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: Summary Judgment Decision, April 1, 2019

PLAINTIFF ANIMAL LEGAL DEFENSE FUND'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Hormel's Opposition openly concedes half this case, stating, "Animals Raised for *Natural Choice*® Products Are Raised Conventionally." Opp. 16. Hormel explains this means Natural Choice animals are given "preventative" antibiotics, growth stimulants such as hormones and the internationally banned drug ractopamine, and GMO-feed, and are trapped indoors. Opp. 16-17. In other words, for most of ALDF's claims, the only *potential* dispute is what Hormel's advertising claims communicate to consumers. If they communicate what ALDF contends, the advertising campaign is false and misleading, as Hormel has admitted.

Hormel attempts to create a dispute of fact regarding consumers' perceptions by asking the Court to disregard Hormel's own statements. However, 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).[1] Hormel's Director of Marketing, the head of Hormel's Consumer Insights & Market Intelligence, and Hormel's Natural Choice Brand Manager each independently concluded natural claims like Hormel's communicate that animals are raised without antibiotics. Hormel RSUMF ¶¶ 81-85. Further, Hormel employees adopted and relied on internal and external studies showing that 50% or more of consumers think "natural" means the

[1] *See also, e.g.*, *Mullins v. Premier Nutrition Corp.*, 2016 WL 1535057, at *3 (N.D. Cal. Apr. 15, 2016) ("[Defendant's] own marketing research is sufficient evidence of the existence of an implied message."); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1018 (C.D. Cal. 2015) ("[Defendant's] market research" into its "100% Natural" claim can be used to show the claim was "material to [consumers'] purchasing decisions"); *Schick Mfg., Inc. v. Gillette Co.*, 372 F. Supp. 2d 273, 285 (D. Conn. 2005) ("Here, Schick can point to Gillette's own studies to prove that the animation is false."); *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 209-11 (D.D.C. 1989) (defendant's internal documents, including its "enthusiastic support" for its ads, demonstrated ads effective in influencing consumer purchasing decisions), *aff'd in part, rev'd in part on other grounds*, 913 F.2d 958 (D.C. Cir. 1990).

For similar reasons, Hormel's repeated invocation of Rule 403 is misplaced. Hormel used the internal documents in question to design, evaluate, and modify the advertising campaign at issue. There is nothing unfairly prejudicial about using those documents to understand the campaign. Until this lawsuit, Hormel *itself* relied on those documents to do just that. *E.g.*, *In re: Coca-cola Prods. Mktg. & Sales Practices Litig. (No. II)*, 2016 WL 6245899, at *5 (N.D. Cal. Oct. 26, 2016) (evidence regarding how "Defendants perceived their own representations, how they intended consumers to perceive those representations, and how they understood customers to perceive those representations" discoverable because Plaintiffs "could use such evidence as common proof that Defendants chose to advertise in a certain way to impact its consumers' choice"); *Church & Dwight Co. v. S.C. Johnson & Son, Inc.*, 873 F. Supp. 893, 910 (D.N.J. 1994) (court unwilling to dismiss evidence "marketers regularly employ … when making multi-million dollar consumer marketing decisions").

animals are raised without antibiotics, growth stimulants, and GMO-feed, and could go outdoors, and that these attributes are "important" to their purchase. *Id.* ¶¶ 86-89, 91-92, 94, 96-97, 99.[2]

Hormel admits that these documents show what "natural" communicates, *id.* ¶¶ 81-84, 86-92, 96-97, 99; and it admits the "Make the Natural Choice" ads communicate the products are "natural," *id.* ¶¶ 58-60, 62-63, 69. If the studies Hormel relied on to craft the campaign showed what attributes are communicated by "natural," and Hormel's ads successfully communicated that its products are "natural," the Court can draw the (only) logical conclusion that Hormel's ads communicate those attributes. *E.g.*, *Martin v. Monsanto Co.*, 2017 WL 5172205, at *4-5 (C.D. Cal. Apr. 10, 2017) (to determine if consumer misled by "'up to' claims" look to "any consumer research data or regulatory communications regarding similar 'up to' representations"); *Cablevision Sys. Corp. v. Verizon New York Inc.*, 119 F. Supp. 3d 39, 50-51 (E.D.N.Y. 2015) (meaning of "fastest WiFi" determined by how consumers understand "WiFi"); *Broadspring, Inc. v. Congoo, LLC*, 2014 WL 4100615, at *13 (S.D.N.Y. Aug. 20, 2014) (look to testimony about what speaker meant to communicate regarding term at issue).

All ALDF must show is that it is more likely than not Hormel's ads violate the CPPA. *Jackson ex rel. Smith v. Byrd*, 2004 WL 3130653, at *12 & n.54. (D.C. Super. Ct. May 11, 2004) (preponderance of the evidence standard). Hormel's own documents establish "natural" communicates Natural Choice products have sources, characteristics, ingredients, benefits, standards, qualities, grades, and/or styles that they do not possess—and that these false aspects are "important," *i.e.*, material, to purchasers. Therefore, Hormel's ads communicating Natural Choice products are "natural" violate the CPPA. D.C. Code § 28-3904(a), (d), (e), (f), (f-1).

Hormel hopes to avoid the merits by attacking ALDF's standing. Yet here too its

[2] There are numerous other documents Hormel concedes state these same things. RSUMF ¶¶ 45, 56, 76, 95, 98, 106, 113, 114. Hormel claims those statements are hearsay. As discussed below, this is incorrect. But, given the plethora of records, the Court need not rely on these particular documents to hold Hormel liable.

arguments are window dressing, concealing a concession. Hormel admits that had ALDF purchased Natural Choice products for the purposes of this litigation, ALDF would have standing. Opp. 24. But, the D.C. Council stated § 28-3905(k)(1)(C), under which ALDF sues, "goes further than standing for testers" of products, providing standing when unlawful conduct "interfere[s] with one of [an organization's] many projects." Yvette M. Alexander, *Report on Bill 19-0581, the "Consumer Protection Amendment Act of 2012,"* 5-6 (Nov. 28, 2012) ("Alexander Report"). Therefore, Hormel's statement that § 28-3905(k)(1)(C) provides standing for purchasers leads to the conclusion that ALDF has standing. It is beyond silly to contend that ALDF, who regularly works against false and misleading advertising that perpetuates animal cruelty (including Hormel's ads), lacks standing, but had *any* organization spent $4.29 on a package of Natural Choice, standing would exist.

