UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC FISHON, et al.,

Plaintiffs,

-v-

PELOTON INTERACTIVE, INC.,

Defendant.

19-cv-11711 (LJL)

OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

Defendant Peloton Interactive, Inc. ("Peloton" or "Defendant") moves, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the Third Amended Complaint (the "Complaint"). For the following reasons, Peloton's motion to dismiss is denied.

**BACKGROUND**

Familiarity with the Court's prior opinions resolving previous motions to dismiss in this case is assumed, and the relevant facts are reviewed here only in brief. For the purposes of this motion to dismiss, the Court accepts as true the well-pleaded allegations of the Complaint.

Peloton is an exercise equipment and media company that sells stationary bicycles ("Peloton Bike") and treadmills ("Peloton Tread"). Dkt. No. 195 ¶¶ 2–3. Peloton also offers a monthly subscription service that allows users of the Peloton Bike and Peloton Tread (together, "Peloton Hardware") to watch live or pre-recorded "on-demand" fitness classes. *Id.* ¶ 3. Purchasers of Peloton Hardware may buy this subscription—which contains library access, advanced metrics, and a feature that allows users to compete against each other—for $39 per month. *Id.* ¶ 5.

Peloton incorporates music into its classes, in that "[e]very on-demand and studio class

includes a themed playlist curated by the instructor to match the tempo and intensity of the class." *Id.* ¶ 18. Peloton obtained licenses from certain copyright holders, but some of the music played in the classes was used without permission, *id.* ¶ 19; Peloton was thus "building its on-demand library with copyrighted material for which it did not have the proper licenses," *id.* ¶ 20. In April 2018, Peloton received a cease-and-desist letter regarding alleged copyright infringement of songs appearing in certain of the on-demand classes in its library. *Id.* ¶ 21. In March 2019, members of the National Music Publishers Association filed a lawsuit against Peloton alleging that, for years, Peloton had been using their music in its fitness-class videos without proper licensing and that this copyright infringement was knowing and reckless. *Id.* ¶ 22. Peloton denied that it was violating copyright laws and asserted counterclaims in that action for antitrust violations and tortious interference with prospective business relations. *Id.* ¶ 23. Notwithstanding this denial, on March 25, 2019, Peloton "abruptly removed every class from its on-demand library that contained one or more of the allegedly copyright infringing songs . . . result[ing] in the removal of more than half of the classes from its on-demand library." *Id.* This "purge of Peloton's on-demand library . . . significantly decreased the quality and quantity of popular music available on Peloton's workout class playlists, . . . materially diminishing users' experience with both the Peloton Hardware and Peloton Membership." *Id.* ¶ 27.

Peloton has described its library of fitness classes as "ever-growing" or "growing," *see id.* ¶¶ 16–17, and Plaintiffs assert that "Peloton's 'ever-growing' on-demand library is central to its marketing," *id.* ¶ 15. Even after receiving notice via the cease-and-desist letter that Peloton was building its library of classes with infringing songs, Peloton continued to market "an expansive, ever-growing library of live and on-demand studio classes," *id.* ¶ 30 (internal

quotation marks omitted), and to refer to its subscriptions as including "unlimited access to a growing library of live streaming and on-demand Peloton classes," *id.* (internal quotation marks omitted). Peloton also continued to accept subscription payments and charge full price for its subscription services notwithstanding that it knew or should have known that subscribers "would not be able to use the full on-demand class library because the number of on-demand classes was materially decreasing due to Peloton's wrongful conduct," *id.* ¶ 31 and knew that they "would necessarily not be receiving everything that Peloton represented they would receive," *id.* ¶ 32.

Plaintiffs Eric Passman ("Passman") and Ishmael Alvarado ("Alvarado" and together with Passman, "Plaintiffs") bring a class action complaint against Peloton, alleging that its statements that its library of classes was "ever-growing" were misrepresentations and that, through these misrepresentations and the failure to disclose the "imminent removal of over half of its on-demand library," Peloton defrauded them and other members of a proposed class, deprived them of the benefit of their bargain, and unjustly enriched itself at their expense. *Id.* ¶ 34. They allege that, as a result of Peloton's representations and material omissions, they overpaid for Peloton's goods and services, *id.* ¶ 41, and that:

> Peloton's representations and material omissions were part of the basis of the bargain, in that Plaintiffs attributed value to Peloton's promises regarding the nature and characteristics of its on-demand digital library and would not have purchased the hardware and corresponding [subscription], or would not have purchased it on the same terms, if they knew the truth that Peloton's on-demand digital library would shrink by more than 50%.

