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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRANCISCO BERLANGA, individually on behalf of himself and all others similarly situated,

Plaintiff,

v.

POLARIS INDUSTRIES INC., a Delaware corporation; POLARIS SALES INC., a Minnesota corporation; POLARIS INC. (f/k/a POLARIS INDUSTRIES INC.), a Minnesota corporation; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 2:21-cv-00949-KJM-DMC

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(b)(2) AND (b)(3) AND TO BE APPOINTED CLASS COUNSEL

Hon. Kimberly J. Mueller

Date: August 11, 2023
Time: 10:00 a.m.
Location: Courtroom 3

Complaint Filed: May 25, 2021

Trial Date: Not Set

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INTRODUCTION

Plaintiff Berlanga's claims are premised on a small label on the rollover protective structure ("ROPS") of Polaris side-by-side ("SxS") vehicles that few purchasers ever saw, and even fewer considered in making their purchase. Multiple surveys, individual buyer and dealer testimony, and testimony from plaintiffs in nearly identical cases establish that the vast majority of buyers never saw the label, and the handful who read it usually had other reasons for purchasing their vehicles. Myriad reasons motivate individuals to purchase a SxS vehicle—style, performance, passenger capacity, and price, among many others. That this small, generally unread label was a class-wide reason for purchase defies common sense as well as the record evidence. Berlanga's claims are dominated by differing individual facts, including whether each buyer saw the label, read it, shared his interpretation of it, and considered and relied on it in purchasing their vehicles. Plaintiff presents no class-wide evidence (such as surveys) on any of these facts. His motion thus should be denied for multiple reasons:

First, the undisputed evidence demonstrates that the overwhelming majority of buyers never saw the label. The named plaintiff in the nearly identical *Guzman* case (who is a putative class member here) admitted the label is located "in the back to where it's hidden" and "not too many people know anything about" it. (Ex. 22, Guzman Dep. at 140:3-9.) Polaris surveyed over 370 past and prospective Polaris SxS vehicle buyers, and only one mentioned the ROPS label. Many buyers purchased Polaris SxSs without any label because the vehicles either had a non-Polaris aftermarket ROPS installed or were used vehicles where the label had been removed by a prior owner. Long-time Polaris dealers also were unaware of the label. Moreover, plaintiff presents no class-wide evidence that buyers saw the label, nor any evidence to rebut Polaris's surveys and the testimony of buyers and dealers. Whether each putative class member saw and read the label—which is required to prove that the label misled them; they relied on it; it became part of the purchase bargain; it was material; and other elements of plaintiff's claims—is an individual fact question that can only be resolved buyer-by-buyer.

Second, unrebutted survey and buyer testimony establishes that individual purchasers differ on outcome-determinative facts such as whether they relied on the label (for the very few that did see it), whether it was a substantial factor in their purchase decisions, the information they considered, the reasons

they purchased, and whether they received the benefit of their bargain. Accordingly, misrepresentation, causation, materiality, reliance, and injury cannot be shown with common evidence.

Third, no Rule 23(b)(3) class can be certified because plaintiff has not proposed a valid class-wide damages model. Plaintiff's model requires a retrofit to the Polaris ROPS that supposedly complies with plaintiff's interpretation of the OSHA regulation referenced on the label. While plaintiff's putative engineering expert attempted to retrofit the ROPS of a single Polaris SxS model, he admits his retrofit does not comply with plaintiff's interpretation. A proposed retrofit that does not remedy the alleged harm for a single vehicle in the alleged class involving multiple different models provides no basis for class-wide damages. Plaintiff's experts also ignore the numerous differences among SxS models that would result in differences in any replacement or modified ROPS, as well as the large number of owners who replaced their Polaris ROPS with an aftermarket ROPS. Plaintiff and his experts do not present any evidence that the label affected the market value of any SxS, and Polaris's undisputed evidence shows that it has no impact.

Finally, plaintiff's Rule 23(b)(2) class fails because owners would not benefit from plaintiff's requested injunction seeking to have Polaris change its ROPS label. Putative class members already own SxSs and changing the label could not impact their past purchase decisions. Moreover, the vast majority of owners have no interest in the label and any change to the label would be meaningless for putative class members who have replaced the Polaris ROPS with an aftermarket ROPS.

BACKGROUND

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

Plaintiff, a convicted sex and ammunition offender who spent time in jail, seeks to represent a putative class of purchasers of various Polaris SxS vehicles sold under the brand names "RZR" and "Ranger."[1] (PM at 10; Ex. 20, Keller Dep. at 21:24-22:6.) Plaintiff's putative class includes over 150 different RZR and Ranger models, whether purchased new or used. (PM at 10; FAC ¶ 83.)

RZR and Ranger vehicles differ in their designs, specifications, and uses. (Ex. 20, Keller Dep. at

[1] Plaintiff's class also purports to include Polaris "General" off-road vehicles but expressly excludes model year 2016-2019 General vehicles because they do not have a label stating the ROPS meets the requirements of 29 C.F.R. § 1928.53. (PM at 10 n.16.) In fact, no General vehicles have such a label. (Ex. 30, Polaris's Resp. to Pls. Interrogs. Gen. Obj. No. 7.)

21:24-22:6.) The RZR is a recreational vehicle, (Ex. 6, Mattar Decl. ¶ 10; Ex. 5, Hummel Decl. ¶ 9; Ex. 7, Rice Decl. ¶ 6), though some buyers use it for ranching or farming, (Ex. 3, Hanssens Rep. ¶ 51). The Ranger, by contrast, is a utility vehicle often used for tasks on a ranch, farm, or workplace. (Ex. 6, 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/.) Only 26% of Ranger owners use their vehicles for recreation; 18% use Rangers for farming or ranching; and another 20% for property maintenance. (Ex. 28, POLGUZPROD066248; *see* Ex. 3, Hanssens Rep. ¶ 51.)

Plaintiff's class definition includes dozens of different RZR and Ranger models, ranging from two- to six-seat vehicles. (Ex. 1, *Guzman* Breen Rep. at 6-13.) Vehicles vary across features such as horsepower, vehicle weight, ground clearance, and suspension systems. (*Id*.) For example, model year ("MY") 2019 RZRs range from 45 to 168 horsepower ("HP"). (*Id.* at 7-8, 12-13.) The design, configuration, construction, and materials (*e.g.*, type of steel) used for ROPS also differ substantially among the putative class vehicles. (*See* Ex. 21, Deckard Dep. at 69:15-70:7, 71:2-10.) Buyers often make aftermarket modifications that further change their vehicles. (Ex. 7, Rice Decl. ¶¶ 10-11.)

B. A Third-Party Testing Company, Not Polaris, Tests And Certifies That Polaris ROPS Meet The Requirements Of 29 C.F.R. § 1928.53.

