John P. Kristensen (SBN 224132)
KRISTENSEN LLP
12450 Beatrice Street, Suite 200
Los Angeles, California 90066
Telephone: (310) 507-7924
Facsimile: (310) 507-7906
john@kristensenlaw.com

Todd M. Friedman (SBN 216752)
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard Street, Suite 780
Woodland Hills, California 91367
Telephone: (877) 619-8966
Facsimile: (866) 633-0028
tfriedman@toddflaw.com

Christopher W. Wood (SBN 193955)
DREYER BABICH BUCCOLA WOOD CAMPORA, LLP
20 Bicentennial Circle
Sacramento, California 95826
Telephone: (916) 379-3500
Facsimile: (916) 379-3599
cwood@dbbwc.com

Attorneys for Plaintiffs and all others similarly situated

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

PAUL GUZMAN and JEREMY ALBRIGHT, individually on behalf of themselves and all others similarly situated, Plaintiffs, v. POLARIS INDUSTRIES, INC., a Delaware corporation; POLARIS SALES, INC., a Minnesota corporation; POLARIS INDUSTRIES, INC., a Minnesota corporation; and DOES 1 through 10, inclusive, Defendants.	Case No.: 8:19-cv-01543-FLA-KES **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Judge: Hon. Fernado L. Aenlle-Rocha Date: April 30, 2021 Time: 1:30 p.m. Crtrm: Courtroom 6B

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Motions for summary judgment are supposed to present the evidence in the light most favorable to the non-moving party and present why the opposing party cannot meet its evidentiary burden. Here, defendants Polaris Industries Inc., Polaris Sales, Inc. and Polaris Industries, Inc. (collectively, "Defendants" or "Polaris") simply misrepresent and take out of context portions of plaintiffs Jeremy Albright ("Albright") and Paul Guzman ("Guzman") (collectively, "Plaintiffs") deposition testimony. Polaris also attempts to apply a new standard for consumer fraud in the Ninth Circuit and California requiring the consumer to have knowledge not just of a sponsorship or certification by a third-party group, but to possess intimate knowledge of the underlying requirements of those certifications.

Genuine material facts are at dispute. Plaintiffs, who both work in construction, testified to the following: (1) they were familiar with the Occupational Safety and Health Administration ("OSHA"); and (2) they saw the labels at the time of purchase on the Polaris vehicles indicating the vehicles complied with OSHA (they described it as OSHA approved in the vernacular of reasonable consumers and real human beings, not individuals with seven years of post-high school education). Plaintiffs explained that they believed the labels meant that the roll cage was safe and would not crush you if the UTV rolled over. Both Plaintiffs indicated that they were dissatisfied with the product and have sought aftermarket roll over protection systems (ROPS) but after spending north of $20,000, they cannot afford the stronger aftermarket ROPS. Albright testified that he is not operating the vehicle and Guzman explained (but Polaris omitted) that instead of letting it rot in his garage, he operates it slower and safer than before.

Polaris claims that Plaintiffs received the benefit of the bargain is contradicted by Plaintiffs' testimony that was omitted by Polaris. Defendants' own research evidences that consumers look to strengthen their stock Polaris ROPS.

Polaris' summary judgment motion seeks to resuscitate its argument that the Court previously rejected in denying the Motion to Dismiss. Polaris tried to claim that Plaintiffs had to show that the entire label was false. The Court pointed out that Plaintiffs alleged that they were deceived because, contrary to Defendants' representations on the labels affixed to Class Vehicles at the point of sale, the vehicles **do not comply** with the OSHA requirements of 29 C.F.R. § 1928.53.[1] *See* Dkt. 38, p. 3 fn. 2. Plaintiffs both testified that they saw the labels and believed the vehicles' ROPS complied with an OSHA standard that applied to the roll cages to keep them safe in rollovers. In Plaintiffs' day-to-day work, the ladders, electrical cords, boots and scaffolding all have to meet OSHA requirements. Being deceived by a sponsorship or certification does not require that the consumer know the underlying requirements. A consumer does not need to know what all five stars for the five-star safety rating for cars mean to be defrauded if the vehicle only meets three of the five stars. A reasonable consumer would simply see that Polaris informs them that the vehicles are safe based on federal standards and then would reasonably rely on the truth of this statement, rather than assuming they are being lied to and sold an unsafe product. This same principal applies in this case.

