IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ANASTASIA WULLSCHLEGER and GERALDINE BREWER, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case No. 19-00235-CV-W-GAF**
ROYAL CANIN USA, INC. and NESTLE PURINA PETCARE COMPANY,	)	
Defendants.	)	

ORDER

Now before the Court is Plaintiffs' Anastasia Wullschleger and Geraldine Brewer (collectively "Plaintiffs") Motion to Remand. (Doc. # 26). Defendants Royal Canin USA, Inc. ("Royal Canin") and Nestle Purina PetCare Company ("Purina") (collectively 'Defendants") oppose. (Doc. # 29). For the reasons provided below, Plaintiffs' Motion is GRANTED.[1]

DISCUSSION

I. BACKGROUND

On February 8, 2019, Plaintiffs commenced this action by filing a putative class-action petition ("Petition") in the Circuit Court of Jackson County, Missouri, Case No. 1616-CV03690, against Purina and Royal Canin. (Doc. # 1, ¶ 1). Plaintiffs served Purina with a summons and copy of the Petition on February 25, 2019. (Doc. # 1, ¶ 2). Purina timely filed its notice of removal

[1] Also before the Court is Royal Canin's Motion to Join Mars Petcare as a Required Party (Doc. # 23), and Purina's Motion to Join the Joinder Motion. (Doc. # 27). Additionally, the parties filed a Joint Motion for Extension of Time for Rule 26(f) Conference and to File a Discovery Plan/Proposed Scheduling Order. (Doc. # 25). Because the Court finds itself without jurisdiction for the reasons provided below, it cannot rule on these Motions.

on March 26, 2019. (Doc. # 1-2); *see* 28 U.S.C. § 1446(b) (requiring the filing of notice of removal within 30 days).[2]

Plaintiffs Wullschleger and Brewer are both citizens of Missouri. (Petition, beginning on p. 5 of Doc. # 1-1, ¶¶ 9-10). Additionally, the proposed classes are all defined to contain "Missouri citizens." (*Id*. at ¶¶ 90-92). Royal Canin is a Delaware Corporation with its principal place of business in Missouri. (*Id*. at ¶ 11). Purina is a Missouri corporation with its principal place of business in Missouri. (*Id*. at ¶ 12).

The Petition alleges that Defendants conspired with other pet food manufacturers to create and enforce upon retailers and consumers the mandatory use of a prescription, issued by a veterinarian, as a condition precedent to the purchase of certain dog and cat food. (*Id.* at ¶ 1). The Petition alleges that no federal, state, or local law requires a prescription for the sale of prescription pet food and that the products contain no drug or other ingredient that requires the United States Food and Drug Administration's ("FDA") approval or prescription. (*Id*. at ¶ 2). The Petition further alleges that this self-created requirement for a veterinarian-issued prescription to purchase prescription pet food misleads reasonable consumers to believe that such food has been tested and approved by the FDA, has been subject to government inspection and oversight, and has medicinal and drug properties for which consumers are willing to pay a premium. (*Id*. at ¶ 1). The Petition alleges that Defendants, along with other pet-food manufacturers, have further conspired with pet-food retailers and veterinary clinics to communicate the false and misleading message to consumers "through a widespread, sophisticated, and coordinated scheme, premised on the

[2] Under 28 U.S.C. § 1453(b), a class action "may be removed by any defendant without the consent of all defendants." As such, Royal Canin properly removed the case without needing the consent of Purina. Purina's counsel has signed the brief filed in opposition to remand submitted to this Court along with Royal Canin's counsel. (*See* Doc. # 29). As such, the Court finds that Purina did consent to removal and seeks federal jurisdiction over this case.

requirement for a prescription written by a veterinarian for the purchase of Prescription Pet Food." (*Id*. at ¶ 3).

The Petition brings six class-action claims against Defendants. (*Id*. at ¶¶ 101-134). Count I is a claim for a violation of Missouri Antitrust Law § 416.031.1 against Defendants. (*Id*. ¶¶ 101-106). Count II is brought against Defendants for violation of Missouri Antitrust Law § 416.031.2. (*Id*. at ¶¶ 107-112). Count III is brought by Wullschleger against Royal Canin alleging a violation of the Missouri Merchandising Practices Act ("MMPA") § 407.020, *et seq*. (*Id*. at ¶¶ 113-118). Count IV is brought by Brewer against Purina for violations of the MMPA. (*Id*. at ¶¶ 119-124). Count V and Count VI are both claims of unjust enrichment brought against Royal Canin and Purina by Wullschleger and Brewer, respectively. (*Id*. at ¶¶ 125-129, 130-134).