Hormel's Opposition and RSUMF are filled with distracting errors, but stripped of their bombast, they leave only the scope of the injunction to which ALDF is entitled to be determined.[3]

I. The Court Should Consider the Full Scope of the Record ALDF Provided.

Hormel seeks to artificially narrow the record and then claim to prevail against that empty suit. However, contrary to Hormel's claims, ALDF's evidence is not hearsay, nor does the narrow expert report of Dr. Dhar speak to ALDF's facts, let alone prevent summary judgment.

a. Hormel's agencies' and Applegate's records are not hearsay.

Hormel challenges the admissibility of records produced by agencies *Hormel hired* that lay out *Hormel's* advertising campaign and its effects, arguing they are hearsay statements of "third parties." Opp. 5 (citing RSUMF ¶¶ 45, 50-51, 56). Hormel also argues statements by its

[3] On January 31, 2019, ALDF filed a motion to strike the arguments Hormel placed in the RSUMF to circumvent the page limits and give the misimpression that there is a dispute of fact.

own brand, Applegate, are hearsay. *See, e.g.*, Hormel RSUMF ¶ 226. However, these statements all fall within Federal Rule of Evidence 801(d)(2), excluding them from hearsay.[4]

Hormel's corporate representative testified its agencies' "job function" includes "articulat[ing] where the [Natural Choice] brand is and articulat[ing] where they believe the brand should go" as well as producing "data analytics" showing the campaign's impacts. A3396-400 (Hormel Dep. at 60:4-62:19, 71:5-23, 118:17-24). Likewise, he testified that "Hormel approves what Applegate does," including on its website. A3402 (Hormel Dep. at 140:3-9).[5]

This testimony makes clear the so-called third-party statements are *not* hearsay, but statements of an opposing party (Hormel) on which ALDF and the Court can rely. Rule 801(d)(2) applies to statements by a "party authorized to make a statement" and, separately, "the party's agent or employee on a matter within the scope of that relationship." The documents Hormel authorized its agencies (its agents) to generate and that Hormel allowed Applegate to publish are both. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1087 n.6 (C.D. Cal. 2003) ("statement by a representative of … third-party advertising vendors … admissible pursuant to Rule 801(d)(2)").[6]

To the extent Hormel suggests it can avoid statements made by its employees and agents by insisting they "do not reflect or state the company's position," *see, e.g.*, Hormel RSUMF

[4] D.C. Courts have adopted Fed. R. Evid. 801(d)(2). *Harris v. United States*, 834 A.2d 106, 115-16 (D.C. 2003).
[5] It is ironic that Hormel (falsely) accuses ALDF of "contradict[ing] prior sworn statements by" the organization, Opp. 20, but invokes hearsay objections its corporate witness disclaimed.
[6] Applegate's statements also do not need to come in for the truth of what they say (that Hormel's treatment of Natural Choice animals is unnatural). Regardless of their veracity, the statements establish ALDF's case by demonstrating a Hormel-owned brand's *beliefs* regarding how to attract consumers, how consumers understand "natural," and how they would react if they knew Hormel's practices. The same is true for a variety of other statements Hormel labels hearsay. For instance, Hormel objects to ALDF's use of a North American Meat Institute PowerPoint that encouraged Hormel and other companies to "[e]xtend… all-natural claims" and "PREMIUM-TIZ[E]" the products, but it is not essential that the Institute thought this was a good idea or possible (the "truth" of the statement), what is relevant is that Hormel was operating with these objectives in the background. RSUMF ¶ 71. Likewise, Hormel claims that ALDF cannot use statements from consumers such as that they "love that [your 'Natural Choice' products] are nitrate/nitrite free." *Id.* ¶ 100. But whether the consumer actually loved Hormel's products for this reason (the "truth" of the statement) is not the sole use of this evidence; that Hormel was aware this was a reason consumers purchase the products makes it relevant.

¶¶ 49, 82-84, that is not how Rule 801(d)(2) operates. Fed. R. Evid. 801(d)(2), advisory committee's note to 1972 proposed rules ("No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party."). The Court must credit these documents demonstrating: (a) the ads were designed to communicate Natural Choice products were "natural," by which Hormel meant premium, "green," "organic," and "artisanal," Hormel RSUMF ¶¶ 45, 48-49, 65; (b) the ads communicated the products were "natural," *id.* ¶¶ 56, 76, 113-14; (c) consumers understand "natural" to mean the animals were not raised using the industrial methods Hormel employs, *id.* ¶¶ 89, 92, 95, 98; and (d) Hormel knew its practices did not meet these standards, *id.* ¶¶ 226-27, 230, 292, 359, 363. If Hormel had wished to survive summary judgment, it needed to produce evidence disputing these statements, which it has not.[7]

b. The third-party studies are not hearsay.

Hormel's effort to toss out the independent research confirming its own studies similarly fails. While Hormel objects to Consumer Reports and the NMI studies confirming ALDF's contentions, Hormel has adopted them as its own.[8] The Consumer Reports study was featured in a 2017 Hormel PowerPoint, which used the study to explain "Consumers expect Natural to stand for more than it currently does." A144-45, 191. Likewise, Hormel states the NMI study was the foundation for a 2016 report put together by the Natural Choice brand team for Hormel's

[7] The same is true for other statements by its agents from which Hormel runs away. For instance, Hormel claims it cannot be held to the statements by its beef supplier, Rabe's. RSUMF ¶ 224. But Hormel's corporate witness testified Hormel's only standards for beef are those Rabe's imposes. A2882 (Hormel Dep. at 103:1-6); *see also* A3407-10 (Hormel Dep. at 108:6-111:13). Thus, Rabe's is authorized to speak about Hormel's standards for beef. *See* Fed. R. Evid. 801(d)(2).

