UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOOD & WATER WATCH, Plaintiff, v. **SMITHFIELD FOODS, INC.**, Defendant.	Case No. 21-cv-02065 (CRC)

OPINION AND ORDER

Plaintiff Food & Water Watch (FWW), on behalf of itself and the general public, filed this action in District of Columbia Superior Court in June 2021. FWW is a D.C.-based public-interest organization that advocates for safe food, clean water, and a livable climate, and part of its mission is reforming the "industrial livestock production system." Compl. ¶¶ 13–14, ECF No. 1-1. Smithfield Foods is a Virginia-based food company that produces, processes, and distributes pork products under several brand names. See id. ¶ 18. FWW alleges that various statements Smithfield has made during the COVID-19 pandemic about the national meat supply chain and the company's workplace safety practices violated the D.C. Consumer Protection Procedures Act (DCCPPA). In July, Smithfield removed the case to federal court based on diversity jurisdiction, 28 U.S.C. § 1332(a), and the Class Action Fairness Act (CAFA), § 1332(d). FWW, however, thinks that removal was hogwash, so it filed a motion to remand the action to D.C. Superior Court.

The Court will grant FWW's motion and remand the case.

I. Background

FWW brings this action under the private attorney general provisions of the DCCPPA, which authorizes suits by and confers standing on nonprofits and public-interest organizations

that have a sufficient nexus to the alleged violation. See D.C. Code § 28-3905(k)(1)(C) (organizational standing), § 28-3905(k)(1)(D) (public-interest standing). FWW's complaint lists at least nine "representations" made by Smithfield that allegedly constitute unfair and deceptive trade practices in violation of the DCCPPA. Compl. ¶ 110. In its prayer for relief, FWW seeks declaratory and injunctive relief, statutory damages of $1,500, punitive damages, and attorneys' fees and costs. Id. at 41; id. ¶ 118. FWW filed its complaint in D.C. Superior Court on June 16, 2021.

On July 30, 2021, Smithfield removed the case to this Court, based on diversity jurisdiction and CAFA. See Notice of Removal at 1, ECF No. 1. It then promptly moved to dismiss, arguing primarily that FWW lacked Article III standing—a jurisdictional requirement to be in federal court. See Mot. Dismiss at 16–32. Viewing this maneuver was a procedural ploy, FFW moved to remand based on a lack of jurisdiction. It noted that "neither party is attempting to prove" Article III standing, as it wanted to be in Superior Court in the first place. Mot. Remand at 5–6. The Court stayed briefing on the motion to dismiss at the parties' request in order to resolve the threshold jurisdictional dispute. Joint Mot., ECF No. 23. The crux of the dispute is the Article III standing issue, as well as whether this Court has diversity jurisdiction; because this is not a class action, there is no federal jurisdiction under CAFA.

II. Legal Standards

Removal is proper only if the case could have been brought in federal court in the first place. 28 U.S.C. § 1441(a). The party seeking removal has the burden to prove that federal jurisdiction exists. See Hood v. F. Hoffman-La Roche, Ltd., 639 F. Supp. 2d 25, 28 (D.D.C. 2009). When the amount in controversy is at issue, the parties are permitted to submit proof, and if the removing party can show by a preponderance of evidence that the threshold requirement

has been met, the district court may exercise jurisdiction. See Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81, 88–89 (2014). Bearing in mind the risk of encroaching on state courts' purview, federal courts construe removal jurisdiction narrowly, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–109 (1941), and "any doubts about the existence of subject matter jurisdiction are to be resolved in favor of remand." Witte v. Gen. Nutrition Corp., 104 F. Supp. 3d 1, 3 (D.D.C. 2015).

III. Analysis

The Court begins, and ends, with diversity jurisdiction. Because the amount-in-controversy requirement is not satisfied, the merits of this case will be for the District's courts to decide.