Each Polaris SxS comes with a ROPS—the shape, configuration, and design of which differs among vehicle models. (Ex. 21, Deckard Dep. at 69:15-70:7; 71:2-10.) Polaris, like other manufacturers, voluntarily certifies to the American National Standards Institute / Recreational Off-Highway Vehicle Association standard providing that the ROPS shall comply with the performance requirements of either OSHA 29 C.F.R. § 1928.53 or the International Organization for Standardization ("ISO") standard 3471. (Ex. 20, Keller Dep. at 14:14-15:16, 57:3-58:5.)

The stock ROPS for many[2] SxS models come with a small (4 x 1.1 inch) label disclosing the certification standard, the vehicle model, as well as the vehicle weight (stated as gross vehicle weight ("GVW")) used for the testing. (PM at 6; Ex. 31, POLGUZPROD000034.)

[2] Plaintiff's class definition only includes SxSs where the ROPS label stated that it met the requirements of 29 C.F.R. § 1928.53. (PM at 10.) Polaris certifies certain RZRs to the ISO 3471 standard: the RZR XP Turbo S (2-seat variant), RZR Pro XP Turbo S, and RZR RS1. (Ex. 30, Polaris's Suppl. Resp. to Interrog. No. 3.) Buyers of these RZRs are not in the alleged class. (*See* PM at 4 n.7.)

Polaris, like other competitor manufacturers, contracts with third party Custom Products of Litchfield, Inc. ("CP") to conduct § 1928.53 certification testing of its SxS ROPS. (Ex. 17, Wosick Dep. at 28:2-11; Ex. 21, Deckard Dep. at 18:12-18; Ex. 18, Schmitt Dep. at 107:12-16.) CP calculates the requirements for the ROPS tests using the formulas set out in § 1928.53. (Ex. 29, POLGUZPROD013171, at 90; ECF No. 95-1, Ex. 39 at 24.) Based on its engineering judgment and the OSHA regulation's text and purpose, CP uses the GVW provided by manufacturers as the tractor weight. (Ex. 18, 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, referred to as the "HP ratio," in § 1928.51 when conducting ROPS tests on SxSs. (Ex. 18, Schmitt Dep. at 113:4-17.) These provisions apply only to vehicles equipped with a PTO, a device allowing the engine to power an agricultural implement. (*Id.* at 81:22-25, 112:17-20; Ex. 2, Breen Rep. at 12-13.) Because SxSs do not have a PTO, CP uses GVW as the appropriate measure of tractor weight for testing. (Ex. 18, Schmitt Dep. at 90:11-91:19.)

Using GVW in ROPS certification testing under § 1928.53 is the accepted practice and interpretation of the OSHA standard in the off-road vehicle industry. (Ex. 2, Breen Rep. at 23.) For example, ROPS labels on the BRP Can-Am Defender HD5 and HD10, Honda Talon 1000, and models of the Honda Pioneer specify compliance with § 1928.53 using GVW. (*Id.*) CP's former Director of Testing testified that, to his knowledge, CP tested every manufacturer's SxS ROPS under § 1928.53 using GVW. (Ex. 18, Schmitt Dep. at 113:4-17.)

Plaintiff has not identified, and Polaris is not aware of, any SxS or aftermarket ROPS manufacturer that calculates the tractor weight using the HP ratio for ROPS certification. (Ex. 32, Berlanga's Resp. to Interrog. No. 21; Ex. 2, Breen Rep. at 21-23.) Plaintiff's putative engineering expert Robert Burnham and damages expert Robert Kneuper could not identify a single manufacturer that uses the HP ratio to certify a ROPS. (Ex. 26, Burnham Dep. at 116:9-17; Ex. 25, Kneuper Dep. at 95:13-96:12.) Moreover, Burnham admits that his attempt to retrofit the stock ROPS of a single RZR model to comply with plaintiff's interpretation of § 1928.53 testing by using the HP ratio was "a failure." (ECF No. 86-59, Burnham Rep.

at 20, 27; Ex. 26, Burnham Dep. at 98:1-12.)[3]

While plaintiff purports to question the safety of the Polaris ROPS (PM at 1, 9), he admits that he has never had any accident, incident, or injury involving his vehicle or its ROPS. (Ex. 24, Berlanga Dep. at 78:14-23.) Neither plaintiff nor his putative experts have presented any evidence regarding how Polaris's ROPS perform, let alone that they are unsafe or less safe than any other manufacturer's or aftermarket ROPS. The only record evidence, including testing by CP, is to the contrary.

C. Whether Buyers Read The ROPS Label Varies, As Most Do Not Even See It.

Plaintiff presents no evidence as to how many SxS buyers read the small ROPS label, and the undisputed record establishes that most do not. Plaintiff's putative experts did not conduct any surveys of actual or potential buyers. (Ex. 25, Kneuper Dep. at 30:23-31:6, 51:13-16.).

In contrast, Polaris's marketing expert surveyed 164 past Polaris SxS purchasers who are putative class members, as well as 207 prospective buyers, by presenting 360-degree images of a class vehicle they could inspect, including in close-up detail. (Ex. 3, Hanssens Rep. ¶¶ 37-46.) None of the past purchasers and only one prospective buyer mentioned the ROPS label as a purchase factor. (*Id.* ¶¶ 47-63).

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

Witnesses testified that finding the label is difficult. The plaintiff in *Guzman*, filed by the same plaintiff's counsel, admitted the label is "in the back to where it's hidden" and "not too many people know anything about" it. (Ex. 22, Guzman Dep. at 140:3-9.) Berlanga admitted that the label is on the lower portion of the ROPS behind the driver's seat and faces the rear of the vehicle. (Ex. 24, Berlanga Dep. at

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[3] Plaintiff cites *Spencer v. Honda*, 2022 WL 14863701 (E.D. Cal. Oct. 26, 2022) (PM at 7-8), a motion to dismiss ruling that did not consider any fact or expert evidence such as that presented in this case. As plaintiff concedes, the OSHA testing regulation is of a "highly technical nature." (*Id.* at 2 n.4.) It is written for engineers, not lay persons, and the *Spencer* court did not have the benefit of any expert evidence regarding the regulation's interpretation. Plaintiff's claim that Polaris "has lied" to its customers and regulator is thus baseless. (*Id.* at 2.) Moreover, regardless of how the regulation is interpreted, plaintiff's claims are overwhelmingly predominated by individual issues. (*See* Section I.)

119:9-17; Ex. 33 (photo of Berlanga's SxS with label circled).) SxS dealers and buyers testified the label is not easy to see. (Ex. 6, Mattar Decl. ¶ 14; Ex. 13, Milligan Decl. ¶ 18.)

