John P. Kristensen (SBN 224132)
Frank M. Mihalic, Jr. (SBN 344691)
CARPENTER & ZUCKERMAN
8827 W Olympic Boulevard
Beverly Hills, California 90211
Telephone: (310) 273-1230
kristensen@cz.law
fmihalic@cz.law

Todd M. Friedman (SBN 216752)
Adrian R. Bacon (SNB 280332)
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard Street, Suite 780
Woodland Hills, California 91367
Telephone: (877) 619-8966
tfriedman@toddflaw.com
abacon@toddflaw.com

Christopher Wood (SBN 193955)
DREYER BABICH BUCCOLA WOOD CAMPORA, LLP
20 Bicentennial Circle
Sacramento, California 95826
Telephone: (916) 379-3500
cwood@dbbwc.com

Attorneys for Plaintiffs and all others similarly situated

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA – SACRAMENTO DIVISION

FRANCISCO BERLANGA, 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.: 2:21-cv-00949-KJM-DMC

ORAL ARGUMENT REQUESTED; MOTION OPPOSED

NOTICE OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Hon. Kimberly Mueller

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

PLEASE TAKE NOTICE that on August 11, 2023 before The Honorable Kimberly J. Mueller of the United States District Court, Eastern District of California, located at 501 I Street, Courtroom 3, 15th Floor, Sacramento, California 95814, Plaintiff Francisco Berlanga ("Plaintiff") will move this Court for an order granting Plaintiff's Motion for Class Certification against Polaris Industries, Inc. of Delaware, Polaris Sales, Inc. and Polaris Industries, Inc. of Minnesota ("Defendants") pursuant to Fed. R. Civ. P. 23(B)(2) and 23(B)(3) concerning 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").

Plaintiff seeks 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 May 25, 2018 and Present, 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, and which were tested using Gross Vehicle Weight, not Tractor Weight.

Plaintiff also seeks class certification for the following Subclass:

> All California residents, who, between in or about May 25, 2018 and Present, 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.

Plaintiff will also move the Court for appointment of Plaintiff as Class Representative, and for appointment of Plaintiffs' attorneys as Class Counsel.

Plaintiff respectfully requests oral argument.

This Motion is made pursuant to the Fed. R. Civ. P. 23 (b)(2) and (b)(3), a class action, on the grounds that the Rule 23 prerequisites are satisfied. This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the declarations and exhibits thereto, the Complaint, all other pleadings and papers on file in this action, and upon such other evidence and arguments as may be presented at the hearing on this matter.

Dated: May 22, 2023

LAW OFFICES OF TODD M. FRIEDMAN, P.C. / CARPENTER & ZUCKERMAN / DREYER BABICH BUCCOLA WOOD CAMPORA, LLP

/s/ John P. Kristensen
John P. Kristensen
Frank M. Mihalic, Jr.
Todd M. Friedman
Adrian R. Bacon
Christopher W. Wood

Attorneys for Plaintiff and all others similarly situated

CERTIFICATE OF SERVICE

I certify that on Wednesday, May 24, 2023, a true and correct copy of the attached **PLAINTIFF FRANCISCO BERLANGA'S NOTICE OF MOTION FOR CLASS CERTIFICATION** was served via CM/ECF and on all parties of record pursuant to Fed. R. Civ. P. 5:

Andrew B. Bloomer
Paul D. Collier
Evan Ribot
Kelsey Bleiweiss
KIRKLAND & ELLIS, LLP
300 North LaSalle
Chicago, IL 60654
andrew.bloomer@kirkland.com
pcollier@kirkland.com
evan.ribot@kirkland.com
kelsey.bleiweiss@kirkland.com
Counsel for Defendants

David A. Klein
KIRKLAND & ELLIS, LLP
333 South Hope Street
Los Angeles, CA 90071
david.klein@kirkland.com
Co-Counsel for Defendants

Richard C. Godfrey
R. Allan Pixton
QUINN EMANUEL URQUHART & SULLIVAN, LLP
191 North Wacker Dr., Suite 2700
Chicago, IL 60606
Telephone: 312-705-7400
Facsimile: 312-705-7401
richardgodfrey@quinnemanuel.com
allanpixton@quinnemanuel.com
Co-Counsel for Defendants

