UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL GUZMAN, et al.,

Plaintiffs,

v.

POLARIS INDUSTRIES, INC., et al.,

Defendants.

Case No. 8:19-cv-01543-FLA (KESx)

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND TO BE APPOINTED CLASS COUNSEL [DKTS. 67, 183]

INTRODUCTION

Plaintiff Paul Guzman ("Plaintiff" or "Guzman") purchased a Utility Terrain Vehicle ("UTV") with the purpose of riding the off-road vehicle during camping trips with his family. He now claims, however, he was misled by a false representation on a sticker on the UTV stating it was compliant with Occupational Safety and Health Administration ("OSHA") standards. Guzman alleges claims against Defendants Polaris Industries, Inc., Polaris Sales, Inc., and Polaris, Inc. ("Polaris") on behalf of a proposed class for violations of: (1) California Civil Code § 1750, et seq. (the California Consumers Legal Remedies Act, "CLRA"); (2) California Business & Professions Code § 17200, et seq. (the California Unfair Competition Law, "UCL");

and (3) California Business & Professions Code § 17500, et seq. (the California False Advertising Law, "FAL"). Dkt. 26 ("FAC").

Present before the court is Guzman's Motion for Class Certification ("Motion"). Dkts. 67, 183 ("Mot."); Dkt. 67-1 ("Mot Br.").[1] Polaris opposes the Motion. Dkt. 105 ("Opp'n"); Dkt. 105-1 ("Opp'n Br.").

For the below reasons, Plaintiff's Motion is GRANTED IN PART.[2]

BACKGROUND

The facts of the parties' dispute are set forth in the court's Order on Defendant's Motion for Summary Judgment (the "MSJ Order"). Dkt. 153; *Guzman v. Polaris Indus. Inc.*, Case No. 8:19-cv-01543-FLA (KESx), 2021 WL 2021454 (C.D. Cal. May 12, 2021).

In relevant part, Polaris sells various models of off-road vehicles. Dkt. 153 at 1. Polaris sells vehicles under the brand names "RZR," "Ranger," and "General." *Id.* Each vehicle comes equipped with a roll cage, also known as a rollover protective structure, or "ROPS." *Id.* As the name suggests, the ROPS serves to protect occupants in the event of a rollover of the vehicle.

Polaris' ROPS follows standards set forth by the American National Standards Institute and the Recreational Off-Highway Vehicle Association, which requires the ROPS to comply with the performance requirements of either the International Organization for Standardization standard 3471 or OSHA regulation 29 C.F.R. § 1928.53 ("§ 1928.53"). *Id.* Certain Polaris vehicles have a label on the ROPS[3]

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[1] The court cites documents by the page numbers added by the court's CM/ECF system, rather than any page numbers that appear natively within the documents.

[2] Plaintiff noticed the Motion for hearing on October 27, 2023. Dkt. 183. The court finds the Motion appropriate for resolution without oral argument and vacates the noticed hearing date. *See* Fed. R. Civ. P. 78(b); Local Rule 7-15.

[3] The operative complaint refers to the label on the ROPS as a "sticker." Dkt. 39 ¶ 3. The court henceforth uses this term to refer to the label.

containing the language: "This ROPS structure meets OSHA requirements of 29 C.F.R. § 1928.53," along with the vehicle model and test gross vehicle weight ("GVW"). *Id.*

Guzman purchased a model year 2018 Polaris RZR XP in November 2018. *Id.* at 2. Guzman alleges he saw and read the ROPS sticker on his vehicle prior to purchase and understood the sticker to mean the vehicle's ROPS structure met OSHA standards for safety. Dkt. 39 ("SAC") ¶¶ 45–46, 49–50. According to Guzman, he relied on the sticker's representations and would not have purchased the vehicle if the sticker were not present. *Id.* ¶¶ 47, 51.

Guzman alleges the sticker on his vehicle reads as follows:

Id. ¶ 49.

