IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD & WATER WATCH, *Plaintiff,* *v.* SMITHFIELD FOODS, INC. *Defendant.*	No. 1:21-cv-02065-CRC

PLAINTIFF'S OPPOSED MOTION TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff Food & Water Watch, pursuant to 28 U.S.C. § 1447(c), moves to remand the above-captioned case to the Superior Court of the District of Columbia for lack of subject matter jurisdiction.

A Memorandum of Points and Authorities in support of this Motion and a proposed order are attached.

Pursuant to LCvR 7(m), counsel for Plaintiff and Defendant have conferred in good faith prior to the filing of this Motion. Defendant's counsel opposes this Motion.

Respectfully submitted,

Dated: August 30, 2021

/s/ Randolph T. Chen

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CERTIFICATE OF SERVICE

I certify that on August 30, 2021, I caused a copy of the foregoing Plaintiff's Motion to Remand for Lack of Subject Matter Jurisdiction to be served via ECF upon the Court and all counsel of record.

/s/ Randolph T. Chen
RANDOLPH T. CHEN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD & WATER WATCH, *Plaintiff,* *v.* SMITHFIELD FOODS, INC. *Defendant.*	No. 1:21-cv-02065-CRC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

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INTRODUCTION

This is a D.C. Consumer Protection Procedures Act (CPPA) action brought by Plaintiff Food & Water Watch (FWW) against Defendant Smithfield Foods, Inc. (Smithfield) for misrepresentations about the national meat supply and worker safety made throughout the ongoing COVID-19 pandemic. FWW chose to file its one-count complaint in D.C. Superior Court and brought its claim under the CPPA's private attorney general provisions, seeking injunctive relief on behalf of general public. Smithfield then removed this case, invoking federal jurisdiction, and has now filed a motion to dismiss this action for lack of Article III standing.

This case must be remanded because Smithfield cannot have it both ways. On removal, Smithfield asserted that subject matter jurisdiction exists. But in moving to dismiss, Smithfield has done an about-face, arguing at length that this Court *does not* have federal jurisdiction because FWW lacks Article III standing—which is, of course, an essential component of subject matter jurisdiction. These are irreconcilable positions. Smithfield, as the removing party, carries the burden to prove that federal jurisdiction exists. But Smithfield cannot meet that burden when it has now taken the repeated position that an essential component of federal jurisdiction does not exist.

Moreover, Smithfield's specific grounds for removal rehash arguments that have been repeatedly made and rejected in this District's anthology of CPPA removal litigation. Smithfield attempts to assert diversity jurisdiction, but it cannot establish that this case clears the amount in controversy threshold of $75,000. Nor is there jurisdiction under the Class Action Fairness Act (CAFA) because this case is not a class action. These are the conclusions compelled by the overwhelming weight of authority in this District, where a steady churn of failed attempts to remove CPPA actions on near-identical grounds have established a well-beaten path toward remand. This case should follow and be remanded to D.C. Superior Court.

BACKGROUND

FWW originally filed its complaint in this action on June 16, 2021 in D.C. Superior Court, alleging a single count against Smithfield under the CPPA. In short, FWW's complaint alleges that Smithfield violated the CPPA by repeatedly misleading District consumers throughout the COVID-19 pandemic about fears of nationwide meat shortages and the company's workplace safety practices related to COVID-19. Compl. ¶¶ 4-5. Smithfield distributed these misrepresentations to District consumers through multiple media, including advertisements in the *Washington Post* and *New York Times*, as well as numerous statements on the company's website and social media accounts. *E.g.*, *id.* ¶¶ 31-35, 52-60. FWW also alleges that Smithfield's misrepresentations are material and "affect consumer purchasing behavior." *Id.* ¶ 8.

