

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

HORMEL FOODS CORPORATION,

Defendant.

Case No. 2016 CA 004744

Judge Fern F. Saddler

Next Court Date: Dispositive Motions Due
Event: January 11, 2019

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR SPOILIATION SANCTIONS**

Plaintiff Animal Legal Defense Fund (“Plaintiff” or “ALDF”), by and through its counsel, files this Memorandum in Support of Plaintiff’s Motion for Spoliation Sanctions.

STATEMENT OF FACTS

Since August 2017, ALDF has worked diligently to obtain documents relevant to Hormel’s animal treatment and, since ALDF learned of its existence, to procure video footage of Hormel slaughter facilities that Hormel had recorded in order to monitor the treatment of animals used in its Natural Choice and other products—a central issue in this case. After months of delay and obfuscation by Hormel, an order to compel production, and a subpoena to a third-party (with its own order to compel production), ALDF determined Hormel had such videos in its custody and control all along. Hormel still has not produced nearly all the videos, citing (a) the expiration of the files and/or (b) the close of discovery. Despite ALDF’s requests, Hormel refuses to explain why these videos were not produced under the Court’s prior order, or why they were not preserved, and were instead allowed [REDACTED] or be destroyed. ALDF seeks sanctions for this spoliation.

A. Procedural History and Motion to Compel

Plaintiff filed the instant case on June 29, 2016 and served on July 14, 2016. The Complaint alleged “Hormel’s Natural Choice advertisements are materially false and tend to mislead because the animals are born, raised, and killed in unnatural, unsafe, and cruel conditions that do not comport with reasonable consumers’ perceptions of ‘natural’ meat, as evidenced by numerous surveys.” Complaint ¶ 89. The complaint specifically cited video evidence of Hormel’s slaughter practices as evidence of Hormel’s false and misleading conduct. *See, e.g.*, ¶¶ 121, 190-92. Thus, from July 14, 2016 on, Hormel was duty bound to preserve videos of inhumane slaughter incidents.

Consistent with its allegations, ALDF’s initial requests for production served on August 10, 2017 asked for “DOCUMENTS [which was defined to include videos] sufficient to determine the conditions under which all animals used in YOUR Natural Choice product line are slaughtered[,]” which included “all monitoring of animal welfare and meat safety.” App172 (definition); App175. ALDF also sought “ALL DOCUMENTS RELATING TO YOUR or YOUR contractors’ ...compliance with the Humane Methods of Slaughter Act, including but not limited to any DOCUMENTS RELATING TO pre-slaughter handling, treatment or slaughter of non-ambulatory disabled animals, ineffective stunning, and/or animals regaining consciousness during the slaughter process.” App175. Furthermore, ALDF requested “any DOCUMENTS RELATING TO the welfare of birds during slaughter and instances of birds killed other than by slaughter at slaughter plants.” App176. These requests were relevant to ALDF’s claims, to Hormel’s denials in its Answer,¹ and to Hormel’s 15th affirmative defense that it at all times complied with all applicable laws.²

1 *E.g.*, Defendant Hormel Foods Corporation’s Answer to Plaintiff’s Complaint at ¶¶150, 165.

2 Defendant, subject to a *pages* of general boilerplate objections and reservation of rights (App158-165), and numerous specific objections, stated that it “has withdrawn its defense that it *at all times* acted in good faith and in compliance with applicable federal and state laws and regulations.” App167

After extensive negotiations, (Rule 37 Certificate at 1), ALDF filed a Motion to Compel production of documents regarding Hormel’s slaughter practices, among other issues. On January 30, 2018, Judge Kravitz granted the motion and ordered Hormel to produce, within 30 days, documents showing defendant’s actual slaughter practices and Hormel’s compliance (or non-compliance) with applicable federal laws. Order at 2-3. As ALDF later learned, Hormel failed to produce countless videos documenting ██████████” of “██████████,” and otherwise unlawful acts of animal cruelty, and thus, failed to comply with this Order.

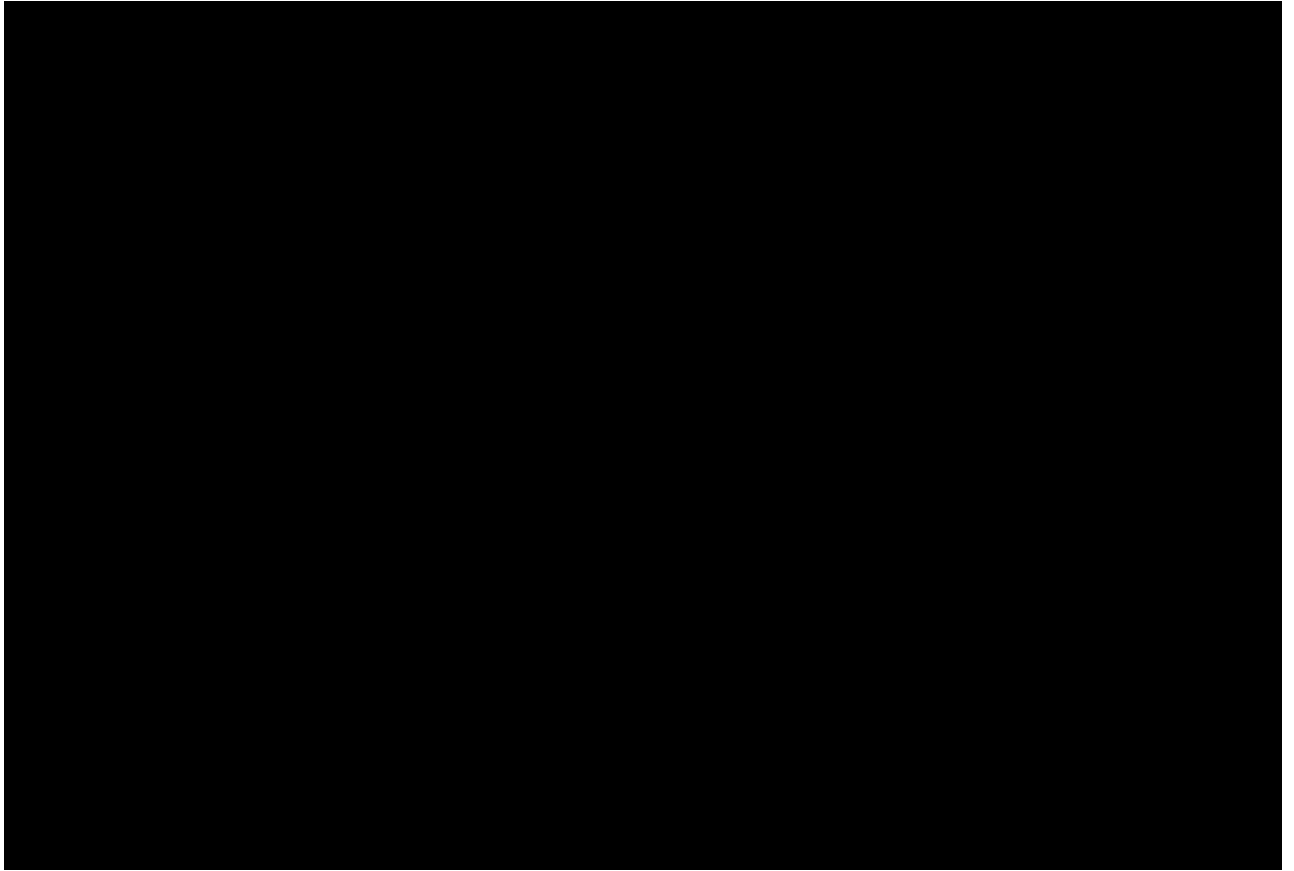
B. Arrowsight Video Auditing

In July 2018, ALDF learned that Hormel contracts with Arrowsight, Inc. (“Arrowsight”) to ██████████. See ██████████ ██████████ ██████████ App031-42 (“Agreement”). The contract provides that any “██████████ ██████████—here Hormel. App031 at §5(c). “██████████ ██████████. App031-32 at §5(a)-(b), 6. Arrowsight, only maintains ownership of ██████████ ██████████. App32 at §6. (emphasis added). The ownership of the ██████████ ██████████ at all times. *Id.* (defining ██████████ ██████████.”); see also App039 (“██████████”).

