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' SUR-REPLY SUGGESTIONS
IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs' Reply (ECF 1085) undermines, rather than supports, class certification. Plaintiffs concede that they have not offered a proper measure of damages for their unjust enrichment claim. *See infra* § III. Additionally, they now acknowledge that memory problems plague ascertainability, asserting that it is not just Plaintiffs but absent class members who cannot be sure what product they bought. *See infra* § X. And, time and again, Plaintiffs argue that the Eighth Circuit, the Western District of Missouri and countless other courts "got it wrong" in finding individualized causation questions defeated certification. This effort to disapprove, rather than distinguish, controlling and persuasive authority is a tacit admission that the overwhelming weight of case law compels denial of certification here. *See infra* §§ I & IV.A.

The impropriety of certification here is apparent not just from what Plaintiffs admit, but also what they ignore. Plaintiffs disregard the Eighth Circuit's admonition that individualized rebuttal evidence dooms certification (*Johannessohn*) as well as the holding of the U.S. Supreme Court that blind acceptance of a presumption to meet a plaintiff's burden without consideration of rebuttal runs contrary to Rule 23(b)(3)'s predominance requirement (*Halliburton*). *See infra* §§ I & IV.C. They similarly imagine that cases certifying unjust enrichment claims in the context of uniform government or employer policies support certification in the altogether different consumer context, when the Eighth Circuit (*Hudock*) holds otherwise. *See infra* § III. Plaintiffs also misstate the significance of this Court's summary judgment rulings, which do not merely weigh against certification, but confirm its impropriety. *See infra* § II.

Finally, Plaintiffs retreat from their position that it was Defendants' representation of their product as "tractor hydraulic fluid" (THF) and the scientific definition of "tractor hydraulic fluid" that constituted the fraud here. Instead, they spend pages on a non-legal and non-scientific argument about "waste" in a bucket. But their characterization does not distinguish this case from other label

cases in which this sort of sweeping argument about "waste" could not carry the day for certification. *See infra* § V.

BACKGROUND

Evidence underpins a predominance inquiry. It is thus worth briefly reflecting on Plaintiffs' argument (under the guise of a statement of facts) about the record here. They purport (at 17) to offer "a summary of the ***truly relevant evidence*** regarding each Plaintiff's purchases and use of Defendants' 303 THF" (emphasis added). In doing so, they cite numerous instances of individualized evidence. To name just a few examples, they agree it is "truly relevant" that:

- some consumers relied on allegedly misleading parts of the label that are not common (e.g., at 18 (Anderson) ("excellent results"); at 25-26 & 101 (Kimmich) ("multiservice"));
- some consumers did not notice the disclaimer language (e.g., at 19 (Anderson)), unlike others who did (e.g., Wendt, Hazeltine);
- some consumers sent others to buy the product for them (e.g., at 22 (Hargraves));
- some consumers are "not sure if Defendants' 303 THF was used in" certain equipment (e.g., at 25 (Harrison)), creating uncertainty about which equipment they seek flushes on;
- some consumers had conversations with retailer employees about the product (e.g., at 21-22 (Hargraves)), while others, such as Boyd, did not (**Ex. A,** Boyd Dep. at 131);
- some consumers believed the product "was a premium oil" (e.g., at 44 (Nash)), as opposed to others, such as Zornes, who believed the product was an "economical" product for economical tractors (ECF 1017-60, Zornes Dep. at 131-32);
- and some consumers "drained the fluid in each [piece of equipment] after purchasing and replaced it with/exclusively used Defendants 303 THF" (e.g., 46 (Dean)), whereas others, like Bollin, have never drained fluid from some of their equipment and used multiple THF products (**Ex. B**, Bollin Dep. at 95, 156, 171-72, 186-87).

These "truly relevant" facts exemplify the individual issues that will predominate at trial. And Plaintiffs' repeated references to Plaintiffs' sham affidavits do not deny these and other individualized facts. *See generally* Reply at 18-50 (referring to Ex. 47 for each).

Plaintiffs also continue to mischaracterize the record and Defendants' accurate descriptions of it. For instance, they dispute (at 33) that Egner said the labels were not misleading. But Defendants never said he did. Rather, Defendants asserted that Egner testified that the ***front***

label – i.e., where it stated "tractor hydraulic fluid" and "303" – was not misleading. And that is precisely what he said. *See* ECF 1017-46 at 240:8-13 (Q. Is there anything on the front label of Exhibit 20 that you contend is false or misleading? … A. Not that I see.). Every representation that Egner testified he believed was misleading was on the back label.[1]

STANDARD

Plaintiffs (at 73) pretend the "rigorous analysis" required under Rule 23 is all bark and no bite. They argue that the "factual setting" of cases robustly applying this standard, such as *Dukes*, "were much different than this one." The factual setting is distinct from the standard. For instance, the "factual setting" of the cases Plaintiffs cite, *Amgen* and *Tyson*, were much different too – neither was a product case. Recent Supreme Court cases all set forth the same standard, which, among other things, directs that:

- "Frequently [the] 'rigorous analysis' will entail some overlap with the merits ...." *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).
- "By refusing to entertain arguments ... simply because [they] would also be pertinent to the merits determination, [a court] [runs] afoul of our precedents requiring exactly that inquiry." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).

Further, Plaintiffs' entire Reply misses the critical point that this inquiry does not just look at Plaintiffs' evidence. The Eighth Circuit expressly recognizes that the inquiry must also look to Defendants' evidence. "[C]ases are not tried on the evidence of one party." *Johannessohn v. Polaris Indus.*, 9 F.4th 981, 985-86 (8th Cir. 2021) ("rebuttal evidence … challenging how much each consumer-plaintiff relied on the alleged omissions" defeated certification). Under this standard, no class may be certified here.

Plaintiffs similarly get wrong the Court's responsibility to evaluate expert opinions.

[1] Plaintiffs also strangely insist (at 43) that it is wrong to say Hazeltine "***believed*** CAM2 303 was causing leaks in his equipment but still continued to use it" but only that he "'***kind of believed***' it was due to the CAM2 303" and continued to buy it (emphasis added). This is just the sort of individualized evidence the jury can parse out.

Defendants' arguments do not depend on their own experts to explain why Plaintiffs' experts have not established that common issues predominate. Rather, unlike Plaintiffs but consistent with Rule 23's standard, Defendants' arguments focus on the record evidence – namely, Plaintiffs' and class members' own experiences and deposition testimony. Plaintiffs thus misperceive what it means to say that class certification is not a battle of the experts. It does not mean that there is no room for a court to evaluate whether expert reports are supported by the record evidence and/or still allow individualized evidence to take center stage at trial. To the contrary, the Eighth Circuit has seized on exactly this sort of careful evaluation as a reason to deny certification. *See Blades v. Monsanto Co.*, 400 F.3d 562, 570, 574 (8th Cir. 2005) (affirming district court's denial of certification, which attached appropriate "weight" to expert testimony and found plaintiffs' expert report not "persuasive"). As the Eighth Circuit explained:

> We have stated that in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case. This extends to the ***resolution of expert disputes concerning the import of evidence concerning the factual setting*** … .

Id. at 575 (emphasis added). *Accord IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 783 (8th Cir. 2016) (reversing order granting class certification).[2]

Once again, *Johannessohn* is instructive. The court there rejected the plaintiffs' "request … for the expert-driven overcharge theory to supplant required showings of causation, injury *and* damages." 450 F. Supp. 3d 931, 985 (D. Minn. 2020). Instead, it held that where the defendant was

[2] *See also Bennett v. NuCor Corp.*, 656 F.3d 802, 815 (8th Cir. 2011) (affirming denial of certification because plaintiffs' expert assumed commonality that was contrary to the record evidence); *Best Pallets, Inc. v. Bramble Indus.*, 2009 WL 10672543, at *13 (W.D. Ark. 2009) (denying certification and evaluating expert assumptions); *Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217, 229-30 (N.D. Cal. 2015) (denying certification, finding there was no valid means to show classwide proof of materiality and reliance where expert's broad statements were unsupported by the record evidence); *Jones v. ConAgra Foods*, 2014 WL 2702726, at *17-18 (N.D. Cal. 2014) (denying certification where marketing expert opined label statement was material but opinions included no consumer survey); *Saavedra v. Eli Lily Co.*, 2014 WL 7338930, at *5 (C.D. Cal. 2014) (denying certification where court found opinions of expert flawed because he did not "tether[]" his analysis to the real world market).

