SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ANIMAL LEGAL DEFENSE FUND	:	
	:	
v.	:	Case No. 2016 CA 004744 B
	:	
HORMEL FOODS CORPORATION	:	

ORDER

The Court grants the summary judgment motion of defendant Hormel Foods Corporation ("Hormel") because plaintiff Animal Legal Defense Fund ("ALDF") has not carried its burden to establish standing and its claim is preempted by federal law. The Court is entering a separate judgment in favor of Hormel. In these circumstances, the Court denies as moot ALDF's summary judgment motion (except with respect to standing, which it denies on the merits) and Hormel's motions to exclude expert testimony. The Court also denies ALDF's motion for sanctions.

The Court grants the motion of Hormel and two non-parties to seal documents that the Court did not consider in connection with the summary judgment motions, but the Court denies the motion of Wayne Farms LLC ("Wayne Farms") and Rabe's Quality Meat, Inc. ("Rabe's") to seal. The Court also grants ALDF's consent motion to unseal documents that Hormel did not move to seal by the deadline established in the protective order.

I. BACKGROUND

ALDF is a non-profit organization that works to protect the lives and advance the interests of animals through the legal system. Hormel produces numerous lines of food products. This case involves Hormel's Natural Choice® meat products.

ALDF filed its complaint on June 29, 2016, seeking declaratory and injunctive relief against Hormel for violations of the D.C. Consumer Protection Procedures Act ("CPPA").

ALDF alleges that Hormel's "Make the Natural Choice" advertising campaign violates the CPPA because it materially misleads consumers into believing that Hormel's products are from animals that are humanely raised and not "factory-farmed" and that its products do not contain preservatives or nitrates or nitrites that are not from natural sources.

On January 11, 2019, each party filed a motion for summary judgment ("Pl. MSJ" and "Def. MSJ"), along with a statement of material facts ("Pl. SOMF" and "Def. SOMF"). On January 25, each party filed an opposition ("Pl. Opp."/"Pl. Response to Def. SOMF" and "Def. Opp."). On February 1, each party filed a reply ("Pl. Reply" and "Def. Reply").

Also pending are two motions by Hormel to exclude testimony of two ALDF experts, a motion for sanctions filed by ALDF, ALDF's motion to strike, Hormel's motion to seal, and four motions to seal filed by various non-parties.

II. THE SUMMARY JUDGMENT STANDARD

Both parties have moved for summary judgment on standing, as well as on other grounds. "Standing is a question of law for the district court to decide," and "[b]ecause the court (and not a jury) decides standing, the [trial] court must decide issues of fact necessary to make the standing determination." *In re ATM Fee Antitrust Litigation*, 686 F.3d 741, 747 (9th Cir. 2012). If the evidence establishes a genuine dispute about a material fact, a trial or evidentiary hearing on facts relating to standing may be necessary. *See id*. at 747-48 (citing cases); *Haase v. Sessions*, 835 F.2d 902, 907 (D.C. Cir. 1987) ("The fact-finding of the court to support or deny standing is subject to review under the clearly erroneous standard."). However, neither party has requested an evidentiary hearing to resolve any dispute about factual issues relevant to standing. As in *ATM Fee Antitrust Litigation*, 686 F.3d at 758, the Court "need not decide whether [it] must conduct additional evidentiary inquiries or the necessary extent of those inquires when

resolving issues of material fact at the summary judgment stage, because" the Court concludes that no genuine dispute of material fact exists with respect to standing. If the issue were whether ALDF has proven by a preponderance of the evidence facts necessary to establish standing, the Court would readily conclude that ALDF has not done so.

Rule 56(a) provides in relevant part, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Mixon v. Washington Metropolitan Area Transit Authority*, 959 A.2d 55, 58 (D.C. 2008) (quotations and citations omitted). "Summary judgment may have once been considered an extreme remedy, but that is no longer the case," and indeed District of Columbia courts have "recognized that summary judgment is vital." *Doe v. Safeway, Inc.*, 88 A.3d 131, 133 (D.C. 2014) (citations omitted).

The moving party has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995). "At this initial stage, the movant must inform the trial court of the basis for the motion and identify 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Paul v. Howard University*, 754 A.2d 297, 305 (D.C. 2000) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Rule 56(c) sets forth the requirements for establishing facts in a form that would be admissible in evidence at trial.

If the moving party carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). "A genuine issue of material fact exists if the record contains some significant probative evidence … so that a reasonable fact-finder would return a verdict for the non-moving party." *Brown v. 1301 K Street Limited Partnership*, 31 A.3d 902, 908 (D.C. 2011) (quotation and citation omitted). "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to defeat a motion for summary judgment." *Smith*, 75 A.3d at 902 (quotation and citation omitted). The "party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing that there is a genuine issue for trial." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 950-51 (D.C. 2012) (quotation and citation omitted). Rule 56(c) establishes the requirements for raising a genuine factual dispute in a form that would be admissible in evidence at trial.

A party "cannot stave off the entry of summary judgment through [m]ere conclusory allegations." *Smith*, 75 A.3d at 902 (quotation and citation omitted); *see McFarland v. George Washington University*, 935 A.2d 337, 349 (D.C. 2007) (plaintiff's "conclusory statements about his own qualifications are not sufficient to defeat a motion for summary judgment" in an employment discrimination case). "The object of [the provision in Rule 56 requiring a declaration to set forth "specific facts"] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) (upholding grant of summary judgment in favor of defendant because plaintiff's affidavits were not specific enough to establish standing). "A plaintiff's own, even self-serving testimony will often suffice to defeat summary judgment – particularly where he has firsthand knowledge of a fact or observed an event, and where the case depends on the jury's

resolution of competing testimony and witness credibility." *Montgomery v. Risen*, 197 F. Supp. 3d 219, 252 (D.D.C. 2016); *see Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1244 (D.C. 2009) (the Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage"). However, conclusory, self-serving statements by a plaintiff do not necessarily create a genuine dispute of material fact for purposes of summary judgment, especially "when these statements are unsubstantiated by any non-self-serving evidence" or when other undisputed evidence in the record renders them unreasonable. *See Mokhtar v. Kerry*, 83 F. Supp. 3d 49, 74 (D.D.C. 2015).

Even a witness who has personal knowledge concerning the matter about which he offers testimony "may make a statement that is so conclusory" and unsupported by "concrete affirmative evidence" that it is "insufficient to defeat a motion for summary judgment." *Montgomery*, 197 F. Supp. 3d at 252, 262 (quotation and citation omitted). "Although, as a rule, statements made by the party opposing a motion for summary judgment must be accepted as true for the purpose of ruling on that motion, some statements are so conclusory as to come within an exception to that rule." *See Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Buie v. Berrien*, 85 F. Supp. 3d 161, 176-77 (D.D.C. 2015) ("Summary judgment for a defendant is most likely when a plaintiff's claim is supported solely by the plaintiff's own self-serving, conclusory statements.") (quotation and citation omitted); *Maramark v. Spellings*, 2006 U.S. Dist. LEXIS 6630, at *52-54 (D.D.C. 2006) ("In the post-discovery summary judgment context, a conclusory affidavit, supported by no evidence within the record, is insufficient to avoid summary judgment.").

Viewing the non-moving party's evidence in the light most favorable to it, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury

or whether it is so one-sided that one party must prevail as a matter of law." *Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013) (quotation and citation omitted). The Court may grant summary judgment only if no reasonable juror could find for the non-moving party as a matter of law. *Biratu v. BT Vermont Avenue, LLC*, 962 A.2d 261, 263 (D.C. 2008). The Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett*, 979 A.2d at 1244.

III. STANDING

The Court grants summary judgment to Hormel because ALDF has not provided evidence sufficient to establish that it has standing to bring its claim.

