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

JAMES ZILINSKY, GERALDINE ZILINSKY, CORY SIMPSON, MEGAN McGINLEY, SANDRA GARRETT DORSEY, BRIAN DERING, THERESA DERING, ALAN ARMSTRONG AND SANDY ARMSTRONG, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

LEAFFILTER NORTH, LLC,

Defendant.

CASE NO. 2:20-CV-6229-MHW-KAJ

JUDGE MICHAEL H. WATSON

DEFENDANT LEAFFILTER NORTH, LLC'S REPLY IN SUPPORT OF ITS 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' Opposition to Defendant's Motion to Dismiss and Strike [ECF No. 33] ("Opposition" or "Opp.") fails to meaningfully dispute that the OCSPA simply does not apply to claims which arise outside of Ohio. A choice of law provision on Defendant's website does not overcome this fundamental defect. Plaintiffs also wholly ignore fundamental policy concerns regarding binding absent class members to laws and remedies that would provide a more limited recovery than the consumer protection statutes adopted by their own state.

No matter how Plaintiffs attempt to reframe their implied warranty in tort claim, they are still pleading damage to property. The OPLA preempts this claim. And, even if not preempted by the OPLA, Plaintiffs' claims are preempted by Ohio's economic loss doctrine. Plaintiffs have proven that they will say anything to avoid dismissal of their claims, backtracking allegations of privity with Defendant and half-heartedly disclaiming damages they have every intention of pursuing. But Plaintiffs have pled themselves out of court on this issue. Moreover, Plaintiffs fail

to compellingly explain why this claim would ever be appropriate to pursue on a classwide basis given the breadth of their own varying experiences with Defendant's gutter systems.

Finally, under Federal Rule of Civil Procedure 23(c)(1)(A), a court is to decide the issue of whether a nationwide class of common law and unjust enrichment classes can be certified "as soon as practicable." There is no reason for the Court to delay holding the inevitable: nationwide classes are inappropriate in this context. Delay in striking these claims will only come at the great time and expense of Defendant and will waste judicial resources.

As explained more fully below, Defendant consequently requests that the Court dismiss Plaintiffs' OCSPA and implied warranty in tort claims under Rule 12(b)(6), with prejudice, and strike the Nationwide Class and Ohio Subclass claims under Rule 23(c)(1)(A).

II. THE OCSPA DOES NOT APPLY TO CONDUCT OUTSIDE OHIO, AND PLAINTIFFS' ARGUMENT THAT A CHOICE OF LAW PROVISION BINDS CONSUMERS TO OHIO CONSUMER PROTECTION LAW LACKS MERIT

A. Plaintiffs Fail to Overcome the Jurisdictional Limitations of the OCSPA

As set forth in Defendant's Motion, none of the named Plaintiffs are Ohio residents, and there is no dispute that their LeafFilter gutter systems were purchased outside of Ohio. (Am. Compl. ¶¶ 4-12). Yet Plaintiffs seek to represent an "Ohio Subclass" comprised primarily of out-of-state purchasers such as themselves who visited Defendant's website to register a warranty or submit a bid, under the website's choice of law provision. (Am. Compl. ¶ 136).

The choice of law provision does not alter the fact that the OCSPA gives them no cause of action: it does not apply to acts which occur outside of Ohio. *See* O.R.C. § 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); *Delahunt v. Cytodyne*

Tech., 241 F.Supp.2d 827, 839 (S.D. Ohio 2003) ("The clause that specifies that courts have jurisdiction over claims related to acts or practices 'in this state' indicates that 'the statute [OCSPA] is only applicable if the offending conduct took place within the territorial borders of the state of Ohio.'") (*citing Shorter v. Champion Home Builders Co.*, 776 F. Supp. 333, 338-39 (N.D. Ohio 1991).

Plaintiffs deflect from this obvious jurisdictional problem by claiming the Court must engage in a choice of law analysis. (Opp. at 5-9). In an attempt to pigeonhole their consumer protection claims within the OCSPA, Plaintiffs urge the Court to apply the choice of law clause from Defendant's website to anyone who submitted a product estimate or registered a product warranty. (*Id.*). But engaging in a choice of law analysis does not change the fact that Plaintiffs cannot state a claim under the OCSPA.