"prepared to present evidence to dispute the causal nexus between [its] actions and the alleged injury the class members suffered" under the consumer protection statutes of Missouri, Minnesota, California, and New York, its "rebuttal opportunity requires plaintiff-by-plaintiff determinations of causation," notwithstanding the opinions of the plaintiffs' experts on commonality. *Id.*

So too, here. Even if the Court credited Plaintiffs' experts with establishing common evidence – notwithstanding individualized record evidence refuting the assumptions on which those opinions were based – Plaintiffs' "expert driven" theories cannot suspend Defendants' "plaintiff-by-plaintiff" "rebuttal opportunity," which will cause individualized issues to predominate.[3]

ARGUMENT

I. Plaintiffs Cannot Escape Eighth Circuit Authority, Which Precludes Certification.

Plaintiffs' Reply launches an assault on the Eighth Circuit. In arguing that the failure of a number of consumers to read the label does not defeat certification, Plaintiffs (at 82) seek to limit *St. Jude* to the medical doctor /patient context. The Eighth Circuit says otherwise. *See, e.g.*, *Hudock v. LG Elecs. USA, Inc*., 12 F.4th 773 (8th Cir. 2021) (regarding purchase of televisions, describing "individualized evidence that some consumers did not see, or did not rely on, the alleged misrepresentation"). Plaintiffs also seek to discount and downplay *Hudock* and other on-point Eighth Circuit authority, like *Johannessohn*, relying instead on *Custom Hair Designs by Sandy v. Cent. Payment Co., LLC*, 984 F.3d 595, 603-04 (8th Cir. 2020). But *Custom Hair* pre-dates those cases. And, unlike *Hudock* and *Johannessohn*, it was not even a consumer product case. *Compare Custom Hair* (affirming certification on RICO and Nebraska fraudulent concealment claims based on failure

[3] Although there is no battle of the experts, Plaintiffs' astonishing argument (at 62) regarding Lillo's inspections being too "perfunctory" is rich. His inspections did not break down tractors because Defendants had no license to perform destructive inspections. Plaintiffs, on the other hand, own the equipment (or at least used to) and nothing hindered Dahm from conducting any inspection he thought appropriate. Yet, Dahm did not even lay eyes on a single piece of equipment.

of defendant to get bank pre-authorization to charge credit card transaction price) *with Hudock* (reversing certification on Minnesota and New Jersey unjust enrichment and consumer protection act claims over alleged misrepresentations about television refresh rates) *& Johannessohn* (affirming denial of certification on Minnesota, California, New York, Missouri and other consumer protection act claims over alleged misrepresentations regarding ATV exhaust heat defect). [4]

Plaintiffs meekly offer (at 116) that reliance does not "***always*** defeat[] certification in the Eighth Circuit" (emphasis added). But they do not – and cannot – deny the Eighth Circuit's admonition that such cases are ***rarely*** suitable for class treatment "because proof often varies among individuals concerning what representations were received, and the degree to which particular persons relied on the representations." *Hudock*, 12 F.4th at 776. The Eighth Circuit, and district courts within, have thus denied certification of common-law fraud claims and claims under consumer protection acts requiring reliance again and again. Plaintiffs want to deny this authority. For instance, they assert (at 117) that the ruling in *Johannessohn* "does not affect consumer act claims" for California, among other states. But *Johannessohn* expressly considered, and rejected, that reliance could be proven classwide on California consumer protection act claims. *See* 450 F. Supp. 3d at 985, *aff'd* 9 F.4th 981 (8th Cir. 2021) ("Here, too, individualized issues as to injury and causation or reliance would predominate in the proposed California … classes. … Because the UCL [and] CLRA … require actual reliance, individualized issues would also predominate as to claims governed by these laws."). As much as Plaintiffs try to escape it, Eighth Circuit authority patently requires denial of certification.

[4] Plaintiffs' rejection of Eighth Circuit authority goes farther. *See, e.g.*, Reply at 105 (asserting that the Eighth Circuit's *Faltermeier* opinion "is contrary to Missouri law"). And they do not stop at delegitimizing contrary Eighth Circuit authority. Their tactic extends to the Western District of Missouri as well. *See* Reply at 79 n. 43 (asserting *In re BPA* was wrong about almost everything); *id.* at 79 (arguing that *Bratton v. Hershey Co.*, 2018 WL 934899 (W.D. Mo. 2018) and *White v. Just Born, Inc.*, 2018 WL 3748405 (W.D. Mo. 2018) get Missouri law wrong because the MMPA has no reliance element, even though those cases were about the ascertainable loss element, not reliance).

II. The Court's Summary Judgment Rulings Foreclose Class Certification.

Plaintiffs (at 9, 74) argue that this Court's ruling on the inconspicuousness of the label disclaimer, which was a ruling only as to Missouri law as it relates to Hazeltine's implied warranty claims, supports certification. At the same time (at 74, 119), they deny that the rulings on Hazeltine and Wendt's unjust enrichment, consumer protection act, fraud, negligent misrepresentation, and express warranty claims have any import at all. They are wrong on both counts.

As set forth more fully in opposing Wendt and Hazeltine's Motion for Reconsideration (ECF 1090), the Eighth Circuit has confirmed that where a consumer reads a disclaimer cautioning that the product is not intended to be used as the consumer uses it, this defeats both the ascertainable loss element of an MMPA claim as well as a required element of unjust enrichment. *See Vitello v. Natrol, LLC*, 50 F.4th 689, 693 (8th Cir. 2022) (holding that these claims failed because plaintiff was aware that the product "was not intended" for the purpose for which she purchased and used it). Contrary to Plaintiffs' repeated assertions, a theory that the consumer would not have bought but-for a label misrepresentation does not alter this result. *See id.* at 694 (holding that if the product disclaimed that it was intended for a given use, its as-represented value was zero as to a plaintiff buying for that use with or without the alleged misrepresentation). This confirms that the following individual questions will predominate on these claims:

(i) whether a label had the disclaimer (not all of the at-issue labels did);

(ii) as to those that did, whether the consumer read the disclaimer (not all consumers did); and

(iii) whether the disclaimer cautioned against that consumer's use (some consumers had only post-1974 equipment, some had only pre-1974 equipment, and some had a combination).[5]

Summary judgment rulings – like that on the significance of the disclaimer to purchases for use in

[5] Plaintiffs (at 119) actually point out another individual question, i.e., whether for those who did read the disclaimer they understood it or found it "misleading." *See, e.g.*, ECF 1017-58, Klingenberg Dep. 214:2-5 (Q. Can you tell me what that warning – in your mind, what the warning said? A. That it wasn't supposed to go in tractors after 1974.).

post-1974 equipment, for unjust enrichment and other claims – are often cited in denying certification. *See* ECF 1090 at § III. *See also Ashcraft v. Welk Resort Grp.*, 2021 WL 2582623, at *1-2 (D. Nev. 2021).

The Court's ruling that the disclaimer was inconspicuous, on the other hand, was limited to implied warranty claims under Missouri law.[6] *See* ECF 1006 at 8-9. It was also limited to the five-gallon CAM2 ProMax 303 label, where the disclaimer was bolded and italicized, in lower case in its own paragraph, and without the heading "WARNING." Other disclaimers varied in prominence and placement. The 5-gallon Super S 303 label, for instance, was in all caps, more distinctly set apart, and began "**WARNING.**" ECF 1017-9 at 18. Thus, unlike CAM2 ProMax 303, the Super S 303 disclaimer was ***not*** in the "same font" as the other language on the label. *Id. See, e.g.*, *Scottsdale Ins. Co. v. Deere & Co.*, 115 F. Supp. 3d 1298, 1306 (D. Kan. 2015) (a disclaimer "in all caps in the context of lowercase font is sufficiently 'conspicuous'"); *Far E. Alum. Works Co. v. Viracon, Inc.*, 520 F. Supp. 3d 1106, 1114 (D. Minn. 2021) (finding there was "no question that the disclaimer" was conspicuous because it "is in all capital letters").

Plaintiffs (at 16 n.11) also criticize the Court's summary judgment rulings in that Plaintiffs claim to be unable to reconcile the Court's ruling regarding the inconspicuousness of the disclaimer under Missouri law with its ruling that under Kentucky law Tim Sullivan does not have fraud and misrepresentation claims where he never read any of the labels at issue. In manufacturing a supposed inconsistency, Plaintiffs pretend that the Sullivan ruling had anything to do with the disclaimer. In fact, it was simply true ***as a factual matter*** that the pre-class version of the label Sullivan read did not have a disclaimer. In other words, this was an undisputed fact that established

[6] Plaintiffs' other argument about the implied warranty of fitness is self-defeating. They assert (at 98) that all issues will be common because Defendants were "aware[] that consumers would purchase 303 THF to service ***a wide range*** of equipment" (emphasis added). The use of a product for a wide range of equipment is the exact opposite of use for a particular purpose. *See M.F. v. ADT, Inc.*, 357 F. Supp. 3d 1116, 1140-41 (D. Kan. 2018).

that Sullivan never read the labels at issue – not a basis for the legal significance of the fact that he did not. *See* ECF 996 at 8 ("The record is clear that Sullivan did not read or rely on the Super Trac 303 Label or the Super S label in purchasing Smitty's 303 THF products."). The Court went on to hold that "[a]lthough Exhibit 35 and the Super Trac 303 Label have language in common, Sullivan has presented no case law that his claim may go forward based on a different label where the two products labels are substantially similar." *Id.* Plaintiffs still have offered no such case law.[7]

Plaintiffs (at 127), on the other hand, embrace the Court's summary judgment rulings to argue that because the *Hornbeck* release does not bar Graves' and Bollin's claims as a matter of law, there are no "manageability problems." But the manageability question is not whether the release is a bar at summary judgment, but rather what trial will look like given its existence. To answer that question, one need only look to the Court's Order. To show that they can recover for property damage claims, Graves and Bollin will each individually need to show that (1) the property damage they seek does not "aris[e] out of or relat[e]" to Super Trac purchased in Missouri (to avoid the release) and (2) they used 303 THF besides Super Trac purchased in Missouri in the equipment (to support causation). ECF 1008 at 6, 7. These are both "genuine issues of material fact" (*id.* at 7, 8) that will hinge on individual, equipment-by-equipment evidence of usage.