Even when a buyer claims to have seen the label, what they viewed varies among individuals. Guzman testified he saw only the words "OSHA" and "Polaris" on the label. (Ex. 22, Guzman Dep. at 28:1-4, 141:7-10, 141:13-142:13, 148:14-20.) A different plaintiff (Albright) read a "portion" of the label and did not read the language regarding the "Test GVW." (Ex. 23, Albright Dep. at 167:9-13, 171:2-172:16.) Berlanga testified that he read the entire label, including the language regarding "Test GVW." (Ex. 24, Berlanga Dep. at 115:5-10, 122:6-11.)

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

Plaintiff presents no evidence of how many buyers considered or relied on the label, or would not have bought a SxS without it. (Ex. 25, Kneuper Dep. at 90:4-9, 91:5-8, 92:5-10, 93:16-22.) Most buyers never saw it. (*Supra* Background.C.) Purchasers testified they did not consider, much less rely on, the label. (Ex. 8, Andersen Decl. ¶ 13; Ex. 10, DeMenge Decl. ¶¶ 11, 20; Ex. 11, Fisk Decl. ¶ 12; Ex. 12, Giannoulias Decl. ¶ 11; Ex. 6, Mattar Decl. ¶ 15; Ex. 13, Milligan Decl. ¶ 18; Ex. 14, Score Decl. ¶ 11.) Even when a buyer noticed the label, it was not a purchase factor. (Ex. 15, Sieberg Decl. ¶ 13; Ex. 9, Carnibucci Decl. ¶ 11; Ex. 16, Turincio Decl. ¶ 13.) Owners who plan to buy another SxS testified the label will not play any role in those future purchases. (Ex. 15, Sieberg Decl. ¶ 16.)

Dealers confirmed that no customers asked about the label, or whether a vehicle's ROPS is certified to any particular standard, during purchase negotiations. (Ex. 6, Mattar Decl. ¶¶ 15, 20-21; Ex. 5, Hummel Decl. ¶¶ 14, 18-19; Ex. 4, Langer Rep. ¶¶ 41, 57; Ex. 2, Breen Rep. at 11-12.) Moreover, if the ROPS language was a reason for purchase, it would feature prominently in social media, user forums, and blogs where buyers discuss their purchase decisions. (Ex. 3, Hanssens Rep. ¶¶ 64-76.) But such online discussions contain virtually no mention of the ROPS label. (*Id.*) Polaris's marketing materials also do not mention the ROPS label or its language. (*Id.* ¶¶ 100, 109.)

E. Buyers Considered Differing Information Before Purchase.

Plaintiff presents no evidence that buyers considered common sources of information. Surveys show that putative class members considered differing information sources in deciding whether to buy a Polaris SxS vehicle: 46% discussed the purchase decision with the dealer, 32% discussed with friends or

family, 37% had experience driving the SxS, and 33% reviewed online forums. (Ex. 3, Hanssens Rep. ¶¶ 58-60.) Only 45% reviewed materials from Polaris. (*Id.*)

Testimony from Polaris SxS buyers, including putative class members, describes the differing information sources they considered. Many conducted online research, some spoke with friends, some compared vehicles, and a few test drove or rented SxSs. Some buyers considered only a few sources and types of information, while others spent up to a year considering myriad sources before purchasing their SxSs.[4] Berlanga was unaware of the ROPS label before arriving at the dealership, and states he only read it because a salesman allegedly led him to it. (Ex. 24, Berlanga Dep. at 114:18-22, 116:23-117:23.)

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

Surveys show a variety of reasons why purchasers bought their SxSs. For RZR owners, the most popular reasons were seating and cargo capacity (62% of buyers); style, color, and design (60%); weight and size (59%); and wheels and tires (49%). (Ex. 3, Hanssens Rep. ¶¶ 48-50.). For Ranger owners, popular reasons were seating and cargo capacity (61%); brand and model (44%); agility, steering, and suspension (41%); and quality, reliability, and durability (39%). (*Id.*) Only 11% of RZR owners and 9% of Ranger owners considered any labels, with none considering the ROPS label. (*Id.*) Prior surveys by Polaris found similar results, with the most frequently identified features including the Polaris brand, vehicle performance, vehicle quality, and price. (*Id.* ¶¶ 79-82.)

Buyer testimony confirms these 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, vehicle storage space, ground clearance, ease of operation, and other factors. Individual buyers have differing combinations of factors they considered important to their purchase decisions.[5]

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[4] Ex. 8, Andersen Decl. ¶ 8 (online research, publications, uncle who owned RZR, and he had rented a RZR); Ex. 11, Fisk Decl. ¶ 7 (riding friend's Polaris RZR); Ex. 16, Turincio Decl. ¶ 7 (spent year researching and comparing ORVs, test drove ORVS, online research, and watched ORV YouTube videos); *see* Ex. 9, Carnibucci Decl. ¶¶ 7-8; Ex. 10, DeMenge Decl. ¶¶ 7-8, 16; Ex. 12, Giannoulias Decl. ¶ 7; Ex. 13, Milligan Decl. ¶ 15; Ex. 14, Score Decl. ¶ 7; Ex. 15, Sieberg Decl. ¶ 8.

[5] Ex. 12, Giannoulias Decl. ¶¶ 8-9, 12 (more familiar with Polaris, Polaris vehicles handle rollovers better, RZR fits in trailer, liked that RZR could be customized, has a navigation system and suspension system, and overall quality of RZR); Ex. 13, Milligan Decl. ¶ 9 (for MY 2018 RZR XP 4 Turbo, active suspension system, styling, power, setup, ride command, user friendliness, space to transport dogs); Ex. 14, Score Decl. ¶¶ 6, 8-9, 12 (true desert vehicle with high ground clearance, performance, price); *see* Ex. 8,

Polaris dealers testified that customers had different reasons for buying SxS vehicles. Depending on their personal preferences, customers generally cared about some combination of price, performance, horsepower, suspension, clearance, tires, towing capacity, color, speed, and accessories. (Ex. 6, Mattar Decl. ¶¶ 12-13, 21; Ex. 5, Hummel Decl. ¶¶ 11-12; Ex. 7, Rice Decl. ¶¶ 7-8.)

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

Some RZR owners replace the Polaris ROPS on their vehicles with an aftermarket ROPS. (ECF No. 86-28, Ex. 22; Ex. 4, Langer Rep. ¶ 94; Ex. 19, Boone Dep. at 43:4-22, 62:8-21, 144:3-6.) They do so for different and typically aesthetic reasons, such as wanting a particular style, color, or sleeker look. (Ex. 4, Langer Rep. ¶ 94; Ex. 6, Mattar Decl. ¶ 19; Ex. 5, Hummel Decl. ¶ 15.)