The OCSPA simply does not allow for out-of-state parties to bring claims for conduct which occurred outside of Ohio. This limitation exists for good reason. "No doubt, States have an independent interest in preventing deceptive or fraudulent practices by companies operating within their borders. But the State with the strongest interest in regulating such conduct is the State where the consumers—the residents protected by its consumer-protection laws—are harmed by it." *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011). Against this landscape, it is understandable why the Ohio legislature limited the OCSPA to acts or practices which occur solely within the borders of Ohio.

For the purposes of stating a claim under the OCSPA, the relevant inquiry is not what choice of law the parties agreed to in connection with the purchase at issue. Rather, the relevant inquiry is whether the conduct alleged in Plaintiffs' Amended Complaint occurred in Ohio, or occurred elsewhere. Courts uniformly hold that where the allegedly offensive representations

were received and relied upon is where the offending conduct occurred for OCSPA purposes. *See Delahunt*, 241 F.Supp.2d at 839 ("Accordingly, the Sales Act claims asserted on behalf of proposed class members whose purchase of Xenadrine RFA–1 did not take place in Ohio are barred by the jurisdictional provision of the statute."); *Pilgrim v. Universal Health Card, LLC*, 5:09CV879, 2010 WL 1254849, at *3 (N.D. Ohio Mar. 25, 2010), *aff'd*, 660 F.3d 943 (6th Cir. 2011) (granting motion to strike a nationwide class of consumers in a false advertising case under the OCSPA because "[i]t is undisputed that the place of injury for these actions is the home state of the individual class members."); *Loreto v. Proctor & Gamble Co.*, 737 F.Supp.2d 909, 917 (S.D.Ohio 2010), *aff'd in relevant part* 515 Fed. Appx. 576, 578 (6th Cir. 2013) (class representatives who purchased the offending product in New Jersey "have no standing to pursue claims under the OCSPA"). Here, Plaintiffs do not dispute that the conduct for each and every named Plaintiff occurred outside of Ohio. This is fatal to stating a claim under the OCSPA.

In support of their argument that the OCSPA is not limited to conduct that occurred within the borders of Ohio, Plaintiffs rely on *Concheck v. Barcroft*, 2:10-CV-656, 2011 WL 3359612, at *2 (S.D. Ohio Aug. 3, 2011) and *Adelman's Truck Parts Corp. v. Jones Transp.*, 5:17CV2598, 2019 WL 1242837, at *2 (N.D. Ohio Mar. 17, 2019). But neither case suggests that an out-of-state party can broaden the reach of the OCSPA beyond that of what the legislature intended. In *Concheck*, the court held that a consumer protection claim should be brought under Michigan law, since the consumer transaction at issue (involving a wire transfer which occurred in Michigan) was subject to an agreement with the Michigan choice of law provision, and the parties both had a substantial relationship to Michigan. 2011 WL 3359612, at *7 (S.D. Ohio Aug. 3, 2011). This case did not involve a plaintiff from outside of Ohio attempting to bring a claim under the OCSPA. *Id.* In *Adelman's Truck Parts*, the court similarly held that Ohio law

applied to a transaction where the defendant signed and agreed to a contract with an Ohio choice of law provision. 2019 WL 1242837, at *2. But it was not clear from the decision where the parties were located. *Id*. The decision did not at all address the jurisdictional limitations of the OCSPA, either. *Id*. The court merely held that a claim could not be asserted under the North Carolina Unfair Business Practices Act, where the agreement for the sale of the good at issue contained an Ohio choice of law provision. *Id*.

Plaintiffs also seek to counter the clear logic of *Pilgrim* by claiming that the OCSPA should be "liberally construed." (Opp. at p. 10). To Plaintiffs, this liberal construction means that courts should apply the OCSPA to extraterritorial conduct in spite of plain language stating that the statute's reach is limited to conduct within Ohio's borders. Plaintiffs cite a single case, *Brown v. Mkt. Dev. Inc.*, 41 Ohio Misc. 57 (Ohio Com. Pl. 1974), in support of this argument. In *Brown*, the court held that the Attorney General of Ohio should be able to enjoin Ohio companies from mailing deceptive materials to consumers outside of Ohio. *Id*. at 59. Defendant had argued that it should only be enjoined from sending deceptive mailers to residents of Ohio, but that it should not be enjoined from sending the same deceptive mailers outside of Ohio. *Id*.

