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THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

PAUL GUZMAN and JEREMY ALBRIGHT, individually on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

POLARIS INDUSTRIES, INC., a Delaware corporation; POLARIS SALES, INC., a Minnesota corporation; POLARIS INDUSTRIES, INC., a Minnesota corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No.: 8:19-cv-01543-FLA-KES

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(B)(2) AND (B)(3) AND TO BE APPOINTED CLASS COUNSEL

Hon. Fernando L. Aenlle-Rocha
Date: April 30, 2020
Time: 1:30 p.m.
Place: Courtroom 6B

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

This case is exactly why class actions exist and are so important to protecting consumer rights.[1] This matter involves a very straightforward, common set of facts, where objectively false statements about product safety were made to tens of thousands of California consumers, conspicuously on the face of products at the point of sale. These false statements are equivalent to any product mislabeling claim[2] from a Rule 23 standpoint; however, this is no mere mislabeling case with respect to its importance.

Defendants Polaris Industries, Inc., Polaris Sales, Inc. and Polaris Industries, Inc. (collectively "Defendants" or "Polaris") have been confirmed through discovery to dangerously misrepresent various safety and regulatory requirements for their Utility Terrain Vehicles ("UTVs"). Polaris affirmatively misrepresents to its customers that the rollover protection systems ("ROPS") for its UTVs comply with the U.S. Department of Occupational Safety and Health Administration ("OSHA") requirements as set forth under 29 C.F.R. § 1928.53. The misrepresentation is due to Polaris using "Gross Vehicle Weight" as its benchmark in performing the regulatory calculations, instead of the actual requirement under the statute, which requires use of "Tractor Weight."[3] The result of this falsity is that consumers think they are buying a vehicle with a ROPS that meets the stringent

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[1] The purpose of a class action is to promote judicial economy by avoiding duplicative suits against the same defendant, and to protect the rights of persons who may not be able to assert their claims on an individual basis. *Crown, Cork, & Seal Co. v. Parking*, 462 U.S. 345 (1983).

[2] Polaris may cite to orders denying class certification in design defect class actions. This is not a design defect class action. It is a mislabeling class action that incidentally involves the vehicle design being the source of the mislabeling. Overwhelmingly, mislabeling class actions are certified in the Ninth Circuit.

[3] Polaris' false representations that Class Vehicles meet OSHA requirements were made in a common fashion to every purchaser of a Class Vehicle at the point of sale. This is not an insignificant misrepresentation. The ROPS are a fraction of the strength that they are represented to be on Polaris' OSHA stickers.

OSHA requirements when, in fact, the ROPS falls far short of meeting the standard.

At the Pleadings, Plaintiffs advised the Court that "[t]his case is as straightforward as 1) determining whether the misrepresentation alleged was in fact made and was in fact false, 2) determining how many Class Vehicles were sold and who the class members are, and 3) calculating how much in damages they are collectively owed." Dkt No. 30 at 8:4-7. After extensive discovery and consulting with multiple experts, Plaintiffs can show that the common misrepresentations were indeed false, and that there were [redacted] Class Vehicles sold to consumers between August 2015 to December 2019, whose identities are in the possession of Polaris and its authorized dealers. All that remains is determining the damages owed to these Class Members—which the Ninth Circuit has repeatedly held is a post-certification issue and will be accomplished using a straightforward market-based methodology as proposed by Plaintiffs' expert.

Every Class Member was exposed to the same false advertisement because it is placed via a sticker on the face of the product in plain view, pursuant to standard procedures. Plaintiffs are typical of Class Members because they too bought Class Vehicles with ROPS that were falsely advertised as complying with OSHA standards and relied on these false statements as a material basis for their purchase. Plaintiffs retained an economic expert who presents a reliable damages model based on a market approach that mirrors a product recall, which is something that Polaris itself has done in the past when identifying defects in some vehicle models. Implementation of this market approach is manageable and will allow consumers to recover the "benefit of the bargain," either through a retrofit or a monetary payout that would put consumers in the position they would have been when they purchased the vehicles but for the false advertisement. This methodology has been approved by the Ninth Circuit in vehicle class actions—which has also held that it would be an *abuse of discretion* for a court to reject such methodology.

Polaris lied to its customers about the strength testing for the ROPS of their

vehicles, which not only results in customers receiving something of less value than what they believed they had purchased but also exposes them to a heightened risk of death or other serious injuries by creating an informational gap. Every Class Vehicle suffers from this same deficiency in the same way. Every Class Vehicle can have this deficiency remedied through Plaintiffs' proposed recall model. These procedures are efficient and equitable in light of what is at stake–peoples' lives.[4] People deserve to know the truth and to be provided the means to remedy this lie. For the reasons described herein, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Class Certification.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their Complaint on August 8, 2019, alleging violations of Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.* ("FAL"), and Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* ("CLRA"). Dkt. 1. Plaintiffs filed a First Amended Complaint on October 24, 2019. Dkt. 24. On November 25, 2019, Defendants filed a Motion to Dismiss [Dkt. 25] which Plaintiffs opposed. Dkt. 30. The Court granted Defendants' Motion in part with leave to amend, but upheld Plaintiffs' case theory:

> Plaintiffs do not deny that the FAC uses the cropped version of the sticker but argue that the cropped portion is irrelevant to their claims. The Court agrees. Plaintiffs do not claim they were deceived because Defendants represent to consumers that they use one tractor weight to test their vehicles when they actually use another (see Mem. at 14). Rather, Plaintiffs allege that they were deceived because, contrary to Defendants' representation on stickers affixed to class vehicles at the point of sale, the vehicles do not comply with 29 C.F.R. § 1928.53.

