IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TINAMARIE BARRALES and MICHAEL WILIAMS, *individually and on behalf of all those similarly situated*, Plaintiffs, v. GHOST BEVERAGES LLC, and MONDELEZ INTERNATIONAL, INC., Defendants.	Case No.: 1:24-cv-1185

DEFENDANTS' MOTION TO STRIKE NATIONWIDE CLASS ALLEGATIONS

Defendants Ghost Beverages LLC and Mondelēz International, Inc. hereby move the Court for an order striking the nationwide class allegations from Plaintiffs' Complaint (Compl., ¶ 63.a, b.). Defendants' Motion is based upon Federal Rules of Civil Procedure 12(f) and 23(d)(1)(D). The grounds for Defendants' Motion are:

1. A court may strike class allegations where it is apparent from the pleadings that the proposed class cannot be certified. *See, e.g., Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *Donelson v. Ameriprise Financial Services, Inc.*, 999 F.3d 1080, 1092 (8th Cir. 2021); *Hill v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 817, 829 (N.D. Ill. 2013); *Cowen v. Lenny & Larry's, Inc.*, No. 17 CV 1530, 2017 WL 4572201, at *4 (N.D. Ill. Oct. 12, 2017).

2. The Court should strike the nationwide class allegations as to the unjust enrichment, negligent misrepresentation, and breach of express warranty claims (Counts V, VI and VII) because, under Illinois choice-of-law principles, those claims would be governed by the varying

laws of 50 different states, and "[n]o class action is proper unless all litigants are governed by the same legal rules." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2022).

The grounds for this motion are more fully set forth in the accompanying Memorandum of Law, filed concurrently herewith. This motion is based on this motion, the accompanying Memorandum of Law, the pleadings and papers filed in this action, and on such matters and arguments that may be presented to the Court at or before any hearing on this matter.

Dated: May 13, 2024

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CERTIFICATE OF SERVICE

I hereby certify that, on May 13, 2024, a copy of the foregoing document was filed electronically via the Court's CM/ECF system. 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.

/s/ William P. Cole
William P. Cole

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TINAMARIE BARRALES and MICHAEL WILIAMS, *individually and on behalf of all those similarly situated*, Plaintiffs, v. GHOST BEVERAGES LLC, and MONDELEZ INTERNATIONAL, INC., Defendants.	Case No.: 1:24-cv-1185

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO STRIKE NATIONWIDE CLASS ALLEGATIONS

I. INTRODUCTION

This case concerns the labeling of Defendant Ghost Beverages LLC's ("Ghost") energy drinks. Although the drinks' labeling expressly states that "THIS PRODUCT IS ONLY INTENDED FOR HEALTHY ADULTS, 18 YEARS OR AGE OR OLDER" and that the drinks contain 200mg of caffeine, Plaintiffs Tinamarie Barrales and Michael Williams allege they were supposedly misled to believe the energy drinks were "appropriate" for children. While they assert certain claims on behalf of proposed Illinois or California subclasses, they attempt to assert three claims—unjust enrichment, negligent misrepresentation, and breach of express warranty—on behalf of a proposed nationwide class.

Defendants Ghost and Mondelēz International, Inc. ("Defendants") have each moved to dismiss Plaintiffs' individual claims. This Motion to Strike addresses the Complaint's nationwide class allegations against both Defendants.

The Court should strike the nationwide class allegations as to the unjust enrichment, negligent misrepresentation, and breach of express warranty claims because, under Illinois choice-of-law principles, those claims would be governed by the varying laws of 50 different states. "No class action is proper unless all litigants are governed by the same legal rules." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2022). Courts within and without this District have repeatedly held that where these claims would be governed by the varying laws of the jurisdictions in which consumers made their purchases, a nationwide class cannot be certified.

Because this motion raises legal issues apparent from the face of the Complaint, the Court should grant the motion to strike.

