IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE: SMITTY'S/CAM2 303 TRACTOR HYDRAULIC FLUID MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	MDL No. 2936 Master Case No. 4:20-MD-02936-SRB
This Document Relates to: ALL ACTIONS	

DEFENDANTS' MEMORANDUM
IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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1	Smitty's Supply, Inc. Responses to First Requests for Admissions (Excerpts)	No
2	Super S Product Catalog (Excerpts) (DEFMDL0000089-91, 99-101)	Yes
3	Deposition of Ed Smith (Jan. 25, 2022) (Excerpts)	No
4	Deposition of Chad Tate (May 9, 2019) (Excerpts)	No
5	Deposition of Jon Lorio (Oct. 12, 2022) (Excerpts)	No
6	Iowa Plaintiff Wayne Rupe Group Exhibit: Deposition (Oct. 28, 2022) & Supplemental Interrogatory Answers (Excerpts)	No
7	Expert Report of Lee Swanger (Excerpts)	No
8	Deposition of Thomas Glenn (Dec. 14, 2022) (Excerpts)	No
9	Class Period Smitty's/CAM2 303 THF Labels (Alter Deposition Exhibit 38)	No
10	Deposition of Chad Tate (Jan. 26, 2022) (Excerpts)	No
11	NIST Handbook 130: Uniform Fuels and Automotive Lubricants Regulation (2022) (Glenn Deposition Exhibit 13)	No
12	Thomas F. Glenn, Do You Know Where Your Line Wash Is?, Lubes'n'Greases Vol. 18, Iss. 6 (June 2012) (Glenn Deposition Exhibit 62)	No
13	Deposition of Matthew Saragusa (May 10, 2019) (Excerpts)	No
14	Deposition of Jack Baker (Sept. 30, 2021) (Excerpts)	No
15	Smitty's Certificates of Analysis Group Exhibit (Glenn Deposition Exhibit 25)	Yes
16	Expert Report of Werner Dahm, *Yoakum v. Genuine Parts Company* (Excerpts)	Yes
17	Expert Report of Werner Dahm (Excerpts)	Yes
18	Expert Report of Werner Dahm, *Zornes et al. v. Smitty's Supply* (Excerpts)	No
19	Deposition of Jeremy Schenk (March 12, 2019) (Excerpts)	No

Exhibit	Description	Filed Under Seal
20	Deposition of Jeremy Schenk (Oct. 11, 2019) (Excerpts)	No
21	Deposition of Jeremy Schenk (Oct. 10, 2019) (Excerpts)	No
22	Deposition of Garrett Clement (Dec. 4, 2018) (Excerpts)	No
23	Smitty's 303 THF Internal Specification Sheet (Clement Deposition Exhibit 15)	Yes
24	Deposition of Steve Shockites (July 19, 2021) (Excerpts)	No
25	Smitty's Supply Letter to Mr. Miller (June 17, 2013) (Schenk Deposition Exhibit 281)	Yes
26	Deposition of Tiffany Cressionnie (July 15, 2022) (Excerpts)	No
27	Deposition of Defendants' Expert Lee Swanger (Feb. 23, 2023) (Excerpts)	No
28	Georgia Department of Agriculture 303 THF Test Results (Glenn Deposition Exhibit 48)	No
29	Thomas F. Glenn, Playing Roulette With 303 Yellow Buckets: The Stakes Are High And The Odds Are Not In Your Favor, PQIA Bulletin (2018) (Glenn Deposition Exhibit 9)	No
30	Missouri Department of Agriculture 303 THF Test Results (Glenn Deposition Exhibit 20)	No
31	PQIA 303 THF Test Results (Glenn Deposition Exhibit 21)	No
32	Expert Report of Thomas Glenn (Excerpts)	Yes
33	Expert Report of Benjamin Lester (Excerpts)	No
34	Deposition of Kentucky Plaintiff Tim Sullivan (Nov. 18, 2022) (Excerpts)	No
35	Pre-Class Period SuperTrac 303 5-Gallon Label (with no disclaimer) (Tim Sullivan Deposition Exhibit 35)	No
36	Expert Report of Adam Alter (Excerpts)	No
37	Deposition of Plaintiffs' Expert Adam Alter (Dec. 21, 2022) (Excerpts)	No
38	Deposition of Missouri Plaintiff Mark Hazeltine (Sept. 2, 2022) (Excerpts)	No
39	Deposition of Arkansas Plaintiff William Anderson (July 26, 2022) (Excerpts)	No

Exhibit	Description	Filed Under Seal
40	Deposition of New York Plaintiff Lawrence Wachholder (Aug. 19, 2022) (Excerpts)	No
41	Deposition of Kentucky Plaintiff Tracy Sullivan (Nov. 17, 2022) (Excerpts)	No
42	Wisconsin Plaintiff Dale Wendt Group Exhibit: Deposition (Aug. 18, 2022) & THF Receipts (Depo. – Excerpts) (Receipts - Pltf-CR 1991-93)	No
43	Deposition of Arkansas Plaintiff Jeffrey Harrison (July 28, 2022) (Excerpts)	No
44	Deposition of Kentucky Plaintiff Dwayne Wurth (Aug. 4, 2022) (Excerpts)	No
45	Missouri Dismissed Plaintiff Jacob Ruhl Group Exhibit: Deposition (Nov. 18, 2022), Retailer Settlement Claim Form & First Supplemental Interrogatory Answers (Depo. - Excerpts) (Claim Form - Pltf-CR 5120-36) (Interrog. - Excerpts)	No
46	Deposition of Kentucky Plaintiff Kirk Egner (Aug. 5, 2022) (Excerpts)	No
47	yesterdaystractors.com online forum (Nov. 23, 2018) (posted message by TheOldHokie)	No
48	Deposition of Arkansas Plaintiff Alan Hargraves (July 27, 2022) (Excerpts)	No
49	Deposition of Seth Arnett (May 3, 2019) (Excerpts)	No
50	T. Glenn Email to Bob Schlott at Warren Distribution (Sept. 19, 2018) (Glenn Deposition Exhibit 56)	No
51	Declaration of Missouri Class Member Eddie Stone (June 22, 2022)	No
52	Declaration of Missouri Class Member Andrew Hawkins (June 22, 2022)	No
53	Deposition of Missouri Plaintiff Ronald Nash (Aug. 31, 2022) (Excerpts)	No
54	Kansas Plaintiff Ross Watermann Group Exhibit: Deposition (Oct. 18, 2022), Retailer Settlement Claim Forms & First Supplemental Interrogatory Answers (Depo. - Excerpts) (Claim Forms - RG2 400-01, RG2 1697-1701) (Interrog. - Excerpts)	No
55	California Plaintiff Jack Kimmich Group Exhibit: Deposition (Aug. 23, 2022), TSC Kimmich Data & Soils To Grow QuickBooks Entries (Depo. - Excerpts) (TSC Data - Pltf-CR 2042) (QuickBooks - Pltf-CR 13444-46)	No
56	Deposition of Kansas Plaintiff George Bollin (Aug. 11, 2022) (Excerpts)	No

Exhibit	Description	Filed Under Seal
57	Kentucky Dismissed Plaintiff Ricky Peck Group Exhibit: Deposition (Nov. 15, 2022), Warren Settlement Claim Form, Warren Settlement Payout & Retailer Settlement Claim Form (Depo. - Excerpts) (Warren Form - DM_CAM2_448-52) (Warren Payout - DM_CAM2_647) (Retailer Form - RG2 1738-43)	No
58	Deposition of Minnesota Plaintiff Jason Klingenberg (Mar. 28, 2023) (Excerpts)	No
59	Deposition of Plaintiffs' Expert Ron Hayes (Jan. 3, 2023) (Excerpts)	No
60	Deposition of Kanas Plaintiff Terry Zornes (Aug. 10, 2022) (Excerpts)	No
61	Deposition of West Virginia/Pennsylvania Plaintiff Earnest Jenkins (Oct. 24, 2022) (Excerpts)	No
62	Minnesota Plaintiff Joseph Asfeld Group Exhibit: Deposition (Aug. 25, 2022), Equipment Damage Repair & Second Supplemental Interrogatory Answers (Depo. - Excerpts) (Equip. Repairs - Pltf-CR 7300-15) (Interrog. - Excerpts)	No
63	Florida Plaintiff Charles Strickland List of Equipment (Pltf-CR 1988)	No
64	Composite Retailer Sales Data (PLMDLRETAIL001-06)	No
65	Kentucky Dismissed Plaintiff Wildie Coleman Group Exhibit: Deposition (Nov. 15, 2022) & Retailer Settlement Claim Form (Depo. - Excerpts) (Claim Form - Coleman Deposition Exhibit 3)	No
66	Minnesota Plaintiff Brett Creger Group Exhibit: Deposition (Aug. 24, 2022), Equipment List & Retailer Settlement Claim Forms (Depo. - Excerpts) (Equip. List - Pltf-CR 3905) (Claim Form - Pltf-CR 4764-67, Pltf-CR 7116-222)	No
67	Declaration of Missouri Class Member Gary Wayne Chalfant (June 22, 2022)	No
68	Kansas Plaintiff Adam Sevy Group Exhibit: Deposition (Sept. 1, 2022) & Equipment List (Depo. - Excerpts) (Equip. List - Pltf-CR 5647)	No
69	Declaration of Missouri Class Member Brandon Cooke (June 21, 2022)	No
70	Expert Report of Thomas Glenn, *Blackmore v. Smitty's Supply, Inc.* (Excerpts)	No
71	Photograph of 55-Gallon SuperTrac 303 Drum (Alter Deposition Exhibit 23; originally produced by Louisiana Plaintiff Pat Beaver as Pltf-CR 2334)	No
72	Deposition of Arkansas Plaintiffs William Edward Anderson Living Trust, Fricker Farms, Inc. & MGA Farms, Inc. (June 8, 2023) (Excerpts)	No

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73	Retailer Settlement Payout Amounts (DM_CAM2_11)	No
74	Deposition of Arkansas Plaintiff J&C Housing Construction, LLC (June 7, 2023) (Excerpts)	No
75	Deposition of California Plaintiff Soils To Grow, LLC (July 17, 2023) (Excerpts)	No
76	Deposition of Texas/Michigan Plaintiff Jacob Mabie (Jan. 24, 2023) (Excerpts)	No
77	Expert Report of Peter Lillo (Excerpts)	No
78	Deposition of Kansas Plaintiff Watermann Land and Cattle, LLC (June 6, 2023) (Excerpts)	No
79	Deposition of Kentucky Plaintiff Wurth Excavating, LLC (June 20, 2023) (Excerpts)	No
80	Citgo 303 THF Settlement Claim Sheet (RG2 44)	No
81	Deposition of Minnesota Plaintiff K&J Trucking, Inc. (June 21, 2023) (Excerpts)	No
82	Deposition of Missouri Plaintiff Arno Graves (Aug. 30, 2022) (Excerpts)	No
83	New York Plaintiff Sawyer Dean Group Exhibit: Deposition (Aug. 18, 2022) & First Supplemental Interrogatory Answers (Excerpts)	No
84	Deposition of New York Plaintiff John Miller (Aug. 17, 2022) (Excerpts)	No
85	Deposition of Wisconsin Plaintiff Michael Hamm (Aug. 18, 2022) (Excerpts)	No
86	*Hornbeck* Missouri-Only Smitty's Settlement Claim Forms (for claims 145, 148, 152, and 129)	No
87	Declaration of Louisiana Class Member Daniel Lyons (July 11, 2022)	No
88	Declaration of Missouri Class Member Matthew Finley (March 15, 2023)	No
89	Matt Finley ("Pissed Off Farmer") Email to Missouri Department of Agriculture (Nov. 18, 2017) (Hayes Deposition Exhibit 42)	No
90	bobistheoilguy.com online forum (July 25, 2020) (posted message by dlundblad (Indiana))	No
91	Hearth.com online forum (Dec. 22, 2017) (posted messages by FTG-05)	No

Exhibit	Description	Filed Under Seal
92	Deposition of Arkansas Dismissed Plaintiff Donald Snyder (Dec. 8, 2022) (Excerpts)	No
93	Deposition of Arkansas Dismissed Plaintiff Donald Herbert (Dec. 6, 2022) (Excerpts)	No
94	Deposition of Arkansas Dismissed Plaintiff Kyle Boyd (Dec. 9, 2022) (Excerpts)	No
95	Deposition of Arkansas Dismissed Plaintiff Jeff Jones (Jan. 12, 2023) (Excerpts)	No
96	Pre-Class Period SuperTrac 303 5-Gallon Label (1977 disclaimer) (DEF01795)	No
97	Dismissed Kansas Plaintiff Greg Vanderree Group Exhibit: Deposition (Jan. 18, 2023) & Supplemental Interrogatory Answers (Excerpts)	No
98	Deposition of Wisconsin Dismissed Plaintiff David Gretzinger (Nov. 8, 2022) (Excerpts)	No
99	Deposition of Wisconsin Dismissed Plaintiff Russell Heise (Nov. 9, 2022) (Excerpts)	No
100	Deposition of West Virginia/Pennsylvania Plaintiff Jenkins Timber & Wood (July 6, 2023) (Excerpts)	No
101	Deposition of Alabama Plaintiff Joe Jackson (Oct. 26, 2022) (Excerpts)	No
102	Georgia Plaintiff Anthony Shaw Group Exhibit: Deposition (Nov. 11, 2022), Supplemental Interrogatory Answers & Retailer Settlement Claim Form (Excerpts) (Claim Form - Pltf-CR 4703)	No
103	Deposition of Michigan/Texas Plaintiff Mabie Trucking, Inc. (May 31, 2023) (Excerpts)	No
104	Bobcat Equipment Operator's Manuals - Group Exhibit (Excerpts)	No
105	International Equipment Operator's Manuals - Group Exhibit (Excerpts)	No
106	Case 9150 Tractor Operator's Manual (Excerpts)	No
107	John Deere Equipment Operator's Manuals - Group Exhibit (Excerpts)	No
108	Gehl Equipment Operator's Manuals - Group Exhibit (Excerpts)	No

Exhibit	Description	Filed Under Seal
109	Mac Don 972 Draper Head Operator's Manual (Excerpts)	No
110	Massey Ferguson 1100 & 1130 Tractors Technical Maintenance Manual (Excerpts)	No
111	Caterpillar E110B Track-Type Excavator Operation & Maintenance Manual (Excerpts)	No
112	New Holland E35B Repair Manual (Excerpt)	No
113	Gehl 2148 DiscMower Conditioners Operator's Manual (Excerpts)	No
114	PQIA Post re: Missouri Stop Sale Order (Nov. 17, 2017) (MDA_THF_1616)	No
115	PQIA Presentation to National Conference on Weights & Measures (Jan. 21, 2014) (Glenn Deposition Exhibit 24)	No
116	Ronald Hayes (Missouri Department of Agriculture) / Tom Glenn (PQIA) Email Chain (May 2017) (Hayes Deposition Exhibit 8)	No
117	Ronald Hayes (Missouri Department of Agriculture) / Tom Glenn (PQIA) Email Chain (May 2017) (Glenn Deposition Exhibit 23)	No
118	Missouri Class Member Tim Underwood ("Concerned Farmer") Email to Missouri Department of Agriculture (Nov. / Dec. 2017) (Hayes Deposition Exhibit 40)	No
119	Missouri Class Member Tim Underwood ("Concerned Farmer") Email to Missouri Department of Agriculture (Nov. / Dec. 2017) (Hayes Deposition Exhibit 41)	No
120	Deposition of Plaintiffs' Expert Bruce Babcock (Jan. 7, 2023) (Excerpts)	No
121	Deposition of Plaintiffs' Expert Werner Dahm (Jan. 12, 2023) (Excerpts)	No
122	Expert Report of Thomas Glenn, *Zornes, et al. v. Smitty's Supply, Inc.* (Excerpts)	No
123	Deposition of Todd Milliken (Oct. 30, 2019) (Excerpts)	No
124	Deposition of Todd Milliken (Feb. 26, 2019) (Excerpts)	No
125	Orscheln 303 THF Sales Data (Orscheln00005)	Yes
126	Tractor Supply 303 THF Sales Data (DEFTSCMO 531-36)	Yes
127	Expert Report of Steven Hamilton (Excerpts)	No

Exhibit	Description	Filed Under Seal
128	Deposition of Plaintiffs' Expert Steven Hamilton (Jan. 5, 2023) (Excerpts)	No
129	Expert Report of Bruce Babcock (Excerpts)	Yes
130	Deposition of Defendants' Expert Benjamin Lester (Feb. 14, 2023) (Excerpts)	No
131	Expert Report of Denise Martin (Excerpts)	Yes
132	Smitty's Agricultural Fluid Internal Specification (DEFMDL 0001084)	Yes
133	bobistheoilguy.com online forum (April 1, 2018) (posted message by Jake Wells (Kentucky))	No
134	Virginia Plaintiff Robert Boone Retailer Settlement Class Membership Form (Pltf-CR 6147-48)	No
135	South Dakota Plaintiff Patrick Gisi's 303 THF Receipt (Pltf-CR 4115)	No
136	Bryan White Email to Christopher Hohn (Mar. 24, 2022)	No
137	Minnesota Dismissed Plaintiff Craig Millam Group Exhibit: Declaration (May 24, 2023) & Deposition (July 26, 2023) (Depo. - Excerpts)	No
138	Declaration of Kansas Dismissed Plaintiff Dave Siegel (May 1, 2023)	No
139	Deposition of Kansas Plaintiff Wayne Wells (Jan. 19, 2023) (Excerpts)	No
140	Deposition of Kentucky Plaintiff Howard Stembridge (Feb. 22, 2023) (Excerpts)	No
141	Deposition of Matthew McGrath (Feb. 27, 2019) (Excerpts)	No
142	Labels From Non-Defendant Manufacturers' 303 THF Products (Alter Deposition Exhibit 18)	No
143	303 Tractor Hydraulic Fluid Class Action Page on Facebook (Excerpts)	No
144	Indiana Plaintiff Frank James Retailer Settlement Claim Form (Pltf-CR 5772-80)	No
145	North Dakota Dismissed Plaintiff Trent Guthmiller Group Exhibit: Retailer Settlement Claim Form & Supplemental Interrogatory Answers (Claim Form - Pltf-CR 5600-15) (Interrog. - Excerpts)	No
146	Errata to Expert Report of Bruce Babcock	Yes
147	Connecticut Plaintiff Todd Carusillo's J20A THF Purchase Receipts (Pltf-CR 4243-44)	No
148	Leonard C. Shrewsbury (Lubrizol Corp.), A Review of Farm Tractor Transmission Fluids, SAE International (1974) (Dahm Deposition Exhibit 7)	No

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149	"Chemistry of Additives," from C.V. Smalheer & R. Kennedy Smith (Lubrizol Corp.), Lubricant Additives (1967) Dahm Deposition Exhibit 8	No
150	Virginia Plaintiff John Bartus, Jr.'s Interrogatory Answers (Excerpts)	No
151	Illinois Plaintiff Steve Burgdorf's Interrogatory Answers (Excerpts)	No
152	Illinois Plaintiff Kyle Feldkamp's Interrogatory Answers (Excerpts)	No
153	Tennessee Plaintiff Tim Grissom's Interrogatory Answers (Excerpts)	No
154	Alabama Plaintiff Bryan Nelms' Equipment List (Pltf-CR 5649)	No
155	Arizona Plaintiff Mark Engdahl's Retailer Settlement Claim Form (Pltf-CR 4064-78)	No
156	Ohio Plaintiff Matt Ortner's Retailer Settlement Claim Form (Pltf-CR 4442-47)	No
157	Texas/New Mexico Dismissed Plaintiff Ruben Quiroga Group Exhibit: Retailer Settlement Claim Form & Warren Claim Form (Retailer - RG2 1754-61) (Warren - DM_CAM2-117-25)	No
158	Maine/New Hampshire Plaintiff Donald Ouelette's Interrogatory Answers (Excerpts)	No
159	Mississippi Dismissed Plaintiff James Still's Interrogatory Answers (Excerpts)	No
160	West Virginia/Maryland Plaintiff Vonda Moreland's Interrogatory Answers (Excerpts)	No
161	Indiana Plaintiff Rick Hardin's Interrogatory Answers (Excerpts)	No
162	Smitty's Response to Customer Inquiry (Nov. 23, 2018) (Arnett Deposition Exhibit 15)	Yes
163	yesterdaystractors.com online forum (Oct. 2017) (posted messages by gears and sotxbill)	No
164	303 THF Product Data Sheet (Schenk Deposition Exhibit 133)	No
165	Thomas F. Glenn, The Games People Play With THF, Jobbers World Vol. I, Iss. 5 (March 2004) (Glenn Deposition Exhibit 5)	No
166	Thomas F. Glenn, The Yellow Bucket, Lubes'n'Greases (Feb. 2012) (Glenn Deposition Exhibit 6)	No
167	Newagtalk.com online forum (Feb. 12, 2012) (posted message by Delmarva Ag)	No

Exhibit	Description	Filed Under Seal
168	yesterdaystractors.com online forum (Aug. 17, 2018) (posted message by DoubleO7)	No
169	Missouri Dismissed Plaintiff Tim Howe's Interrogatory Answers (Excerpts)	No
170	Arizona Dismissed Plaintiff Ben Monday's First Supplemental Interrogatory Answers (Excerpts)	No
171	Smitty's Response to Customer Inquiry (Feb. 20, 2017) (10/10/19 Schenk Deposition Exhibit 170)	Yes
172	Illinois Plaintiff Josh Lesko's Interrogatory Answers (Excerpts)	No
173	Louisiana Plaintiff Pat Beaver's Second Supplemental Interrogatory Answers (Excerpts)	No
174	Arizona Plaintiff Michael Gallegos's Equipment List (Pltf-CR 5664)	No
175	Universal Tractor Transmission Oil OEM Specifications (MDA_THF_135-49)	No

TABLE OF ABBREVIATIONS USED IN BRIEF

Abbreviation	Full Reference
303 THF	Any product designated as a 303 tractor hydraulic fluid
5ACC	Fifth Amended Consolidated Complaint (ECF #834)
ADTPA	Arkansas Deceptive Trade Practices Act
Ag Fluid	Defendants' agricultural fluid products, which they first started selling in 2019
CAM2	Defendant CAM2 International, LLC
CAM2 303	CAM2 303 tractor hydraulic fluid
Class Period	Plaintiffs' proposed putative class period, December 1, 2013 to the present
CLRA	California Consumer Legal Remedies Act
Eight States	The eight bellwether class certification states: Arkansas, California, Kansas, Kentucky, Missouri, Minnesota, New York, & Wisconsin
FAL	California False Advertising Law
Hornbeck	*Hornbeck, et al. v. Orscheln Farm & Home, LLC et al.*, No. 4:18-cv-00941 (W.D. Mo.)
J20A	A more recent John Deere (OEM) specification than JD-303 but not the current John Deere specification
J20C	John Deere's (OEM) current tractor hydraulic fluid specification
J&C Housing	Plaintiff J&C Housing Construction, LLC (affiliated with Plaintiff Jeffrey Harrison – Arkansas)
K&J Trucking	Plaintiff K&J Trucking, Inc. (affiliated with Plaintiff Jason Klingenberg – Minnesota and Iowa)
KCPA	Kansas Consumer Protection Act
KPLA	Kansas Products Liability Act
MDA	Missouri Department of Agriculture
MMPA	Missouri Merchandising Practices Act
Moon Lake	Moon Lake Farm Partners (not a party to this litigation; affiliated with Plaintiff Alan Hargraves – Arkansas)
NIST	National Institute of Standards and Technology
NYGBL	New York General Business Laws

Abbreviation	Full Reference
OEM	Original Equipment Manufacturer
Pl. Mem.	Plaintiffs' Suggestions in Support of Motion for Class Certification Respecting the Eight Focus States of Arkansas, California, Kansas, Kentucky, Minnesota, Missouri, New York, and Wisconsin (ECF #837)
PQIA	Petroleum Quality Institute of America
ProMax	CAM2 ProMax 303 tractor hydraulic fluid
Smitty's	Defendant Smitty's Supply, Inc.
SOF	Statement of Facts
STG	Plaintiff Soils To Grow, LLC (affiliated with Plaintiff Jack Kimmich – California)
Super S	Super S 303 tractor hydraulic fluid
SuperTrac	Super S SuperTrac 303 tractor hydraulic fluid
THF	Tractor hydraulic fluid
TSC	Tractor Supply Company
Smitty's/CAM2 303 THF	Smitty's and CAM2 303 THF products at issue, including Super S SuperTrac 303 THF, Super S 303 THF, CAM2 ProMax 303 THF, and CAM2 303 THF
UCL	California Unfair Competition Law
WDTPA	Wisconsin Deceptive Trade Practices Act
WLC	Plaintiff Watermann Land & Cattle, LLC (affiliated with Plaintiff Ross Watermann – Kansas and Colorado)

TABLE OF PLAINTIFFS AND CLASS MEMBERS NAMED IN BRIEF

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
AR		1. Negligence *Count I* 2. Express Warranty *Count II* 3. Implied Warranty – Merchantability *Count III* 4. Implied Warranty – Particular Purpose *Count IV* 5. Unjust Enrichment *Count V* 6. Fraud *Count VI* 7. ADTPA *Count VIII*		
AR	**Anderson, William** Putative Class Rep.	Smitty's Supply CAM2 International		Summary judgment on statute of limitations denied because genuine issue of material fact exists regarding when Anderson "specifically knew of the cause of [his] injuries" and "there are genuine issues of material fact as to whether the doctrine of fraudulent concealment tolled the statute of limitations." **(ECF #991)**
AR	**Boyd, Kyle** Class Member / Dismissed Plaintiff			
AR	**Buford, Sean** Plaintiff *Non-moving* *Pro se* **(ECF #862)**			

[1] All claims identified in this column are those remaining following the Court's order on Defendants' motion to dismiss **(ECF #451)**. The remaining claims of each individual Plaintiff following the Court's rulings on motions for summary judgment are identified in the "Pending or Decided MSJ" column.

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
AR	**Fricker Farms, Inc.** Putative Class Rep. *Affiliated with Anderson*	Smitty's Supply CAM2 International		
AR	**Hargraves, Alan** Putative Class Rep.	Smitty's Supply CAM2 International		Summary judgment on statute of limitations denied because genuine issue of material fact exists regarding when Hargraves "specifically knew of the cause of [his] injuries" and "there are genuine issues of material fact as to whether the doctrine of fraudulent concealment tolled the statute of limitations." **(ECF #991)** Summary judgment denied because dismissal not warranted as sanction for spoliation under the circumstances. Although Hargraves is not the real party in interest, all partners of the real party in interest (Moon Lake Farms) have ratified bringing suit. A genuine issue of material fact exists based on conflicting testimony regarding role of retailer employee recommendation in purchase process based on "conflicting testimony." **(ECF #1014)**
AR	**Harrison, Jeffrey** Putative Class Rep.	Smitty's Supply CAM2 International		Summary judgment on statute of limitations denied because genuine issue of material fact exists regarding when Harrison "specifically knew of the cause of [his] injuries" and "there are genuine issues of material fact as to whether the doctrine of fraudulent

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				concealment tolled the statute of limitations." **(ECF #991)** Pending motion for summary judgment on all of Harrison's remaining claims because he cannot establish standing, that he is the real party in interest, or provide proof of the basic elements of his claims, such as whether he purchased the at-issue THF or owns the at-issue equipment. **(ECF #1013)**
AR	**Herbert, Donald** Class Member / Dismissed Plaintiff			
AR	**J&C Housing Construction, LLC** Putative Class Rep. *Affiliated with Harrison*	Smitty's Supply CAM2 International		Pending motion for summary judgment on all of J&C Housing Construction, LLC's remaining claims because it cannot establish standing, that it is the real party in interest, or provide proof of the basic elements of its claims, such as whether it purchased the at-issue THF or owns the at-issue equipment. **(ECF #1013)**
AR	**Jones, Jeff** Class Member / Dismissed Plaintiff			
AR	**MGA, Inc.** Putative Class Rep. *Affiliated with Anderson*	Smitty's Supply CAM2 International		
AR	**Moon Lake Farms Partners** Class Member *Affiliated With Hargraves*			

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
AR	**Snyder, Donald** Class Member / Dismissed Plaintiff			
AR	**William Edward Anderson Living Trust** Putative Class Rep. *Affiliated with Anderson*	Smitty's Supply CAM2 International		
CA		1. Negligence *Count I* 2. Express Warranty *Count II* 3. Unjust Enrichment *Count V* 4. Fraud *Count VI* 5. Negligent Misrepresentation *Count VII* 6. UCL *Count IX* 7. FAL *Count X* 8. CLRA *Count XI*		
CA	**Kimmich, Jack** Putative Class Rep.	Smitty's Supply		Summary judgment on all claims against CAM2 granted. **(ECF #985)** Summary judgment on statute of limitations denied because genuine issue of material fact exists regarding when Kimmich's claims accrued based on conflict between sworn forms and sworn deposition testimony. (**ECF #991)** Summary judgment on judicial estoppel denied, and claims as to Super S denied because genuine issue of material fact exists regarding conflict between

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				sworn deposition testimony and sworn claim form. **(ECF #1010)**
CA	**Soils To Grow, LLC** Putative Class Rep. *Affiliated with Kimmich*	Smitty's Supply[2]		
KS		1. Negligence *Count I* 2. Express Warranty *Count II* 3. Implied Warranty – Merchantability *Count III* 4. Implied Warranty – Particular Purpose *Count IV* 5. Unjust Enrichment *Count V* 6. Fraud *Count VI* 7. Negligent Misrepresentation *Count VII* 8. KCPA *Count XVIII* 9. KPLA – Design Defect *Count XLVI* 10. KPLA – Failure to Warn *Count XLVII* *All exclude property damage except Counts V, XLVI, XLVII* **(ECF #451)**		
KS	**Bollin, George** Putative Class Rep.	Smitty's Supply	Missouri	Summary judgment on all claims against CAM2 granted. **(ECF #985)**

[2] The Court granted a motion as to Kimmich on all claims against CAM2. ECF #985. The motion did not include STG, who was not a Plaintiff yet when the motion was filed. However, the same reasoning applies. CAM2 can move specifically as against STG if the Court wishes.

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				Summary judgment on statute of limitations granted as to all warranty claims as they relate to purchases before May 24, 2015, on his KCPA claim as it relates to purchases before May 24, 2016, and on his negligence, unjust enrichment, and misrepresentation claims as it relates to purchases before May 24, 2017. **(ECF #991)** Summary judgment on *Hornbeck* release granted for property damage claims stemming from purchases of SuperTrac in Missouri from May 25, 2013 to July 30, 2019. Summary judgment on *Hornbeck* release denied on all other grounds because "genuine questions of material fact exist as to what extent [his] damage was caused by SuperTrac 303 subject to the *Hornbeck* Settlement Agreement." **(ECF #1008)**
KS	**Seigel, Dave** Dismissed Plaintiff		Oklahoma	
KS	**Sevy, Adam** Putative Class Rep.	Smitty's Supply		Summary judgment on all claims against CAM2 granted. **(ECF #985)** Summary judgment on statute of limitations granted as to all warranty claims as they relate to purchases before May 24, 2015, on his KCPA claim as it relates to purchases before May 24, 2016, and on his negligence, unjust

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				enrichment, and misrepresentation claims as it relates to purchases before May 24, 2017. **(ECF #991)** Pending motion for summary judgment on Sevy's claims under the KPLA and for unjust enrichment for lack of causation. **(ECF #801)** Pending Rule 56(f) notice, wherein the Court ordered, and the parties provided, briefing on property damages for unjust enrichment under Kansas law. **(ECF ##906, 935, 949)**
KS	**Vanderee, Greg** Class Member / Dismissed Plaintiff		Oklahoma	
KS	**Vilela, Randy** Class Member / Dismissed Plaintiff		Missouri	
KS	**Watermann, Ross** Putative Class Rep.	Smitty's Supply CAM2 International	Colorado	Pending motion for summary judgment on all of Watermann's claims because he is not the real party in interest. **(ECF #1012)**
KS	**Watermann Land & Cattle, LLC** Putative Class Rep. *Affiliated with Watermann*	Smitty's Supply CAM2 International	Colorado	Pending motion for summary judgment on WLC's KCPA claim because WLC is not a "consumer" under the KCPA. **(ECF #1012)**
KS	**Wells, Wayne** Plaintiff *Non-moving*		Oklahoma	
KS	**Zornes, Terry** Putative Class Rep.	Smitty's Supply		Summary judgment on all claims against CAM2 granted. **(ECF #985)**

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				Summary judgment as to implied warranty of fitness for a particular purpose granted because Zornes has no evidence he used the product in a unique way beyond the ordinary purpose or that Defendants knew of any such intended use. Summary judgment on negligent and fraudulent misrepresentation claims denied because genuine issues of material fact exist regarding reliance based on what Zornes knew or did not know about the Missouri Stop Sale Order. **(ECF #1011)**
KY		1. Negligence *Count I* 2. Unjust Enrichment *Count V* 3. Fraud *Count VI* 4. Negligent Misrepresentation *Count VII*		
KY	**Baldwin, Robert** Class Member / Dismissed Plaintiff			
KY	**Coleman, Wildie** Class Member / Dismissed Plaintiff			
KY	**Egner, Kirk** Putative Class Rep.	Smitty's Supply CAM2 International		Summary judgment on statute of limitations denied because genuine issue of material fact exists regarding fraudulent concealment. **(ECF #991)**

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
KY	**Peck, Ricky** Class Member / Dismissed Plaintiff			
KY	**Stembridge, Howard** Plaintiff *Non-moving*		Tennessee	
KY	**Sullivan, Tim** Putative Class Rep.	Smitty's Supply		Summary judgment on all claims against CAM2 granted. **(ECF #985)** Summary judgment on statute of limitations denied because genuine issue of material fact exists regarding fraudulent concealment. **(ECF #991)** Summary judgment on fraudulent and negligent misrepresentation claims granted. Summary judgment as to Sullivan's claims for flush damages granted. Summary judgment on negligence and unjust enrichment claims denied because genuine issue of material fact exists regarding causation and whether a benefit was wrongfully retained. **(ECF #996)**
KY	**Sullivan, Tracy** Putative Class Rep.	Smitty's Supply CAM2 International	Illinois	Summary judgment on statute of limitations denied because genuine issue of material fact exists regarding fraudulent concealment. **(ECF #991)**
KY	**Wells, Jake** Class Member / Online Forum User			
KY	**Wurth, Dwayne** Putative Class Rep.	Smitty's Supply CAM2 International	Illinois	Summary judgment on statute of limitations denied because "the record does not reflect that Wurth

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				suffered any damage to his equipment due to the 303 THF products." **(ECF #991)**
KY	**Wurth Excavating** Putative Class Rep. *Affiliated with Wurth*	Smitty's Supply CAM2 International	Illinois	
MN		1. Negligence *Count I* 2. Express Warranty *Count II* 3. Implied Warranty – Merchantability *Count III* 4. Implied Warranty – Particular Purpose *Count IV* 5. Unjust Enrichment *Count V* 6. Fraud *Count VI* 7. Negligent Misrepresentation *Count VII*		
MN	**Asfeld, Joe** Putative Class Rep.	Smitty's Supply CAM2 International		Summary judgment on statute of limitations denied because genuine issue of material fact exists regarding when Asfeld "discovered or had a reasonable opportunity to discover the concealed defects." **(ECF #991)**
MN	**Creger, Brett** Putative Class Rep.	Smitty's Supply	North Dakota	Summary judgment on all claims against CAM2 granted. **(ECF #985)** Summary judgment on statute of limitations denied because genuine issue of material fact exists regarding when Creger "discovered or had a reasonable opportunity to

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				discover the concealed defects." **(ECF #991)**
MN	**Klingenberg, Jason** Putative Class Rep.	Smitty's Supply CAM2 International	Iowa	
MN	**K&J Trucking, Inc.** Putative Class Rep. *Affiliated with Klingenberg*	Smitty's Supply CAM2 International	Iowa	
MN	**Millam, Craig** Dismissed Plaintiff			
MO		1. Negligence *Count I* 2. Express Warranty *Count II* 3. Implied Warranty – Merchantability *Count III* 4. Implied Warranty – Particular Purpose *Count IV* 5. Unjust Enrichment *Count V* 6. Fraud *Count VI* 7. Negligent Misrepresentation *Count VII* 8. MMPA *Count XXII*		
MO	**Chalfant, Wayne** Class Member / Declarant			
MO	**Cooke, Brandon** Class Member / Declarant			
MO	**Finley, Matthew** Class Member / Declarant			
MO	**Goodson, Gary** Plaintiff *Non-moving* *Pro se* **(ECF #862)**			
MO	**Graves, Arno** Putative Class Rep.		Oklahoma	Summary judgment on statute of limitations granted as to negligence,

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				unjust enrichment, negligent misrepresentation and MMPA claims as they relate to purchases before November 5, 2014. Summary judgment on statute of limitations granted as to express and implied warranty claims as they relate to purchases before November 5, 2015. Summary judgment on statute of limitations denied as to fraud because a genuine issue of material fact exists as to when Graves "possessed the means of discovery" of the alleged fraud. **(ECF #991)** Summary judgment on *Hornbeck* release granted for property damage claims stemming from purchases of SuperTrac in Missouri from May 25, 2013 to July 30, 2019. Summary judgment on *Hornbeck* release denied on all other grounds because "genuine questions of material fact exist as to what extent [his] damage was caused by SuperTrac 303 subject to the *Hornbeck* Settlement Agreement." **(ECF #1008)**
MO	**Hawkins, Andrew** Class Member / Declarant			
MO	**Hazeltine, Mark** Putative Class Rep.			Summary judgment on express warranty, unjust enrichment and MMPA claims granted because Hazeltine read the label and the disclaimer. Summary judgment on implied

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				warranty claims denied. **(ECF #1006)**
MO	**Howe, Tim** Class Member / Dismissed Plaintiff			
MO	**Nash, Ron** Putative Class Rep.		Oklahoma	Summary judgment on statute of limitations granted as to negligence, unjust enrichment, negligent misrepresentation, and MMPA claims as they relate to purchases before November 5, 2014. Summary judgment on statute of limitations granted as to express and implied warranty claims as they relate to purchases before November 5, 2015. Summary judgment on statute of limitations denied as to fraud because a genuine issue of material fact exists as to when Nash "possessed the means of discovery" of the alleged fraud. **(ECF #991)** Summary judgment on *Hornbeck* release granted on all of Nash's property damage claims against Smitty's because any property damage claim Nash asserted against Smitty's is for SuperTrac, which was previously released by the *Hornbeck* settlement. **(ECF #1008)**
MO	**Stone, Eddie** Class Member / Declarant			
MO	**Ruhl, Jacob** Class Member / Dismissed Plaintiff			

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
MO	**Vilela, Randy** Class Member / Dismissed Plaintiff		Kansas	
NY		1. Negligence *Count I* 2. Express Warranty *Count II* 3. Unjust Enrichment *Count V* 4. Fraud *Count VI* 5. NYGBL *Count XXV*		
NY	**Dean, Sawyer** Putative Class Rep.	Smitty's Supply		Summary judgment on all claims against CAM2 granted. **(ECF #985)** Summary judgment on statute of limitations granted as to negligence and NYGBL claims as they relate to purchases on or before November 27, 2016. Summary judgment on statute of limitations granted as to express warranty claims as it relates to purchases on or before November 27, 2015. **(ECF #991)**
NY	**Miller, John** Putative Class Rep.	Smitty's Supply		Summary judgment on all claims against CAM2 granted. **(ECF #985)** Summary judgment on statute of limitations granted as to negligence and NYGBL claims as they relate to purchases on or before November 27, 2016. Summary judgment on statute of limitations granted as to express warranty claims as it relates to purchases on or before

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				November 27, 2015. **(ECF #991)**
NY	**Wachholder, Lawrence** Putative Class Rep.	Smitty's Supply		Summary judgment on all claims against CAM2 granted. **(ECF #985)** Summary judgment on statute of limitations granted as to negligence and NYGBL claims as they relate to purchases on or before November 27, 2016. Summary judgment on statute of limitations granted as to express warranty claim as it relates to purchases on or before November 27, 2015. **(ECF #991)**
WI		1. Negligence *Count I* 2. Fraud *Count VI* 3. Negligent Misrepresentation *Count VII* 4. WDTPA *Count XXXIII*		
WI	**Gretzinger, Dave** Class Member / Dismissed Plaintiff			
WI	**Hamm, Michael** Putative Class Rep.	Smitty's Supply CAM2 International		Summary judgment on statute of limitations granted as to WDTPA claim as it relates to purchases on or before November 27, 2016. **(ECF #991)**
WI	**Heise, Russell** Class Member / Dismissed Plaintiff			
WI	**Wendt, Dale** Putative Class Rep.	Smitty's Supply CAM2 International		Summary judgment on statute of limitations granted as to WDTPA claim as it relates to purchases on or before

State	Plaintiff or Class Member	Claims and Defendants[1]	Other States of Purchase	Pending or Decided MSJ
				November 27, 2016. **(ECF #991)** Summary judgment on negligent and fraudulent misrepresentation claims and WDTPA claim as they relate to claims for property damages for his equipment built after 1974 because no justifiable reliance. Summary judgment as to negligence claim denied. **(ECF #998)**

OTHER/NON-8-STATE		
State	**Name**	**Pending or Decided MSJ**
AL	**Jackson, Joe** Putative Class Rep.	Summary judgment as to negligent and fraudulent misrepresentation claims granted "[b]ecause Jackson cannot show that Defendants made the alleged misrepresentations that he relied on." Summary judgment as to his negligence claim granted insofar as it is premised on Defendant's failure to adequately warn of defects because "Jackson did not read Smitty's 303 THF Products' labels." Summary judgment denied as to negligence, unjust enrichment, and negligent and fraudulent misrepresentation claims because "genuine dispute of material fact" exists. **(ECF #1004)** Pending motion for summary judgment as to all remaining claims under the statute of limitations. **(ECF #850)**
AL	**Nelms, Bryan** Putative Class Rep.	Pending motion for summary judgment as to all remaining claims under the statute of limitations. **(ECF #850)**
AZ	**Engdahl, Mark** Putative Class Rep.	
AZ	**Gallegos, Michael** Putative Class Rep.	
AZ	**Monday, Ben** Class Member / Dismissed Plaintiff	
AZ	**Whitehead, Susan** Putative Class Rep.	
CT	**Carusillo, Todd** Putative Class Rep.	
FL	**Strickland, Charles** Putative Class Rep.	

OTHER/NON-8-STATE		
State	**Name**	**Pending or Decided MSJ**
GA	**Shaw, Anthony** Putative Class Rep.	Pending motion for summary judgment as to all remaining claims under the statute of limitations. **(ECF #850)**
IL	**Burgdorf, Steven** Putative Class Rep.	
IL	**Feldkamp, Kyle** Putative Class Rep.	
IL	**Lesko, Josh** Putative Class Rep.	
IN	**Hardin, Rick** Putative Class Rep.	
IN	**James, Frank** Putative Class Rep	
IA	**Rupe, Wayne** Putative Class Rep.	
LA	**Beaver, Pat** Putative Class Rep.	Pending motion for summary judgment as to all remaining claims under the statute of limitations. **(ECF #850)**
LA	**Lyons, Daniel** Class Member / Declarant	
MI	**Dow, Craig** Putative Class Rep.	
MI / TX	**Mabie, Jacob** Putative Class Rep.	
MI / TX	**Mabie, Trucking, Inc.** Putative Class Rep. *Affiliated with Mabie*	
MS	**Blakeney, Samuel** Dismissed Plaintiff	
MS	**Still, James** Dismissed Plaintiff	
ME / NH	**Ouelette, Donald** Putative Class Rep.	
ND	**Guthmiller, Trent** Class Member / Dismissed Plaintiff	
OH	**Ortner, Matt** Putative Class Rep.	
SC	**Kirven, George** Putative Class Rep.	
SD	**Gisi, Patrick** Putative Class Rep.	
TN	**Grissom, Tim** Putative Class Rep.	

OTHER/NON-8-STATE		
State	**Name**	**Pending or Decided MSJ**
TX / NM	**Quiroga, Ruben** Class Member / Dismissed Plaintiff	
VA	**Bartus, John** Putative Class Rep.	
VA	**Boone, Robert** Putative Class Rep.	
WV / PA	**Jenkins, Earnest** Putative Class Rep.	Pending motion for summary judgment as to all remaining claims under the Pennsylvania and West Virginia statute of limitations. **(ECF #850)**
WV / PA	**Jenkins Timber & Wood, Inc.** Putative Class Rep. *Affiliated with Jenkins*	Pending motion for summary judgment as to all remaining claims under the Pennsylvania and West Virginia statute of limitations. **(ECF #850)**
WV / MD	**Moreland, Vonda** Putative Class Rep.	Pending motion for summary judgment as to all remaining claims under the Maryland and West Virginia statute of limitations. **(ECF #850)**
Unknown	**Davis, Shawn** Class Member / 303 Litigation Facebook User	
	Erickson, Gene Class Member / 303 Litigation Facebook User	
	Gann, Teddy Class Member / 303 Litigation Facebook User	
	Lollar, Andrew Class Member / 303 Litigation Facebook User	
	McCall, Allen Class Member / 303 Litigation Facebook User	
	Parrott, Ronald Class Member / 303 Litigation Facebook User	

I. INTRODUCTION

Plaintiffs invite this Court to certify eight state-law based classes of consumers who purchased tractor hydraulic fluid ("**THF**") products under different labels (depending on the brand, date, and size), comprising different physical characteristics (depending on the batch), with different knowledge of the product attributes (depending on their prior experience and which if any publicly available materials they read), and for use in different applications (depending on their equipment and how they used THF in that equipment). The damages they claim are equally varied, from no discernible equipment damage to hundreds of thousands of dollars in repairs. Plaintiffs seek to certify more than 50 different claims. In a poor attempt to mask the overwhelming individual variations in the legal and factual issues, they now frame their case at the highest level of generality—that Defendants sold products labeled as THF when in reality those products are not, definitionally, THF. This does nothing to alter the analysis.

The Court should decline Plaintiffs' invitation for numerous reasons.

- ***First*****,** Plaintiffs' efforts to pin their hopes on *Dollar General* fail because that case certified only two claims that cannot be certified here: (1) unjust enrichment, which was permitted only because *Dollar General*, unlike here, was against a retailer and not a manufacturer, and as to which this Court has already decided there are individual issues that mandate summary judgment against certain class representatives (ECF #1006); and (2) consumer protection statutes, as to which this Court has likewise decided there are individual issues that mandate summary judgment against some class representatives (ECF ##998, 1006). *See* § IV.A.

- ***Second*****,** the inclusion of uninjured class members in Plaintiffs' overly broad class definitions, coupled with an inability to objectively ascertain class membership, make a class improper. *See* § IV.B.

- ***Third*****,** Plaintiffs have failed their burden to show they satisfy Rule 23(a) because, *inter alia*, they assert different claims than the class and are subject to numerous individualized defenses, such as contributory negligence and failure to mitigate. *See* § IV.C.

- ***Fourth*****,** Plaintiffs have not demonstrated – and cannot demonstrate – Rule 23(b)'s predominance requirement, given the overarching individual questions of reliance, causation, and more. Nor can they reliably estimate single-state classwide damages either for refund damages or property damage flush costs (indeed, some of their claims for flush

costs have already been dismissed, ECF #996). *See* §§ IV.D.1 & 2.

- ***Fifth*,** Plaintiffs have equally failed to satisfy Rule 23(b)'s superiority requirement because, *inter alia*, they have made no case for efficiency when their proposed classes entail 40 separate trials and overlapping class membership, creating problems of claim preclusion. And even then, by their own admission, this would still leave the lion's share of the claimed damages for individual resolution. *See* §§ IV.D.3 & IV.E.

Each of these deficiencies, standing alone, defeats class certification. Together, they demonstrate how remarkably unsuited this case is to class treatment.

II. STATEMENT OF FACTS

A. 303 Tractor Hydraulic Fluid

1. *Smitty's Supply Inc. ("Smitty's") and Smitty's 303 THF Products*

Smitty's is an independent lubricants manufacturer. It manufactures and sells its own brands of lubricants, including two at issue here: Super S SuperTrac 303 THF ("**SuperTrac**") and Super S 303 THF ("**Super S**"). Smitty's sells its lubricants, including 303 THF brands, to retailers, distributors, and end-users through bulk and freight sales, local delivery routes, and a store-front in Louisiana adjacent to its manufacturing plant. **Ex. 1**, Smitty's Responses to 1st RFAs at No. 1; **Ex. 2**, DEFMDL0000089-91, 99-101; **Ex. 3**, E. Smith Dep. 183-87; **Ex. 4**, 5/9/19 Tate Dep. 84-85. At all relevant times, Smitty's also manufactured the CAM2 303 THF brands. Ex. 4 at 236.

2. *CAM2 International, LLC ("CAM2") and CAM2 303 THF Products*

During the relevant period, CAM2 sold two brands of 303 THF: CAM2 ProMax 303 THF ("**ProMax**") and CAM2 303 THF ("**CAM2 303**"). Plaintiffs (at 7[3]) falsely state that Smitty's acquired CAM2 in or around late 2013 or early 2014. Not so. Ed Smith, majority owner of Smitty's, acquired the brands and assets of a now defunct entity with a similar name, and

[3] References are to Plaintiffs' arguments in their Memorandum in Support, ECF #837 ("**Pl. Mem.**").

formed CAM2 as a Louisiana corporation in early 2014. **Ex. 5**, 10/12/22 Lorio Dep. 19. CAM2 and Smitty's are separate companies. *Id.* at 66, 94. CAM2 neither manufactured nor sold either SuperTrac or Super S at any time. *Id.* at 149.