According to Plaintiff, the ROPS sticker is false and misleading because the ROPS does not meet the requirements of § 1928.53. *Id.* ¶ 5. He alleges Polaris tested every model of class vehicle based on GVW, rather than the maximum power take off horsepower or 95% of the net engine flywheel, as he argues § 1928.53 requires. *Id.* ¶¶ 37–41. Plaintiff concludes consumers were damaged by Polaris' failure to provide accurate and truthful information about the nature and characteristics of the class vehicles, since consumers must now retrofit purchased vehicles to ensure their safety. *Id.* ¶ 42.

Guzman and former Plaintiff Jeremy Albright ("Albright") filed the initial Complaint on August 8, 2019, First Amended Complaint on October 24, 2019, and the Second Amended Complaint ("SAC") on March 3, 2020, asserting class action claims on behalf of a putative class of: "All persons in California that purchased a Class Vehicle in the four years preceding the filing of [the] Complaint." Dkt. 1 ("Compl.") ¶ 51; SAC ¶ 57. The proposed Class Vehicles in the Complaint and SAC include a

list of various models of Polaris "RZR," "Ranger," and "General" vehicles. Compl. ¶ 2; SAC ¶ 2.

Plaintiff asserts three causes of action in the SAC alleging violations of the CLRA, UCL, and FAL against Polaris on behalf of the proposed class. The court has subject matter jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2).

On January 13, 2021, Guzman and Albright filed the instant Motion, seeking to be certified as a class under Federal Rule of Civil Procedure 23(b)(2) and (3). Mot. Polaris filed an Opposition to the Motion. Opp'n. Guzman and Albright filed a Reply, in which they narrowed the proposed class definition to the following:

> All California residents who between 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 (i.e. a Polaris RZR sold with a stock ROPS installed).

Dkt. 119 ("Reply") at 21.

On May 12, 2021, the court issued the MSJ Order, granting summary judgment in favor of Polaris against all of Guzman and Albright's causes of action in the SAC. Dkt. 153. The MSJ Order also denied as moot: the instant Motion; Polaris' Ex Parte Application to Strike Plaintiffs' Class Certification "Reply" Report and Plaintiffs' Use of Merits in their Class Certification Brief (Dkt. 134); and the remaining portions of Plaintiffs' Motion Requesting Amendment of the Scheduling Order to Continue Outstanding Motions, Discovery, and Trial Deadlines by One Hundred Eighty Days (Dkt. 84).

On September 29, 2022, the United States Court of Appeals for the Ninth Circuit reversed the MSJ Order as to Guzman, ruling that, "viewing all evidence and inferences in the light most favorable to Guzman, a reasonable jury could find that he relied on the ROPS label." *Guzman v. Polaris Indus., Inc.*, Case No. 21-55520, 2022

WL 4547785 (9th Cir. Sept. 29, 2022).

On November 14, 2022, the court reopened this action as to Guzman. Dkt. 165. The parties thereafter filed a joint statement regarding the remaining issues to be decided in connection with the MSJ Order. Dkt. 167. In the joint statement, Guzman again modified the proposed class definition—this time, to begin on August 8, 2016. Thus, Plaintiff's final proposed class definition is as follows:[4]

> All California residents who between August 8, 2016 and December 31, 2019 [the "Class Period"] 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 (i.e. a Polaris RZR sold with a stock ROPS installed) [the "Class Vehicle"].

Id.

On April 19, 2023, the court dismissed without prejudice Guzman's claims for monetary relief in connection with the UCL and FAL claims. Dkt. 172.

REQUEST FOR JUDICIAL NOTICE

Plaintiff requests judicial notice of four documents: three publicly filed recall notices promulgated by the United States Consumer Product Safety Commission and one public report by the Congressional Research Service. Dkt. 120 ("RJN") & Exs. A–D. Defendant does not oppose Plaintiff's request.

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[4] Courts in this district disagree whether a revised class definition may be considered on a motion for class certification. *Compare Andrews v. Plains All Am. Pipeline, L.P.*, Case No. 2:15-cv-04113-PSG (JEMx), 2019 WL 6647928, at *7 (C.D. Cal. Nov. 22, 2019) (considering class definition in motion for certification where amended "definition was narrower than and encompassed within the complaint's broader definition"), *with Costelo v. Chertoff*, 258 F.R.D. 600, 604–05 (C.D. Cal. 2009) ("The Court is bound to class definitions provided in the complaint and, absent an amended complaint, will not consider certification beyond it."). The court chooses to consider the amended class definition, as the new scope is "narrower and encompassed within the complaint's broader definition." *See Andrews*, 2019 WL 6647928, at *7.