A. Legal standard

"Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Grayson v. AT&T*, 15 A.3d 219, 229 (D.C. 2011) (en banc). The CPPA does not "override or disturb our constitutional standing requirement." *Id.* at 245. A plaintiff must demonstrate: "(1) he or she has suffered 'injury in fact' – an actual or imminent, concrete and particularized, invasion of a legally protected interest; (2) the injury is 'fairly … trace[able]' to defendant's challenged actions; and (3) it is 'likely … the injury will be redressed by a favorable decision.'" *Equal Rights Center v. Properties International*, 110 A.3d 599, 603 (D.C. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

When an organization brings a lawsuit in its own right, "[t]he question of standing turns on whether the organization's activities in pursuit of its mission have been affected in a sufficiently specific manner as to warrant judicial intervention." *Equal Rights Center,* 110 A.3d at 604 (quotation, citation and brackets omitted). "This requires a showing that the defendant's unlawful actions have caused a 'concrete and demonstrable injury to the organization's activities

– with the consequent drain on the organization's resources.'" *Id*. (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). "Generally, 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." *Equal Rights Center,* 110 A.3d at 604. That the organization voluntarily "diverts its resources, however, does not automatically mean that it cannot suffer an injury sufficient to confer standing," and court "focus[] on whether they undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged discrimination rather than in anticipation of litigation." *Equal Rights Center v. Post Properties*, 633 F.3d 1136, 1140 (D.C. Cir. 2011). "Furthermore, an organization does not suffer an injury in fact where it expends resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended." *Food & Water*, 808 F.3d at 920 (quotation, citation and brackets omitted).

However, "there are two important limitations on the scope of standing under *Havens*." *Equal Rights Center,* 110 A.3d at 604 n.3 (quotation omitted). "First, there must be direct conflict between the defendant's conduct and the organization's *mission*." *Id*. (quotation and citation omitted). A direct conflict occurs when the defendant's conduct has "perceptibly impaired the organization's ability to provide services." *D.C. Appleseed Center for Law & Justice, Inc. v. D.C. Department of Insurance, Securities & Banking*, 54 A.3d 1188, 1207 (D.C. 2012); *see Food & Water Watch, Inc. v. Vilsak*, 808 F.3d 905, 921 n.9 (D.C. Cir. 2015).

"The second limitation prohibits an organization from manufacturing the injury necessary to maintain a suit from its expenditure of resources on that very suit." *Equal Rights Center,* 110 A.3d at 604 n.3 (quotation, brackets, and citation omitted). "[A]n organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise

to an Article III injury." *Food & Water*, 808 F.3d at 919. "To hold that a lobbyist/advocacy group had standing to challenge government policy with no injury other than injury to its advocacy would eviscerate standing doctrine's actual injury requirement." *Turlock Irrigation District v. Federal Energy Regulatory Commission*, 786 F.3d 18, 24 (D.C. Cir. 2015) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972); *see National Association of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) ("pure issue-advocacy" does not suffice to establish an injury in fact).

B. Facts

Evidence that meets the standards of Rule 56(c) establishes the following facts, and neither party has offered evidence that raises a genuine dispute about them:

1. ALDF is a non-profit organization with the mission "to protect the lives and advance the interests of animals through the legal system." Def. SOMF ¶ 5.

2. One of the ways ALDF fulfills its mission is by filing or participating in high-impact lawsuits, including several lawsuits challenging the labeling or advertising of meat products where the claims related to animal welfare. Def. SOMF ¶¶ 6-7.

3. In addition to legal advocacy, ALDF fulfills its mission through public outreach, including educating consumers about the conditions and practices of factory farming. Pl. SOMF ¶¶ 6, 10.

4. ALDF believes that providing consumers with accurate information about factory farming conditions and practices will reduce consumer demand for factory-farmed products. Pl. SOMF ¶ 12.

5. Hormel launched the Natural Choice brand of products in 2006 and began the "Make the Natural Choice" advertising campaign in May 2015. Def. SOMF ¶¶ 11-14.

6. "Make the Natural Choice" advertisements frequently emphasize that Natural Choice products are "100% natural", "all natural," and contain no added preservatives. The advertisements also use the terms "clean," "honest," "higher standards," "safe," and "wholesome." Def. SOMF ¶¶ 46, 55.

7. ALDF became aware of and started working against Hormel's "Make the Natural Choice" advertising campaign in 2015. Pl. SOMF ¶ 13.

8. The U.S. Department of Agriculture ("USDA") approved labeling Natural Choice products as "Natural," "All Natural," "100% Natural," and "No Preservatives." Def. SOMF ¶¶ 22, 24, 29.

9. In May 2016, ALDF advocated to the U.S. Food and Drug Administration ("FDA") and USDA to prohibit the use of the term "natural" on labels of products that are "factory-farmed," including Hormel's Natural Choice products. Pl. SOMF ¶ 17.

10. ALDF publicized its FDA advocacy. Pl. SOMF ¶ 18.

11. ALDF regularly investigates the meat industry, and specifically factory farming. Def. SOMF ¶ 168.

12. In May 2016, ALDF publicized an undercover investigation of a pig breeding facility in Nebraska, identifying Hormel as one of the breeder's largest customers. Pl. SOMF ¶¶ 20-23.

13. In 2017 and 2018, ALDF opposed USDA's proposed rule expanding the Hazardous Analysis and Critical Control Point ("HACCP")-based Inspection Models Project ("HIMP") pig slaughter program, and publicized its opposition. Def. SOMF ¶ 185.

14. From 2011-2018, ALDF challenged what it calls "Ag-Gag" laws that criminalize undercover investigations and whistle-blowing in the agriculture industry. Def. SOMF ¶ 185.

B. Discussion

1. Dismissal vs. summary judgment

ALDF contends that the Court's denial of Hormel's motion to dismiss on standing grounds precludes Hormel from relitigating the standing issue on summary judgment. *See* Pl. Opp. at 4-5. However, "[s]tanding analysis is different at the successive stages of litigation," *Grayson*, 15 A.3d at 232, and "plaintiffs must support each element of Article III standing with the manner and degree of evidence required at the successive stages of the litigation." *D.C. Appleseed Center*, 54 A.3d at 1205 (citation and quotation omitted). "Thus, the examination of standing in a case that comes to us on a motion to dismiss is not the same as in a case involving a summary judgment motion; the burden of proof is less demanding when the standing question is raised in a motion to dismiss." *Grayson*, 15 A.3d at 232. "For purposes of ruling on a motion to dismiss for want of constitutional standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Id*. at 246 (quotation and citation omitted). "When a lawsuit reaches the summary judgment stage, the 'mere allegations' of the pleadings become insufficient," and "[c]onstitutional standing must be shown through 'specific facts' set forth 'by affidavit or other evidence' to survive a motion for summary judgment." *Id.* (quoting *Lujan*, 504 U.S. at 561).

Therefore, denial of Hormel's motion to dismiss does not preclude the Court from revisiting ALDF's standing at the summary judgment stage. *See Equal Rights Center*, 110 A.3d at 605. When the Court denied Hormel's motion to dismiss, the issue was whether the factual allegations in ALDF's complaint, accepted as true, support a plausible inference of standing, but now the issue is whether ALDF has offered admissible evidence sufficient to establish standing.

2. Standing under § 28-3905(k)(1)

ALDF contends that it has standing under two provisions of the CPPA simply because it is a non-profit public interest organization: § 28-3905(k)(1)(C) permits a "non-profit" organization to bring an action "on behalf of the general public" for the use of an illegal trade practice; and § 28-3905(k)(1)(D) provides that "a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief" from an unlawful trade practice, if the organization meets specified conditions. *See* Pl. Opp. at 6-8. However, the CPPA does not grant automatic standing to any non-profit public interest organization.

After the CPPA was amended in 2012 to add the two provisions on which ALDF relies, the Court of Appeals held that "the CPPA does not relieve a plaintiff of the requirement to show a concrete injury-in-fact to himself." *Stone v. Landis Construction Co.*, 120 A.3d 1287, 1289 (D.C. 2015) (citing *Grayson*, 15 A.3d at 245 (D.C. 2011); *see Little v. Suntrust Bank*, No. 17-PR-1365, 2019 D.C. App. LEXIS 115 *3 (D.C. March 28, 2019); *Stone*, 120 A.3d at 1289; *Floyd v. Bank of America Corp.*, 20 A.3d 246, 251 (D.C. 2013). The Court of Appeals' holdings concerning standing in CPPA cases are consistent with the principle that D.C. courts conform the exercise of judicial power to Article III standing even though they are Article I courts. *See Vining v. Executive Board of Health Benefit Exchange Authority*, 174 A.3d 272, 278 (D.C. 2017).