The *Brown* decision is readily distinguishable. It concerned the regulation of the conduct of an Ohio business in a suit brought by the Ohio Attorney General. *Id*. at 57. But this decision has no bearing on whether an out-of-state plaintiff can bring a cause of action under the OCSPA for the out-of-state conduct of an Ohio defendant. Since *Brown*, the Sixth Circuit twice declined to follow *Brown* as it applied to non-Ohio consumers attempting to assert claims under the OSCPA. *See Pilgrim*, 660 F.3d at 947; *Loreto v. Procter & Gamble Co.*, 515 Fed. Appx. 576, 578 (6th Cir. 2013). Plaintiffs therefore fail to set forth a compelling argument that any authority has expanded the OCSPA allow non-Ohio parties to sue a defendant for non-Ohio conduct.

B. Contrary to Plaintiffs' Assertion, Courts Do Not Apply Choice of Law Provisions to Consumer Protection Claims Due to Overwhelming Policy Concerns

Defendant previously identified the overwhelming policy considerations at issue when binding absent class members to the consumer protection law of that other than their home jurisdiction. (*See* Motion, pp. 16-17). Plaintiffs nonetheless advance that law a choice of law provision in a contract will override any state policy concerns. (Opp. at 8-9). Yet this is exactly the type of analysis *Pilgrim* cautioned against. *Pilgrim*, 660 F.3d at 946-47. Plaintiffs also take the position that if they are not allowed to assert claims on behalf of the "Ohio Subclass," doing so would somehow "deprive" themselves and absent class members of the ability to bring a consumer protection claim in any jurisdiction. (Opp. at pp. 16). Of course, this is belied by the fact that each and every one of the named Plaintiffs has, in fact, also asserted claims under the state consumer protection statute of the state where they reside. (*See* Am. Compl., Counts III-VII). But setting aside this inconsistency, holding the law of the consumer's home jurisdiction applies to a consumer protection claim does not deprive any class member of his or her rights. In fact, the opposite is true.

Ample authority affirms that courts in other jurisdictions can and do override the chosen language of a choice of law provision in the context of a consumer class action, without depriving consumers of claims, since the state of a consumer has a vested interest in protecting its residents from unfair and deceptive trade practices. *See, e.g.*, *Kreger v. Gen. Steel Corp.*, CIV.A. 07-575, 2010 WL 2902773, at *14 (E.D. La. July 19, 2010) (refusing to apply Colorado choice of law provision to consumer class action where the availability of punitive damages and treble damages in some class members' home states, and their likely unavailability in Colorado, raised a policy concern so great that it trumped any choice of law provision); *see also Walter v. Hughes Communications, Inc.*, 682 F.Supp.2d 1031, 1042 (N.D.Cal.2010) ("Because the

[Maryland Consumer Protection Act] would limit Plaintiffs to compensatory damages, this Court finds that the choice-of-law provision in the Subscriber Agreement conflicts with a fundamental policy set down in California law"); *Murphy v. DirecTV, Inc.*, 2:07-CV-06465-FMC, 2008 WL 8611877, at *7 (C.D. Cal. May 9, 2008) (refusing to take judicial notice of a Georgia choice of law provision to foreclose on plaintiff's ability to state a claim under California consumer protection statutes where "the mere fact that the Agreement contains a choice-of-law provision does not foreclose factual challenges to its enforceability"). This is especially true where applicable consumer protection statutes do not provide consumers with equal remedies. (*Id.*).

Here, at least some consumers would recover less than they would under the consumer protection statutes adopted by their home jurisdictions, immediately raising a red flag of fundamental public policy concern. Under the OCSPA, consumers are not entitled to recover treble damages in a class action. *See* O.R.C. § 1345.09(B) ("Where the violation was an act or practice declared to be deceptive or unconscionable … the consumer may rescind the transaction or recover, ***but not in a class action***, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended."). But other consumer protection statutes, such as that of Washington, New Jersey, or Pennsylvania (where coincidentally the Armstrong, Dering and Garrett Dorsey Plaintiffs reside), place no such restrictions on the recovery of treble damages in the context of a class action. *See* R.C.W. §19.86.090 ("The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained[.]"; N.J.S.A. §56:8-19 ("In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained

by any person in interest."); 73 P.S. §201-9.2(a) ("The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper.")

