UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LORI MARIE TURK *and* LUANN RUTHERFORD, individually and on behalf of all others similarly situated, Plaintiffs, v. RUBBERMAID INCORPORATED, Defendant.	No. 21-CV-270 (KMK) <u>OPINION & ORDER</u>

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KENNETH M. KARAS, United States District Judge:

Lori Marie Turk ("Turk") and Luann Rutherford ("Rutherford"; together, "Plaintiffs") bring this putative class action against Rubbermaid Incorporated ("Defendant"), alleging that the labeling on Defendant's 102-Quart Marine Chest Cooler and 45-Quart DuraChill Cooler is deceptive and misleading. Plaintiffs assert claims for damages against Defendant for (1) violations of §§ 349 and 350 of the New York General Business Law ("GBL"), N.Y. G.B.L. §§ 349, 350; (2) violation of the Magnuson Moss Warranty Act ("MMWA"), 15 U.S.C. §§ 201,

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et seq.; (3) common law breach of express warranty; (4) common law breach of the implied warranty of merchantability; (5) common law negligent misrepresentation; (6) common law fraud; and (7) unjust enrichment. (*See generally* First Am. Compl. ("FAC") (Dkt. No. 18).) Plaintiffs also seek injunctive relief to correct the alleged misrepresentations. (*See id.* at 11.) Before the Court is Defendant's Motion To Dismiss the First Amended Complaint (the "Motion"). (*See* Not. of Mot. (Dkt. No. 25).) For the foregoing reasons, the Motion is granted.

I. Background

A. Factual Background

The following facts are drawn from the First Amended Complaint ("FAC") and assumed to be true for the purposes of resolving the instant Motion. *See Div. 1181 Amalgamated Transit Union-N.Y. Emps. Pension Fund v. N.Y.C. Dep't of Educ.*, 9 F.4th 91, 94 (2d Cir. 2021) (per curiam).

Defendant is a company that markets and manufactures household and outdoor products, including coolers and thermoses. (*See* FAC ¶¶ 1, 40.) Defendant's coolers include portable ice coolers, which purport to retain ice for defined period of times. (*See id.* ¶ 1.) This Action involves two such portable ice coolers: the 102-Quart Marine Chest Cooler ("Marine Cooler") and 45-Quart DuraChill Cooler ("DuraChill Cooler"; together, the "Products"). (*See id.* ¶ 2.)

Defendant represents on the labels of both Products that the Products "keep" or retain ice for five days, which means that ice will remain intact in the Products for five days. (*See id.* ¶¶ 2, 5.) Specifically, Plaintiffs allege that Defendant represents that the Marine Cooler "Keeps Ice – Up to 5 Days at 90° F," and that this representation is included "on the product, via sticker" and is communicated "through Defendant's third-party partners, such as Lowes, Home Depot, Amazon[,] and Walmart." (*Id.* ¶¶ 8–9.) The Marine Cooler's label includes no other qualifier as to its ice retention. (*See id.* ¶ 12.) Plaintiffs allege that Defendant represents that the DuraChill

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Cooler will retain ice for "5 days," and that this representation is "made online and through labeling affixed to the" DuraChill Cooler. (*Id.* ¶ 10.) The DuraChill Cooler's label also includes "a small asterisk" which "leads to a statement in fine print and faintly visible which qualifies the '5 day' claim by indicating this was at 90 degrees Fahrenheit and 'under test conditions.'" (*Id.* ¶ 13.) Separately, Defendant provides a one-year limited warranty, which warrants that the Products are "free from defects in material and workmanship for a period of one year from the date of the original purchase." (*Id.* ¶ 11.)

Plaintiffs allege that consumers understand ice retention to refer to "how long their coolers can retain enough ice to effectively keep its contents at temperatures where the food, beverages[,] and/or caught fish, will not spoil," and interpret Defendant's representations that the Products will retain ice for up to five days to mean that the Products will maintain ice and keep food at a safe temperature for five days. (*See id.* ¶¶ 7, 26.) However, Plaintiffs allege that the Products do not retain ice for five days under real world conditions (i.e., opening and closing the Products' tops), and do not maintain a food-safe temperature of 40° Fahrenheit beyond two days. (*See id.* ¶¶ 14, 16–19, 25.) Plaintiffs allege that one reason the DuraChill Cooler fails to perform as advertised is because its hinges are not durable and cannot form the airtight seal required to maintain its contents at the required temperatures; 13 of the 246 reviews for the DuraChill Cooler on Amazon.com mention issues with the DuraChill Cooler's hinges. (*See id.* ¶¶ 21–24.)

