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

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

ORDER

Before the Court is Defendants Smitty's Supply, Inc. ("Smitty's") and CAM2 International, LLC's ("CAM2") (collectively, "Defendants") Motion for Summary Judgment as to Time-Barred Claims in Eight Selected States. (Doc. #851.) For the reasons discussed below, the motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

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

A. Arkansas

Plaintiffs William Anderson ("Anderson"), Alan Hargraves ("Hargraves"), and Jeffrey Harrison ("Harrison") are members of the Arkansas Class and purchased the 303 THF Products

in Arkansas. Plaintiff Sean Buford, a member of the Arkansas Class, filed a class action suit against Defendants on August 30, 2019, which was later consolidated into this MDL. *See Buford v. Smitty's Supply Inc.*, No. 1:19-cv-00082-LPR (E.D. Ark.).[1]

Anderson's Class Membership Form states that he purchased 106 buckets of 303 THF Products from December 2013 to September 2018. The following chart is compiled from exhibits submitted by the parties and reflects what equipment Anderson owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Anderson Began Using the 303 THF Products	Year Anderson First Noticed Damage and/or Repaired Equipment
1989 Case IH 9150 Tractor	2013	Not specified
1995 Komatsu Track Hoe	2013	Not specified
2001 John Deere 8410	2015	February 2019
2006 Case IH 2388 Combine	2013	Not specified
2008 Case IH 335	2018	April 2019
2012 Sany 215 Hoe / Excavator	2016	July 2022
2000s John Deere 6410 Tractor	2013	Early 2022
2000s Case 580L Backhoe	2013	2020
Case 7130 Tractor	2013	Not specified

(Doc. #852-4, pp. 5–7); (Doc. #852-5, pp. 3–10); (Doc. #929-3, p. 15.) As to the 1989 Case IH 9150 Tractor and the 2006 Case IH 2388 Combine, Anderson does not specify when he first noticed damages and states "[t]he damage occurred over time during the time period in which Defendants' bad 303 THF Products were being used in this equipment[.]" (Doc. #852-5, pp. 6–7.) In his deposition, Anderson testified that he generally started experiencing issues with his equipment between 2017 and 2018, but testified that he did not believe the damage was due to his use of the 303 THF Products until early 2020.

[1] In the instant motion for summary judgment, Defendants do not seek dismissal of Buford's claims.

Hargraves's Class Membership Form states that he purchased 96 buckets of the 303 THF Products from June 2014 to June 2019. The following chart is compiled from exhibits submitted by the parties and reflects what equipment Hargraves owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Hargraves Began Using the 303 THF Products	Year Hargraves First Noticed Damage and/or Repaired Equipment
2004 John Deere 8120 Tractor	2014	Fall 2014-2016
2006 John Deere 8320 Tractor	2016	2017
2002-2004 Case 580 Backhoe	2017	2020
2016–2017 Case 315 Tractor	2019	Not specified

(Doc. #929-9.)

Harrison's Class Membership Form states he purchased 84 buckets on CAM2 Promax 303 and CAM2 303 from 2014 to 2019.[2] However, Harrison testified that he began using CAM2 303 in 2013. (Doc. #961-43, p. 3.) The following chart is compiled from exhibits submitted by the parties and reflects what equipment Harrison owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Harrison Began Using the 303 THF Products	Year Harrison First Noticed Damage and/or Repaired Equipment
1970s Case 450 Dozer	2014	2016
1980s Bantam C266 Trackhoe	2015	2016
2004 Case JJ60-580M Backhoe	2014	2015
2015 LS 36 HP Tractor	2015	Not specified

(Doc. #852-11, pp. 3–6); (Doc. #929-11, p. 5.) Harrison testified that he came to believe CAM2 303 was a bad product in 2020 or 2021 after seeing a Facebook ad published by Plaintiffs' counsel. (Doc. #961-43, p. 12.)

[2] In their reply, Defendants produce evidence that Harrison's wife may have purchased the 303 THF Products for him using her personal credit card. As Defendants have not moved for summary judgment on the grounds that Harrison is not the real party in interest or that he did not in fact purchase the 303 THF Products, the Court will not address this point.

B. California

Plaintiff Jack Kimmich ("Kimmich") is the sole member of the California Class and purchased the 303 THF Products in California. Plaintiffs Kimmich filed a class action suit against Defendants on September 16, 2019, which was later consolidated into this MDL. *See Fosdick v. Smitty's Supply, Inc.*, No. 2:19-cv-01850-MCE (E.D. Cal.).

Kimmich's Class Membership Form states that he purchased 83 buckets of Smitty's Super Trac 303 and Super S 303 from July 2014 to November 2018. The following chart is compiled from exhibits submitted by the parties and reflects what equipment Kimmich owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Kimmich Began Using the 303 THF Products	Year Kimmich First Noticed Damage and/or Repaired Equipment
1993 Volvo L-50B Loader	2014	2015-2016
1990s Kubota R400 Loader	2014	2016

(Doc. #852-13, p. 2); (Doc. #929-16, pp. 3–5.) Kimmich testified that the 1993 Volvo L-50B Loader "failed" in 2018, and "that's when [he] started digging around" as to the cause of the failure. (Doc. #852-14, p. 4.) Kimmich testified that he did not come to believe that Smitty's 303 THF Products were the cause of damage to his equipment until after he had the 1993 Volvo L-50B Loader inspected and repaired in Fall 2018. (Doc. #929-15, p. 14.)

C. Kansas

Plaintiffs George Bollin ("Bollin") and Adam Sevy ("Sevy") are members of the Kansas Class and purchased the 303 THF Products in Kansas.[3] Sevy filed a class action suit against

[3] In the instant motion for summary judgment, Defendants do not seek dismissal of the claims of Plaintiffs Ross Watermann and Terry Zornes, who are also members of the Kansas class.

Defendants on May 24, 2019, which was later consolidated into this MDL. *See Zornes v. Smitty's Supply, Inc. et al*, No. 2:19-cv-02257-JAR-TJJ (D. Kan.).

Bollin's Class Membership Form states that Bollin purchased 62 buckets of Smitty's Super Trac 303 and Super S 303 from Spring 2014 to May 2019. In his opposition, Bollin states that he "withdrew his claimed purchased for 2014 and 2015" as "he could not be sure of [those] purchases" because "the Tractor Supply Company records did not include those years." (Doc. #929, p. 20.) The following chart is compiled from exhibits submitted by the parties and reflects what equipment Bollin owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Bollin Began Using the 303 THF Products	Year Bollin First Noticed Damage and/or Repaired Equipment
1961–63 John Deere 4010 Tractor	Not specified	2018-2019
1964 Caterpillar D8H Dozer	Not specified	2015
1965-66 International 806 Tractor	Not specified	2017
1980–81 John Deere 4440 Tractor (1)	Not specified	2019
1980–81 John Deere 4440 Tractor (2)	Not specified	2015
1990 John Deere 4960 Tractor	Not specified	2021
1999 John Deere 9510 Combine	Not specified	2019-2020

(Doc. #852-16, pp. 3–8.)

Sevy's Class Membership Form states he purchased 20 buckets of Smitty's Super Trac 303 from 2014 to 2017. However, Sevy testified that he may have used Smitty's Super Trac 303 in 2010, but that he doesn't "know exactly what year [he] put it in there." (Doc. #961-35, p. 5.) The following chart is compiled from exhibits submitted by the parties and reflects what equipment Sevy owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Sevy Began Using the 303 THF Products	Year Sevy First Noticed Damage and/or Repaired Equipment
1963 Ford 4000 Tractor	Not specified	2014-2015
late 1970s Allis Chalmers 940 Wheel Loader	Not specified	2016
1992 Ford L8000 Dump Truck	Not specified	Not specified
2004 Hinowa Concrete Buggy	Not specified	Not specified
John Deere 240 Skid Steer	Not specified	Not specified

(Doc. #852-19, pp. 4–6); (Doc. #852-20, p. 3); (Doc. #929-21, pp. 2–4.)

D. Kentucky

Plaintiffs Kirk Egner ("Egner"), Tim Sullivan, Tracy Sullivan, and Dwayne Wurth ("Wurth") (collectively, "the Kentucky Plaintiffs") are members of the Kentucky Class and purchased the 303 THF Products in Kentucky. Wurth filed a class action suit against Defendants on June 27, 2019, which was later consolidated into this MDL. *See Wurth v. Smitty's Supply, Inc.*, Case No. 5:19-cv-00092-TBR-LLK (W.D. Kent.).

Egner's Class Membership Form states that he purchased 40 buckets of the 303 THF Products between October 2014 and June 2019. However, Egner testified that he first purchased Smitty's 303 THF Products in 2012 or 2013 because he primarily used Smitty's 303 THF Products in his 1975 International 856 Tractor, which he purchased in 2012. The following chart is compiled from exhibits submitted by the parties and reflects what equipment Egner owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Egner Began Using the 303 THF Products	Year Egner First Noticed Damage and/or Repaired Equipment
1973 Ford 3000 Tractor	Not specified	May 2016
1975 International 856 Tractor (1)	Not specified	2017
1975 International 856 Tractor (2)	Not specified	Not specified
1979 International 1586 Tractor	Not specified	2020

2014 Kubota MX 5100 Tractor	Not specified	2020

(Doc. #929-76, pp. 2–6.) Egner noticed a leak in one of the 1975 International 856 Tractors in 2013, and testified that he believed the leak to be the result of normal wear and tear at the time.

