Mark McKane, P.C. (SBN 230552)
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, California 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500

Gregg F. LoCascio, P.C. (admitted *pro hac vice*)
Michael Glick (admitted *pro hac vice*)
Kathleen A. Brogan (admitted *pro hac vice*)
Terence J. McCarrick (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue N.W.
Washington, D.C. 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200

Attorneys for Defendant
Sanderson Farms, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRIENDS OF THE EARTH, and CENTER FOR FOOD SAFETY, Plaintiffs, vs. SANDERSON FARMS, INC., Defendant.	CASE NO. 3:17-CV-03592 (RS) **DEFENDANT SANDERSON FARMS, INC.'S NOTICE OF MOTION AND RULE 12(h)(3) MOTION REGARDING LACK OF STANDING AND SUBJECT MATTER JURISDICTION** Judge: Honorable Richard Seeborg Hearing Date: May 16, 2019 Time: 1:30 p.m. Location: Courtroom 3, 17th Floor 450 Golden Gate Avenue San Francisco, CA 94102

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on the 16th day of May, 2019 at 1:30 p.m. or as soon thereafter as this motion may be heard by the Honorable Richard Seeborg in Courtroom 3, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Sanderson Farms, Inc. will, and hereby does, move the Court for an order dismissing this action for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(h)(3). The Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the entire file in this matter, and the arguments of counsel.

DATED: April 1, 2019

Respectfully submitted,

/s/ Michael A. Glick
Michael A. Glick

Mark McKane, P.C. (SBN 230552)
mark.mckane@kirkland.com
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, California 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500

Gregg F. LoCascio, P.C. (admitted *pro hac vice*)
gregg.locascio@kirkland.com
Michael Glick (admitted *pro hac vice*)
michael.glick@kirkland.com
Kathleen A. Brogan (admitted *pro hac vice*)
kathleen.brogan@kirkland.com
Terence J. McCarrick (admitted *pro hac vice*)
terence.mccarrick@kirkland.com
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue N.W.
Washington, D.C. 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200

Counsel for Defendant
Sanderson Farms, Inc.

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INTRODUCTION

Rule 12(h)(3) was designed for cases like this one. Across four iterations of their Complaint over the past twenty-one months, the remaining Plaintiffs—the Center for Food Safety and Friends of the Earth—have alleged standing in this false advertising case based on a supposed diversion of resources. Nearly a year of discovery has proven otherwise. Fact discovery is now closed, and the record makes clear that Plaintiffs ***never*** engaged in any activities or diverted any resources ***because of*** Sanderson's advertising. Indeed, there is no evidence—not in documents, written discovery responses, or deposition testimony—that Plaintiffs took any action (short of filing this lawsuit) to address Sanderson's advertising at all. To the contrary, Plaintiffs concede that their general advocacy efforts related to the use of antibiotics in animal agriculture and restaurant supply-chain practices were ***not*** made "because of" Sanderson's advertising, *see, e.g.*, Ex. 1 (FoE Dep.) 128:4-129:5, 129:24-130:3; Ex. 2 (CFS Dep.) 43:9-16, and that Sanderson's advertising neither required any action by Plaintiffs, nor prohibited them from undertaking any organizational activities, *see* CFS Dep. 86:25-87:4. In short, the undisputed factual record shows that Plaintiffs have not suffered any injury in fact at all, much less one that is traceable to the allegedly false advertising Plaintiffs challenge in this case.

"[I]t is not only appropriate, but necessary, for [] jurisdictional issue[s] to be considered and resolved" now. *See Hensley-Maclean v. Safeway, Inc.*, 2015 WL 3956099, at *1 (N.D. Cal. June 29, 2015). To be sure, the Court denied Sanderson's motion to dismiss on standing grounds last spring based on Plaintiffs' allegations at the pleading stage. ECF No. 48. But there is now a substantial and indisputable factual record, and the time to rely on the Complaint's "broad allegations" has passed. *See id.* Rather, because "standing is a necessary element of federal-court jurisdiction" and a "threshold question in every federal case," *Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir. 2009), "[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court *must* dismiss the action," Fed. R. Civ. P. 12(h)(3) (emphases added). It is fundamental to Article III jurisdiction that a plaintiff must have suffered a concrete "injury in fact" that is "fairly traceable to the challenged action of the defendant." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). Plaintiffs here cannot demonstrate any injury or diversion of resources traceable to Sanderson's advertising. Accordingly, the Court lacks subject matter jurisdiction and should dismiss this case.

STATEMENT OF FACTS

Pleading History

1. Plaintiffs Friends of the Earth ("FoE") and the Center for Food Safety ("CFS") filed this case on June 22, 2017, bringing claims under California's Unfair Competition Law and False Advertising Law. ECF No. 1.[1]

2. Plaintiffs have since amended their complaint three times—twice voluntarily and once with leave of Court following the dismissal of the Second Amended Complaint. ECF No. 105.

3. In each of their Complaints (including the operative complaint, the Third Amended Complaint), Plaintiffs have asserted direct organizational standing based exclusively on a diversion-of-resources theory, alleging they diverted money or property "[a]s a result of Sanderson's legal violations." *See*, *e.g.*, ECF No. 114-4 ¶ 18; *see also* ¶¶ 24, 26-27. Plaintiffs do not—and have never—asserted representational or associational standing.

4. After Plaintiffs amended their complaint for the first time, Sanderson moved to dismiss on several grounds, including that Plaintiffs' allegations were facially insufficient to establish Plaintiffs' Article III standing. ECF No. 32.

5. On February 9, 2018, the Court held that Plaintiffs had satisfied their burden regarding standing "[a]t the pleading stage" by "broadly alleg[ing]" a "diversion-of-resources injury." ECF No. 48 at 7.

Discovery History

6. The parties engaged in over 9 months of fact discovery, including 6.5 months in 2018 prior to the dismissal of the Second Amended Complaint and 90 additional days requested by Plaintiffs following the denial of Sanderson's Motion to Dismiss the Third Amended Complaint. Fact discovery concluded two weeks ago (March 18, 2019).[2]

[1] A third organization, the Organic Consumers Association, originally served as the lead plaintiff, but voluntarily dismissed its claims on July 18, 2018. ECF No. 80.

[2] The parties currently have a few remaining discovery disputes pending before Magistrate Judge Kim, none of which relates to Plaintiffs' standing or alleged diversion of resources.

