UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KIMBERLY LAURA SMITH-BROWN, et al.,	)	
Plaintiffs,	)	**No. 18 C 610**
v.	)	**Judge Jorge L. Alonso**
ULTA BEAUTY, INC. and ULTA SALON, COSMETICS & FRAGRANCE, INC.,	)	
Defendants.	)	

ORDER

Plaintiff's motion for class certification [224] is denied. The parties' motions for leave to file documents under seal [230, 248] are granted. Defendants' motion to exclude plaintiffs' expert report and testimony [251] is denied. Plaintiffs' motion to strike certain of defendants' documents [262] is denied. Plaintiffs' motion for extension of time to reply [268] is denied as moot, having been filed the same day as the Chief Judge's General Order 20-0012 (ECF No. 271) granting blanket extensions in all civil cases. The parties are directed to file a joint status report by August 28, 2020, in which they are to propose a schedule for next steps, including an amended motion for class certification, if desired.

STATEMENT

The matter principally before the Court is plaintiffs' class certification motion. Plaintiffs, sixteen customers of defendants' retail cosmetics stores asserting state-law claims of breach of

warranty, unjust enrichment, and consumer fraud, move to certify fifteen statewide classes of all consumers who purchased used beauty products from defendants' stores in each of fifteen states.[1]

I. BACKGROUND

Defendant Ulta Salon, Cosmetics & Fragrance, Inc. ("Ulta Salon") is a "mass retailer of beauty products," operating retail stores "coast to coast." (2d Am. Compl. ¶¶ 1, 4, ECF No. 91.) It is a wholly owned subsidiary of defendant Ulta Beauty, Inc. ("Ulta Beauty"), a holding company with no operations of its own. As of February 2018, defendants (collectively, "Ulta") operated over a thousand stores in forty-eight states and the District of Columbia. (Ulta Beauty 2017 Form 10-K at 4-5, App. Ex. 11, ECF No. 226.[2]) Plaintiffs purchased cosmetics or beauty products at defendants' stores, only to learn that defendants (collectively, "Ulta") had a practice of reshelving products that had been used and returned by dissatisfied customers. In some cases, plaintiffs noticed shortly after purchase that the products appeared to have been previously used. (2d Am. Compl. ¶¶ 13, 19-20, 26-27, 33.) Other plaintiffs infer that the products may have been previously used based on information about Ulta's business practices that subsequently came to light.

In January 2018, a Twitter user identified by the handle "@fatinamxo," who claimed to be a former Ulta employee, revealed that, when Ulta customers returned used beauty products, employees were coached to clean or restore them to look new and reshelve them to be resold. Other Twitter users responded to @fatinamxo's posts by claiming to have also worked at Ulta stores in various states and to have observed similar practices during their employment. The Twitter revelations created a "social media frenzy" (*id.* ¶ 66), and the digital news outlet *Business*

[1] Plaintiffs were originally twenty-two customers seeking certification of seventeen statewide classes, but six of them stipulated to dismiss their claims. (*See* Oct. 20, 2019 Stipulation of Dismissal, ECF No. 241; Pls.' Reply Br. at 2 n.2, ECF No. 283 (recognizing that plaintiffs no longer seek to certify Maryland or New York classes).

[2] The Court will generally cite to the sealed version of the Appendix for convenience, but plaintiffs have also filed a redacted version. (ECF Nos. 232, 233.)

Insider picked up the story. *Business Insider* reported, based on interviews with unnamed former Ulta employees, that store-level managers and employees were pressured to reduce damaged product by reselling product that had been returned, and in response to that pressure, they reshelved any returned product that "looked like it could be sold" (*id.* ¶ 71), sometimes after attempting to clean and restore it so it looked unused.[3]

Plaintiffs obtained sworn affidavits from five former Ulta employees—Tammy Geier, Kami Turner, Ella Soto, Laura Hornick, and Michael Fisher—who worked in Ulta stores in Georgia, Tennessee, South Carolina, Florida, and California. (*Id.* ¶ 83.) Fisher, Geier, and Turner, while working as general managers of individual Ulta stores, were trained by regional management, apparently based on pressure from senior management, on how to restore and repackage used makeup and beauty products in order to reduce "shrink," or inventory going to waste. (*Id.* ¶¶ 84-86.) All five former employees were instructed to use returned products as "testers" in their stores, despite the potential to "spread disease and germs to those" who use them. (*Id.* ¶ 87.)

One of these employees produced an email sent by a superior to thirty-five employees in the South region, attaching a document setting forth "best practices" for avoiding product "damages," *i.e.*, for avoiding removing product from inventory as unfit to be sold. (App. Ex. 9, ECF No. 226.) The document defined "damages" as merchandise that is broken, expired or malfunctioning or that consists of "items used by a guest that compromise hygiene or ULTA's clinically clean standard." (*Id.*) The best practices included using a heat gun to smooth the surface of a cream or gel product that may have been merely "touched gently by a brush." (*Id.*)

[3] The Court summarized the Second Amended Complaint's allegations of these social media revelations and digital news reports in more detail in a previous opinion in this case. (*See* Feb. 26., 2019 Mem. Op. & Order at 2-3, ECF No. 163, *reported at* 2019 WL 932022, at *1.)