[4] The average Class Member cannot afford to spend thousands on an expensive aftermarket ROPS, especially after they spent upwards of $20,000 for their UTV thinking it came with such an OSHA-compliant structure. Moreover, the nature of the false advertisement is not something a typical consumer would ever have reason to know about because of its highly technical nature. The purpose of this Class Action is to remedy the information gap and this inequity and provide Class Members the resources and information necessary to protect themselves and their families in the way that Polaris falsely told them they were being protected.

Dkt. 38, p. 3 n. 2. Plaintiffs filed a Second Amended Complaint ("SAC") on March 3, 2020 [Dkt. 39] and Defendants answered on March 31, 2020. Dkt. 42. Since that time, the parties have engaged in discovery. Plaintiffs were deposed, and Plaintiffs deposed nine Polaris witnesses. Polaris made seventeen document productions totaling roughly 65,000 pages. This Motion is timely filed. Dkt. 63.

III. FACTS UPON WHICH CLASS CERTIFICATION IS BASED

A. The Regulatory History of UTVs

This case concerns high-horsepower recreational vehicles that travel at speeds of up to 65 mph and have a known propensity for rollover accidents, resulting in injury or death.[5] Rather than being regulated by the National Highway Traffic Safety Administration ("NHTSA"), as one might naturally assume, UTVs are regulated under the Consumer Protection Safety Commission ("CPSC"). In 2008, after concerns arose about the safety of UTVs, the CPSC initiated a Notice of Proposed Rulemaking [74 Fed. Reg. 55495 (Oct. 28, 2009)] regarding UTV ROPS. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted][6]

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted].[7] Wosick Dep. 18:1-19:17; Morrison Dep. 72:23-73:4; Ex 49 ("Deckard Dep.") 76:13-18; Rintamaki Dep. 35:5-38:4; Exs. 14-20, 24, 29,

[5] Ex 44 ("Wosick Dep.") 37:19-25; Ex 48 ("Keller Dep.") 28:1-31:8; Ex 47 ("Morrison Dep.") 45:18-46:10.All citations to Exhibits hereinafter are to the Declaration of Thomas E. Wheeler.

[6] Ex 48 ("Rintamaki Dep.") 18:3-22, 23:4-24:13, 28:8-18; Exs. 18-19, 33, 35.

[7] ISO refers to the International Organizations of Standards and is a safety strength test that is primarily used for earthmoving equipment such as Bobcats, and generally has been used for UTVs in European countries. The ISO standards are not directly relevant to this case but are important for context.

33, 35. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] Rintamaki Dep. 30:20-31:20, 45:20-46:7. CONFIDENTIAL PURS [redacted].[8] Exs. 18-20, 39; Deckard Dep. 55:5-18, 58:7-60:16. The problem with Polaris' adoption of the OSHA standards is that Polaris was not following them.

B. The Regulatory History of OSHA

As described in the SAC, the OSHA regulations at issue (29 C.F.R. §§ 1928.51, 1928.52, and 1928.53) were originally designed in the 1970s for employee safety in operating agricultural tractors, not UTVs, which did not exist at the time. Wosick Dep. 22:24-24:25; Keller Dep. 15:12-22, Exs. 38-39. In 1972, the U.S. Department of Labor concerned that "[t]ractor roll-overs have been a major cause of employee injury and death on the farm" appointed the Standards Advisory Committee on Agriculture to make a ROPS standard a priority. 40 FR 18254. After the notice of proposed rulemaking notice period, the Department of Labor, via OSHA promulgated 29 C.F.R. §§ 1928.51, 1928.52, and 1928.53.[9]. Tractor weight is defined pursuant to 29 C.F.R. §§ 1928.51(a)(4):

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[8] CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted].

[9] 29 C.F.R. § 1928.53 outlines federal safety guidelines for protective enclosures designed for wheel type agricultural tractors. "The purpose of this section is to establish the test and performance requirements for a protective enclosure designed for wheel-type agricultural tractors to minimize the frequency and severity of operator injury resulting from accidental upset." 29 C.F.R. § 1928.53(a). Operators of these vehicles could be severely injured or die in case of a rollover if the roll cage is not strong enough to withstand the force of the impact. Basic physics tells us that force is a product of mass multiplied by acceleration. Therefore, the vehicle weight and capacity for acceleration are necessary to determine expected impact force resulting from anticipated normal use. OSHA's two-part test accounts for both static and dynamic impacts. Exs. 12, 23. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

> "Tractor weight" includes the protective frame or enclosure, all fuels, and other components required for normal use of the tractor. Ballast shall be added as necessary to achieve **a minimum total weight** of 110 lb. (50.0 kg.) per maximum power take-off horse power at the rated engine speed or the maximum, gross vehicle weight specified by the manufacturer, **whichever is the greatest**. From end weight shall be at least 25 percent of the tractor test weight. **In case power take-off horsepower is not available, 95 percent of net engine flywheel horsepower shall be used**.

Thus, the weight to be tested is either gross vehicle weight,[10] or 110 lbs. multiplied by the maximum power take off ("PTO") horsepower or 95% of the net engine flywheel horsepower, if PTO is unavailable. Ex 20; Keller Dep. 73:2-74:14. CONFIDENT [redacted].[11] CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted].

