APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS—Continued

APPENDIX TABLE OF CONTENTS—Continued

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1796

ANASTASIA WULLSCHLEGER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; GERALDINE BREWER

Plaintiffs – Appellants

v.

ROYAL CANIN U.S.A., INC.; NESTLE PURINA PETCARE COMPANY

Defendants – Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00235-GAF)

JUDGMENT

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the

district court for proceedings consistent with the opinion of this court.

July 31, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-1796

ANASTASIA WULLSCHLEGER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; GERALDINE BREWER

Plaintiffs – Appellants

v.

ROYAL CANIN U.S.A., INC.; NESTLE PURINA PETCARE COMPANY

Defendants – Appellees

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: January 11, 2023
Resubmitted: February 10, 2023
Filed: July 31, 2023

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

We must decide whether amending a complaint to eliminate the only federal questions destroys subject-matter jurisdiction. The answer is yes, so the case must return to state court.

I.

Anastasia Wullschleger's dog, Clinton, suffered from health problems. The solution, at least according to a veterinarian, was to feed him specialized dog food available only by prescription. It has different ingredients than regular dog food but includes no special medication.

Prescription dog food is expensive. The crux of Wullschleger's complaint is that the "prescription" requirement is misleading because the Food and Drug Administration never actually evaluates the product. And the damages came from its higher sales price.

The original complaint, which included only state-law claims, reflected these theories. Brought on behalf of all similarly situated Missouri consumers, it alleged a violation of Missouri's antitrust laws, claims under Missouri's Merchandising Practices Act, and unjust enrichment. Wullschleger initially filed her complaint in state court, but Royal Canin and Nestle Purina quickly removed it to federal court. The district court then remanded it—a decision that ended up before us on appeal. *See* 28 U.S.C. § 1453(c)(1) (providing for an appeal of "an order of a district court granting or denying a motion to remand a class action").

We concluded that Wullschleger's antitrust and unjust-enrichment claims had important federal ingredients that would require "explication of federal law." *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519, 522 (8th Cir. 2020); *see Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (allowing removal when a state-law claim "necessarily raise[s] a stated federal issue, actually disputed and substantial"). The antitrust claim, for example, alleged a conspiracy consisting of unlawful parallel conduct

between the manufacturers, pet-food stores, and other pet-food producers to ignore Food and Drug Administration guidance and bypass regulatory approval. *See* 21 U.S.C. §§ 321(f)–(g), 352(o), 360; Draft Compliance Policy Guide Sec. 690.150 on Labeling and Marketing of Nutritional Products Intended for Use To Diagnose, Cure, Mitigate, Treat, or Prevent Disease in Dogs and Cats, 77 Fed. Reg. 55,480 (Sept. 10, 2012). The complaint's prayer for relief, which requested an injunction to stop the violations of federal law, only added to the federal character of the case. *See Wullschleger*, 953 F.3d at 522. We decided it belonged in federal court. *See id.*

Wullschleger switched gears once she returned to the district court. She eliminated every reference to federal law in the complaint, cut the antitrust and unjust-enrichment claims, and narrowed her request for injunctive relief. As a replacement, she added a civil-conspiracy claim. *See Oak Bluff Partners, Inc. v. Meyer*, 3 S.W.3d 777, 780–81 (Mo. banc 1999) (per curiam) (listing the elements of civil conspiracy).

The changes, however, made no difference. The district court believed that federal-question jurisdiction still existed. *See* 28 U.S.C. § 1331. It also eventually granted the manufacturers' motion to dismiss, which has resulted in a second appeal. *See* Fed. R. Civ. P. 12(b)(6). We asked the parties to submit supplemental briefing on whether subject-matter jurisdiction exists.

II.

No matter the stage of the case, we must be sure it exists, even if the parties expect a decision on the merits. *See Bilello v. Kum & Go, LLC*, 374 F.3d 656, 659 (8th Cir. 2004) ("[W]hen the record indicates jurisdiction may be lacking, we must consider the

jurisdictional issue sua sponte."). Our review is de novo. *See M & B Oil, Inc. v. Federated Mut. Ins. Co.*, 66 F.4th 1106, 1108 (8th Cir. 2023).

A.

Original jurisdiction is the key to getting into federal court, whether by filing there from the start or by removal. *See id.* at 1109. At first, original jurisdiction came through the federal questions in Wullschleger's complaint. *Wullschleger*, 953 F.3d at 521–22 (citing 28 U.S.C. § 1331). Not the typical type, which are "cause[s] of action created by federal law." *Grable*, 545 U.S. at 312. Rather, ones consisting of "state-law claims that implicate significant federal issues." *Id.*

To qualify, one or more of the claims in her complaint must have "(1) necessarily raised [federal issues], (2) [that were] actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *See Gunn v. Minton*, 568 U.S. 251, 258 (2013). *Id.* We determined in the first appeal that Wullschleger's antitrust and unjust-enrichment claims fell into this "special and small category" of cases. *Id.*

Now those claims are gone. All that remains are the Missouri Merchandising Practices Act claims, which do not *necessarily* raise a substantial federal issue. *See Wullschleger*, 953 F.3d at 521. Wullschleger kept those claims largely the same on remand, so they cannot supply the now-missing federal question. *See Otten v. Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir. 1976) (explaining how the law-of-the-case doctrine applies to legal determinations from a previous appeal).

Nor can her newly pleaded civil-conspiracy claim, which "is not [even] a separate and distinct action" in Missouri. *W. Blue Print Co. v. Roberts*, 367 S.W.3d 7, 22

(Mo. banc 2012). It is instead a theory for holding the manufacturers jointly and severally liable for their allegedly illegal conduct. *See id.* And it is based on the same basic theory as the Missouri Merchandising Practices Act claims: the manufacturers misled pet owners into believing that prescription pet food *legally required* a prescription. If those claims cannot create federal-question jurisdiction, then the civil-conspiracy claim cannot either. *See Wullschleger*, 953 F.3d at 521.

Just on the face of the amended complaint, the answer today is as clear as it can be. Only the carryover claims and their civil-conspiracy counterpart remain, and neither one presents a federal question. It is no longer possible to say that "dependence on federal law permeates the allegations" of Wullschleger's complaint. *Id.* at 522. In fact, the opposite is true: there is nothing federal about it.

The manufacturers, for their part, would rather have us focus on the original complaint. In their view, amendments do not matter: once a federal question, always a federal question.

The manufacturers' argument runs into our rule that "an amended complaint [supersedes] an original complaint and renders the original complaint without legal effect." *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000). It makes no difference whether the case ends up in federal court through removal. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 929 (8th Cir. 2005) (holding that the district court had jurisdiction after removal from state court based on an amended complaint).[1] As we put it nearly

[1] There is an exception. We would have looked at the original complaint if the "district court [had] order[ed] [Wullschleger] to amend [her] complaint or [if] the decision to amend [was] otherwise

100 years ago, if "[t]he plaintiff . . . change[s] his pleading voluntarily [so] that the court will no longer have jurisdiction . . . then [it] becomes the duty of the court to remand the case, if it be a removed case." *Highway Constr. Co. v. McClelland*, 15 F.2d 187, 188 (8th Cir. 1926) (per curiam); *see* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

There is, to be sure, another rule that "the jurisdiction of the [c]ourt depends upon the state of things at the time of the action brought." *Mollan v. Torrance*, 22 U.S. 537, 539 (1824). But both can be true: we can assess "the state of things" at the time of filing and still evaluate jurisdiction according to the allegations in an amended complaint. As the Second Circuit has explained, the "time-of-filing rule applies to changes [to] the 'state of things,' . . . not to changes [to] the '*alleged* state of things.'" *Gale v. Chi. Title Ins. Co.*, 929 F.3d 74, 78 (2d Cir. 2019) (quoting *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007)). *Both* "must support jurisdiction." *Id.* at 77.

The distinction between the two is subtle. The "state of things," which is subject to the time-of-filing rule, refers to the actual facts on the ground. Suppose, for example, that one party destroys diversity by moving to another state after filing. This change to the "state of things" does not destroy diversity jurisdiction, even if living in that state from the beginning would have. *See Morgan's Heirs v. Morgan*, 15 U.S. 290, 297 (1817). The same goes for after-filing changes to the amount-in-controversy. *See Saint Paul Mercury Indem. Co. v.*

---

involuntary." *Atlas Van Lines*, 209 F.3d at 1067; *see Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1240–42 (8th Cir. 1995). Neither, however, occurred here.

Red Cab Co., 303 U.S. 283, 294–95 (1938); *Fochtman v. Hendren Plastics, Inc.*, 47 F.4th 638, 642–43 (8th Cir. 2022).

