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' REPLY 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

I. INTRODUCTION

Plaintiffs' theory—that Defendants sold harmful waste stream as tractor hydraulic fluid—is not new. Since at least January 2021 with the first amended complaint, it was there for Defendants to see. *See* Dkt. 94, ¶¶ 17-18, 137, 169, 171. Sure, there are many allegations of misconduct; Defendants engaged in a wide range of misconduct. But from first to fifth amended master complaint, Plaintiffs asserted that 303 THF was not what it purported to be but harmful waste. *Id*.; *see also* Dkt. 834, ¶¶ 16, 20, 141, 173, 175, 338.[1] Defendants concede as they must that Plaintiffs are masters of their case yet refuse to accept what they clearly understand. They even dub Plaintiffs' theory "definitional fraud" in part to squeeze into "all natural" cases repeatedly cited but much different than this one. They and other cases also involve products labeled with a "premium" feature that otherwise worked. Here, 303 THF was misrepresented as something it fundamentally was not. Defendants want to convince the Court that there are individualizing issues around reliance when most claims do not include that element. Moreover, and despite considerable time and effort, Defendants have located no consumer who knew the truth but purchased anyway. They asked no Plaintiff: "Did you know this was a blend of waste stream materials meeting no specification that would harm your equipment?" They scoured the internet. They cite articles and stop-sale orders. But no one was privy to internal (and still confidential) materials uncovered only through discovery. Even Defendants' declarants stay far away from the salient question, which Defendants clearly did not pose. When the record is scrutinized, Defendants' arguments are unsupported. Even their own human factors expert, Dr. Lester, agreed that under Plaintiffs' theory of the case all purchasers were misled regardless of individual differences. This case is not like those on which Defendants rely. It is well suited for certification.

[1] Plaintiffs know there were other "303" products and when referring thereto, will make that distinction.

II. REPLY TO DEFENDANTS' STATEMENT OF FACTS[2]

A. DEFENDANTS' PRODUCT WAS HARMFUL WASTE.

Defendants spend several pages fighting Plaintiffs on the merits of what 303 THF was, what the term "THF" meant, and whether their product was usable in equipment.[3] None of this changes the analysis. There are common issues with common proof. Who is ultimately correct is not decided at this stage, and Defendants do not squarely address certification in the context of the plainly common issues/evidence that exists. Instead, they push back on the merits, arguing that Plaintiffs are wrong. The merits, however, are not at issue and Defendants may not unilaterally change Plaintiffs' theory of the case to bolster their arguments. Plaintiffs have ample evidence that 303 THF was a worthless waste stream. Defendants' "made-up" internal specification (Opp. at 7) is not evidence of a THF; it is evidence of negligence and inappropriate manufacturing processes.[4] The Court has already held:

- Plaintiffs present evidence that Defendants made affirmative misrepresentations regarding the quality of the 303 THF products when they knew that the products were actually "worthless waste."

- Plaintiffs provided evidence suggesting that Defendants sold a bucket of line wash but marketed and sold the product to appear as a tractor hydraulic fluid that met 303 specifications.

- Plaintiffs present evidence indicating that Defendants concealed the true quality

[2] In this Reply, Plaintiffs refer back to Plaintiffs' Exhibits 1-51 submitting in connection with their Motion for Class Certification. Additional Exhibits are submitted with this Reply, starting with Exhibit 52.

[3] There is no dispute that Smitty's manufactured and sold 303 THF under its own and the Cam2 brand and the labels in this case. Opp. at 2. Defendants take issue with Plaintiffs' claim that Smitty's acquired CAM2 in late 2013 or 2014, citing October 2022 testimony from Jon Lorio in the coverage case. Other evidence supports Plaintiffs' claim, including not only the evidence Plaintiffs previously cited but also, for example, the September 2021 testimony of CAM2 Executive Vice President John Horstman, who testified CAM2 was "purchased by Smitty's Supply." *See* Ex. 52, Horstman 16:9-17:5 (testifying "the CAM2 portion, the lubricant portion, marketing portion was sold to Smitty's Supply.") In any case, it makes no difference, as CAM 2 admits it sold CAM2 Promax 303 and CAM2 303. Dkt. 863 (Answer) ¶ 15.

[4] *See* Ex. 2, Tate Vol. II 139:11-20 ("Q. Can a lubricant manufacturer itself create or make up a tractor hydraulic fluid specification that is safe to sell for use as a tractor hydraulic fluid without the manufacturer first performing any field, rig, laboratory, or other testing on that specification? A. I mean, it's -- it probably wouldn't be wise to do that.").

of the 303 THF products and represented to customers that it was suitable for use in equipment when it, in reality, was not.

- Plaintiffs have produced evidence that damage occurs upon use of the 303 THF products.

Dkt. 991 at 18-19, 30, 32; Dkt. 1076; *see also* Sugg. in Supp. of Class Cert. ("Sugg.") at 12-19. Nonetheless, because Defendants try one more time to fight Plaintiffs on the merits, Plaintiffs briefly respond to the factual arguments in pp. 1-13 of Defendants' opposition.

1. Defendants' "Definitional Fraud Argument is Meritless.

Defendants "definitional fraud" argument does not serve their "all natural" argument or place vice clamp on definition. Misrepresentation-based claims impose liability whether a representation is literally false *or* misleading. *See, e.g. Suchanek v. Sturm Foods*, Inc., 764 F.3d 750, 761 (7th Cir. 2014) (lower court "appear[ed] to assume that a package cannot be misleading if it does not contain literal falsehoods. But that is not the law."). Moreover, Defendants' own officers and employees defined tractor hydraulic fluid as a multi-functional product and testified that 303 THF was marketed and sold as such. Sugg. at 6. Whether some Plaintiffs differentiated between "tractor hydraulic fluid" (useable for both hydraulics and transmission) and "hydraulic" fluid matters not at all. The fluid Defendants sold was neither, but harmful waste. No Plaintiff testified that he did not believe Defendants' product capable of servicing hydraulic needs and instead believed it was harmful waste.

Plaintiffs' experts analyzed whether Defendants' product was in fact what they said it was and employed accepted standards in that endeavor. Whether they are right or wrong is a merits question. Defendants mischaracterize the experts' opinions, industry standards, and the meaning of NIST 130's provisions. The NIST 130 handbook's discussion does not conflict with Plaintiffs' experts. It makes clear that to be a tractor hydraulic fluid, a product must be intended for use in equipment by meeting requirements for that equipment set by OEMs. Defendants' deceptive

intent, or consumers' particular intent, are not the intent NIST 130 refers to; it refers to OEM intent. NIST's "definition" and "standard" are not the separate concepts Defendants say they are. As explained by Mr. Glenn, the word "intended" was "further refine[d]" by section 2.22: "Products *for Use* in Lubricating Tractors" (emphasis added), which states that a lubricant must meet a specification to be called a tractor hydraulic fluid, confirming it was intended *by the OEM* for use in its equipment. As both Glenn and Ron Hayes explain, this was not a "new" definition or concept; THF has always meant a fluid meeting OEM specifications. Ex. 4, Glenn Rpt. ¶¶ 3.1-3.32; Ex. 5, Hayes Rpt. ¶¶ 20-21.[5]

Moreover, Defendants' fluid was always made with improper and inadequate ingredients. Defendants' spin on Chad Tate's testimony about Ag fluid (Opp. at 6-7) is totally discredited by the record. In his January 2022 deposition (well after NIST 130's provisions were finalized), Tate did not say Ag fluid is not called "tractor hydraulic fluid" because of NIST standards. Rather, he unequivocally and firmly testified that Ag fluid is not called "tractor hydraulic fluid" because ***that is not what it is***. Ex. 2, Tate Vol. II, 93:10-17. He testified that it would be "wrong absolutely" to call it tractor hydraulic fluid "[b]ecause it doesn't have the properties that make it a tractor hydraulic fluid" and "it doesn't have any of the add packs or anything in it" and "it doesn't have any of that which would warrant using it in – in a tractor or any – any heavy piece of equipment and so forth." *Id*. at 93:19-94:9. Defendants obviously want to escape these admissions given evidence that Ag fluid and 303 THF are materially the same. Sugg. at 23. They can attempt to do so at trial but for present purposes, it is clear that Mr. Tate agrees that tractor hydraulic fluid must

[5] *See also* Sugg. Ex. 14, Saragusa 15:4-16:1 (agreeing that additive packages and fluid formulations are developed through years of research); Ex. 53, Schenk Vol. I, 76:7-76:18 (agreeing that formulation of fluid is a technical process and development of a specification involves testing); Ex. 52, Horstman 75:25-76:6 (agreeing fluid is formulated to a particular specification). Ex. 6, Smith 40:8-17 (when making a THF, "you have to meet the specifications by which you represent it to be.").

be capable of servicing tractors and equipment with hydraulic needs.

Defendants also argue that the Missouri stop sale did not suggest that 303 fluids were not tractor hydraulic fluid. Plaintiffs disagree, as explained by Mr. Hayes. Defendants also assert that people wanted to buy their product after stop sale orders, but they have no evidence of anyone who knew the truth and purchased, or even wanted to purchase, anyway. The only "evidence" Defendants have located are hearsay emails and internet postings, none of which demonstrate a purchaser who knew Defendants' product was waste stream, met zero specifications, was unsuitable for use and certain to harm their equipment. Any reasonable person who purchased 303 THF thought it was a legitimate fluid, not waste.

2. Defendants' Attempt to Discredit Mr. Glenn and the MDA is Meritless.

Defendants' effort to paint the stop sale and Mr. Glenn as biased is all smoke and mirrors. Outside litigation, they view Glenn favorably. In addition to Tate's favorable comments about Glenn (Sugg. at 5), Cam2's Executive VP John Horstman testified that PQIA is a reputable organization and Glenn is "well respected" and "good people." Ex. 52, Horstman 21:25-22:15.[6] Horstman even emailed Glenn asking for help with lubricant testing. Ex. 54, Glenn Dep. Ex. 100. In June 2020, he asked Glenn for information and help in connection with a competitor. Ex. 55, Glenn Dep. Ex. 102. As recently as July 2022, he asked Glenn about a competitor's product and the difference between VP J20A Plus and "what used to be on 303 Fluids," noting that he did not believe the fluid met specifications. Ex. 56, Horstman Email. The contrast between the aspersions Defendants' lawyers cast and Defendants' own remarks and actions is stark. The same is true for Lubrizol. Horstman agreed it is "well respected in the industry." Ex. 52, Horstman 30:22-25. Defendants' expert Lee Swanger touted Lubrizol in his testimony and agreed that Lubrizol

[6] New exhibits begin with the next sequential number from Plaintiffs' suggestions in support.

employees "are considered experts in the field of formulations and additive technologies for lubricants." Ex. 7, Swanger 33:3-33:6.

3. Defendants' Merits-Based Arguments are Irrelevant to Certification.

Citing Ed Smith's testimony, some cherry-picked excerpts of other Smitty's/CAM2 witnesses and, tellingly, only a single footnote citation to their own technical expert, Defendants argue that their process for creating 303 THF was acceptable. Again this is a merits issue and a common one with common evidence. Plaintiffs have evidence that 303 THF was worthless waste unsuitable for use and harmful. Defendants' disagreement is not a reason to deny certification. This is especially true when they purposefully ignore the evidence. For example, they cite former CAM2 owner Jack Baker's deposition to claim that line flush/lube oil "were not 'used'" oils, when Tate and other witnesses expressly admit that 303 THF was made with used oils. *See, e.g.,* Ex. 9, Tate Vol. I 143:14-144:9 (confirming use of used transformer and turbine oil); Ex. 25, June 9, 2016 Email from J. Hensley ("We purchase used transformer oil, used turbine oil, and lube line flush for use in our economy products.").[7] Defendants' own technical expert acknowledges this. Ex. 57, Swanger 95:16-96:8 (testifying that Defendants used line flush, used transformer oil and used turbine oil in making 303).[8]

Defendants say there was variance in batches of 303 THF, both in component products and

[7] Defendants also cite testimony from Swanger that the silicon levels in 303 THF could be beneficial, but Swanger admitted he did not test to rule out that the silicon was in fact contaminant (Ex. 57, Swanger 116:1-16) and when Tate was shown the test data on the silicon in 303 THF, he did not suggest it was "beneficial"; he said those levels were not acceptable. When asked if the levels were concerning, he said: "Well, sure they are." Ex. 9, Tate Vol. I, 240:3-6; Ex. 58, 284:23-286:3.

[8] As explained in Plaintiffs' opposition to the motion to strike, Glenn did not write that Defendants' use of line wash was appropriate. As he explained, the referenced article discussed the possibility of a responsible use for line wash; that is, if a company was using *its own line wash*, with *known* properties, it might be able to use that in making a lubricant *in the same product group*. Ex. 59, Glenn 350:23-352:12. That is not what Defendants did, and further, the article described Defendants' practice of buying line wash and used oil from third-parties and selling it as tractor hydraulic fluid as "egregious and dangerous." Ex. 59, Glenn 353:8-354:10.

viscosity levels, but under Plaintiffs' theory and in accordance with relevant science, there was no true variance because 303 THF *was always harmful waste*. Meeting one OEM's viscosity benchmark from time to time does not mean a fluid meets a specification. Ex. 59, Glenn 260:21-261:25; 340:11-341:21 (meeting viscosity does not equal meeting a specification, especially when fluid is improperly made); *see also* Ex. 57, Swanger, 176:21-25 (agreeing mere presence of additives in spectrographic analysis is not enough to prove performance). As importantly, Plaintiffs and Defendants agree that 303 THF never met ***any*** OEM specification. Ex. 9, Tate Vol. I, 98:11-15, 104:4-6 (303 THF never met any known specification); Ex. 6, E. Smith 127:23-129:4 (same); Ex. 13, Schenk Vol. II 190:5-191:19, 196:21-197:4; Ex. 14, Saragusa 59:12-18.

Regardless of batch differences Defendants attempt to highlight, the batches *never differed* in that: (1) the fluid never met an OEM specification; (2) did not use an actual additive package; (3) did not begin with appropriate base oil and (4) was harmful waste. *See* Ex. 5, Glenn Rpt. ¶ 4.6 ("unlike actual tractor hydraulic fluid…the start point for Smitty's was neither virgin nor re-refined base oil into which appropriate functional additives could be introduced."); ¶ 4.6, 4.8 (base oil composition was never acceptable and Smitty's never used an additive package); ¶ 4.12 (Defendants did not follow a process that would create tactor hydraulic fluid); Ex. 59, Glenn 341:7-341:12 (to make a THF, "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.") 272:13-272:21 ("When you look at how it's manufactured … I see it as a waste stream, not as a tractor hydraulic fluid. So these have a common -- every one of these has a common issue. I have a common issue with regardless of the color of it, regardless of the brand name."); Ex. 1 Dahm Rpt. All this is based on common proof, with common impact on all consumers. Defendants' attempt to manufacture individualized issues by disputing the merits and ignoring

Plaintiffs' theory should be rejected.

B. ALL LABELS AT ALL TIMES MISREPRESENTED THE NATURE OF DEFENDANTS' PRODUCTS AND HID THE TRUTH.

1. Defendants Do Not Defend the Truth of Their Labels.

With the exception of claiming the 303 THF was "suitable as a replacement where a 303 -type fluid was called for" (Opp at 20),[9] conspicuously absent from Defendants' labeling section (Opp. at 13-26) is any argument that *any label* truthfully and accurately described what was actually in the containers. Instead of defending the truth of the labels, Defendants highlight label differences and claim interpretations of particular statements, without discussion of how that matters to Plaintiffs' theory. There indeed were numerous representations on the labels, and Plaintiffs contend that they all were false or misleading. However, the first and most fundamental misrepresentation was that the product was tractor hydraulic fluid at all. *See* Sugg. at 3 ("At minimum, every label described the product as serving the purpose of tractor hydraulic fluid when it did not."); *id*. at 27 ("More fundamentally, 303 THF was not tractor hydraulic fluid at all."); *id*. at 70-71 ("A central, overriding issue is whether Defendants represented 303 THF as something it was not."). All label representations were not just misleading on a stand-alone basis but in reinforcing that the product was tractor hydraulic fluid in the first place. *See* Sugg. at 27 ("Everything on labels, from name, to description as multifunctional, 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."); *see*

[9] While Defendants now say they "robustly" defend that the fluid was suitable for use where a 303-type fluid was called for, in reality they have no idea what the 303 specification called for and outside litigation, determined that 303 THF *could make no claims with respect to performance* whether in applications where 303 fluid was called for or otherwise. Ex. 14, Saragusa 49:15-50:6, 52:354:11, 55:11-17; Ex. 9, Tate Vol. I, 112:4-114:25, 180:7-12; Ex. 13, Schenk Vol. II, 210:25-213:9. Moreover, and even if an OEM called for a "303" product, it would have been referring to the original John Deere product (with sperm whale oil), which was ***not*** what Defendants were selling.

also Opp. to Mot. to Exclude Dr. Adam Alter, Dkt. 1035. All labels at all times represented the product to be tractor hydraulic fluid capable of servicing hydraulic needs. Plaintiffs' evidence is that it the product was something else entirely. The consumer behavior experts actually agree that a consumer with a goal of purchasing a certain product does not consider or evaluate products that do not meet that goal. Ex. 22, Alter Rpt. ¶33 n. 8. Ex. 23, Lester 197:2-13, 197:21-198:14. Since there is agreement that consumers only consider utility products having utility for the task, there is also agreement that all are commonly misled if what is inside a container is different than what it purports to be. Here, not only was the product not a capable tractor hydraulic (*or* hydraulic) fluid but certain to damage all equipment in which it was used.

2. The Disclaimers were Inconspicuous, Ambiguous and Misleading.

Defendants argue that the disclaimer was conspicuous but the Court already rejected that argument, finding it not conspicuous such that "a reasonable person against whom it is to operate ought to have noticed it." Dkt. 1006 at 4. The version Defendants (misleadingly) present is not more so.[10] Moreover, and for those who may have read disclaimers, Plaintiffs contend that they all were ambiguous and insufficient, and as much or more to the point, did not disclose that the

[10] Defendants cut off part of the Cam2 back label depicted in their brief. Opp. at 16. The label as it actually appeared after the Missouri stop-sale order was as follows, with the front affirming that the product is multi-functional tractor hydraulic oil and the back disclaimer still inconspicuous:

product was not tractor hydraulic fluid at all; rather, they reinforced just the reverse. *See* Ex. 22, Alter Rpt. at 16 (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"). Neither did they reveal that the product was a waste stream. Defendants do not and cannot say otherwise. In addition, their own expert has *disavowed* that suitability depends on whether equipment was manufactured before or after 1974. *See* Sugg. at 25 (citing Swanger 123:25-124:5). According to Swanger, suitability is based on 20-weight applications. That also was nowhere on any of the labels at issue. Dr. Swanger's opinion on pre- vs. post-1974 equipment means, as to all purchasers, *both* that the language that the fluid "has not been recommended" for equipment made after 1974 *and* the language referencing another product for post-1974 equipment were false and at best meaningless. And no label, including the disclaimers, disclosed the truth.

Reference to alternative "premium" product for post-1974 equipment does not change this. First, 303 THF was only in consumers' choice set to begin with because it was falsely and deceptively labelled. No consumer would have even picked it up had they known not only that it was not of what it purported to be, lacked utility and was actually harmful waste. The disclaimer does not alter that fundamental deception. Second, the language at best presenting a false "quality" option: 303 THF vs. J20C when the fluid was never a THF at all or within any THF "quality continuum." It was waste that met *no* specification of *any* OEM for *any* equipment for *any* year and according to Plaintiffs' evidence, certain to damage all equipment in which it was used. Defendants have no evidence of any consumer who knew that the truth but purchased anyway.

C. THE EIGHT STATE PLAINTIFFS

Notwithstanding all alleged "individualized" different Defendants come up with, it remains undisputed that each of the Plaintiffs who seek to be focus-state class representatives were

commonly misled into purchasing harmful waste stream labeled as Defendants' 303 THF based on information on (and omitted from) the labels, including description of what was inside the container. Again, Defendants have not offered evidence of one Plaintiff, or even one class member, who knew the truth and purchased anyway. Each of these Plaintiffs would not have purchased these products were it not for representations on the label, including that the fluid was tractor hydraulic fluid. They also would not have purchased the products had they known that the fluid was not really tractor hydraulic fluid, did not fulfill functions of tractor hydraulic fluid, met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to their equipment. *See* Ex. 47 to Plaintiffs' Suggestions in Support of Class Certification ("Sugg."), Declarations of Class Representatives. Those are the facts relevant to Plaintiffs' case theory.

Many of the alleged factual issues raised in Defendants' Opposition have been rejected by the Court on summary judgment motions, and many are simply inaccurate characterizations of the testimony and evidence. For example, Defendants claim evidence showed purchasers who bought Defendants' 303 THF for non-hydraulic applications, but their characterizations were inaccurate as shown by the following chart:

Defendants' Citation	**Defendants' Characterization**	**What Evidence Actually Shows**
Ex. 157 (Quiroga Claim Form)	Quiroga used 303 THF to grease his irrigation well, "not for a tractor and not as hydraulic fluid." Opp. at 113	Defendants have mischaracterized the evidence. Quiroga purchased and used 303 THF in tractors and in a backhoe, as stated on Def. Ex. 157, which shows use of 303 THF in hydraulic systems of **three John Deere Tractors and one backhoe.**
Ex. 61 (Jenkins testimony)	Jenkins did not use 303 THF in the hydraulic system of his tree harvester. Opp. at 113	Defendants have mischaracterized the evidence. Jenkins testified the tree harvester uses hydraulic oil out of the hydraulic system to lubricate the function of the bar going back and forth. Def. Ex. 61, 121:6-17. In any event, the point is

		irrelevant because Jenkins purchased and used 303 THF in the hydraulic system of several pieces of equipment, including tractors and an excavator. Ex. 60, Jenkins 1st Supp. Resp. Rogs.
Ex. 91 (internet post)	Purchaser bought 303 THF to use as a flush and not as tractor hydraulic fluid. Opp. at 49, 129	Defendants cite a hearsay post that lacks foundation. Furthermore, the poster says only "I use the 303 when I need a cheap hydraulic oil to flush cycle though a hydraulic system to get rid of water-contaminated oil." Def. Ex. 91. He does not say he purchases for only that reason and does not say he is speaking about Defendants' 303 THF. He does say he believes 303 THF is hydraulic fluid (*i.e.* not harmful waste), revealing that he is mistaken about what the product really is.

Defendants also claimed evidence supported that purchasers knew Defendants' 303 THF was lower quality or not intended for their equipment, but purchased or used anyway with not problems. In addition to being irrelevant to showing that any purchaser knew Defendants' 303 THF was not actually tractor hydraulic fluid but instead waste oil, Defendants mischaracterized the evidence, as shown in the following chart:

Defendants' Citation	**Defendants' Characterization**	**What Evidence Actually Shows**
Ex. 69 (Cooke Declaration)	Purchaser was aware 303 THF was not for use in his equipment buy used it anyway because of positive experience and low price. Opp. at 45-46	Declaration is conspicuously silent on key issues. Declarant does not say he knew the 303 THF was waste stream and not hydraulic fluid, does not say he knew the 303 THF was harmful to his system, and does not say he was without equipment issues. Def. Ex. 69.
Ex. 51 (Stone Declaration)	Purchaser knew what he was purchasing, was well satisfied with the performance and understood "303" meant nothing more than economy fluid. Opp. at 45	Declarant is not even speaking about Defendants' 303 THF because the declarant purchased in Missouri from Orscheln and O'Reilly and Defendants' 303 THF **was never sold in Missouri by those retailers**. Declaration is also conspicuously silent on key issues. Declarant does not say he knew the 303 THF was waste stream and not hydraulic fluid and does not say he knew the 303 THF was harmful to his system. Def.

		Ex. 51. Declarant does not "know what he was purchasing" because he mistakenly believed he was purchasing a hydraulic fluid and did not know it was waste stream.
Ex. 52 (Hawkins Declaration)	Purchaser knew what he was purchasing, was well satisfied with the performance and understood "303" meant nothing more than economy fluid. Opp. at 45	Declarant appears to be speaking about another 303 product and is mistaken in believing he purchased Defendants' 303 THF at Orscheln because it was **never sold** at Orscheln in Missouri. Declaration is conspicuously silent on key issues. Declarant does not say he knew the 303 THF was not intended for his equipment, does not say he knew it was waste stream and not hydraulic fluid, does not say he knew the 303 THF was harmful to his system, and does not say he was without equipment issues. Def. Ex. 52.
Ex. 67 (Chalfant Declaration)	Purchaser knew what he was purchasing, was well satisfied with the performance and understood "303" meant nothing more than economy fluid. Opp. at 45	Declarant appears to be speaking about another 303 product and is mistaken in believing he purchased Defendants' 303 THF at Orscheln because it was **never sold** at Orscheln in Missouri. Declaration is conspicuously silent on key issues. Declarant does not say he knew the 303 THF was not intended for his equipment, does not say it was waste stream and not hydraulic fluid, does not say he knew the 303 THF was harmful to his system, and does not say he was without equipment issues. Def. Ex. 67.
Ex. 87 (Lyons Declaration)	Purchaser failed to observe any damage to equipment and recommended product to others after positive experiences. Opp. at 45	Declaration is conspicuously silent on key issues. Declarant does not say he knew the 303 THF was waste stream and not hydraulic fluid and does not say he knew the 303 THF was harmful to his system. He does not say he was without leaks or other equipment issues (which Defendants asked all the Plaintiffs about). Def. Ex. 87.

Defendants also claim there is evidence that purchasers knew of the stop sale or of litigation and purchased again, or were mad about the stop sale. Again, none of this alleged evidence shows any purchaser bought with knowledge that Defendants' 303 THF was not tractor hydraulic fluid but instead harmful waste oil, Defendants again mischaracterize the evidence, as shown by the

following chart:

Defendants' Citation	**Defendants' Characterization**	**What Evidence Actually Shows**
Ex. 88 (Findley Declaration) Ex. 89 (Findley Email)	Findley is a trained mechanic who has full knowledge of the stop sale and lawsuit allegations but would still buy 303 THF today. Opp. at 46	Defendants have mischaracterized the evidence. For Ex. 88: Declarant does not say **anything** about the stop sale or litigation; he does not even mention it. He only says he is aware his declaration "may be used in pending litigation" without any description of what he was referring to or believed the litigation was about. There is no basis to say he has full knowledge of either the stop sale or this litigation. Declaration is conspicuously silent on key issues. Declarant does not say he knew the 303 THF was waste stream and not hydraulic fluid and does not say he knew the 303 THF was harmful to his system. He does not say he was without equipment issues. Declarant also says the equipment he used 303 THF in leaked. Def. Ex. 88. For Ex. 89: Declarant does not say he knew the 303 THF was waste stream and not hydraulic fluid and does not say he knew the 303 THF was harmful to his system. Declarant clearly thinks the 303 THF is "tractor fluid." Ex. 89.
Ex. 118 (Underwood Email) Ex. 119 (Underwood Email)	Underwood was "pissed" and "concerned" about the stop sale. Opp. at 56	Defendants cite a hearsay email that lacks foundation Underwood is unaware and/or unwilling to accept what 303 THF actually was. The emails reflect Underwood believes the fluid is a tractor hydraulic fluid and meets the 303 specification and will not be convinced otherwise, yet there is no dispute in this case that 303 THF meets no OEM specifications. The email does not

		indicate he knows the fluid is waste that is damaging to equipment and that it meets no specification.
Ex. 133 (bobistheoilguy post)	Consumers who were familiar with the stop sale still purchased. Opp. at 89	Defendants cite a hearsay post that lacks foundation. Defendants have also mischaracterized the evidence. The post is made in response to a thread title saying "Georgia joins Missouri in 303 THF ban" but the post refers only to 303 generally and not to Defendants 303 THF. There is no way to know what 303 fluid "jakewells" is talking about. The post does not indicate he knows the fluid is waste that is damaging to equipment and that it meets no specification.

Defendants reference three internet posts as alleged evidence that purchasers knew Defendants' 303 THF was made with line wash or were told it would not work in their equipment but purchased anyway. Defendants again fail to show anyone, through internet post or otherwise, who purchased after being informed that Defendants' 303 THF was not tractor hydraulic fluid at all, but instead a waste product that would harm their equipment. Defendant again mischaracterize the evidence, as shown by the following chart:

Defendants' Citation	**Defendants' Characterization**	**What Evidence Actually Shows**
Ex. 163 (yesterdaystractors.com post))	Person was told the fluid would not work in their equipment but purchased anyway because they wanted to perform flush. Opp. at 119	Defendants cite a hearsay post that lacks foundation. Defendants have also mischaracterized the evidence. The posts refer to 303 generally, not Defendants' 303 THF, so there is no way to know what they are talking about. The poster does not say he purchased 303 THF because he wanted to perform a flush; he says he filled it with 303 for use in the

		system. This is a curious post for Defendants' to cite, because he also says that after filling the 3400 with 303, he used it for 30 hours, had "some repairs" and was changing to "premium stuff."
Ex. 91 (internet post)	Purchaser bought 303 THF to use as a flush and not as tractor hydraulic fluid. Opp. at 120	Defendants cite a hearsay post that lacks foundation. Defendants have also mischaracterized the evidence. The poster says "I use the 303 when I need a cheap hydraulic oil to flush cycle though a hydraulic system to get rid of water-contaminated oil." Def. Ex. 91. He does not say he purchases for only that reason and does not say he is speaking about Defendants' 303 THF. He also mistakenly believes 303 THF is hydraulic fluid (*i.e.* not harmful waste).
Ex. 91 (internet post)	Purchaser knew that Defendants' 303 THF included line wash. Opp. at 120	Defendants cite a hearsay post that lacks foundation. While true the poster says this, the poster still mistakenly believes the product is a hydraulic oil. The post does not indicate he knows the fluid is waste that is damaging to equipment and that it meets no specification.

Defendants also do not have evidence of "many individuals" not exposed to the misrepresentations. Mr. Sullivan read the label misrepresentations, even if the label he recalled did not contain a disclaimer. Opp. at 90-91.[11] Mr. Peck sometimes sent others to purchase the fluid but *did* read the labels. Ex. 61, Peck at 92. Mr. Jackson provided discovery responses and a declaration confirming exposure. The Court also noted that that Jackson "recognized a Smitty's Super S 303 label and purchased products bearing that label. Dkt. 1004 at 2. Consumers who

[11] Respectfully, Plaintiffs are unable to reconcile the Court's holding regarding Mr. Sullivan with its holding that the disclaimer was not such that "a reasonable person … ought to have noticed it." Dkt. 1006 at 9. All UCC statutes are the same. *E.g.*, Ky. Rev. Stat. Ann. §§ 355.1-201(2)(j), 355.2-316(2), (3)(a) (disclaimer must be conspicuous, contain "merchantable" to disclaim that warranty, and be such that "that a reasonable person … ought to have noticed it"). Given that the disclaimer was inconspicuous, it is difficult to understand how its absence would affect Mr. Sullivan.

looked for a yellow bucket with "303" on it (*see* Opp. at 90) also were exposed to labels and believed it contained legitimate fluid. *E,g,* Def. Ex. 54 at 196-97 (Watermann associated 303 with legitimate John Deere product).

Regardless of Defendants attempt to create individual issues with mischaracterizations of the evidence, none of Defendants' factual allegations regarding the named Plaintiffs or class members defeat the common and central issues noted above. Defendants have failed to offer evidence of any Plaintiff or class member who knew the truth – that Defendants' 303 THF was not really tractor hydraulic fluid, did not fulfill the functions of tractor hydraulic fluid, met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to their equipment – and still purchased. Plaintiffs set forth below a summary of the truly relevant evidence regarding each Plaintiff's purchases and use of Defendants' 303 THF, as well as a response to some of Defendants' specifically alleged facts regarding certain Plaintiffs.

1. Arkansas

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

Plaintiff William Anderson ("Anderson") is the trustee of Plaintiff William Edward Anderson Living Trust ("Trust") through which Mr. Anderson operates his farming business. Ex. 62, Anderson Dep. 7:22-8:20; Ex. 63, Trust's Responses to CAM2 Interr., pp. 1-2. Anderson testified he purchased Defendants' 303 THF for use for his farming operations which include the Trust and two small family corporations, Fricker Farms, Inc. ("Fricker Farms")(co-owned with his brother) and MGA Farms, Inc. ("MGA")(owned by his mother). Anderson is the trustee for the Trust, owner of more than 50% of Fricker Farms, as well as its Chairman, President, Treasurer, and the operator and Secretary/Treasurer of MGA. Ex. 62, Anderson Dep. 15:1-3;

Ex. 63, Trust's Responses to CAM2 Interr., pp. 1-2.