The other rulings Plaintiffs cite (at 93) as supposedly "supportive of certification" are ECF 996 regarding "evidence from which a jury could find that 303 THF was 'not of the represented quality'" and ECF 1004 and ECF 1076 regarding "evidence that 303 THF causes 'uniform' damage to equipment." But while these may present at least superficially common questions, they do not erase the myriad individual issues on reliance, causation, and affirmative defenses, to name just a few, and therefore cannot establish predominance.

[7] Sullivan does not even have an implied warranty claim, as it was previously dismissed.

III. Plaintiffs Admit That They Have The Wrong Damages Measure For Unjust Enrichment And Even Their Own Cases Demonstrate A Class Would Be Improper.

Plaintiffs effectively concede they have propounded the wrong damages measure of a full refund against a manufacturer on their unjust enrichment claim. At best, without citing any authority or basis, Plaintiffs weakly claim (at 74) that "[r]elief can be based on either Babcock's [full refund] model ***or***" a different model. Then, tucked in a footnote (at 108 n.71), Plaintiffs claim that they can calculate the proper measure based on evidence of the gallons of THF sold ***in each state***, the amount Defendants charged retailers ***in each state***, and "the amount Defendants paid" for ingredients. In other words, Plaintiffs posit that they "can used [sic] such information [to] calculate revenues and ***net profits*** made off purchases ***of each state-wide class***" (emphasis added). *Accord* Reply at 123.[8] But not only have Plaintiffs not offered a methodology for the proper measure they now propose, but the overwhelming record evidence is that the data does not exist to support such a methodology. This is fatal to certification.

Defendants do not know how many gallons of THF was sold ***into each state*** because they tracked only where the THF was shipped, typically to a retailer or wholesaler's distribution center serving multiple states (ECF 1017-124 at 75-76, 80, 121), or if it was not shipped, the corporate headquarters (not storefront) of the buyer picking up the THF (ECF 1017-5 at 138-41, 212-13). Thus, for instance, Defendants' sales to Tractor Supply all show up in Tennessee (**Ex. C**), even though Tractor Supply sold in all eight bellwether states (and many more).[9] In other words, the data allows no way to account for Plaintiff Dean's purchases, which were all from Tractor Supply in New York,

[8] Plaintiffs are correct that net profits is the proper damages measure. *See, e.g.*, *Astiana v. Ben & Jerry's*, 2014 WL 60097, at *11 (N.D. Cal. 2014) (denying certification of unjust enrichment claim against manufacturer in labeling case, holding that claims for restitution "must correspond to a measurable amount representing the money that the defendant has acquired from each class member by virtue of its unlawful conduct"). *See also* Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011) ("The profit for which the wrongdoer is liable by the rule of § 51(4) is the net increase in the assets of the wrongdoer, to the extent that this increase is attributable to the underlying wrong.").

[9] This is not the only data gap in Plaintiffs' new "methodology." For example, for a large share of their component ingredient purchases, Defendants have no records of what raw materials went into what finished product.

not Tennessee. If Plaintiffs thought there was a methodology based on common evidence to produce a reliable classwide estimate of aggregate damages for their unjust enrichment claim, they would have (and should have) offered it ***before*** moving for certification. They did not.

Even if Plaintiffs could overcome this hurdle (and they cannot), they are simply wrong (at 108) that "[c]laims for unjust enrichment are commonly certified," at least in the consumer product context. Plaintiffs (at n.70) string cite 28 cases certifying unjust enrichment claims, of which only a handful are traditional consumer product cases, much less labeling claims (and a number of which were not even considered under Fed. R. Civ. P. 23).[10] Indeed, some of Plaintiffs' cases stress that they are the exception rather than the rule. *See, e.g.*, *Lott*, 2021 WL 1031008, at *12. Defendants' cases denying certification on unjust enrichment claims, on the other hand, are overwhelmingly in the consumer context and explain why unjust enrichment cases are, in fact, rarely certified. *See, e.g.*, *Hudock*, 12 F.4th 773 (television refresh rates); *In re BPA Polycarb. Plastic Prods. Liab. Litig.*, 2011 WL 6740338 (W.D. Mo. 2011) (health risk in sippy cups); *True v. ConAgra Foods, Inc.*, 2011 WL 176037 (W.D. Mo. 2011) (health risk in pot pies); *White v. Just Born*, 2018 WL 3748405 (W.D. Mo. 2018) (slack-fill in candy); *In re Teflon Prods. Liab. Litig.*, 254 F.R.D. 354 (S.D. Iowa 2008) (health risk of cookware); *Jarrett v. Panasonic Corp. of N. Am.*, 8 F. Supp. 3d 1074 (E.D. Ark. 2013) (blinking picture on televisions); *Ackerman v. Coca-Cola Co.*, 2013 WL 7044866 (E.D.N.Y. 2013) ("vitaminwater" beverage); *Astiana*, 2014 WL 60097 ("all natural" ice cream); *Jones*, 2014 WL 2702726 ("no artificial" canned tomato products, cooking spray, and cocoa); *Hughes v. Ester C Co.*, 330 F. Supp. 3d 862 (E.D.N.Y. 2018) ("Better Vitamin C"); *Kosta*, 308 F.R.D. 217 ("fresh" fruit/veggie products); *Lipton v. Chattem, Inc.*, 289 F.R.D. 456 (N.D. Ill. 2013) (toxic weight loss

[10] *See, e.g.*, *Lott v. Louisville Metro Gov't*, 2021 WL 1031008 (W.D. Ky. 2021) (municipal towing policy); *Menocal v. Geo Grp., Inc.*, 882 F.3d 905 (10th Cir. 2018) (immigrant detainee policy); *Fritz v. Corizon Health, Inc.*, 2021 WL 3883643 (W.D. Mo. 2021) (employer policy re uncompensated pre- and post-shift activities); *Cope v. Let's Eat Out, Inc.*, 319 F.R.D. 544 (W.D. Mo. 2017) (employer policy on dine and dash).

supplement); *Martin v. Ford Co.*, 292 F.R.D. 252 (E.D. Pa. 2013) (defective rear axle).

Courts in the consumer context regularly refuse to certify unjust enrichment claims even where other claims are found suitable for certification because nowhere "does an unjust enrichment claim depend 'solely' on defendant's conduct. To the contrary, each state's unjust enrichment law requires consideration of both plaintiff's and defendant's conduct, as well as the factual context." *In re McCormick & Co. Pepper Prods. Mktg. & Sales Pracs. Litig.*, 422 F. Supp. 3d 194, 264 (D.D.C. 2019). That consideration of not only defendant's, but also plaintiff's conduct, was the basis for the Eighth Circuit affirming summary judgment for the defendant in *Vitello* – not to mention this Court's grant of summary judgment for Defendants on Hazeltine's unjust enrichment claim. Plaintiffs offer no facts or argument to take them out of the general rule and into a narrow exception.[11]

IV. Plaintiffs Sow Confusion; Untangling Reliance, Causation and Presumptions Based on Materiality Under Consumer Protection Statutes.

The parties agree that a reliance element applies to some consumer protection claims (e.g., Arkansas), does not apply to some (e.g., Missouri), and is highly relevant to some (e.g., Wisconsin). They disagree as to others.[12] But reliance or not, the heart of the matter is the causation element of these statutes. The Court must consider for each whether common or individual evidence will be used to prove – and rebut – causation, however framed (e.g., ascertainable loss). Plaintiffs wrongly assume that they may ignore all individual evidence in favor of a classwide presumption. Courts addressing these statutes, including the Eighth Circuit, have routinely held otherwise.

[11] Even *Dollar General* recognized that it was an outlier, noting that "in ***many circumstances unjust enrichment claims require individual inquiries***." 2019 WL 1418292, at *19 (W.D. Mo. 2019) (emphasis added). But the defendant in *Dollar General* was a retailer and the retailer defendant's use of "uniform" placement policies and practices nudged it over the line to certification. No such policies are at issue here.