/ / /

II. PLAINTIFFS' ALLEGATIONS

The accompanying Motions to Dismiss summarize the Complaint's allegations. (Dkts. 18-20.) Relevant here, Plaintiffs purport to bring their unjust enrichment, negligent misrepresentation, and breach of express warranty claims on behalf of a nationwide class. (Dkt. 1-1, Compl., pp. 22 – 24.) They define the proposed nationwide class as "[a]ll consumers that purchased Ghost energy drinks in the United States" from February 1, 2020, to the present. (*Id.* ¶¶ 62, 63.)

Plaintiff Barrales alleges she is a California citizen who resides in Los Angeles, California. (*Id.* ¶ 7.) Plaintiff Williams alleges he is an Illinois citizen who resides in Cook County, Illinois. (*Id.* ¶ 8.) Plaintiffs allege they made their purchases "at stores in Illinois and California." (*Id.* ¶ 22.) They allege Ghost markets its energy drinks "throughout the United States." (*Id.* ¶ 4.)

III. ARGUMENT

A. The Court Can and Should Strike Class Allegations at the Pleading Stage Where a Legal Issue Makes Clear the Case Cannot Proceed on a Nationwide Class Basis.

Plaintiffs' class allegations can be stricken at the pleading stage where, as here, it is apparent from Plaintiffs' Complaint that the class cannot be certified.

To proceed on a class basis, a complaint must plead the existence of a group of putative class members whose claims are susceptible of resolution on a class-wide basis. *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011) (holding the common issue of fact "must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke"). What matters is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers*. *Id.* The common questions must predominate over any questions affecting only individual members, and the class action must be

a "superior" means for adjudicating the claims, taking into account the "likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D).

A court may strike class allegations at the pleading stage when it is apparent from the pleadings that the proposed class cannot be certified. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim."); *Donelson v. Ameriprise Financial Services, Inc.*, 999 F.3d 1080, 1092 (8th Cir. 2021); *Hill v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 817, 829 (N.D. Ill. 2013); *Cowen v. Lenny & Larry's, Inc.*, No. 17 CV 1530, 2017 WL 4572201, at *4 (N.D. Ill. Oct. 12, 2017) ("District courts, both within this district and others, have held that a motion to strike class allegations . . . is an appropriate devise to determine whether the case will proceed as a class action."). "Indeed, the text of Rule 23 provides that the determination of whether a class should be certified must be made 'at an early practicable time,' which may be at the pleadings stage." *Kubilius v. Barilla America, Inc.*, No. 18 C 6656, 2019 WL 2861886, at *2 (N.D. Ill. 2019).

This is especially true "where a defendant raises a legal challenge to class certification" that discovery is unlikely to impact. *Id.*; *accord Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) (affirming district court's striking of class allegations, explaining: "The key reality remains: Their claims are governed by different States' laws, a largely legal determination, and no proffered or potential factual development offers any hope of altering that conclusion, one that generally will preclude class certification."); *Daly v. Glanbia Performance Nutrition, Inc.*, No. 23 C 933, 2023 WL 5647232, at *4 (N.D. Ill. Aug. 31, 2023) (granting motion to strike nationwide class allegations, observing the motion "raises questions of law and concerns

issues where additional discovery is unnecessary"); *Wright v. Family Dollar, Inc.*, No. 10 C 4410, 2010 WL 4962838, at *1 (N.D. Ill. Nov. 30, 2010).

As explained below, it is plain from the face of the Complaint that the unjust enrichment, negligent misrepresentation, and breach of express warranty claims cannot proceed on a nationwide class basis because those claims will be governed by the disparate laws of 50 states.

B. The Court Should Strike the Nationwide Class Allegations Because the Unjust Enrichment, Negligent Misrepresentation, and Breach of Express Warranty Claims Would be Governed by the Laws of All 50 States.

Plaintiffs' attempt to bring a putative nationwide class action fails because their common law claims would be required to be adjudicated under differing laws of multiple jurisdictions.

"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)." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2022). Where the claims will be governed by the laws of dozens of different jurisdictions, a nationwide class "is not manageable." *Id.* at 1018; *Kubilius*, 2019 WL 2861886, at *3. Holding otherwise would be impracticable, requiring the Court to adjudicate Plaintiffs' claims under the law of 48 states where Plaintiffs neither lived nor were injured.