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction. *Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir. 2009). A federal district court may exercise removal jurisdiction only where the court would have had original jurisdiction had the action initially been filed there. *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 922 (8th Cir. 2000) (citing 28 U.S.C. § 1441(b)). "The basic statutory grants of federal-court subject-matter jurisdiction are contained in 28 U.S.C. §§ 1331 [federal-question jurisdiction] and 1332 [diversity jurisdiction]." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 (2006).

Removal statutes are strictly construed, and any doubts about the correctness of removal are resolved in favor of state court jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *In re Bus. Men's Assurance Co. of Am.*, 992 F.2d 181, 183 (8th Cir. 1993). A party seeking removal and opposing remand carries the burden of establishing federal subject-matter jurisdiction by a preponderance of the evidence. *In re Prempro Prods. Liab. Litig.*, 591

F.3d 613, 620 (8th Cir. 2010). A court must resolve all doubts about federal jurisdiction in favor of remand to state court. *Id.*

III. ANALYSIS

Defendants sought removal to this Court first on the basis that this Court has federal-question jurisdiction pursuant to 28 U.S.C. § 1331. (Doc. # 1, pp. 3-6). Defendants also removed the case claiming this Court has diversity jurisdiction to hear the case pursuant to the Class Action Fairness Act ("CAFA"), codified at 28 U.S.C. § 1332(c)(1). (*Id.* at pp. 6-11). The Court will address each of these assertions in turn.

A. 28 U.S.C. § 1331: Federal Question Jurisdiction

"Removal based on federal question jurisdiction is governed by the well pleaded complaint rule: jurisdiction is established only if a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009). A plaintiff "'may avoid federal jurisdiction by exclusive reliance on state law.'" *Cent. Iowa Power v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). "Defendants may not 'inject a federal question into an otherwise state-law claim and thereby transform the action into one arising under federal law.'" *Baker v. Martin Marietta Materials, Inc.*, 745 F.3d 919, 924 (8th Cir. 2014) (quoting *Gore v. Trans World Airlines*, 210 F.3d 944, 948 (8th Cir. 2000)).

"[I]n certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). "There is no single, precise, all-embracing test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties." *Cent. Iowa Power*, 561 F.3d at 912 (quotations omitted). "Instead, the question is, does a state-law claim necessarily raise a stated

federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons*, 545 U.S. at 314.

Defendants assert that federal-question jurisdiction exists in this case because the resolution of Plaintiffs' claims implicate the Federal Food Drug and Cosmetics Act ("FDCA") and the FDA's Compliance Policy Guide ("CPG"). (Doc. # 29, pp. 8-11). Plaintiffs assert that their claims are not dependent on the interpretation of federal regulatory schemes but are constructed solely on the interpretation of Missouri law. The Court agrees with Plaintiffs.

First, "[t]he MMPA prohibits 'deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce' by defining such activity as an unlawful practice." *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 81 (Mo. Ct. App. 2011) (quoting Mo. Rev. Stat. § 407.020.1). Actual damages may be recovered by "[a]ny person who purchases . . . merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property . . . as a result of [an unlawful practice.]" Mo. Rev. Stat. § 407.025.1.

Here, Plaintiffs allege that Defendants and their co-conspirators mislead customers to believe that the prescription pet foods at issue have been tested and approved by the FDA, have been subject to government inspection and oversight, and have medicinal and drug properties, for which consumers are willing to pay a premium. (Petition, ¶ 1). Plaintiffs also state: "Neither federal nor Missouri law requires that Prescription Pet Food be sold with a prescription from a veterinarian. None of the Prescription Pet Food purchased by the Plaintiffs contains a drug, and none has been submitted to the FDA for its review, analysis, or approval. The same is true for all

Prescription Pet Food." (*Id*. at ¶ 34). Plaintiffs then allege that by imposing the prescription requirement on prescription pet food, Defendants have misrepresented that it is a product that is a drug or medicine that has been evaluated by the FDA as a drug that is legally required to be sold by prescription. (*Id*. at ¶ 35). Contrary to Defendants' assertions, these allegations do not require an interpretation of the FDA's regulations. Rather, the Plaintiffs' theory--that these representations deceive consumers into believing the products comply with FDA regulations, amounts to an unlawful act in violation of the MMPA--requires only interpretations of the MMPA and not the FDCA or CPG.