We treat changes to the "*alleged* state of things" differently. *Gale*, 929 F.3d at 78 (quoting *Rockwell*, 549 U.S. at 473). For example, a plaintiff can add a federal claim after removal to cure a lack of subject-matter jurisdiction, *see Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 185 (7th Cir. 1984); *see also ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008) (allowing a plaintiff to "switch[] jurisdictional horses" in an amended complaint), or replace a diverse defendant with a non-diverse one to "divest[] the district court of jurisdiction," *Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp., LP*, 362 F.3d 136, 142 (1st Cir. 2004); *see McClelland*, 15 F.2d at 188. The facts on the ground have not changed, but the facts in the complaint have. Under our rule that "an amended complaint [supersedes] an original complaint," these changes can create or destroy federal jurisdiction. *Atlas Van Lines*, 209 F.3d at 1067; *see Gale*, 929 F.3d at 78.

Was there a change to the "state of things" or the "alleged state of things" here? The facts on the ground never changed, but the allegations in the complaint did. There is little difference, from a jurisdictional perspective, between *adding* a federal claim in the absence of federal-question jurisdiction, *see Bernstein*, 738 F.2d at 185, and *subtracting* a claim or two, as happened here, to eliminate federal-question jurisdiction. Both involve the same simple act of amendment, a change to the "alleged state of things." *See Shaw v. Gwatney*, 795 F.2d 1351, 1354 (8th Cir. 1986) (looking to the amended complaint when the plaintiff added a claim that fell within the exclusive jurisdiction of the Court of Federal Claims).

To the extent that other courts have come out differently, most have emphasized forum-manipulation concerns[2] over jurisdictional rigor. *See, e.g.*, *16 Front St., L.L.C. v. Miss. Silicon, L.L.C.*, 886 F.3d 549, 558–59 (5th Cir. 2018); *In Touch Concepts, Inc. v. Cellco P'ship*, 788 F.3d 98, 101–02 (2d Cir. 2015). Taking the above example, some might say that attempting to cure a lack of federal-question jurisdiction by adding federal claims after removal is not forum-manipulative, but subtracting federal claims to thwart removal is. So we should allow the former but not the latter.

Jurisdictional first principles counsel otherwise. One reason is that there is no preference for federal jurisdiction. Quite the opposite: "all doubts about federal jurisdiction must be resolved in favor of remand." *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009). It makes little sense, as the manufacturers argue, to apply a one-way forum-manipulation ratchet in favor of federal jurisdiction, but not the other way around.

---

[2] There is a straightforward procedural answer to curbing potential forum manipulation. Unless amendments to the complaint happen quickly, a district court can withhold "leave" to amend if the only reason for the changes is to destroy federal jurisdiction. Fed. R. Civ. P. 15(a)(1) (explaining when a party may amend as of right), (a)(2) (allowing a district court to deny leave to amend "when justice so requires"); *see Brown v. Wallace*, 957 F.2d 564, 566 (8th Cir. 1992) (per curiam) (pointing to "undue delay," "bad faith," and "undue prejudice to the non-moving party" as reasons to deny leave to amend (citation omitted)); *see also Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 309 (8th Cir. 2009) (directing district courts "to consider . . . 'the extent to which the joinder of [a] nondiverse party is sought to defeat federal jurisdiction'" in deciding whether to grant leave to amend (citation omitted)).

A second is that it is not even clear that the time-of-filing rule applies in federal-question cases, and certainly not to the extent it does in diversity cases. It first arose in a diversity case nearly 200 years ago. *See Mollan*, 22 U.S. at 539. And for the most part, it has not strayed from there. *See Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 571 (2004) (explaining that the time-of-filing rule "measures all challenges to subject-matter jurisdiction *premised upon diversity of citizenship* against the state of facts that existed at the time of filing" (emphasis added)); *see also ConnectU*, 522 F.3d at 92; *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1503 (3d Cir. 1996); Erwin Chemerinsky, *Federal Jurisdiction* § 5.5, at 377–78 (6th ed. 2012) (recognizing this distinction).

And perhaps most importantly, we adopt the distinction between the "state of things" and "*alleged* state of things" because our precedent requires it. *Gale*, 929 F.3d at 78 (quoting *Rockwell*, 549 U.S. at 473). Recall that we stated nearly 100 years ago that it is a court's "duty . . . to remand the case," even if the plaintiff voluntarily amends the complaint in "a removed case." *McClelland*, 15 F.2d at 188.[3] The *McClelland* rule makes as much sense today as it did then.

C.

The manufacturers hope to keep the case in federal court through supplemental jurisdiction. It is too late, however, to turn back the clock. The original complaint is "without legal effect," *Atlas Van Lines*, 209 F.3d at

[3] To the extent that *McLain v. Andersen Corp.*, 567 F.3d 956, 965 (8th Cir. 2009), is inconsistent with *McClelland*, we follow the latter. *See Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (requiring a "subsequent panel[]" to follow the "earliest opinion" (citation omitted)).

1067, meaning that the possibility of supplemental jurisdiction vanished right alongside the once-present federal questions, *see* 28 U.S.C. § 1367(a). *See M & B Oil*, 66 F.4th at 1109 (discussing the need for "original jurisdiction" in removal situations); *see also Pintando v. Miami-Dade Hous. Agency*, 501 F.3d 1241, 1243–44 (11th Cir. 2007) (per curiam) (explaining that when "there [is] no longer a federal claim on which the district court could exercise supplemental jurisdiction," the source of the "district court's subject-matter jurisdiction cease[s] to exist"). The only option now is state court.

III.

We accordingly vacate the district court's judgment and send this case back to the district court with directions to remand it to Missouri state court.

APPENDIX B

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

Case No. 19-00235-CV-W-GAF

ANASTASIA WULLSCHLEGER and GERALDINE BREWER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ROYAL CANIN USA, INC. and
NESTLE PURINA PETCARE COMPANY,

Defendants.

JUDGMENT IN A CIVIL ACTION

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision of the Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

Plaintiffs' Motion to Remand is GRANTED. Accordingly, it is ORDERED that this case be remanded to the Circuit Court of Jackson County Missouri.

Dated: June 13, 2019

Entered: June 13, 2019

PAIGE WYMORE-WYNN
Clerk of Court

/s/ Lisa Mitchell
(By) Deputy Clerk

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

Case No. 19-00235-CV-W-GAF

ANASTASIA WULLSCHLEGER and GERALDINE BREWER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

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]

---

[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.

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 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,

---

[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.

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 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

[3] Both named Plaintiffs are citizens of Missouri. (Petition, ¶¶ 9-10). Additionally, the proposed classes are all defined to contain

Canin is a citizen of both Delaware, its state of incorporation, and Missouri, its principal place of business. (Doc. # 29, p. 9).[4] 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.

"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.

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

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2645

ANASTASIA WULLSCHLEGER; GERALDINE BREWER
Plaintiffs – Appellees

v.

ROYAL CANIN U.S.A., INC.;
NESTLE PURINA PETCARE COMPANY
Defendants – Appellants

Appeal from U.S. District Court for the
Western District of Missouri - Kansas City
(4:19-cv-00235-GAF)

JUDGMENT

Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

March 13, 2020

Order Entered in Accordance with Opinion: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-2645

ANASTASIA WULLSCHLEGER; GERALDINE BREWER

Plaintiffs – Appellees

v.

ROYAL CANIN U.S.A., INC.;
NESTLE PURINA PETCARE COMPANY

Defendants – Appellants

Appeal from United States District Court for the
Western District of Missouri - Kansas City

Submitted: January 16, 2020
Filed: March 13, 2020

Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

ERICKSON, Circuit Judge.

Plaintiffs Anastasia Wullschleger and Geraldine Brewer seek to represent a class of Missouri plaintiffs who purchased prescription pet foods at premium prices from Defendants Royal Canin U.S.A., Inc. and Nestle Purina PetCare Company. Plaintiffs allege they were deceived by defendants into believing the products were approved by the United States Food and Drug

Administration (FDA). The district court entered an order remanding the action back to state court, finding it lacked subject matter jurisdiction. We granted the defendants' petition for review under 28 U.S.C. § 1453(c)(1), limiting review to the issue of federal question jurisdiction. Because we conclude that federal question jurisdiction exists, the district court's order is vacated and the case is remanded for further proceedings consistent with this opinion.

I. Background

Defendants Royal Canin U.S.A., Inc. and Nestle Purina PetCare Company manufacture prescription pet foods that require the purchaser to consult with a veterinarian and obtain a prescription before purchase. According to the defendants, prescription pet foods are therapeutic formulas for specific health issues, and they may not be tolerated by all pets. However, the defendants have not submitted these pet foods for evaluation by the FDA, and a prescription is not required by law.

On February 8, 2019, plaintiffs filed this putative class action in Jackson County, Missouri. Plaintiffs alleged that defendants' conduct amounted to a joint and coordinated violation of the Food Drug and Cosmetic Act (FDCA) and the FDA's regulatory guidance in the Compliance Policy Guide (CPG). The complaint asserts only state law claims, including violations of the Missouri Merchandising Practices Act (MMPA), Missouri antitrust laws, and Missouri unjust enrichment law. Plaintiffs' prayer for relief includes claims for money damages, and declaratory and injunctive relief requiring that defendants comply with relevant state and federal laws.