7. During fact discovery, Sanderson sought numerous forms of discovery related to Plaintiffs' standing allegations:

8. ***Interrogatories.*** Sanderson's Interrogatory No. 7 asked Plaintiffs to:

> Identify with specificity all bases for your contention that you have lost money or property as a result of the Sanderson advertising identified in the Complaint, including the specific dollar amounts of costs incurred, the number of employee hours diverted, projects undertaken, and/or documents created."

9. Plaintiffs originally responded on April 16, 2018, and supplemented their responses on June 28, 2018. *See* Ex. 3[3] (FoE Supp. Resp. to Sanderson Irrog. 7); Ex. 4 (CFS Supp. Resp. to Sanderson Irrog. 7). Each Plaintiff largely recycled the conclusory allegations referenced in their pleadings and purported to quantify alleged losses of money and property without any supporting documentation. *See* Exs. 3-4.

10. ***Documents.*** Sanderson served 37 Requests for Production. As relevant here, Sanderson requested (i) all documents (including emails) Plaintiffs allegedly prepared in response to or as a result of Sanderson's advertising, (ii) documents sufficient to show any harm or injury Plaintiffs claim to have suffered as a result of Sanderson's advertisements, and (iii) documents sufficient to show the amount of money and/or hours Plaintiffs allegedly devoted to projects or activities as a result of Sanderson's advertising. Ex. 5 (Sanderson's 1st Set of Reqs. for Prod.).

11. In total—for all 37 of Sanderson's requests—Plaintiffs collectively produced less than 275 documents in discovery (notwithstanding that one Plaintiff alleged in the Third Amended Complaint that they had "educat[ed] [Sanderson's] customers on Sanderson's practices by sending thousands of emails," ECF No. 114-4 ¶ 18). *See* Glick Decl. ¶ 5; FoE Dep. 49:1-12.

12. Plaintiffs did not produce budgets, time records, or call logs related to activities allegedly undertaken in response to Sanderson's advertising. FoE Dep. 50:1-51:7, 52:1-5; CFS Dep. 102:17-22; Glick Decl. ¶ 6.

13. Given Plaintiffs' prior representations that they had engaged in substantial educational programs and other initiatives responsive to Sanderson's advertising, Sanderson wrote Plaintiffs on

[3] All "Ex." references are to the exhibits attached to the Declaration of Michael Glick, filed contemporaneously with this motion.

July 31, 2018 regarding the small number of documents Plaintiffs had produced, and asked them to confirm in writing that they had preserved, searched for, and produced any responsive materials. Glick Decl. ¶ 7. On August 3, 2018, Plaintiffs confirmed in writing that they had preserved and produced all materials responsive to Sanderson's requests for production, including Sanderson's standing-related requests. *Id.* ¶ 8.

14. Although Plaintiffs produced a handful of documents after August 3, 2018, nothing in Plaintiffs' document productions (either before or after that date) indicated any Sanderson-advertising specific initiatives, nor did Plaintiffs seek discovery or testimony from employees or third-parties to support or prove the existence of any diversion of resources. *Id.* ¶ 9.

15. ***Depositions.*** Because Plaintiffs failed to provide concrete evidence of any diversion of resources, Sanderson deposed a Rule 30(b)(6) designee from each Plaintiff in February 2019 regarding, among other things, the activities their organizations had alleged to have undertaken in response to Sanderson's advertising.[4]

16. Far from confirming the existence of Sanderson-specific initiatives, Plaintiffs admitted that Sanderson's advertising did not require them to take, or prohibit them from taking, any action. CFS Dep. 85:14-16 ("Q. You agree that Sanderson's advertising didn't require CFS to do anything at all; correct? A. Yes."); *id.* at 86:4-8 ("Q. You would agree, Ms. Spector, that Sanderson's advertising didn't require CFS to do anything; correct? … A. Yes."); *id.* at 86:25-87:4 ("Q. You would agree that Sanderson's advertising didn't prohibit any activities on the part of CFS; correct? … A. I would agree.").

17. Plaintiffs also admitted—in direct contradiction to their pleadings and written discovery responses—that they did not engage in the activities identified in their written discovery and document productions "because of" Sanderson's advertising. FoE Dep. 128:4-9 ("FOE published the Chain Reaction reports because it cares about supplier practices; correct? A. Regarding antibiotics, yes. Q. FOE didn't publish Chain Reaction reports because of Sanderson's advertising; right? A. Correct."); *id.* at

[4] Sanderson requested the deposition of two additional individuals (a current employee of FoE and former employee of CFS) who Plaintiffs had identified in their initial disclosures as likely to possess relevant information. Following discussions between the parties, Plaintiffs agreed that they would not rely on either witness to prove any element for which Plaintiffs bear the burden of proof (including in support of either Plaintiff's alleged standing), and Sanderson agreed to forgo those depositions.

128:24-129:5 ("Q. And FOE made public statements about routine antibiotic use because it opposes routine antibiotic use; right? A. Yes. Q. FOE didn't make those statements because of Sanderson advertising; right? A. No.").

18. Indeed, Plaintiffs acknowledged that they still would have undertaken the activities identified in the Third Amended Complaint and in their interrogatory responses even if Sanderson had never aired the advertisements challenged in this lawsuit. *E.g.*, *id.* at 129:24-130:3 ("Q. Assuming that Sanderson had never aired any of the ads in this case, FoE would still pressure customers of Sanderson to switch to other suppliers that don't use routine antibiotics; right? A. Yes.").

19. Collectively, this discovery has confirmed that Plaintiffs did not, in fact, divert resources to address Sanderson's advertising, but rather, continued longstanding advocacy activities in keeping with their respective missions.

Plaintiffs' Alleged Diversion Activities

20. Plaintiffs have each stated they became aware of the challenged Sanderson's advertisements on August 1, 2016. Ex. 6 (FoE Resp. to Sanderson Interr. No. 5); Ex. 7 (CFS Resp. to Sanderson Interr. No. 5).[5]

21. Before that date, Plaintiffs were already engaged in activities related to the use of antibiotics in animal agriculture, including campaigns targeting Sanderson's customers. This was consistent with each Plaintiff's core work advocating limitations on the use of antibiotics in animal agriculture and discouraging consumers from purchasing meat raised with routine antibiotics. CFS Dep. 24:20-23; FoE Dep. 20:8-12, 43:12-44:15.