Plaintiffs further offer no authority whatsoever to support their all-or-nothing proposition: class members must either bring their claims under Ohio law, or they have no claim at all. (Opp. at 15-17). The cases cited by Plaintiffs where courts outside Ohio upheld a choice of law provision in a consumer protection dispute are distinguishable because the vast majority arose in the context of individual claims, where a court only had to weigh the interests of two states. *See Adelman's Truck Parts*, 2019 WL 1242837; *DeJohn v. The TV Corp. Int'l*, 245 F. Supp.2d 913, 922 (N.D. Ill. 2013); *Simulado Software, Ltd. v. Photon Infotech Private, Ltd.*, 40 F.Supp.3d 1191 (N.D. Cal. 2014); *Shelton v. Munford, Inc.*, 660 F. Supp. 130 (N.D. Ind. 1987). In one consumer class action case cited by Plaintiffs where a court applied a Wisconsin choice of law provision to an extraterritorial class members' claims only did so after the court determined that the Wisconsin consumer protection statute (unlike the OCSPA) applied equally to out-of-state consumers in Illinois. *See Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399, 1414-15 (N.D. Ill. 1996). If it had not, the court undoubtedly would have allowed the claim to proceed under Illinois law, not deprived plaintiff and class members of a cause of action altogether. (*Id.*). The only other consumer class action case cited by Plaintiffs involved a proposed class of exclusively California consumers. *Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1163 (N.D. Cal. 2008). The court analyzed the difference between Utah and California consumer protection law, held there was no meaningful difference between these laws, and thus proceeded to hold that Utah law could be applied to the dispute. *Id.* None of these cases engaged in the more unwieldy analysis of comparing state consumer protection interests across

multiple jurisdictions. And none of these cases held a consumer lacked any consumer protection remedy under the law of ***any jurisdiction***.

Plaintiffs' attempted predictions regarding what law a court in an absent class members' home forum may apply to this dispute further underscores how this matter is not appropriate for classwide treatment. A court outside of Ohio can perform its own choice of law analysis, either holding that it should apply Ohio law, or (more possibly) determine that the overriding interests of its own jurisdiction's consumer protection statute should apply to the dispute. But an Ohio court holding that out-of-state consumers' claims must be governed by Ohio law deprives these states of making this determination. Due to these overwhelming state policy concerns, Plaintiffs have stated no compelling reason to bind absent, out-of-state class members to Ohio law.

C. Plaintiffs' Remaining Attempts to Explain Why the OCSPA Applies to their Claims Are Wholly Meritless

Plaintiffs raise several last-ditch arguments why the Court should ignore established authority holding that they cannot state a claim under the OCSPA. None have merit. Plaintiffs argue that the OCSPA is really a two-pronged statute that presents a court with binary, either/or grounds for jurisdiction: a court has jurisdiction with respect to either <u>any act or practice in this state</u>, ***or*** <u>any claim arising from a consumer transaction</u> subject to such sections. (Opp. at pp. 14-15). Plaintiff cites no authority for this interpretation, which defies logic as well as basic rules of statutory construction. If the Court were to adopt Plaintiffs' novel interpretation, any person could sue any Ohio business for any harm occurring anywhere in the country. Surely the Ohio legislature did not intend such a result.

Moreover, by limiting a court's jurisdiction to acts or practice "in this state," while simultaneously granting jurisdiction over "any claim arising from a consumer transaction" regardless of where it occurred, such an interpretation would render the words "in this

state" meaningless surplusage. It goes without saying that no "act or practice" subject to Ohio's consumer protection statute can occur without some sort of underlying consumer transaction. Plaintiffs' construction would thus violate the rule of statutory construction requiring a court to give each word in a statute meaning whenever possible. *See D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 2002-Ohio-4172, ¶ 26 ("Statutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." (internal citations & quotations omitted).

Plaintiffs further argue that by forcing consumers to file suit in Ohio under Ohio law by way of a choice of law provision Defendant's website, Defendant has engaged in violative activity taking place within Ohio. (Opp. at 15). Plaintiffs cite to no legal authority in support of this argument, and Defendant knows of none. This logic would run contrary to decisions holding that the mere fact that a business is located in Ohio and disseminates materials from Ohio does not give the consumer a claim under Ohio law. *Pilgrim*, 2010 WL 1254849, at *3 (N.D. Ohio Mar. 25, 2010) (striking nationwide class allegations under the OCSPA based on website advertisements emanating from Ohio); *Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 305–06 (2006) (rejecting argument an OCSPA claim applied to a business headquartered in Ohio whose written policies and procedures at issue emanated from Ohio).

III. THE OPLA PREEMPTS PLAINTIFFS' BREACH OF IMPLIED WARRANTY IN TORT CLAIM, AND AS A CLASS IS IMPERMISSIBLY OVERBROAD

A. The OPLA Preempts Plaintiffs' Implied Warranty in Tort Claim

Plaintiffs' claims for breach of implied warranty in tort are preempted by the OPLA. In relevant part, the OPLA preempts all product liability claims for "physical damage to property

other than the product in question." O.R.C. § 2307.71(A)(13).