In response to the social media allegations, Ulta posted a video stating that "its policy does not permit the resale of used, damaged, or expired products," it had "zero tolerance for any actions that would compromise the integrity of [its] products," and it had taken action to investigate the allegations and ensure that its employees were following its policy. (Pls.' Br. at 3-4 (citing video available at https://www.ulta.com/policy-against-reselling-used-makeup).)

Ulta closely monitored shrink and damages (considered a subset of shrink) and took steps to keep them to a minimum. According to a damages policy posted on "ULTAnet," Ulta's internal network, in October 2013, damaged items, which "should not be returned to the sales floor," included those "used by a guest and then returned that compromise hygiene." (App. Ex. 21, ECF No. 227 at 68.) When customers returned items, employees examined them, and items that they "considered damaged" were to be placed in a "slot box labeled 'Damages,'" whereas items that they "considered saleable" were to be placed in a "basket labeled 'Go-Backs'" and reshelved. *Id.* The items in the "Damages" box were to be audited by a manager before they were scanned out of Ulta's inventory and disposed of. *Id.*

A September 2016 version of the policy stated similarly that damaged product was that which was "used by a guest, returned, and compromises hygiene or Ulta Beauty's clinically clean standards." (App. Ex. 26, ECF No. 227 at 102.) Under this version of the policy, cashiers were to make an initial determination of whether the product was "damaged (not salable) or salable," and if "the item is salable, and does not compromise hygiene or Ulta Beauty's clinically clean standards, the item should be placed in the Go-Backs container." (*Id.*) To assess whether a product "cannot be resold," employees were to consider factors including whether the product was "noticeably used (e.g. eye shadow with smudge marks or shampoo bottle that is no longer full)." (*Id.*) For any "eye or lip product, even if it is unclear that the product was opened or used,"

employees were instructed, "[**i**]**f in doubt, damage it out**," because "[r]estocking used eye or lip product directly violates Ulta Beauty's clinically clean standards." (*Id.* at 105 (emphasis in original).) Store managers were to audit all items in the damages container to ensure that they were not saleable, and they had the authority to return an item to the shelves to be resold, whether or not the customer had reported that the item was used.

On December 4, 2013, Ulta's Communications Department instructed all regional vice presidents and district managers to "review product in damage bins to ensure that product that is in good condition and can be resold is not in the damages bins." (App. Ex. 35, ECF No. 227 at 200.) On April 27, 2014, the Communications Department sent an email to "Select Stores" seeking "support [in] our continuing effort to . . . reduce our damages," citing a goal of saving approximately $1 million and instructing employees to "utilize the Damage Protocol" posted on the ULTAnet. On May 28, 2014, then-Director of Operations Raquel Frankenreider sent a follow-up email to the December 4, 2013 message in which she reminded district managers and regional vice presidents to help reduce damages by instructing employees in the stores they managed to verify that all product placed in the damage bins was actually damaged, and general managers and district managers should themselves "review product in damage bins to ensure that product that is in good condition and can be resold is not in the damage bins and put all saleable merchandise back on the floor." (App. Ex. 38, ECF No. 227 at 207.) The email stated in closing: "**Check it once, check it twice, check it three times**." (*Id.* (emphasis in original).)

Ulta continued to emphasize over the following years that managers were to double- and triple-check damage bins to ensure that no saleable product was being discarded as damaged. (*See* App. Exs. 41-44, ECF No. 228.) Senior management tracked damages, calculating each store's percentage damage rate, and pressured store-level employees and middle managers to keep

damages to a minimum. (*See* App. Ex. 45, ECF No. 228.) Certain managers received bonuses for keeping shrink below a certain level, and others received bonuses based on earnings, which were impacted by shrink. (*See* App. Exs. 11, 83-84, 86, ECF Nos. 226, 228.) Regional vice presidents, district managers, and other managers sent out emails reminding lower-level employees to control damages by reselling returned items whenever it was possible to "hygienically salvage" them, even if, for example, it was sometimes necessary to clean or sanitize a product with alcohol or otherwise restore it so that it could be sold. (*See* Pls.' Mem. at 10, ECF No. 225 (quoting App. Ex. 49, ECF No. 228); *see also* App. Exs. 48-76.)

As early as 2014, Ulta was aware of rumblings on social media of Ulta managers pushing employees to restore and reshelve used products to "reduce shrink." (App. Ex. 40.) Following the 2018 social media revelations, Ulta revised its policy to exclude damages from shrink and thereby remove the motive to reshelve used items to increase bonuses.