Tim Sullivan's Class Membership Form states that he purchased 40 buckets of Smitty's Super S 303 and Super Trac 303 between October 2014 and May 2019. The following chart is compiled from exhibits submitted by the parties and reflects what equipment Tim Sullivan owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Tim Sullivan Began Using the 303 THF Products	Year Tim Sullivan First Noticed Damage and/or Repaired Equipment
1980s John Deere 4430 Tractor	Not specified	2015-2016
1985 Ford 8200 Tractor	Not specified	2014-2015
1991 Case 580 Super K Backhoe	Not specified	2015
1995 John Deere 4440 Tractor	Not specified	2014
2002-2003 Caterpillar 120 Track Hoe	Not specified	2014

(Doc. #852-23, pp. 2–7.) However, Tim Sullivan also testified that he made repairs to his 1991 Case 580 Super K Backhoe in 2011 or 2012. Tim Sullivan testified that, in 2019, he came to believe that the 303 THF Products were bad products, and before 2019 he "just wondered why everything was breaking down." (Doc. #961-47, p. 3.) Tim Sullivan testified that, before he stopped using Smitty's 303 THF Products in 2019, his "little brother was getting ticked off at [him] because [he] was still using [Smitty's 303 THF Products]." (Doc. #961-47, p. 7.)

Tracy Sullivan's Class Membership Form states that she purchased 39 buckets of the 303 THF Products from April 2013 to May 2019. (Doc. #929-25, p. 2.) However, Tracy Sullivan testified that he has been purchasing Smitty's Super Trac 303 since the 1990s. The following chart is compiled from exhibits submitted by the parties and reflects what equipment Tracy

Sullivan owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Tracy Sullivan Began Using the 303 THF Products	Year Tracy Sullivan First Noticed Damage and/or Repaired Equipment
1977 John Deere 4430 Tractor	Not specified	Not specified
1978 John Deere 4440 Tractor	Not specified	2016-2017
1996 Caterpillar E110B Excavator	Not specified	Late 2014
2001 New Holland E35 Excavator	Not specified	2016

(Doc. #929-25, p. 3); (Doc. #929-78, pp. 3–6.) Tracy Sullivan testified that he read the 303 THF Products' labels "in full" when he first began purchasing the products. (Doc. #852-24, p. 4.) After the initial purchase, Tracy Sullivan testified that he usually "glanced at" the front and back labels "[t]o make sure it was the same [he] had been buying[.]" (Doc. #852-24, p. 5.) Defendants produced testimony from Tracy Sullivan stating that he experienced damage to a piece of his equipment as early as 2011, which he believes was caused by "whatever tractor hydraulic fluid [he] w[as] using in or about 2011." (Doc. #852-24, p. 6.)

Wurth first purchased CAM2's 303 THF Products in on December 1, 2013. Plaintiffs produced a Class Membership Form stating that Wurth purchased 30 buckets of CAM2's 303 THF Products between September 2014 and October 2018. Wurth states that he first used CAM2's 303 THF Products in 2014 in his 2012 Caterpillar 277 Skid Steer. Wurth testified that he learned that CAM2 used "subpar fluids" in April or May of 2019 when a friend informed him of a lawsuit against CAM2, and that he suspected there was a "very good possibility" than CAM2's 303 THF Products had caused damage to his equipment. (Doc. #929-29, p. 8.)

E. Minnesota

Plaintiffs Joe Asfeld ("Asfeld"), Brett Creger ("Creger"), and Jason Klingenberg ("Klingenberg") (collectively, "the Minnesota Plaintiffs") are members of the Minnesota Class

and purchased the 303 THF Products in Minnesota. Klingenberg filed a class action suit against Defendants on September 6, 2019, which was later consolidated into this MDL. *See Klingenberg v. Smitty's Supply, Inc., et al.*, No. 19-cv-2684-ECT/ECW (D. Minn.).

Asfeld purchased the 303 THF Products on or before December 1, 2013, and continued purchasing them until 2019. Asfeld used the 303 THF Products in twenty-nine pieces of equipment at different points in time between 2014 and 2020. Asfeld first noticed issues with one piece of his equipment in 2014, and continued experiencing problems with different pieces of his equipment as late as 2020.

Creger's Class Membership Form states that he purchased 90 buckets of Smitty's Super Trac 303 between October 2014 and October 2017. Defendants produced handwritten records of Creger's purchases that show he purchased 303 tractor hydraulic fluids as early as 2011, but the records do not state what brand Creger purchased. Creger used Smitty's Super Trac 303 in thirty-five pieces of equipment. Creger considers repairs made to his equipment to be the result of use of the 303 THF Products as early as May 2014, and continued to experience issues and repair various pieces of equipment through 2022. Creger testified that he believes Smitty's Super Trac 303 is "used oil" because of "crud in the bottom of the jugs" that he noticed "[t]hrough years of watching it." (Doc. #961-50, pp. 3–4.)

Klingenberg's Class Membership Form states that he purchased 110 buckets of Smitty's 303 THF Products between 2014 and 2019. The following chart is compiled from exhibits submitted by the parties and reflects what equipment Klingenberg owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Klingenberg Began Using the 303 THF Products	Year Klingenberg First Noticed Damage and/or Repaired Equipment
Massey Ferguson 3650 Tractor	2014	2015
Massey Ferguson 8280 Tractor	2014	2015

Massey Ferguson 8690 Tractor	2014	Fall 2017
Massey Ferguson 8450 Tractor	2014	Not specified
Massey Ferguson 9895 Combine	2014	2018
Massey Ferguson 2856A Baler (1)	2014	2015
Massey Ferguson 2856A Baler (2)	2014	2015
Fiat Bulldozer	2014	Not specified

(Doc. #852-29, pp. 4–5); (Doc. #929-38, pp. 3–10.) When asked why he continued to use Smitty's 303 THF Products after he repaired a piece of equipment in 2015, Klingenberg testified he continued to use them because "we didn't know it was the hydraulic oil at the time" causing the damages. (Doc. #929-37, p. 7.)

F. Missouri

Plaintiff Arno Graves ("Graves") and Ron Nash ("Nash") are members of the Missouri Class and purchased the 303 THF Products in Missouri.[4] Graves and Nash filed a class action suit against Defendants on November 5, 2019. *See Graves v. Smitty's Supply, Inc.*, No. 3:19-cv-05089-SRB (W.D. Mo.).

Graves's Class Membership Form states that he purchased 42 buckets of CAM2 303, CAM2 Promax 303, and Smitty's Super Trac 303 between April 2014 and May 2019.[5] The following chart is compiled from exhibits submitted by the parties and reflects what equipment Graves owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Graves Began Using the 303 THF Products	Month Graves First Noticed Damage and/or Repaired Equipment
1973 International 1066 Tractor	Not specified	October 2015
1975 John Deere 2030	Not specified	September 2016
1984 Case 480E Backhoe	Not specified	April 2014

[4] In the instant motion for summary judgment, Defendants do not move for summary judgment as to the claims of Plaintiffs Gary Goodson and Mark Hazeltine, also members of the Missouri class.

[5] The issue of whether Graves's receipts (Doc. #929-41) support the alleged number of purchases is not relevant to the disposition of this motion and is not further discussed.

(Doc. #929-42, pp. 2–5.) Graves testified that a mechanic told him his equipment issues were caused by "[b]ad oil" in July or August of 2022. (Doc. #929-40, p. 4.) Graves also testified that he heard people talking about "303 going off the market" and D&D Feed Supply, but it is unclear when this occurred. (Doc. #961-36, p. 3.)

Nash's Class Membership Form states that he purchased 32 buckets of CAM2 303 and CAM2 Promax 303 between December 2013 and May 2019. However, Nash testified that, in 2014, he replaced a control valve on one piece of equipment that had been leaking since 2009, and that he believes the "issues were caused by CAM2[.]" (Doc. #852-33, p. 5.) When asked if he recalls purchasing a CAM2 303 THF Product prior to December 2013, Nash testified that he "can't say any specific dates" and that he "ha[s] specific memories of going and buying it, but the dates [are] foggy." (Doc. #929-44, p. 12.) The following chart is compiled from exhibits submitted by the parties and reflects what equipment Nash owned, when he began using the 303 THF Products, and when he began noticing damage and/or repaired such equipment:

Equipment	Year Nash Began Using the 303 THF Products	When Nash First Noticed Damage and/or Repaired Equipment
1968 Allis Chalmers D15 Backhoe	Not specified	June 2014
1968 International 3514 Backhoe	Not specified	2016

(Doc. #929-80, pp. 2–5.) Nash testified that at the time of the repairs to his equipment, he didn't believe that the issues were caused by CAM2's 303 THF Products.

G. New York

Plaintiffs Sawyer Dean ("Dean"), John Miller ("Miller") and Lawrence Wachholder ("Wachholder") (collectively, "the New York Plaintiffs") are members of the New York Class and purchased the 303 THF Products in New York. The New York Plaintiffs became putative

class members when Graves filed suit against Defendants on behalf of a putative nationwide class on November 27, 2019.

Dean's Class Membership Form states he purchased 74 buckets of Smitty's Super Trac 303 and Super S 303 between June 2015 and August 2018, and began using the 303 THF Products immediately upon purchasing. Miller's Class Membership Form states he purchased 29 buckets of Smitty's Super Trac 303 and Super S 303 between August 2014 and November 2018. Wachholder's Class Membership Form states that he purchased 86 buckets of Smitty's Super Trac 303 and Super S 303 between January 2014 and December 2018.

H. Wisconsin

Plaintiffs Michael Hamm ("Hamm") and Dale Wendt ("Wendt") (collectively, "the Wisconsin Plaintiffs") are members of the Wisconsin Class and purchased the 303 THF Products in Wisconsin. Hamm and Wendt became class members when Graves filed suit against Defendants on behalf of a putative nationwide class on November 27, 2019.

Hamm purchased 4 buckets of Smitty's Super Trac 303 from Fall 2015 to Spring 2015, 10 buckets of CAM2 303 in November 2018, and 10 buckets of CAM2 303 in November 2019. Hamm used the 303 THF Products in his 2003-2004 New Holland LS150 Skid Steer. Hamm testified that he began noticing issues with his 2003-2004 New Holland LS150 Skid Steer in 2016, and paid for repairs on February 21, 2017. (Doc. #929-83, pp. 2–4.)[6] Wendt purchased CAM2 Promax 303 from January 2014 to March 2018, and purchased CAM2 303 from July 2018 to December 2019. Wendt began experiencing issues with individual pieces of his equipment in 2018 and 2019.

[6] Hamm used the 303 THF Products in eight pieces of equipment, but only claims repair or equipment damage to his 2003-2004 New Holland LS150 Skid Steer. The Court has omitted the remaining seven pieces of equipment to which Hamm claims no damage.

I. Stop-Sale Orders

The Missouri Department of Agriculture issued a stop-sale order requiring Smitty's to remove its 303 THF Products from sale in October 2017. The Georgia Department of Agriculture, Fuel & Measures Division issues a stop-sale order for the 303 THF Products in February 2018. The North Carolina Department of Agriculture and Consumer Services issued a similar stop-sale order in August 2018.

J. The Instant Action

Plaintiffs initiated suit against Defendants in multiple federal district courts where the 303 THF products were sold. On February 11, 2020, Defendants requested all pending actions be consolidated and transferred pursuant to 28 U.S.C. § 1407. On June 2, 2020, the J.P.M.L. consolidated and transferred the eight then-pending actions to the Western District of Missouri.[7] *See In re: Smitty's/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Practices & Prod. Liab. Litig.*, No. 2936, 2020 WL 2848377, at *1 (J.M.P.L. June 2, 2020). Following the creation of this MDL, Plaintiffs filed another lawsuit, *Feldkamp v. Smitty's Supply, Inc.*, No. 20-cv-02177, in the U.S. District Court for the Central District of Illinois, which was subsequently transferred to this Court. Pursuant to this Court's order dated August 3, 2020, Plaintiffs were permitted to file a Consolidated Amended Complaint that would serve to supersede all prior pleadings in the individual cases that were consolidated. Further, this Court's August 3, 2020 Order permitted direct joinder of new claims through the Consolidated Amended Complaint.

On September 24, 2021, Plaintiffs filed the Fourth Amended Consolidated Complaint ("FACC"). On October 25, 2021, Defendants filed a motion to dismiss the FACC, which the

[7] The pending actions consolidated before the undersigned are as follows: *Buford v. Smitty's Supply Inc.*, No. 19-cv-00082 (E. D. Ark.); *Fosdick v. Smitty's Supply Inc.*, No. 19-cv-01850 (N. D. Iowa); *Blackmore v. Smitty's Supply Inc.*, No. 19-cv-04052 (N.D. Iowa); *Zornes v. Smitty's Supply, Inc.*, No. 19-cv-0257 (D. Kan.); *Wurth v. Smitty's Supply Inc.*, No. 19-cv-00092 (W.D. Ky.); *Mabie v. Smitty's Supply, Inc.*, No. 19-cv-3008 (S.D. Tx.); *Klingenberg v. Smitty's Supply, Inc.*, No. 19-cv-2684 (D. Minn.); and *Graves v. Smitty's Supply, Inc.*, No. 19-cv-5089 (W.D. Mo.).

Court granted in part and denied in part on March 9, 2022. *See* (Doc. #451.) On April 21, 2023, Plaintiffs filed a Fifth Amended Consolidated Complaint ("5ACC").[8]

II. LEGAL STANDARD

Under Rule 56, summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of identifying "the basis for its motion, and must identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (cleaned up). If the moving party makes this showing, "the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial." *Id.* (quotation marks omitted). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* (quotation marks omitted).

III. DISCUSSION

Defendants argue that all claims brought by the following classes are time-barred: Arkansas, California, Kansas, Kentucky, Minnesota, Missouri, New York, and Wisconsin. The parties' arguments as to each separate state are addressed below.

A. Arkansas

Defendants argue they are entitled to summary judgment on following claims because they are barred by the applicable statute of limitations: (I) Anderson's Counts I, V–VI, and VIII;

[8] The instant motion was filed before the 5ACC. Although an amended complaint supersedes the original complaint, the Court finds that the amended did not affect the substance of this motion and treats the instant motion for summary judgment as a motion for summary judgment on the 5ACC. *See Cartier v. Wells Fargo Bank, N.A.*, 547 Fed. Appx. 800, 804 (8th Cir. 2013) (finding a district court did not abuse its discretion in treating a motion to dismiss an original complaint as a motion to dismiss an amended complaint).

(2) Hargraves's Counts I–VI; and (4) Harrison's Counts I–VI and VIII.[9] Anderson, Hargraves, and Harrison disagree. The Court will first determine the applicable statutes of limitations, then address the parties' arguments.

1. Counts I–VI

The Court finds that the applicable statute of limitations for the Arkansas Plaintiffs' Counts I–IV is three years.[10] Products liability actions are defined as "all actions brought for . . . property damage . . . caused by or resulting from the manufacture, . . . marketing, packaging, or labeling of any product[.]" Ark. Code Ann. § 16-116-202. As the Arkansas Plaintiffs seek property damage for Defendants' alleged misrepresentation of the 303 THF Products' quality, the Court finds that the three-year statute of limitations set out for products liability claims applies to the Arkansas Plaintiffs' tort (Counts I and V–VI) and breach of warranty (Counts II–IV) claims. *See, e.g., IC Corp.*, 385 S.W.3d at 885 (applying products liability statute of limitations to tort and breach of warranty claims); *see also Uhiren v. Bristol-Myers Squibb Co., Inc.*, 346 F.3d 824, 827–28 (8th Cir. 2003).

Arkansas courts apply the discovery rule to products liability actions:

> A cause of action accrues when the plaintiff first becomes aware of . . . both the fact of the injury and the probable causal connection between the injury and the product's use, or when the plaintiff by the exercise of reasonable diligence, should

[9] The Court previously dismissed the Arkansas Plaintiffs' Count VII, alleging negligent misrepresentation. *See* (Doc. #451). The Arkansas Plaintiffs' remaining claims are Count I, negligence; Count II, breach of express warranty; Count III, breach of implied warranty of merchantability; Count IV, breach of implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; and Count VIII, Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-101.

[10] *See* Ark. Code Ann. § 16-56-105; *see also Moody v. Tarvin*, 486 S.W.3d 242, 244 (Ark. App. 2016) ("There is a three-year statute of limitations applicable to negligence and other claimed obligations not expressed in writing."); *see also Crutchfield v. Tyson Foods, Inc.*, 514 S.W.3d 499, 502 (Ark. App. 2017) (holding that negligence, unjust enrichment, and fraud claims are subject to a three-year statute of limitations); *see also* Ark. Code Ann. § 16-116-202 (defining product liability actions "all actions brought for . . . property damage . . . caused by or resulting from the manufacture, . . . marketing, packaging, or labeling of any product[.]"); *see also* Ark. Code Ann. § 16-116-203 ("All product liability actions shall be commenced within three (3) years on which the death, injury, or damage complained of occurs.").

> have discovered the causal connection between the product and the injuries suffered.

IC Corp. v. Hoover Treated Wood Prods., Inc., 2011 Ark. App. 589, 385 S.W.3d 880, 883 (2011) (citation omitted). On summary judgment, "the real issue is whether the record reflects any genuine issue of material fact regarding [the plaintiff's] awareness of the [alleged injury] and its causal connection to [the defendant] and the [alleged defective product] more than three years before [he] filed [his] complaint." *Id.* The plaintiff need not know "the full extent of damage caused by" the defective product in order for the statute of limitations to begin running. *Id.* at 884 (citing *Martin v. Arthur*, 3 S.W.3d 684, 690 (Ark. 1999)). "When the running of the statute of limitations is raised as a defense, the defendant has the burden of affirmatively pleading this defense." *See State v. Diamond Lakes Oil Co.*, 347 Ark. 618, 623, 66 S.W.3d 613, 616 (Ark. 2002).

