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Polaris Inc. (f/k/a Polaris Industries Inc.)

IN THE UNITED STATES DISTRICT COURT

FOR CENTRAL DISTRICT OF CALIFORNIA

Guzman and Albright, individually on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Polaris Industries Inc., *et al.*,

Defendants.

CASE NO. 8:19-cv-01543-FLA-KES

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

REDACTED PURSUANT TO COURT ORDER DATED APRIL 12, 2021 [ECF NO. 115]

Complaint Filed Date: August 8, 2019

Judge: Fernando L. Aenlle-Rocha
Hearing Date: April 30, 2021
Time: 1:30 PM
Courtroom: Courtroom 6B

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INTRODUCTION

Plaintiffs' class certification motion is based on a label on Polaris side-by-side vehicles ("SxSs") regarding the vehicles' rollover protective structures ("ROPS"). But plaintiffs' motion lacks evidence showing their claims can be established classwide with common proof. Instead, the record evidence—including from surveys and individual testimony—establishes that this case is dominated by individual issues based upon uncommon proof. Few putative class members even read the ROPS label, much less relied on it or found it material to their purchase decisions. For most buyers the ROPS label was irrelevant; they bought their SxSs for other reasons entirely. Certification should be denied.

First, plaintiffs' proposed Rule 23(b)(3) class fails because plaintiffs have no evidence that required elements of their claims such as causation, materiality, and reliance can be shown with common evidence. Instead, the record evidence is to the contrary, showing that individual buyers sharply differ on outcome-determinative facts such as whether they read or considered the label, received the benefit of their bargain, the information they considered, and the reasons they purchased. Some putative class members bought SxSs without a label, because the vehicles either had aftermarket ROPS or were used vehicles without a label. Courts do not presume reliance or materiality where, as here, the uncontested record establishes that these are individual issues varying among buyers and dependent upon uncommon proof. Myriad decisions have denied class certification in misrepresentation cases where buyers differed in whether they read or relied on the contested language.

Second, plaintiffs cannot certify a Rule 23(b)(3) class because their attempt to use cost-of-repair damages in a mislabeling case violates Ninth Circuit precedent and California law. Moreover, plaintiffs have not proposed valid class-wide damages, but instead rest on speculation. Plaintiffs hypothesize that at some later date they can use the cost of repair to determine damages, but plaintiffs have not identified a single ROPS, or modification to the ROPS, satisfying their interpretation of the ROPS label. Plaintiffs

also ignore the numerous differences among SxS models in the alleged class that would result in differences in any replacement or modified ROPS among these models.

Third, plaintiffs' proposed Rule 23(b)(3) class is not superior or manageable. Uncommon proof among purchasers means any class litigation would require endless mini-trials to decide the outcome-determinative facts for each individual buyer.

Fourth, no class can be certified because the two named plaintiffs are not typical or adequate. Polaris's summary judgment motion explains why the named plaintiffs have no valid claims and are subject to unique defenses, including their testimony that (1) they do not understand the label and do not know whether it contains any misrepresentations; (2) they continue to drive their SxSs after filing this lawsuit; (3) they have their young children ride in their SxSs; and (4) their SxSs satisfied their expectations. Moreover, plaintiffs' alleged facts are atypical compared to buyers who do not claim to have read or considered the label and have no alleged injury.

Fifth, plaintiffs' Rule 23(b)(2) class fails because owners would not benefit from plaintiffs' requested injunction seeking to have Polaris change the label. Putative class members already own SxSs and so changing the label would not impact their past purchase decisions. Moreover, the vast majority of owners have no interest in the label.

BACKGROUND

A. The Proposed Class Vehicles Differ in Their Uses And Design.

Plaintiffs seek a putative class of purchasers for certain Polaris side-by-side vehicles[1] sold under the brand names "RZR," "Ranger," and "General" (though as discussed subsequently, plaintiffs' motion excludes all General vehicles). (Pls. Memo at 11; Ex. 16, Keller Dep. at 21:24-22:6.) Plaintiffs' putative class makes no distinction between new and used vehicles. (Pls. Memo at 11.)

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[1] Polaris uses "side-by-side vehicles" or "SxSs" for the three categories of vehicles at issue. "Off-road vehicles" or "ORVs" describes a broader vehicle category encompassing SxSs, all-terrain vehicles, and other vehicles. "Utility Terrain Vehicles" or "UTVs" is also sometimes used generally for SxSs, and may also refer to a SxS used primarily in work rather than recreation, such as the Ranger.

RZR, Ranger, and General vehicles differ in their designs, specifications, and uses. (Ex. 16, Keller Dep. at 21:24-22:6.) The RZR is a recreational vehicle. (Ex. 4, Mattar Decl. ¶ 10; Ex. 5, Hummel Decl. ¶ 9.) By contrast, the Ranger is a utility vehicle often used for tasks on a ranch, farm, or workplace. (Ex. 4, Mattar Decl. ¶ 10; Ex. 5, Hummel Decl. ¶ 9.) Polaris's website advertises the Ranger as the "#1 trusted UTV by farmers, ranchers, hunters, and homeowners." (https://ranger.polaris.com/en-us/.) CONFIDENTIAL -- Subject to Court Order [redacted]; *see also* Ex. 2, Hanssens Rep. ¶¶ 68, 72.) The Polaris General is a crossover vehicle that can be driven recreationally like a RZR while providing some utility capabilities like the Ranger, with owners using it for either recreational or utility purposes. (Ex. 4, Mattar Decl. ¶ 10; Ex. 5, Hummel Decl. ¶ 9; Ex. 17, POLGUZPROD066248.)

Plaintiffs' class definition includes dozens of distinct RZR models, including one-seat, two-seat, and four-seat vehicles, and dozens of Ranger models, including two-seat, three-seat, four-seat, and six-seat vehicles. (Ex. 1, Breen Rep. at 6-13.) Vehicles vary across features such as horsepower, vehicle weight, ground clearance, and suspension systems. (*Id.*) Model year ("MY") 2019 RZRs range from 45 to 168 HP and from 10.5 to 16 inches of ground clearance. MY 2019 Rangers vary from 30 to 82 HP and from 1,500 to 2,500 lbs. of towing capacity. (*Id.* at 7-8, 12-13.)

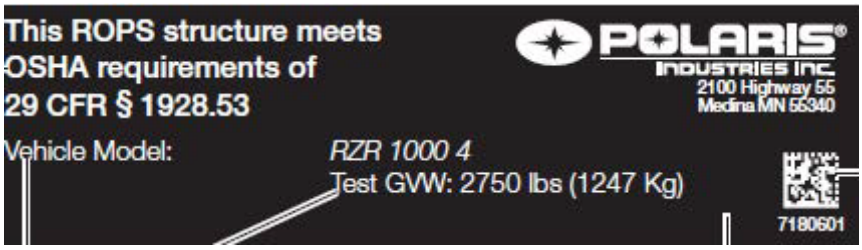
B. A Third-Party Testing Company Certifies That Polaris ROPS Meet The Requirements Of 29 C.F.R. § 1928.53.

Each Polaris SxS comes equipped with a rollover protective structure or "ROPS," with the shape, configuration, and design of the ROPS differing among vehicle models. (Ex. 18, Deckard Dep. at 69:15-70:7; 71:2-10.) Polaris, like other manufacturers, voluntarily complies with the American National Standards Institute / Recreational Off-Highway Vehicle Association standard providing that the ROPS shall comply with the performance requirements of either International Organization for Standardization

("ISO") standard 3471 or Occupational Safety and Health Administration ("OSHA") regulation 29 C.F.R. § 1928.53. (Ex. 16, Keller Dep. at 14:14-15:16, 57:3-58:5.)

Plaintiffs' class definition only includes SxSs where a label on the ROPS stated that it met the requirements of 29 C.F.R. § 1928.53. (Pls. Memo. at 16.) Plaintiffs exclude MY 2016-2019 Generals from their definition because those are tested to ISO, a different standard. (Pls. Memo. at 7-8 n.14.) Because the General line begins with MY 2016 (*see* https://general.polaris.com/en-us/2016/), the class definition excludes all Generals. Polaris also certifies certain RZRs to the ISO standard: the RZR XP Turbo S (2-seat variant), RZR Pro XP Turbo S, and RZR RS1. (Ex. 19, Polaris's Suppl. Resp. to Interrog. No. 3.) Buyers of these RZRs also are excluded from plaintiffs' class definition.

The stock ROPS for the remaining Polaris SxS models in the alleged class come with a label identifying the certification standard, the vehicle model, and the test weight (stated as gross vehicle weight ("GVW")) used for certification testing. (Ex. 20, POLGUZPROD000022.) An example of the ROPS label is:



Plaintiffs allege that Polaris did not use the correct "tractor weight" under 29 C.F.R. § 1928.51 when it calculated certification under 29 C.F.R. § 1928.53. According to plaintiffs, rather than using GVW, Polaris should have multiplied 110 times 95% of the vehicle's net engine flywheel horsepower. (Pls. Memo. at 6.)

Polaris contracts with third party Custom Products of Litchfield, Inc. ("CP") to conduct certification testing of its SxS ROPS pursuant to § 1928.53. (Ex. 21, Wosick Dep. at 28:2-11; Ex. 18, Deckard Dep. at 18:12-18.) CP also performs ROPS testing pursuant to § 1928.53 for other manufacturers. (Ex. 22, Schmitt Dep. at 107:12-16.)

CP calculates the requirements for the ROPS tests using the formulas set out in

OSHA regulation § 1928.53. (Ex. 23, POLGUZPROD013171, at 90; ECF No. 95-1, Ex. 39 at 24.) Consistent with its own engineering judgment in light of the text and purpose of the OSHA ROPS standard, CP uses the GVW provided by Polaris as the tractor weight. (Ex. 22, Schmitt Dep. at 91:7-19; ECF No. 70-9, Ex. 20.)