The Court of Appeals' uniform holdings applying constitutional standing principles in CPPA cases are also consistent with the legislative history of the 2012 amendments, including the committee report on which ALDF principally relies. This committee report states that § 28-3905(k)(1)(C) was "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." *See* Report on Bill 19-0581of the Committee on Public Services and Consumer Affairs, at 5 (Nov. 28, 2012) ("Committee Report"). This statement, followed by approving citations to *Havens Realty Corp.* and *D.C. Appleseed Center*, indicates that the legislative branch intended and expected courts to continue to apply constitutional standing principles to CPPA cases brought by non-profit organizations. Reinforcing this conclusion is the statement in the Committee Report that courts may "consider standing options that satisfy the prudential standing principles for non-profit and public interest organizations acting as private attorneys general." *See* Committee Report at 2; *see also id*. at 6 (expressing disagreement only with a "narrow reading" of Court of Appeals and federal standing cases).

Thus, the legislative history of the 2012 amendments does not establish that the legislative branch intended the judicial branch to ignore in CPPA cases the baseline standing principles that D.C. courts have consistently applied in all cases brought by organizations or other types of plaintiffs. Nor is such a legislative intent manifest in the plain language of the CPPA, which does not explicitly preclude the Court from applying Article III standing principles. ALDF must therefore provide evidence that Hormel's advertisements caused an injury in fact to ALDF's interests that is fairly traceable to the advertisements and that likely will be redressed by a favorable decision, or, more specifically, that the advertisements were in direct conflict with its mission and perceptibly impaired its ability to provide services. *See Equal Rights Center,* 110 A.3d at 603-04; *Appleseed Center*, 54 A.3d at 1207.

In addition, § 28-3905(k)(1)(D), which "most directly" implements "the Council's intention for maximum standing" in CPPA cases (*see* Committee Report at 6), does not apply.

Section 28-3901(a)(15) defines "public interest organization" to mean "a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers." ALDF, however, is organized and operating to promote not the interests and rights of the consumers of Hormel meat products, but rather those of the consumed. *See* Section III.B ¶ 1. Moreover, § 28-3905(k)(1)(D)(ii) requires dismissal of an action brought under § 28-3905(k)(1)(D)(ii) by a consumer organization "if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests." *See* Committee Report at 6 (characterizing this provision as an "important limit[]"). The constitutional standing principles applicable to all plaintiffs, and to organizational plaintiffs in particular, provide objective standards to ensure that the organization has a sufficient stake to adequately represent consumer interests. Otherwise, courts would have to rely on a subjective sense of whether the organization cares enough about the issue that it can be trusted to prosecute the case effectively.

3. Organizational standing

ALDF contends that it has organizational standing because the Natural Choice advertising campaign "conflicts with and frustrates ALDF's mission" and has compelled it to divert organizational resources to counteract Hormel's misleading messages. Pl. MSJ at 31-32. The Court addresses first whether ALDF proved a direct conflict between Hormel's conduct and its own organizational mission, and then whether it proved that Hormel's conduct frustrated its mission.

a. Direct conflict

ALDF must prove a "direct conflict" between Hormel's conduct and its own mission, *Equal Rights Center,* 110 A.3d at 604, or, in other words, that Hormel's conduct "perceptibly

impaired" ALDF's ability to provide services. *Appleseed Center*, 54 A.3d at 1207. In an interrogatory, Hormel straightforwardly asked ALDF to describe how each of the marketing claims challenged by ALDF in this case "conflict with ALDF's organizational mission," and in its verified answer in November 2017, ALDF stated that it "does not allege that the Product Claims themselves 'conflict with' ALDF's organizational mission." ALDF's Response to Interrogatories, at 5 (Def. MSJ Ex. A); Def. SOMF ¶¶ 172-73, 176-177. ALDF did not modify or qualify this particular answer when it supplemented its response on December 14, 2018, one business day before the close of discovery. ALDF Supplemental Response to Interrogatories, at 5-7 (Def. MSJ Ex. D); *see* Order Granting Joint Motion To Amend Scheduling Order and Setting Revised Case Schedule (Oct. 18, 2018) (closing discovery on December 17, 2018). When Hormel asked ALDF's Rule 30(b)(6) representative in a November 2018 deposition to confirm that ALDF is not alleging such a conflict, the representative testified that the interrogatory response was accurate. Mark Walden Dep. 28:17-29:9 (Def. Motion Ex. R). In addition, ALDF's Rule 30(b)(6) deponent testified that factory farming is more a frustration of its mission than a conflict with its mission. *See id*. 92:12-93:8.

Notwithstanding these discovery responses, ALDF now contends that a direct conflict does exist, relying on new, post-discovery declarations by two ALDF employees, including its Rule 30(b)(6) representative. *See* Pl. MSJ at 31 (citing Dillard and Walden Declarations). Reliance on these new declarations would run afoul of the rule requiring courts to disregard an affidavit that "is submitted to withstand a motion for summary judgment when the affidavit contradicts prior deposition testimony without adequate explanation and creates only a sham issue of material fact." *See Destefano v. Children's National Medical Center*, 121 A.3d 59, 70 (D.C. 2015) (discussing the "sham affidavit" doctrine) (quotation omitted); Def. Opp. at 20-21.

ALDF does not explain the significant discrepancy between its discovery responses and the declarations it provided after discovery had ended when it moved for summary judgment on standing grounds. It would be unfair in these circumstances to Hormel to allow ALDF to change its position at this stage of the case.

Furthermore, in evaluating the new declarations that contradict ALDF's prior and consistent discovery responses, and in assessing more generally the sufficiency of ALDF's evidence that Hormel's advertising directly conflicts with and frustrates its mission, the Court takes into account that neither declarant cites any documentary evidence to support statements that can fairly be described as conclusory and self-serving. In Section III.B.3.b below, the Court discusses the four types of activities that ALDF contends Hormel's marketing activities forced it to undertake, and none of these activities explicitly addressed Hormel's "Make the Natural Choice" advertising campaign. The key issue is not *whether* ALDF engaged in these activities but *why* it did so, and on this key issue, ALDF offers nothing other than its declarants' post-discovery say-so. For example, the Court unhesitatingly accepts ALDF's evidence that it engaged in litigation challenging labeling on meat products sold by Hormel and other major meat producers. But on the critical issue of whether, or to what extent, Hormel's marketing affected the resources that ALDF invested in this labeling litigation, ALDF does not proffer any evidence of a causal connection other than the post-discovery statements of two declarants; it does not proffer any affirmative, independent evidence such as a contemporaneous internal memorandum from ALDF staff to the ALDF board stating that the organization needed to spend more money on litigation involving labeling because of Hormel's Natural Choice advertising. ALDF's conclusory, self-serving statements about the alleged causal connection between Hormel's marketing and ALDF's activities do not create a genuine dispute of material fact when these

activities do not directly address Hormel's marketing of Natural Choice products, and these statements are both inconsistent with ALDF's earlier discovery responses and unsupported by any concrete affirmative evidence, *See Mokhtar*, 83 F. Supp. 3d at 74; *Montgomery*, 197 F. Supp. 3d at 252 & 262.

In addition, the Court can consider the reasonableness of conclusory assertions in light of other evidence, *Mokhtar*, 83 F. Supp. 3d at 74, and it is hardly self-evident that ALDF would invest substantial resources to counteract Hormel's advertising program when it had only very limited, anecdotal evidence that a significant number of consumers were actually misled. *See* Def. SOMF ¶¶ 158-69; Pl. Response to Def. SOMF ¶¶ 158-69. Moreover, ALDF's executive director was not aware of any specific Hormel-related activities in 2016 (Pl. Response to Def. SOMF ¶ 179), and even if the executive director was not involved in ALDF's day-to-day activities (*id.*), his lack of awareness implies that any work that specifically responded to Hormel's marketing was not significant enough to ALDF's mission to warrant his attention.