22. Plaintiffs agree that the Sanderson advertising they challenge did not require them to take any action at all. *E.g.*, CFS Dep. 85:14-16. Likewise, Plaintiffs agree that Sanderson's advertising did not prohibit any activities on the part of their organizations. *E.g.*, *id.* 86:25-87:4.

23. Nonetheless, Plaintiffs asserted in discovery that a number of activities they chose to partake in were purportedly "as a result of" Sanderson's advertising. Exs. 3-4. These activities included:

[5] Sanderson denies that all of the advertisements challenged by Plaintiffs were even available on August 1, 2016, as some of the advertisements about which Plaintiffs complain debuted later. For purposes of this motion only, however, Sanderson assumes that Plaintiffs learned of all of the challenged advertisements on August 1, 2016.

24. ***Chain Reaction Reports.*** Starting in September 2015—before Plaintiffs saw (or Sanderson released) the advertising at issue in this case—Plaintiffs collaborated with other, non-party advocacy organizations on a report titled, "Chain Reaction," which graded more than 20 restaurant chains on their antibiotics and sourcing practices. Ex. 8 (2015 report). Plaintiffs and their non-party co-authors continued to publish the Chain Reaction reports in 2016, 2017, and 2018. *See, e.g.*, Exs. 9-10 (2016 and 2017 reports).

25. Each Plaintiff concedes, however, that they did not publish the Chain Reaction reports "because of" Sanderson's advertising. FoE Dep. 128:7-9; CFS Dep. 43:14-16 ("Q. CFS didn't prepare this report because of Sanderson's advertising. Fair? A. Correct."). Indeed, until after this litigation was initiated, the reports did not even mention Sanderson. *Compare* Exs. 8-9 (2015 and 2016 reports) *with* Ex. 10 (September 2017 report).

26. The reports addressed chain restaurants that were Sanderson customers as well as restaurants that were not Sanderson customers, and the annual scorecards—the primary feature in each report—do not identify the company from whom each chain restaurant sources its meat. CFS Dep. 41:24-42:2, 42:25-43:8, 52:18-21, 54:4-10, 65:16-20, 67:10-18, 69:2-5; FoE Dep. 120:2-121:13, 126:7-17.

27. ***Press Releases and Blogs.*** Starting well before Plaintiffs learned of Sanderson's advertising, both Plaintiffs frequently published press releases and blog posts addressing the issue of antibiotic use in raising animals. *See, e.g.*, Exs. 11-14. Both Plaintiffs cite their publication of such press releases and blog posts as an alleged diversion of resources to address Sanderson's advertising. Ex. 3 at 4-6; Ex. 4 at 4-6.

28. As an initial matter, certain of the press releases FoE identified in response to Sanderson's interrogatory asking Plaintiffs to specify money and time diverted "as a result of the Sanderson advertising" were published in 2015 and early 2016, before Plaintiffs were aware of Sanderson's advertising. *See*, *e.g.*, Ex. 3 at 4-6.

29. Moreover, each party's Rule 30(b)(6) designee repeatedly conceded that the pre-litigation press releases and blog posts Plaintiffs identified as "result[ing]" from Sanderson's advertising did not mention Sanderson or the advertising Plaintiffs challenge in this case, and Plaintiffs could not identify any pre-litigation release or post that did so. *See, e.g.*, FoE Dep. 54:18-55:8, 56:10-24, 58:18-24, 59:17-21,

74:11-13, 85:13-21, 86:8-15, 87:20-25, 89:11-17, 90:25-91:7, 91:21-92:1; CFS Dep. 55:11-23, 59:20-60:1, 60:17-61:4; *see also* Exs. 11-12, 15-21. Indeed, a search of each Plaintiff's website in early February 2019 confirmed that neither Plaintiff had published any blog post or press release prior to this litigation referring to Sanderson's advertising. Exs. 18, 19; CFS Dep. 82:13-83:16; FoE Dep. 130:13-131:15.

30. Instead, the publications identified by Plaintiffs concern antibiotics issues generally or involve companies other than Sanderson (and whom are not even Sanderson customers). *See, e.g.*, Ex. 22 (CFS post concerning McDonald's); Ex. 23 (FoE post concerning Subway). At least one post identified by CFS as having been published "as a result of" Sanderson's advertising does not even relate to chicken. *See* Ex. 24 (concerning Thanksgiving turkeys).

31. FoE admits it did not publish its identified statements regarding antibiotic use "because of" Sanderson's advertising. FoE Dep. 128:24-129:5.

32. CFS similarly stated in its interrogatory responses that its efforts in 2016 were "to address … Sanderson's customers' [ ] failures to remove antibiotics from their supply chain," not to address Sanderson's advertising. Ex. 4 at 3; CFS Dep. 53:10-22, 57:8-15.

33. ***Darden Campaign.*** Starting in 2015, FoE engaged in a series of activities (including letters, petitions, and other advocacy) targeting Darden Restaurants—specifically, Darden's Olive Garden restaurant (which is a Sanderson customer). FoE Dep. 46:13-25, 48:15-25, 52:19-53:6, 78:17-79:10**;** Exs. 20, 25-27. FoE's campaign addressed a variety of issues, including Darden's sourcing its meat from suppliers that use antibiotics (including, but not limited to, Sanderson), as well as issues unrelated to Sanderson like fair wages, labor conditions, and portion size. *See, e.g.*, *id.* Notwithstanding that these efforts started more than a year before Plaintiffs state they learned of Sanderson's advertising, FoE's interrogatory response cites this Darden campaign as a "result of" Sanderson's advertising. Ex. 3 at 7.

34. But FoE's Rule 30(b)(6) designee admitted in deposition that FoE did not campaign against Darden and Olive Garden "because of" Sanderson's advertising, and that even if Sanderson had never aired the advertisements at issue, FoE would still encourage Darden and Olive Garden to source its meat from suppliers other than Sanderson. FoE Dep. 128:15-18 ("Q. FoE didn't campaign against Darden and Olive Garden because of Sanderson's advertising; right? A. No."); *see also id.* 79:5-10 ("Q. So even if Sanderson hadn't aired the ads at issue, FoE would still encourage restaurants like Darden and Olive

Garden to source from suppliers other than Sanderson. Fair? A. Yes."); *id.* at 53:2-6 ("Q. Fair to say that FoE was already engaging in advocacy related to Olive Garden's sourcing practices before it saw Sanderson's advertising in this case; correct? A. Yes.").