In their initial Complaint, Plaintiffs demanded all damages stemming from the LeafFilter gutter system, including alleged property damage. (*See* Compl., ECF 1 at ¶ 101). To circumvent preemption by OPLA, Plaintiffs amended their pleading to drop any explicit mention of property damage. They now vaguely claim damages "including, but not limited to" the purchase price of the LeafFilter system, or, in the alternative, the difference in value between the LeafFilter gutter system as advertised and the LeafFitler gutter system as it was sold to them. (Am. Compl., ¶ 153). In opposition to Defendant's Motion, Plaintiffs argue that they seek "purely economic losses arising from their purchase of the defective LeafFilter product." (Opp., p. 19). But this is not so.

First, nowhere have Plaintiffs actually disclaimed their entitlement to recover property damage caused by the allegedly defective LeafFilter gutter systems.[1] Second, Plaintiffs' lack of transparency cannot prevail over the law. Where damages are the natural and proximate consequence of a defendant's conduct, they are general damages, and a plaintiff is not required to plead such damages with particularity. *See, e.g., Zlomsowitch v. East Penn Twp.*, 2012 WL 1569633, *6 (M.D. Pa. 2012) ("General damages, which are 'those elements of injury that are proximate and foreseeable consequences of the defendant's conduct,' may be 'alleged without particularity under Rule 8(a).'"); *Voelkel McWilliams Constr., LLC v. 84 Lumber Co.*, 2015 WL

[1] To the contrary, Plaintiffs represented in their Initial Disclosures on May 7, 2021—*after* Plaintiffs amended their Amended Complaint omitting reference to property damage and *after* Plaintiffs moved to dismiss this Count on the basis that it was preempted by the OPLA—that they are seeking, *inter alia*, "any out-of-pocket expenses for repairs or attempted repairs attributable to the defect." *See* **Exhibit A** at p. 5. The Court should not reward Plaintiffs' lack of transparency regarding the relief they seek. The implied warranty in tort claim at issue should not be allowed to proceed to discovery merely because Plaintiffs amended their pleading to avoid an express demand for property damage—only to allow Plaintiffs to later seek damages in connection with this claim for any repairs or attempted repairs associated with the alleged defect.

1184046, *3 (E.D. La. 2015) ("[D]elay to construction and the associated costs would not constitute special damages, as delayed construction is a foreseeable consequence of a subcontractor's refusal to perform promised work."); *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1226 (7th Cir. 1995) (Special damages "are damages that are unusual for the type of claim in question—that are not the natural damages associated with such a claim.").

Here, Plaintiffs claim that the LeafFilter gutter systems they purchased allegedly caused water to leak onto their property, or allowed debris to accumulate which caused water to leak onto their property. The natural, proximate consequence of a defective gutter system is property damage, not economic losses for "damage to the property in question" (*i.e.*, the LeafFilter gutter systems). (Opp. at 18). The only logical reason Plaintiffs (or any consumer) would uninstall or replace a defective gutter system that was causing water to accumulate is to avoid property damage. Therefore, Plaintiffs' claim is still preempted under the OPLA, regardless of whether Plaintiffs expressly plead property damage as a remedy sought.

As for the named Plaintiffs, the Zilinsky Plaintiffs (after initially seeking property damage in their initial Complaint) plead that their gutters suffered no damage whatsoever and are currently being stored in their garage. (Am. Compl., ¶ 5). The Simpson/McGinley Plaintiffs similarly allege that their gutter system is being stored in their garage and make no allegation that the LeafFilter gutter system itself suffered damage, instead pleading that their basement was in danger of flooding when water accumulated at the foundation of their home. (Am. Compl., ¶ 80). Plaintiff Garrett Dorsey does not allege that the LeafFilter system is damaged; she alleges the problem with the gutters is that water overflowed from them and accumulated at her front door. (Am. Compl, ¶ 87). The Dering Plaintiffs do not allege damage to the gutter system, but instead they complain that water overflows from the gutters and debris collects on top of the

gutters. (Am. Compl., ¶ 100). The Armstrong Plaintiffs do not complain that the gutter itself is damaged and similarly complain that they also suffered overflow and debris issues, and ultimately uninstalled the gutters. (Am. Compl., ¶ 110). Fundamentally, these are claims for property damage (however *de minimis*) rather than damage to a gutter system. As a result, these claims are preempted by the OPLA.

