

Insofar as the lawsuit requires the Court to enforce the Consent Decree, Plaintiff lacks standing to seek that relief. The Court is in agreement with the FTC's exposition of the case law strictly limiting the standing of non-parties to enforce consent decrees to which the government is a party. At a minimum, Plaintiff must show not only that he was an intended third-party beneficiary of the Consent Decree, but also that "the parties intended the third party *to be able to sue* to protect that benefit." *Securities and Exchange Commission v. Prudential Securities Inc.*, 136 F.3d 153 (D.C. Cir. 1998) (emphasis added). Even if the Court were to find that Plaintiff is an intended third-party beneficiary, Plaintiff can point to no language in the Consent Decree clearly manifesting any intent to give third parties the right to sue to protect the benefits conferred on them. In the absence of such a clear indication, Plaintiff lacks standing to proceed.

If, as Plaintiff urges, the case does not require enforcement of the Consent Decree, this Court lacks subject matter jurisdiction. Because the adversaries are non-diverse, the only possible basis for subject matter jurisdiction is the presence of a federal question. 28 U.S.C. § 1331. The Complaint, however, identifies no federal question other than the fact that the lawsuit "involves the interpretation and enforcement of a federal consent decree between KB Home and the United States of America... ." Given that Plaintiff may not enforce the Consent Decree, jurisdiction must be founded solely upon interpretation of the Decree. Yet the proper interpretation of the Decree is not in dispute. The parties agree that the Decree requires Defendant to use a model warranty that does not contain a binding arbitration clause, and that the 1991 court order enforces that requirement.

Therefore, the only issue in this case is whether the disputed contractual provisions are unenforceable because of the existence of the Consent Decree and court order. The tests for invalidating private contractual provisions, and the evidence that may be submitted to prove

illegality, are questions of state contract law. The existence of the Consent Decree, does not give rise to a federal question. “[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.” *Merrell Dow Pharmaceuticals Inc., v. Thompson*, 478 U.S. 804, 813 (1986). *See also MSOF Corp. v. Exxon Corp.*, 295 F.3d 485 (5th Cir. 2002) (existence of a federal consent decree does not create federal question jurisdiction where legal effect of decree is “initially a *state* law question”) (original emphasis).

For the foregoing reasons, the Complaint is hereby **DISMISSED**.

IT IS SO ORDERED.

SIGNED this 19th day of September, 2003.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE