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

ORDER

Before the Court is Plaintiffs' Motion for Class Certification Respecting the Eight Focus States of Arkansas, California, Kansas, Kentucky, Minnesota, Missouri, New York, and Wisconsin. (Doc. #836.) The Court heard oral arguments on this motion on December 12, 2023. For the reasons discussed below, the motion is **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

This Order assumes familiarity with the facts of this case, as set out in prior orders. Only the facts necessary to resolve the instant motion are discussed below.

This MDL arises from Defendants Smitty's Supply, Inc. ("Smitty's") and CAM2 International, LLC's ("CAM2") (collectively, "Defendants") manufacture, sale, and marketing of tractor hydraulic fluid ("THF"), a multifunctional lubricant designed to offer certain protective benefits when used in tractors and heavy equipment as a hydraulic fluid, transmission fluid, and gear oil. Plaintiffs represent a putative class of consumers who purchased at least one of four allegedly defective products at issue in this case: Smitty's Super S Super Trac 303 Tractor Hydraulic Fluid ("Smitty's Super Trac 303"), Smitty's Super S 303 Tractor Hydraulic Fluid ("Smitty's Super S 303"), Cam2's Promax 303 Tractor Hydraulic Oil ("Cam 2 Promax 303"), and Cam2's 303 Tractor Hydraulic Oil ("Cam2 303") (collectively, the "303 THF Products").

Defendants manufactured the 303 THF Products, which were sold nationwide by multiple retailers under various label names.

Plaintiffs initiated suit against Defendants in multiple federal district courts where the 303 THF Products were sold. On February 11, 2020, Defendants requested all pending actions be consolidated and transferred pursuant to 28 U.S.C. § 1407. On June 2, 2020, the Judicial Panel on Multidistrict Litigation ("J.P.M.L.") consolidated and transferred the eight then-pending actions to the Western District of Missouri.[1] *See In re: Smitty's/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 2936, 2020 WL 2848377, at *1 (J.M.P.L. June 2, 2020). Following the creation of this MDL, Plaintiffs filed another lawsuit, *Feldkamp v. Smitty's Supply, Inc.*, No. 20-cv-02177, in the U.S. District Court for the Central District of Illinois, which was subsequently transferred to this Court. Pursuant to this Court's order dated August 3, 2020, Plaintiffs were permitted to file a Consolidated Amended Complaint that would supersede all prior pleadings in the individual cases and the Court allowed direct joinder of new claims through the Consolidated Amended Complaint.

On September 24, 2021, Plaintiffs filed the Fourth Amended Consolidated Complaint ("FACC"). On October 25, 2021, Defendants filed a motion to dismiss the FACC, which the Court granted in part and denied in part on March 9, 2022. On April 21, 2023, Plaintiffs filed a Fifth Amended Consolidated Complaint ("5ACC"). Plaintiffs subsequently filed a corrected version of the 5ACC on November 27, 2023.

[1] The pending actions consolidated before the undersigned are as follows: *Buford v. Smitty's Supply, Inc.*, No. 19-cv-00082 (E. D. Ark.); *Fosdick v. Smitty's Supply, Inc.*, No. 19-cv-01850 (E. D. Cal.); *Blackmore v. Smitty's Supply, Inc.*, No. 19-cv-04052 (N.D. Iowa); *Zornes v. Smitty's Supply, Inc.*, No. 19-cv-02257 (D. Kan.); *Wurth v. Smitty's Supply, Inc.*, No. 19-cv-00092 (W.D. Ky.); *Mabie v. Smitty's Supply, Inc.*, No. 19-cv-03308 (S.D. Tx.); *Klingenberg v. Smitty's Supply, Inc.*, No. 19-cv-02684 (D. Minn.); and *Graves v. Cam2 Int'l, LLC*, No. 19-cv-05089 (W.D. Mo.).

Plaintiffs now move for class certification pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3). Defendants oppose the motion. The parties' arguments are addressed below.

II. LEGAL STANDARD

Class certification is governed by Federal Rule of Civil Procedure 23. Rule 23 requires a plaintiff to satisfy all four prerequisites of Rule 23(a) and at least one of the provisions of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Instead, a plaintiff "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original).

A district court "must undertake a 'rigorous analysis' to ensure that the requirements of Rule 23(a) are met." *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). The Rule 23 analysis will frequently overlap to some extent with the merits of the underlying claims. *Dukes*, 564 U.S. at 351. However, there are limits to a court's analysis of the merits of a matter at the class certification stage. "A court's inquiry on a motion for class certification is 'tentative,' 'preliminary,' and 'limited.'" *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (citation omitted). "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 for class certification are satisfied." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013). "This court denies certification only if the theory of liability is a highly individualized question that does not allow class certification under Rule 23(b)(2) and (b)(3)."

Custom Hair Designs by Sandy v. Central Payment Co., LLC, 984 F.3d 595, 601 (8th Cir. 2020) (citation and quotation marks omitted).

III. DISCUSSION

A. Claims Asserted

The Court must "begin by considering the nature of plaintiffs' claim[s] to determine whether it is suitable for class certification." *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030, 1033 (8th Cir. 2020) (citation omitted). Plaintiffs propose certification of the following classes with the following claims:

1. The Arkansas Class; consisting of all persons and entities who purchased 303 THF Products in Arkansas at any point in time from December 1, 2013, to present. The Arkansas Class asserts the following claims:
    a. Count I, Negligence;
    b. Count II, Breach of Express Warranty;
    c. Count III, Breach of Implied Warranty of Merchantability;
    d. Count IV, Breach of Implied Warranty of Fitness for a Particular Purpose;
    e. Count V, Unjust Enrichment;
    f. Count VI, Fraudulent Misrepresentation;[2] and
    g. Count VIII, Arkansas Deceptive Trade Practices Act ("ADTPA"), Ark. Code. Ann. § 4-88-101.
2. The California Class; consisting of all persons and entities who purchased 303 THF Products in California at any point in time from December 1, 2013, to present. The CLRA Subclass; consisting of all individuals who purchased 303 THF Products in California for personal, family, or household purposes at any point in time from December 1, 2013, to present. The California Class asserts the following claims:
    a. Count I, Negligence;
    b. Count II, Breach of Express Warranty;
    c. Count V, Unjust Enrichment;
    d. Count VI, Fraudulent Misrepresentation;
    e. Count VII, Negligent Misrepresentation;

[2] The 5ACC refers to Count VI as Fraud/Misrepresentation, but for the sake of clarity, the Court will refer to Count VI as Fraudulent Misrepresentation.

f. Count IX, California Unfair Competition Law ("UCL"), Cal. Bus. Prof. Code § 17200;

g. Count X, California False and Misleading Advertising ("FAL"), Cal. Bus. Prof. Code § 17500; and

h. Count XI, California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code. § 1750.

3. The Kansas Class; consisting of all persons and entities who purchased 303 THF Products in Kansas at any point in time from December 1, 2013, to present. The KCPA Subclass; consisting of all individuals, husbands and wives, sole proprietors, or family partnerships who purchased 303 THF Products in Kansas for personal, family, household, business or agricultural purposes at any point in time from December 1, 2013, to present. The Kansas Class asserts the following claims:

   a. Count I, Negligence;

   b. Count II, Breach of Express Warranty;

   c. Count III, Breach of Implied Warranty of Merchantability;

   d. Count IV, Breach of Implied Warranty of Fitness for a Particular Purpose;

   e. Count V, Unjust Enrichment;

   f. Count VI, Fraudulent Misrepresentation;

   g. Count VII, Negligent Misrepresentation;

   h. Count XVIII, Kansas Consumer Protection Act ("KCPA"), K.S.A. § 50-623 et seq.;

   i. Count XLVI, Kansas Product Liability Act ("KPLA") – Design Defect, K.S.A. § 60-3301[3]; and

   j. Count XLVII, KPLA – Failure to Warn, K.S.A. § 60-3301.

4. The Kentucky Class; consisting of all persons and entities who purchased 303 THF Products in Kentucky at any point in time from December 1, 2013, to present. The Kentucky Class asserts the following claims:

   a. Count I, Negligence;

   b. Count V, Unjust Enrichment;

   c. Count VI, Fraudulent Misrepresentation; and

   d. Count VII, Negligent Misrepresentation.

[3] Plaintiffs refer to "Kansas Product Liability Act" which the Court construes as a claim brought under K.S.A. § 60-3301, *et seq*.

5. The Minnesota Class; consisting of all persons and entities who purchased 303 THF Products in Minnesota at any point in time from December 1, 2013, to present. The Minnesota Class asserts the following claims:

    a. Count I, Negligence;

    b. Count II, Breach of Express Warranty;

    c. Count III, Breach of Implied Warranty of Merchantability;

    d. Count IV, Breach of Implied Warranty of Fitness for a Particular Purpose;

    e. Count V, Unjust Enrichment;

    f. Count VI, Fraudulent Misrepresentation; and

    g. Count VII, Negligent Misrepresentation.