Christopher W. Wood
DREYER BABICH BUCCOLA WOOD CAMPORA, LLP
20 Bicentennial Circle
Sacramento, CA 95826
cwood@dbbwc.com
lsabadlab@dbbwc.com
dbbwc-eservice@dbbwc.com
Co-Counsel for Plaintiffs

Todd M. Friedman
Adrian R. Bacon
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard Street, Suite 780
Woodland Hills, CA 91367
tfriedman@toddflaw.com
abacon@toddflaw.com
Co-Counsel for Plaintiffs

/s/ Frank M. Mihalic, Jr.
Frank M. Mihalic, Jr.

John P. Kristensen (SBN 224132)
Frank M. Mihalic, Jr. (SBN 344691)
CARPENTER & ZUCKERMAN
8827 W Olympic Boulevard
Beverly Hills, California 90211
Telephone: (310) 273-1230
kristensen@cz.law
fmihalic@cz.law

Todd M. Friedman (SBN 216752)
Adrian R. Bacon (SBN 280332)
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21031 Ventura Blvd, Ste. 340
Woodland Hills, CA 91364
Telephone: (877) 206-4741
tfriedman@toddflaw.com
abacon@toddflaw.com

Christopher W. Wood (SBN 193955)
DREYER BABICH BUCCOLA WOOD CAMPORA, LLP
20 Bicentennial Circle
Sacramento, California 95826
Telephone: (916) 379-3500
cwood@dbbwc.com

Attorneys for Plaintiffs and all others similarly situated

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA – SACRAMENTO DIVISION

FRANCISCO BERLANGA, 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.: 2:21-cv-00949-KJM-DMC

ORAL ARGUMENT REQUESTED; MOTION OPPOSED

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

This case is epitomizes why class action cases exist.[1] This matter involves a simple, common set of facts, where false statements about product safety were made to tens of thousands of California consumers. Further, these false statements appear 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] As a result consumers think they are buying a vehicle with a ROPS that meets the stringent OSHA requirements when, in fact, the ROPS falls far short of meeting the standard.

After extensive discovery and consulting with multiple experts, Plaintiff can show that the common misrepresentations were false and common to the purchaser of each Class Vehicle sold between July 14, 2018 to February 2023, whose identities are in the possession of Polaris

---

[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 a mislabeling class action not a design defect case. 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.

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 Plaintiff's expert.

Every Class Member was exposed to the same false advertisement because Polaris places it via a sticker on the face of the product. Plaintiff's claims are typical of Class Members because he too bought a Class Vehicle with ROPS that were falsely advertised as complying with OSHA standards. Plaintiff relied on these false statements as a material basis for his purchase. Plaintiff retained an economic expert who presents a reliable damages model that mirrors a product recall, something that Polaris itself did for some ROPS. 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 and to regulators about strength testing for the ROPS of its vehicles. This results in customers receiving something of less value than anticipated. But it also exposes them to a heightened risk of death or other serious injuries by creating an informational gap. Every Class Vehicle suffers from this deficiency in the same way and can be remedied through Plaintiff's 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 remedy this lie. For the reasons described herein, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for Class Certification.

[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.

II. PROCEDURAL BACKGROUND

Plaintiff filed his Complaint on May 25, 2021, alleging violations of Cal. Bus. & Prof. Code §§ 17200, *et seq.* ("UCL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.* ("FAL"), Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* ("CLRA"), Violation of the Oregon Unlawful Trade Practices Act, Violation of the Nevada Deceptive Trade Practices Act, and Violation of the Texas Deceptive Trade Practices Act. Dkt. 1. Plaintiff filed a First Amended Complaint ("FAC") on July 14, 2021. Dkt. 22. On July 28, 2021, Defendants filed a Motion to Dismiss Plaintiff's FAC, Dkt. 23., which Plaintiff opposed. Dkt. 28. The Court granted Defendants' Motion in part and denied it in part. Defendants filed its Answer to Plaintiff's FAC on March 7, 2022. Dkt. 37.

