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 ALL ACTIONS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Treatises

Regulations

INTRODUCTION

Smitty's Supply, Inc. ("Smitty's") and Cam2 International LLC ("Cam2") sold, and putative class members purchased, fluid that was labeled Super S Super Trac 303 Tractor Hydraulic Fluid, Super S 303 Tractor Hydraulic Fluid, Cam2 Promax 303 Tractor Hydraulic Oil, and Cam2 303 Tractor Hydraulic Oil (together "303 THF").[1] In short, this case is about a product labeled as something it was not. For years, Defendants marketed and sold what they represented as tractor hydraulic fluid suitable for tractors and equipment manufactured by leading companies that would provide numerous performance benefits. The truth was far different.

This case is similar to *In re Dollar General Corp. Motor Oil Marketing & Sales Practices Litigation* with some notable exceptions. First, Plaintiffs are not proposing a nation-wide class or one class of consumers from several states entailing variation in state laws. 2019 WL 1418292, at *18-19 (W.D. Mo. Mar. 21, 2019). Second, *Dollar General* involved obsolete motor oils. Here, the "303" specification was not just obsolete. 303 THF *did not and could not* meet a "303" specification. Nor did it meet any other specification. *See* FAC ¶¶ 171, 174(b), 176. Third, while the motor oil in *Dollar General* was obsolete, it was still actual motor oil. Here, what Defendants sold as tractor hydraulic fluid was not that at all. Rather, it was flush oil, line wash, used transformer oil, used turbine oil, and/or other waste oil, without an additive package. FAC ¶¶ 173, 184. In the words of Cam2's own vice president of sales, it was "totally line wash in a bucket." *Id.* at ¶ 172(a). When one of its own salesmen saw that description for the first time at deposition, he was aghast. Defendants for years employed a "smoke and mirrors" approach to marketing. *See id.* at ¶ 174(1). Testing by the State of Missouri revealed that the fluid fell not just short but far short

[1] The fluid was made in the same tanks in the same way and simply sold under different names. *See* Fifth Am. Consol. Compl. ("FAC") ¶ 15; Expert Report of Werner J.A. Dahm (Ex. 1, "Dahm Rpt.") ¶¶ 94-95. Plaintiffs refer to labeled 303 THF products in the singular unless otherwise indicated.

of acceptable standards. *See id.* at ¶¶ 178-81. It was in fact waste unsuitable for, and damaging to, *all* tractors and equipment *regardless* of make, model, or year of manufacture. *Id*. at ¶¶ 195-263; Dahm Rpt. ¶¶ 126, 141, 158-64, 169, 181-82.

Defendants continued to sell 303 THF after it was banned by Missouri and two other states. In mid-2019, they began selling a newly labeled product, which for Smitty's, is called "Agricultural" or "Ag." fluid. *Id.* at ¶ 25. That fluid and 303 THF are materially the same. Smitty's own president testified that it lacks the properties of tractor hydraulic fluid and "***would be wrong, absolutely***" to call it tractor hydraulic fluid.[2] Yet at all times during the relevant time period, 303 THF unquestionably was labeled as tractor hydraulic fluid. Smitty's owner and CEO, Ed Smith, admitted that 303 THF was held out as "universal" and multi-functional. Defendants' own expert admits it was *not* that. Smith and others took the position that 303 THF was suitable only for equipment built in or before 1974. Defendants' own expert, however, disagrees that suitability depends on model year. Rather, he opines that it depends on applications in which a 20-weight fluid would be acceptable. But 303 THF was *never labeled* as such. Defendants have no expert to defend truthfulness of 303 THF labels. Plaintiffs' experts condemn the labeling and the fluid itself.

Defendants will do all they can to dissuade from certification. Most of their arguments, however, are in reality a merits debate. For example, Defendants have made much ado about supposed "misuse" of 303 THF in equipmealtnt built after 1974. *See* Transcript of Defense Arguments (3/1/22) (Ex. 3, "MTD Tr.") at 6-9. The label language on which they rely for this argument was inconspicuous, unclear, insufficient, and itself misleading for numerous reasons. At bottom, however, and assuming Defendants even continue this theory in light of their expert's testimony, it *makes no difference* whether the fluid was used in pre- or post-1974 equipment.

[2] Dep. of Chad Tate (1/26/22) (Ex. 2, "Tate Vol. II") 92:14-94:13.

Defendants want to distinguish the *Morning Song* bird poison case (MTD Tr. 8:9-18) but 303 THF was unsuitable for, and poisonous to, ***all*** equipment, new or old. FAC ¶¶ 195-263; Dahm Rpt. ¶¶ 126, 141. Disagreement thereon is a merits debate that does not affect certification.

Plaintiffs will offer expert testimony that all equipment in which 303 THF was used suffered damage, and every consumer lost money upon purchase by not receiving the product paid for. Defendants will undoubtedly contest Plaintiffs' aggregate damage calculations, which Plaintiffs provide although not required to do so. They will hotly dispute that the 303 THF had zero value. All this is again a merits debate. Plaintiffs are not required to prove their case, or damages, at this stage. Common questions with common answers abound. This case is firmly within the kind courts certify where, among other things, the deception centers on what a product claims to be and do. *Infra*, Sect. III.C. In words from the Arkansas Supreme Court: "Any purchaser ordinarily expects the article being bought to serve its purpose, else he would not buy it." *DeLamar Motor Co. v. White*, 460 S.W.2d 802, 804 (Ark. 1970). In words from defense counsel here, Plaintiffs claim that 303 THF was not suitable for its intended purpose, and "the labeling defines the intended purpose." MTD Tr. 27:8-12. At minimum, every label described the product as serving the purpose of tractor hydraulic fluid when it did not. According to Plaintiffs' experts, the fluid did not serve the purpose of hydraulic fluid at all. It was waste. This case should proceed in the most efficient manner to all concerned: state-wide classes of consumers, all of whom purchased a worthless waste product damaging to all equipment in which it was used.

BACKGROUND AND STATEMENT OF FACTS

A. History of 303 Fluid

In the 1960s and early 1970s, John Deere, a well-recognized tractor manufacturer, created a tractor hydraulic fluid called JD-303 or simply "303," regarded as highly effective and reliable.

"303" fluid became synonymous with the Deere name and this high-quality, effective product. FAC ¶ 9; Dahm Rpt. ¶ 27. The fluid was sold in yellow containers:

Sperm whale oil was an essential ingredient in the original Deere product. When Congress passed the Endangered Species Act, P.L. 93-205 (eff. Dec. 28, 1973), however, sperm whale oil could no longer be used and hence, the original "303" formula could no longer be sold. FAC ¶ 10; Dahm Rpt. ¶¶ 26-28. Tractors themselves were undergoing modernization, moving to hydraulically driven transmissions, use of power take-off (PTO), wet brakes, and single fluid reservoirs. Deere created fluids designed for multiple functions, with certain ingredients, viscosity, anti-wear and detergent additive specifications (*e.g.*, J20A, J20B), sold during the late 1970s until the late 1980s. FAC ¶¶ 10-12; Dahm Rpt. ¶ 23. As of 1989, these were replaced with J20C (Hy-Gard), widely recognized as an effective hydraulic fluid that aligns with specifications for many other original equipment manufacturers ("OEMs"). While OEMs may recommend their brand of fluid, it is common for consumers to purchase non-OEM branded lubricants and many of them, such as J20C, are widely suitable for use. FAC ¶ 12; Dahm Rpt. ¶¶ 40, 79, 104; Expert Report of Thomas F. Glenn (Ex. 4, "Glenn Rpt.") ¶ 3.5; *see also* Expert Report of Ron Hayes (Ex. 5, "Hayes Rpt.") at ¶ 7 (describing J20C as "widely applicable").

Many manufacturers created and sold fluids similar to newer Deere fluids while others continued to trade on the respected but defunct "303" designation. FAC ¶ 11. The formula for the

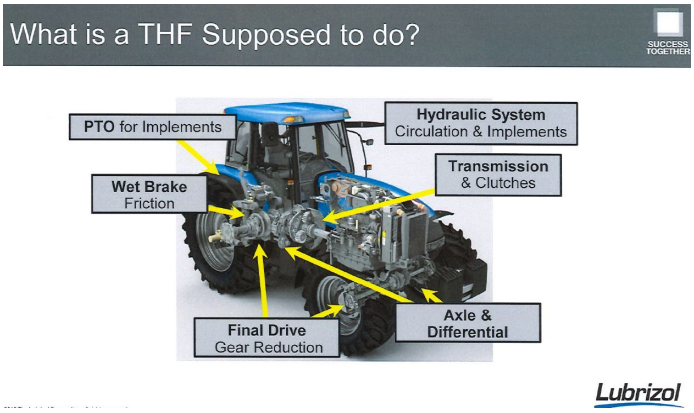
original JD-303 is unknown other than that it contained sperm whale oil, outlawed at year-end 1973. Dahm Rpt. ¶¶ 30-32. Any hydraulic fluid asserting that it meets or has equivalency to a 303 specification is comparing itself to something it cannot possibly meet. Dahm Rpt. ¶ 80. Ed Smith, Smitty's owner and CEO, knew from the beginning that 303 THF did not meet a 303 specification. Dep. of Ed Smith (1/25/22) (Ex. 6, "E. Smith") 124:13-127:3.

Lubrizol is a leading lubricant and additive manufacturer. *See* Tate Vol I. 44:19-23 (Lubrizol authoritative on lubricants); E. Smith 53:1-6 (good reputation); Dep. of Lee Swanger (2/23/23) (Ex. 7, "Swanger") 33:3-6 (Lubrizol considered expert in formulations and additive technologies for lubricants). Lubrizol estimated that as of 2018, less than 2% of tractors still in operation were built between 1960 and 1974 for which JD-303 was originally designed. Kuthoore, *Perilously Obsolete: The Dangers of 303 Tractor Hydraulic Fluids* (Ex. 8). J20C and other quality fluids are backward compatible, meaning they will work in both old and new equipment with hydraulic systems. *Id.*; E. Smith 68:3-8.

B. Functions And Purpose of Tractor Hydraulic Fluid

Tom Glenn is the Founder and President of Petroleum Quality Institute of America ("PQIA"), an organization that tests and reports on quality and integrity of lubricants. Glenn Rpt. ¶ 1.2. Smitty's President, Chad Tate, respects PQIA opinions on lubrications, manufacturing processes and labeling. Dep. of Chad Tate (5/9/19) (Ex. 9, "Tate Vol. I") 44:24-45:23; *see also* Dep. of Jennifer Vernon (1/29/2020) (Ex. 10, "Vernon") 82:20-22 (agreeing that PQIA is authoritative with respect to lubricant quality issues and lubricant labeling issues). Mr. Glenn explains that frictional characteristics and ability to prevent wear are fundamental to tractor hydraulic fluids which, in addition, are formulated to minimize deposits, prevent rust and corrosion, minimize foaming, and keep systems cool. Glenn Rpt. ¶ 3.6. Werner Dahm has

extensive expertise in fluid mechanics, fluid dynamics, and related areas. Dahm Rpt. ¶¶ 1-2, 5-15. He explains the science of fluid mechanics, *id*. at ¶¶ 37-38, as well as functions and importance of proper tractor hydraulic fluid. *Id*. at ¶¶ 26, 34-36, 81-90. It is used in tractors as well as mining, construction, and other equipment in off-road applications. Dahm Rpt. ¶¶ 21-23; Glenn Rpt. ¶ 3.4; E. Smith 35:20-22; Dep. of Jeremy Schenk (3/12/19) (Ex. 11, "Schenk Vol. I") 73:4-8. Consistent with needs of hydraulic systems, tractor hydraulic fluid is multi-purpose, acting as energy transfer medium and lubricant for moving parts in transmissions, differentials, hydraulics, final drives, PTOs, wet brakes, and power steering. FAC ¶ 9; Dahm Rpt. ¶ 34; Glenn Rpt. ¶ 3.3. Defendants describe it similarly. Tech. Prod. Info. Sheet (Ex. 12); Dep. of Chad Tate (1/26/22) Tate Vol. II") 137:25-138:9; Schenk Vol. I 70:22-71:11. A Lubrizol diagram explains:



Ed Smith agrees that this diagram accurately depicts functions of tractor hydraulic fluid. E. Smith 53:12-54:25. He testified that 303 THF was sold as universal and multi-functional, *id.* at 38:2-15, 38:24-39:4, and for years labels described it as "Multi-Sertvice Hydraulic/Transmission/Wet Brake Lubricant" or in these or equivalent words (for Cam2, "Multi-Functional, Hydraulic, Transmission and Wet Brake Lubricant"). *See also* Tate Vol. I 175:23-176:9. ("Q. … consumers were being told for years that Super S Super Trac 303 was a multi-[service] hydraulic transmission and provided lubrication to the wet brakes, right? A. Uh-huh. Q. Yes? A. Yes.").

C. Defendants' Sales and Labeling of 303 THF

In or around late 2013/early 2014, Smitty's acquired Cam2. Having manufactured and sold 303 THF well before that, Smitty's continued to manufacture the fluid for sale under its own and Cam2 brand names. All 303 THF was the same, manufactured and blended together in the same tanks, using the same processes, ingredients and internal "specification." Tate Vol I. 236:3-24; Schenk Vol. I 52:18-53:18; 79:22-80:8; Dep. of Jeremy Schenk (10/10/19) (Ex. 13, "Schenk Vol. II") 96:9-97:5, 103:12-104:5; Dep. of Matthew Saragusa (5/10/19) (Ex. 14, "Saragusa") 20:12-15, 99:20-24; Dahm Rpt. ¶¶ 94-95, 98. It was sold in yellow containers. Dep. of David Smith (5/8/19) (Ex. 15, "D.Smith") 35:17-20; Schenk Vol. I 53:12-24; Vernon 217:22-24. Yellow was associated with "303". Dep. Of Cory Trahan (1/9/19) (Ex. 16, "Trahan) 216:18-217:10. "303" was associated with John Deere. FAC ¶ 14; Dahm Rpt. ¶ 27; Schenk Vol. I 226:5-8. Defendants' 303 THF was sold in 1, 2, and 5-gallon sizes and some 55- and 275-gallon drums. The 5-gallon bucket was by far the largest seller, comprising over 95% of sales. The 1 and 2- gallon jugs made up only 2.68% of sales, and the largest sizes less than 1% of sales during the class period. *See* Def. Sales Data (Ex. 17).

All labels at all times described 303 THF as tractor hydraulic fluid. *See* Labels, (collectively, Ex. 18). Unsurprisingly from a sales-driven marketing standpoint, Defendants pictured tractors and/or equipment newer than 1974 on the front of the bucket:

Trahan 9:6-16, 112:17-113:19, 140:12-141:25**;** Tate Vol. I 71:24-73:3; Dep. of Jonathan Lorio (1/10/19) (Ex. 19, "Lorio Vol. I") 70:23-71:9; Schenk Vol. II") 134:24-135:2; Dep. of Michael Hamm (8/18/22) (Ex. 20, "Hamm") 177:5-178:1, 178:4-179:3. The post-1974 tractor and front loader pictured on Smitty's labels were present from at least 2009:

D. Smith Dep. Ex. 1 (Ex. 21), D. Smith 71:2-76:5. Consumers were also told by Smitty's employees that the fluid would work in newer equipment. Schenk Vol. I 243:1-246:3, 247:24-248:6; Schenk Vol. II 135:20-136:6, 250:24-251:11; Saragusa 91:23-95:14. Consistent with description as multi-function tractor hydraulic fluid, labels (except for largest drums) also set out multiple performance benefits in areas of anti-wear, brake chatter, extreme pressure properties, foam suppression, PTO clutch, rust protection, and water sensitivity:

Expert Report of Dr, Adam Alter (Ex. 22, "Alter Rpt.") ¶¶ 7(g), 8(c). As confirmed by Smitty's Matthew Saragusa (director of laboratory and blending), such performance claims are all "important components of a tractor hydraulic fluid and the protection it provides." Saragusa 55:3-10. Labels (except Cam2 largest-size drums) also stated that the fluid "is suitable as a replacement" "for the following manufacturers where a tractor hydraulic fluid of this quality [or "this performance level" as to Cam2] is recommended:" followed by list of major OEMs—Allis Chalmers, Allison,[3] Caterpillar, Deutz, Ford Tractor, International Harvester, JI Case/David Brown, John Deere, Kubota, Massey Ferguson, Oliver, and White. Smitty's labels stated that the fluid "has been field tested" in support of this suitability claim.

Defendants' 303 THF was offered as a lower-cost alternative to OEM-brand and so-called "premium" fluids. Ed Smith described 303 THF as "economy fluid" in the sense of lower quality, which is a misnomer. Smith admitted that 303 THF must still function satisfactorily as tractor hydraulic fluid. E. Smith 33:17-22. *See also* Schenk Vol. I 223:11-14 ("Q. With respect to meeting a specification, a product either meets it or it doesn't, right? A. Correct.").

D. The Importance of Labels, Label Claims, and Truthful Labelling

Tractor hydraulic fluid is a technical product involving specific ingredients, formulations, chemistry, and properties to which the consuming public is not privy and average consumers cannot knowledgeably assess independently. *See* Dahm Rpt. ¶ 167 (consumers lack technical expertise and do not have their own testing capabilities). As explained by Plaintiffs' consumer behavior expert, Dr. Alter, the fluid is a "credence good," for which consumers, by necessity, rely on labels for explanation of quality and suitability. Alter Rpt. ¶¶ 28, 31; *see also* Dahm Rpt. ¶ 167 (consumers "must and do, rely on what they are told (and not told) by the manufacturer" regarding

[3] Smitty's large-sized drums said simply "where a tractor hydraulic fluid is recommended." Allison was not on the 55-gallon drum and was later removed in 2018 from Smitty's 5-gallon label.

quality and characteristics of 303 THF). At the simplest level, consumers must have a label to know what is inside a closed container. Defendants' own proposed "human factors" expert agrees with that basic truism. Dep. of Benjamin Lester (Ex. 23, "Lester") 133:11-13, 133:18-134:2; *see also id*. at 245:20-246:6 (consumers would not purchase a blank bucket if another was labeled tractor hydraulic fluid); 260:13-16 ("Q. The manufacturer has to label the product to describe what the product is according to the manufacturer so that people can decide whether or not to buy it, right? A. Yes."). In the field of lubricants, "[p]roduct labels are an important source of information for the consumer in evaluating whether a fluid will work in equipment." Hayes Rpt. ¶ 3. Labeling has significant ramifications including harms resulting from improper fluids. Glenn Rpt. ¶ 5.1.

Chad Tate admits "that the label is the primary way for the purchasing customer to know what's in that bucket." Tate Vol. I 87:23-88:1. He agrees that a label is "for the purchaser's benefit, to give[] them information … so they can make a decision about whether or not to buy [the product]." *Id*. at 88:17-23. He agrees that "you want the consumer to be able to rely on the information and the images that you put on that label" (*id*. at 88:24-89:2) and that it is "reasonable and you expect that the consumer is going to rely on … the label in most instances to make a purchasing decision." *Id.* at 89:3-7. He agrees "that [the] label must always be truthful and accurate." *Id*. at 88:2-6. Similarly, Jonathan Lorio, vice president of sales, agrees that "you would want to make sure that whatever product you're selling is in fact what it claims to be and is in fact suitable for the use in which it's presented to the consumer." Lorio Vol. I 29:22-30:11. He agrees that the label "is more likely than not to play a role in the consumer's purchasing decision" and the very point of putting information on packaging is "for the consumer to use in deciding whether or not they are going to make a purchase." *Id*. at 85:6-19. This commonly applies to all consumers. *Id.* at 85:15-86:4. He believes that consumers have a right to rely on labels. *Id*. at 95:2-96:9.

Smitty's Cory Trahan, who was partially responsible for the labels, agrees that information was put on labels for consumers to use in connection with purchase decisions. Trahan 142:21-143:13. Dr. Lester agrees that consumers have a right to rely on the label, and labels provided information for purchasers to use in making a decision whether to purchase. Lester 121:23-122:2, 136:8-11.

Company officers and employees also agree that representations on a label cannot just be made up. Lorio Vol.I 98:1-12; *see also* Schenk Vol. I 220:10-20 (if company says fluid does something, there should be data to back it up); Trahan 220:10-221:13 (same). Lorio assumes through "common sense" that tests determine if performance benefits are actually conferred. *Id*. at 133:3-134:17. He agrees that the performance benefits are part of what "the company is saying gives value to the product," and "[what] the retail customer is paying for when they buy the fluid." *Id*. at 124:9-125:4, 126:10-17, 127:20-25. Schenk agrees that customers would expect performance benefits claimed. Schenk Vol. I 235:5-19. They otherwise confirm the importance of truthful marketing and labeling. The Independent Lubricant Manufacturers Association ("ILMA"), a trade association for lubricant manufacturers, has a code of ethics. In going through these standards, Mr. Lorio testified that Smitty's has a responsibility to:

- adhere to a standard of excellence in manufacturing, blending, producing, packaging, promoting, and marketing its products;
- impose strict quality controls in the manufacturing and marketing process;
- represent and market all products fairly and accurately;
- "assure that all product and promotional information, including statements designed or which can be interpreted to describe the properties or performance of a product are accurate and not misleading."

Lorio Vol.I 90:2-91:2, 91:7-12, 91:13-17, 91:23-92:11.[4] He also testified:

[4] Lorio considers Smitty's an ILMA member through Cam2. Lorio Vol. I 87:24-88:25. Smitty's own membership was rejected. Schenk Vol. II 260:18-22.

Q. And what do you think about that practice of packaging product in a container that isn't exactly what the label says that it is?
A. I don't think it's right.

Id. at 58:15-18. Shenk testified:

Q. And you want to make sure that every time that you package that product for sale that it's going to be of the quality that it needs to be to provide the advertised performance benefits and that type of thing, right?
A. Correct.

Schenk Vol. I 81:1-9. He also testified:

Q. You would expect and you think [consumers] have the right to rely on that information in making a purchasing decision, right?
A. Yes. I mean, that's –
…
Q. And do you agree that Smitty's has to always represent its tractor hydraulic fluid on the labeling fairly and accurately to consumers?
A. Yes.
Q. And do you believe -- do you agree that all information on the labels with respect to performance properties and physical characteristics for the tractor hydraulic fluid 303 must be accurate and not misleading?
A. Yes.

Id. at 219:1-19. Tate also agrees that the label "shouldn't omit any information that would give the consumer … an accurate or complete understanding of what the product is suitable to be used for" and "what the product actually is." Tate Vol. I 88:7-16.

E. Design and Manufacture of Tractor Hydraulic Fluid

True tactor hydraulic fluids are made according to a formula, using virgin or re-refined base oil with known properties and functional additives, pre-determined to work with each other and matched to that base oil at a specific treat rate. Glenn Rpt. ¶ 3.8; *see also* Dahm Rpt. ¶¶ 41-43. Additives are not formulated to work properly with just any base oil, and none are formulated for used oils. Appropriate base oil is thus critical. Glenn Rpt. ¶¶ 3.18-3.19. An additive package is a "carefully balanced set of numerous chemical additives" tailored to both the base oil and relative to each other. Additives are not introduced individually or randomly but as an entire package at a

certain treat rate. Dahm Rpt. ¶ 41; Glenn Rpt. ¶¶ 3.8, 3.14-19. Commercially available additive packages are concentrated products added to base oil at a specified amount. Glenn Rpt. ¶ 3.14. Base oil and additives must then be properly blended. *Id*. at ¶¶ 3.8, 3.28-3.32. Testing is typically performed to assure that the proper treat rate has been used and the blend batch is homogeneous. *Id*. at ¶ 3.14.

True tractor hydraulic fluids cannot be haphazardly thrown together and specifications are not created without extensive research, development, and testing. *See* Glenn Rpt. ¶ 3.17. Development of appropriate additives is a complex, deeply tested process involving numerous chemical properties and interactions that, in combination with the base oil, provides performance objectives that the resulting fluid seeks to achieve. Dahm Rpt. ¶¶ 42, 45-54; Glenn Rpt. ¶¶ 3.14-3.17. In addition to laboratory testing, bench tests, rig tests, and field testing must be performed to examine and ensure results. Field testing is a rigorous exercise that follows controls and protocols. Data is compiled and examined to assess performance and whether the final product meets given claims. Glenn Rpt. ¶¶ 3.21-3.26. In addition, fluid must meet at least one OEM specification to be truthfully called tractor hydraulic fluid. Glenn Rpt. ¶ 3.3 Hayes Rpt. ¶¶ 11-12, 20-21, 25. OEM specifications identify characteristics best suited for their equipment. As noted, it is possible to develop fluids suitable across a wide range of equipment. Glenn Rpt. ¶ 3.5; Dahm Rpt. ¶ 40.

Proper tractor hydraulic fluid provides needed power transfer, lubrication, sealing, heat transfer and other functions while doing no harm to the equipment. *See* Glenn Rpt. ¶ 3.3; Dep. of Ron Hayes (Ex. 24, "Hayes") 234:17-25; Dep. of Thomas F. Glenn (Ex. 25, "Glenn") 124:17-22; 340:11-24. Conversely, a fluid that does not meet specifications will inevitably result in excessive wear and other damage to hydraulic system, transmission, PTO and related machinery. Dahm Rpt. ¶¶ 81-82. Damage from substandard fluid generally occurs in subsystems including: hydraulic

pump, actuators, and valves; transmission; power steering system; wet clutches; wet brakes; final drive; and PTO. Dahm Rpt. ¶¶ 82-83. While equipment system design details may differ somewhat, the main aspects of subsystems, and types of damage, are common to all OEMs and tractor models. *Id.* at ¶¶ 84-88. Smitty's itself identified common harms from use of 303 THF to include "damage to the spiral gear in the final drive, excessive wear in the planetaries, improper and poor shifting, seal leakage and improper operation of the wet brakes … starting the equipment, oil starvation, high pump leakage, deposits, sludging, and thickening." Vernon 145:1-146:3, 146:11-148:2.

F. Defendants' Product Was Not Actual Tractor Hydraulic Fluid.

When Smitty's wanted to make specification-conforming fluids, it consulted additive companies "for guidance and expertise and how to properly blend lubricants that are suitable for use in equipment." Saragusa 15:22-16:1. For 303 THF, however, it did nothing of the sort.

Smitty's made 303 THF according to its own internal "specification." E. Smith 13:9-14:6. Although it could have done so, Smitty's obtained no information or analysis from any additive company or other authority that its specification would generate a product suitable for any tractor or equipment. Tate Vol. I 80:11-81:4; E. Smith 45:2-13; Saragusa 17:9-12, 17:23-18:14, 57:13-25; Schenk Vol. II 117:20-118:13. Smitty's was not concerned with compatibility of base oils or additives, whether incoming materials were "clean" or line flush and used oils, or achieving performance objectives or claims on a label; rather, manufacturing was concerned only with meeting the internal specification. Saragusa 111:16-21. Even then, Smitty's often failed to follow it. Dahm Rpt. ¶ 97; *see also* Saragusa 29:14-20, 31:13-22 (Saragusa had concerns from 2012 until he left in February 2019 that the fluid was out of internal specification). No specific testing or analysis was done to determine that Smitty's was creating a fluid fit for use as tractor hydraulic

fluid. Tate Vol. I 79:7-12; *see also* Swanger 114:10-115:25 (acknowledging he saw no bench, rig or other test data showing 303 THF had the performance properties on the label). Smitty's internal specification in fact contained only a handful of properties. The first set addressed what consumers might notice (*i.e.*, appearance, odor, and color), having little or nothing to do with chemical or physical performance parameters for conforming tractor hydraulic fluid. Dahm Rpt. ¶¶ 99-100. The second set addressed only density without an acceptable value. *Id*. at ¶ 102. Finally, viscosity was listed at two temperatures (40C and 100C) with values, ranges, and index inconsistent with specifications of major OEMS. *Id.* at ¶¶ 103-104. The only other benchmark was elemental zinc. Glenn Rpt. ¶ 4.2. Key performance properties were missing and values of critical performance parameters, including viscosity, were far below standard. The so-called specification did "not come even close to meeting or being able to truthfully suggest an equivalency to any major tractor OEM specifications for a tractor hydraulic fluid." Dahm Rpt. ¶¶ 105-106.

There is no data on what "field testing" may actually have been done. *See* Tate Vol. I 60:17-61:1, 94:4-11; Schenk Vol. I 236:14-17. Ed Smith described making "half a truckload" of fluid, putting it in pails, giving it away, and asking if recipients used it. E. Smith 41:19-42:11, 49:17-50:1, 50:25-51:7. Since then, "field testing" has been selling 303 THF and waiting for complaints. *See id*. at 57:10-58:4; Saragusa 42:20-23. Tate admits that consumers may be unaware that problems are caused by the fluid. Tate Vol. I 136:8-137:3; *see also* Saragusa 42:20-43:3 (does not know if customers experienced problems with equipment they did not report to Smitty's). Tate concedes that quality of the product does not depend on complaints, but whether it is actually safe and is what it purports to be. Tate Vol.I 137:25-138:5. Dr. Dahm and Mr. Glenn roundly reject the notion that Smitty's ever conducted actual field testing. Dahm Rpt. ¶ 109; Glenn Rpt. ¶ 3.26.

303 THF was not made with virgin oil or a matched additive package at a specified treat rate. Dahm Rpt. ¶ 96. It was not made in batches; rather, lubricant material, which Smitty's called "lube oil," from rail cars and tankers went into designated 500,000-gallon tanks on a continuous basis. *See* Schenk Vol. I 109:10-110:14, 141:11-162:14, 172:16-195:25; Dahm Rpt. ¶¶ 96-97; Glenn Rpt. ¶¶ 4.5-4.6. Extensive review of internal records show that the "lube oil" contained flush oil, line wash, used transformer oil, used turbine oil, and other waste oils. Dahm Rpt. ¶¶ 110, 112-119; Glenn Rpt. ¶¶ 3.12-3.13, 4.3-4.7. *See also* Tate Vol. I 143:14-144:9 (confirming 303 THF made with used transformer and used turbine oil). Smitty's did not test incoming lube oil for contaminants like silicon, iron, or other metals. Saragusa 116:3-12. Used base oils were of different types from a wide range of resellers. Dahm Rpt. ¶¶ 112-18. Oil feed was obtained from 25-30 suppliers without adequate controls.[5] Base oil composition was never acceptable and Smitty's never used an additive package, relying instead on whatever additives might exist in feed oils. Glenn Rpt. ¶¶ 4.6, 4.8; Dahm Rpt. ¶¶ 119, 129-30. "[A]t no time was an additive package introduced into a base oil that was, or ever could be, matched with that additive package, much less at a pre-determined treat rate." Dahm Rpt. ¶ 125. The fluid was not, and could not be truthfully called, tractor hydraulic fluid. Dahm Rpt. ¶¶ 156-57; Glenn Rpt.¶¶ 4.12, 5.6; Hayes Rpt. ¶ 25. Put simply, it was waste. Dahm Rpt. ¶ 182; Hayes Rpt. ¶ 25; *see also* Glenn 152:23-24 (…"I wouldn't use that fluid in any hydraulic system.").