3. *Other 303 THF Products*

Smitty's and CAM2 303 THF products were far from the only 303 THF products on the market during the period at issue. In fact, Plaintiffs' counsel and many Plaintiffs were involved in since-settled lawsuits against at least four different manufacturers of 303 THF (Citgo, Martin, Omni, and Warren Oil). Those lawsuits made virtually identical allegations to those here, claiming that other brands, including MileMaster 303, Carquest 303, Lubriguard, Orscheln Premium 303, SuperTech 303, O'Reilly's 303, NAPA Quality, and Harvest King 303, "lacked adequate viscosity and additives" and damaged equipment. *Hornbeck, et al. v. Orscheln Farm & Home, LLC et al.*, No. 4:18-cv-00941 (W.D. Mo.) ("***Hornbeck***"), ECF #19; *Allicks et al. v. Omni Specialty Packaging, LLC et al.*, No. 4:19-cv-01038 (W.D. Mo.), ECF #1; *Burgess et al. v. Martin Operating P'ship LP*, No. 19CA-CC00084 (Mo. Cir. Ct., County of Cass); *Yoakum v. Genuine Parts Co.*, No. 4:19-cv-00718 (W.D. Mo.), ECF #1-1.

Accordingly, Defendants decline to adopt Plaintiffs' misleading reference to "303 THF" as meaning only SuperTrac, Super S, ProMax, and CAM2 303. Instead, "**303 THF**" is used herein to refer to any product designated as a 303 THF – of which Plaintiffs used many. *See, e.g.*, **Ex. 6** at Rupe iRog. Answer 3 and Pltf-CR 3826 (answering he purchased five other brands of 303 THF not manufactured by Defendants, with only a fraction of his 303 THF purchases being Smitty's/CAM2 303 THF). The Smitty's and CAM2 303 THF products at issue are instead referred to, collectively, as "**Smitty's/CAM2 303 THF**."

4. ***Original Equipment Manufacturer ("OEM") THF Specifications***

Plaintiffs (at 3-4) recite the history of a single THF specification of a single OEM: John Deere 303 or "JD-303" from the 1960s and early 1970s. JD-303 has been obsolete for nearly half a century, long before Defendants started selling what the entire industry designated "303" THF – a THF designed not to meet the JD-303 specification but rather to be suitable as a replacement fluid in equipment calling for JD-303 or similar specifications, *i.e.*, an economy fluid for older or less sophisticated equipment. Meeting or failing to meet an OEM specification does not define suitability. *See* **Ex. 7**, Swanger Rpt. 9-10. Rather, the characteristics of a lubricant define suitability, which may exceed an OEM specification on zero fronts, all fronts, or somewhere in between. For example, a lubricant may exceed an OEM specification on zinc levels, but not on viscosity.

OEMs typically do not recommend brands by name, except their house brands, and vary on how they recommend OEM specifications. There are, at a minimum, hundreds of current and obsolete OEM hydraulic fluid and THF specifications. And many OEMs do not even provide OEM specifications, at least for certain models of equipment. *Id.* at 9-10.

Manufacturers like Smitty's may also have ***internal*** specifications, as distinguished from OEM specifications. These are self-imposed standards for viscosity, elemental composition, and possibly other characteristics. Like OEM specifications, internal specifications vary widely.

OEMs periodically upgrade their lubricant specifications, typically because newer additive technology is available, although it can also occur because of changes in equipment, changes in equipment tolerances, or, in the case of JD-303, because of a ban on a component ingredient. John Deere's current THF specification is J20C. Smitty's and CAM2 each sell – and sold during the entire class period – THFs that are suitable as a replacement for equipment calling for J20C. Ex. 3 at 21. Indeed, as shown below, many of the Smitty's/CAM2 303 THF

labels at issue expressly directed consumers to use the J20C alternative for newer equipment:

For equipment built after 1974 requiring multi-functional fluid, use Super S Premium Universal Tractor Hydraulic Fluid (J20C).

Ex. 9 (labels), from SuperTrac, mid-2013-2018, 5-gallon label (back)

Defendants' J20C product cost more for the consumer, and had a higher margin for Defendants.[4]

5. ***The Definition and Regulation of THF and 303 THF***

The essence of Plaintiffs' labeling claims have recently come to focus on the definition of THF. Although for years Plaintiffs and their experts have readily referred to Defendants' products as THF, they now seek (at 12) to make themselves arbiters of what constitutes a "true tactor [sic] hydraulic fluid[]." In doing so, they omit critical context about the changing regulatory environment for THF and 303 THF, which differs now from the beginning of the class period, and even changed mid-class period.

Until October 2017, no state or national regulatory body had ever regulated THF. There had been no accepted industry definition, much less governing standard, for THF's composition or labeling. That is when, for the first time, a single state (Missouri) banned the sale of 303 THF. The Missouri stop sale, along with those of two states that followed suit, is discussed in § II.D. *infra.* For purposes of contextualizing Plaintiffs' definitional theory of fraud, it is only important to understand that this was the first in a series of steps – propelled by the monied interests of additive suppliers who have paid millions to Plaintiffs' proffered expert, Tom Glenn, to lead the crusade – to ban all economy THF products from the market and, ultimately, to broadly regulate THF labels and standards.

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[4] Plaintiffs wrongly assert (at 17 n.6) that Defendants made a whopping $6.50 cent margin per gallon on 303 THF. In fact, when considering components, transportation, labor, marketing, and capital costs, the product was actually a "loss leader," and the margin was "not even close" to the figures Plaintiffs spout – indeed, it may not have even been 20¢ per gallon. *See* Ex. 3 at 261-62 ("if we could make a dollar a [5-gallon] pail on tractor hydraulic, we were doing well. That was … to our biggest customers, so – but I would hope that it ebbed and flowed and we made a dollar a pail. But $5 … would be laughable."). *See also* **Ex. 10**, 1/26/22 Tate Dep. 204 ("that one item was always a loss leader for us."); *id.* at 206 ("We – we would lose money at times selling that particular product … .").

The campaign worked. Effective January 1, 2020 (months after Defendants sold the last Smitty's/CAM2 303 THF products to any retailer), new provisions in the National Institute of Standards and Technology ("**NIST**") Handbook 130 become effective. These amendments, first proposed by Lubrizol,[5] the largest lubricant additive manufacturer in the United States, offered the first-ever definition of THF as follows:

> Definition at 1.54: A product intended for use in tractors with a common sump for the transmission, final drives, wet brakes, axles, and hydraulic system.

Ex. 11, Glenn Dep. Ex. 13.[6] This definition is broader than, and wholly inconsistent with, what Plaintiffs now propose is a THF, as it is defined by product "intent," not adherence to an OEM specification. *Compare* **Ex. 8**, Glenn Dep. 141 (Glenn testifying he views NIST as authoritative) *with id.* at 146-47 (discounting § 1.54 as a "loose definition"). The new NIST guidelines also went further than just ***definitions***, and separately provided ***standards*** for what THFs could be lawfully sold prospectively. Specifically, they directed that, to be sold, THF must meet one current or verifiable OEM specification. Ex. 11. These provisions were fully adopted in only 19 states.[7] Plaintiffs' expert admits that nothing in the NIST definition or new standard applied retroactively, and that he did not enforce them retroactively even as to members of his own organization. Ex. 8 at 149, 244.

These NIST regulations alone explain why Plaintiffs' claims about Defendants' agricultural fluid ("**Ag Fluid**") products, which they first started selling in 2019, make no sense.

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[5] *See* https://cdn.ncwm.com/userfiles/files/Meetings/Annual/Pub%2016%20Archive/2019/3-LR-Web.pdf at L&R - 101 ("Source: The Lubrizol Corporation (2019)"). *See also* Ex. 8 at 163-64, 237-38.

[6] Where the same sump serves both the hydraulic and transmission systems, it is referred to as a "common" sump. For equipment that has wet brakes and power steering, those can (but do not always) operate off this "common" sump. Where equipment has "separate" sumps, its respective hydraulics and transmission operate off different fluid, and each separate pump is "dedicated" for that purpose. Depending on equipment, it may have a "reservoir" as opposed to a "sump" for lubricants, but the two terms are used interchangeably herein.

[7] *See* https://www.nist.gov/system/files/documents/2023/02/09/2023%20NIST%20Handbook%20130_1.pdf at 9 (stating that 19 states fully adopted NIST "Method of Sale" Regulations, which include regulations on THF).

Regardless whether Defendants' Ag Fluid products are the same product, similar but different, or vastly dissimilar, the new fluid cannot be sold as a THF for reasons that have nothing to do with whether 303 THF was appropriately labeled and suitable for use in 2013-2019. Instead, it cannot be sold as THF due to regulations that first took effect in 2020. The product does not meet minimum standards under current, but new, regulations now effective in 19 states.[8] It is rich for Plaintiffs and their experts to be part of a campaign to eliminate consumer choice, and then cry "gotcha" when Defendants comply with the resulting new regulations. *See* Ex. 3 at 47-51 ("I think that most people have exited 303 market because of the – the latest labeling requirements and other things. But not until that, they haven't exited that market.").

6. *The Development and Manufacture of Smitty's/CAM2 303 THF*

When Smitty's first began developing an economy THF, it tested and analyzed the products its competitors were selling. Ex. 3 at 44. It was based on these test results that Smitty's developed its own internal 303 THF specification. *Id.* at 85-86, 97. *See also* Ex. 10, 1/26/22 Tate Dep. 71 ("we're producing a product that's already on the market").

Even though Smitty's competitors had sold volumes of similar product without issue, Smitty's nevertheless "did extensive field testing." Ex. 3 at 47-51. While Plaintiffs quibble over whether this constituted "field testing" as some term of art, the evidence is uncontroverted that the testing occurred. Specifically:

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[8] It is for this reason that it is "wrong" to call Ag Fluid a THF (Pl. Mem. Ex. 2 at 92-94), and it was in this new regulatory environment that Defendants created the upsell document on which Plaintiffs (at 14, 29, 34-35) rely. Plaintiffs mischaracterize that sheet, claiming (at 14) that "Smitty's itself identified common harms from use of" Smitty's/CAM2 303 THF. Not so. ***First,*** the sheet referred to "303 THF" generically, not specifically to Defendants' products. ***Second,*** the identified harms were connected to misapplication, not proper use of the product. Ex. 3 at 173. ***Third,*** the flyer asserts that, if misapplied, a 303 THF *might* cause equipment damage—not that it will with certainty. *Id.* ***Fourth,*** the flyer does not offer Defendants' opinion on these points or any statement of confirmed fact, but rather takes these points directly from *Tom Glenn* articles (and his bought-and-paid for Lubrizol campaign). *Id.* As Glenn's own later articles confirm, Defendants' 303 THF actually outperformed many competitor products on measures such as viscosity and additive content. **Ex. 29,** Glenn Dep. Ex. 9. *See also* **Ex. 30**, Glenn Dep. Ex. 20. ***Finally,*** to the extent Plaintiffs claim (at 35) that "such information was not given to consumers," that is unknown. Regardless, the same information was public by virtue of the fact that it was merely parroting Glenn's article.

> We took about 600 pails of product and … I would estimate about a hundred customers[.] … [M]y father was at the time very – my – he – he didn't – he didn't have money to – to pay a bunch of claims. So we couldn't afford to – to put a product out there that – that bit us in the butt, so to speak. So we were very careful to go out. … [W]e had a plan, and … we gave them enough to – to change their equipment out of oil. And – and we would follow up on a weekly basis with them, make sure they had done that, to make sure they … had used the tractor. It – it took several months to go through this process.

Id. at 50-51. *See also* **Ex. 13**, Saragusa Dep. 41-42 ("Well, the thing is, is that it hasn't caused problems in all this old – in this older equipment … . I would think that would be field – field use. That would show you that over time that you don't have an issue with the fluid.").

The process served its purpose, because not only were millions of gallons of Smitty's 303 THF sold with negligible complaints, but much of it was sold to repeat purchasers who were well versed, and well satisfied, with the product – including Smitty's own neighbors who bought from Smitty's Louisiana storefront. *See* Ex. 3 at 160 ("I'm going to say that if there was problems with any of the items listed there that I would know about it. Absolutely. … Most of our customers are repeat customers, and they continue to buy."); *id.* at 189 ("And we see those people day-in and day-out, and we talk to those people. … We're a family-run business. We don't – we want to give a service – a good service and a good product to our customers. It doesn't help me or anybody else to give a product that doesn't … perform well. It's – it's not going to be a profitable product at the end. This product performed well.").

To make these products, Smitty's used a number of ingredients to meet its internal specification. One frequently used ingredient was lube oil, which may be also referred to as "line wash" or "flush oil." Ex. 10 at 180-81. These products were not "used," as Plaintiffs claim, but rather non-virgin base oils that typically already contained additive content. **Ex. 14**, Baker Dep. 130. *See also* Ex. 3 at 222 (Q. So when you use the term lube oil, that's something that could be a flush line or something else; but if you use base oil, that's without any additives or any use up to

that point in time; is that fair? A. Correct, except for none of the products that – whether they're lube oils or not have not been used up to that – to that time.).[9] The use of line wash is common in the industry. Indeed, Plaintiffs' own expert Tom Glenn once wrote about the acceptability of this practice. *See* **Ex. 12**, Glenn Dep. Ex. 62 (describing using line wash in a "lower-spec hydraulic oil" as a "reasonable and responsible way[] to re-purpose the material"). And their other proffered expert, Dr. Dahm, in a case where the same Plaintiffs' counsel sued Warren Oil with virtually identical allegations, cited another manufacturer's similar use of "line flush oils" in its 303 THF. **Ex. 16**, Dahm *Yoakum* Rpt. at 37.

While all batches of Smitty's/CAM2 303 THF met certain minimum standards, in fact they could far exceed these standards, as well as vary with respect to additive levels that were not subject to a specification. Accordingly, although Plaintiffs (at 7) state that "[a]ll [Defendants'] 303 THF was the same," in fact, nothing could be further from the truth. Even Plaintiffs' own experts confirm as much. *See, e.g.*, **Ex. 17**, Dahm Rpt. ¶ 131 (describing Smitty's 303 THF as "highly variable resulting product"); **Ex. 18**, Dahm *Zornes* Rpt. ¶¶ 110, 129 (stating Smitty's 303 THF compositions "vary substantially" and describing "a highly variable resulting product"); Ex. 8, Glenn Dep. 51 ("the product itself is not the same from one time to another"). There were different tanks, special blends, and even divergent ingredients. For instance, some batches used ***only*** virgin base oil. **Ex. 19**, 3/12/19 Schenk Dep. 91-92; **Ex. 20**, 10/11/19 Schenk Dep. 113; **Ex. 21**, 10/10/19 Schenk Dep. 155-56. In fact, in the aftermath of Hurricane Harvey, this was true for

[9] Lube oils would sometimes include not only traditional line wash, but also transformer oil and "[o]n a rare occasion," turbine oil. Ex. 3 at 200; *accord* Ex. 10 at 266. Plaintiffs (at 1, 16, 36) misleadingly refer to these as "waste" or "used oils." But the transformer oil was not put through any shearing action or oxidizing before its use as an ingredient. *See id.* at 79 ("We don't use any used oil."). Plaintiffs' allusion (at 16 n.5) to the possibility of PCBs in Defendants' products is likewise inflammatory, improper, and baseless. The presence of PCBs is relevant only to claims of personal injury, which are not at issue, *see* Ex. 8, Glenn Dep. 250-51, and there is no evidence that Smitty's ***ever*** used fluids with detectable PCB levels. Indeed, it adamantly denies that it has. *See* **Ex. 15**, Glenn Dep. Ex. 25; ECF #970 (moving to exclude Glenn's opinion regarding PCBs for lack of reliability).

a considerable period. **Ex. 22**, Clement Dep. 132. Similarly, some batches used additive packages to provide zinc content, whereas others would rely solely on additive content infused in the lube oils if they were sufficient to meet the internal specification. **Ex. 23**, Clement Dep. Ex. 15; Ex. 22 at 106-07, 134, 140; Ex. 13 at 100. Thus, while it is false that Smitty's "never used an additive package" (Pl. Mem. at 16), it is true that, as Dahm has noted, the resulting product was "highly variable."

It is equally untrue that Smitty's did not test incoming lube oil. The record is replete with testing and other quality procedures. *See, e.g.*, Ex. 4 at 35. This included buying from reputable suppliers (Ex. 3 at 253-54), canceling suppliers who did not meet Smitty's standards (**Ex. 24**, Shockites Dep. 322; Ex. 3 at 236; **Ex. 25**, Schenk Dep. Ex. 281), auditing incoming products (**Ex. 26,** Cressionnie Dep. 54), and rejecting individual loads if they were not up to par (Ex. 13 at 23-24). It also included testing each incoming load, even though Plaintiffs (at 36) inaccurately state that Smitty's did not have a centrifuge for this purpose. *See* Ex. 13 at 113-14, Ex. 3 at 83; Ex. 19 at 201-02. Component products were also subject to XRF spectrography and triple filtered, and products with moisture content were separated for dehydration. Ex. 3 at 82; Ex. 24 at 25-26, 184; Ex. 22 at 58, 134, 177, 187; Ex. 4 at 181, 184. And, of course, final testing occurred to ensure that batched product met internal specifications. Ex. 4 at 228-29.

None of the emails Plaintiffs cite suggest otherwise. For instance, they cite an email about product shipped to Roseland in 2016. Pls.' Ex. 27. But that email specifically said the blender was not inclined to use the product, which would have to be evaluated when it arrived, and there is no indication in the record that this product was ever used in 303 THF. Indeed, the testimony is that the product would have been tested and subject to a centrifuge for evaluation when it arrived. Ex. 13 at 113-14. Plaintiffs also cite (Pls.' Ex. 29) to Smitty's supposedly making

"crap" "go away in the tractor tank." The face of the email itself makes clear the reference to "crap" was to reworked grease – not any component of 303 THF. The testimony uniformly confirms this. *See, e.g.*, Ex. 13 at 129-31; Ex. 4 at 220, 225-26.[10]

7. *Smitty's/CAM2 303 THF Testing Results Showed Variation Among Batches.*

The parties agree that Smitty's internal 303 THF specification included two critical aspects: (1) viscosity and (2) zinc levels.[11]

In Plaintiffs' own words (at 20), "Viscosity is the most important aspect of hydraulic fluid." Plaintiffs' chief complaint on this front is that the typical viscosity of Smitty's/CAM2 303 THF at 100° C was less than the viscosity called for by John Deere's current *J20C* specification, which is 9.1 minimum. That is true (although in one sample the viscosity of Super S did in fact meet the J20C specification (**Ex. 28**, Glenn Dep. Ex. 48)). But Smitty's never claimed to meet a J20C viscosity. And, Smitty's viscosity range was consistent with numerous OEM specifications. Although Plaintiffs' experts did not bother to test the product they are criticizing, eight sets of test results are available from Smitty's/CAM2 303 THF samples taken by various state Departments of Agriculture and Petroleum Quality Institute of America ("**PQIA**") in 2017 and 2018. **Exs. 29, 30 & 31**, Glenn Dep. Exs. 9, 20, 21. While no central repository of all OEM specification exists, the Missouri Department of Agriculture ("**MDA**") produced viscosity measurements for some OEM specifications. **Ex. 175**, MDA_THF 135-49. Those measurements, along with how they compare to the Smitty's/CAM2 303 THF samples, are set forth below:

[10] Plaintiffs cite some emails from before the class period about sediment. Not only is this irrelevant from a time perspective, but testing processes improved over time. *See* Ex. 13 at 113, 116-18. In any case, sediment is not part of the experts' opinions in this case about the label or the alleged unsuitability of the product. The same is true about Plaintiffs' reference (at 20) to silicon levels. Dr. Swanger testifies that the levels could be due to beneficial silicone anti-foaming agents in the oil, just as easily as they could be from silica, *i.e.*, dirt contaminants. **Ex. 27**, Swanger Dep. 116. And since Plaintiffs' experts did not test the fluid, they cannot rule out beneficial silicone.

[11] Defendants agree with Plaintiffs (at 15) that appearance and color have "little or nothing to do with" performance.

OEM Specification	Kinematic Viscosity at 100° C	Number of Smitty's Samples (out of 8) Meeting Viscosity Standard
CNH MAT 3505 (Rev.)	6.75 min	8/8
CNH MAT 3525 (Rev. D)	9.1 - 9.8	1/8
CNH MAT 3526 (Rev. B)	8.5 - 9.0	2/8
FNHA-2C-200 (Rev. B)	8 min	4/8
Ford M2C 134D	9 min	1/8
Ford M2C 86B	10.5 - 11.6 (99° C)	0/8
Ford M2C 86C	9 min	1/8
JI Case MS 1206	8.8 min	1/8
JI Case MS 1207	6.2 min	8/8
JI Case MS 1209	6.2 min	8/8
JI Case MS 1210	6.65 min	8/8
JI Case MS 1205	11.1 min	0/8
John Deere J20C	9.1 min	1/8
John Deere J20D	7 min	8/8
Massey Ferguson CMS M1135	10.3 - 11.7	0/8
Massey Ferguson CMS M1139	10.1 - 12	0/8
Massey Ferguson CMS M1141	9.6 max	8/8
Massey Ferguson CMS M1143	13.5 max	8/8
Massey Ferguson CMS M1145	13.5 max	8/8

Key: Green – all 8 Smitty's/CAM2 samples met viscosity standard;
Yellow – at least 1 of Smitty's/CAM2 samples, but not all, met viscosity standard.

Many of the OEM viscosity specifications that Smitty's/CAM2 303 THF routinely met were those for 1980s equipment (*e.g.*, JI Case MS 1210 from April 1980 and JI Case MS 1207 from November 1986), although some were later. And the further one looks back – for instance to pre-1974 equipment – the more viscosity specifications Smitty's/CAM2 303 THF would meet. Plaintiffs' expert reports support this. *See* **Ex. 32**, Glenn Rpt. at Fig. 4.1 (showing, *e.g.*, Massey Ferguson M110 with a minimum viscosity of 5.75, JI Case Hy-Tran with a minimum viscosity of 6.2, and John Deere J21A with a minimum viscosity of 5); Ex. 18, Dahm *Zornes* Rpt. ¶ 73 ("These performance specifications vary widely in terms of the minimum required nominal viscosity values measured at 100-deg C, which vary from 5.4 to 11.9 cSt …."). In the tested Smitty's/CAM2 303 THF samples, none had a kinematic viscosity less than 7.1. *See* Ex. 7, Swanger Rpt. Fig. 1. Further, Smitty's/CAM2 303 THF averaged higher (better) viscosities than most of its peer 303 THF products, and its average viscosity was actually better than half the

J20A (a more recent John Deere specification than JD-303) products tested.[12]

Regarding the zinc internal specification, Plaintiffs' own experts concede the importance of this measure, too. Ex. 8, Glenn Dep. 212. And, again, Smitty's/CAM2 303 THF products measured on par with or better than most of its competitor products in this regard. *See* Ex. 30 (showing Smitty's/CAM2 with a higher average zinc level (458) then the average zinc level (388)). *See also* Ex. 29. Even still, zinc levels varied widely (from 362 to 652). Ex. 30.

B. The THF Labels Vary By Time, Brand, and Quantity and Plaintiffs' Exposure, Understanding, and Reliance on the Variable Label Statements Also Differ.

The proposed classes encompass purchasers of 303 THF under 17 different labels. Ex. 9. Some of the labels changed over the class period. For example, the 5-gallon version of Smitty's and CAM2 brands changed in 2018 (from SuperTrac and ProMax, to Super S 303 and CAM2 303, respectively). Others, such as the 55-gallon SuperTrac label, remained the same for the entire period. *See* Ex. 33, Lester Rpt. at 12-28 for a detailed description of the labels at issue.

Plaintiffs allege numerous supposed label misrepresentations. *See* 5ACC ¶¶ 159-76.[13] However, following depositions in which Plaintiffs explained their unique circumstances as to what (if any) of those labels they read, how they understood them, and whether portions were material to their purchase decision, Plaintiffs began to backtrack and focus on just two statements, both appearing on the front of Smitty's/CAM2 303 THF labels: "303" and "tractor hydraulic fluid."[14] Still, Plaintiffs have not abandoned their other misrepresentation claims and

[12] Plaintiffs make much ado about nothing with their repeated references to Dr. Swanger's opinion that Smitty's/CAM2 303 THF products were suitable for applications calling for a 20-weight fluid. According to Plaintiffs' Exhibit 39, showing the equivalent between SAE grades and viscosity indices, a 20-weight fluid's mid-range viscosity would be approximately 7.0 at 100° C, or in line with many of these older OEM THF specifications.

[13] 5ACC refers to Plaintiffs' Fifth Amended Consolidated Complaint, ECF #834.

[14] Plaintiffs' labeling expert, though, de-emphasized the "303" representation after being confronted with the very different interpretations of that term by Plaintiffs, which he did not consider in forming his opinions. *See* SOF § II.E.3. *See also* ECF #969 (moving to exclude opinions of Alter).

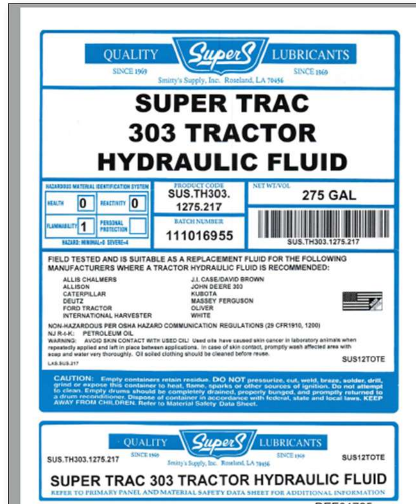
thus a discussion of the labels as to these various representations is relevant. *See, e.g.*, Pl. Mem. at 26 (discussing "numerous respects" in which labels were misleading), 81 (discussing as misleading list of OEMs, performance attributes, and "multi-purpose" description).[15]

1. ***Disclaimer: "Not Recommended" vs. WARNING - "Not Suitable"***

Plaintiffs (at 17) find it concerning if a consumer was "using a 303 product where you should be using a J20C product." That is why the majority of at-issue labels specifically directed consumers to buy the premium J20C product if their equipment was newer than 1974. *See also* ECF #998, July 19, 2023 Order ("The labels clearly stated that the products were not suitable or recommended for equipment built after 1974 and could cause performance problems or equipment harm. The labels also clearly stated that [Defendants] directed consumers to use a premium oil in equipment built after 1974."); ECF #1006 at 7, July 25, 2023 Order ("The Court finds that this construction is reasonable and disclaims the Label's statements regarding performance benefits resulting from the use of CAM2 Promax 303.").

Some exceptions exist, however. The larger sizes of Smitty's and CAM2 303 THF did not include such a disclaimer, one of which is pictured below:

[15] Plaintiffs also allege omissions. With only one exception, the supposed omissions are merely the converse of alleged misrepresentations. For instance, Plaintiffs claim that it was false that the labels said "THF," and that it was a material omission that the labels did not say the content was ***not*** THF. Likewise, they claim that it was misleading for the labels to say the fluid was suitable as a replacement in certain applications, and also that it was a material omission that the labels did not say they were ***not*** suitable for any application. Because these omission claims are not distinct from Plaintiffs' affirmative misrepresentation claims, Defendants do not discuss them separately herein. The sole exception is Plaintiffs' claim that a failure to include an ingredient list on the labels was material.



Ex. 9, SuperTrac 275-gallon label

Nor did older 5-gallon SuperTrac inventory. *See* **Ex. 34**, Ti. Sullivan Dep. 181-82 & **Ex. 35**, Ti. Sullivan Dep. Ex. 35.

With respect to the labels that included the disclaimer, the content varied. There were essentially two different versions[16], as shown below:

Misapplication may cause severe performance problems. 303 Tractor Hydraulic Fluid has not been recommended by any OEM for model years later than 1974. For equipment built after 1974 requiring multi-functional fluid, use Super S Premium Universal Tractor Hydraulic Fluid (J20C).

Ex. 9, SuperTrac, mid-2013-2018 5-gallon label (back) – 1974 disclaimer, "not been recommended"

WARNING: THIS PRODUCT IS NOT SUITABLE FOR USE IN MOST EQUIPMENT MANUFACTURED SINCE 1974. MISAPPLICATION IN NEWER EQUIPMENT MAY CAUSE UNSATISFACTORY PERFORMANCE OR EQUIPMENT HARM. FOR EQUIPMENT BUILT AFTER 1974, USE CAM2® PREMIUM TRACTOR HYDRAULIC FLUID.

Ex. 9, CAM2 303, 5-gallon label (back) – 1974 "warning," "not suitable"

There are obviously numerous differences, but the primary ones were that the later disclaimer:

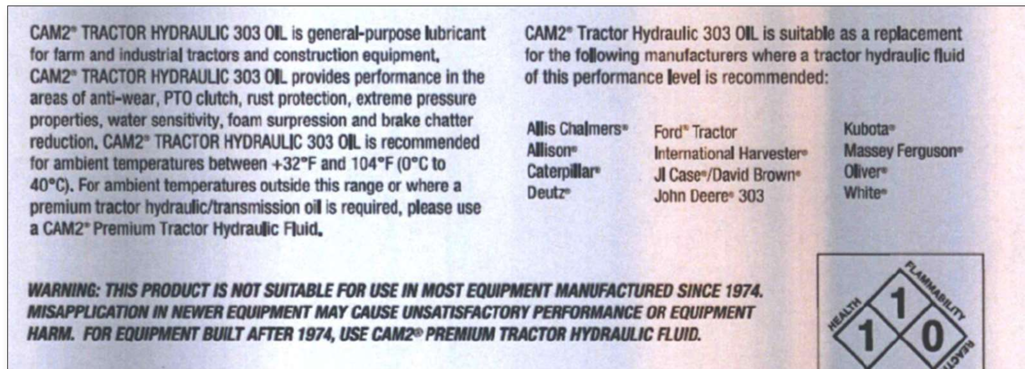
- included the designator "WARNING";
- changed from the product had "not been recommended" for older equipment to a stronger statement that the product "is not suitable for use" in such equipment;
- clarified the meaning of "misapplication," *i.e.*, application to "newer equipment"; and

[16] Although there are essentially only two versions of the disclaimer during the class period, some consumers may have purchased the immediately preceding version of the 5-gallon SuperTrac label, which referred to 1977 rather than 1974. *See* **Ex. 96**, SuperTrac, 2013 5-gallon label (back).

➢ directed users to purchase the premium product not just for post-1974 equipment “requiring multi-functional fluid,” but rather for all post-1974 equipment.

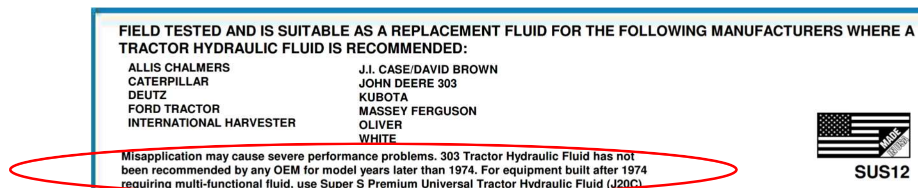
The second of these differences was particularly notable to Plaintiffs’ expert, who opines that the “not-been-recommended” disclaimer (as opposed to the “not-suitable” warning) is “informationally meaningless.” **Ex. 36**, Alter Rpt. ¶ 30. *Accord* Ex. 18, Dahm *Zornes* Rpt. ¶ 150.

The conspicuousness of the disclaimers varied too. When the content of the disclaimer changed so did its font (it got larger) and its format (it became all caps), which differentiated the warning from the remainder of the back label language:



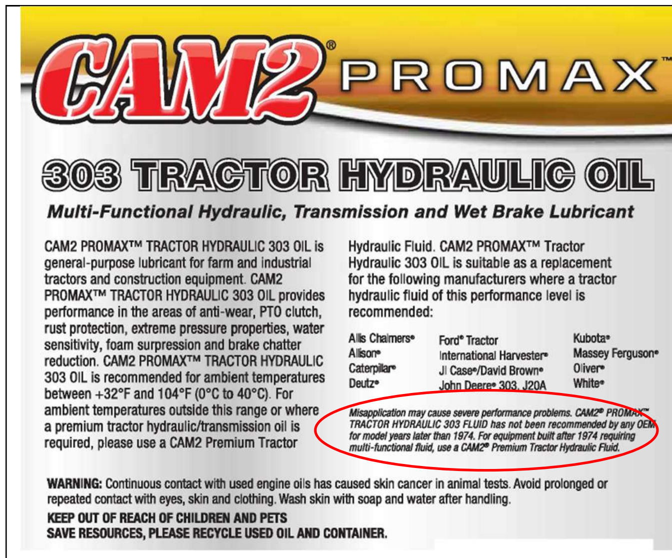
Ex. 9, CAM2 303, 5-gallon label (back)

And even as to consumers where the content of the disclaimer was not in all-caps, the placement and prominence varied by label. For some the type-face of the disclaimer was not contrasted to other language, *e.g.*, not bolded or italicized:



Ex. 9, SuperTrac – 55 gallon label

For others, it was italicized or both bolded and italicized – though even then the placement varied with respect to whether the disclaimer came above or below a separate skin contact warning:



Ex. 9, Promax – 5-gallon label (back)

Ex. 9, SuperTrac – 5-gallon label (back)

Plaintiffs' expert agrees that the disclaimer was "presented differently in different packaging" and is not opining that it was inconspicuous on all labels. **Ex. 37**, Alter Dep. 273-74 ("So some of the comments here … are not generally about every label."). Plaintiffs also admit (at 100 n.78) that the "placement" is material (*e.g.*, above or below other warnings). *See also* Ex. 8, Glenn Dep. 288-89 (placement and font size are relevant to how many consumers will read a warning). Some Plaintiffs read the disclaimer (*e.g.*, Hazeltine), some did not (*e.g.*, Anderson), and one testified that he was incapable of reading it without glasses (*e.g.*, Wachholder). *See* **Ex. 38**, Hazeltine Dep. 140; **Ex. 39**, Anderson Dep. 260; **Ex. 40**, Wachholder Dep. 243-44.

With regard to whether consumers read the disclaimer and how they understood it, some read an older version of a SuperTrac label, prior to ***any*** disclaimer, and then wrongly assumed there were no label changes. *See, e.g.*, **Ex. 41**, Tr. Sullivan Dep. 48. *See also* ECF #996 (granting in part summary judgment). Others, such as Hazeltine and Wendt, read the disclaimer at the time of purchase and bought anyway. *See* Ex. 38 at 140; **Ex. 42** at Wendt Dep. 162-63. *See also* ECF ##998, 1006 (granting in part summary judgment). For those who did not recall reading the disclaimer at purchase, when asked to read the language at deposition, some testified that they

did not understand it (**Ex. 43**, Harrison Dep. 229-30), others said they understood it (**Ex. 44**, Wurth Dep. 105), and still others were unsure (**Ex. 45** at Ruhl Dep. 207). *See also* **Ex. 46**, Egner Dep. 242-43, 310-12 (admitting after reading disclaimer at deposition that Defendants warned of damage to post-1974 equipment); **Ex. 47**, yesterdaystractors.com (posting that SuperTrac 5-gallon label disclaimer "should be a warning flag to potential users") (Nov. 23, 2018).[17] Some said they probably would still have purchased the product if they'd read the disclaimer (Ex. 39 at 260 (Anderson)), while others said they probably would not have (**Ex. 48**, Hargraves Dep. 165).

2. ***Designation of a "303" Product***

Plaintiffs represent (at 3-4) that the shorthand "303" (as opposed to the actual OEM specification, "JD-303") "became synonymous with the Deere name." While this is one of Plaintiffs' only misrepresentation claims that is actually common among labels, the evidence shows wide variation in consumers' understanding of what, if anything, "303" meant.

When Smitty's first explored whether to manufacture an economy THF, competitors were already using the phrase "303." Ex. 3 at 17-18. Ed Smith testified that the only meaning of "303" in present day is "economy product." *Id.* at 75, 76. *See also id.* at 13 ("303 became pretty much widely accepted through the industry that it was an economy fluid"); *id.* at 14 ("it just became known in the industry as the older or economy product"). Retailers agree that "303" refers only to the opening price point. **Ex. 49**, Arnett Dep. 132-33. And Plaintiffs' expert similarly describes "303" as "hav[ing] evolved to become moniker for a low-cost THF" and believes that "303" identifies a THF as acceptable only for use in "older tractors." **Ex. 50**, Glenn Dep. Ex. 56; Ex. 8, Glenn Dep. 129-31. *Accord* Ex. 27, Swanger Dep. 106 ("303 indicates an

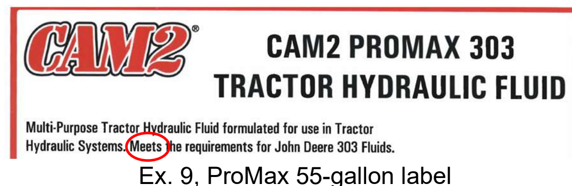
[17] The Court has found that the warning is understandable "and disclaims the Label's statements regarding performance benefits." ECF #1006 at 7. However, if, as Plaintiffs (at 32) contend, the disclaimer were "ambiguous," it would be a question of fact for the jury how any individual consumer actually interpreted it. *See also* Pl. Mem. at 33 (arguing disclaimer "can be interpreted" in different ways).

economy fluid … .”).

As for consumers, many have similarly reported that to them the “303 simply designated an economy fluid.” **Ex. 51**, Stone Decl. ¶ 8; **Ex. 52**, Hawkins Decl. ¶ 7. Nash, for instance, did not know of any relationship between the term “303” and John Deere. **Ex. 53**, Nash Dep. 244. Others associate “303” with John Deere – but even then they differ on whether “303” was material to their purchase decision. *See, e.g.*, **Ex. 54** at Watermann Dep. 196-97, 213; **Ex. 55** at Kimmich Dep. 307, 314; Ex. 46 at 236, 248 (Egner); **Ex. 56**, Bollin Dep. 50, 63. Still others attribute no meaning to the designation or do not know if it carries meaning. *See, e.g.*, Ex. 38 at 56 (Hazeltine); Ex. 43 at 205 (Harrison). But others looked for “303” on the label when making purchase decisions. **Ex. 57** at Peck Dep. 81. Some even testified that the 303 designation was not false or misleading. Ex. 44 at 77, 109 (Wurth).[18]

3. *“Meet” vs. “suitable as a replacement”*

Plaintiffs theorize that no expert defends the truthfulness of the Smitty’s/CAM2 303 THF labels because no one can honestly say that the product “meets” an OEM specification, at least with certainty backed by testing. But the evidence is that ***only one*** of the many labels represented that the product “met” any requirement at all, as shown below:



Ex. 9, ProMax 55-gallon label

Of the eight-state putative class representatives, only Klingenberg purchased under this label. **Ex. 58**, Klingenberg Dep. 26. Most of the other labels represented instead that the products were

[18] Even individual Plaintiff testimony is inconsistent. For instance, Anderson thought “303” and “hydraulic fluid” are interchangeable, but also that “303” refers to economical THF. Ex. 39 at 69-70, 235-36. He also believes “303” to be “a spec grade from John Deere,” and even “synonymous” with J20C, which is what he knew he was supposed to look for. *Id.* at 30, 114, 214-16. Yet, he also thinks “303” is equivalent to the lesser J20A. *Id.* at 175, 220.

"suitable as replacement" where a 303-type fluid was called for – the truth of which Defendants will robustly defend. *See also* Ex. 37, Alter Dep. 306 (agreeing that other labels did not say the product "meets" an OEM specification, but describing it as "an omission that it doesn't say clearly that it does not"); Ex. 8, Glenn Dep. 94 (Q. What's the difference between a product saying it meets a spec and a product using other phrases? A. One meets the spec and one doesn't.); *id.* at 95 (Q. Are you aware of any Smitty's or CAM2 [THF] label that represented that it met the spec? I do not recall seeing one that says this meets any specification.); **Ex. 59**, Hayes Dep. 210 ("It doesn't say it meets any specification.").

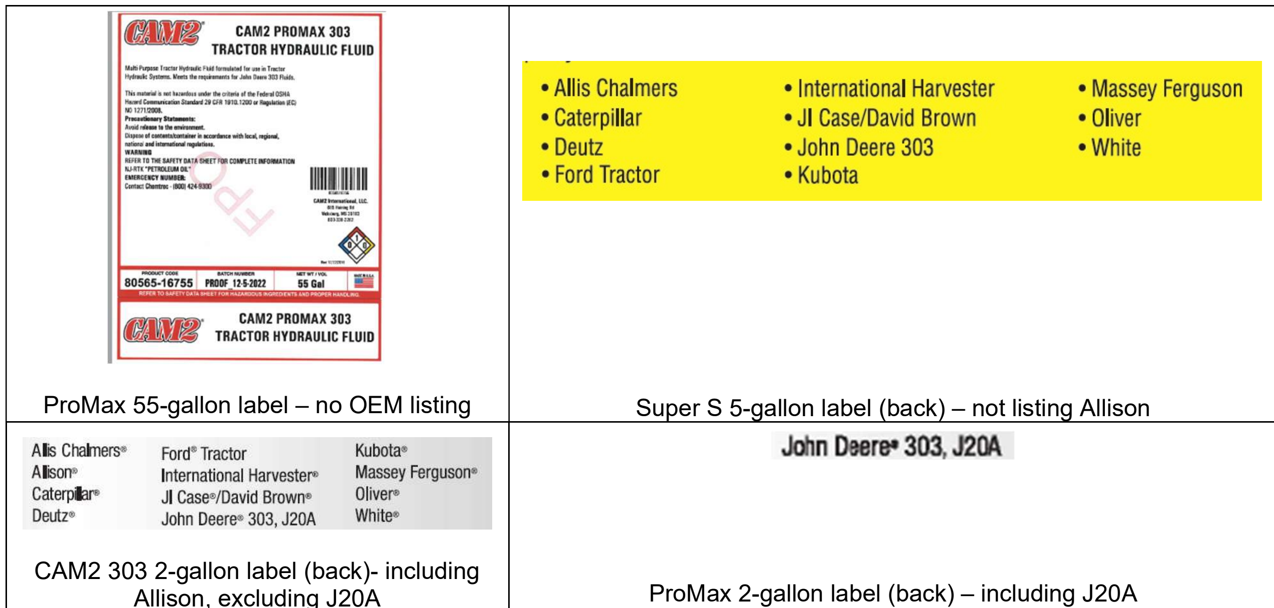
Still other labels did not represent the THF either to "meet" any OEM specification or be "suitable as a replacement" where that OEM specification was called for, as shown below:

Ex. 9, ProMax 275-gallon label

Like everything else on the label, it was hit or miss whether consumers even read this language where it was included. *E.g.*, *compare* **Ex. 60**, Zornes Dep. 319-20 (agreeing he did not read this far) *with* Ex. 42 at Dep. 145 (Wendt read the entire label the first time he purchased CAM2).

4. ***List of OEMs***

Plaintiffs also challenge as a supposedly uniform misrepresentation the list of OEMs on the back of the product labels. Yet again, this is not actually common. There are four variations: (1) labels that did not list OEMs at all; (2) labels that listed 12 OEMs, including Allison; (3) labels that listed 11 OEMs, excluding Allison; and (4) labels that listed all 12 OEMs, but additionally included next to John Deere the OEM specification J20A.



ProMax 55-gallon label – no OEM listing

Super S 5-gallon label (back) – not listing Allison

CAM2 303 2-gallon label (back)- including Allison, excluding J20A

ProMax 2-gallon label (back) – including J20A

Kimmich testified that he only purchased under the label versions that included Allison, and that this was material to his purchase decision. Ex. 55 at Dep. 304-05 ("Number 1, if Allison approves this, and this is suitable for Allison transmission, then it's gold."; "Allison is probably the pickiest of all transmission people. And if they approve that oil … and their name's on there, then that says it all.").[19] Harrison and Jenkins similarly testified that the variations mattered, and in particular that the listing of J20A (which appeared on only two of the 17 labels at issue) was material to their purchases. Ex. 43 at 218, 221; **Ex. 61**, Jenkins Dep. 136-37. *See also* Ex. 37 at 207-08 (Alter agreeing that J20A could be material to those whose manuals called for J20A); Ex. 39 at 246 (Anderson testifying that he purchased ProMax because he thought it was equivalent to J20A, not J20C). Many other Plaintiffs testified that they did not rely on the list of OEMs at all. *See, e.g.*, **Ex. 62** at Asfeld Dep. 55-56. And others used the THF for OEMs not listed on the label. *See, e.g.*, **Ex. 63**, Pltf-CR 1988 (Strickland). Plaintiffs' marketing expert opines that some consumers might not have been misled "[b]y this particular pillar" of the label. Ex. 37 at 243.

[19] The Cout has ruled that it is a genuine issue of material fact whether Kimmich purchased under other label versions, given conflicts between sworn deposition testimony and sworn settlement forms. ECF #1010.

5. ***“Multi-Service” or “Multi-Functional”***

Plaintiffs frequently invoke (*e.g.*, at 2, 81) language on the labels referring to the fluid as “multi-service” or “multi-functional.” This is surprising in a case seeking class certification on label claims, as this language is not on many of the labels encompassed by the class definitions. For example, compare the two labels below, one with this language and one without:

Ex. 9 - SuperTrac 5-gallon label, mid-2013-2018 (front) – Multi-Service	Ex. 9 - Super S 5-gallon label (front) – no reference to Multi-Service

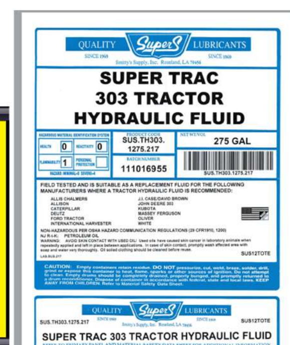
Purchases under labels ***without*** the language that Plaintiffs claim was both material and misleading account for a sizeable share of class period purchases. Indeed, it would include the vast majority of purchases from Orscheln, who only began selling Super S in 2018. **Ex. 64** at PLMDLRETAIL001-2. Still, Plaintiffs are correct that some consumers have testified that this representation was material. *See, e.g*., Ex. 41 at 42 (Tr. Sullivan). *See also* ECF #874 at 3 (Hazeltine offering as material fact that he purchased based on the label representation that the THF was “multifunction” fluid). Others did not understand any difference between a product described as “multi-service hydraulic transmission fluids,” and one designated just “tractor hydraulic fluid.” **Ex. 65** at Coleman Dep. 14-15. Either way, this purportedly material representation is distinctly uncommon across the labels.

6. ***Equipment Images (or Not)***

Even though Plaintiffs' classes encompass 17 labels, Plaintiffs feature only two of these labels in their brief.[20] They claim that these featured labels have images of post-1974 equipment and some Plaintiffs relied on these images in purchasing. *See, e.g.*, **Ex. 66** at Creger Dep. 143-45. Others, however, report never even noticing equipment pictures. *See, e.g.*, **Ex. 67**, Chalfant Decl. ¶ 10. Still, others claim to have relied on the images for some labels, but not others, because the labels differed. Ex. 39 at 106-07, 179, 250 (Anderson, relevant to SuperTrac purchase, but not CAM2); Ex. 46 at 234-35, 284-85 (Egner, relevant to SuperTrac purchase, but not CAM2 or Super S). The record reflects disagreement and uncertainty about the vintage of the pictured equipment, as well as admissions by other Plaintiffs that they did not rely on the images as part of their purchase decision. *See, e.g.*, Ex. 56 at 330 (Bollin); **Ex. 68** at Sevy Dep. 236. *See also* Ex. 51 ¶ 10 (Stone attesting that he "never associated any significance to the equipment"); **Ex. 69**, Cooke Decl. ¶ 9 ("the pictures didn't affect my purchase decision"). Compounding this variability on consumer materiality, of the 15 labels that Plaintiffs did not include in their brief, many do not have similar images or have no images at all. For example:

SuperTrac 1-gallon label (front)

Super S 5-gallon label (front)



SuperTrac 275-gallon label

Whatever imagery labels did or did not have, Plaintiffs' marketing expert "can't say for sure"

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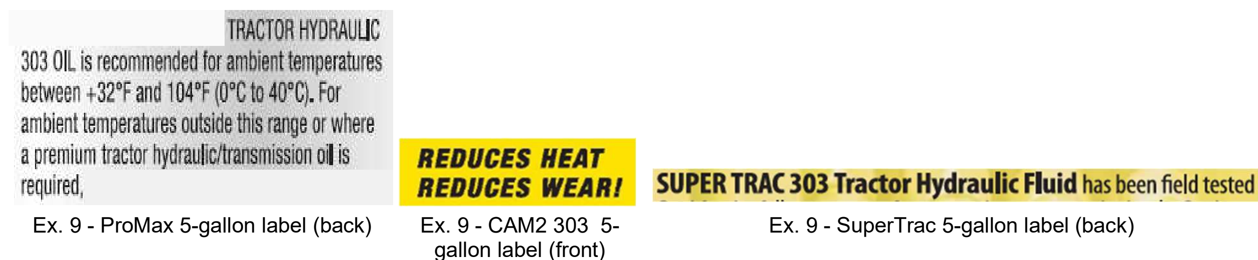
[20] (1) SuperTrac 5-gallon, 2013-2018 (front, Pl. Mem. at 7; back, *id.* at 8); and (2) ProMax 5-gallon (front, *id.* at 7; back, *id.* at 8). Plaintiffs also excerpt a SuperTrac, pre-Class Period label (front, *id.* at 8, 31).

that it was material to consumers. Ex. 37 at 236. *See also id.* at 242 ("it's not about this one pillar").