Plaintiff has engaged in extensive discovery. Plaintiff was also deposed. Plaintiff also retained three experts, whose reports are filed contemporaneously with this Brief. This Motion is timely filed.

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"), 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. To avoid regulatory interference, Recreational Off-Highway Vehicle Association ("ROHVA"), a trade organization which included Polaris, was formed in 2009 to propose voluntary standards, pursuant to the Consumer Product Safety Act. 15 U.S.C. § 2052(a).[6]

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

Polaris, through ROHVA, voluntarily adopted a proposed safety standard, whereby UTVs would be manufactured with a ROPS that satisfied one of two tests: OSHA or ISO.[7] Wosick Dep.[8] 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, 33, 35. This action by ROHVA allowed the industry to "self-regulate." Rintamaki Dep. 30:20-31:20, 45:20-46:7. Polaris adopted the OSHA regulations for ROPS on its RZR, Ranger, and general lines of products. 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 FAC, 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. 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

---

[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.

[8] The parties stipulated that Plaintiff may cite to evidence from and depositions taken of Polaris employees in *Guzman v. Polaris Indus., Inc.*, No. 8:19-cv-01543 (C.D. Ca. Jan. 13, 2021). Dkt. No. 35, pg. 11.

[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. ROHVA considered NHTSA's roof strength test, FMVSS 216, which requires three times the gross vehicle weight be applied to roofs of all cars. *See* Exhibit 52, Deposition of Thomas

pursuant to 29 C.F.R. §§ 1928.51(a)(4):

> "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. The relevant Polaris vehicles range from 67 to 180 horsepower and must be under 3,750 lbs. pursuant to ROHVA.[11] It is mathematically always the case that the horsepower calculation for Polaris vehicles will exceed gross vehicle weight and is therefore the appropriate input to be used for determining tractor weight.

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

In direct contravention of OSHA requirements, Polaris implemented a calculation that ignored horsepower for purposes of compliance, instead building in a 15% "over test margin," and multiplying the gross vehicle weight by 1.15, to run strength tests. Exs. 13, 39; Deckard Dep. 85:14-20; Keller Dep. 17:9-20:20.

Polaris has acknowledged before that this same certification procedure was uniformly performed with every Class Vehicle and has been in place for over a decade. 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.

There is no dispute that this was a common practice across all relevant vehicle models. Moreover, the miscalculation was so severe that Polaris cannot point to a single relevant

---

Yager, at 31:1 to 34:24. ROHVA claims the tougher FVMSS 2016 test was rejected because consumers would see "FMVSS" equate it with an auto regulation and drive on freeways. *Id*. at 34:13-16.

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

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

vehicle for which the gross vehicle weight, even accounting for the 15% margin, which would meet or exceed the horsepower calculation. And it is not close.[12]

This case is straightforward, and concerns a common misrepresentation made across virtually all of Polaris RZR and Ranger and 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." Polaris makes these representations by plastering the following sticker on each Class Vehicle's ROPS:

[13]

Ex. 11. This sticker is on every single Class Vehicle, all RZR and Ranger Polaris UTVs, except Generals MY 2016-2019.[14] Exs. 1, 2, 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:

> Q: How does Polaris determine where to place the labels on the -- on the vehicles indicating that it complied with the OSHA standard pursuant to the ROHVA standard?

---

[12] As an example of why this is important, the 2018 RZR 570 EPS owned by Plaintiff, 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. Adjusted Gross Vehicle Weight is 3,162 (1.15 x 2,750). This means that Polaris is employing a strength test that accounts for only **27.5% of the anticipated force** accounted for under the OSHA test. Stated otherwise, the strength of the ROPS would need to be **3.6 times stronger** to meet the standard Polaris represents to consumers that it meets. 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] The only deviations from this sticker are the model number and gross vehicle weight. The crux of the representation, that the ROPS satisfies compliance with the OSHA regulation, is identical for all Class Members. This misrepresentation is also made in the owners' manual for every Class Vehicle. Ex. 36.