Used and line flush oils are what facilitated the low price point at which Defendants positioned the 303 THF. *See, e.g.*, June 9, 2016 Email from J. Hensley (Ex. 26) ("We purchase

[5] Quality control is important. Schenk Vol. I 80:20-81:3. Smitty's should have Certificates of Analysis for these ingredients, yet rarely do they exist for line flush or used oils. Schenk Vol. I 94:10-97:9; Saragusa 137:24-138:16. Among other things, used transformer oil risks presence of PCBs. Smitty's should have been but was not rigorous in requesting and reviewing documentation pertaining to purchases and use of transformer oil. Glenn Rpt. ¶ 4.4. Process and quality controls were shoddy at best. *See* Dahm Rpt. ¶ 120.

used transformer oil, used turbine oil, and lube line flush for use in our economy products."); Vernon 31:3-7 (Q. And so, my question was, it's true, isn't it, that you can lower the price on a tractor hydraulic fluid by using cheaper component products like line wash; right? A. Yes."). Price of ingredients, not quality or appropriateness, were guideposts for production.[6] Defendants knew well what was going into the tanks. For example, Cam2's Steve Shockites emailed Saragusa and blending manager Steve Bennett that "Trailer 162 has this stuff that is heading down to Roseland … it is perfect 303 fluid except it is contaminated with some graphite/moly … so it is black and slippery ... I am hopeful that it will disappear on your big 500K tanks of 303." May 12, 2016 Email (Ex. 27); Saragusa 108:5-112:13. Another email notes that the "reason why we are able to sell those ["economy"] products at the numbers we sell them is because they have flush oil in them," "line wash is what it is," the "moral of the story is that not much flush is good as is," and that 303 tanks were where "dilution is the solution." May 2016 Email (Ex. 28); Saragusa 119:8-125:2. Defendants made "crap" they purchased "go away in the tractor tank." Oct. 14, 2016 Email (Ex. 29). Saragusa dealt with this type of thing on a regular basis. Saragusa 132:4-133:11.

Upper management and employees testified that 303 THF was unsuitable for equipment manufactured after 1974. E. Smith 164:18-21; Tate Vol. I 71:24-72:3; Schenk Vol. I 240:1-7. Tate testified, for example:

> "I have a deep concern … if you're using a 303 product where you should be using a J20C product. Matter of fact, I have a huge concern if you use a 303 product in any application that does not call for 303."

Tate Vol. I 63:7-12. They took a position that the fluid was suitable only where 303 "is called for." *Id.* at 57:15-58:4, *see also id*. at 177:9-178:6. The fluid, however, has never been called for. *See*

[6] Evidence to date suggests that cost of materials was roughly $2 per gallon, then sold to retailers as a finished product in excess of $8.50 per gallon. Dahm Rpt. ¶¶ 110-11.

E. Smith 21:22-22:5 (no OEM ever recommended 303 THF). There has been no 303 specification for decades, and 303 THF *did not meet* a 303 or any other specification. Tate Vol. I 98:11-15, 104:4-6; E. Smith 127:23-129:4; Schenk Vol. II 190:5-191:14, 196:21-197:4. If an OEM called for 303 in particular equipment, it would be referring to JD-303 from the 1960s-early 1970s. The fluid Defendants sold was never that. Tate Vol. I 55:1-24. Defendants have no expert to say that 303 THF was in truth legitimate tractor hydraulic fluid, "303" or otherwise. It was not.

G. 303 THF Was Unsuitable For, and Damaging to, All Tractors and Equipment In Which It Was Used.

303 THF was in fact unsuitable for any tractor or equipment regardless of type, manufacturer, or year. Dahm Rpt.¶ 141; Glenn Rpt. ¶ 4.12; Glenn 152:18-153:9. Because it was of insufficient technical quality and made with inappropriate, inadequate ingredients, the fluid was "fundamentally unable to conform to or have equivalency to" requirements of any OEM before or after 1974. Dahm Rpt. ¶ 156. Every consumer who purchased 303 THF purchased a waste product that was not actually tractor hydraulic fluid and did not conform to any specification, regardless of OEM, model, type, or year of manufacture of equipment in which the fluid was used. *Id*. at ¶¶ 157, 170; Glenn Rpt. ¶ 4.12; Glenn 152:18-153:9; Hayes Rpt. ¶ 25. The fluid also was uniformly harmful, producing excessive wear and other damage to hydraulic system, transmission, PTO, and other components that use hydraulic fluid for power transfer, lubrication, sealing, heat transfer, and related functions. Dahm Rpt. ¶ 158. For scientific reasons, damage was present in every tractor in which 303 THF was/is used, occurring immediately and continuously until properly flushed. *Id*. at ¶¶ 159-62, 164, 173. This is so regardless of any prior or contemporaneous use of other 303 or tractor hydraulic fluids and independent of equipment condition or maintenance. *Id*. at ¶¶ 160-61, 172. When hydraulic fluid fails to meet specifications and lacks qualities that make it a tractor hydraulic fluid (true of 303 THF in all cases), resulting damage and other impacts are common

regardless of OEM, type, model or year. *Id.* at ¶ 171. Degree of common impacts may vary somewhat but all consumers suffered the same damage and impacts. *Id*. at ¶ 173. Until properly flushed, ill effects continue and inevitably produce further effects over time. *Id.* at ¶ 164.

Owners typically are not aware that damage is occurring until cumulative effects lead to operational impacts requiring attention and repair. They also lack the technical expertise to understand that 303 THF was the root cause of negative impacts and far more likely than not would (wrongly) assume that they are just a routine part of owning and operating a tractor or the fault of the tractor manufacturer. Dahm Rpt. ¶ 167. Such impacts include: (1) reduced actuator power; (2) slow actuator response; (3) erratic actuator movement; (4) wet brake chatter; (5) wet clutch slippage; (6) seal failures; (7) actuator failures; (8) hydraulic pump failures and similar impacts. *Id*. at ¶¶ 89, 165. These, in turn, produce further cost impacts common across all OEMs and equipment including more frequent maintenance, repairs, parts replacement, overhauls and downtime. *Id*. at ¶¶ 90, 166. Such negative impacts are the very sort identified by Defendants themselves but kept from consumers.

H. Three States Banned Sale of 303 THF.

On October 12,2017, the State of Missouri Department of Agriculture ("MDA") sent a Notice of Misbranded Product to Smitty's and Cam2 stating that due to testing results, 303 THF was found misbranded and deceptive.[7] Defendants were ordered to remove it from sale until changes were made to correct either the labeling or the product. *See* Notices (together, Ex. 30).

[7] MDA is responsible for ensuring that all commodities, including oils and transmission fluids meet statutory and regulatory requirements and monitors to ensure products are as represented. Hayes Rpt. ¶ 3. Mr. Lorio understands that part of the mission of agencies like MDA is to act as "a protector of product safety and product integrity, making sure that the products that are being sold … are what they say that they are and are safe for use." Dep. of Jonathan Lorio (1/28/20) (Ex. 31, Lorio Vol. II) 143:21-144:4. He agrees that MDA concerns should not be ignored. *See id*. at 144:5-11 ("Q. And so, whether or not you disagree or agree with those regulators, if you care about the purchasers of the end product, Smitty's at least has to take concerns into account and can't just overlook concerns posed by those regulators; right? A. Yes.").

Ron Hayes was Director of MDA's Weights, Measures and Consumer Protection Division. Hayes Rpt. ¶ 2. He explains that MDA was concerned about quality of "303" fluids and that they were not being accurately described to consumers. MDA testing was performed against the Deere J20C specification because it is recognized as the longest standing widely applicable specification. *Id.* at ¶¶ 6-7. Results for 303 THF came back as follows:

Smitty's

Sample ID	Property	Units	Test Result	J20C, Min
8208/5	Kinematic Viscosity @100°C	cSt	7.647	9.1
Sample ID	**Property**	**Units**	**Test Result**	**J20D, Max**
8208/5	Pour Point	°C	-42	-45

Cam2

Sample ID	Property	Units	Test Result	J20C, Min
8263/1387	Kinematic Viscosity @100°C	cSt	7.633	9.1

Ex. 30. As indicated, the fluid failed to meet specifications (as to J20C or J20A) for viscosity and pour point. Viscosity is the most important aspect of hydraulic fluid. Schenk Vol. II 226:18-20; Swanger 92:9-11. As to viscosity, 303 THF came in at 7.6, well below the minimum 9.1. Results also showed that it contained higher levels of metal contaminants than even other 303 fluids. Hayes Rpt. ¶¶ 10-11. Testing showed silicon levels of 33 and 49, which indicate dirt and abrasive contaminants. *See* Glenn 125:15-126:5, 128:3-12; Hayes Rpt. Ex. B. This is unsurprising as dirt and contaminants are found in used oils and line flush. Schenk Vol. II 73:15-74:15. In 2014, Defendants lost an account due to high silicon levels. Tate Vol. I 234:4-236:8. Third-party testing at the time showed silicon levels at 55-100. Tate agreed that this is unacceptable, *id*. at 239:3-240:6, exposing any equipment to increased wear and damage to hydraulic systems and other metal components that the fluid comes into contact with. *Id.* at 240:24-241:9. Smitty's could and should have been testing for silicon and other contaminants but did not. Saragusa 27:23-28:12, 116:3-12,

117:13-118:4. Tate agreed silicon levels found by MDA three years later were still high, in fact two to ten times higher than other 303 fluids tested. Tate Vol. I 283:14-285:18, 288:3-7. Further:

> Q. And like we talked about earlier, silicon levels at that number raise concern for increased wear and damage on equipment in which that fluid's used, right?
> A. Yes. You don't want silicone.
> Q. Regardless of the year of your equipment, right?
> A. Yes.
> Q. Are those test results concerning to you?
> A. Well, sure they are.

Id. at 285:19-286:3.

MDA held a stakeholder meeting in November 2017. Hayes Rpt. ¶ 14. Saragusa attended and reported to management. Saragusa 154:4-22, 159:14-160:22. At the meeting, "all comments were in favor of eliminating the 303 products." Meeting Notes (Ex. 32); Schenk Vol. II 126:19-128:9. Defendants were invited to provide data to show that 303 THF met some specification, was a tractor hydraulic fluid, or support label claims. They did not do so. Hayes Rpt. ¶¶ 14-15. There was no such data. *See* Schenk Vol. II 113:23-115:13, 117:4-19; Tate Vol. I 282:9-16; Saragusa 43:19-25, 53:14-18. Georgia and North Carolina also banned the fluid. Schenk Vol. I 43:5-9.

I. Defendants Continued Selling 303 THF After State Bans.

Saragusa and Schenk were in favor of stopping sale of 303 THF. Schenk Vol. II 126:19-128:9, 128:19-129:12. Ed Smith would still sell it today. *See* E. Smith 88:23-89:6 ("Q. But for the actions of the regulators saying that the labels were improper, would you still be selling 303 tractor hydraulic fluid today? … [A.] Yes."). Smitty's considered alternatives and launched a J20A product. Schenk Vol. I 37:1-39:2; Saragusa 49:15-50:6; Trahan 75:10-15; *see also* Vernon 112:16-22 ("Q. When Smitty's learned that it could not sell 303 in the state of Missouri anymore, it decided

to sell a J20A product; right? A. Correct.").[8] Counter to opinions of Saragusa and Schenk, however, Defendants continued selling 303 THF in states where it had not been banned. Schenk Vol. II 127:19-22; 128:11-129:12; Lorio Vol. II 144:12-19. It was still called tractor hydraulic fluid. The same performance benefits remained on labels. Tate Vol. I 106:3-20; Saragusa 46:5-24. Language pertaining to OEMs remained the same. Saragusa 46:25-47:3. The formula and process remained the same. Tate Vol. I 111:16-23; Schenk Vol. I 64:6-14.[9]

J. Defendants Admit That 303 THF Was Not Suitable for the Purpose Sold.

After regulatory issues and several lawsuits, Defendants eventually stopped selling 303 fluid under labels calling it tractor hydraulic fluid. In the first half of 2019, they transitioned to new labeling calling the fluid Agicultural or "Ag." fluid. Tate Vol. I 273:23-274:20; Trahan 73:1-17; Schenk Vol. II 24:21-25:6, 27:1-8.[10] This is (and is described as) a 20-weight fluid. Tate Vol. I 271:23-272:12; Schenk Vol. II 26:22-25. Chad Tate emphatically testified that the fluid now sold as Ag. fluid is not, and is not called, tractor hydraulic fluid "[b]ecause it doesn't have the properties that make it a tractor hydraulic fluid" or ingredients "which would warrant using it in – in a tractor or any – any heavy piece of equipment or so forth." Tate Vol. II 53:22-24, 92:14-94:13, 98:5-13, 132:4-7; *see also id*. at 118:6-119:15 ("definitely wouldn't be [suitable for] a tractor"). Asked if it

[8] That specification was obsolete, but unlike 303, it was still in existence and could be formulated. Saragusa 51:24-52:2. Also unlike 303, it was made with a virgin group base oil and additive package. *Id.* at 51:19-23, 56:1-10; *see also* Schenk Vol. II 106:1-9 (303 THF did not meet J20A specification).

[9] Smitty's did change pictures on the front of its bucket labels to old tractors due to concern that current pictures conveyed that 303 THF would work in newer equipment. Saragusa 45:8-17, 45:18-46:3; Lorio Vol. II 144:12-19, 144:23-145:8, 145:15-146:9. The Cam2 picture of post-1974 equipment did not change.

[10] New labels called the product "Agri+Plus" under the Super S brand and "AG-20" under the CAM2 brand. Tate Vol. II 42:9-15. Inventories of 303 THF labels, however, continued to be used during the transition period. Tate Vol. I 273:23-274:20.

would be inaccurate or false to call the fluid a "tractor hydraulic fluid," Tate responded: "It would be wrong, absolutely." *Id*. at 94:11-13.

Ag. fluid is in fact the same fluid previously labeled and sold as tractor hydraulic fluid. It is made with the same line flush ingredients used to make 303 THF and blended in the same 303 tanks. Schenk Vol. II. 27:22-28:4; *see also* Tate Vol. I 271:6-272:3 (testifying that Ag. fluid is made with the same lube oils and line wash, and that internal specification ranges had not changed). Schenk affirmed by declaration that "immaterial changes were done to make it look like Ag. fluid was a different product than the 303, but it was not," and that in "all material respects, the [Smitty's] specification remained the same as it was when the fluid was packaged as 303 THF." Decl. of Jeremy Schenk (3/25/22) (Ex. 33) ¶ 5.[11] Dr. Dahm compared internal specifications for 303 THF and Ag. fluid and found no meaningful difference. Dahm Rpt. ¶ 133. He also analyzed testimonial description of and specification sheets for both, again finding no meaningful difference. *Id*. at ¶¶ 134-39.

303 THF also was a 20-weight fluid. Tate Vol. I 160:4-8; Schenk Vol. I 249:5-20. Shortly before transition to new Ag. fluid labels, Jeremy Schenk emailed a retailer stating that 303 THF was a non-detergent 20-weight fluid "unlike the [u]niversal fluids of today," and that aside from being a thinner fluid "which will not provide the same level of wear protection at higher operating temps as a 30W, the absence of the detergent can lead to excess deposit buildup inside transmissions and other critical components. It will also breakdown quicker in the presence of particulate type contamination due to not having the detergent/dispersant surfactants to keep the soils in suspension." November 23, 2018 Email (Ex. 34); Schenk Vol. II 209:3-11; Tate Vol. I

[11] Mr. Schenk, Smitty's technical supervisor, was identified many times by management as a person with accurate, technical knowledge about 303 fluid and was relied on for technical information. *E.g*., Tate Vol. I. 120:7-10, 157:23-158:2, 171:21-172:4; Saragusa 48:25-49:4.

157:23-160:17. Tate agrees that excess deposit buildup inside transmissions and other critical components can lead to problems. Tate Vol. I 160:22-25. Indeed, a 20-weight non-detergent fluid, even if not made with line wash or used oils (as was 303 THF) can never be called or used as a tractor hydraulic fluid without causing damage. Dahm Rpt. ¶ 143.

Defendants have no expert to opine that 303 THF was in fact tractor hydraulic fluid as it was held out to be. According to their own expert Dr. Swanger, it was not. Swanger 112:2-20; *see also id.* at 113:6-11 ("Q. … Smitty's 303 is not the TsHF or Universal Tractor Hydraulic Fluid that you described in your report; right? A. Correct.").[12] In the face of admissions and evidence in this litigation, Defendants attempt to defend the fluid as actually just a 20-weight "general purpose" fluid, described by Dr. Swanger similar to the current description of Ag. fluid:

> "General purpose hydraulic fluid such as Smitty's /CAM2 303 THF is appropriate for hydraulic systems requiring a hydraulic fluid of SAE 20 viscosity, or ISO 46 or ISO 68 viscosity, and for general lubrication of moving structures."

[12] Dr. Lester offered no opinion on the fluid itself. Dr. Martin is not an expert on hydraulic systems or lubricants. Dep. of Denise Martin (Ex. 35, "Martin") 9:19-25, 11:5-13, 95:21-23. She consulted no outside experts on hydraulic fluids, did not list testimony from Schenk or Saragusa (or others including Ed Smith) as among materials reviewed. She disclaimed any role on how hydraulic fluids work or to respond to opinions of Plaintiffs' experts that 303 THF was not in reality tractor hydraulic fluid. *Id.* at 60:2-5; 61:1-13. Dr. Lillo disclaimed opinion on formulation or content of the fluid and said this subject is addressed by Dr. Swanger. *See* Dep. of Peter Lillo (Ex. 36, "Lillo") 89:22-90:6 (fluid formulation "covered by Dr. Swanger and not myself"), 128:2-11 ("I've seen [Smitty's] specifications, but … Dr. Swanger … is offering the opinions on formulation and blending and such."); 135:13-136:2 (not offering opinion about proper formulations of hydraulic or tractor hydraulic fluids); 136:12-20 ("Q. I don't see anything written about how hydraulic fluids or tractor hydraulic fluids are formulated, and that's probably because you're not going to offer an opinion on that, right? A. … the formulation …is something to ask Dr. Swanger about."); 269:21-270:4 ("Q. All right. Now, just to pin this down, you're not challenging because you're not offering an opinion on Werner Dahm and Tom Glenn's fluid science opinions with respect to per – formulation of hydraulic fluids and the performance of hydraulic fluids, right? A. I have not assessed the formulation. The formulation aspects have – have been looked at by Dr. Swanger."); 271:5-22 (did not analyze Smitty's specification or formulation of fluid).

Excerpt, Expert Report of Dr. Lee Swanger (Ex. 37).[13] According to Dr. Swanger, suitability does *not* depend on whether equipment was built before or after 1974. *See* Swanger 123:25-124:5 ("Q. Okay … You are not putting a blanket prohibition on appropriate use for this fluid in post-1974 equipment; right? A. No. I've given examples where it's appropriate for post-1974 equipment."). Rather, he opines that suitability depends on applications for which a 20-weight would be appropriate. According to Mr. Tate, this "definitely" would not be a tractor or "any heavy piece of equipment or so forth." Tate Vol. II 94:2-9, 118:6-119:15. Tate made clear that the re-labeled but same Ag. fluid is *not* tractor hydraulic fluid:

> Q And you believe agricultural fluid is not supposed to be used and applied as a tractor hydraulic fluid; right?
> A. Its not a tractor hydraulic fluid.

Tate Vol. II 132:4-7. Plaintiffs' experts opine that 303 THF was a waste product, unfit for hydraulic systems at all, was harmful and worthless. Glenn Rpt. ¶ 4.12; Dahm Rpt. ¶ 182; Glenn 127:18-24, 152:18-153:9; Dep. of Werner Dahm (Ex. 38, "Dahm") 272:16-273:4, 282:10-20.

Defendants have no expert to defend truthfulness of 303 THF labels.[14] Before mid-2019, the fluid was always called tractor hydraulic fluid and never labeled as a 20-weight suitable only

[13] ISO 46 / ISO 68 are alternative ways of expressing SAE 20 viscosity. *See* Conversion chart (Ex. 39).

[14] Dr. Lester does not know and was not asked to consider whether the label accurately described fluid actually in the container. *See* Lester 35:10-15 (Q. All right. So just to wrap this up so I understand, you didn't make any effort and you weren't asked to determine what this product was, whether it was a tractor hydraulic fluid or not, whether it was a hydraulic fluid or a waste train; right? A. I did not do that, yes."), 90:10-13 ("Q. Right. But you don't know if the product in the bucket matches the representations on the label from a technical perspective; right? A. Not from a technical perspective."),130:5-9 (Q. … Whether or not this product is what the label says that it is, you don't know one way or the other? A. That's right."). Dr. Lillo had no opinion on labeling. Lillo 94:5-10 ("Q. You don't have any expertise and you're not offering opinions on the truthfulness or accuracy of the product labels in this case, are you? A. I don't have any opinions about the labels. Labeling/marketing is not my area and I don't intend to offer opinions about that."). Dr. Martin's opinions are not directed at whether 303 THF labels accurately conveyed the nature of the fluid being sold. Dr. Swanger was asked multiple times about accuracy of the labels from a technical perspective and declined to express an opinion. *See* Swanger 108:2-3 ("I haven't studied the labels. I don't have opinions on what the label is telling consumers."), 111:9-12 ("Q. … I'm asking you from a technical perspective do you believe the entire label is accurate or not? A. I don't have an opinion on that.").

for 20-weight applications. The type of information conveyed by Mr. Schenk to a retailer was never conveyed to consumers. Tate Vol. I 159:23-160:21. A specification sheet and webpage for the newly-labeled "Ag." fluid states: "Not recommended for use in mobile farm or construction equipment," in other words, non-stationary machines. Tate Vol. II 119:20-120:7, 126:17-22, 128:22-129:3, 129:25-130:11. Tate testified that it would be labeled as a "straight 20 weight" fluid, would not make performance claims, include OEMs, or claim that it is suitable for use in any equipment. Tate Vol. I 272:7-274:20. In short, and without concession on Ag. label accuracy, 303 THF labels during the relevant time period were vastly misleading.

K. 303 THF Labels Were False and Misleading.

By design and necessity, consumers relied on label descriptions of what was in the container, as well as assurances of nature, quality and characteristics of 303 THF. Alter Rpt. ¶ 31. Dr. Lester does not disagree. *See* Lester 121:23-122:2, 136:8-11. Dr. Alter opines that labels were misleading in numerous respects. Alter Rpt. ¶¶ 25, 30, 37, 76-128.[15] Indeed he has never seen a worse case of misinformation. *Id*. at ¶ 27. Dr. Lester agrees that Defendants should not make a bad product and label it with false information. Lester 35:5-8. Testimony from Defendants themselves, as well as their experts, demonstrates the many ways 303 THF was mislabeled. Dr. Dahm and Mr. Glenn explain both misleading and literal falsity of claims as technical experts.

[15] Dr. Alter's opinions are based on his own education and expertise, evidence in this case, including testimony from Defendants, and discussion with Dr. Dahm and Mr. Glenn. Alter Rpt. ¶¶ 10, 12-21, 26. Dr. Lester, by contrast, did not take into account anything that Tate, Schenk, Saragusa, Trahan or anyone else said about the quality and nature of the product and representations on the label. Lester 92:13-93:1. His opinions are without context about what the product actually was or was not. For example, Dr. Lester acknowledged that in developing a label, he would need truthful information about what is inside the bucket, *id*. at 131:12-24, but does not know what was inside the bucket at issue. *Id*. at 35:10-20; 35:23-36:4, 129:8-11, 151:24-152:9. Even under reduced *Daubert* scrutiny in the Eight Circuit, his proffered opinions on purported individualized questions should be disregarded, or at minimum, given little to no weight.

1. All statements, representations and descriptions of quality, function, nature, and characteristics of 303 THF were contrary to fact.

a. 303 THF was not a "303" product.

While creating labels, Smitty's own Cory Trahan assumed that there was a 303 specification and that 303 THF met it. Trahan 91:22-93:3, 97:3-98:1. It is undisputed, however, that 303 THF did not meet a 303 specification, which was not just obsolete but not in existence. Smitty's always knew it did not meet a 303 specification (E. Smith 124:13-127:3) yet labels promoted 303 in name and by reference in OEM listing ("John Deere 303").[16] Smitty's own vice president of sales agreed that if a product does not meet specifications on the label, that would be misleading. Lorio Vol. I 32:8-20. Reference to "303" also associated the fluid with the respected John Deere brand when there was no such association. Alter Rpt. ¶ 80; Dahm Rpt. ¶ 27.

b. 303 THF was not actual tractor hydraulic fluid.

More fundamentally, 303 THF was not tractor hydraulic fluid at all. Yet that is what it was held out to be. E. Smith 38:2-39:4. Everything on labels, from name, to description as multi-functional, performance benefits, pictures of tractors and equipment, and suitability for listed OEMs conveyed the message that 303 THF was a quality product suitable for the purposes and functions of tractor hydraulic fluid. Dr. Lester agrees that labels consistently represented that the product was tractor hydraulic fluid and did not tell consumers otherwise. Lester, 130:16-25, 135:1-5, 136:12-16, 168:22-169:1. The fluid, however, met no OEM specification for tractor hydraulic fluid (Tate Vol. I 106:3-20, 107:23-108:3; E. Smith 128:14-129:13), was made with highly inappropriate and inadequate ingredients, and was not in fact tractor hydraulic fluid. Dahm Rpt. ¶¶ 110-15, 123-25, 129-31; Glenn Rpt. ¶¶ 4.3-4.4, 4.6. 5.6; Hayes Rpt. ¶ 25. As Tate said in reference to the same but re-packaged Ag. fluid, 303 THF did not have the properties needed to

[16] Cam 2 labels also included J20A, which the fluid also did not meet. Schenk Vol. II 106:1-9.

make it a tractor hydraulic fluid. Tate Vol. II 53:22-24, 92:14-94:13, 98:5-13, 132:4-7. In fact, it was a waste stream mixture unfit for and damaging to all tractors and equipment regardless of type, model, or year of manufacture. Dahm Rpt. ¶¶ 141, 170-73, 181-82; Glenn Rpt. ¶¶ 4.12; Hayes Rpt. ¶ 25. Defendants misrepresented the very nature of what they were selling. *See* Alter Rpt. ¶ 27 ("In truth, the 303 THF was fundamentally different from what was represented on the label and not in fact the product that the label told consumers they were purchasing."); ¶ 56 (labels "misrepresented the very nature of what the 303 THF purported to be … when in fact it was not fit for application in tractors and equipment with hydraulic systems, although labeled and sold for that purpose.").[17] Defendants' argument on 20-weight suitability (with which Plaintiffs' experts disagree) demonstrates, if anything, further deception.

c. 303 THF did not have represented performance benefits.

Defendants concede that customers expected the fluid to provide represented performance benefits as "important components of a tractor hydraulic fluid and the protection it provides." Saragusa Dep. 55:3-10. The listed attributes "are typical of high-quality tractor hydraulic fluids … and further assures purchasers that the 303 THF product can be safely used as a tractor hydraulic fluid." Dahm Rpt. ¶ 142. As conceded by Chad Tate, however, the performance benefits are all things that must be measured against a specific specification. Yet there was no such testing and 303 THF met no specification. Tate Vol. I 106:3-20, 107:23-108:3; *see also* E. Smith 128:14-129:4 (fluid met no specification); Schenk Vol. I 265:13-22 (no testing to back up performance claims); Saragusa 40:3-7 (same). Schenk stated in an email that "[t]echnically, [the fluid] doesn't meet any specs so anything that we put on [a label] will just be fluff," with which Saragusa agreed. Saragusa

[17] Dr. Lester agrees that whether a substance is actually what it purports to be is a technical question, regardless of what consumers think or how they interpret technical terms. Lester 285:24-286:4. The definition of tractor hydraulic fluid is not within his expertise. *Id.*at 286:8-17.

58:15-59:15; December 14, 2017 Email (Ex. 40). When the J20A product was introduced, a brochure was prepared (but *not* provided to consumers) stating that "no claims are made [for 303 THF] in reference to performance." Saragusa 49:15-50:6, 52:3-24, 55:11-17; Tate Vol. I 112:4-114:25, 180:7-12; Schenk Vol. II 210:25-213:9. Tate agrees that this is inconsistent with label claims. Tate Vol. I 114:24-115:2. According to Saragusa, statements in the brochure are a more accurate depiction than information on the labels. Saragusa 49:22-50:6,52:6-54:11. The fluid did not provide claimed performance benefits. Because it met no specification, was made with improper oils and no additive package, it was incapable of doing so. *See* Glenn 340:11-341:21 ("And to get there, there are certain things that are required to get there. Now, in Smitty's case, you can't get there by taking a waste stream and blending it with a Chevron base oil or any other base oil.·You effectively are contaminating the base oil….").

d. 303 THF was not recommended by any OEM or suitable as a replacement for any OEM equipment new or old.

All labels (except Cam2 largest-sized drums) stated that the fluid was suitable as a replacement "for the following manufacturers where a tractor hydraulic fluid of this quality [or "this performance level"] is recommended:" listing well-known OEMS. One of the MDA's concerns was that OEMs were listed generically, without (other than John Deere) numerical specifications. Schenk Vol. II 142:6-21. Particularly in view of stated performance benefits, the labels misleadingly conveyed that fluid of "this" quality or performance level, i.e., in this container, is suitable for and recommended by, at minimum, listed OEMs. Alter Rpt. p. 15. Schenk agrees that "[y]ou would think" that before putting an OEM on the label, the company has data that the fluid meets at least one of its specifications. Schenk Vol. II 143:1-16. Schenk was told that 303 THF was formulated for benefits on the specification sheet, which also listed OEMs. Schenk himself told consumers it would work in post-1974 equipment made by one of those OEMs.

Schenk Vol. I 243:1-246:3, 246:23-247:7.[18] Saragusa believed it was inappropriate to represent that the fluid was recommended by OEMs. Saragusa 69:5-12. He and Schenk conveyed to upper management that OEMs should be removed from labels. Schenk Vol. II 143:17-22, 189:7-19; 190:5-192:17, 194:17-195:16. In fact, 303 THF was not suitable for any tractors and equipment, regardless of OEM or whether manufactured before or after 1974. Glenn Rpt. ¶ 4.12; Dahm Rpt. ¶ 182; Glenn 127:18-24, 152:18-153:9; Dahm 272:16-273:4, 282:10-20.

2. 303 THF was not actually field tested.