6. The Missouri Class; consisting of all persons and entities who purchased Smitty's Super S 303, Cam 2 Promax 303, and/or Cam2 303 in Missouri at any point in time from December 1, 2013, to present. The MMPA Subclass; consisting of all persons and entities who purchased Smitty's Super S 303, Cam 2 Promax 303, and/or Cam2 303 in Missouri primarily for personal, family, or household purposes at any point in time from December 1, 2013, to present. The Missouri Class asserts the following claims:

    a. Count I, Negligence;

    b. Count II, Breach of Express Warranty;

    c. Count III, Breach of Implied Warranty of Merchantability;

    d. Count IV, Breach of Implied Warranty of Fitness for a Particular Purpose;

    e. Count V, Unjust Enrichment;

    f. Count VI, Fraudulent Misrepresentation;

    g. Count VII, Negligent Misrepresentation; and

    h. Count XXII, Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010.

7. The New York Class; consisting of all persons and entities who purchased 303 THF Products in New York at any point in time from December 1, 2013, to present. The New York Class asserts the following claims:

    a. Count I, Negligence;

    b. Count V, Unjust Enrichment;

    c. Count VI, Fraudulent Misrepresentation; and

    d. Count XXV, New York Consumer Protection Law ("NYCPL"), N.Y. Code § 20-700.

8. The Wisconsin Class; consisting of all persons and entities who purchased 303 THF Products in Wisconsin at any point in time from December 1, 2013, to present. The Wisconsin Class asserts the following claims:

    a. Count I, Negligence;

    b. Count VI, Fraudulent Misrepresentation;

    c. Count VII, Negligent Misrepresentation; and

    d. Count XXXIII, Wisconsin Deceptive Trade Practices Act ("WDTPA"), Wis. Stat. § 100.18.

With the nature of the claims in mind, the Court will rigorously analyze the motion for class certification in accordance with the requirements of Rule 23.

B. Requirements Under Rule 23(a)

Under Rule 23(a), a proposed class must satisfy four elements:

> (1) the class is so numerous that joinder of all members is impracticable [(numerosity)]; (2) there are questions of law or fact common to the class [(commonality)]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [(typicality)]; and (4) the representative parties will fairly and adequately protect the interest of the class [(adequacy)].

Fed. R. Civ. P. 23(a). Each element is addressed below.

1. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." In determining whether the numerosity requirement is satisfied, "the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joinder is relevant." *Emanuel v. Marsh*, 828 F.2d 438, 444 (8th Cir. 1987), *vacated on other grounds*, 487 U.S. 1229 (1988) (citing *Paxton v. Union Nat. Bank*, 688 F.2d 552, 559–60 (8th Cir. 1982)). Courts have found the numerosity requirement satisfied even when the class size is approximate and fluid. *Barrett v. Claycomb*, No. 11-CV-04242-NKL, 2011 WL 5822382, at *2 (W.D. Mo. Nov. 15, 2011) ("Despite . . . arguments [that the class size was inaccurately calculated], given the large initial number of

potential plaintiffs, and because of the fluid nature of this class[,] . . . it would be impracticable to require individual lawsuits."); *see also M.B. by Eggemeyer v. Corsi*, 327 F.R.D. 271, 278 (W.D. Mo. 2018).

Plaintiffs estimate, "[b]ased on retailer sales data[,]" that each state class has the following members: Arkansas, 39,262; California, 14,900; Kansas, 13,170; Kentucky, 32,120; Minnesota, 2,458; Missouri, 2,619; New York, 23,847, and Wisconsin, 3,592. (Doc. #853-8, p. 17.) Defendants argue that Plaintiffs have not accurately identified class sizes, contending that Plaintiffs' expert Dr. Bruce Babcock relied on inaccurate retailer sales data. Further, they assert that Plaintiffs did not approximate the size of the MMPA Subclass because the MMPA Subclass "includes only CAM2 303 THF products, not Smitty's, and only for a limited period because the [Missouri Department of Agriculture] stopped sales in October 2017[,]" which isn't accounted for in Dr. Babcock's estimated class sizes. (Doc. #1017, p. 149.)

The Court finds that Plaintiffs have appropriately identified approximate class sizes. Retailer sales data indicates the approximate class sizes, and it would be impracticable to adjudicate thousands of potential plaintiffs individually with the same or similar claims. *See* (Doc. #853-8, p. 17.) Also, the size of many of the claims are small given that Plaintiffs assert benefit-of-the-bargain damages, which is the price of the 303 THF Products, relatively low-cost products. Even if the Court presumes there is some inaccuracy in the class sizes, the class sizes still far exceed what the Eighth Circuit has previously found sufficient. *See Barrett*, 2011 WL 5822382, at *2; *see also Arkansas Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765 (8th Cir. 1971) (finding a twenty-member class satisfies numerosity). Further, Defendants incorrectly state that the MMPA Subclass does not include Smitty's products. The MMPA Subclass includes Smitty's Super S 303, and even if only a small fraction of the 2,619 members of the Missouri class were

members of the MMPA subclass, it would still satisfy the numerosity requirement. Thus, the Court finds the numerosity element satisfied for each proposed state class and subclass.

2. **Commonality**

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" which "does not mean merely that they have all suffered a violation of the same provision of law." *Dukes*, 564 U.S. at 349–50 (quoting *Falcon*, 457 U.S. at 148). "This common contention must also be 'of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Bennett*, 656 F.3d at 814 (quoting *Dukes*, 564 U.S. at 350). 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." *Paxton*, 688 F.2d at 561 (quotations and citations omitted); *see also Glen v. Fairway Indep. Mortg. Corp.*, 265 F.R.D. 474, 478 (E.D. Mo. 2010) ("[T]he presence of differing legal inquiries and factual discrepancies will not preclude class certification."). "Thus, '[t]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that the class action is impermissible.'" *Campbell v. Purdue Pharma, L.P.*, No. 1:02CV00163 TCM, 2004 WL 5840206, at *5 (E.D. Mo. June 25, 2004) (citation omitted).

Plaintiffs argue that common issues of law and fact exist because "[a] central overriding question is whether Defendants held 303 THF [Products] out as something [they were] not" and that "all class members were purchasers of a product Plaintiffs claim was worthless waste." (Doc. #837, p. 96.) Defendants argue that

> [w]hat is apt to drive the resolution of this litigation is the individual consumer's understanding of the product at purchase[,] . . . the application for which it was used[,] . . . the suitability of the product and batch for that application[,] . . . and the results of the use in that application[.]"

(Doc. #1017, p. 163.)

The Court finds the commonality requirement satisfied for the proposed state classes and subclasses. Plaintiffs' theory of liability is based on common, class-wide allegations of defective 303 THF Products, and misrepresentations made by Defendants when marketing them, both of which resulted in Plaintiffs suffering economic losses from buying an allegedly worthless product. *See, e.g., Claxton v. Kum & Go, L.C.*, No. 6:14-CV-03385-MDH, 2015 WL 3648776, at *3 (W.D. Mo. June 11, 2015) ("[T]here are multiple questions of law or fact common to the class . . . [when] Defendant misrepresented the gasoline sold[, and when] the marketing/labeling of the gasoline was false, misleading, deceptive, or unfair[.]"). Questions regarding the manufacture and marketing of 303 THF Products do not require individualized testimony because those questions focus on Defendants' conduct. Also, by proposing state-wide classes, the same state law governs each claim, creating common questions of law. Defendants' additional arguments regarding commonality are better addressed under "Rule 23(b)(3)'s more stringent requirement that questions common to the class predominate over other questions." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 559 (D. Minn. 2010), *aff'd*, 644 F.3d 604 (8th Cir. 2011). Thus, factual discrepancies regarding Plaintiffs use and understanding of 303 THF Products do not defeat commonality, and the Court finds the commonality element satisfied for each proposed state class and subclass.

3. **Typicality**

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." "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) (citing *Paxton*, 688 F.2d at 562). "It is 'not necessary to first find that all putative class members share identical claims.'" *Rios-Gutierrez v. Briggs Traditional Turf Farm, Inc.*, 344 F.R.D. 196, 203 (W.D. Mo. 2022) (quoting *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 187 (W.D. Mo. 2009)). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). "Typicality will not be destroyed unless a class representative is 'subject to a unique defense that threatens to play a major role in the litigation.'" *Cromeans v. Morgan Keegan & Co., Inc.*, 303 F.R.D. 543, 552 (W.D. Mo. 2014) (quoting *Uponor Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1064 (8th Cir. 2013)).

Plaintiffs argue that typicality is satisfied because "Plaintiffs, like all class members, purchased 303 THF [Products], a worthless waste product and suffered harms to equipment from use of improper, inadequate fluid[,] . . . assert[ing] the same legal theories as all other class members and seek[ing] the same kind of relief." (Doc. #837, p. 97.) Defendants argue that "Plaintiffs' claims are not typical because they vary too greatly from the claims of class members," because proposed class members purchased under different labels, used 303 THF Products in a variety of equipment, and are subject to individualized defenses. (Doc. #1017, p. 150.)