[12] Defendants do not belabor the point, since courts tend to deny certification of consumer protection act claims on individualized causation, rather than reliance. But it bears mentioning that *Dollar General* itself found that California consumer protection act claims require reliance. 2019 WL 1418292, at n.14. *But see Gartin v. S&M NuTec*, 245 F.RD. 429, 440 (C.D. Cal. 2007) (noting it is "unclear" if UCL requires reliance or just causation; denying certification based on individualized causation). Plaintiffs (at 101 n.67) also claim that *Ackerman* certified claims under the California consumer protection act claims. Not so. *See* 2013 WL 7044866, at *21.

A. The Consumer Protection Caselaw Focuses on Causation, Not Reliance.

In their single-minded focus on reliance, Plaintiffs belittle cases denying certification based on "loss causation," "ascertainable loss" or other elements focused on a causal nexus between an alleged misrepresentation and a plaintiff's injury. But their protest that all these courts got it "wrong" (e.g., at 106, 114 n.80) is not credible.

For instance, Plaintiffs' argument (at 102) that Defendants' "loss causation" argument gets New York law wrong because there was a sea-change in 2012 with *Koch* is baseless. *Ackerman* post-dates *Koch.* And it does not stand alone. *See, e.g.*, *Marotto v. Kellogg Co*., 415 F. Supp. 3d 476, 481 (S.D.N.Y. 2019) (denying certification where each plaintiff would have to show that they were misled by, or at least had seen, the label); *In re Avon Anti-Aging Skincare Creams & Prods. Mktg. & Sales Pracs. Litig*., 2015 WL 5730022, at *4 (S.D.N.Y. 2015) (denying certification where there was no common proof that each consumer was exposed to the alleged misstatement).[13] These courts and others have flatly rejected Plaintiffs' argument that a determination that causation evidence is individualized necessarily conflates reliance and causation. *See, e.g.*, *Fero v. Excellus Health Plan, Inc.*, 502 F. Supp. 3d 724, 739 (W.D.N.Y. 2020) ("The Court is not persuaded by Plaintiffs' argument that this is an issue of 'reliance, proof of which is not required by the GBL,' and not of causation." (internal citation omitted); denying certification of § 349 claim).

Plaintiffs are similarly misguided on the KCPA, focusing (at 106) on language that conduct can violate the Act "whether or not any consumer has in fact been misled." Conduct that violates the act is different from what is required for a consumer to bring a private right of action. The Kansas

[13] Plaintiffs (at 103) claim that *Marotto*, a S.D.N.Y. decision was "roundly rejected" because it was criticized by a single E.D.N.Y. decision, *Allegra*, which was not even a label case. They similarly criticize (at 119) *In re Avon* as "conflict[ing] with New York law." The decision is out of the S.D.N.Y., which has vast experience interpreting the NYGBL.

Supreme Court emphasized that point in *Finstad v. Washburn Univ.*, 845 P.2d 685, 690 (Kan. 1993), wherein it interpreted the very provision Plaintiffs cite as establishing certain *per se* violations, but made clear that a consumer still must establish that he was "aggrieved" by the deception – and thus that a causal connection exists between the deception and injury – to maintain a private KCPA action. This is analogous to the MMPA's ascertainable loss requirement, analyzed by the Western District in *Bratton* and *White* and the Eighth Circuit in *Vitello*, where the court described the argument about the MMPA's lack of a reliance element as "unresponsive." 2021 WL 3764802, at *4.

B. Plaintiffs' Distinction of Price Premium Cases Misses The Point.

A price premium theory posits that all consumers – whether or not exposed to the alleged misrepresentation, and whether or not misled – were nonetheless injured by the alleged misrepresentation because it infected the market as a whole and raised prices. In that way, a price premium theory diminishes the relevance of individualized questions (e.g., exposure, reliance, causation), and is more susceptible to certification than a would-not-have-purchased case like this one. Plaintiffs' own cases make this point. *See, e.g.*, *In re Amla Litig.*, 320 F. Supp. 3d 578, 592-93 (S.D.N.Y. 2018) ("courts regularly certify classes alleging § 349 violations ***when the injury was payment of a price premium***") (emphasis added); *de Lacour v. Colgate-Palmolive Co.*, 338 F.R.D. 324, 337 (S.D.N.Y. 2021) (noting that a price premium theory is what takes focus away from individual purchase motivations because it posits that all consumers paid too much regardless). *See also Baron v. Pfizer, Inc.*, 840 N.Y.S.2d 445, 448 (3d Dep't 2007) (full refund claims are not cognizable under § 349). It is exactly backward, therefore, for Plaintiffs (at 85 & n.50) to dismiss Defendants' price premium cases denying certification out of hand. Plaintiffs' argument is a ruse to claim the Court should disregard cases that do not go Plaintiffs' way – as made clear by Plaintiffs' own reliance on price premium cases when it suits them, *e.g.*, *de Lacour* and

Ebin.

Plaintiffs' counterpoint (at 103-04) relies on *Suchanek v. Sturm Foods, Inc*., 2017 WL 3704206 (S.D. Ill. 2017). But, even assuming the Court were to give as much weight to a Southern District of Illinois interpreting the GBL as New York state and federal courts interpreting it, the court there accepted the assumption of no value only because the product was so badly received that there were essentially no repeat purchasers. Indeed, the court noted how unique the overwhelmingly negative reaction was from day one: "consumers were immediately displeased with the product after they made their first cup of GSC, threw away the remainder of the product, and never purchased it again." *Id.* at *6.[14] Here, in contrast, until a stop sale order, virtually no one complained. And even after the stop-sale, consumers ***protested*** the stop sale order and traveled out of state to purchase it. This case is not *Suchanek.* Whether or not consumers experienced leaks – or no operational impacts at all and just microscopic abrasions as posited by Dahm's theory – Defendants' business was built on satisfied repeat customers who could observe first-hand that the product was in fact operating the hydraulics on their equipment (e.g., making things move up and down or back and forth).[15]

C. No Presumption of Causation (Or Reliance Where It Is Required) Applies.[16]

Under certain circumstances, a showing of classwide materiality allows a presumption of causation (and/or reliance). But not always. And sometimes Rule 23 itself forbids a presumption.

[14] *See also Suchanek v. Sturm Foods, Inc.*, 2018 WL 6617106, at *2 (S.D. Ill. 2018) (noting same, and that product was the "worst performing introductory product" ever for retailers); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 758 (7th Cir. 2014) ("plaintiffs proffered evidence to show the overwhelmingly negative response to the GSC product, the flood of complaints that followed the introduction of GSC, and numerous surveys").

[15] Plaintiffs' argument (at 105) that operation of the hydraulics is irrelevant to the benefit-of-the bargain damages measure because it occurs post-sale defies basic logic. All product benefits, like all product dangers, are realized only post-sale. Certainly, Plaintiffs do not allege that 303 THF damages equipment if a consumer bought it but never used it. Any danger parallels the benefit. And thus both affect the value of the product ***at the time of sale***.

[16] Defendants address the merits (or lack thereof) of a classwide "presumption" under the laws of California, New York, and Wisconsin. Plaintiffs offer no authority that a presumption can ever apply in Arkansas, Kansas or Missouri.

Plaintiffs' own case (at 75-76) *Halliburton v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), demonstrates this latter point. There, the Supreme Court considered a presumption of reliance on a securities fraud claim. Reliance was an element, but a presumption could apply if an efficient market existed such that there would have been a price impact for all purchasers regardless of individual circumstances (e.g., the market would have artificially raised the price as a result of the alleged fraud independent of whether all individuals were exposed to or relied on the alleged fraud). This presumption (the *Basic* presumption) in the securities fraud context is akin to a price premium theory in the consumer fraud context. The Court held that a defendant must have the opportunity to rebut this presumption prior to certification because applying any classwide presumption has "everything to do with the issue of predominance." *Id.* at 283. *See also id.* at 284 ("[T]o maintain the consistency of the presumption with the class certification requirements of Federal Rule of Civil Procedure 23, defendants must be afforded an opportunity before class certification to defeat the presumption through evidence.").

This decimates Plaintiffs' arguments for certification, which assume a presumption is guaranteed and that any rebuttal goes only to the "merits." To the contrary, the questions for the Court are: (i) is a presumption even possible given the factual and legal context, (ii) if so, what evidence must Plaintiffs put forward for it to apply, and (iii) what evidence rebuts that presumption?

1. No presumption is available given the factual and legal context.

In California, a presumption of causation or reliance will not be applied to cases, as here, alleging both misstatements and omissions. *Gartin*, 245 F.R.D. at 438. Thus Plaintiffs' cases applying a presumption in an omission-only case, such as *In re MacBook*, do not help them.