[8] This Consumer Reports study is the same one this Court held substantiated ALDF's allegations, *ALDF v. Hormel Foods Corp*, 2017 WL 4221129, at *3 (D.C. Super. Ct. Sep. 22, 2017). It concludes 50% or more of consumers think "natural" "currently means" no "growth hormones," "no GMOs in feed," "no antibiotics," and "animals went outdoors." A191. Similarly, the NMI study finds between 39% and 86% of consumers believe that when meat is "labeled as natural it is important for it to be" "pasture raised," "free range," "humanely raised," "antibiotic free," and have "no growth hormones." A116.

executives, RSUMF ¶ 89, which used the data to spell out "What is Natural" and warn that "consumers assume we have benefits beyond" what is true about the products, A116.

Under Rule 801(d)(2), a statement a "party manifested that it adopted or believed to be true" is equivalent to the party's statement. A "PowerPoint presentation referring to" other documents shows the maker adopted those statements. *DCD Partners, LLC v. Transamerica Life Ins. Co.*, 2018 WL 3770030, at *13 (C.D. Cal. Aug. 1, 2018); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973 (C.D. Cal. 2006) (information "approv[ingly]" "incorporated" into documents considered "adopted" by party). Put another way, the Court can consider the Consumer Reports and NMI studies as if they had been created by Hormel.

Moreover, the academic and Consumer Reports studies have been vouched for by Hormel's expert, Dr. Dhar. The studies concluding consumers associate "natural" with the absence of "hormones, [and] antibiotics," and superior welfare, A2666, and that people will only pay more for "natural" beef if they do *not* know what USDA allows to be labeled as "natural," A3103, are studies Dr. Dhar stated academics "would rely upon," Hormel MSJ Ex. JJJJ (Dhar Dep. at 298:13-299:4), and he would examine to inform his own thinking, *id.* at 299:11-305:20. He also testified Consumer Reports is a "good brand," regularly relied on in the field, including by him, *id.* at 252:17-261:10.

Per Federal Rule of Evidence 803(18), if an article is either relied upon by an expert or "called to the attention of an expert witness on cross-examination" and that expert agrees it is a "reliable authority," the statements in the article are not hearsay, but evidence.[9]

[9] D.C. Courts have applied Rule 803(18). *Washington v. United States*, 884 A.2d 1080, 1096 (D.C. 2005). Pursuant to this rule, the Court can also accept into evidence all of the studies Dr. Dimofte deemed reliable. Dimofte Decl. Hormel *ipse dixit* asserts Dr. Dimofte's declaration on this matter "contradicts" his prior statements, Opp. 8 n.4, but it cites nothing to support its statement and cannot do so. *See* Dimofte Decl. Ex. A ¶¶ 17, 19.

c. Dr. Dhar's report does not create a dispute of fact.

Hormel insists there is "inherently" a fact dispute given the opinions of Dr. Dhar, Opp. 2-3. Not so. Dr. Dhar's opinions are limited to rebutting ALDF's experts Dr. Maronick and Dr. Dimofte. Dr. Dhar did not examine Hormel's records or other third-party studies demonstrating ALDF's claims. Thus, his opinions cannot speak to the evidence that disposes of this matter. Dr. Dhar testified that the goal of his report was "not to offer an opinion on what natural" or "no preservatives means" "in Hormel's advertising." Hormel MSJ Ex. JJJJ (Dhar Dep. at 93:16-21, 93:22-94:2). His opinion was limited to whether "we learn enough from" Dr. Maronick's and Dr. Dimofte's studies "to rely on them" to know what those terms mean to consumers. *Id.*

Experts may only provide evidence regarding the opinions they are tasked to provide, as outlined in their expert reports. D.C. Super. Ct. Civ. R. 26(b)(4); *see also Burns v. Georgetown Univ. Med. Ctr.*, 106 F. Supp. 3d 238, 241 (D.D.C. 2015) (expert testimony "limited to the contours and scope of the expert reports already submitted"); *Lindner v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 636 (D. Haw. 2008) (rebuttal experts' testimony "limited" and can only testify "as to the opinions" they have been designated to rebut). Therefore, Hormel is correct that ALDF did not "mention" Dr. Dhar's opinions in its Motion, Opp. 2-3, because the opinions aren't relevant to whether Hormel's own admissions and documents decide this case.

II. The Evidence Establishes Hormel Is Violating § 28-3904(a), (d), (e), (f), and (f-1).

Hormel's liability cannot be in question. Hormel repeats the arguments it made in its Motion, that § 28-3904(a) and (d) only apply to "literally false" statements, Hormel MSJ 27-29, and that § 28-3904(e), (f), and (f-1) require survey evidence, *id.* at 32-39. ALDF incorporates by reference its rebuttal of these points in its Opposition, which establishes Hormel's arguments do not apply to the CPPA. ALDF Opp. 25-27. Nonetheless, even under these standards—and

exclusively using evidence Hormel created or adopted—its ads *are* literally false because it admits its animals were given drugs and GMO-feed, Opp. 16-17, which consumers do not expect of "natural" products, RSUMF ¶¶ 81-86, 95, 98, and because surveys on which Hormel relied demonstrate consumers expected and deem important to their purchases these attributes, *id.* ¶¶ 86-89, 91-92, 94, 96-97, 99. The additional evidence this Court should consider merely underscores these facts.

a. Hormel's latest efforts to rewrite the CPPA fail.

The sole noteworthy aspect of Hormel's newest CPPA arguments is their recasting of the standards Hormel argued for in its Motion. While Hormel previously stated a claim is "literally false," and thus actionable under § 28-3904(a) and (d), if there is "consensus" on whether the product has the attributes consumers expect of it, Hormel MSJ 27-29, Hormel now argues there also has to be a "singular, literal" meaning to Hormel's ads before they can be challenged. Opp. 31. In other words, Hormel contends that if, as here, a company uses terms that have different "interpretation[s]" to attract consumers who hold those different "interpretation[s]," *id.* at 30, even if the product lacks the attributes the ad communicates, the company cannot be liable under § 28-3904(a) and (d).