Based upon Plaintiffs' theory of their claims, no analysis of the FDCA or the CPG is necessary. Plaintiffs allege that Defendants imposed a prescription requirement for the prescription drug food. (*Id*. at ¶ 1). Plaintiffs further allege that Defendants did not submit the foods at issue to the FDA for analysis or approval. (*Id*. at ¶ 40). Plaintiffs allege that the failure to submit any foods for analysis or approval is a violation of the FDCA and the CPG when those products are sold as prescription pet foods. (*Id*. at ¶ 58). Plaintiffs' ability to prevail on this theory does not depend on an interpretation of federal law, but rather whether these actions resulted in unlawful practice that violated the MMPA. *See Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. Ct. App. 2006) (explaining that "the MMPA supplements the definition of *common law* fraud") (emphasis added). Therefore, Plaintiffs' MMPA claims do not raise a substantial issue of federal law.

Regarding Plaintiffs' antitrust claims, Mo. Rev. Stat. § 416.031.2 provides: "It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state." Plaintiffs do not ask a court to determine if the Defendants violated the FDCA or the CPG but rather ask a court to determine if the Defendants did, in fact, agree to impose a prescription

requirement on their products despite not submitting them to the FDA for analysis or approval. The necessary inquiry requires Plaintiffs to prove that, through these actions, Defendants engaged in monopolistic behavior, attempted to monopolize, or conspired to monopolize the prescription pet food market. As such, Plaintiffs' antitrust claims do not depend on an interpretation of federal law for their resolution.

Lastly, a state court would not need to engage in an analysis of federal law to resolve Plaintiffs' unjust enrichment claims. "To establish the elements of an unjust enrichment claim, the plaintiff must prove that (1) he conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances." *Howard v. Turnbull*, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010). As discussed above, the act of charging a premium for prescription pet food in the absence of FDA analysis and approval is what a court or fact-finder would evaluate to determine if Defendants retained a benefit under inequitable or unjust circumstances, not whether these actions violated the FDCA or the CPG. As such, Plaintiffs' ability to succeed on their unjust-enrichment claims do not depend on the resolution of federal law.

In short, references to federal law in the Complaint do not, by their presence alone, mean that an interpretation of federal law is necessary to resolve the case. Rather, the actions alleged by Plaintiffs can be evaluated with reference only to state law. Therefore, the Court finds that Plaintiffs' state-law claims do not necessarily implicate significant federal issues. *See Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn. LLC*, 843 F.3d 325, 329 (8th Cir. 2016) ("Federal question jurisdiction exists if . . . the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."). Accordingly, the Court lacks federal-question jurisdiction in this case.

B. 28 U.S.C. § 1332 Diversity Jurisdiction

CAFA amended the diversity statute to extend jurisdiction of federal courts from class actions between "citizens of different States" to those which "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. §§ 1332(a)(1), (d)(2)(A). CAFA is codified, in part, at 28 U.S.C. § 1332, the statutory provision that grants federal courts original jurisdiction on the basis of diversity of citizenship. The traditional grant of diversity jurisdiction provides that all plaintiffs must be citizens of States different from all defendants. 28 U.S.C. § 1332(a)(1). Under CAFA, "federal courts have jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 in the aggregate; there is minimal (as opposed to complete) diversity among the parties, i.e., any class member and any defendant are citizens of different states; and there are at least 100 members in the class." *Westerfield v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) (citing 28 U.S.C. § 1332(d)). CAFA leaves unaltered the general rule that the removing defendant bears the burden of establishing federal court jurisdiction. *Id.*; 28 U.S.C. 1441(a).

Defendants assert that minimal diversity is satisfied in this case as at least one member of the putative class is a citizen of only Missouri[3] and that Royal Canin is a citizen of both Delaware, its state of incorporation, and Missouri, its principal place of business. (Doc. # 29, p. 9).[4]

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[3] Both named Plaintiffs are citizens of Missouri. (Petition, ¶¶ 9-10). Additionally, the proposed classes are all defined to contain "Missouri citizens." (*Id.* at ¶¶ 90-92). Therefore, all Plaintiffs are, for the purposes of determining jurisdiction, citizens of Missouri.

[4] Purina is a Missouri corporation with its principal place of business in St. Louis, Missouri. (Doc. # 1-1, ¶ 12). As such, Purina is a citizen of Missouri by virtue of both its State of incorporation and its State where its principal place of business lies. 28 U.S.C. 1332(a)(1). Both the named Plaintiffs and the proposed class are citizens of Missouri. (Doc. # 1-1, ¶¶ 9-10, 90-92). As such, Purina is not minimally diverse from the Plaintiffs and cannot support a finding of diversity jurisdiction pursuant to CAFA.