Anderson and his Trust made over 80 purchases of Defendants' 303 THF from December 2013 through September 2018 in Lonoke, Arkansas. E x. 64, Anderson Class Membership Form and Purchase Receipts. Anderson provided receipts for the 40 buckets he purchased from July of 2016 through September of 2018. Ex. 64, Anderson Retailer Settlement Class Membership Form and Purchase Receipts; Ex. 62, Anderson Dep. 141:16-23. Anderson testified that these fluid purchases he made were on behalf of "both Fricker Farms and my trust." *Id.* at 266:8-12.

Anderson purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Anderson specifically testified as follows regarding the key factor that the product actually be tractor hydraulic fluid:

> Q: Would you agree with me that 303 is synonymous with economical tractor hydraulic fluid?
>
> A: I would say that I agree with you that it's economical hydraulic fluid of quality.
>
> Q: Okay. I mean, when you generically use the term 303 in the marketplace that that typically refers to the cheaper version, the more economical version of a tractor hydraulic fluid? Would you agree with that?
>
> A: I would agree with that, highlighting that it's still tractor hydraulic fluid.

Ex. 62, Anderson Dep. 235:14-236:2. Anderson further testified that he saw on the label where the product said it provided excellent results in seven performance areas and the OEM specifications it purported to meet. *Id.* at 175-180.

Anderson would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg.; Ex. 62,

Anderson Dep. 258:10-261:24. Anderson confirmed in his deposition that he would not have purchased had he known Defendants' 303 THF was harmful waste:

> If someone had told me that they had a vat and they were making transmission fluid for my tractor and they were dumping line wash and they were dumping transmission oil in this product and they were putting almost no zinc in it and antiwear properties in it, I would not have bought the product.

Id. at 258:19-261:24.

Anderson never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. *Id.* Anderson used Defendants' 303 THF in11 pieces of equipment owned by himself and his Trust, Fricker Farms or MGA Farms: 1989 Case IH 9150 Tractor, 2006 Case IH 2388 Combine, 1995 Komatsu Track Hoe, Case 580L Backhoe, Series 2, John Deere 6410 Tractor, and Case 7130 Tractor. Ex. 63, Trust's Resp. to CAM2Interr.; Ex. 62, Anderson Dep. 74:20-21 (Anderson personally owns the Case 9150). The evidence is that Defendants' 303 was definitely used in each of these pieces of equipment, and Anderson testified that Defendants' 303 THF was 90% of the fluid he bought and used during the 2014-2018 time period. Ex. 62, Anderson Dep. 99-100, 112, 118, 169-175, 186, 229, 237:23-238:4. In addition to these 11 pieces of equipment, Defendants' 303 THF also contaminated a large number of hydraulic implements which were, from time to time, attached to equipment and which included several owned personally by Anderson. *Id.* at 84-86. Anderson testified that payment for most repairs would have been from his Trust, but that some could have been paid by one of the two related family farm entities. *Id.* at 202-204.

Defendants make several factual assertions regarding Anderson and his related entities, many of which are simply inaccurate as shown by the factual summary set forth above. Defendants assert lack of standing and allege facts regarding Anderson and his entities which are similar to those Defendants alleged as to Plaintiffs Harrison and Watermann – standing arguments that have

been rejected by this Court with findings that both the individuals and entities had standing. *See* Dkt. 1068 (Watermann) and Dkt. 1075(Harrison). Anderson, who with his trust personally owns some equipment, bought Defendants' 303 THF, and paid for repairs to equipment, and his farming entities that own equipment all similarly have standing to pursue claims and to serve as Class Representatives in this case.

Defendants reference purchases of 303 THF by Anderson's father, but those are not included in Anderson's list of purchases and are not part of his claims in this case. CITE. Defendants claim that Anderson recovered in the Retailer Settlement for repairs he personally did not pay for, but Anderson's claim and recovery was for himself and all three entities – the Trust, Fricker Farms, and MGA. Defendants claim Anderson knew Defendants' 303 THF was "economy" tractor hydraulic fluid and that he testified he was buying it because he was buying "economical tractors," but the full and complete testimony included, as noted above, Anderson emphasizing that the fluid was supposed to be of sufficient quality as stated on the label and that it was supposed to actually be tractor hydraulic fluid. Ex. 62, Anderson Dep. 212, 235:16-236:2. This further shows that Anderson thought the product was tractor hydraulic fluid and did not know it was harmful waste. Defendants cite to a portion of Anderson's testimony regarding line wash, but that again does not show Anderson knew Defendants' 303 THF was harmful waste (he did not) and is out of context because it omits Anderson's explanation that "[t]here's all kinds of testimony that it's [the fluid] tainted," which he did not know until this lawsuit. Ex. 62, Anderson Dep. 263:24-25. Like all class members, Anderson purchased not knowing Defendants' 303 THF was harmful waste.

b. Alan Hargraves

Plaintiff Alan Hargraves ("Hargraves") and his wife Lindalu Hargraves farmed for more

than forty years, including as the only partners in Moon Lake Farms Partnership No. 2 ("Moon Lake Farms"), which is no longer farming due to their retirement. Ex. 65, Hargraves Dep. 14-16, 43. Lindalu has consented to and ratified the pursuit of claims in this case by her husband, Alan, who was the managing partner. Hargraves has standing, and this Court has denied Defendants' Motion for Summary Judgment argument and held that Hargraves has standing to pursue his and Moon Lake Farms' claims. Dkt. 1014 at 6-7.

Hargraves purchased at least ten buckets of Supertrac 303 and Super S 303 at a Tractor Supply Company store in Arkansas and over 40 buckets of Cam2 Promax 303 and Cam2 303 at Discount Ag in Arkansas during the class period. Ex. 66, Hargraves Retailer Settlement Correction Form; Ex. 65, Hargraves Dep. 50:9-14, 79:7-80:13. Hargraves also separately purchased Defendants' 303 THF from Tractor Supply Company Stores in Mississippi, but those purchases are not included in Hargraves' claims in this case. *Id.* Retailer purchase data reflects 20 of Hargraves' purchases of Defendants' 303 THF. Ex. 67, Hargraves' Retailer Purchase Data.

Hargraves purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg.; Ex. 65, Hargraves Dep. 163:18-20. Hargraves read the label of Defendants' 303 THF prior to first purchasing the product as well as on other occasions and that "I looked at the specs on y'all's products and said that it was okay for me to use in my tractors." *Id.* 65:8-10, 64:22-66:14. He also testified: "When I first purchased the product, I read the label" and that "I went specifically by the label on the 303 that covered that. It covered the Case…" *Id.* at 69:2-9, 148:12-13. He testified that "when they changed from 303 to the other newer brand, [I] did read the label again and all that was different on there was the picture on the front of the 5-gallon bucket, but all the OEMs were listed on the back and that was good enough for me." *Id*. at 69:2-9. His testimony about the conversation with the Discount Ag Store clerk explained the

discussion was about whether the store was selling many buckets of the product and not about the product's nature. *Id.* at 71:19-22, 72:18-19, 71:23-25 (also explaining the clerk "wouldn't have any knowledge of" the nature of the oil or whether it was good quality). The Court's 8/3/23 Order denied Defendants' motion for summary judgment on these grounds and held that Hargraves presented evidence "that he relied on representations on the 303 THF labels before purchasing." Doc. 1014, pp. 8-9. Finally, Hargraves testified that he personally went to the store and purchased Defendants' 303 THF 95%-99% of the time and that if he sent someone to pick it up, he would tell them to get what we always use. Ex. 65, Hargraves Dep. 50:20-51:4, 202:2-11.

Hargraves would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg.; Ex. 65, Hargraves Dep. 190:7-194:22. Hargraves never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. *Id.* at 164:14-4 (noting that "[i]t is in very fine print"). Hargraves used Defendants' 303 THF in his John Deere 8120 Tractor, Case 580 Backhoe, and John Deere 8320 Tractor. Ex. 66, Hargraves Retailer Settlement Correction Form.

Defendants make several factual assertions regarding Hargraves, many of which are simply inaccurate as shown by the factual summary set forth above. Defendants' standing arguments have now been rejected by this Court. Dkt. 1014 at 6-7. Defendants claim Hargraves purchased tractor hydraulic fluid from other manufacturers and commingled fluids, but that conflicts with his actual testimony he only bought Defendants' 303 THF and, even if true, is irrelevant because Defendants' 303 THF was uniformly harmful regardless of the use of other fluids. Dkt. 1076 at 9; Ex. 65,

Hargraves Dep. 60:21-61:18. Like all class members, Hargraves purchased not knowing Defendants' 303 THF was harmful waste.

c. Jeffrey Harrison and J&C Housing Construction, LLC

Jeffrey Harrison ("Harrison") and his construction company, J&C Housing, LLC (J&C) purchased over 80 buckets of Defendants' CAM2 branded 303 THF from 2014-2019, purchasing from Atwoods in Arkansas. Ex. 68, Harrison Retailer Settlement Class Membership Form. Ex. 69, Harrison Dep. 49:6-11, 67:9-68:16, 70:10-20. Although he was unable to locate receipts, Mr. Harrison has produced pictures of some of the empty buckets of Defendants' 303 THF Products. Ex. 70, Photo of Buckets; Ex. 69, Harrison Dep. 75:2-8, 76:15-24. Defendants' 303 THF was the only tractor hydraulic fluid used in these pieces of equipment during the March 2014 through April 2019 time period. Ex. 71, Harrison Second Supplemental Interrogatory Responses, Interrogatory No. 3, pp. 3-4; Ex. 69, Harrison Dep. 49:6-11, 67:9-68:16, 70:10-20.

Harrison and his wife Carla would go to Atwoods together, and he would pick out Defendants' 303 THF to purchase based on the labels. When they went to the checkout line, Jeff would go to assist in loading the buckets while Carla would take her credit card from their joint personal account to the cashier for payment. Ex. 69, Harrison Dep. 53:15-55:7, 197; Ex. 72, J&C Dep. 10:11-17. Harrison testified that 95% of Defendants' 303 THF were purchased by Jeffrey and Carla in this manner on their personal credit card account. Ex. 72, J&C Dep. 22:15-20. For the 5% times when Harrison purchased Defendants' 303 THF Product without Carla present, he paid with personal check and possibly sometimes with a J&C business check. *Id.* at 13:6-7, 16:14-22, 17:1-11.

Harrison and J&C purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Harrison further testified that he purchased

Defendants' 303 THF because the label indicated it would be good for his equipment. Ex. 69, Harrison Dep. 204:20-25 (Q: "When you walked into Atwoods, what made you decide to buy Cam2 that day?" A: "I saw the bucket and I saw the label on the bucket and I saw the price and I said this looks like something that's good for my equipment and it's a good deal and I'm going to purchase it."); (Q: "So backing up, did you pick up a bucket and read the label, sir, the first time?" A: "I looked at the front and I looked over the back and the main thing that caught me was, hey, there's Case and there's all these manufacturers. This is premium, great hydraulic fluid, yeah."). Harrison/J&C would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Like all class members, Harrison/J&C purchased not knowing Defendants' 303 THF was harmful waste.

Harrison/J&C never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. Ex. 69, Harrison Dep. 229:21-230:21. Harrison and J&C used Defendants' 303 THF in a 2004 Case JJ60-580M Backhoe, a 1970s Case 450 Backhoe, and a 1980s Bantam C266 Trackhoe. Ex. 68, Harrison Class Membership Form.

Defendants make several factual assertions regarding Harrison and J&C, many of which are simply inaccurate as shown by the factual summary set forth above. Defendants' standing arguments have now been rejected by this Court with a finding that both Harrison and J&C have standing to pursue the claims. Dkt. 1075 at 8-9. Defendants claim Harrison used Hy-Tran in his newer equipment, but that mischaracterizes testimony which was that he had previously used Hy-Tran until Defendants' labels said their fluid met specs. Ex. 69, Harrison Dep. 44:1-47:17.

Harrison testified he used Defendants' 303 THF in his 1970s Case Backhoe, 1980s Bantam Trackhoe, and 2004 Case Backhoe. *Id.* at 47, 70, 82. (Harrison was not sure if Defendants' 303 THF was used in his 2015 LS tractor, but only because that equipment may not have required any fluid top-offs.) Finally, Defendants cite to Harrison's testimony that the Bantam Trackhoe had leaks when he purchased it, but Defendants fail to cite to the complete testimony that noted the leak was fixed prior to using Defendants' 303 THF. *Id.* at 154:16-21.

2. California – Jack Kimmich and Soils to Grow, LLC

As the Court has already recognized, Plaintiff Jack Kimmich ("Kimmich") and his wife, Sara, are the sole owners and managers of Plaintiff Soils to Grow LLC ("STG"). Dkt. 1010 at 1-2; Ex. 73, Kimmich Dep. 12:9-19, 15:8-19, 23:9-24:3, 24:25-26:5, 26:20-27:12. Kimmich and STG purchased Defendants' 303 THF from 2014-2018, including purchases of Defendants' 303 THF from the Tractor Supply Company store in Gilroy, California. At least 83 buckets of Super S Supertrac 303 and possibly Super S 303 were purchased between 2014 and the Summer of 2018, including 6 buckets of Super S Supertrac 303 in 2014, 9 buckets of Super S Supertrac 303 in 2015, 26 buckets of Super S Supertrac 303 in 2016, 17 buckets of Super S Supertrac 303 in 2017, 9 buckets of Super S Supertrac 303 in March and May of 2018, and 16 buckets of what was possibly/likely Super S 303 in August and November of 2018. Ex. 74, Kimmich Retailer Settlement Corrected Class Membership Form; Ex. 73, Kimmich Dep. 11:2-13:21, 131:24-132:23, 156:17-157:8.

Kimmich/STG purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Kimmich testified that he purchased Defendants' 303 THF because "[w]hen I look at the label, I want to know what it is. It says tractor hydraulic fluid. That tells me it's a hydraulic fluid. When I read the second line down there, it says multiservice

hydraulic, transmission, wet brake lubrication. That means that's an oil that I can utilize." Ex. 73, Kimmich Dep. 315:1-6. Kimmich further testified that he purchased Defendants' 303 THF because "we're looking for fluid that handles clutches, wet pack clutches, brakes, and lubricates … for my two pieces of equipment." *Id.* at 39:23-40:5. He further testified that the label says it "will provide excellent results in the areas of anti-wear properties, brake chatter, extreme pressure properties, foam suppression, clutch PTO performance, rust protection, and water sensitivity. That's all I need to know." *Id.* at 305:4-9. Kimmich further testified that he purchased Defendants' 303 THF because of the equipment manufacturers listed on the back of the label, including "Allis-Chalmers, Allison, Caterpillar, Deutz, Ford, International Harvester, Case, John Deere, Kubota, Massey Ferguson, Oliver, and White." *Id.* at 304:12-21.Kimmich/STG would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg.

Kimmich/STG never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. Ex. 73, Kimmich Dep. 317:1-12. Kimmich and STG used Defendants' 330 THF in a Kubota loader and Volvo loader. Ex. 74, Kimmich Retailer Settlement Corrected Class Membership Form.

Defendants make several factual assertions regarding Kimmich and STG, many of which are simply inaccurate as shown by the factual summary set forth above. In addition, the Court has denied Defendants' motion for summary judgment regarding Kimmich. Dkt. 1010. Furthermore, like all class members, Kimmich and STG purchased not knowing Defendants' 303 THF was harmful waste.

3. Kansas

a. George Bollin

George Bollin ("Bollin") purchased at least 50 buckets of Defendants' 303 THF from 2016-2019, including Super Supertrac 303 and Super S 303 from Tractor Supply and Orscheln stores. Ex. 75, Bollin Retailer Settlement Correction Form and Purchase Data; Ex. 76, Bollin Dep. 90:23-91:2, 332:18-339:16; 338:4-17; *see also* Dkt. 1008 at 3. Each of Bollin's purchases are supported by the records of Tractor Supply Company and Orscheln. Ex. 75, Bollin Retailer Settlement Correction Form and Purchase Data. Bollin purchased only a total of five buckets of Supertrac 303 in Missouri that were included in the *Hornbeck* Settlement, with no purchases in Missouri after the Spring of 2015. None of the Missouri purchases of Supertrac 303 are included in Mr. Bollin's claims in this case. Ex. 75, Bollin Retailer Settlement Correction Form and Purchase Data.

Bollin purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Bollin testified the label was misleading because "it stated it met all these various manufacturers specs" but when tested, it was "used oil out of transformers and turbines". Ex. 76, Bollin Dep. 64:7-22, 329:22-332:16. Bollin would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg.; Ex. 76, Bollin Dep. 64:7-22, 329:22-332:16. Like all class members, Bollin purchased not knowing Defendants' 303 THF was harmful waste.

Bollin never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. Ex. 76, Bollin Dep. 331:2-332:16. Bollin

used Defendants' 303 THF in several pieces of equipment owned by himself, including two John Deere 4440s, a John Deere 4010, an International 806 and a John Deere 9510. Ex. 75, Bollin Retailer Settlement Correction Form and Purchase Data.

Defendants make several factual assertions regarding Bollin, many of which are inaccurate, as shown by the factual summary set forth above, or irrelevant. For example, Defendants claim Bollin likely used Citgo's Orscheln Premium 303 in all his equipment but that does not impact the uniform damage done to his equipment by his use of Defendants' 303 THF. Dkt. 1076 at 9 (finding expert Dr. Dahm provides evidence that Defendants' 303 THF causes uniform damage regardless of other 303 fluids). Defendants claim Bollin failed to properly maintain his Dozer, but he testified that adds fluid to the equipment as needed and changes the filters on regular intervals (Ex. 76, Bollin Dep. 95:2-18) and maintenance practices do not change Defendants' 303 THF's uniformly harmful impacts. *See* Dkt. 1076 at 9; Dkt. 891-1 at 63-64. Further, Bollin and his wife used due diligence to search for responses to discovery to the best of their ability, including going through boxes. Ex. 76, Bollin Dep. 195:21-196:18. Contrary to what Defendants state, Bollin did not testify he did not know the basis for some of his purchases. Instead, he testified the information came from the store records, and he was correct as all 50 of his claimed purchases from 2016-2019 did, in fact, come from the store purchase data. Ex. 76, Bollin Dep. 336:11-337:10; Ex. 75, Bollin Retailer Settlement Correction Form and Purchase Data. Defendants claim Bollin believes he used Missouri bought Smitty's oil in all his equipment when his testimony was that it was only "partially" used in his Dozer and "probably" used in other equipment. Ex. 76, Bollin Dep. 127:11-14. Finally, the evidence is that Defendants' 303 THF purchased in Kansas was definitely used in each of Bollin's equipment and that such products caused damage to each of those pieces of equipment. Ex. 75, Bollin Retailer Settlement

Correction Form.

b. Adam Sevy

Adam Sevy ("Sevy") purchased Defendants' 303 THF from 2014-2017, including purchases of Supertrac 303 in 2014 (5 buckets total), 2015 (5 buckets total), 2016 (5 buckets total), and 2017 (5 buckets total) in Kansas, for a total of 20 buckets. Ex. 77, Sevy Retailer Settlement Class Membership Form; Dkt. 1076 at 2.

Sevy purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg.; Ex. 78, Sevy Dep. 216:8-15, 226:19-24, 227:24-228:4. Sevy would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg.

Sevy never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. Ex. 78, Sevy Dep. 233:2-10. Sevy used Defendants' 303 THF in the following equipment: a 1950s or 1960s Ford tractor, a 2002 John Deere skid steer, a 2000s Hinowa Concrete Buggy, a 1970s Allis Chalmers wheel loader, and a Ford L800 dup truck. Dkt. 1076 at 2. Defendants make several factual assertions regarding that are inaccurate Furthermore, like all class members, Sevy purchased not knowing Defendants' 303 THF was harmful waste.

c. Ross Watermann and Watermann Land & Cattle, LLC

Ross Watermann ("Watermann") is a Colorado resident who purchased the 303 THF Products in Colorado and Kansas. Watermann has the sole ownership interest in Land & Cattle, which is registered in Colorado. Dkt. 1068 at 2. Watermann purchased 14 buckets of the 303 THF

Products from June 2017 to July 2019, which damaged a 1995 Ford Genesis 8970 tractor, a 1998 New Holland 1118 Swather, and 1980 White 2105 Tractor. *Id*. Watermann testified that he did not use the Land & Cattle entity, stating that he did not put the equipment under Land & Cattle's name, did not file a separate tax return or income statement on behalf of Land & Cattle, and used his personal credit card to purchase some of the 303 THF. *Id*.

Watermann purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. When first purchasing, Watermann was looking for a tractor hydraulic fluid that met Ford specs. Ex. 79, Watermann Dep. 199:5-200:5. He testified his understanding is that this class action is about "the junk oil that was sold" and that caused "equipment problems." *Id.* at 187:5-15. Watermann would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Like all class members, Waterman purchased not knowing Defendants' 303 THF was harmful waste. Watermann never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. Ex. 79, Watermann Dep. 219:20-220:4.

Defendants make several factual assertions regarding Watermann and WL&C, many of which are simply inaccurate as shown by the factual summary set forth above. Defendants assert Watermann does not own the equipment and that he does not have standing. When presented with the same argument, this Court denied summary judgment and ruled that both Watermann and WL&C had standing and were proper parties. Dkt. 1068 at 5-7. Defendants next claim Watermann looked for "303" when he went to purchase tractor hydraulic fluid, but his actually testimony was

only that "you look at a John Deere bucket years ago and it was 303, and you look at a bucket there at it says 303 and you think well, there must be some connection," not that he specifically looked for "303". Ex. 79, Watermann Dep. 197:8-11. When discussing his first purchase, he stated he looked at the label to see if it met Ford specs. *Id.* at 199:5-200:5. Defendants state "evidence is beyond doubtful" Watermann's first purchase was of their 303 THF because he testified he only read the label fully at first purchase, but his testimony was clear that he purchased Defendants' 303 THF based on the label and only that he did not read the label "in its entirety" after first purchase and once he was already familiar with the brand. *Id.* at 201:9-202:12. Defendants claim Watermann over-recovered for his White Tractor in the Retailer Settlement but his first statement of the $3,500 was only an estimation. Repairs ended up costing $2,000 and Plaintiffs have corrected his claim form. Ex. 80, WL&C Dep. 59:22-61:11.

d. Terry Zornes

Plaintiff Terry Zornes ("Zornes") is a Kansas resident who purchased Defendants' 303 THF Products in Kansas. Zornes began purchasing Smitty's 303 THF Products in March 2018. Dkt. 1011 at 1-2. Zornes interrogatory responses state he purchased at least 11 buckets of Super S 303 in 2018. *Id*. at 2. Zornes purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg.; Ex. 81, Zornes Dep. 244:10-20. Zornes would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Zornes used Defendants' 303 THF in a Caterpillar 955L Track Loader/Traxavator and a John Deere 7720 Combine. Ex. 82, Zornes 1st Resp. to Defendants First Set of Interrogatories No. 6.

Defendants make several factual assertions, many of which are inaccurate as shown by the factual summary set forth above. For example, Defendants completely mischaracterize Zornes' testimony when saying he was looking for economical fluid, as Zornes testified he relied on Defendants' label because it listed the OEMs for his equipment. Ex. 81, Zornes Dep. 132:12-23; 322:15-323:7. Furthermore, like all class members, Zornes purchased not knowing Defendants' 303 THF was harmful waste.

4. Kentucky

a. Kirk Egner

Kirk Egner ("Egner") purchased at least 40 buckets of Defendants' 303 THF from 2014-2019 from Tractor Supply Company and Rural King in Paducah, Kentucky. Ex. 83, Kirk Egner Retailer Settlement Correction Form and Purchase Data. Many of Egner's purchases are reflected on retailer's data. *Id.*

Egner purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Egner specifically testified the OEM listing, pictures of the "newer looking tractors," and the multi-service hydraulic transmission language were important factors in his purchase decisions. Ex. 84, Egner Dep. 214:25-215:2; 234:8-236:9; 244:13-246:1. Egner would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg.

Egner never noticed the "Misapplication" language Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. Ex. 84, Egner Dep. 242:22-243:23; 250:16-251:10. Egner used Defendants' 303 THF in two International 856 tractors, an International 1586,

and a Ford 3000. Ex. 83, Egner Retailer Settlement Correction Form and Purchase Data.

Defendants make several factual assertions regarding Egner, many of which are inaccurate as shown by the factual summary set forth above. Defendants claim Egner said the labels were not misleading. Setting aside that a misled Plaintiff is not the final arbiter of what is misleading and leads to Defendants' liability, Egner testified the label was misleading in that it says, "hydraulic fluid will provide excellent results" and all the seven bullets of performance benefits listed underneath. He also testified it was misleading when it stated, "we've been field tested, suitable for replacement fluid in the following" because Defendants 303 THF actually contained "line wash and motor oil." Ex. 84, Egner Dep. 240:14-242:7. Further, he testified the language of "tractor hydraulic fluid of this quality is recommended" was misleading because to him it meant that it was suitable for his equipment which was listed. *Id.* at 249:18-250:7.

Defendants also mischaracterize Egner's testimony where he stated Ford tractors pick up condensation. Defendants state Egner admitted Ford's naturally suffer from condensation which in turn lead to hydraulic failures, yet when asked that in his deposition, Egner stated, "I guess you could" -- not that he had experienced condensation leading to hydraulic failures. *Id.* at 161:4-25. Further, Defendants state Egner was only persuaded by the multi-service language on the front and did not read the label after first purchase when his testimony was that he was persuaded by almost the entire label as discussed above and he would read the front and part of the back of the label when re-purchasing. *Id.* at 212:15-23; 214:25-215:2; 234:8-236:9; 244:13-246:1. Any part of the label Defendants want to highlight was misleading and deceptive, and no part of the label informed Egner that Defendants' 303 THF was actually harmful waste. Like all class members, Egner purchased not knowing Defendants' 303 THF was harmful waste.

b. Tim Sullivan

Tim Sullivan purchased at least 40 buckets of Defendants' 303 THF from 2014-2019 at Tractor Supply Company. Ex. 85, Tim Sullivan Retailer Settlement Class Membership Form. Tim Sullivan purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Tim Sullivan specifically testified that he relied on the various OEM's and the fact that it was a universal hydraulic fluid:

> Q: Can you tell me . . .what it is about this label that you specifically relied upon?
>
> A: What it said on the back of it. I mean, John Deere 303, and Massey, Ford, International Harvester, Caterpillar. I mean it – it named everything.
>
> Q: Anything else you relied upon on the back of the label in making your purchase?
>
> A: No, it's just tractor – it's tractor hydraulic fluid – universal hydraulic fluid.
>
> Q: And when you say it's universal hydraulic fluid, where does that come in?
>
> A: Well, it's Tractor Hydraulic Fluid 303. And the way I understand that, that's for transmissions and hydraulics, the works. Because everything runs off of your hydraulic and your transmission, roughly the thing – same thing.

Ex. 86, Tim Sullivan Dep. 178:24-179:17.

Tim Sullivan would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Tim Sullivan testified that he understood this case to be about Defendants' 303 THF being "junk". Ex. 86, Tim Sullivan Dep. 45:12-18.

Tim Sullivan never noticed the "Misapplication" language which Defendants

inconspicuously placed on the lower back of the 5-gallon bucket labels. *Id.* at 181:22-182:3. Tim Sullivan used Defendants' 303 THF in a Caterpillar 120, a John Deere 4430, a John Deere 4440, a Ford 8240 and a Case 580 Super K owned by himself. Ex. 85, Tim Sullivan Retailer Settlement Class Membership Form. The evidence is that Defendants' 303 was definitely used in each of these pieces of equipment.

Defendants make several factual assertions regarding Tim Sullivan, many of which are simply inaccurate as shown by the factual summary set forth above. For example, Defendants claim Tim Sullivan only relied on the OEM listing, but he also relied on the label's claim that it was a "universal" tractor hydraulic fluid. Ex. 86, Tim Sullivan Dep. 178:24-179:17. Furthermore, like all class members Tim Sullivan purchased not knowing Defendants' 303 THF was harmful waste.

c. Tracy Sullivan

Tracy Sullivan purchased at least 39 buckets of Defendants' 303 THF from 2014-2019 from the Tractor Supply Company and Rural King stores in Kentucky. Ex. 87, Tracy Sullivan Class Membership Form. Tracy Sullivan purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Tracy Sullivan specifically testified he relied on the multi-service hydraulic transmission language, the anti-wear and other properties, and the fact it lists John Deere, Caterpillar, and Ford. Ex. 88, Tracy Sullivan Dep. 39:19-45:5, 49:22-50:23. Further, Tracy Sullivan testified that Defendants should be liable for hydraulic problems because the product did not conform to the label representations. *Id.* at 196:24-197:7. Tracy Sullivan would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil,

and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg.

Tracy Sullivan never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. Ex. 88, Tracy Sullivan Dep. 179:14-20. Tracy Sullivan used Defendants' 303 THF in a Caterpillar E110B, a John Deere 4430, a John Deere 4440 and a New holland E35 owned by himself. Ex. 87, Tracy Sullivan Retailer Settlement Class Membership Form.

Defendants make several factual assertions regarding Tracy Sullivan, many of which are inaccurate as shown by the factual summary set forth above. Defendants also contend Tracy Sullivan only looked at pictures to ensure he was purchasing the same brand, but he explained he glanced at the entire label even after the pictures changed "to make sure it was the same I had been buying." Ex. 88, Tracy Sullivan Dep. 33:1-10; 49:22-50:23. Furthermore, like all class members Tracy Sullivan purchased not knowing Defendants' 303 THF was harmful waste.

d. Dwayne Wurth and Wurth Excavating LLC

Plaintiff Dwayne Wurth ("Wurth") is the sole owner and manager of Wurth Excavating LLC ("Wurth Excavating"). Ex. 89, Wurth Dep. 33:17-18. Wurth purchased Defendants' 303 THF for use personally and by Wurth Excavating LLC. *Id.* at 99, 107. He primarily used Defendants' 303 THF in a skid steer owned by Wurth Excavating LLC. *Id.* at 36:8-10, 37-41. The skid steer was used for Wurth Excavating LLC business as well as for personal use by Mr. Wurth on his property.

Wurth and Wurth Excavating purchased 30 buckets of Defendants' 303 THF from 2014-2019. Ex. 90, Wurth Retailer Settlement Class Membership Form; Ex. 89, Wurth Dep. 136:7-138:4. Wurth's and Wurth Excavating's purchases of Defendants' 303 THF were primarily from the Rural King store in Paducah, Kentucky, with some purchases also from the Rural King store

in Harrisburg, Illinois. *Id.* at 83-89. Wurth purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Wurth testified that he purchased based on what was stated on the label and that he wanted to "make sure it'd meet what spec I needed" and that it would meet CAT specs. Ex. 89, Wurth Dep. 86:22-25, 88:5-24, 91:15-92:4, 100:13-15, 105:3-4. Wurth also testified that the performance benefits stated on the label made him believe it was a quality product. *Id.* at 104:2-10.

Wurth would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Wurth never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. Ex. 89, Wurth Dep. 104:11-25. Wurth used Defendants' 303 THF in a 2012 Caterpillar 277 skid steer. Ex. 90, Wurth Retailer Settlement Class Membership Form.

Defendants make several factual assertions regarding Wurth and Wurth Excavating which are inaccurate as shown by the factual summary set forth above. Furthermore, like all class members Wurth and Wurth Excavating purchased not knowing Defendants' 303 THF was harmful waste.

5. Minnesota

a. Joe Asfeld

Each year during the time period of December 2013 through 2019, Joe Asfeld ("Asfeld") purchased between 5 and 15 buckets of Defendants' 303 THF from the Farm and Fleet store in Sauk Centre, Minnesota. He purchased Super Supertrac 303 in 2014 through the first half of 2018 and then Super S 303 in the latter part of 2018 and in 2019. Ex. 91, Asfeld Dep.

51:17-52:5, 188:6-9, 229:7-10, 350:2-7, 352:8-13; Ex. 92, Asfeld 1st Supp. Resp. to Interr., pp. 2-3.

Asfeld purchased Defendants' 303 THF Products based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Asfeld specifically testified his reasoning for purchasing Defendants' Product was "because of what I found on the label." Ex. 91, Asfeld Dep. 53:8-11. Asfeld would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47 SIS. Asfeld testified that he now understands Defendants' 303 was "bad" and "contaminated." Ex. 91, Asfeld Dep. 146, 152, 156-157, 175, 214-216, 222, 238, 240, 270, 306, 316-317.

Asfeld never noticed the "Misapplication" language Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. *Id.* at 55:25-56:3. Asfeld used Defendants 303 THF in numerous pieces of equipment, including a John Deere 4400, a John Deere 4955, two John Deere 4020s and a New Holland TC140. Ex. 93, 2nd Supp. Resp. Interr., No. 6-7.