Exhibit A to the Agreement outlines that Arrowsight “██████████ ██████████” to ██████████. The videos are used for a “██████████ ██████████. Cf. App035 at §1, with

(emphasis added). However, this is not an unequivocal waiver and is subject to pages of future potential loopholes. It also does not otherwise impact the relevance of the materials to the claims, or minimize the culpability of the conduct discussed herein.

e.g., App001-4; App043. Arrowsight also provides “[REDACTED]
[REDACTED]” Arrowsight [REDACTED] App035; *see also* App038; App041. *See*,
for example:



App025.

Arrowsight agreed to “[REDACTED].”

App038 (emphasis added). Further still, the Agreement states that “[REDACTED]

[REDACTED]” *i.e.*, the Hormel plants [REDACTED] App039. This service resulted in [REDACTED]

[REDACTED]. *See* App037; App041 ([REDACTED]

[REDACTED]

[REDACTED]). Hormel produced only a handful of approximately one-minute-long video clips.

In recognition of the fast-approaching discovery deadline, and to mitigate Hormel's apparent failure to produce these videos, ALDF issued a subpoena to Arrowsight dated July 27, 2018 and wrote to Hormel on August 3, 2018. App047-49 at 1-2. ALDF requested that Hormel immediately confirm that it produced all of the animal welfare auditing footage in its possession, custody or control, or otherwise produce any remaining videos in accordance with the Court's January 30, 2018 Order. *Id.*

On August 21, 2018, Hormel curtly responded that it had "produced all of the relevant videos within the parties' agreed-upon date range that it found after a reasonable search." App050-53 at 2. On September 4, 2018, ALDF provided Hormel with a detailed response, citing to over a dozen documents produced by Hormel, demonstrating that:

- (1) Hormel contracted with Arrowsight to [REDACTED];
- (2) Hormel employees [REDACTED];
- (3) Multiple [REDACTED];
- (4) Hormel [REDACTED];
- (5) Hormel has [REDACTED]; and
- (6) These videos are [REDACTED].

App054- 58, at 1-2. On September 7, 2018, Hormel disputed ALDF's characterizations and stated few such videos were located and produced to ALDF because "the videos themselves are made available to Hormel Foods [REDACTED]." App059-62., at 3. In other words, Hormel disputed the terms of its Agreement with Arrowsight and instead characterized its holding of records as [REDACTED] plants. In addition to the contract itself, Arrowsight's [REDACTED]

[REDACTED] (at a minimum). App025;

App038. Thus, Hormel has apparently represented that it does not have possession, custody or control of videos that, according to its contract with Arrowsight, [REDACTED]. App039.

In the face of Hormel's refusals, ALDF pursued its subpoena to Arrowsight, and, after motions practice in New York, finally obtained documents from Arrowsight on October 4, 2018. This production, however, did not include videos as, per Arrowsight's agreement with Hormel,

[REDACTED]

[REDACTED],” and thus, the footage is exclusively within Hormel's possession. *Id.*

Arrowsight's and Hormel's documents nevertheless negate Hormel's suggestion that it lacked possession, custody, or control of the videos, and therefore, Hormel was under an obligation to prevent their destruction. Putting aside [REDACTED], Hormel's documents suggest it routinely [REDACTED] (contradicting its claim that the videos were no longer in its control). App156-57. Moreover, Arrowsight's documents establish that to the extent [REDACTED]

[REDACTED], further indicating Hormel could have taken steps to preserve the videos. App025. Indeed, a Hormel employee refers to [REDACTED]

[REDACTED]

[REDACTED]. App154. Thus, regardless of its failure to put in litigation holds allowing certain videos [REDACTED], Hormel had the ability to [REDACTED]

[REDACTED].

On October 26, 2018, ALDF again wrote to ask Hormel why additional videos had not been collected and produced. App063. On November 2, 2018, Hormel wrote that, because the fact discovery deadline had passed, it would not answer ALDF's questions. App063 at 1. In short, since it was able to ignore the Court's order, and mislead ALDF as to the nature of its ownership and

holding of these videos, long enough for discovery to close, Hormel took the position it could ignore its spoliation and needn't even explain what if any search it undertook for the responsive videos.

The Arrowsight video evidence would provide a unique depiction of the true nature of Hormel's inhumane slaughter practices, which cannot be fully comprehended through other media. Documents produced to ALDF confirm that Hormel recognizes the [REDACTED]. For example, in internal correspondence, Hormel employees have admitted that [REDACTED].” App152. For example, [REDACTED], in violation of federal law. *See e.g.*, App027; A029.

On November 30, 2018, following Judge Neal Kravitz's suggestion on informally handling discovery disputes,³ ALDF served its letter brief outlining Hormel's failure to comply with his prior Order and requesting a teleconference with the Court. App067-69. Hormel responded on December 5, 2018. Therein, Hormel took the remarkable position that after months of negotiation, a motion to compel, *and* an order forcing their production, ALDF had “not been diligent” in seeking this data and that its demand for these videos was “untimely.” App071. Moreover, despite an obligation to produce *even prior to* the Court's January 30, 2018 Order compelling same, Hormel argued that ALDF was not entitled to the discovery absent a motion to reopen fact discovery. App071-72. Unfortunately, Judge Kravitz did not schedule the teleconference and has since rotated off of this docket. ALDF therefore re-raises these issues and seeks sanctions.

³ Hearing Transcript, October 10, 2018, at 73-74. (App148-49)

ARGUMENT

As early as July 14, 2016, Hormel was “obligated to implement a litigation hold with respect to relevant documents including electronically stored information for the ‘key players’ involved with the dispute,” which includes Arrowsight monitoring videos in Hormel’s possession and videos [REDACTED] Hormel by Arrowsight. *See Goodman v. Praxair Servs.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009) (Grimm, J.).⁴

As summarized above, Hormel contracted with Arrowsight to: (a) [REDACTED], (b) [REDACTED]”, [REDACTED], (c) send [REDACTED], and (d) [REDACTED]. *Supra* at page 3-4.

Over the course of several years, Arrowsight identified [REDACTED]. Hormel testified that it uses these videos to [REDACTED] Bollum 30(b)(6) Dep. at 99:7-100:4 (App045-46). The small handful of videos produced do not capture a [REDACTED]. *See, e.g.*, App027; App029. Judge Kravitz found evidence related to Hormel’s inhumane slaughter relevant; video is a unique form of evidence demonstrating not only the violation of applicable laws, but the nature and extent of the inhumane practices at Hormel’s slaughter plants. January 30, 2018 Order at 2.

The Arrowsight videos would support ALDF’s claims that Hormel’s actual practices regarding the slaughter of animals used for its “natural” products was contrary to the pervasive

⁴ This Court may look to Maryland common law for guidance since “the District of Columbia derives its common law from Maryland as of 1801.” *West v. United States*, 866 A.2d 74, 79 (D.C. 2005); *In re C.A.P.*, 633 A.2d 787, 790 (D.C. 1993) (“District derives its common law from Maryland and decisions of Maryland courts on questions of common law are authoritative in the absence of District authority”); D.C. Code § 45-401 (2001).

messaging behind the “Make the Natural Choice” campaign. By spoliating these videos, or outright ignoring a Court order to produce them, Hormel has sought to benefit its litigation position to ALDF’s detriment.

