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 FOOD & WATER WATCH'S REPLY
IN SUPPORT OF ITS MOTION TO REMAND

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INTRODUCTION

Smithfield dug itself into a hole and is only digging deeper. Smithfield does not contest that it has the burden of establishing this Court's subject matter jurisdiction. Indeed, it asserted this Court has subject matter jurisdiction in its notice of removal. Yet several months later, it turned around and argued that Plaintiff FWW lacks Article III standing—a necessary element of this Court's subject matter jurisdiction. Smithfield cannot, as it must, affirmatively establish jurisdiction for purposes of removal while denying jurisdiction for purposes of a motion to dismiss. Instead of trying to reconcile its contradictory positions, Smithfield argues that this strategy is the only way it can both take its shot at a federal forum *and* contest Article III standing. But federal courts have repeatedly held that a defendant cannot have it both ways; the removal statute requires federal subject matter jurisdiction at the time of removal and courts cannot exercise hypothetical jurisdiction. Because it is Smithfield's burden—not FWW's—to establish Article III standing, and Smithfield has abdicated that burden, this Court must remand the case to state court.

Even if this Court looked beyond Article III standing, Smithfield has failed to establish diversity jurisdiction under 28 U.S.C. § 1332(a) because the amount in controversy does not exceed $75,000. FWW requested only $1,500 in statutory damages. Punitive damages are speculative and, even if added, would not push total damages over $10,000. Smithfield has hung its hat on attorney's fees, relying on them to drive the amount in controversy despite numerous courts in this district cautioning against that approach. Nonetheless, attorney's fees do not get Smithfield any closer to satisfying the amount in controversy because they are subject to the non-aggregation principle and must be divided by hundreds of thousands of D.C. consumers that stand to benefit from this lawsuit, and are also speculative.

Thus, Smithfield has failed to establish both Article III standing and diversity jurisdiction—two necessary but insufficient elements of federal subject matter jurisdiction. Because Smithfield, as the removing party, carries the burden of establishing that this Court has subject matter jurisdiction, its failure to establish Article III standing or diversity jurisdiction serve as two independent grounds for remand to state court.

ARGUMENT

I. Remand is required because Smithfield has failed to meet its burden of establishing subject matter jurisdiction.

Far from establishing that the Court has subject matter jurisdiction, Smithfield has argued that this Court *lacks* jurisdiction. Smithfield does not contest that, as "[t]he party seeking removal," it "bears the burden of proving that jurisdiction exists in federal court," and that if it "cannot meet this burden, the court must remand the case." *Animal Legal Def. Fund v. Hormel Foods Corp.* ("*ALDF*"), 249 F. Supp. 3d 53, 56 (D.D.C. 2017). Nor does Smithfield contest that 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 that 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). Nonetheless, Smithfield maintains that FWW lacks Article III standing. *See* Mot. to Dismiss [ECF No. 18] at 16-22. That approach is fatal to Smithfield's attempt to keep this case in federal court: Smithfield cannot establish that this Court has jurisdiction while simultaneously arguing that it lacks jurisdiction.

Smithfield never addresses this contradiction head-on. Instead, it argues that courts have permitted this bait-and-switch strategy and that FWW must take the position that it satisfies federal Article III standing requirements. *See* Def.'s Opp'n to Pl.'s Mot. to Remand ("Opp'n Br.") [ECF

No. 27] at 17-20. Neither argument is true—and neither explains how Smithfield can simultaneously assert and disclaim this Court's jurisdiction.

A. The weight of authority strongly favors remanding this case to D.C. court.

Courts have consistently held that where, as here, a removing defendant turns around and challenges the federal court's Article III jurisdiction, the proper course of action is to remand the case to state court. *See* Mot. to Remand [ECF No. at 22] at 4-5 (citing *Moeck*, *Barnes*, and *Collier*); *see also, e.g.*, *Ayala v. Sixt Rent a Car, LLC*, 2019 WL 2914063, at *2 (C.D. Cal. July 8, 2019) (remanding because "defendant is trying to have it both ways by asserting, then immediately disavowing, federal jurisdiction"); *Black v. Main St. Acquisition Corp.*, 2013 WL 1295854, at *1 (N.D.N.Y. Mar. 27, 2013) (remanding "because no party shoulders the burden of proving jurisdiction"); *Cont'l Cas. Co. v. S. Co.*, 284 F. Supp. 2d 1118, 1120-21 (N.D. Ill. 2003) ("[Defendant] cannot have it both ways. Either I have subject matter jurisdiction and the case was properly removed, or I do not have subject matter jurisdiction and the case must be remanded to state court."); *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) ("This court holds that plaintiffs cannot voluntarily invoke, and then disavow, federal jurisdiction.").