[14] Mr. Wosick clarified that a small handful of models were tested under the ISO standard, not OSHA, but these models (MY 2016 through MY 2019 Generals) are not part of Plaintiffs' Class definition. Wosick Dep. 30:1-16, 34:23-35:25.

> A: We take, as a requirement, the ROHVA requirement that it be placed on the ROPS structure. And we look for a location that's -- that will fit the label and that's visible to the consumer.
>
> Q: Why is it important for it to be visible to the consumer?
> A: Well, like any label, it's intended to be informative to the user. And they need to be able to see it to be so informed.
>
> Q: And each of these vehicles have – when I'm talking about vehicles, I'm saying the Rangers, RZRs, and Generals since model year 2015, have they all had a sticker on it that says it's complied with either the OSHA or the ISO standard?
>
> A: Yes.
>
> Q: And is part of the reason for that that you want to let consumers know that, Hey, this meets the OSHA or ISO standard before they purchase the vehicle?
>
> A: Well, we do it for two reasons: One, that we're required to by the ANSI/ROHVA; and, secondly, yes, to advise consumers.
>
> Keller Dep. 26:15-27:19.

Polaris places an OSHA compliance sticker on <u>every</u> Class Vehicle in a visible location, because it informs consumers of important ROPS safety concerns prior to purchase. Keller Depo 85:19-85:13. But not a single Class Vehicle has been tested using the proper tractor weight pursuant to 29 C.F.R. §§ 1928.51, *et seq.* Ex. 41. Polaris advertised and told the public that every Class Vehicle passed the OSHA 29 C.F.R. § 1928.53 test. This was a lie.

Moreover, Judge Mendez agreed with Plaintiff's interpretation of 29 C.F.R. §§ 1928.51 in *Spencer v. Honda*, Case No. 2:21-cv-00988 2022 WL 14863071 (E.D. Cal. Oct. 26, 2022), attached hereto as Exhibit 56. In granting and denying in part Honda's motion to dismiss, Judge Mendez reasoned:

> The crux of [the parties'] competing views lies in whether the last sentence of this provision, regarding flywheel horsepower, applies to situations where the vehicle in question lacks a power take-off ("PTO"). The Court finds that Plaintiff is correct in that it does.
>
> Defendants' argument that § 1928.53's testing requirements permit them to use

> "gross vehicle weight" in all instances when their vehicle lacks a PTO is unpersuasive . . . . The statute states that a vehicle's weight is the greater of two values, either the maximum gross vehicle weight or 110 pounds times that maximum power take-off horsepower at the rated engine speed. § 1928.51(a). When the power take-off is not available, the second value shall be calculated instead as 110 pounds times 95 percent of the net engine flywheel horsepower. *Id*.
>
> . . . .
>
> When a vehicle lacks a PTO, the value of that vehicle's PTO horsepower is "not available" within the meaning of the statute, and the flywheel horsepower should be used instead.
>
> The Court declines to adopt Defendants' proposed interpretation that the PTO horsepower of a vehicle without a PTO is "available" within the meaning of the statute merely because the horsepower of a nonexistent engine is logically zero. . . . Defendant's interpretation would render the last sentence of this provision superfluous because, in cases where a PTO is installed, the PTO horsepower would apply, and, in cases where a PTO horsepower is not installed, the PTO horsepower would still apply (as zero). This would mean that the flywheel horsepower value would only apply in situations where a PTO is installed but the PTO horsepower is somehow uncalculatable. . . . Given that Defendants suggest that PTO horsepower can be calculated even when a PTO does not exist, the Court declines to credit their suggestion that PTO horsepower might be uncalculatable when a PTO does exist.
>
> . . . .
>
> As such, the Court concludes that, in the absence of a PTO, Defendants were required under § 1928.51(a) to compare their vehicle's gross vehicle weight with 110 pounds times 95 percent of the net engine flywheel horsepower and to use the greater value in their ROPS tests. Plaintiff alleges Defendants failed to do so. . . . The Court finds that this allegation is sufficient to state an actionable misrepresentation under the CLRA, UCL, and FAL. . . .