Mr. Tate admits that if a claim of field testing is made, there should be actual testing. Tate Vol. I 94:4 -9; *see also* Trahan 224:9-225:1 (statement deceptive without tests). Tate and other employees in a position to have done so never saw such data. Tate Vol. I 60:3-20, 94:10-11; Saragusa 42:20-23. As discussed, whatever "field testing" was done was not actual field testing in any meaningful sense of that phrase. Glenn Rpt. ¶¶ 3.23-3.26, 5.7; Dahm Rpt. ¶ 106.

3. No label ever disclosed the truth.

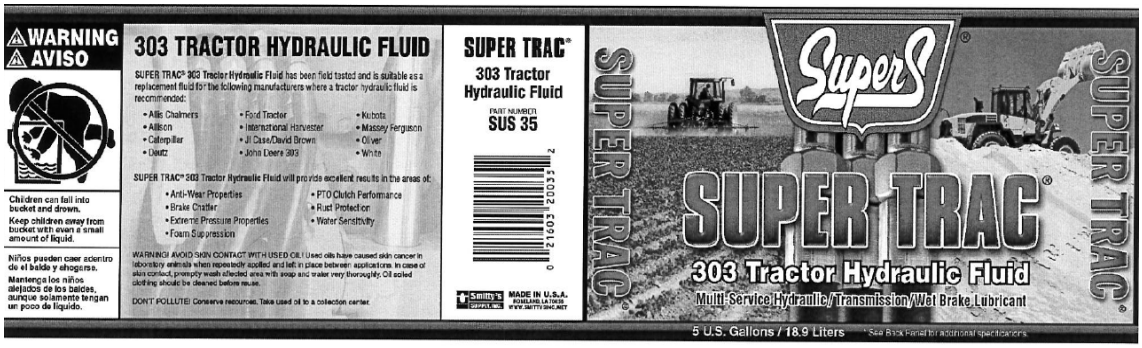
Dr. Alter explains that consumers pay attention not only to what is on, but omitted from, labels. Alter Rpt. ¶¶ 24, 29, 31 & n. 7. Mr. Tate himself agrees that a label should not omit information that would give consumers an accurate and complete understanding of what the product "actually is" and is suitable to be used for. Tate Vol. I 88:7-16. In addition to false and misleading representations, the labels never disclosed, among other things, that 303 THF: did not meet a 303 or any other specification for any tractor or equipment; could not truthfully claim performance benefits; did not have properties to make it tractor hydraulic fluid; contained used oils, flush oils and line wash without an additive package; and was not in reality tractor hydraulic fluid. Alter Rpt. ¶ 9. Rather, they affirmatively conveyed the opposite. Neither did labels state that

[18] At the time Schenk was answering questions and giving advice to consumers before deposition, he did not know that 303 THF contained used turbine and transformer oils. Schenk Vol. II 53:8-13.

the fluid was a 20-weight suitable only for 20-weight applications. All of this information is of high importance to efficacy, function, and use as described by Plaintiffs' experts and Defendants themselves. Labels also did not disclose harms associated with use of 303 THF, which Defendants well knew, discussed below (Sect. L).

4. Language at bottom of back labels was inconspicuous, inadequate and itself misleading.

For many years, 303 THF was sold under labels with all the positive representations about being multi-functional tractor hydraulic fluid, suitability for listed OEMs, and performance benefits with nothing about use in equipment manufactured after 1974:



Ex. 18; D. Smith 71:2-76:5; Tate Vol. I 76:15-23, 78:4-10. In approximately 2013, language was quietly added to the bottom of the back label that "Misapplication may cause severe performance problems. [303 Fluid] has not been recommended by any OEM for model years later than 1974." Email dated June 18, 2013 (Ex. 41).[19] The language was inconspicuous and further, appeared only at the bottom after the numerous assurances. Saragusa believed that any use limitations should be on the "front of the pail, front and center" for consumers to see and understand. He also expressed concern that representations on suitability and performance benefits were inconsistent with later language, and consumers may not read past benefits to the bottom on the back of a label. Even the

[19] As with other revisions, this was effectuated only after existing label inventory was depleted. *Id.*

chosen language was never put on the front. Saragusa 82:25-84:5, 85:5-23, 87:11-88:6. From a consumer behavior standpoint, Dr. Alter explains that attributes first presented are encoded most strongly and negatives positioned at bottom elicit shallow processing making it unlikely that consumers will read them critically if at all. Alter Rpt. ¶¶ 111-13.[20] He opines that "[i]n the unlikely event that consumers noticed the language at all, it was confusing, insufficient, and misleading for numerous reasons." Alter Rpt. ¶ 30 (pp.16-17), ¶¶ 109-21. Among other things, there was no indication of what "misapplication" meant and as that sentence was separate from the next sentence regarding model year, did not connect the two concepts. *Id*. at ¶ 115 ("the labels tie performance issues to 'misapplication' … itself an ambiguous, undefined term. Another separate sentence speaks to model years, conveying that misapplication is a concept distinct and separate from using the product in equipment manufactured after a particular year."). The phrase "has not been recommended by" is a neutral statement informationally meaningless as a limitation on use. *Id.* at p. 17 n. 6, ¶ 116. In no way is it equivalent to saying that 303 THF must not be used. *Id*. at p.17; *see also* Schenk Vol. I 241:1-7 (language does not say don't put in post-1974 equipment); Schenk Vol. II 135:3-136:6 (language does not say don't use in post-1974 equipment); Saragusa 91:12-92:4 (label did not define "misapplication" or say fluid cannot be used in model years later than 1974); Lorio Vol. I 135:5-12 (nothing in misapplication language said the fluid would provide all the represented performance properties unless equipment was manufactured after 1974); *id*. at 135:13-19 (language stated only that the fluid has not been recommended by OEMs for model years later than 1974, not that it should not be used). Saragusa acknowledged that statements at

[20] Lester himself has made the point (based on a scientific study) that 91% of over-the-counter medicine users do not read side effects before taking the medication. Lester 246:13-22. He agrees as he must that for everyone who purchased 303 THF, language at the bottom of back labels did not stop a purchase. *Id*.at 246:23-247:23. There were millions of such sales. Ex. 17 (Def. Sales Data).

the bottom of the rear label can be interpreted as saying that 303 THF will work in equipment manufactured after 1974. Saragusa 91:23-95:14. Tate agreed that it is not acceptable to make deceptive statements, or show deceptive images, and then attempt to disclaim them at the bottom of a label. Tate Vol. I 95:6-16; *see also* Trahan 134:1-13 ("Q. … the company should not be putting untruthful information on a label and then in smaller print down at the bottom of the label somehow disclaiming it, that doesn't make untruthful information acceptable or okay to give to consumers, right? A. Correct. Q. Regardless of any disclaimer, Smitty's should always be putting truthful and accurate information on its 303 product labels for consumers to see. Right? A. Correct.").

After the Missouri ban in late 2017, Smitty's and Cam2 5-gallon labels were changed to add the word "warning," capitalize letters, and state: "This product is not suitable for use in most equipment manufactured since 1974. Misapplication in newer equipment may cause unsatisfactory performance or equipment harm." This language, still at the bottom on the back of containers, was still equivocal and unclear. Alter Rpt. p. 17, ¶ 124. It was expressly rejected as acceptable by MDA for fluids not meeting at least one OEM specification. Hayes Rpt. ¶ 16. Both versions were indeed misleading as reinforcing the idea that 303 THF was actual tractor hydraulic fluid in the first place when it was not. *See* Alter Rpt. p.16 ("This language functioned, at best, to reinforce the misleading representation that the fluid being sold is true tractor hydraulic fluid in the first place, which it is not."). The language is even more unclear and less relevant now that Dr. Swanger has opined that suitability is *not* about model year. Since that is now Defendants' apparent position, the language is untrue and misleading for yet another reason.

L. Defendants Knew but Hid the Truth.

Defendants knew what 303 THF was made of. They knew the significance of OEM specifications, properties needed for tractor hydraulic fluid, and harms associated with

inappropriate fluid. They knew these factor impact consumers in a common way. They employed a "smoke and mirrors" strategy to hide the truth. They hid it even from their own salesmen.

1. Defendants understand properties needed for appropriate tractor hydraulic fluid and harms resulting from improper fluid.

Defendants did and do understand ingredients and properties needed for tractor hydraulic fluid. *See, e.g.*, Trahan 174:5-17, 176:12-18, 177:17-23 (Smitty's described 303 THF to retailers as "formulated from a blend of highly refined base oils with a superior additive package" and as "designed to lubricate the transmission differential and final drive gears in tractors and implements."); *id*. at 182:2-17, 183:1-7 (brochure stated that extensive testing assured that all products "meet or exceed the specifications of the manufacturers"). They understand that specifications are benchmarks for required performance properties. Schenk Vol. I 26:25-27:18, 222:1-10; *see also* Tate Vol. I 81:5-10 (specifications set out properties that fluid must have). They had sufficient knowledge, skills, and ability to conduct, or obtain, tests to determine if 303 THF conformed to or had equivalence to OEM specifications but chose not to do so. *See* Tate Vol. I 106:3-20, 107:23-108:3 (performance benefits must be measured against specifications but there was no such testing); *id*. at 80:24-81:4 (never obtained information to confirm that fluid was suitable for any piece of equipment in whatever year manufactured). Chad Tate maintained that 303 THF "was only suitable for use where 303 was called for." Tate Vol. I 116:14-117:6. Smitty's always knew, however, that it did not meet a 303 specification. E. Smith 124:13-127:3; *see also* Vernon 170:9-172:19 (discussing 2011 email in which Ed Smith stated that fluid "technically does not meet the 40-year-old spec of 303" and is line wash). Smitty's indeed "knew [the fluid] didn't meet any specification." Tate Vol. I 107:12-13; *accord* E. Smith 128:14-129:4.

Defendants understand that inadequate additive levels lead to damage in the spiral gear and final drive, excessive wear in the planetaries, improper and poor shifting, seal leakage and

improper operation of wet brakes. Schenk Vol. II 221:7-224:14. 303 THF as compared even to obsolete J20A will do all this, and carries additional problems including "starting the equipment, oil starvation, high pump leakage, deposits, sludging, and thickening" all resulting in "[c]ostly repair, dreaded downtime or safety issue." Smitty's gave such information to a retailer, stating that test results showed failure "in oxidative and thermal stability, water tolerance, proper friction, hydraulic pump durability, seal performance, and more" and outlining harms. Tate Vol. I 120:12-124:15. Such information was not given to consumers. Tate Vol. I 123:7-124:8; 129:13-130:5.

Defendants understand that inappropriate viscosity is damaging. Schenk Vol. I 107:18-21. Tate testified that if fluid viscosity is too low, it can "absolutely" harm and damage equipment. Tate Vol. I 84:2-15. Saragusa agrees that fluid with low viscosity lacks sufficient boundary protection between moving parts, resulting in rubbing, scarring and premature breakdown of equipment. Saragusa 104:10-105:6. Effectiveness in preventing wear is impaired, and this is true as a matter of fluid science and regardless of system design, climate, maintenance practices, age or condition of the equipment. Schenk Vol. II 225:21-226:20. "That's the nature of lubrication. Viscosity is the most important property of a fluid." *Id*. at 226:18-20. The viscosity requirement for a J20A specification, measured as KV@100C is 9.1 to 9.9. Smitty's internal viscosity test data establishes that 303 THF usually was in the 6 or 7 range. Schenk Vol. II 107:8-21. In addition, thinner 20-weight fluid does not provide the same level of wear protection as a 30-weight fluid, and absence of detergent leads to excess buildup inside transmissions and other critical components. Tate Vol. I 158:11-24, 160:13-17.[21] Further, the fluid will break down quicker in the presence of particulate-type contaminates due to lack of detergent dispersant surfactants to keep soils in suspension. *Id*. at 172:5-19. This kind of information was never conveyed to consumers.

[21] Sludge and increased wear and fluid buildup is "not acceptable in any tractor." *Id*. at 168:21-25.

Id. at 160:18-21, 172:20-22. As with inappropriate viscosity, contaminants are commonly harmful to hydraulic systems regardless of system design, age or condition of the equipment, climate, maintenance practices, age or condition of the equipment. Schenk Vol. II 229:16-231:22. Improper additives also can damage seals, and leakage of hydraulic fluid is a common cause of excessive component wear again regardless of system design, climate, maintenance practices, age or condition of equipment. *Id*. at 232:7-233:14.

2. Defendants understand problems with used oils.

303 THF contained high levels of contamination due to used oils of which it was composed and Defendants well knew it. *See* Saragusa 110:4-23, 121:22-122:15. Test results from private labels showed that Smitty's was sending 303 fluid for packaging with silicon in it. Schenk Vol. II 57:2-60:7.[22] David Smith, who left Smitty's in 2012, testified that sediment was a concern and "we had a problem." He agreed that sediment should not be there and was concerned about dirt or metal and damage to equipment. Such concerns were discussed with, and shared by, Ed Smith. D. Smith 118:4-119:15, 120:19-121:24, 122:6-10, 122:15-123:12, 124:21-125:16. Because it used line wash/line flush and other improper ingredients, Smitty's expected fallout in the 303 fluid. In 2010, Smittys noted, for example, that a product was "not 303, so this should not have this amount of particulate in it." April 7,2010 Email (Ex. 42); D. Smith 141:8-14, 144:7-145:9, 149:3-16. Defendants understand the damaging nature of contaminants. Tate Vol. I 127:14-21. Saragusa recommended in 2014 that Smitty's purchase a centrifuge to help with testing for sediment contamination. That was not done. Saragusa 133:24-135:17. He raised this again in 2017 and again was refused. *Id.* at 133:24-135:17. According to Saragusa, tractor hydraulic fluid that contains

[22] Silicon is a contaminant that is abrasive. Glenn 128:3-12. Dr. Swanger agreed that high levels of silicon could be evidence of dirt contaminants and did not rule that out. Swanger 116:10-16.

sediment is defective and raised concern over increased wear and harm to equipment. Saragusa 25:2-26:2, 26:16-20; Dep. of Garrett Clement (12/4/20) (Ex. 43) 122:12-123:2. Ed Smith testified:

> Q. Do you know what -- do you know whether John Deere ever made any of its products with flush or used oil?
>
> …
>
> BY THE WITNESS: I don't know that they manufactured any to start with, so certainly I wouldn't think they would use used oil. Anybody who would use used oil would be just asking for trouble.

E. Smith 209:15-25. David Smith testified that he did not know that 303 THF was made with used oils and that would be concerning because of contamination, and further:

> Q. And then there's the obvious problem of selling a used product as new tractor hydraulic fluid, right?
>
> A. Right.

D. Smith 155:13-156:21. Neither labels nor any other communications from Defendants to consumers at any time disclosed the actual ingredients of 303 THF.

3. Defendants used "smoke and mirrors" to hide the truth.

In 2014, Martin Lubricants was telling Tractor Supply and other retailers that they should be asking suppliers for written assurance that 303 fluid was not made with ingredients like flush oils, line wash, and reclaimed oils. *See* Vernon 213:10-215:9. Cam2 salesman Kevin Schettler asked supervisors Walter Tyson and Lindsay Baker what he could provide in writing should he be asked to do so. Dep. of Kevin Schettler (9/7/22) (Ex. 44, "Schettler") 158:9-160:17, 162:22-163:24. Baker and Tyson corresponded between themselves after this inquiry. Baker stated: "Are we being asked to respond? You and I both know we can't state anything like this." Tyson replied: "Ha. You are right we just need some smoke and mirrors …." *Id*. at 169:12-170:15, 171:10-172:18. Management rejected the idea of getting a testing report. Steve Shockites stated: "Gang. Do not run our product and get involved in this. It is a trap. Plus our product is nothing more than line wash …." *Id*.at 201:8-18.

That truth was hidden even from Schettler. As a salesman, he was tasked with selling Cam2 products to retailers and distributors. Schettler understood tractor hydraulic fluid to be a multi-function fluid to lubricate hydraulic systems, PTOs, transmission, and wet brakes "so the tractor can do its work." *Id*. at 22:16-23:4. He himself considers base oils and additives important since, among other things, if fluid lacks correct additive content, it does not adequately protect the equipment in which it was used. Schettler wanted customers to get what they were paying for and a product that would not harm their equipment. *Id.* at 37:22-38:1, 114:8-25, 194:16-24. Based on what he was told by management, Schettler told potential buyers that 303 THF was made with pure base oil, not line wash or used oils, and contained a complete additive package. *Id*. at 178:8-179:4. One such buyer was Orscheln Farm and Home. In April 2014, Schettler emailed to say he could offer a "100 percent pure base oil product." *Id*. at 82:2-18, 86:1-14, 87:17-91:11, 92:8-12, 101:10-20, 103:24-104:12. Again based on what he was told, he emailed another potential buyer that Cam2 produced a "quality product with a complete additive package. The base oils used are high-quality base oils. No line wash, water or sludge." *Id*. at 111:1-112:5, 112:23-113:12. Baker emailed to Tyson on August 4, 2014:

> "Ok I worry that Kevin is saying some things on quality that he shouldn't really be saying to try to sell that product. The less we say on this type of product the better."

Tyson responded:

> "Agreed. We completely danced around it with Orschelns. I just think Kevin knows if he could make any statement to that effect the business would be ours."

Id. at 176:25-177:9, 181:12-183:3. Schettler was not told he was saying things about quality he should not be saying. *Id*. at 123:6-13, 176:25- 177:13, 181:6-11. In an email exchange in February 2014 between Baker and Jane Laswell (Director of Marketing) regarding 303 packaging and labeling, Baker stated: "Just put reduces heat, reduces wear. Not the additive technology. There is

no additives in it really ;) it totally line wash in a bucket ha." *Id*. at 124:13-22, 125:14-25, 126:16-127:15. When Schettler saw this for the first time at deposition, he reacted as follows:

> Q. So then read what Ms. Baker says in response to Ms. Laswell about the label representations that they're finalizing?
> A. Okay.
> Q. Read it out loud for me.
> A. Okay. Just put reduces heat, reduces wear. Not the additive technology. There is no additives in it really. Is that a smiley?
> Q. It's a winky face.
> A. Really? It totally -- oh my God.

Id. at 127:1-15. Baker's statement was contrary to everything Schettler had been told. He would not have made the representations he did had he known the truth and would not have sold 303 THF. *Id.* at 128:3-129:8, 202:22-203:6.

M. The 303 Fluid Had Zero Value.

Plaintiffs' technical experts explain in detail why 303 THF was not what it purported to be, how it was harmful, and why it was in truth worthless waste. Dr. Dahm explains that 303 THF causes damage immediately upon use and continuously thereafter until adequately removed and flushed from equipment systems. Dahm Rpt. ¶¶ 158-59, 162. Dr. Alter, as a consumer behavior expert, explains that all consumers go through a purchase process that begins with search for products meeting the consumer's needs. Alter Rpt.¶¶ 27, 34-35. For products offered for a utility or function, "the first decision-making component is, in simple terms: 'Does this product have the function it says it does?' If it does not, the consumer moves on to consider alternative products that are suitable for the represented purpose." *Id.* at ¶ 33.[23] Dr. Lester does not disagree with that

[23] *See also id.* n. 8 ("a person who is seeking toothpaste disregards products that will not fulfill the function of toothpaste, immediately narrowing the choice set to include only toothpaste products. A deodorant or bar of soap, no matter how appealing its branding or attractive its price, falls out at this initial screening phase, and is not considered further").

basic proposition.[24] Dr. Alter opines that 303 THF "was so grossly mislabeled that it was allowed to pass through the search phase filter." Alter Rpt. ¶ 27. Had it been truthfully labeled, consumers would have eliminated it from the choice process and moved on to look for products capable of serving their needs. *Id*. at ¶¶ 129-30. Even if it remained in the choice set, no reasonable consumer would choose to purchase 303 THF had they known that it was both unfit for use in and damaging to their tractors and equipment. *Id*. at ¶¶ 131-36.[25]

Dr. Babcock is a highly credentialed and experienced agricultural economist. *See* Expert Report of Bruce Babcock (Ex. 45, "Babcock Rpt.") at 1-2 & Appx. A. He was asked to determine if there is a methodology to reasonably estimate class-wide aggregate damages from purchase and use of 303 THF. He determined that sufficient data exists to reasonably estimate benefit of the bargain and out-of-pocket damages (which he determined are equal) as well as flushing cost damages. Benefit of the bargain is the difference between value of a product as represented and value of the product as it actually is. *See infra*, Sect. III.E (notes 63-65). Dr. Babcock determined

[24] Dr. Lester opines that consumer attention is primarily goal-directed and this is common for everyone. Lester 195:21-196:5. He agrees, for example, that if a consumer were looking for milk, he would go to the milk isle and pass up produce because produce is not in his choice set. *Id*. at 196:6-14, 197:4-8. He agrees that if the goal is to clean teeth, a consumer will pass up the tube of Preparation H and look for something labeled "Toothpaste." *Id*. at 198:2-14; *see also id.*at 202:11-18 (for a consumer who wants toothpaste, Preparation H never enters his choice set as a matter of buying behavior). He agrees that a consumer who picked up a tube labeled "Toothpaste" that was actually Preparation H has been misled regardless of how much he knew about either product when he walked in the store. *Id*. at 198:15-199:1, 199:23-200:8.

[25] One of the papers Dr. Lester cited states that "[m]uch of the descriptive research on how consumers make decisions under uncertainty shows that consumers are highly concerned with negative information and losses" and will opt for the alternative with the smallest potential loss. Lester 248:10-15, 251:10-25, 252:16-253:2. Costs associated with 303 THF include not only repairs but more frequent maintenance inspections and maintenance, increased down time, potential loss of warranty, lower resale value shorter usable lifespan and more frequent tractor replacement. Dahm Rpt. ¶¶ 90, 166. Dr. Alter considered price savings between 303 THF and true tractor hydraulic fluids and costs associated with use of 303 THF. He concluded that even if 303 THF remained in a choice set, "no reasonable consumer would purchase a product knowing not only that it is not what it purports to be and unfit for use as tractor hydraulic fluid, but also risks and indeed produces damage entailing repairs and other negative outcomes in exchange for modest savings." Alter Rpt. ¶ 136. Dr. Lester conducted no analysis based on what was actually in the bucket.

that the "as represented" value of 303 THF was (at minimum) purchase price and the "as is" value zero. Babcock Rpt. 3-4. For purchase price, he relied on sales data obtained to date. *Id*. at 5. For actual value, he relied on expert opinions from Plaintiffs' technical experts that 303 THF was not in truth tractor hydraulic fluid and was in fact worthless and simply waste. He also relied on Dr. Alter's expert opinion that no reasonable consumer would have purchased 303 THF knowing the truth, including that it was not fit for use and was damaging. Dr. Babcock determined that "fundamental economic principles compel a conclusion that the market value of the actual product is zero." *Id.* at 3-4.[26] The difference between purchase price and zero is purchase price, mathematically the same as "out-of-pocket" for purchase-based injury. *Id*.[27] He calculates this item of damage for each of the eight states currently at issue based upon currently available data. *Id*. at 5. As additional data is obtained, he will provide updated state-level damage numbers. *Id*.

Dr. Babcock's calculation of flushing costs is based on estimated costs to flush out a hydraulic system from Steve Hamilton, who has 40 years of experience in tractor and equipment repair, extensive knowledge and expertise on hydraulic and transmission components of tractors and other equipment, and damage cause by inferior or contaminated oils. *See* Expert Report of Steven R. Hamilton (Ex. 46 "Hamilton Rpt.") at 2-3. He sets out in detail each necessary

[26] Dr. Babcock also pointed out that "[t]he fact that 303 THF damages hydraulic systems suggests that its actual value is negative because with full knowledge of its properties, buyers would require that they be paid before they would use it in their tractors. Thus, use of a zero price provides a lower-bound estimate of [benefit of the] bargain purchase damages." Babcock Rpt. 4, n. 5.

[27] Defendants have offered no criticism of Dr. Babcock's out-of-pocket damage estimate. Opinions from Defendants' expert Martin on "value" and suitability are not from any technical standpoint whatsoever; she opines, for example, that 303 THF was suitable because people bought it and "it operates their equipment for them. So in that sense it's suitable for that use." Martin 60:25-61:3, 158:20-159:5. Plaintiffs highly qualified technical experts disagree. As also explained by Dr. Dahm, consumers typically are not aware that damage is occurring until cumulative effects lead to operational impacts, and even then are unlikely to connect it with the fluid. Dahm Rpt. ¶¶ 165, 167-68. Smitty's own Chad Tate agreed that consumers may be unaware that problems are caused by the fluid, Tate Vol. I 136:8-137:3, it is "absolutely correct" that quality depends not on whether the product is actually safe and what it purports to be. *Id*. at 137:25-138:5.

component of a flushing process, as well as estimated cost (including labor hours) for equipment in three different size categories. *Id*. at 3-6. Based on currently available data, Dr. Babcock estimates flushing labor and material costs each of the eight states. *See* Babcock Rpt. at 18.

APPLICABLE STANDARDS

Certification is proper when the numerosity, commonality, typicality, and adequacy elements of Rule 23(a), and elements of Rule 23(b), are met. *Amchem Prods*., *Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). Where, as here, Plaintiffs seek certification under Rule 23(b)(3), they must demonstrate that common questions predominate and that proceeding as a class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615-16.

"Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites … are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013); *accord Postawko v. Mo. Dep't of Corr*., 910 F.3d 1030, 1037 (8th Cir. 2018) (same); *Dollar General,* 2019 WL 1418292, at *11 (same)*; Ahmad v. City of St. Louis, Mo.*, 2019 WL 2009589, at *2 (E.D. Mo. May 7, 2019) (same). "[T]he question is not whether the … plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (citation omitted). While a class certification motion is not a summary judgment motion and the merits are not at issue, the court may consider evidence to the extent necessary to Rule 23 determinations. *Postawko v. Mo. Dep't of Corr*., 2017 WL 3185155, at *4 (W.D. Mo. July 26, 2017). Inquiry behind the pleadings, however, is "limited to determining whether, if the plaintiffs' general allegations are true, common evidence could suffice to make out a prima facie case for the class." *In re Zurn Pex Plumbing Prods. Liab. Litig*., 644 F.3d 604, 618

(8th Cir. 2011) (internal citations and quotation marks omitted); *Cope v. Let's Eat Out, Inc*., 354 F.Supp.3d 976, 991 (W.D. Mo. 2019) (same). Here, and in accordance with additional standards set out below (Sects. II-IV), requisite elements are met and certification is appropriate.

ARGUMENT

I. CLAIMS ASSERTED

Certain claims asserted by Plaintiffs from selected states (Arkansas, California, Kansas, Kentucky, Minnesota, Missouri, New York, and Wisconsin) were dismissed by the Court's March 9, 2022 Order. Without waiving any argument pertaining thereto, Plaintiffs summarize remaining claims below. While some elements vary among jurisdictions, that is no obstacle as Plaintiffs seek certification of state-wide classes.[28] The purpose of this section is not to initiate debate on the law. It is for guidance on issues and what kind of proof a prima facie case entails.

A. Negligence

Plaintiffs from all states assert a negligence claim. Elements are duty, breach, causation, and injury.[29] In most states, duty exists where harm is foreseeable.[30] This does not demand exactness in terms of person(s) injured or injury inflicted.[31] California and Wisconsin impose a

[28] *See*, *e.g.*, *Dollar General*, 2019 WL 1418292, at *25 (certifying claims after subclassing to remove state law variations); *Petersen v. Costco Wholesale Co., Inc*., 312 F.R.D. 565, 580 (C.D. Cal. 2016) (single-state subclasses "avoid[ed] almost completely the tangled variations in state law present in other multi-state class action cases") (internal quotations and citation omitted).

[29] As to this and other claims, injury and damages are addressed *infra*, Sects. III.D & E.

[30] *Shannon v. Wilson*, 947 S.W.2d 349, 352 (Ark. 1997); *Berry v. Nat'l Med. Servs., Inc*., 257 P.3d 287, 290 (Kan. 2011); *Modern Holdings, LLC v. Corning, Inc*., 2022 WL 903196, at *3 (E.D. Ky. Mar. 28, 2022); *In re Target Corp. Customer Data Sec. Breach Litig.*, 64 F.Supp.3d 1304, 1308 (D. Minn. 2014); *Scott v. Dyno Nobel, Inc.*, 2022 WL 3910709, at *3 (E.D. Mo. Aug. 31, 2022).

[31] *See Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, 100 S.W.3d 715, 724 (Ark. 2003) (defendant need only "be able to reasonably foresee an appreciable risk of harm to others"); *Berry*, 257 P.3d at 290 (duty where harm and injured persons are "within the range of apprehension"); *Modern Holdings*, 2022 WL 903196, at *3 (foreseeability "look[s] to whether a reasonable person … would recognize undue risk to another, not … the specific risk to the injured party") (citation omitted); *Pearson v. Pearson*, 552 S.W.3d

duty of care on all persons. *T.L. v. City Ambulance of Eureka, Inc.*, 83 Cal.App.5th 864, 875 (2022); *Brandenburg v. Briarwood Forestry Servs*., *LLC*, 847 N.W.2d 395, 398 (Wis. 2014). Policy factors may justify exception, but that is rare. *Tesar v. Anderson*, 789 N.W.2d 351, 355 (Wis. App. 2010).[32] In New York, duty is based on policy factors. Its scope asks whether a plaintiff "was within the zone of foreseeable harm" and the harm "was within the class of reasonably foreseeable hazards that the duty exists to prevent." *Breitkopf v. Gentile*, 41 F.Supp.3d 220, 272 (E.D.N.Y. 2014); *see also Johnson v. State*, 334 N.E.2d 590, 593 (N.Y. 1975) (while one "need not foresee novel or extraordinary consequences, it is enough that he be aware of the risk of danger"). Breach occurs by failing to exercise care that a reasonable person would use under the same or similar circumstances.[33] In California, Kentucky, Minnesota, New York, and Wisconsin, causation is present when a defendant's act or omission is a "substantial factor" in bringing about the harm.[34] "Substantial" denotes that conduct "has such an effect in producing the harm as to lead

---

511, 515 (Ky. App. 2018) ("It is enough that injury of some kind to some person within the natural range of effect of the alleged negligent act could have been foreseen."); *Sage as Tr. for Sage v. Bridgestone Americas Tires Ops*., *LLC*, 514 F.Supp.3d 1081, 1088 (D. Minn. 2021) (test is "not whether the precise nature and manner of the plaintiff's injury was foreseeable") (citation omitted); *DeLuna v. Mower Cnty*., 936 F.3d 711, 716 (8th Cir. 2019) (in Minnesota, "the key is whether a defendant had reasonable ground to anticipate that a particular act would or might result in *any* injury … even if [it] could not have anticipated the particular injury which did happen") (quotation marks and citation omitted); *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 776 (Mo. 1989) ("a duty exists when a general type of event or harm is foreseeable … it is immaterial that the *precise* manner in which the injury occurred was neither foreseen nor foreseeable") (citing cases).