FWW brings this action "on behalf of itself in its organizational capacity, as well as on behalf of the general public and interests of District consumers." *Id.* ¶ 117. To seek this generalized relief, FWW invoked the CPPA's "private attorney general" provisions, which expressly authorize nonprofit organizations and public interest organizations to bring CPPA actions on behalf of the general public and District consumers. *Id.* ¶ 113-14 (citing § D.C. Code 28-3905(k)(1)(C) (nonprofit organizations)); 115-16 (citing § D.C. Code 28-3905(k)(1)(D) (public interest organizations)). FWW seeks injunctive relief on behalf of the general public—for example, corrective advertising that remedies Smithfield's misrepresentations to District consumers. Compl. at 41. In addition, FWW seeks, on behalf of itself, statutory damages of $1,500, punitive damages in an amount to be proven at trial, and reasonable attorneys' fees and costs. *Id.*

Smithfield removed this action on July 30, 2021, asserting that this Court has subject matter jurisdiction based on two grounds: (1) diversity jurisdiction under 28 U.S.C. § 1332(a); and (2) CAFA jurisdiction under 28 U.S.C. § 1332(d). *See* Notice of Removal ("Notice") at 1, 5, 17.

On August 20, 2021, Smithfield filed a Motion to Dismiss the Complaint with prejudice (hereinafter, "Def.'s Mot."). Smithfield's motion dedicates an entire section to Article III standing, asserting that the "issue of constitutional standing is a jurisdictional one, because the defect of standing is a defect in subject matter jurisdiction." Def's. Mot. at 16. Smithfield then argues at length that FWW's Complaint should be dismissed with prejudice because FWW cannot demonstrate standing under Article III. *E.g.*, *id.* at 19 ("FWW's allegations . . . are insufficient to support Article III standing"); 22 ("FWW cannot rely on [alleged activities] to establish an organizational injury under Article III").

LEGAL STANDARD

In this District, "[r]emoval is only proper if the case could have been brought in federal court in the first place." *Organic Consumers Ass'n v. Handsome Brook Farm Grp. 2, LLC*, 222 F. Supp. 3d 74, 76 (D.D.C. 2016). Federal courts "construe removal jurisdiction narrowly" to avoid federalism concerns and "tend to resolve factual ambiguities in favor of remand." *Id.* at 76-77. "The party seeking removal has the burden to prove that federal jurisdiction exists" and must establish the amount in controversy by a preponderance of the evidence. *Id.* at 76.

ARGUMENT

I. This case must be remanded because Smithfield has taken the position this Court lacks subject matter jurisdiction.

Under 28 U.S.C. § 1447(c), cases "*shall* be remanded" if at any time before final judgment "it appears that the district court lacks subject matter jurisdiction." (emphasis added); *see also Republic of Venez. v. Philip Morris, Inc.*, 287 F.3d 192, 196 (D.C. Cir. 2002) ("When it appears that a district court lacks subject matter jurisdiction over a case that has been removed from a state court, the district court *must* remand the case.") (emphasis added). Article III standing is "essential to a federal court's subject matter jurisdiction," *Gordon v. Nat'l Archives & Records Admin.*, 258

F. Supp. 3d 23, 26 (D.D.C. 2017), and the "party invoking federal jurisdiction bears the burden of establishing [Article III standing] elements," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, when a case is removed to federal court and Article III standing is not established, the proper outcome is remand. *See Ctr. for Sci. in the Pub. Interest v. Burger King Corp.*, 534 F. Supp. 2d 141, 144 (D.D.C. 2008).

Remand is mandatory here because Smithfield itself is arguing this Court lacks federal jurisdiction. By repeatedly asserting that FWW lacks Article III standing—an essential component of subject matter jurisdiction—Smithfield has expressly and necessarily taken the position that this Court does not have subject matter jurisdiction. *See, e.g.*, Def.'s Mot. 16 ("defect of standing is a defect in subject matter jurisdiction"); 19 (FWW's allegations "insufficient to support Article III standing"); 22 ("FWW cannot rely on [alleged activities] to establish an organizational injury under Article III"). Again, Smithfield is the party invoking federal jurisdiction, so it carries the burden of establishing that jurisdiction—which includes Article III standing. And because Smithfield has now taken the position that Article III standing is lacking, it is impossible for Smithfield to carry its burden.