CP does not use the power take-off ("PTO") horsepower or net engine flywheel horsepower provisions, sometimes referred to as the "HP ratio," in § 1928.51 when conducting ROPS certification tests on SxSs. (Ex. 22, Schmitt Dep. at 113:4-17.) These provisions apply only to vehicles equipped with a PTO, a device used on tractors allowing the engine to power an agricultural implement. (*Id.* at 81:22-25, 112:17-20; Ex. 1, Breen Rep. at 19.) Because SxS (and other off-road vehicles) do not have a PTO, CP uses GVW as the appropriate measure of tractor weight for certification testing. (Ex. 22, Schmitt Dep. at 90:11-91:19.)

Using GVW in ROPS certification testing under 29 C.F.R. § 1928.53 is accepted practice in the off-road vehicle industry. (Ex. 1, Breen Rep. at 19-21.) For example, ROPS labels on the BRP Can-Am Defender HD5 and HD10 state that the ROPS are certified to the requirements of § 1928.53 and are "Tested at GVWR." (*Id.* at 21-22.) The labels on the Honda Talon 1000 and models of the Honda Pioneer also specify compliance with § 1928.53 using GVW. (*Id.*) CP's former Director of Testing testified that, to his knowledge, every SxS ROPS tested to § 1928.53 by CP used GVW, including competitor models. (Ex. 22, Schmitt Dep. at 113:4-17.)

Plaintiffs have not identified, and Polaris is not aware of, any SxS manufacturer that calculates the tractor weight using the HP ratio for ROPS certification. (Ex. 24, Guzman's Resp. to Interrog. Nos. 17-20; Ex. 25, Albright's Resp. to Interrog. Nos. 17-20.) HIGHLY CONFIDENTIAL -- Subject to Court Order

[redacted]

HIGHLY CONFIDENTIAL -- Subject to Court Order

[redacted] Polaris has no knowledge of any aftermarket ROPS manufacturer that certifies its products to § 1928.53 using the HP ratio and plaintiffs have identified none. (Ex. 1, Breen Rep. at 21-22; Ex. 26, Kneuper Dep. at 195:12-23.)

C. Whether Buyers Read The ROPS Label Varies.

Most SxS buyers fail even to read the ROPS label. Polaris's marketing expert surveyed 110 actual and prospective SxS buyers by presenting them with 360-degree images of a class vehicle they could inspect. (Ex. 2, Hanssens Rep. ¶¶ 78-107.) After those inspections, not a single actual or potential buyer even noticed the ROPS label. (*Id.* ¶ 108.) And only 25% looked at or considered the ROPS. (*Id.* ¶ 109.)

Testimony from putative class members confirms they never read the label. (Ex. 6, Andersen Decl. ¶ 13; Ex. 8. DeMenge Decl. ¶¶ 11, 20; Ex. 9, Fisk Decl. ¶ 12; Ex. 10, Giannoulias Decl. ¶ 11; Ex. 11, Milligan Decl. ¶¶ 15, 18; Ex. 12, Score Decl. ¶ 11.) Even long-time Polaris SxS dealers were unaware of the label. (Ex. 4, Mattar Decl. ¶¶ 14-15; Ex. 5, Hummel Decl. ¶¶ 3, 13.) Dealers confirmed that buyers typically do not notice it. (Ex. 4, Mattar Decl. ¶ 15; Ex. 5, Hummel Decl. ¶ 14.)

Witnesses testified that finding the label is difficult. Plaintiff Guzman admitted the label is "in the back where it's hidden" and "not too many people know anything about" it. (Ex. 27, Guzman Dep. at 140:3-9.) SxS dealers and buyers testified that seeing the label is not easy. (Ex. 4, Mattar Decl. ¶ 14; Ex. 11, Milligan Decl. ¶ 18.)

Even when buyers claim to have seen the label, what they viewed varies among individuals. Guzman testified he saw only the words "OSHA" and "Polaris" on the label, and nothing else. (Ex. 27, Guzman Dep. at 28:1-4, 141:7-10, 141:13-142:13, 148:14-20.) Albright read only a "portion" of the label, and did not read the language regarding the "Test GVW." (Ex. 28, Albright Dep. at 167:9-13, 171:2-172:16.)

Plaintiffs present no evidence of how many buyers saw, much less read, the label.

D. Whether Buyers Considered The Label In Their Purchases Varies.

Whether Polaris SxS buyers considered the label in their purchases differs. Most buyers never saw the label and could not have considered it. (*Supra* Background.C.)

Polaris's expert surveyed 82 putative class members about why they purchased their vehicles, and only a single one looked at or considered the ROPS label in their purchase. (Ex. 2, Hanssens Rep. ¶¶ 38, 58-62.) Indeed, only 34% looked at or considered any aspect of the ROPS. (*Id.* ¶¶ 59-61.)

Moreover, if the ROPS language was a reason for purchase, then it would feature prominently in social media, user forums, and blogs where buyers discuss their purchase decisions. (Ex. 2, Hanssens Rep. ¶¶ 14, 113-129; Ex. 3, Langer Rep. ¶¶ 47-50.) But such online discussions contain virtually no mention of the ROPS label. (*Id.*)

Individual purchasers testified they did not consider, much less rely, on the label. (Ex. 6, Andersen Decl. ¶ 13; Ex. 8, DeMenge Decl. ¶¶ 11, 20; Ex. 9, Fisk Decl. ¶ 12; Ex. 10, Giannoulias Decl. ¶ 11; Ex. 4, Mattar Decl. ¶ 15; Ex. 11, Milligan Decl. ¶ 18; Ex. 12, Score Decl. ¶ 11.) Even when a buyer noticed the label, it was not a factor in the purchase. (Ex. 13, Sieberg Decl. ¶ 13; Ex. 7, Carnibucci Decl. ¶ 11; Ex. 14, Turincio Decl. ¶ 13.) Owners who plan to buy another SxS testified the label will not play any role in their future purchases. (Ex. 13, Sieberg Decl. ¶ 16.)

Similarly, dealers confirmed that no customer had asked them about the label during purchase negotiations. (Ex. 4, Mattar Decl. ¶¶ 15, 20-21; Ex. 5, Hummel Decl. ¶¶ 14, 18-19; Ex. 2, Hanssens Rep. ¶¶ 139-45; Ex. 1, Breen Rep. at 11-12.) Customers never ask whether a vehicle's ROPS is certified to any particular standard. (Ex. 5, Mattar Decl. ¶ 20.)

Plaintiffs present no evidence of how many buyers considered or relied on the label, or would not have bought a SxS without it. HIGHLY CONFIDENTIAL -- Subject to Court Order

[redacted]

E. Plaintiffs Have Not Presented Any Evidence Of A Common Understanding Of The Label.

There is no evidence that any buyer has adopted the complaint's interpretation of the label and 29 C.F.R. § 1928.53 to require testing SxSs using the HP ratio. Not even the named plaintiffs testified that this is how they understood the label. The plaintiffs did not read 29 C.F.R. § 1928.53 or know what that regulation related to or required. (Ex. 27, Guzman Dep. at 29:12-30:6, 145:19-21; Ex. 28, Albright Dep. at 65:25-66:15, 163:5-23.) Albright thought that "1928.53" was the price of the ROPS instead of a regulation. (Ex. 28, Albright Dep. at 173:9-174:5.)

Guzman admitted he was unable to identify anything on the label that is false or misleading. (Ex. 27, Guzman Dep. at 143:12-19, 145:22-25, 193:20-23, 199:7-13.) Similarly, Albright admitted he did not know whether the ROPS on his vehicle meets the OSHA requirements of 29 C.F.R. § 1928.53 and did not understand what the label means. (Ex. 28, Albright Dep. at 176:13-21, 179:20-24.)

Plaintiffs have not presented any evidence regarding how absent putative class members understand the label, or that any putative class member thought it required testing based on net engine flywheel horsepower, as their complaint alleges.

F. Buyers Considered Differing Information Before Purchase.

Surveys show that putative class members considered differing information sources and types of before buying a Polaris SxS, with much of that information coming from third parties, not Polaris. (Ex. 2, Hanssens Rep. ¶¶ 63-65.) Among other information, 55% discussed the SxS with the dealer, 51% discussed the SxS with friends or family, 48% reviewed magazine articles, 46% had experience driving the SxS, and 30% reviewed online forums. (*Id.*) Only 46% reviewed manufacturer materials from Polaris. (*Id.*)

Testimony from putative class members further proves the wide array of differing combinations of information and sources they considered before purchase. Many but not all conducted online research, some spoke with friends, some compared vehicles at

dealerships, a few test drove SxSs, and a few rented SxSs. Some buyers considered only a few sources and types of information, while others spent up to a year considering myriad sources and different information before purchasing their SxSs.[2]

G. Buyers Differ In Why Each Purchased A Polaris SxS.

Surveys show a wide variety of reasons for why purchasers bought their SxSs. For RZR owners, 72 % looked at and/or considered seating and cargo capacity; 66% style, color, and design; 57% performance; 45% pricing information and promotions; 45% agility, steering, and suspension; and 25% fitness for work-related activities. (Ex. 2, Hanssens Rep. ¶¶ 66-67.) Only 19% of surveyed RZR owners considered any labels, with just one considering the ROPS label. (*Id*. ¶¶ 60 n.79, 66-67.) For Ranger owners, 70% looked at and/or considered performance; 67% seating and cargo capacity; 61% agility, steering and suspension; and 39% fitness for work-related activities. (*Id*. ¶¶ 66-67.) Only 9% considered any labels, with none considering the ROPS label. (*Id*.) Prior ordinary-course-of-business surveys by Polaris found similar results, with the most frequently identified features including the Polaris brand, vehicle performance, vehicle quality, horsepower, and price. (*Id.* ¶¶ 132-35.)