[32] Foreseeability again does not evaluate "whether a *particular* plaintiff's injury was reasonably foreseeable" but "*more generally whether the category of negligent conduct at issue* is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed." *Shipp v. W. Eng'g, Inc.*, 55 Cal.App.5th 476, 493 (2020).

[33] Ark. Model Instr.-Civ. ("AMI") 303; Cal. Civ. Jury Instr. ("CACI") 3.10; Pattern Inst. Kan.-Civ. ("PIK") 103.01; *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 686 (Ky. App. 2009); 4 Minn. Prac., Jury Instr. Guides-Civ. 25.10; Mo. Approved Instr.-Civ. ("MAI") 11.05; N.Y. Pattern Jury Instr.-Civ. ("CPJI") 2:10; *Dakter v. Cavallino*, 866 N.W.2d 656, 664 (Wis. 2015).

[34] *Frausto v. Dep't of Cal. Highway Patrol*, 53 Cal.App.5th 973, 996 (2020); *Modern Holdings*, 2022 WL 903196, at *5-6; *Staub as Tr. of Weeks v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620-21 (Minn. 2021);

reasonable men to regard it as a cause." *Modern Holdings*, 2022 WL 903196, at *5-6 (quoting Restatement (Second) of Torts § 431, cmt. a); *accord In re Methyl Tertiary Butyl Ether*, 725 F.3d at 116; *Urbach,* 514 S.W.3d at 660-61. Remaining states express causation as but-for and proximate cause,[35] the latter entailing foreseeability in Arkansas, Kansas, Missouri, New York, and perhaps Minnesota[36] again of some harm, not the precise harm that occurred.[37]

B. Breach of Warranty

As an initial matter, notice requirements still entail common legal questions for resolution. The Court has already held that notice is not required in Minnesota and Missouri. ECF 451 at 28. Courts hold that notice to a manufacturer is not required in California. *Greenman v. Yuba Power Prods., Inc*., 377 P.2d 897, 900 (Cal. 1963). Kansas law focuses on purposes of notice, *Sunflower Elec. Power Corp. v. Clyde Bergemann, Inc.*, 2005 WL 1842754, at *10 (D. Kan. Aug. 3, 2005), which may be satisfied by a complaint. *Graham by Graham v. Wyeth Labs., a Div. of Am. Home Prods. Corp.*, 666 F.Supp. 1483, 1500 (D. Kan. 1987). While there is disagreement, New York courts hold the same. *Bayne v. Target Corp*., 2022 WL 4467455, at *3 (S.D.N.Y. Sept. 23, 2022); *Patellos v. Hello Prods., LLC*, 523 F.Supp.3d 523, 534 (S.D.N.Y. Mar. 4, 2021); *Panda Cap. Corp. v. Kopo Int'l, Inc.*, 662 N.Y.S.2d 584, 586-87 (App. Div. 1997); *Silverstein v. Macy & Co*., 40

In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 116 (2d Cir. 2013); *see also Urbach v. Okonite Co.*, 514 S.W.3d 653, 660-61 (Mo. App. 2017) ("the test for causation in Wisconsin is whether the defendant's negligence was a substantial factor in contributing to the result").

[35] *City of Caddo Valley v. George*, 9 S.W.3d 481, 487 (Ark. 2000); *TMG Cattle Co., Inc. v. Parker Comm. Spraying, LLC*, 540 S.W.3d 754, 757 (Ark. App. 2018); *Montgomery v. Saleh*, 466 P.3d 902, 911 (Kan. 2020); *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 712 (Mo. App. 2020); *Poage v. Crane Co*., 523 S.W.3d 496, 508 (Mo. App. 2017).

[36] *Staub*, 964 N.W.2d at 620-21. *But see DeLuna*, 936 F.3d at 717 ("foreseeability is *not* part of the proximate-cause analysis in Minnesota") (citing *Dellwo v. Pearson*, 107 N.W.2d 859, 861 (Minn. 1961)).

[37] *Duston v. Daymark Foods, Inc*., 122 F.3d 1146, 1148 (8th Cir. 1997); *Brock v. Dunne*, 2018 WL 4309412, at *18 (Mo.App. E.D. Sept. 11, 2018); *Comeau v. Rupp*, 810 F.Supp. 1172, 1177 (D. Kan. 1992); *Schulz v. Feigal*, 142 N.W.2d 84, 89 (Minn. 1966); *De'L.A. v. City of New York*, 68 N.Y.S.3d 408, 413 (App. Div. 2017); *Hoggard v. Otis Elevator Co.*, 276 N.Y.S.2d 681, 687 (App. Div. 1966).

N.Y.S.2d 916, 920 (App. Div. 1943). "No particular form of notice is required and the notice need not be in writing." *Jackson v. Swift-Eckrich*, 830 F.Supp. 486, 491 (W.D. Ark. 1993). Notice may also be unnecessary if it would not have served its purpose. *E.g.*, *Mint Solar, LLC v. Sam's W., Inc.*, 2021 WL 1723095, at *8 (W.D. Ark. Apr. 30, 2021) (notice not required by contractual cure provision where breach incurable); *Fischer v. Mead Johnson Labs.*, 341 N.Y.S.2d 257, 259 (App. Div. 1973) (notice not required in case involving prescription drug).

1. Breach of express warranty

Express warranty claims are asserted by Plaintiffs in Arkansas, California, Kansas, Minnesota, Missouri, and New York. Any affirmation or description "part of the basis of the bargain" creates a warranty that the goods will conform to the affirmation, promise or description. Ark. Code Ann. § 4-2-313; Cal. Com. Code § 2313; Kan. Stat. Ann. § 84-2-313; Minn. Stat. Ann. § 336.2A-210; Mo. Rev. Stat. § 400.2-313; N.Y. UCC Law § 2-313. Each state has adopted the UCC version of warranty, which does not require reliance. *See* UCC § 2-313, cmt. 3 ("In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown[.]"). Courts have held that reliance is not required in Kansas, Minnesota, and Missouri.[38] The same is true in California.[39] *See also Greenway Equip., Inc. v. Johnson*, 602 S.W.3d 142, 149

[38] *See Young & Cooper, Inc. v. Vestring*, 521 P.2d 281, 293 (Kan. 1974) ("buyers are not obligated to show particular reliance upon the express warranties, since they are contractual"); *Cavender v. Am. Home Prods. Corp.*, 2007 WL 1378431, at *7 (E.D. Mo. May 7, 2007) (Kansas law does not require reliance); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 564 (D. Minn. 2010) (Minnesota does not require reliance; thus, "each class member will not be required to prove that he or she relied on the warranty"); *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 357 (Mo. App. 1993) (sufficient that representation "was a material factor" in decision to purchase).

[39] *See Weinstat v. Dentsply Int'l, Inc.*, 180 Cal.App.4th 1213, 1227-28 (2010) ("the concept of reliance has been purposefully abandoned") (citation omitted); *Martin v. Tradewinds Bev. Co.*, 2017 WL 1712533, at *9 (C.D. Cal. Apr. 27, 2017) ("although some California courts have treated reliance as an element … the Court finds most persuasive the opinions from those courts that have not"); *In re Nexus 6P Prods. Liab. Litig.*, 293 F.Supp.3d 888, 915-16 (N.D. Cal. 2018) ("multiple [courts] have interpreted California law not

(Ark. App. 2020) (statements that tractor would have low hours in 500 to 550-hour range "was an affirmation of fact having a natural tendency to induce [plaintiff] to purchase it. As such, [no error] in finding that an express warranty had been created"); *Currier v. Spencer*, 772 S.W.2d 309, 311 (Ark. 1989) (analyzing breach of warranty based on what was represented versus what was received). In addition to the warranty, and reliance *if* required, elements are failure to conform to statements or descriptions and resulting harm. AMI 1012; *Allen,* 306 F.R.D. at 648-49; *Cantrell v. Amarillo Hardware Co.*, 602 P.2d 1326, 1330-31 (Kan. 1979); *McDougall v. CRC Indus*., *Inc.*, 523 F.Supp.3d 1061, 1074 (D. Minn. 2021); *Carpenter*, 853 S.W.2d at 357; *Androme Leather Co., Inc. v. Consol. Color Co., a Div. of Lloyd Labs., Inc.*, 569 N.Y.S.2d 514, 515 (App. Div. 1991).

2. Breach of implied warranty - merchantability

In each relevant state (Arkansas, Kansas, Minnesota, Missouri), if the seller is a merchant, there is an implied warranty that goods conform to affirmations on the label and are "fit for the ordinary purposes for which such goods are used." Ark. Code Ann. § 4-2-314(2)(c), (f); Kan. Stat. Ann. § 84-2-314(2)(c), (f); Minn. Stat. Ann. § 336.2-314(2)(c), (f); Mo. Rev. Stat § 400.2-314(2)(c), (f). As to the latter, elements are unfitness and consequent harm. *E.I. Du Pont de Nemours & Co. v. Dillaha*, 659 S.W.2d 756, 757-58 (Ark. 1983); *Gonzalez v. Pepsico, Inc*., 489 F.Supp.2d 1233, 1246-47 (D. Kan. 2007); *Peterson v. Bendix Home Sys., Inc*., 318 N.W.2d 50, 52-53 (Minn. 1982); *Davis v. Dunham's Athleisure Corp*., 362 F.Supp.3d 651, 663 (E.D. Mo. 2019).

In some states, breach is established with proof of defect. *See Gonzalez*, 489 F.Supp.2d at 1247 (Kansas courts tend to equate fitness with defect); *Peterson*, 18 N.W.2d at 53 (warranty breached when product "is defective to a normal buyer making ordinary use of [it]"). In all states, breach occurs when a product is not suited for its ordinary purpose. *Purina Mills, Inc. v. Askins*,

to require … reliance"); *In re MyFord Touch Consumer Litig*., 46 F.Supp.3d 936, 973 (N.D. Cal. 2014) (same); *Allen v. Similasan Corp.*, 306 F.R.D. 635, 648-49 (S.D. Cal. 2015) (reliance not required).

875 S.W.2d 843, 847 (Ark. 1994); *Golden v. Den-Mat Corp.*, 276 P.3d 773, 797-98 (Kan. App. 2012); *Willmar Cookie Co. v. Pippin Pecan Co.*, 357 N.W.2d 111, 114 (Minn. App. 1984); *Groppel Co., Inc. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 61 (Mo. App. 1981).

3. Breach of implied warranty – fitness for particular purpose

UCC statutes in all relevant states (Arkansas, Kansas, Minnesota, Missouri) provide:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is … an implied warranty that the goods shall be fit for such purpose.

Ark. Code Ann. § 4-2-315; Kan. Stat. Ann. § 84-2-315; Minn. Stat. Ann. § 336.2-315; Mo. Rev. Stat. § 400.2-315. A buyer "need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists." Ark. Code Ann. § 4-2-315, cmt. 1; Kan. Stat. Ann. § 84-2-315, cmt. 1; Minn. Stat. Ann. § 336.2-315, cmt. 1; Mo. Rev. Stat. § 400.2-315, cmt. 1; *see also Golden*, 276 P.3d at 799 (buyer "need not bring home" particular purpose where "seller reasonably should understand the buyer's special use"); *Riviera Imports, Inc. v. Anderson Used Cars, Inc.*, 128 N.W.2d 159, 163 (Minn. 1964) (seller may be informed of intended use "by implication" and special use may be "established by a general habit or custom of the using public"). In at least Arkansas and Missouri, caselaw indicates that absent inspection, the buyer necessarily relies on the seller's judgment.[40] Elements also include breach (product not fit for particular purpose) and consequent injury.

[40] *See Price Bros. Lithographic Co. v. Am. Packing Co.*, 381 S.W.2d 830, 835 (Mo. 1964) ("when the buyer has no opportunity to examine or test the finished article … it is unreasonable to say that he … did not rely on the experience, skill and judgment of the seller"); *Bastian-Blessing Co. v. Stroope*, 155 S.W.2d 892, 894 (Ark. 1941) (where manufacturer provides goods for a particular purpose, and buyer "has not had the opportunity to inspect … [he] necessarily trusts to the judgment and skill of the manufacturer").

C. Common Law Fraud

Plaintiffs all assert common law fraud. Generally, elements are: (1) a misrepresentation; (2) knowledge of falsity; (3) intent to induce action; (4) reliance; and (5) resulting harm. *Adeli v. Silverstar Auto., Inc.*, 960 F.3d 452, 458 (8th Cir. 2020); *Ketayi v. Health Enrollment Grp.*, 516 F.Supp.3d 1092, 1124 (S.D. Cal. 2021); *Bank of Am., N.A. v. Narula*, 261 P.3d 898, 910-11 (Kan. App. 2011); *PBI Bank, Inc. v. Signature Point Condos. LLC*, 535 S.W.3d 700, 714 (Ky. App. 2016); *Sorchaga v. Ride Auto, LLC*, 893 N.W.2d 360, 369 (Minn. App. 2017); *Borgschulte v. Bonnot*, 285 S.W.3d 345, 348 (Mo. App. 2009); *Mogull v. Pete & Gerry's Organics, LLC*, 588 F.Supp.3d 448, 454-55 (S.D.N.Y. 2022); *State v. Abbott Labs.*, 816 N.W.2d 145, 161 (Wis. 2012). Knowledge and/or intent is satisfied when the misrepresentation is made without knowledge of, or with reckless disregard for, truth or falsity. *Sorchaga*, 893 N.W.2d at 371; *Young v. Allstate Ins. Co.*, 759 F.3d 836, 841 (8th Cir. 2014); PIK 127.40; *Invs. Heritage Life Ins. Co. v. Colson*, 717 S.W.2d 840, 842 (Ky. App. 1986); *Zurich Am. Life Ins. Co. v. Nagel*, 590 F.Supp.3d 702, 723-24 (S.D.N.Y. 2022); *Chase Manhattan Bank v. Motorola, Inc.*, 184 F.Supp.2d 384, 394 (S.D.N.Y. 2002); *Ollerman v. O'Rourke Co., Inc.*, 288 N.W.2d 95, 107 (Wis. 1980); *see also Pamplin v. Rowe*, 139 S.W. 1105, 1106 (Ark. 1911) (seller knew trees were not of type promised or sold them "in reckless disregard of the fact whether his representations were true or not"); *Manderville v. PCG&S Grp., Inc.*, 146 Cal.App.4th 1486, 1498 (2007) ("defendant knew that the representation was false … or … made the representation recklessly and without regard for its truth").

"Because the very representations relied on can be what cause forbearance from further inquiry into a statement's falsity, justifiable reliance ordinarily 'does not require the party to test the truth of such representations where they are within the knowledge of the party making them[.]'" *Yazdianpour v. Safeblood Techs., Inc.*, 779 F.3d 530, 536 (8th Cir. 2015) (citation omitted). *See*

also Restatement (Second) of Torts § 540 (1977) (recipient of representation "is justified in relying upon its truth, although he might have ascertained the falsity … had he made an investigation").[41]

Fraud includes omission of material facts when there is a duty to speak.[42] Such a duty may be based on superior knowledge, understanding that another is relying on misinformation, and/or representation without information needed to prevent it from being misleading.[43] A representation

---

[41] *See also Adeli*, 960 F.3d at 459 (Arkansas law would not necessarily fault plaintiff's failure to identify car's defects himself) (citing *Yazdianpour* 779 F.3d at 536); *In re Richmond*, 430 B.R. 846, 863 (Bankr. E.D. Ark. 2010) ("a person may rely on a representation of fact even though he could ascertain the falsity … if he made an investigation"); *Alternate Health USA Inc. v. Edalat*, 2021 WL 2935304, at *7 (C.D. Cal. May 19, 2021) (for intentional misrepresentation, it is "well established in California" that "negligence … in failing to discover the falsity … is no defense"); *Fox v. Wilson*, 507 P.2d 252, 266 (Kan. 1973) ("it is no defense … that the party to whom the representations were made might, with due diligence, have discovered their falsity, and that he made no searching inquiry into facts") (internal quotation and citation omitted); *Shilling v. McCraw*, 184 S.W.2d 97, 99-100 (Ky. 1944) (no defense that plaintiff had opportunity to discover whether diamonds were real or counterfeit); *Davis v. Re-Trac Mfg. Corp*., 149 N.W.2d 37, 39-40 (Minn. 1967) (absent adequate investigation by plaintiff, defendant "cannot escape liability by claiming that [plaintiff] ought not to have trusted him"); *Deutsche Bank Nat'l Trust Co. as Tr. for Am. Home Mortg. Inv. Trust 2006-3 v. Luna*, 655 S.W.3d 820, 829 (Mo. App. 2022) ("The proposition has now become very widely accepted … that a man may act upon a positive representation of fact notwithstanding … that the means of knowledge were specially open to him.") (citation omitted); *Hennig v. Ahearn*, 601 N.W.2d 14, 24 (Wis. App. 1999) ("recipient of a fraudulent misrepresentation is justified in relying on it, unless the falsity is actually known or is obvious to ordinary observation").

[42] *See ITT Educ. Servs., Inc. v. AP Consol. Theatres II Ltd. P'ship*, 195 F.Supp.3d 1031, 1046 (E.D. Ark. 2016) ("silence can amount to actionable fraud"); *Ketayi*, 516 F.Supp.3d at 1124 (fraud includes "misrepresentation (false representation, concealment, or nondisclosure)"); *Tetuan v. A.H. Robins Co.,* 738 P.2d 1210, 1228 (Kan. 1987) (fraud includes "anything calculated to deceive, including all acts, omissions, and concealments") (citation omitted); *Estate of Jones by Blume v. Kvamme*, 449 N.W.2d 428, 431 (Minn. 1989) (fraud supported by misrepresentation or concealment); *Borgschulte*, 285 S.W.3d at 349 ("Silence or concealment of facts can amount to misrepresentation") (citation omitted); *Mogull*, 588 F.Supp.3d at 454-55 (fraud may be "misrepresentation or a material omission of fact") (citation omitted); *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205, 211 (Wis. 2005) (claim may arise from failure to disclose or statement of material fact that is untrue).

[43] *See, e.g.*, *Holiday Inn Franchising, Inc. v. Hotel Assocs., Inc*., 382 S.W.3d 6, 14 (Ark. App. 2011) (duty "where information is peculiarly within the knowledge of one party and is of such a nature that the other party is justified in assuming its nonexistence"); *Zimpel v. Trawick*, 679 F.Supp. 1502, 1510 (W.D. Ark. 1988) (defendant "had the duty to tell the whole truth"); *In re 3M Combat Arms Earplug Prods. Liab. Litig*., 2021 WL 6334085, at *3 (N.D. Fla. Sept. 3, 2021) (duty "where one party knows another is relying on misinformation") (citation omitted); *Cottle v. Plaid Inc*., 536 F.Supp.3d 461, 493 (N.D. Cal. 2021) (duty when defendant "makes representations but does not disclose facts … which render his disclosure likely to mislead"); *Sparks v. Guar. State Bank*, 318 P.2d 1062, 1066 (Kan. 1957) (if one "speaks at all, he must make a full and fair disclosure"); *Smith v. Gen. Motors Corp*., 979 S.W.2d 127, 129 (Ky. App. 1998) (duty from partial disclosure and superior knowledge); *Sorchaga* 893 N.W.2d at 369 ("[o]ne who speaks must

or omission is material if a reasonable man would attach importance to it in determining his choice of action. *See generally* Restatement (Second) of Torts § 538(2) (matter is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action"); *accord Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 513 (6th Cir. 2015); *Chase Manhattan Bank*, 184 F.Supp.2d at 394; *Lafarge N. Am., Inc. v. Disc. Grp. L.L.C.*, 574 F.3d 973, 982 (8th Cir. 2009); *Ollerman*, 288 N.W.2d at 107; *see also Russell v. City of Rogers*, 368 S.W.2d 89, 91 (Ark. 1963) (misrepresentation material "if it would be likely to influence a reasonable person"); *Zimpel*, 679 F.Supp. at 1511 (applying Restatement (Second) of Torts § 538); *Fitzmorris v. Demas*, 116 P.3d 764, 768 (Kan. 2005) (materiality considers "whether a reasonable person would have found the information … important in determining whether to purchase"); *In re Sallee*, 286 F.3d 878, 897 (6th Cir. 2002) (a material fact is one "that affects the conduct of a reasonable person and is likely an inducement"); *Jackson Nat'l Life Ins. Co. v. Workman Sec. Corp.*, 803 F.Supp.2d 1006, 1014 (D. Minn. 2011) (representation material if "it would naturally affect the conduct" of other party).

Reliance on a misrepresentation need not be the sole factor influencing a decision. Restatement (Second) of Torts § 546 & cmt. a; *see also Zimpel*, 679 F.Supp. at 1511 (applying Restatement § 546); *Engalla v. Permanente Med. Grp., Inc*., 938 P.2d 903, 919 (Cal. 1997) ("It is not ... necessary that … the fraudulent misrepresentation be the sole or even the predominant or decisive factor") (citations omitted); *Tetuan*, 738 P.2d at 1230-31 (misrepresentation need not be "the" cause of harm; sufficient that it "played a substantial part" in conduct); *Commonwealth Land*

---

say enough to prevent his words from misleading the other party") (citation omitted); *Borgschulte*, 285 S.W.3d at 350-51 (duty from superior knowledge); *Constance v. B.B.C. Dev. Co*., 25 S.W.3d 571, 584 (Mo. App. 2000) (duty "where the defendant has invited plaintiffs' confidence" by partial disclosure) (citation omitted); *Pilkington N. Am., Inc. v. Mitsui Sumitomo Ins. Co. of Am*., 460 F.Supp.3d 481, 493-94 (S.D.N.Y. 2020) ("once a party has undertaken to mention a relevant fact … it cannot give only half of the truth[;]" duty also from knowledge that other party is acting on mistaken facts); *Ollerman*, 288 N.W.2d 107 (duty to disclose facts known and not readily discernible to purchaser; fact is known if defendant "has actual knowledge of the fact or …acted in reckless disregard as to the existence of the fact").

& Title Ins. Co. v. Howard, 2016 WL 1255719, at *6 (E.D. Ky. Mar. 29, 2016) (sufficient that misrepresentation was a "substantial factor," "if not the only factor" in bringing about harm); *Davis*, 149 N.W.2d at 39-40 (misrepresentation must be "a substantial factor" in decision); *Stallings v. Bone*, 327 S.W.2d 513, 517 (Mo. App. 1959) (representation "not the sole factor" inducing purchase); *Sterling Nat'l Bank v. Ernst & Young, LLP.*, 2005 WL 3076341, at *5 (N.Y. Sup. Ct. Jan. 7, 2005) (same); *First Nat'l Bank in Oshkosh v. Scieszinski*, 131 N.W.2d 308, 311 (Wis. 1964) (same).

D. Negligent Misrepresentation

Kansas, Kentucky, Minnesota, Missouri, and Wisconsin have adopted negligent misrepresentation as described in or with guidance from Restatement (Second) of Torts § 552 (1976). *Rinehart v. Morton Bldgs., Inc.*, 305 P.3d 622, 630 (Kan. 2013); *Presnell Constr. Mngrs., Inc. v. EH Constr., LLC*, 134 S.W.3d 575, 582 (Ky. 2004); *TCF Banking & Sav., F.A. v. Arthur Young & Co.*, 706 F.Supp. 1408, 1418 (D. Minn. 1988); *Kesselring v. St. Louis Grp., Inc.*, 74 S.W.3d 809, 813 & n.1 (Mo. App. 2002); *Hatleberg v. Norwest Bank Wis.*, 700 N.W.2d 15, 25-26 (Wis. 2005). Most recognize a claim based on representations or omissions. *See Stechschulte v. Jennings*, 298 P.3d 1083, 1100 (Kan. 2013) (rejecting argument that seller's agent made no affirmative representations); *Liberty Mut. Fire Ins. Co. v. Acute Care Chiropractic Clinic P.A.*, 88 F.Supp.3d 985, 1014 (D. Minn. 2015) ("alleged omission … constitutes negligent misrepresentation"); *Duncan v. Savannah, LLC*, 637 S.W.3d 633, 639 (Mo. App. 2021) (negligent misrepresentation can arise from failure to disclose); *Kesselring*, 74 S.W.3d at 814 (same); *Ramsden v. Farm Credit Servs. of N. Cent. Wis. ACA*, 590 N.W.2d 1, 8 (Wis. App. 1998) (finding claim for negligent misrepresentation; when agent made statements, he assumed a duty to make truthful statements). In California, negligent misrepresentation is a species of deceit governed by

Civil Code §§ 1572, 1710 and common law principles, including guidance from the Restatement. *E.g.*, *Cedars Sinai Med. Ctr. v. Mid-W. Nat'l Life Ins. Co*., 118 F.Supp.2d 1002, 1010 (C.D. Cal. 2000). Deceit may be based on untrue assertion "by one who has no reasonable ground for believing it to be true" as well as "suppression of a fact, by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact." Cal. Civ. Code § 1710. When a defendant "purports to convey the whole truth about a subject," incomplete information constitutes positive assertion. *Alvarez v. AbbVie, Inc*., 2017 WL 10560635, at *1 (C.D. Cal. Dec. 6, 2017).

Elements are similar to fraud except that scienter, knowledge or recklessness are not required. Rather, the defendant is liable if he failed to use reasonable care in providing information. *See* Restatement (Second) of Torts § 552 cmt. f ("the supplier of the information must exercise reasonable care … to ascertain the facts on which his statement is based" and "in communicating the information so that it may be understood by the recipient"); *see also* Cal. Civ. Code § 1710.2 (assertion without "reasonable grounds for believing it to be true"). Under the Restatement, the communication also must have been made in the course of defendant's business or "transaction in which he has a pecuniary interest" and generally, for the guidance of others. It is not necessary, however, that the defendant "should have any particular person in mind as the intended, or even the probable recipient of the information." It is enough that he intends to reach and influence a group or class of persons. Restatement (Second) of Torts § 552 & cmt. h.

E. Consumer Act Violations

Plaintiffs from Arkansas, California, Kansas, Missouri, New York, and Wisconsin assert consumer act violations.

1. Arkansas Deceptive Trade Practices Act

The Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-101 *et seq*. ("ADTPA"), makes unlawful such practices as "[k]nowingly making a false representation as to the characteristics, ingredients, uses, benefits … or as to whether goods are … of a particular standard [or] quality," advertising goods "with the intent not to sell them as advertised," and "[e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade." Ark. Code Ann. § 4-88-107(a)(1), (3), (10). An unconscionable act is one that "affront[s] the sense of justice, decency, or reasonableness" and "includes conduct violative of public policy or statute." *Baptist Health v. Murphy*, 226 S.W.3d 800, 811 & n.6 (Ark. 2006). Also unlawful is "[t]he act, use or employment … of any deception, fraud, or false pretense," as well as "concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission." Ark. Code Ann. § 4-88-108(a)(1)-(2).

Under current Section 4-88-113 (eff. Aug. 1, 2017), any "person who suffers an actual financial loss as a result of his or her reliance on the use of a practice declared unlawful … may bring an action to recover … financial loss proximately caused by the offense or violation[.]" Ark. Code Ann. § 4-88-113(f)(1)(A).[44] Courts have held that pre-amendment, reliance was not required. *See Pleasant v. McDaniel*, 550 S.W.3d 8, 12 (Ark. App. 2018) ("reliance … conspicuously missing from the elements of the ADTPA"). The amendment has been found not retroactive.[45]

[44] Prior to amendment, the statute provided that "any person who suffers actual damage or injury as a result of an offense or violation … has a cause of action to recover actual damages …." 1990 Ark. Acts 3662.

[45] *Mounce v. CHSPSC, LLC*, 2017 WL 4392048, at *7 (W.D. Ark. Sept. 29, 2017); *Zetor N. Am., Inc. v. Rozeboom*, 2018 WL 3865411, at *14 (W.D. Ark. Aug. 14, 2018); *see also In re 3M Combat Arms,* 2021 WL 6334085, at *3 (noting debate on whether prior version required reliance and holding amendment not retroactive as to conduct before effective date); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 355 F.Supp.3d 145, 153 (E.D.N.Y. 2018) ("Reliance … was not an element of the former version of the ADTPA"; finding amendment not retroactive to purchases before effective date).

The current statute does not permit class actions. Ark. Code Ann. § 4-88-113(f)(B). Such a provision, however, is inapplicable in federal court. *Shady Grove Ortho. Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 400-02 (2010); *Whitley v. Baptist Health*, 2020 WL 4575991, at *1 (E.D. Ark. Aug. 7, 2020); *Murphy v. Gospel for Asia, Inc.*, 327 F.R.D. 227, 243-44 (W.D. Ark. 2018); *Mounce*, 2017 WL 4392048, at *7. Also, the Arkansas Supreme Court has exclusive authority over rules of procedure. *Summerville v. Thrower*, 253 S.W.3d 415, 420 (Ark. 2007). Statutory provisions in conflict therewith are invalid. *Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135, 141 (Ark. 2009). Like its federal counterpart, Arkansas Rule 23 permits a class action if requisite elements are found. Ark. R. Civ. P. 23(a), (b).

2. California Consumer Acts

California Plaintiffs assert claims under California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200 ("UCL"), False and Misleading Advertising Law, *id*. at §17500 *et seq*. ("FAL"), and Consumers Legal Remedies Act, Cal. Civ. Code §1750 *et seq*. ("CLRA").

The UCL bans "any unlawful, unfair or fraudulent act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Each adjective captures a liability theory. *Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010). The "unlawful" prong is satisfied by violation of another law, which can be the FAL or CLRA. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). The "fraudulent" prong is "governed by the reasonable consumer test," i.e., "that [reasonable] members of the public are likely to be deceived." *Rubio*, 613 F.3d at 1204 (citation omitted). The same is true for false advertising. *Rikos*, 799 F.3d at 512. A claim can be brought by any "person who has … lost money or property as a result of the unfair competition," Cal. Bus. & Prof. Code § 17204, as when a consumer "paid more for than he or she otherwise might have been willing to pay" or "would not have bought the

product" but for the misrepresentation. *Clevenger v. Welch Foods Inc.*, 342 F.R.D. 446, 453 (C.D. Cal. 2022) (citation omitted). The FAL makes unlawful any statement that "is untrue or misleading" and known or "by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500. Again a reasonable-consumer standard applies. *Bailey v. Rite Aid Corp.*, 338 F.R.D. 390, 399 (N.D. Cal. 2021). Reliance is not required. *Id*. at 407; *Peviani v. Arbors at Cal. Oaks Prop. Owner, LLC*, 62 Cal.App.5th 874, 888 (2021). These laws prohibit advertising not only false but misleading or having "a capacity, likelihood or tendency to deceive[.]" *Williams*, 552 F.3d at 938 (internal quotation marks and citation omitted).