Defendants removed the case to federal court, asserting federal jurisdiction under 28 U.S.C. § 1332(d)

based on the diversity provisions of the Class Action Fairness Act of 2005 and federal question jurisdiction under 28 U.S.C. § 1331. The district court granted plaintiffs' motion to remand, finding no basis for federal jurisdiction. Defendants appealed to our court for review under 28 U.S.C. § 1453(c)(1). We accepted the appeal solely to consider the issue of federal question jurisdiction.

II. Discussion

We review a district court's order of remand for lack of subject matter jurisdiction *de novo*. *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009). Federal courts have original jurisdiction over all civil actions "arising under" federal law. 28 U.S.C. § 1331. "[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (internal citations omitted).

In the case before us, plaintiffs rely explicitly on federal law throughout their pleadings. Notwithstanding their explicit reliance on federal law, plaintiffs contend that remand is proper under the Supreme Court's decision in *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986). The plaintiffs in *Merrell Dow* alleged claims for negligence and fraud relating to the drug Bendectin, and also alleged the drug was misbranded under the FDCA. In affirming the remand order, the Supreme Court emphasized Congress's refusal to create a federal private right of action for FDCA claims and highlighted the Sixth Circuit's explanation that federal question jurisdiction exists "only if plaintiffs' right to relief *depended necessarily* on a substantial

question of federal law." *Id.* at 807 (quoting *Thompson v. Merrell Dow Pharm., Inc.*, 766 F.2d 1005, 1006 (6th Cir. 1985)) (emphasis in original). In other words, "the presence of a claimed violation of [federal law] as an element of a state cause of action" is insufficient on its own to confer federal jurisdiction. *Id.* at 814.

Merrell Dow forecloses the removal of state law claims that merely include a violation of federal law as an element of the offense, without other reliance on federal law. Resolution of the MMPA claims in this case might not depend on federal law if the defendants' failure to submit the prescription pet food for FDA review arguably could be sufficient to prove deception under the MMPA. See Mo. Ann. Stat. § 407.025.1; Sitzer v. Nat'l Ass'n of Realtors, Case No. 4:19-cv-0032-SRB, 2019 WL 5381984, at *7 (W.D. Mo. Oct. 16, 2019) (reciting the elements of an MMPA claim). That said, plaintiffs' MMPA claims do not stand alone, and *Merrell Dow* read as a whole did not "overturn[] decades of precedent." *Grabel & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 317 (2005). When determining whether a case "arises under" federal law, resolution depends on whether a federal forum may entertain a state law claim implicating a disputed and substantial federal issue "without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314.

The complaint in this case consists of more than the MMPA claims. It included allegations brought under Missouri antitrust and unjust enrichment laws. Plaintiffs elected to premise these non-MMPA claims on violations and interpretations of federal law. The complaint included no fewer than 20 paragraphs recounting the defendants' specific and coordinated conduct that plaintiffs contend occurred during the

five years preceding the filing of the complaint. Compl. ¶¶ 55–74. As evidence of coordination and conspiracy, plaintiffs explicitly claim that defendants violated the FDCA, were non-compliant with FDA guidance, and that their refusal to submit the prescription pet food to FDA review was improper. *Id.* According to the plaintiffs' complaint, when confronted with a choice to continue non-compliance or submit to FDA review, the defendants "decided jointly" to continue their conspiracy and market the prescription pet food "in violation of federal and state law." *Id.* at ¶¶ 63, 73. Plaintiffs' dependence on federal law permeates the allegations such that the antitrust and unjust enrichment claims cannot be adjudicated without reliance on and explication of federal law.

Moreover, plaintiffs' prayer for relief invokes federal jurisdiction because it seeks injunctive and declaratory relief that necessarily requires the interpretation and application of federal law. After alleging violations of the FDCA throughout the complaint, plaintiffs request judgment: (1) "[f]inding, adjudging, and decreeing" that defendants have violated federal law; (2) enjoining defendants from engaging in further violations of federal law; and (3) estopping defendants from denying that prescription pet food is a "drug" and "enjoining Defendants to comply with all federal and Missouri provisions applicable to the manufacture of such drugs. . . ." Compl. ¶¶ 136–138; *see also* 21 U.S.C. § 321(g)(1) (FDCA defining "drug"). The face of plaintiffs' complaint gives rise to federal question jurisdiction and plaintiffs' isolated focus on their alleged state law claims is nothing more than an apparent veil to avoid federal jurisdiction.

Based on the allegations in the complaint and relief sought, we find a federal issue surrounding the state

law claims is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). When all four of these requirements are met, federal jurisdiction is proper. *Id.*

III. Conclusion

The district court's order of remand is vacated. We remand the case to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

March 13, 2020

Mr. Bryan A. Merryman
WHITE & CASE
Suite 2700
555 S. Flower Street
Los Angeles, CA 90071-2433

RE: 19-2645 Anastasia Wullschleger, et al v. Royal Canin U.S.A., Inc., et al

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace

period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

JPP

Enclosure(s)

cc: Ms. Susanna R. Allen
Mr. Christopher M. Curran
Mr. James P. Frickleton
Mr. Benjamin M. Greenblum
Mr. Jason M. Hans
Mr. Michael S. Hargens
Mr. Jerry Frank Hogue
Mr. Michael Patrick Morrill
Mr. John E. Schmidtlein
Mr. Daniel Rees Shulman
Ms. Catherine S. Simonsen
Mr. Wade H. Tomlinson III
Ms. Paige A. Wymore-Wynn

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

March 13, 2020

West Publishing Opinions Clerk
610 Opperman Drive
Building D D4-40
Eagan, MN 55123-0000

RE: 19-2645 Anastasia Wullschleger, et al v. Royal Canin U.S.A., Inc., et al

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant was Bryan A. Merryman, of Los Angeles, CA. The following attorney(s) appeared on the appellant brief; Charles W. German, of Kansas City, MO., Christopher M. Curran, of Washington, DC., Jason M. Hans, of Kansas City, MO., John E. Schmidtlein, of Washington, DC., Michael S. Hargens, of Kansas City, MO., Bryan A. Merryman, of Los Angeles, CA., Jerry Frank Hogue, of Washington, DC., Benjamin M. Greenblum, of Washington, DC., Susanna R. Allen, of Washington, DC., Catherine S. Simonsen, of Los Angeles, CA.

Counsel who presented argument on behalf of the appellee was Daniel Rees Shulman, of Minneapolis, MN. The following attorney(s) appeared on the appellee brief; Daniel Rees Shulman, of Minneapolis, MN., James P. Frickleton, of Leawood, KS., Wade H. Tomlinson, III, of Columbus, GA., Michael P. Morrill, of Atlanta, GA, Julia Dayton Klein, of Minneapolis, MN

The judge who heard the case in the district court was Honorable Gary A. Fenner. The judgment of the district court was entered on June 13, 2019.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

JPP

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 4:19-cv-00235-GAF

APPENDIX D

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

Case No. 19-00235-CV-W-GAF

ANASTASIA WULLSCHLEGER and GERALDINE BREWER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

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 for Declination of Supplemental Jurisdiction. (Doc. # 44). Defendants Royal Canin USA, Inc. ("Royal Canin") and Nestle Purina PetCare Company ("Purina") (collectively 'Defendants") oppose. (Doc. # 52). For the reasons provided below, Plaintiffs' Motion is DENIED.

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). The Petition alleged Defendants worked in concert with other manufacturers of cat and dog food, including Mars Petcare US, Inc. ("Mars") and Hill's Pet Nutrition, Inc. ("Hill's"), to mislead retailers and consumers regarding the necessity of a veterinary prescription authorizing the purchase of certain pet food ("Prescription Pet Food"). (*Id*. at ¶¶ 1-3). The Petition further alleged that, absent false claims of disease treatment in the Prescription Pet Food, that were neither verified nor approved by the Food and Drug Administration ("FDA"), Plaintiffs would have selected comparable non-prescription products rather than paying a premium for the Prescription Pet Food. (*Id*. at ¶¶ 4-6). The Petition contained six state-law causes of action including violations of Missouri Antitrust Law (Counts I-II), violations of the MMPA (Counts III-IV), and common-law unjust enrichment (Counts V-VI). (*Id*. ¶¶ 101-134).

Purina removed the case to federal court on March 26, 2019 based on federal question jurisdiction under 28 U.S.C. § 1331 and diversity jurisdiction arising from the Class Action Fairness Act of 2005. (Doc. # 1). Thereafter, Plaintiff filed a Motion for Remand and the Court granted the same, finding no basis to exercise federal jurisdiction. (Docs. ## 26, 32). Defendants appealed and the Eighth Circuit agreed to consider the sole issue of federal question jurisdiction. *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519 (8th Cir. 2020). Upon review, the Eighth Circuit stated that "[r]esolution of the MMPA claims in this case might not depend on federal law if the defendants' failure to submit the prescription pet food for FDA review arguably could be sufficient to prove deception under the MMPA." *Id.* at 521.