Buyer testimony confirms they had different purchase reasons. Vehicle suspension was a reason for some buyers but not others; the same was true for characteristics such as the Polaris brand, price, color, styling, storage space, ground clearance, ease of operation, and other factors. Individual buyers have differing

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[2] Ex. 6, Andersen Decl. ¶ 8 (online research, publications, uncle who owned RZR, and rented a RZR); Ex. 7, Carnibucci Decl. ¶¶ 7-8 (owned MY 2011 RZR, online research, magazines, went to dealerships to compare vehicles); Ex. 8, DeMenge Decl. ¶¶ 7-8 (previously owned a Polaris vehicle, research on online forums, and visited dealerships); *id.* ¶ 16 (before purchasing RZR RS1 for his wife, researched vehicles at online forums and looked at different vehicles at dealership); Ex. 19, Fisk Decl. ¶ 7 (riding friend's Polaris RZR); Ex. 10, Giannoulias Decl. ¶ 7 (visited dealership to compare vehicles, researched vehicle specifications); Ex. 11, Milligan Decl. ¶ 15 (before buying RZR RS1 for his wife, online research, YouTube videos, reviews of the RS1, and spoke with dealership owner); Ex. 12, Score Decl. ¶ 7 (online research, magazines, visited dealers); Ex. 13, Sieberg Decl. ¶ 8 (compared specifications on Polaris website, talked to riders at recreation area, looked at competitors); Ex. 14, Turincio Decl. ¶ 7 (spent year researching and comparing ORVs, test drove ORVS, online research, and watched ORV YouTube videos).

combinations of factors they considered important to their purchases.[3]

Polaris SxS dealers testified that customers had different reasons for buying vehicles. Depending on their individual preferences and needs, customers generally cared about some combination of price, performance, horsepower, suspension, clearance, tires, towing capacity, color, speed, and accessories. (Ex. 4, Mattar Decl. ¶¶ 12-13, 21; Ex. 5, Hummel Decl. ¶¶ 11-12.)

The named plaintiffs varied in the reasons they purchased their Polaris RZRs. Guzman testified he saw two words on the ROPS label (even though he did not understand it), but also that ground clearance, vehicle length and width, color, and price were purchase reasons. (Ex. 27, Guzman Dep. at 105:10-13, 125:9-25.) Albright claims to have seen a portion of the ROPS label and also considered the suspension, color, and the RZR having four seats. (Ex. 28, Albright Dep. at 158:13-15.) Albright testified his purchase was an "all-around decision" where one factor was not more important than another. (*Id.* at 158:19-25.)

H. Buyers Differ In Whether And Why They Replaced The Stock ROPS.

Some RZR owners replace the ROPS on their vehicles with aftermarket products, citing the style or look of the ROPS as a reason for doing so. (ECF No. 70-11, Ex. 22; Ex. 29, Boone Dep. at 43:4-22, 62:8-21, 144:3-6.)

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[3] Ex. 6, Andersen Decl. ¶ 12 (reliability, power, and friends were happy with RZRs they owned); Ex. 7, Carnibucci Decl. ¶ 9 (extra power, improved suspension, power steering, color, dealership gave fair trade-in price for prior ORV); Ex. 8, DeMenge Decl. ¶ 9 (wanted a Polaris vehicle, longer wheel base, and more storage space); *id.* ¶¶ 17-18 (purchased wife's RZR RS1 because she prefers to drive, did not need extra space, sight lines were clear, and it was a lower price); Ex. 9, Fisk Decl. ¶ 8 (performance, suspension, style, and experience driving friend's vehicle); Ex. 10, Giannoulias Decl. ¶¶ 8-9, 12 (more familiar with Polaris; Polaris vehicles hold up better during rollovers; RZR fit in trailer; liked that RZR could be customized, has a navigation system and suspension system, and overall quality of RZR); Ex. 11, Milligan Decl. ¶ 9 (for MY 2018 RZR XP 4 Turbo, active suspension system, styling, power, setup, ride command, user friendliness, space to transport dogs); *id.* ¶¶ 16-17 (for MY 2018 RZR RS1, rollover protection in a non-ATV, Polaris is a pioneer in ORVs, and how Polaris builds ORVs); Ex. 12, Score Decl. ¶¶ 6, 8-9, 12 (true desert vehicle with high ground clearance, performance, price); Ex. 13, Sieberg Decl. ¶¶ 10, 14 (reliable, economical, light, fuel-efficient vehicle that was easy to operate; purchased vehicle based on size, price, and reliability); Ex. 14, Turincio Decl. ¶¶ 8, 14 (better visibility and overall ride than competitors, wife wanted bright color, reliability of Polaris vehicles).

Approximately 28% of surveyed putative class members own Polaris SxSs whose stock ROPS has been replaced with an aftermarket ROPS or roll cage. (Ex. 2, Hanssens Rep. ¶¶ 75-77; *see also* Ex. 3, Langer Rep. ¶ 55 CONFIDENTIAL -- Subject to Court Order [redacted]; Ex. 6, Andersen Decl. ¶ 11; Ex. 9, Fisk Decl. ¶ 12.) CONFIDENTIAL -- Subject to Court Order [redacted] These putative class members include purchasers who bought Polaris SxSs where the dealer already had replaced the stock ROPS with an aftermarket ROPS. (Ex. 2, Hanssens Rep. ¶¶ 76-77; *see also* Ex. 11, Milligan Decl. ¶ 8.) Others ordered an aftermarket ROPS at purchase that was installed before, or shortly after, they took delivery of their SxSs. (Ex. 6, Andersen Decl. ¶ 11; Ex. 9, Fisk Decl. ¶ 11.)

Aftermarket ROPS manufacturers build ROPS that can be outfitted on certain MY 2015-2019 RZRs. (Ex. 1, Breen Rep. at 7-8.) None certify their ROPS to any standard. (*Id.* at 8-11.) Buyers purchase these aftermarket ROPS even though they do not include a label certifying compliance with 29 CFR § 1928.53 or another standard. (Ex. 6, Andersen Decl. ¶ 14; Ex. 9, Fisk Decl. ¶ 13; Ex. 11, Milligan Decl. ¶ 8; *see also* Ex. 4, Mattar Decl. ¶ 18; Ex. 3, Langer Rep. ¶ 51.)

Customers who replaced the stock ROPS, or who bought a SxS with an aftermarket ROPS, did so for different reasons. Buyers typically purchase aftermarket or customized ROPS for aesthetic purposes, such as a unique or sleeker look. (Ex. 4, Mattar Decl. ¶ 19; Ex. 5, Hummel Decl. ¶ 15.)

I. Prices For Polaris SxSs Are Individually Negotiated And Not Affected By The ROPS Label.

Polaris sets a Manufacturer's Suggested Retail Price ("MSRP") as a suggested price for each SxS. (Ex. 15, Miriovsky Decl. ¶ 4.) Polaris-authorized dealers pay a price different from MSRP when the dealers purchase Polaris SxSs. (*Id.*)

Buyers individually negotiate with dealers such that prices differ from MSRP by amounts unique to each buyer. (Ex. 3, Langer Rep. ¶¶ 80-93; Ex. 4, Mattar Decl. ¶ 22;

Ex. 15, Miriovsky Decl. ¶ 7.) What a buyer pays depends on factors including rebates and cash payments, dealer inventory levels, down payments, financing terms, trade-ins, accessory purchases, and dealer negotiations. (Ex. 3, Langer Rep. ¶¶ 52.)

There is no evidence that the ROPS label affects Polaris SxS prices. (Ex. 3, Langer Rep. ¶¶ 13-16, 23-70.) HIGHLY CONFIDENTIAL -- Subject to Court Order [redacted] Polaris does not factor in the ROPS label when setting the MSRP. (Ex. 15, Miriovsky Decl. ¶ 6; *see also* Ex. 3, Langer Rep. ¶¶ 58-59.) Polaris did not use the label's language in its marketing materials. (Ex. 2, Hanssens Rep. ¶¶ 15, 17, 151-166; Ex. 3, Langer Rep. ¶¶ 56-67.) Polaris dealers do not mention the label during the sales process and it does not enter into price negotiations. (Ex. 4, Mattar Decl. ¶ 15; Ex. 5, Hummel Decl. ¶¶ 19-20; Ex. 3, Langer Rep. ¶¶ 52-55.) Nor do dealerships use the label or its language in marketing materials such as YouTube videos. (Ex. 2, Hanssens Rep. ¶¶ 167-74; Ex. 3, Langer Rep. ¶¶ 53-54.) Buyers generally are unaware of the label and do not consider it. (*Supra* Background.C-D; Ex. 3, Langer Rep. ¶¶ 46-51.)

Market data confirms that the ROPS label does not affect vehicle prices. In 2017, Polaris changed the ROPS label of 2017 MY Generals from stating they met the OSHA requirements of 29 C.F.R. § 1928.53 to being tested to the ISO standard. (Ex. 3, Langer Rep. ¶¶ 24-43.) This change had no statistically significant impact on 2017 MY General prices. (*Id.* ¶¶ 37-42.)

Even if the ROPS label might have affected the price of a particular SxS purchase, any such effect would differ for each buyer. (Ex. 3, Langer Rep. ¶¶ 71-93; Ex. 2, Hanssens Rep. ¶¶ 18, 175.) This is shown by the heterogeneity across the vehicle models in the putative class, in demand and supply factors, and in transaction prices of the alleged class vehicles. (Ex. 3, Langer Rep. ¶¶ 71-93; Ex. 2, Hanssens Rep. ¶¶ 18, 175.)