The CLRA prohibits practices including: "[m]isrepresenting the affiliation, connection, or association with, or certification by, another;" representing that goods "have … characteristics, ingredients, uses, benefits, or quantities that they do not have;" representing that goods "are original or new if they … are … reclaimed, used, or secondhand;" representing that goods "are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;" and advertising with intent not to sell goods as advertised. Cal. Civ. Code § 1770(a)(3), (5)-(7), (9). The representation need only be "likely to mislead a reasonable consumer." *Clevenger*, 342 F.R.D. at 456 (citation omitted). Individual reliance is not required. *Id*. There is a presumption of reliance when the representation is material, an objective inquiry "rather than any understandings specific to the individual consumer." *Martin v. Monsanto Co*., 2017 WL 1115167, at *6 (C.D. Cal. Mar. 24, 2017). A matter is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action[.]" *People v. Johnson & Johnson*, 77 Cal.App.5th 295, 325 (2022). Omissions are actionable where "contrary to a representation actually made … or … [of] a fact the defendant was obligated to disclose." *Id*. (citation omitted). Causation is shown by materiality. *Rikos*, 799 F.3d at 512-13. Consumers who

suffer damage may bring suit. Cal. Civ. Code § 1780(a). Consumer means an individual "who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." Cal. Civ. Code § 1761(d).

3. Kansas Consumer Protection Act

Under the Kansas Consumer Protection Act, Kan. Stat. Ann. § 50-623 *et seq.* ("KCPA"), "no supplier[46] shall engage in any deceptive act or practice in connection with a consumer transaction." Kan. Stat. Ann. § 50-626(a). Deceptive practices include: "(1) Representations made knowingly or with reason to know that: (A) Property … [has] sponsorship, approval … characteristics, uses, benefits or qualities that [it does] not have; … (C) property is original or new, if … used to an extent that it is materially different from the representation; (D) "property … [is] of particular standard, quality, grade, style or model, if … of another which differs materially from the representation; … (F) property … has uses, benefits or characteristics unless the supplier relied upon and possesses a reasonable basis for making such representation; or (G) use, benefit or characteristic of property … has been proven or otherwise substantiated unless the supplier relied upon and possesses the type and amount of proof or substantiation represented to exist." Kan. Stat. Ann. § 50-626(b)(1)(A), (C), (D), (F), (G). A supplier need only have "reason to know" that a representation was inaccurate or misleading. *Golden*, 276 P.3d at 801. Deceptive acts also include: "willful use … of exaggeration, falsehood, innuendo or ambiguity as to a material fact" and "willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact." Kan. Stat. Ann. § 50-626(b)(2), (3). A matter is "material" when "a reasonable person would attach importance to it in determining how to act regarding a particular transaction." PIK 129.01. Duty to disclose arises in circumstances including knowledge that consumers are

[46] "Supplier" includes a manufacturer who, in the ordinary course, "solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." Kan. Stat. Ann. § 50-624(l).

acting under mistake of fact, customs in trade, or other circumstances where consumers would reasonably expect disclosure. *See In re Motor Fuel Temp. Sales Pracs. Litig.*, 867 F.Supp.2d 1124, 1139-40 (D. Kan. 2012) (denying summary judgment in class action dealing with motor fuels where "the facts permit[ted] an inference that plaintiffs would reasonably expect defendants to disclose the temperature of motor fuel sold at retail").

Deceptive practices violate the KCPA "whether or not any consumer has in fact been misled." Kan. Stat. Ann. § 50-626(b). While disagreement exists, courts hold that reliance is not required. *Kelly v. VinZant*, 197 P.3d 803, 812 (Kan. 2008); *Kucharski-Berger v. Hill's Pet Nutrition, Inc.*, 494 P.3d 283, 295 (Kan. App. 2021); *see also* PIK 129.01-A & Notes on Use ("One of the important distinctions of the [KCPA] is that reliance … is not required."). In addition, "[n]o supplier shall engage in any unconscionable act or practice," which violates the act "whether it occurs before, during or after the transaction." Kan. Stat. Ann. § 50-627(a). Unconscionability is a question for the court. Factors include: lack of material benefit from the transaction; inducement to enter into a transaction "excessively onesided in favor of the supplier;" misleading statements "on which the consumer was likely to rely to the consumer's detriment" and except as provided by section 50-639, attempts to exclude, modify or limit implied warranties of merchantability and fitness. Kan. Stat, Ann. §§ 50-627(b)(3), (5)-(7).

Under section 50-634, "[a] consumer who suffers loss as a result of a violation … may bring a class action for the damages caused by an act or practice" violating sections 50-626 or 50-627. Consumer is defined as "an individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes." Kan. Stat. Ann. § 50-624(b).

4. Missouri Merchandising Practices Act

Missouri's Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq.* ("MMPA") makes unlawful "[t]he act, use or employment … of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce." Mo. Rev. Stat. § 407.020.1. Deception is any act "that has the tendency or capacity to mislead … or that tends to create a false impression." 15 CSR § 60-9.020(1)-(2). False pretense is any deception, false statement, or pretense with intent to defraud. 15 CSR § 60-9.050(1). Misrepresentation includes assertions not in accord with facts, 15 CSR § 60-9.070(1), untrue statements of material fact, 15 CSR § 60-9.080(1), and omissions necessary to make statements not misleading. 15 CSR § 60-9.090. It also includes assertions intended to induce a purchase if not in accord with the facts, or without reasonable basis for, the assertion. 15 CSR § 60-9.100(2)(A)-(B). Concealment is any act that "operates to hide or keep material facts." 15 CSR § 60-9.110(1). Suppression is any act "likely to curtail or reduce the ability of consumers to take notice of material facts which are stated." 15 CSR § 60-9.110(2). Omission is "any failure … to disclose material facts known … or upon reasonable inquiry would be known to [defendant]." 15 CSR § 60-9.110(3). A fact is material if "a reasonable consumer would likely consider [it] to be important in making a purchasing decision." 15 CSR § 60-9.010(C). Unfair practices include those that "[o]ffend[] any public policy" or are "unethical, oppressive, or unscrupulous" and "[p]resent[] a risk of, or cause[], substantial injury to consumers." 15 CSR § 60-8.020(1)(A)-(B). Reliance is not required. *Plubell v. Merck & Co.*, 289 S.W.3d 707, 714 (Mo. App. 2009).[47]

[47] *Accord Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 774 (Mo. 2007); *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 311 (Mo. App. 2016); *Schuchmann v. Air Servs. Heating & Air Cond'g, Inc.*, 199 S.W.3d 228, 232 (Mo. App. 2006); 15 CSR §§ 60-9.020(2), 60-9.050(2), 60-9.070(2), 60-9.110(4)*; see also In re McCormick & Co., Inc., Pepper Prods. Mktg. & Sales Pracs. Litig.*, 422

Under section 407.025, any "person"[48] who purchases merchandise "primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money … as a result of the use or employment … of a method act or practice declared unlawful" may bring a claim. Ascertainable loss can be established under Missouri's benefit-of-the-bargain rule. *Johnson v. Gilead Scis., Inc.*, 563 F.Supp.3d 981, 989 (E.D. Mo. 2021).

5. New York Consumer Protection Laws

New York's consumer protection laws prohibit "[d]eceptive acts or practices in the conduct of any business, trade or commerce." N.Y Gen. Bus. Law § 349(a). They also prohibit advertising, including mislabeling, "misleading in a material respect," taking into account both representations and failure "to reveal facts material in … light of such representations." N.Y Gen. Bus. Law §§ 350, 350-a. A deceptive practice is one "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 604 (N.Y. 1999). This is an objective test, i.e., "what a *reasonable* consumer, not a particular consumer, would do." *Sharpe v. A&W Concentrate Co.*, 2021 WL 3721392, at *4 (E.D.N.Y. July 23, 2021). Individual reliance is not required. *See Koch v. Acker, Merrall & Condit Co.*, 967 N.E.2d 675, 676 (N.Y. 2012) ("Justifiable reliance by the plaintiff is not an element of the statutory claim.").

These claims require "consumer[-]oriented conduct." *Gaidon*, 725 N.E.2d at 603. It is sufficient if an act has the "potential to affect the public at large, as distinguished from merely a private contractual dispute." *Dorce v. City of New York*, 608 F.Supp.3d 118, 146 (S.D.N.Y. June 24, 2022) (citation omitted). This includes "repeated acts of deception directed at a broad group of

F.Supp.3d 194, 262 (D.D.C. 2019) (D.C. Cir. Sept. 20, 2019) (unlawful practice must cause the loss, but "the purchase [need not] be caused by the unlawful practice") (quoting *Plubell*, 289 S.W.3d at 714).

[48] "Person" is defined to include natural persons as well as partnerships, corporations, companies, and associations. Mo. Rev. Stat. § 407.010(5); *see also* 15 CSR § 60-9.010(B) ("consumer" includes "any person (as defined in section 407.010.5 [*sic*], RSMo) who purchases … merchandise").

individuals." *Id*. (citation omitted). Focus is on the deception "not on the consumer's ultimate use of a product." *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 171 N.E.3d 1192, 1198 (N.Y. 2021).

"[A]ny person who has been injured by reason of any violation of" sections 349 or 350 may bring an action to recover actual or statutorily imposed damages. N.Y Gen. Bus. Law §§ 349(h), 350-e. Statutory damages are $50/violation under § 349 and $500/violation under § 350, with increase available for willful or knowing violations. Injury occurs when a plaintiff alleges that she purchased a product but did not receive the full value of her purchase. *Orlander v. Staples*, *Inc*., 802 F.3d 289, 302 (2d Cir. 2015). While deception must cause a loss, it need not cause the transaction. *Stutman v. Chem. Bank*, 731 N.E.2d 608, 612-13 (N.Y. 2000); *see also Phifer v. Home Savers Consulting Corp.*, 2007 WL 295605, at *5-6 (E.D.N.Y. Jan. 30, 2007) (plaintiff need not show reliance, only that the deceptive act caused injury).

6. Wisconsin Deceptive Trade Practices Act

The Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18, *et seq*. ("DTPA") provides that no person or corporation "with intent to sell … merchandise … or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase … shall make, publish, disseminate, circulate, or place before the public … an advertisement, announcement, statement or representation of any kind … which … contains any assertion, representation or statement of fact which is untrue, deceptive or misleading." Wis. Stat. § 100.18(1). It is deemed deceptive if the representation is "part of a plan or scheme the purpose or effect of which is not to sell … merchandise … as advertised. Wis. Stat. § 100.18(9)(a). Section 100.18 "prohibits deceptive, misleading, or untrue statements of any kind[.]" *Dorr v. Sacred Heart Hosp.*, 597 N.W.2d 462, 473 (Wis. App. 1999). Omissions, while not independently

actionable, are relevant as evidence of the untrue, deceptive or misleading nature of a representation. *Murillo v. Kohl's Corp.*, 197 F.Supp.3d 1119, 1127 (E.D. Wis. 2016).

A plaintiff is a member of the public unless there is "some particular relationship" between plaintiff and defendant. *State v. Automatic Merchandisers of Am., Inc.*, 221 N.W.2d 683, 686 (Wis. 1974). A misrepresentation "need not be the sole or only motivation" but only a "material inducement" or "significant factor contributing to [plaintiff's] decision." *Fricano v. Bank of Am. NA*, 875 N.W.2d 143, 155 (Wis. App. 2016). Reliance is not an element, although reasonableness can be considered in connection with inducement. *See K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 732 N.W.2d 792, 802 (Wis. 2007) ("Unlike common law causes of action for misrepresentations, reasonable reliance is not the standard for a DTPA claim"); *Novell v. Migliaccio*, 749 N.W.2d 544, 553-54 (Wis. 2008) ("plaintiffs … do not have to demonstrate reasonable reliance as an element of the statutory claim" although reasonableness may be a defense as to, for example "a plaintiff's belief that a Superman cloak could "'*actually* permit someone to fly'") (citation omitted). "Any person suffering pecuniary loss because of a violation of [section 100.18] … may sue … and shall recover such pecuniary loss." Wis. Stat. § 100.18(11)(b)2.

F. Unjust Enrichment

Plaintiffs from all states except Wisconsin pursue unjust enrichment. Basic elements are: (1) defendant's receipt of a benefit; (2) at plaintiff's expense; and (3) unjust retention. *Pruitt v. Barclay*, 594 S.W.3d 120, 125 (Ark. App. 2020); *Allegra v. Luxottica Retail N. Am.*, 341 F.R.D. 373, 396 (E.D.N.Y. 2022); *Kucharski-Berger v. Hill's Pet Nutr'n, Inc.,* 494 P.3d 283, 300 (Kan. App. 2021); *Walters v. Gill Indus., Inc.*, 586 F.Supp.3d 633, 645 (E.D. Ky. 2022); *Hull v. ConvergeOne, Inc*., 570 F.Supp.3d 681, 706 (D. Minn. 2021); *Browning v. Anheuser-Busch, LLC*, 539 F.Supp.3d 965, 975 (W.D. Mo. 2021); *Dorce*, 608 F.Supp.3d at 135. Some states add

defendant's appreciation of benefit. None requires specified conduct for unjustness. Minnesota's high court has said a party must be enriched in the sense that "unjustly" could mean "illegally or unlawfully" *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996), but this does not mean that conduct must break the law. *See Hartford Fire Ins. Co. v. Clark*, 727 F.Supp.2d 765, 777-78 (D. Minn. 2010) (canvassing caselaw and finding that unjust enrichment lies where retention would be "morally wrong"); *Wentzel v. CitiMortgage, Inc*., 2012 WL 1004924, at *4 (D. Minn. Mar. 23, 2012) (same).

G. Kansas Products Liability Claims

Kansas Plaintiffs assert product liability claims for design defect and failure to warn. *See Delaney v. Deere & Co.*, 999 P.2d 930, 936 (Kan. 2000) (Kansas recognizes manufacturing, design, and warning defect theories).

1. Design defect

Elements of design defect are: (1) defendant is engaged in the business of manufacturing or selling the product; (2) the product was in defective condition and unreasonably dangerous; (3) the defective condition existed when it left defendant's control; (4) the product reached plaintiff without substantial change; and (5) the defect caused or contributed to cause the injuries. PIK 128.18. The claim may be based on one or more theories including negligence, implied warranty, and strict liability. PIK 128.22. Implied warranty has been discussed. For negligence, a manufacturer has a duty "to use ordinary care in the design of the product so that it will be reasonably safe for the use for which it is intended or which can reasonably be anticipated." PIK 128.02. Breach focuses on the product and conduct of the defendant. *See* PIK 128.01. Strict liability focuses "on the product itself, not the acts or omissions of the maker or seller." *Gaumer v. Rossville Truck & Tractor Co., Inc*., 202 P.3d 81, 85 (Kan. App. 2009).

Kansas law asks whether the product was dangerous to an extent "beyond that which would be contemplated by the ordinary consumer … with the ordinary knowledge common to the community as to its characteristics." *Delaney*, 999 P.2d at 944. Evidence of alternative design is permitted but not required. *Id.* at 945. It is sufficient that a defect cause or contributed to cause injury. *Burton v. R.J. Reynolds Tobacco Co*., 181 F.Supp.2d 1256, 1268 (D. Kan. 2002). Causation is present if the defect was a "substantial factor" in bringing about the harm; proximate cause is present where injury was reasonably foreseeable. *Id*. at 1270.

2. Failure to Warn

Duty to warn encompasses warning of dangers and adequate instructions for safe use. *Delaney*, 999 P.2d at 938. A manufacturer must "warn of all potential dangers which it knew, or in the exercise of reasonable care should have known[.]" *Graham*, 666 F.Supp. at 1498; *accord Burton v. R.J. Reynolds Tobacco Co*., 208 F.Supp.2d 1187, 1199-200 (D. Kan. 2002). This includes tests that would have brought the danger to light. *Richter v. Limax Int'l, Inc.*, 45 F.3d 1464, 1470 (10th Cir. 1995). Warnings may be inadequate "in factual content, the expression of facts, or in the method by which … conveyed." *Graham*, 666 F.Supp. at 1498; *see also O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438, 1441-42 (10th Cir. 1987) ("simply mentioning an association between toxic shock and tampon use did not adequately alert users"). If a warning is inadequate, causation is presumed and the burden shifts to the defendant to prove lack thereof. *O'Gilvie,* 821 F.2d at 1441-42; *Burton*, 208 F.Supp.2d at 1193; *Graham*, 666 F. Supp. at 1499.

With claim elements and background facts in mind, requirements for class certification are discussed below. All are met in this case.

II. THE REQUIREMENTS OF RULE 23(a) ARE SATISFIED.

A. The Classes Are So Numerous that Joinder Is Impracticable.

"No arbitrary rules regarding the necessary size of classes have been established." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982); *see also Weigand v. Maxim Healthcare Servs*., *Inc*., 2016 WL 127595, at * 4 (W.D. Mo. Jan. 11, 2016) (the Eighth Circuit "has not established any rigid rules regarding the … size of [a] class that is necessary to satisfy Rule 23(a)") (internal quotation omitted). The determination is in the court's discretion. *Ark. Educ. Ass'n v. Bd. of Educ. of Portland, Ark. Sch. Dist.*, 446 F.2d 763, 765 (8th Cir. 1971). It may consider "the nature of the action, the size of individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members." *Paxton*, 688 F.2d at 599-60. Even a class of 20 may satisfy numerosity. *Ark. Educ.*, 446 F.2d at 765-66; *see also Weigand*, 2016 WL 127595, at *4 (class of 25 sufficient); *Wakefield v. Monsanto Co.* 120 F.R.D. 112, 115 (E.D. Mo. 1988) (same). Plaintiffs need only show a "reasonable estimate" of the number of class members. *Id*.; *see also Halbach v. Great-West Life & Annuity Ins. Co.*, 2007 WL 1018658, at *3 (E.D. Mo. April 2, 2007) (same). Based on retailer sales data (that included purchasers' names and contact information), Dr. Babcock estimated the number of class members for each state as: Arkansas–36,262; California-14,900; Kansas-13,170; Kentucky-32,120; Minnesota-2,458; Missouri-2,619; New York-23,847; and Wisconsin-3,592. *See* Babcock Rpt. 11-14 & Table 7. Each of the proposed state classes has far more members than required.

B. There Are Common Issues of Law and Fact.

The threshold for commonality is low, requiring only that the issue "linking the class members is substantially related to the resolution of the litigation." *In re Zurn Pex Plumbing Prods. Liab. Litig*., 2013 WL 716088, at *3 (D. Minn. Feb. 27, 2013) (internal citations omitted);

see also Tinsley v. Covenant Care Servs., *LLC*, 2016 WL 393577, at *8 (E.D. Mo. Feb. 2, 2016) (commonality "imposes a very light burden … and is easily satisfied"); *Hartley v. Suburban Radiologic Consultants, Ltd.*, 295 F.R.D. 357, 376 (D. Minn. 2013) (same). Commonality does not require "that every question of law or fact be common to every member of the class." *Fochtman v. DARP, Inc*., 2019 WL 406146, at *4 (W.D. Ark. Jan. 31, 2019) (quoting *Paxton*, 688 F.2d at 561). Indeed, "even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (internal quotation omitted). Common questions include both factual and legal issues capable of "generat[ing] common answers apt to drive the resolution of the litigation." *Id*. at 350 (citation and emphasis omitted). Commonality "may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Hartley*, 295 F.R.D. at 376 (quoting *Paxton*, 688 F.2d at 561); *see also Glen v. Fairway Indep. Mortg. Corp*., 265 F.R.D. 474, 478 (E.D. Mo. 2010) ("the presence of differing legal inquiries and factual discrepancies will not preclude class certification").

Here, all class members were purchasers of a product Plaintiffs claim was worthless waste. A central overriding question is whether Defendants held 303 THF out as something it was not. The focus is on the true state of the fluid, a common issue answered by common proof. There are numerous other common questions, discussed more fully in regard to predominance, and they too are amenable to common proof. *See infra*, Sect. III.A. Simply put, "a classwide proceeding [would] generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (citation, internal quotation marks, and emphasis omitted). Because issues can be addressed through common legal analysis and generalized proof, commonality is satisfied. *See, e.g*., *In re: Syngenta AG MIR 162 Corn Litig*., 2016 WL 5371856, at *5 (D. Kan.

Sept. 26, 2016) (common issues include defendant's "representations and whether they were false or misleading[,] … duty of reasonable care, … and whether [defendant] breached its duty of care"); *Claxton v. Kum & Go, L.C.*, 2015 WL 3648776, at *1 (W.D. Mo. June 11, 2015), at *3 (common questions include "whether Defendant misrepresented the gasoline sold; whether the marketing/labeling of the gasoline was false, misleading, deceptive, or unfair; whether Defendant knew or should have known of the contamination…; whether the sale of contaminated fuel constituted a breach of an express or implied warranty; etc.").

C. Plaintiffs' Claims Are Typical of Other Members of Each Class.

Typicality exists when there are "other members of the class who have the same or similar grievances as the plaintiff." *Zurn Pex*, 2013 WL 716088, at *3. Representatives "need not share identical interests with every class member, but only 'common objectives and legal and factual positions.'" *Claxton*, 2015 WL 3648776, at *3 (quoting *In re Uponor, Inc. F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1064 (8th Cir. 2013)). "The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995); *see also Tinsley*, 2016 WL 393577, at *8 ("The burden of showing typicality is not an onerous one."). Here, Plaintiffs' claims arise from the same conduct by Defendants and "emanate from the same legal theory or offense as the claims of the class." *Doran v. Mo. Dep't of Soc. Servs.*, 251 F.R.D. 401, 405 (W.D. Mo. 2008). Typicality does not demand that circumstances of all class members be identical. *Webb v. City of Maplewood*, 340 F.R.D. 124, 137 (E.D. Mo. 2021); *DeBoer*, 64 F.3d at 1174-75. Plaintiffs, like all class members, purchased 303 THF, a worthless waste product and suffered harms to equipment from use of improper, inadequate fluid. They assert the same legal theories as all other class members and seek the same kind of relief. Typicality is satisfied.

D. Proposed Class Representatives Will Fairly and Adequately Protect the Interests of Absent Class Members.

Finally, representative parties must fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4) This is met where: "1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously; and 2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." *Vogt v. State Farm Life Ins. Co.*, 2018 WL 1955425, at *5 (W.D. Mo. Apr. 24, 2018) (internal citation and quotation omitted); *Barfield v. Sho-Me Power Elec. Co-op.*, 2013 WL 3872181, at *3 (W.D. Mo. July 25, 2013) (same). Adequacy focuses on whether Plaintiffs' attorneys are "qualified, experienced, and generally able to conduct the proposed litigation," and whether Plaintiffs have "interests antagonistic to those of the class." *Claxton*, 2015 WL 3648776, at *4 (citation omitted); *see also Amchem*, 521 U.S. at 625 (adequacy element "serves to uncover conflicts of interest" between representatives and class).

Here each Plaintiff is aligned with other class members in common interest of vindicating the same claims. Each has devoted considerable time and attention to this litigation, providing information to counsel, responding to written discovery and sitting for deposition. Each has and will continue to devote himself to representing the interests of class members.[49] Plaintiffs' Co-Lead Counsels' qualification and commitment are beyond question. They have, from inception, played central roles in this litigation, spending thousands of hours advancing the interests of Plaintiffs and class members. They and their firms were appointed class counsel in related cases and they, along with others, were appointed as leadership in this MDL. More recently, attorneys from Gray, Ritter, Graham entered their appearance. They are well versed in MDLs, class actions, mass actions, and consumer cases. Decl. of Don M. Downing (Ex. 48). Counsel have demonstrated

[49] *See* Declarations of Named Representative Plaintiffs (collectively, Ex. 47).

consistent commitment to this litigation, willingness to devote necessary resources, and knowledge of applicable law. Respectfully, they are able advocates. *See White v. Martin*, 2002 WL 32596017, at *10 (W.D. Mo. Oct. 3, 2002) (absent proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to vigorously prosecute the case).

III. THE REQUIREMENTS OF RULE 23(b)(3) ARE SATISFIED.

A. Common Questions of Law or Fact Predominate.

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623; *accord Backer Law Firm v. Costco Wholesale Corp*., 321 F.R.D. 343, 350 (W.D. Mo. 2017) (same). Certification is appropriate where "a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated." *Amchem*, 521 U.S. at 615. "The question … is not whether the plaintiffs have already proven their claims … [but] whether questions of law or fact capable of resolution through common evidence predominate over individual questions." *Zurn Pex*, 644 F.3d at 619 (citation omitted). Moreover, common proof is not necessarily winning proof. "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" *Amgen*, 568 U.S. at 460.

Importantly, predominance does not require that *all* questions of law or fact be common. *See Morgan v. United Parcel Serv. of Am., Inc*., 169 F.R.D. 349, 357 (E.D. Mo. 1996) ("every question of law or fact does not have to be common to every member of the class") (citing *Paxton*, 688 F.2d at 561). "Rule 23(b)(3) … does *not* require a plaintiff … to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof.'" *Amgen*, 568 U.S. at 469 (citation omitted). All that is required is that common questions predominate. *Id*.; *see also* 2 Newberg and Rubenstein on

Class Actions § 4:51 (6th ed.) ("Newberg") ("Rule 23(b)(3) does not require that common issues be dispositive or significant; simply that they predominate.") (internal quotations omitted). "A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." Newberg § 4:51; *see also Murphy*, 327 F.R.D. at 238 (predominance "is determined not by counting the number of common issues, but by weighing their significance") (citation omitted). Predominance "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the noncommon, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (quoting treatises; internal citations and quotation marks omitted). If "one or more of the central issues … are common … and can be said to predominate," certification is appropriate "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* Because a defendant's conduct is often the central question, "[p]redominance is a test readily met in certain cases alleging consumer … fraud[.]" *Amchem*, 521 U.S. at 625. So it is here.

Key common questions in this case include: the nature and functions of tractor hydraulic fluid; ingredients, testing, and manufacture of tractor hydraulic fluid; specifications for and standards relating to tractor hydraulic fluid; ingredients used and not used to produce 303 THF; whether 303 THF was legitimate tractor hydraulic fluid; whether it was fit for use in any tractor or equipment or was in truth a waste product; what Defendants knew and could have foreseen; whether Defendants were negligent; whether 303 THF conformed to label representations; whether Defendants breached warranties; whether representations and omissions were false or misleading; whether Defendants violated consumer protection acts; whether Defendants were unjustly enriched; and harm caused by 303 THF. A central, overriding issue is whether Defendants

represented 303 THF as something it was not. That question is answered by common proof including admissions by Defendants, and testimony by Plaintiffs' experts that the fluid was in truth worthless waste damaging to all tractors and equipment in which it was used. This topic drives resolution of many issues Defendants will contend are individualized but in reality are not.

B. The Claims Are Amenable to Common Proof.

Numerous courts have certified classes asserting state-law claims like those here. Defendants may well attempt a battle on claim elements. Legal questions common to respective state classes, however, are still common questions. And common questions predominate regardless. All claims are amenable to class-wide proof on core issues involved in this case as discussed below. Injury and damages are discussed *infra*, Sects. III.D & E.

1. Negligence claims are suited for class treatment.

Duty is a legal question although disputed facts can present issues for the jury. *Scott v. Dyno Nobel, Inc.*, 967 F.3d 741, 744-45, 747 (8th Cir. 2020). What constitutes ordinary care is a common question, answerable with common proof regarding, for example, functions and requirements of tractor hydraulic fluid and the manner in which legitimate fluids are made. *See supra*, Statement of Facts ("SOF") B, E. Duty, foreseeability, and failure to meet the standard of focus on Defendants and their conduct. Foreseeability does not demand that victim or harm be specifically anticipated. Sect. I.A & notes 31-32, 37. Purchasers are not unforeseeable victims of harmful products and common proof shows foreseeability of damage resulting from improper fluid. Breach focuses on Defendants' acts and failures to act in ways common to all class members. Certification is appropriate where common issues include a defendant's duty of care, its acts and omissions, and whether the duty of care was breached. *E.g.*, *Syngenta*, 2016 WL 5371856, at *5.

2. Warranty claims are suited for class treatment.

Whether notice is required at all is already resolved for Missouri and Minnesota, and Plaintiffs submit that it is not required or satisfied by complaint, in other states. *Supra*, Sect. I.B. Pre-suit notice would not have served its purpose. *See Sunflower Elec.* 2005 WL 1842754, at *10 (correct defects, prepare for litigation, and protect against stale claims); *City of Wichita v. U.S. Gypsum Co.*, 828 F.Supp. 851, 857 (D. Kan. 1993), *aff'd in part, rev'd in part on other grounds*, 72 F.3d 1491 (10th Cir. 1996) (pre-suit notice not required where purposes not served). Common proof demonstrates that Defendants long knew that 303 THF was "line wash in a bucket." Even after state bans, they continued selling it in other states, still as tractor hydraulic fluid when it was not. Even now, Defendants attempt to defend the fluid as something other than how it was labeled. They had no intention of remedying non-conforming goods. Plaintiffs provided notice on behalf of themselves and putative class members. FAC ¶ 349; Notices (collectively, Ex. 49). Content and timing of notice need only be reasonable. *See* UCC § 2-607, cmt. 4 (notice "need merely be sufficient to let the seller know that the transaction is still troublesome" and timing need only be reasonable; notice is not designed "to deprive a good faith consumer of his remedy"); *Golden*, 276 P.3d at 788 (same; collecting cases). Whether notice is required, and if so, whether it was timely provided, are questions answerable class wide as to each state. Whether Defendants made warranties, breached them, and breach resulted in injury also are common issues.

a. Express warranty

Express warranties are demonstrated with common proof in the form of labels, on which statements, promises and descriptions were made, including that the product was tractor hydraulic fluid and in addition:

- multi-service or multi-functional, providing performance benefits in the areas of anti-wear, PTO clutch, rust protection, extreme pressure properties, water sensitivity, foam suppression and brake chatter reduction;

- suitable as a replacement for listed manufacturers where a tractor hydraulic fluid of "this quality" (Smitty's) or "this performance level" (Cam2) is recommended.

Breach is demonstrated by common proof comparing such statements with actual facts. *See Martin*, 2017 WL 1115167, at *6-7 ("breach of express warranty claims are appropriate for class treatment where whether defendant misrepresented its product and whether such misrepresentation breach warranties are issues common to members of the putative class"); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 569 (S.D.N.Y. 2014) ("The same evidence will determine whether the substance inside [the container] conforms to the express warranty" on the label).

