UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLEAN LABEL PROJECT FOUNDATION, Plaintiff, v. ABBOTT LABORATORIES, INC., Defendant.	Civil Action No. 21-cv-3247 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION

This case about product labeling is *itself* difficult to label. It is not exactly a case about product safety, but about whether an allegedly unsafe component of a product renders misleading advertising materials suggesting that the product is beneficial. It is not exactly a case about federal law, but it looks to federal agency guidance as to what a product can or cannot safely contain. It is not exactly a class action, but is brought by a representative named plaintiff organization on behalf of a large number of non-participating members of the general public. It is not exactly a case seeking money damages, but plaintiff's pleadings, as framed, could require the expenditure of substantial funds to effectuate the relief sought.

Pending before the Court is plaintiff's motion to remand this quirky case to D.C. Superior Court following its removal here by defendant. For the reasons explained below, plaintiff's motion to remand is granted and two other pending motions are denied as moot.

I. BACKGROUND

Plaintiff Clean Label Project Foundation describes itself as a "non-profit public interest organization whose mission is to educate the public and enable consumers to make informed shopping choices." Compl. ¶ 46, ECF No. 1-1. In service of that mission, plaintiff "uses state-of-the-art laboratory testing to identify the best and worst labeled products," publicly publishes

its findings, and in so doing hopes to "reduc[e] contamination across all consumer products." *Id.* ¶¶ 48–49.

Contaminants of interest to plaintiff include lead, a "known neurotoxin," and cadmium, a "known neurotoxin and osteotoxin." *Id.* ¶ 25. Plaintiff cites statements by an assortment of government and private organizations in support of a general scientific consensus that "there is no safe level of lead for children," *id.* ¶ 30, and alleges various facts pertaining to the myriad adverse physiological effects of lead, *id.* ¶¶ 57–75. Plaintiff similarly alleges facts related to the adverse effects of cadmium, but without citing any statements by U.S. government agencies. *Id.* ¶¶ 27–29, 76–86.

One item in defendant's expansive product portfolio is Similac Alimentum Infant Formula for Food Allergies and Colic (12.1 oz) ("Alimentum"). Compl. ¶ 23. Alimentum is part of defendant's broader Similac line of infant formula products marketed as having benefits pertaining to "brain development," "bone development," and "immune support." *Id.* ¶¶ 11–16. Defendant also markets Similac products with such slogans as "We promise to give your baby the best" and "Nearly a century of keeping promises." *Id.* ¶¶ 99–100. To evaluate Alimentum, plaintiff purchased an amount of the product for analysis by a third-party laboratory. *Id.* ¶ 24. According to plaintiff, that analysis showed that the purchased Alimentum sample "contains dangerous levels of" lead and cadmium, which it asserts shows that these contaminants "are present in [Alimentum], or at a minimum, that [defendant] makes no efforts to confirm that they are absent." *Id.* ¶¶ 25–26. Specifically, testing in September 2021 showed that the Alimentum purchased by plaintiff contained a lead content of 3.5 parts per billion ("ppb") and a cadmium content of 5.2 ppb. *Id.* ¶¶ 107–112. According to plaintiff, this type of contamination is

incompatible with defendant's descriptions of Alimentum as promoting "brain development," "bone development," and "immune support." *See id.* ¶¶ 26, 31–40, 66, 70, 72, 75, 81–86, 97.

Based on these findings, on October 1, 2021, plaintiff filed a complaint in D.C. Superior Court alleging, in a single count, that defendant violated the D.C. Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 *et seq.* Compl. ¶ 123. The Complaint is styled as a "representative action claim on behalf of [plaintiff] and the general public of the District of Columbia," pursuant to D.C. Code § 28-3905(k)(1–2). Compl. ¶ 123. Plaintiff alleges that because Alimentum contains detectable amounts of lead and cadmium, defendant's marketing statements mislead or fail to inform consumers with respect to "material facts about" Alimentum. *See generally id.* ¶¶ 114–34. Additionally, plaintiff alleges a further CPPA violation because Alimentum is "adulterated," as defined by D.C. Code § 48-103, due to the presence of the harmful metals lead and cadmium. *See* Compl. ¶¶ 125–26, 135. On December 10, 2021, defendant timely filed a Notice of Removal, ECF No. 1, to this Court.[1]

