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Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7) United States Court of Appeals, Third Circuit.

Ruth KORONTHALY, individually and on behalf of all others similarly situated, Appellant

v.

L'OREAL USA, INC., a New York Corporation; The Procter and Gamble Distributing LLC, an Ohio Corporation.

No. 08-4625. Argued Nov. 10, 2009. Opinion Filed: March 26, 2010.

### Synopsis

**Background:** Purchaser of lipstick products containing lead brought class action against companies that manufactured, marketed, and distributed the products. Defendants filed motions to dismiss. The United States District Court for the District of New Jersey, [Dennis M. Cavanaugh, J.](#), 2008 WL 2938045, granted the motions and subsequently denied plaintiff's motions for reconsideration and to file a second amended complaint. Plaintiff appealed.

**Holdings:** The Court of Appeals, [Roth](#), Circuit Judge, held that:

1 plaintiff's subjective allegation that the trace amounts of lead in the lipsticks were unacceptable to her was not an injury-in-fact sufficient to confer constitutional standing, and

2 to the extent plaintiff contended that she lost the "benefit of the bargain" in purchasing the lipsticks, she did not demonstrate a concrete injury-in-fact.

Affirmed.

\*258 On Appeal from the United States District Court for the District of New Jersey (District Court No. 2-07-cv-05588), District Judge: [Dennis M. Cavanaugh](#).

### Attorneys and Law Firms

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Before: [AMBRO](#), [GARTH](#), and [ROTH](#), Circuit Judges.

### Opinion

#### OPINION

[ROTH](#), Circuit Judge:

Ruth Koronthaly appeals from the District Court's order granting defendant Procter & Gamble Company's ("P & G") motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#) for lack of standing and defendant L'Oreal USA, Inc.'s ("L'Oreal") motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#). We exercise plenary review over a grant of a motion to dismiss for lack of standing and review the factual elements underlying the standing determination for clear error. [Goode v. City of Phila.](#), 539 F.3d 311, 316 (3d Cir.2008). The burden of proving each standing element rests with the plaintiff. [Danvers Motor Co., Inc. v. Ford Motor Co.](#), 432 F.3d 286, 291 (3d Cir.2005). We assume the parties' familiarity with the factual and procedural history, which we describe only as necessary to explain our decision. We will affirm the District Court's order.

Koronthaly purchased lipstick products manufactured, marketed, and distributed by appellees L'Oreal. and P & G. These lipstick products contain lead. The FDA does not regulate the presence of lead in lipstick, but Koronthaly asserts that the lipstick contains lead in far greater amounts than permitted in candy by the FDA. Neither the packaging nor the products themselves contained any indication that the lipstick contained any lead.

Koronthaly did not know when she purchased the products that they contained any lead, and when she learned of the lead content she immediately stopped using them. Moreover, had she known of the lead she would not have purchased the products.

In November 2007, Koronthaly filed a class action complaint in the District Court for the District of New Jersey. She invoked the District Court's jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). After it was amended in March 2008, her complaint asserted claims for: (1) violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1 *et seq.*; (2) breach of implied warranty under the New Jersey UCC; (3) breach of implied warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1); (4) strict liability; (5) negligence per se; (6) unjust enrichment; and (7) injunctive relief.

\*259 L'Oreal and P & G filed motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and 12(b)(1), respectively. On July 25, 2008, the District Court granted those motions, finding that Koronthaly lacked standing to pursue the action. On October 24, 2008, the District Court denied Koronthaly's motion for reconsideration, and her motion for leave to file a second amended complaint. Koronthaly then filed a timely notice of appeal.

To prove constitutional standing, Koronthaly must demonstrate (1) an injury-in-fact that is actual or imminent and concrete and particularized, not conjectural or hypothetical, (2) that is fairly traceable to the defendant's challenged conduct, and (3) is likely to be redressed by a favorable judicial decision. *Summers v. Earth Island Inst.*, --- U.S. ---, 129 S.Ct. 1142, 1149, 173 L.Ed.2d 1 (2009). In this case, standing founders on the first requirement, injury-in-fact.