Federal district courts can exercise jurisdiction in "civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between" "citizens of different States." 28 U.S.C. § 1332(a). FWW and Smithfield are citizens of different States, so the only matter for the Court to decide is whether Smithfield has met its burden to show the amount in controversy exceeds $75,000. To sum up to that amount, Smithfield attempts to cobble together statutory damages, punitive damages, and attorneys' fees.

For starters, FWW seeks only $1,500 in statutory damages. Smithfield counters that those damages must be multiplied by nine, for each alleged deceptive representation, to equal $13,500. Compl. ¶ 110. In support of this argument, Smithfield cites D.C. Code § 28-3905(k)(2)(A)(i), which provides for damages of "$1,500 per violation." The problem for Smithfield is that a plaintiff "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 Indem. Co. v. Red

Cab Co., 303 U.S. 283, 294 (1938)). FWW has chosen that tactic here. $1,500 is thus the relevant statutory damages amount—as FWW concedes and as stated in its complaint. But even if the Court used $13,500, more is needed to get over the $75,000 hump.

Smithfield turns next to punitive damages, contending that a 5:1 ratio of punitive to compensatory damages should be used to determine the amount of punitive damages in play. Punitive damages can "count toward the amount in controversy so long as" they have "at least a colorable basis in law and fact." Lopez v. Council on Am.-Islamic Relations Action Network, Inc., 741 F. Supp. 2d 222, 233 (D.D.C. 2010) (citation omitted). The 5:1 ratio would help to satisfy the amount in controversy only if $13,500 is used for compensatory damages; by that calculation, punitive damages would equal $67,500, plus $13,500, for total damages of $81,000. But at least one other court in this district has noted that even a 4:1 ratio would be a "near-outer-bounds multiplier" and result in a "generous punitive damages" award. See Ham v. TJX Cos., 17-cv-01463 (APM), 2018 WL 1143156, at *3 (D.D.C. Mar. 2, 2018) (considering $5,000 in compensatory damages plus $20,000 in punitive damages). Accordingly, the constitutionality of anything above a 4:1 ratio would at least require closer scrutiny, and in this posture, any doubts should be resolved in favor of remand. Witte, 104 F. Supp. 3d at 3. Applying a 4:1 ratio would raise the amount in controversy to $67,500, but that is still under the diversity jurisdiction threshold.

On the other hand, using the more appropriate $1,500 figure as the relevant baseline would require a 50:1 ratio to satisfy the amount in controversy. That would almost certainly transgress the constitutional limit. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (explaining that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."); Ham, 2018 WL 1143156, at *3 & n.1;

Hunter v. District of Columbia, 384 F. Supp. 2d 257, 261–62 (D.D.C. 2005). Thus, with $1,500 in statutory damages as the baseline, there is no punitive damages multiplier with a colorable basis in law to push this case over the amount-in-controversy threshold.

That leaves FWW's attorneys' fees. Smithfield asserts that they will be substantial. Opp'n at 11–13 & Exs. A–D. But courts have consistently concluded that they are "not entirely comfortable with" retaining an action in federal court "where satisfaction of the amount in controversy requirement depends upon a lump sum award of attorneys' fees." See Hackman v. One Brands, LLC, No. 18-2101 (CKK), 2019 WL 1440202, at *8 (D.D.C. Apr. 1, 2019) (quoting Breakman v. AOL LLC, 545 F. Supp. 2d 96, 107 (D.D.C. 2008)); see also, e.g., Organic Consumers Ass'n v. R.C. Bigelow, Inc., 314 F. Supp. 3d 344, 354 (D.D.C. 2018); Sloan v. Soul Circus, Inc., No.: 15-01389 (RC), 2015 WL 9272838, at *9 (D.D.C. Dec. 18, 2015). That reasoning applies here; statutory damages are only $1,500, and even multiplying that by five for punitive damages would only nudge the amount in controversy to $9,000. Attorneys' fees cannot make up the considerable difference.