C. Class Vehicles Do Not Comply with OSHA, Despite Polaris Representations That They Do

In direct contravention of OSHA requirements, Polaris CONFIDENTIAL PURSUANT TO PROTECTIVE O [redacted]. Exs. 13, 39; Deckard Dep. 85:14-20; Keller Dep. 17:9-20:20. Polaris acknowledges throughout its discovery that CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]. Exs. 10, 13, 17-20, 23-28, 30-32, 39-41; Wosick Dep. 17:17-24; Morrison Dep. 34:19-35:1, 39:16-41:21, 41:22-42:9; Deckard Dep. 27:21-35:13, 43:9-45:17; Keller Dep. 22:11-24:14.

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]. Exs. 30 and 33 at 43278; Morrison Dep. 23:20-25:7.

[10] Typical gross vehicle weight of Class Vehicles range from 2,000-3,000 lbs.

[11] Wheeler Decl. Ex 45 "Schmitt Dep." at 63:14-64:10.

There is no dispute that this was a common practice across all relevant vehicle models. Moreover, CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted][12]

This case is straightforward, and concerns a common misrepresentation made across virtually all of Polaris RZR, Ranger, and General vehicle models during the past five years. Polaris represents on every Class Vehicle the following: "This ROPS Structure meets OSHA requirements of 29 C.F.R. § 1928.53." Such representations are plastered with a sticker placed on the ROPS for every vehicle as follows:

[13]

Dkt. 38, p. 3, n. 2; Ex. 11. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] Exs. 1, 2,

[12] As an example of why this is important, the RZR 1000 owned by Plaintiffs, which according to Polaris' website has a horsepower of 110 HP. *See* https://rzr.polaris.com/en-us/rzr-xp-4-1000-eps/. Tractor Weight = 110 x 110hp x 95% = 11,495. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER This means that CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] For a vehicle that has a documented propensity for rollovers and travels up to 65 miles per hour, it is frankly outrageous and beyond reckless to lie to people in this way.

[13] CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]. Ex. 36.

[14] Mr. Wosick clarified that CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

11, 32, Keller Dep. 22:11-24:14, 40:8-16; Wosick Dep. 31:2-33:23, 35:5-25, 85:2-86:18. The sticker is conspicuously placed because it is an important safety feature of the product. Here is how Mr. Keller, Polaris' director of Product Compliance, describes the placement of the OSHA stickers:

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

[redacted]

Keller Dep. 26:15-27:19. Polaris CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]. Keller Depo 85:19-85:13. The truth is CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]. Ex. 41. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted].

D. Composition and Identification of Class Members

During the relevant time period, CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]. Wosick Dep. 16:10-19. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted].

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] Wosick Dep. 30:1-16, 34:23-35:25.

See Ex. 1 at #2.[15] CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]. Keller Dep. 31:13-32:21, 38:5-39:9.

E. A Strong ROPS Is Important to a Reasonable Consumer, and to Polaris Customers

Polaris' marketing team acknowledges CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] Ex. 21. But CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] Ex. 21 (emphasis added). CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] Ex. 22. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]. Ex. 22 at 27149, 37. Polaris' production confirms what we already know as common sense–safety is important to a reasonable consumer. Yet Polaris intentionally lied to its customers about the level of safety they could expect from their stock ROPS.

F. Polaris Has Implemented Recalls in the Past and Meticulously Tracks Costs of Parts and Labor

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]

[15] The full list of proposed Class Vehicle models is set forth in the Second Amended Complaint. *See* Dkt. 39 ¶ 2. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] *See* Ex No. 1 General Objection 7 and Ex No. 2 General Objection 7. Thus, the term "Class Vehicles" refers to all models of Polaris RZR, Ranger, and General side by side UTVs except for MY 2016 through MY 2019 General Models.

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] Exs. 6-9; Wosick Dep. 57:4-59:8, 69:3-25, 84:3-86:18.[16] CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] Ex. 34 at 44118; Keller Dep. 40:8-41:8. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted] Keller Dep. 31:13-32:21, 38:5-39:9. CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER [redacted]. Deckard Dep. 63:4-65:7. This exact same methodology could be used by Plaintiffs to 1) provide direct notice to the Class Members, and 2) calculate class-wide damages.

G. Plaintiffs' Experiences Were Typical of the Class

In or around September 2018, Plaintiff Guzman purchased a 2018 Polaris RZR XP in Orange County, California. Guzman Decl. ¶ 4. On February 29, 2016, Plaintiff Albright purchased a 2016 Polaris RZR XP in California. Albright Decl ¶ 4. Plaintiffs' vehicles contained a sticker at the point of sale which suggested that the vehicles' ROPS met OSHA requirements. *Id.* at ¶¶ 5. This representation was made in a manner that was visible to Plaintiffs at the point of sale. *Id.* Plaintiffs reasonably relied upon Defendants' representations regarding their vehicles. *Id.* at ¶¶ 5-8. Plaintiffs did not receive the benefit of the bargain. *Id.*[17] This fact pattern

[16] Polaris tracks recalls through the VINs and has near-perfect data that efficiently allows for class member identification and damage valuation. Exs. 4-5.

[17] Plaintiffs were both deposed and confirmed that they saw the OSHA stickers, were concerned about safety of their vehicles and getting injured or killed while driving them, generally understood the representation to mean that the ROPS were safe and met a high bar of government-approved safety, and relied upon Polaris' false representation. They also both testified that they wanted to protect people from this misrepresentation and help the Class.

is the same for every single Class Member.

H. The Class and Subclass for Which Certification Is Sought

Based upon these facts and allegations, Plaintiffs seek class certification under Rule 23(a), 23 (b)(2) and 23(b)(3) of the following class (the "Class"):

> All California residents, who, between in or about August 8, 2015 and December 31, 2019, purchased one or more models of Polaris RZR, Ranger, or General UTVs, in California, which were advertised with a sticker on the ROPS system as complying with OSHA requirements as set forth under 29 C.F.R. § 1928.53,[18] and which were tested using Gross Vehicle Weight, not Tractor Weight.