In New York, causation and reliance will not be presumed where a variety of factors could have influenced a class member's decision to purchase. *See Small v. Lorillard*, 679 N.Y.S.2d 593, 600 (App. Div. 1st 1998); *Ackerman*, 2013 WL 7044866, at *2 (same). Similarly, courts will presume causation

under Wisconsin's WDTPA only where "there is no other logical explanation for the class members' behavior in response to the representation." *Boulet v. Nat'l Presto Indus., Inc.*, 2012 WL 12996298, at *10 (W.D. Wis. 2012). Here, not only are there other logical explanations for class members' purchasing Defendants' 303 THF, there are actually proven explanations that do not depend on the alleged misrepresentations (e.g., assuming it was the same as a different manufacturer's product because it was in a yellow bucket).[17]

Accordingly, independent of the extrinsic evidence Plaintiffs did (or did not) offer, no presumption is available under the laws of any of these states.

2. Plaintiffs do not put forward evidence for the presumption to apply.

Even where a presumption might apply, no case "stand[s] for the proposition that causation and injury should be inferred on a classwide basis in every case." *Jones*, 2014 WL 2702726, at *14 (citation omitted). Thus Plaintiffs' argument about an objective standard for materiality is not the end of the story. Instead, a court must consider what evidence a plaintiff did or did not put forward to establish materiality – or even a uniform understanding – of the alleged misrepresentation.

Defendants cited a number of cases holding that a plaintiff did not establish the prerequisites for a presumption where a label representation was not clearly subject to a fixed-meaning and had not been shown to be subject to a fixed meaning through, for instance, a consumer survey. *See, e.g.*, *id.* at *17-18. *See also Hughes*, 330 F. Supp. 3d 862 (denying certification, noting that survey is typically required). This is consistent with Plaintiffs' own cases, many of which relied on surveys to establish materiality. *See, e.g.*, *de Lacour*, No. 1:16-cv-8364 (S.D.N.Y.) ECF 65 (reflecting survey of 1000 consumers regarding the impact of the "natural" description on price paid).[18]

[17] Notably, Plaintiffs were unable to cite a single case certifying a WDTPA class.

[18] Price premium cases also almost always involve a consumer survey, meaning there is extrinsic evidence by which consumers are weighing in on what they think the representation means, or at least that they value it (i.e., materiality).

This reasoning is in no way limited to "all natural" cases and thus Plaintiffs' attempt to dismiss any "all natural" cases as inapposite fails.[19] For instance, in *In re 5-Hour Energy Mktg. & Sales Pracs. Litig.*, 2017 WL 2559615 (C.D. Cal. 2017), the court applied it to the term "energy." *See id.* at *9 ("Plaintiffs have offered no evidence that any one definition of energy prevails among all consumers. Without a common definition or common understanding of the term, the Court cannot conclude that materiality is susceptible to common proof."). The court honed in on the absence of "a consumer survey or other market research to indicate how consumers reacted." *Id.* at *8. Similarly, in *Shanks v. Jarrow Formula, Inc.*, 2009 WL 4398506, at *5 (C.D. Cal. 2019) – cited in *Testone*, on which Plaintiffs rely – the court found that statements like "No Trans Fatty Acids" and "No Hydrogenation" were "scientific terms unlikely to be understood by an average consumer," much less have been uniformly interpreted to represent the product as healthy. No less here, consumers are unlikely to understand Dahm and Glenn's "scientific" definition of THF or have a uniform interpretation regarding whether it denotes testing to meet OEM specifications.[20]

Further, even if an expert opinion short of a survey could suffice in some circumstances, the case law makes clear that this is not such a case. *See Kosta*, 308 F.R.D. at 230. Plaintiffs (at 101-02) argue that this Court should disregard *Kosta* because (in addition to it concerning "all natural"), "[t]he only opinion was from a serial ('fill-in-the-blanks') expert who provided the same opinion in other cases 'without any real consideration of the specific product attributes at issue[.]'" But Alter

[19] Plaintiffs (at 85) also attempt to distinguish the no-fixed-meaning cases by claiming that none "involve[d] products whose very functionality was at issue." Plaintiffs are wrong that none of Defendants' cases addressed function. *See, e.g.*, *Kosta*, 308 F.R.D. at 230 (referring to product function). Plaintiffs seem to realize how bad *Kosta* is for their position, criticizing the court there (at 87) for "confus[ing] typicality with ability to prove a claim." But their cite for that proposition is not to a California court or even a court interpreting California law. It is to a single Southern District of Florida case considering a claim under the Florida DTPA (which was also a price premium claim which Plaintiffs elsewhere suggest are unilluminating). *See Nelson v. Mead Johnson Nutr. Co.*, 270 F.R.D. 689, 690 (S.D. Fla. 2010).

[20] Plaintiffs' other cases say the same. *See, e.g.*, *Clevenger v. Welch Foods Inc.*, 342 F.R.D. 446, 459-60 (C.D. Cal. 2022) (emphasizing that in "cases involving a subjective marketing misrepresentation, such as a cereal box with the word 'healthy' … proving a reasonable consumer's expectations may require extrinsic evidence").

offers ***virtually identical*** opinions, right down to a discussion of the importance of labels and product functionality, all without citation to survey, consumer reviews, or even Plaintiff testimony.

Plaintiffs' other excuses for not performing a consumer survey are equally futile. They suggest (at 118) that this case is less in need of a survey than *Dollar General* because that case involved "asserted deception via labeling ***and product placement,***" which is "not part of Plaintiffs' theory here" (emphasis added). Plaintiffs do not even attempt to explain why that would make a survey less (rather than more) important.

Finally, Plaintiffs respond by citing (at 85) a handful of cases where the court found there was a fixed meaning to terms on a label without a survey. What they don't mention is that, where there was any genuine dispute at all about definition or connotation, most involved other extrinsic evidence to support a presumption of materiality, whether defendants' ***internal marketing documents*** or an opinion from an expert ***with expertise in the specific product***. *Mullins* and *Testone* are examples of the former. *See Mullins v. Premier Nutr. Corp.*, 2016 WL 1535057, at *3 (N.D. Cal. 2016); *Testone v. Barlean's Organic Oils, LLC*, 2021 WL 4438391, at *14 (S.D. Cal. 2021). And *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552 (N.D. Cal. 2020) is an example of the latter. There, the court denied that the marketing expert needed to conduct a survey to justify a presumption of reliance based on materiality because the product was cereal and the expert had "extensive experience in the … marketing of cereal products." *Id.* at 565. Here, there are no internal marketing documents. As for the testimony of Smitty's employee that Plaintiffs repeatedly cite, it concerns only labels as a general matter – nothing speaks to consumers' understanding of "tractor hydraulic fluid." Regarding Alter's opinion, he has no marketing experience in the tractor hydraulic fluid market akin to the expert's critical cereal experience in *Krommenhock.* Indeed, he had never even heard of the product before he was engaged in this case.

In short, none of Plaintiffs' cases excuse their lack of extrinsic evidence to show materiality. Thus, even independent of Defendants' rebuttal evidence, no presumption applies.

3. *Even if Plaintiffs had put forward evidence for a presumption, Defendants' rebuttal evidence precludes any presumption.*

Classwide reliance may not be presumed where there is evidence that a number of class members were not exposed to the alleged misrepresentation. *Ackerman*, 2013 WL 7044866, at *2. Thus, even if a plaintiff makes an ***initial*** showing as to classwide exposure, this is rebutted if the defendant shows that a number of class members did not read the statement. *Cf. Hudock*, 12 F.4th at 777 (citing as relevant individualized rebuttal evidence "that some consumers did not see, or did not rely on" the statements). This is exactly the evidence Defendants have put forward. *See* ECF 1017 at 17-18.

Defendants also have rebuttal evidence from putative class members. Plaintiffs (at 81 n.46) acknowledge declarations from putative class members who believed that the product "performed as expected" based on their understanding of the label representations and observed no equipment damage. But they criticize the declarations for not going far enough, i.e., not attesting that the declarants did not suffer the unobservable, non-operational "scoring" that Dahm posits. In Plaintiffs' view, the declarants may have been unaware of this damage. Even if that were true, it would at most go to product suitability, not consumer fraud. Further, this is a jury argument that does not speak to Defendants' opportunity to rebut Plaintiffs' showing. *See Halliburton*, 573 U.S. at 276. *See also Johannessohn*, 9 F.4th at 986.[21]

Finally, even if Plaintiffs had offered evidence that "THF" is subject to common consumer

[21] Plaintiffs challenge the foundation of these declarations, but cite no case law that class certification evidence must be admissible. Indeed, if this were required, class certification would become a trial in and of itself. *See In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1083 (C.D. Cal. 2015) (a court "can consider inadmissible evidence in deciding whether it is appropriate to certify a class"; denying certification of CLRA and UCL claims).

understanding, Defendants have come forward with rebuttal evidence – in the form of Plaintiffs' own testimony – confirming the opposite. *See* ECF 1017 at 18-19. Whether THF is subject to a fixed ***technical*** definition may be a common question. But it does not drive resolution of this case and, even if it did, it does not predominate over necessary "plaintiff-by-plaintiff" determinations.