A court may take judicial notice of facts not subject to reasonable dispute because they are either: (1) "generally known within the trial court's territorial jurisdiction," or (2) capable of being "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court may take judicial notice of undisputed matters of public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001); *see also United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 974 (E.D. Cal. 2004) ("While the authenticity and existence of a particular order ... is judicially noticeable, veracity and validity of its contents are not.").

Under Federal Rule of Evidence 201, the court finds it appropriate to take judicial notice of the existence and authenticity of these documents. The court GRANTS Plaintiff's unopposed request for judicial notice.

LEGAL STANDARD

Federal Rule of Civil Procedure 23 ("Rule 23") provides district courts with broad discretion to determine whether a class should be certified. *Armstrong v. Davis*, 275 F.3d 849, 871 n. 28 (9th Cir. 2001). Rule 23 is the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). To justify departure from the rule, a class representative must be part of the class and possess the same interest and suffer the same injury as fellow class members. *Id.* (citation omitted); *accord Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011).

Accordingly, "before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co, Inc.*, 666 F.3d 581, 588 (9th Cir. 2012), *overruled in part on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n. 31 (9th Cir. 2022) (internal quotation marks and citation omitted). This "rigorous" analysis may "entail some overlap with

the merits" of the underlying claims. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013) (citing *Wal-Mart*, 564 U.S. at 351). Rule 23, however, "grants no license to engage in free-ranging merits inquiries at the certification stage." *Id.* at 466. The court may consider the merits "to the extent—but only to the extent—that they are relevant in determining whether Rule 23 prerequisites for class certification are satisfied." *Id.*

Rule 23 "does not set forth a mere pleading standard." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation marks and citation omitted). Rather, the party seeking certification must affirmatively demonstrate compliance with the requirements of both Rule 23(a) and (b). *Wal-Mart*, 564 U.S. at 349.

Rule 23(a) permits a plaintiff to sue as a representative of a class only if: (1) "the class is so numerous that joinder of all members is impracticable" ("numerosity" requirement); (2) "there are questions of law or fact common to the class" ("commonality" requirement); (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class" ("typicality" requirement); and (4) "the representative parties will fairly and adequately protect the interests of the class" ("adequacy" requirement). Fed. R. Civ. P. 23(a). The purpose of Rule 23(a)'s requirements is largely to "ensure that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate," and "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Wal-Mart*, 564 U.S. at 349 (internal quotation marks and brackets omitted).

"If each of the Rule 23(a) requirements are satisfied, the purported class must also satisfy one of the three prongs of Rule 23(b)." *Id.* Rule 23(b) defines three different types of classes. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2012). Here, Plaintiff seeks hybrid certification under Rules 23(b)(2) and (b)(3). Mot. Br. at 29–30. Rule 23(b)(2), which concerns equitable relief, requires the court to find 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[.]" Rule 23(b)(3), which concerns monetary relief, requires the court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members" ("predominance" requirement), and "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" ("superiority" requirement).

DISCUSSION

I. Rule 23(a) Requirements

A. Numerosity

Rule 23(a)(1) requires a class be "so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). There is no set number required to satisfy the numerosity requirement; the court must examine the specific facts of each case. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980). Broadly, however, "courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) (citation omitted).

Plaintiff argues Polaris identified significantly more than 100 customers who purchased a Polaris off-road vehicle in California during the Class Period (which was then defined to be between August 8, 2015 and December 31, 2019). Mot. Br. at 21; Reply at 18. Plaintiff also points to evidence to suggest that a substantial number of those sales were RZRs and/or vehicles with a stock ROPS. Reply at 18. Reports from the United States Consumer Product Safety Commission establish that, at minimum, more than ten thousand Polaris RZR units have been subject to recall during the relevant class period. *See* RJN Exs. B–C. Polaris does not respond to Plaintiff's arguments regarding numerosity and appears to concede that the proposed class is sufficiently numerous. *See* Opp'n.