Plaintiffs brought this suit in 2018, and, after engaging in discovery, they now "seek to be appointed as class representatives of the following classes . . . : All persons who purchased, other than for resale, used beauty products from Ulta retail stores in Alabama, California, Florida, Georgia, Illinois, Indiana, . . . Michigan, Nevada, New Jersey, . . . Ohio, Pennsylvania, Rhode Island, South Carolina, Washington, and Wisconsin." (Pls.' Mot. for Class Cert. ¶ 1, ECF No. 224.) They assert claims under the law of each of the above-listed states for breach of warranty, unjust enrichment, and violation of the relevant state's consumer fraud statute.

II. DISCUSSION

"A class action may be maintained if Rule 23(a) is satisfied" and if the case falls within at least one of the categories outlined in Rule 23(b). Fed. R. Civ. P. 23; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). Rule 23(a) provides as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable;
> >
> > (2) there are questions of law or fact common to the class;
> >
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> >
> > (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(b) allows class certification if the requirements of Rule 23(a) are met and if (as relevant here) either "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," Fed. R. Civ. P. 23(b)(2), or "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3). Additionally, Rule 23(c)(4) provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."

Rule 23(c)(1)(A) requires that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). Rule 23 does not set forth "a mere pleading standard." *Wal-Mart*, 564 U.S. at 350. Thus, a "party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* Thus, the "party seeking certification bears the burden of demonstrating that certification is proper by a preponderance of

the evidence." *Chi. Teachers Union, Local No. 1 v. Board of Ed. of City of Chi.*, 797 F.3d 426, 433 (7th Cir. 2015).

Plaintiffs argue that the Court should certify this case as a class action because they satisfy all the prerequisites set forth in Rule 23(a) and the case meets the requirements described in subsections (b)(2) and (b)(3). Alternatively, plaintiffs argue that the court should certify this case as a class action with respect to "particular issues" common to all plaintiffs' claims under Rule 23(c)(4). Defendants disagree, arguing that plaintiffs have not met their burden as to the Rule 23(a) prerequisites, the Rule 23(b) categories, or Rule 23(c)(4) issue certification.

A. Rule 23(a) Prerequisites

First, regarding numerosity, defendants argue that plaintiffs have only identified 128 Ulta customers besides the plaintiffs themselves who complained about receiving used products, and none of the fifteen classes would have more than forty members. *Wright v. Calumet City, Illinois*, No. 14 C 10351, 2015 WL 13427811, at *1 (N.D. Ill. Nov. 6, 2015) (citing authorities stating that joinder becomes impracticable when there are more than forty class members). Further, defendants argue that even many of these customers either do not fit the class definition or have already received an exchange, refund, or compensation. Plaintiffs reply that they need not identify all class members at the class certification stage, and the evidence combined with "common sense" (Pls.' Reply at 2, ECF No. 283) is sufficient to establish that there are likely more than enough class members among Ulta's millions of customers to meet the numerosity requirement. The Court will give plaintiffs the benefit of the doubt and assume that they are correct.

Second, regarding commonality, plaintiffs assert that there are numerous common questions that the Court could resolve in a phased trial, beginning with the following in Phase I:

> 1. Whether Ulta had a company-wide damage policy that resulted in used beauty products being resold as new;

> 2. Whether Ulta failed to disclose said policy to shoppers at Ulta retail stores;
> 3. Whether a reasonable consumer would have been misled by Ulta's failure to disclose its company-wide damage policy that resulted in used beauty products being resold as new;
> 4. Whether Ulta actually resold used beauty products to unsuspecting consumers;
> 5. Whether consumers reasonably expected that all products for sale at Ulta retail stores were new and previously unused;
> 6. Whether buying used beauty products is material to a consumer's purchase decision;
> 7. Whether Ulta uniformly trains its employees as to when a returned beauty product can be resold as new;
> 8. Whether Plaintiffs purchased used beauty products during the relevant statute of limitations;
> 9. Whether Plaintiffs and the Class paid more for the beauty products they purchased than they otherwise would have had they known of Ulta's damage policy and that it resulted in the sale of used beauty products;
> 10. The legal relationship between Ulta Beauty and Ulta Salon and their liability to Plaintiffs;
> 11. Whether Plaintiffs and the Class have been damaged and, if so, the proper measure of such damages; and
> 12. Whether Plaintiffs and the Class are entitled to declaratory and/or injunctive relief.

(Pls.' Proposed Trial Plan, ECF No. 226.) Plaintiffs suggest that, in Phase II of their trial plan, the Court would enter a verdict on liability on all of plaintiffs' claims, using special verdict forms to take into account differences in state law. In Phase III, the Court would address individualized issues, including the identity of class members and the proper measure of their damages.