However, the Eighth Circuit ultimately determined the Petition did raise a federal question because "federal law permeates the allegations such that the antitrust and unjust enrichment claims cannot be adjudicated without reliance on and explication of federal law." *Id*. at 522. The Eighth Circuit further explained that "plaintiffs' prayer for relief invokes federal jurisdiction because it seeks injunctive and declaratory relief that necessarily requires the interpretation and application of federal law." *Id*. The matter was remanded to this Court and Plaintiffs filed an Amended Complaint on November 11, 2020, almost two years after filing the Petition in Jackson County Circuit Court. (Doc. # 43 ("Amended Complaint")). In the Amended Complaint, Plaintiffs attempt to excise the roadblocks to state court identified by the Eighth Circuit by eliminating the Missouri antitrust and unjust enrichment claims and the accompanying prayers for federal declaratory and injunctive relief. (*Compare* Petition *with* Amended Complaint). The Amended Complaint also eliminates the word "federal" from all but one paragraph, but retains "unchanged" the MMPA claims and adds a claim for civil conspiracy under Missouri common law. (*Id.*). The pending motion was filed contemporaneously with the Amended Complaint. (*See* Docket Sheet).

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

Plaintiffs' Amended Complaint abandons the claims upon which the Eighth Circuit determined presented federal questions. (Doc. # 45). The only claims remaining are MMPA claims and a claim for civil conspiracy under Missouri common law, which is not a separate cause of action but a basis for joint and several liability. *W. Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, (Mo. 2012) (en banc) ("Although civil conspiracy has its own elements that must be proven, it is not a separate and distinct action. Rather, it acts to hold the conspirators jointly and severally liable for the underlying act.") (internal quotations and alterations omitted). Plaintiffs argue that, following its amendment, the only basis for this Court to retain jurisdiction is under the supplemental jurisdiction principals of 28 U.S.C. § 1367 and that the Court should decline to exercise supplemental jurisdiction. (Doc. # 45). Defendants argue that the Amended Complaint still poses substantial

questions of federal food and drug law, and even if it does not, the Court should exercise its supplemental jurisdiction over the remaining claims. (Doc. # 52).

Federal question jurisdiction over a state law claim is proper if "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). As the Eighth Circuit recognized, Plaintiffs' MMPA claims "*might not* depend on federal law if the defendants' failure to submit the prescription pet food for FDA review arguably could be sufficient to prove deception under the MMPA." *Wullschleger*, 953 F.3d at 521 (emphasis added). As all doubts about federal jurisdiction must be resolved in favor of remand, *In re Prempro Prods.*, 591 F.3d at 620, the MMPA claims themselves do not support federal-question jurisdiction.

However, the civil conspiracy claim poses a separate hurdle. Defendants argue that Plaintiffs merely "repackaged their antitrust conspiracy claims as a civil conspiracy claim . . . which the Eighth Circuit held gave rise to federal-question jurisdiction." (Doc. # 52, p. 11). Plaintiffs' civil conspiracy claim does rely on substantially the same allegations. (*Compare* Petition *with* Amended Complaint). Amending "federal law" to just "law" did not change to which law the allegations referred. That being said, the question is not whether the *factual allegations* mention federal law, but rather whether the state law *claim* raises a substantial federal issue that is actually disputed. *Gunn*, 568 U.S. at 258.[1]

[1] Plaintiffs imply that their civil conspiracy claim cannot give rise to federal-question jurisdiction because it is not a separate

Plaintiffs premised their antitrust and unjust enrichment claims in the original Petition on violations and interpretations of federal law. *Wullschleger*, 953 F.3d at 522. In finding the Petition "permeate[d]" with federal law issues in the antitrust and unjust enrichment claims, the Eighth Circuit stated:

> As evidence of coordination and conspiracy, plaintiffs explicitly claim that defendants violated the FDCA, were non-compliant with FDA guidance, and that their refusal to submit the prescription pet food to FDA review was improper. According to the plaintiffs' complaint, when confronted with a choice to continue non-compliance or submit to FDA review, the defendants "decided jointly" to continue their conspiracy and market the prescription pet food "in violation of federal and state law."

Id. (citations omitted). The Eighth Circuit further noted that Plaintiffs sought declarations that Defendant violated federal law and requested injunctive relief from engaging in further violations of federal law. *Id.*

Plaintiffs argue that the civil conspiracy claim in the Amended Complaint does not raise the same substantial, disputed issues of federal law that the antitrust and unjust enrichment claims did because the civil conspiracy claim does not require a showing of anti-competitive or monopolistic effects. (Doc. # 55, pp. 3-5). "To state a cause of action for civil conspiracy, a petition must allege that defendants conspired and agreed to commit an unlawful act and did in fact commit an unlawful act, in pursuit of the conspiracy, which resulted in damages to plaintiff." *Johnston v.*

---

cause of action. Again, the question is whether the *claim* raises a federal issue. *Gunn*, 568 U.S. at 258.

Norrell Health Care, Inc., 835 S.W.2d 565, 568 (Mo. Ct. App. 1992). The alleged unlawful act was misleading Plaintiffs "into believing that a prescription was legally required for Prescription Pet Food." (Amended Complaint, ¶ 87). To determine if a prescription was required, federal law must be examined. Thus, even though the elements of the civil conspiracy claim differ from those of the antitrust and unjust enrichment claims, the civil conspiracy claim still requires resolution of substantial, disputed issues of federal law. As such, a federal question still exists and remand is inappropriate.

CONCLUSION

Plaintiffs' civil conspiracy claim necessarily raises a substantial federal issue that is actually disputed. Consequently, the Court has federal question jurisdiction over this action. For this reason and the reasons stated above, Plaintiffs' Motion to Remand is DENIED.

IT IS SO ORDERED.

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

DATED: May 21, 2021

APPENDIX E

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

Case No. 19-00235-CV-W-GAF

ANASTASIA WULLSCHLEGER and GERALDINE BREWER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ROYAL CANIN USA, INC. and NESTLE PURINA PETCARE COMPANY,

Defendants.

JUDGMENT IN A CIVIL ACTION

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision of the Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED that Plaintiffs have not pled with particularity the causal connection element of a MMPA deceptive practice claim. Nor have Plaintiffs plausibly alleged a civil conspiracy claim. Accordingly, Defendants' Motion to Dismiss is GRANTED.

Dated: March 22, 2022
Entered: March 22, 2022

PAIGE WYMORE-WYNN
Clerk of Court

/s/ Lisa Mitchell
(By) Deputy Clerk

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

Case No. 19-00235-CV-W-GAF

ANASTASIA WULLSCHLEGER and GERALDINE BREWER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ROYAL CANIN USA, INC. and NESTLE PURINA PETCARE COMPANY,

Defendants.

ORDER

Now before the Court is Defendants Royal Canin USA, Inc. ("Royal Canin") and Nestle Purina Petcare Company's ("Purina") (collectively "Defendants") Motion to Dismiss. (Doc. # 64). Plaintiffs Anastasia Wullschleger and Geraldine Brewer (collectively "Plaintiffs") oppose. (Doc. # 72). For the following reasons, Defendants' Motion to Dismiss is GRANTED.

DISCUSSION

I. BACKGROUND

Plaintiffs filed their Amended Complaint on November 11, 2020, asserting three causes of action: violations of the Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. §§ 407.020, 407.025 against Royal Canin (Count I) and Purina (Count II); and

conspiracy against Royal Canin and Purina (Count III). (Doc. # 43 ("Am. Compl.")). The Amended Complaint generally alleges that Defendants, as well as others, have developed certain pet food formulations that veterinarians prescribe and are sold at a higher price despite no testing or approval by the United States Food & Drug Administration ("FDA"). (*Id.*). Plaintiffs allege that the prescription-requirement misleads reasonable consumers to believe that these pet food formulations have been tested and approved by the FDA and contain drugs, thus warranting the inflated prices. (*Id.*). The Amended Complaint contains the following allegations relevant to this Motion.

In the 1960s, Hill's Pet Nutrition, Inc. ("Hill's") began selling pet food formulations, called "Prescription Diet," through veterinarians. (*Id.* at ¶ 23). In 2005, Mars Petcare US, Inc. ("Mars") developed and introduced a competing "prescription" pet food. (*Id.*). Royal Canin is a subsidiary of Mars. (*Id.* at ¶ 14). Today, "[s]ome combination of Royal Canin and Mars manufactures, produces, markets, advertises, distributes, and sells Prescription Pet Food sold as Royal Canin 'Veterinary Diet.'" (*Id.*). Purina is also currently manufacturing, producing, marketing, advertising, distributing, and selling prescription pet foods under various brands/labels, including "Purina Pro Plan Veterinary Diets." (*Id.* at ¶ 12).