V. Plaintiffs' Definitional Fraud Theory Changes Yet Again; Regardless, Their Theories About THF's Definition, Essence or "Waste" Do Not Alter The Analysis.

Given the absence of any genuine way to distinguish Defendants' cases, Plaintiffs (at 86 n.52) resort to asserting that "Defendants present no evidence that any consumer would still view their product as tractor hydraulic fluid ***or hydraulic fluid*** despite being harmful waste" (emphasis added). Before addressing why this supposed lack of evidence does not help Plaintiffs, it is worth pausing to consider how their definitional fraud theory has changed again.

First, Plaintiffs contend (at 3) that it does not matter how consumers understand the term "tractor hydraulic fluid," or whether they do so uniformly, for purposes of Plaintiffs' misrepresentation claim because liability can be imposed even if a representation is ***not literally false*** but only misleading. The legal proposition is sound. But the argument turns Plaintiffs' theory on its head. Again and again, Plaintiffs have asserted that Defendants' 303 THF is not THF, i.e, that the representation as THF is outright false. ECF 837 at 81 ("All labels at all times represented the product to be tractor hydraulic fluid when it was not."). Now, to blunt the fact that consumers diverged on how they understood this term, they resort to suggesting this is ***not false***, but merely misleading. This belies the notion that the alleged fraud here was definitional at all.

Next, Plaintiffs vacillate even on what definition or "essence" is at play. The premise of their technical experts' opinions was that "tractor hydraulic fluid" is ***not*** simply hydraulic fluid. In particular, Plaintiffs' experts defined "THF" by reference to an intent for use in transmissions and by a supposed failure to meet any OEM's ***tractor*** hydraulic specification. These experts do not opine

whether general (non-tractor) hydraulic specifications exist and, if so, what they are – much less how they compare to Defendants' products.[22] Now that it is clear that not all consumers understood THF to mean a product intended to be multi-functional and service transmissions – and, indeed, not all Plaintiffs used the product in common reservoirs for multiple purposes at all – Plaintiffs try to correct this infirmity and expand the "fraud" to Defendants' product not being hydraulic fluid at all. *See, e.g.*, Reply at 9 ("the product [was] not a capable tractor hydraulic ***(or hydraulic) fluid***") & 85 (arguing that the labels were misleading because they were not "***hydraulic fluid***") (emphasis added). This changed theory does not help.

First, even with this shift, buyers bought Defendants' product for non-hydraulic purposes. Plaintiffs (at 11-13, 75 n.34, 85) do not challenge that Quiroga or Jenkins, for instance, are not entitled to relief for their uses in non-hydraulic applications but instead note that they also used Defendants' products in hydraulics. To the extent Plaintiffs suggest that the experiences of two cherry-picked plaintiffs means that all consumers who bought for a non-hydraulic purpose must ***also*** have bought for multiple uses, this doesn't pass muster, much less a "rigorous analysis." Quiroga and Jenkins are not part of a random sample; they are the tip of the iceberg.

Second, since Plaintiffs' experts agree that THF is not the same as hydraulic fluid and only opine on the meaning of THF, this change seeks to correct for one problem at the expense of another. Plaintiffs do not define straight "hydraulic" fluid or any specification for straight hydraulic fluid that Defendants' products did not meet.[23] With one theory Plaintiffs had expert evidence that

[22] *See, e.g.*, ECF 882-5, Glenn Rpt. ¶ 3.3 ("Tractor hydraulic fluids are multi-functional products explicitly formulated to meet original equipment manufacturer's (OEM) specifications to simultaneously lubricate and protect the moving parts in transmissions" and other parts); ECF 882-2, Dahm Rpt. ¶ 35 ("The key point is that tractor hydraulic fluids do far more than simply act as a hydraulic fluid and a simple lubricant."); ECF 882-5 ¶ 3.3 ("Tractor hydraulic fluids must meet at least one OEM specification for respective tractors to be called a tractor hydraulic fluid."). *See also* ECF 1017-11 (defining THF as "product intended for use in tractors with a common sump for the transmission … ").

[23] Hydraulic specifications, if they exist, would likely speak only to viscosity, which Plaintiffs admit (at 7) Defendants' 303 THF met for some applications.

did not account for consumer heterogeneity; their tweaked theory seeks to account for consumer heterogeneity, but leaves them without expert evidence. Either way, a class may not be certified.[24]

Finally, Plaintiffs' argument (at 116) that "Defendants cite no case denying certification in which the very nature of the product was misrepresented on its label" is misplaced. It strains credulity to say that "all natural" does not go to the essence or nature of the product, but a failure to meet an OEM specification does. Indeed, *Lipton* involved the presence of ***toxic ingredients*** in diet supplements. It is possible in almost any misrepresentation case to say that Plaintiffs did not get the product they paid for. For instance, in *Blitz*, the plaintiffs alleged that they did not get a product that targeted an enzyme that was only in plants. Espousing a theory at this level of generality does not magically make it certifiable. Similarly, it is no answer to say "vitaminwater" with sugar is not "waste" (or, if Plaintiffs would go this far, toxic diet supplements are not "waste") because "waste" is not an objective term, and is not defined by Plaintiffs' experts.

For all these reasons, Plaintiffs' attempt (at 12) to poke holes in putative class member declarations because they do not say the declarant "knew the 303 THF was waste stream" falls far short.[25] Indeed, the attempt only admits that individualized questions of knowledge matter. Come trial, a jury would need to hear what the "pissed" and "concerned" farmers of Missouri (or any other state at issue) knew and didn't know. On this issue too, individual issues will predominate.

VI. ***Zurn*** Hurts, Not Helps, Plaintiffs On All But Their Implied Warranty Claims.

Plaintiffs' response to the fact that some putative class members were uninjured in any

[24] Nor can the ingredients in the product provide a way around this conundrum. Not only did Plaintiffs' experts not opine that the use of line wash was definitionally inconsistent with straight hydraulic fluid, but their expert could not credibly do so. *See* ECF No. 1067-4 (Glenn describing use of line wash "to make lower-spec hydraulic oil," as "reasonable and responsible ways to repurpose the material to recover the greatest value").

[25] Plaintiffs again make the not-so-subtle shift away from the supposed misrepresentation having to do with the definition of ***tractor*** hydraulic fluid. *See* Reply at 16 (attempting to discount buyer who purchased knowing the fluid contained line wash because there is no evidence he knew it was "waste" and not "hydraulic oil").

observable sense, i.e., had no operational impact, only proves Defendants' point. Plaintiffs argue (at 77-78) that this Court can follow the markedly narrow decision in *In re Zurn Pex Plumbing Prod. Liab. Litig*, 644 F.3d 604 (8th Cir. 2011) regarding implied warranty only, on ***all*** of Plaintiffs' claims. But *Zurn* permitted plaintiffs with unmanifested defects to proceed with a class action only because a state-specific warranty statute recognized injury for that purpose. *See Halvorson v. Auto-Owners Ins. Co*., 718 F.3d 773, 779 (8th Cir. 2013). The Minnesota warranty statute may not be unique vis-à-vis other similarly crafted warranty statutes, but it is unquestionably unique to warranty claims – as the Eighth Circuit itself has declared. *Id.* (reversing certification of all claims because without an implied warranty claim "there is no similar statute that would create an injury in fact for all class members despite the lack of damages"). Here too, there can be no class that includes those without operational impact who are, under binding Eighth Circuit authority, uninjured for all purposes other than warranty claims.

The fact that *Zurn* does not support certification on the dozens of other dissimilar statutory and common-law claims on which Plaintiffs seek certification is illustrated by *Zurn* itself. That court not only denied certification of consumer protection claims, but refused to certify a negligence claim that would include the "dry" plaintiffs – i.e., to quote Plaintiffs (at n.39) those whose brass fittings exhibited "cracking" immediately "upon installation" but "whose homes had not yet leaked." *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 267 F.R.D. 549, 566 (D. Minn. 2010) ("Because some of the members of the proposed class have not suffered a present injury, the damages element of these Plaintiffs' negligence claims is not satisfied."). Dahm's "scoring" is akin to the *Zurn* plaintiffs' "cracking" and no-operational-impact plaintiffs here are precisely the same as "dry" plaintiffs in *Zurn*. Because Plaintiffs' class definition includes these consumers in the

negligence and other non-implied warranty claims, *Zurn* itself instructs against certification.[26]

VII. Claim Splitting and Collateral Estoppel Infect Every Element of Rule 23.

Plaintiffs try to defend their claim-splitting by arguing (at 91) that Plaintiffs have not fully abandoned repair cost claims. This does not save them on adequacy or superiority.

First, Plaintiffs' attempt to discount the string of cases holding that claim-splitting destroys adequacy as involving foregone personal injury, not property damage, fails. This is a distinction without a difference and Plaintiffs do not offer a single case suggesting this matters. Foregone claims and damages are foregone – whatever their nature.