Other common issues include whether reliance is required. *Supra*, Sect. I.B.1. Even if so, it can be established with common proof. *Infra*, Sect. III.C. A particular representation need not be the sole motivator. Any affirmation or description "part" of the bargain is sufficient. Ark. Code Ann. § 4-2-313; Cal. Com. Code § 2313; Kan. Stat. Ann. § 84-2-313; Minn. Stat. Ann. § 336.2A-210; Mo. Rev. Stat. § 400.2-313; N.Y. UCC Law § 2-313. There are multiple warranties on the labels and, according to Plaintiffs' evidence, 303 THF conformed with none of them. At minimum, all labels described the product as tractor hydraulic fluid, and that is what was held out to be. E. Smith 36:18-39:4. Common evidence demonstrates that it was not. *See* SOF B, C, E, F, J.

b. Implied warranty of merchantability

A warranty of merchantability arises where the defendant is a "merchant" who deals in goods of the kind sold. Ark. Code Ann. § 4-2-314; Kan. Stat. Ann. § 84-2-104(1), Minn. Stat. Ann. § 336.2-314; Mo. Rev. Stat. § 400.2-104(1). Common proof will demonstrate that Defendants meet that description. Common proof will demonstrate the ordinary purpose of tractor hydraulic fluid, including testimony from Defendants and Plaintiffs' experts. There is common proof that 303 THF

did not fulfill the functions of tractor hydraulic fluid and, if required, was defective. It was unsuitable *regardless* of type, model year of equipment, or other factors. *E.g.*, Dahm Rpt. ¶¶ 34-36, 84-85, 89, 126, 141, 155; Glenn Rpt. § 4.12. The same evidence will be used for every class member to determine whether the warranty was breached.

c. Implied warranty of fitness for particular purpose

If use by category of consumers purchasing tractor hydraulic fluid is "particular," that element is met with common proof that the product was so characterized and sold. There also is common proof that Defendants knew, or had reason to know, that consumers were purchasing 303 THF for both pre- and post-1974 equipment, including without limitation, pictures of the latter on labels. To the extent Defendants say that each consumer's needs depended on his or her own make and model of tractor/equipment, there is common proof to the contrary. Labels indicated that the fluid was useable for wide range of needs in wide range of OEM equipment. All hydraulic systems require certain functions and protections, which 303 THF did not and could not provide. Dahm Rpt. ¶¶ 23-24, 34-36, 141-43, 156-57; Glenn Rpt. ¶¶ 3.3, 3.6, 4.10, 4.12. Whether reliance is required is a legal issue common to each state-wide class. To the extent required, it is not an obstacle as discussed *infra*, Sect. III.C. This claim too is suited for class treatment.

3. Fraud claims are suitable for class treatment.

Elements of common law fraud include: a misrepresentation, knowledge of, or recklessness in regard to, falsity and intent to induce action by the recipient. *Supra*, Sect. I.C. Misrepresentation compares what was said about 303 THF on labels with actual facts. This again is a matter of common proof including testimony from both Defendants and Plaintiffs' experts. SOF B, C, E-H, J, K. Knowledge and intent focus on Defendants and what they knew and/or were reckless in communicating. As to omissions, duty to speak is a legal question also informed by common proof

focused on what Defendants knew about 303 THF, expectation that consumers were relying on labels, representations that were false and/or purported to provide some information (e.g., suitability as replacement fluid) without additional needed information (e.g., fluid met no OEM specifications). Materiality is judged under a reasonable-person standard. *See supra*, Sect. I.C at 52-53 (citing cases). As such, it is amenable to common proof, discussed in connection with reliance, which also can be shown with common proof. *Infra*, Sect. III.C.

4. Negligent misrepresentation claims are suitable for class treatment.

Defendants' failure to use reasonable care in providing information is established by common proof including development of 303 THF, lack of sufficient testing, slipshod controls and recordkeeping, incomplete or incorrect information given even to Defendants' own employees, and at best grossly cavalier treatment of labels. That representations and omission were provided in the course of Defendant's business for the guidance of others also can be demonstrated by common proof including, without limitation, admissions from Defendants themselves.

5. Consumer act violations are suitable for class treatment.

Predominance is "readily met" in many consumer fraud cases. *Amchem*, 521 U.S. at 625. "[T]he question of whether [defendant's] representations were accurate is of paramount importance" to liability. *Murphy*, 327 F.R.D. at 243. *See also*, *e.g.*, *Costa v. FCA US LLC*, 2022 WL 18910359, at *15 (D. Mass. Sept. 30, 2022) ("key liability questions overwhelmingly rest[ed] on common proof" regarding whether product was defective, impact on safety, what defendant knew, and what defendant did or did not disclose). Again that question is answered with proof common to all class members. Where required, knowledge or intent is focused on Defendants.

California claims, governed by a "reasonable consumer test," are "ideal for class certification." *Bradach v. Pharmavite*, *LLC*, 735 F. App'x 251, 254-55 (9th Cir. 2018) (citations

omitted). The same is true of New York. Reliance also is not required in Missouri, Wisconsin, or, Plaintiffs assert, Kansas. *Supra*, Sects. I.E.2-6. Issues common to the Arkansas class include whether Federal Rule 23 and/or the Arkansas constitution trumps Ark. Code Ann. § 4-88-113(f)(1)(B) to permit class treatment, and whether amendment requiring reliance is retroactive. *Supra*, Sect. I.E.1. Arkansas law is "well settled that the mere fact that individual issues and defenses may be raised … cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members." *DIRECTV, Inc. v. Murray*, 423 S.W.3d 555, 565 (Ark. 2012). In Wisconsin, reliance is not an element, although reasonableness might come into play as a defense. *Novell*, 749 N.W.2d at 553-54. It is highly questionable whether Defendants would attempt to discredit a consumer's reliance on label representations given that such a defense tacitly concedes falsity, and the wealth of admissions regarding importance of representations (and omissions) to purchasing decisions. *See*, *e.g.*, SOF D. That and other common evidence exists to counter any such attempt and where required, to demonstrate reliance on a class-wide basis. *Infra*, Sect. III.C.

6. Unjust enrichment claims are suitable for class treatment.

In *Dollar General*, the court certified unjust enrichment claims for state-wide classes (including California, Minnesota, Kansas, Kentucky, Missouri, and New York), recognizing that whether a benefit was unjust does not require individual inquiry where "the actions of the defendant are uniform and the transaction with all members are equitably similar." *Dollar General*, 2019 WL 1418292, at *19. Common questions there are similar to common questions here.[50] Here, however, unjustness entails something more: 303 THF was not just obsolete; it was not never legitimate tractor hydraulic fluid at all but in reality a waste stream unsuitable for all equipment

[50] These include whether Defendants misrepresented the safety and suitability 303 THF, the amount sold, Defendants' cost compared to revenue received, and profits. *Id.* at *13.

regardless of model year. That and other common evidence, is more than sufficient to show that Defendants' retention of benefit was unjust as to all class members. *See also*, *e.g.*, *Lott v. Louisville Metro Gov't*, 2021 WL 1031008, at *12 (W.D. Ky. Mar. 17, 2021) (certifying unjust enrichment claim were inequity common to class); *Rodriguez v. It's Just Lunch, Int'l*, 300 F.R.D. 125, 136 (S.D.N.Y. 2014) (whether defendant unjustly profited from misrepresentations could be determined on class-wide basis); *Gonzalez*, 489 F.Supp.2d at 1249 (allegation that plaintiffs "did not receive appropriate value for their purchases" sufficient for inequitable retention of benefit). Defendants may attempt a merits argument on whether unjust enrichment claims should go forward, but that has no bearing on certification. *See*, *e.g.*, *McAllister v. St. Louis Rams, LLC*, 2018 WL 1299553, at *8 (E.D. Mo. Mar. 13, 2018) (if class members had no claim they would lose it "in one stroke") (quoting *Wal-Mart*, 564 U.S. at 350).

7. Kansas product liability claims are suitable for class treatment.

The central focus of product liability claims is the product and its defectiveness. *See*, *e.g.*, *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 207-08 (W.D. Mo. 2017) (whether firearms were defective and evidence to establish the defect "would be the same for each class member"). Plaintiffs' experts will testify that 303 THF was a mix of inappropriate oils without proper additive package not only unsuitable as tractor hydraulic fluid but immediately and inevitably damaging. The defect was the same for all consumers and present when sold. There also is common evidence that ordinary consumers would not expect a product labeled tractor hydraulic fluid to be "line wash in a bucket," including the reaction of even a Cam2 salesman when he first learned of it.

Duty to warn encompasses both "duty to provide a warning to dangers inherent in use and … adequate instructions for safe use." *Delaney*, 999 P.2d at 938. A manufacturer must warn "of all potential dangers which it knew, or in the exercise of reasonable care should have known, to

exist." *Miller v. CNH Indus. Am. LLC*, 2022 WL 17669107, at *8 (D. Kan. Dec. 14, 2022). And there is ample evidence that language at the bottom of the labels was inadequate in multiple respects. Nowhere did labels reveal the true composition of 303 THF, that it met no known specifications, or that it lacked properties needed for hydraulic systems. Until after Missouri's stop-sale order, labels stated only that the fluid "has not been recommended" by OEMs for model years later than 1974—a neutral statement devoid of value as a limitation on use, Alter Rpt. ¶ 116, and far cry from actual warning that the fluid should not be used. The language as revised also was deficient. *See id*. at p. 16; Hayes Rpt. ¶ 16 (language *not* approved for fluids not meeting at least one specification). Defendants' own expert opines that suitability does not depend on model year but instead, applications for which a 20-weight fluid is appropriate. SOF J. If that is the test, it was nowhere stated on 303 THF labels. According to Plaintiffs' experts, the fluid was not fit for any use involving hydraulics at all and was worthless waste. Under no scenario was there adequate warning or instruction on use. Kansas law allows a "heeding" presumption of causation once it is established that a warning is inadequate. *Baughn v. Eli Lilly & Co.*, 356 F.Supp.2d 1177, 1181 (D. Kan. 2005). Defendants may point to section 60-3305(c), which does not apply to design defects. *Delaney,* 999 P.2d at 938-39. Insofar as failure to warn, any position that the defect was "open and obvious" is refuted with ample common evidence that it was not.

C. Where Required, Reliance and Materiality are Amenable to Common Proof.

Not all claims require reliance.[51] There may be debate on some but no matter. Reliance, called by that name or transaction causation, as well as materiality, can be established on a class-wide basis. This case does not depend on oral statements, websites, brochures and the like where

[51] These include at least: negligence; breach of express warranty in at least California, Kansas, Minnesota, and Missouri (*supra*, Sect. I.B.1); breach of warranty-merchantability; consumer act violations under California, Missouri, New York, Wisconsin and, Plaintiffs submit, Arkansas, and Kansas law (*supra*, Sects. I.E.1-6); unjust enrichment; and KPLA claims.

exposure to alleged misrepresentations is questionable. To be sure, misrepresentations were in advertising circulars and/or on Defendants' websites. FAC ¶¶ 163, 166. But they were also on labels to which every consumer was exposed at or before purchase. Defendants' own expert agrees that consumers need a label to know what is inside the container. Lester 133:11-13, 133:18-134:2, 245:20-246:6, 260:13-16. Smitty's own president agrees that the label "is the primary way for the purchasing customer to know what's in that bucket." Tate Vol. I 87:23-88:1. *See also*, *e.g.*, *Johns v. Bayer Corp.*, 280 F.R.D. 551, 558 (S.D. Cal. 2012) (rejecting argument that exposure would vary "depending on the mix of television, radio, or print advertisements" when "at a minimum, everyone who purchased the [product] would have been exposed" to claim "that appeared on *every package* from 2002 to 2009"); *Ebin*, 297 F.R.D. at 569 ("because 100% Pure Olive Oil is the name of the product itself … class members necessarily had to rely on it when shopping").

This case also does not involve a feature that enhances (e.g., "All Natural") or detracts (e.g., defective windshield wipers) from a product that otherwise fulfills its basic function. Defendants' product was fundamentally not what it purported to be, did not do what it purported to do, and moreover, caused immediate and inevitable harm to all equipment in which it was used. We are not dealing with a product of diminished value but one claimed to be worthless waste of negative value. This case also does not entail attenuated connection between misrepresentation and injury. All purchasers received a worthless product. All suffered injury at purchase as well as damage to equipment regardless of type, model, age, or other factors. Courts regularly hold that reliance does not impede certification in cases less compelling than this one.

1. Pursuant to well-established law, reliance and materiality can be established with class-wide proof.

There is in no *per s*e rule against certification involving a reliance component in the Eight Circuit. *See Custom Hair Designs by Sandy v. Cent. Pym't Co., LLC*, 984 F.3d 595, 603-04 (8th

Cir. 2020) (upholding certification; plaintiffs "could reasonably have relied on [defendant's] representation that issuing banks authorized rate changes"). Defendants will likely trumpet *In re St. Jude Medical, Inc.*, 522 F.3d 836 (8th Cir. 2008), which involved different facts and a medical monitoring claim. The product was a prosthetic heart valve available only through a physician. There was "significant issue" whether each plaintiff "even received a representation from St. Jude," what information physicians received from what source, and what may (or may not) have been relayed from physician to plaintiff. *Id.* at 838-39. Here, there is no issue about who represented what to whom: Defendants' misrepresentations were affixed to every product sold for consumers' use in purchase decisions. SOF C, D. Issues involved in *St. Jude* were not present in *Dollar General* and they are not present here.[52] Any assertion of varying pre-purchase knowledge "does not negate the … similarity of the alleged misrepresentations … [or] that the at-issue labeling … did, in fact, occur." *Dollar General*, 2019 WL 1418292, at *26. In *Dollar General*, the court rejected argument about differing label language as well as "variances in store layout, shelf placement, and changes over time" as similarities "could be accepted to show the near uniformity in Defendants' actions throughout the class period." *Id.* at *26. Here, store placement is not in play. And representations need not be identical. Where, as here, the case involves uniform course of conduct and "substantially similar" language in written representations, it "presents a classic case for treatment as a class action." *McKeage v. TMBC, LLC*, 847 F.3d 992, 999 (8th Cir. 2017) (internal quotations omitted). *See also*, *e.g.*, *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 124 (2d Cir. 2013) (contracts were "substantially similar" in material respects); *Allegra*, 341

[52] *See also*, *e.g.*, *Roberts v. C.R. England, Inc.*, 318 F.R.D. 457, 520 & n.422 (D. Utah 2017) (distinguishing cases including *St. Jude* "for lack of a centrally-driven scheme or uniform representation"); *Mooney v. Allianz Life Ins. Co. of N. Am.*, 2009 WL 511572, at *6 (D. Minn. Feb. 26, 2009) (distinguishing *St. Jude* where "almost every class member received the misrepresentation either through the brochure itself or through an agent who orally conveyed the information from the brochure").

F.R.D. at 426-27 (representations presented "non-material differences" and defendant conveyed a common, consistent message); *Murphy* 327 F.R.D. at 241 & n.9 (rejecting argument that representations were different where message consistent); *In re Checking Acct. Overdraft Litig.*, 307 F.R.D. 630, 646 (S.D. Fla. 2015) (variation in agreements did not defeat predominance where neither version fully disclosed the facts). *See also*, *e.g.*, *Barfield*, 2013 WL 3872181, at *10-11 (certifying class in case involving easement violations, recognizing that predominance "does not require that no individual issues exist" and finding that "variations in language are not so substantial as to cause individual questions of easement construction to predominate").

Here, there were some differences in labels on different-sized containers and a few changes over time, but the message was always the same. All labels at all times represented the product to be tractor hydraulic fluid when it was not. With small exception, all labels represented that the fluid was suitable for listed OEMs when it was not and made the same false claims to the same performance areas.[53] All labels (except large-sized, and Smitty's bucket after Missouri's stop-sale order in late 2017) represented that the fluid was multi-purpose, otherwise conveyed via listed performance attributes and description as tractor hydraulic fluid. No label at any time disclosed that the fluid contained line wash, used oils, had no additive package, met no specification, or lacked needed properties. In *Dollar General*, "suitability" language on which defendant relied changed 14 times. Here, it changed only once. There, as here, "no iteration[] … appropriately disclosed the quality and risks of the [303 THF]." 2019 WL 1418292, at *2.

[53] Cam2 55- and 275-gallon labels, which did not have these representations, represent a minute percentage of sales. They, like every other label, misrepresented the product as tractor hydraulic fluid. Smitty's large-sized containers (less than 1% of sales) did not list the performance benefits but did represent like all other Smitty's labels, that the product was "field tested" and suitable as a replacement for listed OEMs.

It has long been recognized that reliance is not adverse to predominance where plaintiffs' action or inaction is a natural and intended consequence of the misrepresentations at issue.[54] Courts often certify classes when the deception goes to the central purpose of the thing sold. *See*, *e.g.*, *Barrera v. Pharmavite, LLC*, 2016 WL 11758373, at *8 n.4 (C.D. Cal. June 2, 2016) ("if plaintiff can prove that TripleFlex, in fact, provides *no* joint health benefits, she will likely be able to establish that such a misrepresentation was material"); *Rodriguez*, 300 F.R.D. at 139 (representation was "so fundamental" that it was reasonable to infer reliance); *Suchanek v. Sturm Foods, Inc.*, 2018 WL 6617106, at *11 (S.D. Ill. July 3, 2018) (causation could be established with class-wide proof where defendant "misrepresented the product's very essence"). Reasonable inference through circumstantial evidence is a well-accepted means of establishing both reliance and causation in class actions. In *Boswell v. Panera Bread Co*., 311 F.R.D. 515, 531 (E.D. Mo. 2015), for example, "reliance [could] be shown by common circumstantial evidence, such as the fact that the class members signed the Agreements and accepted employment." Certification was upheld on appeal. *See Boswell v. Panera Bread Co*., 879 F.3d 296, 304 (8th Cir. 2018) (after summary judgment for employees, "the class is no less certifiable now than it was when certified").

[54] *See, e.g.*, *In re U.S. Foodservice*, 729 F.3d at 120 (reasonable inference that customers who paid amount specified in inflated invoice "would not have done so absent the …implicit representation that the … amount was honestly owed"); *Murphy,* 327 F.R.D. at 239 ("proof of reliance does not defeat predominance where … it was logical to infer" that class members relied on similar representations made by defendants); *City of Farmington Hills Employees Ret. Sys. v. Wells Fargo Bank, N.A.*, 281 F.R.D. 347, 355-56 (D. Minn. 2012) (appropriate to apply "common sense inference" that statement in lending agreements assured class members about safety of investment); *Childress v. JPMorgan Chase & Co.*, 2019 WL 2865848, at *11 (E.D.N.C. July 2, 2019) ("causation may be demonstrated through circumstantial classwide evidence such as payment of an invoice"); *In re Nat'l W. Life Ins. Deferred Annuities Litig.*, 268 F.R.D. 652, 666 (S.D. Cal. 2010) ("since an inference of reliance is logical from Plaintiffs' evidence, this Court finds that Plaintiffs have shown that reliance is a common question"); *Smith v. MCI Telecomms. Corp.*, 124 F.R.D. 665, 679 (D. Kan. 1989) ("It is implausible that, in initiating or continuing their employment with MCI, the salespersons did not rely on the commissions plans which they were required to sign."). *See also In re Morning Song Bird Food Litig*., 320 F.R.D. 540, 555 (S.D. Cal. 2017) ("The Court finds a common sense inference can be made that the class members relied upon Defendants[']misrepresentation that the product was bird food and not bird poison. As such, reliance can be determined on a class-wide basis.").

All relevant states allow elements of misrepresentation to be proved via circumstantial evidence and reasonable inference.[55] As well put by the Tenth Circuit, courts "would surely accept the introduction of such an inference … with little analysis" in individual cases, and there is "no reason why a putative class … should not be entitled to posit the same inference to a factfinder on a classwide basis." *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1092 (10th Cir. 2014). It is indeed implausible to suggest that purchasers do not rely on representations concerning a product's very nature and efficacy. *See Allen v. Hyland's Inc.*, 300 F.R.D. 643, 667 (C.D. Cal. 2014) ("It strains credulity to suggest that 'a significant portion of the general consuming public or of targeted consumers' do not rely—at least *in part*—on representations about the products' uses and effectiveness on product packaging when buying the products.").[56] Here, that is doubly true where the product was not only unfit but harmful.

[55] *See Interstate Freeway Servs., Inc. v. Houser*, 835 S.W.2d 872, 874 (Ark. 1992) ("circumstantial evidence can serve as a basis … to infer fraud"; terms of offer and fact that plaintiff quit job sufficient to establish reliance); *Marler v. E.M. Johansing, LLC*, 199 Cal.App.4th 1450, 1464 (2011) ("it is not necessary to show reliance … by direct evidence") (citation omitted); *L. Ruth Fawcett Trust v. Oil Producers, Inc. of Kan.*, 475 P.3d 1268, 1283 (Kan. App. 2020) ("an inference of reliance … is appropriate where circumstantial evidence … is common to the whole Class"); *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999) ("Fraud may be established by evidence which is wholly circumstantial."); *Davis,* 149 N.W.2d at 39 (reliance "can be inferred from the conduct of the plaintiff"); *Universal C. I. T. Credit Corp. v. Tatro*, 416 S.W.2d 696, 703 (Mo. App. 1967) ("reliance … may be inferred from all the facts and circumstances"); *Osberg v. Foot Locker, Inc.*, 2014 WL 5800501, at *6 (S.D.N.Y. Nov. 7, 2014) ("fact that plaintiffs switched [pension] plans, and may have even received payment without complaint, may be circumstantial proof of plaintiffs' reliance … no reasonable juror would assume that a person knowingly receiving a pension benefit lower than that to which they are otherwise entitled would simply ignore that fact"); *Beuttler v. Marquardt Mgmt. Servs., Inc.*, 978 N.W.2d 237, 247 (Wis App. 2022) ("Wisconsin cases dating back to 1891 show that the courts have admitted circumstantial evidence to prove fraud without excepting the reliance element.").

[56] *See also, e.g.*, *Forcellati v. Hyland's, Inc.*, 2014 WL 1410264, at *9 (C.D. Cal. Apr. 9, 2014) ("It is simply a matter of common sense that consumers who purchased Defendants' products did so in reliance on Defendants' claims that the [homeopathic] products provided effective relief from cold and flu symptoms."); *Garner v. Healy*, 184 F.R.D. 598, 602 (N.D. Ill. 1999) ("if Plaintiffs paid money for a 'wax,' but instead received a worthless "non-wax" product, then issues of proximate cause would be relatively simple to resolve on a classwide basis").

Whether some purchasers were motivated in part by factors such as price or store location is irrelevant. State law does not require that a challenged representation be the sole factor on which decision was based. *Supra*, Sect. I.C at 53-54 (citing cases); *see also Mooney*, 2009 WL 511572, at *5 ("Plaintiffs are not required to prove the extent to which the alleged misrepresentation caused them to purchase the annuity, merely that the misrepresentation was a cause"). Materiality is objective and provable "through evidence common to the class." *Amgen* 568 U.S. at 459. Even were it otherwise, there is little question about materiality here and it is susceptible to class-wide proof not only in the form of opinions from a consumer behavior expert (*see* Alter Rpt. ¶¶ 24-25, 29, 31, 51, 74, 103, 126-27) and experts involved specifically with labeling of hydraulic fluids (Glenn and Hayes) but testimony from Defendants themselves. *See*, *e.g.*, SOF C, D, H-L.

Plaintiffs purchased 303 THF based on label representations and would not have done so had they known the truth. FAC ¶ 267; *see also* Answers to First Set of Interrogs., (collectively, Ex. 50), No. 5. Common evidence is more than sufficient to establish prima facie elements on a class-wide basis. All class members purchased a product represented to be tractor hydraulic fluid when it was waste. *See* SOF B-C, F. Reasonable factfinders could find materiality and reliance from these facts alone. But there is much more, only some of which is recounted here. Dr. Alter explains that, particularly for a product like this one, consumers must and do rely on labels. Alter Rpt. ¶¶ 28, 31, 36, 96. Mr. Hayes, Dr. Dahm, and Mr. Glenn opine on the importance of accurate labeling for lubricants and fuels. Hayes Rpt. ¶ 3; Dahm Rpt. ¶ 167; Glenn Rpt. ¶ 5.1. Such information is material. *See*, *e.g.*, Alter Rpt. ¶¶ 24, 127. Smitty's own officers and employees admit that information was on labels for purchasing decisions. They admit the importance of representations including performance attributes. They embraced truth in labeling. Mr. Tate fully agreed that labels

should provide all information required to give an accurate and complete understanding "of what the product actually is" and suitable to be used for. *See* SOF D. The labels, however, did not.

Common evidence will show that 303 THF was not what it purported to be and harmed all tractors and equipment in which it was used. These are central, paramount issues. Any protestation that 303 THF worked, or that some users received some benefit, is pure merits debate without bearing on the certification inquiry. *See infra*, Sect. III.D (citing cases).

2. Reasonable reliance can be established with class-wide proof.

There not only is reasonable inference but direct evidence from a consumer behavior expert that reasonable consumers would not purchase a product if they knew it was unsuitable for use and caused harm. Alter Rpt. ¶¶ 130-31, 135-36.[57] Defendants sold 303 THF to millions of purchasers. Payment itself "constitutes circumstantial evidence that plaintiffs *lacked* knowledge of the scheme." *U.S. Foodservice*, 729 F.3d at 120. Defendants may pose that information critical of 303 fluids was in the public domain. Justifiable reliance, however, ordinarily does not require a plaintiff to test the truth of a representation. *See supra*, Sect. I.C & note 41 (citing cases); *see also, e.g.*, *Manderville*, 146 Cal.App.4th at 1503 ("it is well established that [a plaintiff] is not held to constructive notice of a public record which would reveal the true facts") (citations omitted). Moreover, "*generalized* proof supporting [a knowledge] defense" is "wholly consistent with class action treatment." *U.S. Foodservice*, 729 F.3d at 121 (emphasis added). Defendants' theory not only is insufficiently supported but does not forestall predominance on Plaintiffs' prima facie case or as a defense for this and other reasons. *See infra*, Sect. IV.A at 101-02.

Defendants may also contend that it was unreasonable to rely on positive assurances when language at the bottom of the back labels purportedly advised that 303 THF should not be used in

[57] Even Dr. Lester admits that more likely than not, consumers would not purchase a soda if it said "Poison" on it. Lester 183:3-17. He did not know or consider what kind of fluid was actually in the bucket.

equipment built after 1974. This theory is undermined by Defendant's own expert Swanger. If Defendants continue to pursue it, however, such an argument would apply to *everyone* who used the fluid in post-1974 equipment. Defendants urged that less than 2% of named Plaintiffs used it in pre-1974 equipment.[58] Any model-year theory is more common than individualized. And there is much common evidence that the language Defendants tout was *anything but* clear or effective. SOF K.3.[59] The very fact that purchasers *did* use the fluid in more modern equipment demonstrates, on common basis, that the language was ineffective. The MDA determined that even the new language was not curative for fluids meeting no specification. Hayes Rpt. ¶¶ 16, 25.

On a more fundamental level, Plaintiffs' position is that 303 THF was not suitable for *any* equipment, whether manufactured *before or after* 1974. Nothing on the labels told consumers that the product was not tractor hydraulic fluid *at all*. If Plaintiffs succeed in persuading a jury of their position, the language on which Defendants rely was ***itself misleading*** as reinforcing the idea that 303 THF was tractor hydraulic fluid in the first place when it was not. Class treatment is well-warranted and appropriate in a case like this one.

D. The Fact of Injury is Amenable to Common Proof.

All class members were injured because they purchased a worthless waste product of zero value. *See*, *e.g.*, *Morning Song*, 320 F.R.D. at 554 (class members who "were relieved of their money by [Defendants'] deceptive conduct[,] … have suffered injury"). They also suffered damage to their equipment regardless of make, model, year of manufacture, or other factors. Dahm

[58] MTD Tr. 7:6-9:9. That is about the same estimated percentage of old tractors still in service. Ex. __.

[59] Even when labels contain an ingredient list (which these did not), "[r]easonable consumers should [not] be expected to look beyond misleading representations on the front of [a bottle] to discover the truth from the ingredient list in small print on the [back] …." *Skinner v. Ken's Foods, Inc.,* 53 Cal.App.5th 938, 949 (2020) (citation omitted); *see also Stonewall Kitchen, LLC*, 503 S.W.3d at 312-13 (ingredient list is not a shield from liability; "A reasonable consumer would expect that the ingredient list comports with the representations on the packaging.") (citing *Williams,* 552 F.3d at 939-40).

Rpt. ¶ 181. Defendants will disagree but that "essentially asks the Court to make a summary determination between a battle of experts. That is not the role of the Court when deciding class certification." *Advance Trust & Life Escrow Servs., LTA v. N. Am. Co. for Life & Health Ins.*, 592 F.Supp.3d 790, 803 (S.D. Iowa 2022) (citing *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)); *see also*, *e.g.*, *Rikos*, 799 F.3d at 520-21 ("The key point at the class-certification stage is that … dueling scientific evidence will apply classwide such that individual issues will not predominate … assessing this evidence will generate a common answer for the class based on Plaintiffs' theory of liability" that drug did not provide health benefits for anyone); *Forcellati,* 2014 WL 1410264, at *12 (argument "that the products worked for some individual class members … challenges the merits … about the uniform inefficacy of the products [and] has no bearing on the Rule 23 predominance inquiry.") (internal quotations and citation omitted).

E. Although Not Required, Damages are Amenable to Common Proof.

The Supreme Court has made clear that where one or more central issue can be said to predominate, certification is appropriate "even though other important matters will have to be tried separately, such as damages …." *Tyson*, 577 U.S. at 453 (citation omitted). "Courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations and a recent dissenting decision of four Supreme Court Justices characterized the point as 'well nigh universal.'" *Reed v. Alecto Healthcare Servs., LLC*, 2022 WL 4115858, at *7 (N.D. W. Va. July 27, 2022) (quoting treatise); *see also Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 376 (8th Cir. 2018) (potential need for individualized damages inquiries "is not sufficient to overcome … predominance and superiority") (citing *Tyson*, 577 U.S. at 453); *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 833 (8th Cir. 2016) (upholding certification despite individualized inquiries for damages); *Menocal v. GEO Grp., Inc*.,

882 F.3d 905, 922-23 (10th Cir. 2018) ("[T]he fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification.") (citation omitted); *Yokoyama v. Midland Nat. Life Ins. Co*., 594 F.3d 1087, 1094 (9th Cir. 2010) ("damage calculations alone cannot defeat certification"); *Lott*, 2021 WL 1031008, at *17 ("the significant and common issue of Defendants' alleged violations outweighs any issues relating to … individual damages"); *In re Target Corp. Customer Data Sec. Breach Litig*., 309 F.R.D. 482, 489 (D. Minn. 2015) ("even if the damages alleged … cannot ultimately be calculated on a classwide basis, class certification is still appropriate if the other certification factors are met"); *Roberts v. Source for Pub. Data*, 2009 WL 3837502, at *6 (W.D. Mo. Nov. 17, 2009) (common issues may predominate "even when there are some individualized damage issues") (quoting treatise); *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 452 (D. Kan. 2006) (even if individualized issues "were to predominate the damage inquiry," certification still appropriate if common questions govern liability). In short, courts repeatedly hold "that differences in the amount and recoverability of damages do not defeat predominance." *Collins v. Olin Corp.*, 248 F.R.D. 95, 105 (D. Conn. 2008).