Hormel cites *no* authority for this proposition,[10] and it is contradicted by the Court of Appeals, which explained that § 28-3904(a) and (d) encompass true, but misleading statements, *i.e.*, statements that have more than one meaning. *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 254-55 (D.C. 2013) (Cal. Civ. Code § 1770(a)(5), (a)(7) should be used to interpret § 28-3904(a) and (d)); *Buso v. Vigo Importing Co.*, 2018 WL 6191390, at *3 (S.D. Cal. Nov. 28, 2018) (Cal. Civ.

[10] It provides as a "see" citation *NCL v Gerber Products Co.*, which merely held that the claim at issue there—a scientific claim about the product—could survive a motion to dismiss where the defendant argued for a "literal falsity" standard because the plaintiff had pleaded the claim was literally false. 2015 WL 4664213, at *7 (D.C. Super. Ct. Aug. 05, 2015). *Gerber* does not speak to the scope of the CPPA.

Code § 1770(a)(5) encompasses true, but misleading statements). Moreover, Hormel's contention is wholly inconsistent with the fact that a claim "under the CPPA is properly considered in terms of how the practice would be viewed and understood by a reasonable consumer." *Cannon v. Wells Fargo Bank, N.A.*, 926 F. Supp. 2d 152, 174 (D.D.C. 2013) (cleaned up) (discussing § 28-3904(a) among other provisions). The CPPA explicitly rejects the notion consumers must have a single, uniform view of a claim for it to be actionable. Instead, it makes actionable any "reasonable" view. *Pearson v. Chung*, 961 A.2d 1067, 1074-77 (D.C. 2008) (explaining phrases "satisfaction guaranteed" and "same day service" must be interpreted as a reasonable consumer would to determine liability under § 28-3904(a) and (d)); *see also, e.g.*, *Velcoff v. MedStar Health, Inc.*, 186 A.3d 823, 827 (D.C. 2018) (claim subject to multiple interpretations—"confidential"—falls within § 28-3904(a)); *Banks v. D.C. Dep't of Consumer & Regulatory Affairs*, 634 A.2d 433, 438 (D.C. 1993) (same—claim "Administrative Advocate").

In addition, while Hormel previously argued ALDF's § 28-3904 (e), (f), and (f-1) claims fail because of a lack of survey evidence, Hormel now suggests that the meaning of the surveys that *do exist* is "a question of fact for the jury" and "necessitates a trial." Opp. 33-34. Yet, as explained to the Court in the parties' motion to lengthen summary judgment briefs, Hormel has maintained a jury is *not* allowed and the Court must act as the finder-of-fact. Put another way, Hormel merely seeks to delay the inevitable: the Court using its judgment to evaluate the meaning of Hormel's documents.

Moreover, Hormel is forced to concede the case law allows ALDF to establish materiality under § 28-3904 (e), (f), and (f-1) through evidence that Hormel "ha[d] reason to know" consumers would regard its misrepresentations as material. *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013); Opp. 37-38. Hormel indicates this *still* requires survey evidence.

Opp. 38. Yet, as the plain text of *Saucier* dictates, no survey is required. *See also* Opp. 37 n.23 ("court [can] conclude[]" on own "obvious ... misrepresentation at issue would matter"); *Beck v. Test Masters Educ. Servs. Inc.*, 994 F. Supp. 2d 90, 96 (D.D.C. 2013) (Hormel's authority stating court's judgment and defendant's admission can establish materiality); *Sloan v. Urban Title Servs., Inc.*, 689 F. Supp. 2d 123, 138-39 (D.D.C. 2010) (looking at information in defendant's possession to determine what it "had reason to know").[11]

b. Hormel is violating § 28-3904(a) and (d).

Looking only at the evidence that must be attributed to Hormel or that its expert validated, before the Court are numerous statements that: (a) the Make the Natural Choice campaign sought to communicate that the products are "natural," RSUMF ¶¶ 45-46, 48-50, 52, 58-60, 62-63, 69, 79-80, 113[12]; (b) by this Hormel meant the products are "artisanal" and "premium," *id.* ¶¶ 45-51, 65, 69-75; (c) between 55% and 72% of consumers got the "natural" message from the ads, *id.* ¶¶ 56-57; *see also id.* ¶¶ 58-60, 62-63, 69, 76, 105-14; and (d) consumers understood the natural claim to communicate the attributes ALDF contends, *id.* ¶¶ 57, 81-99, 105-07, 124-27; *see also id.* ¶¶ 115, 129-30. This evidence also shows Hormel worked to communicate that the products do not have nitrates, nitrites, and preservatives, and consumers received that message. *Id.* ¶¶ 52, 57, 61-64, 66-68, 77-79, 81, 86, 98, 100-04, 113-14, 131.[13]

Thus, because Hormel admits it uses growth-promoting drugs, antibiotics, and GMO-

[11] Further, as explained in ALDF's Opposition, none of Hormel's CPPA arguments prevent ALDF from proceeding under § 28-3904(h), which only requires that Hormel "advertise or offer goods or services without the intent to sell them … as advertised." ALDF did not move on this claim simply because it contains a scienter element.

[12] In another example of Hormel's failure to be forthright with the Court, it complains that one of these documents references "Project Crunchy," but ALDF does not tie "Project Crunchy" to Natural Choice. *See, e.g.*, RSUMF ¶ 45. As Hormel is well aware, "Project Crunchy" is just another name for work on Natural Choice branding: "It was an innovation project to figure out how we can expand the Natural Choice brand." A2906 (Kraft Dep. at 128:18-23).

[13] Hormel's minimal effort to rely on its "disclaimers" wholly fails. Opp. 11 n.6. It does not dispute that numerous, *current* ads fail to include the "disclaimer" when making "natural" claims, ALDF MSJ 12, or that its expert witness testified consumers would *not* associate the leaf it uses in place of an asterisk with a disclaimer, and thus will not connect the "disclaimer" with the ads' text, Hormel MSJ Ex. JJJJ (Dhar Dep. at 198:20-25). Were that not enough, as discussed in ALDF's Opposition to Hormel's *Daubert* motion, Dr. Maronick's study demonstrating Hormel's "disclaimers" had no effect went largely unchallenged by Hormel.

feed, and fails to provide its animals outdoor access, Opp. 16-17, there can be no dispute that its products lack these characteristics, ingredients, benefits, standards, qualities, grades, and/or styles its ads were communicating, and thus the ads violate the CPPA.