While plaintiffs have formulated some common questions, doing so accomplishes little by itself because "'[a]ny competently crafted class complaint literally raises common questions.'" *Wal-Mart*, 564 U.S. at 349 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-32 (2009)). What plaintiffs must show is that "their claims . . . depend upon a common contention," which "must be of such a nature that . . . determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350; *see* Nagareda, 84 N.Y.U. L. Rev. at 132 ("What matters to class certification . . . is . . . the capacity of a class-wide proceeding to generate common *answers* apt to

drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.").

While "even a single common question will do," *Wal-Mart*, 564 U.S. at 359 (internal quotation and alteration marks omitted), the Court doubts whether the questions plaintiffs have raised are both susceptible of common proof and sufficiently "central to the validity" of plaintiffs' claims to satisfy Rule 23(a)(2). *Id.* at 350; *see McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 801 (7th Cir. 2017) ("In other words, resolving the proposed class members' claims doesn't center on any question common to the class, but instead turns entirely on facts specific to each individual class member's claim.") (citing *Wal-Mart*, 564 U.S. at 349-50). As defendants argue, plaintiffs have not pointed to evidence that Ulta established any central policy that prescribed a particular process for determining if particular returned products that had been previously used could be reshelved. To the extent Ulta had an express policy on the matter, it seems to have broadly encouraged reselling undamaged returned items in general, but been against reselling any used product that could compromise hygiene, and it otherwise provided little detail about what could be resold and what could not. It was generally left to the discretion of individual employees and managers to decide for themselves whether an item was damaged or saleable, and plaintiffs have pointed to only a few managers who genuinely instructed their employees to reshelve apparently used products. As in *Wal-Mart*, defendants argue, a relatively few incidents (in proportion to Ulta's sales more broadly) of demonstrably used products being resold does not indicate a general policy, and the commonality needed for a class action is lacking because Ulta "allowed discretion by local supervisors." *Wal-Mart*, 564 U.S. at 355-56.

The Court finds defendants' argument persuasive, and plaintiffs offer no effective rebuttal. Plaintiffs rely heavily on *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014), but

that case is distinguishable. In *Suchanek* there were no relevant, meaningful differences among the products purchased by the various class members, and the allegedly deceptive practice stemmed from an express misrepresentation on the product packaging, not a disparate set of practices that varied from manager to manager and that involved reshelving various used products that had been used differently. *See id.* ("In [ruling that there were no questions common to the class,], the [district] court overlooked the fact that the question whether the GSC packaging was likely to deceive a reasonable consumer is common. The claims of every class member will rise or fall on the resolution of that question."); *see also McCaster*, 845 F.3d at 800 ("[Class members] must show that 'the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members.' 'The critical point is the need for *conduct* common to members of the class.'") (quoting *Suchanek*, 764 F.3d at 756).

In their reply brief, plaintiffs insist that they received used products pursuant to a single damages policy for all stores governing all products, and they point to the evidence in the form of emails and employee declarations suggesting that managers encouraged employees to double-check damage bins for product to resell, or even occasionally pushed employees to restore certain noticeably used products and showed them how to do so. But the Court is not convinced that a preponderance of the evidence that plaintiffs have adduced might demonstrate that a single policy caused plaintiffs and similarly situated class members to receive used products. What it tends to show, rather, is that (a) there was a single Ulta policy pressuring managers and employees to reduce the amount of damaged product in their stores, particularly by ensuring that minimal product was identified as damaged unless it was truly damaged; and (b) under the weight of that pressure, some managers in some scattered parts of the country either put used product back on the shelves or instructed employees under their supervision to do so, to the detriment of some subsequent

purchasers. As the Supreme Court explained in *Wal-Mart*, "[i]n such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's," and therefore plaintiffs seeking to certify a class composed of members injured by various individual managers' invalid uses of discretion "will be unable to show that all the [class members'] claims will in fact depend on the answers to common questions," at least without "identif[ying] a common mode of exercising discretion that pervades the entire company." *Id.* at 355-56. Here there is no such "common mode of exercising discretion"; practices varied according to the manager. This case therefore suffers from the same weakness as *Wal-Mart*. *See Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 557-58 (7th Cir. 2016) ("Just as in *Wal-Mart*, [543 U.S. at 353,] proof of a systemic practice which could tie all the claims together is 'absent here.'"). Defendants have pointed to the sort of "[d]issimilarities within the proposed class" that "have the potential to impede the generation of common answers," *id.* (quoting Nagareda, 84 N.Y.U. L. Rev. at 132), and plaintiffs have not explained why they are still entitled to class certification by a preponderance of the evidence in spite of those dissimilarities.