Second, Plaintiffs' assertion (at 128) that Defendants will be entitled to a second "full-blown trial" on property damages only underscores how inefficient and unmanageable this case is as a class action. Plaintiffs now suggest that if their classes are certified, there will be not just 41 trials in 41 states, but 82 trials. And whatever their view on the role of individualized issues in 41 of those trials, they fully agree that the other 41 will turn entirely on individualized evidence in which the parties would be left to "test specific causation on repair costs" for many thousands of class members. This does not present the sort of efficiencies necessary for this path forward to be superior.

The rule against claim-splitting also undermines certification because it affects typicality and manageability, and renders Plaintiffs' damages methodology unworkable. Plaintiffs admit (at 121-22) that all claims for each multi-state purchaser can proceed ***only in one trial***. *See, e.g.*, Reply 121 (describing those claims being "within a single case"); *id.* at 122 (describing such purchasers as having "a cause of action in each state" but "heard by the same court"). In Plaintiffs' example,

[26] Plaintiffs have offered no way to identify the operational-impact purchasers, nor to address causation issues as a group. *See Ebert v. Gen. Mills Inc.*, 823 F.3d 472, 479-80 (8th Cir. 2016). Plaintiffs also fail to meaningfully respond to the other bars to certification of their implied warranty claims, including the significance of product inspection and testing. An expert opinion, without product inspection and testing, is not enough to proceed even under warranty statutes. *See In re Hardieplank Fiber Cement Siding Litig.*, 2018 WL 262826, at *10 (D. Minn. 2018).

Watermann could recover for both his Colorado and Kansas purchases in one court. But this creates, not cures, the problem. Assume, for instance, that the single court is the District of Kansas. Watermann seeks to be a class representative of the Colorado claims in a trial in the District of Colorado (ECF 834 ¶¶ 3(c), 153(c)). How can Plaintiffs now suggest that he has no claims to try in Colorado because he will try them all in Kansas? Certainly that defeats typicality and adequacy for the Colorado class. But there are implications for the Kansas class as well. A Kansas jury would now need to be instructed not just on Kansas law, but also Colorado law (even though it is unknown whether Colorado law applies to any Plaintiff or class member except for Watermann).

And that is not all. The same logic extends to absent class members – e.g., their claims can only be tried in one court. Thus, the Kansas jury in this example would also need to be instructed on the law of ***every state*** in which Kansas class members purchased Defendants' 303 THF, as Plaintiffs admit no court could later hear those claims due to rules against claim-splitting. But how will the Kansas court know what states those are? Answering the question would require mini-trials regarding what other states each Kansas class member purchased in. (At a minimum, we know from named Plaintiffs that it includes not only Colorado, but also Missouri and Oklahoma.) And it's not just the Kansas court who will be throwing up its hands in confusion; it is the absent class members as well. If a purchaser gets a class notice for three states in which they purchased, and opt out of none, how will they know which of the outcomes from those three different states binds them? How will Defendants know?

There is more still. Plaintiffs (at 72) claim not to understand the deficiency created by the fact that Babcock has no way to adjust for equipment being in one state and the purchaser being in another. Returning again to Plaintiffs' example, assuming all Watermann's claims for purchases and property damage are tried "in the same court" in Kansas, then Babcock will have to calculate

"Kansas" damages that includes not only Watermann's Kansas purchases, but ***also*** his Colorado purchases and damages for his Colorado equipment. Babcock would have to do likewise for all multi-state Plaintiffs and class members with a nexus to Kansas, i.e. add their non-Kansas damages to the Kansas calculation and subtract them from the other states. He has not done so. Nor has he provided any indication that there is even a way to do this. Indeed, it would seem impossible since he has no way of knowing what Kansas class members purchased where, and whether their equipment was part of his flushing cost calculation for Kansas or for a different state.

VIII. Plaintiffs Do Not Abandon Their Allegations That Make Label Differences Matter.

Plaintiffs (at 8) insist they are confused about how admitted label differences "matter[]" to their theory. They need look no further than their own pleadings and briefs, claiming as misleading representations on some labels but not others. *See* ECF 834 ¶¶ 159-76; ECF 837 at 26, 81. *See also* Reply at 17 (admitting reliance on "multiservice" was "truly relevant"). A prime example of label differences that "matter" are the disclaimers that Plaintiffs claim are inconspicuous and ambiguous. They are not on all labels and vary as to both wording and placement on the ones they are on.

Plaintiffs' assertion (at 83) that despite all the differences, the labels were at least "the same in representing harmful waste as 303 THF and omitting the truth" does not save them when their theory is far broader. Whether this is analyzed as standing as it was "for the purpose" of the motion to dismiss and its "limited" inquiry (ECF 451 at 17-18) or under typicality, merely accepting Plaintiffs' allegations does not constitute "rigorous analysis." The parties are no longer at the motion to dismiss stage; Plaintiff must rely on evidence – not allegations – to establish that the labels are substantially similar ***for all*** of the misrepresentations they assert. They cannot do so.[27]

[27] Plaintiffs' passing cite to *Dollar General* ignores that the allegedly deceptive scheme there included product placement.

IX. Plaintiffs' Hollow Promises That Babcock Will Fix His Damages Opinions Do Not Satisfy Their Burden.

Plaintiffs claim not to understand the faults in Babcock's methodology as to (1) subclasses and (2) flushing (in addition to those presented by claim-splitting, discussed above).

Regarding subclasses, if the Court certified only an MMPA class for Missouri (limited to purchasers for primarily personal use), or Plaintiffs prevailed only on an MMPA subclass (similarly limited), Babcock offers no way to compute those aggregate damages. The only methodology he puts forward accounts for ***all*** Missouri purchasers, not all purchasers for personal use.

As for flushing, Plaintiffs (at 81) argue that "[w]hether equipment has been sold goes to whether a class member shares in flushing relief and does not defeat certification." The flaw in their reasoning is best illustrated by a hypothetical. If there are 50,000 class members, who on average owned 2 pieces of equipment, and it costs $100 to flush a piece of equipment on average, then aggregate damages are $10,000,000 ***if*** all that equipment is still owned by class members (and arguments about alternative causation, contributory negligence, etc. were rejected). If, on the other hand, 40,000 pieces of equipment have been disposed of and the current owners are not class members in the same state, i.e., have no right to recover in the lawsuit, then aggregate damages are instead $6,000,000. This is not about allocation; it goes directly to the amount of any verdict and is basic math. The extra $4,000,000 may not be "redistribut[ed]," as Plaintiffs (at 72 n.29) suggest. It may not be awarded at all. The numbers depend on unknown data from individual transactions, leaving no way to reliably estimate aggregate damages by common evidence.

Plaintiffs (at 56) recognize Babcock's calculations are flawed in other respects too. They now claim that his calculations were only "illustrative" and "he will update his report when merits reports are due." For instance, they promise (at 57-58) that down the road Babcock "can consider the disclaimers and updated data and exercise his professional judgment to address any 'data

issues.'" But a promise is insufficient to meet Plaintiffs' burden. Plaintiffs may not need to come up with a precise damages number right now. But it is imperative that they come forward with enough to show that they ***can*** do so reliably and that any "data issues" ***can*** be overcome. They have not done so where they have not shown that there is data to produce a reliable estimate. Babcock cannot simply declare by fiat that such data exists when, by Plaintiffs' own admission, he has not yet "consider[ed]" this or "exercise[d] his professional judgment" to evaluate the question.

Plaintiffs (at 58) also contend that, even though a methodology is nowhere in the class certification record, they fully intend to seek flush costs for non-tractors – perhaps in recognition that if they do not they have foregone damages for large numbers of class members and would be inadequate representatives. Once again, their "intention" misconceives their burden. Even Plaintiffs do not deny the incredible variation in equipment, from forklifts to log splitters to dozers. They have offered nothing to suggest there is a common way to estimate flush costs for each. To the contrary, they admit that they can do this only in an equipment-by-equipment inquiry. *See* Reply at 60 (asserting that "[a]t the merits stage for each state class, [Hamilton's] method can take into consideration the ***specific information regarding pieces of equipment in which Defendants' 303 THF was used as well as other information regarding whether the equipment is still owned*** or has already been flushed") (emphasis added). Not only that, but the very method that Babcock used to calculate tractor flush costs depended on data that does not even exist for non-tractors, i.e., the average distribution of tractors by size, by state. They point to no similar data regarding non-tractors, which would be necessary to apply their method to non-tractors.

