IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES ZILINSKY, GERALDINE ZILINSKY, CORY SIMPSON, MEAGAN McGINLEY, SANDRA GARRETTDORSEY, BRIAN DERING, THERESA DERING, ALAN ARMSTRONG, and SANDY ARMSTRONG, individually and on behalf of all others similarly situated, Plaintiffs, v. LEAFFILTER NORTH, LLC, Defendant.	)	CASE NO. 2:20-cv-6229-MHW-KAJ JUDGE MICHAEL H. WATSON

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT LEAFFILTER NORTH, LLC'S MOTION FOR PARTIAL DISMISSAL PURSUANT TO FED. R. CIV. P 12(b)(6) AND MOTION TO STRIKE THE NATIONWIDE AND OHIO SUBCLASS CLAIMS PURSUANT TO FED. R. CIV. P. 23(c)(1)(A)

I. INTRODUCTION

Plaintiffs James Zilinsky, Geraldine Zilinsky, Cory Simpson, Meagan McGinley, Sandra GarrettDorsey, Brian Dering, Theresa Dering, Alan Armstrong, and Sandy Armstrong (collectively, "Plaintiffs") file this memorandum in opposition to the motion to dismiss and strike class allegations filed by LeafFilter North, LLC ("Defendant"). *See generally* Motion [Doc. 30] ("Br."). Defendant's motion (1) ignores that Defendant's own Terms of Use contain a choice of law provision stating that the parties' "rights and obligations" are governed by Ohio law; (2) invokes a non-existent "jurisdictional limit" to Ohio's consumer fraud statute; (3) asserts that Plaintiffs' claims are statutorily preempted despite clear statutory language to the contrary; (4) argues that Plaintiffs' claims are barred by the economic loss rule despite overwhelming authority to the contrary; and (5) contravenes the Court's Standing Orders[1] by asking the Court to strike Plaintiffs' class allegations based on unspecified conflicts of law without acknowledging that Defendant's own choice-of-law provision requires most class members to sue under Ohio law. In short, Defendant's motion is unpersuasive and should be denied.

II. BACKGROUND

Plaintiffs bring this putative class action against Defendant LeafFilter North, LLC, the distributor of the LeafFilter gutter protection system, which is marketed as a no maintenance alternative to traditional gutter cleaning devices and systems. ¶1[2] Defendant describes LeafFilter as a patented 3-piece system that effectively accepts and manages water while shedding debris. ¶30. The first piece is a "Micromesh screen" made of stainless steel that is so fine that "not even a

[1] The Court's Standing Orders states that the Court disfavors motions to strike unless they address a pleading for the reasons set forth in in Fed. R. Civ. P. 12(f) ("insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"). Defendant's motion does not argue that Plaintiffs' class allegations are redundant, immaterial, impertinent, or scandalous.

[2] All references to "¶_" refer to the corresponding paragraph of the First Amended Complaint [Doc. 19].

single shingle grit will get through…." ¶31. *See also* ¶43 ("LeafFilter[]… is scientifically designed to keep everything out of your gutters—except for water. LeafFilter's screen is fine enough to keep out even the smallest of debris, including: dirt, pollen, shingle grit, and pine needles"). The second piece is uPVC frame that supposedly has a "built-in pitch" maintaining an "optimal angle to shed debris." ¶32. *See also* ¶41 ("LeafFilter is designed with an angle that allows it to shed debris while accepting water."). The third piece of the LeafFilter system is structural hangers that ensure "your gutter system will be stronger than ever before…." ¶33.

According to Defendant, LeafFilter "allows as much water as an open gutter." ¶45. However, unlike an open gutter, with LeafFilter, "you never have worry about weighing the costs of cleaning again. When our ladder goes up, yours goes down forever." ¶28. Defendant particularly targets elderly individuals who lack the physical ability to clean their own gutters of leaves and debris and are at heightened risk of falling. ¶21. Defendant's website warns that 164,000 injuries and 300 deaths occur each year from ladder accidents. ¶21.

Plaintiffs allege that the LeafFilter system possesses a latent defect that prevents substantial amounts of rainwater from passing through the LeafFilter system and instead causes (1) rainwater to flow over the top of the LeafFilter system and gutters; and (2) debris to accumulate on top of the LeafFilter system that must be cleaned off by the homeowner. ¶1. Consumers have been complaining to LeafFilter about these problems for years. ¶115 ("Product is not as described, product causing overflow off gutters"); *id*. ("Water was overflowing the entire length of my front porch, GUSHING over the same front corner gutter"); *id*. ("For the last year and a half, I've been contacting Leaffilter regarding the clogging of their gutter guards… I've had Leaffilter employees come 4 or 5 times to fix problem. I bought a ladder and climbed recently to remove debris. The whole idea with Leaffilter was to not have to do this on my own. I'm too old for this."); *id*. ("Do

not buy Leaf Filter gutter guards … this filter is too fine, it clogs on everything from pollen to dust, the roof shingle debris, cotton wood seeds. The filter needs cleaning more often than your gutter ever would."); *id*. ("Debris from the trees stay on the filter so the rain water does not go into the gutter but runs over the edge of the gutter. I will now have to pay someone to clean the leaf filter. What a waste of money."). Yet Defendant continues to falsely market the product.

Plaintiffs allege that they and the class members paid more for the LeafFilter system based on Defendant's promise that rainwater from their roofs would flow freely through the LeafFilter system, and that they would never have to clean debris from the LeafFilter system. ¶3. Plaintiffs allege that the defect was the direct and proximate cause of economic loss to Plaintiffs and the class members including, but not limited to, the difference in value between the LeafFilter system as advertised and the LeafFilter system as actually sold. ¶153.

III. LEGAL STANDARD

A. Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6)

A district court deciding a Rule 12(b)(6) motion must view the complaint in the light most favorable to the plaintiff and take all well-pled factual allegations as true. *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009). To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). However, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id*. at 556.

B. Motion to Strike Class Allegations

"[C]ourts within the Sixth Circuit recommend [that] a district court should defer its decision on class certification until after discovery if the existing record is not conclusive as to the

relevant class issues." *Black v. Gen. Info. Servs., Inc*., No. 1:15 CV 1731, 2016 WL 899295, at *2 (N.D. Ohio Mar. 2, 2016). Courts do this because a "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Colley v. Procter & Gamble Co*., No. 1:16-CV-918, 2016 WL 5791658, at *2 (S.D. Ohio Oct. 4, 2016). Accordingly, motions to strike class allegations prior to discovery are disfavored.[3]

However, the Sixth Circuit has held that a court does not abuse its discretion by striking class allegations where no "type of factual development would alter the central defect in th[e] class action." *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011). In other words, a court may strike class allegations "where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met." *Loreto v. Procter & Gamble Co*., No. 1:09-CV-815, 2013 WL 6055401, at *2 (S.D. Ohio Nov. 15, 2013). "While a Court may decide that a case is not appropriate for class treatment prior to discovery, it may do so only when 'no proffered or potential factual development offers any hope of altering that conclusion.'" *Sherrod*, 2016 WL 25979, at *2 (quoting *Pilgrim*, 660 F.3d at 949). Thus, a motion to strike class allegations may be granted prior to the close of discovery only when "(1) the complaint itself demonstrates the requirements for maintaining a class action cannot be met, and (2) further discovery will not alter the central defect in the class claim." *Colley*, 2016 WL 5791658, at *2.

Importantly, the "moving party has the burden of demonstrating from the face of the plaintiffs' complaint that it will be impossible to certify the class as alleged, regardless of the facts

[3] *See, e.g., Faktor v. Lifestyle Lift*, No. 1:09-CV-511, 2009 WL 1565954, at *2 (N.D. Ohio June 3, 2009) ("A motion to strike class allegations is not a substitute for class determination and should not be used in the same way."). "This reticence makes sense: typically a court lacks the necessary facts at the pleading stage to determine whether a class-action is proper." *Sherrod v. Enigma Software Grp. USA, LLC*, No. 2:13-CV-36, 2016 WL 25979, at *2 (S.D. Ohio Jan. 4, 2016).

plaintiffs may be able to prove." *Kimber Baldwin Designs, LLC v. Silv Communications, Inc*., No. 1:16-cv-448, 2016 WL 10520133, at *2 (S.D. Ohio Dec. 15, 2016) (internal quotes omitted).