Plaintiffs do not present any evidence that the ROPS label affected SxS prices. HIGHLY CONFIDENTIAL -- Subject to Court Order

ARGUMENT

The record evidence establishes that putative class members and their SxS purchases differ in myriad and outcome-determinative ways. Buyers differ in whether they saw the ROPS label, read it, relied on it, or considered it material to their purchases; whether the label became part of each buyer's bargain or affected the price each paid for the SxS; and whether each would benefit from plaintiffs' proposed damages and injunctive relief. The named plaintiffs differ from absent class members, are subject to unique defenses, and have not proposed a classwide damages methodology. No presumption or inference of reliance, materiality, or any other elements of plaintiffs' claims can apply here because plaintiffs present no evidence these elements can be established through common proof. In contrast, Polaris has presented overwhelming evidence, including surveys, individual testimony, and other facts, demonstrating that all of these elements are individual questions. Given this record, plaintiffs cannot satisfy the requirements of class certification and their motion should be denied.

Plaintiffs bear the burden of proving each requirement of Rule 23. *Zinser v. Accufix Research Inst. Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).[4] Plaintiffs seeking class certification "must actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014) (emphasis in original). "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011).

A district court's "rigorous analysis" of the class certification request requires consideration of the merits to the extent these overlap with Rule 23's requirements. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981-84 (9th Cir. 2011). The district court should resolve any factual disputes, or disputes among experts, necessary to determine whether Rule 23's requirements are satisfied. *Id.* at 982-83.

[4] All citations omit internal quotation marks, brackets, ellipses, and other modifications unless otherwise indicated.

Plaintiffs seek Rule 23(b)(3) certification and must prove "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016).

Plaintiffs also seek Rule 23(b)(2) certification, which requires, among other elements, proof "that final injunctive relief … is appropriate respecting the class as a whole." *E.g.*, *Victorino v. FCA US LLC*, 326 F.R.D. 282, 308 (S.D. Cal. 2018).

"For purposes of class certification, the UCL, FAL, and CLRA are indistinguishable." *Shanks v. Jarrow Formulas, Inc.*, 2019 WL 4398506, at *4 (C.D. Cal. Aug. 27, 2019).

I. INDIVIDUAL DIFFERENCES PREDOMINATE, PRECLUDING ANY RULE 23(b)(3) CLASS.

A. Differences In Causation, Reliance, And Materiality Predominate.

The "'UCL, FAL, and CLRA have independent requirements for standing, which mandate allegations of actual reliance'" on the alleged misrepresentation at issue.[5] (ECF No. 38, MTD Order § III.A at 5 (quoting *Stewart v. Electrolux Home Prod., Inc.*, 2018 WL 1784273, at *4 (E.D. Cal. Apr. 13, 2018)); *see also*, *e.g.*, *Block v. eBay, Inc.*, 747 F.3d 1135, 1140 (9th Cir. 2014); *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793-94 (9th Cir. 2012).

"To state a claim under [UCL] section 17200, a plaintiff must allege that a defendant's unlawful, unfair, or fraudulent business practices caused her an economic injury. That causal connection is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law." *Williams v. Bank of*

[5] Before November 2, 2004, UCL and FAL claims did not require individualized proof of reliance, injury, or damages. *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 852 (2008). On that date, Proposition 64 changed the UCL and FAL to require plaintiffs to prove they have "suffered injury in fact" and "lost money or property as a result of such unfair competition." *Id.* Earlier case law that did not require reliance, and decisions that mistakenly continue to rely on such case law, have been superseded by Proposition 64.

Am., N.A., 701 F. App'x 626, 629 (9th Cir. 2017); *see Hall v. SeaWorld Entm't, Inc.*, 747 F. App'x 449, 452 (9th Cir. 2018); *Saber v. JPMorgan Chase Bank, N.A.*, 2014 WL 2159395, at *3-4 (C.D. Cal. May 22, 2014). If a plaintiff would have purchased a product regardless of the defendant's alleged misrepresentation, that plaintiff cannot prove causation. *Clark v. Hershey Co.*, 2019 WL 6050763, at *2 (N.D. Cal. Nov. 15, 2019). This also applies to FAL and CLRA claims, which similarly require causation.

Finally, the statutes require proof that the alleged misrepresentation was material to the consumer's purchase decision. *E.g.*, *Shanks*, 2019 WL 4398506, at *4; *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1029 (C.D. Cal. 2018); *Ono v. Head Racquet Sports USA, Inc.*, 2016 WL 6647949, at *10 (C.D. Cal. Mar. 8, 2016).

To "establish predominance under Rule 23(b)(3), courts typically require that plaintiff demonstrate that reliance and causation are subject to common proof." *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, 2017 WL 2559615, at *2, 6 (C.D. Cal. Jun 7, 2017). Plaintiffs fail to satisfy this requirement. The facts regarding these elements, and materiality, vary for each buyer, and depend on uncommon proof.

1. Whether Each Buyer Read The ROPS Label Is A Predominant Individual Issue.

If buyers have not read the label, they cannot possibly have relied on it. Judge Staton dismissed plaintiffs' First Amended Complaint because "Plaintiffs never allege that *they* read and relied upon the sticker." (ECF No. 38, MTD Order § III.A at 5-6 (collecting cases).) Similarly, if a buyer was unaware of the label it could not have caused or been a material factor in their decision to purchase a Polaris SxS.

Moreover, it "is not enough to 'receive' a misrepresentation in a document [or product]; a plaintiff must see, read, or hear the alleged misrepresentation and rely on it." *Graham v. VCA Antech, Inc.*, 2016 WL 5958252, at *5 (C.D. Cal. Sept. 12, 2016).[6]

[6] *See also In re iPhone Application Litig.*, 6 F. Supp. 3d 1004, 1022-23 (N.D. Cal. 2013) (rejecting plaintiffs' argument that receiving an alleged misrepresentation is sufficient

While plaintiffs assert buyers were "exposed" to the label (Pls. Memo. at 18), the term "exposed" in the reliance case law means that a buyer must have "heard, read, or saw" the alleged misrepresentation. *Stewart*, 2018 WL 1784273, at *5. This case law reflects common sense, as a person who "receives" or is "exposed" to a representation but does not become aware of its contents cannot possibly rely on it in purchasing a product.

Courts deny class certification of misrepresentation claims where not all class members saw or read the alleged misrepresentation. *E.g.*, *Cohen v. DIRECTV, Inc.*, 101 Cal. Rptr. 3d 37, 47 (Cal. Ct. App. 2009) ("The record supports the trial court's finding that common issues of fact do not predominate … because the class would include subscribers who never saw DIRECTV advertisements or representations"); *Moheb v. Nutramax Labs. Inc.*, 2012 WL 6951904, *4 (C.D. Cal. Sept. 4, 2012) (defendant's alleged misrepresentation was not a common issue "because some of the members of the Class never saw or relied upon Defendant's representation").[7]

Surveys showed that actual and potential SxS buyers did not read the ROPS label before buying their SxSs. (*Supra* Background.C.) Individual buyers testified they did not read the label in purchasing their SxSs. (*Id.*) Plaintiffs have not submitted any evidence that absent putative class members saw or read the label. (*Id.*)

Even the few buyers who might claim to have seen the label would vary in what words they saw. Guzman only saw the words "Polaris" and "OSHA," and did not read the language regarding 29 C.F.R. § 1928.53 that forms the basis of plaintiffs' claims. (*Supra* Background.C.) Albright read only a "portion" of the label, and did not read the language explaining the GVW used to test the vehicle. (*Id.*) Such differences create individual issues, as whether a buyer can show reliance and other elements depends on

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to state a claim where plaintiffs did not read or rely on it); *Stewart*, 2018 WL 1784273, at *5; *Hall v. Sea World Entm't, Inc.*, 2015 WL 9659911, at *5 (S.D. Cal. Dec. 23, 2015); *Doe v. SuccessfulMatch.com*, 70 F. Supp. 3d 1066, 1082 (N.D. Cal. 2014).

[7] *Sotelo v. MediaNews Grp., Inc.*, 143 Cal. Rptr. 3d 293, 306 (Cal. Ct. App. 2012), *disapproved of in part on other grounds by Noel v. Thrifty Payless, Inc.*, 445 P.3d 626 (Cal. 2019); *Sevidal v. Target Corp.*, 117 Cal. Rptr. 3d 66, 85 (Cal. Ct. App. 2010); *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *14-16 (N.D. Cal. June 13, 2014).

whether he or she saw the label and how much of its language the buyer read.

Determining whether each buyer saw the label and what portions (if any) they read before buying will require individual evidence, such as testimony from each buyer, testimony from anyone accompanying the buyer during the purchase, and evidence from the dealership from whom the buyer purchased the Polaris SxS, among other evidence. This fundamental, outcome-determinative individual issue depends on uncommon proof and predominates over any supposed common issues.

Moreover, some buyers could not have read the ROPS label because it had been removed from the Polaris SxS before those buyers purchased their SxSs. For some SxSs, dealers replace the stock ROPS with an aftermarket ROPS before sale, and these aftermarket ROPS do not include any label. (Ex. 11, Milligan Decl. ¶ 8.) Plaintiffs' putative class also includes buyers of used SxSs, which may have had the ROPS label removed. (Ex. 9, Fisk Decl. ¶ 12; *see also* Ex. 11, Milligan Decl. ¶ 12.) Thus, individual evidence and mini-trials would be necessary to determine whether each buyer's SxS came with a ROPS label that the buyer could have read.

2. Reliance, Materiality, And Causation Are Predominant Individual Issues.

The evidence establishes that reliance, causation, and materiality are individual issues. (*Supra* Background.D.) Surveys of putative class members found that only one of 82 respondents claims to have considered the ROPS label in their purchase. Besides the two plaintiffs, each of the nine other individual Polaris SxS buyers who testified explained the label had no role in their purchases. Many consumers replace the stock ROPS with aftermarket ROPS that do not have any labels, further demonstrating that many buyers do not care about the label. (*Supra* Background.H.) Thus, the overwhelming majority of putative class members did not consider the label, they could not have relied on it or considered it material, and it cannot have caused their purchases.