Plaintiffs also seek class certification for the following Subclass:

> All California residents, who, between in or about August 8, 2015 and December 31, 2019, purchased one or more models of Polaris RZR UTVs, in California, which were advertised with a sticker on the ROPS system as complying with OSHA requirements as set forth under 29 C.F.R. § 1928.53, and which were tested using Gross Vehicle Weight, not Tractor Weight.

IV. Plaintiffs' Expert Presents a Market Approach to Calculate Class-Wide Damages Under a Benefits of the Bargain Theory

Recently, the Ninth Circuit issued a binding decision regarding proposed damages methodologies in a proposed class action involving CLRA claims against a vehicle manufacturer. *Nguyen v. Nissan North America, Inc.*, 932 F.3d 811 (9th Cir. 2019). Nguyen filed a motion for class certification arguing that the class-wide damages model should emulate a recall, which would provide damages to each class member equal to the cost of a replacement for the allegedly misrepresented vehicle component. The theory of liability was based on the "benefit of the bargain" analysis, which has been approved by California appellate courts as an appropriate method of calculating damages in such cases. *Id*. at 815. While the district court rejected that model on the basis that such an approach would "deem the defective part valueless," the Ninth Circuit reversed this ruling as an *abuse of discretion*. The reasoning was straightforward – consumers did not receive that which they thought they had

[18] Discovery to date indicates that all RZR, Ranger and General Models *except for* MY 2016 through MY 2019 General Models CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER.

bargained for because the vehicle component (a clutch) was defective *per se*. The Ninth Circuit held that using a benefit of the bargain damages model satisfies Rule 23(b)(3)'s predominance requirement. *Id*. at 821-822.[19] As the Ninth Circuit held, liability stems from "the sale of the vehicle with the known defect" not manifestation of the issue. *Id.* at 820. Thus, plaintiff's market-based recall model for determining benefit of the bargain satisfied the predominance requirement for a CLRA and UCL[20] class action involving misrepresentations about components of vehicles.

To demonstrate a feasible damages methodology to the Court at the class certification phase, Plaintiffs have hired experienced class action economics expert Robert Kneuper, Ph.D. of Infotech. Dr. Kneuper opined that a damages and restitution analysis is straightforward, manageable, and allows for the calculation of cognizable class-wide remedies.[21] As set forth in Dr. Kneuper's report, the methodology would seek to award damages to the class members in a manner that would allow them to retrofit their ROPS to meet OSHA safety standards. This would be done by way of calculating two straightforward costs measures: (1) the cost of the ROPS *structure* that enables the Polaris UTVs to be compliant with Polaris' safety claims, and (2) the cost of *labor* to install the OSHA-compliant ROPS structure replacement. Parts plus labor – simple.[22] Total damages to the Class would simply

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[19] The Ninth Circuit also reaffirmed its holding that individualized damages issues do not alone defeat certification. *Id*. at 817 (citing *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015)).

[20] The case recognized that restitution under the CLRA and UCL are "treated similarly" under both laws under California appellate authority. *Id*. at 820 n.6 (citing *Colgan v. Leatherman Tool Grp., Inc*., 135 Cal.App.4th 663 (2006)).

[21] Plaintiffs expect that Defendants will attempt to employ the use of a conjoin analysis to argue individualized issues. Not only is that the wrong analysis for a case of this nature, but many California courts have certified class actions under a conjoin survey analysis. Ultimately, because it is not the proposed analysis of Plaintiffs' expert, conjoin analysis is irrelevant to the questions at hand.

[22] As an example, Plaintiff Albright received a quote from a Polaris Authorized dealer to install a replacement ROPS, which included parts plus labor. Ex. 3.

be calculated by determining an average expected cost for each of these inputs, adding them up, and multiplying them by the number of Class Vehicles. As Dr. Kneuper observes, this methodology is similar to how a manufacturer estimates the expense of a recall, which is something that Polaris itself has done with ROPS in the past and would have every ability to do with Class Vehicles, either through installation of a replacement ROPS or a kit that could be used to retrofit the existing ROPS with reinforcements to add the necessary strength. Simply put, the expense of this process could be quantified, and multiplied across the Class Vehicles to determine class-wide damages.

By using this methodology, Class Members could be made whole in one of two ways. One, Polaris could institute the recall, with the oversight of Plaintiffs' engineering experts, to replace or retrofit Class Vehicle ROPS such that meet the advertised standards set forth in 29 C.F.R. § 1928.53. Two, Class Members could be provided a cash reimbursement for the expected expense incurred for such a retrofit or replacement. Either of these methods will generate common and cognizable damages and provide the consumers with the benefits they reasonably believed they were paying for based on Polaris' common misrepresentations.