IV. ARGUMENT

A. Plaintiffs Adequately Plead Claims Under Ohio's Consumer Sales Practices Act.

Defendant first argues that Plaintiffs' Ohio Consumer Sales Practices Act ("OCSPA") claims fail as a matter of law because "[n]ot a single named Plaintiff in this case is an Ohio resident" or alleges he or she "purchased a LeafFilter product in Ohio, reviewed any advertising in Ohio, or relied on such statement in Ohio." Br. at 14. Accordingly, Defendant asserts that Plaintiffs' OCSPA claims should be dismissed and Plaintiffs' OCSPA class allegations should be stricken. *Id*. Defendant's argument is unpersuasive.

i. The parties have mutually agreed to have their rights and obligations governed by Ohio law.

Defendant's argument rests primarily on authorities standing for the unremarkable proposition that Ohio's choice of law rules normally require application of each consumer class member's home-state law to his or her claims. *See, e.g., Lichoff v. CSX Transp., Inc*. 218 F.R.D. 564, 574 (N.D. Ohio 2003) (denying motion for class certification in part because class members' claims will be subject to different state laws); *Pilgrim*, 660 F.3d at 946 (similar); *Loreto v. Procter & Gamble Co*., 515 Fed. Appx. 576, 578 (6th Cir. 2013) (affirming dismissal of New Jersey plaintiff's OCSPA claim because New Jersey consumer fraud act applied to claim).

This, however, is not a "normal" situation because Plaintiffs and each member of the proposed Ohio Law Subclass[4] have contractually agreed to have their "rights and obligations" governed by "the laws of the State of Ohio, excluding its choice of law rules." ¶23. *See, e.g.,*

[4] Defendant erroneously refers to the Ohio Law Subclass as the "Ohio Subclass," which it describes as "inaptly-named." Br. 14. However, the Ohio Law Subclass is aptly named because all of its members have agreed to have their relationships with Defendant governed by *Ohio law*.

Carder Buick-Olds Co. v. Reynolds & Reynolds, 148 Ohio App.3d 635, 650 (Ohio Ct. App. 2002) (reversing denial of class certification, noting that choice of law posed no obstacle to class certification because all class members were subject to the same choice of law provision).

Plaintiffs allege that Defendant markets the LeafFilter system through mailed leaflets and newspaper advertisements that drive consumers to Defendant's website, where consumers can request additional information and schedule a visit from a LeafFilter regional sales affiliate. ¶¶24-26. Plaintiffs further allege that Defendant requires LeafFilter purchasers to register their warranties through Defendant's website. ¶22. By virtue of accessing and using Defendant's website, consumers agree to the website's "Terms of Use," which include the following choice-of-law provision and a forum selection clause:

> By using this Site, you expressly agree that your rights and obligations shall be governed by and interpreted in accordance with the laws of the State of Ohio, excluding its choice of law rules. Any legal action or proceeding relating to your access to or use of the Site or Materials shall be instituted in a state or federal court in the State of Ohio.

¶23. This provision applies to Plaintiffs because they allege they visited and registered their warranties through Defendant's website. ¶¶49, 53, 69, 71, 84, 85, 86, 92, 93, 96, 103, 104, 107.

"[A] federal court sitting in diversity applies the choice-of-law rules of the state in which the court sits." *Down-Lite Int'l, Inc. v. Altbaier*, 821 Fed. Appx. 553, 554 (6th Cir. 2020) (internal quotes omitted). In Ohio, "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied unless either [1] the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or [2] application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties." *Schulke Radio Prods., Ltd. v.*

Midwestern Broadcasting Co., 6 Ohio St.3d 436, syllabus (1983) (adopting Restatement (Second) of Conflict of Laws § 187(2)).

Here, the parties have agreed that their "rights and obligations shall be governed by and interpreted in accordance with the laws of the State of Ohio, *excluding its choice of law rules*." ¶23 (emphasis added). Courts disagree whether the Restatement's "substantial relationship" and "fundamental policy" exceptions can even apply where the parties' agreement expressly excludes application of the forum's choice of law rules.[5] But the disagreement is academic for purposes of this case, because neither *Schulke* exception applies here.

"[P]ursuant to [Restatement (Second) of Conflict of Laws § 187, comment f], the state where one of the parties is domiciled or has his principal place of business is sufficient to establish a 'substantial relationship' to the parties." *Century Bus. Servs., Inc*., 197 Ohio App. at 367. Because Defendant is an Ohio limited liability company headquartered in Ohio, Ohio has a substantial relationship to the parties and the first *Schulke* exception does not apply.

As for the second *Schulke* exception, Ohio courts construe "fundamental policy of a state having a greater material interest" narrowly and will only put aside the parties' choice of law in "rare cases." *Down-Lite International, Inc*., 821 Fed. Appx. at 555. This is because "[t]he Ohio Supreme Court has stated that '[i]t is fundamental to [Ohio's] commercial intercourse that parties have the right to contract freely with the full expectation that their bargain will be permitted to endure according to the terms agreed upon. Any rule of law which would sanction the renunciation of an otherwise valid, voluntary agreement would lead to instability in all of our personal and

[5] *Compare Woodside Management Co. v. Bruex*, 157 N.E.3d 295, 308 (Ohio Ct. App. 2020) ("While Ohio has adopted [Restatement (Second) of Conflict of Laws § 187], … an analysis under the Restatement is inappropriate in this case because the parties, in the choice-of-law provision, have contracted for the exclusion of the application of the conflict of laws principles.") *with Century Bus. Servs., Inc. v. Barton*, 197 Ohio App. 3d 352, 366 n.6 (Ohio Ct. App. 2011) ("The *Schulke* analysis is applied even when the parties have set forth a choice of law and indicated that it is to be applied 'without regard to principles of conflicts [sic] of law[s].'").

business contractual relationships and assure multifarious litigation.'" *Id*. at 556 (quoting *Jarvis v. Ashland Oil, Inc*., 17 Ohio St.3d 189, 478 N.E.2d 786, 789 (1985)). Accordingly, the Sixth Circuit has instructed that courts should not "summarily brush aside the clear and unambiguous terms" of the parties' agreement to adjudicate a dispute under Ohio law, *even where outcome-determinative differences of law exist between jurisdictions*. *Id*. (enforcing non-compete covenant based on Ohio choice of law provision in employment contract even though employee worked out of his home in California, where similar covenants are not enforceable).[6]

Importantly, the parties' choice of law agreement is not limited to the interpretation of the contract or breach of contract claims. Instead, it is broadly worded to cover all "rights and obligations" between the parties. Courts recognize that such broadly worded choice of law agreements reflect the intention of the parties to have their choice of law extend beyond merely contractual disputes. *See Concheck v. Barcroft*, No. 2:10-cv-656, 2011 WL 3359612, at * 7-8 (S.D. Ohio Aug. 3, 2011) ("Despite [plaintiff's] assertion to the contrary, the language of the choice of law provision is broad, applying to 'any and all legal issues.'").

Moreover, courts recognize that where parties agree to have their contract governed by a specified state law, the specified law also governs any statutory claims that arise from the contractual relationship. *See Concheck*, 2011 WL 3359612, at * 7-8 ("[T]he Court finds that the choice of law provision applies to all claims related to the Agreement…. Even if this provision could be interpreted as applying to only claims for breach of contract, it would still apply to … [plaintiff's OCSPA] claim, which is predicated on the allegation that the Agreement is a consumer

[6] *See also Century Bus. Servs*., Inc., 197 Ohio App.3d at 369 (enforcing non-compete covenant based on Ohio choice of law provision even though contract was negotiated, signed, and performed in Minnesota, where similar non-compete covenants are not enforceable); *Tele-Save Merchandising Co. v. Consumers Distrib. Co., Ltd*., 814 F.2d 1120, 1122 (6th Cir. 1987) (dismissing Ohio statutory claim based on New Jersey choice of law contract provision even though New Jersey did not have analogous statutory claim: "It is not sufficient for [plaintiff] to argue nor would we hold that Ohio law should be applied merely because a different result would be reached under New Jersey law.").

transaction…."); *Adelman's Truck Parts Corp. v. Jones Transport*, No. 5:17CV2598, 2019 WL 1242837, at *2 (N.D. Ohio Mar. 17, 2019) ("Defendants' unfair business practices claim is predicated upon an argument that the sale agreement itself constituted a consumer transaction. Accordingly, the Court finds that the choice of law provision applies to all claims related to the Agreement.").[7]

ii. Out-of-state plaintiffs are not jurisdictionally barred from suing under the OCSPA, especially when they are subject to an Ohio choice-of-law agreement.

