

DISCUSSION

In its removal notice, defendant Tissue Science Laboratories, Inc. ("Tissue Lab") alleges that "Plaintiff's Complaint revolves around numerous federal claims alleged under 21 U.S.C. § 301 et seq. and 21 C.F.R. § 800 et seq." (Compl. 2.) The court interprets this to be an assertion of federal question jurisdiction in this court, and this allegation is Tissue Lab's sole assertion of jurisdiction in this court.¹

In an attempt to understand the "numerous federal claims" alleged by plaintiff, the court has reviewed both 21 U.S.C. § 301 et seq. (Federal Food, Drug, and Cosmetic Act) and 21 C.F.R. § 800 et seq. (the Control and Enforcement subchapter of that Act). The court has also reviewed in detail the allegations made by Ms. McFarland in this case. The Eleven Counts of the Complaint assert the following claims: (1) Strict Liability pursuant to O.C.G.A. § 51-1-11; (2) Products Liability; (3) Negligent Failure to Warn; (4) Breach of Implied Warranty of Merchantability; (5) Breach of Implied Warranty of Fitness for Particular Purpose; (6) Breach of Express Warranty; (7) Negligence Per Se; (8) Intentional Infliction of Emotional Distress; (9) Negligent Infliction of Emotional Distress; (10) Violation of Georgia Uniform Deceptive Trade Practices Act; and (11) Punitive Damages pursuant to O.C.G.A. § 51-12-5.1. The

¹This court does not have diversity jurisdiction over this matter, as plaintiff Brenda McFarland ("Ms. McFarland") is a citizen of Georgia and, while Tissue Lab is a Delaware corporation, its principal place of business is alleged to be Covington, Georgia.

Complaint's only mention of the Federal Food, Drug, and Cosmetic Act is in Count Seven of the Complaint, a claim of Negligence Per Se, in which it is alleged that Tissue Lab sold the product Permacol for uses not previously cleared or approved by the Food and Drug Administration. Plaintiff alleges that Tissue Lab's violation of 21 C.F.R. § 800 et seq. constitutes negligence per se.

FEDERAL QUESTION JURISDICTION

28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, and treaties of the United States." It is generally recognized that federal question jurisdiction arises in two types of cases. By far, the largest in number are those civil actions alleging a violation of the United States Constitution, or a federal statute which expressly or impliedly provides for a private cause of action. See City of Huntsville v. City of Madison, 24 F.3d 169, 171-72 (11th Cir. 1994). The second category of federal question cases are those that call upon the court to resolve a substantial, disputed question of federal law. Jairath v. Dyer, 154 F.3d 1280, 1282 (11th Cir. 1998). As stated above, Tissue Lab's removal petition alleges that plaintiff's Complaint "revolves around numerous federal claims." While the court questions the definition which Tissue Lab

appears to have assigned to the word "numerous," the court presumes Tissue Lab is seeking to bring this case into federal court on the latter theory.²

It is with regard to this category of cases that this court has been admonished to employ "sensitive judgments about congressional intent, judicial power, and the federal system." Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 810 (1986). Fortunately for this court, it may rely upon the "sensitive judgments" already made by the U.S. Supreme Court in the Merrell Dow case, which raised the issue of federal question jurisdiction in a case presenting facts almost identical to this one.

The complaint which the Supreme Court reviewed in Merrell Dow included five out of six counts which sought recovery on "common-law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence." Id. at 805. The Fourth Count of the Complaint alleged that the product at issue had not been labeled in accordance with the Food, Drug, and Cosmetic Act, and that such mislabeling "constitute[d] a rebuttable presumption of negligence." Id. at 805-06. Prior to the case's arrival in the Supreme Court, the Sixth Circuit had found that the Food, Drug, and Cosmetic Act conferred no federal cause of action for violations, and the parties

²The court also presumes this, of course, because Ms. McFarland has not alleged a federal cause of action, but rather a state tort claim based upon an alleged violation of a duty as established by the Federal Food, Drug, and Cosmetic Act, as well as the regulations associated with that statute.

did not contest that finding before the Supreme Court. The Supreme Court ultimately held that

a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.' 28 U.S.C. § 1331.

Id. at 817. The similarities between the case considered by the Supreme Court in Merrell Dow, and Ms. McFarland's case are striking, and the Supreme Court's ruling on those facts certainly points to the conclusion that this court does not have federal question jurisdiction over this proceeding.

The Eleventh Circuit has also dealt with a similar issue in Jairath, 154 F.3d at 1282. In Jairath, the plaintiff bought a suit in state court for money damages pursuant to O.C.G.A. § 51-1-6, against a doctor for breach of a duty not to discriminate on account of a disability which plaintiff alleged had been created by the Americans with Disabilities Act. The doctor defendant removed the case to federal court asserting that a substantial federal question existed because the court would be called upon to interpret the Americans with Disabilities Act. The district court denied plaintiff's motion to remand, and the parties spent a great deal of time, effort, and (no doubt) money litigating the case in federal court. On appeal, Mr. Jairath raised the issue with the Eleventh Circuit that the district court never had subject

matter jurisdiction over the matter to begin with. The Eleventh Circuit reversed the (very capable) district court judge's denial of the remand motion, comparing Mr. Jairath's case to that remanded in the Merrell Dow case. Hence the parties had to begin again in state court.

Mere reference to a federal regulation in Ms. McFarland's complaint is not sufficient to create a federal question, or create jurisdiction in this court. See also Burney v. 4373 Houston, LLC, No. Civ. A. 5:05-CV-255, 2005 WL 2736515, at *1-*2 (M.D. Ga. Oct. 24, 2005).

For each of the reasons set forth herein, this matter is hereby REMANDED to the Superior Court of Fulton County, Georgia.

IT IS SO ORDERED, this 6th day of July, 2006.

s/Beverly B. Martin _____
BEVERLY B. MARTIN
UNITED STATES DISTRICT JUDGE