In these circumstances, ALDF's admission that Hormel's advertising concerning the Natural Choice products does not directly conflict with ALDF's mission, coupled with the lack of evidence contradicting this admission that is not conclusory and self-serving, is fatal to ALDF's attempt to establish standing.

b. Frustration

ALDF has been consistent throughout discovery in asserting that Hormel's advertisements "frustrate" its mission by misleading consumers to believe that Hormel products do not come from animals that were inhumanely raised. *See* Pl. Opp. at 14; *see, e.g.,* Walden Dep. 28:5-29:4, 264:14-265:13, 267:15-25 (Pl. Opp. Ex. A3254-55, 94-96, 97-98). However, courts have "distinguished between organizations that allege that their activities have been

impeded from those that merely allege that their mission has been compromised," and "[a]n organization must allege more than a frustration of its purpose because frustration of an organization's objectives is the type of abstract concern that does not impart standing." *Food & Water Watch,* 808 F.3d at 919 (quotations and citations omitted). For the reasons the Court explained in the preceding section, ALDF does not offer admissible evidence of a direct conflict.

In any event, ALDF does not offer non-conclusory, non-self-serving evidence sufficient to prove a diversion of resources to combat Hormel's advertisements that is sufficient to establish standing. ALDF contends that it diverted resources to four activities in response to Hormel's advertisements: (1) submission and publication of a comment to the FDA regarding use of the term "natural" in the labels of meat products; (2) investigation and associated publicity of a pig breeding facility that supplied pork to Hormel; (3) a comment to USDA and blogging that opposed the USDA's proposed rule concerning hog inspections; and (4) advocacy against what ALDF calls "Ag-Gag" laws around the country. *See* Pl. MSJ at 32-33; Def. MSJ. at 15-16; Def. SOMF ¶ 185; Walden Decl. ¶¶ 13-14, 17. ALDF does not establish that any of these four activities involves a diversion of resources sufficient to establish an injury in fact.

First, although ALDF expended resources to try to persuade the FDA to change its rules concerning use of the term "natural" on product labels, ALDF contends that labeling and advertising raise separate issues, and ALDF cannot have it both ways, arguing both that labeling is different from marketing and that ALDF's labeling advocacy was really a response to Hormel's marketing. *See, e.g.*, Pl. Opp. at 35 ("Since this case exclusively challenges Hormel's *advertising*, it does not and cannot interfere with the federal scheme regulating *labels*."); Pl. Response to Def. SOMF ¶ 64 (ALDF is not challenging Hormel's labeling in this lawsuit). In any event, ALDF offers conclusory statements that only imply it would have remained silent

about Hormel and other major producers labeling their meat products as "natural" so long as Hormel did not use the same adjective as the centerpiece of its marketing campaign. *See* Walden Dep. 259:2-10 (identifying Tyson as another example of a large meat producer that misleadingly implies that it treats animals humanely) (Def. MSJ Ex. R). Indeed, ALDF did not mention Natural Choice advertisements in its comment to the FDA. *See* Def. Reply at 7 n.8. Furthermore, "the expenditure of resources on advocacy is not a cognizable Article III injury." *Turlock,* 786 F.3d at 24; *see National Association of Home Builders*, 667 F.3d at 12; *see also Equal Rights Center,* 110 A.3d at 605 ("diversion of resources does not necessarily confer organizational standing because some types of expenditures do not qualify").

Second, ALDF does not demonstrate that it conducted the undercover investigation of a pig breeder for the purpose of counteracting Hormel's advertisements. *See* Section III.B ¶¶ 11-12 above. Although ALDF provided information that it began the investigation in 2015 (Walden Dep. 132:2-6 (Def. MSJ Ex. R)), it did not demonstrate that it began the investigation before it learned of Hormel's Natural Choice advertising campaign in the same year, and it refused on privilege grounds to explain why it began the investigation (*id*. 131:13-132:11)). Hormel was only one of the producer's largest customers, and ALDF focused on Hormel in its publicity only because "Hormel is a household name." *See* Putsché Decl. ¶ 9. ALDF does not establish that it would have expended less resources to publicize the results of the investigation if its publicity focused on a different company.

Third, ALDF does not demonstrate that it would have acquiesced in USDA's allegedly deficient inspections of all hog producers (*see* Section III.B ¶ 13 above) if Hormel had not started to market one line of products as natural, or that the resources it expended for these purposes, including educating people, subjected it to "operational costs beyond those normally

expended." *See Food & Water*, 808 F.3d at 920. Moreover, ALDF's submission of comments to the USDA and related publicity fall in the category of advocacy, and as explained above, the expenditure of resources on advocacy is generally not a basis for standing.

Fourth, the resources expended by ALDF to oppose Ag-Gag laws lack a sufficient causal connection to Hormel's Natural Choice advertisements. *See* Section III.B ¶ 14 above. ALDF has engaged in this advocacy since 2011, and it is "committed to oppose Ag-Gag laws until they're all off the books." *See* Walden Dep. 194:1-16, 196:9-14 (Def. MSJ Ex. R). The Court accepts that if no state had an Ag-GAG law, ALDF would shift the resources it devotes to this advocacy to other projects, but the fact remains that ALDF would have engaged in this advocacy even if Hormel did not advertise some of its meat products as a natural choice. In any event, these kinds of advocacy activities are not the type of expenditures that create organizational standing.

c. Redressability

ALDF does not demonstrate that its claimed injury is redressable by the relief it seeks. To establish redressability, "a plaintiff seeking forward-looking relief, such as an injunction, must allege facts showing that the injunction is necessary to prevent injury otherwise likely to happen in the future." *Equal Rights Center*, 110 A.3d at 603. "The sine qua non of constitutional standing to sue is an actual or imminently threatened injury that is attributable to the defendant and capable of redress by the court." *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206-07 (D.C. 2002). Even if ALDF obtained an injunction that prevented Hormel from advertising that its products are natural and contain no artificial preservatives, its products would still include USDA-approved labels that identify the products as "natural" and containing "no preservatives." *See* Def. SOMF ¶¶ 24, 29. ALDF does not allege, much less prove, that if Hormel stops advertising (but not labeling) any of its meat

products as natural, ALDF will cease its advocacy and investigative activities concerning the FDA's and USDA's labeling regulations, USDA's inspection program, and remaining Ag-Gag laws. To the contrary, ALDF asserts that it "will be compelled" to continue challenging USDA's current approach to inspections and that it has specific plans to continue its organizational Ag-Gag advocacy activities "[u]ntil the last Ag-Gag statute is struck down" *See* Def. SOMF ¶¶ 198-200 (citing, among other things, ALDF's 5/14/18 Interrogatory Responses at 33-35 (Def. MSJ Ex. B)). Moreover, although ALDF learned about Hormel's Natural Choice marketing in 2015 (Pl. SOMF ¶ 13), ALDF represents that it has "spent countless hours *since 2013*" working to educate the public about misleading marketing and advertising of factory farmed products, and that meat producers other than Hormel engage in "similar misleading marketing and advertising of their factory-farmed products." *See* Walden Decl. ¶¶ 13, 16 (emphasis added). Thus, the injury ALDF claims – diversion of resources to counteract advertising that results in consumer deception about factory-farmed products – is not redressable by a favorable decision from the Court.

d. Summary

ALDF's evidence shows at most that Hormel's Natural Choice advertisements gave it an additional reason to engage in work that it would otherwise have done. As one of the country's leading meat producers, Hormel is a "household name" (*see* Putsché Decl. ¶ 9), and it engages in "factory farming" that ALDF considers "inherently brutally cruel" (*see* Pl. Response to Def. SOMF ¶ 8). In these circumstances, it is not surprising that ALDF does *not* contend that it would have said and done nothing about Hormel if only Hormel had not included in its marketing the word "natural" that the FDA permits it to include in its labeling. ALDF does not offer any specific evidence that any part of its current or future battle against Hormel other than

this lawsuit was a significant, quantifiable escalation of its continuing war against the "factory-farm" practices of Hormel and other major meat producers.