ALDF also contends Hormel's ads violate the CPPA because Natural Choice products are industrially produced, inhumane, and contain nitrates and nitrites, which are preservatives. The evidence cited above, combined with other concessions and documents attributable to Hormel bear this out, warranting summary judgment for ALDF on these theories as well.

Hormel's records show it uses "natural" to suggest Natural Choice is "premium" and "artisanal." RSUMF ¶¶ 45-51, 65, 69-75; *see also In re: Coca-cola*, 2016 WL 6245899, at *5 (evidence regarding how "how [Defendant] intended consumers to perceive [] representations," can be used to show impact on consumer). It now states it uses "standard" industrial animal agriculture practices that are not the "higher standards" available in the market, and, in some instances, not even "natural." Opp. 17; *see also* RSUMF ¶¶ 176-82, 217-18, 220-21, 224-30, 291-92, 318. It also does not dispute its records that diseased and injured animals are slaughtered for Natural Choice, RSUMF ¶¶ 206, 208-213, 215-216, or that "antibiotic residue," "bacteria," diseases, and contaminants are detected among its animals and meats that could become Natural Choice, Opp. 15; RSUMF ¶¶ 183-204, 231-38, 241-47, 266-78, 290-91. Plainly, Natural Choice is neither "artisanal" nor "premium." Hormel argues "there are several" other products that make more explicit claims about production practices. Opp. 16. However, that other brands make different claims does not speak to Hormel's liability.

Unable to dispute that its studies show consumers understand "natural" to mean animals are humanely treated, Hormel insists its policies and practices "are not inhumane," but this litigation position is irrelevant. Opp. 17. Given the extreme cruelty inherent in Hormel's

practices used across nearly all its products (including Natural Choice), as established in documents attributable to Hormel, the Court can certainly conclude a reasonable consumer would regard them as inhumane. *Beck*, 994 F. Supp. 2d at 96 (court can hold against defendant by concluding how "[a]ny reasonable consumer" would regard the practice); RSUMF ¶¶ 345-48, 353-58, 360, 365, 367-79, 381-86. Such a conclusion is particularly warranted as Hormel's Applegate brand states Hormel's "conventional" practices are inhumane, RSUMF ¶¶ 359, 363, and Hormel admits its practices lag behind industry developments and consumers would be disturbed by Hormel's treatment of animals, *id.* ¶¶ 326-27, 350, 353 388-93. What's more, Hormel concedes ALDF has unearthed a "series" of documents suggesting Hormel's employees engage in animal abuse. Opp. 18; RSUMF ¶¶ 331-34, 337-44. While Hormel states this cannot make its ads false, Opp. 17-18, certainly the volume of so-called "isolated incidents," combined with records evincing a "culture" of abuse, lead to that conclusion, RSUMF ¶¶ 328-30.

Finally, Hormel's sole argument that Natural Choice products do not contain preservatives in the form of nitrates and nitrites—despite its ads' explicit claims to that effect—is that the products do not *need* preservatives. Opp. 19. Hormel agrees it *does* add nitrates and nitrites, which *can* act as preservatives. RSUMF ¶¶ 248-54. But, it claims, the records establishing consumers understand "natural" and "no preservatives"-type claims to mean the absence of "preservatives," nitrates, and nitrites mean consumers care *why* the ingredients were added and/or if they were being used to preserve. Opp. 19; RSUMF ¶¶ 52, 57, 81, 86, 98, 100-04, 131. Hormel claims that if it did not add nitrates and nitrites in order to preserve its products, it cannot be liable. Hormel's unnatural reading of the evidence cannot defeat summary judgment.

In sum, the record establishes Hormel communicated to a reasonable consumer the characteristics, ingredients, benefits, standards, qualities, grades, and/or styles ALDF contends,

which Natural Choice products lack. Thereby, Hormel is violating § 28-3904(a) and (d).

c. Hormel is violating § 28-3904(e), (f), and (f-1).

Even if the Court were to agree that ALDF cannot show Hormel's claims fall within § 28-3904(a) and (d), Hormel does not make that argument regarding § 28-3904(e), (f), and (f-1). Instead, it contends ALDF cannot show that Hormel's misrepresentations are material. Opp. 36-38. Again, looking only to evidence Hormel created or adopted, this argument is impossible to maintain. Hormel's employees concluded that for "natural meat and cheese," 46% to 56% of consumers stated it is important the animals were "never administrated growth [hormones]," the product had "[n]o preservatives," the product came from "humanely raised" animals, the product came from animals "never administered antibiotics," the product had "[no] nitrates or nitrites added," and the product came from "[a]nimals fed [a] 100% organic diet." RSUMF ¶ 86; *see also id.* ¶ 89 ("majority of consumers believe that if a meat product is labeled as Natural then it is important to be Growth Hormone and Antibiotic free[,]" and "[m]any more [] assume that Natural meat has been Humanely Raised, Free Range, or Pasture Raised"). The NMI study Hormel relied on found these numbers were even higher for Natural Choice's target audience. *Id.* ¶ 92. Hormel's agencies and employees likewise stated that Natural Choice consumers seek out "green," "organic," artisanal products, *id.* ¶ 48-49, and Hormel's sales data confirms consumers motivated by these attributes are Natural Choice's primary purchasers, *id.* ¶¶ 105-07. Hormel's documents show its false and misleading representations were material.

Were that not enough, again, the Court can find Hormel's claims were material because Hormel understood or should have understood them to be material. Hormel's records prove this to be the case. *See, e.g.*, *id.* ¶¶ 90 (consumers purchase Natural Choice because of natural "halo"); 279 (company is losing "the battle of public perception" regarding antibiotic usage); 280

(establishing antibiotic working group because of public's concerns); 326 (presentations to Board of Directors warning Hormel "risk[s] losing consumers" if it continues to crate sows); 353 (getting "quite a bit of push back" on pain from tail docking); 389 (electrical slaughter inconsistent with "public perception of what is right"). This is confirmed by the academic research indicating consumers seek out natural products because they believe they are produced without hormones and antibiotics and with higher animal welfare standards. *Id.* ¶¶ 124-27, 129-30. Hormel should have known—and did know—the false impressions it left with consumers were important, *i.e.*, material. *See Saucier*, 64 A.3d at 442.