Defendants make several factual assertions, many of which are inaccurate as shown by the factual summary set forth above. Defendants initially state many Plaintiffs did not rely on the list of OEMs but then contradict themselves in Asfeld's facts saying, "although he relied on the OEMs listed on the label...," and Asfeld did in fact rely on the OEMs and other properties listed on the label. Ex. 91, Asfeld Dep. 341:6-16. Defendants state Asfeld is seeking over $76,000 in repair damages for one of his tractors when he testified, "I'm asking for compensation for a portion of what your product has done, what Smitty's has done to the tractor." *Id.* at 196:16-18. Defendants argue that Asfeld would not have understood the Misapplication language even if he had noticed it, showing that the language is confusing and ambiguous. Furthermore, like all class

members Asfeld purchased not knowing Defendants' 303 THF was harmful waste.

b. Brett Creger

Brett Creger ("Creger") purchased over 80 buckets of Defendants' 303 THF from 2014-2017 from the Tractor Supply Company stores in Grand Forks, North Dakota and Thief River Falls, Minnesota. Ex. 94, Brett Creger Retailer Settlement Class Membership Form and Receipts; Ex. 95, Creger Dep. 137:7-13, 224:17-22. Creger purchased Defendants' 303 THF Products based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg.; Ex. 95, Creger Dep. 143:14-144:5.

Creger would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. When discussing Defendants' 303 THF Product, Creger testified, "my theory is junk, that's contaminated, dirty. If you call something a bathroom facility word, that's what it means to me", and "their own employees are talking about how contaminated this oil is." Ex. 95, Creger Dep. 86:22-88:8.

Creger never noticed the "Misapplication" language on the lower back of the 5-gallon bucket labels. Ex. 95, Creger Dep. 163:25-169:25. Creger used Defendants' 303 THF in numerous pieces of equipment, including two New Holland 688 tractors, a Tiger Cat 822 Shear, and a Hydro-Ax 570 Shear. Ex. 94, Creger Retailer Settlement Class Membership Form.

Defendants make several factual assertions, many of which are inaccurate as shown by the factual summary set forth above. For example, Defendants state Creger's OEM requires a different viscosity fluid for use in colder temperatures, but Creger testified, "recommended. It

doesn't say you can't. It says recommended. . .It doesn't say anything else but recommended." Ex. 95, Creger Dep. 290:15-291:11. Further, Defendants listed the OEMs on their 303 THF label. Finally, like all class members Creger purchased not knowing Defendants' 303 THF was harmful waste.

c. Jason Klingenberg and K&J Trucking, Inc.

Jason Klingenberg ("Klingenberg") is the sole owner and manager of K&J Trucking, Inc. ("K&J"). Ex. 96, Klingenberg Dep. 62:25-63:2; 68:12-14. Mr. Klingenberg purchased Defendants' 303 Products for use personally as well as by K&J. He used Defendants' 303 Products in equipment owned by himself personally as well as equipment owned by K&J. *Id.* at 12-14, 62:25-63:2.

Klingenberg and K&J purchased at least 110 buckets of Defendants' 303 THF from 2014- 2019, including Super Supertrac 303 and Super S 303 from Tractor Supply and CAM2 Promax 303 and CAM2 303 from Bomgaars and another retailer. Ex. 97, Klingenberg Retailer Settlement Class Membership Form. Klingenberg and K&J purchased Defendants' 303 THF Products based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg.; Ex. 96, Klingenberg Dep. 37:2-14. Klingenberg and K&J would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Klingenberg's understanding of this case is that "Smitty's CAM2 didn't – was poor oil and it didn't meet the specs that was on the label. . .it was basically waste oil that was put in a pail." *Id*. at 86:17-87:2. He stated it was supposed to be good for multiple purposes and for newer equipment and it wasn't. *Id.* at 87:9-21. When asked what it meant to be a class

representative, he said, "to represent other people that are in the same position I was that looked at this stuff, looked at these pails, thought it was good stuff, that was misrepresented." *Id.* at 218:21-219:3.

Klingenberg never noticed the "Misapplication" language on the lower back of the 5-gallon bucket labels. *Id.* at 213:6-22. Klingenberg used Defendants' 303 THF in several pieces of equipment. Ex. 97, Klingenberg Retailer Settlement Class Membership Form.

Defendants make several factual assertions, many of which are inaccurate as shown by the factual summary set forth above. Defendants state Klingenberg never looked for receipts or manuals to produce, which is not true. In his deposition, he testified he would have to go back and look "some more." Ex. 96, Klingenberg Dep. 32: 5-9. He also never said he didn't look for equipment manuals, but said he did not know he needed to produce the manual. *Id.* at 121:14-122:9. Finally, Klingenberg said he generally thought Defendants' 303 THF was good fluid because "a lot of people talked about it. Other farmers – you'd hear it advertised", not just a mechanic as Defendants claim. None of that testimony indicated that Klingenberg or K&J purchased Defendants' 303 THF for any reason other than the statements on the label, as noted above. Furthermore, like all class members Klingenberg and K&J purchased not knowing Defendants' 303 THF was harmful waste.

6. Missouri

a. Arno Graves

In the time period of December 2013 through December of 2019, Plaintiff Arno Graves ("Graves") purchased CAM2 Promax 303 Tractor Hydraulic Oil and CAM2 303 Tractor Hydraulic Oil from Atwoods stores in Missouri and Oklahoma. He also purchased Super S Supertrac 303 Tractor Hydraulic Fluid from Tractor Supply Company in Oklahoma. Ex. 98, Arno Graves Retailer

Settlement Correction Form in 303 Retailer Settlement; Ex. 99, Graves Dep., pp. 89, 91, 164-175. Graves' purchases are supported by the records of Atwoods and Tractor Supply Company, as well as by his receipts. Ex. 100, Records Regarding Arno Graves' Purchases of Defendants' 303 THF. Graves purchased at least 23 buckets of CAM2 Promax 303 in Missouri, 17 buckets of CAM2 Promax 303 or CAM2 303 in Oklahoma, and 2 buckets of Supertrac 303 in Oklahoma. Ex. 98, Correction Form; Ex. 100, Purchase Records. Graves purchased 30 of these buckets after 2015, and he purchased 13 buckets in Oklahoma between 2017 and 2019. *Id.*

Graves purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Graves saw the listed OEMs and understood from the label that Defendants' 303 THF was a premium product. Ex. 99, Graves Dep. 89:18-23, 214:25-216:4, 217:8-16. Graves would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg.

Graves never noticed the "Misapplication" language which Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. Ex. 99, Graves Dep. 214:24-216:4. Graves used the CAM2 Promax purchased in Missouri and Defendants' 303 THF purchased in Oklahoma in the following equipment: a 1975 John Deere 2030 Tractor; a 1984 Case 480e Backhoe, and a 1973 International 1066 Tractor. Ex. 98, Correction Form.

Defendants make several factual assertions regarding Graves, many of which are inaccurate as shown by the factual summary set forth above. Furthermore, like all class members Graves purchased not knowing Defendants' 303 THF was harmful waste.

b. Mark Hazeltine

Mark Hazeltine ("Hazeltine") purchased at least 8 buckets of Defendants' 303 THF from 2015-2018, including Cam2 Promax 303 from Rural King in Wentzville, MO. Ex. 101, Hazeltine Class Membership Form. Hazeltine purchased Defendants' 303 THF Products based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg.; Ex. 102, Hazeltine Dep. 135:10-17. Hazeltine would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Hazeltine specifically testified that he now understands that Defendants' 303 THF "wasn't any good. It was trash. They used – how would you say? Not superior products. It was used oil and had different wash in it and different stuff that could cause problems." Ex. 102, Hazeltine Dep. 65:17-21. He further testified, "if I would have known it would have done, you know, damage to my tractor and my log splitter, no, I wouldn't have purchased it." *Id.* at 64:18-20. Hazeltine used Defendants' 303 THF in a Ford 1710 Tractor and a Bush Hog Log Splitter. Ex. 101, Hazeltine Class Membership Form.

Defendants make several factual assertions, many of which are inaccurate as shown by the factual summary set forth above. For example, Defendants mischaracterize Hazeltine's testimony when they say he believed CAM2 303 was causing leaks in his equipment but still continued to use it. He testified not too long after he began using it, things started to leak and he only "kind of believed" it was due to the CAM2 303 fluid and that it was only later when he saw a Facebook post and read about others having similar problems. Ex. 102, Hazeltine Dep. 64:22-66:24. Defendants also claim Hazeltine only focused on the multifunctional hydraulic transmission fluid

language but in fact, OEMs were important to him in that it was compatible with Ford tractors. *Id.* at 137:1-139:8. Furthermore, like all class members Hazeltine purchased not knowing Defendants' 303 THF was harmful waste.

c. Ron Nash

In the time period of December 2013 through December of 2019, Plaintiff Ron Nash ("Nash") purchased CAM2 Promax 303 Tractor Hydraulic Oil and CAM2 303 Tractor Hydraulic Oil from Atwoods stores in Missouri and Oklahoma. Ex. 103, Ron Nash Retailer Settlement Class Membership Form; Ex. 104, Nash Depo., pp. 20-21, 59-60, 73, 225-240, 249-253. Nash purchased at least 14 buckets of CAM2 Promax 303 in Missouri and 18 buckets of CAM2 Promax 303 and/or CAM2 303 in Oklahoma. Ex. 103, Ron Nash Retailer Settlement Class Membership Form.

Nash purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47 to SIS. Based on the label, Nash believed Defendants' 303 THF was a premium fluid. Ex. 104, Nash Dep. 20:11-21:19, 239:17-240:4, 255:3-12. Nash would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg.; Ex. 104, Nash Dep. 73:1-74:19. Nash specifically testified as follows:

> "Well it's [this case is] about the damages that Smitty's oil did, you know, to our equipment. And the – the cost of repairing it and then the cost of buying the oil that we though was a premium oil and find out that it's not, you know."
>
> "Like the line wash and [used] transformer oil and such as that that went into it. You now, if – if we had had any idea, or if I had had any idea that that's what it was, I would not have purchased it even though it was cheaper, you know."

Ex. 104, Nash Dep. 73:6-15; see also 255:3-12. Nash used Defendnats' 303 THF in his 1968 Allis

Chalmers D14/D15 and a 1968 International backhoe. Ex. 103, Ron Nash Retailer Settlement Class Membership Form. Like all class members Nash purchased not knowing Defendants' 303 THF was harmful waste.

7. New York

a. Sawyer Dean

Sawyer Dean ("Dean") purchased Defendants' 303 THF from 2014-2019, including purchases of Supertrac 303 and Super S 303 in June, September and December 2015 (8 buckets total), February, March, June, July, August and September 2016 (17 buckets total), January, February, March, April, July, August, September and October 2017 (34 buckets total) and February, May, June and August 2018 (10 buckets total) in New York. Ex. 105, Dean Retailer Settlement Correction Form and Purchase Data. Dean purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg.; Ex. 106, Dean Dep. 156:23-157:7. Dean would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Dean testified that Defendants were engaged in false advertising in that their 303 THF was not what was advertised and not the quality they represented it to be on the pail and that it did "extreme damage" to his equipment. Ex. 106, Dean Dep. 6:20-7:16.

Dean never noticed the "Misapplication" language Defendants inconspicuously placed on the lower back of the 5-gallon bucket labels. *Id.* at 153:6-18. Dean used Defendants' 303 THF in a Ford TW-15 tractor, a Ford TW-35 tractor, a Ford A64 wheel loader, an International 1086 tractor, a John Deere 2240, a Ford 8830, and a John Deere 4440. Ex. 105, Dean Retailer

Settlement Correction Form and Purchase Data.

Defendants make several factual assertions about Dean, many of which are inaccurate as shown by the factual summary set forth above. Defendants state Dean associates his equipment damage on his John Deere 2440 to their product but has never had it diagnosed. Yet, Dean has completed all regular maintenance, upkeep, fluid checks, and filter changes per periodical and annual requirements on that tractor. In fact, regarding all his equipment, he drained the fluid in each after purchasing and replaced it with/exclusively used Defendants 303 THF. Ex. 106, Dean Dep. 168:20-175:19. Defendants also state Dean did not know any of the OEM requirements for the equipment in which he used their products. However, Dean testified several times that in seeing all the OEMs for the equipment he owned on Defendants' 303 THF label, it led him to believe their product was suitable for use in his equipment. *Id.* at 153:6-18; 156:23-157:7; 159:2-19; 160:18-22. Finally, like all class members Dean purchased not knowing Defendants' 303 THF was harmful waste.

b. John Miller

John Miller ("Miller") purchased Defendants' 303 THF from 2014-2018, including 29 five-gallon buckets of Defendants' 303 THF, specifically Super Supertrac 303 and Super S 303 from Tractor Supply Company stores in New York. In 2014, he bought 1 bucket of Super S Supertrac 303. In 2015, he bought 6 buckets of Super S Supertrac 303. In 2016, he bought 11 buckets of Super S Supertrac 303. In 2017, he bought 3 buckets of Super S Supertrac 303. In May 2018, he bought 1 bucket of Super S Supertrac 303. From July through November 2018, Mr. Miller bought 7 buckets of Super S 303. Ex. 107, Miller Retailer Settlement Correction Form and Purchase Data.

Miller purchased Defendants' 303 THF based on the label, including that the fluid was

tractor hydraulic oil/fluid. Ex. 47, Sugg. Miller specifically testified his purchase decisions were based off looking at the label and making sure it would work in his equipment. The anti-wear language and the OEM names were important because he wanted to buy something the manufacturer recommended. Ex. 108, Miller Dep. 99:5-100:18; 230:12-18. Miller would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Miller's understanding of this case is about Defendants selling "faulty oils." Ex. 108, Miller Dep. 51:16-18.

Miller never noticed the "Misapplication" language on the lower back of the 5-gallon bucket labels. *Id.* at 99:20-23. Miller used Defendants' 303 THF in an International 1086, a Massey Ferguson 1130, and an International 756. Ex. 107, Miller Retailer Settlement Correction Form and Purchase Data.

Defendants make several factual assertions, many of which are inaccurate as shown by the factual summary set forth above. For example, Defendants mischaracterized Miller's testimony in that he only attributed his damage to Defendants 303 THF after reading a Facebook ad when he actually doesn't remember what the ad said and he attributed his damage to the fluid after he had been experiencing issues he knew he shouldn't have and that he wasn't causing or doing anything wrong himself. See above; Ex. 108, Miller Dep. 54:6-56:24. Defendants also assert Miller only read selected portions of the label when purchasing even though he read the entire thing besides the Misapplication language which Defendants inconspicuously placed in fine print on the lower back part of the label. *Id.* at 99:20-23. Finally, like all class members Miller purchased not knowing Defendants' 303 THF was harmful waste.

c. Lawrence Wachholder

Lawrence Wachholder ("Wachholder") purchased Defendants' 303 THF from 2014-2018, including 85 five-gallon buckets and 15 two-gallon jugs of Defendants' 303 THF, with all of his purchases from the Tractor Supply Company store in Dansville and Geneseo, New York. Ex. 109, Wachholder Retailer Settlement Correction Form and Purchase Data. Wachholder's purchases are reflected on the retailer purchase data. *Id.*

Wachholder purchased Defendants' 303 THF based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg.; Ex. 110, Wachholder Dep. 69:4-8. Wachholder would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Wachholder testified that his general understanding of the present lawsuit is about Defendants' product being defective and being advertised to meet needs when it did not. Ex. 110, Wachholder Dep. 95:9-15.

Wachholder never noticed the "Misapplication" language on the lower back of the 5-gallon bucket labels. *Id.* at 241:23-247:19. Wachholder used Defendants' 202 THF in a John Deere 6620, a John Deere 4250, and a Ford 2000. Ex. 109, Wachholder Retailer Settlement Correction Form and Purchase Data.

Defendants make several factual assertions, many of which are inaccurate as shown by the factual summary set forth above. Furthermore, like all class members Wachholder purchased not knowing Defendants' 303 THF was harmful waste.

8. Wisconsin

a. Michael Hamm

Michael Hamm ("Hamm") purchased four total buckets Super S Supertrac 303 in Wisconsin in the spring and fall of 2015. Hamm purchased ten buckets of Cam2 303 from Fleet Farm in Wisconsin November 2018 and ten buckets of Cam2 303 from Fleet Farm in Wisconsin in 2019. Ex. 111, Hamm Retailer Settlement Class Membership Form. Hamm has produced bucket pictures to support these purchases. Ex. 112, Bucket Pictures.

Hamm purchased Defendants' 303 THF Products based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg.; Ex. 113, Hamm Dep. 151:10-18. He testified that he read on the label that it was compatible with Ford tractors, which made him think it was compatible with his skid steer because "Ford is New Holland." *Id.* at 152:3-13. He also stated all the equipment pictures on the label were newer than 1974 and that he remembers seeing the superior lubrication and anti-wear language. *Id.* at 177:5-8; 211:3-5.

Hamm would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Hamm's understanding of the case is about Defendants selling a product that is labeled differently than what is actually in the pail. Ex. 113, Hamm Dep. 57:12-58:6. Hamm argued that Defendants should have never put it on the shelves because he wouldn't have believed, after reading the label, that it's not actually decent hydraulic fluid. *Id.* at 156:3-11; 176:11-16.

Hamm never noticed the "Misapplication" language on the lower back of the 5-gallon bucket labels. *Id.* at 156:23-157:7. Hamm used Defendants' 303 THF in an International 1086

tractor, an International 4786 tractor, an International 1440 tractor, a Gehl 7810 skid steer, a Kenmore manure truck, an International 756 tractor, a Case 2890 tractor, and a New Holland LS150 skid steer. Ex. 111, Hamm Retailer Settlement Class Membership Form.

Defendants make several factual assertions, many of which are inaccurate as shown by the factual summary set forth above. Defendants state Hamm purchased Ag Fluid, which was not labeled as "tractor hydraulic fluid" but Hamm testified he purchased a lot of Defendants Ag-20 fluid not realizing what it was. Ex. 113, Hamm Dep. 194:2-16. Furthermore, like all class members Hamm purchased not knowing Defendants' 303 THF was harmful waste.

b. Dale Wendt

From 2014-2019, Dale Wendt ("Wendt") purchased more than 20 buckets of Cam 2 Promax 303 and CAM2 303, all in Wisconsin. Ex. 114, Wendt Resp. to Interr. No. 3. Wendt has produced receipts and bucket pictures to support his purchases. Ex. 115, Wendt Purchase Receipts and Bucket Pictures. Wendt purchased Defendants' 303 THF Products based on the label, including that the fluid was tractor hydraulic oil/fluid. Ex. 47, Sugg. Wendt specifically testified that he was looking for something compatible with his equipment and implements so the OEMs were important to him along with the performance characteristics listed. Ex. 116, Wendt Dep. 138:2-144:3. He stated, "it looked like it suited my need." Wendt Dep. 145:18-19. Wendt would not have purchased Defendants' 303 THF had he known that the fluid was not really tractor hydraulic oil/fluid, that it met no OEM specifications, did not confer performance benefits, was made with line wash, used turbine oil, used transformer oil, and/or other used oils, and was unfit for use in and damaging to his equipment. Ex. 47, Sugg. Wendt used Defendants' 330 THF in a 742 Bobcat skidder, a manure spreader, a 970 Case tractor, a 1175 Case tractor, and a 990 David Brown tractor. Ex. 117, Wendt Updated List of Equipment that Used 303 THF.

Defendants make several factual assertions, many of which are inaccurate as shown by the factual summary set forth above. For example, Defendants state Wendt is not claiming damages to his pre-1974 equipment, which is correct. However, Wendt testified he is only not making a claim on that equipment "at this time" because it has a leak but has not yet been repaired. Ex. 116, Wendt Dep. 55:7-56:19. Defendants state Wendt attributed his damages to their product only after reading a Facebook ad, but he testified he had already been having all kinds of oil problems and that's when he decided "to call the number and figure out what's going on." Ex. *Id.* at 35:4-11. Defendants also mischaracterize Wendt's testimony where he states he bought his Bobcat Skid Steer in perfect condition and that it is working fine today. Wendt testified he had to repair two different oil leaks in that piece of equipment since using Defendants' 303 THF. *Id.* at 70:17-71:19. Finally, like all class members Wendt purchased not knowing Defendants' 303 THF was harmful waste.

D. THE PARTIES' COMPETING EXPERTS

1. Plaintiffs' Experts Offer Relevant, Reliable Opinions.

Defendants' arguments about Plaintiffs' experts follow the same, tired formula of casting aspersions on the experts and Plaintiffs' counsel with the added twist of now giving cute and flippant headings to their arguments, such as "microscopic abrasion," "Do Not Buy!" and "Be Nice, Flush Twice." Perhaps it is to distract from the lack of real substance/addressing of Plaintiffs' theories in their arguments, or perhaps it is to give everyone a chuckle. Whatever the reason, stripped of rhetoric and condescending tone, Defendants' attacks of Plaintiffs' experts fail for the reasons set forth in Plaintiffs' responses to Defendants' motions to exclude, incorporated herein for the sake of brevity. Plaintiffs address arguments raised as needed.

a. Dr. Werner Dahm, Thomas Glenn and Ronald Hayes

Mr. Glenn's, Dr. Dahm's and Mr. Hayes' opinions on what a THF is and how it is made are supported by science, based on reliable data, and are reliable in the context of this case, including Defendants' admissions. The Court already rejected Defendants' attacks on Dr. Dahm and found his opinions about the nature of the 303 THF and the damages it causes immediately (and continues to cause until flushed) are admissible. Dkt. 1076 at 9. As explained in Plaintiffs' briefing in response to the attacks on Glenn and Hayes, they relied on the same types of data as Dahm and their opinions are just a reliable.

b. Dr. Adam Alter

Dr. Adam Alter has multiple degrees, including a Ph.D. in Social and Cognitive Psychology with an emphasis on consumer behavior, judgment, and decision-making. Ex. 22, Alter Rpt. ¶ 18. He has spent over 20 years researching, teaching, publishing, and consulting on consumer behavior and decision-making. *Id*. at ¶¶ 12-14, 16, 19-20, 27. He is well qualified to give opinions expressed in this case, and they are well supported. As they did in their motion to strike, Defendants distort deposition testimony, taking pieces out of context, and ignore testimony given. They also ignore his Report. Defendants' colorful "Do Not Buy!" epithet is misleading.

As explained in Plaintiffs' opposition (Dkt. 1035, incorporated herein), Dr. Alter does opine that no reasonable consumer would purchase Defendants' product had they known the truth, but that is not his only opinion. Citing scientific literature, he explains what are known as "credence goods," and that for those like 303 THF, consumers rely on the seller to tell them what the product is and does. *See* Alter Rpt. ¶ 28 & n.4, *see also id.*at ¶ 36 (303 THF is a credence good because consumers do not know its ingredients or manufacturing process "or even whether [it is] actually classifiable as [a THF] (vis-à-vis other fluids of similar appearance"). Especially for goods sold for function or utility, information material to decision-making includes what the product does (or

does not do), and also what the product actually is. Alter Rpt. ¶ 24; *see also* Alter Dep. Excerpts, Ex. 126 at 75:18:76:11 (when sold for functional use, it is not just about description of what the product does but "what's actually inside the bucket"). Smitty's management agrees. *See* Ex. 22, Alter Rpt. ¶ 40 (Chad Tate agrees that label "should never omit information that's required to give the purchaser an accurate and complete understanding of what the product actually is"). Particularly for credence goods, "information on, or omitted from, the labeling is a critical driver of the decision-making process on whether to purchase a product." *Id*. at ¶29.

All consumers go through a purchasing process during which they assemble a choice set. He explains that there are "dozens of scientific models that describe how consumers decide whether to purchase a particular product which have been "empirically validated, which means that they describe how consumers behave in practice." *Id.* at ¶ 27 & n.3. The models overlap and all include an early phase known as "search," during which consumers assemble a choice set for consideration. *Id*. The process begins with a screening phase during which the very first question is whether the product serves the function or is of the kind required. He gives as example: "Is this produce?" Products do not become part of the choice set if they do not fulfill the basic function for which they are being examined. This is one of the "oldest and most robust concepts in consumer behavior research." *Id*. at ¶ 33 n. 8. He illustrates with toothpaste. If the product is not toothpaste but deodorant or a bar of soap, the consumer passes it by with no further evaluation. *Id*. at ¶ 33 & n. 8; *see also id.* at ¶ 34. In sum, it is a "basic concept in consumer behavior" that people do not knowingly purchase products not suitable for their represented purpose. *Id.* at ¶ 33. Here, the fluid

not only was misrepresented as true tractor hydraulic fluid but also harmful. In Dr. Alter's opinion, no reasonable consumer would purchase 303 THF had they known the truth.[12]

Just as they did in their motion to strike, Defendants rely on snippets of testimony out of context. Dr. Alter has always maintained that the first and foremost label misinformation was description as tractor hydraulic fluid. *See* Alter Rpt. ¶ 30. His Report describes misleading aspects of label statements standing alone, but he also opines that the numerous purported informational inputs "conveyed a function, nature and quality the 303 THF did not possess" and omissions hid the truth. *Id.* at ¶ 128. At deposition, he reiterated that such informational inputs (e.g., "303") are misrepresentative standing alone and also by reinforcing that 303 THF was actual tractor hydraulic fluid at all. *See* Dkt. 1035 at 5-7 (citing testimony). Defendants mischaracterize the record when they suggest that Dr. Alter was confronted with consumers "never exposed" to the misrepresentation. Opp. at 62. They mischaracterize his deposition otherwise. When asked whether he has an opinion on what portions every consumer would have read on the back label. He said that in his opinion, all information on the label was misleading "beginning from the very first big piece of information, they were mis[led], and no reasonable consumer would have purchased the product had they been given an accurate reflection of what they were buying." Further: "It's not true to say it doesn't matter what's on the back, I think it's – what is on the back compounds the effect of the misrepresentation on the front" and that "by its nature, that information on the back compounds the problem." Ex. 126, Alter 102:25-103:14, 103:24-104:2, 104:9-12.

All Defendants' efforts to demonstrate that Dr. Alter failed to consider what they characterize as salient on label differences or information consumers presumably had "before

[12] Defendants' pointed assertion regarding the disclaimer (Opp. at 62 n. 33) ignores Dr. Alter's opinion that the disclaimer not only was inconspicuous and insufficient but *misleading*. Alter Rpt. ¶ 123 *see also* Ex. 126, Alter 289:10-19 (language "suggests this is a tractor hydraulic fluid and further entrenches that idea").

encountering the label" are artificial. The labels in fact always represented the product to be tractor hydraulic fluid when it was not and never disclosed the truth. What was true at Dr. Alter's deposition is still true now: Defendants point to no consumer who knew the actual truth and purchased anyway.

Defendants' "Do Not Buy!" assertion comes from Dr. Alter's opinions that consumers rely on label information. When asked whether a consumer would rely on "extrinsic indicators of quality" such that they would not read a label at all, Dr. Alter responded that if a label said in bold print "do not buy this product Effectively, it's not a tractor hydraulic fluid and all those sort of negative characteristics" inherent in the product, a consumer would look at that on a label. Def. Ex. 37, Alter 92:12-25. His opinion otherwise is that a truthful label would need to take off untruthful positive information and include the negatives. *See* Opp. at 63 (quoting from Def. Ex. 37 Alter at 24). That includes disclosure that the product was actually waste. *Id.* (citing Def. Ex. 37 Alter at 56). Insofar as whether the product should have been sold at all, Ed Smith himself agreed that even an "economy" fluid must "still function satisfactory as a tractor hydraulic fluid before you put it out on the market[.]" Dkt. 1035 at 11 (citing E. Smith testimony).

Defendant's remaining criticisms are equally meritless. For example, they fault Dr. Alter for not himself being an expert in tractor hydraulic fluids. Opp. at 61. Their own expert is not an expert on hydraulic fluids and did not even attempt to understand, investigate, or account for actual facts regarding Defendants' product. Dr. Alter, by contrast, spoke with Dr. Dahm and Mr, Glenn, and examined an extensive body of information including testimony from Defendants' management and employees most knowledgeable about 303 THF, including admissions on what 303 THF is and what it is not (e.g.,Alter Rpt. ¶¶50, 52-56, 69-71) as well as admissions from regarding information material to any consumer purchasing the product, the role of labels in

purchasing decisions and consumers' reliance thereon. *See id.* at ¶¶ 38-40, 103. Dr. Alter applied his knowledge, expertise and experience to the facts. Defendants accuse Dr. Alter of not citing Plaintiff depositions in his Report and accuse him of being "unfamiliar" with them when asked. Opp. at 161. Dr. Alter certainly did read Plaintiffs' testimony. That he could not recall testimony line and verse from 17 depositions (with hundreds of pages of transcript) is hardly surprising. Def. Ex. 37, Alter 189, 210. It is especially disingenuous for Defendants to characterize Dr. Alter's opinions as unsupported (with surveys and the like) when their own Dr. Lester ***agrees*** with Dr. Alter on purchasing process if the actual state of the product is considered.

c. Dr. Bruce Babcock

For benefit of the bargain damages, Dr. Babcock opines that sufficient data exists to reasonably estimate said damages, calculating the difference between value of the product "as is" versus "as represented." He relied on fundamental economic principles and the expert opinions of Dahm, Glenn and Alter to conclude that the "as is" or market value of the product is zero. Ex. 45, Babcock Rpt. at 3-4. Babcock determined that the "as represented" value was (at minimum) purchase price. *Id.* at 5. Since the difference between purchase price and zero is purchase price, damages calculated under the out-of-pocket measure of damages is the same as calculated under the benefit of the bargain measure of damages. *Id.* For illustrative purposes, Babcock then went on to use then-available sales data to calculate aggregate class damages nationwide and for each of the eight states currently at issue. *Id.* at 5. In doing so, he cautioned multiple times that as additional data becomes available, his estimates will change. Additional data has been obtained and Babcock will update his report when merits reports are due.

Defendants list a few "what ifs" and fault Babcock for not assuming they were true. These assume *Defendants'* expert opinions are correct. Babcock's opinions are permissibly based on the

opinions of *Plaintiffs'* experts, who opine that 303 THF was not tractor hydraulic fluid at all, was in fact worthless waste that damaged every piece of equipment in which it was used and would not have been purchased by any reasonable consumer knowing these facts. The few fact issues raised are simply irrelevant to the benefit of the bargain analysis, which even Defendants' expert admits is focused on the time of sale, and not what happens thereafter.

An apparent attempt at misdirection, Defendants go into detail about the purchase price data *they* do not have. It is not clear what point they are trying to make by explaining how the data they have is both different from that used by Babcock and inadequate to calculate damages in this case. In fact, the limitations of their own data they recognize help demonstrate why Babcock elected to use *retailer* data, which was properly and timely produced to Defendants. They falsely complain that "much" of the retailer data was not specific to the eight states at issue. Opp. at 66. But out of all five retailers, only one (Orscheln) lacked certain data, and it *did* have data reflecting quantity of sales both nationwide and for Kansas.[13] The other "data issues" Defendants point to, both involving inclusion of sales data for third party products, similarly lack significance. At the time of his report and deposition, it was not clear that any of the data Babcock used was actually overinclusive or that any over-inclusivity had a material impact. To the extent any supplemental information reflects that it was, Babcock can easily adjust his estimate based upon the best and most recent available data. As he pointed out in his deposition, errors in implementation of his methodology have no effect on his conclusion that there is a methodology to reliably estimate aggregate damages on a classwide basis in this case. Ex. 118, Babcock 37:3-15. When it comes

[13] For Kansas only, Orscheln's sales were calculated using that retailer's average nationwide price as it was the best data available. Sales from all other retailers used the actual sales price in Kansas. Defendants have not claimed that the average price for Orscheln in Kansas is any different than the nationwide average price, and thus have not shown that the estimated purchase price damages in Kansas would be any different had the Kansas price data been available.

time for Babcock to perform his calculations at the merits stage, he can consider the disclaimers and updated data and exercise his professional judgment to address any "data issues."

Babcock made clear that he could "easily" extend his methodology if provided with flushing costs for equipment other than tractors and tractor-like equipment. Ex. 118, Babcock 140:8-141:24; *see also* Ex. 45, Babcock Rpt. at 7. His decision to focus on tractors and tractor-like equipment (*e.g.*, backhoes, loaders, skid loaders) was clearly not to imply that Plaintiffs are foregoing flush damages for other equipment as Defendants suggest. Opp. at 68, 109. He did so because tractors and tractor-like equipment "are by far the most prevalent type of equipment in which 303 THF was used by plaintiffs," accounting for 86.7% of equipment identified by claimants in retailer class settlement. Babcock Rpt. at 7. He even acknowledged that his "estimate of aggregate flushing cost damages understates actual damages because the hydraulic systems of non-tractors require flushing also to avoid mechanical damage," demonstrating clear intent to expand future calculations. *Id.*

Babcock's reliance on national instead of state-level averages of gallons purchased per customer is a non-issue because he determined through his analysis that national averages were appropriately representative of the gallons purchased in the eight focus states. Ex. 118, Babcock 159:12-160:12; 189:18-21. The outlier example cited by Defendants as being three times the national average was North Carolina, which is *not* one of the focus states for which Dr. Babcock estimated damages. *Id.* at 158:13-159:11. Of those focus states, Defendants pointed only to one, New York, where they claim the national average is not representative. Babcock disagrees. But if New York's gallons per customer needs to be adjusted in his merits report, it easily can be. *Id.* at 160:10 (this type of information is "easily calculable."); *id.* at 189:4-6 ("I fully expect that if this case keeps going forward, that more data is going to come and I'm going to revise [my] report.").