1 Koronthaly's argument that she was misled into purchasing unsafe lipstick products is belied by the FDA's report finding that the lead levels in the Defendants' lipsticks were not dangerous and therefore did not require warnings. Moreover, Koronthaly concedes that she has suffered no adverse health effects from using

the lipsticks. Koronthaly therefore has asserted only a subjective allegation that the trace amounts of lead in the lipsticks are unacceptable to her, not an injury-in-fact sufficient to confer Article III standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (injury-in-fact must be accompanied by "continuing, present adverse effects") (citation omitted); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 636 (3d Cir.1996) (Wellford, J., concurring) ("Fear and apprehension about a possible future physical or medical consequence ... is not enough to establish an injury *in fact*.").

2 Furthermore, to the extent that Koronthaly contends that the injury-in-fact was the loss of her "benefit of the bargain," she mistakenly relies on contract law. See *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319-21 (5th Cir.2002) (plaintiff, whose only claim was that she "would like her money back" for having purchased a product that failed to make certain disclosures and allegedly was defective, did not have an injury-in-fact sufficient to create standing). Her lipstick purchases were not made pursuant to a contract, and therefore she could not have been denied the benefit of any bargain. Absent any allegation that she received a product that failed to work for its intended purpose or was worth objectively less than what one could reasonably expect, Koronthaly has not demonstrated a concrete injury-in-fact.

For the foregoing reasons, we will affirm the order of the District Court granting the Defendants' motions to dismiss.

#### Parallel Citations

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United States District Court,  
D. New Jersey.

Ruth KORONTHALY, individually and on behalf of  
all others similarly situated, Plaintiff,

v.

L'OREAL USA, INC., a New York Corporation, and  
the Proctor & Gamble Distributing LLC, an Ohio  
Corporation, Defendants.

Civil Action No. 07-CV-5588 (DMC).Oct. 24, 2008.

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#### Opinion

### OPINION

DENNIS M. CAVANAUGH, District Judge.

*\*1* This matter comes before the Court upon Plaintiff Ruth Koronthaly's ("Plaintiff") motion for reconsideration pursuant to L. Civ. R. 7.1(i) and Plaintiff's motion for leave to file a second Amended Complaint. Pursuant to [Fed.R.Civ.P. 78](#), no oral argument was heard. After carefully considering the submissions of the parties, and based upon the following, it is the finding of this Court that Plaintiff's motion for reconsideration pursuant to L. Civ. R. 7.1(i) is **denied**; Plaintiff's motion for leave to file a second Amended Complaint is **denied**.

#### I. BACKGROUND

##### A. Factual History

On October 11, 2007, Plaintiff discovered that she purchased lipstick containing lead, in levels between .12 parts per million ("ppm") and .65ppm. On that day, the Campaign for Safe Cosmetics ("CFS") published a report, naming specific lipsticks containing allegedly dangerous levels of lead. CFS's report stipulates that L'Oreal's "Colour Riche True Red" contained between .50ppm and .65ppm; Cover Girl's "Incredifull Lipcolor Maximum Red" contained between .12ppm and .56ppm; Maybelline NY's "Moisture Extreme Midnight Red" contained .18ppm; and Maybelline NY's "Moisture Extreme Scarlet Simmer" contained .11ppm. These levels were alleged to be dangerous based on a comparison to the U.S. Food and Drug Administration's ("FDA") limit of .1ppm for levels of lead in candy, established to prevent the direct ingestion of lead by children.

Plaintiff, a regular user of these products, complains that Defendant Proctor and Gamble Distributing LLC ("P & G") and Defendant L'Oreal USA, Inc. ("L'Oreal," collectively with "P & G," "Defendants") did not recall the subject lipstick products, offer compensation for the allegedly defective products or change their marketing strategies after the study by CFS was published. Plaintiff asserts that Defendants engaged in "misleading, inaccurate, and deceptive practices." Plaintiff further asserts that Defendants "negligent and reckless conduct ... have exposed [Plaintiff] to a known hazardous substance." Plaintiff claims that such egregious conduct entitles her to recover the purchase price of the lipstick products in question and to obtain the costs of diagnostic testing for potential lead poisoning. Plaintiff requests such relief on the basis that she has been injured by mere exposure to lead-containing lipstick and by her increased risk of being poisoned by lead. Plaintiff further suggests that she is entitled to such relief because she would not have purchased the lipstick had she known of its lead content.