7. ***Other Label Differences***

More label variations exist than just the categories set forth above. For example, Plaintiffs admit (at 8) that the labels vary on whether they included performance characteristics, with the largest drums failing to include them.[21] Plaintiffs have also agreed that which performance characteristics a consumer looks for "depend[s] on how they intended to use that product." Ex. 56 at 40-41 (Bollin). Additionally, some labels, but not others, referred to ambient temperatures, "reduces heat," and/or "field tested":



Ex. 9 - ProMax 5-gallon label (back) | Ex. 9 - CAM2 303 5-gallon label (front) | Ex. 9 - SuperTrac 5-gallon label (back)

In each case, there were some Plaintiffs who testified that this variable language was material to their purchase decision, while others testified it was not. *See, e.g.*, Ex. 61 at 140 (Jenkins); Ex. 44 at 104 (Wurth); Ex. 55 at Dep. 304-05 (Kimmich). Additionally, for some consumers the brand (*e.g.*, Smitty's vs. CAM2) mattered to their purchase. *See* **Ex. 70**, Glenn *Blackmore* Rpt. ¶ 5.4.3 ("Whereas Super is used as part of a trademark, a consumer could easily assume it's a statement about the quality of the product."); Ex. 18, Dahm *Zornes* Rpt. ¶ 143 (opining that Smitty's brand implies product reliability to customers, but not opining similarly as to CAM2 brand).

Plaintiffs do not simply gloss over these label differences, but actually misstate the

[21] Plaintiffs pretend (at 28) that an email referring to performance benefits as "fluff" (Pls.' Ex. 40) is a smoking-gun admission. In fact, the testimony is that "performance requirements" in the email referred to whether the product was verified to "meet" an OEM specification (versus meeting Smitty's internal specification). Ex. 4 at 107-08. Other than the 255-gallon ProMax label, no labels represented that the THF met any specification.

labels' commonalities. For instance, they represent (at 7), that Smitty's/CAM2 303 THF "was sold in yellow containers," which their expert opined was a misleading color scheme. Ex. 36 ¶ 30 at "Second." While that is true for the 5-gallon Smitty's brands, Plaintiffs' proposed class definitions sweep in products in all sorts of different colors, including white containers with yellow labels, blue containers with blue and white labels, and products with red and white labels.

Ex. 71, Alter Dep. Ex. 23 (cropped) Ex. 9, SuperTrac – 55 gallon Ex. 9, CAM2 ProMax – 55 gallon

Indeed, the class definitions as proposed would actually include bulk purchases, in which there was no "container" at all.

C. The Eight-State Plaintiffs, the Proposed Classes, and Absent Class Members

Plaintiffs' Statement of Facts is conspicuously devoid of critical facts pertaining to the certification of claims—their own experiences with Smitty's/CAM2 303 THF (and other THFs) and the applications in which they used it.[22] Evidence as to why, when, and for what purposes Plaintiffs purchased and used THF, as well as evidence concerning the use and maintenance of their equipment is necessary for Plaintiffs to present submissible evidence on the elements of their claims. It is also necessary for Defendants to establish, among other defenses, that Plaintiffs

[22] Plaintiffs cite no Plaintiff discovery responses and (at 8) just one page of one deposition transcript of one Plaintiff.

contributed to the alleged damage through their own negligence by deficient maintenance practices or misuse and/or that they have already recovered from other THF manufacturers for the same alleged injuries. A discussion of this evidence is not a "merits" debate, as Plaintiffs (at 2) wrongly claim, but rather an examination of what are the facts to be tried.

1. ***Arkansas Plaintiffs***

a. *William Anderson, Anderson Family Trust, MGA Farms, Fricker Farms*

Anderson does not own any equipment at issue. **Ex. 72**, Anderson Entity Dep. 109 (Q. [I]s it fair to say that none of the elements of the claims in these lawsuits, in this lawsuit, is brought in your individual capacity as a human? A. That's correct.).[23] Instead, he operates through corporate entities, three of which are Plaintiffs. Ex. 39 at 74-76, 81, 119, 155-56, 161. While very few receipts have been produced, Anderson claims these entities purchased at least 106 buckets of Smitty's/CAM2 303 THF and that his father, Fricker Farms, and the Trust purchased THF for use in each other's equipment that Anderson did not pay for. *Id*. at 265-68.

At purchase, Anderson read the front of the bucket and 70% of the back. *Id.* at 248. He concedes that the disclaimer on the back was in the same size font as everything else on the back; had he read it, he "probably" would still have bought the product even though all his equipment was post-1974 model year. *Id.* at 248-49, 260. As for what labels he purchased, Anderson did not recognize the Super S label; he may have purchased it, but cannot be certain because the label was unfamiliar and he does not have receipts to show this. *Id.* at 254-55.

Although Anderson claims that the entities first used Smitty's/CAM2 303 THF as early as 2013, none claim equipment damage until years later. *Id.* at 25. For some equipment, Anderson is unsure if it used Smitty's/CAM2 303 THF, given that he used multiple brands of

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[23] Yet Anderson personally – not the entities – recovered in the Retailer Settlement. **Ex. 73**, DM_CAM2_11. Anderson is a 50.001% owners in Fricker Farms, and does not own any of MGA. Ex. 72 at 75, 85-86.

THF. *Id.* at 28, 70-71, 118, 170-72, 211. Together, Anderson-related entities are claiming damage to over 50 tractors and implements. *Id.* at 74-79. However, there is also equipment that used Smitty's/CAM2 303 THF as to which Anderson and the entities claim no damage. *Id.* at 231. Anderson believes that the Trust paid for repairs, but is unsure. *Id.* at 202-04.

Fricker Farms and MGA purchased used equipment, typically "as is where is," and Anderson is unfamiliar with equipment history. *Id.* at 87-90, 155. For one piece, however, Anderson claims to know the prior owner and maintenance history. *Id.* at 26, 74, 156-57, 161. Anderson read the manual for at least one tractor, but dismissed its recommendations as "guiding [him] to their parts store." *Id.* at 163. Anderson attributed damages to the entities' equipment to Smitty's/CAM2 303 THF after reading an ad on Facebook from Plaintiffs' counsel, which "flipped the light switch." *Id.* at 27-28, 144-45. After that point, Anderson did not buy "THF" for his equipment at all, but instead switched to CAM2 AW-68. *Id.* at 99-100, 105-06.

b. <u>*Alan Hargraves*</u>

Although only purchasing the at-issue THF and equipment through his now defunct partnership Moon Lake Farm Partners ("**Moon Lake**"), Hargraves brings multiple claims in his individual capacity. Ex. 48 at 17, 43, 202. Moon Lake purchased Smitty's/CAM2 303 THF after Hargraves saw a new store display with spiraling buckets and talked to an employee he knew. *Id.* at 70, 72. He "put his faith in the person there." *Id.* at 72. Moon Lake also purchased some "yellow bucket" from NAPA, which was made by a different manufacturer. *Id.* at 80, 82, 157. Moon Lake purchased not only in Arkansas, but also in Mississippi, as to which all claims have been dismissed for the failure to state a claim. *Id.* at 50, 79-80. *See also* ECF #451 at 56-57. Prior to his deposition, Hargraves did not know there was more than one 303 THF manufacturer, and so presumably he believed all 303 products, no matter the label, were the same. Ex. 48 at 61.

Hargraves read the label the very first time Moon Lake purchased Smitty's/CAM2 303 THF; from then on, he did not read the label. *Id.* at 69. Instead, if the label was yellow, said 303 and was the price he expected, he bought the product. *Id.* at 82. If Hargraves had read the disclaimer, Moon Lake "probably" would not have purchased the product— it "definitely would have been debatable." *Id.* at 165. But Hargraves was not always the one doing the purchasing; sometimes employees bought for him. *Id.* at 50. The employees would know what to buy because the bucket "was yellow and it said 303." *Id.* at 202.

Hargraves maintained Moon Lake's equipment before Moon Lake sold all of it after the lawsuit was filed. *Id.* at 31. He topped off with whatever fluid he had on hand, thus commingling many brands of fluid. *Id.* at 96. Moon Lake paid for any repairs. *Id.* at 202. Hargraves saw the lawsuit in a Farm Journal ad and it "started the wheels a turning." *Id.* at 160-61.

c. *Harrison and J&C Housing Construction, LLC ("**J&C Housing**")*

Like Hargraves, Harrison used other THF brands. Ex. 43 at 75-77, 81-82, 85. He would have to look at empty buckets to know which, but he no longer has empty buckets for every THF product he bought. *Id.* at 78. *See also id.* at 47-48 ("I honestly could not tell you what I put in there."); *accord id.* at 76-77. Whatever the brand, it is unclear whether Harrison, his wife, or one of his entities paid for the THF; he does not know how to figure out who bought what – it would just depend on what checkbook the bill was paid with. *Id.* at 53-54; **Ex. 74**, J&C Housing Dep. 17, 22. Sometimes it was actually Harrison's son who did the purchasing, and he may or may not have been reimbursed. Ex. 43 at 211-12. Neither Harrison nor J&C Housing made any "effort to distinguish personal expenses from business expenses." Ex. 74 at 15. The relevant tax documents state that all the equipment that used THF was 100% for business use, but Harrison says that is "not 100 percent accurate." *Id.* at 30.

Harrison used Case-recommended HyTran, not Smitty's/CAM2 303 THF, in his Case

equipment; despite the 5-gallon Smitty's/CAM2 labels listing Case, he did not want to use the more expensive HyTran in his older equipment because it cost too much. Ex. 43 at 44-46. Harrison used Smitty's/CAM2 303 THF on post-1974 equipment and equipment that might be pre- or post-1974 – he does not know the model year. *Id.* at 66-67, 178. Harrison would "look[] for the specifications of the product that I need to put in my equipment," but agrees that "[n]owhere on the [Smitty's/CAM2 303 THF] bucket did it say it met the specifications" he needed. *Id.* at 218-20. He also noticed some buckets of Smitty's/CAM2 303 THF with "dirty fluid" in the bottom, but continued to use the product anyway. *Id.* at 202.

When Harrison purchased a Smitty's/CAM2 303 THF (on whoever's behalf), he would "scan" the front of the label. *Id.* at 211, 225. He would also look at portions of the back, particularly the left side to see "what he was looking for," but he did not necessarily read all of the right side of the label where the disclaimer was located. *Id.* at 210. He equated a yellow bucket with hydraulic fluid. *Id.* at 205. Unlike Anderson, who knowingly bought an "economy" THF because he was "buying economical tractors" (Ex. 39 at 212), Harrison believed Smitty's/CAM2 303 THF was a "premium" THF – even though the disclaimer told him to buy a different, premium product for post-1974 equipment and despite Harrison eschewing 303 THF in favor of the more expensive but recommended HyTran in his Case equipment. Ex. 43 at 209-10.

Although Harrison claims Smitty's/CAM2 303 THF caused leaks to his 1980s Bantam Trackhoe, he admits that the Trackhoe was ***already*** leaking when he purchased it. *Id.* at 165. Harrison does not know if he paid for equipment repairs or if one of his entities did. *Id.* at 197.

2. *California Plaintiffs - Jack Kimmich and Soils To Grow, LLC ("STG")*

STG purchased SuperTrac from Tractor Supply Company ("**TSC**"). Ex. 55 at Dep. 32-33, 35. It also "possibly" purchased Super S but the individual who physically conducted the purchase – Plaintiff Kimmich, part owner of STG – did not recognize the Super S label and

testified he would not have purchased under that label because his purchasing decision was driven by language that was not on the Super S label, including a reference to OEM Allison. *Id.* at 304-05. Kimmich is sure, though, that STG did not purchase any CAM2 303 product. *Id.* at 11. TSC records reflect a different purchase quantity for Kimmich than STG and Kimmich claim. Ex. 55 at Pltf-CR 2042. STG began purchasing THF from TSC in 2004, contending it was a Smitty's brand 303 then and has been since then, but TSC did not sell Smitty's 303 THF for approximately another decade. **Ex. 75**, STG Dep. 36. Kimmich claims to have relied on representations about performance for wet clutches and wet brakes (Ex. 55 at Dep. 39-40), as his equipment – unlike some equipment of many other Plaintiffs – had both. *Id.* at 40; *compare, e.g.*, **Ex. 76**, Mabie Dep. 26-27.

STG bought a Volvo loader new in 1993, and Kimmich maintained it carefully, including through a Volvo mechanic, for years after he purchased it. Ex. 55 at Dep. 26, 50, 160-61, 214. Kimmich did not give similar treatment to STG's Kubota backhoe. Kimmich never drained and replaced the THF in the backhoe as part of regular maintenance – indeed, he only replaced the THF two times over ten years, when a hose failed. *Id.* at 123-24, 285-86. The manual advises that the fluid should be changed every 1,000 hours of use and the hydraulic filter every 500 hours. **Ex. 77**, Lillo Rpt. ¶ 189. The Kubota has over 4,000 hours. Ex. 55 at Dep. 285. In 2017, STG experienced a flood that caused it to have to drain the equipment and replace the equipment's hydraulic fluid. Ex. 75 at 19-21.

Kimmich, unlike many Plaintiffs, claims expertise in hydraulics and believes that once equipment is contaminated, a flush "makes no difference." Ex. 55 at Dep. 28-29, 227, 291.

3. ***Kansas Plaintiffs***

a. *George Bollin*

Bollin has recovered for damages similar to those claimed here on some of his equipment as part of the Citgo 303 settlement and in the Missouri Smitty's *Hornbeck* settlement. Ex. 56 at 75, 84, 125, 159, 224-25. He likely used Citgo's Orscheln Premium 303 in all of his equipment. *Id.* at 84. Here, he claims damages on 11 pieces of equipment, but admits he did not properly maintain the equipment. For instance, Bollin admits that he never drained the THF in his bulldozer at any regular interval. *Id.* at 95. He also testified that one of his tractors had a recall of its hydraulic parts, which in his experience is "a fairly common problem" with Deere tractors. *Id.* at 113-14, 230-32, 276, 288. It is also "a common problem" of International tractors to leak when their O-rings get old due to the type of lines used. *Id.* at 300-02.

Bollin relied on his wife's "best recollection" and "approximation" in answering discovery, and signed discovery answers under penalty of perjury without attempting to verify the information she provided, because he "ha[s] a lot of other responsibilities" besides looking for "paperwork for somebody." *Id.* at 195-99. As it turned out, though, his wife "couldn't see up in the attic that well," and third-party discovery showed his answers were wrong, so he had to amend his damages form and discovery responses multiple times. *Id.* at 197-99.

Bollin does not know the basis for some of the purchases he claims; he thought they were based on store records but realized at his deposition they were not. *Id.* at 335-38. He does not recall purchasing SuperTrac as early as he claimed in written discovery, and did not realize that TSC sold multiple brands of 303 THF during the period. *Id.* at 340-41. He also erroneously thought that Orscheln sold Smitty's 303 THF in 2015. *Id.* at 90-91. *See also* Ex 64.

Bollin testified that when purchasing a Smitty's brand 303 THF, he only read the "top of the back" label; he did not read the disclaimer. Ex. 56 at 331-32. Bollin never used any CAM2

brands, is not making any claims as to these products, and is not seeking to represent purchasers who bought those products. *Id.* at 66-68. In purchasing the Smitty's brands, the tractor images were not relevant to his decision, nor was the yellow bucket. *Id.* at 331-32. Bollin believes "all transmission and hydraulic oils are 303 fluids." *Id.* at 137. He purchased Smitty's 303 THF in at least two different states, Missouri and Kansas. *Id.* at 17-19. He believes he used the Smitty's 303 THF purchased in Missouri, which were subject to a release in *Hornbeck*, in all of his equipment (though he can only say for certain as to his Caterpillar dozer). *Id.* at 85, 125, 127.

b. Adam Sevy

Sevy, a Missouri resident, was a class representative in the O'Reilly and Citgo 303 lawsuits. Ex. 68 at Dep. 24. In addition to purchasing and using O'Reilly- and Citgo-manufactured 303 THF, Sevy also purchased NAPA 303 THF brands. *Id.* at 15. While Sevy here claims problems in the same equipment that used these other manufacturers' 303 THF, ruling out Smitty's/CAM2 303 THF as the sole cause, Sevy also had equipment in which he used Smitty's/CAM2 303 THF that had no issue at all. *Id.* at 177. In fact, Sevy is not seeking a flush on some of his equipment that used Smitty's/CAM2 303 THF. *Id.* at 83, 142, 182. On the other hand, Sevy is seeking damages on his Allis Chalmers wheel loader even though he bought it without any understanding of its history and it was leaking already. *Id.* at 117-18, 132-33. Sevy cannot recall if he read the disclaimer on the Smitty's/CAM2 303 THF label prior to purchase, and he is unsure if it would have changed his purchase decision. *Id.* at 233, 243. This may be, in part, because he had an immediate need for THF on a job site. *Id.* at 245. Sevy did not rely on label imagery when buying Smitty's/CAM2 303 THF. *Id.* at 228.

Sevy used Smitty's/CAM2 303 THF in equipment for which the OEMs were on the label (*e.g.*, Ford), and those for which they were not (*e.g.*, Hinowa). Ex. 68 at Pltf-CR 5647. He also used it for post-1974 equipment and pre-1974 equipment. Ex. 68 at Dep. 115-16.

c. *Ross Watermann and Watermann Land & Cattle, LLC ("**WLC**")*

Watermann does not own the at-issue equipment. Ex. 54 at Dep. 31-32, 38, 54-56, 100, 155, 183. Rather, all purchases of 303 THF were used in equipment owned by WLC and were used only in the operations of WLC. Ex. 78, WLC Dep. 49, 53, 62-64. When Watermann purchased the THF on behalf of WLC in Colorado, Kansas, and elsewhere, he looked for "303" on the label because he associates "303" with John Deere. Ex. 54 at Dep. 196-97. He also testified that he would not have purchased it had the label not said "Ford 134" (the specific Ford specification he was looking for) – even though the label does not say "Ford 134." *Id.* at 200. *See also* Ex. 142 (reflecting Ford "134" specification on Lubriguard, NAPA Quality, and PureGuard 303 THF labels). Watermann only read the label the first time he purchased a 303 THF, but the evidence is beyond doubtful that this first purchase was of a Smitty's/CAM2 303 THF. Ex. 54 at 195, 201. *See also* Ex. 78 at 72 (regarding first purchase of 303 THF from Orscheln in or around 2014: Q. And that once you found that White specification on that label, that in all subsequent purchases, you didn't look at the label? A. No, I did not.). Watermann claims he first purchased a 303 THF in 2014-2016 at Orscheln's; yet, Orscheln did not sell a Smitty's/CAM2 303 THF until 2018. Ex. 54 at Dep. 195. Watermann's later purchases were based on the yellow bucket color and the "303" on the label. *Id.* at 213-14; *accord* Ex. 78 at 72-73.

Watermann recovered in the Retailer Settlement on claimed property damages relating to three pieces of equipment. *See* Ex. 54 at RG2 1697; Ex. 73 (settlement payouts). All of his claimed property damages were approved, including $3,500 relating to WLC's White Tractor. Ex. 54 at RG2 1697; Ex. 73. *See also* Ex. 54 at RG2 400. However, this was an over-recovery. Watermann, testifying on behalf of WLC, admitted that less than $2,000 of repairs on White Tractor could even possibly have been related to use of 303 THF. Ex. 78 at 59-61, 74-75. (And, even then, Watermann cannot say what brand of 303 THF WLC used in the White Tractor. *Id.*)

d. *Terry Zornes*

Zornes, who operates heavy equipment for a living, only ever bought 303 THF from Orscheln, and has been doing so since 2004, long before it sold Smitty's 303 THF. Ex. 60 at 57-58, 104, 119, 125, 305. He used a John Deere brand THF, but that cost $80 for a 5-gallon bucket, whereas he could buy 303 THF for $30 a bucket or less. *Id.* at 311-13. The cost "somewhat" outweighed OEM recommendations. *Id.* at 315.

The 303 brands Zornes purchased included MileMaster 303 and Orscheln Premium 303, for which he recovered in the Citgo settlement. *Id.* at 95-96. By the time he first bought Smitty's 303 THF, *i.e.*, when Orscheln switched brands after more than a decade, Zornes was aware of the Missouri stop sale but purchased anyway. *Id.* at 104. The only time that he can be sure he bought a Smitty's brand 303 THF, as opposed to some other brand, was in December 2018. *Id.* at 124. He cannot be certain for other purchases because he cannot identify the brand from his receipts. *Id.* at 122, 127, 142-43, 151, 278 ("It's whatever they had."). Zornes never purchased any CAM2 brands, and is not making any claims regarding those products. *Id.* at 254. In purchasing Super S, neither the yellow bucket color nor the pictures on the label were a factor. *Id.* at 88, 321. Zornes was simply looking for the "most economical, cheapest option" for use in his Traxcavator and his combine because they did not require a premium fluid. *Id.* at 131-33, 171-72, 177, 323. He used premium THF, not 303, in his other equipment, such as his John Deere tractors. *Id.* at 168-69, 177. Zornes believes that premium THF is for tractors with automatic transmissions, and economy THF is for equipment without automatic transmissions. *Id.* at 137.

Zornes claims that his loader started to leak only two days after putting 20 gallons (half the equipment's capacity) of Super S in it. *Id.* at 153, 166-67, 234.

4. ***Kentucky Plaintiffs***

a. *Kirk Egner*

Egner used Xtreme 334 in addition to Smitty's/CAM2 303 THF, and some fluid with "premium" in the title. Ex. 46 at 61-62, 66, 68, 218. What brand he bought depended on what store he was at, and he cannot remember all the brands he purchased. *Id.* at 105-06, 193. Even with receipts, Egner could not be sure what brands of 303 THF they reflected. *Id.* at 267.

In choosing to purchase Smitty's/CAM2 303 THF, Egner was persuaded by the "multi-service" representation on the front of the label of one of the products, but thereafter he did not read the label each time before re-purchasing. *Id.* at 212, 245-46. After reading the disclaimer at his deposition, Egner understood that Defendants warned potential consumers about possible equipment damage from use in post-1974 equipment. *Id.* at 243, 250-51. Although Egner understands that OEMs have more than one specification each, he never looked for the specification his equipment called for on the label. *Id.* at 233. Nor did he discuss the products with anyone at the stores or encounter a display that influenced his purchasing decision. *Id.* at 251-53.

Egner did not experience damage in all equipment in which he used Smitty's/CAM2 303 THF. *Id.* at 210-11. While he claims damage in his Ford equipment, he admits that Ford tractors naturally suffered from condensation issues that, in turn, led to hydraulic problems. *Id.* at 160-61.

b. *Tim Sullivan*

Tim Sullivan is the brother of Tracy Sullivan. Both know Egner. Unlike Egner, Tim did not rely on anything on the front of the label of a Smitty's/CAM2 303 THF product. Ex. 34 at 177. And, unlike his brother, he did not rely on any performance characteristics on the label – he only relied on the list of OEMs. *Id.* at 180. But even that was not on an actual class period label. *See* ECF #996 (granting summary judgment on fraud and negligent misrepresentation claims

because Sullivan did not read a label at issue during the proposed class period). Tim only read the label upon his first purchase because he thought "it was the same" thereafter. Ex. 34 at 177, 180. In fact, he thinks every bucket of 303 he has ever purchased, from O'Reilly's, TSC before it carried Smitty's, and a number of other stores all had the exact same label. *Id.* at 77. During his deposition, he identified the only label that he read, which pre-dated the class period. *Id.* at 67, 181-85. This label did not include a disclaimer. *Id.* & Ex. 35. Tim concedes that he would not have purchased Smitty's/CAM2 303 THF if that warning language had been on the label he read. Ex. 34 at 181-85. He admits that he only looked for the yellow bucket on later purchases. *Id.* at 18.

c. *Tracy Sullivan*

Although his brother Tim attributed no meaning to "303," Tracy relied on the reference to "303" when purchasing THF because to him "303" meant John Deere. Ex. 34 at 78; Ex. 41 at 38. Tracy purchased Smitty's/CAM2 303 THF in Kentucky and Illinois. Ex. 41 at 53. He reported that the "multi-service" language indicated that the product was appropriate for use in products with a "common" sump, whereas just "tractor hydraulic fluid" on a label does not indicate that to him. *Id.* at 37-42. He only looked at the picture on the label to ensure he was purchasing the same brand he had purchased previously. *Id.* at 33, 50-52.

d. *Dwayne Wurth and Wurth Excavating*

Wurth is an excavator who learned about equipment on the job. Ex. 44 at 45-46. Wurth, Wurth Excavating, or both purchased CAM2 303 not only in Kentucky, but in Illinois. *Id.* at 223. Wurth agrees that specification is important when buying THF, and it should match the OEM specification in the owner's manual. *Id.* at 60. Thus, for instance, because Wurth knows J20C is an OEM specification, if he were looking for a fluid that meets the J20C standard he would specifically look for "J20C" on the label. *Id.* at 12-13. Yet, despite recognizing that

specifications differ from OEMs, he relied on the list of OEMs in buying CAM2 303 THF without matching an OEM specification. *Id.* at 74, 90.

Wurth also used O'Reilly 303 THF, Hy-Gard, and "some other ones" he cannot recall. *Id.* at 69, 79-80, 95. He selectively used CAM2 303 for some OEMs, but not others. *Id.* at 16-17, 69, 95. In fact, he would only use non-OEM THF in equipment that was made by someone other than Case or John Deere; for Case and John Deere he followed recommendations. *Id.* at 18, 21-22, 79, 82, 97. Wurth did use CAM2 303 for Caterpillar equipment, however, and thus it was important to him that Caterpillar be on the label. *Id.* at 91. In fact, he would only read up to where the label said "Caterpillar," and then stop reading. *Id.* at 105. Wurth can only estimate when he began buying CAM2 303, although he thinks he is "[c]lose to correct." *Id.* at 35-36. Nor can he be sure how much he bought. He provided two different numbers in discovery, based on his "[a]pproximate[] usage"; after looking at the first number, he thought, "I may not have bought that many, so we cut it back." *Id.* at 151. He does not keep receipts, and typically pays cash, so he cannot provide actual numbers. *Id.* at 152-53.

Wurth individually owns some of the equipment at issue, but other equipment is owned by Wurth Excavating. *Id.* at 30-33, 35-36, 41, 82, 154. The equipment was all bought used; Wurth does not know how many previous owners there were, what lubricants were used, what (if any) recommended maintenance was done, or what previous repairs or performance issues pre-existed his or Wurth Excavating's ownership. *Id.* at 130-31, 163-65. In one piece of equipment, he claims that a pump failed "within a few hours" of using CAM2 303. *Id.* at 176-80, 197. Yet, there is other equipment that took CAM2 as to which Wurth had no issues and saved money by buying CAM2. *Id.* at 37-38, 128-29; **Ex. 79**, Wurth Excavating Dep. 26-27. Wurth Excavating, not Wurth, typically paid for THF, and would also pay for repairs to company equipment. Ex. 44

at 33-35; Ex. 79 at 66. Wurth agrees that even though he personally submitted for recovery in the Retailer Settlement, Wurth Excavating suffered the loss. *Id.* at 66 (Q. Those were not expenses to Dwayne Wurth, the individual? A. Correct. Q. So Dwayne Wurth, the individual, really isn't the proper person to be paid money to remedy the property damage. It was the LLC that suffered that loss allegedly? A. That is correct.).

5. *Minnesota Plaintiffs*

a. *Joe Asfeld*

Asfeld claims a sizeable amount of damages attributable to use of at least two brands of 303 THF. Asfeld was part of the Citgo 303 settlement for use of MileMaster 303, and he bought multiple other brands as well, in close to equal volumes. Ex. 62 at Dep. 56-57, 130-32, 196-97. Upon purchasing Smitty's/CAM2 303 THF, he did not read the disclaimer, but testified that if he had he would not have understood it. *Id.* at 345. Although he relied on the OEMs listed on the label, he used it in equipment of OEMs not on the list. *Id.* at 53-54, 203, 210. Asfeld claimed over $240,000 in repair damages in the Citgo 303 litigation, and collected over $120,000 in that settlement. Ex. 80, RG2 44 at Row 14, Columns B, S, EJ.[24] Here, Asfeld claims over $76,000 in repair damages to just one of his many tractors. Ex. 62 at Dep. 196.

b. *Brett Creger*

Creger used Smitty's/CAM2 303 THF in more than 30 pieces of equipment, including a 2009 Tigercat 9222 shear/felling saw. Ex. 66 at Pltf-CR 3905. In addition, Creger used Carquest 303 and Xtreme 303. Ex. 66 at Dep. 80-82, 84-85, 200-02. He purchased Smitty's/CAM2 303 THF in both Minnesota and North Dakota. *Id.* at Pltf-CR 4764-65. Creger testified that he performs hydraulic filter changes, on average, about every 400-500 hours, but he only performs a

[24] Demarcations added. For ease of reference, Defendants have added circles to direct the Court to the relevant cells.

fluid change every couple of years (after roughly 1,600-2,000 hours). *Id.* at Dep. 278, 280-281. His OEM, however, recommends he changes the filter at least every 250 hours and the fluid every 500 hours of use. *Id.* at 282.

Creger is a Northern Minnesota logger and sometimes operates his equipment in arctic conditions, which according to the OEM requires different viscosity fluid. *Id.* at 22, 286-87. Creger, however, did not use different fluids based on the season. *Id.* In purchasing a THF, Creger looks for pictures of equipment. *Id.* at 143. For some of his equipment, Creger claims no repair damages, but does seek flushing costs. *Id.* at Pltf-CR 7116-45.

c. *Jason Klingenberg & K&J Trucking, Inc. ("**K&J Trucking**")*

Klingenberg owns some equipment personally and K&J Trucking, a corporation that he owns, owns other equipment. Ex. 58 at 12-13. He cannot always determine who owns which piece of equipment; his tax records may provide an answer, but he did not produce them in discovery. *Id.* at 14-16, 113-15. However, a review of loan documents and canceled checks provided the answer for some pieces of equipment. **Ex. 81**, K&J Trucking Dep. 29, 32.

Klingenberg lives in Iowa, but he and/or K&J Trucking bought Smitty's/CAM2 303 THF in both Minnesota and Iowa. Ex. 58 at 10, 28-29. He may have receipts from these purchases, but he never searched for them in responding to discovery. *Id.* at 32-33, 228. Nor did he look for equipment manuals to produce. *Id.* at 121.

Klingenberg first purchased Smitty's/CAM2 303 THF in or around 2013 when a hose broke in a piece of equipment – although it was actually someone else he sent to physically buy the product. *Id.* at 40-41, 44-45. He was happy with how the product worked at that time, and thereafter bought it for other equipment. *Id.* at 45. He bought it because he was looking for something "universal," the label said Massey Ferguson, the price point was low, and he had heard from a mechanic that "303" was "supposed to be good hydraulic fluid." *Id.* at 36-38, 40-

41, 59. He does not recall buying any other brands of 303 THF. *Id.* at 42. While Klingenberg had his equipment manuals and agrees that maintenance consistent with OEM manuals is "important to mechanical integrity," he is not familiar with THF specifications. *Id.* at 57, 59, 180.

When purchasing 5-gallon buckets, Klingenberg would read some of the label, but never "all of it." *Id.* at 61, 213. He testified that he "obviously should have read more … because come to find out, there's a little fine print on the bottom that wasn't – that you're supposed to not use it in new equipment." *Id.* at 61. When Klingenberg did actually read the disclaimer after filing suit, he understood it to say the THF "wasn't supposed to go in tractors after 1974." *Id.* at 214. All the equipment he's claiming is post-1974. *Id*. *See also id.* at 217 (agreeing that if he had read the entire label, he would have realized that the product wasn't meant to be used in his equipment). In addition to 5-gallon buckets, Klingenberg also bought ProMax in a 55-gallon drum; however, once he saw the CAM2 brand he did not read any of that label. *Id.* at 206.

Klingenberg has sold all of the equipment at issue, and says he is only seeking past repairs, and nothing else, on that equipment. *Id.* at 77, 96; Ex. 81 at 38. He sold the equipment after he filed suit, despite not giving Defendants a chance to inspect and falsely stating in his discovery responses that he still owned it. Ex. 58 at 171-74; Ex. 81 at 34-35, 38.

6. *Missouri Plaintiffs*

a. *Arno Graves*

Graves first filed a claim in the O'Reilly 303 settlement before pursuing his claims here. **Ex. 82**, Graves Dep. 143, 185. He has already collected in the *Hornbeck* settlement as well. *Id.* In purchasing a Smitty's/CAM2 303 THF – which he bought in both Missouri and Oklahoma – he relied on the performance characteristics on the label, as well as the price, and list of OEMs. *Id.* at 215-16. Graves has also purchased and used MileMaster 303, Warren 303, and Quantum 303. *Id.* at 192-94, 199-200. Graves' THF purchases and repairs were all claimed as business

expenses, and therefore could not be for personal or household use. *Id.* at 227-28. Graves purchased his equipment used, including from the 1970s, and he does not know the maintenance history, operation, repairs, or fluid usage for the equipment prior to his ownership. *Id.* at 112-13.

b. Mark Hazeltine

Hazeltine only used a CAM2 303 THF in his 1987 Ford tractor and a log splitter that has no sump and operated as an attachment to the tractor. Ex. 38 at 25-26, 29-30. Hazeltine's claimed equipment issues did not begin until about two years after he started using the product in his Ford tractor. *Id.* at 52, 65, 73-75. Hazeltine attributed his issues to CAM2 303 after reading a Facebook post. *Id.* at 65-66. Even though Hazeltine believed CAM2 303 was causing leaks in his equipment, he continued to buy and use it until the store stopped selling it. *Id.* at 54-55, 64-65.

Hazeltine bought CAM2 303 after reading the label's misapplication language, and was not confused by it. *Id.* at 139-140. Hazeltine found no meaning in the "303" designation when purchasing the product; indeed, he had "no idea" what "303" meant. *Id.* at 56. Hazeltine did not rely on any claimed performance characteristics or images in making his purchase decision. *Id.* at 121, 125. He did not pay attention to branding, and focused only on the presence of the "tractor multifunctional hydraulic transmission fluid" language. *Id.* at 128-30.

c. Ron Nash

Nash, an Oklahoma resident who purchased Smitty's/CAM2 303 THF in both Missouri and Oklahoma, also collected in the O'Reilly 303 settlement and in the *Hornbeck* settlement. Ex. 53 at 46-47, 225, 230. Nash does not know of any relation between the term "303" and John Deere. *Id.* at 244. He believes the label he read said it was "a premium oil," and he also relied on the specific OEM Allis Chalmers listed on the back of the label. *Id.* at 239-40. Nash's equipment is from the 1960s-70s, but he does not regularly maintain it other than checking fluid levels. *Id.* at 101. Nash would only change the hydraulic filters if the equipment started "losing movement."

Id. at 99-101. After joining this lawsuit, Nash sold one of the pieces of at-issue equipment without notice to Defendants. *Id.* at 166-76. He did not take pictures or offer for Defendants to inspect it prior to sale. *Id.* at 206.

7. *New York Plaintiffs*

a. *Sawyer Dean*

Dean did not read the entirety of the label upon purchase of a Smitty's/CAM2 303 THF product. Ex. 83 at Dean Dep. 153, 157. Instead, Dean relied on the list of performance characteristics and OEMs in making his purchase decision. *Id.* at 160-61, 163, 166-68. A retailer employee told him Smitty's/CAM2 303 THF was "good fluid." Ex. 83 at Dean iRog 11 answer. He did not know what the OEM recommendations were for any of the equipment in which he used Smitty's/CAM2 303 THF. *Id.* at Dep. 160-61, 163, 166-68. Indeed, he never had any of the manuals for his equipment. *Id.* at 104. Dean claims his John Deere 2440 is no longer functional because of the THF, but he has never had the equipment diagnosed by a mechanic for the cause of his claimed damages. *Id.* at 82. He bought the tractor used without any understanding of the prior maintenance of the tractor, and has no training on hydraulics. *Id.* at 33, 36, 103.

b. *John Miller*

Miller's purchasing decisions were not based on price; rather, he purchased whatever THF that TSC was selling, including one manufactured by Warren Oil before it sold Smitty's. **Ex. 84**, Miller Dep. 68, 100. Miller read selected portions of the label before purchasing SuperTrac. *Id.* at 99, 106. Miller also relied on his "general conversations" with employees at TSC, whom he knew; he "took [the employee's] word and [he] bought it." *Id.* at 106. Miller stopped buying the product when TSC stopped selling it. *Id.* at 110-11. He attributed his claimed damages to a Smitty's 303 THF only after reading a Facebook ad from Plaintiffs' counsel. *Id.* at 54-55.

c. *Lawrence Wachholder*

Unlike Miller, Wachholder did not know or interact with store representatives when deciding to purchase a Smitty's 303 THF at TSC. Ex. 40 at 51-52. Wachholder purchased Hy-Gard, not SuperTrac, to use in his John Deere tractors – both pre- and post-1974 – because he understood Hy-Gard was specified for his Deere equipment. *Id.* at 33, 36, 40. Some of Wachholder's equipment still has Smitty's 303 THF in it, but he may have mixed Travelers' 303 in the equipment, too. *Id.* at 88-91. Other of Wachholder's equipment has been changed out (filters and oil) with a Traveler's Premium THF. *Id.* at 91-92.

8. *Wisconsin Plaintiffs*

a. *Michael Hamm*

Hamm began purchasing 303 THF in 2011. **Ex. 85**, Hamm Dep. 197. He recovered in the Citgo 303 settlement for his use and purchase of MileMaster 303. *Id.* at 54-55. Hamm purchased Smitty's/CAM2 303 THF because the pictures and the yellow pail stuck out to him. *Id.* at 151, 162. Hamm thought he was purchasing a "premium product" because "Tractor Supply pushed it." *Id.* at 161. Hamm did not read the label on subsequent purchases. *Id.* at 151-52. He did not consult his owners' manuals for the appropriate fluid to use in his equipment because he assumed a manual says to buy the OEM's name brand oil. *Id.* at 119. Hamm's father saw an article in Farm Journal concerning the 303 litigation and discussed it with Hamm. *Id.* at 19-21. Even then, Hamm did not take any action until he saw ads on Facebook about the lawsuit. *Id.* at 191. After he stopped purchasing 303 THF, Hamm started purchasing, among other products, Ag Fluid, which was not labeled as "tractor hydraulic fluid." *Id.* at 194.

b. *Dale Wendt*

Wendt has used MileMaster 303 but did not pursue any recovery in the Citgo settlement. Ex. 42 at Dep. 29-30, 81. Wendt commingled MileMaster 303 with Smitty's/CAM2 303 THF.

Id. at 58-59, 81. Wendt contends his 1990s 742 Bobcat Skid Steer (which does not have a common pump) was in "perfect" condition when he bought it used, and is working fine today, but claims damages on it. *Id.* at 70, 73-75, 89.

"303" does not indicate anything other than "hydraulic oil" to Wendt. *Id.* at 28, 142. Wendt read the warning on the label at purchase, and understood the content. *Id.* at 145, 162-63 Wendt is not claiming damages on his pre-1974 equipment, or a flush remedy on some of his equipment. *Id.* at 47, 53. Wendt attributed his claimed damages to Smitty's/CAM2 303 THF only after reading a Facebook ad from Plaintiffs' counsel. *Id.* at 35.

9. *Class Definition and Experience of Absent Class Members*

For each of the eight states except Missouri, Plaintiffs propose a class consisting of "All persons and entities who purchased Super S SuperTrac 303 Tractor Hydraulic Fluid, Super S 303 Tractor Hydraulic Fluid, Cam2 ProMax 303 Tractor Hydraulic Oil, and/or Cam2 303 Tractor Hydraulic Oil in [that state] at any point in time from December 1, 2013." Despite this December 1, 2013 date, the Court has granted summary judgment on a number of claims as they relate to purchases within that proposed class period. *See* ECF #991 (granting summary judgment as to certain claims within this proposed period as to Kansas negligence, unjust enrichment, fraud, negligent misrepresentation, warranty, and Kansas Consumer Protection Act ("**KCPA**") claims; Missouri negligence, unjust enrichment, negligent misrepresentation, warranty, and Missouri Merchandising Practices Act ("**MMPA**") claims; New York negligence, express warranty, and consumer protection claims; and Wisconsin consumer protection claims). In Missouri, the two Smitty's products are excluded from the definition. Additionally, for the California, Kansas, and Missouri consumer protection claims, Plaintiffs propose subclasses that seek to limit the class definition to those with statutory standing (*e.g.*, individuals, but not corporate entities for the California Consumer Legal Remedies Act and the KCPA) and those who can meet the

substantive liability elements (*e.g.*, those who purchased primarily for personal, family, or household use for the MMPA). Based on the class definitions, there would be overlapping class membership because many consumers purchased Smitty's/CAM2 303 THF in multiple states. *See* SOF § II.C.

Although less is known about the experiences of absent class members than Plaintiffs, there is information to be gleaned. Sources include the depositions of certain dismissed Plaintiffs and a few at-large (non-eight state) Plaintiffs. Online forum posts, claim forms in the Smitty's *Hornbeck* settlement, and declarations from some absent class members also provide insight.

Although Plaintiffs forego these damages, *Hornbeck* claimants (many of whom will be absent class members) sought lost trade-in value and consequential damages, like paying baling costs when equipment was broken down, loan costs, and towing costs. *See, e.g.*, **Ex. 86**, *Hornbeck* Claims 145, 148, 152. Some claimants bought Smitty's 303 THF ***and*** premium products on the ***very same day***, presumably for use in different equipment. *See, e.g.*, *id.* at Claim 129. And some purchased ***before*** the stop-sale and also ***post***-stop sale – likely because they crossed state lines to keep buying Smitty's/CAM2 303 THF. *Id.* at Claim 148.

Declarations collected from absent class members attest to the fact that many consumers knew what they were purchasing, were well satisfied with the products' performance, and understood "303" to mean nothing more than "economy fluid." *See generally* Ex. 51 ¶ 8; Ex. 52 ¶ 7, Ex. 67 ¶ 8, Some of these class members not only failed to observe any damage to their equipment, but recommended the product to others after positive experiences. **Ex. 87**, Lyons Decl. ¶ 16. Some used Smitty's/CAM2 303 THF only in older equipment, or in equipment that leaked. *See* Ex. 51 ¶ 13; Ex. 52 ¶ 12; Ex. 67 ¶ 14. Indeed, some specifically attested they were "aware that the 303 product(s) were not intended for use in" their equipment, but used it anyway

because of their positive experience and the low price. Ex. 69 ¶ 13. At least one, a trained mechanic, was clear that with full knowledge of the stop sale and the allegations in this lawsuit, he would still buy the product today if he could. **Ex. 88**, Finley Decl. ¶¶ 7, 10. *See also* **Ex. 89**, Hayes Dep. Ex. 42 (Finley identifying himself as "pissed farmer" who objected to stop sale).

Online forum posts reveal that there were purchasers of Super S (with the brand identified by name) who were well aware of the disclaimer on the label, but used the THF only for older equipment and "gear drives." *E.g.*, **Ex. 90**, bobistheoilguy.com at Dlundblad (IN) (July 25, 2020). Others reported both knowledge of Smitty's use of line wash and use of the product for flushing, not operating, equipment. **Ex. 91**, Hearth.com at FTG-05 (Dec. 22, 2017).

The experiences of the dismissed eight-state Plaintiffs, now putative class members, also run the gamut. In Arkansas, Donald Snyder used CAM2 303 because the man from whom he purchased his equipment used CAM2 303. **Ex. 92**, Snyder Dep. 59, 88, 99, 105-06 ("I went with what the man told me to put in his machine."). He did not know OEMs recommend fluids in manuals. *Id.* at 110. Unlike Snyder, Arkansas class member Donald Herbert has training as a heavy machinery mechanic – although much of the equipment in which he used Smitty's/CAM2 303 THF was not his, but his mom's. **Ex. 93**, Herbert Dep. 9-10, 33. Other equipment was his, but he bought it for a single job and then promptly resold. *Id.* at 88. Also unlike Snyder, Herbert used other 303 brands. *Id.* at 22, 51. Herbert used Smitty's/CAM2 303 THF only in his older equipment, most of which had a separate transmission sump (in which he used a different fluid), because "it was not the right specification" for his other equipment. *Id.* at 31-32, 42-43, 74, 100. Arkansas class member Kyle Boyd bought and mixed multiple brands of 303 THFs, which he views as interchangeable, despite "303" not actually meaning anything to him. **Ex. 94**, Boyd Dep. 17-18, 36-37, 116. Boyd claims he needs a flush on one piece of equipment he bought in

2008, but to which he never added any THF. *Id.* at 25, 39-41, 65. In another piece of equipment, Boyd immediately drained Smitty's/CAM2 303 THF and refilled with the OEM recommended THF after he had issues, because it is a tractor he relies on, and he "wanted to make sure I did a proper maintenance." *Id.* at 78. Arkansas class member Jeff Jones learned of claims made against Smitty's/CAM2 303 THF from a "pop-up" ad on Facebook. **Ex. 95**, Jones Dep. 29-31.

With respect to Kentucky class members, Coleman Farms LLC bought Smitty's/CAM2 303 THF and used it in equipment owned by the LLC; meanwhile, its 50% owner Wildie Coleman personally recovered over $50,000 in the Citgo 303 THF settlement for use of Orscheln Premium 303 in that equipment. Ex. 65 at 38-40, 57, 133. Coleman did not read the disclaimer language on the label; if he had, he would not have purchased Smitty's/CAM2 303 THF for use in post-1974 equipment. *Id.* at 35. Coleman is unclear on his purchase history: he reports having purchased all his 303 THF from Orscheln, which began carrying Smitty's/CAM2 303 THF in 2018, but when asked what THF he purchased from 2000-2010, he pointed to a SuperTrac label and then asked his attorney, "Is that right?" *Id.* at 45.[25] He thinks he only ever bought one brand from Orscheln. *Id.* at 50, 52, 69-70. And, he would not read a label at purchase if he thought it was the same brand as he previously purchased. *Id.* at 69. Coleman believes that the number of purchases he recorded in discovery and in the Retailer Settlement came from Orscheln records, because he otherwise has no basis for the number. *Id.* at 80, 88-89, 91. However, Orscheln records have been produced that do not support Coleman's claimed purchases of 18 buckets of Smitty's/CAM2 303 THF, but instead reflect only 4 buckets. Ex. 64, at PLMDLRETAIL001-2. Coleman has not flushed any of his equipment, and is not claiming flush damages. Ex. 65 at 135. Kentucky class member Ricky Peck's purchases of Smitty's/CAM2 303 THF are also unclear,

[25] In the retailer settlement, Coleman also claimed purchases from TSC, which began carrying Defendants' 303 THF in 2013 or 2014. Ex. 65 at Coleman Ex. 3. At his deposition, however, he said that was a misprint. *Id.* at Dep. 79.

though based more on who did the purchasing, rather than confusion over what brand a store carried and when. When Peck's farm operation needed THF, it could be Peck who actually purchased, but it could alternatively be his son, his nephew, his cousin's husband, or a former employee. Ex. 57 at Dep. 46-47, 80-81. If it was not Peck personally, he would just tell the individual to "get the 303," and then sometimes he would reimburse them, but sometimes he would not, as they also borrowed Peck's equipment for their own use. *Id.* at 81. In all cases, they would simply buy the product from whatever store was closest to a job site, so the brand depends on where the job site was and what the closest retailer sold. *Id.* at 71-72. Thus, despite signing a Retailer Settlement form declaring under penalty of perjury a certain number of Smitty's/CAM2 303 purchases, Peck cannot say those were made "for a fact." *Id.* at 77-78. Peck has recovered for the same damages he claims in this lawsuit in a separate 303 THF lawsuit against Warren Oil. *See id.* at DM_CAM2_448; DM_CAM2_647; RG2 1738.

Only one absent Kansas class member has been deposed, Greg Vanderee. A friend of his who works at a Case IH store warned him away from "yellow bucket" THF, including those sold at Orscheln and Atwoods, perhaps as early as 2017. **Ex. 97** at Vanderree Dep. 17-19, 39. Vanderee did not stop buying 303 THF until 2020, however, because his tractors "were leaking so bad at that point, cheap fluid was all [he] could afford to put in them." *Id.* at 17-18. Vanderee bought 303 THF from Orscheln and Atwoods (in both Oklahoma and Kansas) for at least a decade before the class period, buying whatever brands they carried. *Id.* at 39, 41, 97. He cannot be sure when he started to buy Smitty's/CAM2 303 THF because whenever they changed brands "it was still the yellow bucket," and he "did not at the time realize there had been a brand change, to be honest." *Id.* at 78, 80-81 ("Because I had been buying the yellow bucket stuff. I saw the yellow bucket stuff and bought the yellow bucket stuff."). *Accord id.* at 94, 107. In fact,

he only learned that he had likely bought more than one brand of 303 THF from his lawyers. *Id.* Vanderee never read the disclaimer on the Smitty's/CAM2 303 THF labels because the language was "very small," but admits that the font of the disclaimer was actually larger than the listing of Massey Ferguson, which was important to him and he did read. *Id.* at 92-93.

Only one Missouri absent class member, Jacob Ruhl, was deposed. Ruhl does not mix lubricants, and CAM2 303 is the only 303 THF he ever used. Ex. 45 at Dep. 15-17, 28. He had never heard of line wash before this lawsuit. *Id.* at 193-94.

Defendants deposed two Wisconsin class members, David Gretzinger and Russel Heise. Gretzinger received approximately $15,000 in damages from the Citgo 303 THF settlement (**Ex. 98**, Gretzinger Dep. 32-34), whereas Heise – who actually reports himself as qualified to identify the root cause of equipment failures – is not claiming any property damage at all (**Ex. 99**, Heise Dep. 16-17, 38-39, 49-51). Heise is not even seeking a flush on his equipment, but is only seeking a refund of purchase price for six buckets of Smitty's/CAM2 303 THF. *Id.* at 17, 45. He seeks the refund notwithstanding that he believes Smitty's/CAM2 303 THF acted like a THF and met his expectations. *Id.* at 50-51. Unlike Gretzinger, Heise only used 303 THF in his older equipment because he "felt the newer tractors needed better quality fluids than what I would get with these, with a – with a Smitty's product." *Id.* at 16-17, 24-25. Gretzinger used Smitty's/CAM2 303 THF in his newer equipment, but would not have if he'd read the disclaimer before purchase. Ex. 98 at 132-33. Gretzinger would look for "hydraulic fluid" (not "tractor hydraulic fluid") when he is purchasing THF, and then would purchase the cheapest option. *Id.* at 38-39, 113-14, 117, 132. Because he did not rely on a product being designated "THF," when he stopped using Smitty's/CAM2 303 THF, he began buying Ag Fluid (not designated "THF") for the same equipment. *Id.* at 115-16 (reporting buying because it "says 'hydraulic fluid' on it and I

needed hydraulic fluid so …"). Heise, on the other hand, looked for the words "303" and "John Deere" when buying THF for his older Deere tractors, and historically purchased JD-303 straight from John Deere back in the 1960s. Ex. 99 at 13-14, 81, 83-84.