Even though Defendant drafted the Terms of Use providing that Ohio law will govern Plaintiffs' "rights and obligations," Defendant now asserts that Ohio law cannot govern Plaintiffs' consumer fraud claims. More specifically, Defendant contends that out-of-state parties are jurisdictionally barred from suing under the OCSPA. Br. at 16-18. But nothing in the text or history of the OCSPA supports depriving Plaintiffs of the protections of the consumer protection statute, especially considering it was Defendant who selected Ohio law to govern the parties' relationship.[8]

The OCSPA broadly prohibits "supplier[s]" from engaging in "unfair or deceptive act[s] or practice[s]" or "unconscionable act[s] or practice[s]" in connection with "consumer transaction[s]," whether they occur "before, during, or after" the transactions. Ohio Rev. Code §§ 1345.02; 1345.03. Ohio Rev. Code § 1345.09 provides that a consumer may bring either an

[7] *Cf. Moses v. Business Card Express, Inc*., 929 F.2d 1131, 1139 (6th Cir. 1991) (affirming dismissal of Alabama statutory claims based on choice of law clause providing "Agreement and the construction thereof shall be governed by the laws of the state of Michigan"); *Banek, Inc. v. Yogurt Ventures U.S.A., Inc*., 6 F.3d 357, 363 (6th Cir. 1993) (holding tort claims related to contract were covered by choice of law clause where "all rights and obligations of the parties hereto shall be governed in accordance with the laws of the State of Georgia"); *Johnson v. Ventra Group, Inc*., 191 F.3d 732, 741 (6th Cir. 1999) (applying choice of law provision to non-contract claims); *American Trim, LLC v. Oralce Corp*., No. 3:99CV–7265, 2001 WL 873073, at *3-4 (N.D. Ohio July 12, 2001) (applying choice of law clause to fraud and negligent misrepresentation claims); *Baumgardner v. Bimbo Food Bakeries Distribution, Inc*., 697 F. Supp. 2d 801, 805-805 (N.D. Ohio 2010) (forum selection clause covering "validity, interpretation and performance" of contract governs tort claims surrounding the contract).

[8] Importantly, as discussed below, the alternative to Plaintiffs asserting claims under Ohio's consumer protection statute is not Plaintiffs asserting claims under the consumer protection statutes of their respective states. It is Plaintiffs losing all protections from consumer protection statutes because Defendant's Terms of Use effectively prevent Plaintiffs from suing under any other state's law. *See supra* at p. 17.

individual or class action (subject to certain restrictions) to rescind the transaction, recover damages, or request declaratory or injunctive relief from a violation of section 1345.02 or 1345.03. "Supplier" is likewise defined broadly to include any "seller … or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer." Ohio Rev. Code § 1345.01(C). "Consumer transaction" is similarly defined broadly to include any "sale … of an item of goods [or] a service … to an individual for purposes that are primarily personal, family, or household…." Ohio Rev. Code § 1345.01(A). None of these substantive provisions place any geographic or residency requirements on plaintiffs, or in any way imply that the General Assembly intended to limit the OCSPA's reach to only in-state plaintiffs, especially where an Ohio supplier engages in deceptive conduct while imposing Ohio law upon out-of-state consumers.

Importantly, the Supreme Court of Ohio has recognized that the OCSPA is a remedial law that must be "liberally construed in order to promote their object and assist the parties in obtaining justice." Ohio Rev. Code § 1.11. *See Einhorn v. Ford Motor Co*., 48 Ohio St.3d 27, 29 (1990).

Brown v. Mkt. Dev., Inc., 41 Ohio Misc. 57, 57, 322 N.E.2d 367, 368 (Ohio Com. Pl. 1974) is instructive. There, the Attorney General of Ohio sought to enjoin Ohio companies from mailing deceptive promotional letters from Ohio to consumers outside of Ohio. *Id*. at 57. The defendants had previously entered into a consent order enjoining them from sending similar letters to "consumers." *Id*. But the defendants interpreted "consumers" narrowly to mean only Ohio consumers and continued to send the deceptive mailings to consumers outside the state. *Id*. at 58. The question presented was whether the OCSPA should be interpreted to apply to deceptive and unconscionable practices of Ohio suppliers directed only to non-Ohio consumers. The defendants claimed that the Act does not by its terms expressly apply to consumer transactions between the

Ohio supplier and non-Ohio consumers and that it cannot be inferred that the legislature intended that the Act should so apply. *Id*. at 59. The court disagreed, concluding that "the legislature intended the [OCSPA] to apply to all Ohio suppliers engaged in consumer transactions, irrespective of location of the consumer, whether within or without Ohio…." *Id*. at 59-60.

Importantly, the court explicitly distinguished the issue at hand – the substantive scope of the OCSPA – from the "line of cases" decided on "principles of conflict of laws," wherein "a contract between persons must be interpreted under the laws of the state in which the contract was made or in which the final act takes place which completes the contract." *Id*. at 65.

iii. *Shorter* and its progeny are distinguishable.

Defendant nevertheless argues that the OCSPA jurisdictionally bars out-of-state plaintiffs from suing Ohio suppliers based on *three words* in Ohio Rev. Code § 1345.04 ("The courts of common pleas, and municipal or county courts within their respective monetary jurisdiction, have jurisdiction over any supplier with respect to any act or practice ***in this state*** covered by sections 1345.01 to 1345.13 of the Revised Code, or with respect to any claim arising from a consumer transaction subject to such sections.") (emphasis added).

In support of the argument, Defendant relies upon *Shorter v. Champion Home Builders Co*., 776 F. Supp. 333 (N.D. Ohio 1991) and its progeny. In that case, the plaintiffs purchased a mobile home in Pennsylvania that was manufactured in Michigan and contained allegedly harmful particle board from Oregon. The plaintiffs, who were residents of Ohio, filed suit alleging they suffered medical problems from high levels of formaldehyde in the particle board flooring, and asserted claims under the OCSPA, arguing that Ohio had an interest in protecting consumers in its state from unscrupulous business practices. The court interpreted the "in this state" language of Ohio Rev. Code § 1345.04 as meaning that the OCSPA "is only applicable if the offending conduct

took place within the territorial boarders of the state of Ohio." *Id*. at 339. Because all of the relevant transactions relating to the manufacture and sale of the mobile home occurred outside of Ohio, the court concluded that the defendant was entitled to summary judgment on plaintiffs' OCSPA claim. *Id*. at 339. In other words, the court held that a plaintiff cannot assert a claim under the OCSPA where the suit's only connection to Ohio is the plaintiff's residency.

Twelve years later, in *Delahunt v. Cytodyne Tech*., 241 F. Supp.2d 827 (S.D. Ohio 2003), an Ohio plaintiff brought a putative class action against the manufacturer of a dietary supplement containing ephedrine, alleging that the supplement caused her to suffer seizures. Although the district court refused to dismiss the plaintiff's individual claim under the OCSPA, the defendants argued that the claim on behalf of the proposed class should be dismissed to the extent that it sought to impose liability on the defendants for sales outside of Ohio. The district court cited *Shorter* as clarifying that the "determining factor" in whether the OCSPA applies is "whether the supplier's allegedly violative activity took place within Ohio." *Id*. at 839. Because the plaintiff did not respond to the argument, the district court construed it as conceding the issue. *Id*.