Defendants point to equipment owners who "need a flush for other reasons" as not "properly includable in aggregate classwide damages." Opp. at 68. Not so. Those who had a flush done as part of regular maintenance or to get rid of some contaminants are still eligible for flushing damages under Babcock's model because the flush required to get rid of 303 THF is different from, and more extensive than, a regular maintenance flush. Defendants have offered no evidence of any class member who already performed the flushing method specified by Hamilton. Further, Babcock does not address change of equipment ownership because it has no effect on his overall methodology. Babcock developed a methodology to reasonably estimate on a classwide basis the cost of flushing hydraulic and transmission systems. Ownership of the equipment is not a factor in that determination. Babcock's calculations incorporate costs on a per-tractor (or equipment) basis, not per owner. *See* Ex. 122, Babcock Dep. 122:5-25 (flushing damages "follow[] the piece of equipment"). A tractor or other piece of equipment that has not already been flushed pursuant to Hamilton's instructions still has to be flushed, regardless of who owns it now.

d. Steven Hamilton

Plaintiffs' expert Steven R. Hamilton ("Hamilton") has 40 years of experience in tractor/heavy equipment repair and extensive knowledge and expertise on hydraulic and transmission components of tractors/other equipment, as well as on the damage caused by inferior or contaminated oils. Hamilton sets out in detail each necessary component of a flushing process which "remedy is common for all systems, regardless of year, make or model." Hamilton Report, Ex. 46, Sugg., at 2-6. Hamilton also provides a methodology for estimating flushing cost (including labor hours) for equipment in three different size categories. *Id*. at 6-7. Hamilton's categorization of equipment and estimation of the flush labor time and costs (fluid and filters) provides a methodology by which class-wide flush damages can be calculated.

Hamilton has the requisite knowledge and experience regarding tractors/heavy equipment, offers opinions based on that experience, and those opinions are reliable and helpful at the class certification stage of this case. Defendants have provided no basis for the Court to exclude Hamilton's opinions. He is qualified under FRE 702. He has specialized scientific and technical knowledge about tractors and heavy equipment, including hydraulic-related components. He offers testimony and opinions about those technical matters that are outside the common understanding of the Court, and his opinions at this class certification stage are based on reliable methods and other sufficient facts and data. Plaintiffs have responded to these same arguments asserted in Defendants' Motion to Exclude Expert Hamilton. *See* Dkt. 1074, incorporated herein.

Hamilton's spreadsheet entries and opinion provide a methodology by which flushing labor time and costs can be categorized and presented for class-wide determination. As noted, this initial spreadsheet was based on more than one thousand pieces of equipment identified by Retailer Settlement Class Members as having used the fluid at issue in this case. Defendants complain about the details of Hamilton's methodology for estimating costs and labor hours, but their specific arguments do nothing to defeat that there is a method for commonly determining the cost the flush remedy on a class-wide basis. At the merits stage for each state class, this method can take into consideration the specific information regarding pieces of equipment in which Defendants' 303 THF was used as well as other information regarding whether the equipment is still owned or has already been flushed. This analysis can be extended to calculate the average cost to flush other equipment as well. Fluid and filter cost considerations can also be updated based on the equipment in each state class. Any gaps in data and/or equipment not considered thus do not support exclusion because Hamilton is not at this point purporting to provide any final merits opinions for each state class.

2. Defendants' Experts Offer Canned, Unreliable and Irrelevant Opinions.

Although they proffer four reports, Defendants in reality only hired two experts: Exponent, Inc. and Dr. Martin. Exponent was hired to opine on the cause of equipment damage, technical aspects of and applications for 303 THF, and "human factors" (*i.e.* people think about different things).[14] Exponent is a consulting firm that, in its own words, handles engagements mostly "initiated directly by large corporations or by lawyers or insurance companies whose clients anticipate, or are engaged in, litigation related to their products, equipment, processes or services."[15] In fact, Exponent has such a large volume of tort defense work that it lists "tort reform" as one of the risk factors in its public SEC filings, stating, "[s]everal of our practices have a significant concentration in litigation support consulting services. To the extent tort reform reduces the exposure of manufacturers, owners, service providers and others to liability, the demand for our litigation support consulting services may be significantly reduced." *Id*.

a. Dr. Peter Lillo

Dr. Lillo has worked for Exponent since completing his schooling. Ex. 119, Lillo 81:7-20. He has a background in root cause failure analysis. In the class action defense context, that means he has a background in explaining how class members were harmed "by something else" besides the defendant corporation's harmful conduct. In this case, Lillo says that to determine the cause of equipment damage, one must find the root cause to the exclusion of everything else. In other words, he disputes what Plaintiffs and Dr. Dahm say about the damage caused by 303 THF. His opinions raise a merits dispute, not a certification issue. The Court has already held that

[14] Dr. Peter Lillo, Dr. Lee Swanger and Dr. Benjamin Lester are the three Exponent experts, and each confirmed Defendants' engagement was with Exponent and they were selected by Exponent to work on the case, with the aid of other Exponent experts and staff.

[15] Exponent SEC Statement (available at https://www.sec.gov/ix?doc=/Archives/edgar/data/0000851520/000095017023004401/expo-20221230.htm#item_1_business).

Defendants' "other causes damages" arguments do not defeat Plaintiffs' claims at this stage. Dkt. 1076 at 9 (noting Plaintiffs present evidence of uniform damage without need for equipment inspection and regardless of other damage causes); *see also* Dahm Rpt. ¶¶ 160-61, 172 (explaining 303 THF causes damage regardless of use of other 303 THFs and independent of equipment condition or maintenance); Dkt. 1008 at 7 (citing *Villa v. Burlington Northern and Santa Fe Railway Co.*, 397 F.3d 1041, 1046-47 (8th Cir. 2005) ("the presence of multiple contributing causes will not preclude a finding of liability against a defendant who has provided a legal cause of a plaintiff's injury.") Lillo, however, does not understand or consider the principle of causation and whether something that more likely than not to contributes to cause damage is considered a legal cause of damage, even if there could be other causes. *See* Ex. 119, Lillo 120:14-21 (stating that to determine the root cause—the standard he applies—you need to "rule out all alternative causes…."). For this reason, Lillo's "other things can damage equipment too" and "Plaintiffs have not ruled out all other potential causes" opinions are neither helpful nor relevant.

In addition, Lillo did not endeavor to actually determine the "root cause" of Plaintiffs' equipment problems in this case. He simply performed perfunctory "inspections" so he could opine that certain equipment exhibited no operational issues attributable to 303 THF or no operational issues at all. Yet he did not know whether or how much of Defendants' 303 THF was still in the equipment he inspected and did not take any of the equipment apart or inspect seals or other components. He simply took some photos, looked at equipment exteriors, watched someone operate the equipment and tested fluid and filters. Defendants cannot say Lillo "observed no evidence" of damage, *because Lillo did not ever look for it and made no efforts to observe it* beyond his observations listed above.

Dahm speaks of the following kinds of damage: damage at the molecular level, damage to

seals, damage to the hydraulic system, transmission, PTO, and other components that use hydraulic fluid for power transfer, lubrication, sealing, heat transfer, and related functions. Ex. 1, Dahm Rpt. ¶¶ 85, 126, 141, 158; Ex. 120, Dahm 290:1-10 ("the damage begins the moment you put it in, even before you start operating the system because of the seal damage we talked about." In other words, damage to the guts of the systems. Lillo does not fundamentally undermine Dahm because Dahm's opinion accounts for the "other causes" argument and Lillo did not do enough legitimate "inspecting" to say Dahm is wrong.[16]

Finally, Defendants are wrong in arguing that Lillo somehow shows that Plaintiffs' experts Hamilton and Dahm are in conflict because Hamilton's testimony indicates a flush will not remove Defendants' 303 THF to a low enough level that ongoing damage is prevented. First, Lillo is not an expert on the consistency of opposing experts' opinions and his role is not to weigh opinions. Second, Lillo is wrong. Both Dahm and Hamilton explain the goal of the flush is to get as much of the fluid out as possible. That some may remain despite best efforts does not undermine either of their opinions.

b. Dr. Lee Swanger

Dr. Swanger is a long-time Exponent expert, engineer and metallurgist and his expert witness history is not confined to fluids, rheology and tribology. He opines on most anything. This includes opinions on failure of a Foley catheter (for which he was excluded), a sliding door, dry cleaning practices, problems with a pressure cooker, accident reconstruction, brake failure, tires, a defective ball hitch, and whether walking surfaces were hazardous. Ex. 57, Swanger, 26:18-27:1,

[16] Even Lillo conceded that damage from improper fluid can be predicted as a matter of fluid science. He agrees that viscosity is one of the most important properties of a hydraulic fluid and that if viscosity is too low the tribological layers of the fluid can be too thin and "you can have wear problems if the oil's too thin." Ex. 119, Lillo 223:14-224-10. He further agrees that foaming from improper hydraulic fluid can lead to abnormal wear, oxidation associated with poor hydraulic fluid can lead to increased wear, sludging and deposits, and that seal incompatibility can lead to leakage and other issues. *Id*. 226:22-231:22.

28:12-31:22. His testimony should be viewed accordingly. Here, Exponent provided him to manufacture individualized issues.[17] He first opines that 303 THF is acceptable to sell as a 20-weight fluid usable in some applications; an interesting opinion given that Defendants sold 303 THF as a multifunctional tractor hydraulic fluid for use in a wide range of OEM's equipment. That does not mean individual issues predominate, it simply means he disagrees with Plaintiffs' experts, who opine that 303 THF was harmful waste not suitable for *any* equipment. Swanger disagreement and resulting opinion that you have to look at each piece of equipment individually, does not create individualized issues. Whether the fluid was suitable for no equipment, or some equipment, is a common issue and a merits question one which Plaintiffs' case will ultimately rise or fall. He also opines that equipment has so many variables that it is impossible to say that there is any common damage from the fluid itself absent any other intervening factor. Ex. 57, Swanger 181:18-182:1.[18] The Court has already found Plaintiffs have evidence of uniform damage despite the possibility of any of alleged "other cause" variables. Dkt. 1076 at 9; Dkt. 1008 at 7.

In fact, although he was engaged to help Defendants' in the lawsuit (yet not engaged to help them challenge the MDA in the real world)[19] he admitted several points that bolster Plaintiffs' theory of the case, the commonality of issues and the common impact of Defendants' 303 THF on class members:

- Defendants' 303 THF was not tractor hydraulic fluid: Though Defendants claim Plaintiffs "pretend" Swanger testified their 303 THF was not a tractor hydraulic fluid, that is in fact what he said and the only way Defendants get around that is to change the definition of tractor hydraulic fluid to something simple or claim it has no definition, neither of which have support in the science as explained by Plaintiffs' experts.

[17] In other words, as with Defendants' other experts, he does not highlight individualized issues *related to Plaintiffs' theory of the case*; instead, he argues Defendants' theory of the case, opining that Plaintiffs' experts are wrong because fluid use and equipment damage is individualized, not uniform. That is a merits fight, not a certification barrier.

[18] Even if his opinion could be found to bear upon comparative fault because of OEM recommendations, comparative fault is a common issue applicable to all class members in the same matter, as explained herein.

[19] Ex. 57, Swanger 182:2-10.

- Definition of harm caused by lubricants: Swanger agreed with Dahm that harm from improper lubrication means degradation beyond what OEMs accept as normal wear and tear. Ex. 57, Swanger 83:13-84:18 (stating "if the wrong lubricant for an application is put in, one whose properties are markedly different from what's required for a system, then that could be a way of attributing the harm to the improper selection of the lubricant itself, and, therefore, the harm would be due to the lubricant….") As Dr. Dahm opines that Defendants' 303 fluid is always markedly different from system requirements, Dr. Swanger's agreement supports reliability of Dahm's damage opinion.

- Improper lubrication causes harm as a matter of science: For example, Swanger agreed that if he learned of corrosion on silver bushings in locomotive diesel engines, the first thing he would think of as the cause would be sulfur from the lubricant's ZDDP additive because the attack on sulfur by silver is known based on the science. Ex. 57, Swanger 79:11-80:15; 82:16-22; *see also* 84:19 (describing wear caused by improper viscosity, based on science and experience).

- Fluid performance can be predicted based on formulas/properties: For Dr. Lee Swanger, an engineer like Dahm, the known fluid data, testing, data and testimony from Defendants provided an accepted scientific basis to opine how Defendants' 303 fluid would/would not perform and would impact all equipment. *See* Ex. 57, Swanger 17:11-18:17 (if science of performance is sound, further testing is not needed); 62:13-64:12 (confirming he looked at the same data as Plaintiff's experts); 119:7-120:7 (saying states' test data supports is basis for his opinion on how fluid will perform); 64:18-21 and 65:7-10 (confirming he did not look at plaintiff specific information); 150:20-152:2 (explaining how lubricant mixtures are tested and how following tested formula means the blend will "give them the results that they are after."); 42:17-22 (stating, "what I had learned at Lubrizol about blending and testing, base oils and additives was relevant to the 303 issues.")

- No OEM or additive company has an "economy grade THF. Ex. 57, Swanger 212:10-13.

And as explained in Plaintiffs' opening brief, Swanger proved the "disclaimer" was a red-herring by opining that suitability of the 303 THF, in his opinion, does not depend on model year. Defendants attempt to explain their way around this, but the fact remains that they hired an expert who says their "disclaimers," including the language directing Plaintiffs to buy another product for post-1974 equipment, were meaningless and without any basis in fact because he believes the fluid *was* usable in certain post-1974 equipment, just as the rest of the label conveyed and just as thousands of unknowing consumers rightfully believed based on the labels.

c. Dr. Benjamin Lester

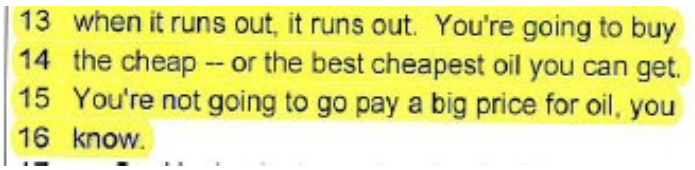
Plaintiffs realize expert testimony is to be liberally admitted, that problems with expert opinions usually go to weight, and the Eighth Circuit's more relaxed *Daubert* standard at the certification phase. For these reasons, Plaintiffs have not asked the Court to strike Defendants' experts' opinions. They strongly note, however, that Dr. Lester's opinions should be taken with more than a little grain of salt. His focus as a "certification defeating expert" (as evidenced by his presentations to defense groups) deeply affects his reliability and his failure to consider the true nature of the fluid in this case render his opinions unhelpful as they do not "fit" with the actual facts. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 591-92 (1993). Lester's opinion that "people think about different things," without context, by an expert who does not acknowledge the admitted truth about the product and misquotes Plaintiffs' testimony to support his opinion, is of little to no value.

First, Lester blatantly misrepresents what certain Plaintiffs said in their depositions. Apparently unable to support his opinions using accurate testimony he not only exaggerates, but in once instance even changed *quoted* testimony, removing the word "best" (the one word that spoke to quality) from quoted testimony inserted into his report as support for his point that Dale Wendt did not care about quality. Ex. 121, Lester, 43:22-49:23. To support his opinion that certain "purchasers *were not concerned with quality*" (*id*. 44:13-45:1), he *quoted* the testimony of Wendt, realizing that testimony is put in quotations to tell the Court and the jury, "this is exactly what Mr. Wendt said." *Id*. 45:8-13. Copying from his report, the quoted testimony said:

> retailer and quality of products that were carried.[54] In contrast, other purchasers were not concerned with quality and were focused on availability. For example, Mr. Wendt testified that he used whatever THF oil was on hand, because if you are "going to buy the cheap, or cheapest, oil you can get. You're not going to go pay a big price for oil."[55] Mr. Wendt further testified that he just went to purchase THF, saw buckets on the shelf and purchased the product.[56] For others,

Lester Rpt. at 31. Lester's quote represented that Wendt only cared about the "cheap or cheapest"

fluid. However, Wendt stated he *did* care about quality, using the work "best," which Lester removed from the quote in his report:


13 when it runs out, it runs out. You're going to buy
14 the cheap -- or the best cheapest oil you can get.
15 You're not going to go pay a big price for oil, you
16 know.

Ex. 122, Lester Ex. 2.

Furthermore, Wendt testified that the CAM2 fluid he bought was not even the cheapest available, and that the label representations about what the fluid was and could do were part of his purchase decision. Ex. 121, Lester 50:25-55:2. Reading Lester's report, one would never know that. And it was not an isolated "mistake." Lester's report states that Egner only cared about the fluid being able to do two things, when in fact Egner testified to more, all of which Lester kept out of his report. Ex. 121, Lester 56:14-60:13. When confronted with the mischaracterization, Lester admitted the accurate information should have been put in the report. *Id* 60:20-61:8. An expert who "doctors" testimony is unreliable. We cannot pick through and trust what is true and what is not; now, is all a guess.

Second, Lester's opinion that "people think about/know different things when purchasing" is a canned, one-size-fits-all opinion. Lester *admittedly* has not considered the context of this case. He does not know anything about the engineering, formulation or performance of the 303 THF in this case, admitting, "I don't have any independent, really, understanding or nature of it." Ex. 121, Lester 77:24-78:8, 90:10-13 (stating he does not know if the product in the bucket matches the label representations from a technical perspective); *see also* 92:13-93:1. He could have at least studied testimony like Tate's admissions regarding Ag. fluid, and Schenk's declaration on that topic. He also admittedly offers no opinions about misrepresentation at the point of sale, basing his opinion about consumer expectations completely on the fact the product (which unbeknownst

to consumers was harmful waste) was used. Ex. 121, Lester 86:12-21. When asked, "[w]hether or not this product is what the label says that it is, you don't know one way or the other?", he answered, "That's right." It is a glaring, material dearth in his analysis, as illustrated by his own testimony. When asked what he would need to know to create a label telling consumers what a product is, he answered: "a general understanding of what the product is and what it could be used for." Ex. 121, Lester 131:12-132:11. Yet he did not obtain that understanding.

When asked what happens to his analysis when, regardless of what purchasers knew before buying, all of the information they were seeing on the label was false, he had no answer, saying, "I don't think I could answer that question" and admitted he did not look at that issue in this case. Ex. 121, Lester 88:15-22. When asked where in his report he explained why the truth about the product and how it was made (critical data) did not make a difference he said: "I don't think it is in there." Ex. 121, Lester 93:16-22. He did not take into account whether consumers were misled by the labels. Ex. 121, Lester 126:10-127:1. He did not account for the actual truth about the product at issue. He does not offer an opinion actually adverse to Plaintiffs' theory.

The reason Lester does not consider context is because his job at Exponent is to defeat certification. He markets himself as someone who can help companies highlight individual issues for purposes of defeating class certification (Ex. 121, Lester 170:21-25), and has given lectures on class certification to product liability defense groups,[20] using the same "people think about/know different things when purchasing" opinions he offers here. *Id*. at 170:11-176:11; 180:5-182:8. Ex. 123, Lester Ex. 10. Certain "science" portions of his report appear to be from a regurgitated "science" template Exponent uses in cases where it seeks to defeat certification. The metadata for

[20] Exponent is listed as a sponsor of PLAC, or the Product Liability Advisory Council, which furthers "Legal Production and Reasonable Treatment for Corporations Through the Entire Product Life Cycle." Ex. 121, 175:25-176:11.

his report showed the author to be Caroline Crump, an Exponent expert who did not work on Lester's report and who is based in a completely different office with no access to Lester's computer. Ex. 121, Lester 153:12-158:12. He also relied on "science" authored by other Exponent experts, perhaps created as part of the company's effort to saturate the field with "science" to support its business of defending lawsuits. Ex. 121, Lester 211:25-214:14. His opinions should be viewed accordingly.

When forced to answer questions that *do* consider the context of this case, Lester actually agrees with Dr. Alter.[21] He also agrees that consumers are uniformly mislead in a case like this if the actual state of the product is considered. For example, Lester agrees that an expert on milk and someone who has never purchased milk are both misled—regardless of individual differences—if the "milk" is actually chalk water. Ex. 121, Lester 89:16-90:5. Defendants disparage Plaintiffs' toothpaste vs. Preparation H example (Opp. at 138) but Lester himself agrees that if people go to a store to buy toothpaste and the container of toothpaste they buy is actually Preparation H, they have all been misled by the product container regardless of how much they know about toothpaste, or any of their individual differences. Ex. 121, Lester. Plaintiffs' theory of the case is that all consumers believed they were getting tractor hydraulic fluid but instead got harmful waste. Although Lester would not admit agreement when THF was discussed (given his role in the case), he did ultimately admit to agreement when confronted with Plaintiffs' theory.

He also agreed with Dr. Alter's opinion purchasing process. He agreed that when someone motivated to buy toothpaste, Preparation H never even enters their choice set as a matter of consumer buying. Ex. 121, Lester 202:11-18. He agreed that consumers going to a store to buy

[21] Dr. Lester acknowledges that literature in the field includes choice set, based on package information, that begins with screening. In one of the studies he cites, the first step was "how does [the product] enter into this decision-making process." Examples were: "Here are the chips" or "Here is the sausage." Ex. 121, Lester 242:12-245:1; *Accord* Alter Rpt. ¶ 33 n. 8.

milk will walk past produce because it is not in their choice set; they are not motivated to buy it, and that is true for all people. *Id.* at 197:2-13. He also acknowledged the concept of a choice set is part of the science of consumer purchasing. *See, e.g., id*. at 29:25-30:7 (saying "I understand what you are referring to."). Lester himself cited literature supporting principles relating to choice set and Dr. Alter's opinion. *Id*. at 242:12-245:11; *see also* Ex. 124, Lester Ex. 16 (noting decision-making based on label and choice set, stating, "Here are the chips. I will skip them."). He simply did not apply them to this case. In sum, Lester actually agrees with Alter if the true nature of 303 THF is considered. The only purpose of his opinion is to say that purchasing process is generally idiosyncratic and create individualized issues where none actually exist.

d. Dr. Denise Martin

Dr. Denise Martin[22] faults Babcock for doing what experts reasonably and commonly do – rely on experts in other fields.[23] Based upon unequivocal opinions from highly qualified experts that 303 THF was worthless waste and caused damage to every piece of equipment in which it was used, Babcock determined the "as is" value was zero. Martin *concedes* that the market value of a "worthless" product is zero, Ex. 125, Martin 72:20-73:25.[24] To attempt to escape this conundrum, she offers "analysis" outside her area of expertise to "contradict" plaintiffs' experts in *their* fields

[22] Dr. Martin has worked "primarily" for defendants in over 200 class actions. Ex. 125, Martin 23:8-13; 32:13-17. Her testimony has been excluded and criticized by judges "from time to time." *Id*. at 41:21-22. She has no experience with or technical expertise in lubricants, hydraulic systems, tractors or the other types of equipment that need tractor hydraulic fluid. Ex. 35, Martin 9:11-24; 10:21-12:1.

[23] One expert's reliance on the expertise of another is common and permissible. *See Jackson v. Asplundh Constr. Corp.*, 2016 WL 4705603, at *5 (E.D. Mo. Sept. 8, 2016); *see also* FRE 703; *Wellshire Fin. Servs. v. TMX Fin.*, 2019 WL 1177728, at *5 (S.D. Tex. Feb. 5, 2019).

[24] Martin also concedes that there would be no "willingness to pay" for a product that no customer would buy at any price. Ex. 125, Martin 64:16-66:17. Willingness to pay does not vary when a product is worthless and the consumer is fully informed about the facts that make it worthless, which did not occur with respect to 303 THF. The information "in the public domain" which supposedly shows consumer understanding of possible negative attributes of 303 THF is likewise irrelevant. *None* of the articles cited in Martin's report fully disclosed actual harms or that 303 THF was not really tractor hydraulic fluid at all. She has no knowledge that any class member ever heard about any negative articles, which mostly appeared in trade magazines or isolated blog posts and did not mention the product by name. *E.g.*, Ex. 35, Martin 174:24-176:10, 178:19-180:25, 185:15-186:20.

of expertise. Ex. 35, Martin at 59:25-61:17.[25] Martin claims that some purchasers must have received "at least some value" because they did not complain and purchased it again. Def Ex. 131, Martin Rpt. 7, 9. But that opinion only highlights her lack of expertise. As Dahm explained, 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, instead assuming the impacts to be a routine part of owning and operating a tractor or the fault of the manufacturer. Ex. 1, Dahm Rpt. ¶¶ 165, 167-68.[26]

Another fatal flaw in Martin's criticism is her choice to sidestep the actual benefit of the bargain measure of damages and instead address a different measure of damages paraphrased from a reference manual. Ex. 125, Martin 124:17-125:10; 140:19-141:4. When pressed at her deposition, Martin conceded that benefit of the bargain measure focuses on the *time of sale*. *Id.* at 127:18-21; *see, e.g.*, MAI 4:03 ("on the date it was sold"). Martin further concedes that any purported benefits farmers supposedly received from use of the 303 THF, under her own theory, would have occurred *after* the purchase. Ex. 125, Martin 126:25-127:17. They are irrelevant.[27]

Martin's criticism of Babcock's flush remedy methodology is equally off-target. Martin's speculative claim of data bias was undermined by Babcock during his deposition. Ex. 118,

[25] Ironically, offering opinions beyond her area of expertise is precisely the reason one federal judge recently excluded her testimony. Ex. 125, Martin 37:11-40:3. *See also Senne v. Kansas City Royals Baseball Corp.*, 591 F. Supp. 3d 453, 486-88 (N.D. Cal. 2022) Even if her opinions were within her area of expertise, disputes among experts "should be resolved at the class certification stage *only* to the extent necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class." *Zurn*, 644 F.3d at 611(emphasis added).

[26] Defendants' digression about "Ag Fluid," which they admit is irrelevant and is certainly outside of Martin's expertise and Babcock's methodologies, has been addressed elsewhere as Defendants recognize.

[27] Defendants' criticisms relating to sales data are speculative at best and either are (TSC) or will be (Orscheln) moot as additional data is produced. Defendants complain about the updated data provided by TSC, but it is hard to see what the issue is. TSC originally said that its data erred on the side of inclusion so reported sales were likely higher than actual sales. Then, TSC updated its data after completing its best reasonable effort to remove third party sales and reported sales were lower – *just like they said they would be*. When it comes time for Dr. Babcock to perform his calculations at the merits stage, he can consider the disclaimers and updated data and exercise his professional judgment on what is the best available data. If Defendants do not agree, they can cross-examine Dr. Babcock on this point at trial. Data issues like this one are common.

Babcock 133:10-138:6.[28] Also revealing her lack of expertise, Martin claims Babcock failed to account for purchasers who have already had a flush performed. But she offers no evidence that *any* purchaser has had the meticulous 30-step double-flush remedy Hamilton states is required to prevent ongoing damage. Merely draining the fluid is not at all comparable to this type of flush.[29] Defendants suggest that Babcock somehow needs to adjust for equipment being in one state and the purchaser being in another without explaining why any adjustment is necessary. No adjustment needs to be made.[30] Finally, Martin asserts speculative bias in using national statistics without any evidence that any bias is material or any acknowledgement of the limited use of those statistics.[31]

[28] Martin apparently did not recognize that the USDA data used by Babcock showed a *higher* number of tractors per farm than did retailer settlement data showed, and that Babcock chose to use the more conservative retailer data. Ex. 125, Martin 195:16-202:25. Far from acknowledging any problem with his use of the retailer data, Babcock stood by his use of the data as even the portion cited by Martin (Ex. 118, Babcock 129:12-138:12) makes clear.

[29] Dr. Babcock does not address change of equipment ownership because it is premature at the class certification stage and has no effect on his overall methodology. The eventual allocation of class wide flushing damages is a legal issue well beyond the scope of Dr. Babcock's current report. The Court may ultimately decide that any person entitled to flushing damages must certify that they continue to own and use the equipment in which the 303 THF was used; and the damages of those who cannot so certify be remitted or held for redistribution. To the extent that Dr. Babcock has evidence at the time of his merits report that change of ownership will materially impact his damages model, he can easily adjust it to account for this factor. But he may not need to address it at all, depending on what the Court ultimately decides.

[30] Defendants have not identified a single case that prohibits a consumer in such a case from recovering in more than one state for the purchases made in each state. As a result, there is simply no need for Dr. Babcock to tweak his methodology to reallocate damages between states to account for purchases by the same class member in different states. He has properly allocated damages to the state in which the purchase was made. There is no double counting.

[31] As Babcock makes clear, he used national statistics for a limited purpose: "to estimate how much currently available retail data underestimate purchase price damages" on a *nationwide* basis. Babcock Rpt. at 4-6 (purchase price for 16 million gallons not included in Babcock's *nationwide* purchase price damage estimate of $203,544,843).

III. APPLICABLE STANDARDS

Plaintiffs have no quarrel with rigorous assessment or need to establish Rule 23 criteria. They reiterate, however, that "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case[.]" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013). Moreover, a plaintiff is not required to prove that "each elemen[t] of [her] claim [is] susceptible to classwide proof." *Id.* at 469. Predominance does not require that all questions be common, only that they predominate. When one or more central issue is common and predominant, certification is proper even though other matters, including damages, "will have to be tried separately." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). The "factual setting" of Defendants' two primary cases were much different than this one. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), commonality was lacking because the "reason for a particular employment decision" was at local supervisors' discretion. *Id*. at 352. Here, according to Plaintiffs' evidence, 303 THF was not what it purported to be for *any* consumer. In *Blades v. Monsanto Co.*, a case Defendants cite repeatedly, the issue was anti-trust impact, i.e., supra-competitive prices, requiring "hypothetical market … free of the restraints and conduct alleged to be anticompetitive." 400 F.3d 562, 569 (8th Cir. 2005) (citations omitted). Plaintiffs are not asserting a price-fixing claim, and the fact of injury here is established with common evidence. Plaintiffs' evidence is that 303 THF was not suitable for ***any*** tractor or equipment. Defendants disagree. Certification is not the place to resolve that dispute and Defendants cannot unilaterally change Plaintiffs' theory to manufacture individualized issues.

IV. ARGUMENT

A. DOLLAR GENERAL SUPPORTS CERTIFICATION.

This case for certification here is even stronger than in *Dollar General* yet Defendants spend pages attempting to say otherwise. Opp. at 82-87. Their misstatements deserve attention.

Defendants say, for example, that property damage claims were rejected, but plaintiffs sought that relief in connection with warranty, not certified for unrelated reasons (i.e., notice, not an impediment here). *In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Pracs. Litig*., 2019 WL 1418292, *24 (W.D. Mo. 2019). Defendants say the unjust enrichment and consumer act rulings are inapplicable because of the Orders on Hazeltine and Wendt, but they do not prevent certification for a number of reasons, including the ruling on inconspicuousness of the disclaimer. Moreover, the Orders did not address the fundamental misrepresentation that 303 THF was actual tractor hydraulic fluid when it was not.[32] Defendants' representation that the disclaimer in *Dollar General* was different because there was "no language … that warned against equipment harm" also is incorrect. One of the labels stated that "[u]se in modern engines may cause unsatisfactory engine performance or equipment harm." *In re: Dollar Gen. Corp. Motor Oil Mktg. & Sales Pracs. Litig.*, 2017 WL 3863866, at *1 (W.D. Mo. Aug. 3, 2017). That did not deter certification.

That *Dollar General* was against a retailer also is not a "critical" distinction for purposes of unjust enrichment or *Comcast*. Opp. at 83-84. Relief can be based on either Babcock's model or Defendants' revenue/sales data depending on applicable measure in each state. Whether damages are recoverable or need to be adjusted is not a bar to certification. *Dollar General*, 2019 WL 1418292, at *20. Defendants also make the strange argument that the buying experience was "cohesive" in *Dollar General* when the label changed at least 14 times, well more than here. *Id*. at *2. Defendants say Dr. Alter did not conduct a survey but neither *Dollar General* nor any other case they cite requires a survey in a case like this one. Defendants also urge that a jury must determine suitability for each class member when in *Dollar General,* the class was limited to those

[32] Given Defendants' citation and use of the Court's orders and in certain respects their bearing on some issues, Plaintiffs are filing motions for clarification and/or to reconsider contemporaneously herewith.

who purchased "for use" in an improper application.[33] That ignores Plaintiffs' evidence that 303 THF was suitable *for no use*.[34] Furthermore, injury includes "the purchase of the [303 THF], meaning that any argument about a change in use is irrelevant." *Id.* at *12.