Turk purchased the Marine Cooler "for no less than $109.99, at Walmart, 1201 NY-300, Newburgh, NY 12550, between 2019 and 2020." (*Id.* ¶ 41.) In purchasing the Marine Cooler, Turk alleges that she "relied on representations on the Product and on websites selling the Product, including Walmart, Amazon[,] and/or Home Depot, which all touted the [Marine Cooler's] ability to retain ice for five days." (*Id.* ¶ 42.) Rutherford purchased the DuraChill

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Cooler "for no less than $45.00, at CVS, 778A Manor Rd[.], Staten Island, NY 10314, between 2019 and 2020." (*Id.* ¶ 43.) In purchasing the DuraChill Cooler, Rutherford alleges that she "relied on representations on the DuraChill Cooler and on websites selling the DuraChill Cooler, including Walmart, Amazon[,] and/or Home Depot, which all touted the [DuraChill Cooler's] ability to retain ice for five days." (*Id.* ¶ 44.) Plaintiffs allege that they "used the [P]roducts for typical events, such as birthday parties, outdoor gatherings, picnics[,] and/or barbecues," and the Products "failed to retain ice for five days and did not even keep food safe – below 40 degrees Fahrenheit – beyond two days." (*Id.* ¶¶ 45–46.) Rutherford also alleges that she "experienced issues with the hinges of the DuraChill Cooler[,] which compromised and reduced its ability to keep items cold." (*Id.* ¶ 47.)

B. Procedural History

Plaintiffs filed their initial Complaint on January 14, 2021. (*See* Dkt. No. 2.) On May 24, 2021, Defendant filed a pre-motion letter in anticipation of filing a motion to dismiss. (*See* Dkt. No. 11.) Plaintiffs filed the FAC on June 16, 2021. (*See* FAC.) On June 28, 2021, Defendant again filed a pre-motion letter in anticipation of filing a motion to dismiss. (*See* Dkt. No. 19.) Following Plaintiffs' response to Defendant's pre-motion letter, (*see* Dkt. No. 21), the Court held a pre-motion conference on August 2, 2021, (*see* Dkt. (minute entry for Aug. 2, 2021)). Pursuant to the briefing schedule adopted at this conference, Defendant filed the instant Motion on August 20, 2021. (*See* Not. of Mot.; Def.'s Mem. of Law in Supp. of Mot. To Dismiss ("Def.'s Mem.") (Dkt. No. 26).) Plaintiffs filed their Opposition on September 20, 2021, (*see* Pls.' Mem. of Law in Opp'n to Mot. To Dismiss ("Pls.' Mem.") (Dkt. No. 27)), and Defendant filed its Reply on October 4, 2021, (*see* Def.'s Reply in Supp. of Mot. To Dismiss ("Def.'s Reply Mem.") (Dkt. No. 28)). On January 19, 2022, Defendant notified the Court of persuasive authority from another judge in this district. (*See* Dkt. No. 29.)

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II. Discussion

A. Standard of Review

Defendant moves to dismiss the FAC pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (*See* Not. of Mot.) "The standard of review for a motion to dismiss under Rule 12(b)(1) is substantively 'identical' to the standard for a Rule 12(b)(6) motion." *McNeil v. Yale Chapter of Alpha Delta Phi Int'l, Inc.*, No. 21-639, 2021 WL 5286647, at *1 (2d Cir. Nov. 15, 2021) (summary order) (quoting *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169 n.3 (2d Cir. 1999)). "In deciding both types of motions, the Court must accept all factual allegations in the complaint as true, and draw inferences from those allegations in the light most favorable to the plaintiff." *Gonazalez v. Option One Mortg. Corp.*, No. 12-CV-1470, 2014 WL 2475893, at *2 (D. Conn. June 3, 2014) (quotation marks omitted). However, "[o]n a Rule 12(b)(1) motion, . . . the party who invokes the Court's jurisdiction bears the burden of proof to demonstrate that subject matter jurisdiction exists, whereas the movant bears the burden of proof on a motion to dismiss under Rule 12(b)(6)." *Id.* (citing *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003)); *see also Gerasimov v. Amalgamated Hous. Corp.*, No. 21-CV-1760, 2021 WL 6338522, at *3 (S.D.N.Y. Dec. 17, 2021) ("The only difference between Rule 12(b)(1) and 12(b)(6) motions is the allocation of the burden of proof.").

1. Rule 12(b)(1)

"A federal court has subject matter jurisdiction over a cause of action only when it has the authority to adjudicate the cause pressed in the complaint." *Bryant v. Steele*, 25 F. Supp. 3d 233, 241 (E.D.N.Y. 2014) (quoting *Arar v. Ashcroft*, 532 F.3d 157, 168 (2d Cir. 2008)). "Determining the existence of subject matter jurisdiction is a threshold inquiry, and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when a district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank*

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