Courts retain considerable discretion to shape the proceedings. It is not sufficient to defeat certification, for example, that Plaintiffs have not put forth aggregate repair costs.[60] Courts can and do employ any number of means to address damage issues including bifurcation, magistrate or special master, subclasses, and decertifying after liability trial, providing notice on how to proceed in proving damages. *Id.* at *3-4, 9; *see also Barfield*, 2013 WL 3872181, at *15 (damages can be addressed through "[s]eparate mini-trials, a special master … or a magistrate").

[60] *See*, *e.g*., *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 87-88 (2d Cir. 2015) (where one type of damages required individualized inquiry and other two could be assessed on basis of common proof, individual issues did not predominate); *Betances v. Fischer*, 403 F.Supp.3d 212, 237 (S.D.N.Y. 2019) ("it is not uncommon to have class treatment for certain aspects of damages while leaving individual-specific damages issues to alternative mechanisms, such as sub-classes, separate determinations, and others").

Manageability is not assessed in the abstract but as "compare[d] to the problems that would occur in managing litigation without a class suit." *Reed*, 2022 WL 4115858, at *9 (citing *Amchem* 521 U.S. at 617).[61]

In sum, proof of damage amounts on a class-wide basis is not a prerequisite to certification. Plaintiffs have, however, provided means to determine class-wide damages as to purchase-based injury and flushing costs. It is black-letter law that once fact of injury is shown, amount may be approximate. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *see also WWP, Inc. v. Wounded Warriors Fam. Support*, *Inc.*, 628 F.3d 1032, 1044 (8th Cir. 2011) ("as we have repeatedly stressed that some uncertainty in damages would not work to bar a plaintiff from recovering from a proved wrongdoer") (internal quotation marks and citations omitted); *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 947 (8th Cir. 2007) (damages may be approximate); *Cunningham v. City of Overland, State of Mo.*, 804 F.2d 1066, 1070 (8th Cir. 1986) ("absolute precision is not required in ascertaining the amount of damages … once liability has been established"). Relevant states follow this basic rule.[62] "[U]se of aggregate damages calculations is well established … and implied by the very existence of the class action mechanism itself." *In re Pharm. Indus. Ave. Wholesale Price Litig*., 582 F.3d 156, 197 (1st Cir. 2009) (citing

[61] "Manageability should rarely, if ever, be in itself sufficient to prevent certification of a class." *Id*. (citing *Amchem* and noting an "oft-cited passage" from Justice Sotomayor that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule") (internal quotation marks and citation omitted); *see also* Newberg § 4:80 (same); *Easterling v. Conn. Dep't of Corr.*, 278 F.R.D. 41, 50 (D. Conn. 2011) ("any difficulties likely to arise in managing this class action … are far less daunting than the difficulties involved in litigating over a hundred separately captioned actions").

[62] *Agracat, Inc. v. AFS-NWA, LLC*, 379 S.W.3d 64, 69 (Ark. App. 2010); *Tufeld Corp. v. Beverly Hills Gateway, L.P.*, 86 Cal.App.5th 12, 32 (2022); *New Dimensions Prods., Inc. v. Flambeau Corp.*, 844 P.2d 768, 774 (Kan. App. 1993); *D.W. Wilburn, Inc. v. H&H Painting, LLC*, 648 S.W.3d 687, 694 (Ky. App. 2022); *Edling v. Stanford Twp.*, 381 N.W.2d 881, 884-85 (Minn. App. 1986); *Gerken v. Sherman*, 351 S.W.3d 1, 11 (Mo. App. 2011); *Reichman v. Warehouse One, Inc.*, 569 N.Y.S.2d 452, 453 (App. Div. 1991); *Cutler Cranberry Co., Inc. v. Oakdale Elec. Co-op.*, 254 N.W.2d 234, 240 (Wis. 1977).

treatise); *see also Webb*, 340 F.R.D. at 142-43 ("although individual class members may be entitled to a different amount of damages, … [plaintiffs'] model … is linked to plaintiffs' theory of liability and is applicable to all members of the Class, [thus,] individual assessments of damages do not erode Rule 23(b)(3)'s predominance factor"); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1257 (10th Cir. 2014) (extrapolation may be used to approximate damages). Plaintiffs' expert, Bruce Babcock, has calculated aggregate damages based on benefit-of-the-bargain or out-of-pocket loss (here, amounting to the same thing), as well as flushing costs. Such damages are consistent with Plaintiffs' liability case and also commensurate with measures applicable to claims including breach of warranty,[63] misrepresentation,[64] and consumer act claims.[65] Such relief also is

[63] All states allow "the difference … between the value of the goods accepted and the value they would have had if they had been as warranted" and "incidental and consequential damages." Ark. Code Ann. § 4-2-714(2), (3); Cal. Com. Code § 2714(2), (3); K.S.A. 84-2-714(2), (3); Mo. Rev. Stat. § 400.2-714(2), (3); Minn. Stat. Ann. § 336.2-714(2), (3); N.Y. UCC Law § 2-714(2), (3); Wis. Stat. Ann. § 402.714(2), (3).

[64] *See Smith v. Walt Bennett Ford, Inc*., 864 S.W.2d 817, 823 (Ark. 1993) (recognizing benefit of the bargain and out-of-pocket measures); *Moore v. Teed*, 48 Cal.App.5th 280, 287-88, 294 (2020) (out-of-pocket measure "awards the difference in actual value … between what the plaintiff gave and what he received"; expenses permitted under Cal. Civ. Code § 3333) (citation omitted); *Alexander v. Certified Master Builder Corp*., 43 F.Supp.2d 1242, 1250-51 (D. Kan. 1999) (describing benefit-of-bargain and out-of-pocket measures and stating that "[r]egardless of which rule is applied, the defrauded party may recover any additional damages which are a natural and proximate consequence of the defendant's misrepresentations") (quotation marks and citations omitted), *abrogation on other grounds recognized* in *Thomas v. Sifers*, 535 F.Supp.2d 1200, 1209 (D. Kan. 2007); *Northstar Indus., Inc. v. Merrill Lynch & Co., Inc.*, 576 F.3d 827, 832-33 (8th Cir. 2009) (Minnesota allows "the difference between what is given and what is received") (citation omitted); *Popp Telcom v. Am. Sharecom, Inc*., 210 F.3d 928, 936 (8th Cir. 2000) (out-of-pocket rule "along with any special damages naturally and proximately caused by the fraud"); *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883, 886 (Mo. App. 1994) (benefit of bargain rule allowing difference between actual value and value as represented); *Revell v. Guido*, 2 N.Y.S.3d 252, 257-58, 260 (App. Div. 2015) (out-of-pocket rule, which also allows related expenditures); *In re Signature Apparel Grp. LLC*, 577 B.R. 54, 93 (Bankr. S.D.N.Y. 2017) (damages for fraud measured by out-of-pocket and consequential damages); *Costa v. Neimon*, 366 N.W.2d 896, 900-01 (Wis. App. 1985) (out-of-pocket and benefit-of-bargain measure for negligent and intentional misrepresentation, respectively, and consequential damages).

[65] *See, e.g.*, *Jim Ray, Inc. v. Williams*, 260 S.W.3d 307, 311 (Ark. App. 2007) (damages for DTPA violation was difference between sticker price and purchase price); *Allen*, 300 F.R.D. at 671 (certifying class asserting full refund on theory that products were worthless); *Dealers Leasing, Inc. v. Allen*, 994 P.2d 651, 657 (Kan. App. 1999) (KCPA violation entitled plaintiff to return of payment for jukebox); *Fisher v. H & H Motor Grp., LLC*, 611 S.W.3d 335, 343 (Mo. App. 2020) (MMPA damages measured by benefit-of-bargain, which "seeks to approximate the difference between the actual value of the property and what its value would

encompassed by measures for negligence,[66] which in addition and for other claims, includes incidental and consequential damages. Kansas and Minnesota have codified versions of an economic loss doctrine. This Court has dealt with Kansas, dismissing claims to the extent they seek property damage. ECF 451 at 49-50.[67] The Minnesota statute allows restoration and repair costs for harm to other property. Minn. Stat. Ann. § 604.101.3(1). It does not apply to intentional or reckless misrepresentation or statutory claims. Minn. Stat. Ann. §§ 604.101.1(e), 604.101.4.

Again, Defendants will dispute that 303 THF had zero value but, aside from weakness of their support,[68] that does not defeat certification. *See*, *e.g.*, *Allen*, 300 F.R.D.at 671 (argument that

---

have been if it had been as represented") (internal quotation marks and citation omitted); *People by James v. Image Plastic Surgery, LLC*, 178 N.Y.S.3d 485, 486-87 (App. Div. 1st Dep't 2022) (restitution appropriate where patients did not receive benefit of bargain); *Mueller v. Harry Kaufmann Motorcars, Inc.*, 859 N.W.2d 451, 458-60 (Wis. App. 2015) (plain meaning of "pecuniary loss" is "broad enough to encompass any *monetary loss*, including the full purchase price, subject to the claimant's proof"). Some consumer acts allow statutory minimums. *See* N.Y. Gen. Bus. Law §§ 349(h) (actual damages or fifty dollars, whichever is greater), 350-e.3 (actual damages or five hundred dollars, whichever is greater, with available increase up to ten thousand dollars if defendant acted willfully or knowingly).

[66] *See*, *e.g.*, Cal. Civ. Code § 3333 ("the measure of damages… is the amount which will compensate for all the detriment proximately caused thereby"); *Moore*, 48 Cal.App.5th at 294 ("There is no fixed rule for the measure of tort damages under Civil Code section 3333. The measure that most appropriately compensates the injured party for the loss sustained should be adopted.") (internal quotation marks and citations omitted); *Yung v. Grant Thornton, LLP*, 563 S.W.3d 22, 59 (Ky. 2018) (measure for negligence and fraud is the "actual pecuniary compensation for the injury sustained," and can include "out-of-pocket"); MAI 4.01 (jury to award sum to "fairly and justly compensate plaintiff for any damages you believe plaintiff sustained … as a direct result of the occurrence"); *Hellenbrand v. Hilliard*, 687 N.W.2d 37, 42 (Wis. App. 2004) (discussing cost of repair rule and allowance of diminution damage in appropriate case).

[67] It appears that under Kansas law, repair costs constitute "property damage" while other relief like benefit-of-the bargain constitutes economic loss. *See Corvias Military Living, LLC v. Ventamatic, Ltd*., 450 P.3d 797, 801, 803-04 (Kan. 2019) (describing what losses can be pursued outside the KPLA). Plaintiffs use the phrase "economic loss" as a descriptor and not for purposes of the economic loss doctrine in any other state.

[68] For example, Dr. Martin speculates that negative publicity means that consumers must have found value despite risks. She has no knowledge that any class member saw or heard about any negative articles, which mostly appeared in trade magazines or isolated blog posts and did not mention the product at issue by name. *E.g.*, Martin Dep. 174:24-176:10, 178:19-180:25, 185:15-186:20. In addition, none of the articles fully disclosed actual harms or that 303 THF was not really tractor hydraulic fluid at all.

damage model failed to account for benefit misperceived theory that products were "*entirely* ineffective").[69] To the extent Defendants quibble with the calculation itself, that too is insufficient to defeat certification. Plaintiffs need not *prove* damages at this stage. Courts certify classes with no calculations at all. *E.g.*, *Urethane*, 237 F.R.D. at 452. Where provided, it is neither uncommon nor alarming that they may be subject to refinement. *E.g.*, *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 173 (D.S.C. 2018). Plaintiffs also need not demonstrate entitlement to relief they seek. They need only show that common questions predominate, "not that those questions will be answered in favor of the class." *Dollar General*, 2019 WL 1418292, at *20 (quoting *Amgen*, 568 U.S. at 459). It is enough that damages are consistent with Plaintiffs' liability case and more than enough that two categories can be determined on aggregate basis.

As to unjust enrichment, some states look to the amount by which the defendant has been unjustly enriched. *Lookabaugh v. Hanna Oil & Gas Co*., 442 S.W.3d 1, 4 (Ark. App. 2014); *Title Partners Agency, LLC v. Devisees of Last Will & Testament of M. Sharon Dorsey*, 334 S.W.3d 584, 587-88 (Mo. App. 2011); *Paulson v. Beliveau*, 2008 WL 5104694, at *2 (D. Minn. Dec. 1, 2008); *Signature Apparel*, 577 B.R. at 117; *see also generally* Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011) (describing relief that, as to a conscious wrongdoer, is "the net profit attributable to the underlying wrong"). Courts in other states describe the substance of unjust enrichment as "a promise implied in law that one restore to the person entitled thereto that which in equity and good conscience belongs to him," *Peterson v. Midland Nat'l Bank*, 747 P.2d 159,

[69] *See also*, *e.g.*, *Capaci v. Sports Research Corp*., 2022 WL 1133818, at *15-17 (C.D. Cal. Apr. 14, 2022) (full refund appropriate where product did not fulfill advertised function); *Morning Song*, 320 F.R.D. at 556 (full refund for bird food alleged to be worthless appropriate); *Suchanek*, 2017 WL 3704206, at *6 (full refund appropriate where "package misrepresented the *very essence* of what was being purchased"); *Barrera*, 2016 WL 11758373, at *10 (where product alleged to be worthless, "the proper measure of restitution is the purchase price"); *Rikos*, 799 F.3d at 523-24 (full refund appropriate where product represented to have digestive benefits was actually inert ingredients and worthless bacteria).

166 (Kan. 1987), and hold that "in some circumstances the calculation … may be based, not on the amount by which the defendant was unjustly enriched, but on the amount the plaintiff lost." *Cnty. of Solano v. Vallejo Redevel. Agency*, 75 Cal.App.4th 1262, 1279 (1999); *see also Boling v. Prospect Funding Holdings, LLC*, 324 F.Supp.3d 887, 892 (W.D. Ky. 2018) (unjust enrichment under recoupment theory); *Mounce*, 2017 WL 4392048, at *19 (noting possibility of calculating unjust enrichment on class-wide basis by hospital lien amounts paid by class members). If, under state law, relief is based on what plaintiffs lost, evidence presented by Mr. Babcock may be used. *See Dollar General*, 2019 WL 1418292, at *20 (full refund for unjust enrichment claim consistent with liability theory). If based on what the defendant gained, that is a mathematical calculation based on discovery information on revenues, cost of goods sold, and profits.

F. The Classes Are Ascertainable.

The Eighth Circuit does not treat ascertainability as a stand-alone requirement. *Dollar General*, 2019 WL 1418292, at *12. Neither has it adopted an "administrative feasibility" standard. *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *see also Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017) ("We have never interpreted Rule 23 to require [a showing of administrative feasibility], and, like the Sixth, Seventh, and Eighth Circuits, we decline to do so now."). Generally, a class is ascertainable "when its members may be identified by reference to objective criteria." *McKeage*, 847 F.3d at 998 (citing *Sandusky*, 821 F.3d at 997-98). Here, classes are defined as persons and entities who purchased one or more named THF products within each relevant state. FAC ¶ 282. Purchase of identified products is objective criteria. Plaintiffs recognize that certain consumer acts contain definitions as to who may assert a private right of action and propose subclasses, within the class period, of the following:

Consumers Legal Remedies Act, Cal. Civ. Code §1750 *et seq*.

> All individuals 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 California for personal, family, or household purposes. (Cal. Civ. Code §§ 1780(a), 1761(d))

Kansas Consumer Protection Act, K.S.A. § 50-623 *et seq.*

> All individuals, husbands and wives, sole proprietors, or family partnerships 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 Kansas for personal, family, household, business or agricultural purposes. (K.S.A. § 50-624(b))

Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq.*

> All persons and entities who purchased Super S 303 Tractor Hydraulic Fluid, Cam2 ProMax 303 Tractor Hydraulic Oil, and/or Cam2 303 Tractor Hydraulic Oil in Missouri primarily for personal, family, household, purposes. (Mo. Rev. Stat. §§407.025.1, 407.010(5))[70]

Such definitions also are proper. *See Dollar General*, 2019 WL 1418292, at *16 (class defined by reference to purchase for use in vehicles built after specified years was not subjective and members could be identified through self-identifying affidavits at claims administration); *see also McAllister*, 2018 WL 1299553, at *8 (determining whether class members used personal seat licenses for "household purposes" did not undercut predominance). Here, many individuals can be identified through means including purchase data maintained by retailers. *See* Decl. of Settlement Administrator (Ex. 51). Several forms of notice can reach class members.[71]

[70] It is perfectly appropriate to modify class definitions and/or create subclasses. *See Lott*, 2021 WL 1031008 at *9 (court has "broad discretion" to revise class definition); *Murphy*, 327 F.R.D. at 234 (court's discretion extends to create subclasses); *Lafollette v. Liberty Mut. Fire Ins. Co.*, 2016 WL 4083478, at *13 (W.D. Mo. Aug. 1, 2016) (court is "not bound by the class definition proposed in the complaint").

[71] Notice is sufficient through means "practical under the circumstances" including individual notice to members "who can be identified through reasonable effort," Fed. R. Civ. P. 23(c)(2), and publication. *Barfield*, 2013 WL 3872181, at *13.

G. Class Treatment Is the Superior Method for Adjudicating These Claims.

Rule 23(b)(3) requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Factors include: (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 forum; and (d) difficulties likely to be encountered in management of a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D). "The 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." *Amchem*, 521 U.S. at 617. Absent class treatment, most class members would never have their day in court because pursuit of individual actions would entail enormous expense, including expert proof. In addition, 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. These are inefficiencies the class mechanism avoids. Simply put, "[t]he judicial system, the attorneys, the plaintiffs and the defendants will save a great deal of time and money by avoiding duplicative lawsuits." *In re Mellon Bank S'holder Litig.*, 120 F.R.D. 35, 38 (W.D. Pa. 1988). Here, to Plaintiffs' knowledge, there are no individual cases pending. To the extent any class members prefer to go it alone, they will have the right to opt out.

As noted, manageability entails comparative analysis of efficiencies as between class and individual treatment and is rarely reason to reject certification. *Reed*, 2022 WL 4115858, at *9. Such should be the case "only when it is found that efficient management is *nearly impossible.*" *In re Visa Check/MasterMoney Antitrust Litig*., 280 F.3d 124, 140 (2d Cir. 2001) (quoting treatise; internal quotation marks omitted), *overruled on other grounds by In re Initial Pub. Offerings Sec.*

Litig., 471 F.3d 24 (2d Cir. 2000); *McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc.*, 2020 WL 1970812, at *11 (D. Or. Apr. 24, 2020) (noting "well-settled presumption" that courts should not refuse certification based on manageability and that "management tools [are] available … to assist with any manageability concerns"). The presence of predominant common questions strongly counsels in favor of manageability. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004) (where common issues predominate, court "would be hard pressed to conclude that a class action is less manageable than individual actions"), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). Common issues here can be resolved for thousands of class members. That is far superior to endlessly repeating the same evidence in thousands of individual trials. Even were the Court to disagree with *all* the above, it still could (and alternatively should) certify issues pursuant to Rule 23(c)(4) to effect efficiencies by resolving core issues and greatly streamline any individualized trials.

IV. ASSERTED DEFENSES DO NOT PRECLUDE CERTIFICATION.

Without attempting to address every one of Defendants' collective 55 defenses, they do not defeat certification. First, many are legal defenses and/or appear to be asserted class wide.[72] Second, defenses "must be subjected to the same rigorous inquiry as plaintiffs' claims." *Zurn Pex,* 644 F.3d at 619; *Barfield*, 2013 WL 3872181, at *12. This entails both questions of proof and viability. Moreover, a defense broadly asserted does not negate predominance. *See, e.g.*, *Applegate*

[72] *See, e.g.*, Aff. Def. 1 (failure to state a claim), 6 (statutes of frauds), 12 (insufficient pleading), 13 (election of remedies), 14 (consumer act "exemptions"), 17 ("safe harbor provisions"), 22 (economic loss doctrine), 24 (insufficient pleading), 33 ("puffery"); 35 (lack of subject matter jurisdiction over direct filers), 38 ("lack of … concrete and particularized injury"); 42 (consumer protection claims "not in the public interest"); 44 (consumer acts; Due Process); 48 and 51 (punitive damages; Fourth, Fifth, Sixth, Eighth, Fourteenth Amendments and Commerce Clause); 49-50 (punitive damages; Due Process and "excessive fines clauses" of state constitutions); 52-55 (punitive damages; *Pacific Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991), *BMW of North Am., Inc. v. Gore,* 517 U.S. 559 (1996) and *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003)). Other defenses are boilerplate without apparent application. *See* Aff. Def. 6 (statute of frauds), 15 (lack of mutuality/consideration), 30 (unjust enrichment and/or quantum meruit).

v. Formed Fiber Techs., *LLC*, 2012 WL 3065542, at *9 (D. Me. July 27, 2012) (defenses would "apply equally to each potential plaintiff" but even if not, they "are not a per se bar to class certification"). In addition, courts are "reluctant to deny class action status … simply because affirmative defenses may be available[.]" *Smilow v. S.W. Bell Mobile Sys., Inc*., 323 F.3d 32, 39 (1st Cir. 2003) (citation omitted). Finally, the Supreme Court has made crystal clear that certification is appropriate even if there are individualized defenses. *Tyson*, 577 U.S. at 453-54. With all this firmly in mind, Plaintiffs address certain defenses Defendants are likely to raise.

It is noted that some defenses refer to "Plaintiffs" only (e.g., Aff. Def. 3-5) while others refer to Plaintiffs and class members (*e.g*., Aff. Def. 13-14). As to the former, the issue is directed more to whether it renders a Plaintiff atypical or antagonistic toward the class. None do. Nor do they defeat predominance even if asserted more broadly.

A. Comparative Fault and "Misuse" Theories Do Not Defeat Certification.

Defendants assert "misuse" and "misapplication" of 303 THF, which they characterize as assumption of risk as to Plaintiffs, Aff. Def. 29, and that consumers (Plaintiffs and class members) were "causally negligent and/or at fault in their purchasing, use and/or handling of" the fluid. Aff. Def. 27. At the outset, whether these defenses apply and if so, to what claims, are legal questions common to each state-wide class. For example, assumption of risk as a bar to recovery has been abolished in Arkansas, Kansas, Kentucky, and Wisconsin.[73] It also is generally abolished in New York, *Matter of Buchanan Marine, L.P.*, 874 F.3d 356, 369-70 (2d Cir. 2017) except for athletic activities where the risk "arise[s] out of the nature of the sport." Comparative Negligence Manual, Ch. 51, New York § 51:2 (3d ed). California, Minnesota, and Missouri retain "primary"

[73] *Dawson v. Fulton*, 745 S.W.2d 617, 619 (Ark. 1988); *Ouachita Wilderness Inst., Inc. v. Mergen*, 947 S.W.2d 780, 786 (Ark. 1997); *Simmons v. Porter*, 312 P.3d 345, 355 (Kan. 2013); *Wallingford v. Kroger Co*., 761 S.W.2d 621, 623-24 (Ky. App. 1988); *Polsky v. Levine,* 243 N.W.2d 503, 505 (Wis. 1976); *Colson v. Rule*, 113 N.W.2d 21, 22 (Wis. 1962).

assumption of risk but also in the narrow circumstance of participation in an activity for which the risk is an integral part (e.g., sports game, firefighting). *Kindrich v. Long Beach Yacht Club*, 167 Cal.App.4th 1252, 1260 (2008); *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 191 (Minn. 2019). If applied, it extinguishes duty of care. *Coomer v. K.C. Royals Baseball Corp*., 437 S.W.3d 184, 193 (Mo. 2014); *Soderberg v. Anderson*, 922 N.W.2d 200, 205 (Minn. 2019). Such a result might be appropriate if risk "remains after due care has been exercised." *Coomer*, 437 S.W.3d at 195 (citation omitted). Manufacturers can and do produce appropriate hydraulic fluids. Defendants would need to convince this Court to relieve them duty to do so. The law condemns such a result.[74]

Comparative fault does not apply to all claims in all states. In most, for example, it does not apply to intentional torts.[75] In some, it is also inapplicable to negligent misrepresentation. *See*, *e.g*., *LL B Sheet 1, LLC v. Loskutoff*, 362 F.Supp.3d 804, 829 (N.D. Cal. 2019) (inapplicable to where reliance was not "preposterous or irrational"). In some states, it is inapplicable to warranty claims. *Vassallo v. Sabatte Land Co.*, 212 Cal.App.2d 11, 18 (1963); *Zutz v. Case Corp.*, 422 F.3d 764, 776 n.3 (8th Cir. 2005); Wis. Stat. Ann. § 895.045(3)(f). In Arkansas, it does not apply to injury to property. Ark. Code Ann. § 16-64-122(a).

[74] Even when applied, assumption of risk does not bar recovery if defendant's negligence "altered or increased" an inherent risk and caused injury. *Coomer*, 437 S.W.3d at 199; *accord Mayes v. La Sierra Univ.*, 73 Cal.App.5th 686, 698 (2022).

[75] *Kellerman v. Zeno*, 983 S.W.2d 136, 141 (Ark. 1998); *Thomas v. Duggins Constr. Co.*, 139 Cal.App.4th 1105, 1111 (2006); *Nkemakolam v. St. John's Military Sch.*, 994 F.Supp.2d 1193, 1204-05 (D. Kan. 2014); *Florenzano v. Olson*, 387 N.W.2d 168, 176 (Minn. 1986); *CitiMortgage, Inc. v. Just Mortg., Inc.*, 2013 WL 6538680, at *11 (E.D. Mo. Dec. 13, 2013); *In re Madigan*, 2020 WL 9215967, at *8 (Bankr. N.D.N.Y. Aug. 28, 2020); *Fleming v. Threshermen's Mut. Ins. Co.*, 388 N.W.2d 908, 910-11 (Wis. 1986); *see also Manderville*, 146 Cal.App.4th at 1502-03 ("It is well established … that … negligence on the part of the plaintiff in failing to discover the falsity of the defendant's statement is no defense when the misrepresentation was intentional.").

All this is a fight for another day. Even assuming comparative fault applies, courts recognize variously that it is a damage-reducing concept, that the merits are not at issue, and that it is insufficient to overcome predominance of central common issues.[76] Defendants put forth three general theories. None defeats certification.

First, Defendants assert "Plaintiffs' failure to properly operate and/or maintain the equipment in which [they] used [303 THF]" and "use of other hydraulic fluids or lubricants" Aff. Def. 5. According to Plaintiffs' expert, however, the fluid "was uniformly harmful" to all equipment regardless of any use of other 303 fluids or tractor hydraulic fluids, and regardless of how the equipment was maintained or used. "[S]imply having [303 THF] in a tractor hydraulic system ensures that damage is being caused when the tractor equipment is operated." Dahm Rpt. ¶¶ 158-161. This is true for Plaintiffs and all class members.

Second, Defendants assert "misapplication" and "misuse." Aff. Def. 3, 4. These defenses are asserted as to "Plaintiffs" (*id*.) and presumably refer to use of 303 THF in equipment built after 1974. Such use does not make any Plaintiff atypical as the fluid was unfit for, and harmful to, all equipment new and old. Moreover, those with post-1974 equipment comprise the majority of consumers and this theory is more common than individualizing. *See*, *e.g*., *Miller v. Optimum Choice, Inc.*, 2006 WL 2130640, at *7 (D. Md. July 28, 2006) (defenses common across class members do not destroy predominance "but would instead provide an additional link of

[76] *See*, *e.g*., *Maney v. State*, 2022 WL 986580, at *21 (D. Or. Apr. 1, 2022) ("Even if comparative fault … [is] relevant here … [it does] not predominate over the common issues."); *Ginzkey v. Nat'l Sec. Corp*., 2021 WL 1627060, at *5 (W.D. Wash. Apr. 27, 2021) (rejecting comparative fault as preclusive of certification where case involved "an important common question with a common answer"); *Ham v. Swift Transp. Co., Inc.*, 275 F.R.D. 475, 487 (W.D. Tenn. 2011) (comparative fault affected damages "rather than the overarching questions" regarding defendant's conduct); *Schojan v. Papa Johns Int'l, Inc.*, 303 F.R.D. 659, 669-70 (M.D. Fla. 2014) (concerns over defenses like comparative fault were "misplaced at this juncture" which is not to pass on the merits; predominance satisfied by conduct common to the class); *Barker v. FSC Sec. Corp.*, 133 F.R.D. 548, 554 (W.D. Ark. 1989) (rejecting argument that some class members were more negligent than others, a matter not within the court's province).

commonality between the class members"). In addition, this theory may be abandoned given testimony from Dr. Swanger. If not, language on which Defendants rely at the bottom of back labels was insufficient for many reasons. Beyond that, fault must be causal before it can be compared. *See* Aff. Def. 27 (alleging that class members were "causally negligent").[77] Here, if "fault" at all,[78] any failure to see or apprehend the language was not. Had 303 THF been truthfully labeled, it would never have entered consumers' choice set to begin with (Alter Rpt. ¶¶ 27, 130) and a purported use limitation is irrelevant. More fundamentally, it makes no difference whether any equipment was manufactured before or after 1974. Defendants' product was unfit and harmful *regardless* of OEM or model year. Dahm Rpt. ¶¶ 85, 126, 141. *See*, *e.g.*, *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 28 (D. Mass. 2003) (rejecting argument that causation and comparative fault must be proven with respect to each class member where, while defendants suggested that hose failed only when misused, plaintiffs' theory was that product failed under foreseeable and even "ideal" conditions). Cause of injury was not use of 303 THF in post-1974 equipment. 303 THF was unsuitable for and damaging to *any* equipment.

Defendants also assert failure to follow OEM specifications. Aff. Def. 5. This is directed to Plaintiffs (*id.*) but again makes none unique. Defendants have urged broadly that consumers should have consulted their owner's manuals to determine whether it called for 303 fluid and

[77] *See also*, *e.g.*, *Skinner v. R.J. Griffin & Co.*, 855 S.W.2d 913, 915 (Ark. 1993) (error to give comparative fault instruction absent causation); *Simmons v. Wexler*, 94 Cal.App.3d 1007, 1014 (1979) (plaintiff negligence must be "causally connected with the injury"); *Zak v. Riffel*, 115 P.3d 165, 172 (Kan. App. 2005) (comparative fault requires that plaintiff's negligence caused or contributed to injury); *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952, 958 (Ky. 1999) ("Absent causation, there can be no comparative fault."); Minn. Stat. Ann. § 604.01.1a ("Legal requirements of causal relation apply … to contributory fault."); *Gustafson v. Benda*, 661 S.W.2d 11, 18 (Mo. 1983) (same); *Martin v. Stone*, 312 N.Y.S.2d 97, 98 (App. Div. 1970) (record devoid of evidence to establish plaintiff's contributory negligence "legally or factually").