35. FoE's documents confirm that it chose Darden and Olive Garden as "an initial target [in 2015] primarily because" a separate, non-party advocacy organization "was already … targeting Darden on … worker justice issues." Ex. 28; FoE Dep. 79:5-10 ("Q. So even if Sanderson hadn't aired the ads at issue, FoE would still encourage restaurants like Darden and Olive Garden to source from suppliers other than Sanderson. Fair? A. Yes."); *id.* at 53:2-6 ("Q. Fair to say that FoE was already engaging in advocacy related to Olive Garden's sourcing practices before it saw Sanderson's advertising in this case; correct? A. Yes.").

36. ***"Action Alerts."*** FoE also cites "Action Alerts related to Sanderson, Darden, Olive Garden, the Chain Reaction report, and antibiotics in the food supply" as "result[ing]" from Sanderson's advertising. Ex. 3 at 6. FoE did not specifically identify the alerts it alleges were "a result of" the challenged Sanderson advertising, nor did FoE identify when such alerts were made or whether they were part of the Darden campaign discussed above. *Id.*

37. Neither Plaintiffs' interrogatory response identified any specific call-to-action or similar communication amongst their members (or anyone else) related to Sanderson's advertising, *see id.*, nor did Plaintiffs produce any such communications or alerts pertaining to Sanderson's advertising in discovery (which would clearly have been responsive to Sanderson's requests). Glick Decl. ¶ 6.

38. CFS admitted that the language and general alerts that it prepared regarding the use of antibiotics in raising animals were designed to address all restaurants that had been identified in the Chain Reaction report—more than 20 restaurants in total—regardless of whether they were Sanderson customers. CFS Dep. 53:10-22 ("Q. And again, this language and these alerts were developed with regard to all of the fast food and fast casual companies referenced in the [C]hain [R]eaction report; correct? A. I believe so, yes. Q. So again, it went to both Sanderson customers and non-Sanderson customers; correct? A. That is my understanding.").

39. ***"News Magazine."*** FoE's interrogatory response cites a "digital and print News Magazine" that it publishes three times a year and which allegedly includes discussion of FoE's "work on use of antibiotics in animal agriculture." Ex. 3 at 6-7.

40. FoE did not produce those News Magazines in discovery, nor has it identified a single article in those magazines addressing Sanderson or its advertising, as opposed to articles relating to the use of antibiotics generally. Glick Decl. ¶ 6.

41. ***Panel Presentations***. CFS's interrogatory response cites its work "speak[ing] on panels and at conferences … on the specifics of the campaign against Sanderson Farms' misleading statements and use of antibiotics." Ex. 4 at 6.

42. However, CFS's response did not identify a single panel or conference at which CFS spoke on such topic, *see id.*, and its Rule 30(b)(6) designee could not identify such a panel or conference either. CFS Dep. 90:8-24, 91:7-12.

43. The only documents produced by CFS that might plausibly relate to such speeches are from a conference post-dating the lawsuit in which CFS summarized this litigation, among other topics. Ex. 29.

44. ***Social Media.*** FoE cites "more than 200 Tweets and more than 30 Facebook posts related to Sanderson, Darden, Olive Garden … the Chain Reaction report, and antibiotics in the food supply." Ex. 3 at 6.

45. Again, FoE did not specifically identify the posts that it alleges were "a result of" the challenged Sanderson advertising, nor did FoE identify when such posts were made. *Id.*

46. CFS admitted that any social media posts related to antibiotics issues that it created were with regard to all restaurants that had been identified in the Chain Reaction report—again, more than 20 restaurants—regardless of whether they were Sanderson customers. CFS Dep. 53:15-22. CFS has never identified social media posts that it alleges constituted a diversion of resources because of the challenged Sanderson advertising.

47. ***Petitions, Letters, and Protests.*** In the Third Amended Complaint and their interrogatory responses, Plaintiffs cite a petition signed by over 100,000 people and delivered to leadership of numerous restaurants. ECF No. 114-4 ¶¶ 18, 24; Ex. 3 at 3, 7; Ex. 4 at 3.

48. That petition, however, addressed—and was delivered to leadership of—all restaurants identified in the 2015 Chain Reaction Report (whether they were Sanderson customers or not) and did not mention Sanderson's advertising in any way. CFS Dep. 51:16-52:2, 52:10-21; FoE Dep. 116:22-117:5.

49. Plaintiffs never prepared any Sanderson-specific petition—let alone a petition specific to Sanderson's advertising. CFS Dep. 52:23-53:9; *see also* FoE Dep. 78:5-21.

50. Additionally, in discovery, Plaintiffs produced various letters they prepared regarding antibiotics and other issues and sent to the leadership of companies such as Subway and Darden. *See, e.g.*, Exs. 25, 30-31. None of these letters refer to Sanderson's advertising in any way. *See id.*

51. Plaintiffs conceded they never sent a similar Sanderson-specific letter to Sanderson leadership regarding either Sanderson's practices or advertisements. CFS Dep. 37:6-9 ("Q. And CFS has never sent or been part of a letter like this to Sanderson regarding its advertising; correct? A. That is my understanding."); FoE Dep. 96:1-6.

52. Plaintiffs have never organized protests or similar activities at Sanderson regarding either Sanderson's practices or advertisements. FoE Dep. 95:23-25.

53. Plaintiffs admit that even if Sanderson ceased the challenged advertising, Plaintiffs would still encourage Sanderson's customers to stop sourcing their poultry from Sanderson, and would still engage in public education regarding the risks of antibiotic use in animal agriculture as well as antibiotic resistance. CFS Dep. 103:13-104:18, 104:22-105:2; FoE Dep. 78:22-79:10, 84:12-19, 122:2-5, 129:24-130:3.

Remaining Case Events

54. Notwithstanding this record, the parties continue to litigate Plaintiffs' claims, including proceeding to expert discovery.

55. Plaintiffs' expert reports are due April 17, 2019, and Sanderson's expert reports are due May 17, 2019. ECF No. 132 at 2. Expert depositions are to be conducted by June 17, 2019. *Id.* Sanderson expects that the parties will hire multiple experts, and incur substantial expenses during the expert discovery period. Glick. Decl. ¶ 10.