ALDF admits that the "chief" organizational activity relating to Hormel's Natural Choice marketing that it plans to undertake in the future is to continue to litigate this case. *See* Supplemental Responses to Interrogatories, at 31 (Def. MSJ Ex. B). The record indicates that this lawsuit has always been ALDF's chief response to Hormel's marketing of these products and that if Hormel's advertising resulted in any incremental increase in activities in which ALDF would not otherwise have engaged, the increment is too indefinite and too small to constitute a perceptible impairment of ALDF's ability to provide services. *See D.C. Appleseed Center*, 54 A.3d at 1207. Thus, ALDF has not carried its burden to show that Hormel's Natural Choice advertisements "forced" it to divert resources to counteract the advertisements. *See Equal Rights Center,* 110 A.3d at 604.

IV. PREEMPTION

Federal law preempts ALDF's claim that Hormel misleads consumers by using the terms "natural" and "no preservatives" in advertisement for its Natural Choice products, because USDA has approved the use of these words in labeling these products. It would not be impossible for Hormel to comply with its obligations under both federal and state law, but applying the CPPA to prohibit the use of terms that USDA approved would stand as an obstacle to the accomplishment of Congress' purposes for consistent regulation of labeling of meat and poultry products.

Hormel's motion raises both a legal issue and a factual issue. The legal issue is whether a state can require advertisements to describe a product differently than labels approved by USDA describe the same product. The factual question is whether Hormel's advertisements in fact

describe its products differently than its USDA-approved labels. The Court addresses each issue in turn.

A. The legal question

The two federal statutes regulating labeling of meat and poultry products are the Federal Meat Inspection Act ("FMIA") and Poultry Products Inspection Act ("PPIA"). PPIA and FMIA prohibit the sale of meat and poultry products if the product has labeling that is false or misleading. *See Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1316 (S.D. Fla. 2017). These Acts delegate the regulation of meat and poultry products to USDA, and through its Food Safety Inspection Service ("FSIS"), USDA has promulgated regulations governing the labeling and packaging of these products. Consistent with its obligations under federal regulations, FSIS reviewed and approved Hormel's Natural Choice labels including the words "natural" and "no preservatives added." *See* Def. SOMF ¶ 19-22; Pl. Response to Def. SOMF ¶¶ 19-22. USDA has indicated that meat producers may use the term "natural" and "no preservatives" in specified circumstances. Pl. Response to Def. SOMF ¶¶ 26, 30. USDA also regulates the use of the term "no nitrates or nitrites added" in labels. Def. SOMF ¶ 41; Pl. Response to Def. SOMF ¶ 41.

Both PPIA and FMIA contain a preemption clause that provides in relevant part, "Marking, labeling, packaging, or ingredient requirements … in addition to, or different than, those made under this chapter may not be imposed by any State." *See* 21 U.S.C. §§ 467e & 678. PPIA and FMIA do not regulate advertising, and they do not preempt all state-law claims alleging false or misleading advertising. To the extent that meat producers describe their products differently in advertising than they do in labeling, states may regulate advertising to ensure that it is not false or misleading. The question in this case is different: can a state

prohibit a meat producer from using in its advertising the same terms in the same way that USDA has determined are not misleading in labeling?

To the extent that a meat producer uses in advertising the same terms with the same disclaimers that USDA has approved in labeling, state-law challenges to the advertising claims are preempted. *See Phelps*, 244 F. Supp. 3d at 1317 n.2. If this Court found misleading Hormel's use in advertising of the same terms that USDA approved in labeling, the finding would conflict with USDA's determination that Hormel's use of the terms to describe the product is not misleading. ALDF does not explain how use of the same term in the same way can be misleading in an advertisement but not in a label. Federal law regulates labeling so that consumers can use labels as the authoritative source of information about a product's ingredients, and if a producer can accurately use a term in a label, the producer should be able to use the same term in its advertising. Otherwise, for example, a state could make it illegal for a meat producer to state in its advertising that USDA approved labeling its product as "natural."

It would be inherently and inevitably confusing to consumers if the description of Hormel's products in its advertisements were materially different from the description in its labels. If Hormel provided information in its advertising about the naturalness of its products or its use of preservatives that is different from the information in its labels, the distinctive information in the advertisements, even if arguably consistent, would undermine consumers' confidence in the information in the labels, and consumers would be uncertain about information they could trust.

ALDF relies on *Wyeth v. Levine*, 555 U.S. 555 (2009). *See* Def. Opp. at 39. *Wyeth* held that the federal Food, Drug, and Cosmetic Act ("FDCA") did not preempt a tort claim under state law that the warning approved by the FDA for a drug was inadequate because it did not warn

against the specific risk that resulted in the plaintiff's injury. The Supreme Court rejected the drug company's argument that "the FDCA establishes both a floor and a ceiling for drug regulation" and that "[o]nce the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate, regardless of whether there is any evidence that the FDA has considered the stronger warning at issue." *Id*. at 573-74. The reasons for the outcome in *Wyeth* do not apply here. First, the evidence of legislative intent concerning the FDCA, including Congress' failure to include a preemption provision, indicated that Congress wanted consumers to have a state-law remedy for inadequate warnings and that federal regulation supplemented rather than supplanted state regulation. *See id*. at 566, 574-75. Here, ALDF has not pointed to any evidence that Congress intended to allow state judges or juries to disagree with USDA's conclusion about whether certain words fairly described a meat product, and PPIA and FMIA contain preemption provisions. Second, federal law permits, if not requires, drug companies to modify drug labels, even before they get FDA approval for the modification, if new data or analysis shows that the warning accepted by the FDA is inadequate. *See id*. at 569, 570-71. ALDF points to no comparable provision in PPIA and FMIA. Third, and at least equally important, the FDA had not made an affirmative decision that the drug in *Wyeth* should be administered by the method that created the specific risk at issue or that the FDA intended to prohibit the drug company from strengthening its warning to include this risk. *See id*. at 572-72. Here, FSIS made an affirmative decision that use of "natural" and "no preservatives added" was not misleading as applied to these Hormel meat products. If the FDA had affirmatively decided that the risk at issue in *Wyeth* was not sufficiently serious to require a warning to patients, the result in *Wyeth* would have been different. *See Phelps*, 244 F. Supp. 3d at 1317-18 (finding

preemption where USDA regulates use of the term "natural" in food labeling even though FDA does not).

B. The factual question

ALDF's claims would not be preempted if ALDF offered evidence that Hormel's advertisements were different in material ways from its labels, but ALDF has not offered such evidence.

In its opposition, ALDF does not dispute Hormel's assertion that ALDF did not offer expert or other evidence that consumers had different understandings of the terms "natural" and "no preservatives" when used in advertisements or labels. *See* Def. MSJ at 38.[1] ALDF does claim in its opposition that Hormel's current advertisements do not include language that USDA requires in labels describing a product as natural, but ALDF does not cite expert or other evidence that the absence of the disclaimer causes consumers to be misled. *See* Pl. Opp. at 38. ALDF points out that Hormel uses a leaf instead of an asterisk to indicate the presence of a disclaimer in its advertisements, and ALDF cites testimony by Hormel's expert that a lot of consumers may not know that the leaf is like an asterisk. *See* Opp. at 39 n.23. However, at this stage, ALDF has the burden to offer expert or other admissible evidence that consumers are misled by the use of a leaf instead of an asterisk, but it did not do so. In sum, ALDF does not offer any evidence that consumers understand the same terms differently when Hormel's uses them in advertising than when Hormel uses them in labeling or that any difference between Hormel's labels and its advertisements causes consumers to understand the same terms differently.

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[1] Citing Def. SUMF ¶ 214, Hormel asserts that ALDF abandoned its argument that the absence of a disclaimer makes "natural" misleading. See Def. MSJ at 39. However, Def. SUMF ends at ¶ 213, and the Court could not locate the language cited by Hormel. ALDF does not address this discrepancy in its opposition.

C. Law of the case

The Court does not agree with ALDF's argument that the Court is bound by its prior ruling denying Hormel's motion to dismiss on preemption grounds. *See* Pl. Opp. at 33-35; Pl. Reply at 14.