[78] For reasons addressed by Dr. Alter, the language itself was insufficient and its placement renders it unlikely that any consumer would have read it critically if at all. Smitty's Saragusa himself was concerned that the language came only after all the positive assurances. Dr. Lester has noted that the vast majority of consumers do not read side-effect statements on over-the-counter medication labels. *See* SOF J.3.

presumably, were negligent in purchasing 303 THF unless it did. *See* Tate Vol. II 122:18-20 (consumers should be "shopping based off of what [their] OEM manufacturer says [they] need to use"). Admittedly, however, if an OEM had called for fluid meeting a 303 specification, it would have been referring to the original JD303, defunct for decades. That is not what Defendants were selling. Tate Vol. I 55:1-24. The fluid did not meet 303 or any other specification.

Third, Defendants assert that consumers purchased "without knowledge" or failed to exercise "reasonable diligence to learn" of the nature, limitations, properties, composition, and characteristics" of their product. Aff. Def. 34. As noted, Defendants may propose that information critical of 303 fluids was in the public domain and consumers either saw it or did not and were negligent in failing to conduct a search. Either way, such a theory would implicate everyone who purchased 303 THF and suggests that *no one should have done so*. It "is an unsavory defense for a man … to assert that if the latter had disbelieved him he would not have been injured." *Scieszinski*, 131 N.W.2d at 312 (citation omitted). Defendants would also be dramatically diverging from their own testimony to propose that consumers were *not* entitled to believe the labels. *See*, *e.g.*, SOF D; *see also* Trahan 143:14-21 ("Q. And can we agree that … it's not okay to put deceptive or misleading information on a product label simply because you think the consumer can go out and do independent research on their own, right? A. Correct."). It is seriously questionable whether Defendants would go down such a path that, in addition, essentially concedes that materials critical of 303 fluids ***were right***.[79] Should they attempt it, however, such a defense is again more common than individualizing and does not undercut predominance. *Miller*, 2006 WL 2130640, at *7; *see also Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 39, 44-45

[79] This problem also infects Defendants' "failure-to-examine" defense (Aff. Def. 45), which not only presupposes ability to meaningfully examine 303 THF before purchase but would accuse consumers of failing to discover fraud and defect Defendants deny.

(E.D.N.Y. 2008) (certifying class where "it appears that defendant may be trying to apply the voluntary payment doctrine broadly to any class member").

As discussed, critiquing articles and the like are generalized evidence, consistent with class treatment. *U.S. Foodservice*, 729 F.3d at 121. Moreover, tractor hydraulic fluids involve a "deeply technical" field of "highly complex, engineered fluids," involving technical properties. Dahm Rpt. ¶¶ 35, 39. Actual composition of 303 THF is not something to which the consuming public was privy. It was uncovered here only through discovery and data analyzed by experts. Articles to which Defendants have pointed do not call out their product by name or detail its actual composition. And Defendants are the horse's mouth from which all class members were told about the purported nature, properties, and characteristics of the product at issue. *See*, *e.g.*, *Burton v. R.J. Reynolds Tobacco Co*., 181 F.Supp.2d 1256, 1266 (D. Kan. 2002) ("mere fact that plaintiff received numerous warnings from other sources … is certainly not the equivalent of receiving warnings from defendants … of … specific risks of smoking, including addiction and PVD"). Defendants would be seeking to impose a duty to investigate, a standard of care demanding high technical acumen and/or presumed understanding of ingredients/characteristics even Defendants' *own salesmen* did not possess.[80] Reasonable reliance does not demand such a thing. *See* cases cited *supra*, note 41.[81] Even were this defense to proceed, reasonableness is amenable to common proof

[80] For example, although he held high-level sales positions, had authority to approve or disapprove labels, and shared responsibility to ensure that labels were not false and misleading, Mr. Lorio knew little about actual composition or technical aspects of 303 THF. Lorio Vol. I 9:5-12,10:21-11:4, 17:15-18:11, 60:11-62:15, 84:16-85:5, 113:12-18. Mr. Schettler was actively kept in the dark. Even Jeremy Schenk was unaware of the full extent of ingredients like used turbine and transformer oil. *See* SOF note 18.

[81] *See also, e.g., Skinner,* 53 Cal.App.5th at 949 ("Reasonable consumers are not required to be versed in the art of inspecting and judging a product ... [or] the process of its preparation or manufacture.") (quotation marks and citation omitted); *Davis*, 149 N.W.2d at 39 (deceiver "cannot escape liability by claiming that the other party ought not to have trusted him"); *Scieszinski*, 131 N.W.2d at 312 (speaker must refrain from deceit and recipient has right "to assume that [he] will do so") (citations omitted); *Deutsche Bank*, 655 S.W.3d at 830 ("[i]t is no excuse … that plaintiff might have discovered the wrong … because this is but equivalent to saying 'You trusted me; therefore I had the right to betray you'") (citation omitted); *Jim Ray*,

including admissions that Defendants fully expected reliance on label representations. In sum, comparative fault does not militate against class treatment and particularly not in this case.

B. Defendants' Superseding Cause Defense Does Not Defeat Certification.

Defendants also assert that Plaintiffs' damages were "caused by superseding or intervening causes" (Aff. Def. 28) without indicating what actor(s) may have intervened in such a way to break the causal chain. Defendants vaguely assert "unauthorized modification" (Aff. Def. 3) but there is no evidence that the fluid was altered. If this defense revisits a "misuse" theory, it has the same problems as before and moreover, must have been unforeseeable.[82] Several states describe this as something highly unusual or extraordinary. *Green v. Healthcare Servs., Inc.*, 68 Cal.App.5th 407, 416 (2021); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 292 (Ky. App. 2009); *Patton v. Bickford*, 529 S.W.3d 717, 731 (Ky. 2016); *46th St. Leaseholder LLC v. Hercules Corp.*, 175 N.Y.S.3d 501, 503 (App. Div. 2022); *Puckett,* 228 P.3d at 1065. Causation also accounts for foreseeable misuse. *See Chronister v. Bryco Arms*, 125 F.3d 624, 627 (8th Cir. 1997) (manufacturer cannot escape liability where "misuse is reasonably foreseeable"); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 479 (C.D. Cal. 2012) (courts "roundly reject[]"that misuse defense requires individual inquiries in cases involving design defects). Foreseeability of use in equipment built after 1974 is established with common proof, including Defendants' own

260 S.W.3d at 309 ("*caveat emptor* is not a license for deceit"); *SEECO, Inc. v. Hales*, 954 S.W.2d 234, 241 (Ark. 1997) ("the majority view appears to be that [lack of diligence in discovering fraud] does not operate as a bar to a finding of predominance in the common issue").

[82] *Shannon*, 947 S.W.2d at 356; *Chanda v. Fed. Home Loans Corp.*, 215 Cal.App.4th 746, 755-56 (2013); *Puckett v. Mt. Carmel Reg'l Med. Ctr.*, 228 P.3d 1048, 1060-61 (Kan. 2010); *Patton*, 529 S.W.3d at 731; *Canada By & Through Landy v. McCarthy,* 567 N.W.2d 496, 507 (Minn. 1997); *Lafarge*, 574 F.3d at 985; *Badilla v. Midwest Air Traffic Control Serv., Inc*., 8 F.4th 105, 135 (2d Cir. 2021). In Wisconsin, proximate cause is a legal question, which also accounts for foreseeability. *See Kubichek v. Kotecki*, 796 N.W.2d 858, 867 (Wis. App. 2011) ("The operative question is whether a reasonable person would foresee that his or her actions create an unreasonable risk of harm.").

depictions of newer equipment on labels. If Defendants suggest that some consumers used other 303 fluids with 303 THF, that also does not decouple it from injury. Dahm Rpt. ¶ 160.

C. Mitigation and Voluntary Payment Defenses Do Not Defeat Certification.

Defendants' mitigation and voluntary payment defenses also do not defeat certification. As with others, they will be subject to motion practice. Among other things, several states reject these defenses in cases of intentional torts and consumer act violations.[83] In addition, each carries elements to prove, including plaintiff's knowledge of the wrong, in order to prevail. *See*, *e.g.*, *United States v. Karlen*, 645 F.2d 635, 640 (8th Cir. 1981) (doctrine of avoidable consequence inapplicable where, while tribe members saw defendant harvesting hay, there was no evidence that they knew it exceeded amount allowed by lease).[84] Such defenses also harken back to Defendants' unpalatable effort to blame consumers who believed them. *See*, *e.g.*, *Am. Sur. Co. of N.Y v. Franciscus*, 127 F.2d 810, 816 (8th Cir. 1942) ("Reasonably prudent action is required only after

[83] *See Bedford v. Audrain Cnty. Motor Co., Inc.*, 631 S.W.3d 663, 674 (Mo. App. 2021) ("Missouri courts have consistently held that mitigation is inapplicable in the context of intentional and tortious conduct."); *S.C. Johnson & Son, Inc. v. Morris*, 779 N.W.2d 19, 28-29 (Wis. App. 2010) (rejecting mitigation for intentional torts); *Morgan, Olmstead, Kennedy & Gardner, Inc. v. Schipa*, 585 F.Supp. 245, 248-49 (S.D.N.Y. 1984) (same); *Sanders v. LoanCare, LLC*, 2019 WL 12340195, at *7-8 (C.D. Cal. Sept. 16, 2019) (rejecting voluntary payment as defense to UCL claim); *Huch v. Charter Commc'ns, Inc*., 290 S.W.3d 721, 726 (Mo. 2009) (same as to MMPA); *MBS-Certified Pub. Accts, LLC v. Wis. Bell, Inc.*, 809 N.W.2d 857, 872 (Wis. 2012) (same as to Wis. Stat. § 100.207; reserving issue as to Wis. Stat. § 100.18(1)).

[84] **Mitigation**: *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 509–10 (8th Cir. 1971); *Kelty v. Best Cabs, Inc.*, 481 P.2d 980, 984-85 (Kan. 1971); *Morris v. Boerste*, 641 S.W.3d 688, 694 (Ky. App. 2022); *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 391 (Mo. App. 1998); *Anderson v. Dairy Farmers of Am., Inc.*, 2010 WL 3893601, at *11 (D. Minn. Sept. 30, 2010); *LaSalle Bank Nat. Ass'n v. Nomura Asset Cap. Corp.*, 846 N.Y.S.2d 95, 100 (App. Div. 2007); *Franck v. Stout*, 120 N.W. 867, 868 (Wis. 1909); *see also Sentinel Offender Servs., LLC v. G4S Secure Sols. (USA) Inc.*, 2017 WL 1535086, at *13 (C.D. Cal. Apr. 26, 2017) (plaintiff "had no reason to act to mitigate damages" until receiving letter rejecting bid).

Voluntary Payment: *Am. Oil Serv. v. Hope Oil Co.*, 194 Cal.App.2d 581, 586-87 (1961); *Whitton v. Deffenbaugh Disposal, Inc*., 2015 WL 751817, at *2 (D. Kan. Feb. 23, 2015); *Lott*, 2021 WL 1031008, at *6; *Minn. Pipe & Equip. Co. v. Ameron Int'l Corp*., 938 F.Supp.2d 862, 874-75 (D. Minn. 2013); *Huch*, 290 S.W.3d at 726; *Samuel v. Time Warner, Inc.*, 809 N.Y.S.2d 408, 418 (Sup. Ct. 2005); *ProHealth Care, Inc. v. HealthEOS by Multiplan, Inc.*, 2014 WL 440663, *4 (Wis. App. 2014) (unpublished); *see also Lookabaugh v. Hanna Oil & Gas Co*., 442 S.W.3d 1, 4-5 (Ark. App. 2014) (exceptions to voluntary payment doctrine include fraud and mistake).

a breach … is known[,] 'not that action which the defendant, upon afterthought, may be able to show would have been more advantageous to him.'") (citation omitted); *Mounce*, 2017 WL 4392048, at *8 ("fraud is an exception to the voluntary payment rule"); *Conrad v. Fields*, 2007 WL 2106302, at *5 (Minn. App. July 24, 2007) (unpublished) (plaintiff not obligated to mitigate by dropping out of school where she relied on promise to pay tuition). Mitigation also requires evidence of mitigation measures, unreasonableness in failing to take them, and amount by which they would have reduced damages.[85] Lack of such evidence defeats the defense. *See In re Syngenta AG MIR 162 Corn Litig.*, 249 F.Supp.3d 1224, 1242 (D. Kan. 2017) (summary judgment absent evidence that plaintiffs acted unreasonably). Defendants assert mitigation as to Plaintiffs only. Aff. Def. 21. Plaintiffs submit that Defendants lack requisite evidence. Even were it otherwise, a defense like this signals, at most, potential damage reduction, not conflict with other class members. To the extent Defendants intend and are permitted to pursue it more broadly, neither mitigation nor voluntary payment doctrine (Aff. Def. 39) defeat predominance.

First, defenses against Plaintiffs and class members alike neither affect typicality nor undercut predominance. *See Lott*, 2021 WL 1031008, at *14 ("because Defendants assert that the voluntary payment defense applies to all class members' claims, it is a common defense and as such is not a bar to class certification"); *Dupler*, 249 F.R.D. at 39 (argument that class members may have been aware of backdating policy was, "far from … atypical … common to numerous class members"); *Hesse v. Sprint Spectrum, L.P.*, 2007 WL 9775533, at *4 (W.D. Wash. May 18, 2007) (response to defense "will be largely identical among class members"). Such defenses "raise

[85] *E.g.*, *Greenway Equip., Inc.*, 602 S.W.3d at 150; *Fisher Constr. Co. v. Lerche*, 232 F.2d 508, 509-10 (9th Cir. 1956); *Alliant Tax Credit Fund 31-A, Ltd. v. Murphy*, 494 F. App'x 561, 572-73 (6th Cir. 2012); *Turner & Boisseau, Chtd. v. Marshall Adjusting Corp.*, 775 F.Supp. 372, 382 (D. Kan. 1991); *Bedford*, 631 S.W.3d at 674; *Barron G. Collier, Inc. v. Kindy*, 178 N.W. 584, 585 (Minn. 1920); *LaSalle Bank*, 846 N.Y.S.2d at 99; *Langreck v. Wis. Lawyers Mut. Ins. Co.*, 594 N.W.2d 818, 820-21 (Wis. App. 1999).

common questions that predominate over individualized issues." *Checking Account Overdraft,* 307 F.R.D. at 650-51 & nn.10-13. Plaintiffs assert that Defendants misrepresented and concealed material information. "If Plaintiffs can prove these facts, they will undercut [Defendants'] defenses through the use of common evidence." *Id.* at 651; *TD Bank*, 325 F.R.D. at 171-72 (same). Plaintiffs also have common evidence that consumers were unlikely to connect performance issues and 303 THF. *See*, *e.g.*, Dahm Rpt. ¶¶ 167-68. Any defense predicated on evidence like information in the public domain also is common as is its sufficiency. *See Lott*, 2021 WL 1031008, at *11 (whether writing existed sufficient to place public on notice of fee increase was common issue going to whether they had full knowledge of alleged illegal fees); *TD Bank,* 325 F.R.D. at 170 (position that documents functioned as notice of overdraft practices undercut argument against certification as defense was "susceptible to class-wide proof") (citing cases); *Yingling v. eBay, Inc.*, 2010 WL 11575128, at *4 (N.D. Cal. July 16, 2010) (there was "simply nothing individualized about" theory that website information or invoices informed of challenged fee; "where the voluntary payment doctrine may apply to many class members based on a common set of facts, courts have declined to find that [it] precludes class certification"). Even if Defendants could prove that some customers had full knowledge and understanding of the true facts, "the presence of individualized defenses against a small number of class members would not destroy the predominance of common liability questions." *Checking Account Overdraft*, 307 F.R.D. at 651. Defenses going to damages are not a barrier to certification. *See id*. (mitigation, "like the other damage-related affirmative defenses, is not barrier to class certification"); *Mounce*, 2017 WL 4392048, at *19 ("To the extent Defendants believe that the existence of [voluntary payment doctrine] … would be sufficient to defeat class certification, the Court disagrees.").

D. Warranty Defenses Do Not Defeat Certification.

Defendants' asserted defenses to warranty claims (*see* Aff. Def. 3, 16) do not defeat certification. If viable, and even if applied beyond Plaintiffs, they are met with common response.

1. Implied warranties were not effectively disclaimed.

To disclaim merchantability, there must be language that is both conspicuous and "mention[s] merchantability" or expressions like "as is" or "with all faults" that "calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." Ark. Code Ann. § 4-2-316(2), (3)(a); Kan. Stat. Ann. § 84-2-316(2), (3)(a); Minn. Stat. Ann. § 336.2-316(2), (3)(a); Mo. Rev. Stat. § 400.2-316(2), (3)(a). Common proof—the labels themselves—establish that there is no such language here. To disclaim fitness for particular purpose, there must be "conspicuous" language such as: "There are no warranties which extend beyond the description on the face hereof." Ark. Code Ann. § 4-2-316(2); Kan. Stat. Ann. § 84-2-316(2); Minn. Stat. Ann. § 336.2-316(2); Mo. Rev. Stat. § 400.2-316(2); *see also*, *e.g.*, *Lieber v. Bridges*, 650 S.W.2d 688, 691 (Mo. App. 1983) (defendant "must not only show a conspicuous provision which fully discloses the consequences of its inclusion but also that such was *in fact* the agreement reached … A knowing waiver of this protection will not be readily implied.") (citation omitted). If Defendants argue that language at the bottom of back labels limited warranty to equipment built in or before 1974, this would be directed to *everyone* with post-1974 equipment and is met with common proof that the language was inconspicuous, unclear, ineffective, and misleading. Defendants also have the problem of their own expert who opines that fitness depends not on model year but 20-weight uses. There was no disclaimer on that score whatsoever. As salient is whether Defendants disclaimed fitness as tractor hydraulic fluid at all, which they did not.

2. 303 THF was not subject to meaningful examination.

Defendants assert an "examination" defense (Aff. Def. 45) addressed to both Plaintiffs and class members and answerable by common response. Each state statute provides that where, before

purchase, a buyer examines the goods fully or refused to do so, there is no implied warranty regarding defects examination would have revealed. Ark. Code Ann. § 4-2-316(3)(b); Kan. Stat. Ann. § 84-2-316(3)(b); Minn. Stat. Ann. § 336.2-316(3)(b); Mo. Rev. Stat. § 400.2-316(3)(b). "Examination" in this context "is not synonymous with inspection" but "goes rather to the nature of the responsibility assumed by the seller." To bring the transaction within a refusal to examine, "[t]here must … be a demand by the seller that the buyer examine the goods" to make clear that the buyer is assuming the risk of defects. UCC 2-316, cmt. 8. That did not happen here. Moreover, examination needing chemical or other testing is not required, "[n]or can latent defects be excluded by a simple examination." *Id*. *See*, *e.g*., *Vestring*, 521 P.2d at 290-91 (buyer not required to determine if cows infected through testing); *H Window Co. v. Cascade Wood Prods., Inc.,* 596 N.W.2d 271, 277 (Minn. App. 1999) (latent defects not excluded from implied warranty); *Land O'Lakes Creameries, Inc. v. Cmdty. Credit Corp.*, 185 F.Supp. 412, 423 (D. Minn. 1960) (inspection was not to detect insect infestation and could not have done so). Here, the defective nature of 303 THF lay in its composition, technical properties and lack thereof. Visual examination would not have revealed the fluid's true nature, much less inform the average buyer of its unfitness. Finally, the examination provision does not create a *caveat emptor* escape hatch. A seller cannot sell one thing and deliver something else instead. If this defense survives dispositive motion, there is much common evidence to meet it.

3. Express warranties were not effectively disclaimed.

In each state, "[w]ords … relevant to the creation of an express warranty and words tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other" and "negation is inoperative to the extent that such construction is unreasonable." Ark. Code Ann. § 4-2-316(1); Cal. Com. Code § 2316(1); Kan. Stat. Ann. § 84-2-316(1); Minn. Stat. Ann. § 336.2-

316(1); Mo. Rev. Stat. § 400.2-316(1); N.Y. UCC Law § 2-316(1). If Defendants even pursue a model-year theory after Dr. Swanger's testimony, whether language on which they rely effectively disclaimed express warranties is again directed to everyone with post-1974 equipment and answerable with common evidence that it did not. Statements conveying efficacy and benefits gave every indication of suitability for more modern equipment. The bottom language was inconsistent therewith, admitted even by Defendants. Honing in on year of manufacture also neglects that the fluid was unfit for *any* equipment. This defense also does not defeat certification.

4. Asserted "misuse" does not void any warranty.

Finally, Defendants assert that Plaintiffs' "misuse" voids any warranty. Aff. Def. 3. Not so. First, negligence is not a defense to warranty claims in all states. Second, Dr. Swanger's opinion undermines Defendants' misuse theory. Third, the language on which they rely was ineffective for reasons addressed. Fourth, misuse has been rejected in cases involving defective condition at time of sale. *Tait*, 289 F.R.D. at 479. Fifth, to the extent misuse is couched as a causation argument, use of 303 THF in post-1974 equipment was not the cause of injury.

E. Statutes of Limitation are Regularly Rejected as Defeating Certification.

Defendants assert that "Plaintiffs claims are barred" by statutes of limitations including a handful cited as to the eight focus states. Aff. Def. 2. This defense does not render any Plaintiff inadequate.[86] To the extent Defendants are permitted to pursue this defense more broadly, it does not defeat certification. Questions including what limitations period applies, when it begins to run, and means of tolling all present issues common to all members within each state-wide class. For

[86] *See In re Willis Towers Watson PLC Proxy Litig*., 2020 WL 5361582, at *14 (E.D. Va. Sept. 4, 2020) (statute of limitations defense was a merits inquiry and further, declining to conclude that it would become a focus of the litigation); *In re Linerboard Antitrust Litig*., 203 F.R.D. 197, 211-12 (E.D. Pa. 2001), *aff'd*, 305 F.3d 145 (3d Cir. 2002) ("While the statute of limitations defense may ultimately affect an individual's right to recovery, it does not affect the presentation of the liability issues for the plaintiffs' class.").

many claims, applicability of a statute of limitations does not affect predominance at all. In Missouri, for example, the "capable of ascertainment" standard is objective and as such, "may be determined on a class-wide basis." *Barfield*, 2013 WL 3872181, at *12. As to statutes triggered by knowledge or notice generally, any attempt by Defendants to lodge a constructive-notice theory is a common issue. *See, e.g., Waldrup v. Countrywide Fin. Corp.*, 2018 WL 799156, at *14 (C.D. Cal. Feb. 6, 2018) (whether article regarding appraisal practices placed class members on notice "could be adjudicated on a class-wide basis"); *Cooper v. Pac. Life Ins. Co.*, 229 F.R.D. 245, 265 (S.D. Ga. 2005) ("whether class members were on constructive notice by the media coverage, regulatory actions, and litigation, is a common issue"). Tolling likewise "will be common to many or all class members" and thus "will contribute to—not undermine—a finding that common issues predominate." Newberg § 4:57. *See also*, *e.g.*, *Urethane*, 237 F.R.D. at 452 ("the common issue of concealment will predominate because the key inquiry will focus on the defendants' conduct—that is, what the defendants did—rather than on the plaintiffs' conduct"); *Waldrup*, 2018 WL 799156, at *14 (fraudulent concealment as basis for tolling involved common proof, "namely, 'the act of concealing" the defendant's wrongdoing'") (citation omitted).

Moreover, "[c]ourts consistently hold ... that the statute of limitations does not bar class certification, even when individual issues are certain to exist." *Childress*, 2019 WL 2865848, at *11 (citation omitted); *see also Lott*, 2021 WL 1031008, at *13 ("the law is settled that '[t]he existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones'") (citation omitted). "[V]ariations in limitations periods are irrelevant to whether there exist common questions of law or fact that go to the heart of Defendants' potential liability as to the claims alleged." *Cox v. Spirit Airlines, Inc.*, 341 F.R.D. 349, 371 (E.D.N.Y. 2022) (citation omitted; collecting cases). *See also Hays v. Nissan N. Am.,*

Inc., 2021 WL 912262, at *8 (W.D. Mo. Mar. 8, 2021) ("individual statute of limitations issues do not predominate over the common issues"). This defense *might* later result in a narrowing of classes but does not defeat certification. *Cox*, 341 F.R.D. at 371; *Doran*, 251 F.R.D. at 407.

F. Settlement Is Not a Barrier to Certification.

Defendants also contend that they are entitled to set-offs for amounts paid in settlement. Aff. Def. 26. This is a damages issue that does not defeat certification. *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 116 (S.D.N.Y. 2010); *see also Berrien v. New Raintree Resorts Int'l, LLC*, 276 F.R.D. 355, 364 (N.D. Cal. 2011) (equitable setoff is a defense that pertains to the amount each class member may receive as damages and "[t]he potential existence of individualized damage assessments, however, does not detract from the action's suitability for class certification."); *Meek v. Kansas City Life Ins. Co.*, 2022 WL 499049, at *5 (W.D. Mo. Feb. 7, 2022) (defense of accord and satisfaction for refund of overdraft fees is a damage calculation that does not defeat predominance); *Cromeans v. Morgan Keegan & Co., Inc.*, 303 F.R.D. 543, 560-61 (W.D. Mo. 2014) ("The differences in calculation of damages, should the defenses apply, is a minor matter in comparison with the fundamental similarity of the claims.").

CONCLUSION

For all the foregoing reasons, this case is well suited for certification; accordingly, Plaintiffs respectfully request that the Court:

1. Certify the following classes and subclasses:

Arkansas: 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 Arkansas at any point in time from December 1, 2013 to present.

California: 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 California at any point in time from December 1, 2013 to present.

CLRA Subclass:
All individuals 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 California for personal, family, or household purposes at any point in time from December 1, 2013 to present.

Kansas: 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 Kansas at any point in time from December 1, 2013 to present.

KCPA Subclass:
All individuals, husbands and wives, sole proprietors, or family partnerships 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 Kansas for personal, family, household, business or agricultural purposes at any point in time from December 1, 2013 to present.

Kentucky: 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 Kentucky at any point in time from December 1, 2013 to present.

Minnesota: 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 Minnesota at any point in time from December 1, 2013 to present.

Missouri: All persons and entities who purchased Super S 303 Tractor Hydraulic Fluid, Cam2 ProMax 303 Tractor Hydraulic Oil, and/or Cam2 303 Tractor Hydraulic Oil in Missouri at any point in time from December 1, 2013 to present.

MMPA Subclass:
All persons and entities who purchased Super S 303 Tractor Hydraulic Fluid, Cam2 ProMax 303 Tractor Hydraulic Oil, and/or Cam2 303 Tractor Hydraulic Oil in Missouri primarily for personal, family, household, purposes at any point in time from December 1, 2013 to present.

New York: 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 New York at any point in time from December 1, 2013 to present.

Wisconsin: 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 Wisconsin at any point in time from December 1, 2013 to present.

2. Appoint the following named Plaintiffs as representatives of their respective state class(es): *Arkansas*: William Anderson, William Edward Anderson Living Trust, Fricker Farms, Inc., MGA Farms, Inc., Alan Hargraves, Jeffery Harrison, J&C Housing Construction, LLC; *California*: Jack Kimmich, Soils to Grow, LLC; *Kansas*: George Bollin, Adam Sevy, Ross Watermann, Watermann Land and Cattle, LLC, Terry Zornes; *Kentucky*: Kirk Egner, Tim Sullivan, Tracy Sullivan, Dwayne Wurth, Wurth Excavating, LLC; *Minnesota*: Joe Asfeld, Brett Creger, Jason Klingenberg. K&J Trucking, Inc.; *Missouri*: Arno Graves, Mark Hazeltine, Ron Nash; New York: Sawyer Dean, John Miller, Lawrence Wachholder; *Wisconsin*: Mike Hamm, Dale Wendt.

3. Appoint as Class Counsel, pursuant to Rule 23(g)(1):

Tom Bender and Dirk Hubbard from the law firm Horn Aylward & Bandy, LLC in Kansas City, Missouri; Bryan White from the law firm White, Graham, Buckley & Carr, L.L.C. in Independence, Missouri; Clayton Jones of the Clayton Jones Law Firm in Raymore, Missouri; Tricia Campbell of the firm Krause & Kinsman in Kansas City, Missouri; Athena Dickson of the Siro Smith Dickson Law Firm in Kansas City, Missouri; Don Downing, Gretchen Garrison and Morry Cole from the law firm of Gray, Ritter, Graham in St. Louis, Missouri; John Emerson of the Emerson Firm, PLLC in Little Rock, Arkansas; Mark Bryant and Teris Swanson from the law firm Bryant Law Center, P.S.C. in Paducah, Kentucky; Christopher Jennings of the Johnson Firm in Little Rock, Arkansas; Stephen Basser from the law firm Barrack, Rodos & Bacine in San Diego, California; Paul Lundberg of the Lundberg Law Firm, P.L.C. in Sioux City, Iowa; James Malters of the law firm Malters, Shepher & Von Holtum in Worthington, Minnesota; Travis Griffith from the law firm Griffith Law Center, PLLC in Charleston, West Virginia; and Jon Robinson and Zachary Anderson from the law firm Bolen Robinson & Ellis, LLP in Decatur, Illinois.

Date: April 21, 2023

Respectfully submitted,

HORN AYLWARD & BANDY, LLC

BY: */s/ Thomas V. Bender*

Thomas V. Bender MO 28099, KS 22860
Dirk Hubbard MO 37936, KS 15130
2600 Grand Boulevard, Ste. 1100
Kansas City, MO 64108
(816) 421-0700
(816) 421-0899 (Fax)
tbender@hab-law.com
dhubbard@hab-law.com

WHITE, GRAHAM, BUCKLEY,
& CARR, L.L.C
Bryan T. White MO 58805, KS 23255
19049 East Valley View Parkway
Independence, Missouri 64055
(816) 373-9080 Fax: (816) 373-9319
bwhite@wagblaw.com

CLAYTON JONES, ATTORNEY AT LAW
Clayton Jones MO 51802
P.O. Box 257
405 W. 58 Hwy.
Raymore, MO 64083
Office: (816) 318-4266
Fax: (816) 318-4267
clayton@claytonjoneslaw.com

GRAY RITTER GRAHAM
Don M. Downing MO 30405
Gretchen Garrison MO 66963
701 Markey Street, Suite 800
St. Louis, MO 63101
Ph: (314) 241-5620
Fax: (314) 241-4140
ddowning@grgpc.com
ggarrison@grgpc.com

ATTORNEYS FOR PLAINTIFFS

AND CLASS MEMBERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document was filed electronically with the United States District Court for the Western District of Missouri, with notice of case activity to be generated and sent electronically by the Clerk of the Court to all designated persons this 21st day of April, 2023.

/s/ Thomas V. Bender