This Court should reject Smithfield's blatant gamesmanship of invoking jurisdiction on removal and then immediately disclaiming it to seek dismissal. Other federal courts confronted with this scenario have remanded actions, rebuking similar ploys by defendants to have their cake and eat it too. *See, e.g., Collier v. SP Plus Corp.*, 889 F.3d 894, 897 (7th Cir. 2018) ("dubious strategy" of challenging Article III standing after removal "has resulted in a significant waste of federal judicial resources"); *Mocek v. Allsaints USA Ltd.*, 220 F. Supp. 3d 910, 914 (N.D. Ill. 2016) (awarding attorneys' fees against removing defendant who "tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction"); *Barnes v. Aryzta, LLC*, 288 F. Supp. 3d 834,

840 n.3 (N.D. Ill. 2017) (awarding attorneys' fees in remanding action and stating "[i]t was incumbent on Defendant . . . to consider the Article III standing issue when it removed the action").

Finally, this jurisdictional bait-and-switch is particularly wasteful when it needlessly deprives a plaintiff of its chosen forum—here, D.C. Superior Court—that is not bound by Article III limitations. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts . . . .").[1] Indeed, the D.C. Superior Court has issued multiple decisions—one of which involved Smithfield as a defendant—that have expressly rejected federal Article III precedent in CPPA cases due to the law's expansive standing provisions. *See, e.g.*, *Organic Consumers Ass'n v. Smithfield Foods, Inc.*, 2020 CA 2566 B at 8 (D.C. Super. Ct. Dec. 14, 2020) (rejecting federal precedent because it "applies standards for 'Article III standing' that are stricter than the standards applied by this Court") (appended as Exh. A); *Organic Consumers Ass'n v. Noble Foods, Inc.*, 2020 CA 002009 at 6 (D.C. Super. Ct. Aug. 25, 2020) (same) (appended as Exh. B); *cf. Beyond Pesticides v. Dr. Pepper Snapple Grp., Inc.*, 2019 WL 2744685, at *2 (D.D.C. July 1, 2019) (quoting *Atchison v. D.C.*, 585 A.2d 150, 153 (D.C. 1991) for proposition that D.C. courts "enjoy[] flexibility in regard to [the case or controversy requirement] not possessed by the federal courts") (alterations in original).

In such cases, Smithfield's strategy of simultaneously asserting and disavowing federal jurisdiction wastes considerable judicial resources. This ruse forces the Court to decide the Article III issue in a vacuum because neither party is attempting to prove it. FWW cannot be

[1] While the D.C. Court of Appeals has generally applied the principles of federal standing as a practical matter "to promote sound judicial economy," it has also recognized that decisions "aris[ing] in the context of the case or controversy requirement of Article III of the Constitution, are not binding on this court." *Atchison v. D.C.*, 585 A.2d 150, 153 (D.C. 1991) (internal quotations omitted).

faulted for this because it does not carry the burden of establishing Article III standing, having chosen to file its case in D.C. Superior Court. Instead, this burden is on Smithfield—but Smithfield has taken the position that Article III standing is lacking. Thus, the Court should decline to waste its time carrying Smithfield's water and promptly remand the case. *See Barnes*, 288 F. Supp. 3d at 839 ("The Court declines to decide whether there is Article III standing because neither party is willing to address the issue. . . . The difference between the two parties is that Plaintiff does not have to take a position on the standing issue while [the removing] Defendant does, because Defendant bears the burden of establishing jurisdiction in this Court.").

II. This Court lacks diversity jurisdiction because the amount in controversy requirement is not satisfied.

The Court should similarly reject Smithfield's asserted grounds for removal. Smithfield asserts this Court has diversity jurisdiction over this action, which requires the amount in controversy in the case to exceed $75,000, 28 U.S.C. § 1332(a), and attempts to clear this bar by summing its injunctive compliance costs, FWW's fees and costs, and damages. These arguments have become routine in this District and courts have just as routinely rejected them in similar CPPA actions brought on behalf of the general public. This case should thus follow the overwhelming weight of authority and be remanded back to D.C. Superior Court.