Smithfield's efforts to distinguish those cases fall flat. Smithfield asserts that *Moeck* is different because, in that case, it "was undisputed that the sole claim the plaintiff asserted did not require Article III standing," so the plaintiff did not need to take a position on whether it satisfied federal Article III standing requirements. Opp'n Br. at 19 (citing *Moeck v. Allsaints USA Ltd.*, 220 F. Supp. 3d 910, 914 (N.D. Ill. 2016)). But here, FWW also need not take a position on whether it has satisfied federal Article III standing requirements. *See infra* at Part I.B. Regardless, the court's decision in *Moeck* had nothing to do with whether the plaintiff would have to establish Article III standing in state court. The court reasoned that "when no party shoulders the burden of proving jurisdiction"—as is the case here—"remand is required under § 1447(c)." *Id.* at 912 (internal

quotation marks omitted). The court even awarded plaintiff attorney's fees because "defendant tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction"—again, just as Smithfield did here. *Id.* at 914.

Similarly, Smithfield tries to distinguish *Barnes* by claiming it was "unsettled" whether plaintiff's claim required Article III standing. Opp'n Br. at 19 (citing *Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d 834, 839 (N.D. Ill. 2017)). But Smithfield quotes from a sentence saying something entirely different. What was "unsettled" was whether the plaintiffs had Article III standing to bring their claim in federal court after *Spokeo*—not whether the plaintiffs' claim required Article III standing as a matter of state law. And instead of trying to resolve the unsettled federal standing question on its own, the court observed that "Defendant has gone from arguing that this Court does *not* have jurisdiction to taking the position that federal jurisdiction may or may not later prove to be lacking." *Id.* at 839. The court reasoned that because the "Defendant does not even attempt and thus necessarily fails to persuade the Court that federal jurisdiction exists," it must "grant[] Plaintiff's motion to remand to state court." *Id.* at 839-40. The same reasoning applies here.

As for the Seventh Circuit's decision in *Collier*, Smithfield argues that it too is distinguishable because "both parties agreed during the remand proceedings that the plaintiff had failed to plead an Article III injury." Opp'n Br. at 19. But the plaintiff in *Collier* took the same position FWW takes here: that it is the removing defendant's "responsibility to establish subject-matter jurisdiction and that, without it, 28 U.S.C. § 1447(c) required the district court to return the[] case to state court." *Collier v. SP Plus Corp.*, 889 F.3d 894, 895 (7th Cir. 2018). The Seventh Circuit agreed that the removing defendant "had to establish that all elements of jurisdiction—including Article III standing—existed at the time of removal" and rejected defendant's argument that "once removal . . . gets a defendant's foot in the door of a federal court, the slate is wiped

clean and the defendant can challenge jurisdiction." *Id.* at 896. Smithfield's strategy is exactly the same bait-and-switch that the Seventh Circuit rejected.

Against these repeated and consistent holdings from multiple federal courts, Smithfield principally relies on an unpublished district court decision: *Brahamsha v. Supercell OY*, 2017 WL 3037382, at *1 (D.N.J. July 17, 2017). But *Brahamsha* erred at the outset by treating CAFA jurisdiction as sufficient for removal even in the absence of Article III standing. *Id.* at *7. Nevertheless, relying on *Brahamsha*, Smithfield argues it is "unquestionably entitled" to have its claims heard in federal court "if it satisfies the prerequisites of diversity jurisdiction" and the only way to do that "without conceding actual injury, is to act as it did and remove first and then move to dismiss under 12(b)(1)." Opp'n Br. at 20. But the removal statute provides no such entitlement. Under 28 U.S.C. § 1441(a), Smithfield is only entitled to remove an action where a federal court would have subject matter jurisdiction of the claim at the outset, and diversity jurisdiction, without Article III standing, does not establish federal jurisdiction. To the extent Smithfield's argument is that it is entitled to take one position for the purposes of removal and a different position once in federal court, that too is wrong. The principle of judicial estoppel prohibits "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Abtew v. DHS*, 808 F.3d 895, 899-900 (D.C. Cir. 2015) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