Illinois applies the "most significant relationship test" to determine which state's substantive law governs class members' claims. *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 497 (S.D. Ill. 1999); *Kubilius*, 2019 WL 2861886, at *2. The two most important factors are the place where the injury occurred and the place where the conduct causing the injury occurred. *Clay*, 188 F.R.D. at 497.

Illinois law presumes that the law of the state where the injury occurred will govern unless another state has a more significant relationship to the occurrence or to the parties involved. *Clay*,

188 F.R.D. at 497. In cases involving alleged false advertising of a consumer product, courts have repeatedly held that, under Illinois choice-of-law principles, the claim is governed by the laws of the state in which the consumer viewed the advertisement and made the purchase. *See, e.g., id.* at 498 ("The plaintiffs also claim that their injury was the actual purchase of the cigarettes and the money spent on those purchases. Obviously this occurred at the location of each sale, and each sale occurred in one of 47 different states."); *Kubilius*, 2019 WL 2861886, at *1-2 (Illinois choice-of-law principles require application of the law of the state in which a class member purchased the pasta sauce bearing the "no preservatives" label statement); *Cowen*, 2017 WL 4572201, at *4; *Siegel v. Shell Oil Co.*, 256 F.R.D. 580, 585 (N.D. Ill. 2008) (the court must apply the law of the state "where consumers received and relied upon" the representations). Because Plaintiffs' proposed nationwide class is defined as all consumers who purchased "in the United States" (Dkt. 1, ¶ 63), and because Plaintiffs allege that Ghost sells its products *throughout* the United States (*id.* ¶ 4), "the claims of the absent class members will be governed by the laws of all fifty states and the District of Columbia." *Kubilius*, 2019 WL 2861886, at *2; *accord Cowen*, 2017 WL 4572201, at *4. And as explained below, there is no question that state laws differ materially with respect to unjust enrichment, negligent misrepresentation, and express warranty claims.

1. Unjust enrichment.

"The laws of unjust enrichment vary from state to state and require individualized proof of causation." *Clay*, 188 F.R.D. at 500. Even "the actual definition of 'unjust enrichment' varies from state to state. Some states do not specify the misconduct necessary to proceed, while others require that the misconduct include dishonesty or fraud." *Id.* at 501; *see also Forever 21, Inc. v. Seven Lions Inc.*, No. CV 12-1152-GW(VBKX), 2012 WL 12888694, at *2 (C.D. Cal. Oct. 18, 2012) (finding that cases under California law which permit unjust enrichment claims to proceed beyond

a motion to dismiss typically do so where the claim supports recovery by some other theory, such as restitution, quasi-contract, or fraud); *Macon Cnty., Ill. ex rel. Ahola v. Merscorp, Inc.*, 968 F. Supp. 2d 959, 966 (C.D. Ill. 2013), *aff'd sub nom. Macon Cnty., Ill. v. MERSCORP, Inc.*, 742 F.3d 711 (7th Cir. 2014) (finding that an unjust enrichment claim under Illinois law does not require an underlying claim of wrongdoing); *Harvell v. Goodyear Tire and Rubber Co.*, 164 P.3d 1028, 1036 (Okla. 2006) (the elements of unjust enrichment "differ markedly from state to state," including differences over whether, or what type of, misconduct is required). *See, e.g., DCB Construction Co., Inc. v. Central City Development Co.*, 965 P.2d 115, 119 (Colo. 1998) (holding that, under Colorado law, unjust enrichment requires a showing of improper, deceitful, or misleading conduct); *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. App. 1984) (holding that, under Minnesota law, unjust enrichment claims are allowed where the enrichment was "morally wrong"); *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999) (restitution for unjust enrichment permitted even when defendant "is not a wrongdoer"); *Thompson v. Bayer Corp.*, No. 4:07CV00017, 2009 WL 362982, at *4 (E.D. Ark. Feb. 12, 2009) ("Arkansas plaintiffs do not have to prove any misconduct on the part of the defendant in an unjust enrichment action.").