V. RULE 23 STANDARDS AND CLASS CERTIFICATION ANALYSIS

Rule 23 governs the certification of class actions and has as main objectives the efficient resolution of the claims or liabilities of many individuals in a single action as well as the elimination of repetitious litigation and possibly inconsistent adjudication.[23] District courts are afforded broad discretion in determining whether an action should be certified. *Montgomery v. Rumsfield*, 572 F.2d 250, 255 (9th Cir. 1978). Rule 23 outlines a two-step process for determining whether class certification is appropriate. First, Rule 23(a) sets forth four conjunctive prerequisites that must be met for any class: (1) the class is so numerous that joinder of all members

[23] C. Wright, A. Miller & M. Kane, Federal Prac. & Proc. Civ. 2d § 1754 (1986).

is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). These requirements are referred to as numerosity, commonality, typicality, and adequacy. *Thompson v. Clear Channel Communs., Inc. (In re Live Concert Antitrust Litig.)*, 247 F.R.D. 98, 105 (C.D. Cal. 2007).[24]

Once Rule 23(a) is satisfied, the party seeking certification must demonstrate that the action falls into one of three categories under Rule 23(b). *In re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150, 153 (N.D. Cal. 1991). Class actions are essential to enforce laws protecting consumers. Indeed, cases involving false advertising on a company's products are particularly ripe for application on a broad class-wide basis.[25] In these cases, as here, there was one singular type of misrepresentation that applies in the exact same way to all the falsely advertised products.

Here, every Class Vehicle purchased by every member of the Class, had a conspicuous and material safety sticker placed visibly on the ROPS, which

[24] A plaintiff must show compliance with the prerequisites of Rule 23(a) under a rigorous analysis. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011). "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). "[I]t is well established that for purposes of class certification, the moving party does not need to establish a likelihood of prevailing on the merits." *McKenzie v. Fed. Express Corp.*, 275 F.R.D. 290, 297 (C.D. Cal. 2011). "[I]t remains relatively clear an ultimate adjudication on the merits of plaintiffs' claims is inappropriate, and any inquiry into the merits must be strictly limited to evaluating plaintiffs' allegations to determine whether they satisfy Rule 23." *Lee v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292, 294 (N.D. Cal. 2013).

[25] *Allen v. Hyland's Inc.*, 300 F.R.D. 643 (C.D. Cal. 2014); *Guido v. L'Oreal, USA, Inc.*, 284 F.R.D. 468 (C.D. Cal. 2012); *Ortega v. Natural Balance, Inc.*, 300 F.R.D. 422 (C.D. Cal. 2014); *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524 (C.D. Cal. 2011); *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523 (N.D. Cal. 2012).

contained a false representation that the ROPS satisfied the OSHA test under 29 C.F.R. § 1928.53. There is no dispute as to these allegations. Polaris has conceded the validity of them in multiple depositions. Moreover, every single Class Vehicle contained the offending sticker and every single Class Vehicle therefore failed to deliver on the benefit of the bargain offered to every single Class Member in the exact same way. A single remedy, emulating a market-solution of a recall will resolve this issue for every Class Member. Polaris can either provide financial remuneration to compensate Class Members to provide the means to upgrade their ROPS to the standards promised or can institute a recall, overseen by Plaintiffs, which does the same. There is ultimately no legitimate question that the conduct at issue was systemic, identical with respect to every purchaser and can be remedied in the same way as to all. This case represents the ideal scenario where a class action must be certified.[26]

A. The Class of All Persons Who Purchased a Class Vehicle in California Is Adequately Defined and Clearly Ascertainable

"Although there is no explicit requirement concerning the class definition in FRCP 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed.'" *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679-680 (S.D. Cal. 1999) (quoting *Elliott v ITT Corp.*, 150 F.R.D. 569, 573-574 (N.D. Ill. 1992)). The Ninth Circuit has recently held that in the context of a consumer class action, that plaintiffs not only do not have to identify class members as a prerequisite to meeting their burden under Rule 23, but also do not even have to present a feasible methodology for doing so, as manageability issues are best reserved post-certification. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123, 1132-33 (9th Cir. 2017).

[26] As the Seventh Circuit noted in *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 755 (7th Cir. 2014), ("[t]he question whether the [] packaging was likely to mislead a reasonable consumer is common to the claims of every class member.")

Class membership here may be readily determined by objective criteria: whether (i) persons within California (ii) purchased a Polaris RZR, Ranger and/or General (iii) with a ROPS that was advertised as satisfying the OSHA standards set forth under 29 C.F.R. § 1928.53 via a sticker on the ROPS, (iv) where Polaris errantly used Gross Vehicle Weight, not Tractor Weight for the OSHA calculation, (v) between August 2015 and December 2019. Such objective information can be readily determined using Polaris sales records and from its authorized dealers. Using this method, there is no risk of the class definition or the claims process being over-inclusive. Polaris knows exactly who the Class Members are and knows the exact number of Class Vehicles sold. Thus, Plaintiffs have identified the general outlines of class membership, and it is manageable to review records of Polaris and its authorized dealers to identify the names and addresses of Class Members to provide them direct notice.

B. Numerosity

Under Rule 23(a), the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).[27] Defendant identified over [redacted] consumers who purchased a Class Vehicle in California during the Class Period. Therefore, the numerosity requirement is satisfied here because thousands of separate actions would be economically and judicially impracticable.[28]

[27] *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003); *see Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 606 (C.D. Cal. 2005) (classes made up of fewer than 100 have satisfied the numerosity requirement); *Sullivan v. Kelly Servs.*, 268 F.R.D. 356, 362 (N.D. Cal. 2010) ("where the exact size of the class is unknown, but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied") (quoting 1 Alba Cone & Herbert B. Newberg, *Newberg on Class Actions* § 3.3 (4th ed. 2002)).

[28] *See Mendoza v. Home Depot, U.S.A., Inc.*, 2010 WL 424679, at *4 (C.D. Cal. Jan. 21, 2010) ("Given the large number of potential plaintiffs, the Court finds that the numerosity requirement of Rule 23(a) is readily satisfied.").