As to Counts I–VI, subject to the discovery rule, Defendants argue they are time-barred because "Plaintiffs allege awareness of issues with their equipment well before the relevant limitations period." (Doc. #961, p. 101.) It is undisputed that Anderson, Hargraves, and Harrison joined this lawsuit on August 30, 2019, meaning that their Counts I–VI must have accrued on or after August 30, 2016.

The record reflects that the Anderson became first aware of damages to his equipment in 2017, Hargraves between 2014 and 2016, and Harrison in 2015. However, Arkansas law requires more than knowledge of the damage in order for the claims to accrue. The Court finds that Defendants have failed to meet their burden in showing they knew, or should have known, of the causal connection between the 303 THF Products and their injuries. Defendants have produced little to no evidence as to whether Anderson, Hargraves, and Harrison specifically knew of the cause of their injuries. Anderson testified that, although he noticed damage in 2017,

he did not come to believe it was caused by the 303 THF Products until 2020, which is well within the limitations period. There is no evidence in the record as to Hargraves's individual knowledge. As to Harrison, he testified that he came to believe CAM2 was a bad product in 2020 or 2021, which is also within the limitations period.

As Defendants bore the burden of showing Anderson, Hargraves, and Harrison did or should have known that the 303 THF Products caused their injuries outside the limitations period, and failed to do so, the Court finds that summary judgment is not warranted.[11]

2. Count VIII

The Court finds that the applicable statute of limitations to Count VIII, alleging a violation of the Arkansas Deceptive Trade Practices Act ("ADTPA"), is five years. *See* Ark. Code Ann. § 4-88-115. An ADTPA claim accrues "on the date of the occurrence of the violation or the date upon which the cause of action arises." Ark. Code Ann. § 4-88-115. Applying the five-year statute of limitations, Anderson and Harrison's Count VIII must have accrued on or after August 30, 2014.

Here, the parties agree that the allegedly fraudulent act is the sale of the 303 THF Products. The record reflects that Anderson began purchasing the 303 THF Products in December 2013, and Harrison in June 2014. December 2013 and June 2014 are before August 30, 2014, when Count VIII must have accrued. Accordingly, the Court finds that the statute of limitations precludes Anderson and Harrison's Count VIII. The parties' arguments regarding tolling are discussed below.

[11] Even if Defendants generalized statements were sufficient to show Anderson, Hargraves, and Harrison should have known that the 303 THF Products caused their equipment damages, summary judgment is inappropriate because there are genuine issues of material fact as to whether the doctrine of fraudulent concealment tolled the statute of limitations, as discussed below.

3. Tolling

Plaintiffs argue that Anderson, Hargraves, and Harrison's claims were tolled by the doctrine of fraudulent concealment because "there is plenty of evidence of fraud going to what the product purported to be and do." (Doc. #929, p. 108.) Defendants disagree, stating that Plaintiffs do not "cite to any actual 'positive fraud' that would distinguish this case from other mill-run fraud actions." (Doc. #961, p. 101.)

If a defendant satisfies his burden of showing "the action is barred by the statute of limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute was in fact tolled." *Bomar v. Moser*, 251 S.W.3d 234, 241 (Ark. 2007) (citation omitted). A plaintiff must prove:

> (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the representation.

Id. (citation omitted). A plaintiff must show "a positive act of fraud that is 'so furtively planned and secretly executed as to keep the plaintiff's action concealed, or perpetrated in such a way that conceals itself.'" *Id.* (citation omitted). "Fraud suspends the statute of limitations until the party having the cause of action discovers the fraud, or should have discovered it by the exercise of reasonable diligence." *Id.* (citation omitted). "[F]raudulent concealment is usually one of fact and unsuited for summary judgment" and summary judgment is only appropriate "when there is no evidentiary basis for a reasonable difference of opinion." *Id*. at 241 (citation omitted).

The Court finds there are genuine issues of material fact as to whether Defendants' actions amount to fraudulent concealment, such that summary judgment is not proper. Plaintiffs present evidence that Defendants made affirmative misrepresentations regarding the quality of

the 303 THF Products when they knew that the products was actually a "worthless waste stream." (Doc. #929, p. 113.)

The facts at hand are similar to *Gibson v. Herring*, 975 S.W.2d 860, 863 (Ark. App. 1998), where the court found genuine issues of material fact as to whether the defendant fraudulently concealed the plaintiff's cause of action when he "switch[ed] a cubic zirconium for a diamond[.]" Specifically, the court found that there were genuine issues of material fact as to whether the defendant engaged in fraud because "[a] cubic zirconium is designed to look like and be mistaken for a true diamond," and, in order to discover the fraud immediately, the plaintiff would have had to "have hired an expert to examine the stone." *Id.*

Here, Plaintiffs have 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. Assuming these allegations to be true, like *Gibson*, the Plaintiffs had no way of knowing upon purchase that the 303 THF Products were worthless unless they had the product tested by an expert. Plaintiffs have provided sufficient evidence to create a genuine dispute of material fact as to whether the 303 THF Products' marketing and packaging concealed the true nature of the product, such that it arises to an act of fraudulent concealment.

Accordingly, the Court finds that summary judgment as to Anderson, Hargraves, and Harrison's claims is not warranted.

B. California

Defendants argue that summary judgment is appropriate on Kimmich's remaining claims, Counts I–II, V, VI–VII, and IX–XI.[12] Kimmich disagrees. The Court will first determine the applicable statutes of limitations, then address the parties' arguments.

[12] The Court previously dismissed the California Plaintiffs' Counts III and IV. *See* (Doc. #451). Kimmich's remaining claims are as follows: Count I, negligence; Count II, breach of express warranty; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; Count VII, negligent misrepresentation; Count IX, California Unfair Competition

The Court finds that the applicable statute of limitations for Kimmich's negligence (Count I), misrepresentation (Counts VI–VII), California's False Advertising Law ("FAL") (Count X), and California Consumers Legal Remedies Act ("CLRA") (Count XI) claims are three years.[13] The Court finds that the applicable statute of limitations for Kimmich's breach of express warranty (Count II) and California Unfair Competition Law ("UCL") claim (Count IX) is four years.[14] As Kimmich filed suit on September 16, 2019, Counts I, VI–VII, and X–XI must have accrued on or after September 16, 2016. Similarly, Count IX must have accrued on or after September 16, 2015.

Under California law, a cause of action accrues when "the wrongful act is done . . . and the consequent liability arises[,]" or, "[i]n other words, . . . the time when the cause of action is complete with all of its elements." *Norgart v. Upjohn Co.*, 21 Cal.4th 383, 397, 981 P.2d 79, 88 (1999) (internal citations and quotations omitted). However, the discovery rule "'postpones accrual of a cause of action until the plaintiff discovers, or has a reason to discover, the cause of action.'" *Hawkins*, 337 F.R.D. at 537 (quoting *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 806, 27 Cal.Rptr.3d 661, 110 P.3d 914 (2005)). "A plaintiff has reason to discover a cause of action when he or she has reason at least to suspect a factual basis for its elements." *Fox*, 35 Cal. 4th at 806 (citation and quotations omitted). "The date of accrual of a cause of action is a question of fact. . . . However, summary judgment is proper if the court can draw only one legitimate inference from uncontradicted evidence about the limitations issue." *California-Am.*

Law, Cal. Bus. Prof. Code § 17200; Count X, California's False Advertising Law, Cal. Bus. Prof. Code § 17500; and Count XI, California Consumer Legal Remedies Act, Cal. Civ. Code. § 1770. Additionally, on July 14, 2023, the Court granted CAM2's motion for summary judgment, and dismissed Kimmich's claims against CAM2. (Doc. #985.)

[13] *See Vera v. REL-BC, LLC*, 66 Cal.App.5th 57, 64–66 (2021), (Counts I and VI, negligence and negligent misrepresentation); *see also* Cal. Code Civ. Proc. § 338(h) (fraudulent misrepresentation, Count VII); *see also* Cal. Code Civ. Proc. § 338(a) (FMA and CLRA, Counts X–XI).

[14] *Hawkins v. Kroger Co.*, 337 F.R.D. 518, 537 (S.D. Cal. 2020) (Count II, express warranty); Cal. Bus. & Prof. Code § 17208 (UCL, Count IX).

Water Co. v. Marina Coast Water Dist., 86 Cal.App.5th 1272, 1304, 303 Cal.Rptr.3d 227, 251 (Cal. App. 2022) (citations omitted).

Defendants argue that Kimmich's claims accrued in 2015 because "Kimmich first purchased Defendants' THF in July 2014 and claims he used the THF and was harmed thereby beginning in 2015." (Doc. #852, p. 24.) Plaintiffs disagree, arguing that there is a genuine dispute of material fact as to when Kimmich's causes of action accrued, rendering summary judgment inappropriate.