The other cases Smithfield cites are wholly inapposite. In *McGrath* and *Dash*, the plaintiff never argued—as FWW does here—for remand on the grounds that the defendant failed to establish Article III standing. Instead, the plaintiffs affirmatively argued that they satisfied federal Article III standing requirements. *See McGrath v. Home Depot USA, Inc.*, 298 F.R.D. 601, 604 (S.D. Cal. 2014); *Dash v. FirstPlus Home Loan Owner Tr. 1996-2*, 248 F. Supp. 2d 489, 500-07

(M.D.N.C. 2003). In *Cox*, the defendant did not—as Smithfield did here—remove the case and then move to dismiss for lack of jurisdiction. *See Cox, Cox, Filo, Camel & Wilson, LLC v. Sasol N. Am. Inc.*, 2013 WL 4516007, at *2 (W.D. La. Aug. 22, 2013). That case had gone up on appeal and was on remand in the district court. *Id.* Based on the appellate court's decision, the plaintiff moved to remand to state court due to lack of subject matter jurisdiction, while the defendant moved to dismiss under Rule 12(b)(6) for lack of statutory standing. *Id.* The court found it had subject matter jurisdiction and dismissed the case for lack of *statutory*—not Article III—standing. *Id.* And *Marrero* had nothing to do with standing at all—remanding a case solely because the defendant's notice of removal was untimely. *See Marrero v. GEICO Gen. Ins. Co.*, 2012 WL 13024105, at *2 (S.D. Fla. May 16, 2012).

In sum, Smithfield's attempt to invoke the federal courts' jurisdiction before immediately disclaiming it is plainly grounds for remand—as the vast majority of courts have held. The court should follow that considerable weight of authority and remand this case to D.C. court.

B. Smithfield wrongly assumes FWW needs to take a position on this Court's jurisdiction.

Instead of addressing its own contradictory position, Smithfield asserts that "FWW has necessarily and unmistakably taken the position that it has Article III standing" by asserting a claim under § 28-3905(k)(1)(C) in its complaint. Opp'n Br. at 18. In other words, Smithfield does not deny that it is both claiming and denying federal subject matter jurisdiction at the same time—it just argues that FWW must take the position that it has Article III standing.

Not so. At this stage, FWW "does not have to take a position on the standing issue while Defendant does, because Defendant bears the burden of establishing jurisdiction in this Court." *Barnes*, 288 F. Supp. 3d at 839. Smithfield, as the removing party, carries the burden of proving subject matter jurisdiction, including Article III standing—regardless of what claims FWW

chooses to assert or whether its pleadings imply some position on Article III standing. "Whichever side chooses federal court must establish jurisdiction; it is not enough to file a pleading and leave it to the court or the adverse party to negate jurisdiction." *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) (citing *Lujan*, 504 U.S. at 561). Here, Smithfield concedes it has not established that FWW has Article III standing, and it has affirmatively argued that FWW lacks Article III standing. That alone compels the Court to remand this case back to state court.