C. Commonality

Rule 23(a)(2) requires that there be at least one common question of law or fact to certify a class. A class has sufficient commonality "if there are questions of fact and law which are common to the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1988) (quoting Fed. R. Civ. P. 23(a)(2)). Commonality focuses on whether certification will offer a more economical approach to resolving the underlying disputes than would individual litigation. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982).[29] "Plaintiffs need not demonstrate that all questions are common to the class; [as there need only be]…'a common core of salient facts coupled with disparate legal remedies within the class' are present." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 506 (N.D. Cal. 2012) (citing *Hanlon*, 150 F.3d at 1019-20). Commonality requires the "common contention is of such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551.[30] Certification is appropriate where the "classwide proceeding [will] generate common answers apt to drive resolution of the litigation." *Id*.

Commonality is also satisfied. Here, substantively identical language was conspicuously placed, via a visible sticker, on the ROPS of every Class Vehicle, which falsely stated that the ROPS was tested under and complied with OSHA

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[29] Where questions of law involve "standardized conduct of the defendants towards members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement...is usually met." *Franklin v. City of Chicago*, 102 F.R.D. 944, 949 (N.D. Ill. 1984). Commonality exists where a "lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (citing *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985)).

[30] "[A] lack of identical factual situations will not necessarily preclude certification where the class representative has shown sufficient common questions of law among the claims of the class" *Franklin*, *supra* 102 F.R.D. at 949.

regulation 29 C.F.R. § 1928.53. I n fact, as is the case with every Class Vehicle, this statement was false, and false in the same way. Polaris universally used gross vehicle weight, not tractor weight, to run the calculations, leading universally to a drastically lower requisite ROPS strength. In other words, every ROPS was falsely advertised on the face of the product, and every ROPS is much weaker than consumers were led to believe. OSHA was trotted out as a marketing tactic and used because the general population associates OSHA with safety. Polaris made a categorical decision that it did not need to comply with the very standard it petitioned the regulators to allow it to use and chose to use cheaper, lighter and weaker materials to build its ROPS—no doubt to save expense. This is a common issue. It affects every Class Vehicle in the exact same way.

In the context of a CLRA case, "[c]ausation, on a class-wide basis, may be established by materiality. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class." *Stearns v. Ticketmaster Corp*., 655 F.3d 1013 (9th Cir. 2011). Materiality is an objective test, judged by what a reasonable consumer would have thought, not by what a particular member of the class actually thought. *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1145 (N.D. Cal. 2005).

As is the case in the overwhelming majority of false advertising and CLRA cases analyzed under Rule 23, the commonality prerequisite is easily satisfied because all Class Members were exposed to Polaris' objectively false advertising of the ROPS compliance with OSHA, which was prominently and ubiquitously featured on the face of the product. All consumers across California who purchased a Class Vehicle were exposed to these material misrepresentations. Whether, and to what extent the misstatements are material is a merits and damages issue and best reserved for post-certification. The Court should find commonality satisfied.

D. Typicality

Rule 23(a)(3) requires that the claims of the representative parties be typical

of the claims of the class. The typicality requirement serves to "assure that the interest of the named representative aligns with the interests of the class." *Hanon, supra* 976 F.2d at 508. Typicality refers to the *nature* of the claim or defense of the class representative and not on facts surrounding the claim or defense. *Id.* (emphasis added). A claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [is] based on the same legal theory." H. Newberg, *Newberg on Class Actions* § 1115(b) (1st Ed. 1977). The burden imposed by the typicality requirement is not great.[31] *See id.* at 1020.[32]

Plaintiffs' claims are clearly typical of those of the Class Members in that both Plaintiffs and Class Members suffered the same harm (promises that their Class Vehicle would include a ROPS that satisfied the safety requirements of OSHA regulation 29 CFR § 1928.53, when this was known by Polaris to be inaccurate and false) in virtually the same manner (on the ROPS of the vehicle in a visible conspicuous location).[33] "Taking all of this law in, it is hard to see how the typicality requirement isn't satisfied here." *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 483 (S.D. Cal. 2013). Typicality is easily satisfied.[34]

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[31] Typicality is a guidepost as to "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes, supra* 131 S. Ct. at 2551 (citing *General Telephone Co. of Southwest, supra* 457 U.S. at 157-158, n. 13).

[32] Typicality is met if the claims of each class member arise from the same "course of conduct," and the defendant's liability turns on "similar legal argument." *Armstrong, supra* 275 F.3d at 868-69. The typicality focuses on a comparison of the named plaintiff's claims with those of the class. *Id.* "[T]he injuries [must] result from the same, injurious course of conduct." *Id.* at 869. "[W]hen the commonality prong is satisfied under Rule 23(a)(2), the typicality prong…generally follows suit." *Harris v. Circuit City Stores, Inc.*, 2008 WL 400862, at *21 (N.D. Ill. Feb. 7, 2008).

[33] *See Ortega, supra* 300 F.R.D. at 427 (holding that typicality is met where a class representative is exposed to the same misleading packaging).

[34] Typicality is discussed further with respect to scope in Section F.

E. Adequacy of Representation

The fourth requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Due process requires as much. *Hanlon*, 150 F.3d at 1020.[35] Plaintiffs' counsel will fairly, responsibly, vigorously, and adequately represent the interests of the Class whose rights were violated by Polaris. Friedman Decl., ¶¶ 9-16; Kristensen Decl at ¶¶ 2-20; Wood Decl. at ¶¶ 2-7. Plaintiffs share the same interests of the Class which is comprised of consumers who were all harmed in virtually the same way by Polaris' advertising. Plaintiffs will fairly represent the interests of the Class. Guzman Decl. at ¶¶ 9-12; Albright Decl. ¶ 9-12. Plaintiffs' counsel is unaware of any conflict of interest in this case (Friedman Decl., ¶ 16; Kristensen Decl at ¶ 20; Wood Decl. at ¶ 7.) and it is highly unlikely that a conflict would exist in this case, given the common practice of Polaris.[36] Plaintiffs have retained competent class counsel experienced in class-wide litigation to represent the Class. Friedman Decl., ¶¶ 9-16; Kristensen Decl at ¶¶ 2-20; Wood Decl. at ¶¶ 2-7. Therefore, the adequacy prerequisite is satisfied.