For any buyers who claim to have considered the label, individual evidence would be necessary to determine if it was a "substantial factor" in each purchase, as

required for reliance and causation. *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1083 (N.D. Cal. 2017). Buyers had a variety of reasons—and combinations of reasons—for buying their SxSs, including performance, cargo capacity, style and color, pricing, steering, suspension, and others. (*Supra* Background.G.) Each buyer weighs whatever reasons they consider differently, with some being more important than others. Individual evidence would be needed to determine if the label was a "substantial factor" in light of each buyer's other purchase reasons. *E.g.*, *Reynante v. Toyota Motor Sales USA, Inc.*, 2018 WL 329569, at *4-5 (Cal. App. Ct. Jan. 9, 2018) (denying certification because "even if a customer was misled by the fuel calculator, this does not necessarily mean that the calculation caused the customer to purchase the vehicle").

Courts deny class certification where the evidence establishes that a significant percentage of buyers did not rely on the alleged misrepresentation and had other reasons for buying the product. *E.g.*, *id.* at *4-5 (denying certification where "defendants presented evidence that the materiality of, or reliance upon, the fuel calculator's [allegedly false] calculation would vary from consumer to consumer"); *Shanks*, 2019 WL 4398506, at *4, 7 (denying certification based on survey evidence demonstrating that buyers typically did not purchase a product based on plaintiffs' interpretation of the label and where "Plaintiff has not introduced any evidence to suggest that any other proposed class members similarly relied on, and were misled by, these statements."); *5-Hour Energy*, 2017 WL 2559615, at *7-8 (denying certification where "Defendants' evidence suggests that the representations are not material to most or even a substantial portion of the class," and "[a]bsent a consumer survey or other market research to indicate how consumers reacted to the … statements, and how they valued these statements compared to other attributes of the product and the … market generally, Plaintiffs have not offered sufficient evidence of materiality across the class").[8] The evidence here presents an even more compelling case for denying

[8] *Townsend*, 303 F. Supp. 3d at 1047; *Lucas v. Breg, Inc.*, 212 F. Supp. 3d 950, 969 (S.D. Cal. 2016); *Pierce-Nunes v. Toshiba Am. Info. Sys., Inc.*, 2016 WL 5920345, at

certification because the vast majority of buyers did not consider the label, and thus could not have relied on it, found it material, or had the label cause their purchase.

The lack of any class-wide impact on Polaris SxSs's real-world market prices confirms that buyers' SxS purchases were not affected by the label. In *McLaughlin v. Am. Tobacco Co.*, an institute published Monograph 13 disclosing that light cigarettes were not safer than regular ones, leading to the *McLaughlin* plaintiffs' suit. 522 F.3d 215, 220-21 (2d Cir. 2008), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1119 (C.D. Cal. 2015) (following *McLaughlin*). In reversing certification because causation and reliance were individual issues, *McLaughlin* held that "the fact that the market did not shift away from light cigarettes after the publication of Monograph 13 is compelling evidence that plaintiffs had other, non-health-related reasons for purchasing Lights." 522 F.3d at 226; *see also id.* at 227.

Plaintiffs have not presented any evidence of a price impact from the ROPS label. The only evidence is that the ROPS label, and changing that label, had no impact on Polaris SxS prices. (*Supra* Background.I.) This "compelling evidence" reinforces the surveys and individual testimony demonstrating that most putative class members' purchase decisions were unaffected by the label, precluding classwide proof of causation, materiality, or reliance.

3. What Each Buyer Believed The ROPS Label Meant Is A Predominant Individual Issue.

"Where plaintiffs fail to establish a controlling definition for a key term in an alleged misstatement, courts have found that materiality is not susceptible to common

*8 (C.D. Cal. June 23, 2016); *In re ConAgra Foods*, 302 F.R.D. 537, 576-77 (C.D. Cal. 2014); *Jones*, 2014 WL 2702726, at *14-16; *Johnson v. Harley-Davidson Motor Co. Grp. LLC*, 285 F.R.D. 573, 576, 581 (E.D. Cal. 2012); *Moheb*, 2012 WL 6951904, at *4; *Webb v. Carter's Inc.*, 272 F.R.D. 489 (C.D. Cal. 2011); *Fine v. ConAgra Foods, Inc.*, 2010 WL 3632469, *2-3 (C.D. Cal. Aug. 26, 2010).

proof." *5-Hour Energy*, 2017 WL 2559615, at *8 (collecting cases).[9]

Plaintiffs' complaint is premised on interpreting 29 C.F.R. § 1928.53 as requiring SxSs to be tested using the HP ratio. But plaintiffs have presented no evidence that any buyer shares that interpretation. Even the named plaintiffs have not adopted that interpretation; they had never read and had no understanding of § 1928.53. (*Supra* Background.E.) Nor have plaintiffs presented any survey or other evidence establishing that buyers have a commonly accepted understanding of the label. As plaintiffs bear the burden of proof, that failure is sufficient to deny their motion. *5-Hour Energy*, 2017 WL 2559615, at *8-9 (denying certification where "the meaning of the term 'energy' is disputed, and Plaintiffs have offered no evidence of a common definition of 'energy' among a substantial number of consumers"); *Pierce-Nunes v. Toshiba Am. Info. Sys., Inc.*, 2016 WL 5920345, at *7 (C.D. Cal. June 23, 2016) (same where there was no common proof "that each class member had the same understanding of the product labeling"); *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *14-16 (N.D. Cal. June 13, 2014).

4. No Inference Of Reliance Or Materiality Applies, And Any Such Inference Has Been Rebutted.

While plaintiffs contend a material misrepresentation can provide an "inference" of reliance (Pls. Memo. at 18), myriad decisions reject any such inference and deny certification of misrepresentation claims where the record establishes individual differences. *First*, no such inference or presumption can arise where whether each putative class member read an alleged misrepresentation is an individual question:

> Even if we assume that all … contracts make the same representation, whether a particular class member has read that misrepresentation presents

[9] *See also Townsend*, 303 F. Supp. 3d at 1046 (no class-wide materiality or reliance where representation did not have a common meaning or controlling definition); *Shanks*, 2019 WL 4398506, at *4 (explaining that "scientific terms are unlikely to be understood by an average consumer," much less be a factor in purchasing the product); *Schechner v. Whirlpool Corp.*, 2019 WL 4891192, at *5 (E.D. Mich. Aug. 13, 2019); *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668-69 (1993).

> an individual question and not a common question. … [R]eliance may not be presumed unless there is a showing that putative class members actually read their contracts and appellants have not made a factual showing that this presents a common rather than an individual inquiry.

Sotelo v. MediaNews Grp., Inc., 143 Cal. Rptr. 3d 293, 306 (Cal. Ct. App. 2012), *disapproved of in part on other grounds by Noel v. Thrifty Payless, Inc.*, 445 P.3d 626 (Cal. 2019).[10] Here, whether each buyer read the ROPS label (and, if so, exactly what they read) is an individual issue, with most not reading any portion of the label.

Second, no inference or presumption can arise where buyers had different reasons for their purchases. *E.g.*, *Reynante*, 2018 WL 329569, at *5 (plaintiffs' argument that individual proof was unnecessary did not address whether common questions predominated; even if a customer was misled by a vehicle's fuel calculator, "this does not necessarily mean that the calculation caused the customer to purchase the vehicle," and "[i]ndividual inquiry would be necessary to determine whether it was the fuel calculator that induced his purchase"); *Safaie v. Jacuzzi Whirlpool Bath, Inc.*, 2008 WL 4868653, at *8-9 (Cal. App. Ct. Nov. 12, 2008) (given the "wide array of features" in a tub, the importance of a horsepower misrepresentation "was too individualized to support an inference of common reliance, and accordingly individual issues of reliance predominated over common issues"); *Johnson v. Harley-Davidson Motor Co. Grp. LLC*, 285 F.R.D. 573, 576, 581 (E.D. Cal. 2012) (denying certification because "while materiality is generally determined by the 'reasonable consumer standard,' there are numerous individualized issues as to whether the reasonable consumer purchasing one of Defendants' motorcycles would find the excessive heat

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[10] *See also Mirkin v. Wasserman*, 858 P.2d 568, 574 (Cal. 1993) (precedents regarding inferring reliance "do not support an argument for presuming reliance on the part of persons who never read or heard the alleged misrepresentations"); *Davis-Miller v. Auto. Club of S. Cal.*, 134 Cal. Rptr. 3d 551, 565-66 (Cal. Ct. App. 2011); *iPhone Application*, 6 F. Supp. 3d at 1026; *Campion v. Old Republic Home Protection Co., Inc.*, 272 F.R.D. 517, 536 (S.D. Cal. 2011); *Friedman v. Old Republic Home Prot. Co., Inc.*, 2015 WL 9948093, at *4 (C.D. Cal. May 18, 2015); *Red v. Kraft Foods, Inc.*, 2011 WL 4599833, at *15 (C.D. Cal. Sept. 29, 2011).

material").[11] Putative class members had myriad different reasons for their purchases.

Third, courts reject an inference and deny certification because of individual reliance where putative class members considered information from third-party sources. *E.g.*, *Pierce-Nunes*, 2016 WL 5920345, at *8 (issues of materiality required individualized inquiry because consumers purchased televisions "based on a variety of factors, including their own research, speaking with sales people, comparison shopping, or recommendations from family, friends, or co-workers"); *Howard v. GC Servs., Inc.*, 2015 WL 5163328, at *9-10 (Cal. App. Ct. Sept. 3, 2015); *Moheb*, 2012 WL 6951904, at *7. Putative class members relied on a wide variety of sources before purchasing their Polaris SxSs, with many not relying on Polaris communications at all.