Next, in *Chesnut v. Progressive Cas. Ins. Co*., 166 Ohio App.3d 299, 305 (2006), a Louisiana plaintiff alleged that the defendant Ohio insurer violated the OCSPA by selling a vehicle declared to be a total loss to a Louisiana dealer with a clean rather than salvage title, in contravention of a Louisiana titling statute. In other words, the plaintiff alleged that defendant violated the OCSPA by transgressing *Louisiana's* vehicle titling statute. Although the damage to the vehicle occurred in Louisiana, the claim was adjusted in Louisiana, the vehicle was repaired and sold to plaintiff in Louisiana, and the clean title was issued in Louisiana, the plaintiff argued that the OCSPA governed because the defendant was headquartered in Ohio and therefore its policies and procedures "emanate[d]" from Ohio. *Id*. at 306. Citing *Shorter* for the proposition that

the OCSPA only applies "if the offending conduct took place within the territorial, borders of Ohio," the court found that the "majority of circumstances" took place in Louisiana, such that Louisiana rather than Ohio law applied. *Id*. at 305-306.

Next, in *Pilgrim v. Universal Health Card*, LLC, No. 5:09cv879, 2010 WL 1254849, at *3 (N.D. Ohio Mar. 25, 2010), two Ohio plaintiffs filed a putative nationwide class action against the providers of a healthcare discount program, alleging that healthcare providers listed in the discount network was inaccurate and that they were deceived into joining the program based on misleading advertisements. The defendant moved to strike the class allegations, arguing that the proposed class failed to satisfy the commonality and predominance requirements because under Ohio's *choice of law rules*, the court would need to analyze each class member's claim under the law of his or her home state. *Id*. at *3. The plaintiff opposed the motion, arguing that the OCSPA could apply to all of the class members because the defendant's advertisements "emanate[d]" from its headquarters in Ohio. *Id*. In rejecting the plaintiff's argument and finding each class member's home state will govern under Ohio's choice of law rules, the district court cited *Chesnut* and *Delahunt* as examples of "Ohio courts [that] have found that the OCSPA cannot apply to consumers outside of Ohio." *Id*. *But see Toltest v. Nelson-Delk*, No. 3:03 CV 7315, 2008 WL 696614, at *10 (N.D. Ohio Mar. 13, 2008) ("Although Toltest claims that the [OCSPA] does not apply to out-of-state consumers, it is incorrect."); *Detrick 84 Lumber Co*., No. 5:06CV2732, 2007 WL 1467070, at *5 (N.D. Ohio May 10, 2007) ("The OCSPA applies to the actions of suppliers in Ohio, even if the ultimate subject of the transaction is located outside the state …."). Notably, *Shorter*, the original case cited by *Chesnut* and *Delahunt* involved an Ohio plaintiff.

Lastly, in *Loreto v. Procter & Gamble Co*., 737 F. Supp.2d 909 (S.D. Ohio 2010), New Jersey plaintiffs brought a putative class action against an Ohio cold medicine manufacturer,

alleging that the products were misleadingly labelled in violation of the OCSPA. The defendant moved to dismiss the OCSPA claim on the basis that the New Jersey plaintiffs lacked "standing" to pursue claims under any state consumer statute except for New Jersey's. *Id*. at 916. Citing *Delahunt* (where the plaintiff conceded the argument by failing to address it) and *Pilgrim*, 2010 WL 1254849, at *3 (a choice of law decision), the district court found that the New Jersey plaintiffs lacked standing to pursue claims under the OCSPA. *Loreto*, 737 F. Supp.2d at 917.

Defendant's "jurisdictional limit" argument is unpersuasive for several reasons. First, the same results would have been reached in *Shorter, Delahunt, Chesnut, and Loreto* had the courts simply applied a traditional choice of law analysis rather than engrafting an artificial geographic jurisdictional limit on the OCSPA based on three words in Ohio Rev. Code § 1345.04. Indeed, the Sixth Circuit affirmed both *Loreto* and *Pilgrim* on *choice of law*, not jurisdictional, grounds. *See Pilgrim*, 660 F.3d at 947 ("the place of injury controls in a consumer protection lawsuit, requiring application of the home-state law of each potential class member"); *Loreto*, 515 Fed. Appx. at 578 (same). Neither the Ohio Supreme Court nor the Sixth Circuit has ever endorsed the interpretation of the "in this state" language of Ohio Rev. Code § 1345.04 as providing a geographic jurisdictional limit on the statute. And none of these cases cited by Defendant involved a forum selection or choice of law provision requiring the application of Ohio law.

Second, Defendant's reading of the "in this state" language of Ohio Rev. Code § 1345.04 as creating a geographic jurisdictional limit conveniently ignores the second half of the statute's sentence. *See id*. ("The courts of common pleas, and municipal or county courts within their respective monetary jurisdiction, have jurisdiction over any supplier with respect to any act or practice in this state covered by sections 1345.01 to 1345.13 of the Revised Code, *or with respect to any claim arising from a consumer transaction subject to such sections*.") (emphasis added).

When read as a whole, the statute provides not only "jurisdiction over any supplier with respect to any act or practice in this state covered by sections 1345.01 to 1345.13," but also "jurisdiction over any supplier … with respect to any claim arising from a consumer transaction subject to [sections 1345.01 to 1345.13]." The OCSPA's definition of "consumer transaction" does not include any geographic limitation. *See* Ohio Rev. Code § 1345.01(A) (defining "consumer transaction" broadly as any "sale … of an item of goods [or] a service … to an individual for purposes that are primarily personal, family, or household…."). Thus, the only requirement is that the "consumer transaction" be "subject to" the OCSPA, such as through application of a traditional choice of law analysis or choice of law agreement. Here, Plaintiffs' transactions are "subject to" the OCSPA through agreement by the parties to have their relationship governed by Ohio law. Defendant's interpretation to the contrary renders the second half of the Section 1345.04 meaningless, in contravention of the well-established canon of statutory interpretation. *Keeley v. Whitaker*, 910 F.3d 878, 884 (6th Cir. 2018); *State v. Noling*, 153 Ohio St. 3d 108, 116 (2018).

More fundamentally, Defendant ignores that its imposition of a forum selection provision requiring consumers to file suit in Ohio, and a choice-of-law provision requiring consumers to sue under Ohio law, is part and parcel of its unfair, deceptive, and unconscionable acts and practices as alleged in the First Amended Complaint. Defendant used its website as a tool to lure out-of-state consumers into purchasing a defective product, and then by virtue of that use bound them to Ohio and Ohio law. Defendant's unfair, deceptive, and unconscionable acts and practices not only emanate from Ohio like in *Brown*, *Chesnut*, and *Pilgrim*, but Defendant contractually binds aggrieved consumers to Ohio and Ohio law. By forcing Plaintiffs and the other Ohio Law Subclass members to file suit in Ohio using Ohio law, Defendant engages in violative activity taking place within Ohio. That is a sufficient jurisdictional nexus to support an OCSPA claim.

Defendant protests that Plaintiffs' reliance on Defendant's own forum selection and choice of law provisions "to bypass the provision of absent members' consumer protection laws" is "fundamentally unfair to absent class members who may wish to have their claims heard under their own consumer protection statute." Br. at 18. But it was Defendant, not Plaintiffs, who chose to bind class members to Ohio and Ohio law. Moreover, Defendant's feigned concern about the "fairness" of applying its own choice of law provision to class members is disingenuous because the true intent of Defendant's argument is to defeat class certification. *See Eggleston v. Chicago Journeymen Plumbers' Local Union*, 657 F.2d 890, 895 (7th Cir. 1981) ("[I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. … [I]t is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.").