"The 'law of the case' doctrine bars a trial court from reconsidering the same question of law that was presented to and decided by another court of coordinate jurisdiction when (1) the motion under consideration is substantially similar to the one already raised before, and considered by, the first court; (2) the first court's ruling is sufficiently final; and (3) the prior ruling is not clearly erroneous in light of newly presented facts or a change in substantive law." *Kumar v. D.C. Water & Sewer Authority*, 25 A.3d 9, 13 (D.C. 2011). The doctrine also applies to relitigation of issues in the same case in the same court. *Kleinbart v. United States*, 604 A.2d 861, 864 n.6 (D.C. 1992). "[T]he law of the case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power,'" and "the important question is not whether" different judges expressed different views of the law at different stages of the case "but which view was right." *Guilford Transportation Industries v. Wilner*, 760 A.2d 580, 593 (D.C. 2000) (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.)).

With respect to the legal issue discussed in Section IV.A above, the Court's order denying Hormel's motion to dismiss did not directly address whether a state can prohibit a meat producer from using in its advertising the same terms in the same way that USDA has determined is not misleading in its labeling. In addition, "denial of a motion for summary judgment by one judge does not foreclose grant of summary judgment by another judge." *Guilford Transportation Industries*, 760 A.2d at 593 (quotation and citation omitted); *see Kumar*,

25 A.3d at 14, 15 (an order denying a summary judgment motion is ordinarily not sufficiently final to trigger the law-of-the-case doctrine). Likewise, denial of a motion to dismiss by one judge does not foreclose grant of summary judgment by another judge.

With respect to the factual issue discussed in Section IV.B above, the Court now has a more complete and specific record about whether the challenged information in Hormel's advertisements is materially different from the information in the labels approved by USDA. In opposing Hormel's motion to dismiss, ALDF relied on its allegation that Hormel's advertisements were materially different from its labels, and at the summary judgment stage, ALDF has not offered evidence that any difference is material to consumers. *See* Def. MSJ at 37-38; Def. Reply at 20 n.27.

V. SEALING

The Court grants the motions for continued sealing by Hormel and two of the four non-parties. The Court also grants ALDF's consent motion to unseal the documents that Hormel did not move to seal by the deadline in the October 16, 2017 protective order.

On February 1, Hormel filed a motion asking the Court to continue to seal approximately 100 documents that Hormel designated as confidential and that ALDF filed under seal with its summary judgment motion ("Motion"). On February 22, ALDF filed an opposition, and three days later it filed a corrected version ("Opp."). On February 27, Hormel filed a reply ("Reply").

Four non-parties filed motions to seal: Arrowsight, Inc. ("Arrowsight"); Quality Pork Processors, Inc. ("QPP"); Rabe's; and Wayne Farms. Each of these motions involves documents that the non-parties provided in response to subpoenas and that ALDF cites in its summary judgment motion. ALDF also opposes these motions.

A. Legal standard

D.C. courts apply the "principle that the public has a presumptive right of access to civil filings, and in particular to summary judgment pleadings and orders." *J.C. v. District of Columbia*, 199 A.3d 192, 207 (D.C. 2018); *Mokhiber v. Davis*, 537 A.2d 1100, 1106 (D.C. 1988); *see Courthouse News Service v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("the federal courts of appeals have widely agreed that [the First Amendment right of access] extends to civil proceedings and associated records and documents."). "This presumption of open public records is particularly strong with regard to documents in connection with a motion for summary judgment because parties' substantive rights have been decided on motion in lieu of a trial." *J.C.*, 199 A.3d at 207; *see EEOC v. National Children's Center, Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (applying a strong presumption in favor of public access to documents filed with the court); *In re McCormick & Co., Pepper Products Marketing & Sales Practices Litigation*, 316 F. Supp. 3d 455, 463 (D.D.C. 2018).

The "presumptive right of access extends to all material that becomes *germane* to a court's ruling." *Mokhiber*, 537 A.2d. at 1111 (emphasis added). ALDF agrees there is a "presumptive right of public access to documents relied on by the court in making rulings in civil cases." Opp. at 3 n.1 (citing 7/17/18 Order and 10/10/18 hearing transcript). Conversely, the public "has no presumptive right of access" to exhibits that did not play any material role in a court's decision concerning a motion. *See* Order Granting Defendant's Unopposed Motion in Support of Sealing and Redacting Certain Documents Filed by Plaintiff, at 1 (Oct. 26, 2018).

"Whether [filings] should be sealed requires the weighing of factors and interests, which should be left to the discretion of the trial court." *J.C.*, 199 A.3d at 207 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599 (1978). In evaluating the relevant interests, the Court

applies the "six-factor balancing test first articulated in *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980)." *See J.C.*, 199 A.3d at 207. The six *Hubbard* factors are: "(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the document prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purpose for which the documents were introduced." *J.C.*, 199 A.3d at 207 (quoting *Hubbard*, 650 F.2d at 317-22).

The kinds of information that "may be more readily closed from public view" include "commercial … secrets." *Mokhiber*, 537 A.2d at 1115. "For documents containing sensitive business information and trade secrets, those factors often weigh in favor of sealing and courts commonly permit redaction of that kind of information." *In re McCormick*, 316 F. Supp. 3d at 464 (quotation, ellipsis, and citation omitted).

Another kind of information that "may be more readily closed from public view" is "information that seriously invades the privacy of third parties." *Mokhiber*, 537 A.2d at 1115. "[T]he fact that the objection to access is made by a third party weighs in favor of non-disclosure." *Hubbard*, 650 F.2d at 320. Indeed, the "privacy interests of innocent third parties should weigh heavily in a court's balancing equation." *See United States v. Smith*, 985 F. Supp. 2d 506, 524 (S.D.N.Y. 2013) (quotation, ellipsis, and citation omitted). Part of the rationale for public access to pleadings is that "[b]y submitting pleadings and motions to the court for decision, one enters the public arena of courtroom proceedings and exposes oneself, as well as the opposing party, to the risk, though by no means the certainty, of public scrutiny." *Mokhiber*, 537 A.2d at 1111. This rationale does not apply to non-parties that did not voluntarily submit

documents and that do not have any direct interest at stake in the case. *See McConnell v. Federal Election Commission*, 251 F. Supp. 2d 919, 927 (D.D.C. 2003) (non-parties "clearly have a greater privacy interest than those here by their own volition").

Even if the Court does not consider a document attached to a court filing in making a ruling, a party seeking to shield the document from public view has the burden under Rule 26(c) to establish good cause for a protective order. *See Mampe v. Ayerst Laboratories*, 548 A.2d 798, 804 (D.C. 1988); *United States v. Microsoft Corp.*, 165 F.3d 952, 959-60 (D.C. Cir. 1999); *see also* Opp. at 5 (citing cases addressing protection of discovery materials not filed in connection with motions). Rule 26(c) provides, "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c)'s "good cause" standard is different from the standard governing access to judicial records because different interests are at stake. A party "has no First Amendment right of access to information made available only for purposes of trying his suit," so a protective order limiting a party's use of discovery materials to the case in which the party obtains them is "not a restriction on a traditionally public source of information." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 (1984). The price of access to the courts for plaintiffs should not include putting all discoverable information into the public domain, *see id*. at 36 n.22, and defendants and non-parties involuntarily ensnared in litigation deserve at least equal protection.

"Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co.*, 467 U.S. at 36; *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988); *United States v. Liebert*, 519 F.2d 542, 548 (3d Cir. 1975).[2] "Before a protective order may be entered, however, the

[2] Like Rule 26(c), Rule 16 of the Superior Court and Federal Rules of Criminal

party seeking it must make a showing of good cause, stating with some specificity how it may be harmed by the disclosure of a particular document or piece of information." *Mampe*, 548 A.2d at 804. The party seeking a protective order under Rule 26(c) has the burden to make a reasonably particularized showing of harm. *See* 8A C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 2035 at 157 (3d ed.); *United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007); *Klayman v. Judicial Watch*, 247 F.R.D. 19, 23 (D.D.C. 2007).

