SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND, Plaintiff, v. HORMEL FOODS CORPORATION, Defendant.	Case No. 2016 CA 004744 Judge Fern F. Saddler Next Event: Decision on Dispositive Motions Event: April 1, 2019

PLAINTIFF'S REPLY IN SUPPORT OF ITS
MOTION FOR SPOLIATION SANCTIONS

Hormel told ALDF that animal welfare video footage audited by Arrowsight is "made available to Hormel Foods through a link which expires" and that Hormel "does not save these recordings as an ordinary business practice." App061.[1] Only after ALDF filed this motion has Hormel finally revealed the truth: it has full custody and control of this footage and its practice, at least for its Austin, MN plants, is to save the videos "for roughly 40 days." Opp. 2.[2] Hormel further admits that, since the filing of the complaint, and even after it was ordered to produce materials regarding its *actual* slaughter practices, Hormel knowingly destroyed videos that its auditors flagged as "potential" acts of animal cruelty, and videos that Hormel itself deemed to show "actual" inhumane treatment of animals. Opp. 4. Hormel argues that this willful misconduct was harmless as the videos would, at most, demonstrate "isolated accidents or instances of misbehavior." Opp. 15; *see also* Hormel MSJ Opp. 18. But that asks the Court to draw an inference *favoring Hormel* about evidence *it destroyed*. Without the videos, the Court can't know what the videos show. Besides, the law requires inferences *adverse* to spoliators. Based on Hormel's statements, the Court must conclude Hormel spoliated evidence and should order sanctions.

I. Argument.

A. ALDF Efforts to Obtain the Audit Videos Have Been Timely.

Given that Hormel admits it destroyed relevant material, its defense largely rests on procedural concerns regarding the timing of this motion. Yet, to reiterate, ALDF's Complaint specifically cited videos of Hormel's slaughter practices as evidence of Hormel's false and misleading conduct, placing Hormel on notice that it would seek such materials. Compl. ¶¶ 121 & n.9, 190-193 & nn. 40-43. Consistent with this, ALDF's initial requests for production sought documents (defined to include recordings) demonstrating slaughter conditions. App172; App175-

[1] The Appendix filed with ALDF's Motion for Sanctions is cited herein as "AppXXX."
[2] No information is provided regarding storage capacity and policy for other plants. *See* Toliver Aff. ¶¶ 3,5.

76. ALDF filed a Motion to Compel specifically seeking "documents demonstrating Hormel's *actual* slaughter practices." ALDF Memo. in Supp. of Mot. to Compel 8 (Dec. 29, 2017); (emphasis added); *see also id.* at 17-18, 21.[3]

A year ago, this Court granted ALDF's motion, overrode Hormel's burden objection, and ordered it to produce, within 30 days, documents showing Hormel's "actual slaughter" practices. Order 2-3 (Jan. 30, 2018). The parties' subsequent email exchange documents that Hormel did not answer ALDF's specific questions regarding who audits its plants and what sorts of audits they carry out, and instead stated only that they would produce such slaughter audit documents. Opp Ex. D 1, 7. Despite Hormel possessing thousands of slaughter audit documents from Arrowsight, only a handful of Arrowsight documents were ever produced by Hormel. Memo at 4. On August 3, 2018 (*before* the close of fact discovery), after ALDF had learned through depositions the true extent of the video monitoring of Hormel's plants, it requested that Hormel immediately confirm that it produced all animal welfare auditing footage in its possession. App047-49. On August 21, 2018 (*after* the close of fact discovery), Hormel finally responded and misrepresented that it had "produced all of the relevant videos within the parties' agreed-upon date range that it found after a reasonable search." App051.

ALDF challenged the sufficiency of Hormel's production on September 4, 2018, App054-55, and was misled again that Hormel produced few videos because "the videos themselves are made available to Hormel Foods through a link which expires." App061. Hormel's Opposition is the first time it has confirmed that it had ownership of these videos throughout the litigation *and*

[3] Despite the definition of "documents" in Rule 34(a), Hormel takes the position that since ALDF did not use the word "video," then it never sought such documents and Hormel was never required to preserve them. However, the duty to preserve applies to "documents" as broadly defined by Rule 34(a) and not by the spoliating party. *E.g.*, *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 511-12 (D. Md. 2009); *Zubulake v. UBS Warburg LLC (Zubulake IV),* 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003); *accord Banushi v. City of N.Y.*, 2009 WL 2707364, at *1 (E.D.N.Y. Aug. 25, 2009) ("The defendants' suggestion that the video recording at issue need not be produced because the discovery request upon which the plaintiff relies was not sufficiently specific is unpersuasive.").

simply allowed their destruction. Hormel's misdirection resulted in the letter brief to Judge Kravitz and then this motion—the latter is the *only* event that occurred after the close of all discovery.

In sum, the Court ordered Hormel to produce documents that should have included audit videos. Hormel disguised the videos' existence, ownership, and nature, and then, after ALDF discovered their existence, misrepresented its ability to produce them. Now Hormel seeks the Court's aid because this obfuscation successfully prevented ALDF from securing this footage prior to the videos' destruction. *Hormel* is not the victim of this successful scheme to destroy evidence.

B. Hormel Admits to Purposefully Destroying Relevant Videos.

After (mis)representing that it only had "links" to certain videos, Hormel now flaunts that it actually had ownership of *"every*" video so as to argue the burden of storage warranted their intentional deletion every 40 days. Opp. 2 (emphasis in original); *see also id.* at 4. But Hormel's records demonstrate that certain videos stayed active for at least five months. App154.