Importantly, the alternative to Plaintiffs and the Ohio Law Subclass asserting claims under the OCSPA is not, as Defendant suggests, having Plaintiffs and the Ohio Law Subclass assert claims under their respective home-state consumer protection laws. Rather, it is to deprive Plaintiffs and the Ohio Law Subclass of the protections of *any* consumer protection statute, because courts across the country routinely dismiss consumer protection claims brought by plaintiffs subject to a choice-of-law provision requiring the application of another state's law. *See, e.g., Adelman's Truck Parts Corp*, 2019 WL 1242837, at *2 (dismissing North Carolina party's North Carolina unfair business practices act claim based on purchase order's choice of law provision stating that it "shall be governed by and construed in accordance with" Ohio law); *DeJohn v. The .TV Corp. Int'l*, 245 F. Supp.2d 913, 922 (N.D. Ill. 2003) (dismissing Illinois plaintiff's Illinois consumer fraud claim where contract specified New York law governed any disputes arising from the contract even though "the contract does not specifically say that New York law will apply to a

fraud or deceptive practices act claim"); *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F.Supp.2d 1399, 1413 (N.D. Ill. 1996) (dismissing Illinois plaintiff's Illinois consumer fraud claim based on lease provision stating "Lease will be construed and enforced in accordance with the laws of the State [of Wisconsin]"); *Simulado Software, Ltd. v. Photon Infotech Private, Ltd.*, 40 F. Supp.3d 1191, 1199 (N.D. Cal. 2014) (dismissing Texas plaintiff's Texas statutory deceptive trade practices act claim based on California choice of law provision); *Brazil v. Dell, Inc.*, 585 F. Supp.2d 1158, 1166 (N.D. Cal. 2008) (dismissing California plaintiffs' California statutory consumer fraud and false advertising claims based on Texas choice of law provision in defendant's terms and conditions); *Sheldon v. Munford, Inc.*, 660 F. Supp. 130, 136-37 (N.D. Ind. 1987) (dismissing Indiana plaintiffs' Indiana statutory claims based on franchise agreement's choice of law provision stating that it shall be "governed and construed in accordance" with Georgia law).[9] Because the OCSPA is a remedial law that must be liberally construed to promote justice, Defendant's motion should be denied.

B. Plaintiffs Adequately Plead Claims for Breach of Implied Warranty in Tort.

i. Plaintiffs' implied warranty claims are not preempted by the OPLA.

Defendant next argues that Plaintiffs' implied warranty claims are preempted by the Ohio Product Liability Act ("OPLA"), because the OPLA allegedly "evince[s] a clear mandate to treat all claims arising from the design, manufacturing, marketing, warning, warranty or representation

[9] *See also Tele-Save Merchandising Co*, 814 F.2d at 1122 (dismissing Ohio plaintiff's Ohio statutory claim based on agreement provision stating that the "Agreement shall be governed by, and construed in accordance with, the laws of the State of New Jersey"); *Concheck*, 2011 WL 3359612, at *7 (N.D. Ohio Mar. 17, 2019) (dismissing Ohio plaintiff's OCSPA claim where choice of law provision stated Michigan law governed "any and all legal issues"); *Schiff v. Mazda Motor of Am.*, 102 F.Supp.2d 891, 897 (S.D. Ohio 2000) (dismissing Ohio Plaintiff's OCSPA claim where vehicle lease contained Michigan choice of law provision); *Scott v. Independent Savings Plan Co.*, No. 2013-CA-19, 2014 WL 1691372, at *4 (Ohio Ct. App. Aug. 25, 2014) (dismissing Ohio plaintiff's OCSPA claim where contract specified the "Agreement and your use of your … account shall be governed by and be in accordance with Florida law"); *Procter & Gamble Co. v. Bankers Tr. Co.*, 925 F. Supp. 1270, 1288 (S.D. Ohio 1996) (dismissing Ohio Plaintiff's Ohio deceptive trade practices act claim based on choice of law provision stating that "This Agreement will be governed by, and construed and enforced in accordance with, the laws of the State of New York….").

of a product as a 'product liability claims' exclusively defined, remedied, and governed by the OPLA." Br. at 20. This argument ignores that plain language of the statute.[10]

While the OPLA provides that "[a]ny recovery of compensatory damages based on a ***product liability claim*** is subject to [the OPLA]," Ohio Rev. Code § 2307.72(A) (emphasis added), it also provides that "[a]ny recovery of compensatory damages for ***economic loss*** … ***other than a product liability claim***, is not subject to [the OPLA] [and] may occur under the common law of this state or other applicable sections of the Revised Code." Ohio Rev. Code § 2307.72(C) (emphasis added). Thus, "[t]he OPLA preemptions provision [only] extinguishes any common-law claim that, as pled, actually meets the statutory definition of a product liability claim." *Volovetz v. Tremco Barrier Solutions, Inc*., 2016-Ohio-7707, 74 N.E.3d 743, 753 (Ohio Ct. App. 2016).

The OPLA defines "product liability claim" as a claim that "seeks to recover compensatory damages from a manufacturer or supplier for ***death, physical injury to a person, emotional distress***, or ***physical damage to property other than the product in question***, that allegedly arose from … (1) [t]he design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product; (2) [a]ny warning or instruction, or lack of warning or instruction, associated with that product; [or] (3) [a]ny failure of that product to conform to any relevant representation or warranty." Ohio Rev. Code § 2307.71(A)(13) (emphasis added). The OPLA defines "economic loss" as "direct, incidental, or consequential ***pecuniary loss***, including, but not limited to, ***damage to the product in question***, and nonphysical damage to property other than that product." Ohio Rev. Code § 2307.71(A)(2) (emphasis added).[11]

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[10] *See* 76 Oh.Jur.3d Products Liability § 1 ("Although a cause of action may concern a product, it is not a 'product liability claim' within the purview of Ohio's product liability statute unless it alleges damages other than economic ones. . . . Ohio's products liability statutes, by their plain language, neither cover nor abolish claims for purely economic loss cause by defective products.").

[11] The distinction between claims seeking compensation for purely economic loss and claims seeking compensation for death, physical injury, emotional distress, or physical damage to property other than the product in question is consistent throughout the OPLA. The damages provisions of the OPLA provide that economic damages

Unlike the cases cited by Defendant, which almost without exception involved death or personal injuries,[12] Plaintiffs here seek compensation for purely economic losses arising from their purchase of the defective LeafFilter product. More specifically, Plaintiffs allege that they overpaid for the LeafFilter system and are entitled to the purchase price of LeafFilter system or, alternatively, the difference in value between the LeafFilter system as advertised and the LeafFilter system as actually sold. ¶153. Similar claims have been found to fall outside the purview of the OPLA. *See, e.g., Huffman v. Electrolux N. Am., Inc*., 961 F. Supp.2d 875, 881 (N.D. Ohio 2013) (plaintiff's common law claim for difference in value between what she paid for defective washing machine and value of the machine with the alleged defect not abrogated by OPLA); *Hoffer v. Cooper Wiring Devices, Inc.*, No. 1:06CV763, 2007 WL 1725317, at *2 (N.D. Ohio, June 13, 2007) (noting that while the plaintiff's common law claim for damage to the area around the allegedly defective wiring was preempted by the OPLA, the plaintiff's common law claim for economic loss to the wiring itself was not preempted); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*., 45 F. Supp. 3d 706, 719 (N.D. Ohio 2014) (allowing a common law claim seeking purely economic loss to proceed because it does not fit into the OPLA's definition of a statutory product liability clam); *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's Enters*., 2015-Ohio-4884, 50 N.E.3d 955, 966 (Ohio Ct. App. 2015) (trial court erred by dismissing

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can only be recovered where there are also compensatory damages for "harm." Ohio Rev. Code § 2307.79. The OPLA defines "harm" as "death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question," and specifically states that "[e]conomic loss is not 'harm.'" Ohio Rev. Code § 2307.71(A)(7).

[12] *See, e.g., Miller v. ALZA Corp*., 759 F. Supp. 2d 929 (S.D. Ohio 2010) (wrongful death); *Miles v. Raymond Corp*., 612 F. Supp. 2d 913 (N.D. Ohio 2009) (wrongful death); *Tompkin v. Am. Brands*, 219 F.3d 566, 567 (6th Cir. 2000) (wrongful death); *Duffey v. Rust-Oleum Corp*., No. 2:19-CV-775, 2020 WL 4933894, at *1 (S.D. Ohio Aug. 24, 2020) (personal injury); *Hempy v. Breg, Inc*., No. 2:11-CV-900, 2012 WL 380119, at *1 (S.D. Ohio Feb. 6, 2012) (personal injury); *Krumpelbeck v. Breg, Inc*., 491 F. App'x 713 (6th Cir. 2012) (personal injury); *Mitchell v. Procter & Gamble*, No. 2:09-cv-426, 2010 WL 728222, at *4 (S.D. Ohio Mar. 1, 2010) (illness); *Delahunt*, 241 F.Supp.2d at 842 (seizure).

common law claim seeking damages only for economic loss (i.e., damage to the value of the defective grinder), which does not fall into the purview of the OPLA).