Plaintiff timely filed the instant Motion to Remand to D.C. Superior Court ("Pl.'s Mot."), ECF No. 8, on January 10, 2022.[2] During briefing on the motion to remand, on January 31, 2022, defendant filed the also-pending motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Def.'s Mot. Dismiss Failure State Claim, ECF No. 11. The motion to dismiss was accompanied by a Request for Judicial Notice, ECF No. 11-3, concerning 22 exhibits from various public sources. Before filing its opposition to the motion to

[1] A notice of removal must be filed within 30 days of service of the summons and complaint on defendant. 28 U.S.C. § 1446(b)(1). Here, the Complaint was filed on October 1, 2021, with service effected on November 17, 2021. Notice of Removal ¶ 2. Accordingly, the December 10, 2021, notice of removal falls within the authorized 30-day timeframe.

[2] A motion to remand for lack of subject matter jurisdiction may be made "at any time before final judgment." 28 U.S.C. § 1447(c). Furthermore, the motion complies with the 30-day deadline for a motion to remand for any other reason, *see id.* Thirty days after December 10, 2021, was Sunday, January 9, 2022. Thus, the deadline was Monday, January 10, 2022, the date the instant motion was filed.

dismiss, plaintiff filed, on February 21, 2022, a Motion to Strike Defendant's Requests for Judicial Notice, ECF No. 14, seeking to strike a declaration filed with the motion to dismiss, the request for judicial notice, the 22 sundry exhibits thereto, and "all arguments relying on those documents," *id.* at 2. Briefing on the trio of interlocking motions was completed on March 14, 2022.

On May 11, 2022, review by the Court identified a possible lack of diversity of citizenship between the parties on account of both named parties appearing to be incorporated in Delaware, and directed the parties to file a supplemental report clarifying the citizenship of the parties. *See* Min. Order (May 11, 2022). The parties responded in a joint statement on May 13, 2022. Joint Statement Resp. May 11, 2022 Order ("Joint Statement"), ECF No. 20. All pending motions are now ripe for disposition.

II. LEGAL STANDARD

"[A]ny 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 . . . to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). "When it appears that a district court lacks subject matter jurisdiction over a case that has been removed from a state court, the district court must remand the case, and the court's order remanding the case to the state court whence it came 'is not reviewable on appeal or otherwise.'" *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 196 (D.C. Cir. 2002) (citing 28 U.S.C. § 1447(c) and quoting *id.* § 1447(d)); *see also Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 640 (2006) (noting the "policy of Congress oppos[ing] interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed," resulting in statutes that "have

accordingly limited the power of federal appellate courts to review orders remanding cases removed by defendants from state to federal court" (internal quotation marks and citation omitted) (citing 28 U.S.C. § 1447(d))). Due to the statutory prohibition of most appellate review of remanded cases, the legal standard for removal has largely been developed in the district courts.

Defendants seeking the exercise of federal court jurisdiction over a removed case "bear[] the burden of pleading" the basis for jurisdiction. *Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902, 906 (D.C. Cir. 2006) (citation omitted); *Apton v. Volkswagen Grp. of Am., Inc.*, 233 F. Supp. 3d 4, 11 (D.D.C. 2017). Absent such a showing, a "court must remand the case." *Johnson-Brown v. 2200 M Street LLC*, 257 F. Supp. 2d 175, 177 (D.D.C. 2003) (citing 28 U.S.C. § 1447(c)). "In light of the significant federalism concerns involved, this court 'strictly construes the scope of its removal jurisdiction,'" *RGI Events & Pub. Rels., LLC v. Al Qurm Mgmt. Consultancy*, No. 18-cv-1828 (BAH), 2019 WL 935498, at *2 (D.D.C. Feb. 26, 2019) (quoting *Moses v. SunTrust Mortg., Inc.*, No. 11-cv-00822, 2012 WL 113375, at *2 (D.D.C. Jan. 13, 2012) (quoting *Breakman v. AOL LLC*, 545 F. Supp. 2d 96, 100 (D.D.C. 2008))), resolving "any ambiguities concerning the propriety of removal in favor of remand," *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 56, 61 (D.D.C. 2017) (quoting *Johnson-Brown*, 257 F. Supp. 2d at 177).

III. DISCUSSION

Defendant asserts three independent bases for removal: (1) the Complaint "raise[s] substantial questions of federal law" both by relying on "federal regulatory bodies" for the assertion that there is "no known safe level" of lead and cadmium, Notice of Removal ¶¶ 9–14, and because federal law governs the contents and labeling of infant formula, *id.* ¶¶ 15–20;

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