Id. at *6-7.

D. Composition and Identification of Class Members

During the relevant time period, Polaris sold three categories of relevant vehicles: RZR, Ranger and General. Wosick Dep. 16:10-19. Between 2017 and 2021, Polaris sold 29,284 Class Vehicles, identified down to the paint color. Ex 51. Thus, given the passage of time since this data, Plaintiff estimates that there are approximately 30,000-40,000 Class Members. Polaris maintains records of the contact information of the customers who purchase Class Vehicles through their authorized dealers. 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 "[s]afety is a big concern for [Polaris] customers. They want more durable roll cages from the factory." Ex. 21. But instead of improving the ROPS' strength, Polaris instead recommended that the "[r]oll case should give some added *perception of strength*." Ex. 21 (emphasis added).

Polaris conducted consumer surveys regarding the importance of the strength and safety of its vehicles' ROPS, which revealed that 25% of RZR owners replaced their ROPS, and of the remaining 75% of owners, 31% were likely to do so in the next year. Of RZR XP owners, 65% wanted a ROPS with more structure. Ex. 22. In another survey, 71% of RZR XP owners agreed that they preferred to have ROPS with more structure. 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

A recall model for damages is a methodology that Polaris itself employs. In 2018, Polaris implemented a recall for 2018 Turbo XP RXR models concerning a ROPS safety defect after discovering failures in the field. Exs. 6-9; Wosick Dep. 57:4-59:8, 69:3-25, 84:3-86:18.[15] Nationwide service bulletins were provided to authorized dealers to alert them to the nature of the recall. *Id*. Dealers were provided with retrofit kits by Polaris to be applied to affected vehicles. *Id*. Dealers were compensated at a reasonable hourly rate by Polaris for the labor cost of installing and retrofitting the kits. *Id*.

All costs of any recall, including parts and labor are meticulously tracked and expensed by Polaris. Ex. 34 at 44118; Keller Dep. 40:8-41:8. Notice of the recall can be provided to customers through a Polaris' client database and its authorized dealers. Keller Dep. 31:13-32:21,

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

38:5-39:9. Polaris has a "great process for handling recalls," making Plaintiff's proposed recall model manageable. Deckard Dep. 63:4-65:7. Plaintiff could use this same methodology to 1) provide direct notice to the Class Members, and 2) calculate class-wide damages.

G. Plaintiff's Experiences Were Typical of the Class

In or around May 18, 2019, Plaintiff Berlanga purchased a 2018 Polaris RZR 570 EPS in California. Berlanga Decl. ¶ 4. Plaintiff Berlanga' vehicle 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 Plaintiff at the point of sale. *Id.* Plaintiff reasonably relied upon Defendants' representations regarding their vehicles. *Id.* at ¶¶ 5-8. Plaintiff did not receive the benefit of the bargain. *Id.* This is the same for each Class Member.

H. The Class and Subclass for Which Certification Is Sought

Based upon these facts and allegations, Plaintiff seeks 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 May 25, 2018 and Present, 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,[16] and which were tested using Gross Vehicle Weight, not Tractor Weight.

Plaintiff also seeks class certification for the following Subclass:

> All California residents, who, between in or about May 25, 2018 and Present, 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. Plaintiff's Expert Presents a Market Approach to Calculate Class-Wide Damages Under a Benefits of the Bargain Theory

In 2019, the Ninth Circuit examined proposed damages methodologies in a proposed class

[16] Discovery to date indicates that all RZR, Ranger and General Models *except for* MY 2016 through MY 2019 General Models contained such an OSHA sticker.

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 it 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 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.[17] As the Ninth Circuit reasoned, 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[18] class action involving misrepresentations about components of vehicles.

To demonstrate a feasible damages methodology to the Court at the class certification phase, Plaintiff hs 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.[19] 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

---

[17] 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)).

[18] The case recognized that damages 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)).

[19] 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.

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.