State laws vary on whether the equitable defense of unclean hands is available with respect to an unjust enrichment claim, and "[t]hose states that permit a defense of unclean hands vary significantly in the requirements necessary to establish the defense." *Clay*, 188 F.R.D. at 501; *see, e.g., Polverari v. Peatt*, 29 Conn. App. 191, 614 A.2d 484, 490 (1992) (requiring that the defendant demonstrate that the plaintiff engaged in "willful misconduct"); *Dennett v. Kuenzli*, 130 Idaho 21, 936 P.2d 219, 225 (1997) (a court may deny a plaintiff equitable relief if the plaintiff's conduct has been "inequitable, unfair, and dishonest"); *Tai v. Broche*, 115 A.D.3d 577, 578, 982 N.Y.S.2d

463 (1st Dept. 2014) (doctrine of unclean hands is not an available defense if the defendants were "willing wrongdoers").

Some states do not require the enrichment to have come directly from the plaintiff. *See, e.g., Thompson*, 2009 WL 362982, at *5 (in Arkansas, the enrichment may come from a third party). Other states require a direct benefit to the defendant from the plaintiff. *See, e.g., Sperry v. Crompton Corp.*, 26 A.D.3d 488, 489, 810 N.Y.S.2d 498 (N.Y.A.D. 2 Dept. 2006) ("Because the plaintiff was not in privity with the defendants, the plaintiff cannot maintain an action against them to recover damages for unjust enrichment."); *Effler v. Pyles*, 94 N.C. App. 349, 380 S.E.2d 149, 152 (N.C. Ct. App. 1989).

The statutes of limitations for unjust enrichment claims also vary widely from state to state. *See, e.g., Focus 15, LLC v. NICO Corp.*, No. 21-CV-01493-EMC, 2022 WL 267441, at *11 (N.D. Cal. Jan. 28, 2022) (California: two years if grounded on a quasi-contract theory, three years if grounded in fraud, and four years if derived from a written contract); *Tartan Constr., LLC v. New Equip. Servs. Corp.*, No. 17-CV-5950, 2018 WL 4563079, at *2 (N.D. Ill. Sept. 24, 2018) (Illinois: five years); *The Hoag Living Trust dated February 4, 2013 v. Hoag*, 292 Or.App. 34, 424 P.3d 731, 44 (Or. Ct. App. 2018) (Oregon: six years if based on implied contract but two years if "grounded in tort"); *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wash.2d 824, 837-38, 991 P.2d 1126 (2000) (Washington: three years); *Sevast v. Kakouras*, 591 Pa. 44, 915 A.2d 1147, 1153 (2007) (Pennsylvania: four years); *Mobil Producing Texas & New Mexico, Inc. v. Cantor*, 93 S.W.3d 916, 919 (Tex. Ct. App. 2002) (Texas: two years). In some states, unjust enrichment is not subject to a statute of limitations at all but is instead subject only to the doctrine of laches. *See, e.g., Connecticut General Life Ins. Co. v. BioHealth Labs., Inc.*, 988 F.3d 127, 134

(2d Cir. 2021) (Connecticut law); *Suburban Motors of Grafton, Inc. v. Forester*, 134 Wis.2d 183, 187, 396 N.W.2d 351 (Ct. App. 1986) (Wisconsin law).

In sum, "unjust enrichment is a tricky type of claim that can have varying interpretations even by courts within the same state, let alone among the fifty states." *In re Sears, Roebuck & Co.*, 2006 WL 3754823, at *1 n.3 (N.D. Ill. 2006).[1] "Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class *is not manageable*." *Bridgestone/Firestone*, 288 F.3d at 1018 (emphasis added); *see also In re GMC Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 324 (S.D. Ill. 2007) ("The Seventh Circuit Court of Appeals has warned repeatedly in recent years against . . . unwieldy multistate classes, holding that the difficulties inherent in applying the laws of numerous states to the class claims defeat both predominance and manageability."); *Daly*, 2023 WL 5647232, at *4 (granting motion to strike nationwide class allegations as to unjust enrichment claim).