56. Trial is scheduled for late January 2020, nearly 10 months away. ECF No. 132.

LEGAL STANDARDS

"If the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action." Fed. R. Civ. P. 12(h)(3) (emphasis added); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction … may be raised by a party, or by a court on its own initiative, at any stage in the litigation."). This includes evaluating the threshold issue of a plaintiff's standing to sue: "'[b]ecause standing … pertain[s] to a federal court's subject-matter jurisdiction under Article III, [it is] properly raised' in a Rule 12(h)(3) filing." *Caselman v. Pier 1 Imports (U.S.), Inc.*, 2015 WL 106063, at *2 (N.D. Cal. Jan. 7, 2015) (citation omitted). Indeed, "federal courts are required *sua sponte* to examine jurisdictional issues such as standing," and the "district court ha[s] both the power and the duty" to address a plaintiff's standing whenever its adequacy is in question. *Bernhardt v. Cty. of L.A.*, 279 F.3d 862, 868 (9th Cir. 2002) (citation omitted).

Rule 12(h)(3) effectively "prolong[s]" the time for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See Wood v. City of San Diego*, 678 F.3d 1075, 1082 (9th Cir. 2012); *see also Hensley-Maclean*, 2015 WL 3956099, at *1. Where, as here, the moving party "disputes the truth of the [plaintiff's jurisdictional]" allegations, "the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In doing so, "[t]he court need not presume the truthfulness of the plaintiff's allegations." *Id.* Rather, "[o]nce challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009) (citation omitted). Whereas, "general factual allegations of injury may suffice" "at the pleading stage," "[i]n response to a [Rule 12(b)(1) or Rule 12(h)(3) motion], plaintiff must present specific facts to establish injury." *See Woods v. Google LLC*, 2019 WL 935979, at *2 (N.D. Cal. Feb. 26, 2019) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *see also Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253, 1255-56 (9th Cir. 2008) ("In response to … a trial court's post-pleading stage order to establish Article III standing, a plaintiff can no longer rest on 'mere allegations' but must set forth by … admissible evidence 'specific facts' … as to the existence of such standing.") (citation omitted). In doing so, the plaintiff must support each standing element "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561.

Finally, where, as here, a challenge to jurisdiction is independent of the merits of a plaintiff's claims, the court "may 'hear evidence regarding jurisdiction' and 'resolve factual disputes where necessary.'" *Robinson*, 586 F.3d at 685 (citation omitted). As long as "the jurisdictional issue and the substantive issues are [not] so intermeshed that the question of jurisdiction is dependent on decision of the merits," "a district court is permitted to resolve disputed factual issues bearing upon subject matter jurisdiction in the context of a Rule 12(b)(1) [or Rule 12(h)(3)] motion." *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1196-97 (9th Cir. 2008) (citation omitted).

ARGUMENT

It is fundamental to Article III jurisdiction that a plaintiff seeking relief in federal court must establish it has suffered an injury in fact that is "[1] concrete, particularized, and actual or imminent; [2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted); *see State v. Ross*, 2019 WL 1052434, at *4 (N.D. Cal. Mar. 6, 2019) ("As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing all three requirements by a preponderance of the evidence.") (citation omitted). Organizations like Plaintiffs satisfy Article III's "injury in fact" requirement of injury only if they can demonstrate both: "(1) frustration of its organizational mission; *and* (2) diversion of its resources to combat the particular [unlawful actions] in question." *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (emphasis added). A diversion of resources to combat some other harm, even if related to the challenged conduct, is insufficient. *See, e.g.*, *City of Oakland v. Wells Fargo Bank, N.A.*, 2018 WL 3008538, at *11 (N.D. Cal. June 15, 2018). Furthermore, "standing must be established independent of the lawsuit filed by the plaintiff"; an organization "cannot manufacture the injury by incurring litigation costs." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

Here, the discovery record makes clear that neither Plaintiff in this false advertising case actually diverted resources to address the Sanderson advertising they allege was false. Plaintiffs thus cannot establish an "injury in fact," and certainly not one "traceable to the challenged action of the defendant," *i.e.*, the challenged Sanderson advertising. ***First***, Plaintiffs logically cannot rely on their activities undertaken before they knew about the advertising at issue to claim those activities caused them to divert

resources. Accordingly, any activities Plaintiffs engaged in before August 1, 2016—when they first became aware of the advertising—cannot support Plaintiffs' assertion of standing. ***Second***, even for those activities post-dating Plaintiffs' awareness of Sanderson's ads, there is no evidence whatsoever that Plaintiffs undertook any action *in response to* the advertising. Most of Plaintiffs' cited activities did not even reference Sanderson (let alone its advertising), and any activities tangentially related to Sanderson were not a response to the challenged advertising and were merely a continuation of the same exact work Plaintiffs performed before they knew about Sanderson's ads (again confirming that those activities were not undertaken to "combat" the challenged advertising). ***Finally***, Plaintiffs' litigation-related expenses cannot establish standing under a diversion-of-resources theory. Any other rule would allow parties to manufacture standing by mere virtue of bringing a lawsuit and creating press about it.

I. Plaintiffs Cannot Establish Standing Based On Activities Before Learning Of The Challenged Advertisements.

Plaintiffs' activities before Sanderson aired its advertisements (much less before Plaintiffs learned of them) cannot qualify as a "diversion" of resources for Article III standing purposes. To show standing based on a diversion-of-resources theory, Plaintiffs must show that their "diversion [wa]s made *necessary* by" Sanderson's conduct—that is, the "allegedly unlawful conduct" (here, Sanderson's advertisements) "somehow affected [Plaintiffs'] ability to operate." *Project Sentinel v. Evergreen Ridge Apts.*, 40 F. Supp. 2d 1136, 1140 (N.D. Cal. 1999). As a matter of logic, Plaintiffs could not have diverted resources to combat Sanderson's advertisements before Plaintiffs even knew about them. *Cf. Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (unlawful retaliation for protected activity requires that "the defendant was aware that the plaintiff had engaged in protected activity").

Both Plaintiffs asserted in discovery that they first became aware of the Sanderson advertisements at issue—whether in print, online, on television, or on the radio—on August 1, 2016. Ex. 6; Ex. 7. Any activities undertaken by Plaintiffs before that date cannot constitute a diversion of organizational resources, a point which Plaintiffs concede. *See, e.g.*, FoE Dep. 68:1-5 ("[Q.] [Y]ou'd agree FoE could not divert any resources in response to Sanderson advertising if it had not yet seen that advertising; right? A. Yes."), 68:8-11 ("[Q.] And FoE did not, in fact, divert resources to counteract Sanderson advertising before August 1, 2016; correct? A. That's my understanding.").