Total damages to the Class would 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. Polaris itself has done this 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. The expense of this process could thus 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 Plaintiff's engineering experts, to replace or retrofit Class Vehicle ROPS to 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. Rule 23 seeks 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.[20]

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

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

conjunctive prerequisites that must be met for any class: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *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).[21]

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 ripe for application on a broad class-wide basis.[22] In these cases, as here, one misrepresentation applies 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 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, each Class Vehicle contained the offending sticker. Each Class

[21] 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).

[22] *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).

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 Plaintiff, which does the same. There is no question that Polaris' conduct 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.[23]

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). 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 July 2018 and February 2023.

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

[23] 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.")

process being over-inclusive. Polaris knows exactly who the Class Members are and knows the exact number of Class Vehicles sold. Thus, Plaintiff has 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).[24] In determining whether numerosity is satisfied, the Court may consider reasonable inferences drawn from the facts before it. *Astiana v. Kashi Co.*, 291 F.R.D. 493, 501 (S.D. Cal. July 30, 2013) (citing *Gay v. Waiters' Dairy Lunchmen's Union*, 549 F.2d 1330, 1332 n.5 (9th Cir. 1977)).

In *Guzman v. Polaris Industries, Inc., et al.*, Case No. 8:19-cv-01543 (S.D. Cal. Apr. 30, 2020), Polaris identified over 30,000 consumers who purchased a Class Vehicle in California during the Class Period. Ex. 24. The Class Vehicles in *Guzman* share significant similarity with the Class Vehicles in this case. Accordingly, "reasonable inferences drawn from" the facts before this Court suggest that numerosity is satisfied. *See Astiana*, 291 F.R.D. at 501. Therefore, the numerosity requirement is satisfied here because thousands of separate actions would be economically and judicially impracticable.[25]

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)).

---

[24] *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)).

[25] *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.").

The commonality inquiry 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).[26] "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.[27] Certification is appropriate where the "classwide proceeding [will] generate common answers apt to drive resolution of the litigation." *Id*.

Commonality is also satisfied. Polaris placed substantively identical language, via a visible sticker, on the ROPS of every Class Vehicle. This sticker falsely stated that the ROPS was tested under and complied with OSHA regulation 29 C.F.R. § 1928.53. In fact, as is the case with each Class Vehicle, this statement was false. Polaris universally used gross vehicle weight, not tractor weight, to run its calculations. This caused 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.

Polaris trotted out OSHA as a marketing tactic because the public associates OSHA compliance with safety. Polaris decided that it did not need to comply with the very standard it petitioned the regulators to allow it to use; instead, Polaris chose to use cheaper, lighter, weaker and less materials to build its ROPS—undoubtedly to save money. This is a common issue. It

---

[26] 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)).

[27] "[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.

affects every Class Vehicle equally.

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); See also *In re Tobacco II Cases*, 46 Cal.4th 298, 320 (Cal. 2009)). ("relief under the UCL is available without individualized proof of deception, reliance, and injury.")

Commonality is satisfied because all Class Members were exposed to Polaris' false advertising of the ROPS' compliance with OSHA, which Polaris prominently featured on the face of its 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.[28] *See id.* at 1020.[29]

[28] 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).

[29] 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-

Plaintiff Berlanga's claims are typical of those of the Class Members in that both Plaintiff 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 Polaris knew this was false in the same manner (on the ROPS of the vehicle in a visible conspicuous location).[30] "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 satisfied.[31]

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.[32] Plaintiff's 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.

Plaintiff wishes to be upfront that he has two felony convictions – a 2014 count for contacting a minor with the intent to commit a sexual offense, and a 2014 charge for felony possession of ammunition. Berlanga Decl., at ¶¶ 10-11. Neither of these nine-year old charges relate to dishonesty theft or fraud. *Id.* This Court has held that drug-related felonies (of a similar nature to possession of ammunition) were irrelevant to determining a class representative's adequacy, and that only charges which "prove dishonesty" are relevant to a class representative's adequacy. *Pena v. Taylor Farms Pacific, Inc.*, 305 F.R.D. 197, 215-216 (E.D. Cal. 2015). As to the sex offense charge, undersigned counsel certified a class action with a representative who held a similar charge in

---

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).