The Court finds that Plaintiffs' claims are typical of the proposed classes' claims. While some putative class representatives' claims may not be identical to other class members' claims, those factual variations do not preclude class certification. *See Alpern*, 84 F.3d at 1540. Although some putative class representatives are not asserting every claim asserted by the

proposed class, with multiple putative class representatives for each state, together their claims "are similar to those of the rest of the class." *In re Hartford Sales Pracs. Litig.*, 192 F.R.D. 592, 603 (D. Minn. 1999). Further, even when Plaintiffs purchased under different labels or used 303 THF Products in different equipment, the same course of conduct, Defendants allegedly marketing and producing a defective product, gives rise to the proposed classes' claims. *See In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Pracs. Litig.*, No. 16-02709-MD-W-GAF, 2019 WL 1418292, at *14 (W.D. Mo. Mar. 21, 2019) (holding that the proposed class satisfied typicality where the motor oil labels changed 14 times during the relevant time period and the oil was used in a variety of vehicles). "While the Court may have to make individualized determinations regarding damages, this alone does not preclude certification." *Zurn Pex Plumbing*, 267 F.R.D. at 559. Defendants do not point to any "unique defense that threatens to play a major role in the litigation." *Cromeans*, 303 F.R.D. at 552 (quoting *Uponor*, 716 F.3d at 1064). Thus, the Court finds typicality satisfied for each proposed state class and subclass.

4. **Adequacy**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562–63. "A class representative must be part of the class, possess the same interest, and suffer the same injury as the prospective class members." *Henke v. Arco Midcon, L.L.C.*, No. 4:10-CV-86-HEA, 2014 WL 982777, at *11 (E.D. Mo. Mar. 12, 2014). The requirement of adequacy "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

> [P]erfect symmetry of interest is not required and not every discrepancy among the interests of class members renders a putative class action untenable. . . . [T]o forestall class certification the intra-class conflict must be so substantial as to overbalance the common interests of the class members as a whole.

Vogt v. State Farm Life Ins. Co., 963 F.3d 753, 767 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2551 (2021) (citation omitted).

Plaintiffs argue that (1) Plaintiffs are adequate class representatives because they are "aligned with other class members in common interest of vindicating the same claims[,] . . . devot[ing] considerable time and attention to this litigation[;]" and (2) Co-Lead Counsel is qualified because they have "played central roles in this litigation, spending thousands of hours advancing the interests of Plaintiffs and class members." (Doc. #837, p. 98.) Defendants argue that Plaintiffs are inadequate representatives because: (1) "Plaintiffs' dereliction of duty in providing accurate discovery responses has been rampant[;]" (2) there are conflicts of interest between Plaintiffs and the proposed class; (3) "Plaintiffs' failure to pursue the class members' claims for consequential damages and repair costs makes them inadequate representatives and prejudices class members[;]" and (4) plaintiffs are inadequate for additional independent reasons. (Doc. #1017, pp. 158–62.)

Defendants do not contend that co-lead counsel is not qualified, so the Court finds that qualified counsel will prosecute the interests of the classes. For many of the same reasons listed above the Court finds that Plaintiffs share in a common interest of vindicating the same claims. *See Bird Hotel Corp. v. Super 8 Motels, Inc.*, 246 F.R.D. 603, 607 (D.S.D. 2007) ("Courts usually analyze the 'common interests' factor along with typicality, and the above discussion of typicality shows that Plaintiff has common interests with the class members."). Plaintiffs have stated that they understand the case and are willing to serve as class representatives, seeking relief for themselves and others. *See* (Doc. #837-38.) To the extent Defendants argue that

Plaintiffs are inadequate representatives because of their lack of knowledge, "[t]he requirement that a named Plaintiff have an understanding of the litigation only requir[es] one to 'be aware of the basic facts underlying the lawsuit.'" *Dollar Gen.*, 2019 WL 1418292, at *14 (citation omitted). Further, Defendants' argument that there are conflicts of interest because subsequent owners of the equipment may be class members entitled to flush costs is speculative, since Defendants do not submit any examples of subsequent owners being class members. *See Vogt*, 963 F.3d at 767 ("This purported conflict is entirely speculative and is insufficient to render class certification inappropriate[.]"). Finally, as to conflicts about the damages sought on behalf of the class, "even if there are slightly divergent theories that maximize damages for certain members of the class, this slight divergence is greatly outweighed by shared interests in establishing [defendant's] liability." *Id.* at 768 (quotations and citations omitted). Thus, the Court finds that the adequacy requirement is satisfied. As all Rule 23(a) requirements are satisfied, the Court will turn to Rule 23(b).

C. Requirements Under Rule 23(b)

If Rule 23(a) is satisfied, the party seeking certification "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast,* 569 U.S. at 33. Plaintiffs move for class certification under Rule 23(b)(3). Federal Rule of Civil Procedure 23(b)(3) requires a finding that:

> the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

The predominance and superiority elements are discussed below.

1. **Predominance**

"Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast*, 569 U.S. at 34. "The predominance inquiry requires an analysis of whether a prima facie showing of liability can be proved by common evidence or whether this showing varies from member to member." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) (citation omitted). Specifically, the Court considers "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 984 (8th Cir. 2021) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). "The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, and goes to the efficiency of a class action as an alternative to individual suits." *Id.* (quoting *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 479 (8th Cir. 2016)). "This necessarily requires an examination of the underlying elements necessary to establish liability for plaintiffs' claims." *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005). "When one or more of the central issues in the action . . . can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses[.]" *Custom Hair*, 984 F.3d at 601 (citation and quotation omitted).

Plaintiffs argue that common questions of law and fact predominate over individual questions for each proposed state class. Plaintiffs state that "[a] central, overriding issue is whether Defendants represented 303 THF [Products] as something [they were] not[,]" which "is answered by common proof including admissions by Defendants, and testimony by Plaintiffs'

experts." (Doc. #837, pp. 100–01.) Defendants argue that "significant individualized inquiries underlie Plaintiffs' purportedly 'common questions' and these questions, therefore, are incapable of adjudication classwide," taking issue with label variations, equipment variations, and prima facie elements that require individualized factual determinations. (Doc. #1017, p. 167.)

a. **Count I, Negligence (asserted in AR, CA, KS, KY, MN, MO, NY, WI)**

Plaintiffs argue that the negligence claims asserted by all proposed state classes are suited for class treatment because the claim is focused on Defendants' conduct and "[c]ertification is appropriate where common issues include a defendant's duty of care, its acts and omissions, and whether the duty of care was breached." (Doc. #837, p. 101.) Defendants argue that the negligence claims require Plaintiffs to prove "*proximate* cause." (Doc. #1017, p. 185) (emphasis in original).

For "negligence claims premised on a universal and inherent product defect, however, plaintiffs may rely on common evidence to establish a prima facie case because there is no . . . individual reliance requirement for such claims." *Zurn Pex Plumbing*, 644 F.3d at 619 (citations omitted); *see also Zurn Pex Plumbing*, 267 F.R.D. at 565 ("If Plaintiffs can prove that the [product] suffer[s] from a uniform, inherent design and manufacturing defect, and that the defect is the only cause of failure in the majority of the cases, then proximate cause will not involve predominately individual determinations[.]")

The Court rejects Defendants' arguments that proximate cause must be proven for each class member. If Plaintiffs can prove that 303 THF Products suffer from a uniform defect, the evidence required to resolve the negligence claims will be common to the class. The Court concludes that Plaintiffs have submitted sufficient evidence to support this theory of the case.

See id. Thus, the Court finds that common questions of law and fact predominate the negligence claims.

b. **Count II, Breach of Express Warranty (asserted in AR, CA, KS, MN, MO)**

Plaintiffs argue that the breach of express warranty claims asserted by the proposed Arkansas, California, Kansas, Minnesota, and Missouri classes are suited for class treatment because "[w]hether Defendants made warranties, breached them, and breach resulted in injury . . . are common issues." (Doc. #837, p. 102.) Defendants argue that Plaintiffs' express warranty claims involve individual questions because Plaintiffs must prove "reliance or materiality in several states[,]" which is an individualized inquiry. (Doc. #1017, p. 187.)

"Class certification is typically denied for classes with claims involving reliance when there is variance in the representations made by the defendant." *Dollar Gen.*, 2019 WL 1418292, at *25. In Kansas and Minnesota, courts have uniformly held that reliance is not an essential element of a breach of express warranty claim. *See In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 319 (S.D. Ill. 2007) ("[R]eliance is not an element of an action for breach of express warranty under the Kansas UCC." (citing *Unified School Dist. No. 500 v. U.S. Gypsum Co.*, 788 F. Supp. 1173, 1177 (D. Kan. 1992))); *Zurn Pex Plumbing*, 267 F.R.D. at 564 ("[E]ach class member will not be required to prove that he or she relied on the warranty in order to succeed on the breach of warranty claim [under Minnesota law].").

Arkansas, California, and Missouri courts have been less steadfast regarding whether reliance is an element of a breach of express warranty claim. Multiple federal district courts have held that "under Arkansas law, reliance is an essential element of an express warranty claim." *In re Dial Complete Mktg. & Sales Pracs. Litig.*, 312 F.R.D. 36, 58 (D.N.H. 2015) (citations and quotations omitted); *see also Boothe Farms, Inc. v. Dow Chem. Co.*, 487 F. Supp.

3d 758, 760 (E.D. Ark. 2020). However, the Eighth Circuit has held that "Arkansas cases . . . do not establish reliance as essential to a contractual warranty claim." *IPSCO Tubulars, Inc. v. Ajax TOCCO Magnathermic Corp.*, 779 F.3d 744, 750 (8th Cir. 2015).

Recent California courts have held that "[p]roof of reliance on specific promises or representations is not required [under California law]." *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 984 (C.D. Cal. 2015), *aff'd sub nom. Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. 2017), and *aff'd sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). "Indeed, the California Court of Appeal in *Keith v. Buchanan* noted that '[i]t is clear from the new language of this code section that the concept of reliance has been purposefully abandoned.'" *Id.* at 985 n.198 (quoting 220 Cal. Rptr. 392 (Cal. Ct. App. 1985)).