*Id.* ¶ 42.

Plaintiffs bring claims under New York consumer-protection statutes individually and on behalf of a class defined in the Complaint as "[a]ll purchasers of the Peloton Hardware and/or the corresponding Peloton Membership subscription from April 9, 2018 through March 25, 2019 in

the State of New York." *Id.* ¶ 107.[1]

**PROCEDURAL HISTORY**

This is the third amended complaint in this action. The first complaint was filed in December 2019 by Eric Fishon ("Fishon"), Alicia Pearlman ("Pearlman"), and Patrick Yang, individually and on behalf of all others similarly situated, bringing claims for violations of New York General Business Law ("NYGBL") §§ 349 and 350, which relate to deceptive acts or practices and false advertising. Dkt. No. 1. On August 4, 2020, and pursuant to an unopposed request, the Court ordered the voluntary dismissal of Patrick Yang. Dkt. No. 61. On November 9, 2020, the Court granted a motion to dismiss the claims of Pearlman—a Michigan resident—because she lacked statutory standing under the New York statute, but it denied a motion to dismiss Fishon's claims. *See Fishon v. Peloton Interactive, Inc.* (*"Fishon I"*), 2020 WL 6564755 (S.D.N.Y. Nov. 9, 2020). In denying the motion to dismiss Fishon's claims, the Court explained that a plaintiff bringing a claim under Sections 349 and 350 need not specifically allege that the plaintiff saw the misleading statements because "[r]eliance is not an element of a private cause of action under either statute." *Id.* at *9. Because reliance is not an element of the claim, alleging that a plaintiff was injured by "rel[ying] on the misleading statement to her detriment is not a '[t]hreadbare recital[] of the elements of a cause of action'" but rather "an allegation of fact as to how she came to be injured." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also id.* at *10.

On January 21, 2021, Plaintiffs filed a first amended complaint. Dkt. No. 81. Peloton

[1] In the Complaint, Plaintiffs also state that they are bringing claims on behalf of "[a]ll purchasers of the Peloton hardware and/or corresponding Peloton Membership subscription from April 9, 2018 through March 25, 2019," *id.* ¶ 106, but clarify that they are not pursuing claims on behalf of this nationwide class but "includ[ing] the assertion of a nationwide class in this Third Amended Complaint to preserve the issue for appeal," *id.* n.70.

again moved to dismiss Pearlman's claims, again contending that Pearlman did not plead facts sufficient to show that she had statutory standing to sue under Sections 349 and 250 of the NYGBL. The Court, once again, dismissed Pearlman's claims under the NYGBL, explaining that her amendment failed to cure the deficiencies identified in the original complaint. *Fishon v. Peloton Interactive, Inc.* (*"Fishon II"*), 2021 WL 2941820, at *5 (S.D.N.Y. July 12, 2021). The Court did, however, grant leave for Pearlman to amend her complaint to plead her cause of action under Michigan law. *Id.*

On July 26, 2021, Plaintiffs filed a second amended complaint, with Fishon bringing claims under NYGBL §§ 349 and 350 and Pearlman bringing a claim under the Michigan Consumer Protection Act ("MCPA"), Mich. Comp. Laws Ann. § 445.901, *et seq.* On August 9, 2021, Defendant moved to dismiss Pearlman's claim in that complaint. Dkt. No. 107. On September 16, 2021, Fishon and Pearlman moved to certify the putative classes; Fishon moved for certification of a class of "[a]ll purchasers of the Peloton hardware and/or the corresponding Peloton Membership subscription from April 9, 2018 through March 25, 2019 in the State of New York," while Pearlman sought certification of a class of "[a]ll purchasers of the peloton hardware and/or the corresponding Peloton Membership subscription from April 9, 2018 through March 25, 2019 in the State of Michigan." Dkt. No. 118 at 9. The Court granted Defendant's motion to dismiss Pearlman's claim under the MCPA, concluding that Pearlman did not allege with the requisite specificity facts giving rise to her reliance on Peloton's statements that its on-demand library of fitness classes were "ever-growing," as was required under the Federal Rule of Civil Procedure Rule 9(b) standard applicable to her MCPA claim for which reliance was an essential element. *Fishon v. Peloton Interactive, Inc.*, 2022 WL 179771, at *8 (S.D.N.Y. Jan. 19, 2022). The Court also denied the motion for class certification by Fishon on the grounds that

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