Plaintiffs admit that the prescription pet food business "requires substantial research and development expertise and investment, the ability to reach veterinary clinics through a separate sales force and distribution network," and "compliance with FDA regulatory requirements and processes." (*Id.* at ¶ 27). Plaintiffs also admit that, while there is overlap between ingredients of prescription pet food and non-

prescription pet food, there are differences in the formulations. (*Id.* at ¶¶ 52, 59).

To purchase prescription pet food, one must either (1) purchase it directly from a veterinarian or (2) consult with a veterinarian and obtain a prescription. (*Id.* at ¶ 31). If one obtains a prescription, the consumer may purchase the prescription pet food a pet supply retailer, such as PetSmart or Chewy.com. (*Id.*). At PetSmart, a consumer must present their veterinarian's prescription to the onsite Banfield Animal Hospital ("Banfield"), a subsidiary of Mars. (*Id.* at ¶ 15). Eighteen of PetSmart's 31 Missouri locations houses a Banfield clinic. (*Id.*). Banfield will then issue a "MedCard," which shows the "Rx," "Rx Date," and "Rx #." (*Id.*). These third-party retailers advertise the prescription pet food with an "Rx" symbol and note that a veterinarian prescription is required to purchase. (*Id.* at ¶¶ 24-26). However, Royal Canin's packaging contains no "Rx" symbol nor any reference to a prescription. (*Id.* at ¶ 24). Purina's packaging does display an "Rx" symbol but does not reference a prescription. (*Id.*).

Plaintiffs purchase Defendants' prescription pet foods at the recommendation of their veterinarians. (*Id.* at ¶¶ 48, 55). Plaintiff alleges Royal Canin, Purina, and other manufacturing conspirators impose the prescription requirement. (*Id.* at ¶ 5). Plaintiffs do not allege that they reviewed Defendants' advertising, marketing, or product labels before or after purchasing the products. (*See id. generally*). Instead, Plaintiffs assert that, when their veterinarians informed them they needed a prescription for the prescribed food, they both understood and believed the foods contained medicine, and there had been regulatory oversight in the foods' manufacture. (*Id.* at ¶¶ 49, 56). Plaintiffs

have continued to purchase these prescription pet foods and will continue to make such purchases if recommended by their veterinarians. (*Id.* at ¶¶ 48, 55, 62). They and other pet owners do so because they "trust their vets" and are "willing[] to follow doctor's orders to their fullest extent." (*Id.* at ¶¶ 6, 30).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint that fails to state a claim upon which relief may be granted. When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court treats all well-pleaded facts as true and grants the non-moving party all reasonable inferences from the facts. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation" and such "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotation marks omitted). A Rule 12(b)(6) motion should be granted only if the non-moving party fails to plead facts sufficient to state a claim "that is plausible on its face" and would entitle the party to the relief requested. *Twombly*, 550 U.S. at 570.

III. ANALYSIS

A. The MMPA Claims

The MMPA "protects consumers by expanding the common law definition of fraud to preserve fundamental honesty, fair play and right dealings in public transactions." *Watson v. Wells Fargo Home Mortg., Inc.*, 438 S.W.3d 404, 407 (Mo. 2014) (en banc) (quotation and citation omitted). The MMPA prohibits "any

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." Mo. Rev. Stat. § 407.020.1. "To successfully present a claim under the MMPA, a plaintiff must allege that she (1) purchased merchandise from the defendant; (2) for personal, family, or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of defendant's use of one of the methods, acts or practices declared unlawful by the Act." *Kelly v. Cape Cod Potato Chip Co.*, 81 F. Supp. 2d 754, 757 (W.D. Mo. 2015) (citing Mo. Rev. Stat. § 407.025.1).

MMPA claims must satisfy Federal Civil Rule of Procedure 9(b)'s particularity requirements. *See Pollard v. Remington Arms Co., LLC*, No.13-0086-CV-W-ODS, 2013 WL 3039797, at *4 n.2 (W.D. Mo. June 17, 2013); *Khaliki v. Helzberg Diamond Shops, Inc.*, No. 4:11-CV-00010-NKL, 2011 WL 1326660, at *3 (W.D. Mo. Apr. 6, 2011). "To satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006) (citations omitted). In other words, a plaintiff must identify the "who, what, where, when, and how" of the alleged fraud. *U.S. ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003) (citation omitted). General statements and conclusory allegations are insufficient under Rule 9(b). *Neubauer v. FedEx Corp.*, 849 F.3d 400, 406-07 (8th Cir. 2017).

At first glance, it appears Plaintiffs have set forth a prima facie case for a MMPA violation. Plaintiffs allege that they purchased the prescription pet food manufactured by Defendants through third-party retailers such as PetSmart. (Am. Compl., ¶¶ 31, 48, 55). Plaintiffs allege the purchase was for personal or household purposes, specifically to feed their pets. (*Id.* at ¶¶ 48, 55). Plaintiffs additionally allege that the prescription pet food is sold at a substantially higher price because of the prescription requirement and, as a result, Plaintiffs have suffered an ascertainable loss of money. (*Id.* at ¶¶ 4, 54, 61). Finally, Plaintiffs allege the Defendants' enforcement or imposition of a veterinarian prescription requirement upon retailers and consumers as a condition precedent to purchase prescription pet food is unlawful under the MMPA because the prescription requirement "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." (*Id.* at ¶¶ 1, 2, 30).

Defendants argue, however, that these allegations do not meet the particularity requirement of Rule 9(b). (Doc. # 65, pp. 7-12). Specifically, Defendants argue Plaintiffs do not plausibly allege that: (1) Defendants caused their alleged injury; (2) they sustained damages attributable to Defendants' allegedly fraudulent prescription requirement; and (3) the prescription requirement is likely to mislead a reasonable consumer. (*Id.*). Plaintiffs counter, asserting that: (a) other courts have rejected some of Defendants' arguments for dismissal; (b) Defendants have not read the Complaint as a whole and ask the Court to improperly make inferences in Defendants' favor; and (c) Plaintiffs have not waived their MMPA claims by continuing to feed their pets prescription pet food.

(Doc. # 72, pp. 7-13). Because the Court finds that Plaintiffs have not plead that Defendants caused their alleged injuries with particularity, it does not address Defendants' other arguments.

Because "the plain language of the MMPA demands a causal connection between the ascertainable loss and the unfair or deceptive merchandising practice," "causation is a necessary element of an MMPA claim." *Owen v. Gen. Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008) (citing Mo. Rev. Stat. § 407.025.1). "Thus, even where an MMPA violation occurs, if it does not *cause* an ascertainable loss of money or property—i.e. an injury—a plaintiff cannot sue for the violation." *White v. Just Born, Inc.*, No. 2:17-cv-04025-NKL, 2018 WL 3748405, at *3 (W.D. Mo. Aug. 7, 2018) (emphasis in original).

Viewing all allegations in Plaintiffs' favor and all inferences in their favor, Plaintiffs have not pleaded with particularity that Defendants *caused* their injuries. Neither Plaintiff alleges she saw any advertising, marketing, labeling, packaging, or representations that prompted them to purchase the product or seek a prescription from their veterinarians for Defendants' products. Nor do they allege that they purchased the products because of the prescription requirement. Instead, Plaintiffs state they purchased the prescription pet food because their veterinarians prescribed the products. (Am. Compl., ¶¶ 9-10, 48, 55). Further, Plaintiffs' continued purchases of the purportedly deceptive products and admission that they would purchase more if prescribed by their veterinarians supports that Defendants have not caused Plaintiffs' injuries. *See Missouri ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 962 (Mo. 2008) (en banc) (determining that plaintiffs who "knew about" an alleged MMPA

violation and "purchased . . . [the] products anyway," were not injured by the practice); *see also In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, No. 08-1967-ODS, 2011 WL 6740338, at *5 (W.D. Mo. Dec. 22, 2011) (denying class certification because "it includes individuals who have not suffered an injury in fact," explaining that "[i]ndividuals who knew about BPA's existence and the surrounding controversy before purchasing Defendants' products have no injury").