Wayne Rupe purchased various brands of 303 THF. He specifically asked retailer employees at the stores he frequented whether the products would work in his specific model and model year equipment, and they told him it would. Ex. 6 at Dep. 54, 66-68.

Jenkins Timber & Wood, Inc. purchased and used Smitty's/CAM2 303 THF, and other THF brands, in multiple states. Ex. 61 at 30-31, 52-53, 110-11, 114. Earnest Jenkins used some, but not all of the equipment, for personal use occasionally, but Jenkins Timber always paid for the THF and repairs. **Ex. 100**, Jenkins Timber Dep. 44-45, 48-49. Earnest Jenkins (unlike others, *e.g.*, Ex. 46 at 224 (Egner)) always stores hydraulic fluid buckets on their side "so no contaminants can get into the top of the bucket." Ex. 61 at 123-24. His John Deere 640 skid steer called for J20A, so he "would look at a bucket and if it had J20A on it, then [he] felt it had what [he] needed." *Id.* at 136-37. But for his Komatsu Tree Harvester, neither the J20A specification nor any other mattered because he used 303 THF only as a lubricant for the pivot point – not in any hydraulic or transmission system. *Id.* at 121, 131-32. He agrees the product had value for that function, and was economical for him. *Id.* at 153.

Joe Jackson purchased damaged pallets of 303 THF from TSC. **Ex. 101**, Jackson Dep. 30-32, 45-46, 197. He has no way of knowing when he started buying Smitty's 303 THF. *Id.* at 45-47. He would only read the label after his first purchase if he thought he was buying a "different brand"; otherwise he just assumed the labels were the same. *Id.* at 64-66, 215-16. And, in fact, Jackson does not recall TSC ever changing brands from when he first started buying 303 THF there, years before TSC ever carried Smitty's/CAM2 303 THF. *Id.* at 45-47, 215-16. *See*

also ECF #1004. Jackson sold some equipment on which he is claiming damages after filing this lawsuit without providing notice. *Id.* at 162-63. He is not seeking a flush on that equipment because, as he explains, "You can't flush it after it's gone." *Id.* at 223-24.

Anthony Shaw does not own any of the equipment in which he used Smitty's/CAM2 303 THF and, although he knows it's in the "family" somehow, he is not actually sure who owns the equipment. **Ex. 102** at Shaw Dep. 17-19, 21, 32-33. In the Retailer Settlement he claimed to have purchased 1000 buckets, but at his deposition he was uncertain he had bought even half that. *Id.* at 133-34. Nor does Shaw know what buckets his parents or him were reimbursed for by a family LLC. *Id.* at 63-64. Shaw never read the disclaimer language on the labels he purchased, but it probably would not have influenced his decision because he does not understand it. *Id.* at 135-36. He is unsure in which equipment he used Smitty's/CAM2 303 THF, partly because he is unsure when he bought some of the equipment, *i.e.*, if it was before or after he stopped using Smitty's/CAM2 303 THF. *Id.* at 106-11.

Jacob Mabie originally claimed to have purchased Smitty's/CAM2 303 THF in Michigan and Texas, although he can provide only a "rough guesstimate" of how much and he mixes it with other products. Ex. 76 at 10-11, 46-47, 77. However, in fact Mabie Trucking, Inc., of which Mabie is a 10% owner, owns all four pieces of equipment at issue in this litigation, and Mabie Trucking paid all expenses relating to that equipment, including the purchase of 303 THF. **Ex. 103**, Mabie Trucking Dep. 8, 16-21, 23. "Jacob Mabie, on his own behalf, has never purchased any tractor hydraulic fluid labeled 303 of any sort." *Id.* at 25-26. Mabie recovered in the Retailer Settlement for flush costs for two pieces of equipment that he had already sold and cannot flush. Ex. 76 at 74-75. He is not sure if reading the disclaimer language on the Smitty's/CAM2 303 THF labels would have affected his purchase decision because of the specific applications he

used it for – namely, he was "not running it in a transmission or anything like that." *Id.* at 103.

10. *Equipment Manuals and Maintenance*

Plaintiffs vary on whether they had the owner's manual for the equipment in which they used Smitty's/CAM2 303 THF. Some had manuals for most or all equipment, some had them for none of the equipment – and everything between. *See, e.g.*, Ex. 48 at 65-66, 145 (Hargraves); Ex. 44 at 47-48, 134 (Wurth); Ex. 46 at 76, 86, 134, 156-57, 182, 194 (Egner). Some thumbed through the manuals when they first acquired them; others used the manuals for reference; some looked what specifications the OEM called for; and others never did. *See, e.g.*, Ex. 39 at 93, 163 (Anderson); Ex. 48 at 176 (Hargraves); Ex. 46 at 88-89, 137 (Egner); Ex. 56 at 131-33 (Bollin); Ex. 60 at 260-61, 268-69 (Zornes).

Most manuals emphasized the importance of their contents. *See, e.g.*, **Ex. 104** at Bobcat 541, 549 ("Read this manual completely and know the loader before operating and servicing it. … DO NOT operate the Bobcat loader until you have read this operator's manual completely.").[26] *See also* **Ex. 105** at International 856 Tractor, *1-2 ("Before you operate the tractor, study this manual carefully."; "The life of any tractor depends upon the care it is given."). Many Plaintiffs appreciated this importance. *See, e.g.*, Ex. 48 at 65 (Hargraves follows manual at first to "mak[e] sure you're doing everything right"); Ex. 56 at 131, 279 (Bollin understands manuals provide instructions for care and use, and agrees it is the owner's responsibility to learn and understand proper maintenance). However, not everyone agreed. *See, e.g.*, Ex. 60 at 200-02 (Zornes, "I've been around equipment all my life, heavy equipment. So no, I don't think I need one.").

OEM recommendations in the manuals varied widely. Instructions regarding how often to

[26]All manuals referenced in this section correspond to equipment owned by at least one eight-state Plaintiff.

replace hydraulic filters ranged from every 100 hours of use (*e.g.,* Ex. 104 at Bobcat 555, 583), to every 1,000 hours (*e.g.,* **Ex. 106**, CaseManual 2580), with some providing intervals but also requiring that it be changed annually even if the hours interval was not reached (*e.g.,* **Ex. 107** at DeereManual 11830). Some manuals dictate screen cleaning processes along with the filter change. *See e.g.*, Ex. 105 at International 400-02. How often manuals instructed draining and refilling the hydraulic sump varied just as widely, from at least once a year, to 500 hours, all the way to 2000 hours. *See, e.g.*, *id.* at 11, 156; **Ex. 108**, Gehl 4840 Skid Loader, *53, 60; Ex. 107 at DeereManual 11449. In many cases, the OEM warned the operators that the recommendations were for average conditions, and that excessive temperatures, dust, or heavy loads required more frequent maintenance intervals. *See, e.g.*, Ex. 107 at DeereManual 3140; **Ex. 109**, Mac Don 972 Draper Head, *77. In actuality, some Plaintiffs changed their filters every season, or even more, and others never changed their filters at all, much less cleaned any screens. Fluid draining practices also differed. For instance, Zornes ***never*** drained his fluid. Ex. 60 at 208, 211, 300.

With respect to hydraulic and transmission fluids, many of the manuals did not direct a common fluid for both (and/or wet clutches, wet brakes, etc.) – as described by Plaintiffs as the function of a THF – but rather directed that different fluids be used in the separate hydraulic and transmission sumps, and even other non-common sumps. *See, e.g.*, Ex. 107 at DeereManual 11419-21 (SAE 10W engine oil or J20B for hydraulic system; 80W 90 Gear Lubricant in transmission system; SAE J1803d in brake system); Ex. 108 at Gehl Round Baler 1860, *32 (SAE #140 EP Gear Lube in transmission; Mobile DTE-11 fluid in hydraulics). *See also* Ex. 105 at International 152 (calling for the same fluid for transmission and hydraulics, but not for brakes). Some equipment owners ignored the manuals and used the same fluid in both sumps (*e.g.,* Ex. 56 at 33, 312-15), while others used Smitty's/CAM2 303 THF only in the hydraulic

sump, but not the transmission (*e.g.,* Ex. 60 at 148, 204-05). Where a common fluid was contemplated, the specifications called for ran the gamut. There were those that called for "John Deere Type 303-Special Purpose Oil or its equivalent," *i.e.*, JD-303. *See, e.g.*, Ex. 107 at DeereManual 1165 & 2317. Some manuals required the more recent J20C/J20D specification. *See, e.g.*, *id.* at DeereManual 273 & 10442. Others allowed for J20A/J20B, a Deere specification coming between JD-303 and J20C/J20D (*e.g., id.* at DeereManual 5283); engine / motor oils of various viscosities (*e.g.,* Ex. 104 at BobcatManual 619); older specifications of non-Deere OEMs (*e.g.,* **Ex. 110**, MasseyManual 275); or something else entirely (*e.g.,* **Ex. 111**, Caterpillar E110B, *77 (CAT HYDO); **Ex. 112**, New Holland E35B Service Manual, *23 (Ambra Hi-Tech 46)). Some did not even direct use of a hydraulic fluid specification at all. *E.g., see generally* Ex. 109 & **Ex. 113**, Gehl 2148 Discbine Manual. Regardless of what specification was (or was not) called for, some manuals warned against "mixing different brands or types of oils." *E.g.*, Ex. 107 at DeereManual 276. As noted, many Plaintiffs commingled fluids. *See, e.g.*, Ex. 48 at 36, 96, 149 (Hargraves); Ex. 44 at 142-47 (Wurth).

The content in the manuals was not limited to service intervals and OEM specifications. Manuals also included important information regarding other potential causes of hydraulic issues, how to store lubricants to avoid contaminating the hydraulic system, and practices to avoid in order to prevent damage to hydraulic and transmission systems. *See, e.g.*, Ex. 104 at Bobcat 1026 (warning against a dirty work area or failure to use hose caps and plugs); Ex. 107 at DeereManual 277 (recommending storing "containers on their side to avoid water and dirt accumulation"); *id.* at 2578 (warning of the importance of thoroughly cleaning and drying cooler "to prevent contaminants from entering the hydraulic system"); *id.* at 2963 (warning against use of wrong filter); *id.* at 4230 (warning against failing to match size of implements to tractor

power); Ex. 105 at International 111 (warning against running with low hydraulic fluid levels); Ex. 109 at 56 ("Keep hydraulic coupler tips and connectors clean. Dust, dirt, water and foreign material are the major causes of damage to the hydraulic system."). Many manuals also explained how some equipment components (including ones whose replacement Plaintiffs have attributed to Smitty's/CAM2 303 products) are subject to frequent replacement for normal wear and tear. *See, e.g.*, Ex. 104 at Bobcat 132 (hoses); *id.* at 3262 (O-rings).

D. <u>The Stop Sales</u>

In October 2017, Missouri became the first state to regulate THF (followed by Georgia and North Carolina). That is when MDA ordered a stop sale of ***all*** 303 THF products of ***all*** manufacturers. The MDA did not determine, nor even suggest, that these products were not – definitionally – THF.[27] Rather, the MDA concluded that all 303 THF products (not just Smitty's/CAM2 303 THF) were mislabeled because they did not meet or exceed the John Deere J20C specification. *See* **Ex. 114**, MDA_THF_1616; Ex. 59, Hayes Dep. 208, 211. This, despite the fact that, at least as to Smitty's/CAM2 303 THF, nothing on any of the labels suggested that the product met the J20C specification, and in fact most specifically disclaimed that it did.[28] The MDA did no testing or evaluation to determine if any 303 THF had actually caused any equipment damage. Ex. 59, Hayes Dep. 175-76.

What Defendants know now that they (and the public) did not know in 2017 was that the stop sales were not the result of a spontaneous groundswell of complaints about widespread

[27] Plaintiffs (at 21) wrongly state that the MDA invited Defendants to show their product "was a [THF]." In fact, in 2017 Plaintiffs were still many years away from coming up with their definitional theory of misrepresentation, as evidenced by earlier reports of Plaintiffs' experts omitting this opinion and referring to Defendants' products as THF. *See* SOF § II.E.1. *See also* ECF #970 at 8; ECF #972 at 13.

[28] Not all brands of 303 THF had a disclaimer about model years or misapplication. *See, e.g.*, Ex. 142.

equipment problems from the use of 303 THF.[29] Rather, it was the result of a well-financed campaign organized by monied interests who stood to increase profits by purging from the market the economy THF products that did not rely heavily on the purchases of additive packages. Lubrizol, in particular, is the largest U.S. supplier of additive packages and a sponsor of the limited liability company PQIA, the organization of which Plaintiffs' expert Tom Glenn is the President and sole member.[30] Ex. 8, Glenn Dep. 70-71, 163-64. It is also the same company who sponsored the new NIST Handbook 130 regulations effective January 1, 2020 and paid hefty sums to Glenn; between fees paid to PQIA and PTI, Glenn's other for-profit outfit, Lubrizol and other additive manufacturers have lined Glenn's pockets to the tune of at least $600,000.[31] *Id.* at 73, 138 (Lubrizol and three others ***each*** pay $25,000 ***per year*** to PQIA alone, without even considering PTI fees, and all have been members since at least 2017).

Lubrizol also sat on PQIA's advisory board, which provides guidance, advice and recommendations to Glenn, including on 303 THF. *Id.* at 74, 241. PQIA, in turn, was in regular contact with MDA advocating for a stop sale, and even had access to non-public materials in advance of the stop sale. *See, e.g.*, Ex. 59, Hayes Dep. 152-53; **Ex. 116**, Hayes Dep. Ex. 8; Ex. 8, Glenn Dep. 167; **Ex. 117**, Glenn Dep. Ex. 23. PQIA had been lobbying for removing 303 THF from the market for at least five years before Missouri become the first state to accede. Ex. 59 at

[29] Indeed, multiple Sunshine Law requests to the MDA turned up zero complaints about 303 THF. Nor could the former director of the MDA, Weights and Measures, specifically recall any. Ex. 59, Hayes Dep. 201-02, 204-05.

[30] Glenn's expert report is actually signed in his capacity as President of PQIA. *See* Ex. 32 at 20.

[31] Smitty's President Chad Tate testified that he respects PQIA, but was not privy to the fact that it was paid to do Lubrizol's bidding. Glenn certainly never disclosed this; indeed, he never registered as a lobbyist despite urging MDA to ban 303 THF. Ex. 8, Glenn Dep. 311. Discovery has now revealed a straight line from Lubrizol to this lawsuit –financing PQIA, who then urged MDA to stop 303 THF sales. *See also* **Ex. 115**, Glenn Dep. Ex. 24 (PQIA describing itself as "lobbying for change"); Ex. 8 at 346-48 (Glenn testifying that PQIA seeks to drive change by "shin[ing] a light" for state agencies on what "they, too, should be concerned with," plus litigation like the instant lawsuit). Meanwhile, actual farmers were "pissed" and "concerned" about the stop sale. Ex. 89 ("pissed farmer" complaining the MDA "rob[bed] the farmers of Missouri the access to the only affordable tractor fluid"); **Exs. 118 & 119,** Hayes Dep. Exs. 40 & 41 ("concerned farmer" objecting, after being told by MDA the fluid did not meet JD-303, that he was "smart enough" to know what his older tractor required). *See also* Ex. 59, Hayes Dep. 221-29.

153 (Q. I mean he had been campaigning or lobbying to have the 303 [THFs] removed from the market for a least five years before this. You'd agree with that; right? A. He probably, yes.). Lubrizol also hosted a PQIA summit, attended by MDA representatives a month before the stop sale, where it put on an exhibition to advertise to attendees damages Lubrizol claimed resulted from 303 THF. Ex. 8, Glenn Dep. 318-19; Ex. 59, Hayes Dep. 165. Immediately before the summit, Ron Hayes, the head of MDA's Weight and Measures division presented at the non-public meeting of the PQIA Advisory Board, where the board members, including Lubrizol, voiced their support for removing 303 THF from the market. Ex. 59 at 162, 171-72. Hayes reported that his visit to Lubrizol influenced his decision to issue a stop sale. *Id.* at 177.

Plaintiffs (at 2) make much of the fact that Defendants continued to sell 303 THF in other states (under changed labels) where ***it remained perfectly legal***. But there was no reason for Defendants not to – even consumers who knew about the stop sales still wanted to purchase the product. *See, e.g.*, Ex. 88 ¶ 7 (Matt Finley identifying himself as a class member); Ex. 89; Exs. 118 & 119, Hayes Dep. Exs. 40 & 41 ("concerned farmers" objecting to Missouri stop sale); Ex. 88 ¶ 10 ("If it was still on the market, I would buy and use 303 hydraulic fluid.").

E. Plaintiffs' Experts

Plaintiffs retained five experts: Tom Glenn, Werner Dahm, Adam Alter, Steven Hamilton, and Bruce Babcock.[32] None opine on repair damages, either as to causation or amount of classwide damages. *See, e.g.*, **Ex. 120**, Babcock Dep. 39 ("I was not asked to do so.").

[32] Plaintiff also nominally proffered Ron Hayes, former head of the MDA, Weights & Measures. In actuality, Hayes merely provided a declaration as a fact witness to "[j]ust explain what we had done at the department." Ex. 59 at 48. *See also id.* at 39 (Q. [W]ere you asked to give any opinions beyond the actual factual investigation that the [MDA] did relative to 303 [THF]? A. They asked me basically what I did at the department and that's basically it. Q. Okay. So not asking you to opine on anything beyond what was already completed; you were done with the [MDA] at that point, correct? A. That's correct.). Indeed, Plaintiffs' counsel convinced Hayes to be involved only by advising (wrongly) that his involvement could avoid a subpoena or deposition. *Id.* at 37.

1. ***<u>Definitional Fraud: Glenn and Dahm on the Meaning of THF</u>***

Dahm admits that he "never had to deal with tractor hydraulic fluids specifically before" this engagement. **Ex. 121**, Dahm Dep. 27, 28. Nor has he ever bought, operated, or inspected a tractor; bought or used THF; or used any type of equipment which calls for THF. *Id.* at 24-26, 56. Nonetheless, Dahm and Glenn, who also has never owned equipment that takes THF, opine that "[t]ractor hydraulic fluids must meet at least one OEM specification for respective tractors to be called a tractor hydraulic fluid." Ex. 32, Glenn Rpt. ¶ 3.34. *See also* Ex. 8, Glenn Dep. 70, 121. Although this differs from the NIST definition (*see* SOF § II.A.5.) and instead mimics the NIST "standard" – both of which only went into effect in January 2020 – Dahm and Glenn opine that their definition applies for the entire class period. Additionally, they both opine that Smitty's/CAM2 303 THF did not meet this definition (Ex. 17, Dahm Rpt. ¶¶ 121, 126, 157, 171; Ex. 32, Glenn Rpt. ¶ 4.10) and thus Defendants are liable for what is, effectively, "definitional fraud."

Dahm and Glenn offer a "technical" definition of THF only – ***not*** any opinions about how consumers "would react to labeling and so forth" and understood that term or other aspects of the label. Ex. 121, Dahm Dep. 60-61. *See also* Ex. 8, Glenn Dep. 248-49 (noting he has no "consumer research nor [has] [he] seen any that speaks to buyer behavior with regard to THF purchases"); *id.* at 285-86 (Q. Do you have any expertise about how a consumer end user might understand the term [THF]? A. I have no expertise… on consumer behavior.).

Plaintiffs' experts did not offer this same definition of THF in ***any*** of the earlier THF litigation in which they were proffered. *See, e.g.*, *id.* at 157-58 (explaining that he did not offer definition in early reports because, "[a]fter seeing more information …, it really pointed to the need to further refine my expert opinions to make it clear"). *See also, e.g.*, **Ex. 122**, Glenn *Zornes* Rpt. ¶¶ 3.4, 4.2 (defining THF consistent with NIST definition (not standard) and opining

that Smitty's/CAM2 303 THF was a "tractor hydraulic fluid," but that it was not "formulated to meet any known [THF] OEM specification"). This includes other cases where the experts knew the manufacturers "did not begin their THF manufacturing process with a virgin or re-refined base oil." Ex. 8, Glenn Dep. 162; Ex. 16, Dahm *Yoakum* Rpt. at 11-12.

2. *Microscopic Abrasion Theory: Dahm on Immediate Non-Operational "Damage"*

Dahm did not conduct any tests or examine any equipment that used Smitty's/CAM2 303 THF. Ex. 121, Dahm Dep. 15, 43. Nonetheless, he opines that, "[f]or specific technical reasons," "damage is present in each and every tractor that used or uses Smitty's 303 THF," which damage "occurs immediately upon the first use" and "continues until completely flushed." Ex. 17, Dahm Rpt. ¶¶ 158, 159, 164. Dahm further opines that while the degree of impact may vary, the fact of damage does not depend on poor maintenance or the use of other 303 THFs that many Plaintiffs have claimed damage from. *Id.* ¶¶ 160, 161. Dahm describes this damage as including surface wear, scoring, pitting, and corrosion. *Id.* ¶ 164. He agrees that there are other causes of surface wear. Ex. 121 at 292-96. Indeed, he testified that if an equipment operator uses ***any*** fluid that does not meet the prescribed OEM specification, "even by just 1%" – as was the case with many Plaintiffs, *see* SOF § II.C. – then "you must assume that that will produce damage in the equipment that you use [it] in." Ex. 121 at 106. And, he specifically opined in 303 THF litigation against the manufacturer of NAPA Quality, Carquest 303, and Coastal 303, that each of these fluids "unavoidably" caused this same damage in "each and every tractor or other hydraulic equipment that used or uses" these products. Ex. 16, Dahm *Yoakum* Rpt. at 21.

Dahm agrees that the "damage" he theorizes may not have an operational impact for years – or maybe ever for a Plaintiff who sells or otherwise disposes of his equipment before operational impact. *See* Ex. 121 at 289 ("As time progresses and that damage accumulates, eventually you'll get to the point where some of these higher symptoms, what I refer to as

operational impacts, will become evident …"); *id.* at 290 ("As that fluid is used in the tractor system over a longer and longer time, the accumulation of damage eventually can become large enough or will become large enough that these types of failure will occur."); *id.* at 292 (testifying owner could sell equipment without ever being aware of damage); *id.* at 294 (testifying that he had been "very careful intentionally" in this report to distinguish "damage" from "operational impact"; "I would urge us here not to mix that terminology…."). He also agrees that, although he failed to examine a single piece of equipment for evidence of damage, it would "[e]ventually" be observable "with proper diagnostics" had he bothered to look. *Id.* at 299-300. *See also id.* at 222 (Q. Can you name a piece of equipment from one of the plaintiffs that had corrosive wear from using Smitty's or CAM2 303? A. … I've not been asked to examine the experiences in any individual plaintiff, and so the answer is no … .).

Dahm's opinions are limited to where purchasers used 303 THF in a tractor hydraulic system. *Id.* at 305 (A. I give no opinions in this report about what happens in a situation other than what this report is based on. Q. Which is only tractor hydraulic systems, right? A. Which is – has to do with putting improper [THFs], including Smitty's 303 and CAM2 303 fluids, into a tractor hydraulic system.). He was unaware that some Smitty's/CAM2 303 THF purchasers did not use it in a tractor hydraulic system. *Id.* at 304. With respect to actual use in tractor hydraulic systems, Dahm was "thinking primarily of modern tractors that have a common sump…" *Id.* at 306-07. He was explicit that his opinions do not apply to the use of Smitty's/CAM2 303 THF in the transmission system of a tractor with separate sumps. *Id.* at 308. At times in his deposition, Dahm referred to the "risk" of damage, rather than inevitable damage: "And, therefore, you're at risk of damaging your equipment if you're using a [THF] that doesn't meet the spec that the OEM for your equipment called for you to use." *Id.* at 207-08.

Notwithstanding his blanket assertions about suitability, Dahm concedes that performance requirements for different applications vary considerably. *See, e.g.*, *id.* at 61-62 (distinguishing THF from hydraulic fluid based on the fact that fluid in tractors are exposed to "far higher" temperature ranges). These variations hinge not only on application, but usage. For instance, Dahm agrees that if one merely drives a tractor to a barn, "the hydraulic system is not being exposed to these extreme pressures" that would require a THF. *Id.* at 78. So if, for instance, a tractor was used as a hay wagon, Dahm cannot say if usage would result in high pressures. *Id.* at 78-79 ("I would need to know the details about what you're envisioning in that application"; "I would say that depends on the details of the application."). Nonetheless, Dahm did not know anything about what equipment Smitty's/CAM2 303 THF was put in, much less how that equipment was actually used. *See id.* at 208, 210-11, 276 ("I haven't reviewed the circumstances of the plaintiffs and I haven't been asked to do that, and so I have nothing to - bring you on that."; "I haven't studied any aspect of the individual plaintiffs' experiences or the equipment they used. That was outside the scope …").

3. *"Do Not Buy!": Alter on the Alleged Omissions and Fraud "In the Gestalt"*

Dr. Alter is a marketing professor who had never heard of THF prior to his engagement and does not know if THF is supposed to act as a power transfer medium. Ex. 37, Alter Dep. 13, 74. He did not conduct any sort of interviews, focus group, or consumer survey to determine how consumers understood THF labels, how they interpret "THF," what is material to them in buying THF, or whether they were misled by Smitty's/CAM2 303 THF labels. *Id.* at 23, 26. He also did nothing to understand information that buyers had before encountering the label, as that "wasn't relevant to the opinions that [he] ultimately formed." *Id.* at 28. Alter claimed to have read 17 Plaintiff depositions, but did not cite them in his report and was unfamiliar with them when asked. *See, e.g.*, *id.* at 189, 210. He explained that Plaintiffs' deposition testimony was not

relevant because "none of them were given full information," *id.* at 32, and could be discounted in any case "because I don't think they have a good sense of what they actually would have done in the circumstances" or even knew whether they had read the label. *Id.* at 150, 301. *See also id.* at 71 ("But to be honest, none of that was – was material in – in the report and the opinions I arrived at in my report."). Alter likewise did not review Plaintiffs' discovery answers. *Id.* at 60.

In his report, Alter opined about individual alleged affirmative misrepresentations on Smitty's/CAM2 303 THF labels. Ex. 36 ¶ 30. But he backed away from these opinions at his deposition when confronted with example after example of Plaintiffs either not being exposed to that representation, not uniformly understanding that representation, or attesting that they did not rely on that representation:

> Q. What information on the label did consumers necessarily rely on?
>
> A. So, again, I can't say specifically which information every consumer relied on but I can say that every consumer was ultimately exposed to a series of pieces of misinformation that in the gestalt, in the whole, when put together, mislead them.

Ex. 37 at 147. *See also id.* at 152 ("it's not my claim that he relied on those representations"); *id.* at 226 ("I don't think it's – it's useful to go through each of the claims [misrepresentations] individually"); *id.* ("I'm not making specific claims about any one pillar."). Indeed, he opined that "it's immaterial really how much of the label" any given consumer read, including whether they read any of the back label at all. *Id.* at 99-100. *See also id.* at 104 ("for my opinion … it doesn't actually matter").[33]

[33] This Court has already rejected the notion that "it's immaterial" whether a consumer read the label and if so what parts. As to Tim Sullivan, it granted summary judgment on his misrepresentation claims because "[t]he record is clear that Sullivan ***did <u>not</u> read*** or rely on the SuperTrac 303 Labor or the Super S Label in purchasing Smitty's 303 THF Products." ECF #996 at 8 (emphasis added). *See also* ECF #1004 (same as to Jackson). As to Wendt, the Court granted summary judgment on his fraud, negligent misrepresentation, and Deceptive Trade Practices Act claims because of what he did read on the label, *i.e.*, "***he observed*** and had the capacity to understand" the disclaimer directing him to use a premium product for post-1974 equipment, negating justifiable reliance. ECF #998 at 7 (emphasis added). *See also* ECF #1006 (dismissing Hazeltine's unjust enrichment and MMPA claims on this basis).

Ultimately, then, Alter's opinion was that the labels omitted the converse of the purported misrepresentations such that, had missing information been disclosed, no reasonable consumer would ever have purchased Smitty's/CAM2 303 THF. *Id.* at 100-01 ("asking which pieces of information they would read isn't relevant to the question of whether they would have purchased this at a point of sale if it had been labeled appropriately," which is the "heart of [his] opinion").[34] When asked what specifically the label should have disclosed, Alter answered that in his but-for world the label "just would have been a list of essentially negative features or dis-utilities." *Id.* at 24. *See also id.* at 56 (opining that no consumer would have purchased if the product was described as "waste"). But he did know what, specifically, that disclosure should have looked like. *See id.* at 177 (responding to what the label should have said, "I don't know – in full …").; *id.* at 310 (regarding disclosure of line wash and whether consumers would even understand the term, testifying the labels did not "necessarily" need to say the product contained line wash, but rather needed to be more transparent about it being "a waste product"); *id.* at 76-77 (line wash may not matter to consumers, but "[i]f you describe the product as waste, I think that matters to people"). Alter did not opine that any of the claimed omissions in isolation were material. *Id.* at 314 (Q. So you don't have an opinion that in isolation any of these omissions was material? A. I'm – I'm suggesting that in concert all of them are material.). In fact, he testified that what was material might vary from consumer to consumer. *Id.* at 313 ("for every … reasonable consumer, there is at least one piece of information").

In the end, Alter opined it all came down to warning consumers: "do not buy." *Id.* at 286

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[34] The sole claimed omission Plaintiffs (at 30) discuss that is not the converse of a purported affirmative misrepresentation is that the labels did not disclose "the actual ingredients." This is true. Defendants are unaware of any THF on the market that does so. In any case, Plaintiffs and even retailer buyers testified to not knowing what line wash was, creating an individual fact issue. **Ex. 123**, 10/30/19 Milliken Dep. 122-23; Ex. 48 at 158 (Hargraves does not know what line wash is); Ex. 39 at 263 (Anderson erroneously believes line wash comes out of radiators).

("I'm talking about a product where on its label it says do not buy."). *See also id.* at 92 ("if the label says in bold print do not buy this product … then no reasonable consumer would buy that product without looking at the label"); *id.* at 99 ("if this product were labeled appropriately, I don't think any consumers would read past the very immediate part of the label which would effectively say don't buy this product"). For example, he is ***not*** opining that no consumer would have purchased if the label simply disclosed that the product may contain line wash. *See id.* at 112 ("depends what else is on the label"). Similarly, he cannot say that simply removing the designation of the product as "THF" would have changed consumers' purchasing decisions. *See id.* at 65-66. Rather, Alter's opinion rests on Dahm's, such that "the global opinion here is that no reasonable consumer would buy this product because it doesn't do the job and does harm." *Id.* at 232. Indeed, Alter ultimately concludes that, regardless of the label, the product should not have been sold at all. *See id.* at 182 ("But really that product shouldn't be for sale if it's a waste oil and it will do – do harm.").

4. *Zero Value: Babcock on Full Refund Damages*

Babcock purports to measure benefit-of-the-bargain damages for the class by comparing the price paid for Smitty's/CAM2 303 THF and the actual value received, which he places at zero. His opinion that the product was valueless is based on the opinions of other Plaintiffs' experts that the product was not in truth THF and "was just waste"; he then posits that consumers would not have had a positive willingness to pay if the labels had affirmatively represented that it would damage the buyer's equipment. Ex. 120, Babcock Dep. 55-59, 62, 116.

If, contrary to these assumptions, the product was suitable for some uses, Babcock's calculations did not measure any price premium based on alleged misleading statements such as "303" or "THF." *Id.* at 107-10. Likewise, if data showed some buyers ended up better off economically from the use of 303 THF as compared to more expensive THFs (*e.g.*, because they

did not experience "operational impacts" and the savings more than offset flush costs), it would not change Babcock's opinions. *Id.* at 62. Nor would it change his opinions if some purchasers bought the product knowing that it could damage their equipment (although he admits each individual's knowledge base is relevant to willingness to pay (*i.e.*, value)). *Id.* at 63, 69-70. All of this is despite Babcock admitting that if a particular consumer purchased Smitty's/CAM2 303 THF, used it in equipment, and then later sold the equipment without ever experiencing any THF-related problems, that person "might have gotten some value." *Id.* at 116. In that case, any unobservable "damage" would "follow the tractor" to the new owner. *Id. See also* Ex. 101 at 223-24 ("You can't flush it after it's gone.") (Jackson).

Defendants do not have data reflecting the dollar value of class member purchases during the period. Most of the 303 THF they sold was to distributors, wholesalers, and retailers – not end users. Thus, they have no way of knowing the price buyers paid for Smitty's/CAM2 303 THF. In addition, ***Defendants'*** sales during the class period do not match ***retailer*** sales during the class period because the time of those separate transactions cannot be matched; it is unknowable to Defendants when retailers sold the product, *e.g.*, how long product was in inventory. Additionally, despite the fact that Plaintiffs pursue single-state classes, and thus need to be able to show sales ***by state***, Defendants do not know what volumes of Smitty's/CAM2 303 THF was sold in each state. Rather, Defendants tracked only: (1) where product was shipped if Defendants did the shipping, in which case this location was often a distribution center serving multiple states (**Ex. 124**, 2/26/19 Milliken Dep. 75-76, 80, 121); or (2) the corporate headquarters (not storefront) of the buyer if the buyer picked up the product (Ex. 5 at 138-41, 212-13).

Given this lack of relevant Defendant data, Babcock looked to collect sales data directly

from five retailers, namely TSC, Atwoods, Rural King, Orscheln, and Bomgaars. Ex. 120, Babcock Dep. 46. But much of this was not specific to the eight states for which he now purports to estimate classwide damages. For instance, Orscheln provided nationwide and Arkansas and Kentucky sales, but not Kansas sales.[35] **Ex. 125**, Orscheln00005. There were other data issues as well. The TSC data Babcock relied on was, according to TSC, "***likely*** higher than the actual sales" due to anomalies and a decision by TSC to "err[] on the side of inclusion." **Ex. 126**, DEFTSCMO 531 (emphasis added). Babcock was unaware of this fact when relying on the data. Ex. 120 at 88. The Orscheln data likewise cautioned against its reliability:

> Disclaimer: The below sales information was derived utilizing the 303 [THF] product SKU number: 101013725. This SKU number was used for all 303 products, irrespective of the manufacturer. Orscheln is unable to separate the 303 product sales specific to manufacturer. Accordingly the below sales information ***likely*** contain sales of 303 [THF] not manufactured or distributed by Smitty's Supply Inc.

Ex. 125 (emphasis added). Babcock was similarly unaware of the unreliability of the Orscheln data, and cannot say one way or other whether this results in his benefit-of-bargain damages measure being materially overstated. Ex. 120 at 98 (Q. Which would overstate the damage calculation? A. I don't know if it materially does.). *See also id.* at 100 ("I don't know the importance of this [disclaimer] or not. I – I just don't know.").

5. *Be Nice, Flush Twice: Hamilton and Babcock on Flush Costs*

Plaintiffs' expert Hamilton, an equipment mechanic, opines that users of Smitty's/CAM2 303 THF should receive a double flush. **Ex. 127**, Hamilton Rpt. ¶¶ 2-4. He admits that there are other reasons heavy equipment would require a flush, and that for those purchasers who used multiple THFs that did not meet the OEM specification – of which there are many – it is

[35] Orscheln did not begin selling Smitty's/CAM2 303 THF until after the Missouri stop sale. Orscheln does not have stores in California, Minnesota, New York, or Wisconsin.

impossible to tell which fluid caused the issue. **Ex. 128**, Hamilton Dep. 74-76, 99, 201-03, 207-08 (Q. So there are instances in which you would recommend this flush remedy for problems not caused by the use of a 303 THF product? A. Oh, yes, ma'am.; "I don't know that – how – how you could determine which fluid actually caused any damage."). Hamilton additionally admits that some equipment using Smitty's/CAM2 303 THF does not need a flush – *e.g.*, if it is no longer operational – and that some equipment requiring a flush due to use of Smitty's/CAM2 303 does not belong to class members. *Id.* at 228, 270-71. He also testified to wide variations in the cost and efficacy of his proposed double flush remedy. *Id.* at 227-28, 278-79. *See also* Ex. 121 at 230-32, 241-42, 298-99 (Dahm testifying that "even a thimbleful" of Smitty's/CAM2 303 THF in a 70 gallon reservoir can cause damage, "[i]t would take an infinite number of flushes to get every last molecule out," and he has not "studied how many flushes" would get enough out).

Hamilton purported to arrive at average costs to perform a double flush for various sizes of tractors, though not other diverse equipment used by class members. Ex. 127 ¶ 5. Babcock then used those costs to calculate supposed classwide damages for property damage flushing costs. Specifically, he attempted to determine the size of each single-state class, then the average number of tractors per class member, and then multiplied the number of tractors times Hamilton's average costs for various tractor sizes. *See* **Ex. 129**, Babcock Rpt. § IV. To arrive at the class size per state, Babcock relied on national averages of gallons purchased per customer based on data from tax exempt sales, rather than state-specific averages. *Id.* He agrees that "if my national average deviates from what the reality is in the state then you'll get an overestimate or underestimate" of the class size for that state, and by extension, flushing costs. Ex. 120 at 156-57, 159. In fact, the available data for some states shows that the average number of gallons per customer was more than three times the national average. *See id.* at 157-58. With respect to the

eight bellwether states, New York in particular is an outlier. *See id.* at 188 (Q. Anything that you did to try and correct for New York's outlier status? A. No, I wasn't trying to gauge that. …). *See also id.* at 189 ("If I was to use the state-specific estimate of gallons per customer for each of the focus state[s], New York class size would go down – and others would go up.").

Babcock included in his flush damages estimate costs for those who need a flush for other reasons and those who already resold their equipment to non-class members without having performed a flush, despite those costs not being properly includable in aggregate classwide damages. *See id.* at 122 (Q. Can … your methodology identify who still owns the piece of equipment for which the flush remedy would be applied? A. No. It just follows the piece of equipment, not the ownership of the equipment. …); *id.* at 125-26 (Q. But wouldn't your estimate of flushing cost damages be overstated if there were some significant group of individuals who already had their hydraulic systems flushed for whatever other reason? A. To tell you the truth, I don't know … .). *See also* ECF #996 at 10 (granting summary judgement on Tim Sullivan's flush damage claims). Conversely, Babcock excluded all non-tractor equipment of class members from his estimate, despite the fact that Plaintiffs purport to seek those damages.

F. <u>Defendants' Experts</u>

1. *<u>Dr. Peter Lillo</u>*

Peter Lillo is a licensed Professional Engineer and ASE Master Certified Automotive Technician with a Ph.D. in Mechanical Engineering. He has an extensive background in failure root cause analysis that includes analysis of tractors and other heavy equipment, and in particular hydraulic and transmission systems. He personally inspected various pieces of Plaintiffs' equipment and observed no evidence of the kind posited (but not observed) by Dahm. Ex. 77, Lillo Rpt. ¶ 9(c).

Dr. Lillo opines that the potential causes for damage and performance issues in farming,

construction, logging, and other equipment are myriad. *Id.* ¶¶ 11, 327. Performance issues are highly dependent on a number of individualized factors, including part failures unrelated to the hydraulic fluid, operating conditions, contaminants from a bounty of sources, and even normal wear and tear.[36] *Id.* ¶¶ 60, 445. Other causes of equipment damage (including those for which Plaintiffs' own experts recommend a flush) include poor maintenance practices, contamination entering through pre-existing leaks, and contaminated lubricant from bucket storage methods. *Id.* ¶ 41. In other words, whether equipment is properly cared for – from routine filter changes, to ensuring that fluid levels do not get too low, to tightening fittings to keep out dirt – is a significant factor in whether failures occur and whether a flush is indicated. *Id.* ¶ 171. *See also id.* ¶¶ 223-30 (discussing Plaintiffs' maintenance practices); SOF § II.C.10. (discussing manuals).

To determine the root cause in any particular case requires a scientific failure analysis, which would typically include, among other things, an inspection of the equipment and an understanding of the maintenance history. Ex. 77 ¶ 274. This is particularly important – and particularly difficult – on very old equipment with unknown use and maintenance histories. *Id.* ¶¶ 80, 137. In conducting preliminary reviews of the named Plaintiffs' experiences with their equipment, as well as other available data, Dr. Lillo found that "[s]ome of the named Plaintiffs neglected the maintenance of their equipment in ways that cause the same type of damage that Dr. Dahm theorizes the Subject Oil causes." *Id.* ¶ 13(a). For instance, the pictures below taken by Dr. Lillo show the water content in Hazeltine's hydraulic fluid:

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[36] *See also* https://www.mynewtractor.com/blog/understanding-used-tractors-life-expectancy--24241 ("around 2,500 hours: the hydraulic pumps, clutches, and injectors usually need some maintenance. … Factors Affecting the Used Tractor Life Span. The lifespan of a given used tractor will be influenced by many factors. The Tractor Brand. … The Hour Usage. … The Past Owner's Maintenance Efforts. … The Used Tractor's Storage. … The Intensity of the Work.").

Figure 3. Photograph of a hydraulic fluid samples, shortly after collection from Plaintiff Hazeltine's Ford 1987 Ford 1710 tractor during the October 6, 2022, inspection. Notice the chocolate milk like appearance of the fluid, which is indicative of a fluid contamination issue.[57] [37]

Dr. Lillo was able to understand potential root causes by reviewing individual discovery answers, deposition testimony, and equipment records, plus inspecting the equipment. *Id.* ¶ 222. He found that Plaintiffs frequently used many brands of 303 THF, not limited to Smitty's/CAM2 303 THF, based on empty buckets on the property – including brands that were never reported in discovery responses. *Id.* ¶¶ 13, 111.

Figure 33. Some of the many empty 5-gallon buckets of a variety of hydraulic fluid products observed during my inspection of Mr. Zornes' equipment on October 4, 2022. Only one of the many buckets once contained the Subject Oil (Super S 303). Many other buckets once contained non-Subject economy or 303 hydraulic fluid products, including MileMaster 303, Oscheln Premium 303, and Suregard 303.[197]

This is important, because Dr. Lillo also opines that "[i]n cases where equipment damage is thought to be caused by factors related to the hydraulic fluid, and the equipment has a history of

[37] Dr. Lillo's inspections also found causes of claimed repairs that rule out Smitty's/CAM2 303 THF as a cause. *See, e.g.*, *id*. ¶¶ 225-26, 247. However, since Plaintiffs limit the property damage claims on which they seek certification of a class to flush damages, Defendants do not expand on these in this summary of Dr. Lillo's opinions.

inappropriately using multiple fluid products, it would be extremely difficult, if not impossible, to determine the individual impact of each fluid. Plaintiffs' experts have made no attempt to do so." *Id.* ¶ 13. *See also id.* ¶¶ 211-22.[38] This is not to say that Smitty's/CAM2 303 THF is unsuitable for all applications; to the contrary, Dr. Lillo identifies a bevy of applications in which the fluid is suitable based on how the fluid compares to OEM recommendations. These include, among many others, 1960s Massey Ferguson 72 S.P. combines, Atlas hydraulic jacks, Toyota 74GCU5 forklifts, Bush Hog log splitters (like Hazeltine's), and a 1943 WD Allis tractor (as reported by a *Hornbeck* claimant). *Id.* ¶¶ 68, 83, 294. For other equipment, like Wendt's Bobcat 742 skid steer or Creger's IH 1066 Tractor, the use of Smitty's/CAM2 303 THF was inappropriate. *Id.* ¶ 139. And for Creger's Timberjack 360, Smitty's/CAM2 303 THF was the appropriate viscosity for use at some temperature ranges, but not the low temperature range during which Creger sometimes used the equipment in harsh Minnesota winters. *Id.* ¶ 159.

Finally, Dr. Lillo opines that Hamilton's opinions regarding the need for a double flush to prevent ongoing damage and Dahm's theories of inevitable damage from even a tenth of a thimbleful of Smitty's/CAM2 303 THF are in direct conflict – Hamilton admits that the flush he proposes will not reduce the amount of Smitty's/CAM2 303 THF below that threshold. *Id.* ¶ 14(c). In any case, how much Smitty's/CAM2 303 fluid will be left in the equipment after a double flush will depend on a range of individualized factors, including whether the fluid was used to top-off or as part of a drain and fill; whether Smitty's/CAM2 303 THF was commingled with other hydraulic fluids; and even the equipment's physical architecture. *Id.* ¶¶ 14, 398, 418.

[38] Defendants are still learning what other brands Plaintiffs and class members used. Just two weeks before this filing, Defendants received another flurry of supplemental interrogatory answers identifying new brands – presumably prompted by a recent settlement recovery on some of these brands in litigation against Warren Oil.

2. ***Dr. Lee Swanger***

Dr. Swanger holds a Ph.D.in Material Science and Engineering and is a Licensed Professional Engineer. He has extensive experience with design and failure analysis of hydraulic equipment of all types, with vast knowledge of blending lubricants and equipment performance requirements. Dr. Swanger opines that Smitty's/CAM2 303 THF is suitable for numerous applications, but that "[e]ach application would have to be considered individually." Ex. 7, Swanger Rpt. at 14. This follows in part from the fact that there are hundreds of OEM specifications, which would be a critical piece of evidence in each case for comparison to determine if (the relevant batch of) Smitty's/CAM2 303 was equivalent. *Id.* Dr. Swanger further opines that "[b]ecause of the great disparities among consumers' equipment, maintenance, operating conditions, and environment, there is no common means to assess what damage – if any – arose from the use of the Smitty's/CAM2 303 versus damage arising from other factors, such as how that equipment was operated and maintained." *Id.* at 14-15. He also opines that "[t]ractor hydraulic fluid is not a term of art, subject to a single definition." *Id.* at 15.

Plaintiffs (at 24) pretend that Dr. Swanger said that Smitty's/CAM2 303 THF is not actually THF. Not so. He testified that it is not "TsHF" (***Transmission*** Hydraulic Fluid) or a "***Universal*** Tractor Transmission Oil." Ex. 27 at 112, 113. But, in his report, Dr. Swanger explicitly distinguishes these from THF in that they are for use only in "more modern equipment," and further opines there was not even a definition of THF until recently upon the adoption of NIST Handbook 130. Ex. 7, Swanger Rpt. at 4. Further, he testified emphatically:

> ***It is a tractor hydraulic fluid.*** It lubricates the equipment into which it's put and it's able to transmit power from one location to another. That's the most basic definition of tractor hydraulic fluid I can come up with.

Ex. 27 at 123 (emphasis added). *See also* Ex. 7, Swanger Rpt. at 4 ("Plaintiff experts' opinion that tractor hydraulic fluid (THF) has only a single, and narrow, meaning … is without basis and

ignores this history.").

It is equally untrue, as Plaintiffs contend (at 85-86), that Dr. Swanger said that the disclaimer on many of the labels was inappropriate. Plaintiffs (at 107) wrongly reason that Dr. Swanger opines that "fitness depends not on model year but 20-weight uses." In fact, however, he opines that "Smitty's/CAM2 303 THF is a hydraulic fluid with a viscosity within the SAE 20 weight range" and that "[m]any pieces of equipment do not even mandate the use of a certain OEM specification as a hydraulic (or transmission fluid), but instead call for SAE 20, 80W weight gear oil, or ISO 46, just to name a few, for which Smitty's/CAM2 303 products are suitable." Ex. 7, Swanger Rpt. at 5, 9, 10. He then names multiple older model year equipment for which the fluid is suitable. *Id.* at 9, 10, 14. Rather than opine that a disclaimer regarding use in post-1974 equipment was somehow misleading, he testified that there was not a blanket prohibition on use by year and provided "examples where it's appropriate for post-1974 equipment." Ex. 27, Swanger Dep. 123-24. As a general matter, he agrees that factors relevant to suitability turn on a number of tractor characteristic that changed over time, *e.g.*, "whether it has common or separate reservoirs, … whether it has wet brakes, … and whether or not it has hydraulic steering," and "[t]he age (***original manufacture year***)." Ex. 7, Swanger Rpt. at 8 (emphasis added).[39]

Further, while Swanger testified that he could not categorically say Smitty's/CAM2 303 THF was suitable for ***each and every*** piece of 1974 or pre-1974 equipment under the sun "because there's so many different kinds of equipment" and inherent product variability, he was not provided a single example of an older application for which Smitty's/CAM2 303 THF would be unsuitable. Ex. 27 at 121-22. *See also id.* at 168-69 ("they ended up with an acceptable 303

[39] Plaintiffs (at 78) put great stock in Defendants not referencing 20-weight in their disclaimer. But being *over*-cautious on a the label warning is no basis for liability.

[THF] that was suitable for many of the wide variety of applications across the country in all kinds of equipment, including hydraulic systems in dump trucks, log splitters, combines, drilling rigs, and some tractors”). Whatever Plaintiffs think of Dr. Swanger’s opinions on the merits, they cannot discount the individualized evidence Dr. Swanger cites that will be relevant to determining suitability and fact of injury.