This requirement of a reasonably particularized showing "does not mean, however, that the party seeking the protective order must necessarily demonstrate to the court in the first instance on a document-by-document basis that each item should be protected." *Cipollone v. Liggett Group*, 785 F.2d 1108, 1122 (3d Cir. 1986). "In a case with thousands of documents, [requiring document-by-document determination of good cause] might impose an excessive burden on the district judge." *Citizens First National Bank v. Cincinnati Insurance Co.*, 178 F.3d 943, 946 (7th Cir. 1999). When a protective order is based on a "good cause" finding concerning specified categories of documents, a party may "designate whether discovery materials fall within any of the enumerated good cause categories set forth in the protective order," and if the other party challenges a designation, "the party seeking to avoid disclosure has the burden of persuading the court that the designated material falls within a particular good cause category." *United States ex rel. Davis v. Prince*, 753 F. Supp. 2d 561, 566-67 (E.D. Va. 2010); *see also Cipollone*, 785 F.2d at 1122.

Procedure permits entry of a protective order on a showing of good cause. As a result, cases interpreting and applying the "good cause" standard in Criminal Rule 16 are relevant to the interpretation and application of Rule 26(c). *See, e.g., United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007).

B. Hormel

The Court grants Hormel's motion to seal approximately 100 documents and redact personal identifying information from 26 documents. ALDF does not oppose Hormel's request to redact personal identifying information of Hormel employees and third-parties (*see* Motion at 3-4, 7-8), and the Court exercises its discretion under Rule 12-I(e) to grant this portion of the motion as conceded.

1. Over-designation of confidentiality

ALDF contends that Hormel's motion should be summarily denied because Hormel indiscriminately designated documents as confidential under the October 16, 2017 protective order and then refused to correct its errors. *See* Opp. at 1-3. The Court assumes, without deciding, that Hormel designated as confidential a significant number of documents that did not merit confidential designation. Even with this assumption, the Court does not agree that summary denial of Hormel's motion is warranted.

"When exercising its broad discretion [concerning discovery sanctions], a trial court must act in accordance with established standards, which include that the sanction should fit the offense." *Roe v. Doe*, 73 A.3d 132, 135 (D.C. 2013) (quotations, ellipses, and citations omitted). "Furthermore, … a trial court may impose an extreme sanction only upon a showing of severe circumstances." *Id*. (quotations and citations omitted). "In determining what constitutes severe circumstances which would warrant such an extreme sanction, we must determine whether the non-compliance resulted from willfulness and whether it prejudiced the other side," and the trial "court must also consider whether less severe sanctions will not suffice, notwithstanding the societal preference for a decision on the merits." *See id* at 135-36. (quotations and citations omitted). Even "when the trial court finds a party in civil contempt, it has broad discretion to

impose a temperate sanction in light of equitable considerations." *Federal Marketing Co. v. Virginia Impression Products Co.*, 823 A.2d 513, 528 (D.C. 2003) (quotation and citation omitted).

ALDF does not cite any rule or case suggesting that the punishment for designating as confidential documents that are not truly confidential should be release to the public of confidential documents that otherwise warrant protection. The Court exercises its discretion not to impose the punitive sanction requested by ALDF.

2. No strong presumption of public access

For the reasons discussed in Section V.A above, a strong presumption of public access applies to documents that the Court considers in deciding whether to grant a motion for summary judgment. This presumption does not apply here because the Court has not considered any of the internal Hormel documents that were filed in connection with the summary judgment motions and that Hormel seeks to seal. In granting summary judgment, the Court addressed only standing and preemption. None of the documents that are the subject of Hormel's (or the four non-parties') motion to seal is germane to the Court's ruling that ALDF lacks standing, and the Court did not consider, much less rely on, any of them. ALDF asserts that Hormel's treatment of animals is "germane" because "Hormel's standing arguments fixate on whether and how ALDF would have sought to counteract Hormel's unlawful activity." Opp. at 7. The Court disagrees with this assertion: Hormel's standing arguments, and the Court's standing analysis, focus on what ALDF did or did not do in response to Hormel's Natural Choice advertising campaign; and Hormel's internal documents are not germane to this issue. Likewise, the Court's analysis of preemption does not involve the documents that Hormel seeks to keep sealed.

The six *Hubbard* factors (*see J.C.*, 199 A.3d at 207) lead to the same result, because Hormel has carried any burden to establish that its interest in confidentiality outweighs any public interest in access. The first *Hubbard* factor is the need for public access, and the public interest in understanding the basis for judicial decisions does not apply here because the Court did not consider any of the documents at issue in granting Hormel's motion on two narrow grounds. The sixth *Hubbard* factor – the purpose for which the documents were introduced – weighs in Hormel's favor, because the Court did not consider the documents for any purpose at all.

The second *Hubbard* factor is the extent to which the public had access to the documents prior to the sealing order. Hormel provides credible evidence that the documents contain proprietary and sensitive information that Hormel does not disclose and takes reasonable steps to keep confidential. *See* Motion at 13 (citing the three affidavits attached as Ex. C-E). ALDF argues that Hormel's discussion of these documents in a publicly available filing (Hormel's response to ALDF's statements of material facts) eliminates any legitimate interest in the confidentiality of the underlying documents. *See* Opp. at 11. However, the publicly available filing includes only general information and brief excerpts from some of the documents that Hormel seeks to seal, and this filing does not contain the details that Hormel contends are confidential and competitively sensitive. To the extent that Hormel put limited information in the public domain, the public has no need to see the underlying documents containing the same information. ALDF also argues that some of the documents "describe actions Hormel has since taken in the public sphere" or contain "the type of information frequently shared among competitors in the industry." Opp. at 11. Here again, the fact that the documents contain some publicly available information does not automatically mean that the analysis in the documents is

not confidential and sensitive. The cost to Hormel of redacting confidential portions of documents exceeds any benefit to the public from access to portions that contain information already in the public domain.

The third *Hubbard* factor is whether the party objected to disclosure, and Hormel has objected to disclosure. "The strength with which a party asserts its interests is a significant indication of the importance of those rights to the party," *Hubbard*, 650 F.2d at 319, and Hormel's detailed motion and affidavits indicate the importance it attaches to the sealing of these documents.

The fourth and fifth *Hubbard* factors are the strength of Hormel's property and privacy interests and the possibility of prejudice from disclosure. These factors weigh in favor of sealing because Hormel has made a reasonably specific and substantial showing of prejudice from disclosure under the circumstances. *See* Section V.B.3 below.

For these reasons, the strong presumption of public access applicable to documents considered by the Court in deciding whether to grant a summary judgment motion does not apply here, and Hormel has carried any burden to establish that its interest in confidentiality outweighs any public interest in access.

3. Good cause

Even though Hormel does not have to rebut the strong presumption of public access that applies to documents that are germane to a court's summary judgment ruling, Hormel still has the burden to show good cause for continued sealing of these documents. *See* Section V.A above. Hormel has carried its burden – just as the Court concluded last fall when it decided to permit the continued sealing of documents submitted in connection with Hormel's motion to

dismiss. *See, e.g.*, Order Granting Defendant's Unopposed Motion in Support of Sealing and Redacting Certain Documents Filed by Plaintiff, at 1 (Oct. 26, 2018).

ALDF contends that Hormel's showing of confidentiality falls short in several ways. ALDF contends that Hormel did not make a sufficiently specific showing of the need for sealing because it grouped documents into categories instead of analyzing them individually. *See* Opp. at 10. The Court agrees that blanket, generalized assertions of confidentiality are not sufficient, but it is reasonable, and far more efficient, to make a showing for a group of documents that share common characteristics. *See* Section V.A. above. Notwithstanding ALDF's contrary arguments (Opp. at 13-20), Hormel's groupings are reasonable, and its showing is reasonably specific. The Court's review of the record does not bear out ALDF's contentions that Hormel failed to demonstrate that it keeps the information in these documents confidential and that "many of the documents Hormel seeks to seal contain competitively stale information." *See* Opp. at 11-12. ALDF also contends that sealing is not warranted simply because Hormel paid for certain research or reports. Opp. at 12. The Court agrees that this fact by itself does not justify sealing, and the Court does not understand Hormel to argue otherwise. Hormel's investment in the development of the information, however, supports its contention that protection of this information is important to it.

Accordingly, Hormel has carried its burden to show good cause for continued sealing of documents that contain sensitive business information and that did not become germane to any court ruling.