Defendants' argument on "expos[ure]" to labels (Opp. at 85) as means of defeating certification is meritless. Their *Lexecon* argument is misrepresentative. *Dollar General* did not refuse to certify a Texas class because there was no transferor court but because *there was no active case/Texas plaintiff* on file. *Id*. at *3 n.5. Here, there are representatives, and this Court already addressed Defendants' *Lexecon* arguments, allowing Plaintiffs to direct file/join New York and Wisconsin class cases. Dkt. 46 at 4. Defendants' venue or jurisdictional defenses were preserved and once consolidated proceedings are complete, cases will be sent to the appropriate venue. *Id*. at 5; Dkt. 834, ¶ 153 (t) and (ee).

B. THE CLASS DEFINITION IS NOT OVERBROAD

Defendants make overbreadth arguments in part through the lens of Article III regarding "unmanifested defects" and otherwise acknowledge that "class definitional issues" are assessed through the lens of Rule 23. Opp. at 88 n.50. Through that lens, a class may include some purportedly "uninjured" members as recognized by decisions Defendants cite. *See McKeage v. TMBC, LLC*, 847 F.3d 992, 998-99 (8th Cir. 2017) (discussing *Sandusky* holding that district court erred in denying certification as class could be defined by subscription to fax number, although this would include members "who don't have rights under the [TCPA]") (quoting *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc*., 821 F.3d 992, 998 (8th Cir. 2016)); *see also Halliburton*

[33] *See* Opp. at 86. This is an interesting observation because it highlights that *Dollar General* certified claims for purchasers who "mis-used" the product in more modern equipment despite the presence of disclaimers.

[34] Defendants cite three people they say used 303 THF for some non-hydraulic purpose: Jenkins, who used unspecified hydraulic fluid for a tree cutter; Quiroga who used 303 THF as grease for his irrigation well; and a blogger who implies that he used it as a flush. *See* Opp. at 46, 113, 131. Jenkins and Quiroga, however, *did* use 303 THF in equipment with hydraulic systems. The blogger also was injured because if in fact he did use 303 THF, it indeed harmed his equipment.

Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 276 (2014) ("That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal [on reliance] does not cause individual questions to predominate."); *In re Pork Antitrust Litig*., 2023 WL 2696497, at *24 (D. Minn. Mar. 29, 2023) ("Common questions predominate, so the alleged small number of uninjured class members is insufficient to defeat class certification.").[35] Under Plaintiffs' theory, however, there are no uninjured class members. Defendants' overbreadth arguments are meritless. Ascertainability is addressed *infra*, D.8.

As introduction, Article III concerns case-or-controversy entitlement to be heard, not entitlement to relief. [36] While a class must be defined in a way that those within it would have standing, the analysis is "not a review of the merits" and "[t]he fact that some plaintiffs may be unable to succeed on their claims does not necessarily mean that they lack standing to sue." *Stuart v. State Farm Fire & Cas. Co*., 910 F.3d 371, 377 (8th Cir. 2018); s*ee also Vogt v. State Farm Life Ins. Co.,* 963 F.3d 753, 766-67 (8th Cir. 2020) ("failure on the merits does not affect a class member's individual standing"); *Bartle v. TD Ameritrade Holdings Corp*., 2021 WL 5106459, *7 (W.D. Mo. Sept. 15, 2021) (a plaintiff "may have constitutional standing to pursue a claim *even though* that claim is barred by the applicable statute of limitations").[37] Relatedly, whether a plaintiff

---

[35] In *Mayo v. USB Real Estate Sec., Inc.*, 2012 WL 4361571 (W.D. Mo. Sept. 21, 2012) (Opp. at 88) plaintiffs challenged second mortgage loan fees. The standing issue pertained mortgagee bankruptcies. *Id*. at *4-5. As ***to injury***, about 6% of the loans did not include the alleged illegal fees. On that subject, the Court said: "If only a handful of individuals … may not have paid illegal fees at closing, the class is not impermissibly overbroad." *Id*. at *3.

[36] Article III standing is not to be confused with whether all class members can recover. *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 797 (8th Cir. 2014) (refusing decertification based on argument that some class members did not work overtime and were uninjured); *Bouaphakeo v. Tyson Foods, Inc.*, 593 F.App'x 578, 585 (8th Cir. 2014) ("federal courts do not require that each member of a class submit evidence of personal standing," so long as each member may allege injury") (citing *Halvorson v. Auto-Owners Ins. Co*., 718 F.3d 773, 779 (8th Cir. 2013)); *see also id*. (failure of some employees to demonstrate damages "goes to the merits, not jurisdiction").

[37] *See also Novartis Seeds, Inc. v. Monsanto Co.*, 190 F.3d 868, 871 (8th Cir. 1999) (defense that plaintiff breached contract and had no legal right to complain of breach was not a "standing" argument in jurisdictional sense); *Sisson v. Patel*, 2022 WL 497347, at *4 n. 3 (W.D. Mo. Jan. 26, 2022) (arguments about plaintiffs' ability to enforce leases not properly characterized as Article III issue; all that is required for standing is a claim that defendant owes the plaintiff money because "a loss of even a small amount of money is ordinarily an 'injury' … Whether the defendant is liable for that loss is a merits question, not a standing question.").

has a statutory right of action (e.g., consumer protection acts) is not jurisdictional. *See Kuklenski v. Medtronic USA, Inc*., 635 F. Supp. 3d 726, 734 n.4 (D. Minn. 2022) ("Statutory standing is *not* jurisdictional") (citation omitted). Physical and financial harms as here are injuries in fact,[38] and the question is not extent of injury. *See Douglas Phillip Brust, D.C., P.C. v. Opensided MRI of St. Louis LLC,* 343 F.R.D. 581, 591 (E.D. Mo. 2023) (five unsolicited faxes sufficient to confer standing for TCPA claims) (citing *Golan v. FreeEats.com, Inc.,* 930 F.3d 950, 959 (8th Cir. 2019) ("in the standing analysis we consider the nature or type of the harm, not its extent")).

1. This Case Does Not Involve An "Unmanifested Defect"

Defendants' Article III argument relies on inapplicable cases in which not all products "manifest" the alleged defect. *O'Neil v. Simplicity, Inc.,* 574 F.3d 501 (8th Cir. 2009) involved recall of baby cribs with a hardware defect making it possible for the drop-down side to detach. *Id*. at 502. Plaintiffs, however, "purchased a crib with a functioning drop-side and that crib continue[d] to have a functioning drop-side." *Id.* at 504. In *Polaris*, plaintiffs alleged a defect producing excessive heat in certain ATVs. The Eighth Circuit likened the case to *O'Neil* and "a defect in a product line … at risk for manifesting a defect" that had not. *In re Polaris Mktg., Sales Practs*, *& Prods. Liab. Litig.*, 9 F.4th 793, 797 (8th Cir. 2021). To the same effect is *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 987 (8th Cir. 2021). In *Zurn Pex*, however, brass fittings in a plumbing system exhibited stress corrosion cracking upon installation. 644 F.3d at 617. Calling them "dry plaintiffs" the Court upheld certification as to plaintiffs whose homes had not yet leaked, stating: "*O'Neil* never indicated that a child would have to be injured by a crib for a defect to be

[38] *See Tyler v. Hennepin Cnty., Minn.*, 598 U.S. 631, 636-37 (2023) (financial injury confers standing) (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) ("If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.")); *George v. Omega Flex, Inc.*, 874 F.3d 1031, 1032 (8th Cir. 2017) ("assertions of paying more than [steel tubing] is worth and the consequent loss in value of the structures are economic injury sufficient to establish Article III standing"); *see also* Order, Dkt. 451 at 15 (purchase price paid for worthless 303 THF is an injury in fact).

manifest." *Id*. at 617-18. The fittings had a "universal inherent defect" and all class members had standing.[39] Here, the product is 303 THF and this Court has recognized that Plaintiffs "allege an inherent defect afflicting all 303 THF Products," present and exhibited by "poor quality base oils, waste oil, line flush, and used oils and diluted additive packages." Dkt. 451 at 21.[40] According to Plaintiffs' evidence, *every* bucket purchased by *every* consumer contained harmful waste. And 303 THF caused damage to all equipment regardless of type or model year. In other words, there are no "dry" class members. Defendants disagree but that is a merits issue, not a standing issue.[41]

Defendants argue that *Zurn* applies only if an expert tests the product. Opp. at 92. The cases they cite say no such thing.[42] Moreover, 303 THF's physical and chemical properties are known and Plaintiffs' experts examined extensive data. Defendants' assertion that manifestation occurs only upon "operational impact" (Opp. at 92) ignores Dr. Dahm's opinion that damage occurs immediately. The corrosion cracking in *Zurn* was not visible and dry plaintiffs did not need to wait until next-stage visible damage (i.e., leaking). *See Polaris*, 9 F.4th at 797 (distinguishing *Zurn* where plaintiffs did not allege "manifest-but invisible" degradation). If Defendants are asserting that Dahm's opinions are deficient for lack of testing, that has been rejected. Dkt. 1076 at 9.

2. The Classes Do Not Contain "Uninjured" Members Who "Did Not Care"

Defendants' "did not care" argument is based on a line of cases addressing not Article III

---

[39] Defendants cite *Halvorson* to suggest that *Zurn* recognized injury despite "lack of damages" because of some quirk of the Minnesota warranty statute. Opp. at 92. *Zurn* recognized fact of injury to dry plaintiffs citing *Peterson v. Bendix Home Sys., Inc.,* 318 N.W.2d 50, 53 (Minn. 1982), which simply enumerates damages available. The Minnesota statute is hardly unique on recoverable damages. Sugg. at 90-91 (citing authorities).

[40] To be clear, this case has not "morphed into … a product defect case." (Opp. at 79 n.42) and if Defendants really believed that, they would not have cited limitations periods applicable to all the causes of action actually asserted.

[41] Defendants also are wrong that injury cannot be present if there is "pre-existing" injury. Opp. at 90. Plaintiffs' evidence is that 303 THF harms equipment ***regardless*** of independent factors. Ex. 1, Dahm Rpt. ¶¶ 160, 181.

[42] In *Thunander v. Uponor, Inc.,* 887 F.Supp.2d 850 (D. Minn. 2012), plaintiffs alleged that pipe failed to meet toxicity requirements based on a memo identifying a toxic catalyst used in 2003. Plaintiffs' home, however, was built in 2002. *Id*. at 857-58, 862. In *George v. Uponor Corp*., 988 F.Supp.2d 1056 (D. Minn. 2013), there was testing but plaintiffs did not allege that pipe fittings in homes other than theirs exhibited dezincification. *Id*. at 1070 n.6. Neither case holds that testing is a necessary predicate.

standing but injury under Missouri's MMPA. Sugg. at 88-89. All rely on non-contextual reading of *State ex rel. Coca-Cola Co. v Nixon* and are very different than this case. *Bratton* and *White* were both slack-fill cases where the plaintiff asserted that boxes of candy were underfilled. In the first, plaintiff had for years purchased candy knowing the boxes were not full. *Bratton v. Hershey Co.* 2018 WL 934899, *1-2 (W.D. Mo. Feb. 16, 2018). In both, the courts looked to *Nixon* in saying that consumers who "did not care" about an allegedly misleading marketing practice are uninjured. *Id.* at *2; *see also White v. Just Born, Inc.*, 2018 WL 3748405, *3 (W.D. Mo. Aug. 7, 2018) (same).[43] In *Nixon,* plaintiff asserted that she and others would not have purchased Diet Coke had they known it contained saccharin. 249 S.W.3d 855, 859, 862 (Mo. 2008). The Court considered *Craft v. Philip Morris Companies, Inc.*, in which a class was certified over objection that whether consumers were deceived by the term "light" cigarettes was individual. There, plaintiffs asserted that they did not receive low tar, low nicotine cigarettes, going to the "condition of the product." 190 S.W.3d 368, 382 (Mo. App. 2005). In *Nixon*, by contrast, "all purchasers of fountain ***Diet Coke*** received fountain ***Diet Coke***" and the alleged injury was merely a "subjective preference against saccharin." 249 S.W.3d at 863 (emphasis original). The Court distinguished that situation from and pointed to *Craft* as a case where injury derives from objective characteristic or condition of the product. *Id*. Other courts recognize this distinction. *See SI03, Inc. v. Musclegen Research, Inc.*, 2020 WL 2468412, at *4-5 (E.D. Mo. May 13, 2020) (distinguishing *Nixon* in case alleging false advertising of product using term "medical grade" and claiming it had certain grams

[43] The *Bratton* decision also cited *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 2011 WL 6740338 (W.D. Mo. Dec. 22, 2011), which relied on *Nixon* as well. *Id*. at *1. *BPA* is incorrect about in a number of respects, but to the point here, the Court considered plaintiffs' claim regarding BPA-containing products akin to purchasers who ingested the drug Duract, found uninjured because "Duract worked." 2011 WL 6740338 at *3 (quoting *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 317 (5th Cir. 2002)). Here, Plaintiffs' evidence is that 303 THF ***did not*** work and also caused harm. *See, e.g.*, *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practs. Litig.*, 701 F. Supp. 2d 356, 381-82 (E.D.N.Y. 2010) (distinguishing "no-injury" product cases where plaintiffs asserted that drug at issue contained insufficient amount of chemicals to provide health benefits).

of protein in serving size). This Court itself has done so. *Burnett v. Nat'l Ass'n of Realtors*, 2022 WL 1203100, at *18 (W.D. Mo. Apr. 22, 2022). In *this* case, the supposed "Diet Coke" ***was not*** Diet Coke and *Nixon*'s analysis supports certification.

Defendants propose that the classes "necessarily include those who were aware of and/or 'did not care' about the alleged misrepresentations and defects." Opp. at 88. But they present no consumers who knew 303 THF was harmful worthless waste and purchased it anyway. They point to the disclaimer (Opp. at 89) which was inconspicuous and deficient in numerous respects. Unlike *Bratton* and *White*, where the candy was still candy, the product here was not what it purported to be at all. Nothing in the disclaimer dispels the foremost misrepresentation that 303 THF was tractor hydraulic fluid in the first place. All labels described it as such and none told the truth. The disclaimers instead reinforced that 303 THF was a legitimate hydraulics product, presenting, at best, a false "quality" option (303 THF vs. "premium") when it never belonged on a quality continuum at all. It was harmful waste.

Moreover, purchase process begins with a screening phase. The very first question is whether the product serves the function or is of the kind required. If not, he passes it by. Ex.22, Alter Rpt. ¶ 33 n. 8. Dr. Lester ***agrees*** that consumers with a goal of purchasing milk walk past the produce; if they want toothpaste, they disregard Preparation H. Ex. 121, Lester Dep. 197:2-13, 197:21-198:14. Lester also agrees that consumers who purchase a tube labeled toothpaste have been mislead if it actually is Preparation H, regardless of idiosyncrasies or individualized differences. *Id.* at 197:14-199:11, 199:22-200:8. Defendants seek escape from these admissions by urging that "just one use" would confirm that Preparation H is not "usable as toothpaste" and say Plaintiffs' theory is "hyper-technical" as would be the case if Coca-Cola's carbonation method did not qualify as "soda." Opp. at 138 n.103. They miss the point but Plaintiffs agree that the

toothpaste example is not perfect because the situation here is worse. It *is not* the case that consumers would understand that 303 THF was not what it purported to be. *See* Dahm Rpt. ¶ 167. Nor would it be hyper-technical to argue that a Coca-Cola label is misleading if what is inside the bottle turns out to be diluted sludge. In addition, and unlike *George v. Omega Flex, Inc.* (Opp. at 88), 303 THF harmed all equipment in which it was used.[44] Defendants have no evidence of consumers who knew the truth but purchased anyway. Plaintiffs affirm that they would not have done so. Sugg. Ex. 47. Defendants do not actually demonstrate a "did not care" purchaser on the theory Plaintiffs assert and supposition does not defeat certification.[45]

3. Defendants' Other "Overbreadth" Arguments are Meritless.

a. No class members used 303 THF "without incident"

Argument that equipment owners used 303 THF "without incident" and may have sold their equipment (Opp. at 89) does not render the class overbroad. The first assertion ignores purchase injury and as to physical harm, is contradicted by Plaintiffs' evidence that no class member used 303 THF without incident.[46] Whether equipment has been sold goes to whether a class member shares in flushing relief and does not defeat certification. *E.g., Huskey v. Birch Telecom of Mo. Inc.*, 2018 WL 4679738, at *2 (E.D. Mo. Sept. 28, 2018) (class definition not overbroad and inquiry into damages "is not enough to defeat class treatment").

b. Defendants' contention that "many individuals" were not exposed to labels is unsupported and does defeat certification.

---

[44] The "did not care" language Defendants lift from *George* was a quote from *Bratton* and in truth dicta. 2020 WL 4718386, *8 (W.D. Mo. Aug. 13, 2020). There, plaintiffs alleged diminution in value of homes containing defective piping. Home values, however, increased and there was no evidence of damage. *Id.* at *1-3, 7-8.

[45] *See, e.g. In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 122 (2d Cir. 2013) (speculation that some class members might have knowledge of a misrepresentation insufficient to forestall certification).

[46] Defendants cite declarations in an effort to show consumers who believed that their (or some other 303 product) "performed as expected." They are carefully worded, stating that the declarant is unaware of damage to equipment "from my use of" 303 hydraulic fluid. Def. Ex. 52, ¶ 15; Ex. 69, ¶ 17; Ex. 51, ¶ 18; Ex. 67, ¶ 18. None say he experienced no equipment issues and all express unawareness that a 303 product was the cause, which as Dr. Dahm explained would not be unusual but does not mean harm did not in fact occur. Dahm Rpt. ¶ 167.

Defendants also argue that "for the fraud, consumer protection act, and warranty claims," the classes include "many individuals who would have never been exposed to the allegedly misleading materials at issue and thus could not have suffered an injury from them." Opp. at 90. First, not all claims require reliance. Also, this is not a standing argument. *See Dollar General,* 2019 WL 1418292, at *12 (reliance arguments "better addressed in a Rule 23 analysis of commonality and predominance and not in the realm of standing"). Defendants' cases are readily distinguished and their contention that "many individuals" were unexposed to labels is wrong.

St. Jude involved varying communications from defendant to doctor and doctor to patient. 522 F.3d 836, 838-39 (8th Cir. 2008). Here, every label represented that the product was tractor hydraulic fluid when it was actually harmful waste. In *Faltermeier v. FCA US LLC*, the only cited representation was in a press release regarding product recall. 899 F.3d 617, 619 (8th Cir. 2018).[47] Here, labels were affixed to every container. In *In re Hardieplank Fiber Cement Siding Litig*., plaintiffs' expert did not demonstrate a common defect. 2018 WL 262826, at *9-11 (D. Minn. Jan. 2, 2018). [48] Here, 303 THF was unsuitable for every purchaser. Defendants also do not have evidence of "many individuals" not exposed to the misrepresentations. *See* Section __, above. Plaintiffs have much evidence that consumers rely on labels, including testimony from Plaintiffs *as well as* Defendants, circumstantial evidence (permitted in all jurisdictions), and opinion from a consumer behavior expert. Defendants' ***own*** expert testified that it is "almost exclusively the case" that when fulfilling a goal, consumers notice what they are looking for. Ex. 23, Lester Dep. 195:21-196:5. He also acknowledged that consumers must have a label to know what is inside a

[47] Summary judgment was upheld not for want of injury or reliance but "connection" with the sale. *Id*. at 622 (citing *Conway v. CitiMortgage, Inc*., 438 S.W.3d 410, 414 (Mo. banc 2014)). The opinion reveals no consideration of Missouri law on transaction causation, which the MMPA *does not* require.

[48] The Court there expressly distinguished the circumstances before it from when a misrepresentation is "*on the label* … that every class member purchased." *Id.* at *17 (emphasis added).

closed container. Chad Tate admits that "the consumer is going to rely on … the label in most instances to make a purchasing decision." Sugg. at 9-10. The class definition is not overbroad.

c. Named Plaintiffs do not lack "standing" to act as class representatives as to products they did not purchase.

Defendants cite *Drew v. Lance Camper Mfg. Corp.*, 2021 WL 5441512 (W.D. Mo. Nov. 19, 2021) to argue that Plaintiffs cannot represent a class based on purchases of 303 THF bearing labels they did not purchase. Opp. at 91. There, however, there was no cited evidence that the camper plaintiff purchased was similar to other campers manufactured by defendant. 2021 WL 5441512, at *7. *Smith v. Atkins* also is not analogous because the plaintiff purchased "25 different products," again with no evidence that products were the same. 2018 WL 9868591 at 7 ((W.D. Mo. May 8, 2018). Here, there is evidence that Smitty's/Cam2 303 THF was the same. Labels also were the same in representing harmful waste as 303 THF and omitting the truth. More recent cases hold that where labels and product are substantially similar, a plaintiff's claim "need not be limited to only the products she purchased." *Boone v. PepsiCo, Inc.*, 2023 WL 1070293, *6 (E.D. Mo. Jan. 27, 2023); *see also Goldman v. Tapestry, Inc.*, 501 F. Supp. 3d 662, 667 (E.D. Mo. 2020) ("plaintiffs have standing to assert claims on behalf of a class as to products they have not purchased as long as 'the products and alleged misrepresentations are substantially similar.'").

D. RULE 23(a) REQUIREMENTS ARE SATISFIED.

1. Plaintiffs Have Demonstrated Numerosity.

There is no fixed number for numerosity and even a class of 20 may suffice. Sugg. at 65. Defendants cite *Belles v. Schweiker* to suggest Plaintiffs must further "accurately identify" an approximate class size, but the plaintiff there failed to offer any approximate class size and Plaintiffs here provide evidence of thousands of purchasers in each state. Babcock Rpt. 11-14 & Table 7. Defendants do not otherwise explain their overall numerosity argument other than citing

their entire motion to exclude Babcock. Opp. at 98. As such, their argument is unclear and should be rejected. If Defendants are suggesting that retailer sales and settlement claims data is unreliable, Plaintiffs disagree, as explained by Dr. Babcock and illustrated by Matt McGrath on behalf of Tractor Supply Company ("TSC"), making clear that all 303 SKU sales from July 1, 2015 forward were exclusively Defendants' 303 THF. *See* Ex. 127, McGrath Dec. ¶¶ 8-9. Defendants have no basis to claim unreliability of retailer data.[49] They also urge that a MMPA subclass is not numerous because the CAM2 Missouri class has approximately 2,600 members and only a fraction might be for personal use. That presumes on the merits that business use does not qualify as personal use, but any event, even if a "tiny fraction" were only 1% of purchasers (which is not possible based on Plaintiffs' purchase evidence), that would still satisfy the numerosity requirement.

2. There Are Common Issues of Law and Fact.

Commonality is not a stringent test; even "a single common question will do." *Wal-Mart,* 564 U.S. 359. Here, there are many common questions. Sugg. at 66, 70. The single most common and overriding issue is the actual state of 303 THF, i.e., what it was and was not. The answer is a primary driver for every claim. Defendants' arguments are a study on deflection. They contend that ingredients to create 303 THF "depends on the batch" Opp. at 113. But Plaintiffs' experts explain that the ingredients always produced harmful waste. Regarding "specifications for and standards relating to tractor hydraulic fluid," Defendants pose: "what specification?" *Id*. They bastardize the inquiry, which is common in demonstrating, among other things, Defendants'

[49] TSC data, provided to the Administrator for the Retailer Settlement, covers sales from July 2015 through July 2019 and reflects unique purchasers in Arkansas (696), Kansas (2,252), Kentucky (5,821), Minnesota (767), New York (9,134), Wisconsin (1,444). *Id*. at ¶ 13. The number in California is 19 because California did not recognize a tax exemption used by TSC to track purchasers. But sales data for 303 THF during just the 2016-2019 time period totaled $4,520,713.06. *Id*. at ¶ 9. Rural King sales data (7/16-9/20) and Atwoods data (1/17-12/19) provides additional numbers of identifiable purchasers: Rural King - Kentucky (4,167), Missouri (407); Atwoods - Arkansas (728), Kansas (332), Missouri (98). *See* Ex. 129, Settlement Administrator Declaration, at Exs. C (Rural King) and B (Atwoods).

deviation from the standard of care, materiality, and part of why 303 THF is not what Defendants said it was. The answer does not depend on specific tractors. Common proof shows 303 THF met *no specification* for *any* equipment. *E.g.*,Sugg. at 18 (citing Smith, Tate, Schenk).

Defendants cite testimony they say indicates distinction between tractor hydraulic fluid and hydraulic fluid. Opp, at 113. In point of fact, Defendants *did* hold out their product as multi-functional and usable for hydraulics as well as wet brakes and transmission, Sugg. at 6, and Plaintiffs' evidence is that 303 THF was unsuitable period (whether common or single reservoir). Defendants' "no-fixed meaning" argument is based on inapposite "all natural" cases or variants thereof asserting a price premium theory and did not involve products whose very functionality was at issue.[50] Defendants also suggest that some people did not use 303 THF for hydraulics, citing Jenkins, who they say "did not even use the THF in the hydraulic system of his tree harvester" and Quiroga, who they say "used it as a grease for his irrigation well not for a tractor and not as a hydraulic Fluid." Opp. at 113. That is misrepresentative. Both *did* use 303 THF in equipment with hydraulic systems.[51] Defendants' argument that a jury might believe 303 THF was suitable for some uses (Opp. at 114) is a merits issue. *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 519-20 (6th Cir. 2015) (whether drug worked for some individuals "goes solely to the merits; it has no relevance to class certification"); *In re Nissan N. Am., Inc. Litig.*, 2023 WL 2749161, at *4 (M.D.

[50] *Vizcarra v. Unilever United States, Inc.*, 339 F.R.D. 530 (N.D. Cal. 2021) is one such case. The representation was "Natural Vanilla," alleged to mean that ice cream "would be flavored exclusively with vanilla from the vanilla plant." *Id*. at 537-38, 547. An expert conducted a conjoint analysis to "measure the price premium" associated with that asserted misrepresentation. *Id*. at 541. He did not, however, isolate the "Vanilla Representation." *Id*. at 548, 551. Plaintiffs are not asserting a price premium theory and this case is not akin to "all natural" cases. In *Lytle v. Nutramax Labs, Inc*., 2022 WL 1600047 (C.D. Cal. May 6, 2022), for example, defendants sold a "Joint Health Supplement." The Court was unimpressed by the case on which *Vizcarra* relied (*Jones v. ConAgra Foods*) as the word "natural" "is a more capacious label claim than the joint health representation here." *Id*. at *15 n.18. *See also, e*.g. *Brickman v. Fitbit, Inc*., 2017 WL 5569827, *6 (N.D. Cal. Nov. 20, 2017) (sleep-tracking representations "were substantially more clear, concrete and defined than the vague and open-ended term 'all natural'").

[51] Mr. Jenkins was attempting to estimate how much hydraulic fluid he uses "across the board weekly," including in a tree cutter hydraulic tank to lubricate the chain. He did *not* indicate that he purchased it only for that use. Jenkins did use 303 THF in equipment with hydraulic systems. Ex.128, Jenkins 136:16-137:25. The same is true of Mr. Quiroga. *See* Def. Ex. 157 at RG2 1754 (used 303 THF in tractors and a backhoe).

Tenn. Mar. 31, 2023) (argument that different vehicle configurations did not bar certification).

Defendants' argument on omission of ingredients (Opp. at 114 n.77) is another deflection that relies again on an inapposite "natural" claim in food products.[52] Materiality of omissions is not a subjective but objective standard amenable to common proof. *See Speerly v. Gen. Motors, LLC,* 343 F.R.D. 493, 521-22 (E.D. Mich. 2023) ("Because the materiality inquiry is based uniformly on the application of an objective standard, it is susceptible to class-wide proofs … [that] along with [existence of defect and common proof of concealment] will dominate the case on all the statutory and common law consumer fraud claims"); *In re MacBook Keyboard Litig*., 2021 WL 1250378, at *13 (N.D. Cal. Apr. 5, 2021) (materiality is a reasonable-person standard, reasons for purchasing "apply on a class-wide basis"); *Dickey,* 2019 WL 251488 at *5-6 (rejecting argument that consumers understood term differently: "Because the issues of materiality and falsity are not evaluated on an individualized basis, these questions do not weigh against a finding of predominance"). There is much common evidence of materiality. Defendants' knowledge-based arguments are unsupported.

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

Defendants' characterization of typicality as demanding near uniformity between class representatives and members is contrary to law. *See Burnett*, 2022 WL 1203100 at *6 ("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."); *Claxton v. Kum & Go, L.C*., 2015

[52] In *Astiana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Cal. 2013), there was evidence that not even food processors or the FDA defined "natural" in "any sort" of definite way and many consumers still viewed food as "natural" despite artificial ingredients. *Id.* at 508-09. Here, Defendants present no evidence that any consumer would still view their product as tractor hydraulic fluid *or* hydraulic fluid despite being harmful waste. Also, for claims using a reasonable-person construct, courts reject challenges regarding individual understandings. *See, e.g*., *Dickey v. Advanced Micro Devices, Inc*., 2019 WL 251488, at *3 (N.D. Cal. Jan. 17, 2019) (argument that there was no common understanding of the term "core" was premature and a common question) (citing *Mullins v. Premier Nutrition Corp.*, 2016 WL 1535057, at *5 (N.D. Cal. Apr. 15, 2016) (whether ordinary consumer "reasonably believes [plaintiffs' interpretation] is amenable to common proof: reviewing the … labels, and then asking the jury how they understand the message")).

WL 3648776, *3 (W.D. Mo. June 11, 2015) (representatives "need not share identical interests with every class member, but only 'common objectives and legal and factual positions.'") (citation omitted). The standard is not that the claims be identical, only typical. That WLC asserts no claim under the KCPA does not make it atypical of the class, because the facts and circumstances giving rise to its claims and all claims it shares with class members are typical. *See Cope v. Let's Eat Out, Inc.*, 354 F.Supp.3d 976, 990 (W.D. Mo. 2019) ("The claims of the entire class need not be identical.") The same is true for Wendt, Hazeltine and Zornes; even though certain individual claims have been ruled on, their remaining claims are all typical. Plaintiffs who do not have claims against CAM2 also still share common objectives and legal and factual positions because all class members have claims against Smitty's, and CAM2 and Smitty's 303 THF is the same.[53]

Defendants' label argument is meritless. First, Plaintiffs maintain and have explained why labels are substantially similar and indisputably, all labels represented the product as actual tractor hydraulic fluid and none disclosed the truth. *Dollar General* involved multiple labels yet typicality was met. Defendants cite to *Kosta v. Del Monte Foods, Inc*., which involved "natural" and other label claims dissimilar to this case, does not stand for the proposition asserted (Opp. at 101), and confused typicality with ability to prove a claim. 308 F.R.D. 217, 220, 226-27 (N.D. Cal. 2015). *See Nelson v. Mead Johnson Nutrition Co.*, 270 F.R.D. 689, 695-96 (S.D. Fla. 2010) (rejecting argument that products plaintiff first purchased did not contain challenged label statement, which "conflates the typicality requirement … with Plaintiff's ability to prove [consumer act] claim," which in addition did not require reliance).

[53] *Elizabeth M. v. Montenez*, 458 F.3d 779 (8th Cir. 2006) is not analogous. There, plaintiffs attempted to certify a class based on assaults and due process violations requiring analysis of particular interactions. Here, Defendants' conduct was the same for everyone. In *Rapcinsky v. Skinnygirl Cocktails, L.L.C.*, 2013 WL 93636 (S.D.N.Y. Jan. 9, 2013), the Court found the claims were not typical because the plaintiff sought to represent a New York class when he only purchased in Massachusetts. That is not the case here.

Defendants' "logical inconsistency" spin (Opp, at 100) also is flawed. First, materiality is objective, not subjective. Second, every Plaintiff and class member bought a product represented to be tractor hydraulic fluid suitable for use that was actually harmful waste. Defendants have no consumer who purchased with that understanding. Plaintiffs moreover allege "a common pattern of wrongdoing" supported by common evidence, and will "present the same evidence, based on the same legal theories to support [their own] claims … and all class members." *Allegra v. Luxottica Retail N. Am.*, 341 F.R.D. 373, 399 (E.D.N.Y. 2022). Defendants' "absurdity" argument (Opp. at 101 n. 60) also fails. Milemaster and other 303 labels are not at issue, Defendants' labels all represented product as tractor hydraulic fluid when it was not that or any other conceivable fluid Defendants can name *other than* harmful waste, which *no Plaintiff* interpreted the product to be. *See, e.g. Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 535 (E.D.N.Y. 2017) (plaintiff typical although he "did not buy every flushable product at issue" where defendant sold wipes with same formulation under different brands and most contained the word "flushable" in their titles).

Defendants' "suitability of use" argument (Opp. at 101) also fails and the "distinctions" they list are irrelevant because all claims are based on the theory that 303 THF was harmful waste that damaged all equipment uniformly, *regardless* of other factors. Dr. Dahm's opinion can and will be presented for all class members and Plaintiffs are typical regardless of Defendants' suitability protestations. Defendants also misrepresent Dr. Dahm's opinions. Opp. at 102. They apply to pre-1974 e as well as post-1974 equipment. *See* Dkt. 1039 at 18. Multi-function fluid can be used for all tractors and equipment, which all have hydraulic needs, old or new.