3. _*Dr. Benjamin Lester*_

Benjamin Lester holds a Ph.D. in Cognitive Neuroscience. He focuses on how humans respond to and process information and consumer decision-making. Dr. Lester opines that “[f]or disclosures to influence the behavior of a consumer, three conditions are necessary: (1) the consumer must detect and read the message; (2) the consumer must understand the message; and (3) the consumer must behave according to the message.” Ex. 33, Lester Rpt. at 5, 28-30. He concluded that whether these preconditions were satisfied varied significantly among class members, with some consumers reading only the front label, others reading only portions of the back label, and others reading all of the back label, including the disclaimer. *Id.* at 5, 30-33. From this, as well as a careful review of all the available Plaintiffs’ depositions, he opines that the effect of Defendants’ disclosure of any of the alleged omissions would have varied by consumer. *Id.* at 39-41. For instance, some purchasers reported only using the products in older or leaking equipment, and some – as shown from their own testimony – would never have read any disclosure at all. *Id.* at 6-7. Further, many factors influence the response to a given disclosure including, *e.g.*, the consumer’s previous experience with the product, the availability of alternatives, and contextual factors at sale. *Id.* at 29.

In making THF purchase decisions consumers rely on varied sources of information. *See id.* at 35-38. By way of example, consumers may seek information from the internet (*e.g.*, Sevy), friends (*e.g.*, Anderson), relatives (*e.g.*, Nash), mechanics (*e.g.*, Wells), and salespeople (*e.g.*,

Hargraves). *Id.* at 30, 32, 45. *See also* ECF #1014 at 8-9 (finding genuine issue of material fact with role that retailer recommendation played in purchase). In addition to varied sources, consumers evaluate varied factors, and place differing importance on those factors, in arriving at their ultimate decision. *Id.* at 28-30. Individuals also diverge in the features they find most important, (*e.g.*, brand name, convenience of acquiring, price, use history). *Id.* at 29. Scientific research shows that one single factor, such as component ingredients, will not outweigh other factors for all individuals; rather, it will be considered in the context of each individual's needs, goals, and knowledge at the time of the decision. *Id.* Thus, Dr. Lester opines that simply assuming that any reasonable consumer relied on Plaintiffs' alleged affirmative misrepresentations or that no reasonable consumer would have purchased had the alleged omissions been disclosed – particularly without any empirical data, as Alter did – is unsupported by the record or by science. *Id.* at 29-30. Indeed, even the fact that sales of Smitty's/CAM2 303 THF continued to be healthy after the stop-sales and lawsuits like this one were widely publicized shows that consumers were not uniform with respect to the materiality of this information. *Id*. at 39.

Regarding Plaintiffs' "definitional fraud" theory in particular, Dr. Lester opined that consumers have varying understandings of the term "tractor hydraulic fluid." *Id.* at 8-9, 34-35. Some testified that "tractor hydraulic fluid" was the same as hydraulic fluid, whereas others understood them to be different. *Id.* at 9, 34. Some testified that "tractor hydraulic fluid" indicated that a fluid was appropriate for use for both hydraulics and transmission, whereas others specifically denied that was the case. *Id.* Plaintiffs' attack (at 24, n.12 & 25 n.14) on Dr. Lester for having no opinion as to whether Smitty's/CAM2 303 THF was in fact "tractor hydraulic fluid" misses the point. He is neither a technical expert nor a THF consumer. His

opinions are about ***consumers'*** understanding of the term – not Dahm's, not Swanger's, and not his own. *See* **Ex. 130**, Lester Dep. 17. And, unlike Alter's, they are based on empirical data, including the vast record in this case. Based on this empirical data, Dr. Lester concludes that inclusion of the term "tractor hydraulic fluid" on the at-issue labels would not have been uniformly misleading to all consumers. Ex. 33 at 8-9. He further opines that inclusion of the term was not essential to all consumers' purchases, particularly given examples of consumers buying products without that term for the same applications, *e.g.*, AW32, Ag Fluid. *Id.* at 39.

Lastly, Dr. Lester opined that it would be unreliable to have purchasers depend on their memories to determine if they bought one of Smitty's/CAM2 303 THF products during the class period considering, for instance, that some erroneously reported purchasing Smitty's/CAM2 303 THF at stores during periods when it was not even sold there. *Id.* at 8, 47-50.

4. *Dr. Denise Martin*

Dr. Denise Martin received a Ph.D. in economics from Harvard University, and was formerly an Assistant Economist at the Federal Reserve Bank of New York. She opines that neither of Babcock's methods – *i.e.*, benefit-of-the-bargain damages or property damage flushing costs – "will generate a reliable estimate of any damages – for any individual consumer or for the putative class in the aggregate – attributable to the purchase or use of Smitty's/CAM2 303 THF." **Ex. 131**, Martin Rpt. ¶ 3.

With respect to the benefit-of-the-bargain measure, Dr. Martin addresses microeconomic principles that explain the process by which consumers make purchasing decisions. *Id.* ¶ 5 & § III. These principles reveal that there are many individualized factors – from budget constraints to willingness to trade off attributes (*e.g.*, price and risk) – that would allow a reasonable purchaser to buy much cheaper THF even if they were aware of the negative product attributes that Plaintiffs challenge. *Id.* ¶¶ 5-6. This is not a hypothetical; Dr. Martin opines that the

information about Smitty's/CAM2 303 THF in the public domain in fact "indicates that these negative attributes were known to at least some consumers." *Id.* ¶ 5. *See also id.* § IV. She further opines that the repeat purchase of the product by so many consumers after considerable experience with the product – in many cases years upon years, with no observable equipment damage – reinforces that the product was not uniformly "valueless" for all consumers, as Babcock's benefit-of-the-bargain opinion necessarily assumes. *Id.* ¶ 5 & § V. In fact, based on developed evidence, empirical analysis demonstrates that, "given the cost savings, a decision to repurchase was economically rational." *Id.* ¶ 6. *See also id.* ¶¶ 73-75. Dr. Martin thus concludes that Babcock's failure to account for these scientific principles and variable facts "render[s] his estimate biased upwards to an unknowable degree" and that actual benefit-of-the-bargain damages would require individualized assessment. *Id.* ¶ 5. *See also id.* ¶¶ 76-80.

Plaintiffs devote considerable time to arguing regarding Ag Fluid, which this Court had already ruled is irrelevant. ECF #485. But, even if one were to accept relevance and assume Plaintiffs were correct that Smitty's/CAM2 303 THF and Ag Fluid were "in fact the same fluid,"[40] Dr. Martin opines that its limited relevance would be as follows: (1) Alter is incorrect that a product must say "tractor hydraulic fluid" to enter into a consideration set for use in the applications for which consumers used Smitty's/CAM2 303 THF, and (2) products for use in hydraulics, transmissions, wet brakes, and other assorted purposes as reported by Plaintiffs and class members indeed have value to consumers even when they are not represented to be "tractor hydraulic fluid." *Id.* ¶¶ 56-58, 69-72.

It is not just microeconomic principles that undercut the reliability of Babcock's benefit-of-the-bargain damages estimate, but also his underlying data. Dr. Martin explains that TSC's

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[40] In actuality, Smitty's 303 THF and Smitty's Ag Fluid had different specifications, most notably in that 303 THF had a minimum zinc requirement double that of Ag Fluid. **Ex. 132**, DEFMDL0001084; Ex. 23.

and Orscheln's inability to reliably limit their sales data to reflect only Smitty's/CAM2 303 THF purchases undercuts the reliability of Babcock's estimate. *Id.* ¶ 89. *See also* Ex. 125 ("the sales information likely contains sales of 303 [THF] not manufactured or distributed by Smitty's Supply, Inc."); Ex. 126 (noting that while sales numbers reflected TSC's best efforts, it "erred on the side of inclusion, versus exclusion of questionable, anomaly and/or disparate data," and thus its reported sales "are likely higher than actual sales" of Smitty's 303 THF).[41]

With respect to Babcock's flush damages measure, it fares no better. To begin with, Dr. Martin takes issue with the biased samples Babcock used to generate his data for estimating class size, on which his flush estimate closely depends – a fact which "[h]e acknowledged at this deposition and offered no way to correct." Ex. 131, Martin Rpt. ¶¶ 7, 103. She also opines that Babcock's estimate is unreliable because he does not account for class members who may have already had a flush performed independent of their use of Smitty's/CAM2 303 THF, require a flush for a different reason, or no longer even own the equipment to be flushed. *See id.* § VI.

For these reasons, any estimate of flush damages is inherently unreliable. But there are also additional reasons that Dr. Martin concludes the estimates, which must correspond to Plaintiffs' ***single-state classes***, cannot come close to accurately estimating the number for each state. For one thing, Dr. Martin notes Babcock's estimate did nothing to account for equipment being in one state when a consumer purchased in a different state – of which there are numerous examples just among Plaintiffs. *See id.* ¶ 81. For another, she opines that Babcock's "use of national statistics biases his state-specific estimates" and leave them "understated in some states

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[41] As explained in Defendants' motion to exclude the opinions of Dr. Babcock, since Babcock's deposition, Plaintiffs have served new evidence confirming the inaccuracy of the TSC data on which Babcock relied. *See* ECF #973 at 4 n.2. Namely, they provided a declaration signed by a TSC employee reflecting data that reduced TSC's purported sales volumes from those relied on by Babcock in every state, including by almost $1 million in Kentucky and over $1.5 million in New York. *See* ECF #973-12. Incidentally, the declaration directly contradicts significant portions of earlier sworn testimony of TSC employees in many respects. However, as Plaintiffs did not rely on it in their class certification motion, Defendants leave that for another day.

and overstated in others." *Id.* ¶¶ 7, 91.

G. Plaintiffs' Remaining Causes of Action

At the hearing on Defendants' motion to dismiss Plaintiffs' Fourth Amended Consolidated Complaint, the Court expressed concerns about the number of claims Plaintiffs were pursuing. *See* ECF #465 at 65 ("Because no doubt you've got what I perceive as too darn many claims trying to move ahead in an MDL fashion … ."); *id.* at 76 ("My question is more like why do we need five product liability counts for the same state? … We don't need five counts."). Plaintiffs' counsel advised that they agreed with the Court and would limit the number of claims after the selection of eight states for initial class certification briefing. *See id.* at 76 ("And I agree with you, and eventually it will get there."); *id.* at 85-86 ("We want to narrow down the claims once we pick our states, see what the plaintiffs are."). These assurances notwithstanding, Plaintiffs have not winnowed down their causes of action.[42]

Respecting the eight states, the causes of action on which Plaintiffs seek certification are:

(1) negligence under the laws of all eight states (but for Kansas not as to property damages);

(2) breach of express warranty under the laws of five states – Arkansas, California, Kansas (but not as to property damages), Minnesota, and Missouri (but ***not*** Kentucky, New York, or Wisconsin)[43];

(3) breach of the implied warranty of merchantability under the laws of four states – Arkansas, Kansas (but not as to property damages), Minnesota, and Missouri (but ***not*** California, Kentucky, New York, or Wisconsin);

(4) breach of the implied warranty of fitness for a particular purpose under the laws of four

[42] Plaintiffs have, however, drastically altered their theory of liability on these counts. What began as essentially a labeling case (*i.e.*, "303" was misleading) has morphed into what it is, at bottom, a product defect case. Although Plaintiffs still maintain, at least nominally, that the labels were fraudulent, their primary claim is that the labels were fraudulent ***because the product was defective*** (*i.e.*, caused damage in every tractor, and was thus valueless and not actually THF). This shift was presumably to account for the fact that Plaintiff after Plaintiff testified that many of the alleged misrepresentations were not material to them – or not even on the labels they purchased or otherwise not read by them. Despite this shift in theory, Plaintiffs have steadfastly refused to jettison their non-defect related fraud claims (*e.g.*, "303"), which – for reasons discussed *infra* – dooms certification on any claim sounding in fraud.

[43] Plaintiffs (at 46) profess to move for certification on their New York express warranty claim. However, the Court dismissed that claim for failure to allege privity. *See* ECF #451 at 25-26.

states – Arkansas, Kansas (but not as to property damages), Minnesota, and Missouri (but ***not*** California, Kentucky, New York, or Wisconsin);

(5) unjust enrichment under the laws of seven states – Arkansas, California, Kansas, Kentucky, Minnesota, Missouri, and New York (but ***not*** Wisconsin);

(6) common-law fraud under the laws of all eight states (but for Kansas not as to property damages);

(7) negligent misrepresentation under the laws of six states – California, Kansas (but not as to property damage), Kentucky, Minnesota, Missouri, and Wisconsin (but ***not*** Arkansas and New York);

(8) breach of the Arkansas Deceptive Trade Practices Act ("**ADTPA**");

(9) breach of the California Unfair Competition Law ("**UCL**");

(10) breach of the California False Advertising Law ("**FAL**");

(11) breach of the California Consumer Legal Remedies Act ("**CLRA**");

(12) breach of the Kansas Consumer Protection Act ("**KCPA**") (but not as to property damages);

(13) breach of the Kansas Products Liability Act ("**KPLA**") for design defect;

(14) breach of the Kansas Products Liability Act ("**KPLA**") for failure to warn;

(15) breach of the Missouri Merchandising Practices Act ("**MMPA**");

(16) breach of the New York General Business Laws ("**NYGBL**"); and

(17) breach of the Wisconsin Deceptive Trade Practices Act ("**WDTPA**").

The claims of Kimmich, STG, Bollin, Sevy, Zornes, Tim Sullivan, Creger, Dean, Miller, and Wachholder are against Smitty's Supply, Inc. only. ECF #985. The claims of the remaining Plaintiffs are against both Smitty's Supply, Inc, and CAM2 International, LLC.

By refusing to focus their claims, Plaintiffs have thrown everything against the wall hoping something sticks. This inaction seeks to shift an excessive burden onto the Court to wade through this morass in applying Rule 23 to the extensive record across 50+ claims. Fortunately, because no class can be certified for numerous reasons applicable to ***all*** claims, the Court can

avoid the brunt of this burden. Nonetheless, Defendants explain in the predominance section (§ IV.D.) how the varying individual elements of these claims further preclude certification.

III. STANDARD

Plaintiffs' anodyne recitation of class certification standards overlooks two critical points: (1) Plaintiffs bear the burden of proof on certification; and (2) the Court must conduct a "rigorous analysis" to ensure that they have met that burden.

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). To invoke this exception, Plaintiffs must ***prove*** the requisites for certification – numerosity, commonality, typicality, and adequacy under Fed. R. Civ. P. 23(a), and predominance and superiority under Fed. R. Civ. P. 23(b)(3). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Blades v. Monsanto*, 400 F.3d 562, 569 (8th Cir. 2005). The failure to prove even one precludes class certification. *Hale v. Emerson Elec. Co.*, 942 F.3d 401, 403 (8th Cir. 2019).

Pleadings are not proof. The Supreme Court has dispelled the notion that a plaintiff can simply rely on his complaint to declare that the requisites are met. *Dukes*, 564 U.S. at 349-50. Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove" that Rule 23's requirement are met "*in fact*." *Id.* at 350 (emphasis in original). *See also id.* at 353, 359 (plaintiff must offer "significant" and "convincing" evidence to satisfy Rule 23); *accord Perras v. H&R Block*, 789 F.3d 914, 916 (8th Cir. 2015).

The court must take a "close look" at the evidence the plaintiff presents and engage in a "rigorous analysis" to verify that all prerequisites have been satisfied. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Further, although not a "free-ranging merits inquir[y]," *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*,

568 U.S. 455, 466 (2013), courts can – and must – address substantive legal issues at the class certification stage to the extent needed to address these prerequisites. *Blades*, 400 F.3d at 567. Thus, a "rigorous analysis" may "entail some overlap with the merits," and the court may have to "resolve disputes going to the factual setting of the case." *Dukes*, 564 U.S. at 351.

IV. ARGUMENT

A. *Dollar General* Weighs Heavily Against Certification.

Plaintiffs oft invoke *In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Pracs. Litig.*, 2019 WL 1418292 (W.D. Mo. 2019). They argue that *Dollar General*, which granted certification on some counts but denied certification on others, is both similar (and thus supports certification here), yet also distinguishable (and thus an even broader class is proper here). That court denied a nationwide class and single-state breach of warranty classes, but certified single-state unjust enrichment and consumer protection act claims with no claims for property damages.[44]

In fact, *Dollar General* weighs heavily against certification of any class. For starters, Plaintiffs here seek to certify breach of warranty claims and claims for property damage, both of which were rejected in *Dollar General.* And, the *Dollar General* plaintiffs did not even seek to certify a class for common-law fraud, as such cases are notoriously unsuited for certification. *See* §§ IV.D.1.b.i. & c.vi. *infra.*

Even as to the unjust enrichment and consumer protection act claims that the *Dollar General* court certified, this Court has already recognized that unjust enrichment and consumer protection claims cannot proceed where a plaintiff reads a label that includes "language directing consumers to purchase a different product for" their application. ECF #1006 at 5 (granting

[44] The Eighth Circuit granted permission for an interlocutory appeal of the certification decision in *Dollar General. See Oren v. Dollar Gen. Corp.*, No. 19-8008 (8th Cir. 2019), EID 4801885 (June 26, 2019). The case was settled while the appeal was pending, and thus the Eighth Circuit issued no opinion.

summary judgment on unjust enrichment and MMPA claims because a plaintiff who "knew about" the allegedly misleading practice "was not injured by the practice" and cannot "establish that [the defendant's] retention of the purported benefit was unjust") (quoting *Bratton v. Hershey Co.*, 2018 WL 934899, *3 (W.D. Mo. 2018)). *See also* ECF #998 (granting partial summary judgment on WDTPA claim). No similar issue arose in *Dollar General* because no language on the motor oil labels there warned against equipment harm or directed use of another product. Instead, those labels were limited to statements that the product was "not suitable" for certain applications and "may not provide adequate protection." *Dollar Gen.*, No. 4:16-cv-02709, Doc. 44 ¶ 66. Whether a Plaintiff or class member read the warning on a Smitty's/CAM2 303 THF label, and thus had the requisite knowledge, is necessarily an individualized inquiry. *See* §§ IV.D.1.a. & b. *infra*. Indeed, the Western District of Missouri has denied unjust enrichment and MMPA classes on these precise grounds. *See White v. Just Born*, 2018 WL 3748405, *4-5 (W.D. 2018) ("The unjust enrichment claims thus turn on each individual class member's knowledge at the time of purchase. Inquiries into each class member's knowledge would dominate litigation over the unjust enrichment claim just as they would the MMPA claim. The Unjust Enrichment Classes therefore cannot be certified.").[45]

But even if the Court had not already made these rulings with respect to the disclaimer, the single-state unjust enrichment claims in *Dollar General* differed markedly from those here because the defendant was the ***retailer***, not the manufacturer. This distinction is critical for two reasons. ***First,*** the measure of damages for unjust enrichment is the defendant's "net profit attributable to the underlying wrong." Rest. (Third) of Restitution & Unjust Enrichment § 51

[45] There are many reasons why an unjust enrichment class is improper here in addition to those discussed in this Section. *See* § IV.D.1.c.viii. *infra*. "[C]ommon questions will rarely, if ever, predominate an unjust enrichment claim … ." *Vega v. T. Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009).

(2011). Neither of the supposed classwide damages models Plaintiffs offer, *i.e.*, a full refund or flush costs, match this measure. *See Comcast*, 569 U.S. at 35 (predominance requirement includes a burden on plaintiff to establish that "damages are susceptible of measurement across the entire class" by a model that is "consistent with its liability case"). While a full refund may "fit" an unjust enrichment claim against a retailer, it cannot "fit" against a manufacturer.[46] ***Second*****,** because the defendant in *Dollar General* was a retailer, the plaintiffs' claims – that in-store practices and product placement were part of the allegedly deceptive scheme – made the class cohesive because of a uniform buying experience. 2019 WL 1418292, at *3 (describing claim as "but for the Defendants' deceptive labeling ***and product placement practices***, consumers would not have knowingly purchased obsolete motor oil") (emphasis added); *accord id.* at *12, 18, 20. *See also id.* at *26 (describing evidence that product placement was "substantially similar" and supported "near uniformity"). Here, by contrast, the displays varied, with some stores displaying the product in end caps, others not displaying in the end caps, and others with featured spiral displays. *See, e.g.*, Ex. 46 at 253-54 (Egner); Ex. 48 at 70-71 (Hargraves). And Plaintiffs do not claim uniform placement next to, *e.g.*, J20C.[47]

Plaintiffs' claims under state consumer protection laws likewise lack the sort of common evidence that the court found warranted certification in *Dollar General*, particularly consumer survey evidence. In *Dollar General*, plaintiffs' expert "conducted a consumer survey to determine if reasonable customers would be misled by the labeling and display of the at-issue motor oils." *Id.* at *2. Not only did Alter fail to conduct a consumer survey, but he did not even

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[46] Neither of Plaintiffs' damages models measure "the value of the benefit ***conferred upon the defendant***," which is "[t]he proper measure of damages for unjust enrichment." *Rezac Livestock Comm'n Co. v. Pinnacle Bank*, 2020 WL 109648, *6 (D. Kan. 2020) (emphasis added). *See also* ECF #906 (ordering briefing on this point) (citing *Rezac*).

[47] The sole unjust enrichment case Plaintiffs cite that certified an unjust enrichment class against a manufacturer defendant is *Allegra v. Luxottica Retail N. Am.*, 341 F.R.D. 373 (2002). However, in *Allegra* the manufacturer, LensCrafters, was also the retailer, meaning that these distinctions were not at issue.

conduct a meaningful analysis of Plaintiffs' own testimony on this subject (which, as analyzed in detail by Dr. Lester, shows vast heterogeneity). *See* SOF §§ II.E.3. & F.3. *See also Haskell v. Time, Inc.*, 965 F. Supp. 1398, 1407-08 (E.D. Cal. 1997) (distinguishing between cases with consumer survey evidence and those without; granting summary judgment based on lack of survey evidence despite plaintiff's expert opinion on misleading nature of representations); *Rahman v. Mott's LLP*, 2014 WL 5282106, *10 (N.D. Cal. 2014) ("Apart from plaintiff's own testimony, the only evidence advanced by plaintiff tending to show that a reasonable consumer would be deceived is an assertion by Prof. Belch, unsupported by any independent facts or data."); *Hughes v. Ester C Co.*, 330 F. Supp. 3d 862, 872 (E.D.N.Y. 2018) (granting summary judgment to defendants on MMPA and CLRA claims alleging that statements on vitamin supplements were false and misleading because "[t]o satisfy the reasonable consumer standard, a plaintiff must adduce extrinsic evidence—ordinarily in the form of a survey—to show how reasonable consumers interpret the challenged claims").[48]

Further, in *Dollar General* there was no record to suggest that some class members were "never exposed to the alleged misrepresentations." 2019 WL 1418292, at *26. Here, by contrast, there are consumers who bought the product simply because the bucket was yellow and thus looked like what they typically bought. *See, e.g.*, Ex. 34 at 180-84 (Ti. Sullivan). *See also* ECF ##998, 1004 (granting summary judgment in part as to claims of Tim Sullivan and Jackson because they did not read the class period labels). This question is especially murky as to the many challenged back-label representations, with numerous Plaintiffs testifying that they never read the back label. Thus, unlike *Dollar General*, this case falls squarely within the four corners of the Eighth Circuit's decision in *Hudock v. LG Elecs. U.S.A., Inc.*, 12 F.4th 773, 777 (8th Cir.

[48] Many courts find surveys on a fraud claim essential. *E.g.*, *Grp. Health Plan, Inc. v. Philip Morris, Inc.*, 188 F. Supp. 2d 1122, 1129-30 (D. Minn. 2002), *aff'd in part & remanded on other grounds*, 344 F.3d 753 (8th Cir. 2003).

2021), which reversed certification as to unjust enrichment and consumer protection act claims – the very claims certified in *Dollar General* – because the defendants "presented evidence that some consumers did not see, or did not rely on, the allegedly false representations."[49]

Another fundamental distinction between *Dollar General* and this case is the proposed class definitions. The *Dollar General* class was limited to those who purchased "for use" in cars for which the specification was indisputably obsolete. The jury did not have to decide issues of suitability for differently-situated purchasers. Here, on the other hand, Plaintiffs seek a class of ***all*** purchasers of Smitty's/CAM2 303 THF, regardless of the application for which they used it. Plaintiffs (at 1) attempt to distinguish *Dollar General* in this regard, claiming that the JD-303 specification is unknowable and Smitty's/CAM2 303 THF was not verified to meet any known OEM specification. That is true. But it is irrelevant to Smitty's and CAM2's suitability defenses. *See* § IV.C.2.b. *infra* (discussing suitability defenses). *See also* SOF §§ II.A.4-7., II.F.1-2.

Given that Plaintiffs' contention is uncontested, the focus at trial would instead be whether the THF was suitable for Plaintiffs' myriad applications. How the jury answers that question would impact Plaintiffs' property damage and label claims alike. This factual issue, however, is highly individualized. *See* § IV.C.2.b. i*nfra* (detailing the individual facts that impact suitability of THF in a particular application). For example:

- A jury could decide that the label (1) was ***not misleading as to post-1974 equipment*** because the label expressly disclaimed that as a proper use (*see* ECF ##998, 1006), but (2) ***was misleading as to pre-1974 equipment*** because the use of "303" misled consumers into thinking it was tested to meet JD-303, which is the specification for pre-1974 John Deere equipment (despite many consumers not understanding "303" this way), when it was not in fact suitable for those purposes.

- Or a jury could find the opposite, namely that the label (1) ***was misleading as to post-1974 equipment*** because the disclaimer was inadequate (despite some Plaintiffs reading it and understanding it, *e.g.*, Wendt, Hazeltine), but (2) was ***not misleading as to pre-***

[49] *Hudock* post-dates *Dollar General* in any case and controls.

1974 ***equipment*** because it was generally suitable for those applications.

- Or a jury could find based on the testimony of Drs. Lillo and Swanger that Smitty's/CAM2 303 THF's internal specifications made the fluid suitable for a Swisher splitter manufactured decades ago but not a new Case IH tractor.

But a class action gives a jury no mechanism to reach these results. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) ("The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.").

Dollar General forecloses certification for other reasons as well. The court there denied certification of any class without an underlying case that could be remanded to a district court in that state. 2019 WL 1418292, at *3 n.5 ("Because there is no member case that can be remanded to Texas, no statewide class can be certified for that state … ."). Here, that defeats certification for New York and Wisconsin, where there is no transferor court to which to remand a certified class action. *See Lexecon Inc. v. Millberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32-33 (1998) (holding that each non-terminated transferred action shall be remanded to the transferor district for trial). Additionally, the *Dollar General* court noted that the defendants could identify only "a few examples of potential individual defenses." 2019 WL 1418292, at *14. But here there is abundant evidence of contributory negligence, spoliation, and other individual defenses against large numbers of class members. *See* § IV.C.2.c. *infra*. The notion that individualized defenses could overwhelm the litigation are not merely theoretical, but virtually certain.

Nothing about *Dollar General* requires certification here. To the contrary, the distinctions between this case and *Dollar General* compel denial of certification.

B. Class Definitional Problems Preclude Certification.

A proper class definition is a threshold issue and requires that the class be "ascertainable" and "readily identifiable." *Dumas v. Albers Med. Inc.*, 2005 WL 2172030, *5 (W.D. Mo.

2005).[50] Additionally, a class cannot encompass uninjured class members. *Mayo v. USB Real Est. Secs., Inc.*, 2012 WL 4361571, *4-5 (W.D. Mo. 2012). The Eighth Circuit has declared that this requirement is jurisdictional. *Johannessohn v. Polaris Indus.*, 9 F.4th 981, 987 (8th Cir. 2021). Thus, "[a]lthough federal courts do not require that each member of a class submit evidence of personal standing, a class cannot be certified if it contains members who lack standing." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (internal citation omitted). *Accord Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013). Plaintiffs' motion stumbles out of the gate because their proposed class definitions impermissibly include a significant number of uninjured class members and render it impossible to identify members without relying on individualized, unreliable methods.

1. *<u>The Classes are Overbroad Because They Contain Uninjured Class Members.</u>*

It is "foundational" and "jurisdictional" that "under the case-or-controversy requirement, a 'class must be defined in such a way that anyone within it would have standing.'" *Johannessohn v. Polaris Indus.*, 450 F. Supp. 3d 931, 980 (D. Minn. 2020), *aff'd*, 9 F.4th 981 (8th Cir. 2021) (quoting *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 377 (8th Cir. 2018)). Plaintiffs' proposed classes fail this test.

***First*,** Plaintiffs' proposed classes necessarily include those who were aware of and/or "did not care" about the alleged misrepresentations and defects. *See George v. Omega Flex, Inc.*, 2020 WL 4718386, *8 (W.D. Mo. 2020) ("Plaintiffs who did not care about an allegedly misleading marketing practice, or who knew about an alleged practice and purchased the products anyway, are not injured by the practice."); *White*, 2018 WL 3748405, at *1, 4 (denying

[50] In the Eighth Circuit, class definitional issues are sometimes alternatively viewed through the lens of typicality, commonality, or predominance. *See, e.g.*, *McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017). Regardless the lens, certification requires that a class "must be adequately defined and clearly ascertainable." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (quotations omitted).

certification based on proposed class definition; "if an individual knew how much slack-fill was in a candy box before he purchased it, he suffered no injury"); ECF #1006 (granting summary judgment on Hazeltine's unjust enrichment and MMPA claims on this basis). This is not abstract. For one thing, many of the labels included a disclaimer that conferred this knowledge on anyone who read it. *See Bratton*, 2018 WL 934899, at *3 (if the plaintiff has requisite knowledge, he was "not injured" by an allegedly deceptive practice). The length of the class period compounds this problem because it extends after stop sale orders in three states, the first of which was in 2017, and after ten lawsuits alleging Defendants' products caused injury. The stop sales and the lawsuits received publicity; indeed, Plaintiffs' expert promoted them on PQIA's website and trumpeted them in emails to THF end users. Ex. 114. *See also* Ex. 8, Glenn Dep. 75-77. Under these circumstances, a class spanning years after these events, and the very public coverage of them, is way too broad in scope. In fact, the labeling on many (but not all) of the labels changed after the Missouri stop sale, with a revised warning making even more consumers aware that the product "was not suitable" for use in post-1974 equipment. And consumers who were familiar with the stop sale still purchased. *See, e.g.*, **Ex. 133**, bobistheoilguy.com (Jake Wells posting in response to news of the stop sale: "I'm glad it is still being sold in Kentucky") (Apr. 1, 2018).

Second, Plaintiffs' proposed classes include many people who not only used the THF, but who also ***sold the equipment in which they used it, all <u>without incident</u>***. Ex. 39 at 79 (Anderson); Ex. 48 at 25, 28, 31 (Hargraves). *See also In re BPA Polycarb. Plastic Prods. Liab. Litig. ("BPA")*, 2011 WL 6740338, *2-4 (W.D. Mo. 2011) (buyers who did not know of health risks suffered no injury if they "fully used Defendants' baby bottles and other products without physical harm before learning about BPA"). Dahm's opinions do not alter this analysis. He claims immediate and certain "damage" (*e.g.*, scoring or pitting). But if Plaintiffs or class

members never experienced an operational impact, and have since sold or scrapped the equipment for reasons unrelated to the THF, then the class is overbroad—even the flush remedy Dahm claims is inapplicable to them. *See* § IV.D.2.b. *infra*. *See also* ECF #996 at 10, n.5 (granting summary judgment on Tim Sullivan's flush damage claims).[51] In any case, another of Plaintiffs' experts testified to independent causes of the sort of damage Dahm theorizes. Ex. 128, Hamilton Dep. 100-01, 105. Thus, large numbers of class members had pre-existing injury that precludes a finding of injury in fact from use of a Smitty's/CAM2 THF.[52]

***Third*,** for the fraud, consumer protection act, and warranty claims, the proposed classes include many individuals who would have never been exposed to the allegedly misleading materials at issue and thus could not have suffered an injury from them. *See In re St. Jude Med*., 522 F.3d 836, 838-40 (8th Cir. 2008); *Faltermeier v. FCA US LLC*, 899 F.3d 617, 622 (8th Cir. 2018) ("some factual connection between the [alleged] misrepresentation and the purchase is required" for MMPA claim); *In re Hardieplank Fiber Cement Siding Litig.*, 2018 WL 262826, *15 (D. Minn. 2018) ("In order for a marketing or advertising representation to be part of the basis of the bargain for every relevant state's breach of warranty law, the putative class member must have at least been exposed to the representation."). For example, WLC first bought Orscheln, a non-Defendant product. While Watermann read that brand's label, he did not read the label for subsequent purchases, including when he first bought a Smitty's/CAM2 303 THF product. Instead, he looked for a yellow bucket and a "303" designation. Ex. 54 at Dep. 213; Ex. 78 at 72-73. Tim Sullivan bought a pre-class period label and then never read the at-issue labels

[51] Plaintiffs in their summary judgment briefing object that "'damages' is vague, ambiguous, and undefined." ECF #929 at 4, ¶ 9. Defendants agree that Dahm's use of "damages" to mean something other than its ordinary understanding, and something he has not even observed, is confounding.

[52] Plaintiffs (at 87) argue that were the Court to find there are uninjured class members in the face of Dahm's theory, that would be akin to "mak[ing] a summary determination between a battle of experts." But there can be no battle of experts about what constitutes Article III injury nor what meets the statutory definition of damages to assert a claim.

during the class period. *See* ECF #996 (granting partial summary judgment on this basis). Other class members may have paid for the THF but never saw the label because they often sent others to purchase the THF for them. *See, e.g.*, Ex. 57 at Dep. 46-47, 80-81 (Peck).

Fourth, a class definition is overbroad where the plaintiff seeks to represent a class based on products he did not purchase. *Drew v. Lance Camper Mfg. Corp.*, 2021 WL 5441512, *7 (W.D. Mo. 2021) (citing *Smith v. Atkins Nutritionals, Inc.*, 2018 WL 9868591, *7 (W.D. Mo. 2018)). Here, Kimmich, STG, Bollin, Sevy, Creger, Tim Sullivan, Dean, Miller, and others did not purchase any products under any CAM2 labels. *See generally* SOF § II.C. Similarly, Boone, Gisi, and Wendt only purchased Smitty's/CAM2 303 THF after "WARNING" and "not suitable" were added to the disclaimer language. **Ex. 134**, Pltf-CR 6147; **Ex. 135**, Pltf-CR 4115, Ex. 42 at Pltf-CR 1991-93.[53] *See also* ECF #996 at 8 (disallowing fraud claims to proceed on basis that Tim Sullivan read similar, but different label).

Fifth and finally, in cases alleging defect, "a plaintiff must establish that the product 'exhibited the alleged defect' – that is, that the defect is not latent but has manifested itself in the product." *Johannessohn*, 450 F. Supp. 3d at 980 (quoting *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009)). *Accord Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999). This "no-injury" rule applies regardless of whether the cause of action seeks property damage or overpayment. *See O'Neil*, 574 F.3d at 503-04; *Johannessohn*, 450 F. Supp. 3d at 983.

Plaintiffs seek to avoid this fatal flaw by trying to shoehorn their case into *Zurn Pex*, where a manifested defect in brass fittings (stress corrosion cracking) that did not immediately cause external damage to homes was found to fall outside the Eighth Circuit's bar on no-injury class actions for unmanifested defects. *See In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d

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[53] Label differences are discussed § IV.C.2.a. *infra* as part of the typicality discussion and § IV.D.1.a. *infra* as part of the predominance discussion. *See also* SOF § II.B.

604, 616 (8th Cir. 2011). But it does not fit for two reasons.[54]

- ***First***, although Dahm parrots the *Zurn Pex* expert by describing "damage" as "immediate" and "inevitable," a crucial distinction remains. The expert there ***tested*** the product and ***observed*** manifestation. *Id.* at 609 (describing physical examination, "a battery of tests," and a scientific "experiment" followed by more tests; addressing opinion of immediate manifestation based on "numerous tests"). Courts applying *Zurn Pex* have made clear that testing is key to establishing injury. *See Thunander v. Uponor, Inc.*, 887 F. Supp. 2d 850, 862, 865 (D. Minn. 2012) (ruling that no standing exists where no injury has manifested unless the plaintiff alleges "testing" that "revealed the defect," and distinguishing *Zurn Pex* defect claim as "supported by expert testing"); *George v. Uponor Corp.*, 988 F. Supp. 2d 1056, 1068 (D. Minn. 2013) (same). Without testing, manifestation occurs only at the time of what Dahm terms "operational impact," which he admits does not occur with every purchaser. *See also, e.g.*, Ex. 52 ¶¶ 14-15 (Hawkins attesting that the fluid "performed as I expected" and that he has "not observed and am not aware of any increased or excessive wear and tear or damage to" equipment).[55]

- ***Second,*** the Eighth Circuit itself has made clear that *Zurn Pex* depended entirely on a statute "creat[ing] an injury in fact for all class members despite the lack of damages," namely Minnesota warranty statute. *Halvorson*, 718 F.3d at 779. *See also Zurn Pex*, 644 F.3d at 617 ("the district court did not err in concluding that the claims of the dry plaintiffs are ***cognizable under Minnesota warranty law*** …"). Here, for the reasons discussed throughout and in particular in §§ IV.D.1.c.ii-v. *infra*, and confirmed by *Dollar General*'s denial of a warranty class, Plaintiffs' warranty claims are not amenable to class treatment. Absent these claims, "the lack of damages" of numerous class members defeats certification.

2. *<u>Lack of Ascertainability Precludes Certification of the Proposed Classes.</u>*

Plaintiffs are incorrect that defining a class using objective criteria is, in and of itself, sufficient to establish the legal sufficiency of a class definition. *See, e.g.*, *Dumas*, 2005 WL 2172030, at *5 ("the requirement that there be an identifiable class demands more than just an objective definition"). Rather, the class must be defined so that "it is administratively feasible for the court to determine whether a particular individual is a member." *Id.* In other words, the court must "be able to determine class membership ***without having to answer numerous fact-intensive inquiries***." *Id.* (emphasis added). Plaintiffs' class definition does not come close to

[54] Plaintiffs' *Zurn Pex* analogy is irrelevant to the four other enumerated reasons that the class is overbroad.

[55] These deficiencies are further set forth in ECF #972 (moving to exclude Dahm's opinions). *See also Hardieplank*, 2018 WL 262826, at *17 (denying certification; expert's "common injury" opinion wasn't "shown to be an injury").

meeting this standard. For the majority of class members, the only way to reliably determine membership (not to mention the amount of their purchases) will be to conduct mini-trials. *See Secreti v. PTS of Am., LLC*, 2015 WL 3505146, *3 (M.D. Tenn. 2015) (need to conduct "mini-trials" just to determine who is in the class precludes certification). Discovery bears this out.

Ascertaining the party who actually purchased any particular bucket of Smitty's/CAM2 303 THF requires a particularized investigation due to the frequency with which purchasers were actually business entities. Consider that just weeks before moving to certify, Plaintiffs added 23 new parties because depositions had revealed that many of the individual Plaintiffs were not the ones to have purchased THF and/or did not own the at-issue equipment. This came to light well after these Plaintiffs submitted sworn discovery answers claiming they had purchased the THF and notwithstanding their recovery in settlements pursuant to sworn claim forms.[56] Even then they did not add all implicated entities. *See* ECF #1014 (ruling that Hargraves is not real party in interest and allowing him to proceed only because all members of partnership ratified suit). And additional Court-ordered discovery did not always resolve the uncertainty regarding the proper party. *See* ECF #1013 (addressing lack of evidence whether Harrison purchased THF).

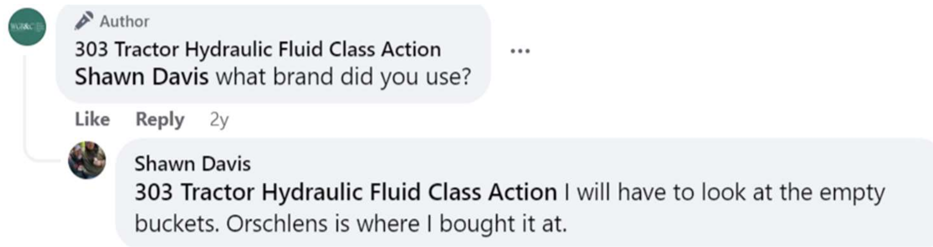
Nor can putative class members reliably self-identify that they purchased Smitty's/CAM2 303 THF as opposed to 303 THF made by the numerous other manufacturers that competed in the marketplace. Putative class members do not have objective evidence of all their 303 THF purchases and many did not differentiate among 303 THF products in the marketplace. Consider former Plaintiffs Dave Seigel, Robert Baldwin, and Craig Millam. They did a lot more than submit an affidavit; they retained counsel and filed suit alleging that they had purchased

[56] The new pleading also means that a number of Plaintiffs are themselves inadequate and their claims not typical, as in those cases ***either*** the individual ***or*** the entity can be the property party – but not both. For some, both are inadequate representatives because both are subject to a no-evidence summary judgment motion. *See* ECF #1013.

Smitty's/CAM2 303 THF during the class period. ECF #94. Only after Defendants sought their depositions did Plaintiffs' counsel advise that these Plaintiffs had not in fact purchased the at-issue products. *See* **Ex. 136**, Mar. 24, 2022 Email. *See also, e.g.*, **Ex. 137** at Millam Decl. ¶¶ 3-4 ("I initially thought that I had purchased Super S Supertrac 303 [THF] at some point in the 2014-2019 time period from Hardware Hanks," but "[u]pon further reflection, I determined that I could not be sure if any of the [THF] purchases I had made from Hardware Hanks were the Super S Supertrac 303 [THF]"; silent as to how he could determine what brand he in fact purchased); **Ex. 138**, Seigel Decl. ¶¶ 4-5 (attesting that he purchased a "Supertrac" product from Orscheln in 2018-2019, and only realized that it was a J20A product, not 303 after Defendants served discovery requesting bucket photos). Still others cannot remember what state they purchased in. Plaintiffs Wells and Stembridge alleged in multiple amended complaints that they purchased in Kansas and Kentucky during the class period, respectively, but later claimed that was incorrect. **Ex. 139**, Wells Dep. 32-34; **Ex. 140**, Stembridge Dep. 5-6.

Other class members likewise have struggled recalling details (*e.g.*, brands or dates) of 303 THF purchases, and Dr. Lester explains the scientific reasons why. Ex. 33, Lester Rpt. at 47-50.[57] Most were yellow and said "303." Ex. 3 at 324-25. *See also* **Ex. 141**, McGrath Dep. 141 ("They'll come into the store and say, 'Give me the yellow bucket.'"); **Ex. 142**, Alter Dep. Ex. 18 (sample of other 303 THF labels). Indeed, when Plaintiffs' counsel was soliciting clients online for the various lawsuit(s) (*e.g.*, Citgo 303 THF, Warren 303 THF), individuals were frequently unable to distinguish brands from memory:

[57] If the version of Defendants' label matters (and they do, *see* ECF #996), potential class members would have to remember even more. This would prove impossible for the average purchaser. Recalling whether they purchased for use in pre- or post-1974 equipment (*see* ECF #998) would prove equally impossible.



Ex. 143 at 7, Facebook - 303 THF Class Action. *See also id.* at A. Lollar, T. Gann, G. Erickson, R. Parrott (when asked what brand they bought, only able to give bucket color or store). Instead, they required physical evidence to recall the brand used. *Id.* The Court has weighed in on the difficulties of wading through this morass, finding "fact issues" based on "conflicting evidence," *e.g.*, claim forms and deposition testimony (both sworn). *See, e.g.*, ECF #1010 at 8.

This record forecloses self-identification. It is "especially troublesome" to use affidavits of putative class members to determine class membership. *St. Louis Heart Ctr., Inc. v. Vein Ctrs. for Excellence, Inc.*, 2017 WL 2861878, *4 (E.D. Mo. 2017) (inquiry would require mini-trials as to the validity of each affidavit); *Stewart v. Beam Global Spirits & Wine, Inc.*, 2014 WL 2920806, *3 (D.N.J. 2014) (use of affidavits "would amount to no more than ascertaining by potential class members' say so"); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012) (forcing defendants to "accept as true absent persons' declarations that they are members of the class, without further indicia of reliability" implicates due process). But in a case like this, where "individuals will have difficulty recalling their purchases," it is not just "troublesome" but wholly improper to ascertain the class based on self-identification. *Carrera v. Bayer Corp.*, 727 F.3d 300, 309 (3d Cir. 2013) ("a defendant must be able to challenge class membership"). *See also Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 685-86 (S.D. Fla. 2014) (denying class for lack of ascertainability, focusing on consumers' "difficulty recalling the number of times and the different variations" of product purchased with any "reasonable specificity" or if they purchased within or outside the class period, and noting corresponding due process concerns); *BPA*, 2011

WL 67340338, at *8 ("Defendants would be entitled to cross-examine each and every alleged class member regarding his or her memory."); *Jones v. ConAgra Foods*, 2014 WL 2702726, *10 (N.D. Cal. 2014) (noting "subjective memory problem" in denying certification).

Although *Dollar General* did allow affidavits to prove fact of purchase, Defendants respectfully submit that was wrongly decided. Even if this Court disagreed, however, *Dollar General* still cannot support ascertainability here for two reasons. ***First*,** the voluminous record here proves putative class members are incapable of reliably self-declaring membership – a record absent in *Dollar General*. ***Second***, the *Dollar General* court relied heavily on the involvement of "low-cost products" and the lack of property damage claims so that "financial incentives to falsify are low." 2019 WL 1418292, at *16. Here, Plaintiffs seek property damages in the forms of flushing costs and repair costs. Plaintiffs' classes include those who claim to have purchased $20,000 worth of Defendants' 303 THF (Ex. 102 at A. Shaw Supp. iRog. Answer 3), plus those who claim to have suffered property damage of well over $100,000 (Ex. 66 at Pltf-CR 7116, 7144 (Creger); **Ex. 144**, Pltf-CR 5772, 5779 (James); **Ex. 145**, Pltf-CR 5603, 5614 (Guthmiller), Ex. 45 at Pltf-CR 5120, 5135 (Ruhl)). *See also* **Ex. 157** at RG2 1759-60 (Quiroga) (claiming $88,000 in property damage from use of THF as lithium grease on well, not in hydraulic system or transmission system (in addition to $100,000+ in other damages)).[58]

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[58] The ascertainability problems increase by leaps and bounds for the subclasses. Plaintiffs must show how the element of personal use could be established by common proof. Untested affidavits will not suffice. *See BPA*, 2011 WL 6740338, at *8 ("A plaintiff in a typical case is not allowed to establish an element of a defendant's liability merely by completing an affidavit swearing the element is satisfied."); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018) ("The fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure [or] the Seventh Amendment"). For this reason, *McAllister v. St. Louis Rams, LLC*, 2018 WL 1299553 (E.D. Mo. 2018), relied on by Plaintiffs, was wrongly decided. In any case, it is distinguishable. As Plaintiffs admit, whether a consumer purchased for personal, family or household use is a ***question of fact for the jury*.** ECF #465 at 63 (THE COURT: But isn't the real question whether they used it for personal use? MS. CAMPBELL: And that's a fact question for the jury, Your Honor.). The court in *McAllister* was at least in some position to assume that purchases were for personal use since the product was, by definition, a personal one, *i.e.*, "*Personal* Seat Licenses." Here, unlike in *McAllister*, the answer to that question may not be easily assumed because this product was expressly labeled for use in "construction, agricultural, and logging" equipment. It is thus certain that many sales were for professional use. *See Johannessohn*, 450 F. Supp. 3d at 961 (characterizing use of product

Furthermore, Plaintiffs' contention (at 94) that class members can be identified by retailer purchase data is wrong. Take, for instance, Kimmich and STG. The retailer records identify ***Kimmich*** as having purchased Smitty's 303 THF. Ex. 55 at Pltf-CR 2042. In fact, discovery uncovered that he did not purchase Smitty's 303 THF at all, but that instead ***STG*** did; Kimmich simply used his own name on the customer loyalty account. *Id.* at Pltf-CR 13444-46; *id.* at Dep. 154; Ex. 75 at 10-11. Further, because TSC sold Smitty's 303 THF and other 303 THF under the same SKU during the class period, that data does not distinguish sales, and therefore purchasers from this period are not necessarily class members. Ex. 126. *See also* SOF § II.F.4.[59] Even if they were, Babcock claims that nationwide (aggregating as if there were 50 single-state classes), there are approximately 729,000 class members. **Ex. 146**, Babcock Rpt. Errata. Yet, only approximately 16% of these are identified in retailer records. *See* Ex. 64.

Because neither retailer records nor self-identifying affidavits can establish class membership, proof of purchase (*e.g.*, receipts, credit card statements, or empty buckets) would be necessary. *See* Ex. 137 at Millam Dep. 30-31, 48-49 (testifying he "initially thought" he had purchased Smitty's/CAM2 303 THF, then "looked for evidence of me buying any," but did not find any such evidence and that he would have had an empty bucket if he had ever actually purchased Smitty's/CAM2 303 THF). But this type of proof is a hallmark of "mini-trials." When asked in discovery for receipts of his purchase of Smitty's/CAM2 303 THF, Plaintiff Carusillo submitted receipts identifying his purchase of Smitty's J20A, ***not*** 303. **Ex. 147**, Pltf-CR 4243-44. Others have admitted that their receipts do not distinguish between 303 THF manufactured by

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for "farming" as "business purposes"). *See also Saey v. CompUSA, Inc.*, 174 F.R.D. 448, 451-52 (E.D. Mo. 1997) (denying certification of MMPA claim where there was no "method to track each individual computer sold" to determine whether it was purchased for primarily business or personal reasons without resort to mini-trials).

[59] *See also White*, 2018 WL 3748305, at *3 (class was not administratively feasible where "class members will have purchased … from a third-party retailer" and there was no "common proof for each class member's purchase").

Defendants or others. *See, e.g.*, Ex. 60 at 127 (Zornes). And some claim to have purchased Smitty's 303 THF product from certain stores before it was sold there or after it was no longer sold there. *See* SOF § II.C. *See also* ECF #1004 (granting partial summary judgment on this basis as to Jackson).