Defendant acknowledges Plaintiffs seek purely "economic damages." Br. at 21. However, Defendant half-heartedly argues that at least Plaintiff Cory Simpson and Plaintiff Meagan McGinley's claim qualifies as a product liability claim because they allege that they once noticed water in their basement during a particular rainstorm when the LeafFilter mesh had frozen over and water passed over the top of the filter and fell down to the ground near the foundation. ¶76. But Plaintiffs Simpson and McGinley do not allege that the foundation was *damaged* by the water. Nor do they seek compensation for any such damage. This stands in stark contrast to the *Volovetz* case cited by Defendant, where the plaintiffs sought "the amount needed to excavate the foundation; remove the excavated materials; remove the Tuff–N–Dri system; repair the foundation; apply a new exterior waterproofing system; backfill the foundation with gravel and dirt; replace paving, concrete, drain tiles, and landscaping damaged by the excavation; remove and reinstall the electrical panels and low-voltage systems; and treat the inner foundation walls for mold." 74 N.E.3d at 747-48.

On the one hand, Defendant admits that "Plaintiffs do not contend that the alleged overflow or accumulation has harmed … their property." Br. at 21. On the other hand, Defendant argues that the OPLA preempts Plaintiffs' implied warranty claims because Plaintiffs allege that they have suffered economic losses "including *but not limited* to" the purchase price but do not affirmatively "disclaim" damages for death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. *Id*. at 21 (emphasis in original). While it is true that Plaintiffs' complaint does not affirmatively disclaim damages for any wrongful deaths or personal injuries caused by the LeafFilter system (because Plaintiffs know of none),

Defendant identifies no authority requiring Plaintiffs to affirmatively plead such a disclaimer to avoid dismissal. Defendant's argument is frivolous.

ii. Plaintiffs' implied warranty class allegations are not overbroad or uncertifiable.

Defendant next argues that Plaintiffs' implied warranty class allegations are "overbroad" and "uncertifiable" because the putative class includes all LeafFilter system purchasers "regardless of whether … any individual class members actually experiences overflow or debris accumulation…." Br. at 22. Defendant speculates that the proposed class will contain a large number of "no injury" consumers. Br. at 22.

Defendant's argument misconstrues Plaintiffs' allegations. Plaintiffs do not allege that rainwater flows over the top of *some* LeafFilter systems or that debris accumulates on top of *some* LeafFilter systems. Plaintiffs allege that rainwater flows over the top of *all* LeafFilter systems and that debris accumulates on top of *all* LeafFilter systems. *See Rikos v. P&G*, 799 F.3d 497, 524 (6th Cir. 2015) (rejecting argument that class was overbroad insofar as it included customers who suffered no injury: "This argument ... misconstrues the basic theory of liability at issue ... If [the product] does not work as advertised for anyone, then every purchaser was harmed ...").

Defendant speculates that some consumers may not still own the property at which the system was installed. Br. at 22. But Plaintiffs allege that the class members were harmed at the time of purchase when they failed to receive the benefit of the bargain, so why would it matter if the consumer subsequently sold the house? Even if Defendant could somehow prove that a given class member was arguably made whole when he or she sold the house, "[a] class may be certified based on a predominant common issue even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Hicks v. State Farm Fire & Cas. Co*., 965 F.3d 452, 460 (6th Cir. 2020) (internal quotes

omitted). *See also Jimenez v. Allstate Ins. Co*., 765 F.3d 1161, 1167-68 (9th Cir. 2014) ("In [*In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.,* 722 F.3d 838, 855 (6th Cir. 2013)], the Sixth Circuit held that, 'no matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment with the question of liability tried as a class action,' a position that is said held true *even when some consumers might have no harms at all*." (emphasis added)). Thus, "'[h]ow many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified.'" *Kimber Baldwin Designs, LLC*, 2016 WL 10520133, at *2 (internal quotes omitted; emphasis in original).

Defendant cites a handful of cases for the proposition that no class can be certified where the proposed class contains "significant numbers of consumers who have not suffered any injury." Br. at 22. But Defendant's authorities are inapposite. For instance, in *Loreto*, it was facially obvious that the overwhelming majority of putative class members had no claim or injury. *Compare Loreto*, 2013 WL 6055401, at *4 (Black, J.) (striking class allegations where "less than 0.25% of class members were exposed to allegedly false advertisement) with *Kimber Baldwin Designs, LLC*, 2016 WL 10520133, at *2 (Black, J.) ("To require a district court to first determine which class members are injured before certifying a class put[s] the cart before the horse and vitiate[s] the economies of class action procedure." (internal quotes and cites omitted)). In *Romberio v. UnumProvident Corp*., 385 Fed. Appx. 423, 431 (6th Cir. 2009), the plaintiffs challenged a "a group of loosely-defined [disability benefit] practices that were not applied uniformly to a discrete, easily defined class" such that "individualized fact-finding" would be required to identify class members. And in *McGee v. East Ohio Gas Co*., 200 F.R.D. 382 (S.D. Ohio 2001), the court *granted* class certification but merely tweaked the class definition to exclude consumers who were not at risk of future harm.

Defendant asserts that *Meta v. Target Corp*., 74 F. Supp.3d 858 (N.D. Ohio 2015) is "directly on point." Br. at 23. There, the plaintiff sued the manufacturer of "flushable moist wipes," alleging that the wipes caused $210 worth of damage to his septic system even though they were marketed as safe for septic systems. *Meta,* 74 F.Supp.3d at 860. The plaintiff's complaint asserted both common law (warranty, negligence, fraud) and OPLA claims on behalf of a class of all Ohio residents who purchased the wipes. *Id*. The defendant moved to dismiss the common law claims, arguing that they were preempted by the OPLA and the court agreed (at least with regard to plaintiff's tortious breach of warranty, negligent design, negligent failure to warn claims). *Id*. at 861.[13] Distinguishing cases that have allowed purchasers to bring common law claims for economic losses from the defective product itself, the *Meta* court explained that the plaintiff's claims were preempted by the OPLA because the plaintiff did not allege a defect that rendered the wipes unusable for their intended purpose (i.e., cleaning) but rather that the wipes caused damage to property other than the product in question (i.e., septic systems). *Id*. at 862-64.

The *Meta* court analogized to *Mitchell v. Proctor & Gamble*, No. 2:09-CV-426, 2010 WL 728222, at *1 (S.D. Ohio Mar. 1, 2010), where the plaintiff sought "recovery for 'treatments for food-borne illnesses, as well as the purchase price of the [allegedly defective heartburn medicine]…." *Id*. at *4. The *Mitchell* court held that the plaintiff "cannot separate out his [physical injury] claims from the purview of the OPLA simply by claiming only economic losses." *Id*.[14]

[13] The court found that that the defendant had not established that plaintiff's negligent misrepresentation or fraud claims were "product liability claims" for purposes of the OPLA. *Id*. at 861 n.3.

[14] Courts disagree whether a plaintiff may simultaneously assert common law claims for economic loss and OPLA claims. *Compare Huffman*., 961 F.Supp.2d at 882 (plaintiff may simultaneous assert common law claims and OPLA claims) and *Great Northern Ins. Co. v. BMW of N. Am. LLC*, 84 F. Supp. 3d 630, 649 (S.D. Ohio 2015) (common law claims and OPLA claims may be brought together if pleaded in the alternative) *with Mitchell*, 2010 WL 728222, at *4 (dismissing common law claims for economic losses because "Mitchell can not separate out his claims from the purview of the OPLA simply by claiming only economic losses") and *McKinney v. Microsoft Corp*., No. 1:10-CV-354, 2011 WL 13228141 (S.D. Ohio May 12, 2011) (dismissing common law claims as preempted where plaintiff also brought OPLA claim).