F. The Class Should Be Certified Across All Vehicle Models As All Class Vehicles Were Identically Impacted

Plaintiffs anticipate that Polaris will attempt to distinguish the RZR vehicles from other Class Vehicles based on irrelevant differences between RZRs, Rangers and Generals and will argue that the Class should be more narrowly certified. This will ignore the reality that every Class Vehicle was falsely advertised in the same manner, suffered from the same policy and practice, and will be remedied via the exact same benefit of the bargain damages analysis as proposed by Dr. Kneuper.

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[35] Courts ask two questions: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton*, *supra* 327 F.3d at 957; Fed. R. Civ. P. 23(g)(1)(B).

[36] *See Yoshioka v. Charles Schwab Corp.*, 2011 WL 6748984, at *5 (N.D. Cal. Dec. 22, 2011) ("apart from [his] proposed incentive award, [plaintiff] will receive the same relief as the class…and there is no apparent conflict of interest").

California district courts have broadly certified false advertising class actions where the same misrepresentation was uniformly made across a wide array of related products. The test is one best analyzed under typicality and predominance, and the question comes down to whether 1) the named plaintiffs were exposed to the same misrepresentation as was made in other class products, and 2) whether plaintiff's claims are "reasonably co-extensive" with those of the remainder of class members.[37] There is no legitimate difference between the vehicles Plaintiffs

[37] *See Forcellati v. Hyland's, Inc.*, 2014 WL 1410264 at *10 (C.D. Cal 2014); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 2191901 at *17 (N.D. Cal 2014); *Brazil, supra* 2014 WL 2466559 at *10; *Davidson v. Apple, Inc.*, 2018 WL 2325426 at *8-9 (N.D. Cal 2018); *Lanovaz v. Twinings North America, Inc.*, 2014 WL 1652338 at *4 (N.D. Cal 2014); *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, 2008 WL 4906433 at *6-7 (C.D. Cal 2008); *Pecover v. Electronic Arts, Inc.*, 2010 WL 8742757 at *12 (N.D. Cal 2010); *Gallucci v. Boiron, Inc.*, 2012 WL 5359485 at *3 (S.D. Cal 2012); *In re Static Random Access memory (SRAM) Antitrust Litigation*, 264 F.R.D. 603, 609 (N.D. Cal 2009); *Castillo v. Bank of America, NA*, 980 F.3d 723, 730 (9th Cir. 2020); *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 539-540 (N.D. Cal. 2012); *Hanlon, supra* 150 F.3d 1011; *Donohue v. Apple, Inc.*, 871 F.Supp.2d 913, 922 (N.D. Cal. 2012); *Anderson v. Jamba Juice Co.*, 888 F.Supp.2d 1000, 1006 (N.D. Cal. 2012); *Wilson v. FritoLay North America, Inc.*, 2013 WL 5777920 at *4 (N.D. Cal. 2014); *Astiana v. Dreyer's Grand Ice Cream*, 2012 WL 2990766 at *13 (N.D. Cal. 2012); *Rojas v. General Mills, Inc.*, 2014 WL 1248017 at *10 (N.D. Cal. 2014); *Cardenas v. NBTY, Inc.*, 870 F.Supp.2d 984, 992 (E.D. Cal. 2012); *Koh v. S.C. Johnson & Son, Inc.*, 2010 WL 94265 at *3 (N.D. Cal. 2010); *Bruno, supra* 280 F.R.D. at 534-535; *Astiana v. Kashi Co., supra* 291 F.R.D. at 505; *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726 at *6 (N.D. Cal. 2014); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 378 (N.D. Cal. 2010); *Brown v. Hain Celestial Group, Inc.*, 913 F.Supp.2d 881, 891 (N.D. Cal. 2012); *Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217, 227 (N.D. Cal. 2015); *Ehret v. Uber Technologies, Inc.*, 148 F.Supp.3d 884, 893 (N.D. Cal. 2015); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 308 F.R.D. 606, 613 (N.D. Cal. 2015); *Allen v Similasan Corp.*, 306 F.R.D. 635, 645-646 (S.D. Cal. 2015); *In re Korean Ramen Antitrust Litigation*, 2017 WL 235052 at *18 (N.D. Cal. 2017); *Todd v. Tempur-Sealy International, Inc.*, 2016 WL 5746364 at *5 (N.D. Cal. 2016); *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231 (N.D. Cal. 2014); *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 562 (N.D. Cal. 2020).

purchased and the vehicles of other Class Members. The overwhelming majority of district court certification orders agree that this case should be certified broadly.

G. Hybrid Class Certification Under Rule 23(b)(2) and (b)(3) Should Be Granted

Plaintiffs seek hybrid certification pursuant to Rule 23(b)(2) and (b)(3).