A. Smithfield's injunctive costs are insufficient to meet the amount in controversy because they are speculative and subject to the non-aggregation principle.

As an initial matter, the Court should disregard Smithfield's claimed injunctive costs of "at least $150,000" for corrective advertising, *see* Notice ¶ 60, because they are speculative and lack evidentiary support. *See Wexler v. United Air Lines, Inc.*, 496 F. Supp. 2d 150, 154 (D.D.C. 2007) (rejecting conclusory assertion that injunctive costs would exceed $75,000 when it was not supported by any evidence, such as employee declarations or affidavits).

Moreover, Smithfield's estimated injunctive costs are marginal because in calculating the amount in controversy, the non-aggregation principle requires those costs to be "divided among the beneficiaries of the injunction." *Animal Legal Defense Fund v. Hormel Foods Corp.* ("*ALDF*"), 249 F. Supp. 3d 53, 60 (D.D.C. 2017) (collecting cases). This is because under the non-aggregation principle, the "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement." *Snyder v. Harris*, 394 U.S. 332, 335 (1969). This principle applies in CPPA cases that seek injunctive relief on behalf of the general public because "members of the general public have separate and distinct claims that could be brought independently against [the defendant] with respect to the challenged conduct." *ALDF*, 249 F. Supp. 3d at 61-62.

In CPPA cases like this one that seek injunctive relief on behalf of the general public, even injunctive costs exceeding millions of dollars are insufficient to meet the amount in controversy because they must be divided amongst hundreds of thousands of D.C. consumer beneficiaries. *See, e.g.*, *id.* (injunctive costs of $5.4 million insufficient to meet amount in controversy when "divided pro rata among the members of the general public of Washington, D.C."); *FWW v. Tyson Foods, Inc.*, 2020 WL 1065553, at *5 (D.D.C. Mar. 5, 2020) (injunctive costs of $400,000 insufficient when "divided pro rata among the members of the general public of the District of Columbia"); *Handsome Brook*, 222 F. Supp. 3d at 77 (Cooper, J.) (injunctive costs of $113,000 insufficient after pro rata division).

The non-aggregation principle applies here, reducing the amount in controversy to far less than $75,000. FWW has expressly brought this action on "behalf of the general public and interests of District consumers." Compl. ¶ 117. FWW also seeks broad injunctive relief on the public's behalf in the form of corrective advertising, which is "a remedy that by its very nature would

benefit not only [the plaintiff organization's] members but the general public." *Tyson Foods*, 2020 WL 1065553, at *3. FWW's claim is separate and distinct from a claim held by a member of the general public because any individual who views or has viewed Smithfield's misrepresentations set out in the Complaint could bring a CPPA suit on the same grounds advanced in this action. *See Tyson Foods*, 2020 WL 1065553, at *4 (claims were distinct because "any individual who watched Defendant's marketing videos could bring a CPPA suit on the same grounds advanced by Plaintiffs here"). Thus, Smithfield's claimed injunctive costs must be disaggregated among the general public who benefit from the injunctive relief. The asserted and entirely speculative cost of $150,000 for corrective advertising would fall far below $75,000 after being divided across hundreds of thousands of District consumers.

B. FWW's fees and costs are insufficient to meet the amount in controversy because they are speculative and subject to the non-aggregation principle.