Fourth, even if an inference could exist, it is rebutted by the evidence. Plaintiffs rely on *Stearns v. Ticketmaster Corp.* (Pls. Memo. at 18), which holds that "[i]f the misrepresentation or omission is not material as to all class members, the issue of reliance 'would vary from consumer to consumer' and the class should not be certified." 655 F.3d 1013, 1022-23 (9th Cir. 2011). Indeed, *Stearns* affirmed denial of a class certification motion because of the "myriad reasons that someone who was not misled" might sign up for a service. *Id.* at 1024. Numerous decisions cited in this Section I.A. have denied certification because of such individual differences.[12]

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[11] *See also In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 98-99 (Cal. App. Ct. 2009) (denying certification in case involving drug where some plaintiffs would use the drug if it were still available, patients received information from a variety of sources, and each consumer had his or her own preferences and characteristics); *Fairbanks v. Farmers New World Life Ins. Co.*, 128 Cal. Rptr. 3d 888, 906-07 (Cal. Ct. App. 2011); *Fine*, 2010 WL 3632469, at *1, 4; *Webb*, 272 F.R.D. at 502-03; *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 457, 459 (S.D. Cal. 2014); 1 MCLAUGHLIN ON CLASS ACTIONS § 5:55 (17th ed. 2020) ("The existence of individualized issues of causation, reliance, and knowledge will preclude certification where class members' decisions to enter into a transaction with defendant could be explained by considerations other than reliance on defendant's alleged misrepresentations.").

[12] Nor does the discussion regarding absent class members in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009) change that no class can be certified on the record here. *Tobacco II's* statements regarding such class members concern statutory standing and do not prevent certification being denied because of individual differences in reliance among putative class members. *E.g.*, *Cohen*, 101 Cal. Rptr. 3d at 48-49; *Davis-Miller*, 134 Cal. Rptr. at 564-65; *Tucker v. Pac. Bell Mobile Servs.*, 145 Cal. Rptr. 3d 340, 360-62 (Cal.

Finally, this is not a case where a handful of putative class members found the misrepresentation immaterial or did not rely on it. Surveys and individual testimony demonstrate that the vast majority of buyers did not consider the ROPS label in making their purchases. Accordingly, the record evidence establishes that individual, outcome-determinative issues of causation, reliance, and materiality predominate over any common issues.

B. Differences In Whether Putative Class Members Have Any Injury And Received The Benefit Of Their Bargain Predominate.

"If one gets the benefit of his bargain, he has no standing under the UCL." *Johnson v. Mitsubishi Digital Elecs. Am., Inc.*, 365 F. App'x 830, 832 (9th Cir. 2010) (collecting cases); *see*, *e.g.*, *Baker v. Yamaha Motor Corp.*, 2021 WL 388451, at *4 (Cal. Ct. App. Feb. 4, 2021) ("When a plaintiff gets the benefit of his bargain, he has no standing under the UCL and FAL.") (collecting cases); *Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 972 (C.D. Cal. 2014); *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 487-88 (S.D. Cal. 2013); *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.*, 915 F. Supp. 2d 1151, 1159 (C.D. Cal. 2013). That holding applies equally to FAL and CLRA claims. *See Baker*, 2021 WL 388451, at *4; *Lee*, 992 F. Supp. 2d at 972-73; *Gaines v. Home Loan Ctr., Inc.*, 2011 WL 13182970, at *5 n.4 (C.D. Cal. Dec. 22, 2011).

For many putative class members, the ROPS label never became part of their bargain and thus they could not have been injured by the alleged misrepresentation. *See McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 706 (9th Cir. 2020) (dismissing claims because plaintiff could not "show that she did not receive a benefit for which she actually *bargained*"). Some buyers purchased SxSs where third-party aftermarket ROPS had already been installed. (*E.g.*, Ex. 11, Milligan Decl. ¶ 8.) Plaintiffs' putative class also includes those who purchased used SxSs, where the label (or the Polaris

Ct. App. 2012); *Campion*, 272 F.R.D. at 535; *Jones*, 2014 WL 2702726, at *14; *Hobbs v. Brother Int'l Corp.*, 2016 WL 4734394, *3-6 & n.1 (C.D. Cal. Sept. 8, 2016).

ROPS itself) could have been removed by the prior owner. Such buyers' SxSs did not come with the ROPS label, which was not part of their bargain. Other buyers installed third-party aftermarket ROPS at or immediately after purchase, typically for aesthetic reasons. (*E.g.*, Ex. 6, Andersen Decl. ¶ 11.) Such buyers likewise did not consider alleged misrepresentations regarding the stock ROPS to be any part of their bargains.

More broadly, whether each buyer received the benefit of the bargain depends on individual evidence. The named plaintiffs admit their RZRs have met their expectations and that they like or love their RZRs, continue to regularly drive their RZRs even after filing this lawsuit, and have had their young children ride in their RZRs. (Ex. 27, Guzman Dep. at 12:7-15, 22:13-23, 23:21-24; 33:16-20, 46:10-16, 53:19-54:1, 61:17-62:1; 69:1-10; 96:13-22; Ex. 28, Albright Dep. at 13:25-14:21, 15:5-6, 35:5-11, 75:5-25, 94:25-95:2, 191:25-192:3; Ex. 30, Albright Supp. Resp. to Interrog. No. 12.) The Court would have to evaluate similar evidence to determine whether each Polaris SxS satisfied each buyer.

Whether each buyer has any economic loss also is an individual issue. Plaintiffs lack any evidence showing the label had a common impact on prices across thousands of different SxS purchases, or that all buyers experienced an economic injury. Instead, the record shows that Polaris SxS prices did not change after Polaris switched labels from OSHA to ISO requirements on the MY 2017 General. (*Supra* Background.I.) Evidence such as heterogenous market factors demonstrates that whether the label affected the price each buyer paid requires individual inquiries. (*Id.*)

Courts deny class certification based on individual differences in fact of injury and whether buyers received the benefit of the bargain. *Moheb*, 2012 WL 6951904, at *4 ("the existence of economic injury is also not a common question, because many purchasers are satisfied").[13] The same result should obtain here.

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[13] *Harley-Davidson*, 285 F.R.D. at 582 (denying certification where some class members had driven their allegedly defective motorcycles "for several years and … thousands of miles" and so "should not be entitled to recover any damages"); *Sanchez*

C. Differences In SxS Use Predominate For CLRA Claims.

CLRA claims are limited to "[a]ny consumer who suffers any damages as a result" of conduct violating the CLRA. Cal. Civ. § 1780(a). "Consumer" is limited to individuals who purchase or lease "any goods or services for personal, family or household purposes." Cal. Civ. § 1761(d); *see also Zepeda v. PayPal, Inc.*, 777 F. Supp. 2d 1215, 1222 (N.D. Cal. 2011).

Particularly for Rangers, buyers differ in whether they use SxSs for personal, family, or household purposes, or for farming, ranching, or other business. (*Supra* Background.A.) Determining each SxS buyer's purpose will require individual evidence, including how the buyer uses the SxS, their discussions with the dealership, and buyer testimony, creating an individual issue that predominates over any common questions for CLRA claims. *E.g.*, *Harley-Davidson*, 285 F.R.D. at 582-83; *Arabian v. Sony Elecs., Inc.*, 2007 WL 627977, at *14 (S.D. Cal. Feb. 22, 2007).

D. Polaris Generals And Certain RZRs Were Not Certified Under 29 C.F.R. § 1928.53 And Cannot Be Part Of The Class.

All Generals and the RZR XP Turbo S (2-seat variant), RZR Pro XP Turbo S, and RZR RS1 were certified to the ISO standard, not 29 C.F.R. § 1928.53, and are not part of plaintiffs' putative class. (*Supra* Background.B.) To the extent plaintiffs seek to include them, whether any particular General or RZR vehicle in these categories had an OSHA ROPS label would be a predominant individual issue.

II. PLAINTIFFS HAVE NOT PRESENTED A PROPER DAMAGES MODEL TO SUPPORT THEIR RULE 23(b)(3) CLASS.

"[A]t the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). "And for purposes of Rule 23, courts must conduct a '"rigorous analysis"' to determine whether that is so." *Id.* Plaintiffs' purported "cost-of-repair"

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v. Wal Mart Stores, Inc., 2009 WL 1514435, *2 (E.D. Cal. May 28, 2009); *Spacone v. Sanford, L.P.*, 2018 WL 4139057, at *8 (C.D. Cal. Aug. 9, 2018).

measure fails this requirement for two independent reasons.

A. Plaintiffs Fail To Present Evidence Of Difference In Value, Which Is Legally Required In Mislabeling Cases.

The proper damages measure in mislabeling cases is "the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received." *Townsend*, 303 F. Supp. 3d at 1048; *5-Hour*, 2017 WL 2559615, at *10; *Reitman v. Champion Petfoods USA, Inc.*, 2019 WL 7169792, at *13 (C.D. Cal. Oct. 30, 2019), *aff'd*, 830 F. App'x 880 (9th Cir. 2020); *NJOY*, 120 F. Supp. 3d at 1118.

Thus, in mislabeling cases, the proposed damages methodology *must* take into account the value the consumer received from the product, and compensate plaintiff for no more than the difference in value between the product as promised and as delivered. *Chowning v. Kohl's Dep't Stores, Inc.*, 733 F. App'x 404, 405 (9th Cir. 2018) ("Under California law, where a plaintiff obtains value from the product, the proper measure of restitution is the difference between what the plaintiff paid and the value of what the plaintiff received."); *Shanks*, 2019 WL 4398506, at *7 (class certification denied where plaintiff had not met his burden of showing what "portion of the sale price was attributable to the value consumers placed" on an alleged misrepresentation); *Alvarez v. NBTY, Inc.*, 331 F.R.D. 416, 426 (S.D. Cal. 2019); *In re POM Wonderful LLC*, 2014 WL 1225184, at *2-5 (C.D. Cal. Mar. 25, 2014); *Brazil v. Dole Packaged Foods, LLC*, 660 F. App'x 531, 534-35 (9th Cir. 2016). Only when a misrepresented product has no value whatsoever may plaintiffs receive a full refund. *Reitman v. Champion Petfoods USA, Inc.*, 830 F. App'x 880, 882 (9th Cir. 2020).