While Plaintiff has not stated with specificity the number of RZRs sold in California between August 8, 2016 and December 31, 2019, that meet the final proposed definition of a Class Vehicle, the court finds Plaintiff has demonstrated the

proposed class size is sufficiently numerous.

B. Commonality

Courts construe the commonality requirement liberally, requiring a showing of "questions of law or fact common to putative class members." Fed. R. Civ. P. 23(a)(2); *Mazza*, 666 F.3d at 589. Commonality requires the plaintiff to demonstrate the class members' claims depend upon a common contention that 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." *Wal-Mart*, 564 U.S. at 350; *accord Willis v. City of Seattle*, 943 F.3d 882, 885 (9th Cir. 2019) ("The commonality element may be fulfilled if the court can determine 'in one stroke' whether a single policy or practice which the proposed class members are all subject to 'expose[d] them to a substantial risk of harm.'").

To assert a claim under either the UCL, FAL, or CLRA, "it is necessary only to show that members of the public are likely to be deceived." *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) (citation and internal quotations omitted); *see also Bradach v. Pharmavite, LLC*, 735 Fed. App'x. 251, 254 (9th Cir. 2018) ("[T]he standard in actions under both the CLRA and UCL is whether 'members of the public are likely to be deceived.'"). Thus, claims of this type are ideal for class certification because they do not require "the court to investigate class members' individual interaction with the product." *Bradach*, 735 F. App'x at 254–55.

Plaintiff argues commonality is satisfied because this action presents common questions of whether: (i) Polaris engaged in any unlawful practice by representing the ROPS system complied with OSHA requirements; and (ii) the sticker on the Class Vehicles' ROPS system would deceive a reasonable consumer. The court agrees.

Under Plaintiff's final proposed class definition, every putative class member would have purchased a Class Vehicle with a sticker stating the ROPS complied with § 1928.53. *See* Reply at 21. All putative class members, therefore, would necessarily have "suffer[ed] the same injury," as required. *See Wal-Mart*, 564 U.S. at 348; *see*

also Clevenger v. Welch Foods Inc., 342 F.R.D. 446 (2022) (finding commonality satisfied in case involving UCL and FAL claims because all putative class members who purchased the product with allegedly misleading representations suffered the same injury); *Prescott v. Reckitt Benckiser LLC*, Case No. 2:20-cv-02101-BLF, 2022 WL 3018145, at *6 (N.D. Cal. July 29, 2022) (same). Accordingly, the court finds there are questions of fact and law common to the class.

C. Predominance[5]

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). While similar to commonality, the inquiry requires a heightened showing that facts and issues common to the class predominate over any individual issues that may be present. Fed. R. Civ. P. 23(b)(3); *Amchem Prods.*, 521 U.S. at 624.

Rule 23(b)(3) requires a showing that "questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 568 U.S. at 459. In assessing predominance, the court "is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial." *Olean Wholesale*, 31 F.4th at 666–67 (cleaned up) (emphasis in original). A court does not have "license to engage in free-ranging merits inquiries at the certification stage" and therefore "cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue." *Id.* at 667.

Polaris argues predominance is lacking because reliance, materiality, and

[5] For clarity and efficiency, the court addresses predominance prior to the remaining Rule 23 considerations.

causation are predominant individual issues. *See* Opp'n Br. at 25–36.

1. Polaris' Objections

Polaris argues the evidence demonstrates individualized issues relating to reliance, causation, and materiality. Opp'n Br. at 28. However, at the class certification stage, Plaintiff need not prove "individualized proof of deception, reliance, and injury." *Tobacco II*, 46 Cal. 4th at 320. "[A] presumption, or at least an inference, or reliance arises wherever there is a showing that a misrepresentation was material." *Id.* at 327. A misrepresentation is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction." *Id.* "Because materiality is judged according to an objective standard"—the reasonable consumer—it may generally be established by common proof. *Amgen*, 568 U.S. at 459.