FWW's prospective attorneys' fees, expert fees, and costs in this case are insufficient to clear the amount in controversy for several reasons. First, the amount in controversy generally cannot be satisfied "through speculative assertions as to the potential for an award of attorneys' fees." *ALDF*, 249 F. Supp. 3d at 62-63. Here, Smithfield argues that the fees and costs in this action will surpass the jurisdictional amount by citing purportedly similar CPPA cases and lawsuits brought by FWW's counsel where fee petitions have exceeded $75,000. Notice ¶¶ 27-28. But this approach of cherry-picking fee requests from prior cases to establish the amount in controversy in another has been repeatedly rejected in this District as too speculative. *E.g.*, *id.* (attempt to "cobbl[e] together a blended billing rate of Plaintiff's lawyers from filings [] in other cases" was too speculative); *Clean Label Project Found. v. Now Health Grp., Inc.*, 2021 WL 2809106, at *7 (D.D.C. July 6, 2021) (citation to fee award in prior CPPA case was too speculative); *Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 140 (D.D.C. 2010) (conjecture that

plaintiff's attorneys would bill 300 hours at a "conservative estimate of $250 per hour" was too speculative).

Second, the non-aggregation principle also applies to fees and costs when calculating the amount in controversy. *See, e.g.*, *Breakman v. AOL, LLC*, 545 F. Supp. 2d 96, 107 (D.D.C. 2008) (non-aggregation principle "logically should extend to claims of attorneys' fees"); *Gen. Mills*, 680 F. Supp. 2d at 141 (applying non-aggregation principle to attorneys' fees and costs). In CPPA actions like this one that seek injunctive relief on behalf of the general public, courts have repeatedly applied the non-aggregation principle to require attorneys' fees be "divided by the number of the members of the public benefited by [the] case." *Fahey v. Godiva Chocolatier, Inc.*, 2020 WL 805776, at *6 (D.D.C. Feb. 18, 2020); *see also Institute for Truth in Marketing v. Total Health Network Corp.*, 321 F. Supp. 3d 76, 92 (D.D.C. 2018) (attorneys' fee amount "shrinks considerably when divided across the consumers on whose behalf [the organizational plaintiff] brings the action"). Thus, like Smithfield's claimed injunctive costs, any attorneys' fees, expert fees, and costs recovered in this case are marginal after being divided by the hundreds of thousands of District consumers who stand to benefit from this case.

Smithfield attempts to evade the non-aggregation principle by carving out "attorneys' fees that will be spent litigating [FWW's] organizational standing" and arguing that those fees are not subject to disaggregation because they are "attributable solely to litigation activities unique to FWW's individual claim." Notice ¶ 45. This novel proposition lacks legal authority. Courts routinely remand CPPA cases where plaintiffs bring suit both on their own behalf as well as the general public's and do not split hairs regarding the fees spent litigating the plaintiff's individual standing. *E.g.*, *Now Health*, 2021 WL 2809106, at *1; *Handsome Brook*, 222 F. Supp. 3d at 76. This is for good reason. The non-aggregation principle should logically extend to standing

litigation fees because standing is a threshold requirement in *every* CPPA case and thus part-and-parcel of obtaining relief for the general public.

Finally, courts in this District have repeatedly expressed policy concerns that the amount in controversy should not turn on attorneys' fees alone. *E.g.*, *Gen. Mills*, 680 F. Supp. 2d at 141 ("[A]s a policy matter, it is the Court's view that allowing attorneys' fees to satisfy the amount in controversy could encourage defendants to remove cases improperly simply to increase plaintiffs' fees and costs and thereby support removal."); *Breakman*, 545 F. Supp. 2d at 107 ("[T]he Court is not entirely comfortable with the premise that an action should be retained in federal court where satisfaction of the amount in controversy requirement depends upon a lump sum award of attorneys' fees."). These concerns apply with full force to this case and further support rejection of the unsubstantiated rule Smithfield proposes here.

C. Smithfield's punitive damages estimate should be disregarded as speculative.

"Courts have consistently held that the mere possibility of a punitive damages award is insufficient to prove that the amount in controversy requirement has been met." *Apton v. Volkswagen Grp. of Am., Inc.*, 233 F. Supp. 3d 4, 14 (D.D.C. 2017) (internal quotations and emphasis omitted); *see also Wexler*, 496 F. Supp. 2d at 154 ("Because this completely speculative estimate is factually unsupported . . . punitive damages will not be included in determining the amount in controversy."). Here, Smithfield asserts that the amount in controversy should include a "4:1 ratio of punitive damages to statutory damages." Notice ¶ 49. This is an entirely speculative ratio estimate, as Smithfield has failed to provide any factual or evidentiary support. It should thus be set aside in calculating the amount in controversy.