B. Non-parties

The Court grants the motions to seal filed by non-parties Arrowsight and QPP, but it denies the motions filed by Wayne Farms and Rabe's. Each of these motions involves

documents that the third party provided in response to a subpoena and that ALDF included in its summary judgment motion.

The Court has not relied on, or even considered, any of these documents in denying ALDF's summary judgment motion or in granting Hormel's motion on two narrow grounds unrelated to the subject matter of these documents. These documents were submitted as evidence of how Hormel and its suppliers treat animals, but the Court did not make any finding concerning this issue in its ruling on the summary judgment motions. ALDF argues that the Arrowsight documents are relevant to its motion for sanctions against Hormel because the documents contain information about Hormel's control and ownership of destroyed records, Opp. at 9, but the Court denies ALDF's sanctions motion on other grounds. *See* Part VI below. Accordingly, the strong presumption of public access to documents germane to a judicial ruling does not apply.

The Court concludes that Arrowsight and QPP have made a sufficient showing, through declarations, of good cause for continued sealing of these documents. These non-parties have a stronger interest in confidentiality precisely because they are not parties. *See* Section V.A above. Some of the information in several documents is available to the public. *See, e.g.*, QPP Reply at 1 (a redacted version of one document would be available through the federal Freedom of Information Act); ALDF Opp. to QPP's Motion at 8 n.4 (accepting redactions of this document consistent with FOIA). However, the public has only a minimal interest in access to information in these documents that is otherwise available, and although ALDF argues that these third parties should go to the trouble and expense of providing copies with confidential information redacted (*see, e.g.*, ALDF Opp. to Arrowsight's Motion, at 5), the cost to these non-parties of redacting

confidential portions of documents exceeds any benefit to the public from access to portions containing information that is otherwise publicly available.

The Court denies Wayne Farm's and Rabe's motions because these two non-parties did not provide an affidavit or declaration demonstrating that public disclosure of its material would cause it significant competitive or other harm. It may be easier for third parties than for parties to justify a protective order, but third parties are not automatically entitled to sealing of any information and they still must make a reasonably specific showing of good cause. Wayne Farms seeks to permanently seal excerpts of the transcript of a Rule 30(b)(6) deposition and a document concerning its operational practices. However, it has not carried its burden to show "with some specificity how it may be harmed by the disclosure of a particular document or piece of information." *See Mampe*, 548 A.2d at 804.[3] Similarly, Rabe's has not carried its burden to show good cause to seal two documents. Rabe's has not made any showing that disclosure of a letter from its lawyer to ALDF's lawyer would cause significant harm to Rabe's, nor is such prejudice established by the fact that a letter from one of its suppliers contains the boilerplate, non-specific statement that "This document contains confidential and proprietary information furnished for evaluation purposes only." Even if these documents were not previously available to the public, Rabe's has not shown that their unsealing would cause significant harm its interests.

[3] Wayne Farms states that it seek to seal WF000425, which ALDF cited in SUF ¶ 377 to support a statement about an increase in the number of cadavers. *See* Motion at1. However, in ¶ 377, ALDF cites WF000428, and although ALDF states that this page is page 2515 of its appendix, page 2515 is WF000429, which refers to an apparent increase in the number of cadavers. The Court need not resolve the discrepancy, because Wayne Foods has not shown good cause to continue sealing of any of these documents.

VI. SANCTIONS

In its motion for spoliation sanctions, ALDF argues that Hormel wrongly failed to preserve videos and other evidence concerning treatment of animals, and ALDF moves for sanctions, including an adverse inference against Hormel at the summary judgment stage, preclusion of Hormel's argument that its practices are humane, and costs. Hormel opposes the motion, arguing among other things that it imposed an appropriate litigation hold. The Court denies ALDF's motion.

"The doctrine of what has been termed spoliation of evidence includes two sub-categories of behavior: the deliberate destruction of evidence and the simple failure to preserve evidence." *Battocchi v. Washington Hospital Center*, 581 A.2d 759, 765 (D.C. 1990). "It is well settled that a party's bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction." *Id*.; *see Brooks v. D.C. Housing Authority*, 999 A.2d 134, 141 (D.C. 2010). When a loss of evidence occurs as the result of negligence, "[t]he choice of which sanction, or whether to impose any sanction at all is within the trial court's discretion, with the only real limitation being that a sanction must be just under the circumstances." *Washington v. United States*, 111 A.3d 16, 21 (D.C. 2015) (citation, quotations, and brackets omitted). In deciding whether to impose sanctions, the Court should consider three factors: "the degree of negligence or bad faith involved, the importance of the evidence lost to the issues at hand, and the availability of other proof enabling the party deprived of the evidence to make the same point." *Battocchi*, 581 A.2d at 767; *see also Williams v. Washington Hospital Center*, 601 A.2d 28, 32 (D.C. 1991).

The Court need not decide whether, or with what intent, Hormel violated any duty to preserve videotapes or other evidence. "Standing is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims," *Grayson*, 15 A.3d at 229 (quotation and citation omitted), and lack of standing means that the Court lacks subject-matter jurisdiction over a dispute and must dismiss the complaint without a ruling on the merits. *See UMC Development, LLC v. District of Columbia*, 120 A.3d 27, 48-49 & nn. 33-34 (D.C. 2015). For the reasons discussed in Part III, ALDF does not have standing to pursue any claim, including its request for sanctions, so the Court must dismiss the case. Moreover, the videotapes do not relate to whether ALDF has standing or whether federal law preempts its claims, and any adverse inference drawn from the evidence would be of no help to ALDF concerning the two reasons for entry of summary judgment in Hormel's favor. Therefore, sanctions relating to Hormel's treatment of animals would not be "just under the circumstances." *See Washington*, 111 A.3d at 22. In addition, monetary sanctions are not appropriate because the Court denies ALDF's motion for sanctions and no court order obligated Hormel to preserve the evidence in question. *See Perry v. Sera*, 623 A.2d 1210, 1216 (D.C. 1993) (a court order is a "prerequisite" to sanctions under Rule 37(b)).

VII. CONCLUSION

Accordingly, the Court orders that:

1. Hormel's motion for summary judgment is granted.

2. ALDF's motion for summary judgment is denied on the merits with respect to standing and denied as moot otherwise.

3. Hormel's motion to seal is granted.

4. Redacted copies of documents containing personal identifying information attached as Exhibit 1 to the Affidavit of Jeremy Zavoral shall be filed in the public record, but original, unredacted copies filed by ALDF shall remain sealed.

5. All documents identified in Part II of Exhibit F to the Affidavit of Martin Demoret shall remain sealed.

6. The motions to seal filed by non-parties Arrowsight and QPP are granted.

7. The materials of Arrowsight and QPP Rabe's Quality Meat that are attached to summary judgment filings shall remain sealed.

8. Wayne Farms' motion to seal is denied.

9. The excerpts of the transcript of the deposition of Wayne Farms' Rule 30(b)(6) witness and the documents produced by Wayne Farms that ALDF submitted with its summary judgment motion shall be unsealed.

10. Rabe's motion to seal is denied.

11. The January 9, 2018 letter to Rabe's and the December 13, 2018 letter from Rabe's counsel to ALDF's counsel shall be unsealed.

12. ALDF's March 5, 2019 consent motion to unseal documents that Hormel has not moved seal is granted.

13. The documents identified in ALDF's March 5 motion to unseal are unsealed.

14. ALDF's motion for sanctions is denied.

15. All other pending motions are denied as moot.

16. The mediation scheduled for April 18, 2019 is canceled.

Anthony C Epstein

Anthony C. Epstein
Judge

Date: April 8, 2019

Copies to:

Leah M. Nicholls
David S. Muraskin
Kim E. Richman
Tracy D. Rezvani
Kelsey Eberly
Daniel Waltz
Jay Shooster
Counsel for plaintiff Animal Legal Defense Fund

Allison Holt
Miranda L. Berge
E. Desmond Hogan
Counsel for defendant Hormel Foods Corporation

Jacob M. Lebowitz
Counsel for third-parties Arrowsight, Inc., Quality Pork Processors, Inc. and Rabe's Quality Meat, Inc.

Jonathan A. Constine
Counsel for third-party Wayne Farms, LLC