Plaintiff has not, however, complained of any manifest injuries. Plaintiff has not rebutted Defendants' assertion that the FDA does not regulate the presence of lead in lipstick, a product inadvertently ingested, despite the fact that the FDA does regulate the presence of lead in candy, a product directly ingested in large quantities.

##### B. Procedural History

*\*2* On March 11, 2008, Plaintiff filed her Amended Complaint as a class action, pursuant to [Fed.R.Civ.P. 23\(a\), \(b\)\(1\)-\(3\)](#). Plaintiff's Amended Complaint alleges seven causes of action: violation of consumer protection laws under the New Jersey Consumer Fraud Act ("CFA"),

N.J.S.A. § 56:8-1 *et seq.* (Count I); breach of implied warranty pursuant to the Uniform Commercial Code (“UCC”) (Count II); breach of implied warranty pursuant to the Magnuson-Moss Warranty Act (“Magnuson-Moss”) (Count III); strict liability (Count IV); Negligence *Per Se* (Count V); Unjust Enrichment (Count VI); and injunctive relief pursuant to 21 U.S.C § 331 (Count VII).

P & G filed a motion to dismiss Plaintiff’s Complaint pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction, Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction, and Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted.

L’Oreal filed a motion to dismiss Plaintiff’s Complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted.

On July 25, 2008, by Opinion and Order the Court granted P & G’s motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and L’Oreal’s motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). The Court denied as moot P & G’s motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On August 12, 2008, Plaintiff filed a motion for reconsideration. On August 13, 2008, Plaintiff filed a motion for leave to file a Second Amended Complaint. On September 22, 2008, Plaintiff filed a request for leave to provide supplemental authority in support of both of her motions.

## II. STANDARD OF REVIEW

### A.L. Civ. R. 7.1(i)

Motions for reconsideration in this District are governed by Local Civil Rule 7.1(i). Local Rule 7.1(i) provides that a party may file a motion for reconsideration “within ten (10) business days after entry of the Order or Judgment on the original motion by the Judge or Magistrate Judge.” A motion pursuant to Local Rule 7.1(i) may be granted only if (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice. *Database Am., Inc. v. Bellsouth Adver. & Pub. Corp.*, 825 F.Supp. 1216, 1220 (D.N.J.1993); *see also North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir.1995). Such relief is “an extraordinary remedy” that is to be granted “very sparingly.” *See NL Indus. Inc. v. Commercial Union Ins. Co.*, 935 F.Supp. 513, 516 (D.N.J.1996). Local Rule 7.1(i) does not contemplate a recapitulation of arguments considered by the Court before rendering its original decision. *See Birmingham v. Sony Corp. Of Am., Inc.*, 820 F.Supp. 834, 856

(D.N.J.1992), *aff’d*, 37 F.3d 1485 (3d Cir.1994). In other words, a motion for reconsideration is not an appeal. It is improper on a motion for reconsideration to “ask the court to rethink what it ha[s] already thought through-rightly or wrongly.” *Oritani Sav. & Loan Ass’n v. Fidelity & Deposit Co.*, 744 F.Supp. 1311, 1314 (D.N.J.1990)).

### B. Standard Of Review For Leave to File A Post Dismissal Amended Complaint

\*3 A plaintiff may obtain leave of the Court to amend its Complaint pursuant to Fed.R.Civ.P. 15(a) prior to a determination having been rendered. Rule 15(a) provides that leave to amend “shall be freely given when justice so requires.” This liberal standard, however, is not the appropriate standard where the court has already dismissed the complaint. *See Cooper Hosiery Mills, Inc. v. Honeywell International, Inc.*, WL 1782341 at \*2 (D.N.J.2008). Instead, a plaintiff seeking to amend a complaint after its dismissal must move to alter or amend the Court’s original judgment. This can be done pursuant to Fed.R.Civ.P. 59(e) or 60(b) or, as is the case here, a plaintiff may seek reconsideration of the Court’s original determination and if granted, the plaintiff can seek to amend her Complaint pursuant to Fed.R.Civ.P. 15(a).