Plaintiffs argue that two federal appellate courts—the Ninth and Seventh Circuits—have expressly rejected Defendants' causation argument in consumer deception claims concerning prescription pet food. (Doc. # 72, pp. 7-9) (citing *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007 (9th Cir. 2020) (hereinafter "*Moore I*"); *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730 (7th Cir. 2019)). Both cases are distinguishable. In *Moore I*, the plaintiffs sought recovery under California's consumer protection laws, *Moore I*, 966 F.3d at 1015, while the *Vanzant* plaintiffs sought remedies under the Illinois Consumer Fraud and Deceptive Business Practices Act. *Vanzant*, 934 F.3d at 734. In both cases, the plaintiffs alleged that they received advice from their veterinarians and saw the defendant manufacturers' packaging, marketing materials, and/or advertisements before purchasing the prescription pet food. *Moore I*, 966 F.3d at 1020-21; *Vanzant*, 934 F.3d 739. In this case, Plaintiffs do not allege they saw any of Defendants' advertising, marketing, labeling, packaging, or representations before purchasing the food. (*See generally* Am. Compl.). Instead, they allege that their veterinarians and salespeople at PetSmart told them they cannot buy prescription pet food without a prescription. (Am. Compl., ¶¶ 48, 55). Thus, Plaintiffs' Amended Complaint is devoid of any allegations that

Defendants' alleged MMPA violation *caused* them to purchase the food.

Plaintiffs do plead that Defendants, with their alleged co-conspirators, "created and enforced" or "imposed" a prescription requirement on retailers and consumers. (*Id.* at ¶¶ 1, 5, 6, 37, 38). These are conclusory allegations. None of the substantive allegations demonstrate how the named Defendants have "imposed" or "enforced" a prescription requirement. (*See, generally, id.*). Instead, the substantive allegations consist of actions taken by third parties—Chewy.com, PetSmart, and Banfield. (*Id.* at ¶¶ 25, 26, 49, 56).

Regardless, this case is legally distinct from *Moore I* and *Vanzant*. In interpreting the MMPA, the Missouri Supreme Court, en banc, stated that individuals who "knew about" an alleged MMPA violation and "purchased . . . [the] products anyway," or "did not care," were not injured. *See Coca-Cola Co.*, 249 S.W.3d at 862. Although *Coca-Cola* made the statement in the context of class certification, courts have cited this language when dismissing MMPA claims. *See Bratton v. Hershey Co.*, No. 2:16-cv-4322-C-NKL, 2018 WL 934899, at *2-3 (W.D. Mo. Feb. 16, 2018) (dismissing MMPA claim where plaintiff admitted he knew about alleged deceptive practice well before the class period); *Owen v. GMC*, No. 06–4067–NKL, 2007 WL 1655760, at *5 (W.D. Mo. June 5, 2007) (granting summary judgment in favor of defendant where plaintiffs failed to show that they would not have purchased the product had they been aware of the purportedly unlawful practice), *aff'd*, 533 F.3d 913 (8th Cir. 2008); *McCall v. Monro Muffler Brake, Inc.*, No. 10–269, 2013 WL 1282306, at *5 (E.D. Mo. Mar. 27, 2013) (dismissing MMPA claim at summary judgment stage

where, *inter alia*, undisputed evidence showed that the named plaintiffs "could not have been misle[ ]d by the disclosures"). It does not appear California or Illinois consumer protection laws have a similar interpretation of the causation standard.

The Court recognizes that Plaintiffs started purchasing the prescription pet food before they discovered the alleged deception. However, Plaintiffs other allegations that they have continued to purchase the product and would purchase a different prescription pet food if recommended by their veterinarians undercuts their claim that the prescription requirement caused their injuries. Coupled with the lack of substantive allegations tying the imposition or enforcement of the prescription requirement by Defendants, Plaintiffs have failed to plausibly allege with particularity a causal connection between Defendants' conduct and Plaintiffs' injuries.

B. Conspiracy Claim

To state a civil conspiracy claim, a plaintiff must allege: "(1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) [the plaintiff] was thereby damaged." *W. Blue Print Co., LLC v. Roberts*, 367 S.W.3d 7, 22 (Mo. 2012) (en banc). "In Missouri, if tortious acts alleged as elements of a civil conspiracy claim fail to state a cause of action, then the conspiracy claim fails as well." *Oak Bluff Partners, Inc. v. Meyer*, 3 S.W.3d 777, 781 (Mo. 1999) (en banc). Plaintiffs' underlying MMPA claims sound in tort. As the MMPA claims fail to state a claim, so too does their civil conspiracy claim.

Moreover, Plaintiffs have failed to allege sufficient facts to establish a meeting of the minds. In the Ninth

Circuit's second decision in the *Moore* case, it determined that an identical conspiracy involving the same pet food manufacturers and alleged co-conspirators did not state a plausible claim for relief. *Moore v. Mars Petcare US, Inc.*, 820 F. App'x 573, 576 (9th Cir. 2020) (hereinafter "*Moore II*"). Specifically, the Ninth Circuit concluded the plaintiffs lacked direct evidence and, while showing a common motive, did not plausibly allege a "meeting of the minds" because there were "obvious alternative explanations" for the defendants' conduct. *Id.* at 575-76 (cleaned up). Like the Amended Complaint here, the plaintiffs had alleged "significant barriers to entry" in the prescription pet food mark due to "substantial research and development expertise and investment, the ability to reach veterinary clinics through a separate sales force and distribution network," and "compliance with FDA regulatory requirements and processes." *Compare id.* at 576 *with* Am. Compl., ¶ 27. "The higher costs of prescription pet food may therefore be a market reflection of the high amount of investment necessary to develop such products and enter the market." *Moore II*, 820 F. App'x at 576.

Additionally, the Ninth Circuit noted that the conspiracy theory failed to account for the role of other players in the market. *Id.* Both Plaintiffs and the *Moore* plaintiffs acknowledged that other companies produce prescription pet food—for a smaller share of the market—but do not allege how those companies market their products, the prices of the competing products, or if consumers must have a prescription to purchase the competing products. *Compare id. with* Am. Compl., ¶ 27. Further, Plaintiffs' suggestion that one Mars subsidiary (Royal Canin) has the power to exclude competitors from an independent retail chain (PetSmart) because the retail chain houses clinical locations for a second Mars subsidiary (Banfield) is

implausible. (Am. Compl., ¶¶ 39-47). First, if Royal Canin and/or Mars had that level of influence over PetSmart, it makes little sense that Royal Canin and/or Mars would allow PetSmart to sell its two major competitors' (Purina and Hill's) products. Second, it seems highly unlikely that Royal Canin or Mars could exert such a high level of control. Banfield employs only 38 veterinarians at PetSmart locations in Missouri. (*Id.* at ¶¶ 15, 17). And PetSmart and Banfield accept prescriptions from veterinarians outside of their network. (*Id.* at ¶ 15). Finally, Plaintiff pleads that Petco sells prescription pet foods and that Plaintiff Brewer purchased prescription pet food directly from veterinarians who are not a part of the alleged conspiracy. (*Id.* at ¶¶ 27, 55). "Given that these other players also produce, sell, and prescribe prescription pet food, their behavior—insofar as it is like that of Defendants—provides a market-based reason for what Plaintiffs allege to be a conspiracy." *Moore II*, 820 F. App'x at 576. Thus, Plaintiffs' civil conspiracy claim fails.

CONCLUSION

Plaintiffs have not pled with particularity the causal connection element of a MMPA deceptive practice claim. Nor have Plaintiffs plausibly alleged a civil conspiracy claim. Accordingly, Defendants' Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

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

DATED: March 22, 2022

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1796

ANASTASIA WULLSCHLEGER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED AND GERALDINE BREWER

Appellants

v.

ROYAL CANIN U.S.A., INC. AND NESTLE PURINA PETCARE COMPANY

Appellees

Appeal from U.S. District Court for the
Western District of Missouri - Kansas City
(4:19-cv-00235-GAF)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judges Colloton and Shepherd would grant the petition for rehearing en banc. Judges Gruender and Grasz did not participate in the consideration or decision of this matter.

September 20, 2023

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX G

Wullschleger v. Royal Canin U.S.A., Inc.

Supreme Court of the United States

October 19, 2020, Decided

No. 20-152.

Reporter

2020 U.S. LEXIS 5131 *; 141 S. Ct. 621; 208 L. Ed. 2d 229; 89 U.S.L.W. 3122; 2020 WL 6121578

Anastasia Wullschleger, et al., Petitioners v. Royal Canin U.S.A., Inc., et al.

Prior History: *Wullschleger v. Royal Canin U.S.A., Inc., 953 F.3d 519, 2020 U.S. App. LEXIS 8038, 2020 WL 1225265 (8th Cir. Mo., Mar. 13, 2020)*

Judges: [*1] Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

APPENDIX H

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

Case No.: 4:19-cv-235

ANASTASIA WULLSCHLEGER, *et al.*,

Plaintiffs,

v.

ROYAL CANIN U.S.A., INC. and
NESTLÉ PURINA PETCARE COMPANY,

Defendants.

NESTLÉ PURINA PETCARE COMPANY'S
NOTICE OF REMOVAL

Defendant Nestlé Purina PetCare Company ("Purina") hereby removes this action, Case No. 1916-CV03690 in the Circuit Court of Jackson County, Missouri to this Court under 28 U.S.C. § 1441(a) (removal of civil actions). Removal is proper based on the original subject-matter jurisdiction of this Court under 28 U.S.C. § 1331 (federal question) and under 28 U.S.C. § 1332(d) (diversity of citizenship in a class action under the Class Action Fairness Act ("CAFA")). This removal comports with 28 U.S.C. § 1446 (procedure for removal of civil actions) and 28 U.S.C. § 1453 (removal of class actions).