"Missouri courts have held that breach of express warranty claims are not capable of classwide proof because these claims require proof that each individual class member knew of and relied on the warranty." *Dial Complete*, 312 F.R.D. at 69; *see also Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 86 (Mo. Ct. App. 2011) ("Because each class member's claim for breach of express warranty would rely on an individual determination of whether they had in fact read or seen the marketing materials . . . that the [p]laintiffs purport were a material factor in inducing [purchase,] the claims include an individual issue that predominates."); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 97 (W.D. Mo. 1997) ("[C]laims that [d]efendant breached expressed warranties are permeated with individual issues because these claims require proof that purchasers were induced to make purchases based on affirmative representations."). However, Plaintiffs point to a case where the Southern District of the Missouri Court of Appeals held that "where a contract is reduced to writing and the warranty is one of its terms, it is presumed that the buyer relied on the warranty when he purchased the goods." *Walker v. Woolbright Motors, Inc.*, 620 S.W.2d 451, 453 (Mo. Ct. App. 1981)

The Court finds that where reliance is not an essential element of a breach of express warranty claim common questions of law and fact predominate. In Kansas and Minnesota, reliance is not an element. The Court also finds that reliance is not an element in Arkansas, given the Eighth Circuit's holding. Similarly, because California courts have held that reliance has been abandoned, this Court finds that reliance is not an essential element for breach of express warranty in California. In Missouri, because more recent cases have held that reliance is an essential element that requires an individual inquiry, the Court finds common questions of fact do not predominate as to the breach of express warranty claim. Thus, the Court finds that common questions of fact and law predominate the breach of express warranty claims in Arkansas, Kansas, California, and Minnesota, but not in Missouri.

c. **Count III, Breach of Implied Warranty of Merchantability (asserted in AR, KS, MN, MO)**

Plaintiffs argue that the breach of implied warranty of merchantability claims asserted by the proposed Arkansas, Kansas, Minnesota, and Missouri classes are suited for class treatment because common proof will show "whether the warranty was breached." (Doc. #837, p. 104.) Defendants argue that "the fundamental question to be answered for this claim is inherently individual." (Doc. #1017, p. 190.) Specifically, Defendants point to *Dollar General*, where the Court held that the breach of implied warranty of merchantability claims asserted in statewide classes were unsuited for certification. *See* 2019 WL 1418292, at *23–24.

In *Dollar General*, the Court held that the breach of implied warranty of merchantability claims were unsuited for class treatment because the notice of breach requirement required individual inquiries. *Id.* at *24 ("[T]he individual factual inquiries necessary to evaluate notice, primarily whether it was given within a reasonable time, still exist[s for] statewide classes[.]") This Court previously held, however, that Minnesota and Missouri law "require that pre-suit

notice be pled against an immediate seller only." (Doc. #451, p. 28.) Further, in Kansas, "the filing of a lawsuit satisfied the notice requirement." *Dollar Gen.*, 2019 WL 1418292, at *23. "Arkansas's version of the Uniform Commercial Code provides that a 'buyer must within a reasonable time after he discovers or should have discovered any breach notify the *seller* of breach or be barred from any remedy.'" *Indus. Elec. Supply, Inc. v. Lytle Mfg., L.L.C.*, 226 S.W.3d 1, 4–5 (Ark. 2006) (quoting Ark. Code Ann. § 4–2–607(3)(a) (Repl. 2001)) (emphasis added).

The Court finds that common question of fact and law predominate the breach of implied warranty of merchantability claims. While the court in *Dollar General* found that the claims were unsuited for class treatment, the facts are distinguishable. There, the plaintiffs were required to provide notice to the defendant seller. Here, Defendants are the product manufacturers, so the notice requirement is inapplicable in Missouri and Minnesota, as this Court previously held. Further, Arkansas law is clear that the buyer must notify the seller, and the Court is unaware of any requirement that the buyer must notify the manufacturer instead. Thus, any individual issues regarding notice, and whether it was given within a reasonable time, are irrelevant here because Plaintiffs were not required to notify Defendants, manufacturers. As for the Kansas class, given that filing a lawsuit constitutes notice, individual inquiries are not required. Thus, the Court finds that common evidence supports Plaintiffs' breach of implied warranty of merchantability claims in Arkansas, Kansas, Minnesota, and Missouri.

d. **Count IV, Breach of Implied Warranty of Fitness for a Particular Purpose (AR, KS, MN, MO)**

Plaintiffs argue that the breach of implied warranty of fitness for a particular purpose claims asserted by the proposed Arkansas, Kansas, Minnesota, and Missouri classes are suited for class treatment because all elements can be shown by common proof. Defendants argue that

"determining th[e] purpose[of the 303 THF Products] is an innately individual question, [and] so is whether they were fit for that particular purpose." (Doc. #1017, p. 191.)

In Arkansas,

> [t]o recover for breach of an implied warranty of fitness for a particular purpose, the plaintiff must prove that (1) he has sustained damages; (2) at the time of contracting, the defendant had reason to know the particular purpose for which the product was required; (3) the defendant knew the buyer was relying on defendant's skill or judgment to select or furnish the product; (4) the product was not fit for the purpose for which it was required; (5) this unfitness was a proximate cause of plaintiff's damages; and (6) plaintiff was a person whom defendant would reasonably have expected to use the product.

Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc., 785 S.W.2d 13, 17 (Ark. 1990).

Similarly, in Kansas,

> [w]hen a seller "has reason to know [of] any particular purpose for which the goods are required" and should understand that the buyer "is relying on the seller's skill or judgment to select or furnish suitable goods," the transaction includes "an implied warranty that the goods shall be fit for such purpose."

Golden v. Den-Mat Corp., 276 P.3d 773, 799 (Kan. Ct. App. 2012) (quoting Kan. Stat. Ann. § 84-2-315 (West)). "Unlike an implied warranty of merchantability, an implied warranty of fitness for a particular purpose depends upon communication between the buyer and seller regarding a specific transaction." *Id.* In Missouri,

> [w]here 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.

Howard Const. Co. v. Bentley Trucking, Inc., 186 S.W.3d 837, 842 (Mo. Ct. App. 2006) (quoting Mo. Ann. Stat. § 400.2-315 (West)). In Minnesota,

> [b]reach of an implied warranty of fitness for intended use requires proof that: (1) the seller had reason to know of the buyer's particular purpose; (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods; and (3) the buyer's actual reliance.

Driscoll v. Standard Hardware, Inc., 785 N.W.2d 805, 817 (Minn. Ct. App. 2010).

Here, the Court finds that common questions of fact do not predominate claims for breach of the implied warranty of fitness for a particular purpose. To prove this claim, each state requires an inquiry into the particular purpose, distinct from its ordinary purpose, that the plaintiff intended for the 303 THF Products. The Court finds that common proof cannot demonstrate the particular purpose that each plaintiff intended for the 303 THF Products. Further, Minnesota law requires proof of the buyer's actual reliance, an element that requires individualized proof, as previously discussed. In Kansas, the law is clear that proof of communication between the buyer and seller regarding the specific transaction is needed, an inherently individualized inquiry. Thus, the Court finds that the predominance inquiry is not satisfied for the breach of the implied warranty of fitness for a particular purpose claims.

e. **Count V, Unjust Enrichment (asserted in AR, CA, KS, KY, MN, MO, NY)**

Plaintiffs argue that unjust enrichment asserted by the proposed Arkansas, California, Kansas, Kentucky, Minnesota, Missouri, and New York classes are suited for class treatment because "where 'the actions of the defendant are uniform and the transaction with all members are equitably similar,'" predominance is satisfied. (Doc. #837, p. 106) (quoting *Dollar General*, 2019 WL 1418292, at *19). Defendants argue "the vast differences between [*Dollar General*] and the instant [case] do not allow certification here[,]" and "[t]he very question of what is inequitable is not a common one." (Doc. #1017, pp. 193–94.)