III. Hormel's Effort to Repackage Its Preemption Argument Fails.

Hormel makes various references to the federal laws governing meat and poultry labeling and inspection, but those references are wholly irrelevant; they are an attempt to repackage the preemption arguments Hormel has already made (and lost) before the federal District Court and this Court. *See ALDF v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 57 (D.D.C. 2017); *ALDF*, 2017 WL 4221129, at *1-2. Thus, as explained in ALDF's Opposition, law of the case prevents this issue from being relitigated. ALDF Opp. 33-35. But even if this Court could revisit it, it should still hold federal law inapplicable. *Id.* at 35-40.

Hormel repeatedly cites USDA's view of when claims may be used on meat and poultry labels, and that Hormel's Natural Choice labels have been approved by USDA. Opp. 4, 31 n.19, 39, 40. However, *USDA*'s view about what may appear on Hormel's *labels* does not govern the CPPA question here: whether a reasonable *consumer* is misled by Hormel's *advertising*. *See Saucier*, 64 A.3d at 442. Hormel avers its products "meet consumer expectations" because Natural Choice products meet USDA's "definition" of "natural," but that does not follow. Opp. 39. The relevant question is what *consumers* take away from the ad claims, not what USDA

allows.[14]

Moreover, Hormel's characterization of the USDA approval process is simply false. There are *no* statutes or regulations laying out a federal "definition" of "natural," "preservatives," "nitrates," or "nitrites."[15] Rather, the regulations provide that before a meat or poultry label may make certain claims, including "natural," the proposed label itself must be submitted to USDA for approval. 9 C.F.R. § 412.1(c)(3), (e). And USDA has, in turn, put out informal guidance discussing under what circumstances it may approve the use of "natural" on a label, USDA Labeling Policy Book 108-110, guidelines that Hormel's ads do not always follow, even if the guidelines were applicable, ALDF MSJ 12. In short, though USDA might approve Natural Choice *labels*, the agency has said nothing about when Hormel may make particular claims outside that context, has not approved any claims in Hormel's *ads*, and has not spoken to consumers' understandings of ads. Indeed, USDA lacks the authority to do any of these things. ALDF Opp. 37-38.

For the same reasons, Hormel cannot escape CPPA liability because USDA oversees the slaughter process and may stamp meat as "inspected for wholesomeness." Hormel summarily, and without legal authority, states that "[a]ny claim that the products are not clean, safe, and wholesome is ***clearly preempted*** by federal law." Opp. 15 n.9. That is just wrong. Whether consumers are misled by Hormel's advertising claims is entirely separate from, and not preempted by, federal slaughter and inspection law, which have nothing to do with advertising.

[14] Hormel similarly argues that ALDF cannot prevail on its CPPA claims because USDA has approved the use of various forms of celery juice and cherry powder in its products, but makes no effort to explain how that approval has any relevance. The challenge is not to the use of these ingredients; it is to the deceptive advertising implying the nitrates and nitrites they add are not there. *See* Opp. 40.

[15] Indeed, USDA has not even attempted to lay out what it considers a "preservative." *None* of Hormel's cited USDA materials define preservatives or indicate that nitrates and nitrites are not preservatives. *See* Opp. 4. Moreover, there is *no* USDA authority anywhere indicating that it approved the use of "no nitrates or nitrites added" on Natural Choice packaging because the nitrates and nitrites were not being used as preservatives.

IV. Hormel's Attack on ALDF's Standing Is Baseless.

Like the rest of its Opposition, Hormel's attacks on ALDF's standing are a smokescreen meant to camouflage an admission: that ALDF can pursue this action under the CPPA, and has standing under the statute *and* under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Hormel tries to portray statements in ALDF's declarations as a "complete reversal" of ALDF's prior positions. Opp 1. While Hormel's characterization is utterly false, it is also irrelevant. ALDF has established standing whether or not the Court looks to the declarations (which are consistent with the cited documents).[16] No matter where the Court turns, it will find Hormel's misleading advertising of its factory-farmed Natural Choice products led ALDF to divert resources to counter the misrepresentations, and stands in opposition to ALDF's mission of protecting animals by providing consumers with truthful information about inhumane and unnatural meat products. ALDF need show no more. *ALDF*, 2017 WL 4221129, at *4.

a. Hormel's arguments under the CPPA bolster ALDF's right to bring this action.

As noted above, Hormel concedes that under § 28-3905(k)(1)(C), an organization that spends a few dollars to purchase a defendant's product would have standing, yet claims that ALDF—whose dogged work to promote truth in meat advertising is impeded by Hormel's false advertising—does not. Opp. 23-24. This cannot be. *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Sec., & Banking*, 54 A.3d 1188, 1208 (D.C. 2012). Hormel makes much of *Grayson v. AT&T Corp.*, 15 A.3d 219 (D.C. 2011), but fails to acknowledge the D.C. Council amended the CPPA *in response to* Grayson, to extend § 28-3905(k)(1)(C) beyond "standing for

[16] As Hormel's authority makes clear, for the "sham affidavit" doctrine "to apply, the affidavit must clearly contradict prior sworn testimony, rather than clarify confusing or ambiguous testimony[.]" *Hinch v. Lucy Webb Hayes Nat. Training Sch. for Deaconesses & Missionaries Conducting Sibley Mem'l Hosp.*, 814 A.2d 926, 930 (D.C. 2003). Indeed, "there must be a bona fide inconsistency between an affiant's averments and his deposition testimony." *Kinser v. United Methodist Agency for the Retarded--W. N. Carolina, Inc.*, 613 F. App'x 209, 210-11 (4th Cir. 2015) (internal quotations and citations omitted). As explained below, no such "bona fide inconsistency" can be found here, when the declarations are instead *consistent* with ALDF's other evidence.

testers" and provide a right of action when, as here, unlawful conduct "interfere[s]" with any part of an organization's work. Alexander Report 5-6.