This action is essentially a duplicate of a pre-existing putative nationwide class action filed in 2016

in the United States District Court for the Northern District of California, *Moore, et al. v. Mars Petcare US, Inc., et al.*, No. 16-CV-07001-MMC (N.D. Cal.). The *Moore* action, filed by the same counsel as this action (except for local counsel), alleged subject-matter jurisdiction based on, among other provisions, 28 U.S.C. § 1331 (federal question) and 28 U.S.C § 1332(d) (diversity of citizenship in a class action under CAFA). *Moore*, No. 16-CV-07001-MMC, Second Am. Class Action Compl. ¶ 17, ECF No. 116. The district court twice dismissed the *Moore* action for failure to state a claim. *Id.*, ECF Nos. 106, 134. The plaintiffs in that action have appealed the dismissal to the United States Court of Appeals for the Ninth Circuit, where briefing has concluded and oral argument is being scheduled. *Moore, et al. v. Mars Petcare US, Inc., et al.*, No. 18-15026 (9th Cir.).

In light of the outcome in *Moore* in the Northern District of California, here Plaintiffs and their counsel have engaged in a strategy to construct their Complaint to circumvent federal-court jurisdiction, by renaming the claims and by selectively naming defendants. Their strategy fails because their Complaint is inherently and unavoidably subject to federal subject-matter jurisdiction, based on both federal question and diversity of citizenship in a class action under CAFA, making the action removable.

In further support of this Notice of Removal, Purina provides the following non-exhaustive summary of the grounds for removal:

TIMELINESS OF REMOVAL

1. On February 8, 2019, Plaintiffs commenced this action by filing a putative class-action petition (hereinafter "Complaint") in the Circuit Court of Jackson

County, Missouri, Case No. 1916-CV03690, against Purina and another Defendant, Royal Canin U.S.A., Inc. ("Royal Canin").

2. Plaintiffs served Purina with a summons and a copy of the Complaint on February 25, 2019. This Notice of Removal is therefore timely under 28 U.S.C. § 1446(b) (requiring the filing of notice of removal within 30 days). *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) (holding that service triggers the 30-day period in which to file notice of removal).

CITIZENSHIP

3. Under 28 U.S.C. §§ 1441(b)(2) and 1453(b), Purina may remove this action without regard to its citizenship (Missouri) or the citizenship of any other Defendant.

VENUE

4. Venue is proper in this Court because the Western District of Missouri, Western Division is "the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a).

CONSENT

5. Pursuant to 28 U.S.C. § 1446(b)(2)(A), only defendants "who have been properly joined and served must join in or consent to the removal of the action." As of the filing of this Notice, Plaintiffs have served Purina but, upon information and belief, have not served Royal Canin.

6. Additionally, under 28 U.S.C. § 1453(b), a class action "may be removed by any defendant without the consent of all defendants."

THIS COURT HAS FEDERAL-QUESTION JURISDICTION

7. Under 28 U.S.C. § 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Whether a case "arises under" federal law is to be determined based on the content in a "well-pleaded complaint." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 9-10 (1983).

8. A "longstanding . . . variety of federal 'arising under' jurisdiction" is when state-law claims "implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). The Supreme Court has recognized this category of federal-question jurisdiction "for nearly 100 years." *Id.*; *see Franchise Tax Bd.*, 463 U.S. at 9 (observing that the Court has "often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law").

9. In determining whether claims arise under federal law, courts consider whether a federal issue is: (1) "necessarily raised," (2) "actually disputed," (3) "substantial," and (4) "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013); *see Grable*, 545 U.S. at 314.

10. On the face of the Complaint, Plaintiffs' claims under the Missouri Antitrust Law, the Missouri Merchandising Practices Act ("MMPA"), and the Missouri common law of unjust enrichment implicate substantial federal questions and necessarily turn on interpretation of the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301, 321, 352, 360, and the

FDA's Draft Compliance Policy Guide ("Draft CPG"), "Labeling and Marketing of Nutritional Products Intended for Use To Diagnose, Cure, Mitigate, Treat, or Prevent Diseases in Dogs and Cats." *See* Compl. ¶¶ 55-74. Indeed, the Complaint is replete with references to alleged violations of the FDCA and "federal law," and Plaintiffs' state-law claims explicitly invoke and turn on substantial questions of federal law, justifying "resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312. For example, Plaintiffs' claims rely upon supposed "[FDCA] violations by Mars/Royal Canin, Purina, and Hill's." Compl. ¶ 62. The antitrust claims set forth in the Complaint turn on federal law because Plaintiffs' antitrust claims are predicated upon the allegation that Prescription Pet Food manufacturers were selling their products in violation of federal law. *See id.* ¶¶ 73, 74, 102, 108. Plaintiffs' MMPA claims also necessarily raise federal issues because they allege that Royal Canin and Purina misled the public by fraudulently representing a prescription requirement that had "no legal basis or mandate" under the FDCA. *See id.* ¶¶ 114, 120.

11. Given these allegations, Plaintiffs' claims necessarily require judicial interpretation of the FDCA and require a court to determine whether Defendants violated the FDCA. *See, e.g.*, *id.* ¶ 34 ("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."); *id.* ¶ 59 ("All of the Prescription Pet Food of Mars/Royal Canin, Purina, and Hill's lacked an approved New Animal Drug Application or met other [FDCA] requirements, and therefore all of their Prescription Pet Food was 'unsafe,' 'adulterated,' and 'misbranded' in violation of the [FDCA]."); *id.* ¶ 65 ("In view of the Draft CPG and

their non-compliance with the [FDCA], Mars/Royal Canin, Purina, and Hill's were confronted with the choice of whether to continue marketing their Prescription Pet Food in violation of *federal* and state law, or to eliminate the prescription requirement and otherwise comply with law." (emphasis added)); *id.* ¶ 40 (alleging that Prescription Pet Food, among other things, "has not been subjected to the FDA process for evaluating the quality of drug ingredients and manufacturing processes"; "does not contain any drug approved by the FDA"; and "does not bear the mandatory legend borne by those items required by the FDA to be sold by prescription"); *id.* ¶ 58 (alleging that if "products, including the Prescription Pet Food of Mars/Royal Canin, Purina, and Hill's, did not have an approved New Animal Drug Application or meet other [FDCA] requirements, they were 'unsafe,' 'adulterated,' 'misbranded,' illegal, and subject to enforcement actions by the FDA"); *id.* ¶¶ 41- 42, 59, 63, 69, 72-74, 95, 102, 108, 114, 120, 126, 131. The meaning of the FDCA is an "essential element" of Plaintiffs' state-law claims. *Grable*, 545 U.S. at 315.

12. Beyond making disputed and substantial issues of federal law essential to their claims, Plaintiffs also affirmatively seek an injunction requiring Purina to adhere to *federal* law. *See* Compl. ¶ 138 (requesting orders and judgment "[e]stopping Defendants from denying Prescription Pet Food is a 'drug' and enjoining Defendants to comply with all *federal* and Missouri provisions applicable to the manufacture of such drugs" (emphasis added)). Plaintiffs' express request for relief requiring compliance with federal law further embeds federal questions into the matter.

13. A federal forum is necessary in order to ensure uniform application of the FDCA. *See Grable*, 545 U.S.

at 312. Plaintiffs' strategy to evade federal court invites state courts to reach differing interpretations of the FDCA's regulation of Prescription Pet Food. Plaintiffs should not be permitted "to disguise an essentially federal claim by artful pleading to close off [Purina's] right to a federal forum." *Thermalcraft, Inc. v. U.S. Sprint Commc'ns Co.*, 779 F. Supp. 1039, 1040 (W.D. Mo. 1991) (internal quotation marks and citation omitted).

THIS COURT HAS JURISDICTION UNDER CAFA

14. This Court also has original subject-matter jurisdiction under 28 U.S.C. § 1332(d) because: (a) "any member of a class of plaintiffs is a citizen of a State different from any defendant"; (b) "the number of members of all proposed plaintiff classes in the aggregate is [more] than 100"; and (c) "the matter in controversy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2)(A), (d)(5)(B).

There Is Minimal Diversity Under CAFA

15. The Complaint alleges that Plaintiffs Anastasia Wullschleger and Geraldine Brewer are Missouri residents. Compl. ¶¶ 9-10. These Plaintiffs seek to represent classes of Missouri citizens. *Id.* ¶¶ 90-92.