Approximately 62% of surveyed buyers replaced the Polaris stock ROPS on their SxS with an aftermarket ROPS. (Ex. 3, Hanssens Rep. ¶¶ 56-57; Ex. 8, Andersen Decl. ¶ 11; Ex. 11, Fisk Decl. ¶ 11.) Some purchasers bought Polaris SxSs where the dealer had replaced the stock ROPS with an aftermarket ROPS. (Ex. 3, Hanssens Rep. ¶¶ 56-57; *see* Ex. 13, Milligan Decl. ¶ 8.) Others ordered an aftermarket ROPS at purchase that was installed before, or shortly after, they took delivery of the vehicle. (Ex. 8, Andersen Decl. ¶ 11; Ex. 11, Fisk Decl. ¶ 11.)

Aftermarket ROPS manufacturers build ROPS that can be outfitted on certain RZRs but which do not include any ROPS label. (Ex. 3, Hanssens Rep. ¶ 56.) Buyers purchase these aftermarket ROPS even though they do not include a label certifying compliance with § 1928.53 or any other standard. (Ex. 8, Andersen Decl. ¶ 14; Ex. 11, Fisk Decl. ¶ 13; Ex. 13, Milligan Decl. ¶ 8; *see* Ex. 6, Mattar Decl. ¶ 18; Ex. 4, Langer Rep. ¶ 94.)

H. Polaris SxS Prices Are Individually Negotiated And Unaffected By The Label.

Polaris sets a Manufacturer's Suggested Retail Price ("MSRP") for each SxS. (Ex. 27, Miriovsky Decl. ¶ 4.) Buyers individually negotiate with dealers such that prices differ from MSRP by unique amounts. (Ex. 4, Langer Rep. ¶¶ 54-56; Ex. 6, Mattar Decl. ¶ 22; Ex. 27, Miriovsky Decl. ¶ 7.) What a buyer pays depends on rebates, dealer inventory levels, down payments, financing terms, trade-ins, accessory purchases, and dealer negotiations. (Ex. 4, Langer Rep. ¶ 54.)

Andersen Decl. ¶ 12; Ex. 9, Carnibucci Decl. ¶ 9; Ex. 10, DeMenge Decl. ¶¶ 9, 17-18; Ex. 11, Fisk Decl. ¶ 8; Ex. 15, Sieberg Decl. ¶¶ 10, 14; Ex. 16, Turincio Decl. ¶¶ 8, 14.

There is no evidence that the ROPS label affects Polaris SxS prices. (Ex. 4, Langer Rep. ¶¶ 12-15, 22-44.) Plaintiff's damages expert Robert Kneuper did not analyze whether the label affected Polaris SxS prices or buyers' purchase decisions. (Ex. 25, Kneuper Dep. at 146:13-148:11; *see id.* 90:4-93:22.) Polaris does not factor in the label when setting the MSRP. (Ex. 27, Miriovsky Decl. ¶ 6; *see* Ex. 4, Langer Rep. ¶¶ 55-57.) Neither Polaris nor dealerships use the label's language in their marketing. (Ex. 3, Hanssens Rep. ¶¶ 97-107; Ex. 4, Langer Rep. ¶¶ 53-67.) Polaris dealers generally do not mention the label during the sales process or price negotiations. (Ex. 6, Mattar Decl. ¶ 15; Ex. 5, Hummel Decl. ¶¶ 19-20; Ex. 7, Rice Decl. ¶¶ 13-14; Ex. 4, Langer Rep. ¶¶ 41.) Buyers generally are unaware of the label. (*Supra* Background.C-D; Ex. 4, Langer Rep. ¶¶ 42-44.)

Market data confirms that the ROPS label does not affect vehicle prices. In 2017, Polaris changed the ROPS label of MY 2017 Generals from stating they met the OSHA requirements of 29 C.F.R. § 1928.53 to stating they met the ISO 3471 standard. (Ex. 4, Langer Rep. ¶¶ 22-44.) This change had no impact on MY 2017 General prices. (*Id.* ¶¶ 36-44.)

Finally, even if the ROPS label might have affected the price of a particular SxS purchase, any such effect would differ for each buyer. (Ex. 4, Langer Rep. ¶¶ 45-68; Ex. 3, Hanssens Rep. ¶¶ 114-17.) 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 putative class vehicles. (*Id.*)

I. Procedural History.

This case was originally filed by five plaintiffs, with the two California plaintiffs (Berlanga and Hellman) bringing claims under the UCL, FAL, and CLRA. This Court granted dismissal of (1) the non-California plaintiffs' claims, and (2) all equitable restitution claims. Dkt. 36 at 9-10. Hellman later admitted that (contrary to the complaint's allegations, *see* FAC ¶¶ 51-54) his RZR ROPS had an ISO—not OSHA—label, and thus he voluntarily dismissed his claims with prejudice. Dkt. 52. The only claims remaining are Berlanga's claims for damages (CLRA) and for injunctive relief (UCL, FAL, CLRA).

In 2019, prior to filing this case, the same plaintiffs' counsel filed a nearly identical class action, *Guzman v. Polaris Indus. Inc.*, No. 8:19-cv-01543-FLA (C.D. Cal.). The *Guzman* court granted summary judgment for Polaris, but the Ninth Circuit reversed based on an individual fact dispute as to whether plaintiff Guzman had read the ROPS label, and remanded his claims. Class certification has been fully

briefed and currently is pending in *Guzman*. Guzman's proposed class includes Berlanga, who bought his RZR vehicle in May 2019, and Berlanga's proposed class includes Guzman, who bought his RZR vehicle in November 2018.

ARGUMENT

A plaintiff seeking 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).[6] "[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 court's "rigorous analysis" requires considering the merits and resolving any factual or expert disputes where necessary to determine whether Rule 23's requirements are satisfied. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981-84 (9th Cir. 2011).

For Rule 23(b)(3) certification, plaintiff must prove "that questions of law or fact common to class members predominate over any questions affecting only individual members." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member.'" *Id.* Plaintiff also seeks Rule 23(b)(2) certification, which requires, among other elements, "that final injunctive relief … is appropriate respecting the class as a whole." *E.g.*, *Victorino v. FCA US LLC*, 326 F.R.D. 282, 290 (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 FACTUAL DIFFERENCES AMONG PUTATIVE CLASS MEMBERS PREDOMINATE, BARRING A RULE 23(b)(3) CLASS.

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

The "UCL, FAL, and CLRA have independent requirements for standing, which mandate allegations of actual reliance" on any alleged misrepresentation. *Guzman v. Polaris Indus., Inc.*, 2020 WL 2477684, at *3 (C.D. Cal. Feb. 13, 2020) (quoting *Stewart v. Electrolux Home Prod., Inc.*, 2018 WL 1784273, at *4 (E.D. Cal. Apr. 13, 2018)); *see Block v. eBay, Inc.*, 747 F.3d 1135, 1140 (9th

[6] All citations omit internal quotation marks and other modifications unless otherwise indicated.