#### i. Fed.R.Civ.P. 59(e)

Fed.R.Civ.P. 59(e) provides that a motion to alter or amend a judgment must be filed no later than ten (10) days after the entry of a judgment. The District Court loses jurisdiction to hear such a motion after the time limit has expired. *See Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263 fn. 7, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978); *see also Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1362 (3d Cir.1990) (holding it “undoubtedly correct” that “the ten day time period established by Rule 59(e) for filing a motion to alter or amend the judgment is jurisdictional, and ... the District Court has no power to enlarge it”). Where the ten (10) day limitation has expired a party seeking to alter or amend a judgment can turn to Fed.R.Civ.P. 60(b).

Motions to alter or amend made pursuant to Rule 59(e) can only be granted where: “(1) an intervening change in the law has occurred, (2) new evidence not previously available has emerged, or (3) the need to correct a clear error of law or prevent a manifest injustice arises.” *Gutierrez v. Ashcroft*, 289 F.Supp.2d 555, 561 (D.N.J.2003) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir.1995)). In addition, “requests pursuant to [Rule 59(e)] are to be granted ‘sparingly,’ ... and only when ‘dispositive factual matters or controlling decisions of law’ were brought to

the court's attention, but not considered." *Id.* (citing *Pelham v. United States*, 661 F.Supp. 1063, 1065 (D.N.J.1987)).

**i. Fed R. Civ. P.60(b)**

Fed.R.Civ.P. 60(b) sets forth six (6) specific grounds upon which a plaintiff can obtain post judgment leave to amend its Complaint. These grounds are:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under [Rule 59\(b\)](#);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

\*4 (6) any other reason that justifies relief.  
If it can not be demonstrate that at least one of the above grounds applies, then the plaintiff is not entitled to post judgment leave to amend.

**III. DISCUSSION**

**A. Plaintiff's Motion For Reconsideration**

Plaintiff seeks reconsideration of this Court's July 25, 2008, Opinion and Judgment based on her belief that the Court overlooked the essence of her Complaint by analyzing her claims pursuant to product liability standards. Plaintiff contends that her claims founded in consumer fraud satisfy the Article III standing requirements that the Court found lacking. Specifically, Plaintiff alleges that she would not have bought Defendants products had she known of their lead content and that this constitutes an injury-in-fact/ascertainable loss necessary to meet the standing requirements of and to state a claim upon which relief can be granted under the New Jersey Consumer Fraud Act ("CFA"). P & G correctly argues that Plaintiff has not identified the matter or controlling decisions which Plaintiff believes the Court overlooked. Plaintiff's moving papers present no case law which she had not presented to the Court in her previous filings.<sup>1</sup>

<sup>1</sup> The Court recognizes that Plaintiff has filed a motion for leave to submit supplemental authority, namely a recent opinion which discusses consumer fraud claims

brought in part pursuant to New Jersey law. The Court has reviewed the In Re Ford Motor Co. E-350, No. 03-4558 slip op. (D.N.J. Sept. 3, 2008) opinion and concludes that this opinion is not inconsistent with the Courts original determination in this matter.

As highlighted by P & G, Plaintiff's argument for reconsideration is based upon her belief that the Court misunderstood her Complaint and that actions sounding in consumer fraud have a different threshold for Article III standing than product liability cases. Plaintiff is in fact attempting to recapitulate the claims raised in her original pleadings. The Court was aware of Plaintiff's CFA claims and provided authority to support its conclusion that no matter what the basis of a claim, an injury-in-fact capable of conferring Article III standing "must not be subjective." *Whitmore v. Arkansas*, 495 U.S. 149, 154-55, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990).