The Court finds that summary judgment is not proper here because the Court cannot draw a legitimate interference regarding when Kimmich's claims accrued. In his Class Membership Form, Kimmich represented that his 1993 Volvo L-50B Loader started experiencing leaks and transmission problems sometime in 2015 or 2016, and that 1990s Kubota R400 Loader/Backhoe started experiencing problems in 2016. (Doc. #929-16, pp. 3, 5.) Kimmich testified, however, that he began observing major leaks in his 1993 Volvo L-50B Loader towards the end of 2017, and that he did not come to believe that Smitty's 303 THF Products were the cause of damage to his equipment until after he had the 1993 Volvo L-50B Loader inspected and repaired in Fall 2018. (Doc. #929-15, p. 14.) Beyond Kimmich's testimony, the parties present no facts as to when Kimmich had reason to suspect that the 303 THF Products were causing his equipment damage. As Defendants have not shown that Kimmich had reason to discover his causes of action before September 16, 2016 or September 16, 2015, and questions of fact remain, the Court finds that summary judgment is not appropriate.

C. Kansas

Defendants argue that summary judgment is appropriate as to the following Bollin and Sevy's Counts I–VII and XVIII.[15] Bollin and Sevy disagree. The Court will first determine the applicable statutes of limitations, then address the parties' arguments.

1. Counts I and V–VII

The Court finds that the applicable statute of limitations for Bollin and Sevy's Counts I and V–VII claims is two years. K.S.A. § 60-513(a). As Sevy filed suit on May 24, 2019, Bollin and Sevy's Counts I and V–VII must have accrued on or after May 24, 2017.

Counts I and V–VII accrue under Kansas law when the following events occur: "(1) the act which caused the injury; (2) the existence of substantial injury; and (3) the injured party's awareness of the fact of the injury." *Dumler v. Conway*, 49 Kan.App.2d 567, 576, 312 P.3d 385, 392 (2013). "[T]he statute does not require the identification of the party who caused the injury." *Id.*

Here, it is undisputed that Bollin was aware of damage to his equipment in 2015, and Sevy was aware of damage sometime between 2014 and 2015. These dates are before May 24, 2017, meaning that Bollin and Sevy's claims fall outside the limitations period. Plaintiffs argue that, although Bollin and Sevy knew they were "experiencing problems[,]" but that they were not "aware that they were related to the 303 THF at any time prior to 2 years before May 24, 2019." (Doc. #929, p. 118.) However, Kansas law does not require that the plaintiff know the cause of the injury for a cause of action to accrue. Accordingly, Plaintiffs argument is rejected.

[15] The Court previously dismissed the Kansas Plaintiffs' Counts I–IV, VI–VII, and XVIII, to the extent that the Kansas Plaintiffs seek property damages. *See* (Doc. #451). The Kansas Plaintiffs remaining claims are as follows: Count I, negligence; Count II, breach of express warranty; Count III, breach of implied warranty of merchantability; Count IV, breach of implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; Count VII, negligent misrepresentation; and Count XVIII, Kansas Consumer Protection Act ("KCPA"), K.S.A. § 50-623, *et seq*. Additionally, on July 14, 2023, the Court granted CAM2's motion for summary judgment, and dismissed Bollin and Sevy's claims against CAM2. (Doc. #985.)

Plaintiffs argue that "Defendants provide no basis to conclude that they have no claim respecting purchases within the limitations period" because "Plaintiffs suffered purchase injury on the dates of purchase and physical harm at each use of the fluid." (Doc. #929, p. 118.) Defendants disagree, arguing that "Plaintiffs do not allege separate causes of action for each piece of equipment or for each purpose." (Doc. #961, p. 109.)[16] However, the Court finds there are genuine issues of material fact that preclude summary judgment on Bollin and Sevy's claims insofar as they are based on purchases made within the limitations period. Defendants have not presented any case law indicating Plaintiffs are required to plead separate causes of action for each purchase, and have not met their burden of showing they are entitled to summary judgment on purchases made within the limitations period. *Dreiling v. Davis*, 38 Kan.App.2d 997, 10001, 176 P.3d 197, 201 (Kan. App. 2008) ("[T]he burden of pleading and proving the applicability of the affirmative defense of statute of limitations rests on the defendant[.]").

Accordingly, Defendants are entitled to summary judgment on Bollin and Sevy's Counts I and V–VII as to purchases made May 24, 2017. Bollin and Sevy's Counts I and V–VII remain as they relate to purchases made on or after May 24, 2017.

2. Counts II–VI and XVIII

The Court finds that the applicable statute of limitations for Bollin and Sevy's breach of warranty claims, Counts II–IV, is four years. The Court finds that the applicable statute of limitations for Bollin and Sevy's KCPA claim, Count XVIII, is three years. K.S.A. § 60-512(2). Counts II–IV, alleging breach of warranty claims, accrue "when tender of delivery is made,"

[16] Defendants also argue that Plaintiffs have failed to allege a continuing violation theory. Under Kansas law, the continuing violation doctrine "provides that when the last act of wrongful conduct is part of an ongoing pattern and occurs within the filing period, allegations concerning earlier acts are not time-barred." *Renteria v. Donahue*, 92 F.3d 1197, 1996 WL 446905, at *2 n.4 (10th Cir. Aug. 8, 1996). However, "the continuing violation doctrine has been applied very infrequently outside the Title VII employment discrimination context[.]" *United Cities Gas Co. v. Brock Exploration Co.*, 984 F.Supp. 1379, 1389 (D. Kan. 1997). The Court finds that the continuing violation, under Kansas law, is inapplicable here.

"regardless of the aggrieved party's lack of knowledge of the breach." *Id.* at § 84-2-725(2). Similarly, Count XVIII, alleging violation of the KCPA, "[t]he statute begins to run at the time of the transaction(s) that is/are the subject of the plaintiff's claim." *Rogers v. Bank of America, N.A.*, No. 13-1333-CM, 2014 WL 3091925, at *5 (D. Kan. July 7, 2014) (citing *Four Seasons Apartments, LTD v. AAA Glass Serv., Inc.*, 152 P.3d 101, 105 (Kan. Ct. App. 2007)). As Sevy filed suit on May 24, 2019, Bollin and Sevy's Counts II–IV must have accrued on or after May 24, 2015, and Count XVIII must have accrued on or after May 24, 2016.

As to Counts II–IV and XVIII, the Court finds that summary judgment is warranted as to Bollin and Sevy's purchases outside the limitations period. As Sevy filed suit against Defendants on May 24, 2019, to be timely their warranty and KCPA claims must have accrued on or after May 24, 2015, and May 24, 2016, respectively. The Court agrees with Defendants that Bollin and Sevy's purchases of the 303 THF Products before those dates are subject to dismissal. However, for the reasons stated above, the Court agrees with Bollin and Sevy that all purchases made on or after those dates fall within the limitations period and should not be dismissed.

3. Tolling

Bollin and Sevy argue that tolling applies to their warranty claims (Counts II–IV) that fall outside the limitations period. Defendants argue that Bollin and Sevy cannot produce sufficient evidence of fraudulent concealment to toll the statute of limitations.

"In order to toll a statute of limitations, the party's concealment must be fraudulent or intentional and . . . there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action." *Foxfield Villa Assoc., LLC v. Robben*, 57 Kan.App.2d 122, 130, 449 P.3d 1210, 1217 (Kan. App. 2019) (citation and quotations omitted). "[T]he plaintiff bears the burden of proving facts sufficient to toll the statute of limitations."

Dreiling, 38 Kan.App.2d at 1001 (citation omitted). "There must be something more–some affirmative inducement *beyond* the underlying cause of action that lulls the plaintiff into not filing his action until the limitations period has already run." *Campbell v. Hubbard*, 201 P.3d 702, 706 (Kan. App. 2008).

Here, the Court finds that the doctrine of fraudulent concealment is inapplicable. Bollin and Sevy argue that Defendants fraudulently concealed their warranty claims because they, as consumers, had no way to know the true character of the 303 THF Product, "a worthless waste stream." (Doc. #929, p. 113.) However, they present no facts, beyond the allegations of Defendants' misrepresentations that give rise to their underlying claims, that Defendants took affirmative action to conceal any claims. The Court finds that Bollin and Sevy had failed to prove facts sufficient to toll the statute of limitations on their warranty claims.

In sum, the Court finds that summary judgment is warranted only on Bollin and Sevy's (1) Counts II–IV, as they relate to purchases before May 24, 2015; and (2) Count XVIII, as it relates to purchases before May 24, 2016.

D. Kentucky

Defendants argue that they are entitled to summary judgment on the Kentucky Plaintiffs' Count I, negligence, because it is time-barred.[17] The Kentucky Plaintiffs disagree. The Court will address (1) whether the applicable statute of limitations bars the Kentucky Plaintiffs' negligence claim; and (2) whether tolling is applicable.

1. Count I

The Kentucky Plaintiffs' negligence claim is subject to a two-year statute of limitations. Ky. Rev. Stat. Ann. § 413.125; *Ingram Trucking, Inc. v. Allen*, 372 S.W.3d 870, 783 (Ky. Ct.

[17] On July 14, 2023, the Court granted CAM2's motion for summary judgment, and dismissed Tim Sullivan's Counts I and V–VII against CAM2. (Doc. #985.)

App. 2012). "[A] claim accrues for limitations purposes when a defendant's 'conduct causes injury that produces loss or damage." *Faulkner v. Martin*, No. 1:19-CV-00054-GNS, 2020 WL 3862267, at * (W.D. Ky. July 8, 2020) (citing *Abel v. Austin*, 411 S.W.3d 728, 736 (Ky. 2013)). "Pleading the statute of limitations is an affirmative defense, this it [is] the burden of the [defendant] to show his entitlement to it." *Wimmer v. City of Ft. Thomas*, 733 S.W.2d 759, 761 (Kt. App. 1987) (citation omitted).