Defendants additionally argue that plaintiffs' claims are not typical of the class members' and, relatedly, plaintiffs could not serve as adequate class representatives because the particular Ulta products that plaintiffs purchased varied widely. The Court agrees with these arguments as well, for similar reasons. Evidence shows that the few Ulta employees who admit to having reshelved used products for resale stated that differences in the products affected their decisionmaking in determining whether a product could be resold. (*See* Defs.' Resp. in Opp'n at 17 (citing, *e.g.*, Defs.' Ex. 53, Fisher Dep., ECF No. 254-56 (stating that he would not resell certain types of eye products and he was "more likely to" resell higher-priced foundation brands than lower-priced brands)). Because the type of product seems to have affected how and whether Ulta

employees determined that a particular returned item could be resold, purchasers of certain products did not necessarily suffer the same injury caused by the same practice as purchasers of other products. While the Court in *Wal-Mart* was addressing commonality, the same logic supports defendants' arguments as to the typicality and adequacy prongs of Rule 23(a), to the extent it is rooted in the exercise of discretion by low-level managers. *See Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011) (stating that the United States Supreme Court had "noted in passing" in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982)) that "'[t]he commonality and typicality requirements of Rule 23(a) tend to merge'").

In short, to the extent class members purchased different products that had been used differently and shelved by different managers (or by different employees working under their instruction) than the ones purchased by plaintiffs, plaintiffs are unable to show that their claims "will in fact depend on the answers to common questions," that their injuries are typical of those of the class, or that they have the same interests as the class members such that they are adequate class representatives.

B. Rule 23(b)

"A plaintiff seeking class certification bears the burden of proving that her proposed class meets the four requirements of Federal Rule of Civil Procedure 23(a), as well as those for one of the three types of classes identified in Rule 23(b)." *Dancel v. Groupon, Inc.*, 949 F.3d 999, 1004 (7th Cir. 2019). Plaintiffs claim that this case meets the requirements of both subsections (b)(2) and (b)(3). The Court takes the latter subsection first.

1. Rule 23(b)(3) and Predominance

Even if plaintiffs were able to meet the requirements of Rule 23(a), they run into an even greater obstacle in Rule 23(b)(3), which "requires a district court to find that 'the questions of law

or fact common to class members predominate over any questions affecting only individual members.'" *Dancel*, 949 F.3d at 1004 (quoting Fed. R. Civ. P. 23(b)(3)). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "While similar to Rule 23(a)'s requirements for typicality and commonality, "the predominance criterion is far more demanding.'" *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 814 (7th Cir. 2012) (quoting *Amchem*, 521 U.S. at 623-24).

In assessing whether common questions predominate, courts must "give careful scrutiny to the relation between common and individual questions." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The common questions are those "where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof,'" whereas individual questions are those where "'members of a proposed class will need to present evidence that varies from member to member.'" *Id.* (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50 (5th ed. 2012)). "The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods*, 136 S. Ct. at 1045 (quoting Rubenstein, *supra*, § 4.49).

"Individual questions need not be absent. . . .The rule requires only that those questions not predominate over the common questions affecting the class as a whole." *Messner*, 669 F.3d at 815. "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Tyson Foods*, 136 S. Ct. at 1045 (quoting 7AA C.

Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778 (3d ed. 2005) (footnotes omitted)); *see In re IKO Roofing Shingle Prod. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014) (citing *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013) ("A determination of liability could be followed by individual hearings to determine the damages sustained by each class member.")). But "[i]f resolving a common issue will not greatly simplify the litigation to judgment or settlement of claims of hundred[s] or thousands of claimants, the complications, the unwieldiness, the delay, and the danger that class treatment would expose the defendant or defendants to settlement-forcing risk are not costs worth incurring." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014).

The "starting point" of the district court's predominance inquiry is "'the substantive elements of plaintiffs' cause of action and . . . *the proof necessary for the various elements*.'" *Dancel*, 949 F.3d at 1008 (quoting *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981) (emphasis added in *Dancel*)). "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage," but "a court's class-certification analysis . . . may 'entail some overlap with the merits of the underlying claim,'" so long as "[m]erits questions [are] considered . . . only to the extent . . . it is necessary 'to determine the propriety of certification.'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) (quoting *Wal-Mart*, 564 U.S. at 351, 352 n. 6). The Seventh Circuit has described the merits inquiry at the certification stage as "involving a 'peek at the merits' that is 'limited to those aspects of the merits that affect the decisions essential under Rule 23.'" *Dancel*, 949 F.3d at 1005 (quoting *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010)).

Defendants argue that, even assuming that plaintiffs' proposed common questions at least meet the commonality requirement of Rule 23(a)(2), they do not predominate over the individual

issues because, even after deciding them, it will remain not only for the Court to make individualized determinations of damages but also to decide "core liability issues":

> Most obviously, each class member would still need to show an actual purchase of a previously used product. The nature of the prior "use" would also need to be determined, because it impacts whether the product was "merchantable," or the sale was deceptive or unjust. Why the product was available for resale would need to be determined to show causation. Defendants' pre-sale knowledge that the specific product sold was returned and used would have to be analyzed to determine liability, reliance, and damages.

