

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ALEJANDRO VIVAR, individually and on
behalf of all others similarly situated,

Plaintiffs,

- against -

APPLE INC.,

Defendant.

22 Civ. 0347 (VM)

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

Plaintiff Alejandro Vivar ("Vivar"), on behalf of himself and all others similarly situated, (together with Vivar, "Plaintiffs") brings this action against Apple Inc. ("Apple"), alleging that Apple's representations about the battery-life of one of its products, Powerbeats Pro wireless headphones ("Powerbeats" or the "Product"), are materially misleading. (See "Complaint" or "Compl.," Dkt. No. 1.) Vivar asserts ten causes of action on behalf of Plaintiffs: (1) violation of the New York General Business Law ("NY GBL") Section 349; (2) violation of NY GBL Section 350; (3) violation of the consumer fraud acts of the states in which the remaining Plaintiffs reside; (4) breach of contract; (5) breach of express warranty; (6) breach of implied warranty of merchantability; (7) violation of the Magnuson Moss Warranty

Act, 15 U.S.C. Sections 2301, *et seq.*; (8) negligent misrepresentation; (9) fraud; and (10) unjust enrichment.

Now before the Court is Apple's motion to dismiss the Complaint in its entirety pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure.¹ (See "Motion," Dkt. No. 14.) For the reasons stated below, Apple's Motion is DENIED in part and GRANTED in part.

I. BACKGROUND

A. FACTUAL BACKGROUND²

Vivar is a citizen of New York who purchased Powerbeats in New York between January 2021 and July 2021. Apple is a corporation incorporated and headquartered in California. Apple markets Powerbeats as having a battery life of "up to 9 hours of listening time" and "24 hours with the Powerbeats charging case." (Compl. ¶ 5.) The Complaint includes an image of this marketing, copied below. (See id.)

¹ Apple also moved to dismiss Vivar's claim for injunctive relief pursuant to Rule 12(b)(1). On August 11, 2022, Vivar withdrew this claim. (See Dkt. No. 18 at 5 n.1 ("Plaintiff withdraws his claim for injunctive relief.")).

² The factual recitation set forth below, except as otherwise noted, derives from the Complaint and the facts pleaded therein, which the Court accepts as true for the purposes of ruling on a motion to dismiss. See Spool v. World Child Int'l Adoption Agency, 520 F.3d 178, 180 (2d Cir. 2008) (citing GICC Capital Corp. v. Tech Fin. Grp., Inc., 282 F.3d 147, 152 (2d Cir. 2002)). Except when specifically quoted, no further citation will be made to the Complaint or the documents referred to therein.



Vivar contends that Apple has also made written representations and promises that the Product would be “defect-free” and would “maintain its charge equally and consistently.” (Id. ¶¶ 92-93.) The Complaint does not incorporate any evidence to support these representations.

Despite Apple’s statements, one of the earbuds “will not consistently charge or will quickly dissipate its charge” due to a speculated design defect with the charging case and corrosion from user perspiration. (Id. ¶¶ 7-8; 22-23.) Thus, Vivar argues, Apple has made false and misleading representations as to the Product.

Vivar purchased Powerbeats for no less than \$150.00 on the belief that the earbuds would retain a charge for the time promised in Apple’s marketing materials. He would not have purchased the product, or would not have paid as much,

but for Apple's representations as to Powerbeats' battery life.

On January 13, 2022, Vivar filed the Complaint on behalf of himself, a putative class of persons from New York (the "New York Class"), and a putative class of persons from the states of Michigan, Montana, Rhode Island, Georgia, North Dakota, Virginia, South Dakota, and Oklahoma (the "Non-New York Class"), all of whom purchased Powerbeats "during the statute of limitations for each cause of action alleged." (Id. ¶ 64.)

Pursuant to the Court's Individual Practices, Apple notified Vivar by letter dated April 13, 2022 of its intention to move to dismiss the Complaint. (See Dkt. No. 11-1.) Vivar responded by letter dated April 20, 2022. (See Dkt. No. 11-2.) Unable to resolve the dispute through these letters, Apple moved the Court on April 29, 2022 for leave to file a motion to dismiss, (see Dkt. No. 11), and the Court directed the parties to submit briefing on the matter.³ (See Dkt. No. 16.)

Apple filed its Motion and supporting papers (see "MOL," Dkt. No. 15) on August 4, 2022, and Vivar filed his opposition memorandum on August 11, 2022. (See "Opp.," Dkt. No. 18.)

³ The Court granted full briefing, (see Dkt. No. 16), however, the parties consented to the Court deeming the parties' pre-motion letters (Dkt. No. 11), and the parties' limited briefing (see Dkt. Nos. 15, 18, 20), as a fully briefed motion, (see Dkt. No. 19).

Apple replied on August 18, 2022. (See "Reply," Dkt. No. 20.) In reaching this Decision and Order, the Court has considered each of these submissions, in addition to the parties' premotion letters. (See Dkt. No. 11).

B. THE PARTIES' ARGUMENTS

Apple moves to dismiss the complaint on two grounds. First, it argues that Vivar has failed to state a claim for any of the ten alleged causes of action. (See Dkt. No. 11-1 at 1-4). And second, the Court lacks personal jurisdiction over the putative Non-New York Class members' claims because their claims do not arise out of or relate to Apple's contacts in those Class members' eight states of residency. (See MOL at 4-6.) Vivar responds that his allegations are sufficient to state a claim for relief, (see Dkt. No. 11-2 at 2-4), and the claims for the Non-New York Class members should proceed because at this stage personal jurisdiction over Apple is determined solely by Vivar's residency in New York. (See Opp'n at 6-9.)

II. DISCUSSION

A. MOTION TO DISMISS UNDER RULE 12(b)(2)

1. Legal Standard

Apple seeks dismissal of the putative Non-New York Class members' claims on the basis that the Court lacks personal jurisdiction pursuant to Rule 12(b)(2). Upon motion, the

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