The relevant inquiry here, then, is not whether each individual putative class member read and/or believed the ROPS sticker's representations, but whether the sticker would be likely to cause a reasonable consumer to believe the ROPS system complies with relevant safety standards. Plaintiff alleges the existence of safety defects in the ROPS of the Class Vehicles. If such defects exist, members of the putative class would be forced to either subject themselves to greater risk to their wellbeing than that for which they initially bargained or undertake costs to replace the ROPS themselves. A reasonable consumer would likely attach importance to either scenario.

While a class representative must demonstrate he has suffered injury in fact because of the misconduct alleged, absent class members do not. *Tobacco II*, 46 Cal. 4th at 320 (recognizing "relief under the UCL is available without individualized proof of deception, reliance and injury" as to class members). Accordingly, the court finds that the question of whether each putative class member read and/or believed the ROPS sticker is irrelevant to the court's inquiry and does not predominate over questions common to the class.

2. Damages

To satisfy the predominance requirement, Plaintiff must also "propose a damages model that is consistent with [his] theory of liability and capable of measuring damages on a classwide basis." *Comcast*, 569 U.S. at 27, 34–35. The Ninth Circuit has held that "a district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial" because "such individualized issues do not predominate over common ones." *Olean*, 31 F.4th at 669. The potential for "more than a de minimis number of uninjured class members" does not stand in the way of certification. *Id.* While "[r]easonable minds may differ" as to whether a plaintiff's damages model "is probative as to all purchasers in the class, ... that is a question of persuasiveness for the jury once the evidence is sufficient to satisfy Rule 23." *Id.* at 681.

At this point in the action, the court is satisfied Plaintiff's damages methodology is consistent with his theory of liability. Plaintiff alleges the ROPS on all Class Vehicles does not comply with § 1928.53, despite the ROPS sticker's representation it is OSHA compliant. SAC ¶ 5. Plaintiff's expert intends to employ a benefit of the bargain damages model. Mot. Br. at 19. Specifically, he would calculate the cost of retrofitting the ROPS structure to be OSHA-compliant, add the cost of labor of the retrofitting, and multiply that figure by the number of Class Vehicles. *Id.* at 19–20.

Polaris urges the cost of retrofitting the ROPS system is an improper basis to calculate damages because Plaintiff has "presented no evidence by which the ROPS could be replaced or 'repaired' so that they comply with plaintiffs' interpretation of 29 C.F.R. § 1928.53." Opp'n Br. at 40. Polaris' concerns regarding the sufficiency of this evidence are not properly brought before the court in deciding a motion for class certification. "In this circuit... damage calculations alone cannot defeat certification." *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). Rather, at the class certification stage, Plaintiff's burden is simply to propose a damages

model "measur[ing] only those damages attributable" to his theory of liability. *See Comcast*, 569 U.S. at 35. Plaintiff's proposed damages theory, therefore, is sufficient to satisfy his burden on the subject Motion.

D. Typicality

Rule 23(a)(3) requires "the claims or defenses of the representative parties [to be] typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same source of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quotation marks omitted). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Castillo v. Bank of Am., N.A.*, 980 F.3d 723, 729 (9th Cir. 2020) (quotation marks omitted). "[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Hanon*, 976 F.2d at 508 (citation omitted).

Guzman argues his claims are not "unique" to him and that members of the putative class "have been injured by the same source of conduct"—a false promise that the ROPS system satisfied § 1928.53—and in the same manner—via a sticker on the vehicle's ROPS. Mot. Br. at 10.

Polaris argues Guzman's claim is atypical because he has "experience with OSHA from [his] construction industry work" and is subject to a unique defense. Opp'n Br. at 43–44. The court disagrees. While Guzman's construction experience (and his own testimony) may suggest he is familiar with OSHA safety standards, this does not mean other putative class members are unfamiliar with OSHA or the concept of safety standards. *See id.* A reasonable consumer need not be familiar with specific provisions of the United States Code to believe the term "OSHA" signals safety.

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Polaris further argues Guzman is subject to unique defenses regarding reliance, causation, and injury in fact. *Id.* at 44. Under California law, the fact that Guzman, as class representative, must prove actual reliance, causation, and injury in fact is alone insufficient to establish grounds to deny class certification on UCL, FAL, and CLRA claims. *See Tobacco II*, 46 Cal. 4th at 320–21. "Were this defense alone enough to warrant denial of class certification, consumer claims such as the ones at issue here would never be certified." *Broomfield v. Craft Brew Alliance, Inc.*, Case No. 17-CV-01027-BLF, 2018 WL 4952519, at *6 (N.D. Cal. Sept. 25, 2018).