Based on the *Mitchell* court's reasoning, the *Meta* court concluded that the plaintiff adequately pleaded "claims under the OPLA for damages to something other than the wipes themselves (the septic system)" and that "once within the purview of the OPLA, Mr. Meta is able to recover his economic losses under R.C. § 2307.79(A)." *Meta*, 74 F.Supp.3d at 864. "However, Mr. Meta may not carve out a common law product liability claim for economic loss only where, as in *Mitchell*, the facts underpinning his common law claims constitute the same conduct that ... giv[es] rise to [the] 'products liability claim'." *Id*. (internal quote omitted). The court further noted in passing that the "vast majority" of the members of the plaintiff's proposed class would not have septic systems and therefore could not possibly have suffered the harm alleged by the plaintiff. *Id*. For those class members, the wipes functioned "as expected for them." *Id*.

Defendant's reliance on *Meta* and *Mitchell* is misplaced. The plaintiffs in *Mitchell* (physical injury) and *Meta* (physical damage to property other than the product in question) both alleged "death, physical injury to a person, emotional distress, or physical damage to property other than the product in question." Ohio Rev. Code § 2307.71(A)(13). Plaintiffs do not. Moreover, the alleged harm caused by the defect at issue in *Meta* (septic system damage) could only possibly affect the small percentage of class members whose homes were equipped with a septic system.[15] In contrast, Plaintiffs here allege that every LeafFilter system sold is defective and allows rainwater to flow over the top and debris to accumulate. As a result, none of the individuals who purchased this expensive product received the benefit of their bargain.

C. Factual Issues Concerning Privity Prevent Application of the Economic Loss Doctrine at the Pleading Stage.

[15] Approximately one in five (20%) of households use septic systems. https://www.epa.gov/septic/septic-systems-overview#:~:text=The%20U.S.%20Bureau%20of%20the,homes%20served%20by%20septic%20systems. (last visited May 13, 2021).

Defendant next contends that Plaintiffs' implied warranty in tort claims are barred by Ohio's economic loss doctrine. Br. at 24-26. This argument too misses the mark.

"Implied warranty in tort' is a common-law cause of action that imposes liability upon a manufacturer or a seller for breach of an implied representation that a product is 'of good and merchantable quality, fit and safe for its ordinary intended use…." *Caterpillar Fin. Servs. Corp.*, 50 N.E.3d at 963 (internal quotes omitted). Parties need not be in privity in order to bring a breach of implied warranty in tort claim. *Lonzrick v. Republic Steel Corp*., 6 Ohio St.2d 227, syllabus (1966). "Moreover, a breach of implied warranty in tort claim is within an entirely separate body of law from that applied under the UCC." *Caterpillar Fin. Servs. Corp*., 50 N.E.3d at 963 (internal quotes omitted). "And because 'implied warranty in tort is not a matter of contract … contractual provisions disclaiming implied warranties and limiting liability to repair and replacement do not affect [a] claim based upon implied warranty in tort.'" *Id*. (quoting *Avenell v. Westinghouse Elec. Corp*., 41 Ohio App.2d 150, 156 (Ohio Ct. App. 1974)).

Defendant argues that Plaintiffs' implied warranty claims are nevertheless barred by the economic loss rule. The economic-loss rule serves to maintain the distinction between tort law and contract law. *Corporex Dev. & Constr. Mgt., Inc. v. Schook, Inc*. 106 Ohio St.3d 412, 835 N.E.2d 701, 2005–Ohio–5409, ¶6. Tort law offers redress for losses suffered by reason of a breach of some duty imposed by law to protect the broad interests of social policy. *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn*., 54 Ohio St.3d 1, 7 (1990). In contrast, contract law is designed to compensate a party for breach of duties assumed only by agreement and the parties' bargained-for expectations. *Id*. However, the Ohio Supreme Court has squarely held that consumers may bring a breach of implied warranty in tort claim against remote suppliers to recover economic losses. *See LaPuma v. Collinwood Concrete*, 75 Ohio St.3d 64 (1996). The

Supreme Court has reasoned that because an ordinary consumer lacking privity with a remote supplier cannot bargain over the quality of the goods or sue the remote manufacturer for breach of contract, the economic loss rule will not bar his or her tort claims for economic damages.[16]

Defendant acknowledges that "'Ohio law permits ordinary consumers who are not in privity of contract with product manufacturers to bring [common law] claims in order to recover for economic injury only.'" Br. at 25 (quoting *In re Whirlpool Corp. Front-Loading Washer Prods Liab. Litig*., 722 F.3d at 856). However, Defendant asserts that the economic loss rule applies because Plaintiffs *allege* that there is privity between Plaintiffs and defendant. Br. at 25-26 ("Plaintiffs allege that Defendant is the 'exclusive distributer' of the LeafFilter gutter systems, that they each bought systems from Defendant, and that their gutters came with Defendant's express warranty."). Defendant mischaracterizes Plaintiffs' allegations.

First of all, the fact that a product supplier furnishes a written warranty that travels with the product to a remote consumer does not establish privity. *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig*., 45 F. Supp. 3d at 715 ("Whirlpool insists that, having issued express written warranties to the Plaintiffs, it cannot be found liable for breach of an implied warranty. This argument fails because Whirlpool is not in privity with any Plaintiff."); *Caterpillar Fin. Servs. Corp*, 50 N.E.3d at 963 (finding plaintiff could state an implied warranty in tort claim absent privity despite existence of valid written warranty). Second, although Plaintiffs allege that LeafFilter North is the exclusive distributor of the LeafFilter system, Plaintiffs do not allege that LeafFilter North was the entity that sold them the LeafFilter systems (i.e., was a party to Plaintiffs'

[16] *See Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co*., 42 Ohio St. 3d 40, 46 (1989) ("For an ordinary consumer, i.e., one not in privity of contract with the seller or manufacturer against whom recovery is sought, an action in [tort] may be an appropriate remedy to protect the consumer's property interests. However, where the buyer and seller are in privity of contract, and they have negotiated that contract from relatively equal bargaining positions, the parties are able to allocate the risk of all loss, including loss of the subject product itself, between themselves. Therefore, any protection against the product's self-inflicted damage in the latter context is better viewed as arising under the contract and not under the law of [tort].").

purchase contracts). Rather, Plaintiffs allege that Defendant maintains a network of separately registered regional entities in 42 states and the District of Columbia that actually sell and install LeafFilter products. For instance, the Armstrong Plaintiffs' purchase contract was with "LeafFilter™ North of Washington, LLC." *See* Exhibit A (Armstrong Purchase Agreement).[17] Similarly, Plaintiff GarrettDorsey's purchase contract and the Dering Plaintiffs' purchase contract identifies "LeafFilterTM North of Pennsylvania, LLC" as the seller. *See* Exhibit B (GarrettDorsey Purchase Agreement); Exhibit C (Dering Purchase Agreement).

To be sure, Plaintiffs allege upon information and belief that Defendant "owned, dominated, and/or controlled" the installation companies. ¶19. *See also* ¶20 (alleging Secretary of State records show that Defendant's owner and founder, Matthew Kaulig, serves as President of at least 24 LeafFilter installation companies). However, Defendant cites no authority suggesting that a parent company should be treated as a party to its subsidiary's contracts for purposes of the privity requirement pursuant to alter ego or piercing the corporate shield doctrines. Regardless, factual questions remain regarding the details of Defendant's relationship with these regional affiliates which prevent the Court from making a privity determination at the pleading stage. *See, e.g.*, *Nessle v. Whirlpool Corp*., No. 1:07CV3009, 2008 WL 2967703, at *5 (N.D. Ohio July 25, 2008) (finding it "premature at th[e] [pleading] stage to determine whether any contractual arrangement Plaintiff may have had with Whirlpool will serve to bar Plaintiff's claim for implied warranty in tort"). Accordingly, the Court should deny Defendant's motion to dismiss to permit the parties to engage in discovery before making a privity determination at summary judgment.