As an initial matter, the Kentucky Plaintiffs argue that the Court should apply the discovery rule to the accrual of their negligence claim.

> 'The discovery rule acts to delay the accrual of a cause of action until the plaintiff discovers, or should have reasonably discovered his injury.' *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 796 (Ky. 2003). In *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 288 (Ky. App. 1998), this Court explained, 'With the exception of cases involving latent injuries from exposure to harmful substances, Kentucky courts have generally refused to extend the discovery rule without statutory authority to do so.' For example, it is clear the legislature extended the discovery rule to actions for medical malpractice, KRS 413.140(2), as well as claims of professional negligence, KRS 413.245.

Middleton v. Sampey, 522 S.W.3d 875, 878–79 (Ky. App. 2017). The Kentucky Plaintiffs fail to identify a statute authorizing the application of the discovery rule here. Consequently, the argument is rejected. It is undisputed that the Kentucky Plaintiffs filed suit on June 27, 2019. Therefore, to be timely, the Kentucky Plaintiffs' negligence claim must have accrued on or after June 27, 2017.

The Court finds that the Kentucky Plaintiffs' negligence claim is barred by the statute of limitations. The record shows that Defendants' 303 THF Products caused damage such that Egner, Tim Sullivan, and Tracy Sullivan noticed damage and/or repaired their equipment because of such damage outside the limitations period – Egner in May 2016 and Tim Sullivan in 2011 or 2012, Tracy Sullivan in late 2014. However, the record does not reflect that Wurth

suffered any damage to his equipment due to the 303 THF Products.[18] Accordingly, the Court finds that Egner, Tim Sullivan, Tracy Sullivan's claims are barred by the statute of limitations. The Court also finds that Defendants have not shown that Wurth's claim is barred by the statute of limitations.

2. Tolling

The Kentucky Plaintiffs argue that their claims should not be subject to summary judgment as they were tolled by the doctrine of fraudulent concealment. Defendants argue that Plaintiffs fail to give evidence of affirmative acts "designed to prevent inquiry into the underlying negligence claims." (Doc. #961, p. 104.)

The "doctrine of equitable estoppel will operate to bar an inequitable application of a statute of limitation" where there is "'some act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so.'" *Satterfield v. Satterfield*, 608 S.W.3d 171, 173–74 (Ky. App. 2020) (quoting *Munday v. Mayfair Diagnostic Lab'y*, 831 S.W.2d 912, 914 (Ky. 1992)). Fraudulent concealment "requires a showing of an affirmative act by the party charged." *Munday*, 831 S.W.2d at 914.

The Court finds that there are genuine issues of material fact as to whether the Kentucky Plaintiffs' claims were tolled. Plaintiffs provide evidence that, if true, Defendants took affirmative action to conceal the true quality of the 303 THF Products from consumers. Further, Defendants have provided no case law indicating that, under Kentucky law, the actions giving rise to the underlying claim must be separate from the actions constituting fraudulent concealment. Accordingly, as there are genuine disputes of material fact as to whether the

[18] Plaintiffs produced Wurth's Repairs/Parts/Specific Equipment Damage Claim Form (Doc. #929-79) to support the contention that Wurth suffered damage to his 2012 Caterpillar 277 Skid Steer. However, the form appears to be missing a page as Page 1 bears Bates No. PLAINTIFFCR00005758 and Page 2 bears Bates No. PLAINTIFFCR00005760. As the instant motion only moves for summary judgment on the grounds of statute of limitations, the Court will not address the merits of Wurth's negligence claim.

Kentucky Plaintiffs' claims were tolled, the Court finds summary judgment as to the Kentucky Plaintiffs' claims is not warranted.[19]

E. Minnesota

Defendants argue that they are entitled to summary judgment on the Minnesota Plaintiffs' breach of warranty claims, Counts II–IV, because they are time barred.[20] The Minnesota Plaintiffs disagree. The Court will address (1) whether the applicable statute of limitations bars the Minnesota Plaintiffs' warranty claims; and (2) whether tolling is applicable.

1. Counts II–IV

Under Minnesota law, the statute of limitations for breach of warranty claims is four years. Minn. Stat. Ann. § 336.2-725(1). A breach of warranty claim accrues "when tender of delivery is made," "regardless of the aggrieved party's lack of knowledge of the breach." *Id.* at § 336.2-725(2).

As an initial matter, Plaintiffs argue that the 303 THF Products make promises as to future performance such that the Minnesota Plaintiffs' claims accrued when they discovered the breach. Defendants argue that any promises as to future performance are insufficient to alter accrual. Minnesota law provides that, "where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." § 336.2-725(2). However, "[t]o constitute a warranty of future performance, 'the terms of the warranty must

[19] As the Court denies to grant summary judgment, the Court need not address Plaintiffs' argument that summary judgment is not warranted on Egner, Tim Sullivan, Tracy Sullivan's claims for purchases made within the applicable limitations period.

[20] The Court previously dismissed the California Plaintiffs' Count XXI, alleging violation of the Minnesota Consumer Fraud Act. *See* (Doc. #451.) The Minnesota Plaintiffs claims remain as follows: Count I, negligence; Count II, breach of express warranty; Count III, breach of implied warranty of merchantability; Count IV, breach of implied warranty of fitness for a particular purpose; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; and Count VII, negligent misrepresentation. Additionally, on July 14, 2023, the Court granted CAM2's motion for summary judgment, and dismissed Creger's claims against CAM2. (Doc. #985.)

unambiguously indicate that the manufacturer is warranting the future performance of the goods for a specified period of time.'" *M.G. Longstreet, LLC v. James Hardie Bldg. Prods.*, No. 21-CV-1213 (SRN/ECW), 2021 WL 5567863, at *3 (D. Minn. Nov. 29, 2021) (quoting *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 823 (8th Cir. 1983); *see also Anderson v. Crestliner, Inc.*, 564 N.W.2d 218, 222 (Minn. App. 1997). Here, the 303 THF Products do not specify a period of time for which they promise superior performance. Thus, the Plaintiffs' argument is rejected.

It is undisputed that Klingenberg filed suit against Defendants on September 6, 2019. Therefore, to be timely, the Minnesota Plaintiffs' claims must have accrued on or before September 6, 2015. The record shows that the Minnesota Plaintiffs purchased the 303 THF Products outside the limitations period – Asfeld in December 2013, Creger in October 2014, and Klingenberg in 2014. Accordingly, the Minnesota Plaintiffs' warranty claims are barred by the statute of limitations.

2. Tolling

Plaintiffs argue that the Minnesota Plaintiffs' Counts II–IV were tolled by the doctrine of fraudulent concealment. Defendants disagrees.

To prove fraudulent concealment that tolls the statute of limitations under Minnesota law, a plaintiff must show that the defendant fraudulently concealed "the very existence of the facts which establish the cause of action" and that the plaintiff was "actually unaware" of the facts. *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 918–19 (Minn. 1990). "Since these are disputes of fact, summary judgment is appropriate only where a reasonably juror could not find fraudulent concealment." *Marvin Lumber and Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 877 (8th Cir. 2000) (citation omitted). Fraudulent concealment tolls the statute of limitations until

the plaintiff "discovered or had a reasonable opportunity to discover the concealed defects." *Id.* at 876–877.

Here, similar to the Courts' analysis under Kentucky law in III.D.2, the Court finds that genuine issues of material fact preclude summary judgment. Plaintiffs present evidence indicating that Defendants concealed the true quality of the 303 THF Products, and represented to customers that it was suitable for use in equipment when it, in reality, was not. Here, a reasonable juror could find that Defendants fraudulently concealed the 303 THF Products' defects. Accordingly, the Court finds that summary judgement is not warranted on the Minnesota Plaintiffs' Counts II–IV, as genuine issues of material fact remain.[21]

F. Missouri

Defendants argue that summary judgment is warranted on Graves and Nash's remaining claims, Counts I–VII and XXII, because they are untimely. Graves and Nash disagree. The Court will first determine the applicable statutes of limitations, then address the parties' arguments.

1. Counts I, V–VII, and XXII

The Court finds that the applicable statute of limitations for the Missouri Plaintiffs' Counts I, V, VI–VII, and XXII claims is five years.[22] Because Counts I, V, VII, and XXII are governed by different accrual rules than Count VI, as discussed below, these Counts are discussed separately. Graves and Nash filed suit on November 5, 2019, and their claims must have accrued on or after November 5, 2014 to be timely.

[21] As the Court denies to grant summary judgment, the Court need not address Plaintiffs' argument that summary judgment is not warranted on the Minnesota Plaintiffs' claims for purchases made within the applicable limitations period.

