C. § 467e; *see ALDF*, 2017 WL 4221129, at *1-2.

Now, Hormel argues only that ALDF's claims are impliedly conflict preempted. Under implied conflict preemption, 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) (cleaned up); *see also Wyeth*, 555 U.S. at 573. Hormel makes no argument that it would be impossible for it to both conform its advertisements to D.C. law and its labels to federal law—a notion correctly rejected by Judge Kravitz, *ALDF*, 2017 WL 4221129, at *2. Therefore, Hormel can only demonstrate preemption by showing that a holding that its advertisements violate the CPPA would be a sufficient obstacle to Congress' purposes and objectives in the FMIA and PPIA. Hormel has not done so.

The FMIA and PPIA, and USDA's regulation of meat and poultry labeling promulgated under those statutes, cannot evince Congressional intent to preempt state law regulating advertising because those statutes evince no intent to federally regulate meat and poultry advertising at all. Indeed, the statutes give USDA "no congressional authority" to regulate advertising, *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 549 F. Supp. 2d 708, 720 (D. Md. 2008), and thus USDA lacks the power to have any say as to whether Hormel's advertisements are misleading, *see ALDF*, 249 F. Supp. 3d at 57 ("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)). Hormel does not and cannot argue otherwise. Indeed, Hormel admitted USDA does not oversee its Natural Choice advertising

through corporate testimony from its Corporate Manager of Regulatory Affairs.[22]

Hormel's lengthy discussion of USDA approval of its *labels* is a red herring. Hormel MSJ 38-40. Not only does USDA's review of labels do nothing to suggest USDA's powers are meant to extend to claims in ads or that imposing state law requirements on ads would at all encumber USDA, but the label approval process highlights how preempting advertising claims would be at odds with the label approval scheme Congress designed. USDA only approves labels, and the claims on them, based on the entirety of the label, reviewing the precise language, placement, font size, color and overall design of a label. 9 C.F.R. § 412.1(c)(3), (e); *see also* Hormel MSJ Ex. OOOO (Hormel Dep. at 17:4-19:22); Hormel MTD, Exs. 1-3. USDA cannot and did not pass judgment on Hormel's claims generally or the claims as they appear in Hormel's advertisements. Indeed, as ALDF explains in its motion, Hormel's *current* ads *still* do not contain language USDA *requires* to appear on labels that use the natural claim. *See, e.g.*, A978; A3188 (current Natural Choice ads using term "natural" without any accompanying explanatory language). Preempting state advertising laws based on USDA's label approval

[22] **Q** Does Hormel submit any of its Natural Choice advertisement or other marketing material to the USDA for approval?
A No, we do not.
Q Does Hormel submit any of its Natural Choice advertisement or other marketing materials to any other regulator?
A No, we do not.
Q Does Hormel submit any of the individual claims or text of its advertising marketing materials to any regulator? **MR. YOUNG:** Objection; vague.
A No, we don't.
Q Have you had any interactions with the USDA regarding the Natural Choice advertisements?
A No.
Q …Have you had interactions with the USDA with regard to particular statements in any of the Natural Choice advertisements? **MR. YOUNG:** Objection; vague. Go ahead.
A No.
Q Has Hormel had any interactions with any regulator regarding its Natural Choice advertisements?
A Not that I'm aware of, but it's possible that I'm not aware of anything.
Q Has Hormel had interactions with any regulator with regard to any text or image or any other particular component of its Natural Choice advertisement? **MR. YOUNG:** Objection; vague. Go ahead.
A Not that I'm aware of.
A3345-46 (Hormel Dep. at 11:8-12:16); *see also* A3347 (Hormel Dep. at 13:16-18) (stating that he did not believe USDA has any oversight over advertisements).

would give companies a pass to exploit consumers without any federal consideration of representations as they are used in ads.[23]

Further, 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*, the Supreme 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. 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. *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. At any rate, the state-law advertising claim here is even further afield from the federal labeling regime than the claim in *Wyeth*—at least there, the challenge was to the label itself.