Cir. 2014); *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793-94 (9th Cir. 2012).

Plaintiff's claims also require a "causal connection" between Polaris's conduct and buyers' supposed economic injury, which "is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law." *Williams v. Bank of 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).

The statutes further 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 plaintiffs demonstrate that reliance and causation are subject to common proof." *In re 5-Hour Energy Mktg. & Sales Pracs. Litig.*, 2017 WL 2559615, at *2, 6 (C.D. Cal. Jun 7, 2017). Plaintiff fails this requirement because the facts regarding these elements, and materiality, vary for each buyer.

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

If buyers have not read the label, they cannot have relied on it or considered it material to their purchase. A nearly identical complaint was dismissed where "Plaintiffs never allege that *they* read and relied upon the sticker." *Guzman*, 2020 WL 2477684, at *3 (collecting cases).)[7] Nor could an unread label have caused them to purchase a Polaris SxS or incur any alleged economic injuries. *Id.*

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) ("[C]ommon issue[s] of fact do not predominate … because the class would include subscribers who never saw DIRECTV advertisements or representations"); *Bennett v. N. Am. Bancard, LLC*, 2022 WL 1667045, at *9-11 (S.D. Cal. May 25, 2022) (plaintiff "has not established that every, or even most,

[7] After dismissal, the two *Guzman* plaintiffs amended their complaint to allege they both had read and relied on the label, and that case's subsequent history is discussed in Background.I.

class member was exposed to the same alleged misrepresentation"); *Singh v. Google LLC*, 2022 WL 94985, at *8 (N.D. Cal. Jan. 10, 2022) ("Without exposure to the alleged misstatements, a putative class member could not rely on those misstatements …."); *Dunn v. Costco Wholesale Corp.*, 2021 WL 4205620, at *5 (C.D. Cal. July 30, 2021) (individual questions predominated where "proposed class includes members who did not see or rely on the … representation on the packaging in deciding to purchase the Product"); *Moheb v. Nutramax Labs. Inc.*, 2012 WL 6951904, at *4 (C.D. Cal. Sept. 4, 2012) (alleged misrepresentation was not a common issue "because some of the members of the Class never saw or relied upon Defendant's representation").[8]

Surveys show that the overwhelming majority of actual and potential SxS buyers do 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.*) Even the few buyers who may have seen the label vary in what words they saw. (*Id.*) Plaintiff has submitted no evidence that absent putative class members saw and read the label or, even if they did, what words they read.

Many buyers could not possibly have read the ROPS label because it had been removed from the Polaris SxS before purchase. (*Supra* Background.G.) For some SxSs, dealers replace the stock ROPS with an aftermarket ROPS—which do not have any label—before sale. (Ex. 13, Milligan Decl. ¶ 8.) Plaintiff's putative class also includes buyers of used SxSs, which may have had the ROPS label removed. (Ex. 11, Fisk Decl. ¶ 12; *see* Ex. 13, Milligan Decl. ¶ 12.) Individual evidence would be necessary to determine whether each SxS even had a ROPS label that the buyer could have read.

Determining whether each buyer saw the label and what portions (if any) they read before buying will require mini-trials with individual evidence, such as testimony from each buyer, testimony from anyone accompanying the buyer during the purchase, and evidence from the dealership (or other seller) from whom the buyer purchased their Polaris SxS. Such differences create individual issues, as whether a buyer can show causation, reliance, and other elements depends on whether they saw the label and how

[8] *Sotelo v. MediaNews Grp.*, 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).

much of it they read. This fundamental, outcome-determinative individual fact question depends on uncommon proof and predominates over any supposed common issues.

While plaintiff asserts buyers were "exposed" to the label (PM at 2, 17, 19), 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), *aff'd*, 720 F. App'x 537 (9th Cir. 2018) (affirming summary judgment where plaintiff received and was exposed to invoice including disputed fee, but did not notice fee before paying the invoice); *see Woolley v. Ygrene Energy Fund, Inc.*, 2021 WL 4690971, at *2 (9th Cir. Oct. 7, 2021) (affirming certification denial and criticizing "Plaintiffs' flawed assumption … that class-wide exposure to a [misrepresentation] equates to a class-wide showing of actual reliance on the alleged misrepresentations …").[9] The term "exposed" in the case law means that a buyer must have "heard, read, or saw" the alleged misrepresentation. *Stewart*, 2018 WL 1784273, at *5. A person who "receives" or is "exposed" to a representation but does not become aware of its contents cannot be misled by it, or consider it, in purchasing a product.

Finally, plaintiff's assertion that the label is "on the face of the product" (PM at 1-2, 16-17) cannot overcome the record evidence. As the *Guzman* plaintiff admitted, the label is "in the back [of the ROPS] where it's hidden" and "not too many people know anything about" it. (Ex. 22, Guzman Dep. at 140:3-9.) The label on Berlanga's SxS is on the lower portion of the ROPS behind the driver's seat and faces toward the rear of the vehicle. (Ex. 24, Berlanga Dep. at 119:9-17.) Buyers and even long-time dealers testified the label was difficult to find and they were unaware of it. (*Supra* Background.C.) Surveys demonstrated that the vast majority of buyers do not see the label. (*Id.*) And many putative class members bought

[9] *Simon v. SeaWorld Parks & Entm't, Inc.*, 2022 WL 1594338, at *3 (S.D. Cal. May 19, 2022) ("Actual reliance in the context of CLRA, UCL and FAL claims requires a plaintiff allege that she (1) was exposed to (e.g., heard, read or saw) a defendant's representation …."); *In re iPhone Application Litig.*, 6 F. Supp. 3d 1004, 1022-23 (N.D. Cal. 2013) (receiving a representation cannot state a claim where plaintiffs did not read or rely on it); *Doe v. SuccessfulMatch.com*, 70 F. Supp. 3d 1066, 1082 (N.D. Cal. 2014); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1220 (N.D. Cal. 2014) ("To make the reliance showing, this Court has consistently held that plaintiffs in misrepresentation cases must allege that they actually read the challenged representations.") (collecting cases); *Rothman v. Equinox Holdings, Inc.*, 2021 WL 124682, at *5-6 (C.D. Cal Jan. 13, 2021); *Morizur v. Seaworld Parks & Entm't*, 2020 WL 6044043, at *16 (N.D. Cal. Oct. 13, 2020); *Stewart*, 2018 WL 1784273, at *5; *Hall v. Sea World Entm't, Inc.*, 2015 WL 9659911, at *5 (S.D. Cal. Dec. 23, 2015); *Phillips v. Apple Inc.*, 2016 WL 1579693, at *7 (N.D. Cal. Apr. 19, 2016); *Allen v. Verizon Cal., Inc.*, 2010 WL 11583099, at *6 (C.D. Cal. Aug. 12, 2010).

vehicles without any label. (*Supra* Background.G.) Thus, this is not a case where all purchasers likely saw a representation on a product when they purchased it, but instead requires individual evidence to find the handful of buyers who even saw and read the label.