The basic elements of unjust enrichment are: (1) defendant's receipt of a benefit; (2) at plaintiff's expense; and (3) unjust retention.[4] "While it is true that in many circumstances unjust

[4] *See Trickett v. Spann*, 613 S.W.3d 773, 777 (Ark. Ct. App. 2020) ("For a court to find unjust enrichment, a party must have received something of value to which the party is not entitled and which the party must restore."); *Lyles v. Sangadeo-Patel*, 171 Cal. Rptr. 3d 34, 40 (Cal. Ct. App. 2014) ("The elements for a claim of unjust enrichment are receipt of a benefit and unjust retention of the benefit at the expense of another." (quotation marks and citation omitted)); *Est. of Draper v. Bank of Am., N.A.*, 205 P.3d 698, 706 (Kan. 2009) ("[U]njust enrichment arises when (1) a benefit has been conferred upon the defendant, (2) the defendant retains the benefit, and (3) under the circumstances, the defendant's retention of the benefit is unjust."); *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, 540

enrichment claims require individual inquiries, common evidence can be used to satisfy all claims when the actions of the defendant are uniform and the transaction with all members are equitably similar." *Dollar Gen.*, 2019 WL 1418292, at *19 (citing *James D. Hinson Elec. Contracting Co. v. BellSouth Telecomms., Inc.*, 275 F.R.D. 638, 647 (M.D. Fla. 2011) ("[W]hen the defendant's conduct is the same, it is difficult to conceive of any significant equitable differences between class members." (quotation omitted)); *Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 570 (E.D. Mich. 2009) (providing that if the plaintiff's theory was ultimately supported with evidence, a jury could conclude that the defendant was unjustly enriched no matter what the particular facts of each individual class member's transaction [are])). When "[p]laintiffs' theory of liability centers on the substantial similarities of the labeling and product placement practices of [the d]efendant throughout the class period[,]" "common evidence could potentially be used to show that the retention of the benefit was unjust." *Id.* at *20. Even when the "[d]efendants assert that the variations in labeling and product placement practices throughout the class period . . . necessitates individual inquiries into each transaction . . . [if] the

S.W.3d 770, 777–78 (Ky. 2017) ("To recover on a claim of unjust enrichment a plaintiff is required to 'prove the following three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of [that] benefit without payment for its value.'" (quoting *Furlong Dev. Co. v. Georgetown-Scott Cty. Planning & Zoning Comm'n*, 504 S.W.3d 34, 39–40 (Ky. 2016))); *Christensen L. Off., PLLC v. Ngouambe*, No. A17-1917, 2018 WL 2293423, at *6 (Minn. Ct. App. May 21, 2018) ("To prevail on an unjust-enrichment claim, a plaintiff must establish '(1) a benefit conferred; (2) the defendant's appreciation and knowing acceptance of the benefit; and (3) the defendant's acceptance and retention of the benefit under such circumstances that it would be inequitable for him to retain it without paying for it.'" (quoting *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 195 (Minn. Ct. App. 2007), *review granted* (Minn. Feb. 27, 2008) *and order granting review vacated* (Minn. Jan. 20, 2009))); *Holliday Invs., Inc. v. Hawthorn Bank*, 476 S.W.3d 291, 295 (Mo. Ct. App. 2015) ("To properly and sufficiently establish a claim for unjust enrichment, the plaintiff must prove three elements: (1) the defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; and (3) that it would be unjust to allow the defendant to retain the benefit." (quoting *Brunner v. City of Arnold*, 427 S.W.3d 201, 233 (Mo. Ct. App. 2013) (*overruled on other grounds by Tupper v. City of St. Louis*, 468 S.W.3d 360 (Mo. 2015)))); *GFRE, Inc. v. U.S. Bank, N.A.*, 13 N.Y.S.3d 452, 454 (N.Y. App. Div. 2015) ("The elements of a cause of action to recover for unjust enrichment are (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered[.]" (quotation marks and citations omitted)).

evidence cited by [the p]laintiffs[is] found to be persuasive, [it] could be viewed as substantially similar, if not uniform, throughout the class period." *Id.*

The Court finds in this case, like *Dollar General*, common questions of law and fact predominate the state-wide unjust enrichment claims. In each state, the elements of an unjust enrichment claim are subject to common proof because Plaintiffs' theory centers around Defendants allegedly misrepresenting their product as 303 THF when it was actually waste. *See id.* at *19. Likewise, label variations do not create individual issues because Plaintiffs alleged Defendant uniformly mislabeled their 303 THF Products throughout the class period. *See id.* at *20. Thus, the Court finds that predominance is satisfied for the unjust enrichment claims.

f. **Count VI, Fraudulent Misrepresentation (asserted in AR, CA, KS, KY, MN, MO, NY, WI)**

Plaintiffs argue that the fraudulent misrepresentation claims asserted by all proposed state classes are suited for class treatment because all elements are "a matter of common proof including testimony from both Defendants and Plaintiffs' experts." (Doc. #837, p. 104.) Defendants argue "[t]he individual questions . . . with respect to reliance, materiality, causation, and knowledge are fatal to any attempt to certify a fraud class[,]" which is "why common-law fraud cases are rarely certified." (Doc. #1017, p. 192.)

The Eighth Circuit has "noted that fraud cases are ill-suited for class actions because they require individualized findings on whether the plaintiffs actually relied on the alleged misrepresentation." *Johannessohn*, 9 F.4th at 985. In *Johannessohn*, where the defendant had "evidence challenging how much each consumer-plaintiff relied on the alleged omissions," the Court held that individualized findings of reliance would be required to prove fraudulent misrepresentation, so common questions of fact did not predominate, and the district court properly denied the motion for class certification on that basis. *Id.*; *see also Hudock v. LG Elecs.*

U.S.A., Inc., 12 F.4th 773, 777 (8th Cir. 2021) ("Because determination of the companies' liability would require individual determinations on causation and reliance, 'common issues will not predominate' in the case." (quoting *St. Jude*, 522 F.3d at 840)). To prove fraudulent misrepresentation under Arkansas, California, Kansas, Kentucky, Minnesota, Missouri, New York, and Wisconsin law, the plaintiff must prove reliance.[5]

The Court finds that the fraudulent misrepresentation claims are unsuited for class certification as it requires individual inquiries. It appears that reliance is an essential element of fraudulent misrepresentation in all eight states where a class is proposed. Defendants provided evidence that some Plaintiffs may not have read the label or some parts of the label when purchasing the 303 THF Products, challenging how much each Plaintiff relied on the alleged label misrepresentations. Given that fraud is usually unsuited for class certification because reliance is an individualized inquiry, the Court finds that common questions of fact do not predominate, and declines to certify the fraudulent misrepresentation claims.

[5] See *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568, 577 (Ark. 2002) ("The tort of fraud or deceit consists of five elements[, including] . . . justifiable reliance on the representation[.]"); *Dhital v. Nissan N. Am., Inc.*, 300 Cal. Rptr. 3d 715, 727 (Cal. Ct. App. 2022) ("As with all fraud claims, the necessary elements of a concealment/suppression claim consist of [five elements, including] . . . justifiable reliance[.]" (quoting *Hoffman v. 162 N. Wolfe LLC*, 175 Cal. Rptr. 3d 820, 826 (Cal. Ct. App. 2014), *as modified on denial of reh'g* (Aug. 13, 2014))); *Alires v. McGehee*, 85 P.3d 1191, 1195 (Kan. 2004) ("The elements of an action for fraud include an untrue statement of fact, known to be untrue by the party making it, made with the intent to deceive or with reckless disregard for the truth, upon which another party justifiably relies and acts to his or her detriment."); *PBI Bank, Inc. v. Signature Point Condominiums LLC*, 535 S.W.3d 700, 714 (Ky. Ct. App. 2016) ("To succeed on a fraud claim a party must prove . . . the plaintiff reasonably relied upon the misrepresentation[.]" (quoting *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011))); *McClain v. Papka*, 108 S.W.3d 48, 52 (Mo. Ct. App. 2003) ("An essential element of both fraud and negligent misrepresentation is reliance on the representation and damage as a result of that reliance."); *St. Jude*, 522 F.3d at 838 ("In a typical common-law fraud case, a plaintiff must show that he or she received the defendant's alleged misrepresentation and relied on it." (citing *Breezy Point Airport, Inc. v. First Fed. Sav. and Loan Ass'n of Brainerd*, 179 N.W.2d 612, 615 (Minn. 1970))); *Von Ancken v. 7 E. 14 L.L.C.*, 98 N.Y.S.3d 32, 34 (N.Y. App. Div. 2019) ("Reasonable reliance is an element of claims for fraud[.]"); *D'Huyvetter v. A.O. Smith Harvestore Prod.*, 475 N.W.2d 587, 592 (Wis. Ct. App. 1991) ("The elements of a claim for intentional misrepresentation are: (1) a false representation of fact; (2) made with intent to defraud and for the purpose of inducing another to act upon it; and (3) upon which another did in fact rely and was induced to act, resulting in injury or damage.").

g. **Count VII, Negligent Misrepresentation (asserted in CA, KS, KY, MN, MO, WI)**

Plaintiffs argue that the negligent misrepresentation claims asserted by the proposed California, Kansas, Kentucky, Minnesota, Missouri, and Wisconsin classes are suited for class treatment because "Defendants' failure to use reasonable care in providing information is established by common proof." (Doc. #837, p. 105.) Defendants argue the "individualized nature of the materiality and justifiable reliance elements of a negligent misrepresentation claim defeat certification." (Doc. #1017, p. 192.)