Even if FWW's pleadings were relevant to the remand inquiry, asserting a claim under § 28-3905(k)(1)(C) does not and will not require FWW to take a position on whether it has Article III standing as interpreted by federal courts. While Article III's case or controversy requirement applies to claims brought under § 28-3905(k)(1)(C) under D.C. law, it is Article III's case or controversy requirement as interpreted by *D.C. courts*—not federal courts. Courts in this district assessing Article III standing for (k)(1)(C) claims, have recognized that "D.C. courts 'enjoy flexibility in regard to the case or controversy requirement not possessed by the federal courts.'" *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)) (brackets omitted); *see also Organic Consumers Ass'n v. Smithfield Foods, Inc.*, No. 2020 CA 002566 B at 8 (D.C. Super. Ct. Dec. 14, 2020) [ECF 22, Ex. A]; *Organic Consumers Ass'n v. Noble Foods, Inc.*, No. 2020 CA 002009 at 6 (D.C. Super. Ct. Aug. 25, 2020) [ECF 22, Ex. B]. Indeed, the "decisions of the [U.S.] Supreme Court on . . . the case or controversy requirement of Article III of the Constitution are not binding on [D.C.] court[s]," *Atchison*, 585 A.2d at 153; *see also Animal Legal Defense Fund v. Hormel Foods Corp.*, --- A.3d ---, 2021 WL 3921512, at *3 n.2 (D.C. Sept. 2, 2021) (noting "[s]tate courts need not become enmeshed in the federal complexities and technicalities involving standing" and that "federal decisions in this area are not binding upon this court") (citations omitted).

In short, FWW need not take any position on whether this Court has Article III jurisdiction because Smithfield carries the burden of persuasion, and even in state court, FWW need not establish that it satisfies Article III's case or controversy requirement as interpreted by federal courts.[1]

II. Remand is required because Smithfield has failed to meet the amount in controversy requirement necessary to establish diversity jurisdiction.

Smithfield failed to satisfy the amount in controversy requirement because the statutory damages are nowhere near $75,000, and the remaining costs are speculative and must be divided by the hundreds of thousands of D.C. consumers that stand to benefit from this case.

A. FWW's damages do not come close to exceeding $75,000.

Smithfield cannot get around the fact that FWW's complaint expressly requests only $1,500 in statutory damages. *See* Compl. [ECF NO. 1-1] at 41 (requesting in the prayer for relief "an order awarding FWW statutory damages of $1,500"). Smithfield claims FWW's statutory damages could be greater, pointing to *Cannon v. Wells Fargo Bank, N.A.* where the court calculated the amount in controversy by multiplying $1,500 per violation of the statute alleged in the complaint. *See* 908 F. Supp. 2d 110, 113 (D.D.C. 2012). But in *Cannon* "the Plaintiff's Amended Complaint d[id] not purport to limit recovery for violations of the CPPA to $1,500." *Id.* Here, by contrast, the complaint *does* limit recovery of statutory damages to $1,500.

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[1] Even if FWW had to take a position, *in state court*, on whether it had Article III standing *as interpreted by federal courts*, that would only apply to its (k)(1)(C) claim. Smithfield concedes no such showing would be necessary for FWW's (k)(1)(D) claim, which requires no form of Article III standing. Thus, no party is arguing, or will ever argue, that FWW has Article III standing to bring its (k)(1)(D) claim. In a footnote, Smithfield argues this Court could still exercise supplemental jurisdiction over the (k)(1)(D) claim, *see* Opp'n Br. at 20 n.10, but FWW's (k)(1)(D) claim raises "'complex issue[s] of State law' best left to local courts to adjudicate," *Adler v. Loyd*, 496 F. Supp. 3d 269, 283 (D.D.C. 2020) (quoting 28 U.S.C. § 1367(c)(1)), including, for example, what constitutes a "sufficient nexus to the interests involved" to bring a representative action under the new (k)(1)(D) provision. Thus, at minimum, this Court must remand FWW's (k)(1)(D) claim.

The fact that FWW's allegations might support even more in statutory damages is irrelevant. A plaintiff is not required to seek all damages potentially available to them. "If [a plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) (quoting *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938)); *see also Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983) (explaining courts should not inquire into whether plaintiff could have alleged greater damages because "where jurisdiction is at issue a plaintiff is held to his own representations regarding damages"). Thus, FWW's statutory damages amount to $1,500—not $13,500.

Nor can Smithfield rely on the potential for punitive damages to tip the amount of controversy over $75,000. "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) (citation omitted). Smithfield has not established a non-speculative basis for punitive damages here, so punitive damages should not be included in determining the amount in controversy.