1. Rule 23(b)(2)

Certification under Rule 23(b)(2)[38] requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b). Despite knowing that all of its UTVs falsely advertise that the ROPS complies with OSHA regulations, Polaris continues to falsely advertise its vehicles. This is not an open question of fact. Polaris knew of this issue long before this case was filed. Even giving the company the benefit of the doubt, litigation has been underway for a year and a half and they still have not changed the practice. Only an injunction can resolve the deficiency. An order requiring Polaris to remove or revise its OSHA stickers to reflect accurate information would resolve this deficiency. In *Yoshioka*, *supra* 2011 WL 6748984 at *6, the court explained that, "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."[39] Certification under Rule 23(b)(2) is necessary and appropriate.

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[38] It is well established that Rule 23(b)(2) classes "need not meet the predominance and superiority requirements." *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 263-264 (3rd Cir. 2011).

[39] The *Yoshioka* Court found that plaintiffs satisfied the requirement because the requested relief, and the relief to be provided, would apply class-wide. *Id.* Plaintiffs' requested remedy is the appropriate remedy for a case under Rule 23(b)(2), which "applies only when a single injunction or declaratory judgment would provide relief to each member of the class" (*Dukes*, *supra* 131 S.Ct. at 2557), as it does here, based upon Polaris' practice of mislabeling the ROPS for all UTVs as complying with OSHA.

2. Rule 23(b)(3)

Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon*, *supra* 150 F.3d at 1022. "Individual questions need not be absent." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012). "Court[s] looks at common factual link[s] between all class members and the defendants for which the law provides a remedy." *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 547 (N.D. Cal. 2005). "Implicit in…the predominance test is…that the adjudication of common issues will help achieve judicial economy." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). "Generally, when a class challenges a uniform policy or practice, the validity of the policy or practice tends to be the predominant issue in the ensuing litigation."[40] "At class certification, plaintiff must present a likely method for determining class damages, though it is not necessary to show that his method will work with certainty at this time."[41] A plaintiff must support a damages theory with evidence, not mere allegations. *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 460-461 (S.D. Cal. 2014). Thus, "[e]xpert testimony may be necessary" in class

[40] *See CE Design Ltd. V. Cy's Crabhouse North, Inc.*, 259 F.R.D. 135, 142 (N.D. Ill. 2009) (citing *General Telephone Co. of Sw.*, *supra* 457 U.S. at 159 n.15). Rule 23(b)(3) does not require that all issues of law and fact be subject to common proof, as even the rule itself recognizes that there may be some issues that are individualized. *Ellis*, *supra* 285 F.R.D. at 539 (the predominance question is not one of scale, but whether certification would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.)

[41] *Chavez*, *supra* 268 F.R.D. at 379; *Astiana v. Kashi Co.*, *supra* 291 F.R.D. at 506.

action cases to "establish the price inflation attributable to the challenged practice." *Id.* at 460. When 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. *Morales*, *supra* at *8-10.[42]

The principal legal issue in this case is whether a reasonable consumer would have found the advertisement of Class Vehicles' ROPS being compliant with OSHA requirements under 29 C.F.R. § 1928.53, material to their purchase of a Class Vehicle. The issues making up Plaintiffs' claim are common to Class Members, who have allegedly been injured in the same way and in virtually the same manner by Polaris' common advertising practice. Through a class action, the Court may resolve important common questions to which all parties seek an answer, thus serving the policy goal of judicial economy as explained by the Ninth Circuit. *Valentino*, *supra* 97 F.3d at 1234. Therefore, the common issues predominate in this action, and certification under Rule 23(b)(3) is appropriate.

Additionally, "'Rule 23 (b) was designed for situations … in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate.'" *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). This inquiry calls for a comparison of alternative methods for resolution of the dispute (*Hanlon*, *supra* 150 F.3d at 1023), such as the UCL, FAL and CLRA claims common to the Class.

Certification here is superior to numerous individual false advertising actions and serves the efficient resolution of Polaris' alleged violations of the UCL, FAL and CLRA, which implicates the rights of tens of thousands of persons throughout California and will provide no difficulty in allocating fixed statutory damages under

[42] Citing *Brazil*, *supra* 2014 WL 2466559 at *18-20 (accepting a regression model for certification; analysis was not yet complete); *Astiana v. Kashi Co.*, *supra* 291 F.R.D. at 506 (accepting proposal to calculate restitutionary damages using sales information maintained by the defendant); *Guido v. L'Oréal, USA, Inc.*, 2014 WL 6603730, at *11–14 (C.D. Cal. July 24, 2014) (same).

the proposed damages mode of Dr. Kneuper.[43] The Class Members are individual consumers who are not likely able to successfully maintain an individual action against Polaris where only approximately $1,000 in damages is being sought. As can be seen from the litigation commenced to date in this action, the amount of discovery necessary to effectively litigate this case on the merits would require an investment of millions of dollars of attorneys' fees and costs. A class action is a superior means of resolution. It would avoid a multiplicity of actions and possible inconsistencies in judgment.[44] "To permit the defendant to contest liability with each claimant in a single, separate suit…would be almost equivalent to closing the door of justice to all small claimants."[45] The superiority requirement is satisfied.

VI. CONCLUSION

Class Certification should be granted, to protect consumers from further harm, force Polaris to correct its lies, and provide Class Members the means to retrofit their vehicles with the safety equipment they were promised.

Dated: January 13, 2021

Law Offices of Todd M. Friedman, P.C

/s/ Todd M. Friedman

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[43] If [redacted] individual suits were filed, there would be a risk of inconsistent results arising from injunctive relief regarding the numerous consumers affected by Polaris marketing practices. *See e.g., Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 236-237 (C.D. Cal. 2003) ("Where common questions 'predominate,' a class action can…avoid inconsistent outcomes…").

[44] *See e.g., Westways*, *supra* 218 F.R.D. at 236-237.

[45] *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941).