Smithfield also runs head-on into the non-aggregation principle, which "establishes clearly that actual and statutory damages should not be aggregated in representative actions like this one." See Breakman, 545 F. Supp. 2d at 105. Many courts in this district have applied this principle in DCCPPA cases seeking relief on behalf of the general public because a plaintiff "and the members of the general public have separate and distinct claims that could be brought independently against [a defendant] with respect to the challenged conduct." Animal Legal Def. Fund v. Hormel Foods Corp., 249 F. Supp. 3d 53, 61–62 (D.D.C. 2017); id. at 60 (collecting cases). And it applies to attorneys' fees. Breakman, 545 F. Supp. 2d at 107. While "[c]ourts in this district generally agree that if attorneys' fees are recoverable by statute, they can be included

in the amount-in-controversy calculation," the fees "must be apportioned amongst the individual consumers." See Organic Consumers Ass'n v. Handsome Brook Farm Grp. 2, LLC, 222 F. Supp. 3d 74, 78 (D.D.C. 2016) (Cooper, J.). At least as to FWW's claims arising under subsection (k)(1)(D), Smithfield does not really contest this doctrine's application. See Opp'n at 13–16.

Rather, Smithfield attempts to isolate the claims asserted under subsection (k)(1)(C), and the accompanying damages and fees arising out of those claims, which Smithfield asserts is on behalf of just FWW itself and not the general public. To be fair, FWW has seemingly vacillated on the question of whom it seeks statutory and punitive damages for. Compare Mot. Remand at 2 ("FWW seeks, on behalf of itself, statutory damages of $1,500, punitive damages . . . , and reasonable attorneys' fees and costs."), with Reply at 11 n.2 ("FWW seeks relief for the general public under *both* (k)(1)(C) and (k)(1)(D)."). Moreover, for similar reasons, Smithfield contends that non-aggregation should not apply to fees incurred litigating FWW's organizational standing. Indeed, the only exhibits it submitted in opposition to the motion to remand focus on the attorneys' fees issues.

These arguments miss the mark. Subsection (k)(1)(C) permits an 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*." D.C. Code § 28-3905(k)(1)(C) (emphasis added); see also Compl. ¶ 117. Simply put, even under subsection (k)(1)(C), a DCCPPA suit can seek relief on behalf of the general public such that non-aggregation applies. As this Court has concluded before: "[C]onsidering the weight of authority supporting remand, the importance of respecting a plaintiff's choice of forum, and federalism concerns, 'the Court sees no problem with articulating a rule that would, in effect, exclude just one category of recovery from diversity jurisdiction

eligibility.'" Handsome Brook, 222 F. Supp. 3d at 79 (quoting Nat'l Consumers League v. Bimbo Bakeries USA, 46 F. Supp. 3d 64, 73 n.3 (D.D.C. 2014)). Litigating organizational standing under subsection (k)(1)(C) is a prerequisite to FWW's obtaining injunctive relief on behalf of the public, so non-aggregation would logically apply to any fees spent litigating that issue just as the principle would apply under (k)(1)(D). And no matter what, as mentioned, Smithfield would need to lean on attorneys' fees to push the amount in controversy over the $75,000 threshold. A long line of cases forecloses that tactic. See, e.g., Hackman, 2019 WL 1440202, at *8; R.C. Bigelow, 314 F. Supp. 3d at 354; Sloan, 2015 WL 9272838, at *9; Breakman, 545 F. Supp. 2d at 107.

Because the Court finds that diversity jurisdiction is lacking, it will not address the parties' dispute about whether the case must be remanded based on Smithfield's argument that FWW lacks Article III standing, which if correct would deprive this Court of jurisdiction for a separate reason.

IV. Conclusion

For these reasons, it is hereby

ORDERED that [22] Plaintiff's Motion to Remand is **GRANTED**. It is further

ORDERED that the Clerk remand the action to the Superior Court for the District of Columbia.

SO ORDERED.

Christopher R. Cooper

CHRISTOPHER R. COOPER
United States District Judge

Date: December 6, 2021