Here, plaintiffs' hypothetical cost-of-"repairs"—which do not repair anything since plaintiffs do not allege any defect—involve replacement ROPS that would provide the equivalent of a full refund of the value of the ROPS component. (Pls. Memo. at 12-13.) But plaintiffs do not provide any evidence that the allegedly mislabeled ROPS has no value. Plaintiffs' damages theory thus violates California law.

Ignoring this case law, plaintiffs rely on the inapposite decision in *Nguyen v.*

Nissan North America, Inc., 932 F.3d 811 (9th Cir. 2019). *Nguyen* involved an alleged vehicle defect, unlike in this case where plaintiffs expressly disclaim any design defect theory. (Pls. Memo. at 1 n.2.) HIGHLY CONFIDENTIAL -- Subject to Court Order [redacted] Plaintiffs conflate the allegedly "defective *per se*" components in *Nguyen* with the allegedly mislabeled—but admittedly not defective—SxS ROPS. (Pls. Memo. at 12.)

This distinction is key, because (as plaintiffs recognize) the Ninth Circuit found that replacement cost was an appropriate proxy for plaintiffs' damages in *Nguyen* only because the part was defective and thus valueless. *Id.* at 11 (noting that Ninth Circuit allowed damages that "would 'deem the defective part valueless'"). Thus, in *Nguyen*, the court permitted plaintiff to seek "the cost of replacing a defective component, which is a proxy for his overpayment of the vehicle at the point of sale." 932 F.3d at 821.

Nguyen's finding based on a defective and valueless component cannot apply to this case, which involves a label, not any alleged defect, without any evidence that the ROPS itself is valueless. Polaris has not located any case law applying *Nguyen*'s cost-of-repair measure without an alleged defect.[14] Instead, in mislabeling cases not involving defects, the Ninth Circuit and this district have held that plaintiffs must consider the value of a mislabeled product in determining damages. *E.g.*, *Chowning*, 733 F. App'x at 405; *Shanks*, 2019 WL 4398506, at *7.

Polaris's expert evidence additionally confirms the impropriety of using cost-of-repair as a proxy in this case. There is no evidence that the presence of the ROPS label affects Polaris SxS prices, let alone renders the ROPS valueless. (*Supra* Background.I.) Moreover, any effects on prices would differ across the various SxS models in the alleged class based on differing demand and supply inputs, transaction

[14] The Ninth Circuit's rejection of considering "post-purchase value" is likewise inapplicable here. *Nguyen*, 932 F.3d at 820-21. The allegedly mislabeled ROPS have a value greater than zero—and plaintiffs and their expert do not contend otherwise—but plaintiffs' cost-of-repair damages nonetheless treat the ROPS as valueless.

prices, and other factors (*id.*), [redacted]. This real-world evidence demonstrates that cost-of-repair damages would provide plaintiffs with far more than the benefit-of-the-bargain and thus cannot constitute proper class-wide damages.[15] (Ex. 3, Langer Rep. ¶¶ 16, 119-23.)

B. Plaintiffs' Proposed Damages Do Not Match Their Liability Theory.

Certification also is impermissible here because plaintiffs' proposed damages are untethered to their liability theory, violating *Comcast*, 569 U.S. at 35. Plaintiffs' liability theory is that the ROPS allegedly violate 29 C.F.R. § 1928.53, but their proposed damages are based on "repairs" that do not satisfy plaintiffs' interpretation of 29 C.F.R. § 1928.53.

[redacted] Plaintiffs admitted in their interrogatory answers they could not identify any such ROPS. (*Supra* Background.B.) Plaintiffs also have presented no evidence of what building a ROPS satisfying plaintiffs' interpretation of § 1928.53 for each SxS configuration would cost, how that ROPS would affect the vehicle's operation, or whether any consumer would even want it. (Ex. 1, Breen Rep. at 23-24.) Indeed, there are no aftermarket ROPS available for certain RZR models and model years, or for Rangers generally. (*Id.* at 15-18, 24; Ex. 3, Langer ¶¶ 109-110.) The potential costs for building and certifying a

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[15] Where the cost to bring a product into compliance with a label may be lower than the price differential between the mislabeled product and the product as represented, damages representing the cost to bring the product into compliance would more accurately measure the benefit-of-the-bargain without providing a windfall. (Ex. 3, Langer Rep. ¶¶ 20-21.); *see also In re Gen. Motors LLC Ignition Switch Litig.*, 407 F. Supp. 3d 212, 225 (S.D.N.Y. 2019) ("California courts have also followed the traditional rule that the measure of damages for tortious injury to personal property—such as an automobile—is the lesser of the diminution in value or the reasonable cost of repairs.") (collecting cases). However, those circumstances do not apply here where the price differential is zero, and plaintiffs do not even purport to present damages that would bring the ROPS into compliance with their interpretation of 29 C.F.R. § 1928.53.

compliant ROPS structure for each SxS configuration in the class will vary significantly depending on the particular vehicle (Ex. 1, Breen Rep. at 24-28), and [redacted] In short, Kneuper's opinion is purely speculative and he does not provide any evidence he can properly calculate damages. (Ex. 3, Langer ¶¶ 17-18, 94-123.)

Miller v. Fuhu Inc., 2015 WL 7776794, at *20 (C.D. Cal. Dec. 1, 2015), is instructive. The *Miller* plaintiff proposed that damages could be calculated based on the cost-to-repair allegedly defective charging systems in computer tablets. The court rejected this proposal because "at present it is not clear that a viable means of repairing the defect in the Nabi tablets exists." *Id.* The cost of a replacement charger also was an inappropriate way to calculate damages, because "it is not clear that simply replacing the charger will cure the defect." *Id.* Likewise, plaintiffs here have presented no evidence by which the ROPS could be replaced or "repaired" so that they comply with plaintiffs' interpretation of 29 C.F.R. § 1928.53.

Even if plaintiffs had attempted to present a damages methodology where Polaris stock ROPS would be modified to satisfy plaintiffs' interpretation of § 1928.53—rather than replaced with other ROPS that also do not satisfy that regulation—[redacted] (Ex. 1, Breen Rep. at 24-28; Ex. 3, Langer Rep. ¶¶ 17-18, 94-100, 114-18); *see Opperman v. Path, Inc.*, 2016 WL 3844326, at *14 (N.D. Cal. July 15, 2016) (rejecting proposed damages based on averages that likely "would overcompensate some class members, while undercompensating others"); *cf. Nguyen*, 932 F.3d at 816, 819 (plaintiff proposed the same repair for all vehicles by replacing component made from composite materials with a solid cast-aluminum component).

Plaintiffs implicitly acknowledge these problems by suggesting that "[w]hen discovery has not closed, it may be appropriate to certify a class based on a proposed damages model subject to possible decertification after close of discovery." (Pls.

Memo. at 24.) But the deadline for plaintiffs' class expert reports was January 13, 2021 (ECF No. 63), and thus the time for presenting any class-wide damages model has closed. Moreover, plaintiffs have not submitted any expert reports identifying any SxS ROPS or modifications complying with their interpretation of 29 C.F.R. § 1928.53, nor showing how any such ROPS or modification could be applied to all the SxS configurations in their class definition. (Ex. 1, Breen Rep. at 24-28; Ex. 26, Kneuper Dep. at 37:18-39:19.) And plaintiffs' failure to tether their damages to their liability theory does not represent a flaw that can be fixed following further discovery, but instead fundamentally violates *Comcast*. *See*, *e.g.*, *e.g.*, *Doyle v. Chrysler Grp., LLC*, 663 F. App'x 576, 579 (9th Cir. 2016) (reversing class certification because there was "no way to determine whether the proposed damages model measures damages that are solely attributable to the theory of liability"). Plaintiffs' failure to provide a class-wide damages methodology tracking their liability theory requires denial of certification.

III. PLAINTIFFS' PROPOSED CLASS IS NEITHER SUPERIOR NOR MANAGEABLE AS REQUIRED UNDER RULE 23(b)(3).

A Rule 23(b)(3) class action can be certified only if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Courts consider four factors for superiority, which all weigh against certification here. Fed. R. Civ. P. 23(b)(3)(A)-(D); *Zinser*, 253 F.3d at 1190-92.

First, any class would be unmanageable. "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'" *Zinser*, 253 F.3d at 1192; *see also Reynante*, 2018 WL 329569, at *5. Here, each buyer would have to litigate whether he or she read the ROPS label, relied on it, would have purchased the SxS regardless of the label, what the buyer understood the label to mean, the buyer's use and satisfaction with their SxS, and other individual issues. *See also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416 (5th Cir. 2004); *In re LifeUSA Holding Inc.*, 242 F.3d 136 (3d Cir. 2001).

Second, the extent and nature of this litigation weighs against certification. *Zinser*, 253 F.3d at 1191. *Zinser* held this factor weighed against certification where there were thousands of putative class members but only nine lawsuits were pending. *Id.* Likewise, Polaris is aware of only two other cases (both in state court) alleging Polaris miscalculated compliance with 29 C.F.R. § 1928.53 by using the GVW.

Third, there is no desirability to concentrating the litigation in this forum because this is the only federal suit making these allegations. Moreover, buyers are scattered across the state, and defense witnesses largely are in Minnesota. *See id.* at 1191-92.