Defendants argue that Royal Canin is a citizen of either Delaware or Missouri for the purposes of CAFA's minimal-diversity requirement. (*Id.*). This argument requires the Court to determine if CAFA grants jurisdiction over a class action brought by a group of Missouri citizens against a corporation that is a citizen of both Missouri and Delaware.

The statutory provision defining the citizenship of a corporation, found in the same statute as CAFA, 28 U.S.C. § 1332, provides that a corporation is a citizen of the State in which it is incorporated and the State of its principal place of business. 28 U.S.C. § 1332(c)(1). Corporations have always been deemed to be citizens of both States for diversity purpose. The statute's "use of the conjunctive gives dual, not alternative, citizenship to a corporation whose principal place of business is in a State different from the State where it is incorporated." *Johnson v. Advance Am.*, 549 F.3d 932, 935 (4th Cir. 2008). Therefore, for the purposes of diversity jurisdiction, Royal Canin is a citizen of both Delaware, its State of incorporation, and Missouri, the State of its principal place of business.

While neither the Supreme Court, nor the Eighth Circuit, has addressed the issue of dual citizenship as it applies to CAFA, every court of appeal that has considered the issue has reached the same conclusion. *See Roberts v. Mars Petcare US, Inc.*, 874 F.3d 953, 956-57 (6th Cir. 2017); *Life of the S. Ins. Co. v. Carzell*, 851 F.3d 1341, 1344-46 (11th Cir. 2017); *Johnson*, 549 F.3d at 935-36; *see also In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 564 F.3d 75, 78 n.2 (1st Cir. 2009) (expressing skepticism in the argument that dual citizenship of a corporation can satisfy minimal diversity when citizenship of one State is shared with another party). Additionally, this Court has previously rejected the argument that dual citizenship entitles a corporate defendant to rely on its Delaware citizenship to establish minimal diversity under CAFA. *See Sundy v. Renewable Envtl. Sols., LLC*, No. 07-5069-CV-SW-ODS, 2007 WL 2994348, at *3

n.4 (W.D. Mo. Oct. 10, 2007) ("The court does not agree with Defendant's suggestion that minimal diversity exists unless a member of the class is a citizen of *both* Missouri *and* Delaware.") (emphasis in original). These considerations support the conclusion that Royal Canin is not minimally diverse from Plaintiffs.

Defendants also assert that Mars Petcare, a citizen of Delaware and Tennessee–a party Defendants assert is a required party-defendant under Rule 19(a)–is a basis to establish minimal diversity. (Doc. # 29, pp. 17-18). "But even after CAFA, plaintiffs remain the masters of their claims and can choose whom they want to sue." *Roberts*, 874 F.3d at 958 (citing *Caterpillar*, 482 U.S. 386). First, Rule 19 pertains to joinder, not subject-matter jurisdiction. *See* Fed. R. Civ. P. 19; Fed R. Civ. P. 82. Additionally, for jurisdictional purposes, the Court's inquiry is limited to examining the case as of the time it was filed in state court. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013). As such, if the Court were to evaluate Defendants' Motion to Join Mars Petcare and proceed to consider its citizenship to determine jurisdiction, it would be an impermissible exercise of federal judicial power in the absence of jurisdiction. *See Roberts*, 875 F.3d at 958. Because Plaintiffs, as the master of their Complaint, did not elect to sue Mars Petcare, the Court cannot consider its citizenship, but can only evaluate the citizenship of the two named Defendants. Therefore, the Court rejects Defendants argument that Mars Petcare's citizenship can be used to establish minimal diversity as required by CAFA.

Defendants have not met their burden of establishing this Court's jurisdiction under CAFA. Defendants, both as citizens of Missouri, are not minimally diverse from Plaintiffs, also citizens of Missouri. Royal Canin cannot rely on its dual citizenship to create minimal diversity. Mars Petcare cannot be considered by the Court when determining if it has jurisdiction as it was not

named as a Defendant when Plaintiffs filed suit. Because minimal diversity does not exist, the Court cannot exercise jurisdiction granted to it by CAFA over this case.

CONCLUSION

Defendants have not met their burden of establishing this Court's jurisdiction. The Court does not have federal-question jurisdiction because Plaintiffs' state-law claims do not necessarily implicate substantial federal issues. The Court does not have diversity jurisdiction pursuant to CAFA because there is not minimal diversity between the parties. Therefore, Plaintiffs' Motion to Remand is GRANTED. Accordingly, it is

ORDERED that this case be remanded to the Circuit Court of Jackson County Missouri.

IT IS SO ORDERED.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: June 13, 2019