Hormel's attack on ALDF's right to proceed under § 28-3905(k)(1)(D), which provides an *independent and alternative* avenue for organizations to pursue CPPA violations, is similarly unfounded. Hormel's first complaint—that ALDF failed to cite this particular provision in its Complaint—should be ignored. Hormel insisted upon a battery of discovery regarding ALDF's work to protect consumers, to which ALDF responded. Hormel cannot now object to ALDF using that same material to establish it is a "public interest organization" under § 28-3901(15), and it can proceed under § 28-3905(k)(1)(D). Hormel demanded this record be generated and has had ample opportunity to address it; it now must live with the consequences.

Neither should the Court heed Hormel's substantive contentions. Hormel essentially argues ALDF is not a "public interest organization" because it does not have the word "consumer" in its name. Opp. 27-28. This nonsensical test ignores that (k)(1)(D) provides a right of action to "a nonprofit organization that is organized and operating, in whole *or in part*, for the purpose of promoting interests or rights of consumers[,]" D.C. Code § 28-3901(15) (emphasis added). Contrary to Hormel's claim, (k)(1)(D) standing is not "sharply limited," Opp. 2, but purposefully broad. The Council explained (k)(1)(D) provides "bases for standing that the D.C. courts have not yet … recognize[d] at all." Alexander Report 6.

Similarly unavailing are Hormel's claims that ALDF: (1) must, but failed to, identify a consumer or class of consumers whose interests it seeks to vindicate; and (2) failed to demonstrate a "sufficient nexus" between itself and consumers. Opp. 28-29. ALDF refuted the first of these in its Opposition, 19-21, and will not repeat those points. As to the second, Hormel simply ignores the existence of ALDF's evidence demonstrating its nexus to consumers. But

ALDF's track record of working to protect consumers' interest in animal welfare is neither insignificant nor newly described. ALDF's declarations do not contain new information; they restate what discovery has already shown.[17]

b. ALDF has Havens *standing, notwithstanding Hormel's false contentions about ALDF's declarations.*

In addition to the statutory bases for standing, as described in ALDF's Motion and Opposition, ALDF has *Havens* standing. In an effort to convince the Court otherwise, Hormel claims there are inconsistencies between ALDF's declarations and ALDF's testimony, and complains ALDF made a scattering of privilege assertions to disguise why ALDF undertook its Hormel-related work. Hormel's contentions are fabrications, but ultimately without consequence, as ALDF can demonstrate *Havens* standing with or without its witnesses' declarations, as detailed at length in its briefing.

ALDF's mission is far from "neutral" with respect to Hormel's misleading marketing of its factory-farmed meat products—the only requirement ALDF need prove to show Hormel's activities were inconsistent with ALDF's mission. ALDF Opp. 12-13; *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011). Hormel's "smoking gun" evidence on this point, ALDF's corporate witness' testimony, proves *ALDF's* point.[18]

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[17] *Compare* A3419-25, 28, 48 (ALDF Dep. at 100:25-101:5, 102:15-104:13, 105:16-106:3, 152:13-24, 245:2-18); *and* A3475-76 (Walden Dep. at 272:19-273:25); *and* A3484-85, 88-89, 92 (Putsché Dep. at 113:21-114:14, 120:16-121:18, 138:13-25); *and* A3507-08 (Holtz Dep. at 92:1-93:8); *and* A3385-88 (ALDF001627-30); *and* A3390-92 (ALDF001442-44); *and* A2627-34 (ALDF000495-502); *and* A2641-43 (ALDF000512-14); *and* A2661-64 (ALDF000554-57); *and* Hormel Ex. B at 5-19 (ALDF Resp. to Def.'s Interrogatory 3), *with* Dillard Decl. ¶¶ 5-7; *and* Walden Decl. ¶¶ 2, 8-9; *and* Putsché Decl. ¶ 4, 9.

[18] In response to Hormel's counsel's question, "Is it correct that ALDF is not alleging that the product claims themselves conflict with ALDF's organizational mission?" Mr. Walden provided ALDF's mission statement and explained, "[G]oing to the core of that mission is transparency and truth in advertising and dissemination of accurate information. So to the extent there are false and misleading statements propagate that encourage reasonable customers to procure product under misleading circumstances, that increases artificially or even fraudulently, demand for product that goes through an abusive, inhumane and unsanitary process, that does frustrate Animal Legal Defense Fund's mission." A3253 (ALDF Dep. at 27:10-25). When asked to confirm that statement, Mr. Walden replied, "The use of false and misleading information and a lack of transparency goes to the core of our mission requiring us to divert resources to address the frustration of that mission." A3254 (ALDF Dep. at 28:2-8).

Likewise, a comparison between ALDF's declarations and testimony reveals as meritless Hormel's attempt to paint them as inconsistent.[19] At base, Hormel's argument seems premised on the false (and bizarre) notion that the words "conflict" and "frustrate" are antonyms. But, quite obviously, something that materially frustrates (makes ineffectual, impedes, obstructs) also conflicts (is opposed, is contradictory, clashes, collides[20]) with ALDF's mission.[21] ALDF easily satisfies this "limitation" on *Havens* standing.[22]

Hormel attacks ALDF's diversion of resources by accusing it of sword-and-shield privilege violations. Opp. 21-22. This argument is easily disproved. Since the day ALDF filed its Complaint and throughout fact discovery (at Hormel's demand), ALDF has been explaining the motivations for its diversions of resources. Hormel Ex. B at 20-43 (ALDF Resp. to Interrog. 4-6). ALDF's witnesses also testified at length about these activities and their relation to Hormel[23]; Hormel's references to a handful of objections, meant to caution ALDF's witness not to divulge

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[19] *Compare* A3254-55, 58-59, 94-95, 97-98 (ALDF Dep. at 27:10-29:4, 98:10-99:14, 264:17-265:1, 267:15-268:1); *and* A3312-13 (Walden Dep. at 121:20-122:7); *and* Hormel Ex. D at 5-7 (ALDF Resp. to Interrog. 1); *and* Hormel Ex. B at 20-43 (ALDF Resp. to Interrog. 4-6) (describing manner in which Hormel's conduct frustrates and impedes ALDF's mission), *with* Dillard Decl. ¶¶ 5-8; *and* Walden Decl. ¶¶ 2, 10-12; *and* Putsché Decl. ¶ 4 (describing manner in which Hormel's conduct frustrates and conflicts with ALDF's mission).