C. Plaintiffs Have Failed to Prove the Rule 23(a) Requisites.

Plaintiffs must "prove": "numerosity"; "commonality"; "typicality"; and "adequacy." Fed. R. Civ. P. 23(a); *Dukes*, 564 U.S. at 350. "[A]ctual, not presumed, conformance with Rule 23(a) [is] indispensable." *Falcon*, 457 U.S. at 160. Yet, Plaintiffs simply throw out purported "facts" on merits issues as if they have already been proven, state the basic law on each class requisite, and baldly declare they have met each one.

This fails their burden. Their arguments and assumptions do not come close to passing the "rigorous analysis" that this Court must employ in deciding whether Rule 23(a) is satisfied.

1. *Plaintiffs Have Not Met Their Burden to Establish Numerosity.*

To satisfy numerosity, Plaintiffs must present evidence that both accurately identifies the approximate size of the class and establishes the impracticability of joinder. Fed. R. Civ. P. 23(a)(1). Plaintiffs have not met their burden to "accurately identify" an approximate class size for their classes, *Belles v. Schweiker*, 720 F.2d 509, 515 (8th Cir. 1983), for the reasons explained in Defendants' motion to exclude the opinions of Dr. Babcock, ECF #973. They certainly have not done so as to their proposed MMPA subclass. *See Duchard v. Midland Nat'l Life Ins. Co.*, 265 F.R.D. 436, 443 (S.D. Iowa 2009) (subclass must meet all the same requirements as the class). The Missouri class includes only CAM2 303 THF products, not Smitty's, and only for a limited period because the MDA stopped sales in October 2017. Babcock estimates the ***entire*** Missouri class to include approximately 2,600 members. Ex. 146, Babcock Rpt. Errata. But he does not – nor could he – estimate the size of the subclass who used

for personal use, which may be only a tiny fraction of that. This precludes certification, particularly where this product was marketed primarily for commercial, not household, use.

2. *Plaintiffs Have Not Met Their Burden to Establish Typicality.*

Neither can Plaintiffs satisfy typicality. Rule 23(a)(3) requires that the "claims or defenses of the representative parties" be "typical of the claims or defenses of the class." "The presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry." *Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006). The "typicality requirement concerns the fairness of allowing an entire class's claim to rise or fall with the fate of the named representative's claims; thus, that representative's claims must be typical of the class so as to prevent a false prophet from bearing the standard for an entire class of claims." *Rapczinsky v. Skinnygirl Cocktails, LLC*, 2013 WL 93636, *5 (S.D.N.Y. 2013).

Plaintiffs' claims are not typical because they vary too greatly from the claims of class members to share the same "essential characteristics." *Campbell v. Purdue Pharma, LP*, 2004 WL 5840206, *8 (E.D. Mo. 2004). As one reason, many Plaintiffs do not have the same claims against the same defendants as the class they seek to represent. For instance, WLC has no KCPA claim because he is not a "consumer" under the statute; Creger does not have claims against CAM2 because he did not buy any CAM2 product; and no California Plaintiff has any claims against CAM2 or under the CLRA because the only purchaser representative, STG, did not buy any CAM2 products and is not a "consumer." Indeed, Tim Sullivan's fraud and negligent misrepresentation claims, Wendt's misrepresentation and consumer protection act claims as to post-1974 equipment, Hazeltine's unjust enrichment, express warranty, and consumer protection action claims, and one of Zornes' implied warranty claims have been dismissed, leaving them with different claims than the classes they seek to represent. *See* ECF ##996, 998, 1006, 1011. Beyond their failure of basic identity between the class representatives' claims and the claims of

the putative class, the variations in labels and applications make it impossible for any Plaintiff to assert claims that can fairly be said to be "typical" of the entire class. Plaintiffs' claims are also atypical because they are subject to unique defenses that are central to this lawsuit.

a. *Plaintiffs' claims are not typical because they seek to represent class members who purchased under different labels.*

Plaintiffs argue that labels matters. Defendants agree. But Plaintiffs cannot have it both ways: arguing that labels matter, while pretending label differences do not. Equally relevant is how consumers understood those differing labels, or even whether they read relevant portions at all. The label variations here are fatal to typicality.

Plaintiffs foresaw this result. Plaintiffs previously urged the Court to apply the "substantial similarity test" as "the most appropriate one at the motion-to-dismiss stage." ECF #465 at 77. The Court agreed and deferred the more exacting analysis for another day. *See id.* at 78 ("rather than a standing issue, distinction between product types may create an issue for typicality"; "any difference in the product labels are better determined at a later stage").

That day is here. And the Court's typicality inquiry is informed not only by the label differences, but now by Plaintiffs' own testimony about the materiality of those differences. For instance, Tracy Sullivan testified that that the "multi-functional" language, which is only on some labels, was material. Ex. 41 at 40, 42. Kimmich testified that the inclusion of OEM Allison, which was not on all labels, was material. Ex. 55 at Dep. 304-05. It is logically inconsistent that Plaintiffs could bring class claims alleging that certain label language, like "multi-functional," is materially misleading and caused damage where some of the class members purchased labels without that language (*e.g.*, CAM2 5-gallon purchasers). That alone defeats certification.[60] *See,*

[60] Plaintiffs' "substantial similarity" argument is particularly absurd given that, under their lax view of that standard, virtually ***all*** 303 labels are "substantially similar." Put another way, Plaintiffs' argued-for standard would allow

e.g., *Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217, 220, 226-27 (N.D. Cal. 2015) (addressing typicality misrepresentation-by-misrepresentation for "natural source," "no artificial flavors," and "fresh" claims because typicality hinged on which labels class representatives purchased under).[61] Indeed, the Court's summary judgment ruling on Tim Sullivan underscores this point. *See* ECF #996 at 8 (noting Plaintiffs presented no authority that a "claim may go forward based on a different label where the two product labels are substantially similar").

b. *Plaintiffs' claims are atypical because they seek to represent class members as to whom a different suitability analysis applies.*

As seen above, the label differences doom Plaintiffs' label claims. But their defect claims, which hinge on suitability of use, are just as flawed. Class members here used Smitty's/CAM2 303 THF in an enormous variety of equipment, for a multitude of applications. The class, therefore, is full of distinctions. To name just a few, some distinctions are based on:

- ❖ whether the equipment was a tractor (*e.g.*, Hamm's IH 4786 tractor) or a non-tractor (*e.g.*, Sevy's Ford L8000 Dump Truck);
- ❖ whether the equipment was 1974 model year or earlier (*e.g.*, Whitehead's 1968-1973 Allis Chalmers 170 tractor) or post-1974 (*e.g.*, Stembridge's 1995 Ford 1320 tractor);
- ❖ whether the fluid was used in a common sump (*e.g.*, Sevy), only a hydraulic sump but not in the separate transmission sump (*e.g.*, Peck), or not used in any sump (*e.g.*, Jenkins);
- ❖ whether the OEM specification called for a 20-weight fluid (*e.g.*, Jackson's Case backhoe) or a 20-weight was unsuitable (*e.g.*, Boone's 1998 John Deere 655B);
- ❖ whether the OEM specification specifically called for JD-303 (*e.g.*, Feldkamp), J20C, which was specifically disclaimed (*e.g.*, Blakeney), or neither (*e.g.*, Carusillo); and
- ❖ the unique properties of the batch purchased and used in terms of viscosity and zinc, which varied widely, and how it compared to the OEM recommended fluid.[62]

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those who purchased 5-gallon MileMaster 303 buckets to be typical of purchasers of 5-gallon SuperTrac buckets, as those labels are far more similar than the SuperTrac label is to a 5-gallon CAM2 label (much less a 55-gallon label).

[61] The *Kosta* court ultimately denied certification for the lack of commonality these variations created.

[62] Dahm and Glenn agree Smitty's/CAM2 303 THF was not a uniform product over time. *See* SOF § II.A.7. *See also, e.g.*, Ex. 17 ¶¶ 122, 129; Ex. 122 ¶¶ 3.27, 4.2. This makes certification additionally improper because the defect is more akin to a manufacturing defect, inherently unsuitable to certification. *See Gonzalez v. Corning*, 317

See generally SOF § II.C. Each of these may be outcome determinative. *See* § IV.A. *supra.*

Plaintiffs' claims, centered around their own applications, cannot be typical of all these divergent claims. Indeed, their experts implicitly concede as much. *See* Ex. 121, Dahm Dep. 131 ("I'm talking about [THFs] in the sense that applies to ***tractors*** that have a ***single reservoir*** …"; some opinions are "meant … to refer to … post-mid 70s era") (emphasis added); *id.* at 279-80 ("And so the demands that were placed on the hydraulic fluid, the [THF] was different. They were single purpose fluids. When we switch to the single reservoir in the ***post-mid-70s*** now we require multi-functional fluids.") (emphasis added). Not only does different equipment call for different THF specifications, but some do not call not for OEM THF at all but instead for automatic transmission fluid, engine oil, or straight mineral oil. *See* **Exs. 148 & 149**, Dahm Dep. Exs. 7 & 8. *See also* Ex. 8 at 97-98. And, as to viscosity, which Plaintiffs (at 20) admit is "is the most important aspect of hydraulic fluid," the requirement varies by equipment. *See* Ex. 121 at 184 (Dahm agreeing that "each tractor is going to have its own acceptable viscosity range," which he testified was determined by "the OEM specification for that piece of equipment").

Plaintiffs cannot credibly dismiss these differences because they concede distinctions between older and modern tractors (and because many pieces of equipment were not tractors at all). According to Plaintiffs (at 4), around 1974 tractors "were undergoing modernization, moving to hydraulically driven transmissions, use of power take-off (PTO), wet brakes, and single fluid reservoirs." *See also* Ex. 121, Dahm Dep. 117 ("I'm not exactly sure when the transition goes from the type of tractor architectures and the corresponding fluids that were used in those tractors … I believe that was centered more or less around the 1973, '74 period.").

Nor is it any answer to say a jury will not have to struggle with suitability as between

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F.R.D. 443, 513-14 (W.D. Pa. 2016). These admissions, moreover, establish that the "value" of the product depended on batch, defeating Plaintiffs' full refund damages model. *See* § IV.D.2.a. *infra*.

different model year equipment because there are so few older pieces of equipment out there. According to Plaintiffs (at 5), Lubrizol estimated that as of 2018 less than 2% of tractors still in operation were built between 1960 and 1974 (a point which, again, ignores that class members routinely used the product in non-tractors). Whatever the percentage, huge numbers of Plaintiffs and class members used Smitty's/CAM2 303 THF in pre-1974 equipment. *See, e.g.*, Ex. 62 at Plft-CR 7300; **Ex. 150**, Bartus iRog. Answer 6; **Ex. 151**, Burgdorf iRog. Answer 6; **Ex. 152** at Feldkamp iRog. Answer 6; **Ex. 153**, Grissom iRog. Answer 6. *See also* Lillo Rpt. ¶¶ 271-72 (noting that equipment in which *Hornbeck* claimants alleged use of Smitty's 303 THF ranged from 1943-2019 and that approximately 25% reported using it in tractors manufactured before 1974). This is not limited to a handful of class members. Between 18% and 24% of equipment reported by Plaintiffs and dismissed Plaintiffs to have used the fluid was from model year 1974 or earlier.[63] Indeed, some report ***only*** using Smitty's/CAM2 303 THF in older equipment. *See, e.g.*, Ex. 51 ¶ 13 ("I never used 303 hydraulic fluid in later model equipment … .") (Stone).

c. *Plaintiffs' claims are not typical due to individualized defenses.*

Typicality requires an assessment not only of the claims at issue, but also the unique and varying defenses to be asserted against Plaintiffs and class members. *See Hardieplank*, 2018 WL 262826, at *13 (denying certification of class of property owners with the same brand siding because representatives were subject to unique defenses). "A proposed class representative is not adequate or typical if it is subject to a unique defense that threatens to play a major role in the litigation." *In re Milk Prod. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999). *See also Dukes*,

[63] More precision is impossible because some Plaintiffs reported a model year as "1970s" or "1965-1975." Exs. 145 (Guthmiller) & **154**, Plft-CR 5649 (Nelms). There is no way to know if this 18-25% is representative of the class. If it is – and if Lubrizol's estimate is correct – it suggests that owners of older equipment were ***overrepresented*** in buying Smitty's/CAM2 303 THF and perhaps understood it was intended for older equipment. Further, because older tractors may be more likely to require topping off, the percentage of Smitty's/CAM2 303 THF sold that went into older equipment may be much higher.

564 U.S. at 367 ("[A] class cannot be certified on the premise that [Defendant] will not be entitled to litigate its statutory defenses to individual claims."). Individualized defenses threaten all class members, since "as goes the claim of the named plaintiff, so go the claims of the class." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) (describing this as "[t]he essence of the typicality requirement" (internal quotations omitted)).[64]

Plaintiffs argue (at 96) that defenses "must be subjected to the same rigorous inquiry as plaintiffs' claims" (quoting *Zurn Pex*, 644 F.3d at 610). "This entails both questions of proof and viability." *Id.* On this, Defendants agree – and welcome the Court applying scrutiny to both potential defenses and the prima facie elements of Plaintiffs' claims. The agreement ends there, however, as Plaintiffs' efforts to discount the viability of these defenses are meritless.

First, Plaintiffs (at 98, 104, 109) claim that some defenses do not apply to intentional torts, and that comparative fault, contributory negligence, and misuse defenses do not apply to all claims in all states. But this admits that the defenses apply to negligence and negligent misrepresentation, and apply in many states.[65] They must be considered as to claims and states where they do apply.[66] And, as to those claims, they defeat certification. *See, e.g.*, *Marshall v. Hyundai Motor Am.*, 334 F.R.D. 36, 56 (S.D.N.Y. 2019). As the Court has already indicated, application of these defenses involve individualized fact issues for the jury's determination. *See* ECF #1004 at 7 n.3 (individual question whether Jackson's mitigation efforts were reasonable).

[64] Plaintiffs (at 67) curiously cite *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171 (8th Cir. 1995), in support of typicality. *DeBoer* does not help them. The court there denied objectors' claims challenging a classwide settlement, finding that typicality was satisfied "given the nature of the injunctive relief sought." *Id.* at 1174. Plaintiffs' claims for injunctive relief have been dismissed. *See* ECF #451 at 16.

[65] Even as to other claims, Plaintiffs misstate the law. For example, they suggest (at 104 n.83-84) that there is no duty to mitigate in Wisconsin as to intentional torts unless the plaintiff had "knowledge of the wrong." In fact, Wisconsin does not require knowledge of a ***wrong***, but simply knowledge of a ***harm***. *See S.C. Johnson & Son, Inc. v. Morris*, 779 N.W.2d 19, 29 (Wis. 2009).

[66] Comparative fault, for example, is a defense to warranty actions for property damage. *See Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 53 (Minn. 1982) (citing Minn. Stat. § 336.2-715(2)(b) (1980)).

Second, the applicability of these defenses is not "a fight for another day" that can be deferred until the damages stage, as Plaintiffs claim (at 99). Plaintiffs are correct that the applicability of these defenses reduces damages. But in assuming that they do so only individually, and not classwide, Plaintiffs misconstrue the order of operations. A jury would have to: *first*, decide which class members the defenses apply to; *second*, determine the associated damages for those individuals; and, *third**, and only then,* determine aggregate classwide damages so as to exclude these amounts. For instance, anyone (like Wendt or Hazeltine) who read the disclaimer, but then used the THF in post-1974 equipment anyway, is subject to a defense as to those property damage claims. *See* ECF ##998, 1006. Yet their claims are part of the ***aggregate*** classwide damages that Plaintiffs propose. A new ***aggregate*** number cannot be calculated without first determining who this defense applies to and their associated damages.

Third**,** Plaintiffs' argument (at n.77 & 109) that fault or misuse must be causal is equally self-defeating. The question of whether an individual Plaintiff's or class member's own fault or misuse is causal is individualized – a fact supported even by Plaintiffs' own cases. *See, e.g.*, *Martin v. Stone*, 312 N.Y.S.2d 97, 98 (App. Div. 1970) (examining individualized evidence in record to determine if it established plaintiff's contributory negligence).

Fourth**,** even a brief overview of individualized defenses applicable to the claims of each purported class representative highlights the lack of typicality. As to those against whom Defendants have sought (and in some cases obtained) summary judgment, the applicability of these defenses can be found in the summary judgment briefing, and is incorporated herein. *See* ECF ##804-05, 812-13 & 1012 (real party in interest), 806-07 (release of claims), 840-41 (failure to mitigate), 851-52 (statute of limitations); ECF ##991, 1008. *See also* ECF #1004 (ruling spoliation as defense may allow adverse inference instruction). But individual defenses also exist

as to those against whom Defendants have not moved for summary judgment. For instance, Asfeld is subject to large offsets for amounts he has collected in settlement.

Finally, although Defendants (with one exception) address their defenses as part of the typicality inquiry, as courts normally do, Plaintiffs address them with respect to predominance – and are correct that the implications for the predominance inquiry are significant.[67] Even where such-and-such Plaintiff is not subject to such-and-such defense, sorting that out for all Plaintiffs and class members will devolve into mini-trials. For instance, a Wisconsin plaintiff cannot recover ***at all*** if his negligence is greater than Defendants' and cannot recover in full if he was contributorily negligent in any degree. *See* Wis. Stat. § 895.045(a). *See also Swanson v. Gerald O. Gatzke, DDS, Inc.*, 930 N.W.2d 279, n.1 (Wis. App. 2019). Thus, mini-trials would be needed to assess which class members were contributorily negligent, to apportion fault, and to determine if the defense bars recovery or merely diminishes damages (and by how much).

Plaintiffs may not shrug off these issues by suggesting (at 106) that these defenses only apply to a handful of class members. The ample record demonstrates that, at a minimum, there are genuine issues of material fact for a jury to decide. Consider that Plaintiffs' own experts agree a consumer could be at fault for contamination. *See, e.g.*, Ex. 128, Hamilton Dep. 89 ("Look at … what the manufacturer says. Okay? And use this – if this is the fluid you're supposed to use, then use that fluid."); Ex. 8 at 265 (Glenn testifying that consumers should "look at your owner's manual" to determine suitable THF); Ex. 128 at 83-86, 106 (Hamilton discussing the importance of preventative maintenance and observing that, if maintained

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[67] The one exception is statute of limitations. Although various Plaintiffs are subject to a statute of limitations defense based on individualized inquiries and thus are atypical, this defense requires a highly individualized inquiry ***for all class members*** based on Plaintiffs having raised the discovery rule and equitable tolling, *see* ECF #929 at 91, 98, and this Court having identified individualized issues that apply to this inquiry. *See, e.g.*, ECF #991 at 16 (application of statute of limitations for Arkansas depends on whether plaintiff "specifically knew" the cause of his injuries). This defense alone precludes certification. *See* § IV.D.1.d. *infra.*

improperly, "you're going to get water in it. You're going to get – if you have debris, dirt in it – which will contaminate the system and cause problems.").[68] The manuals themselves vary, as do Plaintiffs' and class members' maintenance practices. *See* Ex. 77, Lillo Rpt. ¶ 223. For instance, manuals reveal that Plaintiffs had equipment calling for J20C, which Defendants' THF did not claim to be suitable for – indeed, as to which it expressly warned against use. *See* SOF § II.C.10.

3. ***Plaintiffs Have Not Met Their Burden to Establish Adequacy.***

Rule 23(a)(4) requires a finding that the named plaintiffs "will fairly and adequately protect the interests of the class." To adequately represent a class, the class representative must have the same interests and injuries as the rest of the class. *Roby v. St. Louis Sw. Ry. Co.*, 775 F.2d 959, 961 (8th Cir. 1985). He must also be sufficiently interested in the case outcome to ensure vigorous advocacy on behalf of the unnamed members. *Rattray v. Woodbury Cty., Ia.*, 614 F.3d 831, 836 (8th Cir. 2010).

a. *All Plaintiffs are inadequate representatives for a variety of reasons.*

Despite the fact that the adequacy requirement involves due process, *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985), Plaintiffs (at 68) summarily dismiss it in a one-page pronouncement as satisfied. But there is no proof demonstrating that Plaintiffs understand the case, the claims, their duties, or where their allegiances must lie. In any case, while it is not Defendants' duty to prove that adequacy is lacking, an abundance of evidence shows that it is. All Plaintiffs are inadequate representatives for at least three reasons.

First, Plaintiffs' dereliction of duty in providing accurate discovery responses has been rampant. Numerous Plaintiffs confirmed they verified inaccurate interrogatory answers and

[68] *See also* Ex. 128 at 135-36 (opining that consumer should not buy non-recommended fluid even if it is cheaper); *id.* at 23-24, 84, 86 (testifying operators should always follow the manual); *id.* at 113 (improper capping can cause contamination); *id.* at 145 (use of non-recommended economy filter could allow in contaminants).

declared false information under penalty of perjury in documents submitted for settlements.[69] *See Rapczinsky*, 2013 WL 93636, at *6 n.3 ("An inquiry into Rapczynski's exposure to the product and his veracity – given the apparent inconsistencies between his deposition and affidavit – 'threaten[s] to become the focus of the litigation' in the sense that Defendants would seek to highlight these discrepancies and causation issues … .").

Second, the adequacy requirement is not satisfied where there are "conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. The record is replete with examples where Plaintiffs sold the equipment on which they are now claiming flush costs to second (or third, or fourth) owners. If the second owner is not a class member, then it is simply a case where no class member may claim those flush costs (and thus Plaintiffs cannot reliably estimate classwide damages, *see* § IV.D.2.b. *infra*). But, if the subsequent owner is a class member – and given how Plaintiffs describe Defendants' market share, it is virtually certain that some are – there is an obvious conflict between Plaintiffs and these class members regarding who is entitled to flush costs. A similar conflict applies to class members from whom they purchased used equipment.[70]

Third, and critically, Plaintiffs' failure to pursue the class members' claims for

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[69] *See, e.g.*, Ex. 44 at 187-88 (Wurth, admitting initial interrogatory answers were "false"); Ex. 55 at Dep. 162, 208-09 (Kimmich, same); Ex. 41 at 71, 138-39 (Tr. Sullivan, admitting to wrong information in interrogatory answers); Ex. 40 at 133-34, 140, 220, 222 (Wachholder, same); Ex. 46 at 14-15, 18-23, 152-53 (Egner, admitting to false interrogatory answers and to false information on settlement forms); Ex. 60 at 222-23, 231 (Zornes, same); Ex. 84 at 80-81, 146, 196-97, 249, 251 (Miller, same); Ex. 53 at 91-92, 187-88 (Nash, same); Ex. 56 at 198, 269-70 (Bollin, admitting to wrong information on settlement forms); Ex. 66 at Dep. 222-24 (Creger, same); Ex. 82 at 152 (Graves, same). Others verified in discovery answers that they purchased THF or owned equipment, but later at depositions it was revealed those answers were wrong—it was actually distinct corporate entities that had purchased the product and/or owned the equipment. *See, e.g.*, ECF #813.

[70] If Plaintiffs could seek other property damages and consequential damages (despite, as noted below, engaging in claim-splitting on these categories), the conflict escalates. A Plaintiff may seek diminution in value and an absent class member repair costs on the same equipment. Engdahl, for instance, purchased a Terex 840 from auction for $35,000. He sold it for $16,000 and claims that he could have sold the Terex for more than $35,000 but for his use of Defendant's products. He seeks $19,000 in diminution damages. **Ex. 155**, Pltf-CR 4064-87 at 76. He may have sold to a class member, however, who claims the needed repairs that diminished the value of the Terex 840. Both may not recover, as that is duplicative, and thus an inevitable conflict exists as to which (if either) may recover.

consequential damages and repair costs makes them inadequate representatives and prejudices class members.[71] Plaintiffs themselves (at 19 & 40 n.25) cite many examples of consequential damages, such as more frequent maintenance, downtime, and potential loss of warranty. In their claim forms and depositions, they reported even more. *See, e.g.*, Ex. 45 at Ruhl iRog. Answer 7 (claiming he could have sold equipment for $25,000-30,0000, but instead received $5,000 for parts); **Ex. 156**, Pltf-CR 4444 (claiming sentimental value) (Ortner).[72] But Plaintiffs are not pursuing these claimed damages on behalf of the class. Instead, they forgo seeking consequential or repair damages classwide in favor of supposedly common purchase price and flush costs in their ongoing charade to transform a product-liability action into a labeling claim. Not only does this guise fail, but it creates significant claim-splitting problems, as it would forever bar class members from recovering these categories of damages. *See Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 476 (8th Cir. 2016) (recognizing "potential issues of res judicata and claim-splitting" in a class action).[73] Indeed, Plaintiffs' asserted classwide damages figures even ***forego supposedly necessary flush costs for potentially tens of thousands of class members*** because those figures only include flush costs for tractors – and not, for instance, combines. Ex. 120 at 140-41. Class members who used Smitty's/CAM2 303 THF in combines, like Greg Vanderee, would never be

[71] *See* Ex. 120, Babcock Dep. 39-40 (Q. And so your damages model would not compensate for or provide a mechanism for compensation to individuals who were claiming damage to their equipment, is that right? A. That's correct. Q. So if your damage model was adopted by the Court and used to – for the trial of this case, that would be the extent of damage that class members would be able to recover, would be the flushing cost damage and the benefit of the bargain damage? A. Yes.). In the Retailer Settlement, class members sought over $20 million in non-flush cost damages. Although Plaintiffs nominally seek to pursue repair claims individually, separate and apart from the class action vehicle, their attempt fails. *See* § IV.E. *infra.*

[72] *See also* Pl. Mem. at 90 n.63, n. 64, 91 (stating that all states allow "incidental and consequential damages" on warranty claims, noting the availability of "special damages" and/or "consequential damages" on some fraud and negligent misrepresentation claims, and stating that negligence claims "include[] incidental and consequential damages"). *See also id*. (asserting allowance of diminution damage in appropriate cases).

[73] Claim-splitting implicates claim preclusion. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). *See also Doe Run Res. Corp. v. St. Paul Fire & Marine Ins. Co.*, 48 F.4th 574, 579 (8th Cir. 2022) (explaining that when an issue of fact or law is actually litigated and an essential determination to a final judgment, "the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim").

able to recover these costs. *See* Ex. 97 at Vanderee iRog. Answer 6. And absent class members who maintain Defendants' 303 THF caused equipment damage that led to lost profits and other consequential damages could forfeit their opportunity to seek hundreds of thousands of dollars.

This failure to safeguard the interests of absent class members renders Plaintiffs inadequate representatives. *See In re BPA Prods. Liab. Litig.*, 276 F.R.D. 336, 347 (W.D. Mo. 2011) ("absent some explanation for Plaintiffs' decision to eschew these claims ... the Court cannot conclude these representatives can adequately represent the class").[74] While a single litigant may forego his own right to pursue relief, he cannot do so on behalf of absent class members, who will be bound by the class action and thus precluded from seeking that relief in the future. *See Henke v. Arco Midcon, LLC*, 2014 WL 982777, *11 (E.D. Mo. 2014). This is why claim-splitting "destroy[s] adequacy of representation"; it "creates a significant conflict of interest" between the representative and the class by having "imposed upon the entire proposed class [the plaintiff's] decision to give up" a category of claims. *Id. See also Thornburg v. Ford Motor Co.*, 2022 WL 4348475, *7 (W.D. Mo. 2022) (denying certification where "some plaintiffs may have personal injury claims" and "Plaintiff's failure to assert personal injury claims would result in a waiver by all class members of their right to bring personal injury claims"); *Krueger v. Wyeth, Inc.*, 2008 WL 481956, *2-4 (S.D. Cal. 2008) ("claim splitting constitutes a compelling reason to deny class certification"); *Cochran v. Oxy Vinyls*, 2008 WL 4146383, *10 (W.D. Ky. 2008) (Plaintiffs' failure to pursue personal injury claims "would bar absent class members from later asserting such claims, calling into question the ability of the proposed representatives to adequately protect the interests of absent class members."); *In re*

[74] *See also In re Teflon Prod. Liab. Litig.*, 254 F.R.D. 354, 366 (S.D. Iowa 2008) (claim-splitting "prevents the representative plaintiffs from adequately representing the full interests of absent class members"); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 550-51 (D. Minn. 1999) (same).

MTBE Prods. Liab. Litig., 209 F.R.D. 323, 340 (S.D.N.Y. 2002) (same). This inadequacy should come as no surprise to Plaintiffs; despite their failure to seek full recovery, they have previously acknowledged their duty as class representatives to do so. ECF #465 at 76 ("But we are obligated to on behalf of the class seek full recovery that's available in those states for those claims.").

b. *Some Plaintiffs are additionally inadequate for independent reasons.*

While the above deficiencies apply to all Plaintiffs, a number of Plaintiffs are also inadequate for additional reasons. These include:

- Anderson, Nash, and Hargraves committed spoliation. Ex. 39 at 79-81; Ex. 53 at 192; ECF ##810-11, 1003. *See Falcon v. Philips Elec. N. Am. Corp.*, 304 Fed. App'x 896, 897 (2d Cir. 2008) (adequacy lacking on this basis). This opens them up to an adverse inference instruction, detrimental to all class members. *See also* ECF #1004.[75]

- Anderson, Kimmich, and Watermann are not proper parties. *See* ECF ##805, 813, 1012 (incorporated by reference); *Gevedon v. Purdue Pharma*, 212 F.R.D. 333, 336-37 (E.D. Ky. 2002) (certification improper where plaintiffs do not show class membership).

- STG, as a corporate entity, is not a member of the CLRA subclass, Cal. Civ. Code. § 1761(d), and has a track record of inadequacy as it "[d]id nothing to stay apprised" of a previous lawsuit in which it sought to represent a class. Ex. 55 at Dep. 44-46.

- Tim Sullivan has never read the complaint, was urged to sue by his father-in-law – an attorney at one of putative class counsel's law firms who "lied [] all the time" – and confesses that if he is representing Kentucky purchasers, "they'll all screwed." Ex. 34 at 47-49, 58, 138. He agrees that to adequately represent the class he should know what and when he purchased, but he's only "guessing." *Id.* at 138-39. He also has already had summary judgment granted against him on his fraud claims. ECF #996.

- Watermann over-recovered in the Retailer Settlement, thereby diluting the common fund for the very same class members he seeks to represent in this lawsuit. *See* SOF § II.C.3.c. Also, neither Watermann nor WLC are members of the KCPA subclass. *See* ECF #1012.

- All of Graves' purchases were for business purposes, so he has no MMPA claim and cannot adequately represent an MMPA subclass. *See* SOF § II.C.6.a.

- Wendt had summary judgment granted against him on his negligent misrepresentation, fraud, and consumer protection act claims as they relate to damages on equipment built after 1974. ECF #998. Hazeltine likewise had summary judgment granted against him on his unjust enrichment, consumer protection, and express warranty claims because he read the ProMax label's disclaimer and proceeded anyway. ECF #1006.

[75] As to Jackson, this Court has ruled that "Defendants may seek an adverse inference instruction" at trial. ECF #1004 at 12. As to Hargraves, this Court has ruled that the sanction of dismissal is not warranted. ECF #1014 at 8.

4. ***Plaintiffs Have Not Met Their Burden to Prove Commonality.***

A class action may be certified only if questions of law or fact common to the class exist. Fed. R. Civ. P. 23(a). Plaintiffs' claims must depend upon a "common contention … of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one in one stroke." *Dukes*, 564 U.S. at 350. *See also Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 376 (8th Cir. 2013) (varied circumstances of class members prevented "one stroke" determination required to show commonality). Commonality is not satisfied merely by demonstrating that each plaintiff suffered the same violation of law. *Bennet v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011).

It is possible to articulate "common questions" in ***every*** case, regardless of whether that case is suitable for class certification. That does not suffice for class certification. *See Dukes*, 564 U.S. at 349-50 ("any competently crafted class complaint literally raises common questions"). If it did, every negligence case, no matter the issues, would be certified simply by asking the "common question," "was the defendant negligent"? Whether a question is "common" is defined instead by the potential answers it will generate:

> What matters to class certification is not the raising of common questions – even in droves – but, rather the capacity of a classwide proceeding to generate common ***answers*** apt to drive the resolution of the litigation.

Id. at 350 (internal citation omitted). This standard is not remotely satisfied here.[76] What is apt to drive the resolution of this litigation is the individual consumer's understanding of the product at purchase (*e.g.*, reliance, materiality, and basis of the bargain), the application for which it was used (*e.g.*, particular purpose), the suitability of the product and batch for that application (*e.g.*, defect, fact of injury), and the results of the use in that application (*e.g.*, causation).

[76] As discussed below in § IV.D.1., even if the Court nonetheless found common questions that "generate common answers apt to drive resolution of the litigation," they clearly do not predominate.

Applying *Dukes*, many of the supposedly "common questions" Plaintiffs (at 70) describe do not "generate common answers" – and certainly not ones "apt to drive the resolution of the litigation." For instance, Plaintiffs posit that "common questions" include "specifications for and standards relating to [THF]." But, what specification? The specification for Kirven's 1998 John Deere 7810 Tractor (J20C), Stembridge's 1962 David Brown 990 Tractor (20-weight), Wurth's 2012 Caterpillar 277 Skid Steer (CAT TDTO), or Asfeld's 1961 John Deere 4020 Tractor (JD-303)? Similarly, the supposedly "common question" of THF's nature does not generate common answers. The nature in whose understanding? And for what application? For Jenkins who did not even use the THF in the hydraulic system of his tree harvester? Ex. 61 at 121, 131-32. For Quiroga who used it as a grease for his irrigation well, not for a tractor and not as a hydraulic fluid? Ex. 157 at RG2 1759-60. Tracy Sullivan testified he does not necessarily believe that "tractor hydraulic fluid" even indicates a fluid is appropriate for use in a common sump, which is 180° from how Plaintiffs' own experts define it. Ex. 41 at 40. *See also* Ex. 32, Glenn Rpt. ¶ 3.3; Ex. 17, Dahm Rpt. ¶ 23. The same goes for question after question Plaintiffs pose. What ingredients were used? It depends on the batch. *See* SOF § II.A.7. Plaintiffs pretend there is only one answer to whether 303 THF "conformed to label representations," but the answer depends on, *inter alia*, which label? *See* SOF § II.B. *See also Kosta*, 308 F.R.D. at 229 (finding lack of commonality based on "variations on the labeling and packaging in the product lines").

Plaintiffs' omission claims only further defeat commonality. The uncommon questions regarding their omission case are endless and include: what did Defendants know (which changed over time with, *e.g.*, stop sales), what did class members know (*e.g.*, did they receive information from retailers or online fora, did they read the disclaimer), and why did class members purchase (*e.g.*, because of the front label, something on the back, or because it was in a

yellow bucket like a previous product they'd purchased)? In these circumstances commonality is sorely lacking. *See, e.g.*, *Oscar v. BMW of N. Am., LLC*, 2012 WL 2359964, *5 (S.D.N.Y. 2012).

The supposedly common question that Plaintiffs hang their hat on is whether Smitty's/CAM2 303 THF was unsuitable for ***any*** use, caused property damage in ***all*** equipment, and was thus totally worthless. But a jury will need to hear individualized evidence regarding suitability (*see* § IV.C.2.b. *supra*) before it can decide if it agrees with Plaintiffs' experts. *See Blades*, 400 F.3d at 566 (holding that if "the evidence … varies from member to member, then it is an individual question").[77] And in hearing that evidence, the jury may not generate a common answer. Instead, it could find that the product was defective for certain applications, but not for others. Thus, even Plaintiffs' defect question is not common. *See, e.g.*, *Grodzitsky v. Am. Honda Motor Co., Inc.*, 2014 WL 718431, *6 (C.D. Cal. 2014) (finding common questions listed by the plaintiff were dependent on a common answer to the "defect" question, and because there was no common answer to the "defect" question, the other identified questions were also not common).

To defend this case, and challenge Plaintiffs' prima facie case, Defendants have a right to introduce evidence as to each label, each claimed piece of equipment put at issue by the claims, and the suitability of the product for each such application. And Defendants intend to do just that. Regardless of a single type of product, the requirements of Rule 23 are not met where potentially outcome determinative differences remain. *See, e.g.*, *Vizcara v. Unilever U.S., Inc.*, 339 F.R.D. 530, 547-49 (N.D. Cal. 2021) (finding lack of commonality on UCL, FAL, and CLRA claims based on label misrepresentations where, despite consumer survey evidence, the

[77] Plaintiffs fare no better by seeking to characterize the omission as one about ingredients. *See Astiana v. Kashi Co.*, 291 F.R.D. 493, 508 (S.D. Cal. 2013) (noting that individual class members' interpretation of the labels "may very well accommodate the presence of the challenged ingredients"). ***First,*** Plaintiffs offer no evidence that all consumers care about the ingredients in their THF, much less understand the ingredient names if they had been disclosed. *See generally* SOF § II.C. ***Second,*** not all consumers received batches which contained line wash. *See* SOF § II.A.6.

representations were not subject to one "fixed meaning").

D. <u>Plaintiffs Have Not Proved, and Cannot Prove, the Requirements of Rule 23(b)(3).</u>

Plaintiffs seek certification under Rule 23(b)(3). They must show "through evidentiary proof" that common questions of law or fact predominate over questions affecting only individuals and that a class action is superior to other available methods for resolving the claims at issue. Fed. R. Civ. P. 23(b)(3); *Comcast*, 569 U.S. at 33. Plaintiffs fail both requirements.

1. ***<u>Plaintiffs Have Not Proven the Predominance Requisite of Rule 23(b)(3).</u>***

Plaintiffs drastically over-simplify their burden to prove predominance. The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. It is "far more demanding" than Rule 23(a)'s commonality requirement. *Id.* at 624. "In contrast to Rule 23(a)(2), the issue of predominance under Rule 23(b)(3) is qualitative rather than quantitative." *Ebert*, 823 F.3d at 478. "When deciding whether common issues predominate over individual issues under Rule 23(b)(3), the court should conduct a rigorous analysis including an examination of what the parties would be required to prove at trial." *BPA*, 2011 WL 6740338, at *5. Where (1) common answers to core questions are not possible, or (2) where there are issues requiring claimant-specific evidence (even if the answers might ultimately be the same), adjudication by representation is impractical and class certification must be denied. *Dukes*, 564 U.S. at 357-59.

A claim's elements frame the predominance inquiry. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). *See also Blades*, 400 F.3d at 566 ("If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question."). Each of the claims Plaintiffs assert requires a showing of two essential elements: causation and damages. *See* § IV.D.1.b.ii. *infra*; ECF #1006 at 5. Multiple others require reliance. *See* § IV.D.1.b.i. & n.85.

Thus, to satisfy Rule 23(b)(3), key questions relating to causation, damages and reliance must not turn on individualized facts. *See Ebert*, 823 F.3d at 480 (inquiry examines if "individual issues predominate the analysis of causation and damages"). *Accord Halvorson*, 718 F.3d at 778.

Plaintiffs ignore this standard, asserting in conclusory fashion that an array of "common questions" predominate over individual issues. But, significant individualized inquiries underlie Plaintiffs' purportedly "common questions" and these questions, therefore, are incapable of adjudication classwide. Indeed, Plaintiffs' summary judgment briefing highlights how individual questions will take center stage. They contend that the jury will have to draw "inferences," make "credibility determination[s]," and "weigh[]" evidence to decide, among other questions:

- whether Zornes' testimony that 303 THF "could have been" MileMaster 303, but he "doubt[s] it," is sufficient evidence that a purchase from Orscheln in March 2018 was of Super S where no documents reflect the brand (ECF #877 at 2);

- whether to believe Sevy's sworn discovery responses from 2019 that he did not use Smitty's/CAM2 303 THF in his dump truck; his sworn statements in 2021 that he did; or his sworn deposition testimony, which Plaintiffs contend is controverted but claim reflects Sevy's uncertainty on this point (ECF #879 at 8-9);

- whether Sevy is entitled to flush costs (1) as to equipment for which he testified that he was not seeking these costs and (2) as to other equipment on which he is seeking these costs but on which he used other brands of 303 THF, possibly first – which Plaintiffs' experts opine independently requires a flush (ECF #879 at 5).

The Court's summary judgment rulings likewise highlight individual questions, such as whether a jury will believe Kimmich's sworn testimony that he did not purchase Super S 303 or his sworn claim form that he did. *See* ECF #1010. *See also* ECF #1014 at 8-9 (finding genuine issue of material fact on role of retailer recommendation based on "conflicting deposition testimony"). For these reasons and more, individual issues predominate and class certification is improper.[78]

[78] Defendants organize this Section to address evidentiary matters and then prima facie elements – in both cases which affect multiple causes of action. Next, they address each cause of action to the extent it requires separate discussion. Finally, they address how individualized statute of limitations defenses defeat predominance.

a. *Individualized Factual Questions Preclude Predominance.*

i. Label Variations Preclude Predominance.[79]

Now is the time to heed Plaintiffs' plea that the Court decide the issue of label variations at class certification. *See* SOF § II.B. *See also* Ex. 33, Lester Rpt. at 12-28 (discussing variations). The significance of these variations will not disappear if the Court certifies a class. Even if Plaintiffs are allowed to present the varying labels to the jury as though they are one-and-the-same in Plaintiffs' prima facie case, Defendants have a due process right to defend each label separately. *See In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (holding procedure whereby class action would determine liability for almost 3,000 class members based on evidence regarding 41 violates due process). This is why courts routinely conclude that common questions can predominate only if product labels "remain constant." *Marotto v. Kellogg Co.*, 415 F. Supp. 3d 476, 481-82 (S.D.N.Y. 2019) (denying certification based on label variations where the class spanned seven years and 20 labels). *See also In re Vioxx Prod. Liab. Litig.*, 239 F.R.D. 450, 461 (E.D. La. 2006) (denying certification of class spanning five years because the "label changed several times," which "frustrate[d] a finding of predominance").

That the label variations destroy predominance is partly a problem of Plaintiffs' own making. Plaintiffs are masters of their case. Although individual issues would still predominate, they at least could have limited their case to a single label. At a minimum, they could have limited their case to an alleged misrepresentation that appears on every label. They did neither. For instance, Plaintiffs could have limited their claims to labels that do not include disclaimers. Or, they could have run with their new-found "definitional" fraud theory and ***only*** challenged the labels' "THF" designation. Instead, they continue (at 26-30) to assert a litany of alleged label

[79] The label variations are relevant to the elements of reliance, materiality, deceptiveness, and causation.

representations. *See* 5ACC ¶¶ 159-76 (alleging numerous misrepresentations); Ex. 36, Alter Rpt. ¶ 30 (opining on numerous alleged misrepresentations). *See also* Ex. 37, Alter Dep. 193 (describing "constellation of misrepresentations"); *id.* at 247 ("There's a – a litany of misrepresentations … ."); *id.* at 66 ("there are many different points or pillars of miscommunication on which the overall miscommunication and misapp – misrepresentation sit"); *id.* at 147 ("every consumer was ultimately exposed to a series of pieces of misinformation that in the gestalt, in the whole, when put together, misled them"); *id.* at 42 ("It's about the many pillars" acting "in concert"). This "constellation" varies widely from label to label rendering Plaintiffs' label claims improper for certification. *See Kosta*, 308 F.R.D. at 229-30 (finding that not even commonality was satisfied where plaintiffs challenged multiple misrepresentations, which varied among the labels).

ii. Equipment Variation Precludes Predominance.[80]

Defendants do not repeat all of the equipment variation and the role that will play at any trial. *See* SOF § II.C. *See also* Ex. 77 ¶¶ 196-210. They stress, however, that even blanket acceptance of Plaintiffs' expert opinions would not foreclose individualized evidence, which Defendants will present to challenge these opinions. A jury evaluating the record may not agree that the product was unsuitable for ***all*** applications simply because Dahm opines it is. Rather, it could reasonably determine that suitability depends on the application. *See* § IV.C.2.b. & pp. 86-87 *supra*. *See also* Ex. 77 ¶ 348. Given this realistic possibility, not only does the premise of a class action fail (as goes one, so goes all), but individualized evidence will predominate.

iii. Non-Label Communications Preclude Predominance.[81]

Where a plaintiff asserts a claim based on a product label and reliance and materiality are

[80] The equipment variations are relevant to the elements of defect, fact of injury, justifiable reliance, and causation.

[81] Non-label communications are relevant to the elements of reliance, knowledge, and causation.

elements, non-label communications frequently preclude predominance. Unlike an everyday household good like soap, THF purchasers frequently relied on what they believed to be the expertise of retailers, mechanics, or online fora in determining what to buy. *See* Ex. 128, Hamilton Dep. 161-62 (stating that websites like yesterdaystractors.com are "known in the industry that – that you would frequent and look" at to provide valuable information to equipment owners). For example, Plaintiff Ouelette's retailer specifically told him that SuperTrac 303 was compatible with his Kubota tractor model and year. **Ex. 158**, Ouelette iRog. Answer 4. A similar story holds true for Plaintiffs Still and Moreland. **Ex. 159**, Still iRog. Answer 11; **Ex. 160**, Moreland iRog. Answer 11. Feldkamp's retailer, on the other hand, posted a sign that the product was ***not*** suitable for certain equipment. Ex. 152 at Feldkamp iRog Answer 11. Hardin's retailer made a representation about the base oil ingredients. **Ex. 161**, Hardin iRog Answer 11. And, class member Lyons chose the product "in part, based upon conversations with employees at parts houses" (and, based on his own experience, has recommended the product in turn). Ex. 87 ¶¶ 15-16. Further, as Plaintiffs point out (at 8), there were consumers who inquired directly of Smitty's if the 303 THF would work in their equipment, and were told it would. *See, e.g.*, Ex. 19 at 244-46; Ex. 13 at 94-95. And the record equally contains instances where Smitty's recommended against 303 in favor of a premium product. *See, e.g.*, **Ex. 162**, Arnett Ex. 15.

Logic dictates that consumers who were specifically advised by retailers, mechanics, or others that the product would work with their particular equipment – especially where the label specifically disclaimed that usage – are differently situated than those who relied exclusively on the label. They are also differently situated than someone who was told the fluid would not work in their equipment model and year, but purchased it anyway because they simply wanted the fluid to perform a flush. *See, e.g.*, **Ex. 163**, yesterdaystractors.com ("Since the machine was new

to me, leaking and possibly in need of a flush and maybe repairs I filled it with the 303.") (Oct. 30, 2017); Ex. 91, Hearth.com at FTG-05 ("I use the 303 when I need a cheap hydraulic oil to flush through a hydraulic system or get rid of water-contaminated oil.") (Feb. 8, 2014).

There are other varied non-label communications that a jury must consider as well. Notwithstanding Plaintiffs' bold claim (at 78) that "[t]his case does not depend on oral statements, websites, brochures and the like," Defendants' website included statements that differed from the labels (or at least some of the labels). For instance, it included materials that described the product as "highly refined base oils." **Ex. 164**, Schenk Ex. 133.[82] The claims of consumers who relied on this representation are markedly different from the claims of those who allege only an omission as to product ingredients. And there are consumers who knew that 303 THF included line wash. *See* Ex. 8 at 78-79, 83 (Glenn testifying regarding wide circulation of his articles, which discussed the use of line wash, to end-users). *See also* **Exs. 165 & 166**, Glenn Dep. Exs. 5, 6; Ex. 91 (posting Smitty's used line wash in 303 THF); **Ex. 167**, newagtalk.com (posting PQIA article); **Ex. 168**, yesterdaystractors.com (posting PQIA article). While Plaintiffs pretend that anyone who learned this information could not possibly be a class member – *i.e.*, could not have purchased with this knowledge – that is demonstrably false. *See* Ex. 91.

iv. The Label Disclaimers Preclude Predominance (Even Aside From the Variation Between Versions).[83]

Plaintiffs offer the truism (at 86) that for everyone who bought Smitty's/CAM2 303 THF, the disclaimer did not prevent their purchase. But this does not mean, as Plaintiffs erroneously claim (*id.*), that "on [a] common basis, that language was ineffective." Indeed, the Court has

[82] There is evidence in the record that consumers visited Smitty's website for information about 303 THF. *See* Ex. 131, Martin Rpt. ¶ 39 (citing 2013 *TractorbyNet* forum thread). Defendants generally included non-label material on the website, such as a product data sheet and safety data sheet; however, they are unable to state specifically what materials were on the website at any given time as they do not maintain those historical records.

[83] The disclaimer is relevant to reliance and causation, as well as to numerous individualized defenses.

already found to the contrary. *See* ECF ##998, 1006. In any case, to test Plaintiffs' assertion, relevant but decidedly uncommon questions to answer would be who read the disclaimer, how they understood it, and whether they used the product contrary to the disclaimer. It is not a hypothetical that consumers could buy the product only for older (pre-1974) equipment. *See, e.g.*, Ex. 51, Stone Decl. ¶ 13; Ex. 99, Heise Dep. 24-25. *See also* Ex. 143 at Lance Miller (online post from Plaintiffs' counsel's Facebook page: "It works in 4020 and 4430 tractors but dont [sic] use it in new tractors or combines … only run it in old tractors that leak").[84]

Alternatively, consumers who read the disclaimer could have bought for older equipment and then – satisfied with its performance – opted to use for off-label applications. *See* Ex. 69 ¶ 13 ("I was aware that the 303 product(s) were not intended for use in much of the equipment listed above, but I used it in all of the above equipment because it worked fine in all of the above equipment and was reasonably priced."); Ex. 52 ¶ 12 ("I chose the 303 hydraulic fluid because it worked; was economically priced; and some of the equipment leaked which meant that the fluid was not in the equipment for a long time and required frequent topping off.").

Plaintiffs (at 85-86, 107) alternatively suggest that the issues raised by the disclaimer are at least common to "everyone who used the fluid in post-1974 equipment." Again (and even if that were the proposed class, which it is not), not so. For instance, compare Wendt, who read the disclaimer but still used it in his post-1974 equipment (and was subject to summary judgment on multiple claims on this basis), *with* Anderson who never read the disclaimer but would still have purchased the fluid for his post-1974 equipment if he had, *with* Harrison, who testified that he did not read the disclaimer but would ***not*** have purchased the product if he had. ECF #998

[84] *See also* Ex. 88, Finley Decl. ¶ 8 ("Until it was taken off the market, I routinely used 303 hydraulic fluid in my older equipment, as that equipment is prone to leak and blow hoses. It's hard to justify giving 3 times the price of 303 hydraulic fluid for the name brand fluid that's marketed to a wealthy farmer with new equipment.").