Plaintiff's Complaint is based on the allegation that Defendants' lipstick products contain dangerous quantities of lead and that Defendants intentionally concealed this fact. The FDA does not regulate the lead content in lipstick and lipstick is only incidentally ingested. As stated in the Court's Opinion, Plaintiff has provided no authoritative evidence that the lead levels in Defendants' lipstick products constitute a dangerous amount or is in some way prohibited. Therefore, Plaintiff's contention that Defendants' failure to provide the lead content of its lipstick products constitutes conduct that mislead Plaintiff into purchasing a product she otherwise would not have is not supported by evidence.

Plaintiff's CFA claims fail to meet the specificity requirements of [Fed.R.Civ.P. 9\(b\)](#). As discussed in the original opinion, Plaintiff has not identified an injury-in-fact. Moreover, Plaintiff has not established a factual basis for an "unlawful act." Plaintiff does not allege facts that could support an argument that the value of Defendants' lipstick products is less because of the their lead content. Even if the Court accepts Plaintiff's contention and assumes that to her, the lipstick lost value. This is a purely subjective allegation of harm.

\*5 Plaintiff has not raised any new controlling law or fact which was not originally available nor has the Plaintiff identified a manifest error which warrants reconsideration of the Court's original determination in this matter. Therefore, Plaintiff's motion for reconsideration pursuant to L.Civ. R. 7.1(i) is **denied**.

**B. Plaintiff's Motion For Leave To File An Amended Complaint**

Plaintiff stipulated in her reply to Defendants' briefs in opposition to her motion for leave to file an Amended Complaint that her motion was intended to be read in *pari materia* with her motion for reconsideration. Since the Court has denied her motion for reconsideration Plaintiff's motion for leave to file an amended complaint also fails. Had Plaintiff's motion for reconsideration been granted, the Court would have considered Plaintiff's motion under the liberal [Rule 15\(a\)](#) standard. The Court's denial of Plaintiff's reconsideration motion however, compels consideration of Plaintiff's motion for leave to file an Amended Complaint as a post judgment motion pursuant to [Fed.R.Civ.P. 59\(e\)](#) or [60\(b\)](#).

Plaintiff's motion for leave to file an Amended Complaint if filed pursuant to [Fed.R.Civ.P. 59\(e\)](#), would still be denied because it was not filed within the ten (10) day time frame required by the Rule. Where, as in the instant situation, a motion to alter or amend the Court's original judgment pursuant to [Fed.R.Civ.P. 59\(e\)](#) is filed later than ten (10) days after the Court rendered its judgment, the Court loses jurisdiction to hear the motion. See *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263 fn. 7, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978); see also *Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1362 (3d Cir.1990).

If the Court were to consider Plaintiff's motion for leave to file an Amended Complaint as a motion to alter or amend the Court's judgment pursuant to [Fed.R.Civ.P. 60\(b\)](#) the motion would again fail. [Rule 60\(b\)](#) provides six (6) possible grounds for the Court to grant a motion to alter or amend a previous judgment. Of the six (6)

possible grounds, none are relevant here. The record does not support a determination that fraud, mistake, inadvertence, surprise, or excusable neglect occurred. Plaintiff did not submit newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under [Rule 59\(b\)](#). As provided for above, the Court has not voided its original determination. The fifth ground is in no way applicable and the Court can find no other reason that would justify relief.

Plaintiff's motion for leave to file an Amended Complaint can not be considered as a motion pursuant to [15\(a\)](#) because the Court has dismissed Plaintiff's Complaint and has denied Plaintiff's motion for reconsideration. Even if the Court were to consider Plaintiff's motion pursuant to rules that allow for altering or amending a judgment, Plaintiff's motion would still be unsuccessful. Plaintiff's motion for leave to file an Amended Complaint is **denied**.

#### IV. CONCLUSION

**\*6** For the reasons stated, it is the finding of this Court that Plaintiff's motion for reconsideration pursuant to [Fed.R.Civ.P. 7.1\(i\)](#) is **denied**; Plaintiff's motion for leave to file a second Amended Complaint is **denied**. An appropriate Order accompanies this Opinion.

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