D. Left with statutory damages, Smithfield cannot meet the amount in controversy.

With injunctive costs, attorneys' fees and costs, and punitive damages disregarded as either too speculative, too marginal, or both, Smithfield is left with statutory damages. But the statutory

damages at issue here are plainly insufficient. FWW expressly only seeks "an order awarding FWW statutory damages of $1,500." Compl. at 41. And while Smithfield attempts to inflate the statutory damages total by identifying additional CPPA violations in the Complaint, even the company's own calculation method amounts to a final tally of $13,500. Notice ¶ 48. Thus, Smithfield cannot establish that this case clears the $75,000 jurisdictional threshold and the Court lacks diversity jurisdiction over this action.

III. This Court does not have CAFA jurisdiction because this case is not a class action.

CAFA only permits removal of certain *class actions*, defined as "civil action[s] filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule." 28 U.S.C. § 1332(d)(1)(B). Here, the underlying action was not filed under Federal Rule 23 or D.C. Superior Court Rule of Civil Procedure 23. Instead, this action was brought under D.C. Code § 28-3905(k)(1). This Court has repeatedly held that § 28-3905(k)(1) "lacks the requisite procedural safeguards to qualify as a state statute sufficiently equivalent to Rule 23" and therefore removal "is not permitted under CAFA's class action provision." *Toxin Free USA v. J.M. Smucker Co.*, 507 F. Supp. 3d 40, 44 (D.D.C. 2020) (internal quotations and citations omitted).

Suits brought under § 28-3905(k)(1) are "private attorney general suits"—"a separate and distinct procedural vehicle from a class action, to which CAFA does not apply." *Beyond Pesticides v. Exxon Mobil Corp.*, 2021 WL 1092167, at *3 (D.D.C. Mar. 22, 2021); *see also ALDF*, 249 F. Supp. 3d at 64; *Nat'l Consumers League v. Flowers Bakeries, LLC.*, 36 F. Supp. 3d 26, 36 (D.D.C. 2014); *Zuckman v. Monster Beverage Corp.*, 958 F. Supp. 2d 293, 304-306 (D.D.C. 2013); *Breakman*, 545 F. Supp. 2d at 101-02.

No class action mechanism is required in cases, like this one, where a plaintiff seeks injunctive relief on behalf of the general public and damages only on behalf of itself. *See Hackman v. One Brands, LLC*, 2019 WL 1440202, at *1 (D.D.C. Apr. 1, 2019) (finding no CAFA

jurisdiction over § 28-3905(k)(1) action where plaintiff sought an injunction on behalf of the general public and statutory damages on behalf of herself). Smithfield cites *Rotunda v. Marriot International, Inc.*, 123 A.3d 980 (D.C. 2015), and suggests that this case must be brought under D.C. Superior Court Rule 23 because it seeks damages. Notice ¶ 67. But *Rotunda* held only "that a plaintiff bringing a *representative suit for damages* under the DCCPPA must comply with Rule 23's requirements." *Toxin Free*, 507 F. Supp. 3d at 45 (emphasis added). FWW is not bringing a representative suit for damages here. Rather, FWW "seeks injunctive relief and not damages on behalf of the general public" and therefore "the *Rotunda* court's concern—that not requiring compliance with Rule 23 would preclude members of the public from asserting their own claims for damages—does not apply here." *Id.* (internal citations omitted).

In sum, this case is not a class action and this Court thus lacks CAFA jurisdiction.

CONCLUSION

For these reasons, FWW's motion to remand should be granted.

Respectfully submitted,

Dated: August 30, 2021

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