Courts summarily reject affirmative defenses as affecting typicality, that are concerned with whether the claims of named plaintiffs are based on the same legal theory and the course of conduct as other class members. *Haile v. Debt Shield, Inc.*, 2011 WL 13290211, at *4 (W.D. Mo.

Aug. 29, 2011); *Doran v. Mo. Dept. of Soc. Servs.*, 251 F.R.D. 401, 405 (W.D. Mo. 2008). Even when taken up, such arguments are rejected where a defendant fails to show unique individual defenses that "threaten[] to play a major role in the litigation." *Dollar General*, 2019 WL 1418292, at *14. Also, affirmative defenses are subject to rigorous analysis and must be supported *Id*. at *2 n.3 (citing *Zurn*, 644 F.3d at 619)); *see also Barfield v. Sho-Me Power Elec. Co-op*., 2013 WL 3872181, at *12 (W.D. Mo. July 25, 2013) (same); *H&T Fair Hills, Ltd. v. All. Pipeline L.P*., 2021 WL 2526737, at *12 (D. Minn. June 21, 2021) (same). Defendants fail to do so.

Defendants hold forth potential defenses but in the main fail to explain just how they believe they come into play on what claims in what states, or as to which Plaintiff they create a typicality problem. For example, Defendants make a show of what they say is Wisconsin law on mitigation but fail to apply it to a Wisconsin Plaintiff. Opp. at 104 n. 65. Plaintiffs from focus states Defendants address are: (1) Kimmich and Waterman, regarding a "real party in interest" assertion; (2) Graves, Nash and Bollin regarding asserted release of equipment damage claims under the *Hornbeck* Settlement; and (3) Wendt and Hazeltine "who read the disclaimer" and are "subject to a defense as to … property damage claims." Opp. at 105. Kimmich and Watermann's entities already have been added to the complaint. Plaintiffs already propose that repair costs be addressed individually. Disclaimer arguments are insufficient for reasons addressed, and Defendants fail to explain how typicality is affected. Their "order of operation" argument (Opp. at 105) does not relate to typicality at all. Plaintiffs all have purchases within the limitation periods. Defendants fail to explain how their limitations defense is unique to them or affects typicality. This and the remainder of Defendants' argument do not affect typicality for the same reasons they do not affect predominance. How Defendants believe comparative fault will apply (to what claim) is left to speculation. Opp. at 106-07. Typicality is satisfied.

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

Defendants also bypass governing standards on adequacy and ignore supporting declarations from Plaintiffs, all of whom have actively participated in this litigation and are willing and able to continue doing so. Sugg.at 68 & Ex. 47. Defendants claim "dereliction of duty" on discovery responses and "false" statements on settlement forms. Opp. at 107-08. What the cited exhibits show were errors *corrected,* information disclosed and/or clarified, or no error by the Plaintiff himself.[54] Class representatives are not required to be infallible. *See, e.g. In re Select Comfort Corp. Sec. Litig*., 202 F.R.D. 598, 609 (D. Minn. 2001) (adequacy satisfied where representative demonstrated willingness to vigorously prosecute action; argument that stock purchase date should have been earlier disclosed did not "rise[] to a level … which precluded [plaintiff] from serving as a subclass representative"). Defendants' argument about "conflicts" is even weaker. They do not assert an *Amchem* conflict, which was tension between persons already suffering personal injuries from asbestos (whose goal was "generous immediate payments") and those only exposed (whose interest was "ensuring an ample, inflation-protected fund for the future"). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997). Rather, they suggest possible dispute over who would get money if Plaintiffs prevail on flushing. Opp. at 108. If that issue arose, it can be addressed at the administration stage. *E.g., Barfield,* 2013 WL 3872181, at *15 (if land owned by multiple persons, check would be issued in both names).

[54] *See, e.g*., Def. Ex. 44, Wurth 187-88 (continued ownership of one piece of equipment *corrected* in a supplemental response); Ex. 55, Kimmich 208-09 (same); Ex. 41 Sullivan 71, 138-39 (inadvertent mistake on *someone else's* part about unidentified date error, and *corrected* information regarding repair); Ex. 84 Miller 80-81, 146, 251 (purchase or repair dates *corrected* by supplement); Ex. 56, Bollin 198, 269-70 (*amended* claim form regarding repair costs, *corrected* answer regarding repair costs); Ex. 82, Graves 152 (lawyer filled out claim form with typographical error). *See also* Def. Ex. 40, Wachholder 220 (questioned about whether dozer purchased or inherited, both on response); Ex. 84, Miller (explaining answer that "he" purchased fluid because it was purchased on his account); Ex. 66, Creger 222-24 (listing purchases of Smitty's product where *attached* receipt indicated Traveller product).

Defendants' suggestion that Plaintiffs have somehow "abandoned" repair cost or other claims (Opp. at 109-110) is wrong. Simply because Plaintiffs submit aggregate damages models for purchase price and flushing costs does not mean they have abandoned other claims, including repair costs, which they plainly have not. The cases Defendants cite are inapposite. *In re BPA Prods. Liab. Litig.*, 276 F.R.D. 336, 347 (W.D. Mo. 2011), the Court found plaintiffs inadequate because they did not pursue consumer act and warranty claims against one or more defendant without explanation. In *Henke v. Arco Midcon*, LLC, 2014 WL 982777 (E.D. Mo. 2014), plaintiffs were found inadequate because they asserted claims only for injunctive relief and property damages, not personal injury. *Id.* at *11. *Thornburg v. Ford Motor Co.*, 2022 WL 4348475, *7 (W.D. Mo. 2022) and *Cochran v. Oxy Vinyls*, 2008 WL 4146383, *10 (W.D. Ky. 2008) held similarly. *In Krueger v. Wyeth, Inc.*, 2008 WL 481956, *2-4 (S.D. Cal. 2008), plaintiff left the class open to personal injury claims she was not pursuing. *See also In re MTBE Prods. Liab. Litig.*, 209 F.R.D. 323, 340 (S.D.N.Y. 2002) (named plaintiffs claimed no personal injury).

5. Defendants' other adequacy arguments are meritless.

Defendants' arguments about certain Plaintiffs also fail. Opp. at p. 111.[55] Some arguments are disputed as contrary to the facts. For example, Defendants claim Anderson, Kimmich, and Watermann are not proper parties, but the Court denied summary judgment motion as to both Kimmich and Watermann. Dkt. 1010; Dkt. 1068.[56] defendants claim that Wendt, Hazeltine, and

[55] For example, "spoliation" would go only to individual repair claims of Anderson, Nash, and Hargraves and does not make them inadequate. Whether Graves' purchases were for business purposes reflects an implicit merits issue on the MMPA, and has no affect on any other claim..

[56] Anderson also is a proper plaintiff as he and his trust, in addition to the two farming entities, personally purchased 303 THF and paid for equipment repairs. Also disputed is Defendants' claim that Soils to Grow, LLC is inadequate.. Kimmich's understanding that nothing came from Soils to Grow,'s involvement in another case is accurate, as the matter was transferred without Soils to Grow, LLC as a class representative. Defendants' claim that Watermann is not a member of the KCPA subclass is also not accurate per this Court's Order (Dkt. 1068), as is their claim that Watermann "over-recovered" in the Retailer Settlement, where recovery was approximately 8% of damages and any error of Watermann's or any other Plaintiffs' claim form was innocent and was or will be corrected.

Sullivan are not adequate because some of their damages and/or claims were dismissed on summary judgment. The Wendt Order, however, only related to certain equipment damage, and, in any event, all are appropriate representatives for remaining claims.[57]

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

Defendants zero in on damages, reliance and causation. Opp. at 115-16. Plaintiffs reiterate that predominance focuses on fact of damage, not amount. Sugg. at 86-87. Defendants' reliance-based arguments are limited to claims that require individual showings of reliance.[58] *See*, *e.g., Zurn*, 644 F.3d at 619 (for "warranty and negligence claims premised on a universal and inherent product defect … plaintiffs may rely on common evidence … because there is no … individual reliance requirement for such claims"). Regarding causation, Defendants ***improperly conflate*** type of injury with cause of action. *See* Opp. at 126 (asserting that Plaintiffs "essentially bring two kinds of claims": (1) label claims … and (2) defect-property damage claims"). Again, not all claims require reliance[59] and contrary to suggestion (Opp. at 128), purchase-based injury derives not only from label-based analysis (Dr. Alter) but the fact that 303 THF was worthless waste. Ex. 45,

[57] Defendants' references to Tim Sullivan are also inaccurate and out of context. First, Sullivan's father-in-law was Albert Jones, now deceased, who was with Kentucky Plaintiffs' counsel's Law Firm years ago. Also, it is clear from review of the complete testimony that Tim was merely joking when he made the comments excerpted by Defendants. Similarly, the cited comments about his own representation of the class were an attempt at self-deprecating humor. Sullivan gave testimony reflecting knowledge of what the case is about and that he shares complaint common with other class members. For example, he testified: "A:..The fluid that – whoever makes the hydraulic oil, it needs to be checked. Not just for me, for everybody out there. I mean, I've had to pay bills that I shouldn't have had to pay because I – it should run longer and do better…." Ex. 1, Sullivan 172:3-7. Sullivan has specifically affirmed his willingness to serve as a class representative. Sugg. Ex. 47, Sullivan Dec. ¶ 4.

[58] According to Defendants, reliance is required for common law fraud and negligent misrepresentation as well as some consumer protections acts. Opp. at 122 n.86. Plaintiffs agree as to the first two but not as to consumer protection claims in most states. Plaintiffs also do not agree that reliance is required for breach of express warranty in Kansas or concede individual reliance issues for breach of the warranty of fitness. Defendants also are incorrect that "no classwide proof of reliance or presumption applies." Opp. at 123 n. 88.

[59] Defendants' citation to *Marshall v. H&R Block Tax Servs. Inc*., (Opp. at 127) is misleading. First, it addressed a multi-state class in which variations on elements defeated certification. Second, it said claims may be unsuited for certification "when reliance must be proven." 270 F.R.D. 400, 408 (S.D. Ill. 2010). Third, Defendants are arguing for reliance even when not required. *See Mednick v. Precor, Inc.*, 2017 WL 2619139, at *9 (N.D. Ill. June 16, 2017) (rejecting causation argument that "class members must have been persuaded by the misrepresentation in making their purchasing decisions" where reliance "is not an element" of the claim).

Babcock Rpt. at 3-4; Ex. 118, Babcock Dep. 57:10-59:18. Argument on whether 303 THF harms equipment (*see* Opp. at 118) ignores or attempts a merits determination on Plaintiffs' evidence.[60] Arguments about products purchased or entitlement to a flush remedy (Opp. at 116) have to do with who share in recovery, not predominance. Supposed label variations, non-label "communications," and disclaimer arguments (Opp. at 117-122) also do not defeat certification. Defenses are no barrier either. Plaintiffs also have set out means of demonstrating purchase-based damages and flushing on an aggregate basis. Class treatment is a superior means of adjudication, manageability rarely a basis to refuse certification and in regard to repair costs, not nearly the problem Defendants suggest. Defendants point to summary judgment orders they say affect certification but do not,[61] and ignore other rulings supportive of certification. *E.g.*, Dkt. 996 at 10 (recognizing (common) evidence from which a jury could find that 303 THF was "not of the represented quality") Dkt. 1004 at 11-12 and Dkt. 1076 at 9 (evidence that 303 THF causes "uniform" damage to equipment); Dkt. 1006 at 8 (disclaimers not conspicuous).

1. Elements of Plaintiffs' Claims Are Amenable to Common Proof.

a. Negligence claims are suitable for class treatment.

Duty, breach and harm are common questions answered by common proof. Defendants'

[60] *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472 (8th Cir. 2016) could not be more unlike this case. There, property owners alleged that a chemical released from an industrial facility migrated into the surrounding area. Remediation efforts had been underway for years. They sought injunctive relief and further remediation. *Id*.at 475-76. The action was "directed at TCE in breathable air, where both its presence and effect differ by property." *Id*. at 479. Here, every class member purchased a product unsuitable as to everyone and all equipment in which it was used was damaged.

[61] Responding to their examples, whether Zornes' purchased 303 THF or another 303 fluid from Orscheln in 2018 will not take "center stage." It is undisputed that he purchased 303 THF within the class period and, according to Plaintiffs' evidence, requires a flush. *See* Dkt. 1011 at 1 ("Zornes began purchasing Smitty's 303 THF Products in March 2018."). Whether Sevy used 303 THF in his dump truck is not an issue because Defendants have admitted and the Court has found that there is evidence he did, and regardless, Defendants do not explain how use in that equipment impacts class issues when there is no doubt he bought 303 THF and used it in equipment he owned. Dkt. 1076 at 1-2. As for all class members, use of other 303 does not impact damage from use of 303 THF. *Id*. at 9. The Court's ruling that a jury can decide any disputed fact issue as to whether the buckets Mr. Kimmich purchased in December 2018 had the Super S 303 or Supertrac 303 label on them does not create predominating individual issues because Kimmich undeniably purchased Supertrac 303 and suffered damage in the class period. His last purchase is not critically important or dispositive and Defendants provide no explanation how it could be.

causation argument is all about reliance and whether misrepresentation caused a purchase. Opp. at 127-28.[62] Defendants are incorrect in their analysis but as it relates to negligence, reliance *is not an element*. Arguments about comparative fault go to damages, not liability, and are unsupported. In addition, no state adopts a sole-cause standard and Defendants' contention as to proximate cause (Opp.at 134-35) is cursory at best. They cite cases for a soundbite that proximate cause is an element (Opp. at 134 n. 100), when all but one was decided on duty or ordinary care in inapplicable contexts. In *Cross v. W. Waste Indus.,* plaintiffs had no evidence of contamination or source. 469 S.W.3d 820, 825 (Ark. App. 2015). Here, all class members purchased a product causing harm to all equipment. *O'Connor v. Boeing N. Am., Inc*., 180 F.R.D. 359 (C.D. Cal. 1997) is another inapposite contamination case, and the issue in *Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 436, 439 (C.D. Cal. 2007) was whether dog treats caused illness, involving medical histories, environment, age, and diet. Here, 303 THF harmed all equipment *regardless* of age, condition, model year, maintenance, use of other fluids, etc. Some states place proximate cause within public policy. *Rockweit by Donohue v. Senecal*, 541 N.W.2d 742, 747 (Wis. 1995) (Opp. at 134 n.100). Defendants do not make that argument and the analysis would be common even if they did. Proximate cause often is analyzed by foreseeability. Sugg. at 45. Causation might be severed by an intervening cause but only if independent of defendant's negligence and unforeseeable. Sugg. at 103. Foreseeability is provable with common evidence.

b. Warranty claims are suitable for class treatment.

(1)Implied warranty of_merchantability: All states recognize an implied warranty,

[62] Defendants' caused-a-purchase arguments are misplaced for a number of reasons. For example, they come out of the gate with *Hadley v. Kellogg Sales Co.* (Opp. at 127), which did not refuse to infer class-wide exposure to label representations but held just the opposite as to representations prominently displayed. 324 F.Supp.3d 1084, 1100 (N.D. Cal. 2018); *see also Zakaria v. Gerber Prods. Co.*, 2016 WL 6662723, *8 (C.D. Cal. 2016) (same); *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 563-64 (N.D. Cal. 2020) (relevant analysis is not whether each class member "saw and relied on" representations but whether they were consistent, which "support[s] an inference of classwide exposure"). Here, every label indeed prominently displayed description as tractor hydraulic fluid.

arising by law, that goods "conform to affirmations of fact made on the container or label" and are fit for ordinary purpose. Sugg. at 47. Defendants rely on a single case, *Martin v. Ford Motor Co*., 292 F.R.D. 252, 276-77 (E.D. Pa. 2013), to claim that merchantability depends on "the experience" of each class member. Opp. at 139. *Martin* did not involve the focus states at issue and cites no authority for that assertion. Aside from that, it was initiated after a recall indicating that a rear axle "could potentially fracture" and was "prone to fracture." *Id*. at 263, 268. Here, 303 THF uniformly did not conform to label description and was uniformly unfit for ordinary use. Plaintiffs' evidence is that no consumer used 303 THF "problem free." Opp. at 139. Assertion that Dr. Dahm "confesses that the ordinary purpose of a THF is to use in tractors" only (Opp. at 140) is beyond the pale. His opinions clearly encompass more than tractors. Dahm Rpt. ¶ 21.

(2) Express warranty: Express warranty claims also are suitable for class treatment for reasons addressed, and Defendants arguments to the contrary are unsupported and/or meritless.

(a) Defendants do not show that reliance is required.

California: Defendants rely on *Graham v. Cent. Garden & Pet Co*., 2023 WL 2744391, *5 (N.D. Cal. 2023), which as explained by other decisions, is incorrect. The decision cites *Minkler v. Apple, Inc.*, 65 F.Supp.3d 810, 817 (N.D. Cal. 2014), which cites another case tracing back to *Burr v. Sherwin Williams Co.*, 268 P.2d 1041 (1954). Courts continuing to rely on pre-UCC cases "have failed to incorporate new language from the [UCC] that disavows the reliance requirement." *Kellman v. Whole Foods Mkt., Inc*., 313 F.Supp.3d 1031, 1052 n.91 (N.D. Cal. 2018). Contrary to suggestion (Sugg. at 46 n. 39), the better view is that reliance is *not* required in California. *See Weinstat v. Dentsply Internat., Inc*., 103 Cal. Rptr. 3d 614, 626 (2010) ("the concept of reliance has been purposefully abandoned"); *LeGrand v. Abbott Labs*., 2023 WL 1819159, at *13 (N.D. Cal. Feb. 8, 2023) ("Statements on a product's label are part of the bargain … and create express

warranties"); *Smith v. Keurig Green Mountain, Inc*., 2020 WL 5630051, at *5 (N.D. Cal. Sept. 21, 2020) (reliance not required); *Hastings v. Ford Motor Co*., 495 F. Supp. 3d 919, 924 (S.D. Cal. 2020) (same); *Hanson v. Welch Foods Inc.*, 470 F. Supp. 3d 1066, 1075 (N.D. Cal. 2020) (same).

Kansas: Defendants cite *Golden v. Den-Mat Corp*., 276 P.3d 773, 796 (Kan. App. 2012) for the proposition that statement or description must be part of the basis of the bargain but the opinion discusses representations by the defendant (rather than reliance by the recipient) to find sufficient evidence of express warranty. *Id*.at 796. *See also Cavender v. Am. Home Prods Corp.*, 2007 WL 1378431, at *7 (E.D. Mo. May 7, 2007) ("Kansas law does not require Plaintiff to show that she relied on Wyeth's statements to submit her breach of express warranty claim.").

Missouri: *Carpenter v. Chrysler Corp*., 853 S.W.2d 346 (Mo. App. 1993) does not impose a reliance requirement.[63] There, a salesman made representations to the effect that a Chrysler LaBaron was "a good car, reliable, brand new." *Id*. at 358. The Court ruled that such representations conveyed "*sufficient definite information* about the quality of the LeBaron … to be considered material." *Id*. (emphasis added) (citing *Clark v. Olson*, 726 S.W.2d 718, 719-720 (Mo. 1987) (explaining difference puffing, "deemed not to be material to a transaction" and statements conveying sufficient information as to character or condition to be material). Affirmation or description that 303 THF was tractor hydraulic fluid is in no way puffery.

Minnesota: In *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co*., 848 N.W.2d 539 (Minn. 2014), the Court acknowledged that after UCC adoption, articulation of express warranty does not require reliance. *Id*. at 544 n.6. Minnesota courts follow that lead. *Krause v. City of Elk River*, 2015 WL 3823093, at *3 & n.2 (Minn. App. June 22, 2015); *see also In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 564 (D. Minn. 2010) (current statute "omitted the requirement that a

[63] *See also Walker v. Woolbright Motors, Inc*., 620 S.W.2d 451, 453 (Mo. App. 1981) ("Since the adoption of the Uniform Commercial Code no particular reliance on an express warranty is required.").

buyer rely on an express warranty"). Defendants cite nothing to the contrary.

Arkansas: Defendants cite *Madden v. Mercedes-Benz USA, Inc*., 481 S.W.3d 455, 463 (Ark. App. 2016) but more must be considered. In *Currier v. Spencer*, 772 S.W.2d 309 (Ark. 1989), a seller placed an ad to sell a Datsun. In affirming breach, the higher Court said nothing about reliance but rather: "[Seller] warranted the car to be a one owner 1984 Datsun. What [buyer] purchased was two-thirds of one car and one-third of another." *Id.* at 311. It either did not require reliance or presumed it. The *Madden* court cited *Ciba–Geigy Corp. v. Alter,* 834 S.W.2d 136 (Ark. 1992) in which a purchaser never read the warranty. The Eighth Circuit, however, found that this case does "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 cases indicate that express warranty is created by "affirmation of fact … having a natural tendency to induce [plaintiff] to purchase it" as there indicated by deposit on the sale. *Greenway Equip., Inc. v. Johnson*, 602 S.W.3d 142, 149 (Ark. App. 2020). Caselaw indicates that reliance is not a required but relevant with affirmative proof that a description played no role. *See* Ark. Code Ann. § 4-2-313, UCC cmt. 3 ("any fact which is to take such affirmations … out of the agreement requires clear affirmative proof"). Even if Defendants had such proof for a few people, predominance would not be defeated for this Arkansas action.

b. Description as tractor hydraulic fluid is not mere opinion.

Defendants' argument on "opinion" is confounding. Opp. at 137. Their own expert does not opine that 303 THF was tractor hydraulic fluid and Plaintiffs' experts explain why it was not. Moreover, opinion in the context of warranty means puffery. *See Golden*, 276 P.3d at 795 ("unqualitifiable[] expressions" such as "first rate" or "the finest around"). Description, affirmation or promise that 303 THF was actual tractor hydraulic fluid was in no way puffery.

Common evidence establishes that the product was not what it purported to be.

c. Defendants' other efforts to create individualized issues fail.

Defendants contend that "testimony varies on whether statements [of "multi-functional," performance benefits, and suitability as replacement for listed manufacturers] could have formed the basis of the bargain," citing Hazeltine and Wendt who they say "used the product in a way that they knew Defendants had not warranted." Opp. at 137. This suggests a warranty of suitability for post-1974 equipment but *does not* speak to the fundamental warranty that the fluid was capable of functioning as tractor hydraulic fluid at all. Defendants attempt an interpretive issue regarding tractor hydraulic fluid vs. hydraulic fluid, Opp. at 137-38, but again 303 THF was neither.[64] All hydraulic systems require functions/protections 303 THF did not nprovide. Defendants' argument that suitability is individualized (Opp. at 137) also fails. 303 THF was not suitable for *any* equipment. Assertion that some people purchased Ag. fluid for the "same applications" (Opp. at 138) is an unsupported and overt attempt to inject a reliance requirement. Even in Arkansas, such purchases are not proof that would undercut a claim.

(3) Implied warranty of fitness: Defendants assert that in Arkansas and Kansas, if general functional use coincides with particular use, the latter merges with the former. This is a merits issue that does not affect certification. Defendants suggest that whether they had "reason to know of the buyer's particular purpose" is individualized but it is not. It is sufficient that "circumstances are such that the seller has reason to realize the purpose intended[.]" *See* Sugg. at 48.(citing UCC comments and cases). Defendants' awareness that consumers would purchase 303 THF to service a wide range of equipment is provable by common evidence. Defendants cite *Driscoll v. Standard*

[64] *Randolph v. J.M. Smucker Co*., 303 F.R.D. 679, 695 (S.D. Fla. 2014) (Opp. at 138) was not addressing an express warranty claim and was again an "all natural" case. Other courts found that phrase "a description, or statement of fact breached if the product contained synthetic ingredients. *Vicuna v. Alexia Foods, Inc*., 2012 WL 1497507, at *2 (N.D. Cal. Apr. 27, 2012)."All natural" also is different from a functional claim. *Lytle*, 2022 WL 1600047 at *15 n.18.

Hardware, Inc., 785 N.W.2d 805 (Minn. App. 2010) to say Minnesota requires reliance on a seller's judgment but the buyer tested the product "and worked closely with [defendants'] engineers to examine [its] capabilities." *Id*. at 617. A buyer need not inspect and reliance may be inferred. *Saunders v. Cowl*, 277 N.W. 12, 14 (Minn. 1938). Defendants do nothing to counter that in Missouri, absent inspection, a buyer necessarily relies on the seller's judgment. Sugg. at 48 & n.40. The same is true in Arkansas. *Id*. *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc*., 785 S.W.2d 13 (Ark. 1990) (Opp. at 140) does not hold otherwise.

(4) Pre-suit notice: This Court has held that notice is not required in Missouri and Minnesota. Order, Dkt. No. 451 at 28 & n. 26 (citing cases); *see also Browning v. Anheuser-Busch, LLC*, 539 F.Supp.3d 965, 974 (W.D. Mo. 2021) (buyer "is only under a duty to notify the immediate seller"). Defendants say the ruling "did not speak to class member notice" (Opp. at 135 n. 111) but pre-suit notice is required or it is not.[65] They concede by silence it is not in California. Sugg. at 45; *accord Woodard v. Labrada*, 2021 WL 4499184, at *27 (C.D. Cal. Aug. 31, 2021) (pre-suit notice not required for actions against manufacturer). Defendants do not contest that in Kansas and New York, notice may be satisfied by the complaint. Sugg. at 45. They cite *Golden* to say reasonableness should be assessed under the circumstances in Kansas. Opp.at 135. That looks to whether delay prevented remediation and prejudiced the seller in defending against suit. 276 P.3d at 788. Defendants do *not* suggest any purpose would require notice earlier than provided. *E.g., Stockinger v. Toyota Motor Sales USA Inc,*, 2017 WL 10574372, at *10 (C.D. Cal. July 7, 2017) (complaint reasonable notice where defendant took no action to correct defect, timing did not prejudice ability to defend, and no evidence of bad faith). Defendants demonstrate no

[65] Defendants point to *Dollar General*, which relied on *BPA* in regard to Missouri. In *Dollar General*, however, defendants were retailers. *BPA* provides no analysis of any kind except to say that plaintiffs there made a constructive-notice-of-defect argument, rejected as specific to landlord-tenant law. 2011 WL 6740338, at *7.

individualizing inquiries. As to Arkansas, they ignore futility. Sugg. at 46. Generically, Defendants contend that sufficiency of notice is a fact issue. Opp. at 135. As to any state that requires it, pre-suit notice was provided on behalf of named Plaintiffs and class members. Adequacy is a common question and the notice itself common evidence. As to timeliness, the standard is "within a reasonable time after [the buyer] discovers or should have discovered any breach." *E.g.*, Ark. Code Ann. § 4-2-607(3)(a). Defendants' arguments on "individual knowledge" (Opp. at 132-34) are hollow. It simply cannot be said on this record that anyone knew or should have known of a breach before notice was provided.

c. Consumer Act claims are suitable for class treatment.

"Contrary to [Defendants'] position, class certification of consumer fraud claims in federal courts is not impractical or impossible but ready and routine." *Speerly v. Gen. Motors, LLC*, 343 F.R.D. 493, 520 (E.D. Mich. 2023). Consumer protection statutes prohibit "deceptive" or "misleading" acts, which typically may be supported by proof of either affirmative falsehoods or omissions. *Id.* at 518-519. Here, there are both.

Arkansas: Defendants cite *Apex Oil* to say reliance is required but many decisions hold that pre-amendment, it was not. Sugg. at 54 & n. 45. Even if Defendants are correct, reliance and causation can be established by common circumstantial proof. *E.g.*, *Murphy v. Gospel for Asia, Inc.*, 327 F.R.D. 227, 243 (W.D. Ark. 2018). Defendants suggest that if reliance was not required before the effective date of amendment (Aug. 1, 2017) certification cannot be had. Opp. at 145. Plaintiffs contend that reliance does not impede certification at all. If the Court disagrees, it can and should certify an ADTPA class for purchases before the effective date. If it agrees and certifies for all Arkansas purchasers, ADTPA violation is still answered by common proof. For everyone who purchased both before and after August 1, 2017, reliance would be in play. A subclass could

be used for those purchasing only before that date.

California: California consumer act violations do not require individual reliance. *See* Sugg. at 55-57 (citing cases).[66] Defendants say the named plaintiff in a UCL case must demonstrate reliance and that Mr. Kimmich "did not rely on a number of … misrepresentations." Their own exhibit establishes that he relied on "on the front of the label where it says Tractor Hydraulic fluid" as well as multi-service. Def. Ex. 55, Kimmich 313:9-15. Defendants' "label variations" argument (Opp. at 151-52) is unavailing; all labels represented the product to be tractor hydraulic fluid when it was not. Analysis is objective. *Clevenger v. Welch Foods Inc*., 342 F.R.D. 446, 460 (C.D. Cal. 2022); *see also de Lacour v. Colgate-Palmolive Co*., 338 F.R.D. 324, 342 (S.D.N.Y. 2021) (UCL, FAL, and CLRA claims "are governed by an objective 'reasonable consumer' test"). Materiality also is objective. Sugg. at 56; *Rikos*, 799 F.3d at 513; s*ee also Woodard*, 2021 WL 4499184, at *36 ("a reasonable consumer of weight loss supplements could find representations of superior weight loss efficacy important"); *Testone v. Barlean's Organic Oils, LLC*, 2021 WL 4438391, at *4 (S.D. Cal. Sept. 28, 2021) ("it is clear under California law that ... materiality to a reasonable consumer does not mean it has to be material to every consumer") (citation omitted).

Defendants focus on criticizing Dr. Alter. Opp. at 150-51. First, the merits are not at issue. *Testone*, 2021 WL 4438391 at *14. Second, the case on which they rely is again different than this one. *Kosta v. Del Monte Foods* involved multiple food products labeled variously with "natural" and other similar claims. 308 F.R.D. 217, 230 (N.D. Cal. 2015).[67] The only opinion was from a

[66] The passage Defendants cite from *Johnnessohn* (Opp. at 152) is contrary to California law. *See also, e.g., Alger v. FCA US LLC*, 334 F.R.D. 415, 425 (E.D. Cal. 2020) (plaintiffs not required to make "an individual showing of deception, reliance, or injury"). Presumption of reliance arises from materiality not only for consumer-act claims but fraud and negligent misrepresentation. *Woodard*, 2021 WL 4499184 at*37.

[67] Defendants' citation to *Vizcarra* and their "fixed-meaning" argument (Opp. at 150-51) are as incorrect as before. The court in *Ackerman v.Coca-Cola Co*., did not deny but granted certification on California claims. 2013 WL 7044866, at *19 (E.D.N.Y. July 18, 2013). It did not find issue with the meaning of "vitamin water" (Opp at 152.) and misperceived that a NYGBL § 350 claim requires reliance.

serial ("fill-in-the-blanks") expert who provided the same opinion in other cases "without any real consideration of the specific product attributes at issue[.]" *Id*. That may describe Dr. Lester, but not Dr. Alter, who considered product, nature, and facts. His opinions moreover are not the only evidence of materiality. In *Testone*, plaintiffs alleged that defendant marketed coconut oil as a health alternative when it was actually unhealthy. Opinion from a scientist and testimony from defendant's corporate representative were sufficient to satisfy predominance. 2021 WL 4438391, at *14. Here, Plaintiffs have experts opining on the importance of hydraulic fluid, that 303 THF was harmful waste, and many admissions from Defendants on those subjects as well as the importance of truthful labels on purchasing decisions. California consumer act claims "are ideal" for certification because they do not require investigation into members' "individual interaction with the product." *Bradach v. Pharmavite, LLC*, 735 F.App'x 251, 254-55 (9th Cir. 2018) citation omitted); *Alger*, 334 F.R.D. at 425 ("Courts regularly find predominance satisfied and certify UCL and CLRA class claims."); *Bailey v. Rite Aid Corp.*, 338 F.R.D. 390, 407 (N.D. Cal. 2021) (courts "routinely hold" that if materiality and likelihood of deception can be resolved with common evidence under objective standard, predominance is satisfied for UCL, CLRA, and FAL).