Yet both Plaintiffs improperly claim a diversion of resources based on various efforts predating their knowledge of the challenged ads. For instance, both Plaintiffs cite efforts related to the September 2015 publication of the Chain Reaction report, which graded restaurant chains on their meat sourcing practices (regardless of whether they sourced from Sanderson or not). *See* Exs. 3-4. Likewise, in its interrogatory response, FoE cites various publications as far back as 2015, including:

- a September 2015 blog post discussing antibiotics use in animal agriculture and the Chain Reaction report
- a November 2015 press release concerning the release of the Chain Reaction report
- a November 2015 blog post calling for changes to Darden's wage and labor practices, use of meat, portion sizes, and food sourcing policies
- a March 2016 press release targeting Darden's and Olive Garden's food sourcing and labor practices[6]
- a March 2016 blog post calling on Darden and Olive Garden to adopt the FoE coalition's "Good Food Principles"
- a May 2016 press release describing a 130,000 person demonstration in support of FoE's "Good Food Now!" campaign, which targeted Darden and Olive Garden, and
- unspecified (and thus undated) Twitter posts, Facebook posts, News Magazines, and Action Alerts regarding the same that may have occurred before August 1, 2016.

Ex. 3 at 4-6. But any efforts related to those publications all took place *before* Plaintiffs knew about any of the challenged advertisements in this case, and therefore could not have been undertaken in response to or to combat such ads.

Nor can FoE rely on its campaign regarding Darden (including Olive Garden). According to FoE, that campaign included "130,000 petition signatures," along with "Tweets," "Facebook Posts," and "Action Alerts" "related to Sanderson, Darden, Olive Garden, the Chain Reaction report, and antibiotics in the food supply." Ex. 3 at 6. But that campaign started in ***2015*****,** more than a year before the advertising in question, and thus also could not have been in response to that advertising. *See* FoE Dep. 46:13-25, 48:15-25, 52:19-53:6, 78:17-79:10; Exs. 25, 28, 30.[7] The Court must therefore find—as a matter of law

[6] FoE incorrectly dates this press release from March 2013 in its interrogatory response. Ex. 3 at 5.

[7] FoE also relies on its work in connection with its tri-annual "News Magazine" and its "Annual Report." Although FoE does not identify the dates of any such publications and did not produce any such publications in discovery, these publications almost certainly began before August 2016. Plaintiffs offer

and fact—that Plaintiffs' pre-August 1, 2016 efforts were not "diverted" to address Sanderson's advertising, and thus cannot support Article III standing.

II. Plaintiffs Did Not Divert Resources Because Of Or To Address The Challenge Advertising.

Discovery has also shown that Plaintiffs' activities after August 1, 2016 were in no way a reaction to Sanderson's advertising, but were instead no more than a continuation of non-Sanderson-specific initiatives Plaintiffs were already undertaking in furtherance of their respective missions to address antibiotic use generally. Such activities cannot be said to "combat the particular [conduct] in question" in this false advertising case, and are thus plainly insufficient to establish standing on a diversion-of-resources theory. *Smith*, 358 F.3d at 1105.

A. Activities Unrelated to Sanderson's Advertising Cannot Establish Standing.

Plaintiffs have failed to come forward with any evidence of activities undertaken (or resources diverted) because of—or "traceable to"—the challenged advertising, and they cannot establish standing on the basis of actions they undertook for purposes unrelated to such advertising. As an initial matter, a number of the materials produced by Plaintiffs, referenced in the Third Amended Complaint, or identified in their interrogatory responses do not even mention Sanderson at all. For instance, CFS cites to press releases and blog posts having nothing to do with (and bearing no mention of) Sanderson. *See, e.g.*, Ex. 24 (discussing Thanksgiving turkeys); Ex. 16 (discussing United Nations statements regarding global superbug threats). And both Plaintiffs produced in discovery publications and letters addressing companies other than Sanderson (and who were not even Sanderson customers). *See, e.g.*, Ex. 23 (FoE post concerning Subway); Ex. 22 (CFS post regarding McDonald's).

Even cherry-picking the few materials that *do* mention Sanderson, Plaintiffs still cannot carry their burden of showing such efforts were designed to "combat" the Sanderson *advertising* at the core of this false advertising case:

- Plaintiffs did not publish Action Alerts or send emails to their members addressing Sanderson's advertising.

no suggestion that they were caused by Sanderson's advertising. Rather, they are at most consistent with FoE's other, general activities related to the use of antibiotics in raising animals.

- Plaintiffs never addressed Sanderson's advertising as part of its ongoing Darden campaign, instead addressing the mere fact of Darden's sourcing meat from Sanderson and other suppliers (in addition to a host of issues unrelated to animal-raising practices).
- Plaintiffs did not write letters to Sanderson or any of its customers (including Darden) complaining about Sanderson's advertising.
- Plaintiffs did not publish a single press release, blog post, or News Magazine article pertaining to or referencing Sanderson's advertising (until their press releases touting the initiation of this lawsuit).
- Until months after they had initiated this litigation, Plaintiffs did not reference Sanderson or its advertising in the Chain Reaction reports (or any other published report), and even then only noted Sanderson's advertising in a single paragraph of a single report while failing to even assert that such advertising was false or misleading.
- Plaintiffs never petitioned Sanderson (or anyone else) regarding Sanderson's advertising (or any other topic).
- Plaintiffs never engaged in protests at Sanderson (or anywhere else) regarding Sanderson's advertising (or any other topic).

See FoE Dep. 52:19-53:6, 78:2-79:4, 80:10-81:24, 83:3-25, 84:12-19, 95:23-96:6; CFS Dep. 52:23-53:9.

Plaintiffs' document production is telling on this score. One would think that if Plaintiffs had truly diverted resources in response to the challenged advertising, Plaintiffs' internal emails or emails to their members in the months following August 1, 2016 would have reflected a campaign or related activities to combat the consumer misperception from the ads. In the era of modern email communication—particularly where both Plaintiffs have multiple offices on both the East and West Coasts—if such campaigns in fact took place, it is implausible that employees of each Plaintiff would not have been communicating about them extensively. The fact that Plaintiffs' document productions are wholly devoid of such communications—when Sanderson expressly requested any such communications—underscores the reality here: neither Plaintiff actually engaged in any such campaign or activities in response to the challenged advertising.