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

Reliance, causation, and materiality are individual fact issues for each putative class member. (*Supra* Background.C.) Surveys found no actual buyers, and only one potential buyer, who might have considered the ROPS label. Nine other Polaris SxS buyers testified that the label played no role in their purchases. Many consumers replaced the stock ROPS with aftermarket ROPS that do not have any labels, demonstrating they do not care about the label. (*Supra* Background.G.) Plaintiff has not presented any class-wide evidence to show that buyers saw, read, or relied on the label in purchasing their SxSs.[10] The undisputed evidence is that the vast majority of buyers did not see the label, they could not have relied on it or considered it material, and it cannot have caused their purchases.

Even for buyers who claim to have considered the label, they vary in their combinations of reasons for buying their SxSs, including performance, cargo capacity, style and color, pricing, steering, suspension, among other reasons. (*Supra* Background.F.) Each buyer weighs their purchase reasons differently, with some being more important than others. Individual evidence is needed to determine if the label was a "substantial factor" in each SxS purchase, as required for reliance and causation. *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1083 (N.D. Cal. 2017); *see Woolley*, 2021 WL 4690971, at *1-2 (affirming denial of certification of UCL claims based on allegedly misleading contract terms: "Where there is no indication that awareness of the written contract terms necessarily did or would have impacted Plaintiffs' decision to enter into the contract, Plaintiffs cannot establish actual reliance on a class-wide basis."); *Reynante v. Toyota Motor Sales USA, Inc.*, 2018 WL 329569, at *4-5 (Cal. App. Ct. Jan. 9, 2018)[11] ("[E]ven if a customer was misled by the fuel calculator, this does not necessarily mean that the

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[10] Plaintiff's lack of class-wide evidence undermines his reliance on cases whose results depend on surveys or other class-wide evidence to support certification. *Compare Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 753 (7th Cir. 2014) (reversing denial of class certification where plaintiff presented "[n]umerous expert surveys" to show consumers were misled by product advertising).

[11] Federal courts "may consider unpublished state decisions, even though such opinions have no precedential value." *Emp'rs Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003); *Napear v. Bonneville Int'l Corp.*, 2023 WL 3025258, at *8 n.4 (E.D. Cal. Apr. 20, 2023).

calculation caused the customer to purchase the vehicle.").

Courts deny class certification where the evidence shows that some buyers did not rely on the alleged misrepresentation and had other reasons for buying the product. *E.g.*, *Woolley*, 2021 WL 4690971, at *2 ("[T]he individual issue of each class member's reliance on that purported misrepresentation … will dominate the issue of the actionability of that misrepresentation …."); *Reynante*, 2018 WL 329569, at *4-5 ("[D]efendants presented evidence that the materiality of, or reliance upon, the fuel calculator's [allegedly false] calculation would vary from consumer to consumer."); *Dunn*, 2021 WL 4205620, at *5 (survey "showed that only two percent of purchasers … thought that" the alleged misrepresentation "was an 'important factor' in deciding to purchase the Product"); *5-Hour Energy*, 2017 WL 2559615, at *7-8 ("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"); *Shanks*, 2019 WL 4398506, at *4, 7.[12] The evidence here presents an even more compelling case for denying certification because the vast majority of buyers did not consider the label, and thus could not have relied on it, found it material, or made their purchase because of it.

The lack of any class-wide impact on Polaris SxSs's real-world market prices confirms that the label did not affect buyers' SxS purchases. 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* plaintiff's 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 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

[12] *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 *8 (C.D. Cal. June 23, 2016); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 576-77 (C.D. Cal. 2014); *Jones*, 2014 WL 2702726, at *14-16; *Johnson v. Harley-Davidson Motor Co. 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).

had other, non-health-related reasons for purchasing Lights." 522 F.3d at 226; *see id.* at 227; *see also Dunn*, 2021 WL 4205620, at *5 (denying certification where defendant removed representation from product without experiencing a substantial decrease in sales, showing many consumers bought it regardless of the label).

Plaintiff presented no evidence of a price impact from the ROPS label. The undisputed and only evidence is that the label had no impact on prices. (*Supra* Background. H.) This "compelling evidence" reinforces the surveys and testimony demonstrating that the vast majority of buyers' purchases were unaffected by the label, precluding class-wide proof of causation, materiality, or reliance.

3. Each Buyer's Understanding 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 proof." *5-Hour Energy*, 2017 WL 2559615, at *8 (collecting cases).[13] Plaintiff's complaint is premised on interpreting § 1928.53 as requiring SxSs to be tested using the HP ratio. But he presented no evidence that any buyer shares that interpretation. Even plaintiff has not adopted it; he never read and had no understanding of § 1928.53. (Ex. 24, Berlanga Dep. at 118:16-119:5.) Nor has plaintiff presented any survey or other evidence establishing that buyers have a common understanding of the label; instead, Berlanga admits that the label's meaning "is not something a typical consumer would ever have reason to know about because of its highly technical nature." (PM at 2 n.4.) As plaintiff bears the burden of proof, that failure is sufficient to deny his 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; no common proof "that each class member had the same understanding of the product labeling"); *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at

[13] *See Townsend*, 303 F. Supp. 3d at 1046 (no class-wide materiality or reliance where representation had no common meaning or controlling definition); *Shanks*, 2019 WL 4398506, at *4 ("scientific terms are unlikely to be understood by an average consumer," let alone a factor in purchasing the product); *Vizcarra v. Unilever U.S., Inc*., 339 F.R.D. 530, 547 (N.D. Cal. 2021); *In re Seagate Tech. LLC Litig.*, 2019 WL 282369, at *9 (N.D. Cal. Jan. 22, 2019); *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 747-48 (7th Cir. 2008); *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).

*14-16 (N.D. Cal. June 13, 2014).

4. No Inference Of Reliance Or Materiality Applies And, Regardless, The Record Evidence Rebuts Any Such Inference.

While plaintiff contends a material misrepresentation can provide an "inference" of reliance (PM at 17), myriad cases reject any such inference and deny certification of misrepresentation claims where the record establishes individual factual differences. ***First***, no inference arises where whether each putative class member read an alleged misrepresentation is an individual question of fact:

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

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).[14] Whether each buyer read the ROPS label (and exactly what they read) is an individual issue, as most did not read it.

Second, no inference or presumption can arise where the record evidence establishes, as here, that buyers had different reasons for their purchases. *E.g.*, *Reynante*, 2018 WL 329569, at *5 (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 a tub's "wide array of features," 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) ("[W]hile 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

[14] *See Mirkin v. Wasserman*, 858 P.2d 568, 574 (Cal. 1993) (precedents about 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).

excessive heat material.").[15] Putative class members had divergent reasons for their purchases. (*Supra* Background.F.)