New York: Defendants concede that NYGBL § 349 does not require reliance. They say reliance is required under § 350, citing *Ackerman* which, like Defendants' other cases, was decided or relied on cases decided before New York's high court ruled that reliance is not required. *See* 2013 WL 704486, *10 (citing older cases); *but see Koch v. Acker, Merrall & Condit Co.*, 967 N.E.2d 675, 676 (2012) (error to impose reliance requirement on §§ 349 and 350 claims: "Justifiable reliance …is not an element"). Their "loss causation" argument, also based on pre-*Koch* cases, also fails. New York's Court of Appeals cautions against conflating reliance and causation; plaintiffs must show that a misrepresentation caused a loss, not that it caused them to

enter into a transaction. *Stutman v. Chem. Bank,* 731 N.E.2d 608, 612-13 (2000); *see also Chery v. Conduent Educ. Servs., LLC*, 581 F. Supp. 3d 436, 451 (N.D.N.Y. 2022) (rejecting argument that plaintiff could not establish causation because neither he nor other class members saw or were deceived by deceptive statement as "such a declaration goes to reliance, not causation" and reliance is not an element). Whether a representation is misleading is again an objective standard provable with common evidence. *See Sharpe v. A&W Concentrate Co*., 2021 WL 3721392, at *3-4 (E.D.N.Y. July 23, 2021) (rejecting argument that consumers did not have common exposure to label claim that many "did not even notice, much less understand" as an effort to "sneak in reliance"). New York claims also are "ideal for class certification because liability turns on what a *reasonable* consumer, not a particular consumer would do." *Id.*

The decision in *Marotto* (Opp. at 147) has been roundly rejected. *See Allegra*, 341 F.R.D. at 409 & n. 14 (NYGBL claims do not require that "the entire class was exposed to the consistent misrepresentations," rejecting *Marotto* and another case "rightfully found" to have "inappropriately read[] a *seeing* requirement into the GBL"). Moreover, only four of the twenty label versions contained the challenged representation. *Morotto v. Kellogg Co*., 415 F.Supp.3d 476, 481 (S.D.N.Y. 2019). Again here, every label on every container represented the product to be tractor hydraulic fluid when it was not. Defendants cite *Marshall v. Hyundai Motor Am.*, 334 F.R.D. 36 (S.D.N.Y. 2019) (Opp. at 148), another "unmanifested" defect case, where plaintiffs asserted a price premium theory based on post-purchase conduct. *Id*.at 57-59. That is not the scenario here. In *Haag v. Hyundai Motor Am.*, plaintiffs offered *no* evidence to support a theory of diminished value. 330 F.R.D. 127, 132 (W.D.N.Y. 2019). Here, Plaintiffs have evidence that the product was worthless. Finally, Defendants contend that "[f]ull refund … claims are not cognizable under § 349." Opp. at 149. They cite *Baron v. Pfizer, Inc*., 840 N.Y.S.2d 445 (3d Dep't

2007) into which they read too much. There, "plaintiff failed even to allege … that [the drug] was ineffective to treat her neck pain." *Id*.at 448. Here, 303 THF was both worthless waste and harmful. Under these facts, full compensation of purchase price is appropriate. *See Suchanek v. Sturm Foods, Inc*., 2017 WL 3704206, at *6-7 & n. 7 (S.D. Ill. Aug. 28, 2017) (approving full-refund model for class claims in states including New York where product was not "simply missing a particular premium quality … [but] the package misrepresented the *very essence* of what was being purchased" and product is claimed to be valueless) (citing cases).

Missouri: The MMPA does not require reliance. *Hess v. Chase Manhattan Bank, USA, N.A*., 220 S.W.3d 758, 774 (Mo. 2007). Nor does it require transaction causation. *See Plubell v. Merck & Co., Inc*., 289 S.W.3d 707, 714 (Mo. App. 2009) (MMPA "does not require that an unlawful practice cause a 'purchase'"); *Edmonds v. Hough*, 344 S.W.3d 219, 222-23 (Mo. App. 2011) (rejecting argument that purchaser did not rely on appraisal in decision to close on loan). Defendants shrug off *Plubell* as the product of lowered state-law scrutiny at certification. Opp. at 154. Not so. Merck urged individualized questions as to prescribing physician's knowledge of risks and "whether each class member saw, and was affected by, Merck's advertisements for Vioxx." *Plubell v. Merch & Co., Inc*., Appellant's Brief, 2008 WL 5040728 (Mo. App. W.D.) at *2, 28-29, 31. It also argued causal nexus between defendant's misrepresentation and "plaintiffs' decision to purchase the product" must be shown. *Id*. at *45-46. The Court rejected these arguments based *on substantive* Missouri law requiring neither reliance nor transaction causation. *Plubell*, 289 S.W.3d at 714-15. The element of ascertainable loss is established if the value of a product is less than its value as represented. *Id*.; *see also Johnson v. Gilead Scis., Inc*., 563 F.Supp.3d 981, 989-90 (E.D. Mo. 2021) (MMPA "does not require a plaintiff to have "personally

'seen' or rely upon the deceptive practice" but only that loss resulted from an unlawful practice).[68] Respectfully, Plaintiffs contemporaneously move for reconsideration on the Hazeltine order.

Defendants cite *Faltermeier* for the proposition that "consideration of the individual facts of each case is critical to the causation analysis." Opp. at 154. That decision said there must be "some factual connection between the misrepresentation and the purchase." 899 F.3d at 622 (emphasis added). The MMPA actually states that wrongful conduct "in connection with *the sale* or advertisement" is unlawful. Mo. Rev. Stat.§ 407.020.1. "Sale" encompasses even offers and attempts to sell. Mo. Rev. Stat. § 407.010(6). Practices violating the MMPA are unlawful whether committed "before, during or after the sale." Mo. Rev. Stat. § 407.020.1. In *Faltermeir*, the alleged misrepresentation was in a recall announcement and there was no evidence that either buyer *or seller* was aware of it. *Id*. at 622. It cannot be said that *a label* has no connection with a sale. To the extent *Faltermeir* imposes a reliance requirement, it is contrary to Missouri law.

Defendants also contend that a plaintiff who uses a product receives the benefit of the bargain (Opp. at 153), which is simply wrong. First, benefit-of-the-bargain injury occurs at the point of sale. *See Schoenlein v. Routt Homes, Inc*., 260 S.W.3d 852, 854 (Mo. App. 2008) (rule measures damages "at the time of the transaction"); *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883, 886 (Mo. App. E.D. 1994) (same). Second, it applies when plaintiff ***has retained*** the product rather than returning it. *See Sunset Pools*, 869 S.W.2d at 886 (rule applies where parties "have not elected to rescind the contract"). Merck argued at length that Vioxx was an effective pain reliever. Just because a product can be said "to work" does not mean there is no injury. But

[68] Defendants' contentions about varying prices (Opp. at 153) in reliance on *Blades* is again misplaced. *True v. Conagra Foods, Inc.*, 2011 WL 176037, at *6 (W.D. Mo. Jan. 4, 2011) did not address benefit of the bargain. In *Saavedra v. Eli Lilly & Co*. (Opp. at 154) the Court said that price can stand as a proxy for value but that "numerous complicating factors in the prescription drug market" severed relationship between price and value. 2014 WL 7338930, *5 (C.D. Cal. Dec. 18, 2014). Commentary on *Plubell* and pharmaceutical pricing (*id.* at *5 n.7) is irrelevant.

303 THF did not work. *BPA* is wrong but readily distinguished on that basis.

Any suggestion that materiality renders a claim individualized also fails. Section 407.020.1 refers to "concealment, suppression, or omission of any material fact," not a decision to purchase. *Johnson*, 563 F.Supp.3d at 989. Materiality is not the subjective viewpoint of an individual purchaser and provable with common evidence. *See* 15 CSR § 60-9.010(1)(C) (material fact is "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision, *or* which would be likely to induce a person to manifest his/her assert, *or* which the seller knows would be likely to induce a reasonable consumer to act, respond or change his/her behavior in any substantial manner") (emphasis added).

Kansas: The KCPA states that prohibited conduct violates the Act "whether or not any consumer has in fact been misled." K.S.A. § 50-626(b). Defendants cite *Delcavo v. Tour Res. Consultants, LLC*, 2022 WL 1062269 (D. Kan. 2022), which had two holdings. As to affirmative representations, it found that § 50-636(d) requires that plaintiff suffer a loss caused by defendant's acts and (based on *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668, 677-80 (D. Kan. 2007)), inserted a reliance requirement notwithstanding § 50-626(b). *Id*. at *8. It denied certification for affirmative representations, made *after* purchase, which it said required inquiries as to particular representations. *Id*. at *9. Here, the misrepresentation was the same for everyone and at the point of sale. Moreover, *Delvaco* involved no benefit-of-the-bargain allegation and *Benedict* relied on a case decided before K.S.A. § 50-626 was amended to provide that a consumer need not be misled. As recognized in *Kucharski-Berger v. Hill's Pet Nutr., Inc.*, 494 P.3d 283, 295 (Kan. App. 2021) (Sugg. at 58), loss can be caused by paying more for a product than it is worth, which Defendants do not address. The second holding in *Delvaco* was that omissions "impose[s] an objective standard …[that] may be shown on a class-wide basis." 2022 WL 1062269, at *8 (citation omitted).

That claim was certified. Here, Defendants both misrepresented their product as tractor hydraulic fluid and failed to disclose its true nature. Defendants' "do not buy!" argument (Opp. at 153) is meritless. Defendants also ignore K.S.A. § 50-627 on unconscionable practices, which has no reliance requirement. Certification is appropriate on the KCPA claim.,

Wisconsin: Defendants agree that reliance is not required but say it is considered for causation. Opp.at 149. Causation means "material inducement." *Novell v. Migliaccio* 749 N.W.2d 544, 553 (Wis. 2008). That does not require a representation to be the only motivator and omissions are relevant. In *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc*., 732 N.W.2d 792 (Wis. 2007), for example, the plaintiff wanted a 1000-ton press and received a quotation from the defendant. *Id*. at 796. What he got was a 800-ton press. He testified that *had he received* a promotional quotation that defendant was offering 800-ton presses, he would have made no further inquiry. That was sufficient. *Id*. at 803.[69] In addition, Defendants acknowledge that reliance may be presumed where "there is no other logical explanation for the class members' behavior in response to the representation." *Boulet v. Nat'l Presto Indus., Inc.*, 2012 WL 12996298, *10 (W.D. Wis. Dec. 21, 2012); Opp. at 149-50. They say there are alternative explanations (e.g., "purchasing the same product … in a yellow bucket" or cost) but that is the wrong analysis. The presumption is recognized in scenarios "reflect[ing] the commonsensical notion that people generally won't pay something for nothing." 2012 WL 12996298 at *10. In *Boulet*, class members "paid for a deep fryer … and that is what they got. [Plaintiff] makes no claim that the CoolDaddy is incapable of deep frying or … is essentially useless for that purpose … Thus, this is not a case where the class members got nothing for their money." *Id.* This, however, *is* that case.

d. Unjust enrichment claims are suitable for class treatment.

[69] Whether independently actionable (Opp. at 149 n. 110), omissions are relevant as evidence of the untrue, deceptive or misleading nature of a representation. Sugg. at 62. They also are relevant to purchasing decision as in *K&S Tool*.

Defendants contend that unjust enrichment involves individualized inquiries but their only attempt to distinguish *Dollar General's* certification is based on damages. Here, common issues predominate on liability and damage and the claim should be certified as in *Dollar General* where the Court rejected many of the same arguments Defendants advance. *Dollar General*, 2019 WL 1418292 at *41-43. The issue is whether Defendants were unjustly enriched by profiting off sales of what they knew to be a waste stream. That is capable of class-wide resolution. Claims for unjust enrichment are commonly certified.[70] The few cases cited by Defendants are distinguishable, as Plaintiffs' evidence of the unjust nature of the enrichment is common, and Defendants provided no evidence that any purchaser wanted waste. Damages will be common and class-wide, whether based on amount paid or Defendants' profits.[71]

e. KPLA claims are suitable for class treatment.

[70] *See, e.g., Delcavo v. Tour Resource Consultants, LLC*, 2022 WL 1062269 (D. Kan. 2023); *Staubus v. Regents of Univ. of Minn.*, 2023 WL 2663049 (Minn. App. 2023); *Shelter Mut. Ins. Co. v. Baggett*, 646 S.W.3d 106, 114-115 (Ark. 2022); *Fritz v. Corizon Health, Inc., LLC,* 2021 WL 3883643 (W.D. Mo. 2021); *Lott v. Louisville Metro Gov't*, 2021 WL 1031008 at *12 (W.D. Ky. 2021) (citing *Hoving v. L. Title Ins. Co.*, 256 F.R.D. 555, 570 (E.D. Mich. 2009) which noted '[i]f the plaintiff's theory is ultimately supported with evidence, a jury could conclude that the defendant was unjustly enriched no matter what the particular facts of the individual borrower's case"); *Hicks v. State Farm Fire and Cas. Co.*, 2019 WL 846044 (E.D.Ky 2019), *affirmed and remanded*, 965 F.3d 452 (6th Cir. 2020); *Rilley v. Moneymutual, LLC,* 329 F.R.D. 211, 217, 219 (D. Minn. 2019); *Basso v. New York Univ.*, 363 F.Supp.3d 413, 421 (S.D. N.Y. 2019); *Menocal v. Geo Group, Inc.*, 882 F.3d 905, 913, 924-25 (10th Cir. 2018)("the unjustness element is susceptible to generalized proof and thus cannot defeat class certification"); *Houston v. St. Luke's Health System, Inc.*, 2018 WL 11491445 (W.D. Mo. 2018); *Murphy,* 327 F.R.D. at 237 (noting certification would be appropriate for fraud and unjust enrichment claims); *Cope v. Let's Eat Out, Inc.*, 319 F.R.D. 544 (W.D. Mo. 2017); *Robinson Nursing and Rehabilitation Center, LLC v. Phillips*, 519 S.W.3d 291, 297-98, 301(Ark. 2017); *In re: AMLA Litigation*, 282 F.Supp.3d 751, 766-69 (N.D.N.Y. 2017); *Longest v. Green Tree Servicing LLC*, 308 F.R.D. 310, 330 (C.D. Cal. 2015); *Khoday v. Symantec Corp.*, 2014 WL 1281600 at *31 (D. Minn. 2014); *In re Motor Fuel Temperature Sales Practices Litig.*, 292 F.R.D. 652, 660, 667-68 (D. Kan. 2013); *Kersten v. State Farm Mut. Auto. Ins. Co.*, 426 S.W.3d 455, 461,62 (Ark. 2013); *United American Ins. Co. v. Smith*, 371 S.W.2d 685, 692-95 (Ark. 2011); *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418, 436 (S.D.N.Y. 2009); *Keilholtz v. Lennox Hearth Prod., Inc.*, 268 F.R.D. 330, 341-42 (N.D. Cal. 2010); *Rosenow v. Alltel Corp.*, 358 S.W.3d 879, 886-887 (Ark. 2010); *General Motors Corp. v. Bryant*, 285 S.W.3d 634 (Ark. 2008); *In re Abbot Labs. Norvir Anti-Tr. Litig.*, 2007 WL 1689899, at *9-10 (N.D. Cal. June 11, 2007); *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 225-226 (Mo. App. 2007) (rejecting claim that elements of unjust enrichment required individualized proof); *Mooney v. Allianz Life Ins. Co.*, 244 F.R.D. 531, 537-38 (D. Minn. 2007); *Curtis v. Phillip Morris Companies, Inc.*, 2004 WL 2776228 (D. Minn. 2004).

[71] Evidence from retailers provides the total number of gallons of 303 THF sold in each state and the amount Defendants charged retailers. Plaintiffs also have evidence of the amount Defendants paid for used transformer oil, used turbine oil, other waste oil and line wash ingredients that went into 303 THF. Plaintiffs can used such information calculate revenues and net profits made off purchases of each state-wide class, contrary to Defendants' assertion. Opp at 143 n.105. Plaintiffs have also propounded discovery regarding Defendants' own calculations, to which Defendants have objected and Plaintiffs will continue to pursue.

Defendants make two design defect arguments that *do not* include the disclaimer, First, they say the "unreasonably dangerous" element is not common because whether 303 THF is unreasonably dangerous depends on equipment in which it was used. They cite two Plaintiffs' testimony about observing *operational impacts* as sole support. As discussed numerous times, Plaintiffs' common evidence is that 303 THF causes uniform damage, present whether or not operational impacts are observed. Defendants have no evidence to support their second argument that individualize proof will be needed to show that 303 THF reached purchasers "without substantial change." Purchase of a bucket of 303 THF from a retailer evidences that it did, Defendants say only that sometimes buckets were stored outside or rained on. Opp. at 155. Exposure to the elements *after* purchase is not evidence of substantial change to fluid inside the container prior to purchase. Certification is proper for reasons previously explained.

Defendants say the failure-to-warn claim does not lend itself to common proof because what Defendants knew, and should have warned of, varied by class period. It does not. Defendants always knew 303 THF was a waste stream mixture meeting no OEM specifications, regardless of the batch. The disclaimer does not destroy commonality because it is inconspicuous and did not disclose or warn that the product was a harmful waste stream. Defendants' citations to testimony about the misleading, inadequate and irrelevant disclaimer do not change the reality that common evidence shows consumers were never warned of the truth. Finally, Defendants assert that this claim depends on circumstances like training, experience, education and special knowledge. Common questions still predominate. No Plaintiff knew the truth and Defendants offer no evidence of a single consumer who did. As acknowledged even by Dr. Lester when speaking of toothpaste and milk, consumers are misled when they purchase a fundamentally misrepresented product regardless of individual differences and knowledge.

f. Fraud and negligent misrepresentation are suitable for class treatment.

There are many common questions on fraud and negligent misrepresentation amenable to common proof which Defendants do not dispute other than merits-based arguments about the state of 303 THF and assertions regarding their own knowledge. Defendants also give scant if any attention to the authorities Plaintiffs cite or the analysis they provide. Rather, they rely on broad pronouncements on three Eighth Circuit decisions and soundbites from *E. Maine Baptist Church v. Union Planters Bank, N.A.*, 244 F.R.D. 538 (E.D. Mo. 2007) (Opp. at 142), which does not even discuss what misrepresentations were at issue and thus of little value. In *Drew,* the misrepresentation concerned discrepancy between represented and actual weights of campers described as light weight. Defendant argued that this was "not reducible to common evidence because of the 'bespoke nature' of each camper with optional equipment." 2021 WL 5441512 at *6. Here, there is nothing "bespoke" about whether 303 THF was what it purported to be. That is subject to evidence common to all class members. Plaintiffs also assert both representation and omission/concealment. Defendants are correct that *Johannessohn* involved an omission, but there, not all ATV vehicles were defective, they otherwise worked, and the asserted "heat defect" omission was not one going to the heart and nature of the product.

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

As an initial matter, Defendants understate claims that entail, or even turn on, materiality. Opp. at 131 n.96. California consumer act, fraud and negligent misrepresentation claims do not require reliance at all or presume it where a misrepresentation is material. *See also, e.g.*, 15 CSR § 60-9.010(1)(C) (defining material fact for MMPA claim); *People ex rel. Schneiderman v. One Source Networking, Inc.,* 3 N.Y.S.3d 505 (2015) (act or practice deceptive in material way when

representation or omission is "likely to mislead a reasonable consumer"); *Allegra,* 341 F.R.D. at 394 (objective standard applies to materiality). For misrepresentation claims generally, materiality is not based on individual knowledge or preference. Sugg. at 51. *See e.g., Martin v. Monsanto Co*., 2017 WL 1115167, *6 (C.D. Cal. Mar. 24, 2017) (materiality does not inquire about "any understandings specific to the individual consumer")*; Lafarge N. Am., Inc. v. Discovery Grp. L.L.C.*, 574 F.3d 973, 982 (8th Cir. 2009) (representation material "if a reasonable person would attach importance to it … [and thus] subjective beliefs concerning the importance of the misrepresentation at issue are immaterial to our analysis") (citations omitted).[72] *See also generally Tylka v. Gerber Prods. Co*., 178 F.R.D. 493, 498-99 (N.D. Ill. 1998) (objective standard renders "irrelevant whether a plaintiff believes a misrepresentation is material"). Defendants cite two cases (*Novell* and *Blitz*) in support of a contention that materiality is "often" individualized when wrapped up with reliance. Opp. at 132. Both are limited to the Wisconsin consumer act, and neither involved a product that did not work. The WDTPA claim should be certified for reasons addressed. Defendants' only other citations, *Astiana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Cal. 2013), and *Jones v. ConAgra Foods, Inc*., 2014 WL 2702726 (N.D. Cal. 2014), are more "all natural" cases inapposite here. *Lytle,* 2022 WL 1600047, *15 n.18.[73]

Materiality is well suited to class treatment and reliance is amenable to common proof in a case like this. Reliance is often demonstrated by circumstantial evidence and reasonable inference is a well-accepted means of establishing reliance and causation in class actions. *See* Sugg. at 82-

[72] *Lakeland Tool & Eng'g, Inc. v. Thermo-Serv, Inc.*, 916 F.2d 476 (8th Cir. 1990) (Opp. at 131) is not to the contrary. In identifying facts "material" to a contract, the Court said they typically "concern[] the contract's subject matter or the parties' abilities to perform." *Id*. at 479. It held that whether the omitted fact was subjectively important was irrelevant because materiality is an objective standard. *Id*.at 480.

[73] *Astiana* contains several rulings adverse to Defendants, including that "[v]ariation among class members in their motivation for purchasing the product[ ]" did not defeat commonality, *id*. at 502, and [b]ecause the alleged misrepresentations appeared on the actual packages …, there is no concern that the class includes individuals who were not exposed to the misrepresentation." *Id*. at 500; *see also Woodard,* 2021 WL 4499184, at *35 (where misrepresentation appears on the label "class-wide exposure to it may be inferred").

83 & notes 54, 55; *Morning Song Bird Food Litig*., 320 F.R.D. 540, 555 (S.D. Cal. 2017) ("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."). Defendants dispute none of this. There is a wealth of common evidence going to materiality and reliance, not just from Dr. Alter but testimony by other experts about the importance of proper hydraulic fluid, stop-sale orders, admissions from Defendants' own officers and employees about labelling, harms resulting from 303 THF, and evidence that they hid the truth. Defendants have simply not put forth evidence that defeats predominance.

3. Defendants' Knowledge-Based Arguments Are Meritless.

Defendants contend that non-label communications defeat predominance when "reliance and materiality" are elements. Opp. at 118. As much as they try, however, none of the purported evidence Defendants offer actually creates individualizing issues. For example they cite advice regarding particular equipment (Opp. at 119) when 303 THF was suitable *for no* equipment and no state requires that the asserted misrepresentation be the sole basis for a purchasing decision. Positive information from retailers or Defendants' website[74] changes nothing; it simply reinforces that 303 THF was held out as a legitimate hydraulics product.[75] As to negative information Defendants have no evidence of a ***single consumer*** who knew the full truth about 303 THF but purchased it anyway. All the internet research so assiduously pursued did not produce such a person.[76] That includes the blog poster (Def. Ex. 91) Defendants repeatedly cite. *See* Opp. at 120,

[74] Defendants say consumers visited their website (Opp. at 120 n. 82) but make no claim that anything on the website during the relevant time period disclosed the truth about their product.

[75] *See, e.g*., Def. Ex. 161 (Hardin Rog. Answer 11) (asked if product was as good as label said, sales associate stated "it would not be on the label if it was not what is said it was").

[76] For example, Defendants cite a blogger from Kentucky responding in mid-2018 to the stop sale in Georgia (Opp. at 89; Def. Ex. 133) but neither that nor surrounding posts indicate purchase of Defendants' product (as opposed to some other 303 product) or that purchasers knew it was both waste and harmful. The same is true of other exhibits. *See, e.g.,*Opp. at 45-46, 57, 89; Def. Exs. 88, 89, 90, 91.

121, 133 & n. 99.[77] Defendants make much of purported evidence that does not show what they contend. For example, they say there were "instances where Smitty's recommended against 303 in favor of a premium product," citing an email to a *retailer*, not a consumer. Opp. at 119; Def. Ex. 162; *see also* Ex. 141, Schenk (10/10/19) 209:1-11. Defendants also cite articles they say showed that 303 THF was made with line wash (Opp. at 120, 132), but they do not address *Defendants*' product, manufacturing process or ingredients.[78] And neither they nor stop-sale orders state that it amounted to harmful waste stream. Defendants provide no evidence of a third-party source that had, or conveyed, that information.[79] No one was privy to internal documents (or testimony) relating to ingredients, formula, and process for creating 303 THF. To this day, such information is Defendant-Confidential and subject to protective order, which itself defies suggestion "that any of the relevant information previously was disclosed … to any buyers of [their] product." *Speerly* 343 F.R.D. at 519 (rejecting argument that concealment could not be resolved on a class-wide basis, finding it "disingenuous" and certifying class).

Protests notwithstanding, Defendants indeed are relying on hypothesized constructive knowledge, from sources amounting at best to common insufficient evidence. S*ee* Sugg. at 106 (citing cases); *see also In re Lehman Bros. Sec. & ERISA Litig.*, 2013 WL 440622, at *4 (S.D.N.Y.

[77] The blogger was responding to a question whether 303 would work in a log splitter. He re-posted a message *from someone else* that Smitty's is a buyer of line wash. This other messager did not indicate that *he* was a purchaser or discuss harmful impacts of 303 THF. The blogger, who used (unspecified) 303, did not indicate reliance on what the messager said (just received), or awareness that the fluid was harming his equipment. The blogger on yesterdaystractors.com (Def. Ex. 163) gives no indication that he is referring to a Smitty's/Cam2 product, but if so, does not indicate awareness that it was waste or that damage to his equipment occurred upon first use.

[78] When Glenn authored the articles, he had not seen actual information discovered in this litigation. And the articles nowhere discuss Defendants' product. Glenn talked about obsolescence of "303," not that Defendants' product met no specifications. He discussed "down-treating" (using additive package for JD-20C at lower treat rate for JD-20A), not that 303 THF lacked additive package at all. He spoke of potential use of low-quality base oil, not the waste material used by Defendants. Glenn also expressed high *skepticism* on education. Def. Ex. 166.

[79] The consumer Defendants cite from Missouri (Mr. Underwood) was unhappy that Orscheln's 303 product was taken off the market, the MDA communication references no 303 product by name, does not say that Defendants' product was both harmful and actually waste. Def. Exs. 118, 119. Neither does this demonstrate that Mr. Underwood wanted to, or did, purchase Smitty's or Cam2 303 product.

Jan. 23, 2013) ("to the extent Defendants argue that actual knowledge can be inferred from … newspaper articles and public reports … this again is an issue subject to generalized proof") (citation omitted). Generalized proof is "wholly consistent with class treatment" and speculation insufficient to defeat it. *In re U.S. Foodservice,* 729 F.3d at 121-22; *see also Pub. Employees' Ret. Sys. of Miss. v. Merrill Lynch & Co., Inc.*, 277 F.R.D. 97, 119 (S.D.N.Y. 2011) (conjecture that class members "'must have' discovered" falsity insufficient "when there is no admissible evidence to support Defendants' assertions" and argument that actual knowledge can be inferred from newspaper articles and public reports, "this again is an issue subject to generalized proof"). Defendants' attempt at analogy to *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) falls flat. That decision "rest[ed] on [its] unique facts" readily distinguished. *In re Lehman Bros*., 2013 WL 440622, at *4 n.13. Defendants' other case is equally inapposite.[80]

Insofar as Defendants' own knowledge, that is a common question amenable to common proof.[81] Defendants' reliance on *BPA* is far off base. First, it was not addressing "foreseeability" or "duty to disclose" (Opp. at 133)[82] but a MMPA omission claim, defined as failure to disclose material facts either known or "upon reasonable inquiry" would be known to the defendant. 2011

[80] In *In re Ford Motor Co. E-350 Van Prods. Liab. Litig*., plaintiffs alleged that vans were designed in a way that led to high rollover rates. The court got right that New York law does not require that a misrepresentation cause a purchase for GBL § 349 claims. 2012 WL 379944, at *15 (D.N.J. Feb. 6, 2012). It got wrong that it requires knowledge of the deception. *Allegra,* 341 F.R.D. at 409 n. 14. As to publicly available information, *Ford Motor* involved numerous sources discussing rollovers and handling problems, as well as a safety advisory from Ford itself. 2012 WL 379944 at *15. Acknowledging that plaintiffs *did not* need to show they would not have purchased if they had known of the handling problem, the Court treated knowledge as a defense, presuming along the way that consumers who saw the reports would understand that the van had such problems. *Id*. Here, no public source conveyed the truth about Defendants' product and unsuitability was not obvious like a rollover.

[81] Defendants cite *Oxford Health Plans (N.Y.), Inc. v. Biomed Pharms, Inc.,* 122 N.Y.S.3d 47 (2020) to say that New York law requires actual knowledge of a falsity. Courts, however, recognize a fraud claim where defendant knows a representation is false or was "reckless with respect to whether [it] was true or false." *Cambridge Capital LLC v. Ruby Has LLC*, 565 F.Supp.3d 420, 466 (S.D.N.Y. 2021); *see also* Sugg. at 49 (citing cases). Nevertheless, the subject is still focused on Defendants rather than any class member.

[82] The Court earlier recognized that "all jurisdictions surveyed create a duty to disclose material facts that are more readily known by one side of the transaction." *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods Liab. Litig.*, 687 F.Supp.2d 89, 907-08 (W.D. Mo. 2009).

WL 6740338, at *5 (quoting 15 CSR § 60-9.110(3)). Defendants argued that their knowledge about health risks of the chemical at issue changed as available scientific information changed. *Id.* Defendants here did not need external science to tell them that fluid containing improper and inadequate ingredients is harmful. Neither did they need an external source to tell them how and with what their product was made. *BPA* does not aid them. Neither does the other case they cite.[83]

4. Defendants' Arguments on Equipment and Label Variation are Meritless.

Defendants' argument on variation in equipment (Opp. at 118) is a repeat on merits-based arguments that suitability of 303 THF depends on the application, which it does not. Their causation/property damage/flushing argument simply ignores Dr. Dahm's opinion Opp. at 128-29, 131.Defendants may put on their own evidence to disagree. Whether repair costs are individualized is in no way an "implicit admission" as to flushing, needed uniformly as to all purchasers; repairs involve additional questions such as what repairs were undertaken.

Defendants acknowledge that Plaintiffs are "masters of their case" yet persist in ignoring it. All labels at all times represented 303 THF was tractor hydraulic fluid when it was waste. Other representations were false or misleading whether standing alone or reinforcing that the fluid was what it purported to be. Sugg. at 27. Defendants ignore Alter's testimony on that very point. Defendant's contention that they have a "due process right to defend each label separately" is an untenable generalization, precluding certification in every case, which Defendants themselves acknowledge in the next breadth by saying that common questions predominate if product labels "remain constant." Opp. at 117. Here they did by representing the product as something it was not.

[83] In *Sanneman v. Chrysler Corp*., defendant manufactured vehicles using a painting system that allegedly failed to prevent topcoat delamination. When defendant started using the system, it was new. 191 F.R.D. 441, 443 (E.D. Pa. 2000). Plaintiff asserted that defendant must have known of the problem (exposure to ultraviolet rays reacting with primer) by 1997 but "[made] no such claims for the early years of the class period." *Id*. at 453 & n.18. Here, there was nothing new about 303 THF within the class period. Smitty's, for example, knew from the beginning that it did not meet a 303 or other specification. Sugg. at 34; *see also id*. at 38-39 (discussing February 2014 emails between Cam2 executives acknowledging that fluid was "just line wash in a bucket" without additive technology).

5. Defendants' Reliance Arguments Are Meritless.

Plaintiffs cited numerous decisions, including within this circuit, granting certification in cases involving reliance less compelling than this one.[84] Defendants cite ***no case*** denying certification in which the very nature of the product was misrepresented on its label. [85] Certification is even more warranted than in *Dollar General* where the motor oil was at least still motor oil, and consumer protection classes were certified as to states that both did not *and did* require reliance. 2019 WL 1418292, at *26.

a. Defendants' Eighth Circuit decisions are readily distinguished.

Defendants proceed as though reliance always defeats certification in the Eighth Circuit but that simply is not true. *St. Jude* involved varying representations, not labels which here at all times misrepresented the product as something it was not. In such circumstances, the Eighth Circuit recognizes that certification is appropriate. *E.g.*, *McKeage v. TMBC, LLC*, 847 F.3d 992, 999 (8th Cir. 2017) (although documents varied at times, district court "correctly determined" that differences were not distinct enough for decertification); *see also* Sugg. at 80 & n. 52 (citing cases distinguishing *St. Jude*); *Dollar General*, 2019 WL 1418292, at *26 (same). In *Johannesson v. Polaris Indus. Inc,* plaintiffs asserted consumer-act claims in various states. As to omission of the alleged "heat defect" (which not all ATVs manifested), the Court looked to evidence "challenging how much each consumer-plaintiff relied on the alleged omissions." 9 F.4th 981, 985 (8th Cir.

[84] The scenario in *Rikos* (Opp.at 125) is one of many and supports Plaintiffs. First, as in *Rikos*, Defendants conveyed a "generally uniform core message such that all class members were likely exposed to the alleged misrepresentation" on the packaging. 799 F.3d at 518. Second, the Court observed that there was one reason to buy the drug—to promote digestive health—and this representation was material. Here too the product was represented as having a function it did not possess. To analogize, the task here was "[equipment] health" when the product was not just waste but harmful.