2. Express Warranty.

"Express warranty law also varies across the 50 states" and "the differences in the states' express warranty law is [sic] material." *Darisse v. Nest Labs., Inc.*, No. 14-cv-01363-BLF, 2016 WL 4385849, at *11, 12 (N.D. Cal. Aug. 15, 2016). For example, Arizona, Connecticut, Illinois,

[1] *Accord Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012) ("the elements necessary to establish a claim for unjust enrichment vary materially from state to state"), *overruled on other grounds in Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022); *Yarger v. ING Bank, Fsb*, 285 F.R.D. 308, 324-25 (D. Del. 2012) (numerous courts have held that states' unjust enrichment laws vary materially, defeating predominance); *Vulcan Golf, LLC v. Google, Inc.*, 254 F.R.D. 521, 532-33 (N.D. Ill. 2008) (same); *Siegel v. Shell Oil Co.*, 256 F.R.D. 580, 583-85 (N.D. Ill. 2008) (same); *In re Conagra Peanut Butter Products Liab. Litig.*, 251 F.R.D. 689, 698 (N.D. Ga. 2008) (same).

Iowa, Kentucky, New York, Tennessee, and Vermont require privity, while Alaska, Colorado, Louisiana, Michigan, Nebraska, New Jersey, Ohio, Pennsylvania, Texas, and Washington do not.[2]

"The reliance element for a breach of express warranty claim also differs across the states." *Darisse*, 2016 WL 4385849, at *11. Kentucky, Oklahoma, New Hampshire, New York, Florida, Mississippi, and Rhode Island require a showing of actual reliance.[3] Idaho, Kansas, and Virginia do not require reliance. *Jensen v. Seigel Mobile Homes Group*, 668 P.2d 65, 71 (Idaho 1983); *Young & Cooper, Inc. v. Vestring,* 521 P.2d 281, 291 (Kan. 1974); *Daughtrey v. Ashe*, 413 S.E.2d 336, 339 (Va. 1992). In California, reliance is required where the plaintiff is not in privity. *Watkins v. MGA Entertainment, Inc.*, 574 F. Supp. 3d 747, 758 (N.D. Cal. 2021).

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[2] *See Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 289 (Alaska 1976); *Flory v. Silvercrest Indus. Inc.*, 633 P.2d 383, 387 (Ariz. 1981); *American Safety Equip. Corp. v. Winkler*, 640 P.2d 216, 221 (Colo. 1982); *Fraiser v. Stanley Black & Decker, Inc.*, 109 F. Supp. 3d 498, 506 (D. Conn. June 15, 2015); *Manley v. Hain Celestial Group, Inc.*, 417 F. Supp. 3d 1114, 1125 (N.D. Ill. 2019); *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 107 (Iowa 1995); *Berger v. Standard Oil Co.*, 126 Ky. 155, 103 S.W. 245, 245 (1907); *Media Prod. Consultants, Inc. v. Mercedes-Benz of N.A., Inc.*, 262 La. 80, 90, 262 So.2d 377 (1972); *Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp.*, 284 Mich. App. 617, 774 N.W.2d 332, 343 n.12 (2009); *Peterson v. North Am. Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625, 631 (1984); *Alloway v. Gen. Marine Indus., L.P.*, 149 N.J. 620, 642, 695 A.2d 264 (N.J. 1997); *Klausner v. Annie's, Inc.*, 581 F. Supp. 3d 538, 550 (S.D.N.Y. 2022); *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 758 (N.D. Ohio 2010); *Whyte v. Stanley Black & Decker, Inc.*, 514 F. Supp. 3d 684, 707 (W.D. Pa. 2021); *Gregg v. Y.A. Co. Co., Ltd*, 2007 WL 1447895, at *6 (E.D. Tenn. May 14, 2007); *U.S. Tire-Tech, Inc. v. Borean, B.V.*, 110 S.W.3d 194, 198 (Tex. Ct. App. 2003); *Vermont Plastics, Inc. v. Brine, Inc.*, 824 F. Supp. 444, 454 (D. Vt. 1993); *Fortune View Condo. Ass'n v. Fortune Star Dev. Co.*, 151 Wash.2d 534, 541 (2004).