A. Hormel Had a The Duty to Preserve Evidence

Hormel was under a “duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.” *E.g., Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 33 n.3 (D.D.C. 2004). A party to litigation has “an obligation to preserve and also not to alter documents it knew or reasonably should have known were relevant if it knew the destruction or alteration of those documents would prejudice its opponent.” *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1481 (D.C. Cir. 1995) (cleaned up); *see also Williams v. Washington Hosp. Ctr.*, 601 A.2d 28, 32 (D.C. 1991) (recognizing duty to preserve evidence). Even “if a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (cleaned up). Notably, “the duty to preserve evidence relevant to litigation of a claim is a duty owed to *the court*, not to a party’s adversary.” *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 525 (D. Md. 2010) (Grimm, J.). Thus, both the Court *and* ALDF are harmed by spoliation.

The duty to preserve includes documents prepared *for those* parties, to the extent those documents can be readily identified. “The duty also extends to information that is relevant to the claims or defenses of *any* party, or which is ‘relevant to the subject matter involved in the action.’” Thus, the duty to preserve extends to those key players likely to have relevant information,”

whether or not the key player is a litigant. *Goodman*, 632 F. Supp. 2d at 512 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003) (Scheidlin, J.)). Determining “key players” in litigation is “not dependent on the volume of interaction between an individual and a litigant, but rather is determined by whether an individual is likely to have information relevant to the events that underlie the litigation.” *Id.* As discussed below, the “key player” designation can and has applied to outside third-parties through basic agency principles.

The safe harbor described in Fed. R. Civ. P. 37(e) – which applies to “information lost as a result of the routine, good-faith operation of an electronic information system” – does not apply once litigation has initiated, after which a party is required to cease such “routine, good faith” document destruction policies. *See, e.g., Thompson v. HUD*, 219 F.R.D. 93, 100 (D. Md. 2003). “It generally is recognized that when a company or organization has a document retention or destruction policy, it ‘is obligated to suspend’ that policy and ‘implement a ‘litigation hold’ to ensure the preservation of relevant documents’ once the preservation duty has been triggered.” *Victor*, 269 F.R.D. at 524.

B. Hormel’s Duty Extends to Information Maintained by Third-Party Vendors

Even if the evidence did not show that Hormel has [REDACTED] [REDACTED]), Hormel was nevertheless obligated to notify and instruct Arrowsight to preserve. Hormel failed to do this when it failed to take any action to prevent Arrowsight video clips [REDACTED]. Thus, it can be liable for spoliation.

As the Fourth Circuit has noted, if a party cannot fulfill the duty to preserve because he does not own or control the evidence, “he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.” *Silvestri*, 271 F.3d at 591. However, if, as here, there is some

agency, some contractual relationship over the documents, then courts have shifted the duty from one of notice to one of preservation and even production. *See GenOn Mid-Atlantic v Stone & Webster, Inc.*, 282 F.R.D. 346, 356 (S.D.N.Y. 2012) (“I therefore conclude, at least for present purposes, that Shaw has met its burden of establishing that FTI’s materials related to the audit were within GenOn’s practical control. It follows that GenOn had a duty to ensure that those materials were adequately preserved.”); *Haskins v. First Am. Title Ins.*, 2012 U.S. Dist. LEXIS 149947, *4 (D.N.J. Oct. 18, 2012); *United States v. Kilroy*, 523 F. Supp. 206, 215 (E.D. Wis. 1981) (control found through practical ability to obtain third-party records). This is especially true if documents are considered to be under a party’s control. *Goodman*. 632 F. Supp. 2d at 515 (when the party has “the right, authority, or practical ability to obtain the documents from a non-party to the action.”).⁵

Finally, given the contractual terms, and the degree of control vested in Hormel over the circumstances of the videos’ generation and maintenance, it would also be reasonable to conclude the Hormel had an affirmative duty to do more than merely notify Plaintiff and Arrowsight but to also seek a litigation hold and enforce it. *Cf. Silvestri*, 271 F.3d at 591. Hormel, as the [REDACTED] had a [REDACTED] from Arrowsight as a means of preserving them. *Cf. App30-42 with GenOn*, 282 F.R.D. at 356.

C. This Court has the Power to Sanction Hormel for Spoliation

Spoliation is defined as “the destruction or material alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Silvestri*, 271 F.3d at 590); *Smith v. Cafe Asia*, 246 F.R.D. 19, 21 n.2 (D.D.C. 2007). This Court has the inherent authority, as well as authority granted by Rule 37(b)(2) to issue sanctions for

⁵ Further, to the extent Arrowsight is used to create, maintain, and then “[REDACTED] evidence as a means of avoiding discovery obligations, Hormel had an affirmative duty to produce *from* Arrowsight’s holdings. *See Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007); *Chura v. Delmar Gardens of Lenexa, Inc.*, 2012 U.S. Dist. LEXIS 36893 (D. Kan. 2012).

spoliation. *Victor*, 269 F.R.D. at 517; *Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011). The Court’s inherent authority arises “when a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process.” *Victor*, 269 F.R.D. at 517.⁶

Sanctions for spoliation are issued to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. *Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759, 766 (D.C. 1990); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). The doctrine covers two categories of behavior: the deliberate destruction of evidence and the mere failure to preserve evidence. *Battocchi*, 581 A.2d at 765. Deliberate destruction can include not only bad faith destruction, but also grossly negligent or merely negligent destruction: “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.*

Spoliation sanctions also reach grossly negligent destruction: “[U]pon a finding of gross indifference to or reckless disregard for the relevance of the evidence to a possible claim, the trial court *must* submit the issue of lost evidence to the trier of fact with corresponding instructions allowing an adverse inference.” *Id.* at 767 (emphasis added). “[W]hen the loss or destruction of evidence is not intentional or reckless, by contrast, the issue is not strictly ‘spoliation’ but rather a failure to preserve evidence.” *Id.* Even if the conduct does not reach “gross indifference or reckless disregard” the Court still has discretion to award adverse inferences weighing [1] the degree of negligence or bad faith involved, [2] the importance of the evidence lost to the issues at hand, and

⁶ This Court is also authorized by Rule 37(b)(2) to issue sanctions. Here, Hormel’s failure to abide by the Court’s January 30, 2018 Order is sufficient cause. *See Goodman*, 632 F. Supp. 2d at 505; *cf.*, *Victor Stanley*, 269 F.R.D. 497, 519-20 (D. Md. 2010)(Grimm, J.).

[3] the availability of other proof enabling the party deprived of the evidence to make the same point. *Williams*, 601 A.2d at 32 (hereinafter the *Williams* test).

D. The Court has Discretion to Levy Many Types of Sanctions Against Hormel.

There are many equitable and penal sanctions available to the Court for spoliation, including dispositive sanctions, awards of attorneys' fees and expenses, and drawing adverse evidentiary inferences or precluding the admission of evidence. *Shepherd*, 62 F.3d at 1475. In determining the severity of the sanctions imposed, the court may consider the resulting prejudice to the other party, any prejudice to the judicial system, and the need to deter similar misconduct. *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996).

The D.C. Circuit has subdivided these sanctions into two categories: (1) punitive or penal sanctions; and (2) issue-related sanctions. *See Shepherd*, 62 F.3d at 1478. Issue-related sanctions include adverse evidentiary determinations and preclusion of the admission of evidence. *Id.* *Shepherd* found that, "because issue-related sanctions are fundamentally remedial rather than punitive," a court may impose such sanctions "whenever a preponderance of the evidence establishes that a party's misconduct has tainted the evidentiary resolution of the issue." *Id.* Punitive or penal sanctions include dismissal or default judgments, contempt orders, awards of attorneys' fees, and the imposition of fines. *Id.* They require a higher burden of proof than issue-related sanctions; a court "must find clear and convincing evidence of the predicate misconduct" before imposing them. *Id.*

1. Adverse Inferences are Appropriate Here

A fact-finder "may be permitted to draw an adverse inference from the failure of a party to preserve evidence within his exclusive control." *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. 1998); *Battocchi*, 581 A.2d at 766-67. "Allowing the trier of fact to draw the inference

presumably deters parties from destroying relevant evidence before it can be introduced at trial.”

Battocchi, 581 A.2d at 766.

The inference thus *does not* necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, *against the whole mass of alleged facts* constituting his cause.