[85] *In re Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig*., 2017 WL 1196990 (N.D. Ill. Mar. 31, 2017) did not involve a label and most class members outsourced plumbing work or purchased a home with the product already installed. *Id*.at *55. *Clayton v. Batesville Casket Co.*, 2009 WL 2448164 (E.D. Ark. 2009) did not involve labels and use of marketing and warranty materials was not consistent. *Id*. at *4. *Johnson v. BLC Lexington, SNF, LLC*, 2020 WL 3578342 (E.D. Ky. July 1, 2020) did not involve labels; plaintiff alleged false advertising about staffing and ratings for a nursing facility, but those levels changed monthly. *Id*. at *5.

2021). It identified two (non-focus state) consumer acts requiring reliance, was equivocal as to California's UCL, and did not address Arkansas, Missouri, Kansas, or New York, *Id.* at 985 & n.2. Non-reliance claims were not certified for "superiority reasons." *Id*. at 986.[86] The ruling does not affect consumer act claims for any state that does not require reliance. In addition, the "heat defect" had not manifested in all vehicles. Here, 303 THF was unfit for everyone. And unlike the situation in *St. Jude* or *Johannesson,* Defendants present ***no evidence*** that any consumer was told, knew, or in any way did not care that 303 THF was worthless, harmful waste. *See Custom Hair Designs by Sandy v. Cent. Payment Co., LLC*, 984 F.3d 595, 603-04 (8th Cir. 2020) (communications relevant but only if defendants had proof of disclosure; affirming certification). *Hudock v. LG Elecs. U.S.A., Inc*., 12 F.4th 773 (8th Cir. 2021), like many of Defendants' cases, involved a particular product feature, television refresh rates alleged to be lower than stated on a fact tag. There again, however, the televisions were still televisions. Plaintiffs proposed a choice-based conjoint analysis to value the refresh rate. 2020 WL 1515233, at *2, 15 (D. Minn. Mar. 30, 2020). The Eighth Circuit *did not* reject certification merely because of evidence that "not everyone read the labels," as Defendants appear to concede. Opp. at 124 (stating that *Hudock* "says this matters," not that it is dispositive). Under plaintiffs' theory, the refresh rate was the attribute to value but surveys showed that consumers did not value it more than other considerations. *Hudock,* 12 F.4th at 777. Here, Plaintiffs are not proposing a conjoint analysis[87] and the product at issue was not what it purported to be at all. It is not the law that predominance is defeated if even one consumer did not see a label,

[86] The district court was considering manageability of one trial of multiple state-wide classes, *Johannessohn*, 450 F.Supp.3d at 986, involving four sets of state law, "forty-three different vehicle configurations, including at least four different engines, with changing exhaust standards … and various attempts by Polaris to remedy the problems." *Johannessohn*, 9 F.4th at 986. That is not what Plaintiffs propose here, and there is much less complexity.

[87] As indicated, reliance on a misrepresentation need not be the sole factor for a purchase decision in any state. Sugg. at 51. Defendants do not dispute but discount this law because cited cases were not class cases. Opp. at 124 n. 89. The class action device, however, does not alter substantive law on what is required for a plaintiff to prove a claim. *E.g. Murphy,* 327 F.R.D. at 241 (no authority that the law requires that reliance on representations be sole cause; certifying class); *Woodard,* 2021 WL 4499184, at *35, 36 (same).

and Defendants' factual showing in that regard is slim to none.

b. Surveys are not required, and Dr. Alter does not make assumptions.

Defendants' criticism that Dr. Alter did not conduct a survey (*see* Opp. at 84-85) is meritless. Surveys often are conducted for price-premium theories. Here, however, Plaintiffs contend that the product was worthless waste. In *Dollar General*, plaintiffs asserted deception via labeling and product placement, not part of Plaintiffs' theory here. And there, the fluid while obsolete, was still true motor oil. Defendants cite no case holding that surveys are required in a case like this.[88] Defendants' argument about fail-safe classes (Opp. at 125) is unsupported, convoluted and meritless. First, they cite zero salient authority. Neither *Blades* nor *Best Pallets Inc. v. Brambles Indus., Inc.*, 2009 WL 10672543 (W.D. Ark. Aug. 17, 2009) say anything about a fail-safe class and both deal with anti-trust impact. Second, Dr. Alter is not assuming but applying well-established principles of consumer behavior, with which even Lester agrees**.** Third, Defendants *do not* contend that the classes actually are fail-safe. The class is defined by objective act of purchase, not reliance or whether the member would have purchased knowing the truth. Putative class members purchased a product or did not. If a jury is not persuaded, members are not defined out of the class but bound by an adverse judgment. Defendants also are not deprived of putting on their own evidence, including Dr. Lester, who can opine on his own views, subject to examination on, among other things, his admissions. Tellingly, Defendants solicited declarants

[88] Both *Hughes v. Ester C Co.*, 330 F.Supp.3d 862, 872 (E.D.N.Y. 2018) and *Haskell v.Time, Inc*., 965 F. Supp. 1398, 1407 (E.D. Cal. 1997) were decided at summary judgment and neither hold that surveys are required but only "extrinsic evidence." *Id*.at 1407. *Park v. Cytodyne Techs., Inc*., 2003 WL 21283814, at *4 (Cal. Super. Ct. May 30, 2003); *see also Consumer Advocates v. Echostar Satellite Corp.*, 8 Cal. Rptr. 3d 22, 30 (2003) (rejecting argument that plaintiff must produce a survey to prevail on a claim that the public is likely to be misled; reversing summary judgment); *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 565 (N.D. Cal. 2020) (granting certification and holding that expert was not required to conduct survey). In *Rahman v. Mott's LLP* (Opp. at 85), misleadingness of the challenged representation was counterintuitive with the label claim as "presumably both parties would agree that "No Sugar Added" is literally true, in that it accurately reflects the ingredients used to make Mott's 100% Apple Juice." 2014 WL 5282106, at *9 (N.D. Cal. Oct. 15, 2014).

and, aware of Plaintiffs' position on the truth of their product, did not elicit even by hypothetical an affirmation that, contrary to Dr. Alter's opinion, those declarants would still have purchased 303 THF knowing the truth. That deficit is not of Plaintiffs making.

6. The Disclaimers Do Not Defeat Predominance.

No consumer-act claim requires individual reliance (except Arkansas for purchases after Aug. 1, 2017). Neither Missouri nor New York require reliance ***or*** transaction causation, defeating Defendants' caused-a-purchase argument. The same is true in Kansas. California uses a reasonable-man analysis (as to consumer act *and* fraud claims) and does not require transaction causation either. Wisconsin consumer-act law is consistent with Plaintiffs' theory. The disclaimer does not preclude certification on any of these claims. As to other misrepresentation-based claims (fraud and negligent misrepresentation), the disclaimer was not conspicuous. Dkt. 1006 at 9. As to those who did read the disclaimer, it was not just ambiguous but misleading. Neither version informs that the fluid was not in reality tractor hydraulic fluid, was waste, or even likely to, much less certain to cause harm. And once again, Defendants have no evidence of any purchaser with knowledge (actual or constructive) of the truth. Predominance is intact as to all misrepresentation-based claims, including those requiring reliance.

The case on which Defendants rely for their "inherently individualized" soundbite, *In re Avon Anti-Aging Skincare Creams & Prods. Mktg. & Sales Pracs. Litig*. (Opp. at 128) conflicts with New York law by conflating reliance and causation. In addition, it illustrates by comparison why this case is suitable for class treatment. There, plaintiffs alleged that website statements that skin cream reversed or repaired wrinkles and rebuilt collagen were false. These "scientific" misrepresentations were not made to all consumers as would be the case "through a uniform label" and the "falsity" question thus "would not decide the claims of many purchasers." 2015 WL

5730022, at *4 (S.D.N.Y. Sept. 30, 2015). Second, while improving skin appearance may not have been accomplished "through the promised [biological] mechanism … [it] worked nonetheless." *Id.* at *7. This case is not about a product that worked. The "falsity question" is the same and resolvable for all consumers. Subjective beliefs do not alter the fact that 303 THF was a waste product that did not work but harmed and Defendants have no evidence that consumers still purchased, or would have purchased, their product knowing the truth.[89] Defendants' factual contentions are artificial and unsupportive of their arguments.[90]

7. There Is No *Comcast* Problem and Plaintiffs' Damages Models are Proper.

Plaintiffs were not even required to put forth damages models for certification, but they have did so and they are proper. *Comcast* does not require a plaintiff to show that damages can be measured with a classwide damages methodology but only that damages sought be consistent with injury claimed. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (model supporting damages case "must be consistent with its liability case"). *Comcast* plaintiffs did not even challenge whether class certification required a methodology to prove classwide damages; thus the ruling was "good for this day and case only" as there is "well nigh universal" recognition "that individual damages calculations do not preclude class certification." *Id.* at 42 (Ginsburg & Breyer, JJ., dissenting).[91] Courts consistently reject the same arguments Defendants make here. *Roach v. T.L. Cannon Corp*.,

[89] *In Lipton v. Chattem, Inc.*, 289 F.R.D. 456 (N.D. Ill. 2013), plaintiff asserted that Dexatrim contained a toxic chemical but she would have purchased even had it been listed as an ingredient. *Id*. at 459-60. Here there is no evidence that anyone would have purchased knowing the truth. Moreover, the certification decision is countermanded by *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757, 758 (7th Cir. 2014), holding that whether packaging was likely to mislead is a common question and "not one that depends on each purchaser's subjective understanding"; further, certification does not require proof that "every member has been harmed." *Id* .at 757, 758..

[90] Defendants suggest that Vanderree purchased "separate and apart from the label" (Opp. at 127) is misleading; he did read and rely on the label. Def. Ex. 97 39:10-22. Gretzinger purchased Ag fluid because "it says 'Hydraulic fluid' on it." Def. Ex. 98 at 115-16. Ag fluid is materially the same as 303 THF and still waste. Hamm was unaware that AG-20 is"the same stuff just labeled differently" and it is still sitting in his shed. Ex. 113, Hamm Dep. 194:2-19.

[91] *Halvorson* does nothing more than describe what happened in *Comcast*, explicitly noting that *Comcast* was based on class antitrust claims in discussing damages. 718 F.3d at 778.

778 F.3d 401, 407 (2d Cir. 2015); *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 375 (3d Cir. 2015); *In re Barrick Gold Sec. Litig.*, 314 F.R.D. 91, 105 (S.D.N.Y. 2016).[92] The Supreme Court itself later made clear that certification ***does not*** require evidence of classwide damages. *Tyson*, 577 U.S. at 453-54; *see also Stuart*, 910 F.3d at 376 ("The potential need for individualized damages inquiries is not sufficient to overcome the district court's findings of predominance and superiority."); 2 Newberg on Class Actions § 4:54 (5th ed.) (every circuit uniformly holds that "predominance … is satisfied despite the need to make individualized damage determinations").

Defendants' repeat arguments about Babcock's benefit of the bargain methodology fail for the reasons set forth in Plaintiffs' opposition (Dkt. 1028), incorporated by reference. Specifically, Defendants take issue with Babcock's conclusion that the market value of 303 THF is zero, claiming it is unsupported. Opp. at 159-60. Babcock permissibly relied on opinions of other experts that 303 THF was not tractor hydraulic fluid at all, was in fact worthless harmful waste, and would not have been purchased by consumers with complete information. There is no variability among class members because 303 THF causes immediate and inevitable harm to *all* equipment. All purchasers received a worthless product. All suffered injury at purchase as well as equipment damage regardless of type, model, age, or other factors. Babcock's methodology also did not need to "account" for purchasers who bought in multiple states. He has properly allocated damages to the state in which the purchase was made. Defendants claim that a class member like WLC cannot have a claim in Kansas and Colorado because doing so would amount to claim splitting. But by its nature, claim splitting cannot exist within a single case because (as Defendants' own case points out) it prohibits claim from being "parsed out to be heard by different courts." *Sparkman Learning*

[92] These cases are all consistent with *In re Target Corp. Customer Data Security Breach Litigation*, 309 F.R.D. 482 (D. Minn. 2015), which is clearly not "radical," as Defendants claim. Opp. at 159 n.116.

Ctr. V. Ark. Dep't of Hum. Servs., 775 F.3d 993, 1000 (8th Cir. 2014) (emphasis added). Here a person who purchased in more than one state has a cause of action in each state, heard by the same court. Similarly, this is not a case involving "duplicative litigation" like in *Mo ex rel. Nixon v. Prudential Health Care Plan, Inc.*, 259 F.3d 949, 954 (8th Cir. 2001). In fact, Defendants' cases do not involve class actions at all. They identify no authority prohibiting a consumer in such a case from recovering in more than one state for purchases made in each state. There is simply no prohibition on membership in multiple classes. *See, e.g.*, *Berndt v. Cleary Bldg. Corp.*, 2013 WL 3287599 (W.D. Wis. Jan. 25, 2013). There is no overstating of damages or double counting. Babcock's methodology is reliable and supports class certification.[93]

Defendants' arguments regarding flushing also fail. Defendants vastly misconstrue *Tyson,* which did not hold that representative or statistical sample evidence is improper. In fact, it cautioned against establishing strict rules like Defendants suggest. *See* 577 U.S. at 455 (the Court "would reach too far were it to establish general rules governing the use of statistical evidence … in all class-action cases"). Defendants claim that equipment numbers should not be used to determine number of flushes for three reasons. None have merit. *See* Dkt. 1028. Equipment owners who include a flush as regular maintenance or flushed for some other reason are still eligible because the flush to get rid of 303 THF is different from a regular flush. Suggestion that Plaintiffs incorrectly listed equipment on their claim forms is not supported, particularly not by testimony in which Plaintiffs could not recall with certainty while in the deposition setting. Ownership of equipment is not a factor in Babcock's calculations because they incorporate costs on a per-tractor (or equipment) basis, not per owner. *See* Babcock 122:5-25 (flushing damages "follow[] the piece

[93] It is unclear what Defendants are arguing with regard to subclass damages for Kansas, Missouri and California. Opp. at 161. Babcock estimated the total damages for nationwide and *each* of the focus states. Ex. 45, Babcock Rpt. at 18. His estimates will be updated at the merits stage as needed.

of equipment"). Nothing Defendants raise is fatal to his ability to calculate such damages on a classwide basis. Moreover, at this stage, Plaintiffs need not *prove* damages.[94] *See generally Dollar General*, 2019 WL 1418292, at *20. Defendants' argument about unjust enrichment presumes that all states measure relief by benefit to the defendant. That is incorrect. Sugg. at 92-93, Regardless, there is no *Comcast* issue. If Defendants are right, Defendants' own books and records will establish their profits. Plaintiffs may or may not choose to present expert testimony about what those records show, but if so, that would be common proof too.

8. The Classes are Ascertainable and Defined by Objective Criteria.

Ascertainability is *not* a separate requirement and the heightened rule of administrative feasibility does *not* apply in this circuit. *Sandusky*, 821 F.3d at 996; *see also Cherry v. Dometic Corp*., 986 F.3d 1296, 1302 (11th Cir. 2021) (Third, First, and Fourth Circuits require proof of administrative feasibility; others including Eighth Circuit "reject that approach"); *Schatz v. Quapaw House, Inc.*, 2021 WL 3008597, at *2 (W.D. Ark. July 15, 2021) (Eighth Circuit "has not outlined a ... separate, preliminary requirement" of ascertainability and focus is on whether the definition identifies class members "by objective criteria" rather than administrative concerns). Defendants do not dispute that purchase is objective criteria. Retailer records are one means of identification and notice may be accomplished by other means including publication. It is not required that every class member be identified at certification, and classes are "routinely" certified even "where there are unlikely to be records of who purchased the product." *Guido v. L'Oreal,*

[94] *Mazur v. eBay Inc.*, 257 F.R.D. 563 (N.D. Cal. 2009) (Opp.at 162) does not establish otherwise, involves vastly different facts, and predates the *Comcast* and *Tyson* decisions. Defendants' assertion that flushing "offsets" must be accounted for at this stage (Opp. at 162 n.199) has no factual or legal support. Defendants have not pointed to a single class member who has received flushing costs for or undergone Hamilton's rigorous 2-flush, 30 step. There simply is no factual basis at this stage for offsets. If and when evidence is presented that more than a de minimus number of class members have received compensation in other settlements for this type of flush, Babcock can easily account for those in his merits report. The other case Defendants cite also does not support their argument. The "offset" in *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc*., 339 F.3d 1001, 1012 (8th Cir. 2003), affected *liability*; here (even were there evidence of it), offset would go only to *amount* of damages.

USA, Inc., 2014 WL 6603730, at *17 (C.D. Cal. July 24, 2014).[95] Defendants complain that purchases may be made by individual vs. business entity (Opp. at 93) but the calculation remains the same regardless and Defendants have no interest in distribution between them. *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014). It is speculation that large numbers of class members do not have receipts or other evidence of purchase (e.g., bank statements, notes, electronic purchase records, buckets/containers). Affidavits if needed are also permissible and often used. *E.g. In re: Syngenta AG MIR 162 Corn Litig*., 2016 WL 5371856, at *3 (D. Kan. Sept. 26, 2016); *Benson v. Newell Brands, Inc*., 2021 WL 5321510, at *8 (N.D. Ill. Nov. 16, 2021).[96] Defendants' cries of potential problems and "memory" issues are exaggerated.[97] 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." *In re Dial Complete Mktg. & Sales Practs. Litig*., 312 F.R.D. 36, 52 (D.N.H. 2015) (citation omitted). Cases from the First and Third Circuits on which Defendants rely (*Asacol Antitrust Litig*., *Carrera*, *Marcus, Stewart*) are in the minority that impose an administrative feasibility requirement.[98] at 1304. In *St. Louis Heart Ctr., Inc. v. Vein Centers for Excellence, Inc.*, 2017 WL 2861878 (E.D.

---

[95] *See also, e.g., Ries v. Arizona Bevs. USA LLC*, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (rejecting argument that without receipts, administration would require "mini-trials" to establish whether each member had made a purchase: "This is simply not the case. If it were, there would be no such thing as a consumer class action."); *Ebin v. Kangadis Food Inc*., 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (declining certification when consumers likely lack proof of purchase "would render class actions … almost impossible to bring" and ascertainability difficulties, even if formidable "should not be made into a device for defeating the action").

[96] *See also Chalmers v. City of New York*, 2022 WL 4330119, at *20 (S.D.N.Y. Sept. 19, 2022); *Bakov v. Consol. World Travel, Inc*., 2019 WL 1294659, at *19 (N.D. Ill. Mar. 21, 2019); *Kurtz v. Kimberly-Clark Corp*., 321 F.R.D. 482, 538-39 (E.D.N.Y. 2017).

[97] For example, Lester generically opines that memory "is not immune to errors." Def. Ex. 33 at 47. He went in search of support, citing snippets of testimony but looked at nothing else. For example, he cited Mr. Hargraves as someone whose testimony supposedly indicated a fallible memory, yet Mr. Hargraves *does* have evidence that he purchased 303 THF. Ex. 121, Lester Dep. 288:24-292:22.

[98] *Randolph v. J.M. Smucker Co*., 303 F.R.D. 679, 685-86 (S.D. Fla. 2014) was decided before the Eleventh Circuit rejected such requirement in *Cherry*. In *Jones,* 2014 WL 2702726, there were dozens of varieties of food products and some labels included the challenged language and some did not. Here, all labels misrepresented 303 THF as legitimate tractor hydraulic fluid. *Jones* also was decided before the Ninth Circuit rejected an administrative feasibility requirement, *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). The *BPA* case in Missouri treated class membership as a "manageability" issue and was decided before *Sandusky.*

Mo. July 5, 2017), without a fax log there apparently was no other "generalized classwide proof of liability" for the TCPA claim (*id*. at *4), which is not the case here. Defendants' challenge to a "use" component of definitions (Opp. at 96 n. 58) has been rejected. As recognized in *Dollar General*, product "use" is still objective, 2019 WL 1418292, at *16, and as recognized in *McAllister v. St. Louis Rams, LLC*, even if "some individualize proof may be required does not prevent the plaintiffs from carrying their burden to show that common questions otherwise predominate." 2018 WL 2869025 (E.D. Mo. Apr. 19, 2018). Defendants say *McAllister* was wrongly decided but it was not. *See Burnett*, 2002 WL 1203110 at *19 (common issues predominated "over any individualized issues of how the house was used").

9. Class Treatment is Superior to Other Forms of Litigation.

Defendants treat superiority as a bullet-point exercise while the overall point is that superiority is a relative analysis, comparing class treatment with other forms of adjudication "realistically available to the plaintiffs." *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 690 (S.D. Fla. 2013) (citation omitted); *accord Cherry*, 986 F.3d at 1304. Benefits of class treatment also must be considered, including "economies of time, effort, and expense and promot[ing] uniformity of decision as to persons similarly situated." *Douglas Phillip Brust, D.C., P.C. v. Opensided MRI of St. Louis LLC*, 343 F.R.D. 581, 594 (E.D. Mo. 2023). Here, there are many common questions and it is far more efficient to address them once than repetitively.

Defendants suggest that superiority exists only for negative value cases (Opp. at 162), myopically focusing on a few people with substantial claims and ignoring ***everyone not*** in the potential damage range they cite as well as cost of litigation relative to recovery on a solo basis. Liability experts alone are a significant expense. Defendants are wrong in their contention about claim-splitting (Opp. at 163), and their next sentence belied by the fact that none of the persons

they mention is pursuing an individual action. Moreover, if anyone would rather go it alone, he may opt out. Assertion regarding availability of punitive damages or recovery of attorney fees (Opp. at 163-64) comes from opposing litigants pushing relentlessly to *defeat* them.[99] Nothing Defendants say considers whether absent the class device, absent class members would, or could, still come forward on claims that, while carrying such possibilities, still risk no recovery as well as all the other costs and burdens attendant to one-party litigation.

Certification serves judicial and private resources. Pre-trial activity has already been concentrated in this forum and Defendants' apparent argument that class certification adds nothing (Opp. at 164) is wrong from the outset as certification itself is a pre-trial matter that itself weighs in favor of efficiency. *See* Wright & Miller, 15 Fed. Prac. & Proc. Juris. § 3866 (4th ed.) (transferee court may rule upon "various motions and management matters in these actions" and indeed "class certification rulings seem especially well-suited for decision by the transferee court because the transferee judge has an overall view of the litigation").

10. The Litigation is Manageable.

"Manageability should rarely, if ever, be in itself sufficient to prevent certification of a class." *Reed v. Alecto Healthcare Services, LLC*, 2022 WL 4115858, *9 (N.D.W. Va. July 27, 2022) (citing *Amchem* and noting "oft-cited passage" 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* 2 Newberg and Rubenstein on Class Actions § 4:80 (same). Defendants' contentions are meritless.

Defendants first argument (Opp. at 165) is a mash-up of assertions already addressed

[99] Defendants cite three cases as though potential fee or punitive damage recovery was dispositive but of course that is not so. *See, e.g. Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 627-28 (5th Cir. 1999) (discussing reasons for decertification in *Castano* and holding them insufficient to defeat certification in instant action).

insofar as certification itself. Moreover, and much unlike *Chin v. Chrysler Corp*., 182 F.R.D. 448, 458 (D.N.J. 1998), in which plaintiffs proposed a nationwide class (or groupings of various statewide classes), there is nothing remotely unmanageable about trials asserting claims against both Defendants within each state-wide class. Jury instructions will hardly be "a quagmire and too complicated to follow" but will lay out elements according to applicable law in that state. Next, Defendants say that a class action would not be manageable as to Wisconsin and New York . Opp. at 166. The Court appropriately allowed direct filing/joinder and Plaintiffs have designated the appropriate courts for trial in both New York and Wisconsin. Next, the *Hornbeck* release does not create manageability problems. Opp. at 166. The Court has already ruled that the Missouri *Hornbeck* release is not a bar to the claims of Graves and Bollin. Dkt. 1008. The same is true for any class members, as well as for any of the other state classes where purchasers bought in more than one state – a purchaser may be a class member in more than one state, and damages will be proven as noted in the Court's prior Order, with offsets applied where appropriate. None of the cases cited by Defendants are applicable to the present facts.

Finally, individual treatment of repair costs (or other individual relied) is in no way a basis to deny certification. Plaintiffs reiterate the Supreme Court's directive that certification is appropriate *even if* individual questions, including damages, remain. *Tyson*, 577 U.S. at 453; *see also* Sugg. at 87 (citing cases). Courts have multiple ways of addressing damages issues. Sugg. at 88. Defendants' suggestion that Plaintiffs' listing of methods "is effectively an admission that individual issues predominate" (Opp at 168) is of course wrong. Common issues predominate for reasons discussed originally and here. It is a waste to needlessly present the same evidence on the same common questions over and over. Moreover, "[f]ederal law does not require a plaintiff to submit a trial plan during or immediately after the certification stage." *Stickles v. Atria Senior*

Living, Inc., 2022 WL 718563, at *1 (N.D. Cal. Mar. 10, 2022). Defendants' suggestion that *Barfield* plaintiffs set out some detailed management process Plaintiffs here do not (Opp. at 168 n.125) is wrong. The process was simply that class members would file a claim form with sworn statement and deed, and if owned by multiple persons, disputes would be handled by, for example, special master. *Barfield,* 2013 WL 3872181, at *15. Addressing individual issues also is not the rocket science Defendants make it out to be; bifurcation is just one method Plaintiffs identified, meaning that once liability and aggregate damages for purchase-based and flushing relief are determined, repair costs can be treated in a second phase. Defendants cite another contamination case, *Henke v. Arco Midcon, L.L.C.*, 2014 WL 982777 (E.D. Mo. Mar. 12, 2014) for a causation argument (Opp. at 169) but the court there was presented with multiple unanswered questions regarding source and harm. *Id*. at *1-2, 6-9, 14. Here, the evidence is that 303 THF harmed all equipment in which it was used. The first phase could establish that 303 THF is worthless waste and caused damage to all equipment and if so, all class members are entitled to purchase-based relief as well as flushing. The second phase could determine if 303 THF caused or contributed to damage for which repairs were made. A special interrogatory might ask if the jury finds 303 THF capable of causing adverse impacts. If Defendants wanted to opt for full-blown trial they could do so. Findings against them on liability and special interrogatory would be binding under law-of-the-case or collateral estoppel, but they would be free to test specific causation on repair costs. That is just one option. Use of special masters, magistrates or other methods have also been used to efficiently manage individual issues remaining after class trials. Finally, resolution of the common questions with common proof most certainly advances the litigation. Individualized hearings on repair costs is narrow in scope and significance when compared to threshold classwide issues subject to generalized proof.

E. ASSERTED DEFENSES DO NOT PRECLUDE CERTIFICATION

Courts routinely hold that affirmative defenses *do not* defeat certification. This is true *even if* they involve some individual fact-finding and even more so if they go not to liability but damages. In addition, affirmative defenses are subject to rigorous scrutiny, *Zurn*, 644 F.3d at 619, and the defendant must support them and assertions of individualized issues. *Barfield,* 2013 WL 3872181, at *12; *H&T Fair Hills,* 2021 WL 2526737, at *12; *see also Barfield v. Sho-Me Power Elec. Coop.*, 852 F.3d 795, 806 (8th Cir. 2017) ("unsupported allegation of individual consent questions [did] not undercut … finding that common questions predominate over individual ones"). Defendants do not come forward on some of the defenses Plaintiffs anticipated (e.g., intervening cause), and fall far short on those they raise.[100]

1. Mitigation does not defeat certification.

Mitigation carries its own elements, including knowledge of the wrong, which Defendants lack evidence to support. *Id*. at 104-05. Defendants contest this element as to Wisconsin (Opp. at 104 n. 65) but address no other element and otherwise are silent on Plaintiffs' authorities. Mitigation also requires evidence of mitigation measures, unreasonableness in failing to take them, and amount by which they would have reduced damages. Sugg. at 105. The "evidence" offered pertains to Mr. Jackson regarding diminished resale value of equipment Defendants say he could have repaired for less. Dkt. 841 at 19. That can be addressed in individual proceedings. It does not create a predominance (or typicality) problem.

2. Comparative Fault Does Not Defeat Predominance.

[100] For example, Defendants cite a single comparative fault statute in Wisconsin to say that in that state, comparative fault might result in no recovery if a plaintiff is 51% at fault (Opp. at 106) but analyze it no further than that (e.g., standard of care, how conduct is assessed, etc.).

Defendants contend generally that the disclaimer is relevant to comparative fault, applicability of which is undeveloped even in terms of to which claims Defendants contend it would apply. Other than warranty actions in Minnesota,[101] they identify only negligent misrepresentation and negligence. Opp. at 104, 106 & n.66. Negligent misrepresentation has been addressed. As to negligence, Defendants offer no authority whatsoever to support applicability, reliance is not required, and they still do not explain how the disclaimer would affect causation. Order, Dkt. 1006 at 6. Defendants' other arguments are as shallow. As discussed, neither maintenance practices nor use of other fluids defeats predominance (or typicality) as to any claim. Plaintiffs' evidence is that 303 THF was uniformly harmful regardless of such factors. Defendants also alleged failure to follow OEM specifications as to Plaintiffs only (Sugg. at 100), but again in any case do not show how that defeats predominance. First, they admit the fluid met no specification as to any OEM. Second, Defendants *do not* suggest that it is unusual for people to either not consult a manual or use a fluid not recommended by an OEM. Clearly it is not, or Defendants would not have been out in the market selling a so-called "economy" replacement. That includes people with tractors calling for *John Deere* 303, who purchased *Smitty's* or *Cam2* 303, as well as people with tractors calling for JD20C, constituting the group Defendants say are affected. The disclaimer was commonly inconspicuous and as to those who may have read it, the disclaimer did not, on a common basis, disclose the actual truth.

3. Statutes of Limitation are Regularly Rejected as a Basis to Deny Certification and Tolling Does Not Affect The Analysis.

Statutes of limitation are not a reason to deny certification. Sugg. at 109-111 (citing cases).

[101] Defendants contend that comparative fault is a defense to warranty actions in Minnesota, but only as to property damage, citing *Peterson* 318 N.W.2d 50. *See* Opp. at 104 n.66. That decision does not affect the fact that the disclaimer is inapplicable to merchantability, inconspicuous as to all warranties, or Defendants' lack of analysis. Moreover, all class members are in the same position as to property damage, which occurred immediately upon use.

Defendants' retort is meritless. Limitations periods are what they are and apply to class members within each state on applicable claims. This defense is insufficient to preclude certification even if individual questions are present. *Hays*, 2021 WL 912262, at *7-8; *accord In re Potash Antitrust Litig.*, 159 F.R.D. 682, 698-99 (D. Minn. 1995). In many states the limitations period does not even begin to run until a plaintiff has notice of both injury and cause of injury. Here, ordinary equipment owners would *not* know that 303 THF was the cause of equipment issues. Ex. 1, Dahm Rpt. ¶ 167; *see also* Order, Dkt. 991 at 17, 21 (Defendants failed to show that Anderson, Hargraves, Harrison or Kimmich did or should have known that 303 THF caused their injuries outside limitations period); *see also id*. at 19 (Plaintiffs "had no way of knowing upon purchase that the 303 THF Products were worthless unless they had the product tested by an expert"). Moreover, Defendants at all times omitted and concealed the truth and as before, ***have not*** presented evidence of consumers with knowledge thereof. Articles, stop-sale orders and the like are not individualized but general proof that does not undercut predominance. *See generally* Sugg. at 106 (citing cases).[102] Defendants' invocation of *Thorn v. Jefferson-Pilot Life Ins. Co*., 445 F.3d 311, 321 (4th Cir. 2006) does not aid them. Opp. at 158. Assessment of predominance accounts for the record and *Thorn* does not say otherwise. *See Alig v. Quicken Loans Inc*., 2017 WL 5054287, *16-17 (N.D.W. Va. July 11, 2017) (*Thorn* instructs to consider the record; "it is only fair to [also] refer to *Thorn* for its holding that in cases like this one, where the statute of limitation defense relies on common facts applicable to the entire class, certification is appropriate. Here, those common facts

[102] S*ee also e.g., Alger,* 334 F.R.D. at 430 (concealment involves proof common to the defendant, i.e., the "act of concealing" and "[c]ourts have been nearly unanimous … in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs, does not preclude certification of a class action") (citation omitted); *Bartle,* 2021 WL 5106459, at *12 (information on website available commonly and thus, "the statute of limitations defense presents more common issues than individualized ones"); *Cardenas v. Toyota Motor Corp.*, 2021 WL 5811741, at *14 (S.D. Fla. Dec. 6, 2021) (whether defendants succeeded at concealing alleged defect capable of common proof).

… are that [defendant] affirmatively kept its conduct hidden from class members … and that there is not a single shred of evidence in the record of any class member having actual knowledge about [defendant's] practice of tipping off appraisers."). Plaintiffs have evidence that Defendants sold 303 THF as a legitimate product when it was really waste. On this record, Defendants' limitation defense is amenable to class treatment. They have no evidence of any purchaser with knowledge of the truth and their public-information argument is common, not individualized.

V. CONCLUSION

This case is well suited for certification. For all the reasons addressed, Plaintiffs respectfully request that certification be granted.

Date: October 5, 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 5th[t] day of October, 2023.

/s/ Thomas V. Bender