Third, courts reject an inference and deny certification where purchasers considered information from third parties. *E.g.*, *Pierce-Nunes*, 2016 WL 5920345, at *8 (materiality required individualized inquiries as 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"); *Dunn*, 2021 WL 4205620, at *5 ("some of the class members may have relied on the recommendation of friends or family or may have sampled and enjoyed the" product instead of relying on alleged misrepresentation); *Howard v. GC Servs., Inc.*, 2015 WL 5163328, at *9-10 (Cal. App. Ct. Sept. 3, 2015); *Moheb*, 2012 WL 6951904, at *7. Buyers relied on diverse information sources, with many not relying on any Polaris statements. (*Supra* Background.E.)

Fourth, even if an inference could exist, it is rebutted by the evidence here. Plaintiff cites *Stearns v. Ticketmaster Corp.* (PM at 17), which holds that "[i]f the misrepresentation … 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); *see Morizur v. Seaworld Parks & Entm't, Inc.*, 2020 WL 6044043, at *15 (N.D. Cal. Oct. 13, 2020) (under the UCL and CLRA, the "presumption or inference of reliance can be rebutted"); *Krueger v. Wyeth, Inc.*, 2016 WL 3981125, at *8 (S.D. Cal. Apr. 4, 2016) (same). Indeed, *Stearns* affirmed denial of certification due to the "myriad reasons that someone who was not misled" might sign up for the defendant's service. *Id.* at 1024.[16]

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[15] *See In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 98-99 (Cal. App. Ct. 2009) (denying certification where some plaintiffs would use defendant's drug if it were still available, patients received information from a variety of sources, and each consumer had their 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.").

[16] 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, not whether certification is improper 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. Ct. App. 2012); *Campion*, 272 F.R.D. at 535; *Jones*, 2014 WL 2702726, at *14; *Hobbs v. Brother*

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 the vast majority of buyers did not consider the ROPS label in purchasing their SxSs. Accordingly, the record 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). That holding applies equally to CLRA and FAL 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). Courts deny class certification where, as in this case, the record establishes individual differences regarding the alleged fact of injury and receipt of 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").[17]

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 with third-party aftermarket ROPS already installed. (*E.g.*, Ex. 13, Milligan Decl. ¶ 8.) Others purchased used SxSs where the label

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Int'l Corp., 2016 WL 4734394, *3-6 & n.1 (C.D. Cal. Sept. 8, 2016). Moreover, *Tobacco II* can apply only in the context of a massive advertising campaign, and here neither Polaris nor its dealers used the ROPS label in advertising. *E.g.*, *Singh*, 2022 WL 94985, at *11.

[17] *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 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).

(or the Polaris ROPS itself) may have been removed by the prior owner. Still other buyers installed third-party aftermarket ROPS at or immediately after purchase, typically for aesthetic reasons. (*E.g.*, Ex. 8, Andersen Decl. ¶ 11.) Such buyers likewise could not consider the label on the Polaris stock ROPS to be any part of their bargains.

Whether buyers are satisfied with their SxSs and consider them to have met their expectations depends on individual evidence, such as each buyer's testimony, SxS use, and social media claims about their SxS. Plaintiff admits class certification depends on what "consumers think" or "were led to believe" about the Polaris ROPS (PM at 1, 12, 16), which can only be determined through individual evidence and testimony from buyers and dealers.

Finally, whether each buyer has any alleged economic loss is an individual issue. Plaintiff has no evidence showing the label had a common impact on prices across thousands of different SxS purchases, or that any (much less all) buyers experienced an economic injury. Instead, the record shows that Polaris SxS prices did not change after Polaris switched from OSHA to ISO labels on the MY 2017 General. (*Supra* Background.H.) Evidence such as heterogenous market factors confirms that whether the label affected the price each buyer paid requires individual inquiries. (*Id.*)

C. Differences In SxS Use Predominate For CLRA Claims.

CLRA claims are limited to "[a]ny consumer who suffers any damage 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 Zepeda v. PayPal, Inc.*, 777 F. Supp. 2d 1215, 1222 (N.D. Cal. 2011).

Particularly for Rangers, buyers differ in whether they use their SxSs for personal, family, or household purposes, or for farming, ranching, or other business. (*Supra* Background.A.) Determining each SxS buyer's purpose requires individual evidence, including how the buyer uses the vehicle, their discussions with the dealership or other seller, 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).

II. PLAINTIFF HAS NOT PRESENTED A PROPER RULE 23(b)(3) DAMAGES MODEL.

"[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). "[C]ourts must conduct a 'rigorous analysis' to determine whether that is so." *Id.* (quoting *Dukes*, 564 U.S. at 351). Here, certification is impermissible because plaintiff's proposed damages are untethered to his liability theory, violating *Comcast*. Plaintiff's liability theory is that the label is false because the Polaris ROPS as tested allegedly violate 29 C.F.R. § 1928.53, but his proposed damages model is based on a "retrofit" for a single RZR vehicle model that does not comply with plaintiff's own interpretation of § 1928.53.[18]

Plaintiff's purported class-wide damages model requires a ROPS that complies with plaintiff's interpretation of § 1928.53. (Ex. 25, Kneuper Dep. at 129:5-20, 131:4-11.) Plaintiff's putative engineering expert Burnham attempted to design a bolt-on retrofit design for a single RZR 570 model. But Burnham admits his retrofit design does not comply with plaintiff's interpretation of § 1928.53 and was "a failure." (ECF No. 86-59, Burnham Rep. at 20, 27; Ex. 26, Burnham Dep. at 98:1-12.) Plaintiff thus has no evidence of a ROPS retrofit design (or the cost to install such a retrofit) that complies with his interpretation of the regulation and his liability theory, violating *Comcast*. While Burnham asserts that such a design is possible, this is pure speculation. Burnham had plenty of time to try to design a ROPS retrofit to meet plaintiff's interpretation, but failed to do so.

Miller v. Fuhu Inc., 2015 WL 7776794, at *20 (C.D. Cal. Dec. 1, 2015), is instructive. The *Miller* plaintiff proposed that class-wide damages could be calculated based on the cost-to-repair allegedly defective charging systems in the defendant's computer tablets. The court rejected this proposal and denied class certification 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, Berlanga has presented no evidence of a ROPS retrofit that complies with plaintiff's interpretation of § 1928.53 for any vehicle, let alone all vehicles in the alleged class. Burnham attempted to retrofit a *single* RZR 570 model and failed; plaintiff's putative class includes over 150 different models of RZRs and Rangers. These vary widely in their ROPS design, horsepower, seating, and other factors, all of which affect whether a proposed ROPS retrofit would comply with plaintiff's interpretation of

[18] *See* Polaris's Motion to Exclude the Opinions of Plaintiff's Experts Robert Kneuper and Robert Burnham Under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharms., Inc*. Dkt. 89.