Regardless, even if FWW had sought $13,500 in statutory damages *and* this Court included punitive damages in its calculation, the amount in controversy would *still* not exceed $75,000. The Supreme Court has repeatedly observed that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Accordingly, this Court has used that 4:1 ratio as a guidepost to determine if even "generous punitive damages" could tip the amount in controversy over $75,000. *See, e.g., Ham v. TJX Cos.*, 2018 WL 1143156, at *3 (D.D.C. Mar. 2,

2018); *Szymkowicz v. Frisch*, 2020 WL 4432240, at *9 (D.D.C. July 31, 2020). Under that ratio, Smithfield still comes up short. Even assuming statutory damages of $13,500 (despite FWW's request for only $1,500) and applying the nearly unconstitutional ratio of 4:1 for punitive damages, the total statutory and punitive damages would only amount to $67,500. That does not satisfy the amount in controversy requirement.

B. Costs of attorney's fees and injunctive relief cannot be aggregated, are speculative, and do not tip the amount in controversy over $75,000.

With statutory and punitive damages not exceeding $75,000, Smithfield is forced to rely on attorney's fees to push the amount in controversy past $75,000. But Smithfield's argument fails for three reasons: those fees are subject to the non-aggregation principle, they are speculative, and, as a matter of law, they generally cannot satisfy the amount-in-controversy requirement.

First, any attorney's fees would be marginal because they are subject to the non-aggregation principle—and must therefore be divided by the thousands of D.C. consumers who stand to benefit from this case. Smithfield concedes that the non-aggregation principle generally applies to attorney's fees when calculating the amount in controversy in CPPA cases. *See* Opp'n Br. at 13; *see also 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"); *Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 141 (D.D.C. 2010) ("aggregation of attorneys' fees is not appropriate in a CPPA case"). And Smithfield does not try to "demonstrate that the pro rata amount of attorneys' and expert fees that would be attributable to [FWW] as a member of the general public would exceed $75,000." *Clean Label Project Found. v. Now Health Grp., Inc.*, 2021 WL 2809106, at *7 (D.D.C. July 6, 2021) (citation omitted).

Instead, Smithfield argues that the non-aggregation principle should only apply to a subset of potential attorney's fees in this case. *See* Opp'n Br. at 13-16. In Smithfield's view, any

attorney's fees spent litigating FWW's organizational standing to bring a claim under (k)(1)(C) only benefit FWW and therefore are not subject to the non-aggregation principle. But even assuming attorney's fees can be subdivided in that manner, FWW seeks relief for the general public under (k)(1)(C).[2] The (k)(1)(C) provision expressly authorizes a nonprofit organization to seek relief "on behalf of itself or any of its members, or on any such behalf and on behalf of the general public." In other words, FWW can seek relief on behalf of the general public under (k)(1)(C), so long as it is also seeking relief on behalf of itself or its members. This means that organizational standing under (k)(1)(C) is a necessary element of seeking injunctive relief for the general public under (k)(1)(C)—and any fees accrued in litigating that question are for the public's benefit.

In addition to organizational standing, Smithfield argues that the non-aggregation principle should not apply to attorney's fees spent litigating (1) whether FWW can receive statutory damages that are only payable to "consumers" and (2) whether punitive damages are appropriate, because these questions only benefit FWW. *See* Opp'n Br. at 16. Smithfield estimates the fees required to litigate these two issues will amount to $40,000 ($10,000 for the first issue, and $30,000 for the second issue). However, even applying Smithfield's estimate, the extra $40,000 would not push the amount in controversy over $75,000 because damages are only $1,500 (or, with Smithfield's estimate of 5:1 punitive damages, $9,000). Moreover, $40,000 is unreasonably high and speculative. The first issue is a very narrow legal question that Smithfield addressed in two sentences in its motion to dismiss. *See* Mot. to Dismiss at 24. The latter is also a minor issue because the standard for punitive damages is well-established, and the question will just be whether

[2] FWW seeks relief for the general public under *both* (k)(1)(C) and (k)(1)(D). *See* Compl. at 117. And if FWW did seek only statutory damages under (k)(1)(C), it would be unreasonable to think the parties would spend $150,000 litigating over $1,500.

the facts satisfy that standard. The discovery relevant to violations of the statute will also overlap with discovery regarding punitive damages.