Stancil v. United States, 866 A.2d 799, 816 n.29 (D.C. 2005) (emphasis in original). Adverse inferences *must be* granted if bad faith or grossly negligent destruction is shown. *Battocchi*, at 767.

They *may* be granted for the failure to preserve (or merely negligent destruction) under *Williams*.

a. The Court should grant adverse inferences at summary judgment

Adverse inferences are available at the summary judgment phase. *Gerlich v. United States Dept. of Justice*, 711 F.3d 161, 170-71 (D.C. Cir. 2013). ALDF respectfully requests imposition of an inference in its favor at summary judgment. Through use of such an adverse inference, the Court can correct Hormel’s conduct in failing to preserve relevant and highly probative evidence, ameliorate the prejudice to ALDF, and prevent Hormel from being rewarded for its failure to preserve. ALDF, therefore, requests the Court adopt *Stancil* inferences on the issues discussed.

In *Thaqi v. Wal-Mart Stores E., LP*, 2014 U.S. Dist. LEXIS 45107, at *17 (E.D.N.Y. Mar. 31, 2014), the defense had provided several conflicting explanations for why a video was not produced. Given defense counsel’s later statements, which called into doubt these explanations, the court found it established that the defendant’s failure to produce to the video “has not been satisfactorily explained” and an adverse inference was warranted. *Id.* at *25. The adverse inference on its own prevented summary judgment against the plaintiff. *Id.* at *25; *cf. Roese v. Keyco, Inc.*, 2008 U.S. Dist. LEXIS 62454, *13-14 (D. Md. Aug. 12, 2008) (since video was deleted *prior to* spoliation, no spoliation found).

The Arrowsight videos are the only percipient “witnesses” to actual slaughter practices

which are relevant to ALDF's claims. Hormel's failure to institute a hold internally as well as at Arrowsight, despite the information being referenced in the pleading, sought in discovery, and ordered by the Court, demonstrates at least grossly negligent conduct, if not outright bad faith. Accordingly, ALDF request that the Court permit *Stancil* inferences; i.e., inferences which operate "indefinitely though strongly, against the whole mass of alleged facts constituting his cause." 866 A.2d at 816 n.29. Alternatively, the Court may limit adverse inferences to issues, arguments, and proofs relevant to slaughter practices.

b. The Court should grant adverse inferences should there be a trial.

ALDF is also entitled to an adverse inference at any trial. *Ashraf-Hassan v. Embassy of Fr.*, 130 F. Supp. 3d 337, 340 (D.D.C. 2015); *Silverman v. United States*, 2011 U.S. Dist. LEXIS 1806, at *13 (M.D.N.C. Jan. 7, 2011); *Seoul Broad. Sys. Int'l v. Young Min Ro*, 2011 U.S. Dist. LEXIS 82377, at *14 (E.D. Va. July 26, 2011). Neither ALDF, nor the Court, should accept any self-serving argument that sufficient materials have been produced for ALDF's case-in-chief, or that Hormel was able to hide the ball long enough for the parties to reach the fact discovery deadline. *See, e.g.*, App59-62. Here, the litigation was already initiated when Hormel destroyed, or failed to preserve, the videos. Hormel not only failed to inform ALDF of the loss or expiration of these files (████████████████████), but continued to allow their loss, and then *hid their loss* or ██████████ through obfuscation and misdirection.

The "failure to issue a litigation hold prevents the Court from determining the exact number of relevant ... documents from the key players that were not preserved." *Goodman*, 632 F. Supp. 2d at 517. Such a failure has similarly hampered ALDF here and will further hamper the Court. Hormel, its in-house counsel, and its litigation counsel all failed to prevent the loss of crucial evidence by allowing Arrowsight and Hormel to expire and/or destroy these videos. This mandates

sanctions no matter what Hormel turned over.

Indeed, *Chen* held that a video that tended to prove, or disprove, an element of the claim, should clearly have been preserved and the failure to do so warranted an adverse inference. 839 F. Supp. 2d at 13. Judge Friedman explained that to justify the issuance of an adverse inference instruction, “the spoliation of evidence need not be ‘purposeful,’ as the defendant implied; *negligent spoliation* may suffice.” *Id.* at 14 (emphasis added, cleaned up). The court found that Red Roof was at least negligent in failing to preserve this video. *Id.* Judge Friedman noted that Red Roof had possession of the video (just as Hormel had [REDACTED]) and could have preserved the video by halting the periodic overwrite or by making a copy of the video (just as Hormel could have [REDACTED]). *Id.* Given the culpability finding, relevance⁷ was satisfied and a reasonable fact-finder “could also find that the destroyed evidence was adverse to Red Roof.” *Id.*

The exact same is true here. Hormel failed to stop the [REDACTED] of the slaughter monitoring videos despite direct references to similar videos in the complaint and discovery requests. It failed to produce the vast majority of the video evidence (even when ordered to by the Court) which under contract [REDACTED]. Then, once ALDF learned of the evidence, it had been destroyed (and/or [REDACTED] and Hormel argues that ALDF should have caught the failure it had taken great pains to conceal sooner. Hormel’s disregard for the Court and discovery rules warrants an adverse inference.

⁷ On the issue of relevance, Judge Friedman noted that in the context of spoliation, the concept of relevance “encompasses not only the ordinary meaning of the term, but also that the destroyed evidence would have been favorable to the movant.” *Chen*, 839 F. Supp. 2d at 14 (quoting *Zubulake*, 220 F.R.D. at 217-18).

2. *The Court Should Preclude Certain Evidence or Arguments at Summary Judgment or Trial*

Preclusion ensures a party will not be able to profit from its own failure to comply with discovery rules, or the orders or rules set forth by the Court. *D'Onofrio v. SFX Sports Group, Inc.*, 2010 U.S. Dist. LEXIS 86711, *19-20 (D.D.C. Aug. 24, 2010) (Facciola, J) (citing cases). Preclusion has been said to “provide an approach that flows more logically when the destruction of evidence is not in bad faith.” *Id.* at *31. Preclusion may be affirmative (a party is precluded from proving a fact) or negative (a party is precluded from disproving what the other party’s evidence establishes). *Id.* at *20. Here, preclusion could prevent Hormel from contending that its slaughter practices are humane and in compliance with all applicable laws, or that its facilities are clean and its animals not diseased.

In *Jenkins v. Woody*, 2017 U.S. Dist. LEXIS 9581, *45 (E.D. Va. Jan. 21, 2017), the court held that the lost video “would have been the only unbiased and dispassionate depiction of events” which were relevant to the claims and issues. On this basis, in addition to awarding an adverse inference and fees, the court precluded “any evidence or argument that the contents of the video corroborated the [spoilator’s] version of events.” *Id.* at *46; see *Long v. Celebrity Cruises, Inc.*, 2013 U.S. Dist. LEXIS 202770, *22 (S.D. Fla. July 31, 2013) (court should not allow party to benefit from its failure to preserve). The videos would have shown Hormel’s true slaughter practices. Indeed, they are the only evidence of those slaughter practices unfiltered by human bias. It chose to allow them to be lost or to ██████ (or deliberately violated the Court’s order and refused to produce them). Therefore, it should be prohibited from making any argument regarding how, and under what conditions, it slaughters animals destined for “Natural Choice” products.

3. *The Court Should Award Fees and costs.*

Generally, if a “victim demonstrates that [another party] destroyed discoverable material it

knew or should have known was relevant to pending, imminent, or reasonably foreseeable litigation, courts award the victim its attorney's fees and costs on the sanctions motion." *Chen*, 839 F. Supp. 2d at 16. Attorneys' fees are a common judicial solution to spoliation because of the wide variety of scenarios such sanctions may address. *E.g.*, *Bradley v. Sunbeam Corp.*, 2003 U.S. Dist. LEXIS 14451, *56 (N.D. W. Va. Aug. 4, 2003) (collecting cases). In assessing the need and extent of monetary sanctions, a court should focus more on the conduct of the spoliating party than on whether documents were lost, and, if so, whether those documents were relevant and resulted in prejudice to the innocent party. *Victor*, 269 F.R.D. at 536. The appropriate scenarios for monetary sanctions include:

- (1) as an alternative to dismissal or an adverse jury instruction;
- (2) if additional discovery must be performed after a finding that evidence was spoliated;
- (3) award a prevailing party its reasonable fees and expenses incurred in making the motion; and
- (4) award a prevailing party its reasonable costs associated with the motion plus any investigatory costs into the spoliator's conduct.