For the same reasons discussed regarding fraudulent misrepresentation, the Court finds that individual inquiries are required when evaluating the negligent misrepresentation claims. Like fraudulent misrepresentation, the negligent misrepresentation claims require Plaintiffs to prove reliance, which the Eighth Circuit has held requires an individualized inquiry. *See Borman v. Brown*, 273 Cal. Rptr. 3d 868, 879 (Cal. Ct. App. 2021) ("In our view, and to clarify, the proper formulation of the elements is that negligent misrepresentation does require proof of 'intent to induce another's reliance on the fact misrepresented.'" (quoting *Tindell v. Murphy*, 232 Cal. Rptr. 3d 448, 458 (Cal. Ct. App. 2018))); *Katzenmeier v. Oppenlander*, 178 P.3d 66, 70 (Kan. Ct. App. 2008) ("Although a claim for negligent misrepresentation has different elements than a claim for intentional misrepresentation, both torts require a plaintiff to have relied on a misrepresentation."); *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 580 (Ky. 2004) ("One who . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." (quoting Restatement (Second) of Torts § 552 (Am. Law. Inst. 1977))); *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012) ("To prevail on a negligent

misrepresentation claim, the plaintiff must establish[, among other elements] . . . justifiable reliance upon the information by the plaintiff[.]"); *McClain*, 108 S.W.3d at 52 ("An essential element of both fraud and negligent misrepresentation is reliance on the representation and damage as a result of that reliance."); *Emer's Camper Corral, LLC v. Alderman*, 928 N.W.2d 641, 646 n.3 (Wis. Ct. App. 2019) ("[A] negligent misrepresentation claim requires proof that the plaintiff relied on the defendant's negligent misrepresentation to the plaintiff's detriment[.]"). Thus, the Court declines to certify the negligent misrepresentation claims.

h. **Count VIII, Arkansas Deceptive Trade Practices Act, Ark. Code. Ann. § 4-88-101**

Plaintiffs argue that the claim under the ADTPA, does not require Plaintiffs to prove reliance, and materiality "can be established on a class-wide basis." (Doc. #837, p. 108.) Defendants argue that "[r]eliance is a required element of an ADTPA claim," which requires individualized proof. (Doc. #1017, p. 196.)

"The Arkansas Deceptive Trade Practices Act prohibits '[e]ngaging in any . . . unconscionable, false, or deceptive act or practice in business, commerce, or trade.'" *Apex Oil Co., Inc. v. Jones Stephens Corp.*, 881 F.3d 658, 662 (8th Cir. 2018) (quoting Ark. Code Ann. § 4-88-107(a)(10)). In 2017, the statute was amended, providing "a cause of action for '[a] person who suffers an actual financial loss as a result of *his or her reliance* on the use of a practice declared unlawful' by the Act." *Id.* at 663 (quoting Ark. Code Ann. § 4-88-113(f)(1)(A) (2017) (emphasis added)). However,

> [t]he Arkansas courts have not addressed whether reliance is required under th[e pre-amendment] statute, but [the Eighth Circuit] think[s] the better view is that reliance is an element of the claim. A plaintiff must prove that it suffered damage "as a result of" a violation of the Act; in other words, the defendant's deceptive trade practice must have caused the damage.

Id. at 662.

The Court finds that common questions of fact do not predominate the ADTPA claim. The Court finds that reliance is a required element, both pre- and post-amendment, which is an inherently individual inquiry. Thus, the Court declines to certify the ADTPA claim as predominance is not satisfied.

i. **Count IX, California Unfair Competition Law, Cal. Bus. Prof. Code § 17200; Count X, California False and Misleading Advertising, Cal. Bus. Prof. Code § 17500; Count XI, California Consumer Legal Remedies Act, Cal. Civ. Code. § 1750**

Plaintiffs argue that the UCL and FAL do not require them to prove reliance, and for the CLRA claim, reliance can be established with class-wide proof. Defendants argue that the UCL requires Plaintiffs to prove reliance and "Plaintiffs assert more than a dozen alleged misrepresentations, which varied by label." (Doc. #1017, p. 202.)

"Under both the UCL and FAL, relief is available without individualized proof of deception, reliance, and injury." *Martin v. Monsanto Co.*, No. EDCV-16-2168-JFWSPX, 2017 WL 1115167, at *6 (C.D. Cal. Mar. 24, 2017); *see also Bailey v. Rite Aid Corp.*, 338 F.R.D. 390, 407 (N.D. Cal. 2021) ("Reliance is not an element of a UCL and FAL claim."). "Although [the p]laintiff must prove actual reliance as an element of the CLRA claim, reliance may be presumed as to the entire [c]lass if [the defendant's] misrepresentations were material." *Martin*, 2017 WL 1115167, at *6. "'Because materiality is judged according to an objective standard'—that of the reasonable consumer—it may generally be established by common proof." *Clevenger v. Welch Foods Inc.*, 342 F.R.D. 446, 459 (C.D. Cal. 2022) (quoting *Amgen*, 568 U.S. at 459). Further, since "materiality is the central element of a claim under the CLRA, 'when [it] can be resolved with common proof, [it] predominate[s] over any remaining issues, even those that must be resolved on an individual basis.'" *Id.* (quoting *Bailey*, 338 F.R.D. at 407). "Claims under the CLRA are thus 'ideal for class certification because they will not require the court to investigate

class members' individual interaction with the product[s].'" *Id.* (quoting *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 480 (C.D. Cal. 2012)). Further, "California courts have 'expressly rejected the view that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim that the public is likely to be misled by a representation.'" *Id.* (quoting *Mullins v. Premier Nutrition Corp.*, No. 13-cv-01271-RS, 2016 WL 1535057, at *5 (N.D. Cal. Apr. 15, 2016)). "[A] lack of such evidence does not prevent class certification—even when [the] defendants offer their own extrinsic proof suggesting that the misrepresentation is not material to consumers." *Id.*

Here, the Court finds that common issues of fact and law predominate the UCL, FAL, and CLRA claims. The UCL and FAL claims do not require individual proof of deception, reliance, and injury. *See Martin*, 2017 WL 1115167, at *6. Further, Plaintiffs submit that every 303 THF Product was mislabeled as a tractor hydraulic fluid, a material misrepresentation, so reliance may be presumed to the entire class. *See id*. Plaintiffs do not need to submit consumer survey evidence to demonstrate this. *See Clevenger*, 342 F.R.D. at 459. Thus, the Court finds the predominance requirement satisfied for the California UCL, FAL, and CLRA claims.

j. **Count XVIII, Kansas Consumer Protection Act, K.S.A. § 50-623 et seq.; Count XLVI, Kansas Product Liability Act – Design Defect, K.S.A. § 60-3301; Count XLVII, Kansas Product Liability Act – Failure to Warn, K.S.A. § 60-3301**

Plaintiffs argue that "[t]he central focus of product liability claims is the product and its defectiveness." (Doc. #837, p. 107.) Defendants argue that "there is unquestionably a causation element the courts must analyze in deciding whether to certify" a KCPA claim. (Doc. #1017, p. 203.) They also assert that a KPLA design defect claim requires Plaintiffs to "prove that the product 'reached [a] plaintiff without substantial change[,]' . . . a highly individualized inquiry." (Doc. #1017, p. 206) (citation omitted). As to the KPLA failure to warn claim, Defendants assert

that "Plaintiffs must prove that Defendants did not warn of potential dangers of which they should have known[, b]ut what Defendants knew or should have known varies by class period." (Doc. #1017, p. 206.)

Reliance is not required under the KCPA. *Dollar Gen.*, 2019 WL 1418292, at *25 n.15. So, "[p]redominance is likewise satisfied [where] states . . . do not require reliance in a prima facie consumer fraud claim." *Id.* at *26. "The substantially similar labeling and product placement practices utilized by [the d]efendants can be used as evidence common to all members in the proposed subclasses . . . to make a prima facie showing of consumer fraud." *Id.*

"Under the [KPLA], a product liability claim . . . can be 'brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product.'" *Messer v. Amway Corp.*, 210 F. Supp. 2d 1217, 1227 (D. Kan. 2002), *aff'd*, 106 F. App'x 678 (10th Cir. 2004) (quoting Kan. Stat. Ann. § 60-3302(c) (West)). "Kansas law recognizes three ways in which a product may be defective: (1) a manufacturing defect; (2) a warning defect; and (3) a design defect." *Id.*

> To establish a prima facie case based on negligence or strict liability in a products liability case, plaintiff must produce evidence to establish three elements: (1) the injury resulted from a condition of the product; (2) the condition was an unreasonably dangerous one; and (3) the condition existed at the time it left defendant's control.

Id.

Here, the Court finds that common questions of law and fact predominate the Kansas consumer protection claims. First, the KCPA does not require proof of reliance, and the Court finds that Plaintiffs have submitted evidence that Defendants uniformly labeled their 303 THF Products as tractor hydraulic fluid when it was actually waste. With the substantially similar labeling practices, like in *Dollar General*, common evidence can be used to prove the KCPA

claim. Second, the Court finds that elements of a prima facie KPLA claim can be met with common proof. Plaintiffs have submitted evidence in the form of expert testimony that the 303 THF Products uniformly caused damage to the equipment they were used in, the 303 THF Products were dangerous to equipment because they were improperly formulated, and each 303 THF Product was improperly formulated when it was packaged. Thus, the Court finds that the predominance inquiry is satisfied for the Kansas consumer protection claims.

k. **Count XXII, Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010**

Plaintiffs argue that "[r]eliance also is not required in Missouri." (Doc. #837, p. 106.) Defendants alternatively assert that "[c]ertification is improper because individual issues predominate as to causation, ascertainable loss, and materiality." (Doc. #1017, p. 204) (quotation marks omitted).

"The MMPA prohibits 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 by defining such activity as an unlawful practice." *Plubell v. Merck & Co.*, 289 S.W.3d 707, 711 (Mo. Ct. App. 2009) (quotation marks and citation omitted). "The MMPA 'supplements the definition of common law fraud, eliminating the need to prove an intent to defraud or reliance.'" *Id.* at 713 (quoting *Schuchmann v. Air Servs. Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. Ct. App. 2006)). Specifically, "[i]ndividualized evidence of each [plaintiff's] reliance on the misrepresentation is not required." *Id.* at 714. So, "[t]he substantially similar labeling and product placement practices utilized by [the d]efendants can be used as evidence common to all members in the proposed subclasses . . . to make a prima facie showing of consumer fraud" under the MMPA. *Dollar Gen.*, 2019 WL 1418292, at *26.