Fourth, each buyer has an interest in individually controlling separate actions. Because of the myriad, differing facts, any buyer who believed they have a claim would want to file their own complaint rather than relying on two plaintiffs subject to unique defenses. (*Supra* Background.E; *infra* Section IV.D.) Plaintiffs assert that the potential recovery is too slight for individual suits (Pls. Memo. at 24-25), but courts in similar cases hold that individual claims are sufficient because plaintiffs can obtain statutory damages, attorney's fees, or punitive damages. *E.g.*, *Sanneman v. Chrysler*, 191 F.R.D. 441, 456 (E.D. Pa. 2000); *Rosen v. Chrysler Corp.*, 2000 WL 34609135, at *15 (E.D. Mich. July 18, 2000). Plaintiffs claim that each buyer has approximately $1,000 in damages (Pls. Memo. at 25), and also seek "attorneys' fees" and "statutory enhanced damages" (ECF No. 39, 2d Am. Compl. at 32). These potential recoveries incentivize any owner who believes he or she has a meritorious individual claim to pursue it.

IV. NAMED PLAINTIFFS ARE NEITHER TYPICAL NOR ADEQUATE CLASS REPRESENTATIVES.

A. The Named Plaintiffs Have No Legally Viable Claims.

If a named plaintiff cannot state a claim against the defendant, then he or she cannot have typical claims or be a class representative. *E.g.*, *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977). As explained in Polaris's Motion for Summary Judgment, both plaintiffs' claims fail for several independent reasons. (ECF No. 85.) Without a representative, no class can be certified. *E.g.*, *E. Tex. Motor*, 431

U.S. at 403-04. Moreover, even if the Court denies summary judgment based upon factual disputes for each plaintiff, that would confirm the lack of typicality by illustrating that each plaintiff's individual claim turns on his particular facts.

B. The Disparate Individual Facts Establish That No Claim Is Typical.

The different individual facts for each SxS buyer demonstrate that "no claim is typical of another in the sense of providing common answers, and leaves the 'class' no more than a diverse and unmanageable aggregation of individual claims, better dealt with separately." *Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 68 (S.D.N.Y. 2013).[16] Even if the named plaintiffs could prove their own claims based on their individual facts (which Polaris disputes), that could not prove the claims of buyers who never saw or read any part of the ROPS label; did not consider the label in purchasing their SxSs; purchased a SxS with the intent of installing an aftermarket ROPS; or have other differing, outcome-determinative characteristics.

C. Plaintiffs Are Atypical In Claiming They Considered The Label.

The two named plaintiffs are atypical in asserting that they considered the ROPS label in buying their RZRs, as most buyers did not notice, much less read or consider, the label. *E.g.*, *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 458 (S.D. Cal. 2014) ("Based upon the evidence presented, the named Plaintiffs' reliance on the alleged misrepresentation was not typical of other class members."); *Fine v. ConAgra Foods, Inc.*, 2010 WL 3632469, at *3-4 (C.D. Cal. Aug. 26, 2010).[17] Plaintiffs' atypicality also is shown by their experience with OSHA from their construction industry work, which they claim caused them to notice the label's reference to OSHA. (Ex. 27, Guzman Dep.

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[16] *See also Romberio v. Unumprovident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998); *McKinnon v. Dollar Thrifty Auto. Grp., Inc.*, 2015 WL 4537957, at *10 (N.D. Cal. July 27, 2015); *Robinson v. Am. Corp. Sec., Inc.*, 2009 WL 10669403, at *6-7 (C.D. Cal. May 20, 2009).

[17] *Moheb*, 2012 WL 6951904, *5 (plaintiff "would not be an adequate representative for those members of the Class that did derive benefit from" a product); *Caro*, 18 Cal. App. 4th at 665 (claims of plaintiffs who read only a portion of label "would be typical of only those persons whose reading of the label was similarly limited").

at 15:1-17, 23:25-24:8, 159:14-17; Ex. 28, Albright Dep. at 57:21-58:7, 59:1-4, 67:13-68:7, 183:2-184:1.) Indeed, in opposing summary judgment, plaintiffs repeatedly emphasize their construction experience. (ECF No. 102-1 at 1-2, 8-9, 12.) Few buyers work in the construction industry or have the same exposure to OSHA.

D. The Named Plaintiffs Are Subject To Unique Defenses.

"Class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Mansfield v. Midland Funding, LLC*, 2011 WL 1212939, at *6 (S.D. Cal. Mar. 30, 2011); *see Banarji v. Wilshire Consumer Capital, LLC*, 2016 WL 595323, at *3 (S.D. Cal. Feb. 12, 2016). The "'presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representative.'" *Mansfield*, 2011 WL 1212939, at *6 (quoting *J.H. Cohn & Co. v. Am. Appraisal Assocs.*, 628 F.2d 994, 999 (7th Cir. 1980)); *Banarji*, 2016 WL 595323, at *3; *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 557-58 (C.D. Cal. 2012).

Each named plaintiff's testimony establishes that he is subject to unique defenses regarding reliance, causation, and fact of injury. Neither plaintiff read the entire label, but only two words (Guzman) or a portion (Albright). (*Supra* Background.E.) Neither plaintiff understood what they read or could explain how the label was false or misleading. (*Id.*) Both plaintiffs mistakenly believed the label said "OSHA-approved," and considered that non-existent term rather than the label's actual language. (Ex. 27, Guzman Dep. at 26:6-23, 27:10-25, 142:4-13, 148:14-149:7; Ex. 28, Albright Dep. at 65:25-66:15, 148:8-23, 149:11-3, 172:25-173:8.) Both plaintiffs' beliefs about the label were based on their construction industry experience. (*Supra* Section IV.C.) Plaintiffs continued to drive their RZRs after filing suit, had their children ride with them, and testified their RZRs met their expectations. (*Supra* Section I.B.)

V. PLAINTIFFS CANNOT CERTIFY ANY RULE 23(b)(2) CLASS.

Plaintiffs' demand for class certification to enter an injunction "requiring Polaris

to remove or revise its OSHA stickers" (Pls. Memo. at 22), fails for multiple reasons. Initially, for the reasons explained in Polaris's summary judgment motion, the two named plaintiffs have no claims for injunctive relief (or any other claims), and thus cannot seek certification of these claims. (ECF No. 85 at 19-24.) Indeed, plaintiffs offer no opposition to Polaris's argument that Guzman's injunctive relief claims are barred by his having an adequate legal remedy. (ECF No. 102-1 at 2, 21-22.) Moreover, the two named plaintiffs are not typical or adequate. (*Supra* Section IV.) Therefore, plaintiffs cannot satisfy the requirements for Rule 23(a) and no class can be certified.

Additionally, no Rule 23(b) class can be certified because "final injunctive relief" is not "appropriate respecting the class ***as a whole***." Fed. R. Civ. P. 23(b)(2) (emphasis added). "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide ***relief to each member of the class***." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (emphasis added); *see also id.* at 362 (Rule 23(b)(2) classes seek "an indivisible injunction ***benefiting all its members*** at once") (emphasis added).

Courts deny Rule 23(b)(2) certification when an injunction would not benefit all putative class members. In *Moheb*, plaintiffs alleged that the drug Cosamin's label misrepresented that it reduced joint pain and protected cartilage. 2012 WL 6951904, at *1. The *Moheb* court denied Rule 23(b)(2) certification because many putative class members would not benefit from any injunctive relief regarding Cosamin's labeling:

> Plaintiff and other members of the Class no longer buy Cosamin and, thus, will obtain no benefit from an injunction concerning Defendant's advertising because they cannot demonstrate a probability of future injury. Similarly, members of the class who continue to use Cosamin and have derived some benefit from it will not benefit from an injunction concerning Defendant's advertising because they have suffered no injury as a result of their purchase of Cosamin and will likely continue to buy Cosamin in the future regardless of its advertising.

Id. at *6 (collecting cases).[18]

Here, any injunction requiring Polaris to remove or revise the ROPS label will provide no benefit to putative class members. *First*, the putative class consists of those who already have purchased Polaris SxSs, who cannot benefit from changing the label. *Second*, a buyer who learns of an alleged misrepresentation regarding a product lacks standing to seek injunctive relief unless, at a minimum, the buyer intends to purchase that product again in the future. *E.g.*, *Lanovaz v. Twinings N. Am., Inc.*, 726 F. App'x 590 (9th Cir. 2018); *Yu v. Dr Pepper Snapple Grp., Inc.*, 2020 WL 5910071, at *8 (N.D. Cal. Oct. 6, 2020); *Prescott v. Nestle USA, Inc.*, 2020 WL 3035798, at *6 (N.D. Cal. June 4, 2020). Plaintiffs do not present any evidence that putative class members intend to purchase another Polaris SxS in the future (and especially not a SxS in plaintiffs' class definition), and many will not. *Third*, most buyers never saw the ROPS label, did not consider it, and do not care about it. These buyers have no injury from any alleged misrepresentation; they cannot establish causation, materiality, or reliance and causation; and will receive no benefit from changing a label in which they have no interest. *Fourth*, many buyers installed an aftermarket ROPS without any labels, or bought a Polaris SxS that already had an aftermarket ROPS installed without the Polaris label. Such buyers could not have been injured by any alleged misrepresentation, and would not benefit from the label being omitted from the stock ROPS or from revised labels that have no applicability to their aftermarket ROPS.

Thus, as in *Moheb* and other decisions, a classwide injunction provides no benefit to many class members, and thus no Rule 23(b)(2) class should be certified.

CONCLUSION

Polaris respectfully requests that the Court deny class certification.

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[18] *See also Lautemann v. Bird Rides, Inc.*, 2019 WL 3037934, at *7 (C.D. Cal. May 31, 2019) (denying Rule 23(b)(2) certification because an injunction "would not provide relief to all class members," including because "some class members may not be entitled to any relief"); *Cholakyan*, 281 F.R.D. at 559; *Algarin*, 300 F.R.D. at 458; *Victorino*, 326 F.R.D. at 308; *Barraza v. C. R. Bard Inc.*, 322 F.R.D. 369, 390 (D. Ariz. 2017).

DATED: March 30, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2021, I caused the foregoing document to be served on the following counsel for Plaintiffs via the Court's electronic filing system:

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