X. Plaintiffs Now Themselves Argue That Self-Identifying Affidavits Are Unreliable, Dooming Ascertainability.

Plaintiffs (at 124) posit that "[i]t is speculation that large numbers of class members do not have receipts or other evidence of purchase." But this Court well knows—from discovery disputes

and the retailer settlement process—that the proof is not in the pudding. Perhaps in recognition of that truth, Plaintiffs proceed to try to defend the use of affidavits to establish class membership. But their cases do not support the use of affidavits where, as here, the record shows numerous issues associated with reliable self-identification. For instance, in *In re Syngenta AG MIR 162 Corn Litig*., 2016 WL 5371856, at *3 (D. Kan. 2016), class members were required to keep records of contracts so proof problems did not abound, but the court would allow, if necessary, a "proper[]" affidavit. And *Chalmers v. City of N.Y.*, 2022 WL 4330119, at *20 (S.D.N.Y. 2022) related only to a "small number" of employees who did not self-identify race on employment records and who "may" need an affidavit to state racial identification – a fact easily within the affiant's knowledge/memory and confirmed without mini-trials.[28]

While Plaintiffs (at 124) claim that "Defendants' cries of potential problems and 'memory' issues are exaggerated" it is not only Plaintiffs' testimony (discussed in ECF 1017 at 94-96, and not repeated here), but Plaintiffs' own argument in reply that proves this is not so. For instance, Plaintiffs (at 12) claim that declarant Stone could not have purchased Defendants' 303 THF, as he attests, because the stores he identified did not sell the products, and (at 13) that Hawkins and Chalfant "appear" not to be speaking about Defendants' 303 THF because it was never sold at Orscheln in Missouri. In other words, Plaintiffs themselves now attack consumers' ability to accurately remember what brands they purchased. Perhaps Stone, Chalfant, and Hawkins misremembered the stores, not brands. Perhaps they bought at Orscheln stores outside Missouri. Or, perhaps, they are wrong about the brands they purchased. If they were, they would join the ranks of Plaintiffs who

[28] Plaintiffs also rely on *In re Dial Complete Mktg. & Sales Pracs. Litig.*, 312 F.R.D. 36 (D.N.H. 2015). The case is not helpful to them on ascertainability, as it specifically noted that it would be easy for potential class members "to recall" whether they had purchased under the at-issue labels. *Id.* at 52. More notably, that court denied certification on, *inter alia*, Arkansas and Missouri express warranty claims, Arkansas implied warranty claims, and Wisconsin DTPA claims because all required individual proof. It also denied unjust enrichment under the laws of Arkansas, California, Missouri, and Wisconsin because of "the necessity for individualized inquiries into motivations and purchasing decisions, as well as the benefit defendant derived by the buyer." *Id.* at 60, 62-63, 70, 74.

have been wrong time and again. Plaintiffs want to have the chance to cross-examine these declarants and test their memories, but deny Defendants the opportunity to do the same when these are exactly the sort of affidavits Plaintiffs want to use to establish class membership. This is hypocritical and improper. Plaintiffs' argument merely reinforces that the "yellow bucket"—across ***all*** 303 brands, not just Defendants' products—were viewed as the same by the public at large. *See, e.g.*, ECF 1017-97, Vanderee Dep. (answering he "did not know" who manufactured the product and did not know about any "brand change").

Whether or not the Eighth Circuit imposes an administrative feasibility requirement (which the Eighth Circuit has neither specifically accepted or rejected, and on which district courts within the Eighth Circuit disagree), ascertainability precludes certification because the record before the Court is that affidavits regarding this particular product present especially acute memory issues. Plaintiffs' effort (at 124 n.98) to distinguish *Jones*, which rejected class member affidavits because of a "subjective memory problem," misses the point. It is true that in *Jones* there were dozens of varieties of food products and some labels included the challenged language – and so fell within the class – while some did not. But, here, since Plaintiffs and class members ***cannot distinguish between brands of 303*** – Defendants' and non-Defendants' brands alike – that is equally true. In other words, whether consumers are unable to accurately recall if they purchased the at-issue products because of an inability to distinguish the at-issue products from other products that the defendant manufactured, or because of an inability to distinguish the at-issue products from other products that ***non-defendants*** manufactured, the problem and the result are the same. These "subjective memory" problems foreclose the reliability of self-identifying affidavits. ECF 1017-137, Millam Decl. (professing he "could not be sure" if he purchased Defendants' products after facing the prospect of deposition, even though he was "sure" enough to file suit).

Just as in *In re Teflon*, where self-identifying affidavits were rejected because there was evidence that some buyers mistakenly "believe[d] ***all*** non-stick coating is from [one manufacturer] DuPont," so too here there is abundant evidence that some buyers ***mistakenly believed all 303 THF was made by one manufacturer***. *See* 254 F.R.D. at 362; *id.* at 363 (describing issue not as one of objective criteria, but of "objective certainty"; "Without such an assurance, the Court cannot in good in conscience grant certification."). *See also In re Avon*, 2015 WL 5730022, at *5 (reliability of self-identifying affidavits particularly problematic because products in the class had "similar names" to products not in the class); ECF 1017-48, Hargraves Dep. (answering "not really" when asked if he understood there was more than one manufacturer of "303").[29]

XI. Plaintiffs All But Admit Defenses Preclude Certification.

The significance of affirmative defenses to typicality is not one-size-fits-all. It turns on how individualized the defenses and the supporting evidence are. Plaintiffs' Reply proves this point. They argue (at 129) that mitigation evidence – which they acknowledge is in the record – "can be addressed in individual proceedings." This is tantamount to an admission that individualized issues will predominate on this point.

Plaintiffs also object (at 89 & 129 n.100) that Defendants do not analyze the application of Wisconsin's comparative fault statute, which results in no recovery if a plaintiff is 51% at fault. This is curious. On the one hand, Plaintiffs argue that summary judgment briefing and evidence are irrelevant to the certification analysis. On the other, they now argue that Defendants cannot raise plausible individual defenses to defeat certification unless they brief it at the level of a summary judgment-type analysis. With approximately 30 Plaintiffs (and over a dozen more

[29] *In re Teflon* additionally noted that consumers' need to recall when and in what states they purchased – also at issue here – further undermines ascertainability. Plaintiffs' reliance on economic-only cases, where a class did not encompass property damages, to argue that chances for fraud are low is misplaced given the alleged damages at issue here.

dismissed Plaintiffs) just in the eight states, there are simply too many Plaintiffs to do that for each affirmative defense as to each Plaintiff. But to flesh out the Wisconsin comparative fault point, this bar to recovery means that on Wendt's negligence claim (for which his property damage claims were dismissed, but as to which he still has purchase price claims), a jury must consider whether he was contributorily negligent in reading the disclaimer and buying for a use the label said the product was not suitable for, as compared to any alleged negligence by Defendants in providing an allegedly unsuitable product but disclaiming its suitability. *See Krantz v. Gehl Co.*, 431 N.W.2d 675, 677-78 (Wisc. App. 1988) (finding plaintiff's contributory negligence exceeded defendant's as a matter of law where plaintiff did not heed safety instruction in the operator's manual).

With respect to statute of limitations, it is no response at all for Plaintiffs to say (at 131) "[l]imitations period are what they are."[30] While Plaintiffs cite a couple cases for the proposition that limitations defenses are generally "insufficient to preclude certification even if individual questions are present," this is not a blanket rule. Indeed, Defendants have offered numerous examples where it was sufficient. *See* ECF 1017 at 156-58. Moreover, Plaintiffs' argument (at 131) that in some states limitations do not "begin to run until a plaintiff has notice of both injury and cause of injury" does not help them across the board.[31] Rather, it concedes that this varies by state – and in some states it is ***only*** notice of the injury itself, not its cause – that triggers limitations. Notice of injury varies individual to individual. Finally, Plaintiffs' argument (at 131) that limitations cannot be individualized because "[a]rticles, stop-sale orders and the like are not individualized but general proof" seems to intentionally miss the point. Defendants do not contend that any of these constitute

[30] It is not true, as Plaintiffs claim (at 89), that all Plaintiffs necessarily "have purchases within the limitation periods." The answer depends on the Plaintiff and the claim. For instance, Sevy's last purchase was at an unknown time in 2017. The Court has ruled that Sevy's negligence, unjust enrichment, and fraud claims "accrued on or after May 24, 2017." ECF 991 at 22. More discovery is needed to determine the last month of Sevy's 2017 purchases. If the court certified any of these causes of action, it is highly possible that Sevy does ***not*** have purchases in the class period.

[31] Plaintiffs point only to California and Arkansas as states where this might be true. *See* Reply at 131.

constructive knowledge as to all class members. They merely argue that where – and only where – individual class members reviewed these sources, it may (depending on the state) trigger accrual and/or stop tolling. Accordingly, Plaintiffs' constructive knowledge cases are inapposite.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Defendants' Opposition to Plaintiffs' Motion for Class Certification, Plaintiffs have failed to meet their burden to show through evidence and under a rigorous analysis that any of their classes meet the requirements of Federal Rule of Civil Procedure 23. The Court should therefore deny Plaintiffs' motion.

Respectfully submitted,

By: */s/* _____

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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 30th day of October, 2023.

/s/