Second, Smithfield has failed to support its estimate of attorney's fees with anything more than speculation. Smithfield points to fees collected in other CCPA cases, but the Court has held that "cobbling together a blended billing rate of Plaintiff's lawyers from filings [] in other cases, calculating how many hours of work at that average billing rate it would take to reach $75,000, and then baldly asserting that 'Plaintiff's attorneys will assuredly spend at least that much time on this case'" is insufficient to meet the amount-in-controversy requirement. *ALDF*, 249 F. Supp. 3d at 62-63 (citation omitted); *see, e.g., Clean Label Project Found.*, 2021 WL 2809106, at *7 (citation to fee award in prior CPPA case was too speculative); *Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d at 140 (conjecture that plaintiff's attorneys would bill 300 hours at a "conservative estimate of $250 per hour" was too speculative). Smithfield has therefore failed to establish that the total attorney's fees in this case—much less those spent solely to benefit FWW—exceed $75,000.

Third, as Smithfield concedes, attorney's fees should not be the determinative factor in deciding whether the amount in controversy is satisfied. Courts in this district have repeatedly noted that they are "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." *Breakman v. AOL LLC*, 545 F. Supp. 2d 96, 107 (D.D.C. 2008); *see also, e.g.*, *Hackman v. One Brands, LLC*, 2019 WL 1440202, at *8 (D.D.C. Apr. 1, 2019) (same); *Organic Consumers Ass'n v. R.C. Bigelow, Inc.*, 314 F. Supp. 3d 344, 354 (D.D.C. 2018) (same); *Sloan v. Soul Circus, Inc.*, 2015 WL 9272838, at *9 (D.D.C. Dec. 18, 2015) (same);

Zuckman v. Monster Beverage Corp., 958 F. Supp. 2d 293, 301 (D.D.C. 2013) (same); *Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d at 141 (same).

Smithfield's litigation strategy here is precisely why courts are uncomfortable with letting attorney's fees drive the amount in controversy. The underlying concern is "that allowing attorneys' fees to satisfy the amount of controversy could encourage defendants to remove cases improperly simply to increase plaintiffs' fees and costs and thereby support removal." *Id*. That is what Smithfield has done here. Smithfield is effectively manufacturing federal jurisdiction by removing the case, turning around and contesting this Court's jurisdiction, and then hoping the costs of litigating against its convoluted strategy will add up, resulting in an amount in controversy that itself justifies removal.

Finally, Smithfield has waived any argument concerning the costs of injunctive relief. In moving to remand, FWW explained that Smithfield's assertion that corrective advertising would cost $150,000 was entirely speculative and unsupported by any evidence. *See* Mot. to Remand at 6. In response, Smithfield failed to even argue that the costs of injunctive relief should be considered, let alone supply any evidence supporting its assertion. This Court has repeatedly refused to consider the estimated costs of injunctive relief where the defendant fails to "submit supporting declarations or affidavits from its employees, who would undoubtedly be in a position to estimate such costs." *Wexler v. United Air Lines, Inc.*, 496 F. Supp. 2d 150, 154 (D.D.C. 2007). Regardless, under the non-aggregation principle, any injunctive cost would have to be "divided among the beneficiaries of the injunction," *ALDF*, 249 F. Supp. 3d at 60—meaning the hundreds of thousands of D.C. consumers who would benefit. That insignificant amount would make virtually no difference in assessing the amount in controversy. *See, e.g., id.* at 61 (holding

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.").

Thus, neither attorney's fees nor the costs of injunctive relief can save Smithfield from its failure to meet the amount-in-controversy requirement necessary for diversity jurisdiction. Smithfield's failure to establish diversity jurisdiction and its decision to contest subject matter jurisdiction after invoking the jurisdiction of the federal courts both independently warrant remanding this case to D.C. court.

CONCLUSION

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

Dated: October 25, 2021

Respectfully submitted,

/s/ Ellen Noble

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CERTIFICATE OF SERVICE

I certify that on October 25, 2021, I caused a copy of the foregoing Plaintiff Food & Water Watch's Reply in Support of the Motion to Remand for Lack of Subject Matter Jurisdiction to be served via ECF upon the Court and all counsel of record.

Dated: October 25, 2021 */s/ Ellen Noble*

Ellen Noble [D.C. Bar No. 242053]