See Goodman, 632 F. Supp. 2d at 523-24.

Hormel's destruction of, and failure to preserve or produce, the videographic materials also warrant monetary sanctions in the form of ALDF's fees and costs. *See Victor*, 269 F.R.D. at 539. The Court's inquiry here focuses more on the conduct of the spoliating party than on whether documents were lost, and, if so, whether those documents were relevant and resulted in prejudice to the innocent party. *Id.* at 536; *Chen*, 839 F. Supp. 2d at 16. A monetary award is consistent with the scenarios outlined in *Goodman*, including when a plaintiff is required to pursue additional discovery after finding that the requested evidence was spoliated and that plaintiffs has incurred costs and expenses in making the motion. *Goodman*, 632 F. Supp. 2d at 523-24; *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 526 (S.D. W. Va. 2014) (financial

compensation warranted since spoliation “unduly complicated the Plaintiffs’ discovery and case preparation and has unnecessarily increased for Plaintiffs the costs of litigation.”⁸

Notably, attorney’s fees and costs should be awarded whether or not more substantive sanctions are granted. *Goodman*, 632 F. Supp. 2d at 524 (“in addition to a spoliation sanction, a court will award a prevailing litigant the litigant’s reasonable expenses incurred in making the motion, including attorney’s fees.”) (citing *Chan v. Triple 8 Palace*, 2005 WL 1925579, at *10 (S.D.N.Y. Aug. 11, 2005) (“plaintiffs are also entitled to an award of the costs, including attorneys’ fees, that they incurred in connection with this motion”)); *see also* Fed. R. Civ. P. 37(a)(5)(A).

Here, the spoliation of the videos demanded additional time and effort by ALDF’s counsel to understand and explore possible (and ultimately unsuccessful) solutions to the discovery voids resulting from Hormel’s conduct. The additional time and effort expended by ALDF is evidenced in the extensive written exchanges and teleconferences with Hormel and Arrowsight, relating to the production, and later destruction of, the materials. *State National Insurance Company v. County of Camden*, 2012 U.S. Dist. LEXIS 38504 (D.N.J. 2012) (awarding monetary sanctions for reasonable costs associated with a spoliation motion and investigation). In *Camden*, the defendant also failed to place a litigation hold. *Id.* at *2. The court imposed sanctions because the resulting destruction of documents not only represented spoliation, but also required opposing counsel to spend time, money, and energy investigating the extent of the damage to their client’s case caused by the deletion. *Id.* at *5.

⁸ Plaintiff shall provide an itemized invoicing of reasonable fees and expenses associated with the filing of the instant motion, as well as efforts expended through investigation and additional discovery. *Cf. Goodman*, 632 F. Supp. 2d at 524; *Victor Stanley*, 369 F.R.D. at 540-41. Plaintiff can provide an unredacted report to the Court and, should the Court deem appropriate, a redacted version to Hormel. By awaiting the Court’s order, Plaintiff (a) avoid the expenditure of time to prepare reports and (b) permits it to submit reports that target the information the Court may require.

CONCLUSION

For the foregoing reasons, ALDF respectfully request the Court impose *Stancil* adverse inferences in ALDF's favor during Summary Judgment and Trial. Alternatively, ALDF requests adverse inferences on issues relevant to slaughter practices and conditions. ALDF further request Hormel be precluded from making any argument regarding how, and under what conditions, it slaughters animals destined for "Natural Choice" products, as well as how such practices and conditions are in compliance with all applicable laws and at all times. Finally, ALDF seeks monetary sanctions, and any other sanctions deemed proper by the Court.

Date: January 11, 2019

Respectfully Submitted,

/s/ Tracy D. Rezvani

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CERTIFICATE OF SERVICE

I, Tracy D. Rezvani, hereby certify that on January 11, 2019, I caused a true and correct copy of the foregoing Motion to Reopen Fact Discovery to be served on counsel of record via CaseFileXpress.

Respectfully submitted,

/s/ Tracy D. Rezvani

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

HORMEL FOODS CORPORATION,

Defendant.

Case No. 2016 CA 004744

Judge Fern F. Saddler

**APPENDIX TO PLAINTIFF'S
MOTION FOR SPOILIATION SANCTIONS**

REDACTED

App001-157

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

ANIMAL LEGAL DEFENSE FUND, a non-profit corporation, 525 East Cotati Avenue, Cotati, CA 94931

Plaintiff,

Civil Action No. 2016 CA 004744 B
Judge Neal E. Kravitz

v.

HORMEL FOODS CORPORATION,
1 Hormel Place, Austin, MN 55912

Next Court Date: November 9, 2018
Event: Deadline for Deposing Proponent’s Experts

Defendant.

**DEFENDANT HORMEL FOODS CORPORATION’S
SECOND SUPPLEMENTAL RESPONSES AND OBJECTIONS
TO PLAINTIFF’S INTERROGATORY NOS. 16-17, 22-29 and 31**

Pursuant to Rules 26 and 33 of the District of Columbia Superior Court Rules of Civil Procedure, Defendant Hormel Foods Corporation (“Hormel Foods”), on its own behalf by and through its attorneys, hereby provides supplemental written responses and objections to Plaintiff’s Interrogatory Nos. 16-17, 22-29 and 31.

RESERVATION OF RIGHTS

1. Hormel Foods makes the written responses and objections herein (collectively, the “Responses”) based on its interpretation and understanding of Plaintiff’s Interrogatories and based on its current knowledge, understanding, and belief as to the facts and information available to Hormel Foods as of the date of the Responses. Additional investigation and discovery may lead to additions to, changes in, or modifications of these Responses. Without in any way obligating itself to do so, Hormel Foods expressly reserves the right to supplement, amend, correct, clarify or modify its responses to the Interrogatories as further information becomes available. Further, if Plaintiff subsequently asserts an interpretation of any individual

Interrogatory that differs from Hormel Foods' understanding, Hormel Foods reserves the right to complete its investigation and discovery of the facts and to rely at trial, or in other proceedings, on documents and information, regardless of whether such information is newly discovered or newly in existence.

2. Hormel Foods responds to the Interrogatories based on (a) its interpretation and understanding of the Interrogatories, (b) its interpretation and understanding of the nature and scope of Plaintiff's claims pursuant to the Complaint, the Court's orders, and all other filings in this matter, (c) its current knowledge, understanding, and belief as to the facts and information available to Hormel Foods as of the date of the Responses, and (d) any prior and future discussions and correspondence in the parties' efforts to meet and confer regarding appropriate parameters for discovery in this case. These Responses are provided without prejudice to Hormel Foods' right to revise, amend, supplement, modify, clarify, or correct any of them. Hormel Foods reserves the right to make use of, or introduce at any hearing or trial, information or documents responsive to the Interrogatories discovered or otherwise identified by Hormel Foods after the date hereof. Hormel Foods also reserves all rights to seek to supplement its Responses, or submit during motions practice or other pre-trial or trial proceeding after the close of discovery, additional documents or information as rebuttal to any theory of liability not pled in the Complaint or subsequent operative complaint filed prior to the close of discovery.

3. These Responses shall not constitute an admission by Hormel Foods that any of the Interrogatories, any of the Responses, or any of the documents or things produced in connection herewith, are admissible as evidence in any trial or any other proceeding. Hormel Foods reserves the right to object on any grounds, at any time, to the admission of any interrogatory or any objection, response, or any document or thing produced in connection

therewith in any such trial or other proceeding. Hormel Foods reserves all evidentiary objections and issues under the District of Columbia law of evidence.