If Plaintiffs' activities were at all related to Sanderson, those activities were directed toward Sanderson's (and other poultry producers') animal-raising *practices*, namely their use of antibiotics, ***not*** the challenged *advertising*. But Plaintiffs bring false advertising claims in this litigation, and to have standing to assert such claims, Plaintiffs must have actually engaged in activities in response to the challenged advertising. The fact that "[Plaintiffs] simply disagree[] with the substantive" way in which Sanderson raises its chickens—"a position that long predates the" advertising and that Plaintiffs "will no

doubt continue to lobby" against in the future—is irrelevant and cannot establish standing for false advertising claims. *See Int'l Acad. of Oral Med. & Toxicology v. FDA*, 195 F. Supp. 3d 243, 258 (D.D.C. 2016); *see also City of Oakland*, 2018 WL 3008538, at *11-12. In fact, Plaintiffs ***admitted*** that they did not divert resources "because of" Sanderson's advertising. *See, e.g.*, FoE Dep. 128:4-130:3, CFS Dep. 43:14-16. What is more, Plaintiffs expressly admitted ***they still would have undertaken the very same advocacy activities***—including advocating against the use of antibiotics in animal agriculture and discouraging consumers from purchasing meat raised with routine antibiotics (whether by Sanderson or some other producer)—***even if Sanderson had never aired the challenged advertisements***. CFS Dep. 103:13-104:18, 104:22-105:2; FoE Dep. 78:22-79:10, 84:12-19, 122:2-5, 129:24-130:3. Those concessions are fatal to Plaintiffs' claim to Article III standing because Plaintiffs cannot show that their alleged diversion activities "combat the particular [advertisements] in question," rather than some other conduct or concern (here, the routine use of antibiotics in raising animals for meat consumption). *City of Oakland*, 2018 WL 3008538, at *11 (quoting *Smith*, 358 F.3d at 1105).

The factual record developed in discovery distinguishes this case from the precedent cited in the Court's motion to dismiss order, which was based on Plaintiffs' pleading-stage allegations alone. ECF No. 48 at 5-6. For instance, in *Fair Housing of Marin v. Combs*, 285 F.3d 899 (9th Cir. 2002), the Ninth Circuit affirmed the district court's finding of organizational standing because the plaintiff identified control tests and "$10,160 in frustration of mission damages, namely for design, printing, and dissemination of literature *aimed at redressing the impact [the defendant's] discrimination had on the [] housing market*." *Id.* at 905 (emphasis added). Likewise, in *People for Ethical Treatment of Animals v. Whole Foods Market California, Inc.* ("*PETA*"), 2016 WL 362229 (N.D. Cal. Jan. 29, 2016), the court found organizational standing by accepting as true (at the motion to dismiss stage) the plaintiff's allegations that it diverted resources specifically to "urge [the defendant] to stop its misleading advertising and to educate the public about the inadequacy of [the defendant's] animal welfare standards," which the plaintiffs there had challenged under the UCL and FAL. *Id.* at *1, 3. And in *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012), the plaintiffs had actually investigated the defendant's alleged violations and, in direct response, started new education and outreach

campaigns specifically targeting discriminatory roommate advertising (which the plaintiffs alleged the defendant had partaken in). *Id.* at 1219.

The record here is far different. Unlike in *Combs*, none of Plaintiffs' activities here were "aimed" at Sanderson's advertisements, as opposed to broader animal agriculture issues (often unrelated to Sanderson or even chicken). And unlike in *PETA* and *Roommate.com*, Plaintiffs have not claimed to have investigated Sanderson's false advertising, nor have they sought to specifically train or educate consumers or anyone else about the Sanderson advertising they now challenge. (There is certainly no contemporaneous no documentary evidence to support any such investigation, training, or education efforts.) To be sure, Plaintiffs baldly assert that their actions were undertaken "in order to counteract Sanderson's deceptive advertising," and that they "diverted [time and money] to undertake projects to address Sanderson's false, misleading and deceptive advertising." Ex. 3 at 3. But those conclusory allegations—which are blatantly contradicted by the factual record following discovery—are not enough at this stage. *See Project Sentinel*, 40 F. Supp. 2d at 1139-40 (granting summary judgment on standing grounds where organization relied solely on conclusory declaration that organizational resources were diverted from educational, counseling, and mediation functions to test and document alleged discrimination). That is, although Plaintiffs' "broad" allegations to the contrary were properly deemed true at the pleading stage, Plaintiffs can no longer hide behind conclusory statements belied by discovery into their actual conduct. *See id.*

The proper analog at this stage is *City of Oakland*. *See* 2018 WL 3008538. There, the plaintiff organization sued a defendant for violations of state and federal housing statutes. *Id.* at *1. The Court granted dismissal, in part, on standing grounds, holding that the plaintiff put forward "no allegations … that [the defendant's] conduct *caused* the [plaintiff] to divert resources toward … housing discrimination." *Id.* at *11 (emphasis added). While the plaintiff repeatedly mentioned "diversion of resources" in the complaint, the court found "each mention regards the diversion of resources to address" a separate (albeit related) issue—blight conditions—but "not to combat the particular housing discrimination in question." *Id.* (citation omitted). So too here. Plaintiffs' diversion activities merely relate—at most—to Sanderson's chicken-raising *practices*, not the challenged *advertising*, and therefore cannot form the basis for organizational standing as a matter of law.

B. Activities Not Required By Sanderson's Advertising Cannot Establish Standing.

The fact that Sanderson's advertising did not require Plaintiffs to take, or refrain from taking, any action independently dooms their standing allegations. Plaintiffs concede that Sanderson's advertising neither required them to take, nor prohibited them from taking, any action whatsoever. *See, e.g.*, CFS Dep. 86:25-87:4. In other words, Plaintiffs were not *required* to counteract the supposedly misleading advertisements at issue. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1241 (9th Cir. 2018). But that is the very hallmark of standing: "An organization may sue only if it was *forced* to choose between suffering an injury and diverting resources to counteract the injury." *La Asociacion de Trabajadores*, 624 F.3d at 1088 n. 4 (emphasis added). By their own admission, Plaintiffs faced no such choice here, and instead (as explained further below) simply chose to continue the very same activities they had engaged in before the advertising.