[22] Mo. Rev. Stat. § 516.120; *Thomas v. Grant Thornton LLP*, 478 S.W.3d 440, 444 (Mo. App. W.D. 2015) (negligence, negligent misrepresentation, and fraudulent misrepresentation); *Royal Forest Condo. Owners Ass'n v. Kilgore*, 416 S.W.3d 370, 373 (Mo. App. E.D. 2013) (unjust enrichment); *Boulds v. Chase Auto Fin. Corp.*, 266 S.W.3d 847, 851 (Mo. App. E.D. 2008) (MMPA).

a) Counts I, V, VII, and XXII

Counts I, V, VII, and XXII accrue when "the damage resulting [from the wrong] is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item[.]" Mo. Rev. Stat. § 516.100. Damages are ascertainable when a reasonable person would be put on notice:

> The issue is not when the injury occurred, or when plaintiff subjectively learned of the wrongful conduct and that it caused his or her injury, but when a reasonable person would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages. At that point, the damages would be sustained and capable of ascertainment as an objective matter.

Powel v. Chaminade College Prep., Inc., 197 S.W.3d 576, 584–85 (Mo. banc 2006). "Whether damages are capable of ascertainment is an objective test, ordinarily decided as a matter of law." *Ferrellgas, Inc. v. Edward A. Smith, P.C.*, 190 S.W.3d 615, 620 (Mo. App. W.D. 2006). "The party asserting the affirmative defense of the running of the applicable statute of limitations has the burden of not only pleading but proving it." *Lomax v. Sewell*, 1 S.W.3d 548, 552 (Mo. App. W.D. 1999).

The Court finds that Counts I, V, VII, and XXII are barred by the statute of limitations. As to Graves, although there is no evidence in the record as to when Graves's equipment was damaged for the first time, the record is clear that Graves repaired his 1984 Case 480E Backhoe on April 29, 2014. On this date, regardless of Graves's subjective knowledge, the damage to the 1984 Case 480E Backhoe was capable of ascertainment, putting a reasonable person on notice of an actionable claim and triggering the statute of limitations. *M&D Enterprises, Inc. v. Wolff*, 923 S.W.2d 389, 394 (Mo. App. S.D. 1996) ("When the *fact of damage* becomes capable of ascertainment, the statute of limitations is put in motion.") (emphasis in original). Thus, Graves's claim would expire on April 29, 2019, which is before he filed suit on November 5,

2019. Similarly, Nash testified he experienced relief valve leakage in his 1968 Allis Chalmers D15 Backhoe starting in 2009, which ultimately failed Summer 2013 and was replaced in June 2014. Even assuming that damages were not objectively capable of ascertainment until the Summer 2013 failure, Nash's claim would expire Summer 2018, which is before he filed suit on November 5, 2019.

Plaintiffs argue that Graves and Nash "made more than one purchase," and that claims on purchases within the limitations period should proceed. (Doc. #929, p. 120.) Defendants disagree, arguing "Plaintiffs' own expert has said that damages occurred when Plaintiffs first used Defendants' 303 THF . . . and Plaintiffs have not even attempted to separate their claimed damages from different periods of time." (Doc. #961, p. 107.) The Court agrees with Plaintiffs. Plaintiffs have produced evidence that damage occurs upon the use of the 303 THF Products, and the record shows that Graves and Nash purchased and used the 303 THF Products until 2019. Allowing these claims to proceed does not relieve Plaintiffs of their burden of proving that the damages they experienced resulted from purchases made within the limitations period.

Accordingly, Graves and Nash's Counts I, V, VII, and XXII are barred by the statute of limitations only as they relate to purchases made before November 5, 2014.

b) Count VI

Count VI, alleging fraudulent misrepresentation, sounds in fraud and is governed by different accrual rules. *See* § 516.120(5). "A cause of action for fraud accrues at the time the defrauded party discovered or in the exercise of due diligence should have discovered the fraud." *Larabee v. Eichler*, 271 S.W.3d 542, 546 (Mo. banc 2008) (citation and quotations omitted). "A plaintiff has a duty to make inquiry to discover facts surrounding the fraud and is deemed to have knowledge of the fraud when he possesses the means of discovery." *Dean v. Noble*, 477 S.W.3d 197, 204 (Mo. App. W.D. 2015) (citation omitted).

The Court finds that Count VI is not barred by the statute of limitations. Upon review of the record and exhibits, the Court finds that Defendants have provided evidence such that a reasonable jury could infer Graves and Nash possessed the means of discovery only as early as October 2017, when the Missouri Department of Agriculture issued its stop-sale order. Although there is evidence that both Graves and Nash's equipment incurred damage prior to October 2017, Defendants have provided no evidence that that Graves or Nash, in the exercise of due diligence, should have discovered fraud until that point. Using October 2017 as the date of accrual, Graves and Nash's Count VI would have expired in October 2022, which is well after they filed suit on November 5, 2019. Accordingly, the Court finds that Count VI is not barred by the statute of limitations.

2. Counts II–IV

The Court finds that the applicable statute of limitations for Graves and Nash's Counts II–IV, alleging breach of warranty, is four years. Mo. Rev. Stat. § 400.2-725(1). Counts II–IV accrue when "tender of delivery is made[.]" *Id.* at § 400.2-725(2).

The Court finds that Counts II–IV are barred by the statute of limitations. The record shows that Graves began purchasing the 303 THF Products in April 2014, and Nash in December 2013. Graves warranty claims expire in April 2018, and Nash in December 2017, which is before they filed suit on November 5, 2019. The Court agrees with Defendants that Graves and Nash's purchases of the 303 THF Products made before November 5, 2015, are subject to dismissal. However, as discussed above, the Court agrees with Graves and Nash that all purchases made after November 5, 2015, fall within the statutory period and should not be dismissed.

3. Tolling

Plaintiffs argue that Defendants concealed Graves and Nash's causes of action such that they should be tolled. Defendants argue that Plaintiffs "misconstrue the Missouri tolling standard." (Doc. #961, p. 107.)

Missouri law allows a cause of action to be tolled "[i]f any person, by absconding or concealing himself, or by any other improper act, prevent[s] the commencement of an action[.]" Mo. Rev. Stat. § 516.280. "The essence of a fraudulent concealment action is that a defendant, by his or her post-negligence conduct, affirmatively intends to conceal from plaintiff the fact that the plaintiff has a claim against the defendant." *Batek v. Curators of Univ. of Missouri*,920 S.W.2d 895, 900 (Mo. banc 1996). "Improper acts are uniformly held to mean some act on the part of the defendant that would hinder or delay the commencement of a suit, the service of process or some necessary step in relation thereto." *State ex rel. Heart of Am. Council v. McKenzie*, 484 S.W.3d 320, 325 (Mo. banc 2016) (citation and quotations omitted).

Here, the Court agrees with Defendants and finds that Plaintiffs have not presented evidence that Defendants fraudulently concealed Graves and Nash's claims. As discussed above, Plaintiffs argue that Defendants made affirmative misrepresentations regarding the quality of the 303 THF Products when they knew it was worthless, which amounts to concealing their claims. However, Missouri law requires some action on the part of Defendants outside of and after the conduct making up the underlying claim. Because Plaintiffs have failed to show evidence that Defendants took action to conceal their claims outside of the marketing and manufacture of the THF 303 Products, Missouri's fraudulent concealment doctrine is inapplicable.

In sum, the Court finds that Defendants are entitled to summary judgment only as to (1) Graves and Nash's Counts I, V, VII, and XXII, as they relate to purchases made before

November 5, 2014; and (2) Graves and Nash's Counts II–IV, as they relate to purchases made before November 5, 2015.

G. New York

Defendants argue they are entitled to summary judgment on the New York Plaintiffs' Counts I, II, and XXV because they are untimely.[23] The New York Plaintiffs disagree. The Court will first determine the applicable statutes of limitations, then address the parties' arguments.

1. Counts I and XXV

The Court finds that Count I (negligence) and Count XXV (New York Consumer Protection Law, "NYCPL") are subject to a three year statute of limitations.[24] N.Y. C.P.L.R. § 214; *Kampuries v. Am. Honda Motor Co., Inc.*, 204 F.Supp.3d 484, 489 (E.D.N.Y.2016). Counts I and XXV accrue "upon the date of injury . . . even if the plaintiff is unaware that he or she has a cause of action at the time[.]" *Kampuries*, 204 F.Supp.3d at 491 (citations and quotations omitted); *see also Beck v. Christie's Inc.*, 141 A.D.3d 442, 443–44, 34 N.Y.S.3d 58, 59 (N.Y. App 2016). "Because the statute of limitations is an affirmative defense, the defendant bears the burden of establishing by prima facie proof that the limitations period has expired since the plaintiff's claim accrued." *Overall v. Estate of Klotz*, 52 F.3d 398, 403 (2nd Cir. 1995). Graves filed suit on behalf of a nationwide suit on November 27, 2019, so the New York Plaintiffs' Counts I and XXV must have accrued on or after November 27, 2016.

[23] The Court previously dismissed the New York Plaintiffs' Count III, breach of implied warranty of merchantability; Count IV, breach of implied warranty of fitness for a particular purpose; and Count VII, negligent misrepresentation. *See* (Doc. #451.) The New York Plaintiffs' remaining claims are Count I, negligence; Count II, breach of express warranty; Count V, unjust enrichment; Count VI, fraudulent misrepresentation; and Count XXV, New York Consumer Protection Law, N.Y. Gen Bus. Law § 349. Additionally, on July 14, 2023, the Court granted CAM2's motion for summary judgment, and dismissed Dean, Miller, and Wachholder's claims against CAM2. (Doc. #985.)

