

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

MELISSA HILL, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

LLR, INC. d/b/a LuLaRoe, and
LULAROE, INC.,

Defendants.

CV-18-120-GF-BMM-KLD

ORDER

INTRODUCTION

Plaintiff Melissa Hill (“Hill”), on behalf of herself and all others similarly situated, brought this putative class action against Defendant LLR, Inc. d/b/a/ LuLaRoe and Defendant LULAROE, Inc. (collectively, “LLR”). Hill’s remaining claim against LLR alleges violation of the Montana Consumer Protection Act (“MCPA”). LLR filed a Motion to Dismiss for lack of subject matter jurisdiction on October 7, 2020. (Doc. 130). United States Magistrate Judge Kathleen DeSoto entered Findings and Recommendations on LLR’s motion on October 29, 2020. (Doc. 135). Judge DeSoto recommends that this Court grant LLR’s motion to dismiss because Hill cannot show cognizable harm to establish Article III standing.

(Doc. 135 at 10). Hill objected to Judge DeSoto's Findings and Recommendations. (Doc. 136).

This Court reviews de novo those Findings and Recommendations to which a party timely objected. 28 U.S.C. § 636(b)(1). Where a party's objections constitute perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original motion, however, the Court will review the applicable portions of the Findings and Recommendations for clear error. *Rosling v. Kirkegard*, 2014 WL 693315, *3 (D. Mont. Feb 21, 2014). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted). LLR's objection reasserts the same arguments made before Judge DeSoto in her dismissal determination. The Court reviews the Findings and Recommendations for clear error.

DISCUSSION

LLR operates a multi-level marketing company that sells clothing through independent retailers in all fifty states. The company began levying taxes on consumers in April 2016 based on retailer location, regardless of the delivery location of the products. This policy resulted in LLR improperly taxing customers who resided in states with no sales tax. (Doc. 125 at 3.)

LLR eventually issued refunds to its customers in tax-free states, including Hill, whose purchases had been taxed improperly. At the time, LLR believed that the refunds reflected only the amounts that it improperly had charged without any interest or other damages added. Hill then filed the present action on behalf of herself and putative class members. LLR later realized that the money it refunded to Hill was actually in excess of the combined amount of taxes Hill paid *and* any interest which accrued as a result of the improperly charged funds. (Doc. 125 at 12; Doc. 129 at 7). This over-refund occurred over a year before Hill filed the present lawsuit. *Id.* LLR claims that, because of this repayment to Hill plus interest, Hill cannot establish Article III standing to maintain her claim. (Doc. 131 at 2).

LLR challenges the Court's subject matter jurisdiction over this action and moves to dismiss pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure. (Doc. 131 at 3). Article III, § 2 of the United States Constitution limits federal courts to adjudication of justiciable "cases" or "controversies." The doctrine of standing reflects this fundamental limitation. *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). The plaintiff, as the party asserting jurisdiction, bears the burden of proving its existence. *Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008).

Hill can establish Article III standing by showing the following: (1) that she has "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual

or imminent, not conjectural or hypothetical”; (2) that the injury complained of is “fairly traceable to the challenged action of the defendant”; and (3) that a favorable decision will likely, and not merely speculatively, redress the plaintiff’s injury.

Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. Inc., 528 U.S. 167, 180–81 (2000). Hill must establish that she met the elements of Article III standing at the time that she filed her complaint. *See Davis v. Fed. Election Comm’n*, 554 U.S. 724, 732–34 (2008) (“[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.”).

LLR argues that Hill lacks Article III standing because she received a refund in excess of her claimed injury. (Doc. 130). LLR contends that this over-refund vitiates Hill’s ability to establish an injury in fact. *Id.* Hill counters that the loss of use of her money alone constitutes an injury that properly confers Article III standing. (Doc. 136 at 15–23). Hill also argues that her statutory damages claim under the MCPA confers Article III standing. (Doc. 136). Judge DeSoto agreed with LLR. (Doc. 135). Judge DeSoto found that Hill lacks a cognizable Article III injury and recommended that this Court dismiss Hill’s remaining MCPA claim. *Id.*

The Ninth Circuit has determined that a plaintiff’s inability to have and use money to which they are entitled constitutes a concrete injury. *Van v. LLR, Inc.*, 962 F.3d 1160, 1163 (9th Cir. 2020). The harm alleged “cannot be remedied by

simply receiving the amount owed—*it requires something more to compensate for the lost time, like interest.*” *Id.* (quoting *MSPA Claims 1, LLC v. Tenet Fla., Inc.*, 918 F.3d 1312, 1318 (11th Cir. 2019)) (emphasis added). In *Van*, the plaintiff sued LLR for improperly charged sales tax. 962 F.3d at 1164. LLR had refunded the plaintiff the money that she was improperly charged, without interest, before the plaintiff’s filing of the lawsuit. *Id.* The Ninth Circuit found that the small amount of interest owed—\$3.76—established Article III standing. *Id.* The court’s holding in *Van* was directly premised on LLR’s failure to pay the plaintiff for interest owed on the plaintiff’s wrongfully withheld funds prior to the plaintiff’s filing of the suit.

Contrary to the facts in *Van*, here LLR fully compensated Hill for its improper collection of sales tax, plus interest on the lost time value, before Hill filed her complaint. (Doc. 125 at 11–12). Judge DeSoto found that, although the scope of Article III standing does not exclude a tiny monetary injury, in Hill’s case there exists no injury at all. (Doc. 135 at 8). LLR’s over-refund to Hill remedied Hill’s alleged harm, leaving her without a concrete injury. *Id.* at 10. This lack of a cognizable claim defeats Hill’s ability to establish Article III standing.

Judge DeSoto also found that Hill cannot establish Article III standing by claiming that LLR’s violation of the MCPA entitles her to statutory damages. (Doc. 135 at 11). Hill’s assertion fails because “Article III standing requires a

concrete injury even in the context of a statutory violation.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549–50 (2016).

Judge DeSoto found that the facts warrant dismissal of Hill’s final remaining claim. The Court has reviewed Judge DeSoto’s Findings and Recommendations for clear error. The Court finds no error in Judge DeSoto’s Findings and Recommendations and adopts them in full.

ORDER

Accordingly, **IT IS ORDERED**:

1. LLR’s Motion to Dismiss (Doc. 130) is **GRANTED** and this case is **DISMISSED** with prejudice.
2. All pending motions in this matter are **DENIED** as **MOOT**.
3. The Clerk of Court is directed to close this matter and enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Dated this 16th day of November, 2020.



Brian Morris, Chief District Judge
United States District Court