Defendant also explained in its Motion why these property damage claims are uncertifiable—every home is different. (*See* Motion, pp. 21-24). To overcome this issue, Plaintiffs make the unwarranted and implausible inference that each and every consumer who purchased a LeafFilter gutter system suffered the exact same harm due to a defect in the gutter system. (Opp. at 22). Plaintiffs argue that this avoids a "no injury" consumer class. (*Id.*). But asking the Court to suspend disbelief and find that each and every consumer suffered only economic harm (and at that, the same type of harm) is facially implausible.

Plaintiffs plead that as many as 668,750 households installed a LeafFilter gutter system. (Am. Compl., ¶ 29). A cursory examination of Plaintiffs' own circumstances reveals that they fail to take into account how implausible it is that all customers suffered the exact same alleged defect. For instance, the Zilinsky Plaintiffs allege that they were told their roof pitch impacted the efficacy of the gutter system. (Am. Compl, ¶ 61). Plaintiff Garrett Dorsey alleges that LeafFilter installed an additional shield to prevent flooding water from accumulating on her property. (Am. Compl. ¶ 87). The Simpson/McGinley Plaintiffs' foundation and potentially the basement was allegedly impacted by flooding from the gutter system. (Am. Compl., at ¶ 77). Each of these Plaintiffs' circumstances are different because everyone's home is different. Naturally, a consumer who does not have vegetation surrounding a property is not going to complain about gutters becoming clogged with pine needles as the Armstrong Plaintiffs and

Simpson-McGinley Plaintiffs do. (Am. Compl., ¶¶ 75 & 109). Named Plaintiffs plead varying circumstances regarding their experience with the product, and factors such as the slope of a roof, the condition of a roof, the vegetation surrounding a property, and the climate where the LeafFilter gutter system is installed will impact whether and to what extent any alleged "defect" manifested. It simply cannot be that "all" purchasers of a LeafFilter gutter system shared Plaintiffs' experiences. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir.2006) ("The class must therefore be defined in such a way that anyone within it would have standing."); *Miller v. Univ. of Cincinnati*, 241 F.R.D. 285,288 (S.D. Ohio 2006) ("A proposed class may be deemed overly broad if it 'would include members who have not suffered harm at the hands of the Defendant and are not at risk to suffer such harm.'") (quoting *McGee v. East Ohio Gas Co.*, 200 F.R.D. 382,388 (S.D. Ohio 2001)).

B. Plaintiffs Are in Privity with Defendant and Their Claims Are Barred by the Economic Loss Doctrine

Equally doomed are Plaintiffs' arguments regarding the applicability of the economic loss doctrine. In Ohio, it is well established that a plaintiff cannot assert a cause of action in tort for pure economic losses in connection with a defective product. *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's Ents., Inc.*, 2015-Ohio-4884, ¶ 26 ("Under the economic loss rule, plaintiffs who have only suffered an economic loss from a defective product—defined as losses attributable to the decreased value of the defective product itself (direct economic loss) and consequential losses by the purchaser of the defective product (indirect economic loss)—cannot recover economic losses premised on tort theories of recovery.") (*citing Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40 (1989)). This includes implied warranty in tort claims. *See Chemtrol*, 42 Ohio St. 3d at 50 ("It is clear, then, that the doctrine of implied warranty in tort must be limited in its applicability. Otherwise, unlimited application of the

doctrine would emasculate the Uniform Commercial Code provisions dealing with products liability.")

As set forth above, Plaintiffs went out of their way to show that they seek solely economic losses in connection with the allegedly defective LeafFilter gutter systems. Consequently, their claim is preempted by the economic loss doctrine.

To avoid dismissal under the economic loss doctrine, Plaintiffs now claim that a question of fact exists regarding whether Plaintiffs are actually in privity with LeafFilter. (Opp. at 25-26). But Plaintiffs pled themselves out of court on this issue. Courts recognize that privity exists between a manufacturer and an ultimate consumer if that manufacturer "is so involved in the sales transaction that the distributor merely becomes the manufacturer's agent". *Norcold, Inc. v. Gateway Supply Co.*, 2003-Ohio-4252, ¶ 38; *see also Bobb Forest Products, Inc. v. Morbark Indus., Inc.*, 2002-Ohio-5370, ¶ 57 ("However, when the manufacturer is so involved in the sales transaction that the distributor merely becomes the agent of the manufacturer, then the manufacturer and the ultimate consumer are in privity of contract.").