[30] *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).

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

[32] 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).

Stemple v. QC Holdings, Inc., 2014 WL 4409817 (S.D. Cal. Sept 5, 2014). The Court found Mr. Stemple's offense to be irrelevant for similar reasons and found him adequate. *Id*. at *9. Plaintiff's criminal history from nine years ago does not impact his credibility or his genuine desire to represent the Class in this case today. The Court should look past these transgressions, given that neither charge undermines Mr. Berlanga's credibility or honesty in this matter.

Plaintiff shares the same interests of the Class which is comprised of consumers who were all harmed in virtually the same way by Polaris' advertising. Plaintiff will fairly represent the interests of the Class. Berlanga Decl. at ¶¶ 9-12. Plaintiff's 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 unlikely that a conflict would exist in this case, given the common practice of Polaris.[33] Plaintiff has 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. Adequacy is satisfied.

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

Plaintiff anticipates 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.

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) plaintiff was 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

[33] *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").

members.[34] There is no legitimate difference between the vehicle Plaintiff 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

Plaintiff seeks hybrid certification pursuant to Rule 23(b)(2) and (b)(3).

1. Rule 23(b)(2)

Certification under Rule 23(b)(2)[35] 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.

---

[34] *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).

[35] 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).

Polaris knew of this issue long before this case was filed. Polaris still has 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."[36] Certification under Rule 23(b)(2) is necessary and appropriate.

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."[37] "At class certification,

[36] 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.

[37] *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

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."[38] 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 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.[39]

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 Plaintiff's 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.

Moreover, "'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. The Class

---

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.)

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

[39] 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).

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.[40] "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."[41] The superiority requirement is therefore 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: May 24, 2023

CARPENTER & ZUCKERMAN & LAW OFFICES OF TODD M. FRIEDMAN, P.C & DREYER BABICH BUCCOLA WOOD CAMPORA, LLP

/s/ *John P. Kristensen*
John P. Kristensen
Frank M. Mihalic, Jr.
Todd M. Friedman
Adrian R. Bacon
Christopher W. Wood

Attorneys for Plaintiff and all others similarly situated

[40] *See e.g., Westways, supra* 218 F.R.D. at 236-237.
[41] *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941).

CERTIFICATE OF SERVICE

I certify that on Wednesday, May 24, 2023, a true and correct copy of the attached **PLAINTIFF FRANCISCO BERLANGA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION** was served via CM/ECF and on all parties of record pursuant to Fed. R. Civ. P. 5:

Andrew B. Bloomer
Paul D. Collier
Evan Ribot
Kelsey Bleiweiss
KIRKLAND & ELLIS, LLP
300 North LaSalle
Chicago, IL 60654
andrew.bloomer@kirkland.com
pcollier@kirkland.com
evan.ribot@kirkland.com
kelsey.bleiweiss@kirkland.com
Counsel for Defendants

David A. Klein
KIRKLAND & ELLIS, LLP
333 South Hope Street
Los Angeles, CA 90071
david.klein@kirkland.com
Co-Counsel for Defendants

Richard C. Godfrey
R. Allan Pixton
QUINN EMANUEL URQUHART & SULLIVAN, LLP
191 North Wacker Dr., Suite 2700
Chicago, IL 60606
Telephone: 312-705-7400
Facsimile: 312-705-7401
richardgodfrey@quinnemanuel.com
allanpixton@quinnemanuel.com
Co-Counsel for Defendants

Christopher W. Wood
DREYER BABICH BUCCOLA WOOD CAMPORA, LLP
20 Bicentennial Circle
Sacramento, CA 95826
cwood@dbbwc.com
lsabadlab@dbbwc.com
dbbwc-eservice@dbbwc.com
Co-Counsel for Plaintiffs

Todd M. Friedman
Adrian R. Bacon
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard Street, Suite 780
Woodland Hills, CA 91367
tfriedman@toddflaw.com
abacon@toddflaw.com
Co-Counsel for Plaintiffs

/s/ Frank M. Mihalic, Jr.
Frank M. Mihalic, Jr.