(Defs.' Resp. in Opp'n at 23 (internal citations omitted).) According to defendants, the common questions are not substantial enough in relation to these individualized "core liability issues," as well as individualized damages issues, to predominate over them.

In reply to this argument, plaintiffs cite only *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010), in which the district court had certified a class of consumers who purchased the defendant's casement windows. The court based its certification decision on the common question of whether the windows suffered from a common defect permitting water intrusion that caused wood rot, even though individual proof would be necessary on proximate causation and damages. The Seventh Circuit affirmed, explaining that "[a] district court has the discretion to split a case by certifying a class for some issues, but not others, or by certifying a class for liability alone where damages or causation may require individualized assessments." *Id.* at 394.

But *Pella* offers limited guidance as to how this Court should exercise its class-certification discretion in this case because, as another district court has pointed out, the plaintiffs in *Pella* and similar cases such as *Butler*, 727 F.3d at 798, "identified a specific design issue common to all [products] in the class that caused" the class members' injuries. *Cates v. Whirlpool Corp.*, No. 15-CV-5980, 2017 WL 1862640, at *19-20 (N.D. Ill. May 9, 2017) (St. Eve, J.); *see id.* at *19 n.16. Thus, "although damages were likely to vary across the members of the class, the common question of whether the [products] were defective . . . was susceptible to classwide proof and a

class action was therefore efficient" because "[t]he finder of fact would simply need to focus on the design issue Plaintiffs identified . . . to generate a common answer to a critical question in the litigation." *Id.* at *20 (internal quotation and alteration marks omitted). *Pella* and *Butler* do not apply where the plaintiffs fail to "identify a common defect or present a coherent theory as to what cause[d]" the class members' injuries. *Cates*, 2017 WL 1862640, at *20.

Where, instead, the common proof does not somehow "tie a broad swath of consumer products together" with some common defect or otherwise, the common questions may not predominate. *Id.* at *21. In *Cates v. Whirlpool Corp.*, a consumer class action involving ovens that tended to fail during self-cleaning, the court distinguished *Pella* and *Butler* and declined to certify a class under Rule 23(b)(3) because the plaintiffs had not adduced evidence showing that there was a common reason for the ovens' failure during self-cleaning; their expert admitted that, as far as he could tell, two different class members' ovens might both fail during self-cleaning for different reasons. The court explained that, "without a common cause, it is impossible to extrapolate from a particular [product's defect] to learn anything about" the other products in the class. *Id.* at *19; *see also Elward v. Electrolux Home Prods., Inc.*, No. 15-CV-09882, 2020 WL 2850982, at *18 (N.D. Ill. June 1, 2020) ("Plaintiffs argue, even if it is not clear what exactly is wrong with the Zoppas heating elements, Electrolux knew of the *possibility* the elements might fail, yet made no changes to the design. That theory still fails to set forth a specific problem, common to the entire class, that could have *caused* the injuries suffered by the class. . . . Even though Plaintiffs have proposed superficially common questions about the dishwashers' propensity to melt and flood, these questions are not apt to lead to common answers where there is no common defect tying the proposed classes together.").

Similarly, in *Gonzalez v. Corning*, a case in which the plaintiffs sought certification of a class of consumers who purchased defective shingles, the Third Circuit distinguished *Pella*, *Butler*, and like cases because the plaintiffs admitted that some of the defendants' shingles "may in fact last the length of their warranties, *i.e.*, lack any defect." 885 F.3d 186, 196-97 (3d Cir. 2018). In *Pella* and *Butler* the defect was "allegedly present in all [products] manufactured under a particular line, even if the defect had not yet manifested itself," but in *Gonzalez*, there was no "particular defect that [could] be attributed to all [of the defendants'] shingles," a "great many [of which] will last through the end of their warranty periods, and . . . a shingle-by-shingle inspection [was] necessary to distinguish ones that are likely to fail before the end of their warranty periods from ones that are likely to perform as expected (*i.e.*, that are not defective)." *Id.* at 197. Because the plaintiffs had not shown that there was a "defect common to the class that might be proved by classwide evidence," their theory amounted to an "invit[ation] . . . to equate the existence of a defect with the mere possibility that one might exist," and the Third Circuit found "no support in Rule 23 or caselaw for case certification on such a speculative basis." *Id.* at 199.

This case is similar to *Cates* and *Gonzalez* because, even if there are "superficial common questions," plaintiffs "do not meet their burden to show that these questions will efficiently generate a common answer that will drive the litigation forward," *Cates*, 2017 WL 1862640, at *20, nor do they show that any common answer predominates over answers to individualized questions. Even if plaintiffs prove that defendants had a common practice of reshelving returned products, given the fact that the practice's effect on precisely which returned products were reshelved—and in which conditions—varied from manager to manager, the practice does not suggest "a coherent theory as to what cause[d]" each particular class member to receive used products from a particular Ulta store. *Cates*, 2017 WL 1862640, at *20. Plaintiffs have not adduced

evidence tending to prove that any particular product that a particular class member purchased was used or to establish the any practice of reshelving used product was uniform (or even nearly so) throughout Ulta stores, so the evidence will not prove "in one stroke" that plaintiffs purchased used product that was not of merchantable quality or that the sale was therefore deceptive or unjust. *See id.*; *Elward*, 2020 WL 2850982, at *18.