(Wendt); Ex. 39 at 260 (Anderson); Ex. 43 at 229-30 (Harrison).[85]

Finally, Plaintiffs (at 86) claim that "[t]he MDA determined that even the new [warning] language was not curative for fluids meeting no specification" (citing Hayes Rpt. ¶¶ 16, 25). A jury or the Court, not the MDA, will be the arbiter of the disclaimer's significance to any Plaintiff's ability to meet his burden. But, even were it otherwise, Plaintiffs misstate the record. The MDA issued a stop sale of all 303 THF products, those with and without disclaimers, because it decided, after decades of the product on the market (without complaints) that it was appropriate to require for the first time that THF meet a known and verifiable OEM specification – something that Smitty's/CAM2 303 THF labels never even claimed to do. *See* SOF § II.B.3.

b. *Prima Facie Elements Hinge on Individualized Fact Determinations.*

i. Individual Reliance Issues Abound.[86]

Many of the factual issues addressed above render reliance an individualized question of fact. For instance, a jury deciding if Defendants are liable to Zornes for fraud based on the

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[85] Plaintiffs rationalize (at 6 & n.58) that "Defendants urged that less than 2% of named Plaintiffs used [Smitty's/CAM2 303 THF] in pre-1974 equipment." Even this would defeat certification, as it would leave differently situated Plaintiffs and class members depending on whether they purchased 303 THF solely for post-1974 equipment, solely for equipment from 1974 and earlier, or a combination of the two. But, regardless, the estimate Plaintiffs point to was based on allegations in the Fourth Amended Consolidated Complaint, which discovery responses reveal substantially understated use in older equipment. *See* n.63 *supra* (discussing that 18-25% of the equipment reported to have used Smitty's/CAM2 303 was pre-1974).

[86] Claims that require reliance include common-law fraud (*Rosser v. Col. Mut. Ins. Co.*, 928 S.W.2d 813, 815 (Ark. App. 1996) (justifiable reliance); *Graham v. Bank of Am., NA*, 172 Cal. Rptr. 3d 218, 228 (Cal. App. 2014) (reasonable reliance); *Kelly v. VinZant*, 197 P.3d 803, 808 (Kan. 2008) (same); *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011) (same); *Hoyt Props., Inc. v. Prod. Res. Grp., LLC*, 736 N.W.2d 313, 318 (Minn. 2007); *Roth v. Eq. Life Assur. Soc'y of U.S.*, 210 S.W.3d 253, 258 (Mo. App. 2006); *Oxford Health Plans, Inc. v. Biomed Pharm., Inc.*, 122 N.Y.S.3d 47, 52 (N.Y. App. Div. 2020) (justifiable reliance); *Bartz v. Edmonds*, 781 N.W.2d 550 (Wis. App. 2010)), and negligent misrepresentation (*Nat'l Union Fire Ins. Co. v. Cambridge Integ. Servs. Grp., Inc.*, 89 Cal. Rptr. 3d 473, 483 (Cal. App. 2009) (justifiable reliance); *Evolution, Inc. v. SunTrust Bank*, 342 F. Supp. 2d 964, 971 (D. Kan. 2004) (same); *Presnell Const. Mgrs., Inc. v. EH Const., LLC*, 134 S.W.3d 575, 580-82 (Ky. 2004) (same); *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012) (same); *Blevins v. Am. Fam. Mut. Ins. Co*., 423 S.W.3d 837, 842 (Mo. App. 2014) (same); *Miron v. MNI, Inc.*, 879 N.W.2d 809 (Wis. App. 2016)). Plaintiffs (at 78 n.51) concede this. They also do not deny that breach of implied warranty of fitness for a particular purpose in all states and breach of express warranty in Arkansas and Kansas require reliance. *See, e.g.*, *M.F. v. ADT, Inc.*, 357 F. Supp. 3d 1116, 1141 (D. Kan. 2018); *Driscoll v. Stand Hardware, Inc*., 785 N.W.2d 805, 817 (Minn. App. 2010). Some consumer protection statutes also require reliance, as addressed *infra.*

representation that Smitty's/CAM2 303 THF was "multi-functional" would need to hear that he ***never*** purchased a label with that language. And, that is not all. In deciding whether reliance was reasonable, a jury would need to consider a timeline of events as it relates to individual purchaser knowledge. For instance, the first 303 THF stop sale was in 2017 and the first 303 THF lawsuit against Smitty's was brought in 2018. *See* § IV.D.1.b.iv. *infra* (discussing knowledge).[87]

These sorts of issues are precisely why courts routinely hold that a need to prove reliance defeats predominance. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 281-82 (2014) ("without the presumption of reliance …[e]ach plaintiff would have to prove reliance individually, so common issues would not 'predominate'")[88]; *Zurn Pex*, 644 F.3d at 619 ("Claims requiring individual proof of reliance are generally not amenable to class certification"); *In re Fluidmaster, Inc., Water Connector Components Prod. Liab. Litig.*, 2017 WL 1196990, *55 (N.D. Ill. 2017) (denying certification on omissions claim due to individual reliance questions); *Johnson v. BLC Lexington, SNF, LLC*, 2020 WL 3578342, *5 (E.D. Ky. 2020) (reliance requires individualized proof).

This chorus of courts has cited exposure to the alleged misrepresentations, exposure to other (*e.g.*, non-label) representations, and knowledge as individualized, as well as differences among consumers in purchase decisions. *See, e.g.*, *Clayton v. Batesville Casket Co.*, 2009 WL 2448164, *3-4 (E.D. Ark. 2009). *See also Hudock*, 12 F.4th at 777 ("Questions of which television features . . . motivated individual consumers to purchase particular LG televisions are

[87] Plaintiffs (at 76) claim that is doubtful whether Defendants would defend on reliance as it would "tacitly concede[] falsity." Defendants will defend on reliance, and doing so in no way concedes falsity. The labels never said that the fluid did not contain line wash, was suitable for post-1974 equipment (in fact, it said the opposite), or was tested to "meet" any OEM specification. But to the extent that Plaintiffs contend the labels misleadingly implied the opposite, consumer knowledge is key. Moreover, Plaintiffs are wrong that reliance relates to a defense, *i.e.*, whether consumers had a duty to seek out information that might have made reliance unjustified. Reliance is a prima facie element and Plaintiffs' burden to prove.

[88] No classwide proof of reliance or presumption of reliance applies here, as discussed in this Section *infra*, and in §§ IV.D.1.c.ix.-xiv. *infra* (discussing law on presumption of reliance for consumer protection act claims).

the kind of 'plaintiff-by-plaintiff determinations' that made certification inappropriate … .").
Thus Plaintiffs' suggestion (at 79) that everyone who purchased the product was exposed to claims that appeared on every package cannot save them even if it were true (and it is not).[89]

(a) Eighth Circuit Caselaw on Reliance Precludes Certification.

Plaintiffs (at 79) seek refuge in the fact that there is no *per se* rule in the Eighth Circuit against certifiying a claim involving reliance. Nevertheless, the Eighth Circuit's *St. Jude* and *Johannessohn* decisions speak clearly, and hold that certification is rarely, if ever, proper in these cases. *See, e.g.*, *Johannessohn*, 9 F.4th at 985 ("[F]raud cases are ill-suited for class actions because they require individualized findings on whether the plaintiffs actually relied on the alleged misrepresentation."). The standard is whether individual or common proof will be used to present and defend against the elements. *Id.* at 984-85. As shown, individual evidence regarding reliance (or the lack thereof) will overwhelm any common issues.

Moreover, Plaintiffs' attempt (at 80) to limit *St. Jude* to the context of a physician intermediary fails. ***First,*** *Johannessohn* is the Eighth Circuit's more recent pronouncement on this issue and did not involve intermediaries. ***Second,*** it is just as individual here as in *St. Jude* whether a consumer was exposed to any given representation since the labels varied so greatly and, in any case, not everyone read the labels. *See* SOF § II.B., II.C. The Eighth Circuit says this matters. *See Hudock*, 12 F.4th at 777. ***Third,*** Plaintiffs' cases (at 80 n.52) supposedly distinguishing *St. Jude* are to no avail. They are from two district courts, one outside of the Eighth Circuit, and both pre-date *Johannessohn*.

[89] Plaintiffs (at 51) string cite cases for the proposition that reliance need not be the sole factor affecting a purchase decision, but may simply be a substantial factor. But not a single one stands for the proposition that reliance can be a common, classwide issue – because ***not a single one of them*** was a class action. Each decided reliance individually.

(b) Alter's Opinion Fails to Provide Classwide Proof of Reliance.

Lastly, Plaintiffs argue (at 85) that reasonable reliance can be established with classwide proof because Alter opines that ***no one*** would buy a product if: "[1] they knew it was unsuitable for use ***and*** [2] caused harm" (citing Alter Rpt. ¶¶ 130-31, 135-36). This unscientific declaration does not carry the day for Plaintiffs. Courts accept this sort of classwide claim only infrequently and only where there is evidence linking the alleged misrepresentations to how consumers actually think about the product. *See, e.g.*, *Rikos v. Procter & Gamble Co*., 799 F.3d 497, 518 (6th Cir. 2015) (allowing classwide reliance evidence where the misrepresentation was uniform and the "only" reason consumers bought the product). Alter does not provide that link, and certainly not by any scientific method. *See* SOF § II.E.3.[90]

Applying Alter's opinion here to allow classwide proof of reliance would be only one step removed from an impermissible fail-safe class, as there would be uniform reliance on this basis ***if and only if*** it is assumed that Alter's opinions are not only admissible but ***accurate***. *See Best Pallets Inc. v. Brambles Indus.*, 2009 WL 10672543, *5 (W.D. Ark. 2009) (denying certification because the way in which plaintiffs attempted to show predominance "necessarily includes improper assumptions relating to their satisfaction of the requirements of Rule 23(b)(3)"). If one simply assumes that the class uniformly relied on various representations (or else, in Alter's view, would never have purchased), then Defendants are deprived of an opportunity to put on individualized reliance evidence. This would allow Alter's opinion to act as a sword to exclude relevant (but individualized) evidence on the premise that he is correct. The Eighth Circuit has affirmed denial of certification in similar circumstances. *See Blades*, 400 F.3d at 570 ("[P]laintiffs ***presume*** class-wide impact without any consideration of whether the

[90] Defendants additionally refer to, and incorporate by reference, their *Daubert* challenge to Alter. *See* ECF #969.

markets or the alleged conspiracy at issue here actually operated in such a manner so as to justify that presumption. Dr. Leitzinger ***assumes*** the answer to this critical issue and plaintiffs, in turn, have asked the Court to rely on this ***conclusion*** as support for class certification.") (emphasis in original).[91] This Court should heed *Blades* and reject Plaintiffs' argument.

ii. Individual Causation Issues Abound.

Plaintiffs are conspicuously silent on causation. They seem to believe that a single-minded focus on the supposed uniformity of Defendants' conduct erases their burden of proof on this element. That is not the case. "[T]he wrongfulness of the defendant's conduct" is "only half the question." *Pelman v. McDonald's Corp.*, 272 F.R.D. 82, 94 (S.D.N.Y. 2010). Plaintiffs must also be able to show ***with common evidence*** "that defendant's conduct ***caused*** an individual class member to suffer actual damages." *Id.* (emphasis added). *See also Comcast*, 569 U.S. at 30 (requiring "evidence that [is] common to the class"). Plaintiffs have not met this burden.

Plaintiffs bring essentially two kinds of claims: (1) label claims, where the causation element focuses on the alleged misrepresentation and thus whether the representation ***caused the purchase***; and (2) defect-property damage claims, where the causation element focuses on whether the alleged defect actually ***caused equipment damage*** such that a flush is needed.[92] Defendants address each of these kinds of claims in turn.

[91] Plaintiffs are guilty of this not only as to Alter. Their predominance argument boils down to this: ignore all non-uniform evidence – especially Plaintiffs' own experiences and testimony – and look ***only*** to Plaintiffs' experts. But if these opinions are admissible (which Defendants challenge), they will be a small fraction of the evidence the jury hears. The Rule 23(b)(3) inquiry is not whether there is ***any*** common evidence, but whether it predominates.

[92] This is not a bright-line distinction. Plaintiffs' claims intersect in myriad ways. For instance, they claim property damages ***and*** purchase price are recoverable on their negligence and unjust enrichment claims. And, their proffered basis for a full refund is predicated on the notion that the product is valueless ***because it causes property damage.*** Despite this nexus, considering the claims in two categories is conceptually useful in analyzing predominance.

(a) Causation – Deceptiveness and Purchase

There are scores of reasons why *any* particular alleged misrepresentation did not cause ***all*** Plaintiffs and class members to purchase the product. *See, e.g.*, § IV.D.1.a.i. *supra* (regarding label variations). But the threshold reason is that not all class members even read the representations. *See* SOF § II.C. Whether that is because they did not read parts of the class period labels (or any of them, *e.g.*, Jackson), or because the alleged misrepresentation did not even appear on the label they did read, the result is the same: causation is not uniform. *See Hudock*, 12 F.4th at 777 (reversing certification on unjust enrichment and consumer protection act claims where defendants produced evidence that not all class representatives saw or relied on alleged misrepresentations "[b]ecause determination of … liability would require individual determinations on causation and reliance"); *Marshall v. H&R Block Tax Servs. Inc.*, 270 F.R.D. 400, 408 (S.D. Ill. 2010) ("[c]ourts routinely have found that variations in … fact required to prove proximate causation in the consumer fraud context are a valid basis to defeat certification"). *See also Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1099-100 (N.D. Cal. 2018) (denying certification and declining to infer classwide exposure to label representation); *Zakaria v. Gerber Prods. Co.*, 2016 WL 6662723, *8 (C.D. Cal. 2016) (same).

Even beyond that initial hurdle, the record provides plentiful examples of reasons consumers purchased Smitty's/CAM2 303 THF separate and apart from the label, *e.g.*, because the 5-gallon buckets were yellow. *See, e.g.*, Ex. 97 at Dep. 78, 80-81 ("I saw the yellow bucket stuff and bought the yellow bucket stuff.") (Vanderree). And a jury may find it impossible to conclude that but for the inclusion of "tractor hydraulic fluid," Gretzinger or Hamm would never have purchased Smitty's/CAM2 303 THF given that they purchased Ag Fluid – which did not say "tractor hydraulic fluid"—for the same purpose. Ex. 98 at 115; Ex. 85 at 159-60. *See also*

Ex. 68 at Dep. 77 (Sevy purchasing AW32, not THF, for the same equipment).

All of this is to say that the reasons a consumer purchased Smitty's/CAM2 303 THF, and thus whether any alleged misrepresentation ***caused his purchase***, is "inherently individualized." *In re Avon Anti-Aging Skincare Creams & Prod. Mktg. & Sales Practices Litig.*, 2015 WL 5730022, *7 (S.D.N.Y. 2015) (noting that purchase decisions about cosmetics are "inherently individualized"). The reason for purchase is particularly important here because Plaintiffs' only proposed classwide benefit-of-the-bargain measure is a complete refund; that is, Plaintiffs' case is premised on ***no consumer*** having purchased this product ***at any price***, ***but for the alleged misrepresentations***. The viability of the claims here thus depend on consumers' purchasing decisions being so homogenous that every single class member "would not have purchased the product" if he knew of the alleged "defect"; if any class members would have "purchased the product anyway" – but just paid less – a class cannot be certified. *Lipton v. Chattem, Inc.*, 289 F.R.D. 456, 462 (N.D. Ill. 2013) (citing *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 746-48 (7th Cir. 2008); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006)).

(b) Causation – Property Damage

Causation is an equally individual question with respect to Plaintiffs' property damage claims. As Plaintiffs' own experts agree, heavy equipment can need repair (or even replacement) for a host of reasons having nothing to do with Smitty's/CAM2 303 THF – or any THF at all. *See, e.g.*, Ex. 121, Dahm Dep. 268-69. Obviously, Defendants cannot be held liable for repairs a consumer needed due to his own negligent maintenance or operation of his equipment, use of another manufacturer's products, or natural wear and tear of equipment that, in many cases, is decades old. *See* Ex. 128, Hamilton Dep. 68, 70 (maintenance may cause equipment failures and

shorten life span of equipment).[93]

Nor do Plaintiffs obviate these individual causation questions by declining (at least for the moment) to pursue equipment ***repair*** damages classwide. Their proffered property damage claim for ***flush costs*** is likewise subject to an individualized causation inquiry. Again, Plaintiffs agree that there are other factors causing the need for a flush. *See, e.g.*, Ex. 55 at Kimmich Dep. 123 ("If you break a hydraulic hose and you're in dirt, dust, whatever, and potential for dirt to get in the system, then you flush the system."). Indeed, Plaintiffs' admission that repair costs are individualized is an implicit admission as to flush costs as well. If it is improper to assume that Smitty's/CAM2 303 THF was the cause of any particular repair without an inspection and root cause analysis (and it is), then it is equally improper to assume that the 303 THF caused the need for a flush without the same individualized evidence.[94] It would be equally incompatible with Plaintiffs' burden and due process to assume that there were not independent reasons a flush would be required, *e.g.*, environmental contaminants or even buying used equipment that already required a flush. *See* Ex. 128, Hamilton Dep. 74-76, 99, 202 (describing need for flush based on diesel or water entering the hydraulic reservoir and other causes of contamination). *See also* Ex. 163, yesterdaystractors.com at gears ("Since the machine was new to me, leaking and possibly in need of a flush and maybe repairs I filled it with the 303.") (Oct. 30, 2017); Ex. 91, Hearth.com at FTG-05 ("I use the 303 when I need a cheap hydraulic oil to flush through a hydraulic system

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[93] Smitty's likewise cannot be liable for any damage "that arose from or relates to *Hornbeck*." ECF #1008 at 7. This implicates varying inquiries into which purchasers are bound by *Hornbeck* – a fact not readily determined by state of residence (*e.g.*, Bollin). Once that is answered, there still leaves the looming question of "to what extent [a plaintiff's] damage was caused by the SuperTrac 303 subject to the *Hornbeck* Settlement Agreement," if any. *Id.* at 7-8. As detailed herein, this causation inquiry is no easy task and is certainly not one that can be applied classwide.

[94] For purposes of this Section, Defendants assume *arguendo* that the ***need*** for a flush can be established classwide. In fact, it cannot. *See* Ex. 128 at 172 (Hamilton asked whether he would recommend a flush with no observable damage: A. Well, can I say how can you assume there's no damage without tearing the unit apart? Q. Okay. So in order for us to determine whether or not there is damage associated – or the start of damage associated with a 303 THF product, we would have to tear that machine apart? A. Yes.); *id.* at 174-75 ("I'm not going to base an opinion of – whether to flush or to repair or tear down without facts about the equipment itself").

or get rid of water-contaminated oil.") (Feb. 8, 2014); Ex. 111 at 77 (manual suggesting a "purge and refill," *i.e.*, a flush, if fluid is cloudy, or water or air have entered system).

A need for a flush may also arise from use of ***other*** brands of THF. *See* Ex. 128, Hamilton Dep. 202, 207-08 (equipment would require flush upon use of any fluid that was "not equivalent to or does not meet OEM specs" (as Plaintiffs have alleged was true of MileMaster 303 and other THFs used by Plaintiffs and class members)). *See also id.* at 203 (if all fluids used by operator did not meet recommended OEM specification, then "I don't know that – how – how you could determine which fluid actually caused any damage"); Ex. 16, Dahm *Yoakum* Rpt. at 83 (claiming use of 303 THF manufactured by Warren Oil caused a "need to flush" equipment "to prevent the product from causing any further negative impact to equipment").[95] Many Plaintiffs report using other 303 THF fluids, and even commingling fluids. *See, e.g.*, Ex. 48 at 96 (Hargraves commingled fluids); Ex. 44 at 79-80 (Wurth used O'Reilly 303 THF); Ex. 68 at Dep. 28, 35-36, 122-23, 129-31, 250-51 (Sevy used other brands, and cannot say what he put in which equipment when); Ex. 66 at Dep. 80-82, 84-85 (Creger not only used another brand, Carquest 303 THF, but reports seeing "crud" on the bottom). *See also* Ex. 128, Hamilton Dep. 203-06 (unable to say which of the 303 THFs that Asfeld used caused damage). An ***assumption*** that Defendants' products caused the need for a flush is not ***evidence*** of causation – even when it is an expert who does the assuming. *See Ebert*, 823 F.3d at 479-80 (denying certification, observing that causation issues "necessarily must be adjudicated to resolve the heart of the matter," and finding that "sources of contamination" is an individual question).

These individual causation issues are especially daunting where – as is so often the case –

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[95] *See also* Ex. 128, Hamilton Dep. 202 (Q. So there are instances in which you would recommend this flush remedy for problems not caused by the use of a 303 THF product? A. Oh, yes ma'am. Q. Like a mechanical failure? A. Mechanical failure or improper fluid of some sort introduced into the system.).

consumers purchased their equipment used, sometimes more than 50 years old, and do not know the maintenance or repair history. For instance, Sevy's 1970s Allis Chalmers wheel loader was already leaking from the hydraulic reservoir when he bought it. Ex. 68 at Dep. 117-18, 132-33. Plaintiff Howe purchased equipment from salvage yards. **Ex. 169**, Howe Answer iRog. 7. Courts routinely deny certification where such individual causation issues exist. *See, e.g.*, *Jarrett v. Panasonic Corp. of N. Am.*, 8 F. Supp. 3d 1074, 1089 (E.D. Ark. 2013) (denying class certification because individual issues such as the use, performance, maintenance, and service history of each class member's television defeated predominance); *Hardieplank*, 2018 WL 262826, at *15 (denying certification because defendant had a right to challenge each plaintiff's injury and cause thereof, requiring individual home inspections to address unique factors such as the condition, location, and age of the house).

Moreover, this case is even less suited to certification than most cases because not only ***might*** the need for a flush have been caused by something other than the use of Smitty's/CAM2 303 THF in some cases, but actually in some cases it ***cannot*** have been caused by use of Smitty's/CAM2 303 THF. Consider, for instance, Jenkins, who testified that he did not even use Smitty's/CAM2 303 THF in a hydraulic or transmission system on his tree harvester, but rather used it merely as an exterior lubricant. Ex. 61 at 121, 131-32. Perhaps his tree harvester requires a flush – but it could not have been caused by Smitty's/CAM2 303 THF.

iii. Individual Materiality Questions Abound.[96]

A statement is material if it "naturally affects" a person's decision or conduct. *Lakeland Tool & Eng'g, Inc. v. Thermo-Serv, Inc.*, 916 F.2d 476, 479 (8th Cir. 1990). Materiality is often

[96] Materiality is an element for breach of express warranty under Missouri law (*Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 357 (Mo. App. 1993)); common-law fraud (*Graham*, 172 Cal. Rptr. 3d at 228; *Kelly*, 197 P.3d at 808; *Giddings & Lewis*, 348 S.W.3d at 747; *Hoyt Props.*, 736 N.W.2d at 318; *Roth*, 210 S.W.3d at 258; *Oxford Health*, 122 N.Y.S.3d at 52); negligent misrepresentation for California and Kentucky (*Nat'l Union Fire*, 89 Cal. Rptr.3d at

measured under a reasonable person standard. This does not mean, however, that materiality is necessarily a common question. To the contrary, due to an intersection with reliance issues, materiality is often an individual question. *See, e.g.*, *Novell v. Migliaccio*, 309 Wis.2d 132, 136-37 (2008) ("the reasonableness of a plaintiff's reliance may be relevant in considering whether the representations materially induced the plaintiff's pecuniary loss"). Applying this reasoning, courts often decline to certify where materiality is an element. *See, e.g.*, *Blitz v. Monsanto Co*., 2019 WL 95440, *5-6 (W.D. Wis. 2019); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 508 (S.D. Cal. 2013) (finding that "All Natural" representation was not necessarily material to all consumers as it lacked a uniform definition); *Jones*, 2014 WL 2702726, at *16-18 (materiality determination would require "individualized purchasing inquiries").

iv. Individual Knowledge Questions Abound.[97]

Knowledge is likewise an individual issue – both of individual purchasers and Defendants. The record is clear that the former varied based on diverging testimony regarding, *e.g.*, the existence and obsolete nature of JD-303. *See* SOF §§ II.B. & C. There was information in the public domain that some class members can be expected to have accessed, such as March 2004 and February 2012 articles by Plaintiffs' expert advising that JD-303 was obsolete, the risks of purchasing 303 THF, and the use of low quality of ingredients.[98] But not for others. With respect to both Defendants' and consumers' knowledge, significant events occurred ***during*** the

483; *Collins v. Ky. Lottery Corp*., 399 S.W.3d 449, 453 (Ky. App. 2012) (requiring clear and convincing evidence)); the ADTPA (*Apprentice Info. Sys., Inc. v. DataScout, LLC*, 544 S.W.3d 536, 539 (Ark. 2018)); the MMPA (Mo. Rev. Stat. Ann. § 407.020); and the NYGBL (*Stutman v. Chem. Bank*, 731 N.E.2d 608, 611 (N.Y. 2000)).

[97] Plaintiffs' and defendants' knowledge are particularly relevant on Plaintiffs' misrepresentation claims. *See, e.g.*, *Oxford Health Plans*, 122 N.Y.S.3d at 52 (an element of fraud under New York law is that "a misrepresentation or an omission of material fact which was false and known to be false by the defendant").

[98] *See* Ex. 165, The Games People Play With THF, *Jobbers* World, vol. 1, no. 5, Mar. 2004; Ex. 166, The Yellow Bucket, *Lubes'N'Greases*, vol. 18, n.2, 12-20, Feb. 2012. These articles reached end-users and were intended to educate consumers. Ex. 8, Glenn Dep. 76, 82, 83, 91.

class period affecting available information, including:

- ❖ online posts in 2017 specifically identifying Smitty's 303 THF as being made from line wash;[99]
- ❖ the Missouri stop sale order in 2017, publicized not only by the MDA but by PQIA;
- ❖ Lubrizol publishing on *TractorLife.com* in 2018 that 303 THFs contain line flush;
- ❖ the Georgia and North Carolina stop sales in 2018, again publicized by PQIA;
- ❖ a change in the label disclaimer language in 2018;
- ❖ the filing of the *Hornbeck* lawsuit in 2018, and later lawsuits thereafter; and
- ❖ passage of the new NIST Handbook 130 THF regulations in 2019 (with an effective date in January 2020).

See generally SOF. Some consumers did not even purchase for the first time until after some (or all of) these events. For instance, Plaintiff Monday first bought Smitty's/CAM2 303 THF in June or July 2019, after lawsuits had long been pending. **Ex. 170**, Monday iRog. Answer 3.

In similar circumstances, courts routinely deny certification finding that knowledge is a core issue to foreseeability and a duty to disclose, and is not a common question. *See, e.g.*, *BPA*, 2011 WL 6740338, at *5 (duty to disclose not a common issue because knowledge of defect based on available information "changed during the class period"); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 453 (E.D. Pa. 2000) (same).

Plaintiffs cite cases (at 110) on "constructive notice" as a common question. But these are inapposite because the individual differences here concern ***actual knowledge*** – not constructive notice. After some point in time, anyone who did even a little research on 303 THF prior to purchase would have learned of the alleged "defect" and misrepresentations. Surely some consumers performed research, while others did not. *See* Ex. 163, yesterdaytractors.com at

[99] *See* Ex. 91, Hearth.com at FTG-05 ("303 Fluid is mostly made by one company anymore – Smitty's. They're also the #1 buyer of line wash around the United States. … So what you're actually getting when you buy 303 fluid is a bucket of bs.") (Feb. 8, 2014).

sotxbill (noting re: 303 THF, "I would do my research first.") (Oct. 29, 2017). Regardless of how those numbers shake out, widespread publicly-available information defeats predominance because it "thoroughly undermine[s]" an argument that all class members uniformly lack knowledge. *In re IPO Sec. Litig.*, 471 F.3d 24, 43 (2d Cir. 2006). *See also In re Ford Motor Co. E-350 Van Prod. Liab. Litig.*, 2012 WL 379944, *15 (D.N.J. 2012) (finding predominance not met due to "public reports, articles, and broadcasts" concerning the alleged defect).

As to Plaintiffs' claim (at 91 n.68) that maybe no purchaser saw the negative articles, since no online posts name Smitty's by name, that is false. *See* Ex. 91, Hearth.com. And, even as to posts that reflect consumers buying some brand of 303 THF with knowledge of some of these facts but which do not specifically cite Smitty's or CAM2 303 THF, Plaintiffs' claims about Defendants' market share shatter the notion that none of these posters were class members.

c. *Specific Elements of Various Causes of Action Preclude a Finding of Predominance.*

i. Negligence Claims (AR, CA, KS, KY, MN, MO, NY, WI)

Plaintiffs' negligence claims require not only causation, like all their claims, but specifically require ***proximate*** cause.[100] As a practical matter, this is generally a more discerning, and more individualized, inquiry than the already individual causation issues discussed. *See, e.g.*, *O'Connor v. Boeing N. Am., Inc.*, 180 F.R.D. 359, 382-83 (C.D. Cal. 1997) (finding individual proximate cause issues predominated where different class members' properties had differing levels of exposure to hazardous substance); *Gartin v. S & M NuTec LLC*, 245 F.R.D. 429, 439

[100] *See Cross v. W. Waste Indus.*, 469 S.W.3d 820, 825 (Ark. App. 2015); *Jewett v. Miller*, 263 P.3d 188, 191 (Kan. App. 2011); *Kellogg v. Finnegan*, 823 N.W.2d 454, 458 (Minn. App. 2012); *Reddick v. Spring Lake Est. Homeowner's Assn.*, 648 S.W.3d 765, 774 (Mo. App. 2022); *Pasternack v. Lab. Corp. of Am. Holdings*, 59 N.E.3d 485, 490 (N.Y. 2016); *Brown v. USA Taekwondo*, 483 P.3d 159, 213 (Cal. 2021); *Walmart, Inc. v. Reeves*, 2023 WL 2033691, *2 (Ky. 2023). It is unclear whether Wisconsin requires only but-for causation or proximate cause on negligence claims. *See Rockweit by Donohue v. Senecal*, 541 N.W.2d 742, 747 (Wis. 1995) (negligence requires "causal connection"); *id.* at 428 (declining to impose liability because omission was "too remote" from harm).

(C.D. Cal. 2007) ("Because the proximate causation analysis involves individualized factual issues, courts generally consider negligence claims ill-suited for class action litigation."). Causation issues render it impossible for Plaintiffs to satisfy the predominance requirement on their negligence claims. *See* § IV.D.b.ii. *supra.*

Furthermore, Plaintiffs' negligent failure-to-warn claims are particularly unsuited to classwide resolution action because they turn on whether each individual purchaser read the label. *See* ECF #1004 at 11 (granting partial summary judgment against Jackson on this basis).

ii. <u>All Warranty Claims (AR, CA, KS, MN, MO)</u>

The question whether notice of a warranty claim was filed within a reasonable time "is an inquiry that requires individualized inquiry." *Dollar Gen.*, 2019 WL 1418292, at *24 (denying classes on implied warranty counts due to notice requirement (citing *BPA*, 2011 WL 6740338, at *7 n.13 (denying class certification in part because determining whether plaintiff provided adequate notice under Missouri law is individualized)); *cf. Golden v. Den-Mat Corp*., 276 P.3d 773, 788 (Kan. App. 2012) (explaining that the reasonableness of the notice should be assessed under the totality of the circumstances); *Cotner Int'l Harvester Co.*, 545 S.W.2d 627, 630 (Ark. 1977) ("Ordinarily, the sufficiency of notice is a question of fact for the jury based upon the circumstances."). Nor is it an answer for Plaintiffs to just assume that the fact of a class action relieves them and class members of their notice requirements. *See, e.g.*, *Hartness v. Nuckles*, 475 S.W.3d 558, 563 (Ark. 2015) ("***before*** filing a lawsuit, a person alleging breach of warranty must give the breaching party reasonable notice or be barred from any remedy").[101]

[101] Defendants are mindful of the Court's ruling that Plaintiffs adequately pled notice. *See* ECF #451 at 28. But that ruling did not speak to class member notice. Thus, while the Court's determination that Plaintiffs adequately pled notice allows Plaintiffs to proceed on an individualized basis, it does not mean they can proceed as a certified class.

iii. Express Warranty (AR, CA, KS, MN, MO)

Plaintiffs insist that reliance is not an element of a breach of express warranty claim. In fact, a plaintiff must prove reliance or materiality in several states. *See Madden v. Mercedes-Benz USA, Inc.*, 481 S.W.3d 455, 463 (Ark. App. 2016) (reliance); *Graham v. Cent. Garden & Pet Co.*, 2023 WL 2744391, *5 (N.D. Cal. 2023) (reliance); *Carpenter*, 853 S.W.2d at 357 (Mo.) (materiality to purchase decision).[102] *See also Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 544 n.6 (Minn. 2014) (leaving open question of whether reliance is element).

Moreover, in all states, the warranty must form the "basis of the bargain," which is akin to a reliance requirement and goes to the heart of Plaintiffs' claim. *See Golden*, 276 P.3d at 795 (basis of bargain). *See also In re GM Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 323 (S.D. Ill. 2007) ("[E]ven were it possible to separate the question of reliance from the question of whether the statements at issue in this case constitute a warranty—and the Court sees no way to know the dancer from that particular dance—the proposal raises very significant Seventh Amendment questions in the Court's mind."). To simply say (at 73) that "reliance" is not required does not come close to a "rigorous analysis." The salient point is that the only way for any plaintiff to prove that some label claim was the "the basis" for his particular bargain is individually.

Indeed, the individual nature of this question is clear from Plaintiffs' own descriptions of what, precisely, constitutes the supposed warranty. They assert (at 72-73) that "common proof in the form of the labels" will establish that the following affirmations of fact constituted a basis of the bargain: (1) the THF was "multi-service or multi-functional"; (2) "provid[ed] performance benefits"; and (3) was "suitable as a replacement for listed manufacturers." But, as noted above, whether the labels even included this language is not uniform. *See* SOF § II.B. And even as to

[102] While Defendants agree with Plaintiffs (at 46 n.39) that courts applying California law are not uniform on this point, the better view is that reliance is an explicit element of a California breach of express warranty claim.

the subset of the class whose labels included all these affirmations identically, Plaintiffs' testimony varies on whether that could have formed the basis of the bargain. For instance, Hazeltine and Wendt acknowledge that they used the product in a way that they knew Defendants had not warranted. Ex. 38 at 139-40; Ex. 42 at 162-63; ECF ##998, 1006.

It is likewise an individual question whether – if, say, suitability was a warranty – that warranty was breached. As discussed § IV.C.2.b. *supra*, for a jury to decide if Plaintiffs have met their burden of proof on the question of suitability it will need to hear, at the very least:

- ❖ evidence regarding the OEM specification in each piece of equipment at issue;
- ❖ evidence of the viscosity and zinc ranges of Smitty's/CAM2 303 THF in comparison; and
- ❖ evidence of how the product actually performed in the piece of equipment, *e.g.*, did it operate as expected for years until the equipment was sold at no loss or did the equipment require a new hydraulic cylinder within weeks after first use of the product?

Plaintiffs' newly-filed 5ACC and their brief both make clear that Plaintiffs' theory of breach of express warranty is ***not*** limited to a definitional warranty (*i.e.*, warranting that the product was in fact THF). But even if Plaintiffs had attempted to limit their claim in this way individual questions would still predominate. That is because Plaintiffs' theory of "definitional fraud" has turned the question of "what is THF" into an opinion – not an affirmation of fact. Not only do experts disagree, but even Plaintiffs' own experts offer an opinion that differs from their previous definitions and from the NIST framework. *See* SOF § II.E.1. Consumers themselves also understood the term quite differently. *E.g.*, *compare* Ex. 42 at Dep. 28, 142 (Wendt understanding hydraulic fluid and THF to be the same); Ex. 55 at Dep. 40-41 (Kimmich, same); Ex. 44 at 11 (Wurth, same) *with* Ex. 65 at Dep. 8-9 (Coleman understanding those terms differently); *with* Ex. 38 at 15 (Hazeltine unsure if there was a difference); Ex. 139 at 13 (Wells, same). *See also* Ex. 56 at 253-54 (Bollin reporting "difference between tractor hydraulic fluid and tractor hydraulic transmission fluid" is that the former is just for pressuring fluids, whereas

the latter also works in lubricating gears); Ex. 41 at 37-42 (THF does ***not*** necessarily indicate a multi-service fluid) (Tr. Sullivan). Indeed, some Plaintiffs have been clear that "THF" is not false or misleading. *See, e.g.*, Ex. 44 at 109 (designation "303 tractor hydraulic fluid" is not misleading) (Wurth); Ex. 46 at 240 (nothing on the front label is misleading) (Egner).[103] Courts addressing similar proposed misrepresentations have rejected a definitional theory of fraud or warranty. *See Randolph*, 303 F.R.D. at 695 (finding failure of predominance based on the "the lack of consensus surrounding the definition of 'natural'" and the inability to show that "an objectively reasonable consumer would agree with [plaintiff's] interpretation"); U.C.C. § 2-313(a)(1) (express warranty requires "affirmation of fact"). *See also* Ex. 121, Dahm Dep. 86-87 (asked if he agrees with NIST definition of THF as a "product intended for use in tractors with a common sump for the transmission, final drives, wet brakes, axles and hydraulic system," answering, "It's not a black or white, zero, one thing.").

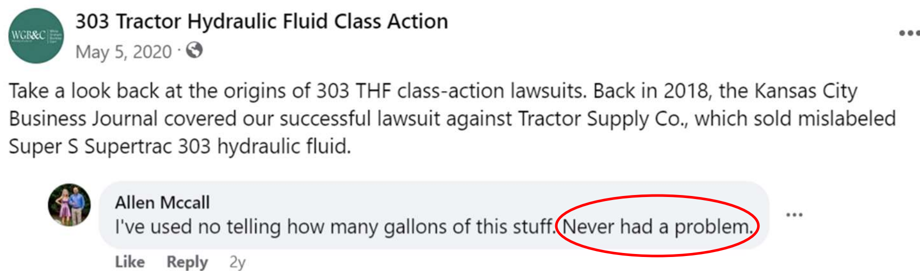
Finally, the record reflects not only that consumers did not uniformly agree on the definition of "THF," but also that they diverge on whether a description as THF was the basis on which they purchased the product. Some Plaintiffs bought Ag Fluid, AW32, or other products that did not claim to be THF for ***the exact same applications***, compelling the conclusion that a representation of a product as THF was not the basis of the bargain. This is fatal to Plaintiffs' definitional fraud/warranty theory, *i.e.*, that a product must say "THF" to even enter a consumers' consideration set. At the very least, Defendants are entitled to have the jury hear this

[103] This confirms the ridiculousness of Plaintiffs' toothpaste / Preparation H example (at 40 n.24). There is not one reasonable consumer who would understand Preparation H to be toothpaste, and just one use would confirm that Preparation H is not in fact usable as toothpaste. To the contrary, many Plaintiffs and class members would tell you Smitty's/CAM2 303 was in fact THF, and repurchased it again and again. Even Plaintiffs' expert has referred to it as THF. And, given the lack of operational impact in so much equipment, Plaintiffs' soda versus poison analogy (at 85 n.57) is equally inapt. Plaintiffs' definitional theory of fraud would be more like suggesting Coca-Cola breached a warranty because some expert somewhere says that – wholly independent of consumers' understanding of "soda" – Coca-Cola's carbonation method does not qualify it as "soda" in some novel, hyper-technical and definitional sense.

individualized evidence to make an individualized determination.

iv. Implied Warranty of Merchantability (AR, KS, MN, MO)

Plaintiffs tread on thin ground on their implied warranty claim given that *Dollar General* denied certification on this claim. But, even *Dollar General* aside, the fundamental question to be answered for this claim is inherently individual. *See Martin v. Ford Motor Co.*, 292 F.R.D. 252, 276-77 (E.D. Pa. 2013) (denying implied warranty class because whether vehicles were fit for ordinary purpose was "a question of fact" that depended in part on "the experience of each individual Class member," including length of "problem-free" use, which the jury must consider in deciding merchantability). Here, the "experience[s] of each individual Class member" are as numerous and varied as the class members and their equipment themselves. Some used Smitty's/CAM2 303 THF "problem-free" not merely for years, but for the ***entire length of their equipment ownership***. *See, e.g.*, Ex. 140, Stembridge Dep. at 154. Consider, for instance, the following excerpted exchange from Plaintiffs' Counsel's 303 Facebook page.



Ex. 143. Others report experiencing equipment issues after a few years of use. *E.g.*, Ex. 94 at 66-68. Yet, others claim to have experienced problems almost immediately after first use. *E.g.*, Ex. 74 at 12. These class members are not similarly situated, and the relevant evidence varies.

Further, Plaintiffs' expert confesses that the ordinary purpose of a THF is to use in tractors. Ex. 17, Dahm Rpt. ¶¶ 23-24. But some Plaintiffs and class members didn't use Defendants' THF in any tractors at all (*e.g.*, Gallegos), highlighting another individual question.

See **Ex. 174**, Pltf-CR 5664.

v. Implied Warranty of Fitness for a Particular Purpose (AR, KS, MN, MO)

Smitty's/CAM2 303 THF products were used for a variety of purposes. *See* SOF §§ II.C. Because determining those purposes is an innately individual question, so is whether they were fit for that particular purpose. Indeed, it is necessary to answer how a class member's specific use did or did not intersect with the fluid's "general functional use" to know whether his claim for breach of the implied warranty of fitness for a particular purpose is viable, or whether it is instead subsumed by a cause of action for breach of the more general implied warranty of merchantability. *See, e.g.*, *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc*., 785 S.W.2d 13, 17 (Ark. 1990) ("If the particular purpose for which goods are to be used coincides with their general functional use, the implied warranty of fitness for a particular purpose merges with the implied warranty of merchantability."); *Miller v. G&W Elec. Co.*, 734 F. Supp. 450, 455 (D. Kan. 1990) (summary judgment is proper on implied warranty of fitness claim where the "goods are acquired for the ordinary purposes for which such goods are generally used"). *See also* ECF #1011 (granting summary judgment on Zornes' warranty of fitness claim on this basis).

Additionally, breach of the implied warranty of fitness for a particular purpose requires that the seller had reason to know of the buyer's particular purpose. *See Great Dane*, 785 S.W.2d at 17; *M.F. v. ADT, Inc.*, 357 F. Supp. 3d 1116, 1141 (D. Kan. 2018); *Driscoll v. Stand. Hardware, Inc*., 785 N.W.2d 805, 817 (Minn. App. 2010); *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, 130 (Mo. 2010). In Arkansas and Minnesota, this cause of action also requires that the buyer relied on the defendant's skill or judgment ***and*** that the defendant knew the buyer was relying on defendant's skill or judgment to select the product. *See Great Dane*, 785 S.W.2d at 17; *Driscoll*, 785 N.W.2d at 817. For some class members, they expressly reached

out to Defendants to advise of the particular purpose for which they were using Smitty's/CAM2 303 THF, asking if the product was suitable for a particular model and model year of equipment. *See, e.g.*, **Ex. 171**, 10/10/19 Schenk Ex. 170. Many others did not. But only individualized inquiries will answer this question.

Plaintiffs cannot credibly deny this; even the evidence that they describe as relevant to this count is not common. According to Plaintiffs (at 74), evidence of the elements of implied warranty for a particular purpose includes pictures of post-1974 equipment on the labels. But, of the 17 labels encompassed by their class definition, eight did not include any pictures that Plaintiffs are claiming post-date 1974.

vi. Common-Law Fraud (AR, CA, KS, KY, MN, MO, NY, WI)

The individual questions set forth above with respect to reliance, materiality, causation, and knowledge are fatal to any attempt to certify a fraud class. *See* § IV.D.1.b. *supra.* This case is thus a prime example of why common-law fraud cases are rarely certified. *See, e.g.*, *Johannessohn*, 9 F.4th at 985 ("Polaris has evidence challenging how much each consumer-plaintiff relied on the alleged omissions. … While a jury is free to reject this evidence, Polaris may present it. This will require individualized findings on reliance and is likely to make for multiple mini-trials within the class action."). Nor does the fact that Plaintiffs assert an omission theory of fraud alter the analysis. *Johannessohn* itself was an omissions case.

vii. Negligent Misrepresentation (CA, KS, KY, MN, MO, WI)[104]

The individualized nature of the materiality and justifiable reliance elements of a negligent misrepresentation claim defeat certification. *See* § IV.D.1.b. *supra*; ECF ##986, 988,

[104] Plaintiffs seem to acknowledge that some states do not recognize omissions for purposes of negligent misrepresentation. They are correct. *See, e.g.*, *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 245 (Wis. 2004) ("The DTPA does not purport to impose a duty to disclose, but, rather, prohibits only affirmative assertions, representations, or statements of fact that are false, deceptive, or misleading.").

1004. *See also, e.g.*, *E. Maine Baptist Church v. Union Planters Bank, N.A.*, 244 F.R.D. 538, 545 (E.D. Mo. 2007) (decertifying negligent misrepresentation class because issues as to "the individual class members' receipt, review, and reliance on the prospectus" and "whether these alleged misrepresentations ... had an impact on the class members" predominated). *See also id.* at 544-45 (collecting cases finding that negligent misrepresentation claims are "not readily susceptible to classwide proof"); *Drew*, 2021 WL 5441512, at *7 (striking class allegations as to a claim for negligent misrepresentation based on individualized issues).

viii. Unjust Enrichment (AR, CA, KS, KY, MN, MO, NY)

Unjust enrichment was one of only two claims certified for single-state classes in *Dollar General*, but the vast differences between that case and the instant one do not allow certification here. *See* § IV.A. *supra.* Some of the most salient differences are the Eighth Circuit's admonition in *Hudock*, 12 F.4th at 777, that such a claim is not certifiable where defendant "present[s] evidence that some consumers did not see" the alleged misrepresentation; the critical difference in the disclaimer language; and that unjust enrichment here would not allow a full refund – the only non-property damage measure that Plaintiffs propose – because Defendants are manufacturers and a full refund is not tied to the amount that they supposedly retained unjustly. *See Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, *11-12 (N.D. Cal. 2014) (denying certification of claims, including unjust enrichment, because "restitution … awarded must correspond to a measurable amount that the defendant has acquired from each class member by virtue of its unlawful conduct," which was not possible for manufacturer, who did not sell retail).

Plaintiffs address only the last point, citing (at 93) a single case for the proposition that in some circumstances damages can be the amount plaintiff lost, as opposed to the amount the defendant gained. They do not even suggest this rule could apply in any state other than

California – implicitly conceding the impropriety of certification of unjust enrichment classes in the six other states. And, in fact, even the California case they cite is inapposite. *Cty. of Solano v. Vallejo Redev. Agency*, 75 Cal. App. 4th 1262 (1999), did not hold that the defendant had to pay restitution in the amount plaintiff paid out of pocket even when the defendant did not receive the benefit of that money. Rather, the court held that where the defendant had ***saved money*** (*i.e.*, did not have to make expenditures it otherwise would have) at plaintiff's expense, full restitution required payment of that amount the plaintiff. *Id.* at 1278-80.[105]

Moreover, even if unjust enrichment were not *per se* off the table based on the crucial differences between this case and *Dollar General*, Plaintiffs' efforts to certify unjust enrichment classes would still fail. The very question of what is inequitable is not a common one. Although the recitation of the elements of unjust enrichment vary some by state, all include some element that in essence requires that the ***specific circumstances*** make the enrichment unjust.[106] This inquiry "rarely, if ever" turns on common questions. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) (observing that because unjust enrichment is an equitable claim, "a court must examine the particular circumstance of an individual case and assure itself that, without a remedy, inequity would result or persist"; these "individualized equities" make "unjust enrichment claims inappropriate for class action treatment"). *Accord Russell v. Citigroup, Inc.*, 2015 WL 9424144, *9 (E.D. Ky. 2015) (denying certification and referring to the "many

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[105] Nor could Plaintiffs later adduce evidence to show Defendants' sales revenues, much less profits, in a way that could be tied to individual single-state classes. Defendants do not know what share of their products are offered for retail in each state. Ex. 5 at 211. This is amply demonstrated by the fact that their records – tracking corporate headquarters of the buyer or sometimes the physical location of a distribution center –reflect ***zero sales*** into a number of states as to which Plaintiffs seek a class and allege retail purchases. *Id.* at 139-40, 211.

[106] *See, e.g.*, *Derrick v. Derrick*, 477 S.W.3d 577, 580 (Ark. App. 2015) (there "must be some operative act, intent, or situation to make the enrichment unjust"); *Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.*, 910 P.2d 839, 847 (D. Kan. 1996) ("circumstances as to make [retention] inequitable"); *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 195 (Minn. App. 2007) (same); *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1110 (N.Y. 2011) ("equity and good conscience" would not permit retention).

individualized inquiries inherent in a claim for unjust enrichment" based on the "individual circumstances of each class member"); *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 WL 139913, *9 (S.D. Fla. 2013) ("because of the fact-specific nature of the inquiry required, an unjust enrichment claim is almost always -and certainly here- not suitable for class action treatment"); *Carter v. PJS of Parma, Inc.*, 2016 WL 3387597, *3 (N.D. Ohio 2016) ("In the context of unjust enrichment claims, courts have noted that the resolution of such claims depends on individualized inquiries into the particular circumstances of each case to determine whether, without a remedy, inequity would result."). *See also* ECF #1006 at 5 (Hazeltine cannot prove retention of any benefit was unjust under his circumstances where he read the language directing him to purchase a different product for post-1974 equipment and his equipment was post-1974).