The court finds Guzman's claims are reasonably co-extensive with the putative class members. Because Plaintiff's interests align with those of the proposed class members, the typicality requirement is satisfied.

E. Adequacy

Rule 23(a)(4) requires class representatives to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). A named plaintiff satisfies the adequacy test if he has no conflict of interest with other class members and if the named plaintiff will prosecute the action vigorously on behalf of the class. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011).

Plaintiff argues that he shares the same interest as the putative class, who all suffered the same harm. Mot. Br. at 27. Plaintiff attests he will fairly represent the interests of the class. Dkt. 67-4 ¶¶ 9–12.

Polaris addresses adequacy and typicality in the same portion of its brief. Opp'n Br. at 42–44. For the reasons stated in the section on typicality above, the court finds none of these arguments persuasive. Based on Plaintiff's representations, the court is satisfied he is an adequate representative for the class.

II. Rule 23(b)(2) Requirements

In addition to the Rule 23(a) requirements, Plaintiff must also establish one or more grounds for maintaining a class action under Rule 23(b). Here, Plaintiff

advances grounds under Rule 23(b)(2) and (b)(3).[6]

Rule 23(b)(2) states class certification may be maintained where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Under this Rule, class certification is appropriate "only where the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Rsch. Inst, Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2000), *amended by*, 273 F.3d 1266 (9th Cir. 2001) (citation omitted). A class seeking both monetary and injunctive relief, however, "may be certified pursuant to Rule 23(b)(2) where [monetary] relief is 'merely incidental to [the] primary claim for injunctive relief." *Id.* (citation omitted).

"Where a plaintiff seeks to certify a class under Rule 23(b)(2), such plaintiff must have standing to seek the declaratory and/or injunctive relief sought on behalf of the class." *Friend v. Hertz Corp.*, Case No. C-07-5222, 2011 WL 750741, at *4 (N.D. Cal. Feb. 24, 2011) (citing *Bates v. United Parcel Serv.*, 511 F.3d 974, 983–85 (9th Cir. 2007). The Ninth Circuit has held that, in certain circumstances, "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase[.]" *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018).

Polaris argues the class should not be certified under Rule 23(b)(2) principally because injunctive relief will "provide no benefit to putative class members" and Plaintiff lacks standing. Opp'n Br. at 46. Specifically, Polaris urges a buyer alleging misrepresentation lacks standing for injunctive relief "unless, at a minimum, the buyer intends to purchase the product again in the future." *Id.*

The Ninth Circuit's opinion in *Kimberly-Clark* is instructive. There, the Ninth

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[6] The court discusses Rule 23(b)(3) in Section III *infra*.

Circuit held plaintiff plausibly alleged standing because she still "desire[d] to purchase" the at-issue product and would purchase the product in the future if it worked as-advertised. *Kimberly-Clark*, 889 F.3d at 970–71. The Ninth Circuit in *In re Coca-Cola Products Marketing and Sales Practices Litigation*, Case No. 20-15742, 2021 WL 3878654 (9th Cir. Aug. 31, 2021), clarified:

> [*Kimberly*-Clark] offered two non-exclusive examples of threatened future harm a consumer complaining of assertedly false labeling might plausibly allege: "she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to" and "she might purchase the product in the future, despite the fact that it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved."

Id. at *1 (citing *Kimberly-Clark*, 889 F.3d at 969–70).