§ 1928.53. Burnham conceded there are differences among the alleged class vehicles and their ROPS, but he did not analyze them and thus "can't comment on those differences." (Ex. 26, Burnham Dep. at 11:13-22, 26:18-27:3.) Neither can Kneuper. (Ex. 25, Kneuper Dep. at 122:16-25, 149:2-17.) Finally, retrofit costs depend on labor rates; Burnham admitted these vary but had "no idea what those [labor rate] changes would be." (Ex. 26, Burnham Dep. at 114:13-115:6; *see* Ex. 25, Kneuper Dep. at 114:14-115:11, 116:11-25.) Plaintiff thus lacks any evidence of the cost to retrofit the various ROPS on the different vehicle models in the alleged class, or whether retrofits are even possible. (Ex. 25, Kneuper Dep. at 108:24-109:5, 119:5-120:10, 122:3-123:7, 125:11-21, 149:2-150:10.) Without an appropriate damages model for all of the vehicles at issue, no class can be certified under *Comcast*.

Moreover, many buyers have already replaced their stock ROPS with an aftermarket product. (*Supra* Background.G.) Plaintiff provides no explanation of how or why a cost-of-repair measure based on modifying the stock Polaris ROPS on a single RZR model would be an appropriate measure of damages for buyers with a non-Polaris aftermarket ROPS. SxS owners with aftermarket ROPS would receive no benefit from modifications to a stock ROPS they no longer own or use.

Finally, *Nguyen v. Nissan North America, Inc.*, 932 F.3d 811 (9th Cir. 2019), cannot save plaintiff's damages theory. *Nguyen* involved an alleged vehicle design defect, whereas plaintiff disclaims any design defect theory. (PM at 1 n.2.) The *Nguyen* plaintiff proposed a viable repair and a cost-of-repair damages model consistent with his liability claim; here, plaintiff's single-vehicle retrofit failed and his damages model contradicts his liability claim. *Nguyen* also did not involve dozens of different models that would require separate retrofits and cost-of-repair calculations that neither Berlanga nor his experts have performed. Nothing in *Nguyen* supports plaintiff's fundamentally flawed class-wide damages model.

III. THE NAMED PLAINTIFF IS ATYPICAL.

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).[19] Even if Berlanga could prove his

[19] *See 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.,*

own claims based on his individual facts (which Polaris disputes), that would 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 that did not have the ROPS label or with the intent of installing an aftermarket ROPS; or have other differing, outcome-determinative characteristics.

Berlanga also is atypical in asserting he considered the ROPS label in buying his RZR, as most buyers did not notice, consider, or read the label. *E.g.*, *Singh*, 2022 WL 94985, at *8 (plaintiff's injury was "atypical of members of the putative class who did not view the alleged misstatements"); *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."); *Dunn*, 2021 WL 4205620, at *5; *Fine v. ConAgra Foods, Inc.*, 2010 WL 3632469, at *3-4 (C.D. Cal. Aug. 26, 2010).[20]

IV. A RULE 23(b)(3) CLASS IS NEITHER SUPERIOR NOR MANAGEABLE.

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 v. Accufix Research Institute, Inc*., 253 F.3d 1180, 1190-92 (9th Cir. 2001).

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 Reynante*, 2018 WL 329569, at *5. Here, each buyer would have to litigate whether they read the ROPS label, relied on it, would have purchased the SxS regardless of the label, and other individual issues. *See 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).

Second, the "extent and nature" of the litigation, Fed. R. Civ. P. 23(b)(3)(B), which primarily considers judicial economy and a multiplicity of suits, weighs against certification. *Zinser*, 253 F.3d at 1191. In *Zinser*, there were nine separate lawsuits pending that alleged the defendant's pacemaker leads

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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).

[20] *Moheb*, 2012 WL 6951904, *5 (plaintiff "would not be an adequate representative for those members of the Class that did derive benefit from" the 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").

were defective, yet the Ninth Circuit held that this fact did not support a class action. *Id.* That holding applies all the stronger here, as there are only two other pending economic loss cases alleging Polaris miscalculated compliance with § 1928.53 by using the GVW, both brought by the same plaintiff's counsel.

Third, there is no desirability to concentrating the litigation in this forum. *Zinser* held this factor weighed against certification where plaintiffs, witnesses, and evidence were found across the country. *Id.* Likewise here, buyers are scattered across the state, and defense witnesses largely are in Minnesota (Polaris) or Michigan (Custom Products). *See id.* at 1191-92.

Fourth, each buyer has an interest in individually controlling their separate action. Because of the myriad, differing facts, any buyer who believed they have a claim would want to file their own complaint. (*Supra* Background.E.) Plaintiff asserts that the potential recovery is too slight for individual suits, but courts in similar cases hold that individual claims are sufficient because plaintiffs can obtain other damages and attorney's fees. *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).

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

Plaintiff's request for certification to enter an injunction "requiring Polaris to remove or revise its OSHA stickers" (PM at 21), fails on several grounds. Initially, the named plaintiff is atypical (*supra* Section IV), and cannot satisfy the requirements of Rule 23(a). 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 … would provide ***relief to each member of the class***." *Dukes*, 564 U.S. at 360 (emphasis added); *see id.* at 362 (Rule 23(b)(2) requires "an indivisible injunction benefiting all [class] members at once").

Courts deny Rule 23(b)(2) certification when an injunction would not benefit all putative class members. In *Moheb*, plaintiffs alleged that the label on the drug Cosamin misrepresented its benefits. 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).[21]

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; they 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 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). Plaintiff presents no evidence that putative class members intend to purchase another Polaris SxS in the future, which is an individual decision. ***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 and will receive no benefit from changing the label. ***Finally***, many buyers installed an aftermarket ROPS without any label, or bought a Polaris SxS that already had an aftermarket ROPS installed. Such buyers could not have been injured by any alleged misrepresentation and would not benefit from revised labels that do not apply to their aftermarket ROPS. Thus, as in *Moheb* and other decisions, a class-wide injunction provides no benefit to many class members, and no Rule 23(b)(2) class should be certified.

CONCLUSION

Polaris respectfully requests that the Court deny class certification.

DATED: July 10, 2023

Respectfully submitted,
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[21] *See Lautemann v. Bird Rides, Inc.*, 2019 WL 3037934, at *7 (C.D. Cal. May 31, 2019) (denying Rule 23(b)(2) certification where 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.

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2023, I caused the foregoing document to be served on the following counsel for Plaintiff via the Court's electronic filing system:

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