D. Defendant's Motion to Strike Class Allegations Should Be Denied.

[17] In ruling on a motion to dismiss, a court may consider any documents referred to in the complaint and are central to the plaintiff's allegations, even if not explicitly incorporated by reference. *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) (district court did not err by considering insurance contracts submitted in connection with motion seeking to dismiss breach of contract claim).

In addition to moving to dismiss Plaintiffs' claims, Defendant also moves to strike certain of Plaintiffs' class allegations. But Defendant ignores the Court's Standing Orders, which clearly provide that the "Court disfavors motions to strike unless they address a pleading for the reasons set forth in Federal Rule of Civil Procedure 12(f)." *See* Fed. R. Civ. P. 12(f) ("insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"). Defendant does not explain why Plaintiffs' class allegations are redundant, immaterial, impertinent, or scandalous. Accordingly, Defendant's motion to strike should be denied on this ground alone.

However, Defendant's motion is also substantively meritless. Courts must exercise caution when evaluating class action allegations based solely on the pleadings "because class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Geary v. Green Tree Servicing, LLC*, No. 2:14cv522, 2015 WL 1286347 (S.D. Ohio Mar. 20, 2015). Though procedurally permissible, striking a plaintiff's class allegations prior to discovery and the filing of a motion for class certification is rarely appropriate. A court may only strike class allegations prior to completion of discovery when: "(1) the complaint itself demonstrates the requirements for maintaining a class action cannot be met, and (2) further discovery will not alter the central defect in the class claim." *Amerine v. Ocwen Loan Servicing LLC*, No. 2:14-CV-15, 2015 WL 10906068, at *2 (S.D. Ohio Mar. 31, 2015). Defendant cannot satisfy its substantial burden of proving that this is such a rare case.[18]

Defendant criticizes Plaintiffs for failing to allege "support" for the "self-serving, conclusory allegation" that the laws of the 42 states in which Defendant operates are "materially

[18] "When a defendant moves to strike class action allegations on the basis that class certification is precluded as a matter of law, the defendant bears the burden of establishing that the plaintiff will be unable to demonstrate facts supporting certification, even after discovery and the creation of a full factual record. The standard is the same as applied in deciding a motion to dismiss under Rule 12(b)(6). In other words, the moving party has the burden of demonstrating from the face of the plaintiffs' complaint that it will be impossible to certify the class as alleged, regardless of the facts plaintiffs may be able to prove." *Kimber Baldwin Designs, LLC*, 2016 WL 10520133, at *2 (internal quotes and cites omitted).

the same" for purposes of Plaintiffs' fraud claim. Br. at 26. But the "touchstone for striking class allegations at this stage is facial deficiency." *Kimber Baldwin Designs, LLC*, 2016 WL 10520133, at *5 (internal quotes omitted). Thus, while the party seeking class certification may ultimately be required to demonstrate that any variations in state law are manageable and will not swamp common issues, Defendant cites no authority requiring a plaintiff to *affirmatively plead* such a detailed choice of law analysis to avoid dismissal at the pleading stage.

To the contrary, courts routinely defer such choice of law issues until class certification. *See Wiggins v. Bank of Am*., NA, No. 2:19-cv-3223, 2020 WL 5642422, at *9 (S.D. Ohio Sept. 22, 2020) ("Defendants argue that, if the class action can go forward, Plaintiffs' common-law claims will be subject to varying states' laws and therefore class treatment is inappropriate. First, this argument is more appropriately raised on a motion for class certification…. Thus, while the Court could strike class allegations prior to the motion to certify, the Court finds it prudent to assess the propriety of issues of class certification in the context of a fully briefed motion rather than at the pleading stage."); *Eliason v. Gentek Bldg. Prods., Inc*., No. 1:10cv2093, 2011 WL 3704823, at *3 (N.D. Ohio Aug. 23, 2011) (refusing to strike class allegations because whether certification would require application of multiple states' laws "cannot be determined until discovery has taken place and choice of law provisions applied").[19] In other words, the mere fact that varied state laws *may* ultimately apply to the claims of a proposed class does not mandate that a motion to strike should be granted at this stage of the proceedings, especially where (as here) many of the proposed class members are subject to a choice of law provision dictating application of a single state's law.

[19] *See also Albright v. Sherwin-Williams Co*., No. 1:17 CV 251, 2019 WL 5307068, at *17 (N.D. Ohio Jan. 29, 2019) (declining to strike claims under theory that the differences in state laws precluded class certification for a nationwide class and potential separate state law classes); *Allen v. Andersen Windows, Inc*., 913 F. Supp. 2d 490, 516 (S.D. Ohio 2012) (declining to strike class allegations despite court's "serious doubts" as to the Plaintiff's ability to certify a class: "the Court deems it prudent to assess the propriety of class certification in the context of a fully briefed class certification motion rather than in the context of a motion to strike class claims at the pleading stage").

In any event, courts have expressed doubts that differences in state law fraud principles are so great as to preclude class treatment. *See, e.g., Carder Buick-Olds Co*., 148 Ohio App.3d at 650 ("when courts are faced with common-law state claims such as fraud, negligent misrepresentation, and negligence, they have expressed doubts that differences in state laws are so great as to preclude class treatment" (citing *In re Revco Sec. Litig*., 142 F.R.D. 659, 666 (N.D. Ohio 1992)); *Todd v. XOOM Energy Maryland, LLC*, No. GJH-15-154, 2020 WL 4784767, at *13 (D. Md. Aug. 18, 2020) ("[T]he Court is satisfied that the common law of fraud is sufficiently similar in each jurisdiction to avoid defeating predominance."); *Ebin v. Kangadis Food Inc*., 297 F.R.D. 561, 570 (S.D.N.Y. 2014) ("[A] survey of potentially applicable state laws reveals no material difference that would affect the merits of the class's common law [fraud] claims at trial; elements of the common law of fraud are sufficiently similar across jurisdictions where [the product] was sold"); *Rodriguez v. It's Just Lunch, Int'l*, 300 F.R.D. 125, 141 (S.D.N.Y. 2014) (certifying nationwide fraud class action, noting similarity of elements of all states' fraud laws).

Similarly, "courts disagree as to whether states' unjust enrichment laws vary to any significant degree." *Kimber Baldwin Designs, LLC*, 2016 WL 10520133, at *5 (denying motion to strike unjust enrichment class allegations). *See also Hoving v. Lawyers Title Ins. Co*., 256 F.R.D. 555, 568 (E.D. Mich. 2009) (finding "few real differences" between the states' unjust enrichment laws); *In re Cardizem CD Antitrust Litig*., 218 F.R.D. 508, 518 (E.D. Mich. 2003) (characterizing the standards of unjust enrichment around the country as "virtually identical"); *In re Terazosin Hydrochloride*, 220 F.R.D. 672, 697 n.40 (S.D. Fla. 2004) (similar). And even those courts that have found significant variation among some states' unjust enrichment laws agree that such variations are not material where, as here, they do not "significantly alter the central issue of

manner of proof in the case." *Keilholtz v. Lennox Hearth Prod. Inc*., 268 F.R.D. 330, 341 (N.D. Cal. 2010) (certifying multistate unjust enrichment class).

Notably, Plaintiffs specifically reserved the right in their complaint to modify the class definitions upon the conclusion of discovery. ¶124. Because Plaintiffs may ultimately move to certify a class encompassing some but not all states – such as one consisting solely of states with compatible laws to support certification under Rule 23 – the issues Defendant raises regarding differences in states' fraud and unjust enrichment law may never materialize. *See Kimber Baldwin Designs, LLC*, 2016 WL 10520133, at *6; *Bohlke v. Shearer's Foods, LLC*, No. 9:14-CV-80727, 2015 WL 249418, at *2 (S.D. Fla. Jan 20, 2015) (declining to strike nationwide class allegations and explaining that plaintiff reserved the right to modify the class definition and could ultimately move to certify a more limited class of compatible jurisdictions).

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Partial Dismissal and Motion to Strike Class Allegations [Doc. 30] should be denied.

DATED: May 27, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Jeffrey S. Goldenberg
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