[3] *See Overstreet v. Norden Labs., Inc.*, 669 F.2d 1286, 1291 (6th Cir. 1982); *Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395, 397 (10th Cir. 1967); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 680 (D.N.H. 1972); *State Farm Ins. Co. v. Nu Prime Roll-A-Way of Miami*, 557 So.2d 107, 109 (Fla. Dist. Ct. App. 1990); *Rowan v. Kia Motors America, Inc.*, 16 So.3d 62, 64 (Miss. Ct. App. 2009); *Colpitts v. Blue Diamond Growers*, 527 F.Supp.3d 562, 589 (S.D.N.Y. 2021); *Thomas v. Amway Corp.*, 488 A.2d 716, 720 (R.I. 1985).

Notice requirements also differ. Arkansas, Florida, Illinois, Texas, and Wyoming require pre-suit notice.[4] In California and Colorado, notice must be given to the seller, but not to a manufacturer with whom the plaintiff has not dealt. *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810, 817 (N.D. Cal. 2014); *Cooley v. Big Horn Harvestore Systems, Inc.*, 813 P.2d 736, 741 (Colo. 1991). In Georgia, service of the suit may be reasonable notice. *Terrill v. Electrolux Home Products, Inc.*, 753 F. Supp. 2d 1272, 1287 (S.D. Ga. 2010).

The statutes of limitation also vary from state to state. *See, e.g.,* Colo. Rev. Stat §§ 4-2-725(1), 13-80-101 (three years); NC ST § 1-52 (three years); Cal. Com. Code § 2725 (four years); N.J. Stat. Ann. § 12A:2-725 (four years); Fla. Stat. § 95.11(2)(b) (five years).

Considering the material differences in express warranty law among the states, courts have repeatedly held that express warranty claims are not amenable to nationwide class treatment. *See, e.g., Cowen*, 2017 WL 4572201, at *4-5; *In re General Motors Corp. Dex-Cool Products Liability Litigation*, 241 F.R.D. 305, 324 (S.D. Ill. 2007) ("In view of the significant variations with respect to the laws of warranty among the states in the proposed class, the Court's path is clear."); *Darisse*, 2016 WL 4385849, at *12, 15.

3. Negligent Misrepresentation.

Negligent misrepresentation law also varies materially among the states. "The most obvious variation—which, in itself, is enough to deny [nationwide] class certification—is that not every State recognizes the tort of negligent misrepresentation, and some states only recognize it under certain circumstances." *Hughes v. The Ester C Company*, 317 F.R.D. 333, 352 (E.D.N.Y.

[4] *Cotner v. Int'l Havester Co.*, 545 S.W.2d 627, 630 (Ark. 1977); *Valiente v. Unilever United States, Inc.*, No. 22-21507, 2022 WL 18587887, at *16 (S.D. Fla. Dec. 8, 2022); *Gardner v. Ferrara Candy Co.*, No. 22-cv-1272, 2023 WL 4535906, at *8 (N.D. Ill. Mar. 22, 2023); *U.S. Tire-Tech*, 110 S.W.2d at 199; *Western Equipment Co., Inc. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 811 (Wy. 1980).

2016). Arkansas does not recognize negligent misrepresentation. *South County v. First W. Loan Co.*, 871 S.W.2d 325, 326 (Ark. 1994). Idaho does not recognize it "except in the narrow confines of a professional relationship involving an accountant[.]" *Duffin v. Idaho Crop Imp. Ass'n*, 895 P.2d 1195, 1203 (Idaho 1995). Virginia "does not recognize a general cause of action for negligent misrepresentation," except as "an action for constructive fraud." *Zaklit v. Global Linguist Solutions, LLC*, No. 14cv314, 2014 WL 3109804, at *19 (E.D. Va. July 8, 2014); *Smith v. Flagstar Bank*, No. 14cv741, 2015 WL 1221270, at *5 (E.D. Va. Mar. 17, 2015). Indiana recognizes negligent misrepresentation "in the limited context of an employer-employee relationship." *Bledsoe v. Capital One Auto Finance*, No. 14-cv-02109-SEB-DML, 2016 WL 1270206, at *8 (S.D. Ind. Mar. 31, 2016).

