IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Melinda K. Lindler, Plaintiff, vs. Mentor Worldwide LLC Defendant.	)	Civil Action No. 3:14-1982-MGL

This matter is before the Court for resolution of the Motion to Dismiss and accompanying Motion For Judicial Notice filed by Defendant Mentor Worldwide LLC ("Defendant") on May 21, 2014. (ECF Nos. 8 and 10). Defendant moves this Court to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 8). Plaintiff Melinda K. Lindler ("Plaintiff") filed a Response in Opposition, (ECF No. 14), on June 19, 2014, to which Defendant replied, (ECF No. 18), on June 27, 2014. Also before the Court is Plaintiff's Motion to Amend the Complaint filed June 19, 2014. (ECF No. 15). Defendant responded in opposition to that motion on July 3, 2014, (ECF No. 19), to which Plaintiff replied, (ECF No. 20), on July 14, 2014. The Court has carefully considered the pleadings, motions, and memoranda of the parties, and this matter is now ripe for disposition.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As such, "[a] motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is a challenge to the legal sufficiency of a complaint, as governed by Rule 8." Federal Trade Commission v. Innovative Marketing, Inc., 654 F.Supp.2d 378, 384 (D. Md. 2009). The

United States Supreme Court has notably held that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In Iqbal, the Supreme Court explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and noted that "[d]etermining whether a complaint states a plausible claim for relief will... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." 556 U.S. at 678-679; see also Harman v. Unisys Corp., 2009 WL 4506463 *2 (4th Cir. 2009). The Supreme Court further noted that while "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," courts are to assume the truth of all well-pled factual allegations and to determine whether they plausibly give rise to an entitlement to relief. Iqbal, 556 U.S. at 678.

DISCUSSION

This case arises out of the rupture of a silicone gel breast implant in Plaintiff, who underwent reconstructive surgery following a right and left mastectomy. (ECF No. 1-2 at pp. 8-9, ¶¶ 4-5). Plaintiffs' Complaint asserts four causes of action for strict liability, breach of express warranty, breach of implied warranty and negligence, all against Defendant, a silicone gel breast implant manufacturer. (ECF No. 1-2 at pp. 8-12). In its brief in support of its Motion to Dismiss, Defendant sets out clear authority for the proposition that all four of Plaintiff's claims as originally set out in the Complaint are subject to dismissal based upon a theory of federal preemption. See ECF No. 8-1 (citing Riegel v. Medtronic, Inc., 552 U.S. 312 (2008)). Indeed, in her Response brief, Plaintiff concedes as much with respect to her strict liability,

negligence and breach of implied warranty claims. See ECF No. 14 at p. 2. However, Plaintiff maintains that her claim for breach of express warranty is not preempted and cites Fourth Circuit precedent for the proposition that a breach of express warranty claim is not automatically preempted by the Medical Device Amendments ("MDA"), 21 U.S.C. § 301 et seq., given the voluntary, contractual nature of such a claim. See ECF No. 14 at p. 3-4 (citing Duvall v. Bristol-Meyers Squibb Co., 65 F.3d 392 (4th Cir. 1995) and its reconsideration on remand, Duvall II, 103 F.3d 324 (4th Cir. 1996)). Plaintiff moves the Court to permit amendment of the Complaint, appearing to recognize that her express warranty claim, at least as originally pled, suffers from an infirmity similar to that suffered by her other three claims. (ECF No. 15). The proposed Amended Complaint, (ECF No. 15-1), would consist of a single cause of action against Defendant for breach of express warranty and rely not upon an allegation that Defendant warranted, generally, that its product would be "safe and effective" but rather upon an allegation that Defendant voluntarily offered a specific warranty of replacement and reimbursement. Defendant counters that Plaintiff's request to amend should be denied, given that even the proposed Amended Complaint fails to state a cognizable claim for breach of express warranty, as Plaintiff has failed to allege any facts supporting the essential element of "breach" of warranty. (ECF No. 19).

It appears, therefore, that the critical determination before the Court is whether, despite Federal Rule of Civil Procedure 15(a)(2)'s directive that courts should freely grant leave to amend, the grant of leave to amend here would be futile because even the proposed Amended Complaint would not survive a motion to dismiss. See Matrix Capital Mgmt. Fund LP v. BearingPoint, Inc., 576 F.3d 172, 193 (4th Cir. 2009) (noting that amendment pursuant to Rule 15(a)(2) is properly denied where the amendment would be "futile"); Woods v. Boeing Co., 841

F.Supp.2d 925, 930 (D.S.C. 2012) (noting that where "an amendment would fail to withstand a motion to dismiss, it is futile."). For the following reasons, the Court concludes that the amendment proposed here would in fact be futile.

In order to establish a cause of action for breach of an express warranty, a plaintiff must show: (1) the existence of the warranty; (2) the warranty's breach; and (3) damages proximately caused by the breach. See Burton v. Chrysler Group LLC, 2012 WL 831843 *3 (D.S.C. March 12, 2012) (citing First State Sav. & Loan v. Phelps, 299 S.C. 441, 385 S.E.2d 821, 825 (S.C. 1989)). In the proposed Amended Complaint, Plaintiff adequately alleges the existence of a warranty, see ECF No. 15-1 at ¶ 10, as well as causation and damages, see id. at ¶¶ 11-12. However, on the equally important element of "breach," Plaintiff avers only that "[a]s a result of Defendant's breach of express warranty, Plaintiff has been injured…". Id. at ¶ 11. This conclusory allegation is presented without any factual support whatsoever. In her Motion to Amend, Plaintiff asks this Court for leave to file an Amended Complaint that complies with the heightened scrutiny and pleading requirements of Iqbal and Twombly. (ECF No. 15 at p. 1). However, Plaintiff's proposed Amended Complaint, which provides no factual content on the critical element of "breach," itself simply does not comport with the pleading requirements of this Court.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Amend the Complaint, (ECF No. 15), is **DENIED**. Defendant's Motion to Dismiss, (ECF No. 8), along with its companion Motion for Judicial Notice, (ECF No. 10), are **GRANTED** in substantial part. Plaintiff's causes of action for strict liability, negligence and breach of implied warranty are **DISMISSED** *with prejudice* as

preempted. Plaintiff's cause of action for breach of express warranty is **DISMISSED** *without prejudice*.

IT IS SO ORDERED.

October 23, 2014
Spartanburg, South Carolina

s/Mary G. Lewis
United States District Judge