Here, Guzman does not allege he desires to purchase a Class Vehicle in the future and would do so if he could rely on Polaris' advertising practices regarding the ROPS. On Reply, Guzman alleges he should not be precluded from seeking injunctive relief because "Class Members will benefit from injunctive relief insofar as they may wish to purchase Polaris UTVs in the future and would likely strongly desire that those vehicles" are compliant. Reply at 30. In light of the Ninth Circuit's holding in *Kimberly-Clark*, Guzman's contention is too speculative. *Cf. Kimberly-Clark*, 889 F.3d at 970–91 (plaintiff stated she would purchase the at-issue product if properly advertised); *Stewart v. Kodiak Cakes, LLC*, 537 F. Supp. 3d 1103, 1126 (S.D. Cal. 2021) (same); *Broomfield*, 2018 WL 4952519, at *8 (same) *and contra In re Coca-Cola*, 2021 WL 3878654, at *2 (finding plaintiffs lacked standing where they claimed they would not consider purchasing product even if properly labeled).

Accordingly, Plaintiff has not met the requirements to proceed as a class under Rule 23(b)(2).

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III. Rule 23(b)(3) Requirements

To certify a class under Rule 23(b)(3), Plaintiff must show (1) common questions predominate over individual issues, and (2) a class action is superior to other means of resolution. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009). As stated above, the court finds the predominance requirement met here. *See* Section I.C *supra*.

"The purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citation omitted). The superiority analysis considers the views: "(1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large and (6) of the defendant." *Batemen v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 713 (9th Cir. 2010) (citation omitted).

Here, the court finds a class action is the superior method of adjudicating Plaintiff and the proposed class's claims. First, the class members' interest in bringing individual actions is minimal. Plaintiff alleges each class member will seek "only approximately $1,000 in damages." Mot. Br. at 31. The small amount of damages potentially recoverable by each putative class member weighs in favor of certifying the class. *Zinser*, 253 F.3d at 1190 ("Where damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action."). The alternative to a class action suit is the likely abandonment of claims by most class members. *See Mazza*, 666 F.3d at 628 (finding superiority where damages amounted to $4,000 per class member).

Defendant argues that proceeding as a class action would be unmanageable as "each buyer would have to litigate whether he or she read the ROPS label, relied on it, would have purchased the SxS regardless of the label, what the buyer understood the label to mean, the buyer's use and satisfaction with their SxS, and other individual issues." Opp'n Br. at 41. As stated, however, absent class members need not

establish individualized proof of deception, reliance, and injury to recover here. *See Tobacco II*, 46 Cal. 4th at 320. Polaris' argument, therefore, fails.

Further, the court finds Polaris' remaining concerns surrounding management of the class action unpersuasive, as they speak to general issues present in any single consumer-product class action. *See* Opp'n Br. at 41–42.

The court finds the superiority requirement met.

IV. Class Counsel

"Unless a statute provides otherwise, a court that certifies a class must appoint class counsel." Fed. R. Civ. P 23(g)(1). In appointing class counsel, the court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). The court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[.]" Fed. R. Civ. P. 23(g)(1)(B). Questions regarding the competency of class counsel also implicate the adequacy-of-representation requirement of Rule 23(a)(4). *Wal-Mart*, 564 U.S. at 349 n. 5.

Plaintiff has retained capable counsel with extensive experience in successfully prosecuting consumer class actions. *See* Dkt. 67-2 ¶¶ 9–14; Dkt. 67-3 ¶¶ 8–19; Dkt. 67-6 ¶ 6. Accordingly, and without any opposition to counsel's experience, the court finds Kristensen LLP, the Law Offices of Todd M. Friedman, P.C., and Dreyer Babich Buccola Wood Compora, LLP are adequate under Rule 23(g)(1) and (4).

CONCLUSION

For the foregoing reasons, the court GRANTS IN PART Plaintiff's Motion for Class Certification. The court CERTIFIES the following Rule 23(b)(3) class: "All California residents who between August 8, 2016 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 (i.e. a Polaris RZR sold with a stock ROPS installed)." The court APPOINTS Kristensen LLP, the Law Offices of Todd M. Friedman, P.C., and Dreyer Babich Buccola Wood Compora, LLP to serve as class counsel for the certified class.

The parties are ORDERED to meet and confer within fourteen (14) days of this Order regarding: (1) the contents and logistics of class notice and (2) the status of the action. The parties are further ORDERED to submit a joint status report within twenty-eight (28) days of this Order regarding the same.

IT IS SO ORDERED.

Dated: September 27, 2023

FERNANDO L. AENLLE-ROCHA
United States District Judge