Among states that recognize negligent misrepresentations more generally, "laws differ dramatically regarding whether and when the economic loss rule operates to bar negligent misrepresentation claims." *In re Amla Litig.*, 282 F. Supp. 3d 751, 762 (S.D.N.Y. Oct. 24, 2017). For example, Illinois, Kansas, and New York generally bar negligent misrepresentation claims that seek to recover only economic losses. *See Manley v. Hain Celestial Group, Inc.*, 417 F. Supp. 3d 1114, 1120 (N.D. Ill. 2019); *Ritchie Enterprises v. Honeywell Bull, Inc.*, 730 F. Supp. 1041, 1052 (D. Kan. 1990); *Stern v. Electrolux Home Products, Inc.*, No. 22-CV-3679, 2024 WL 416495, at *14 (E.D.N.Y. Jan. 30, 2024).

Furthermore, some states—including California—require a positive assertion of fact, not merely an implied representation or omission. *See, e.g., SI 59 LLC v. Variel Warner Ventures, LLC*, 29 Cal. App. 5th 146, 154 (2018); *Flanagan Lieberman Hoffman & Swaim v. Transamerica Life and Annuity Co.*, 228 F. Supp. 2d 830, 851 (S.D. Ohio 2002). In contrast, an implied representation may support a negligent misrepresentation claim in Massachusetts. *See In re TJX*

Companies Retail Sec. Breach Litigation, 524 F. Supp. 2d 83, 91 (D. Mass. 2007). Pennsylvania permits omissions to suffice where "the defendant has previously spoken on an issue, and upon learning that he was incorrect, he fails to correct his statement." *State Coll. Area Sch. Dist. v. Royal Bank of Canada*, 825 F. Supp. 2d 573, 589 (M.D. Pa. 2011).

The statutes of limitation vary widely among the states, ranging from one to six years. *See, e.g., Ethyl Corp. v. Gulf States Utilities, Inc.*, 836 So.2d 172, 178 (La. Ct. App. 2002) (Louisiana: one year); Ariz. Rev. Stat. § 12-542 (two years); Cal. Civ. Proc. Code § 339(1) (two years); *Hydrogen Master Rights, Ltd. v. Weston*, 228 F. Supp. 3d 320, 336 n.11 (D. Del. 2017) (Delaware: three years); *Pucci v. Litwin*, 828 F. Supp. 1285, 1299 (N.D. Ill. 1993) (Illinois: five years); *Au v. Au*, 63 Haw. 210, 217-218 (1981) (Hawaii: six years).

Not surprisingly, courts have held negligent misrepresentation claims are not amenable to nationwide class treatment. *See, e.g., Cowen*, 2017 WL 4572201, at *4-5 (granting motion to strike nationwide class allegations as to negligent misrepresentation claim); *Amla*, 282 F.Supp.3d at 763 ("the patchwork of law regarding the duty to avoid misrepresentations and waiver of the economic loss rule would be unmanageable at trial"); *Hughes*, 317 F.R.D. at 352 ("[C]ourts have declined to certify nationwide classes based on negligent misrepresentation because the laws of fifty states have 'material' differences, which could 'mean the difference between success and failure' of a plaintiff's claims"); *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1101-1102, 1104 (C.D. Cal. Feb. 27, 2012).

IV. CONCLUSION

In *Daly*, *Kubilius*, and *Cowen*, judges in this District granted motions to strike nationwide class allegations, rejecting the notion that it was "premature" to do so. In each of those cases, like here, it was obvious the claims would be governed by the disparate laws of dozens of different

states, which is "a largely legal determination" that "no proffered or potential factual development offers any hope of altering[.]" *Kubilius*, 2019 WL 2861886, at *2 (quoting *Pilgirm*, 660 F.3d at 949); *accord Daly*, 2023 WL 5647232, at *2 ("Glanbia's motion to strike raises questions of law and concerns issues where additional discovery is unnecessary"); *Cowen*, 2017 WL 4572201, at *4.

The same applies here. Defendants request that the Court strike the nationwide class allegations.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 13, 2024, a copy of the foregoing document was filed electronically via the Court's CM/ECF system. 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.

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