Here, the Court finds that common issues of fact and law predominate the MMPA claim. Missouri courts have held that the MMPA does not require individualized evidence as it pertains to reliance, and in *Dollar General*, the court certified an MMPA claim because the plaintiffs submitted common evidence that the defendants uniformly mislabeled their product. As previously discussed, the Court finds Plaintiffs have submitted similar evidence here. Thus, the Court finds the predominance inquiry satisfied as to the MMPA claim.

l. **Count XXV, New York Consumer Protection Law, N.Y. Code § 20-700**

Plaintiffs assert that "[i]ndividual reliance is not required" under New York's consumer protection laws. (Doc. #837, p. 90.) Defendants alternatively contend that, "[t]o prevail under § 350, [the plaintiffs] must . . . prove justifiable reliance" and Plaintiffs fail to demonstrate actual injury. (Doc. #1017, p. 197.)

"To successfully assert a claim under [NYCPL's] § 349(h) or § 350, 'a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.'" *Koch v. Acker, Merrall & Condit Co.*, 967 N.E.2d 675, 675 (N.Y. 2012) (quoting *City of New York v. Smokes–Spirits.Com, Inc.*, 911 N.E.2d 834, 838 (N.Y. 2009)).

> To aid in the interpretation of the second element, the New York Court of Appeals has instructed that a deceptive act or practice has an 'objective definition,' whereby deceptive acts or practices—which may be acts or omissions—are limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances.

New World Sols., Inc. v. NameMedia Inc., 150 F. Supp. 3d 287, 329–30 (S.D.N.Y. 2015) (quoting *Leider v. Ralfe*, 387 F. Supp. 2d 283, 292 (S.D.N.Y. 2005)). "Additionally, neither Section 349 nor 350 require proof of reliance, . . . nor proof that defendants intended to mislead consumers." *Id.* at 330 (quoting *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 409 (S.D.N.Y.

2015)). *Dollar General* held that claims under Section 349 did not require reliance, so common questions of fact predominated. *See Dollar Gen.*, 2019 WL 1418292, at *25–26.

Here, the Court finds that common issues of fact and law predominate the NYCPL claim. New York courts have held that the NYCPL does not require individualized evidence as it pertains to reliance, and in *Dollar General*, the court certified an NYCPL claim because the plaintiffs submitted common evidence that the defendants uniformly mislabeled their product. As previously discussed, the Court finds Plaintiffs have submitted similar evidence here. Additionally, Plaintiffs have submitted expert testimony that the 303 THF Products uniformly caused injury. Thus, the Court finds the predominance inquiry satisfied as to the NYCPL claim.

m. **Count XXXIII, Wisconsin Deceptive Trade Practices Act, Wis. Stat. Ann. § 100.18.**

Plaintiffs argue that "[r]eliance also is not required in . . . Wisconsin." (Doc. #837, p. 106.) Defendants alternatively contend that "[w]hile the WDTPA does not expressly require reliance, courts consider reliance when determining causation." (Doc. #1017, p. 200.)

"To prevail on such a [WDTPA] claim, the plaintiff must prove three elements. First, that with the intent to induce an obligation, the defendant made a representation to 'the public.' Second, that the representation was untrue, deceptive or misleading. Third, that the representation caused the plaintiff a pecuniary loss." *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 732 N.W.2d 792, 798–99 (Wis. 2007) (citations omitted). "A plaintiff does not have the burden of proving reasonable reliance. Unlike common law causes of action for misrepresentations, reasonable reliance is not the standard for a [W]DTPA claim because the legislature created a distinct cause of action." *Id.* at 802.

Here, the Court finds that common issues of fact and law predominate the WDTPA claim. Wisconsin courts have held that the WDTPA does not require individualized evidence as

it pertains to reliance, and Plaintiffs have submitted evidence Defendants uniformly mislabeled their 303 THF Products. Thus, the Court finds the predominance inquiry satisfied as to the WDTPA claim.

n. **Statute of Limitations**

Plaintiffs contend that the statute of limitations "defense is insufficient to preclude certification even if individual issues are present." (Doc. #1085, p. 148.) Defendants argue that various statute of limitations and accrual dates mean that common issues of law and fact do not predominate.

"[C]ertification may be proper under Rule 23(b)(3) 'even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Hays v. Nissan N. Am., Inc.*, No. 4:17-CV-00353-BCW, 2021 WL 912262, at *7 (W.D. Mo. Mar. 8, 2021) (quoting *Day v. Celadon Trucking Servs. Inc.*, 827 F.3d 817, 833 (8th Cir. 2016)). "[A] limitations defense . . . presents individual inquiries that have to be compared to the common issues to determine whether the common issues predominate over the individual issues." *Id.* (quoting *In re BPA Polycarbonate Plastic Prods. Liab. Litig.*, No. 08-1967, 2011 WL 6740338, at *7 (W.D. Mo. Dec. 22, 2011)). While "the applicability of the statute of limitations will require some individualized fact finding[,] . . . given the common issues that exist as to the [product] defect and the elements of the . . . claim[s], the Court [may] find[] that individual statute of limitations issues do not predominate over the common issues." *Id.* at *8.

The Court finds that the statute of limitations defenses do not preclude a finding of predominance as to the claims already discussed. While considering the statute of limitations may require some individual inquiries, the common issues that exist as to Defendants' conduct and 303 THF Products predominate.

o. **Damages**

"To establish predominance, a plaintiff must produce a reliable method of measuring classwide damages based on common proof." *Kleen Prods. LLC v. Int'l Paper*, 306 F.R.D. 585, 601 (N.D. Ill. 2015). "Individual damage calculations, however, are permissible if they do not 'overwhelm questions common to the class.'" *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 798 n.5 (8th Cir. 2014) (quoting *Comcast*, 569 U.S. at 34). Plaintiffs need not prove damages at this stage of the litigation, but Plaintiffs' damages model "must be consistent with its liability case." *Comcast*, 569 U.S. at 37 (internal citations and quotations omitted).

Plaintiffs argue that "proof of damage amounts on a class-wide basis is not a prerequisite to certification . . . [and] Plaintiffs have . . . provided means to determine class-wide damages as to purchase-based injury and flushing costs." (Doc. #837, p. 119.) Defendants contend that Plaintiffs' damage calculations are based on the unsupported assumption that Plaintiffs received zero value from the 303 THF Products, fail to account for Plaintiffs who purchased in multiple states, and are "built on unreliable data." (Doc. #1017, p. 212.)

The Court finds that Plaintiffs have submitted a sufficiently reliable damages model. The Court previously held that Dr. Bruce Babcock's damage calculations are sufficiently reliable for purposes of class certification, and Defendants' "contention that Babcock relied on unsupported data or had errors in his calculations for the flushing damages is the purpose of cross-examination." (Doc. #1124, p. 5.) Further, the Court agrees with Plaintiff that *Comcast* does not stand for the proposition that damage models must be exact, but instead stands for the proposition that damage models must be "consistent with [the plaintiffs'] liability case." 569 U.S. at 37; *see also Dollar Gen.*, 2019 WL 1418292, at *20 ("While [the p]laintiffs may ultimately fail to show each class member is entitled to a full refund, the full-refund model aligns with Plaintiffs' theory that they would not have purchased the at-issue motor oil had they known

it was obsolete."). "The potential need for individualized damages inquiries is not sufficient to overcome . . . findings of predominance and superiority." *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 376 (8th Cir. 2018). Thus, the Court finds that the proposed damage models are consistent with Plaintiffs' theories of liability.

2. **Superiority**

Plaintiffs argue that a class action is the superior method for adjudicating these claims. Defendants assert that each factor in Rule 23(b)(3) weighs against a finding of superiority.

"In determining whether a class action is the superior vehicle for litigation, courts consider . . . the difficulties likely to be encountered in the management of the action." *Barfield v. Sho-Me Power Elec. Co-op.*, No. 11-cv-04321-NKL, 2013 WL 3872181, at *12 (W.D. Mo. July 25, 2013). Specifically, the factors pertinent to superiority are:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)–(D). "[I]t is important to note that [when a] case is comprised of low-value consumer claims, . . . it [is] highly unlikely that individual actions would even be brought in the absence of a class action." *Dollar Gen.*, 2019 WL 1418292, at *21. "Additionally, considering Rule 23(b)(3)(D), single-state classes present a manageable jury trial . . . [because a] jury would receive instruction on the . . . laws of their own state and no others." *Id.*

The Court finds that a class action is the superior method for resolving these claims. Rather than individual claimants in eight states litigating their own claims, where they may have small recoveries if they are only recovering for purchase-price damages, a class action provides

for far greater efficiency. The Court agrees with Plaintiffs that "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." (Doc. #837, p. 125.) No individual cases are pending, and efficient management of the class action is possible. Thus, the Court finds the superiority requirement satisfied.