4. Hormel Foods makes these Responses without waiver of or prejudice to any claim or defense, whether procedural or substantive. Hormel Foods does not waive any objection, nor any claim of privilege or immunity, whether expressly asserted or not, by providing any information or identifying any document or thing in response to any interrogatory. The inadvertent disclosure of such information, or the inadvertent identification or production of such a document, shall not constitute a waiver of any applicable privilege or immunity as to that information and/or document or any other document identified or produced by Hormel Foods. All objections as to privilege, immunity, relevance, authenticity, or admissibility of any information or documents referred to herein are expressly reversed. Further, these Responses are not a concession that any individual identified by Hormel Foods may be called as a witness, that such person possesses discoverable information, or that the subject matter of any particular interrogatory or objection thereto is relevant to this action.

5. Hormel Foods has construed the Interrogatories as not seeking information prepared by outside counsel in the course of defending this action.

GENERAL OBJECTIONS

The following General Objections form a part of, and are hereby incorporated into, the response to each and every Interrogatory set forth below. Nothing in the Responses and Objections to Specific Interrogatories should be construed as a waiver of these General Objections.

1. Hormel Foods objects to the Definitions, Instructions, and Interrogatories to the extent they purport to impose burdens or obligations upon Hormel Foods that are

inconsistent with the District of Columbia Superior Court Rules of Civil Procedure or otherwise render the Interrogatories overly broad or unduly burdensome. Hormel Foods will construe the Definitions, Instructions, and Interrogatories consistently with the District of Columbia Superior Court Rules of Civil Procedure.

2. Hormel Foods objects to the Definitions, Instructions, and Interrogatories to the extent they are vague and ambiguous, overly broad and unduly burdensome, and/or call for information that is neither relevant to any party's claim or defense nor proportional to the needs of the case. Hormel Foods further objects to the Interrogatories to the extent that they are not limited by any reasonable time period, and, therefore, are overly broad and unduly burdensome, and call for information that is not relevant to the claims, defenses, or subject matter of this case.

3. Hormel Foods objects to the Interrogatories to the extent that they: (i) call for Hormel Foods to provide information not in Hormel Foods' possession, custody, or control; (ii) purport to require Hormel Foods to provide information that is publicly available, already in Plaintiff's possession, custody, or control, or is otherwise available from sources other than Hormel Foods to which Plaintiff also has access; or (iii) call for information that is available from a more convenient, more efficient, less burdensome, or less expensive source than Hormel Foods or through a more convenient, more efficient, less burdensome, or less expensive means than the Interrogatories.

4. Hormel Foods objects to the Interrogatories that seek admissions or denials concerning pure questions of law or the legal effect of certain documents, which are not permitted under Rule 33 of the District of Columbia Superior Court Rules of Civil Procedure.

5. Hormel Foods objects to all Interrogatories that seek information relating to

Hormel Foods' products other than the *Natural Choice*® products that are the subjects of Plaintiff's claims in the Complaint as overly broad, irrelevant, and unduly burdensome.

6. Hormel Foods further objects to all Interrogatories that seek information that is not relevant to the subject matter of Plaintiff's claims in the Complaint.

7. Hormel Foods objects to the Interrogatories to the extent they seek information protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other applicable privilege or protection. In the event that information that is privileged or protected from disclosure is disclosed by Hormel Foods, such information will have been disclosed through inadvertence and shall not constitute a waiver, in whole or in part, of the applicable privilege or protection.

8. To the extent that any Interrogatory seeks information that includes expert material, Hormel Foods objects to the Interrogatory as premature and contrary to the requirements of Rule 26(b) of the District of Columbia Superior Court Rules of Civil Procedure and expressly reserves the right to supplement, clarify, revise, or correct any or all Responses to such Interrogatory, and to assert additional objections or privileges. Hormel Foods' Responses are not intended to limit in any way the opinions of any of Hormel Foods' experts who may ultimately opine on matters contemplated by the Interrogatories.

9. Unless otherwise stated herein, these Responses cover the period from June 29, 2013, to the present, i.e., a period starting three years preceding the date on which the first complaint was filed against Hormel Foods in this action.

10. Each specific Response to the Interrogatories is made subject to these objections, which are incorporated therein as if repeated in full, and by responding to the Interrogatories below, Hormel Foods does not waive any applicable objection and expressly

reserves all objections not specifically asserted herein.

11. By responding to any Interrogatory, Hormel Foods is neither admitting nor agreeing with any characterizations made therein and is not conceding the relevance or admissibility of anything requested in the Interrogatory.

12. Hormel Foods is willing to meet and confer regarding its objections detailed herein.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. Hormel Foods objects to the Definitions to the extent they purport to extend terms beyond a reasonable scope and/or their natural meaning. Hormel Foods will interpret the Interrogatories reasonably and in good faith in accordance with common English usage as supplemented by its understanding of the common meanings of terms in the meat and poultry product industry.

2. Hormel Foods objects to the definition of “you,” “your,” “yours,” and “yourself” to the extent it imposes an obligation to respond on behalf of any entity other than Hormel Foods Corporation. These Responses and Objections are made on behalf of Hormel Foods Corporation only and should not be construed as applicable to any other party, entity, or person, including any of Hormel Foods Corporation’s direct or indirect subsidiaries, unless otherwise stated. Hormel Foods will respond to the Interrogatories based only on information known to it and which is in its own possession, custody, or control, as required by the District of Columbia Superior Court Rules of Civil Procedure.

3. Hormel Foods objects to the definitions of the terms “document” and “documents” to the extent they exceed the requirements of Rule 34 of the District of Columbia Superior Court Rules of Civil Procedure or otherwise render the Interrogatories overly broad or

unduly burdensome. Hormel Foods interprets all Interrogatories to be so limited, and each response is made with this limiting interpretation.

4. Hormel Foods objects to the terms “advertisement” and “advertising” to the extent that they render the Interrogatories overly broad or unduly burdensome. Hormel Foods further objects to the terms as not limited to the specific advertisements for *Natural Choice* products that comprise the “Make the Natural Choice” advertising campaign that is the subject of Plaintiff’s claims in the Complaint. Hormel Foods will construe the terms “advertisement” and “advertising” to mean the specific consumer-facing advertisements identified in the Complaint, as well as similar consumer-facing advertisements that were part of the same “Make the Natural Choice” advertising campaign concerning the *Natural Choice* deli meats and bacon products identified in the Complaint, that were made available to consumers in the District of Columbia prior to the date the Complaint was filed.

5. Hormel Foods objects to the terms “market,” “marketing,” and “marketing materials” to the extent that they render the Interrogatories overly broad or unduly burdensome. Hormel Foods further objects to the terms as not limited to the specific advertisements for *Natural Choice* Products that comprise the “Make the Natural Choice” advertising campaign that is the subject of Plaintiff’s claims in the Complaint. Hormel Foods will construe the terms “market,” “marketing,” and “marketing materials” to mean the specific consumer-facing advertisements identified in the Complaint, as well as similar consumer-facing advertisements that were part of the same “Make the Natural Choice” advertising campaign concerning the *Natural Choice* deli meats and bacon products identified in the Complaint, that were made available to consumers in the District of Columbia prior to the date the Complaint was filed.

6. Hormel Foods objects to the term “Products” to the extent that it renders the

Interrogatories overly broad or unduly burdensome. Hormel Foods further objects to the term as not limited to the specific *Natural Choice* deli products that are the subjects of Plaintiff's claims in the Complaint. Hormel Foods will construe the term "Products" or "*Natural Choice* Products" to mean the *Natural Choice* products that are the subjects of Plaintiff's claims in the Complaint.

7. Hormel Foods objects to Instruction Nos. 5, 6, and 13-15 to the extent that they exceed the requirements of Rule 33 of the District of Columbia Superior Court Rules of Civil Procedure or otherwise renders the Interrogatories overly broad or unduly burdensome.