[24] Plaintiffs argue that Count XXV is subject to New York's six-year statute of limitations because Count XXV sounds in fraud, but this position is not supported by case law. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 750 N.E.2d 1078, 1082–83 (N.Y. 2001).

Here, the Court finds that Counts I and XXV are barred by the statute of limitations. Defendants argue that, "[b]ecause Plaintiffs' expert opines that damage occurred immediately upon first use," and because "discovery of the alleged harm is irrelevant to the commencement of the limitations period[,]" the New York Plaintiffs' claims accrued upon first use. Plaintiffs do not disagree with this theory, or disagree that the New York Plaintiffs used the 303 THF Products upon first purchase. Dean first purchased the 303 THF Products in June 2015, so his claims accrued in June 2015 and expire in June 2018. Miller first purchased the 303 THF Products in August 2014, so his claims accrued in August 2014 and expire in August 2017. Wachholder first purchased the 303 THF Products in January 2014, so his claims accrued in January 2014 and expire in January 2017. Because the New York Plaintiffs' Counts I and XXV expired before November 27, 2019, they are barred by the statute of limitations.

Plaintiffs argue that "Defendants have not provided a basis that claims respecting purchases within 3 years of November 27, 2019 . . . cannot go forward." (Doc. #929, p. 121.) Defendants argue that the New York Plaintiffs' "claims should be dismissed in their entirety because Plaintiffs seek damages from their first use of Defendants' THF . . . , which occurred outside of the limitations period." (Doc. #961, p. 108.)

The Court agrees with Plaintiffs. Defendants do not cite to case law that precludes the New York Plaintiffs from asserting claims for subsequent purchases. Plaintiffs have provided evidence that the New York Plaintiffs purchased and used the 303 THF Products through 2018. Allowing these claims to proceed does not relieve Plaintiffs of their burden of proving that the damages they experienced resulted from purchases made within the limitations period. Accordingly, the Court finds that summary judgment is warranted as to the New York Plaintiffs' Counts I and XXV as they relate to purchases made on or before November 27, 2016.

2. Count II

The Court finds that Count II (breach of express warranty) is subject to a four-year statute of limitations. N.Y. U.C.C. § 2–725(1). Count II accrues "when tender of delivery is made[.]" *Id.*

As to Counts II–IV, the Court finds that summary judgment is warranted as to the New York Plaintiffs' purchases of the 303 THF Products outside the limitations period. As discussed above, the New York Plaintiffs made their first purchases of the 303 THF Products between 2014 and 2015, with June 2015 being the latest first purchase. As claims for these first purchases did not accrue by November 27, 2015, they are not timely. However, as discussed above, the Court agrees with the New York Plaintiffs that all purchases made after November 27, 2015, fall within the statutory period and should not be dismissed.

3. Tolling

Plaintiffs argue that equitable estoppel tolls the New York Plaintiffs' claims. Defendants disagree, arguing that Plaintiffs cite inapplicable law. The Court agrees with Defendants.[25]

"The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense." *Zumpano v. Quinn*, 6 N.Y.3d 666, 673, 849 N.E.2d 926 (N.Y. 2006). "[E]quitable estoppel will apply where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *Id.* at 674 (citation and quotations omitted). A plaintiff asserting equitable estoppel must "allege[] an act of deception, separate from the ones for which they sue, on which an equitable estoppel could be based." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 789, 967 N.E.2d 1177 (N.Y. 2012).

[25] Although New York "[c]ourts have identified a limited number of circumstances where a 'self-concealing' fraud exists such that plaintiffs need not show any additional affirmative acts of concealment," these are principally "bid-rigging and price-fixing schemes," in which the claims involve proving conspiracies. *Vincent v. Money Store*, 304 F.R.D. 446, 459 (S.D.N.Y. 2015) (citations omitted). That is not the case here. Further, Plaintiffs have shown no basis in law to utilize equitable tolling concepts applicable to claims brought under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*, or other federal standards.

Here, similar to the Court's analysis of tolling under Missouri law, *supra* III.F.3, the Court finds equitable estoppel is inapplicable. Plaintiffs have not shown acts of deception separate from the conduct forming the underlying causes of action.

In sum, the Court finds summary judgment is warranted as to the New York Plaintiffs' (1) Counts I and XXV, as they relate to purchases made on or before November 27, 2016; and (2) Count II, as it relates to purchases made on or before November 27, 2015.

H. Wisconsin

Defendants argue they are entitled to summary judgment on the Wisconsin Plaintiffs' Counts XXXIII, alleging a violation of the Wisconsin Deceptive Trade Practices Act ("WDTPA"), because they are untimely.[26] The Wisconsin Plaintiffs appear to concede their claims are untimely.

The WDTPA provides a three-year statute of repose. *Kain v. Bluemound East Indus. Park, Inc.*, 248 Wis.2d 172, 182–83, 635 N.W.2d 640, 645 (Wis. App. 2001). "Under a statute of repose, 'a cause of action must be commenced within a specified amount of time after the defendant's action which allegedly led to injury, *regardless of whether the plaintiff has discovered the injury or wrongdoing*." *Id.* at 645 (quoting *Tomczak v. Bailey*, 218 Wis.2d 245, 252, 578 N.W.2d 166, 170 (Wis. 1998)) (emphasis in original).

The Court finds that the Wisconsin Plaintiffs' Count XXXIII is time-barred. As the Wisconsin Plaintiffs joined this suit on November 27, 2019, claims involving products purchased before November 27, 2016 are barred by the statute of repose. The record establishes that Hamm

[26] The Court previously dismissed the Wisconsin Plaintiffs' Count II, breach of express warranty; Count III, breach of implied warranty of merchantability; Count IV, breach of implied warranty of fitness for a particular purpose; and Count V, unjust enrichment. *See* (Doc. #451.) The Wisconsin Plaintiffs' remaining claims are Count I, negligence; Count VI, fraudulent misrepresentation; Count VII, negligent misrepresentation, and Count XXXIII, WDTPA.

began purchasing the 303 THF Products in Fall 2015, and Wendt began purchasing the 303 THF Products in January 2014.

Plaintiffs argue that claims for purchases made within the limitations period should not be subject to summary judgment. Defendants disagree, arguing that "Plaintiffs did not rely on any misstatements" when making subsequent purchases of the 303 THF Products within the limitations period. Hamm testified that he always read the 303 THF Products' labels "[t]he first time" he purchased them, but did not read the labels after the first purchase. (Doc. #961-41, p. 9.) Defendants point to an unpublished opinion from the District Court for the Eastern District of Wisconsin to argue the Wisconsin Plaintiffs' entire claim should be dismissed as it rests on representations outside the limitations period.[27]

However, even if there was evidence that Wendt also only read the labels once, the Court is not convinced that summary judgment is appropriate. Wisconsin recognizes the continuing violation theory. "Where a tort is continuing, the right of action is continuing." *Production Credit Ass'n of W. Cent. Wisconsin v. Vodak*, 150 Wis.2d 294, 305–06, 441 N.W.2d 338 (Wis. App. 1989). It is undisputed that Defendants continued to manufacture and sell the 303 THF Products, which contained the same representations regarding quality and performance. Accordingly, the Court finds that summary judgment is not appropriate as to Count XXXIII for purchases made after November 27, 2016.

In sum, the Court finds that summary judgment is warranted on the Wisconsin Plaintiffs' Count XXXIII, as it relates to purchases made before November 27, 2016.

[27] In *Falk v. Wheeler*, No. 19-CV-1168, 2020 WL 759180, at *5 (E.D. Wis. Feb. 13, 2020), the Court granted the defendant's motion to dismiss a WDTPA claim. The complaint was "not specific about the dates on which certain misrepresentations took place[,]" so the Court "dismiss[ed] the [WDTPA] claim to the extent it rests on false representations made before" the limitations period and stated that "[o]nly false representations made [within the limitations period] are actionable." *Id.*

IV. CONCLUSION

Accordingly, Defendants' Motion for Summary Judgment as to Time-Barred Claims in Eight Selected States (Doc. #851) is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to the following claims:

- Kansas Plaintiffs George Bollin and Adam Sevy's Counts II–IV, as they relate to purchases before May 24, 2015;
- Kansas Plaintiffs George Bollin and Adam Sevy's Count XVIII, as it relates to purchases made before May 24, 2016;
- Missouri Plaintiffs Arno Graves and Ron Nash's Counts I, V, VII, and XXII, as they relate to purchases made before November 5, 2014;
- Missouri Plaintiffs Arno Graves and Ron Nash's Counts II–IV, as they relate to purchases made before November 5, 2015;
- New York Plaintiffs Sawyer Dean, John Miller, and Lawrence Wachholder's Counts I and XXV, as they relate to purchases made on or before November 27, 2016;
- New York Plaintiffs Sawyer Dean, John Miller, and Lawrence Wachholder's Count II, as it relates to purchases made on or before November 27, 2015; and
- Wisconsin Plaintiffs Michael Hamm and Dale Wendt's Count XXXIII, as it relates to purchases made on or before November 27, 2016.

IT IS SO ORDERED.

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

Dated: July 18, 2023