3. **Ascertainability**

Plaintiffs argue that the classes are ascertainable, as they can be identified "through means including purchase data maintained by retailers." (Doc. #837, p. 124.) However, Defendants assert that putative class members cannot "reliably self-identify that they purchased [the 303 THF Products,]" which forecloses self-identification. (Doc. #1017, p. 144.) They also assert that members cannot "be identified by retailer purchase data" because: (1) the data does not distinguish between purchases made by individuals versus business entities; and (2) retailers "sold Smitty's 303 THF and other 303 THF Products under the same SKU during the class period." (Doc. #1017, p. 148.) Since self-identification and retailer sales data is foreclosed, they assert that Plaintiffs can only rely on proof of purchase, an individualized inquiry.

"Issues regarding ascertainability of class members arise when determining if common issues of fact or law predominate over individual issues." *Dollar Gen.*, 2019 WL 1418292, at *15. "In addition to the Rule 23(a) prerequisites to class certification, '[i]t is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable.'" *Id.* at *12 (quoting *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016)). "Ascertainability is not a separate, preliminary inquiry, but a court should include the ascertainability requirement in its rigorous Rule 23 analysis." *Id.* "A class may be ascertainable when its members may be identified by reference to objective criteria." *Id.* (quoting *McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017)).

> In *Sandusky*, the plaintiffs alleged [the defendant] violated the Telephone Consumer Protection Act (TCPA) by sending unsolicited faxes without the opt-out notice required by the TCPA. [The Eighth Circuit] identified the "fax logs showing the numbers that received each fax" as "objective criteria that make the recipient clearly ascertainable." [The Court] concluded that the district court abused its discretion by denying class certification, despite the fact that the logs may have identified some fax recipients "who don't have rights under the [TCPA]," noting that those class members "just wouldn't be entitled to share in the damages awarded to the class by a judgment or settlement."

McKeage, 847 F.3d at 999 (citations omitted). In *McKeage*, the Eighth Circuit similarly held that where "most [plaintiffs] who may have been subject to [the defendant's] individual defenses were excluded from the class[,]" the class was ascertainable. *Id.* In *McAllister v. St. Louis Rams*, even when the defendant asserted that the data did not accurately identify class members, the Court held that "the data sufficiently identifies class members and provides a mechanism with which to provide class members with notice. Class membership and contact details may be easily confirmed through responses to the class notice." *McAllister v. St. Louis Rams, LLC*, No. 4:16-CV-172-SNLG, 2018 WL 1299553, at *7 (E.D. Mo. Mar. 13, 2018). Additionally, "[s]elf-identification affidavits are appropriate in 'consumer class actions concerning low-cost products . . . where class members are unlikely to retain purchasing records and financial incentives to falsify are low.'" *Dollar Gen.*, 2019 WL 1418292, at *16 (quoting 1 McLaughlin on Class Actions § 4:2 (15th ed. 2018)). "The fact that some individual proof may be required does not prevent the plaintiffs from carrying their burden to show that common questions otherwise predominate." *McAllister*, 2018 WL 1299553, at *8.

The Court finds that the classes are ascertainable. Purchase of a 303 THF Product is an objective criterion to identify the class, which can be ascertained through retailer sales data and confirmed by class notice, like in *McAllister*. *See* 2018 WL 1299553, at *7. Despite contentions that the retailer sales data may have identified individuals who did not purchase the 303 THF

Products, "those class members just wouldn't be entitled to share in the damages awarded to the class by a judgment or settlement." *McKeage*, 847 F.3d at 999 (quotation marks and citation omitted). The Court also agrees with Plaintiffs that "[i]t is speculation that large numbers of class members do not have receipts or other evidence of purchase." (Doc. #1085, p. 141.) While Defendants point to a few examples of Plaintiffs who may not have evidence of purchase, these issues do not appear to overwhelm the common questions that predominate the class and the fact that some individual proof may be required to ascertain the class does not mean the class is unascertainable. *See McAllister*, 2018 WL 1299553, at *8. Further, if needed, courts can and do "rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques." *Dial Complete*, 312 F.R.D. at 52 (citation omitted). Thus, the Court finds that the classes are ascertainable.

4. **Notice**

For classes certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

In view of the Court's mandate to direct to class members the best practicable notice, the Court orders the parties to meet and confer to determine agreed upon proper notice procedures.

IV. CONCLUSION

Accordingly, Plaintiffs' Motion for Class Certification (Doc. #836) is GRANTED IN PART AND DENIED IN PART.

The Court hereby certifies the following classes in accordance with Rule 23:

1. The Arkansas Class; consisting of all persons and entities who purchased 303 THF Products in Arkansas at any point in time from December 1, 2013, to present. For the following claims:

a. Count I, Negligence;

b. Count II, Breach of Express Warranty;

c. Count III, Breach of Implied Warranty of Merchantability; and

d. Count V, Unjust Enrichment.

2. The California Class; consisting of all persons and entities who purchased 303 THF Products in California at any point in time from December 1, 2013, to present. The CLRA Subclass; consisting of all individuals who purchased 303 THF Products in California for personal, family, or household purposes at any point in time from December 1, 2013, to present. For the following claims:

   a. Count I, Negligence;

   b. Count II, Breach of Express Warranty;

   c. Count V, Unjust Enrichment;

   d. Count IX, California Unfair Competition Law ("UCL"), Cal. Bus. Prof. Code § 17200;

   e. Count X, California False and Misleading Advertising ("FAL"), Cal. Bus. Prof. Code § 17500; and

   f. Count XI, California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code. § 1750.

3. The Kansas Class; consisting of all persons and entities who purchased 303 THF Products in Kansas at any point in time from December 1, 2013, to present. The KCPA Subclass; consisting of all individuals, husbands and wives, sole proprietors, or family partnerships who purchased 303 THF Products in Kansas for personal, family, household, business or agricultural purposes at any point in time from December 1, 2013, to present. For the following claims:

   a. Count I, Negligence;

   b. Count II, Breach of Express Warranty;

   c. Count III, Breach of Implied Warranty of Merchantability;

   d. Count V, Unjust Enrichment;

   e. Count XVIII, Kansas Consumer Protection Act ("KCPA"), K.S.A. § 50-623 et seq.;

   f. Count XLVI, Kansas Product Liability Act ("KPLA") – Design Defect, K.S.A. § 60-3301; and

   g. Count XLVII, KPLA – Failure to Warn, K.S.A. § 60-3301.

4. The Kentucky Class; consisting of all persons and entities who purchased 303 THF Products in Kentucky at any point in time from December 1, 2013, to present. For the following claims:

   a. Count I, Negligence; and

   b. Count V, Unjust Enrichment.

5. The Minnesota Class; consisting of all persons and entities who purchased 303 THF Products in Minnesota at any point in time from December 1, 2013, to present. For the following claims:
    a. Count I, Negligence;
    b. Count II, Breach of Express Warranty;
    c. Count III, Breach of Implied Warranty of Merchantability; and
    d. Count V, Unjust Enrichment.
6. The Missouri Class; consisting of all persons and entities who purchased Smitty's Super S 303, Cam 2 Promax 303, Cam2 303 in Missouri at any point in time from December 1, 2013, to present. The MMPA Subclass; consisting of all persons and entities who purchased Smitty's Super S 303, Cam 2 Promax 303, Cam2 303 in Missouri primarily for personal, family, or household purposes at any point in time from December 1, 2013, to present. For the following claims:
    a. Count I, Negligence;
    b. Count III, Breach of Implied Warranty of Merchantability;
    c. Count V, Unjust Enrichment; and
    d. Count XXII, Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010.
7. The New York Class; consisting of all persons and entities who purchased 303 THF Products in New York at any point in time from December 1, 2013, to present. For the following claims:
    a. Count I, Negligence;
    b. Count V, Unjust Enrichment; and
    c. Count XXV, New York Consumer Protection Law ("NYCPL"), N.Y. Code § 20-700.
8. The Wisconsin Class; consisting of all persons and entities who purchased 303 THF Products in Wisconsin at any point in time from December 1, 2013, to present. For the following claims:
    a. Count I, Negligence; and
    b. Count XXXIII, Wisconsin Deceptive Trade Practices Act ("WDTPA"), Wis. Stat. Ann. § 100.18.

Additionally, it is FURTHER ORDERED that

1. the parties shall meet and confer to agree on the proposed notice to potential class members pursuant to Federal Rule of Civil Procedure 23(c)(2)(B). The proposed notice shall be filed within fourteen (14) calendar days of the filing of this Order.

2. The following named Plaintiffs are appointed as representatives of their respective state class(es):

   a. Arkansas: William Anderson, William Edward Anderson Living Trust, Fricker Farms, Inc., MGA Farms, Inc., Alan Hargraves, Jeffery Harrison, J&C Housing Construction, LLC;

   b. California: Jack Kimmich, Soils to Grow, LLC;

   c. Kansas: George Bollin, Adam Sevy, Ross Watermann, Watermann Land and Cattle, LLC, Terry Zornes;

   d. Kentucky: Kirk Egner, Tim Sullivan, Tracy Sullivan, Dwayne Wurth, Wurth Excavating, LLC;

   e. Minnesota: Joe Asfeld, Brett Creger, Jason Klingenberg, K&J Trucking, Inc.;

   f. Missouri**:** Arno Graves, Mark Hazeltine, Ron Nash;

   g. New York: Sawyer Dean, John Miller, Lawrence Wachholder; and

   h. Wisconsin: Mike Hamm, Dale Wendt.

3. The following attorneys are appointed as class counsel, pursuant to Federal Rule of Civil Procedure 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.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: December 13, 2023