RESPONSES AND OBJECTIONS TO SPECIFIC INTERROGATORIES

Without waiving or limiting in any manner the foregoing Reservation of Rights, General Objections, and Objections to Definition and Instructions, but rather incorporating them into each of the following responses, Hormel Foods responds to Plaintiff's Interrogatories as set forth below.

Interrogatory No. 16: Identify the marketing claims at issue in this litigation that you contend are nonactionable puffery and identify all evidence that you believe establishes each element of the defense for each assertion you contend is puffery.

Response to Interrogatory No. 16: Hormel Foods objects to this Interrogatory on the grounds that it is vague and ambiguous, particularly with respect to the words or phrases "marketing claims," "all evidence," and "each element of the defense," and on the grounds that it is unduly burdensome, insofar as it asks Hormel Foods to identify "*all* evidence." Hormel Foods also objects on the grounds that this is a compound request, in that it asks Hormel Foods to respond to multiple distinct requests for information. Hormel Foods also objects to the Interrogatory to the extent it seeks material that is the subject of expert discovery. Hormel Foods objects on the grounds that it calls for a legal conclusion and seeks privileged or work product information to the extent that it asks Hormel Foods to state its legal theory and explain its legal strategy. Hormel Foods

- Reports, exhibits, and deposition and trial testimony provided by the parties' proffered experts
- Sworn testimony provided by Hormel Foods' fact witnesses, 30(b)(6) witnesses and trial witnesses
- Consumer research performed, commissioned or referenced by Hormel Foods that has been produced in this lawsuit and documents produced by Hormel Foods that reference or relate to such research
- Consumer research produced by ALDF in connection with this lawsuit
- Documents and sworn testimony related to USDA approval of the advertising claims included on the labels and packaging for *Natural Choice*® products
- Documents and sworn testimony related to the ingredients and characteristics of *Natural Choice*® products
- To the extent necessary, documents and sworn testimony related to the animal welfare practices used by Hormel Foods and its vendors as they pertain to *Natural Choice*® products
- To the extent necessary, documents and sworn testimony related to the production process used by Hormel Foods and/or its vendors as they pertain to *Natural Choice*® products

Interrogatory No. 29: Identify all evidence you believe establishes “Hormel Foods *at all times* acted in good faith and in compliance with applicable federal and state laws and regulations.”

Response to Interrogatory No. 29: Hormel Foods objects to this Interrogatory on the grounds that it is vague and ambiguous, particularly with respects to the words “all evidence,” and on the grounds that it is unduly burdensome, insofar as it asks Hormel Foods to identify “all evidence.” Hormel Foods also objects on the grounds that this is a compound request, in that it asks Hormel Foods to respond to multiple distinct requests for information. Hormel Foods also objects to the Interrogatory to the extent it seeks material that is the subject of expert discovery. Hormel Foods objects on the grounds that it calls for a legal conclusion and seeks privileged or work product information to the extent that it asks Hormel Foods to state its legal theory and explain its legal strategy. Hormel Foods further objects on the grounds that this Interrogatory asks Hormel Foods to identify all evidence that may support an affirmative defense while fact discovery is ongoing and, in particular, before Plaintiff has provided a sufficient response to a number of Hormel Foods' discovery requests, including Interrogatories #7-26 from Hormel

Foods' First Set of Interrogatories.

Subject to and without waiving its general and specific objections, Hormel Foods refers Plaintiff to Hormel Foods' Opposition to Plaintiff's Opposed Motion to Strike Affirmative Defenses at 24-26. Hormel Foods will supplement its response as appropriate at the close of discovery to describe the factual basis for its legal theory.

First Supplemental Response to Interrogatory No. 29

Subject to and without waiving its general and specific objections, Hormel Foods provides the following supplemental response to Interrogatory No. 29. It is Hormel Foods' policy and practice to always act in good faith toward its consumers. It is likewise Hormel Foods' policy and practice to follow applicable laws and regulations at all times. In particular, the labels of Hormel Foods' *Natural Choice*® products are reviewed and approved by the USDA. The facilities that produce Hormel Foods' *Natural Choice*® products are also subject to inspection and supervision by government regulators and inspectors and operate in accordance with the FMIA, PPIA and various regulations and requirements promulgated thereunder, as well as operate under continuous inspection and supervision by government regulators and inspectors. Hormel Foods makes every effort to cooperate with those regulators.

Second Supplemental Response to Interrogatory No. 29

Hormel Foods has withdrawn its defense that it at all times acted in good faith and in compliance with applicable federal and state laws and regulations. Hormel Foods reserves the right to argue that ALDF has not and cannot prove the elements of its legal claims in this lawsuit.

packaging for *Natural Choice*® products. Further, the vast majority of the final advertisements that ALDF is challenging include pictures of Hormel Foods’ federally-approved labels and packaging and/or include claims that are actually or materially the same as claims which appear on the product labels and packaging. To the extent that ALDF claims that the use of *Natural Choice*® labels and packaging (or statements which appear on such labels and packaging) in any of the “Make the Natural Choice” advertisements at issue are false and misleading, those claims are preempted by federal law. Hormel Foods also intends to argue that, to the extent ALDF is challenging Hormel Foods’ use of the terms “wholesome” and/or “safe” to described *Natural Choice*® products, these claims are preempted by the misbranding and adulteration provisions of the FMIA and the PPIA.

At this time, Hormel Foods reasonably anticipates relying on the following evidence to support its Preemption defense:

- The parties’ written discovery responses
- The final advertisements for the “Make the Natural Choice” advertising campaign
- Reports, exhibits, and deposition and trial testimony provided by the parties’ proffered experts
- Sworn testimony provided by the parties’ fact witnesses, 30(b)(6) witnesses and trial witnesses
- Consumer research performed, commissioned or referenced by Hormel Foods that has been produced in this lawsuit and documents produced by Hormel Foods that reference or relate to such research
- Consumer research produced by ALDF in connection with this lawsuit
- Documents and sworn testimony related to USDA approval of the advertising claims included on the labels and packaging for *Natural Choice*® products
- Documents and sworn testimony related to the ingredients and characteristics of *Natural Choice*® products

Dated: November 9, 2018

Respectfully submitted,

/s/ Tyler Young

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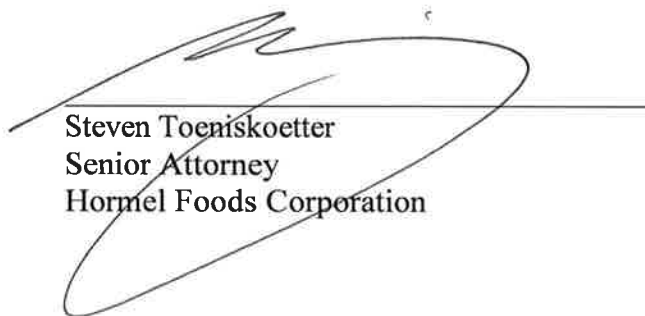
Counsel for Hormel Foods Corporation

**AS TO SUPPLEMENTAL ANSWERS TO INTERROGATORY NOS.
16-17, 22-29 AND 31**

The undersigned, Steven Toeniskoetter, states that the foregoing responses are based on information obtained from the books and records of Hormel Foods Corporation, on information provided to me by other employees and representatives of Hormel Foods Corporation, and on my personal knowledge where applicable. I hereby declare under penalty of perjury that the foregoing responses to interrogatories are true and correct to the best of my knowledge, information, and belief.