16. Plaintiffs allege that Defendant Royal Canin is, and has been at all relevant times, a company incorporated under the laws of Delaware, with its principal place of business in Missouri. *Id.* ¶ 11. Under 28 U.S.C. § 1332(c)(1), Royal Canin is a citizen of both Delaware and Missouri. CAFA's requirement of minimal diversity is satisfied because members of the putative class are citizens of a state (Missouri) different from Defendant Royal Canin (Delaware). 28 U.S.C. § 1332(d)(2)(A).

17. Courts are divided on how to interpret CAFA's minimal-diversity requirement for corporate defendants with dual citizenship. *Compare Fuller v. Home Depot Servs., LLC*, No. 1:07-CV-1268-RLV, 2007 U.S. Dist. LEXIS 59770, at *7-8 (N.D. Ga. Aug. 14, 2007) (holding that "minimal diversity has been established" under § 1332(d)(2)(A) because "although Home Depot is a Citizen of Georgia, it is also a citizen of Delaware and, therefore, is diverse from at least one member of the class [containing Georgia citizens]"), *with Roberts v. Mars Petcare US, Inc.*, 874 F.3d 953 (6th Cir. 2017) (reversing denial of motion to remand, which found that minimal diversity existed based on Mars Petcare US, Inc.'s dual citizenship in Delaware and Tennessee), *and Sundy v. Renewable Envtl. Sols., L.L.C.*, No. 07-5069, 2007 U.S. Dist. LEXIS 75762, at *10-11 n.4 (W.D. Mo. Oct. 10, 2007) ("The Court does not agree with Defendants' suggestion that minimal diversity exists unless a member of the class is a citizen of *both* Missouri *and* Delaware."); *see also Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 577 n.6 (2004) (noting that "[i]t is possible, though far from clear, that one can have opposing parties in a two-party case who are cocitizens, and yet have minimal Article III jurisdiction because of the multiple citizenship of one of the parties"). Neither the U.S. Supreme Court nor the U.S. Court of Appeals for the Eighth Circuit have resolved this issue, but the sounder view is that CAFA's requirement of minimal diversity is satisfied where there is a difference in citizenship between any member of a class of plaintiffs and any defendant, even if there is also overlapping citizenship.

18. Furthermore, the Complaint intentionally avoids naming as defendants certain necessary parties having diverse citizenship, despite those same parties being named as defendants in the *Moore* complaint in the

Northern District of California. For example, the Complaint conspicuously refrains from naming Mars Petcare US, Inc. ("Mars") as a defendant even though Plaintiffs allege that "[s]ome combination of Royal Canin and Mars manufactures, produces, markets, advertises, distributes, and sells Prescription Pet Food sold as Royal Canin 'Veterinary Diet.'" Compl. ¶ 14. As the Complaint acknowledges, "Mars is a Delaware corporation with a principal place of business in Franklin, Tennessee." *Id.* Under Plaintiffs' theory of liability, therefore, Mars is a necessary party that must be joined in this action. *See* Fed. R. Civ. P. 19(a) (requiring joinder of necessary parties). The presence of Mars as a defendant satisfies CAFA's minimal-diversity requirements under any interpretation.

There Are At Least One Hundred Members of the Proposed Classes

19. Plaintiffs' Complaint alleges that "the members of the Classes are likely to number at least in the thousands." Compl. ¶ 94.

The Amount in Controversy Exceeds $5,000,000

20. Plaintiffs seek compensatory damages, treble damages, and punitive damages on behalf of "thousands" of purchasers who were overcharged, for a period of five years, as a result of Purina and Royal Canin's alleged misconduct. *Id.* ¶¶ 90-92, 94, 101-24, 140-42.

21. Based on these allegations, "a fact finder *might* legally conclude" that the class members suffered damages of more than $5,000,000, satisfying 28 U.S.C. § 1332(d)(2). *Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 789 (8th Cir. 2012) (quoting *Bell v. Hershey Co.*, 557 F.3d 953, 959 (8th Cir. 2009)).

EXCEPTIONS TO CAFA JURISDICTION
DO NOT APPLY

22. CAFA includes two exceptions to the exercise of federal jurisdiction, the local- controversy exception and the home-state exception. 28 U.S.C. § 1332(d)(4)(A), (d)(4)(B). Plaintiffs bear the burden of establishing each element of these exceptions by a preponderance of the evidence. *See Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) ("Once CAFA's initial jurisdictional requirements have been established by the party seeking removal, . . . the burden shifts to the party seeking remand to establish that one of CAFA's express jurisdictional exceptions applies."). Plaintiffs cannot carry their burden as to either exception.

23. The local-controversy exception precludes the exercise of subject-matter jurisdiction over a class action only if during the 3-year period preceding the filing of that class action "no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." 28 U.S.C. § 1332(d)(4)(A)(ii). Plaintiffs cannot carry their burden as to this exception for a number of reasons.

24. For example, on December 7, 2016, the same counsel as in this action (except for local counsel) filed a putative nationwide class action complaint in the U.S. District Court for the Northern District of California against Purina, Royal Canin, Mars, Hill's Pet Nutrition, Inc., PetSmart, Inc., Medical Management International, Inc. d/b/a Banfield Pet Hospital, and BluePearl Vet LLC, alleging violations of antitrust, consumer protection, and unjust enrichment laws based on the same supposed violations of the FDCA. *Moore*, No. 16-CV-07001-MMC.

25. The *Moore* complaint contained substantially identical allegations as the Complaint here, against Purina, Royal Canin, and other defendants, based on essentially identical legal theories, including alleged violations of the MMPA. In an apparent attempt to avoid federal court, class counsel carved up the *Moore* nationwide class into separate state classes and re-filed in state court. The Court should not allow such gamesmanship, which CAFA was designed to thwart. *See* S. Rep. No. 109-14, at 27 (2005) (providing that CAFA aimed to "make it harder for counsel to 'game the system' and keep class actions in state court" and to "create efficiencies in the judicial system by enabling overlapping and 'copycat' cases to be consolidated in a single federal court, rather than proceeding simultaneously in numerous state courts"); *Williams v. Emp'rs Mut. Cas. Co.*, 845 F.3d 891, 901 (8th Cir. 2017) ("Congress expressed concern about lawyers who 'game the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests.'" (quoting S. Rep. No. 109-14, at 4)).

26. Thus, because the plaintiffs in *Moore* (led by the same counsel as in this case) asserted the same or similar factual and legal allegations against Purina and Royal Canin on behalf of a nationwide class of purchasers, including purchasers in Missouri, the local-controversy exception does not apply.

27. Second, the home-state exception applies only where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B).

Plaintiffs cannot carry their burden as to this exception for a number of reasons.

28. For example, the home-state exception does not apply because, once Mars is joined as a necessary party for the reasons described above, it will be a primary defendant that is not a citizen of the State in which Plaintiffs filed this action. *See Green v. Skyline Highland Holdings LLC*, No. 17-CV-00534 BSM, 2017 U.S. Dist. LEXIS 198553, at *11-12 (E.D. Ark. Dec. 4, 2017) (explaining that, among others, a "primary defendant is one [that] . . . is the subject of a significant portion of the claims asserted by plaintiffs" and holding that the home-state exception did not apply in part because "[t]he complaint [did] not single out any particular defendant as more responsible for the alleged harm than any other defendant").

Pursuant to 28 U.S.C. § 1446(a), Purina attaches as Exhibit A copies of all process, pleadings, and orders filed in the Circuit Court of Jackson County. In accordance with 28 U.S.C. § 1446(d), Defendant Purina will file a copy of this Notice of Removal with the Clerk of the Circuit Court of Jackson County and provide written notice to Plaintiffs. *See* Exhibit B.

Dated: March 26, 2019

Respectfully submitted,

/s/ Michael S. Hargens

Michael S. Hargens (MO #51077)
HUSCH BLACKWELL LLP
4801 Main Street, Suite 1000
Kansas City, Missouri 64112
Telephone: (816) 283-4636
Facsimile: (816) 983-8080
E-mail: Michael.hargens@huschblackwell.com

And

Bryan A. Merryman (*pro hac vice forthcoming*)
Catherine Simonsen (*pro hac vice forthcoming*)
WHITE & CASE LLP
555 South Flower Street, Suite 2700
Los Angeles, CA 90071
Telephone: (213) 620-7700
Facsimile: (213) 452-2329
E-mail: bmerryman@whitecase.com
csimonsen@whitecase.com

And

Christopher M. Curran (*pro hac vice forthcoming*)
J. Frank Hogue (*pro hac vice forthcoming*)
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 626-3600
Facsimile: (202) 639-9355
E-mail: ccurran@whitecase.com
fhogue@whitecasel.com

Attorneys for Defendant Nestlé Purina PetCare Company

APPENDIX I

28 USCS § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1441. Removal of civil actions

(a) Generally. Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal based on diversity of citizenship.

(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal law claims and State law claims.

(1) If a civil action includes—

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) Actions against foreign states. Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) Multiparty, multiforum jurisdiction.

(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) Derivative removal jurisdiction. The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 USCS § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.