Plaintiffs allege that LeafFilter is the exclusive distributor and installer of the LeafFilter gutter system, and that LeafFilter owned, dominated, and/or controlled any company that installed the LeafFilter gutter system on their homes. (Am. Compl. at ¶ 19). Plaintiffs further assert this claim on behalf of the "Ohio Subclass" based on the fact that they entered into a contract with Defendant. (Am. Compl. at ¶ 136 & Count II). Plaintiffs cannot now divorce themselves from their clear admissions of privity to avoid dismissal of this claim.

IV. PLAINTIFFS FAIL TO SET FORTH WHY THEIR FRAUD OR UNJUST ENRICHMENT CLAIMS SHOULD SURVIVE OTHER THAN TO ARGUE THE CASE IS IN ITS INFANCY

Plaintiffs asserted two nationwide class claims: "fraud and fraudulent concealment" and unjust enrichment. (*See* Am. Compl., Counts VIII and IX). Defendant set forth in its Motion

why both claims are facially untenable due to the differing law of the 42 states where absent class members reside. (Motion, pp. 26-30).

Plaintiffs argue that their fraud and unjust enrichment claims should not be stricken for two reasons. First, Plaintiffs allege that this challenge "violates" the Court's standing order because the Court prefers motions to strike to remain limited to the reasons set forth in Rule 12(f). (Opp., p. 28). Second, Plaintiffs argue that any choice of law analysis is premature and should not be resolved until class certification. (Opp., p. 28-29). Both arguments lack merit.

Defendant respects this Court's Standing Order and its guidance regarding motions to strike. However, Defendant followed the guidance set forth in Rule 23(c)(1)(A) and brought this argument before the Court as soon as practicable. While Rule 12(f) provides general guidance on facially striking pleadings, Rule 23(a) is the appropriate vehicle for striking specific class allegations, which is why Defendant brought this challenge under Rule 23(c)(1)(A). *See, e.g., Amerine v. Ocwen Loan Servicing LLC*, 2:14-CV-15, 2015 WL 10906068, at *1-2 (S.D. Ohio Mar. 31, 2015) (Watson, J.) (highlighting the purposes of Rule 12(f) and Rule 23(c)(1)(A)).

Setting aside that Rule 23(c)(1)(A) is the appropriate federal rule in this context, there is nothing premature about Defendant's Motion. Specifically, Rule 23(c)(1)(A) states that a court "must" rule on class certification "[a]t an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). "Nothing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939–40 (9th Cir.2009); *see also Pilgrim*, 660 F.3d at 949 ("That the motion to strike came before the plaintiffs had filed a motion to certify the class does not by itself make the court's decision reversibly premature.").

It is well within this Court's power to strike facially deficient class allegations when discovery will not "alter" the putative class's "central defect." *Pilgrim*, 660 F.3d at 949 (affirming the district court's judgment striking class allegations and dismissing an action prior to discovery where the defect in the class action at issue involved "a largely legal determination" regarding numerous state laws that "no proffered factual development offer[ed] any hope of altering"). Consequently, courts within the Sixth Circuit routinely strike classwide allegations prior to discovery in circumstances where it is facially apparent that the class cannot be certified. *See, e.g., Sauter v. CVS Pharmacy, Inc.*, 2:13-CV-846, 2014 WL 1814076, at *9 (S.D. Ohio May 7, 2014); *Loreto v. Procter & Gamble Co.*, No. 1:09–cv–815, 2013 WL 6055401, at *6 (S.D. Ohio Nov.15, 2013); *Rikos v. Procter & Gamble Co.*, No. 1:11–cv–226, 2012 WL 641946, at *7 (S.D. Ohio Feb.28, 2012).