[20] https://www.merriam-webster.com/dictionary/frustrate; https://www.merriam-webster.com/dictionary/conflict.

[21] As already explained, Hormel confuses precedent stating that mere "frustration" of an organization's "abstract social *interests*" is insufficient to confer standing, with the notion that conduct which stands as an impediment and frustration to an organization's concrete *advocacy* efforts cannot support standing when it does. ALDF Opp. 14-15.

[22] One need look no further than Hormel's Opposition for an admission of this conflict. Hormel accuses ALDF, in describing Hormel's own practices, of making "inflammatory claims" in a "multi-page diatribe about animal raising and slaughter practices reveal[ing] ALDF's true reasons for pursuing this lawsuit: to attempt to publicly shame and harass Hormel Foods and the animal agriculture industry." Opp. 14, n.8. If that does not demonstrate a "conflict" between Hormel's conduct and ALDF's mission-driven work, then the word has lost all meaning.

[23] A3415-16, 31-32, 35-37, 39, 41-42 (ALDF Dep. at 173:7-174:18 (explaining why ALDF initiated its investigation of The Maschhoffs and when it identified the relationship to Hormel); 85:20-86:6, 184:22-186:23, 188:10-22, 190:15-191:1 (explaining why ALDF opposes the HIMP program); 193:22-194:10 (explaining why ALDF opposes "Ag-Gag" laws)); A3495-97 (Putsché Dep. at 150:2-6, 151:19-152:8) (explaining why ALDF focused on Hormel in its media related to The Maschhoffs investigation); *see* A3427-28 (ALDF Dep. at 151:5-152:5 (ALDF's counsel explaining that ALDF's corporate witness was able to answer questions as to what role Hormel played in ALDF's decision to submit comments to FDA regarding use of "natural" on meat and poultry products, which Hormel chose not to ask)); *see also* A3458-59, 61-63, 67-68, 71-72 (Walden Dep. at 77:14-78:8, 80:25-81:10, 82:9-22 (discussing ALDF's comments to the FDA regarding use of "natural" on meat and poultry products and the nexus to Hormel); 121:16-122:7 (explaining how ALDF's investigation of The Maschhoffs relates to ALDF's work to increase transparency and empower consumers); 188:17-189:8 (discussing ALDF's media linking Hormel to the HIMP program)).

privileged information, do nothing to change this fact. Hormel's citations do not suggest ALDF has produced new information during summary judgment, as, again, a comparison of the prior evidence and the relevant portions of ALDF's witnesses' declarations reveals.[24] Hormel's spurious sword-and-shield argument should be ignored.

Hormel's histrionics as to ALDF's declarations cannot obscure that ALDF has standing by virtue of CPPA provisions enabling it to remedy Hormel's violations, and has also provided ample evidence Hormel tested at length demonstrating that ALDF has been and continues to be harmed by Hormel's conduct, providing standing under *Havens*.[25]

V. Conclusion.

For the foregoing reasons, ALDF asks this Court to hold it has standing and declare Hormel's Make the Natural Choice campaign's natural, no preservative, and no nitrate or nitrite claims unlawful under the CPPA. The parties and Court can then turn to crafting the needed injunction.

[24] *Compare* A3458-59, 61-64 (Walden Dep. at 77:14-78:8, 80:25-81:18, 82:9-83:16); *and* Hormel Ex. B at 14, 20-22, 37-39 (ALDF Resp. to Interrog. 4-6), *with* Dillard Decl. ¶¶ 8-10; *and* Walden Decl. ¶ 13; *and* Putsché Decl. ¶ 6 (discussing ALDF's work to highlight Hormel in its comments to the FDA regarding use of "natural" on meat and poultry products). *Compare* A3431-32 (ALDF Dep. at 173:7-174:18); *and* A3467-68 (Walden Dep. at 121:3-122:7); *and* A3495-97 (Putsché Dep. at 150:12-151:6, 151:19-152:8); *and* Hormel Ex. B at 15, 23-25, 39-40 (ALDF Resp. to Interrog. 4-6), *with* Carter Decl. ¶¶ 8, 12-14; *and* Walden Decl. ¶ 13; *and* Putsché Decl. ¶ 7-10 (discussing ALDF's work to empower consumers by linking Hormel to The Maschhoffs investigation). *Compare* A3415-16, 35-37, 39, 41-42 (ALDF Dep. at 85:20-86:6, 184:22-186:23, 188:10-22, 190:15-191:1); *and* A3471-72 (Walden Dep. at 188:17-189:8); *and* Hormel Ex. B at 17, 20-21, 25-26, 33-34, 40-42 (ALDF Resp. to Interrog. 4-6), *with* Walden Decl. ¶ 24 (discussing ALDF's work on HIMP and Hormel's link to the program). *Compare* A3444-45 (ALDF Dep. at 193:22-194:10); *and* Hormel Ex. B at 27-30, 34-35, 42-43 (ALDF Resp. to Interrog. 4-6), *with* Walden Decl. ¶¶ 13-16 (discussing ALDF's work to combat "Ag-Gag" laws). Because there are no "newly revealed" facts, there is absolutely *no* need for Hormel to further harass ALDF's witnesses and pursue further intrusive discovery. The Court should not entertain Hormel's unnecessary request.

[25] As to whether ALDF's injuries are fairly traceable to Hormel's conduct, Hormel recycles arguments from its Motion, which fail for the reasons pointed out in ALDF's Opposition. *See* ALDF Opp. 16-18. Hormel fails to cite a single case to support its argument that ALDF's injury is not fairly traceable to Hormel. Opp. 25-26.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Leah M. Nicholls, certify that on February 1, 2019, I electronically filed the foregoing document with the Clerk of the Court through the Court's CaseFileExpress system, thereby providing notice upon all parties who have entered an appearance in this matter.

Dated: February 1, 2019 */s/ Leah M. Nicholls*
Leah M. Nicholls