As the Court has already ruled in its prior opinion, plaintiffs have no standing to assert claims based on the purchase of new products, so they and each class member must prove that they purchased a used product. (*See* Feb. 26., 2019 Mem. Op. & Order at 6-8, ECF No. 163.) Further, tracing generally the elements of plaintiffs' causes of action, it appears that the quality and condition of the products they purchased and how they came to be in that condition "form the core of their theory of liability," *Gonzalez*, 885 F.3d at 196: plaintiffs must prove that the products they purchased were not of merchantable quality; that defendants have unjustly retained a benefit by selling them for full price when they were worth less in their used condition; and that defendants have engaged in an intentionally deceptive practice by selling products to plaintiffs for more than they were worth in their used condition. (*See generally* App. Ex. 1, Pls.' Proposed Trial Plan, Ex. A (reciting elements of plaintiffs' causes of action in all seventeen states in which they initially sought class certification), ECF No. 226 at 34.) But, despite the apparent centrality of the condition of the products they purchased, plaintiffs propose to present little common evidence that bears directly on that question, instead relying essentially on an "examin[ation of] each individual [product]," *Gonzalez*, 885 F.3d at 199, which may entail an inquiry into the practices among the particular employees at the store at which it was sold. If the Court will have to make individual inquiries into the condition and quality of the products class members took home and the practices among employees at the stores where they shopped just to determine liability, before even reaching

damages, it would seem that those individual issues are the predominant ones. *See Gonzalez*, 885 F.3d at 197; *Cates*, 2017 WL 1862640, at *19-20; *Elward*, 2020 WL 2850982, at *18; *see also Dancel*, 949 F.3d at 1010 (common question on an element of plaintiff's cause of action did not predominate because plaintiff could establish that element not purely by way of common proof but only by meeting an "individualized evidentiary burden").

The Court recognizes that in this situation there remains a superficial similarity to *Pella*, where the court certified a class on the question of whether there was a common defect in the defendant's products that could cause water intrusion, even though there remained certain individual proximate causation issues—in particular, whether the common defect or some other water intrusion issue actually caused the wood rot the class members experienced. But the court in *Pella* did not hold that individualized issues of proximate causation can *never* predominate over common issues pertaining to a common defect; it merely held that the district court had not abused its discretion by finding that the common issues predominated in that case. *Pella*, 606 F.3d at 394. It bears emphasizing that the plaintiffs in *Pella* proposed to show by way of common evidence that a common defect existed in each and every class member's product. *Id.*; *see also Suchanek*, 764 F.3d at 761 (concluding that "classwide resolution would substantially advance the case" because the packaging of all the products defendant sold to plaintiffs contained the same alleged misrepresentation).

In this case, by contrast, plaintiffs' common evidence of Ulta's damage policy can only prove that a common "defect" (the used condition of the products) *might* have existed in class members' products, depending on the practices at the stores at which the class members shopped. The Court finds that this common evidence suggesting at most that Ulta "sometimes" sold used products is not enough to predominate over the individual questions of whether Ulta actually did

sell used products to the particular plaintiffs and class members and under what conditions. *See Elward*, 2020 WL 2850982, at *17 ("It is not enough for Plaintiffs to simply show that the . . . dishwashers *sometimes* cause damage . . . . [M]erely defining the defect as the 'failure to prevent failure' sets the bar at much too high a level of generality.") (emphasis added); *see also Tomeo v. CitiGroup, Inc.*, No. 13 C 4046, 2018 WL 4627386, at *11 (N.D. Ill. Sept. 27, 2018) (ruling that addressing proposed common questions would not "sufficiently drive the resolution of the litigation" because the individualized issue of consent was "inextricably intertwined with [the] primary issue of liability to the point where it predominates over the . . . common issues"); *T.S. v. Twentieth Century Fox Television*, 334 F.R.D. 518, 537 (N.D. Ill. 2020) (ruling that, notwithstanding *Pella*, individualized issues of causation predominated).

Defendants' liability here principally turns not on the common questions about organization-wide practices and conduct but on individualized store-level practices and conduct because whether a particular store sold used products (and what kind, and how used) depended on the particular employees working there and their managers. Under these circumstances, resolving the proposed common questions will not sufficiently simplify the litigation to justify "the complications, the unwieldiness, the delay, and the danger that class treatment would expose the . . . defendants to settlement-forcing risk," *see Parko*, 739 F.3d at 1085, so Rule 23(b)(3)'s predominance standard is not met.