This reasoning carries even more force where, as here, purchase decisions may be based on a variety of factors. *See Ackerman v. Coca-Cola Co.*, 2013 WL 7044866, at *20 n.31 (E.D.N.Y. 2013) ("the New York plaintiffs' claim for unjust enrichment is unsuited to class certification" on this basis)[107]; *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 992 (C.D. Cal. 2015) (same, under California law). *See also Tropical Sails Corp. v. Yext, Inc.*, 2017 WL 1048086, *15 (S.D.N.Y. 2017) (denying certification of unjust enrichment classes because "[m]uch like reliance on the misrepresentation, the idiosyncratic personal choice of each [purchaser] … obfuscates any classwide resolution of whether [the alleged misrepresentation] induced any class member's purchase and, therefore, 'whether it is against equity and good conscience to permit' [defendant] to retain what is sought to be recovered"). It was similar individual issues – and in particular variation about what consumers cared or "did not care" about, or who knew what about the product – that led the Western District of Missouri to deny

[107] The parties in *Ackerman* settled before the district court could adopt the report and recommendation.

certification of an unjust enrichment class against a manufacturer based on an allegedly misleadingly label. *White*, 2018 WL 3748405, at *4-5. *See also Hudock*, 12 F.4th at 777 (Eighth Circuit reversing certification of unjust enrichment class where some "consumers cared less" about the alleged misrepresentation and "[q]uestions of which [product] features … motivated individual consumers to purchase" were individual); *Tropical Sails*, 2017 WL 1048086, at *15 (holding that plaintiff failed to meet burden to show individual questions would not "overwhelm the class because [it] has not identified that each class member's reasons for purchasing … are capable of common proof"). This Court should do likewise.

Indeed, this case is even less suited for certification than *White*. Here, the wide variation in whether a Plaintiff or class member ever experienced any operational impact – and, if so, the extent (ranging from inexpensive new seals to expensive new transmissions) – further underscores that individualized questions will predominate on Plaintiffs' unjust enrichment claims. *See Cormier v. Carrier Corp.*, 2019 WL 1398903, *5 (C.D. Cal. 2019) (denying unjust enrichment class because whether retention of benefit was unjust would turn in part on "whether that class member ever actually experienced any problems with his or her HVAC system").

ix. Arkansas Deceptive Trade Practices Act (ADTPA)

Reliance is a required element of an ADTPA claim. *See* Ark. Code Ann. § 4-88-113(f)(1)(A) (plaintiff must "suffer[] an actual financial loss as a result of his or her reliance on the use of a practice declared unlawful"). *See also Apex Oil Co. v. Jones Stephens Corp.*, 881 F.3d 658, 662 (8th Cir. 2018). According to Plaintiffs (at 54), this has been true only since August 1, 2017. This fact alone defeats certification of an ADTPA class. With the class stretching from 2013 to present, August 2017 was mid-class period and the reliance element is not retroactive. Thus, much of the class will need to prove individual reliance, dooming

predominance ***and*** the class is not even cohesive as to the elements.[108] Further, materiality is an element for the entire class, which is also individualized. *See* § IV.D.1.b.iii. *supra*.

x. New York General Business Laws (NYGBL §§ 349, 350)

Plaintiffs seek to certify a class for violations of NYGBL §§ 349, 350. To prevail under either, they must prove "a deceptive consumer-oriented act or practice which is misleading in a material respect" and "actual injury" as a result. *Marshall*, 334 F.R.D. at 51, 57; *Ackerman*, 2013 WL 7044866, at *2. To prevail under § 350, they must additionally prove justifiable reliance. *Ackerman*, 2013 WL 7044866, at *2, 19. *Accord Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 599 (1st Dep't 1998) ("individualized proof of reliance is essential to the cause[] of action for false advertising under [GBL] § 350"), *aff'd*, 94 N.Y.2d 43 (1999). Although § 349 does not require proof of individual reliance per se, "loss causation [under § 349] must be addressed individually." *Ackerman*, 2013 WL 7044866, at *2, 19. *See also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008) ("individual [purchasers] would have incurred different losses depending on what they would have opted to do, but for defendants' misrepresentations"), *abrogated in part on other grounds*, *Bridge v. Phoenix Bond & Indem. Co*, 553 U.S. 639 (2008); *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 310-11 (S.D.N.Y. 2004) ("assessment of specific causation often dissolves into a myriad of individualized causation inquiries"); Ex. 33, Lester Rpt. at 30-33 (discussing myriad factors entering into purchase decisions regarding Smitty's/CAM2 303 THF).

As discussed above, § IV.D.1.b., reliance, causation, and materiality all necessitate individualized inquiries. And Plaintiffs' plea for a presumption of reliance fails. With respect to § 350, reliance "will not be presumed where plaintiffs had a reasonable opportunity to discover

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[108] Because the ADTPA claim is not certifiable on these bases (and others), the Court need not reach whether the ADTPA's class action bar is enforceable in federal court.

the facts about the transaction beforehand by using ordinary intelligence ***or*** where a variety of factors could have influenced a class member's decision to purchase." *Ackerman*, 2013 WL 7044866, at *2 (quoting *Leider v. Ralfe*, 387 F. Supp. 2d 283, 297 (S.D.N.Y. 2005)) (emphasis added). For these reasons, courts rarely certify claims under the NYGBL "based on allegations of misleading product labeling." *Id.* at *20 (denying certification on § 349 and § 350 claims).

Ackerman is instructive. That case involved allegedly deceptive labeling of "vitaminwater," a product description that appeared "on the label of every vitaminwater product sold" during the class period. *Id.* at *10 & n.2. While the court found it was a common question whether this description misled a reasonable consumer, it nonetheless denied certification for §§ 349 and 350 claims because causation and/or reliance would be individualized, and thus "individual questions regarding loss causation would overwhelm" the common questions. *Id.* at *10, 18-20, n.2. Significantly, like Plaintiffs here with respect to "tractor hydraulic fluid," the plaintiffs there argued that "the name itself, vitaminwater" was misleading. *Id.* at *10 ("any putative class member in this case would have the same, central claim: that the name 'vitaminwater' was misleading and deceptive"). Again, while the court there found this sufficient to satisfy the less onerous commonality requirement, it could not carry plaintiffs over the finish line for purposes of the more exacting predominance requirement because consumers had read different portions of the label, including disclaimers, and purchased the product with different motivations. *Id.* at *20. *See also Marotto*, 415 F. Supp. 3d at 481-82 (denying certification of §§ 349, 350 labeling claims because whether each class member was "induced to make a purchase or injured as a result of having been induced to make the purchase, due to a" misrepresentation necessarily entailed an inquiry into what "motivated" the consumers to buy the product, which is an "individualized inquiry"); *id.* ("If the proposed class were certified, the

Court would need to engage in fact-finding as to the inner workings of … consumers' minds.").

The evidence of failure rate here is also fatal to certification. In *Marshall v. Hyundai Motor Am.*, despite an allegation that a vehicle's "brakes ***will*** progressively degrade and fail as a result of the defect," the actual manifested failure rate was under 10%. 334 F.R.D. at 56, 57, 59 (emphasis added). The court discounted the plaintiffs' theory supported by expert opinion – similar to that offered here – "that ***all*** class members experienced the … defect during the life cycle of their" equipment, as well as the assertion that injury need not be proven on an individual because "[a]t the point of sale, class members, in essence, did not receive the benefit of their bargain." *Id.* at 57, 58.[109] Instead, the court ruled that "issues of actual injury, causation, and reliance would completely swallow any common issues, including whether there was a common defect" in claims under §§ 349 and 350 because the actual failure rates, *i.e.*, the number of class members "requiring repairs," "render dubious Plaintiffs' theory that all class members experience the … defect." *Id.* at 57.

Applying *Marshall* here, it makes no sense to conclude that if all consumers were told what Plaintiffs suggest – that Smitty's/CAM2 303 THF would run their equipment, unobservable non-operational damage requiring a flush would result, and this "damage" may or may not manifest into an actual operational defect before they disposed of their equipment – no reasonable consumer would have purchased. They may still have purchased since, by definition, any alternative product was more expensive. Or they may still have purchased but only at a lower price. This is particularly so when these "operational defects" were in many instances limited to new hoses or seals, which Plaintiffs admit are normal wear and tear items. *See* Ex. 44

[109] *Marshall* also highlights that individual causation issues will predominate on the NYGBL claims. *See* 334 F.R.D. at 59-60 (noting that individual causation issues included "whether each owner abided by the recommended maintenance schedule" and the need to "rule out ***other***" causes of the alleged defect).

at 126-27 (Wurth); Ex. 56 at 191 (Bollin). This was precisely the kind of class claim rejected in *Haag v. Hyundai Motor Am.* in the face of expert opinions similar to those Plaintiffs offer here:

> [T]here is no basis for the Court to infer that a reasonable consumer – let alone an entire class of consumers – would have demanded a lower purchase … price if they were informed that they might have to perform in initial brake part replacement and maintenance … earlier than they otherwise have expected.

330 F.R.D. 127, 133 (W.D.N.Y. 2019). *Haag*'s reasoning applies with even more force here where Plaintiffs claim not just a price premium but that no one would have bought at any price.

Plaintiffs' class claims under § 349 fail for still another reason. Full refund (as opposed to price premium) claims are not cognizable under § 349. *Baron v. Pfizer, Inc.*, 840 N.Y.S.2d 445, 448 (3d Dep't 2007). New York courts have squarely rejected "that consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices, have suffered an injury under General Business Law § 349." *Id.* (quotations omitted).

xi. <u>Wisconsin Deceptive Trade Practices Act (WDTPA)</u>[110]

While the WDTPA does not expressly require reliance, courts consider reliance when determining causation. *Boulet v. Nat'l Presto Indus.*, 2012 WL 12996298, *9 (W.D. Wis. 2012). Plaintiffs' own cases state as much. *See K&S Tool & Die Corp.*, 732 N.W.2d 792, 802 (Wisc. 2007) (plaintiff must show material inducement to prove causation and "the reasonableness of a plaintiffs' reliance may be relevant in considering whether the representation materially induced the plaintiff's pecuniary loss"); *Novell*, 749 N.W.2d at 553. *See also* ECF #998.

Nor can Plaintiffs avoid the import of this individualized reliance inquiry based on a presumption of reliance. Courts will presume reliance under the WDTPA only in the rare circumstance "where there is no other logical explanation for the class members' behavior in

[110] Omission claims are not actionable under the WDTPA. Wis. Stat. § 100.18. *See also Tietsworth*, 677 N.W.2d at 245 (Wis. 2004) ("[s]ilence – an omission to speak – is insufficient to support a claim").

response to the representation." *Boulet*, 2012 WL 12996298 at *10. Here, Plaintiffs' own testimony provides a multitude of logical alternative explanations, such as assuming wrongly that they were purchasing the same product they'd previously purchased in a yellow bucket after a retailer switched brands or a financial inability or unwillingness to buy a more expensive premium product to put in an already-leaking machine. *See generally* SOF § II.C.

xii. California Consumer Acts (FAL, UCL, and CLRA)[111]

Plaintiffs seek a class on three California consumer protection act claims: (1) the Unfair Competition Law, (2) the False Advertising Law, and (3) the Consumer Legal Remedies Act.

The UCL requires reliance, but in certain circumstances permits a presumption of classwide reliance and thus allows relief "without individualized proof of deception, reliance and injury." *Ackerman*, 2013 WL 7044866, at *3, 13. The FAL requires materiality and is governed by the "reasonable consumer" test. *Id.* at *4. The CLRA affords a cause of action for conduct "likely to mislead a reasonable consumer," although courts evaluating class certification focus on its separate causation requirement. *Id.* (quotations omitted). Similar to the UCL, in appropriate cases causation under the CLRA may be established classwide by materiality. *Id.*[112]

As to all three, "in all but the most unusual case, plaintiffs must offer some means of proving materiality and reliance by a reasonable consumer on a classwide basis in order to certify a class." *Kosta*, 308 F.R.D. at 225. In *Kosta*, where the plaintiffs sought a class on all three claims, the plaintiffs – like Plaintiffs here – challenged not just a single label

[111] As noted above with respect to adequacy, only an individual "who seeks or acquires, by purchase or lease, any good or services for personal, family, or household purposes," may bring a CLRA claim. Cal. Civ. Code. § 1761(d). Accordingly, Plaintiff STG has no CLRA claim (and Kimmich owns no claims at all). *See* ECF ##805, 1002.

[112] Even where classwide reliance may be presumed, the named plaintiff in a UCL class action still "must demonstrate actual reliance." *Ackerman*, 2013 WL 7044866, at *13 (quoting *In re Tobacco II Cases*, 207 P.3d 20, 26 (Cal. 2009)). Here, Kimmich testified he did not rely on a number of Plaintiffs' alleged misrepresentations. *See, e.g.*, Ex. 55 at Dep. 313 (the reference to "303").

misrepresentation, but multiple representations. *See* 308 F.R.D. at 220 (describing "natural source" claims, "no artificial flavors or preservatives" claims, and "must be refrigerated" or "fresh" claims). The court denied certification in part because, "[w]hile materiality and reliance for purposes of UCL, FAL and CRLA claims can be subject to common proof on a classwide basis under some circumstances," the plaintiff bears the burden to offer "valid means by which such classwide proof would be made." *Id.* at 229-30. Significantly, the court denied that an expert declaration met this burden where it "consist[ed] of broad statements about why labels generally matter to consumers" and that the specific alleged misrepresentations "would be material to a reasonable consumer … because [they] would rely on them to identify products that have [a] particular … function." *Id.* at 230. This describes Alter's declaration to a tee. *See, e.g.*, Ex. 36 ¶ 24 (labels are material to consumers where "a product is … sold for a functional use").

Moreover, courts deny certification of California consumer protection claims for lack of predominance on materiality and/or causation, and refuse to allow a classwide inference, where:

- the plaintiff claims that a label representation was misleading but the representation was not subject to a "fixed meeting" (*Vizcara*, 339 F.R.D. at 547 (quoting *Jones*, 2014 WL 2702726, at *17 ("even if the challenged statements were facially uniform, consumers' understanding of those representations would not be" because there is "no fixed meaning for the word 'natural'"))); or
- "the misrepresentation or omission is not material to all class members," based, *e.g.*, on label variations (*Vizcara*, 339 F.R.D. at 548-49). *See also Pardini v. Unilever U.S., Inc.*, 2020 WL 6821071, at *4 (N.D. Cal. 2020).

Here, Plaintiffs assert more than a dozen alleged misrepresentations, which varied by label, and Plaintiffs' testimony varies as to which of those alleged misrepresentations were material to them, even on the same label. *See* SOF §§ II.B., II.C. Not only that, but there is ample evidence that "tractor hydraulic fluid" is not subject to a "fixed meaning" that would be uniform for all class members. *See, e.g.*, Ex. 85 at 11 ("makes your equipment go up and down. It lubricates your … transmission") (Hamm); Ex. 99 at 10 (THF just means "fluids that can be used in the

hydraulic system of a tractor") (Heise). *See also* § IV.D.1.a. *supra.* Accordingly, this is not a case where classwide reliance, materiality or causation could be presumed. *See Ackerman*, 2013 WL 7044866, at *10 (alleging "vitaminwater" was misleading, and denying certification of FAL, UCL, and CLRA claims discussed § IV.D.1.c.xii. *supra*). *See also Johannessohn*, 450 F. Supp. 3d at 985 ("Because the UCL [and] CLRA … all require actual reliance, individualized issues would also predominate as to claims governed by these laws.").

xiii. Kansas Consumer Protection Act (KCPA)[113]

Although Defendants agree with Plaintiffs that what a plaintiff must prove in terms of reliance for a KCPA claim is not perfectly settled, there is unquestionably a causation element that courts must analyze in deciding whether to certify. *See also* Pl. Mem. at 58 (noting that relevant factors include whether there were misleading statements "on which the consumer was ***likely to rely*** to the consumer's detriment") (citing Kan. Stat. Ann. §§ 50-627(b)(3), (5)-(7)) (emphasis added); *Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685, 692 (Kan. 1993) (emphasizing the causal connection required between defendants' conduct and plaintiffs' damages for plaintiff to be "aggrieved"); *Hernandez v. Pistotnik*, 472 P.3d 110, 117 (Kan. App. 2020) (noting that while reliance may not be an element, plaintiff "must show some adverse effect on her legal rights, and some causal connection between the deceptive act and her claimed injury"). In doing so, courts deny certification under the KCPA for affirmative misrepresentation claims where representations made to each class member varied and/or where the answer could differ as to whether all "relied on those representations in some way." *Delcavo v. Tour Res. Consultants, LLC*, 2022 WL 1062269, *9 (D. Kan. 2022). Here, the representations varied

[113] As noted above on adequacy, only a "consumer." *i.e.*, an "individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property for personal, family, household, business or agricultural purposes," may bring a KCPA claim. Kan. Stat. Ann. §§ 50-634, 50-624(b). Accordingly, Plaintiff WLC has no KCPA claim. As for Plaintiff Watermann, he does not own *any* claims. *See* ECF #1012.

among class member based on the label differences. *See* SOF § II.B. So did the question of reliance and/or causation. *See* § IV.D.1.b. *supra.* While the *Delcavo* court certified a KCPA omissions claim, that was because there was a clear omission on which all class members were claimed to have relied – namely, a failure to disclose that defendant could charge a cancellation fee. *Id.* Here, by contrast, Plaintiffs are unable to define the actual omission they claim any more precisely than: "do not buy!" Ex. 37, Alter Dep. 92. *See also* SOF § II.E.3.

xiv. Missouri Merchandising Practices Act (MMPA)[114]

Plaintiffs seek to certify a subclass for violations of the MMPA. Certification is improper because individual issues predominate as to causation, "ascertainable loss," and materiality. *See* §§ IV.D.1.a. & b. *supra.* In fact, the inquiry as to whether each class member would have an MMPA claim is even more muddied than a number of other counts, as some Plaintiffs admittedly used all of the THF which they purchased and thus received the benefit of their bargain. *See BPA*, 2011 WL 6740338, at *4 (holding that consumers who fully used product cannot assert MMPA, warranty, or unjust enrichment claims). Others read the disclaimer on the label and proceeded anyway. ECF #1006 at 5 (granting summary judgment on Hazeltine's MMPA claim, as he "knew roughly what he was getting every time he purchased" and thus "was not injured by" the alleged deception). Personalized inquiry would thus be required to determine if each plaintiff and class member suffered an ascertainable loss. Further, courts have denied certification of MMPA claims where, as here, the price paid for the product varied. *See, e.g.*, *Blades*, 400 F.3d at 572 (holding that prices paid could not be determined with common proof because product was sold at varying prices); *True v. Conagra Foods, Inc.*, 2011 WL 176037, *6 (W.D. Mo. 2011) (denying certification for lack of predominance in part because recovery

[114] As noted above with respect to adequacy, Graves cannot assert any MMPA claims. *See* § IV.C.3.b. *supra.*

"would depend (at least in part) on the purchase price," which "would likely vary among members" because, *e.g.*, "some members may have used a coupon"). Plaintiffs admit that different customers purchased at different prices. *E.g.*, *compare* **Ex. 172**, Lesko iRog Answer 3 ($15.99 and up) *with* **Ex. 173**, Beaver iRog Answer 3 ($30-$40).

Plaintiffs' emphasis (at 59) on *Plubell v. Merck & Co.*, 289 S.W.3d 707 (Mo. App. 2009) does not alter this analysis. *Plubell* was a class certification decision in state court, where the court applied a wholly different standard for deciding commonality and predominance. *See id.* at 712 (holding "the trial court has no authority to conduct even a preliminary inquiry" into whether the plaintiffs stated a cause of action). Thus, for instance, the court there declined to consider the defendant's argument that "benefit-of-the-bargain" damages could not be determined classwide. *Id.* at 715 ("[w]hether a plaintiff is able to prove a theory [of ascertainable loss] is irrelevant at the class certification stage"). This Missouri certification rule is "at odds with the Rule 23 inquiry, which is strict and often overlaps with the merits of plaintiffs' claims." *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, *5 n.7 (C.D. Cal. 2014) (distinguishing *Plubell* on the basis that the court did not address argument regarding price). In contrast to Missouri procedural law regarding class certification, a Rule 23 inquiry overlaps with the merits to the extent necessary to determine if the requisites for certification are met. *See* § III. *supra* (Standard).

Moreover, varying standards aside, *Plubell* does not stand for the proposition that an MMPA claim includes no individual issues. To the contrary, as the Eighth Circuit has noted, consideration of the individual facts of each case is critical to the causation analysis. *Faltermeier v. FCA US LLC*, 899 F.3d 617, 622 (8th Cir. 2018) ("While actual reliance on the defendant's misrepresentation by the buyer is not required, we agree with the district court that evidence of some factual connection between the misrepresentation and the purchase is required.").

xv. Kansas Product Liability Claim (KPLA) – Design Defect

A required element of a KPLA design defect claim is that a defect made the product "unreasonably dangerous." *Samarah v. Danek Med., Inc.*, 70 F. Supp. 2d 1196, 1202 (D. Kan. 1999). That clearly depends here on the equipment in which THF was used, as illustrated by the contrasting experiences of Bollin, who used it in an Oliver 1850 Tractor and never suffered any operational impacts after years, with Wells, who claims injury from use in his Komatsu Dozer that took out the transmission soon after use (if that could even be considered "unreasonably dangerous"). Ex. 56 at 328; Ex. 139 at 138-42. But, even if this element were common, Plaintiffs admit (at 63) that they also must prove that the product "reached plaintiff without substantial change" (citing PIK 128.18). This is a highly individualized inquiry. For example, discovery revealed instances of Plaintiffs storing buckets outside and using buckets that had been rained on. Ex. 48 at 90; Ex. 49 at 153-54. *See also* Ex. 107 at DeereManual 277 (recommending storing "containers on their side to avoid water and dirt accumulation"). Plaintiffs (at 78) not only fail to address how this could be common, and thus do not meet their burden, but do not cite a single case suggesting certification would be appropriate. (Citing *Baughn v. Eli Lilly & Co.*, 356 F. Supp. 2d 1177 (D. Kan. 2005) (not a class action); *Pollard v. Remington Arms Co.*, 320 F.R.D. 198 (W.D. Mo. 2017) (settlement only class with different predominance standard)).

xvi. Kansas Product Liability Claim – Failure to Warn

Plaintiffs must prove that Defendants did not warn of potential dangers of which they should have known. But what Defendants knew or should have known varies by class period. *See* § IV.D.1.b.iv. *supra*. To the extent that Plaintiffs claim Defendants should have warned of the "danger" of line wash, such a position is in conflict with Plaintiffs' own expert, who agrees this same "danger" applies to any THF that does not meet an OEM specification, regardless of the use of line wash. Ex. 17, Dahm Rpt. ¶ 82. *See also* Ex. 12 (Glenn describing use of line wash

as a "reasonable and responsible way[] to re-purpose the material"). In any event, this, too, is individualized, as whether the product purchased by individual Plaintiffs and class members contained line wash varied by batch. *See* SOF § II.A.7.

Aside from these individualized inquiries, the disclaimer on most (but not all) labels, which varied by content and placement, destroys commonality on a failure to warn claim. *See* SOF §§ II.B.1. & II.C. Defendants issued a warning; whether it was effective and how it was understood varies. *See, e.g.*, Ex. 39 at 260 (Q. If you had read that warning, would you have looked to purchase a different product? A. Probably not.) (Anderson); Ex. 48 at 165 ("[H]ad I read that it …was not suitable for a piece of equipment that I owned, then I wouldn't have bought it regardless of the price.") (Hargraves). *See also* Ex. 97 at Dep. 92 ("I did not read that as I figured it was redundant of warning me not to throw it all over myself or drink it.") (Vanderee).

Further, Plaintiffs do not cite and Defendants have not located, a single case certifying a KPLA failure to warn class. *See* Pl. Mem. at 64 (citing only non-class cases). Presumably this is because whether a duty to warn even applies depends on the "facts and circumstances" of the consumer, including highly individualized factors, such as that consumer's "training, experience, education and any special knowledge" Kan. Stat. Ann. § 60-3305. Regardless, Plaintiffs have not met their burden to show that common questions will predominate on this claim.

d. *Statute of Limitations Issues Preclude Predominance.*

Plaintiffs (at 109) claim, incredibly, that common questions include when limitations begin to run. But it is Plaintiffs themselves who raised the discovery rule and equitable tolling, which squarely implicate not only the date of purchase but also the date of discovery of a cause of action, the diligence of any investigation into the source of equipment issues, and a gaggle of other individual questions. *See* ECF #929 at 91, 98. *See also In re LIBOR-Based Fin. Instr.*

Antitrust Litig., 299 F. Supp. 3d 430, 572-73 (S.D.N.Y. 2018) (holding that individual questions predominated because "class members with untimely claims must rely on equitable tolling to save their claims, which presents an individual question of law and fact") (quoting *In re Comm'ty Bank of N. Va. & Gty. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 622 F.3d 275, 293 (3d Cir. 2010)). What's more, the Court accepted these arguments as to various Plaintiffs and claims, assuring that these individual questions will be a focus of trial. ECF #991.

Even putting these doctrines aside, ***accrual*** of some causes of action in some states depends not on the date of injury but on the date the injury was discovered. *See, e.g.*, *Foxfield Villa Assocs., LLC v. Robben*, 449 P.3d 1210, 1216 (Kan. App. 2019); ECF ##851, 852, 991. *See also Hardieplank*, 2018 WL 262826, at *15 ("The Court will also have to inquire regarding the statute of limitations, which entails when the siding was bought, when the problem arose, when the class member discovered or should have discovered the problem, and whether equitable tolling applies."); *BPA*, 2011 WL 6740338, at *7 (denying certification in part based on "the applicability of a statute of limitations defense to each class member's claim"); *Fero v. Excellus Health Plan, Inc.*, 502 F. Supp. 3d 724, 738 (W.D.N.Y. 2020) (finding lack of predominance because plaintiffs had "not proffered any methodology, reliable or otherwise, for determining how many class members' claims are time-barred"). Plaintiffs have even claimed in opposing summary judgment that there are "disputed fact issues on accrual as well as tolling." ECF #929 at 89. *See also id.* at 96 (arguing that the jury should decide whether and when Plaintiffs had knowledge of wrongful conduct).[115] This is especially convoluted and individualized because,

[115] Plaintiffs' summary judgment briefing also underscores the individualized nature of establishing date of injury for both their purchase and property damage claims. They argued that the claims of some may not be time barred because there was contradictory evidence regarding the date of purchase that a jury would have to resolve (*e.g.*, Bollin) and that the discovery of equipment issues may not constitute discovery of injury because the injury could be normal wear and tear (*e.g.*, Egner). *See* ECF #929 at 14, Resp. to SUMF ¶ 24. The Court's order further emphasizes these individual issues, pointing out, for example, the conflicting evidence as between Kimmich's class membership form and his testimony about when his claim accrued. *See* ECF #991 at 21.

per the Court's Order, this entails not only each Plaintiff showing when they purchased and when they discovered injury, but also a "burden of proving that the damages they experienced resulted from purchases made within the limitations period." ECF #991 at 32. In other words, whether Plaintiffs' property damage claims are time barred along with their purchase claims depends on individualized questions of specific causation on which they bear the burden.

Neither can Plaintiffs get around the individual issues that underlie the limitations inquiry by claiming that the duty to inquire can be ignored for accrual purposes because, supposedly, there is common evidence that consumers would not connect performance issues and Smitty's/CAM2 303 THF. Even putting aside that there is testimony from consumers who suspected the fluid was the issue but continued to use it anyway (*see, e.g.*, ECF #961 at 29), the question of actual knowledge, rather than the duty of inquiry, is an individual one. *See LIBOR*, 299 F. Supp. 3d at 572-73 ("inquiry notice is of course only one form of notice; actual notice is no less effective at starting the limitations clock. … [W]e accordingly conclude that statute of limitations also presents an individual question.") (internal citation omitted).

Plaintiffs (at 111) seek to avoid these undeniably individual issues by suggesting that the Court should certify now and narrow the class ***later***. Plaintiffs fundamentally misconstrue the certification standard. Punting this key issue does not erase the predominant individual questions. There is no time – now or later – when the Court will be able to draw a line in the sand and announce, without individual inquiry, which class members have valid claims (and if so, which of their claims are valid) and which do not. A class may not be certified unless all class members will be bound by any ruling, win or lose. *See Thorn v. Jefferson-Pilot Life Ins. Co*., 445 F.3d 311, 321 (4th Cir. 2006) ("the record must affirmatively reveal that resolution of the statute of limitations defense on its merits may be accomplished on a class-wide basis").

2. ***Plaintiffs Fail* Comcast.**

In *Comcast*, the Supreme Court held that certification is proper only if a plaintiff shows that damages can be measured "on a class-wide basis through use of a common methodology" and that the methodology "must measure only those damages attributable to" plaintiff's theory. 569 U.S. at 30, 38. *Accord Halvorson*, 718 F.3d at 778 (citing *Comcast*). Thus, to meet their burden, Plaintiffs must prove (1) they can reliably establish damages for all class members, but only class members, and (2) that they do so in a way that "fits" their liability theory.

Plaintiffs claim that their experts can measure benefit of the bargain damages, in the form of a full refund, and property damages, in the form of flushing costs. Their damages estimates for both measures fail *Comcast.* Plaintiffs perhaps recognize this, diverting focus (at 88) from *Comcast* to cases observing that individual damages issues "alone" generally do not defeat certification. But not one of those cases relieves Plaintiffs of the burden described by *Comcast*. Indeed, most address only the relevance of individualized issues in the ***allocation*** of – not the ***calculation*** of – aggregate classwide damages.[116]

a. *Damages Measure – Full Refund*

Plaintiffs' full-refund measure of damages cannot satisfy Rule 23(b) for the myriad reasons set forth in Defendants' motion to exclude the opinions of Dr. Babcock, ECF #973,

[116] Plaintiffs (at 89) wrongly state that proof of damages on a classwide basis is not a pre-requisite to certification. They cite *In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482, 489 (D. Minn. 2015), wherein the district court attempted to discount the Supreme Court's clear holding in *Comcast* to the contrary. The Eighth Circuit has never endorsed *In re Target*'s radical view. With respect to the Eighth Circuit cases Plaintiffs cite, none stand for the proposition that a proponent of certification need not prove damages classwide. Rather, they suggest only that a modicum of uncertainty in the precise amount of damages will not, standing alone, preclude recovery –as long as the damages estimate is reliable. *See, e.g.*, *Cunningham v. City of Overland*, 804 F.2d 1066, 1070 (8th Cir. 1986) (not a class case at all, much less about what constitutes proof of classwide damages by common proof); *WWP, Inc. v. Wounded Warriors Fam. Support, Inc.*, 628 F.3d 1032, 1043-44 (8th Cir. 2001) (same).

incorporated herein by reference.[117] Most problematically, this measure of damage is built on a singular assumption that is not merely unsupported – but actually contradicted by the evidence in this case, none of which Babcock considered: *i.e.*, that all class members received zero value in purchasing and using Smitty's/CAM2 303 THF in their applications. To the contrary, and consistent with the evidence on nearly every critical issue in this case, the evidence shows wide variability concerning the value class members received from using Smitty's/CAM2 303 THF.

Plaintiffs' election to pursue only full refund rather than price premium damages was presumably made to whitewash the variability amongst class members. But this choice does not obviate the individual issues inherent in calculating classwide damages, which Babcock's method does not account for.[118] *See* ECF #973. Further, even if Babcock's data were reliable and applied statewide rather than nationwide (and it is neither), his methodology still fails to account for purchasers who bought in multiple states. Consider, for instance, WLC, which purchased in Kansas and Colorado. Ex. 54 at Watermann Supp. iRog Answer 3. Any Kansas trial would take place separately from any Colorado trial. *See Lexecon*, 523 U.S. at 32-33. And WLC must seek all of his damages in Kansas or all of his damages in Colorado – he cannot split claims. *See Sparkman Learning Ctr. v. Ark. Dep't of Hum. Servs*., 775 F.3d 993, 1000 (8th Cir. 2014) ("All claims must be brought together, and cannot be parsed out to be heard by different courts."). *See also Mo. ex rel. Nixon v. Prudential Health Care Plan, Inc.*, 259 F.3d 949, 954 (8th Cir. 2001). Supposing WLC proceeds in the Colorado action, where Watermann lives, its Kansas purchases will ***not*** be included in Babcock's Colorado refund damages estimate and WLC can never collect

[117] If Defendants' motion to exclude Babcock's opinions were granted on any ground, that alone would defeat certification. *See, e.g.*, *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95, 115, 128 (E.D.N.Y. 2019) (denying certification because plaintiffs could not show damages could be proven classwide after exert report was stricken).

[118] Plaintiffs (at 79) seek to distinguish this case from cases that have pursued a price premium, claiming in those cases the alleged misrepresentations merely "enhanced" or "detracted" "from a product that otherwise fulfills its basic function." As to the multitude of class members who claim no operational impact, this is no distinction at all.

them. Conversely, the Kansas refund damages will overstate classwide damages because there will be no Plaintiff or class member who can collect WLC's Kansas purchases in the Kansas action. If this were a genuine outlier, the result may be different. But it is not. *See* § IV.D.3.d.

Plaintiffs' deficiencies are even more egregious as to their proposed subclasses in Kansas, Missouri, and California. Plaintiffs and Babcock do not even attempt to estimate subclass damages, nor propose any way they could. Thus, the subclasses cannot be certified. *See Duchard*, 265 F.R.D. at 443 (subclass is subject to all the same certification requirements).

b. *Damages Measure – Equipment Flush*

Plaintiffs' flush cost estimates are built on unreliable data, then stack unsupported and untestable inferences on that data, to arrive at precisely the type of "representative or statistical sample" evidence that the Supreme Court admonished as improper under Rule 23 in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016). *See* ECF #973 at 19-20.

Moreover, even if Babcock were justified in using the average number of tractors of each class member, the number of tractors a class member owns doesn't always equal the number a class member needs flushed due to the use of Smitty's/CAM2 303 THF for at least three reasons.

- ***First***, Plaintiffs' own expert has admitted that some equipment owners may have already flushed their equipment, or need to flush their equipment, for other reasons entirely.
- ***Second***, despite listing equipment in the claim forms that Babcock used to calculate the average number, Plaintiffs are frequently unsure that all such equipment even used Smitty's/CAM2 303 THF. *See, e.g.*, Ex. 39 at 169-170 (Anderson does not know if the 2008 Case 335 he listed took Smitty's/CAM2 303 THF); Ex. 43 at 75-77, 81-82, 85 (Harrison is not certain what equipment he used various brands of 303 THF in).
- ***Third***, as discussed more fully in Defendants' motion to exclude, ECF #973 at 22-24, many consumers already sold their equipment and cannot perform a flush or benefit from one (*e.g.*, Ex. 48 at 134-35 (Hargraves)).

Yet, Babcock did nothing to exclude any of these pieces of equipment from his calculations.

Plaintiffs (at 111) seek to shrug all this off, suggesting at most it implicates who may

ultimately be entitled to those funds, an issue that supposedly can be easily addressed during the claims process. In actuality, and again as argued in Defendants' motion to exclude, ECF #973 at 16-24, these issues are fatal to the ability to estimate any flush damages classwide. Critically, this is not a question of allocation, but of actual ***aggregate*** damages. *See Mazur v. eBay Inc.*, 257 F.R.D. 563, 572 (N.D. Cal. 2009). *See also* § IV.c.2.c. *supra* (discussing order of operations in determining aggregate classwide damages).[119]

3. ***Plaintiffs Have Not Proven Superiority of a Multitude of Single-State Class Actions, as Required by Rule 23(b)(3).***

In determining whether a class action would be superior to other available methods for the fair and efficient adjudication of the controversy, as required by Rule 23(b)(3), factors for the Court to consider include the "(a) interest of class members in individually controlling prosecution of separate actions; (b) extent and nature of litigation already commenced; (c) desirability of concentrating the litigation in the particular of forum; and (d) difficulties likely to be encountered in management of a class action." Fed. R. Civ. P. 23(b)(3)(A)-(D).

a. *Class Members Have Interests in Individually Controlling Prosecution.*

Courts considering this factor typically focus on whether the claims at issue, if brought individually, would constitute negative value cases. *Accord* Pl. Mem. at 95 ("[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for *any* individual to bring a solo action prosecuting his or her rights")

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[119] Plaintiffs' failure to account for offsets in flush costs is an independent flaw precluding certification. Some purchasers, like Dow, already recovered flush costs in other settlements. Ex. 80 (Citgo settlement spreaadsheet) at Row 17, Columns G, S, EH (demarcations added; for ease of reference, Defendants have added circles to direct the Court to the relevant cells). The Eighth Circuit requires this be taken into account. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 339 F.3d 1001, 1012 (8th Cir. 2003) (affirming denial of certification where damages award would have to be setoff based on factors specific to each plaintiff's claim). Yet, Plaintiffs have not done so. And their claim (at 105) that this is simply an allocation issue is misplaced. Had they tried to calculate the ***total*** of all offsets by which to reduce aggregate classwide recovery, then sorting out who gets what at the end would concern allocation. Plaintiffs did nothing of the sort – making this a deficiency as to aggregate classwide damages.

(quoting *Amchem*, 521 U.S. at 617) (emphasis added). This is problematic for Plaintiffs, as these are not negative value cases for many. Asfeld seeks over $100,000 in property damages alone, not to mention a full refund and punitive damages. Ex. 62 at Pltf-CR 7300-15. Creger also seeks over $100,000 in property damages alone. Ex. 66 at Pltf-CR 7116-45. *See also* Ex. 77, Lillo Rpt. ¶ 276 (referring to settlement claimant asserting repair damages of $122,400). Quiroga claims almost $250,000 in property damages alone (although he has recovered over $50,000 from the Citgo settlement and tens of thousands from the Warren settlement, as he used their 303 THF products, too). Ex. 157 at DM_CAM2 117, 125.[120] The class would also include consumers who claim to have purchased over 2,000 buckets during the class period, meaning refund damages *alone* would be over $40,000. *See* Ex. 145 at Pltf-CR 5600 (Guthmiller). Further, with Plaintiffs engaged in claim splitting (*see* § IV.C.3. *supra*), it is all the more critical for individuals to control their own cases before certification forfeits other potentially high-dollar damage claims.

Even if the actual damages claimed were not so sizeable here, courts are dubious that superiority exists where claims call for punitive damages, high statutory damages, or attorneys' fees, since those claims would allow someone to litigate potentially for free or to recover much more than the actual damages suffered. *See Jones v. CBE Grp., Inc*., 215 F.R.D. 558, 570 (D. Minn. 2003) (denying certification, finding class action was not superior because statutory claims provided for actual damages, statutory damages of $1000, and attorneys' fees, meaning there would be "no lack of incentive for either plaintiffs or counsel to pursue individual" actions); *Gardner v. Equifax Info. Servs., LLC*, 2007 WL 2261688, *6 (D. Minn. 2007) ("The attorney's fees provision, allowing harmed individuals to pursue meritorious claims without

[120] Quiroga, remarkably, has collected almost $150,000 from the Citgo, Warren, and Retailer Settlements on just four pieces of equipment (three 1980s and 1990s tractors and a backhoe), on which he has performed repairs of barely over $5,000. He amassed his gargantuan claim in part by asserting that he used Defendants' 303 THF "as a drip oil for the pump turbulent on my irrigation well," and now needs $88,000 to buy a new well. Ex. 157.

incurring financial detriment, weighs against a finding of class action superiority over other litigation mechanisms."). Here, Plaintiffs pursue statutory claims providing for attorneys' fees in six of the eight states (AR, CA, KS, MO, NY, WI), and seek punitive damages in all eight states. *See also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (reversing certification decision, pointing to availability of punitive damages in most states and attorneys' fees under many consumer protection statutes).

b. *The Extent of Litigation Already Begun Weighs Against Superiority.*

More than 170 plaintiffs have individually brought suit at some point against Defendants. If a class is not certified, this litigation – already commenced – may continue individually as to any Plaintiff who so desires, subject to their individualized proof and Defendants' individualized defenses (though already 51 Plaintiffs have voluntarily dismissed their claims, and even more have failed to respond to attempts by Plaintiffs' counsel to contact them). *See* ECF #826.

c. *Certification Would Not Concentrate the Litigation in a Single Forum.*

Plaintiffs are not seeking to certify one class, with a trial to occur in one forum. They seek initially eight, and ultimately 41, dispersed classes and trials. Plaintiffs agree this is certain. *See* ECF #465 at 75 (Plaintiffs' counsel: "these are still individual states that are going to at some point go back to those individual courts if they're going to be tried"). Thus, Plaintiffs' claim (at 95) that without a class action, "numerous courts would be bogged down adjudicating the same factual and legal issues, and the same evidence would need to be repeated over and over" is not an argument in favor of certification – it is simply a prophecy. "Numerous courts" will be "bogged down adjudicating" the same issues whether or not this Court certifies a class. This negates the efficiencies to be gained through certification, and weighs heavily against

certification.[121]

d. *Class Resolution of the Underlying Cases Would Be Unmanageable.*

Manageability "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974). The "practical problems" here abound.

***First*,** Plaintiffs' proposed aggregation of consumers, claims, and labels means that a jury will be overwhelmed with competing evidence rather than a streamlined trial. This is compounded by the inclusion of two separate defendants, as to whom liability for damages would neither be identical nor joint and several. *See* SOF §§ II.A.1. & 2. And in Kansas, Kentucky, and Minnesota, some Plaintiffs have claims against Smitty's only, whereas others have claims against Smitty's and CAM2 – begging the question which defendant(s) the class members would have claims against and how the answer could be managed. *See* ECF #985 (granting CAM2 summary judgment against certain Plaintiffs). Not all Plaintiffs have the same causes of action, as many have been dismissed as to some (but not all) Plaintiffs. *See, e.g.*, ECF ##996, 998, 1006, 1011. As between (1) the several labels; (2) the litany of alleged misrepresentations; (3) the numerous (but not always identical) claims; (4) the two different (not always identical) defendants; (5) the varying statute of limitations; and (6) the corresponding issues raised by discovery and tolling, the jury instructions would be a quagmire and too complicated to follow. *See Chin v. Chrysler Corp.*, 182 F.R.D. 448, 458-61 (D.N.J. 1998) (denying the certification in part because plaintiffs had not "explained how their multiple causes of action could be presented to a jury for resolution" in a fair way "while not overwhelming

[121] It is impossible to predict how many trials there would be if certification is denied. Consumers in each state may permissively join claims against Defendants (as they have already done). And joinder may be practicable because non-Plaintiffs may be unlikely to join where so many were satisfied customers. *See, e.g.*, Ex. 88, Finley Decl. ¶ 10.

jurors with hundreds of interrogatories and a verdict form as large as an almanac").

Second**,** a class action would not be manageable as to Wisconsin and New York because, in those states, there is no underlying case to remand to those states for trial. *See Dollar Gen.*, 2019 WL 1418292, at *3 n.5. (There are also no proposed class counsel licensed in those states.)

Third**,** a class action is not manageable as to Missouri because the class will inevitably include significant numbers of class members who already released their property damage claims against Smitty's. *See* ECF #1008 (granting partial summary judgment and noting causation issues that jury will have to consider regarding whether Missouri SuperTrac purchases caused damage). This problem extends into neighboring states. For purposes of the eight focus states, this means Kansas, Arkansas, and Kentucky – due to frequent, documented interstate purchases.

Fourth**,** the record is replete with examples of consumers who purchased Smitty's/CAM2 303 THF in multiple states. Of just the eight-state Plaintiffs, these include WLC (KS/CO), Graves (MO/OK), Nash (MO/OK), Creger (MN/ND), K&J Trucking (MN/ IA), Tracy Sullivan (KY/IL), and more. *See* SOF § II.C.[122] Plaintiffs define the classes by state of purchase such that, for instance, a person who purchased one unit of a Smitty's/CAM2 303 THF product "in Arkansas" and 20 units of Smitty's/CAM2 303 THF product "in Texas," and used all of the THF in three pieces of equipment in Texas, is still a member of the Arkansas class (in addition to the Texas class). This creates manageability problems galore.

Multiple states' laws may be at play even in a single-state class. In the Arkansas / Texas example, the class member is pursuing the same property damage (flush cost) claims on the same equipment from both his Arkansas and Texas purchases. Per the Court's rulings, the law of the state of purchase controls, meaning his flush damage claims would be governed by ***both***

[122] Others, like Mabie, Nash, and Miller, purchased THF in one state, but used it in equipment in a different state.

Arkansas and Texas law. *See* ECF #451 at 7-12 (the law of the state of purchase controls). Either an Arkansas jury would need to decide whether the one bucket purchased in Arkansas alone caused his problems (even though it probably was not enough to have used in all three pieces of equipment) or, more likely, Texas law would apply to his property damage claims. This creates a manageability (and predominance) problem at the outset because sorting this out will require mini-trials. *See also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (where choice of law would vary between class members, individual inquiry is required).

If, on the one hand, a jury in a single state were instructed on the laws of all the states the class members purchased in (if that could even be determined), the instructions would be complex and unruly.[123] *See Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 625-626 (D. Kan. 2008) ("federal court[s] cannot give a 'a kind of Esperanto instruction' merging the requirements" of different state laws into one instruction) (quoting *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995)). *See also Jarrett*, 8 F. Supp. 3d at 1088 (finding that applying the law of multiple states "would render this action unmanageable"); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 277 (D.D.C. 1990) ("[W]hen the myriad of factual permutations are piled upon layers of legal standards and choice of law dilemmas, this litigation appears to take on epic proportions.").

If, on the other hand, a Kansas court, for instance, instructed only on Kansas law, the problem is far from resolved. For those purchasers who are members of other state classes, a different court would then have to consider issue and claim preclusion in subsequent actions. *See Blair v. Equifax Check Servs.*, 181 F.3d 832, 838 (7th Cir. 1999) (regarding class actions, "[w]hen the cases proceed in parallel, the first to reach judgment controls the other, through

[123] For instance, Plaintiffs have at one time or another alleged Kansas Plaintiffs or class members purchased not only in Kansas but in Colorado (WLC), Missouri (Vilela), and Oklahoma (Wells).

claim preclusion (res judicata)"); *Bustillos v. Bd. of Cnty. Comm'rs of Hidalgo Cnty*., 310 F.R.D. 631, 656-57 (D.N.M. 2015) ("Subsequent proposed classes should either be defined to avoid class member-overlap with previously certified classes or else should assert different claims."); *cf. Threet v. Dassault Falcon Jet Corp.*, 2019 WL 1422725, *3 (E.D. Ark. 2019) (denying class certification to avoid the possibility of "inconsistent fact-finding between classes in two separate lawsuits for the overlapping members"); *MacLean v. Wipro Ltd.*, 2020 WL 7090746, *6 (D.N.J. 2020) (applying the first-filed rule in the class action context to "avoid duplicative, competing class actions, which could produce inconsistent judgments and burden the judiciary").[124]

Each of these issues alone makes manageability dubious; together, they are insurmountable.

E. **Plaintiffs' Request to Individually Proceed With Property Damage Repair Costs is Improper, and They Have Not Met Their Burden as to an Issue-Only Class.**

Plaintiffs argue (at 88) that the fact that they "have not put forth aggregate repair costs" does not defeat certification. They propose bifurcation, or subclasses, or decertification after a liability trial. This is effectively an admission that individual issues predominate. There is no mechanism to decertify while keeping a liability ruling intact across the class, or otherwise pursue these claims individually.[125]

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[124] For instance, if Defendants prevail in Kansas first, but then lose in Colorado, can someone who belongs to both classes (*e.g.*, WLC) claim that only what it purchased in Kansas is subject to res judicata or collateral estoppel on causation, and that the THF it bought in Colorado actually caused ***all*** his property damage and should be subject to the more favorable judgment? Indeed, a similar question already exists as to Hargraves. He reports having bought some THF in Mississippi, as to which claims have already been dismissed in their entirety. Ex. 48 at 50.

[125] Plaintiffs (at 88) cite *Barfield v. Sho-Me Power Elec. Corp.*, 2013 WL 3872181, at *15 (W.D. Mo. 2013) for the proposition that damages can be addressed through "[s]eparate mini-trials, a special master … or a magistrate" at a later date. They fail to mention that the plaintiffs there "set forth a process for managing" those inquiries, right down to the claim form and documentation that would be required, and even accounting for when multiple owners had an interest in the same property. *Id.* Plaintiffs do nothing remotely similar to meet their burden. Plaintiffs' other cases are equally unhelpful to them and entirely distinguishable. For instance, *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70 (2d Cir. 2015) did not involve individual property damage. The plaintiffs there sought damages set by statute and under a "generally applicable formula" set by Congress; both were distinctly common. *Id.* at 87. The third type of damages to which Plaintiffs refer were incidental damages as to which the "evidence necessary to make out such damages claims" were "easily accessible" and within ***defendant's*** knowledge. *Id.* at 88.

To the extent Plaintiffs (at 96) instead urge the Court to certify an issue-only class under Rule 23(c)(4) as to liability, this too fails. At the outset, Plaintiffs do not even set forth the standards for an issue-only class, much less meet their burden to explain how they have met those standards after a "rigorous analysis." That is because they cannot meet those standards. *See St. Jude*, 522 F.3d at 841 ("Even courts that have approved 'issue certification' have declined to certify such classes where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation.") (internal citations and parentheticals omitted); *Henke* 2014 WL 982777, at *14 (rejecting request to resolve liability classwide and leave only damages to individual hearings, and denying issue-only class, where causation would be individual and would predominate); *Marshall*, 334 F.R.D. at 61 (rejecting issue-only class on liability in common defect case because plaintiffs had not met their burden to show "how this would 'materially advance' the litigation, since individual issues of injury, reliance, and causation, and other issues of damages would remain to be adjudicated in hundreds or even thousands of cases").

V. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny class certification as to all causes of actions in all eight states.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served on all counsel of record via the Court's e-filing system on this 4th day of August, 2023.

/s/ Sharon B. Rosenberg