Moreover, Hormel's preservation obligation is a mandate of law and not a question of discretion. *Cf.* Opp. 4 *with Shepherd v. Am. Broad. Cos*., 62 F.3d 1469, 1481 (D.C. Cir. 1995); *Williams v. Washington Hosp. Ctr*., 601 A.2d 28, 32 (D.C. 1991). Hormel is not allowed to decide for itself that it has too much video evidence and is therefore not required to preserve any of it. Had it wished to be relieved of this obligation in any fashion it was required to notify ALDF and the Court. *See Wagner Dairy Farms, LLC v. Tri-County Dairy Supply*, 2013 WI App. 1, 7 (Wis. Ct. App. Nov. 1, 2012) (providing procedures for notice and opportunity to inspect before destruction). The time to raise burden is not after destruction, but in a request for a protective order.

Hormel's authority, *Al Otro Lado, Inc. v. Nielsen*, 328 F.R.D. 408 (S.D. Cal. 2018), proves Hormel's misconduct. There, DHS has a systemic recording protocol at ports of entry (like Hormel's plants). DHS moved for a protective order to relieve itself of its video preservation

obligations. The Court scolded DHS for failing to meet its preservation obligations, *id.* at 418, and stated it had an independent duty to preserve *information* it reasonably *should have known* was relevant. *Id.* at 416 ("While an opposing party might explicitly request preservation of some information, parties must also independently evaluate their obligation to preserve.") *with* Opp. 5 (claiming *ALDF* had a duty to notify). The Court highlighted the importance of preserving "active ESI" and ordered preservation of *all* videos for a certain period so the parties could work *together* to identify what videos needed to be preserved. *Id.* at *417, 419.

Had Hormel's intent not been to hide the existence of its video holdings, a similar process, prompted by Rule 34(c), should have been used here. *See id.* at 418. *Nielsen* underscores that Hormel *at least* should have preserved the clips specifically flagged as demonstrating potentially inhumane slaughter practices. *Cf.* Order 2. Hormel offers *no* explanation why, from the start of this litigation, it did not preserve all of the clips Arrowsight identified as showing "potential" animal abuse, or why it did not even preserve the clips Hormel itself confirmed depict "actual" inhumane treatment of animals. *See* Opp. 4. Hormel argues that Arrowsight's identification may not always be correct,[4] *id.* but this relevancy determination is not for Hormel to assert post-hoc and it does not explain why Hormel did not keep and produce the videos that it believed *did* depict "actual" concerns. Moreover, the only evidence Hormel submits to substantiate its burden claim are two meager sentences in a declaration from an employee who has no stated expertise in data or discovery. *Cf.* Toliver Decl. ¶ 1 *with Nielsen*, at 414 (describing affidvits). He simply asserts that, due to an unsubstantiated estimate, preservation would require "significant money." *Id.* ¶ 9.

C. Evidentiary and Monetary Sanctions Are Warranted.

[4] Hormel's own policy, with which Arrowsight complied, has [redacted] *See. e.g.* ALDF SUF ¶¶ 332-333, 336-342. Thus, Hormel's characterizations of Arrowsight's findings as not always correct is self-serving.

Hormel's efforts to delay the imposition of sanctions with further briefing are meritless. Opp. 19. The potential remedies are clear. When a party destroys evidence, without substantial justification, as here, the finder of fact can infer the missing evidence would have worked "*against the whole mass of alleged facts constituting his cause*." *Stancil v. United States*, 866 A.2d 799, 816 n.29 (D.C. 2005) (emphasis in original), *reh'g granted en banc on other grounds*, 878 A.2d 1186 (D.C. 2005), *aff'd sub nom Green v. U.S.,* 878 A.2d 1186 (2008). The sort of wanton disregard Hormel has demonstrated must be deterred and placing a heavy thumb on the scale against destruction is proper. *See Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759, 766 (D.C. 1990). Alternatively, the Court can preclude Hormel from making arguments to which the destroyed evidence would have spoken—such as Hormel's current argument that ALDF cannot demonstrate Hormel's standard practices are inhumane. *See D'Onofrio v. SFX Sports Group, Inc*, 2010 WL 3324964, at *7 (D.D.C. Aug. 24, 2010). Indeed, Hormel's refrain that its "instances of misbehavior [cannot] render [an] advertisement misleading," establishes why this sanction is necessary. Hormel Opp. 15. While ALDF disagrees with Hormel's characterization of the record, Hormel's argument is dependent on it having destroyed mountains of evidence potentially showing rampant and repeated legal and regulatory violations. Hormel's claims that sanctions are not warranted because ALDF has yet to prove its contentions at trial is nothing more than a distraction. Opp. 2-3, 14-15. No discovery rule or case law places the cart before the horse like that.

II. Conclusion.

ALDF requests the Court impose an adverse inference in ALDF's favor at Summary Judgment and Trial. Alternatively, ALDF requests adverse inferences on issues relevant to slaughter practices and conditions and that Hormel be precluded from making any positive arguments regarding such. Finally, ALDF should be awarded monetary sanctions.

Date: January 30, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Tracy D. Rezvani, hereby certify that on January 30, 2019, I caused a true and correct copy of the foregoing Motion to Reopen Fact Discovery to be served on counsel of record via CaseFileXpress.

Respectfully submitted,

/s/ Tracy D. Rezvani