Phelps v. Hormel Foods Corp., 244 F. Supp. 3d 1312 (S.D. Fla. 2017), is of no particular help to Hormel. That case, which arose under Florida law, primarily challenged Hormel's *labels*, and the plaintiff seemingly made no arguments as to why his tacked-on advertising claims were not preempted. *See id.* at 1317 n.2. In its two-sentence, footnote treatment of the issue, *Phelps* made the same error Hormel makes here: It conflated USDA approval of labels with USDA approval of advertisements, *id*., a mistake that Judge Kravitz and the district court avoided, *see*

[23] Hormel's characterization of "disclaimer language in Natural Choice® advertisements" as being USDA-approved is simply false. *See* Hormel MSJ at 39. At no point did USDA approve any Natural Choice advertising language because it does not approve the ads nor review language outside the way in which it appears on a label. A3345-46 (Hormel Dep. at 11:8-12:16). Further, Hormel's own designated expert testified that "a lot of people may not know·[a] lea[f]," which Hormel uses in its ads in place of the asterisk that USDA requires appear with disclaimers on labels, "is like an asterisk." Hormel MSJ Ex. IIII (Dhar Dep. at 198:24-25).

ALDF, 2017 WL 4221129, at *1-2; *ALDF*, 249 F. Supp. at 57.

Perhaps sensing that the FMIA and PPIA's oversight of labeling was insufficient to demonstrate Congressional intent to preempt state advertising law, Hormel also cites an FTC policy statement regarding food claims. Hormel MSJ 39. While the FTC regulates advertising, a policy statement from the agency as to how it will choose to exercise its enforcement authority is not evidence of Congressional intent to displace state law. *Altria*, 555 U.S. at 88. Indeed, the Supreme Court rejected the argument by a manufacturer of "light" cigarettes that non-enforcement statements by the FTC created obstacle preemption, prohibiting state-law claims against the manufacturer for its deceptive statements. *Id.* (FTC letter indicating that it would generally not challenge statements reflecting accurate tar and nicotine amounts did not preempt state-law claims that use of "light" was misleading to consumers); *see also Gilles v. Ford Motor Co.*, 24 F. Supp. 3d 1039, 1047 (D. Colo. 2014) (Congressional grant of authority to FTC to oversee certain components of fuel economy information insufficient to demonstrate Congressional intent to preempt all state-law regulation of fuel economy advertising).[24]

A Congressional mandate exclusively providing for USDA to regulate meat *labels* does not overcome the presumption that Congress did not intend to displace traditional state-law powers to regulate *advertising*. ALDF's CPPA claims are not preempted.

VIII. Conclusion.

For the foregoing reasons, Hormel's motion for summary judgment should be denied.

[24] The fact that the FMIA and PPIA impose some regulation on the production of meat and poultry products is of no moment. As the federal district court found, ALDF "does not allege that Defendant's treatment of animals is necessarily *illegal*. It merely alleges that such treatment is misleadingly portrayed." *ALDF*, 249 F. Supp. 3d at 57-58 (emphasis in original) (citation omitted).

Date: January 25, 2019

Respectfully Submitted,
/s/ Leah M. Nicholls

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CERTIFICATE OF SERVICE

I, Leah M. Nicholls, hereby certify that on January 25, 2019, I caused a true and correct copy of the foregoing Motion to be served on counsel of record via CaseFileXpress.

/s/ Leah M. Nicholls

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND, Plaintiff, v. HORMEL FOODS CORPORATION, Defendant.	Case No. 2016 CA 004744 Judge Fern Flanagan Saddler

[PROPOSED] ORDER

Upon consideration of Defendant Hormel Foods Corporation's Motion for Summary Judgment and Plaintiff Animal Legal Defense Fund's Opposition thereto, for the reasons stated in Plaintiff's Opposition, the Motion is DENIED WITH PREJUDICE.

_____ _____

Date Saddler, J.