2. Rule 23(b)(2) and Injunctive Relief

It follows from the above that the proposed classes are "insufficiently cohesive to warrant certification under Rule 23(b)(2)." *See Cates*, 2017 WL 1862640, at *23.

> The Rule requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Rule "operates under the presumption that the interests of the class

> members are cohesive and homogenous such that the case will not depend on adjudication of facts particular to any subset of the class." *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000); *see also Wal-Mart*, 564 U.S. at 360 ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" (quoting Nagareda, *supra*, at 132));

Cates, 2017 WL 1862640, at *23. As the Court has explained above, plaintiffs' proposed classes lack the requisite cohesiveness or unity of interest and their claims depend disproportionately on individual issues. Certification under Rule 23(b)(2) is not appropriate in such situations, where the "'glue that makes a class action efficient,'" the cohesiveness that makes "'the class members' claims . . . so inherently intertwined that injunctive relief as to any would be injunctive relief as to all,'" is lacking. *See id.* (quoting Rubenstein, *supra*, at § 4:34).

C. Rule 23(c)(4)

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Whether plaintiffs must meet the predominance requirement in order to obtain certification of issues under Rule 23(c)(4) has not been strictly settled in the Seventh Circuit. *See In re Fluidmaster, Inc., Water Connector Components Prod. Liab. Litig.*, No. 14-CV-5696, 2017 WL 1196990, at *61 (N.D. Ill. Mar. 31, 2017) (citing cases). Regardless, the Manual of Complex Litigation explains that certifying an issues class is "appropriate"—the word Rule 23(c)(4) uses—"only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole." Manual for Complex Litigation (Fourth) § 21.24 (2004) (citing *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 167 (2d Cir. 2011) (citing *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985) (requiring "the issues covered by the request [for certification to] be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole"))). "If the

resolution of an issues class leaves a large number of issues requiring individual decisions, the certification may not meet this test." *Id.*; *see Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (district courts considering issue certification requests should "explain how class resolution of the issue(s) will fairly and efficiently advance the resolution of class members' claims, including resolution of remaining issues") (citing Principles of the Law of Aggregate Litigation § 2.02(e) (Am. Law Inst. 2010)); *see also* Principles of the Law of Aggregate Litigation § 2.02 ("(a) The court should exercise discretion to authorize aggregate treatment of a common issue by way of a class action if the court determines that resolution of the common issue would (1) materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies.").

Thus, while "the appropriateness of certifying a Rule 23(c)(4) class is analytically independent from the predominance inquiry under Rule 23(b)(3), a case may present concerns relevant to both." *Gonzalez*, 885 F.3d at 202. As the above discussion of predominance and commonality amply suggests, the Court does not find that certifying plaintiffs' proposed common issues for class treatment would "materially advance" the resolution of plaintiffs' and the class members' claims "by addressing the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies." Principles of the Law of Aggregate Litigation § 2.02(a)(1). To the extent plaintiffs have identified common issues, they are not central enough to their claims in relation to the overwhelming individual issues to justify certifying this case as a class action, even just with respect to those common issues.

The Court recognizes that the damages plaintiffs seek on behalf of themselves and the class members are small, probably too small to support individual actions, which tends to weigh in favor

of permitting the case to proceed as a class action in some form; but the Court is also mindful of the "danger that class treatment would expose the . . . defendants to settlement-forcing risk." *Parko*, 739 F.3d at 1085. The Court is not inclined to expose defendants to that risk unless plaintiffs have met their burden of adducing evidence that suffices to demonstrate that there are questions common to all class members that are centrally important to the resolution of the litigation. As the Court has explained, it has not found common issues susceptible of resolution by common proof that are sufficiently central to the claims of these plaintiffs asserting these causes of action, given their widely disparate injuries based on the disparities in the particular products they received.

The parties raise numerous other issues, but saying more is unnecessary at this point. The above reasons suffice to show that plaintiffs' motion for certification must be denied as to the present class definition.

D. Other Motions

The parties have filed a number of motions ancillary to the class certification motion. The parties' motions for leave to file documents under seal [230, 248] are granted because the redactions are reasonable and leave the evidentiary support for the issues in dispute open to public view to the extent practicable in light of confidentiality concerns, at least at this stage. Defendants' motion to exclude plaintiffs' expert report and testimony [251] is denied because it is (a) moot as to the class certification motion, on which the Court rules without reaching the issues on which the expert proposes to testify, and (b) premature as to the admissibility of the substance of the expert's testimony at later stages, given that he has not even performed his survey yet. Plaintiffs' motion to strike certain of defendants' documents [262] is denied because the documents in dispute are not material to the Court's decision on class certification.

SO ORDERED.

ENTERED: August 6, 2020

JORGE L. ALONSO
United States District Judge