As made plain enough from the pleadings, Plaintiffs cannot establish commonality or predominance for either a common law fraud or unjust enrichment claim, no matter what discovery takes place. Plaintiffs have made no meaningful attempt to demonstrate that the common law of fraudulent misrepresentation is uniform among 42 states. Even a facial examination of just a handful of state laws indicates there will be varying nuances among the common law of different jurisdictions, which have developed their own long-standing jurisprudence on issues such as burdens of proof, reliance, and materiality for fraud claims. *Compare, e.g., Diblik v. Marcy*, 166 P.3d 23, 28 (Alaska 2007) ("plaintiff in a misrepresentation case bears the burden of establishing by a preponderance of the evidence that the misrepresentation was material") *with Comerica Bank v. Mahmoodi*, 229 P.3d 1031, 1033-34 (Ariz. Ct. App. 2010) ("A claim for fraud requires proof of nine elements by clear and convincing evidence"); *see also Zimmerman v. Loose*, 162 Colo. 80, 87-88 (1967) (under

Colorado law, proof of reliance on a false statement is not required); *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill.2d 482, 221 (1996) (an element of common law fraud under Illinois law is the defendant's "knowledge that a representation is false at the time it is made") *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 333 (1982) (Maryland common law fraud requires either a representation that is made with knowing of falsity, or a statement that is made with "reckless indifference for the truth").

Similarly, Plaintiffs fail to address the actual, notable difference in the law of unjust enrichment pointed out in Defendant's opening brief. (*See* Motion, p. 30). Plaintiffs similarly ignore case law from this very Court holding that nationwide unjust enrichment classes should be stricken because there are many varying factors that would impact the validity of an unjust enrichment claim from jurisdiction to jurisdiction, including whether such a claim is even an independent cause of action. *Colley v. Procter & Gamble Co.*, 1:16-CV-918, 2016 WL 5791658, at *7 (S.D. Ohio Oct. 4, 2016) (Watson, J.) (holding "it was not the absence of state subclasses that doomed class allegations in *Pilgrim* but rather 'the key defect that the claims must be resolved under different legal standards.'") (*citing Pilgrim*, 660 F.3d 948).

Hoping to avoid these obvious variants in state laws, Plaintiffs argue that at the pleading stage they have no affirmative duty to demonstrate this lack of variance. But, when faced with a Rule 23(c)(1)(A) challenge, courts have held that it is Plaintiffs' burden to show that they can establish commonality and predominance. *Progressive Health & Rehab Corp. v. Quinn Med., Inc.*, 323 F.R.D. 242, 245 (S.D. Ohio 2017) ("Where a party files a motion to strike class action allegations, the plaintiff bears the burden of proving that Rule 23 has been satisfied.") (*citing In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) ("The party seeking the class

certification bears the burden of proof.")). Plaintiffs cannot keep these claims alive until class certification by ignoring the real and obvious differences among state common laws.

As a final matter, Plaintiffs argue that their classwide claims should not be stricken because they may later modify the definition of the classes. (Opp. at 31). Yet Plaintiffs offer no explanation of how further delay and expense associated with discovery will correct the deficiencies in their Amended Complaint. As discovery cannot remedy the apparent and fundamental flaws of the nationwide class allegations, this Court should follow the dictate of the federal rules to decide class certification at "an early practicable time" and strike the class allegations. Fed. R. Civ. P. 23(c)(1)(A). Courts within the Southern District of Ohio emphasize the utility of an early motion to strike when class allegations are facially deficient. *See, e.g., Amerine*, 2015 WL 10906068, at *2 ("This Court has specifically recognized its authority to strike class allegations prior to the close 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.") (*citing Loreto*, No. 2013 WL 6055401, at *2; *Sauter*, 2014 WL 1814076, at *2; *Pilgrim*, 660 F.3d at 949).

In sum, the individualized issues of law applicable to a nationwide class asserting claims of fraud or unjust enrichment preclude commonality and predominance of class issues. *See, e.g., Pilgrim*, 660 F.3d at 946 (affirming the decision to strike class allegations on the basis that it would be impossible to establish predominance due to vastly different state laws governing class members' claims); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a), (b)(3). Yet state laws about theories such as those presented by our plaintiffs differ, and such

differences have led us to hold that other warranty, fraud, or products-liability suits may not proceed as nationwide classes.") (collecting cases). The nationwide class claims may, therefore, be appropriately stricken at this time.

V. CONCLUSION

LeafFilter respectfully requests that the Court (i) dismiss Count I and II of Plaintiffs' Amended Complaint with prejudice; (ii) strike the classwide claims asserted on behalf of the Ohio Subclass for Counts I and II of Plaintiffs' Amended Complaint; (iii) strike the classwide claims asserted on behalf of the Nationwide Class for Count VIII and IX of Plaintiffs' Amended Complaint; and (iv) award all other relief the Court deems fair and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, a copy of the foregoing ***Defendant LeafFilter North, LLC's Reply in Support of Its 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)*** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Gregory J. Phillips
One of the Attorneys for Defendant
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