Plaintiffs have therefore failed to identify any way in which Sanderson's advertising "injured the organization's advocacy activities themselves." *See Int'l Academy*, 195 F. Supp. 3d at 358 (citation omitted). Indeed, Plaintiffs' is "a difficult argument to make since the [advertising] has no impact whatsoever on [Plaintiffs] ability to gather information, collect and present data, [and] communicate [their] belief that" routine antibiotics use in farming is unsafe. *Id.* (collecting cases). To show standing, Plaintiffs must demonstrate that Sanderson's advertising "somehow affected [their] ability to" function or "obstruct[ed]" Plaintiffs' mission. *See Project Sentinel*, 40 F. Supp. 2d at 1141. Plaintiffs' failure to do so provides further (and independent) justification to dismiss their claims. *See id.*

C. Plaintiffs' Activities Were Merely a Continuation of Their Prior Advocacy Work.

Even if Plaintiffs' activities had some tangential relation to Sanderson, those activities could not constitute a "diversion of resources" because such conduct was merely a continuation of Plaintiffs' pre-existing advocacy work. "Plaintiffs have not explained how the[ir] activities [,] which basically boil down to examining and communicating about" general animal agriculture issues "differ from the [Plaintiffs'] routine [advocacy and educational] activities." *See NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 238 (5th Cir. 2010). The record "is not clear how [Sanderson's advertising] led [] to any [] 'diversion' of expenditures at all; on the contrary, [Plaintiffs'] recent spending [and engagement] pattern falls neatly within the core set of activities it has long performed." *See Int'l Academy*, 195 F. Supp. 3d at 258. In fact,

by Plaintiffs' own admission, ***years*** before Sanderson ever aired the advertising in question, Plaintiffs' core organizing and policy work involved educating consumers about antibiotics use in animal agriculture, and engaging in advocacy related to restaurants' meat supply policies. Specifically, Plaintiffs "undert[ook] [] a plethora of [effort]s relat[ed] to" animal agriculture practices generally, including "educating its members on … potential adverse health effects posted by [antibiotics use]; funding scientific research; publishing [] literature; promoting public education on" related issues; "promoting [organic and no-antibiotics]" animal raising; and other similar initiatives, including campaigns designed to change restaurant sourcing practices. *See id.*; CFS Dep. at 18:1-9, 19:13-16, 19:24-20:4, 24:20-23, 25:19-26:9; FoE Dep. at 19:4-20:15, 22:5-23:4, 43:12-44:15, 48:5-25. "That is all fine and well. But [Plaintiffs] ha[ve] not explained how [Sanderson's advertisements] ha[ve] forced it to divert or modify [their] activities in any meaningful way from its standard programmatic efforts that existed before [the advertisements] w[ere]" aired. *Int'l Academy*, 195 F. Supp. 3d at 259.

Thus, even if Plaintiffs' activities met the threshold requirement that they be designed to "combat" the challenged conduct—which they do not—those activities "[were] not a 'diversion' from, but rather a continuation of [Plaintiffs'] ordinary educational, advocacy, and [other] activities." *See id.* (citation omitted). The undisputed record shows that Plaintiffs started ***all*** of the activities they identify as a basis for standing—the Chain Reaction reports, public advocacy on antibiotics use in farming, and influence campaigns to change restaurant sourcing practices—before they ever saw even a single Sanderson advertisement. The activities that Plaintiffs point to as a purported diversion of resources are therefore merely part of their ordinary work, *see Project Sentinel*, 40 F. Supp. 2d at 1139, and Plaintiffs cannot "convert [their] ordinary program costs into an injury in fact." *People for the Ethical Treatment of Animals, Inc. v. U.S. Fish and Wildlife Serv.*, 2014 WL 12580234, at *5 (C.D. Cal. Jan. 31, 2014) (citation omitted).

III. Plaintiffs' Litigation-Related Activities Are Not A Cognizable Diversion Of Resources.

Nor can Plaintiffs bootstrap standing based on litigation-related conduct. Plaintiffs cite a handful of press releases and social media posts about this lawsuit as activities they engaged in "as a result of the Sanderson advertising." *See, e.g.*, Ex. 3. But as this Court has already recognized, "[a]n organization cannot 'manufacture' an injury by sustaining litigation costs …." ECF No. 48 at 4 (citing *La Asociacion*

de Trabajadores, 624 F.3d at 1099); *see also E. Bay Sanctuary Covenant*, 909 F.3d at 1241 ("a diversion-of-resources injury" requires expenditures "independent of the litigation"); *Fair Hous. Council of Or. v. Travelers Home & Marine Ins. Co.*, 2016 WL 7423414, at *4 (D. Or. Dec. 2, 2016) ("The Ninth Circuit has … rul[ed] that a diversion of resources toward litigation expenses cannot establish Article III standing."), *report & recommendation adopted by* 2017 WL 90373 (D. Or. Jan. 10, 2017). "A diversion of resources to litigation or investigation in anticipation of litigation does not constitute injury in fact sufficient to support standing." *See id.* (citation omitted). Indeed, "[b]y the mere bringing of … suit, every plaintiff demonstrates [its] belief that a favorable judgment will make [it] happier. Presumably every such plaintiff would prefer to allocate elsewhere the resources spent on such litigation." *Project Sentinel*, 40 F. Supp. 2d at 1141. However, "the diverted cost of litigation can[not] generate an Article III case or controversy." *Id.*

The same is true for the handful of instances where Plaintiffs discussed this litigation outside of court filings, including in press releases, social media posts, and speeches. Such activities are not "independent of the litigation" as they must be to constitute a diversion-of-resources injury. "A contrary rule would drain the Article III standing requirement of any import," as a plaintiff could underwrite standing with the very efforts undertaken to investigate, bring suit, and publicize such litigation. *Id.* For these reasons, Plaintiffs' reliance on litigation press releases and social media posts cannot support their assertion of Article III standing as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should dismiss this case for lack of subject matter jurisdiction.

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Respectfully submitted,

/s/ Michael A. Glick
Michael A. Glick

Mark McKane, P.C. (SBN 230552)
mark.mckane@kirkland.com
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, California 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500

Gregg F. LoCascio, P.C. (admitted *pro hac vice*)
gregg.locascio@kirkland.com
Michael Glick (admitted *pro hac vice*)
michael.glick@kirkland.com
Kathleen A. Brogan (admitted *pro hac vice*)
kathleen.brogan@kirkland.com
Terence J. McCarrick (admitted *pro hac vice*)
terence.mccarrick@kirkland.com
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue N.W.
Washington, D.C. 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200

Counsel for Defendant
Sanderson Farms, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2019, I arranged for the filing of this pleading through ECF, which sent notice to all counsel of record.

/s/ Michael A. Glick
Michael A. Glick