Dated: November 8, 2018

Respectfully submitted,



Steven Toeniskoetter
Senior Attorney
Hormel Foods Corporation

CERTIFICATE OF SERVICE

I, Tyler Young, hereby certify that on November 9, 2018, I caused a true and correct copy of the foregoing Responses and Objections to Plaintiff's First Set of Interrogatories to be served via electronic mail upon the following counsel of record as indicated below:

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Respectfully submitted,

/s/ Tyler Young
Tyler Young

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

<p>ANIMAL LEGAL DEFENSE FUND, a non-profit corporation, 170 East Cotati Avenue, Cotati, CA 94931</p> <p style="text-align:right">Plaintiff,</p> <p style="text-align:center">v.</p> <p>HORMEL FOODS CORPORATION, 1 Hormel Place, Austin, MN 55912</p> <p style="text-align:right">Defendant.</p>	<p>Civil Action No. 2016 CA 004744 B</p>
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PLAINTIFF’S FIRST REQUESTS FOR PRODUCTION TO DEFENDANT

Pursuant to Rule 34 of the D.C. Superior Court Rules of Civil Procedure, Plaintiff, by and through its attorneys, hereby requests that Defendant produce the documents and things described herein within its custody, possession, or control within 30 days after service of these requests.

DEFINITIONS AND INSTRUCTIONS

1. As used herein, the term “COMMUNICATIONS” shall mean the transmittal of information in any form (oral, written, or otherwise) of facts, ideas, inquiries, or otherwise.
2. As used herein, the term “DOCUMENTS” shall mean and refer to any “document” as that term is used in D.C. Sup. R. Civ. P. 34 including, but not limited to, any printed, written, taped, recorded, graphic, computerized printout, electronically stored (including but not limited to Word documents, spreadsheets, PDFs, emails, database reports, and social media postings), or other tangible matter or materials from which information can be obtained. A draft or non-identical copy is a separate document within the meaning of this term.

3. As used herein, the words “RELATING TO” are used in the broadest sense and mean concerning, constituting, containing, comprising, consisting of, embodying, identifying, stating, referring to, dealing with, setting forth, proposing, showing, evidencing, negating, disclosing, describing, discussing, explaining, summarizing, or otherwise addressing in any way, in whole or in part, the subject matter referred to in the request.

4. “AND” and “OR” shall be construed conjunctively and disjunctively so as to require the broadest possible response.

5. All singular terms include the plural, and all plural terms include the singular.

6. The pronouns “YOU,” “YOUR,” “YOURS,” and “YOURSELF” refer to Hormel Foods Corporation and its employees, agents, representatives, assigns, successors in interest, and attorneys.

7. As used herein, the words ADVERTISEMENT or ADVERTISING means every public statement Hormel makes about its products, practices, values, and/or company, including, but not limited to, statements made in print, online, and on video.

8. Unless otherwise specified, the relevant time period for each Request for Production is June 29, 2013 through today.

9. In answering these requests, please furnish all documents that are available to YOU, not merely documents currently in YOUR possession. This means YOU are to furnish documents which are in the possession of any of your employees, agents, representatives, contractors, subcontractors, supervisors, board members, or persons acting on YOUR behalf, or which are subject to your custody or control.

10. YOUR attention is directed to D.C. Sup. R. Civ. P. 34(e), which requires that responsive documents be organized and labeled to correspond with the request(s) to which they

are responsive, or produced as they are kept in the ordinary course of business.

11. Please note that these document requests are to be regarded as continuing to the extent allowed under the governing rules. YOU are requested to provide, by way of supplementary responses, such additional documents as may hereafter be obtained by YOU, or any person on YOUR behalf, which are responsive to the requests set forth herein, in the time and manner required by rules.

REQUESTS FOR THE PRODUCTION OF DOCUMENTS

Please produce for inspection:

1. DOCUMENTS sufficient to demonstrate every ADVERTISEMENT referencing YOUR Natural Choice line of products.

2. DOCUMENTS sufficient to demonstrate where each and every ADVERTISEMENT referencing YOUR Natural Choice line of products appeared.

3. ALL DOCUMENTS RELATING TO the use of the word “natural” in ADVERTISEMENTS or on labels. This request includes but is not limited to any DOCUMENTS YOU generated or received from third-parties and all DOCUMENTS RELATING TO consumer perception or views of the word “natural.”

4. ALL DOCUMENTS RELATING TO the use of the phrase “all natural” in ADVERTISEMENTS. This request includes but is not limited to any DOCUMENTS YOU generated or received from third-parties and all DOCUMENTS RELATING TO consumer perception or views of the phrase “all natural.”

5. ALL DOCUMENTS RELATING TO the use of the phrase “100% natural” in ADVERTISEMENTS. This request includes but is not limited to any DOCUMENTS YOU generated or received from third-parties and all DOCUMENTS RELATING TO consumer

components or the feed's impact on animals or meat products.

30. All DOCUMENTS sufficient to show YOUR sales of Natural Choice meat products; YOUR costs of production, marketing, and distribution; and YOUR profit from sale of YOUR Natural Choice meat products, in such a form as may be distinguished by point-of-sale to the consumer.

31. All DOCUMENTS RELATING TO consumer views of and demand for "natural" meat and poultry, including but not limited to consumer surveys, data, and reports, focus groups, and test markets.

32. All DOCUMENTS RELATING TO consumer views of YOUR Natural Choice products, including but not limited to DOCUMENTS RELATING TO the Make the Natural Choice ADVERTISING campaign, consumer surveys, data, and reports, focus groups, and test markets.

33. All DOCUMENTS RELATING TO YOUR contracts with third-party meat packaging or processing facilities.

34. DOCUMENTS sufficient to determine the conditions under which all animals used in YOUR Natural Choice product line are slaughtered. This request includes but is not limited to DOCUMENTS sufficient to determine the method of stunning (if any) and how this method was monitored, the method of slaughter, the speed of the line on which the animals were stunned, dismembered, and processed, and all monitoring of animal welfare and meat safety.

35. ALL DOCUMENTS RELATING TO YOUR or YOUR contractors' and subcontractors' compliance with the Humane Methods of Slaughter Act, including but not limited to any DOCUMENTS RELATING TO pre-slaughter handling, treatment or slaughter of non-ambulatory disabled animals, ineffective stunning, and/or animals regaining consciousness

during the slaughter process.

36. ALL DOCUMENTS RELATING TO YOUR or YOUR contractors' and subcontractors' compliance with Good Commercial Practices under the Poultry Products Inspection Act, including but not limited to any DOCUMENTS RELATING TO the welfare of birds during slaughter and instances of birds killed other than by slaughter at slaughter plants.

37. DOCUMENTS sufficient to show the existence of lack thereof of any process for segregating animals used in "natural" products and other products and to determine how YOU decided which animals would be packaged into Natural Choice products.

38. DOCUMENTS sufficient to determine whether any animals, or portions of animals, were packaged both as Natural Choice products and as any other products.

39. All COMMUNICATIONS with YOUR employees, contractors or subcontractors regarding any actual or alleged violations of state or federal regulations regarding animal husbandry, food production, food safety, and facility inspections.

40. All COMMUNICATIONS with government regulators regarding any letters of concern, actual or alleged violations of state or federal regulations regarding animal husbandry, food production, food safety, and facility inspections.

DATED: August [9], 2017

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

HORMEL FOODS CORPORATION,

Defendant.

Case No. 2016 CA 004744

Judge Fern F. Saddler

[PROPOSED] ORDER

Upon consideration of Plaintiff Animal Legal Defense Fund’s Motion for Spoliation Sanction, on this _____ day of _____, 2019, it is:

ORDERED, that the Plaintiff’s motion is GRANTED, and it is further,

ORDERED, that *Stancil* adverse inferences shall be granted in ALDF’s favor during Summary Judgment and Trial, on issues relevant to slaughter practices and conditions; and it is further

ORDERED, that Hormel shall be precluded from making any argument regarding how, and under what conditions, it slaughters animals destined for “Natural Choice” products; and it is further

ORDERED that Hormel shall be precluded from arguing that its slaughter practices and conditions are compliant with the Federal Meat Inspection Act and Humane Methods of Slaughter Act; it is further

ORDERED that monetary sanctions are awarded. Plaintiff has until _____, 2019, by which to file its Statement outlining the fees and costs incurred by it related to its attempts to obtain videographic evidence withheld and spoliated by Hormel.

Date

Saddler, J.