Polaris' request to strike the UCL claim fails to consider that Guzman alleges the CLRA and FAL claims and Albright has the UCL claim. Plaintiffs are happy to withdraw Guzman's UCL claim. However, Albright, unlike the cases cited by Polaris, never sought legal relief, only equitable relief. In addition, Polaris' contention that injunctive relief is not available because Plaintiffs no longer seek to purchase a Polaris misrepresents Ninth Circuit precedent.

[1] While the case was transferred from Judge Staton to this Court, the law of the case holds that Plaintiffs adequately pled and demonstrated that their claims as alleged would entitle them to relief under the consumer protection statutes, and Judge Staton's prior ruling is independently straightforward and highly persuasive. There is no reason to alter course, where discovery fully supports the allegations of the operative complaint.

II. STATEMENT OF FACTS

Defendants' Summary of Allegations either misstates or omits several critical factual matters pled in Plaintiffs' operative Complaint and supported by evidence, and for this reason, Plaintiffs offer this supplemental Summary of Allegations, for the Court's consideration.

A. To Avoid CPSC Regulations for Roof Strength, Polaris Created a Captive Entity, ROHVA, That Adopted Tractor Standards

The vehicles at issue in this case are known as side by sides or UTVs. [redacted]

See Plaintiffs' Statement of Genuine Disputes ("PSGD") ¶ 1.

[redacted] Confidential Pursuant to Protective Order [redacted]

[redacted][2] *See* PSGD ¶ 2.

Around the same time in May 2009, NHTSA was issuing a Final Rulemaking increasing the requirements for roof crush resistance for cars, passenger vehicles, trucks and buses with less than 6,000 pounds. Those vehicles' roof structures were now required to withstand a test involving three (3) times the vehicle's weight compared to the prior 1.5 multiplier (74 Fed. Reg. 22348 (May 12, 2009)). *See* PSGD ¶ 3.

[redacted] Confidential Pursuant to Protective Order [redacted]

[redacted][3] *See* PSGD ¶ 4. [redacted]

[2] [redacted] Confidential Pursuant to Protective Order [redacted]

[3] [redacted] Confidential Pursuant to Protective Order [redacted]

Confidential Pursuant to Protective Order

.[4] *See* PSGD ¶ 5. Confidential Pursuant to Protective Order

See PSGD ¶ 6. The problem with Polaris' adoption of the OSHA standards is that Polaris did not comply with them.

B. Polaris Did Not Comply with the OSHA Standard and Admitted Not Doing So in Internal Communications and in Multiple Depositions

Confidential Pursuant to Protective Order

See PSGD ¶ 7. Confidential

See PSGD ¶ 8. Tractor weight is defined pursuant to 29 C.F.R. §§

[4] Confidential Pursuant to Protective Order

[5] Confidential Pursuant to Protective Order

1928.51(a)(4) as:

> "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, or 110 lbs. multiplied by the maximum power take off ("PTO") horsepower. If the PTO is not available, 95% of the net engine flywheel horsepower is used. *See* PSGD 9. Confidential Pursuant to Protective Order [redacted] *See* PSGD ¶ 10.

Confidential Pursuant to Protective Order [redacted] *See* PSGD 11. Confidential Pursuant [redacted]

Confidential Pursuant to Protective Order [redacted]

[redacted] Confidential Pursuant to Protective Order [redacted]

[redacted] Confidential Pursuant to Protective Order [redacted]

[redacted] *See* PSGD 13. [redacted] Confidential Pursuant to Protective Order [redacted]

[redacted] *See* PSGD 14.

C. Polaris' Objectively False Advertisement

Polaris placed the following label on all Class Vehicles, including the UTVs purchased by Plaintiffs: "This ROPS Structure meets OSHA requirements of 29 CFR § 1928.53." Such representations are plastered with a sticker placed on the ROPS for every vehicle as follows:

[6]

The only deviations from this sticker are the model number and the gross vehicle weight. The crux of the representation, i.e. 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 Plaintiff's vehicles. *See* PSGD 15.

[6] The only deviations from this sticker are the model number and the 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 Plaintiffs' vehicles. *See* Ex. 35.

Confidential Pursuant to Protective Order

[redacted]

See PSGD 16.

Confidential Pursuant to Protective Order

[redacted]

Id.

Confidential Pursuant to Protective Order

[redacted]

See PSGD 17.

D. Plaintiffs' Reliance on Polaris' False Statements Caused Damages

1. Albright

On or around February 29, 2016, Albright purchased a 2016 Polaris RZR XP. *See* PSGD 18. Albright testified that what was important to him in purchasing the vehicle was safety, and in particular "[s]eat belts and the roll bar." When asked what was important about the roll bar, Albright explained it was the OSHA-approved roll bars and "make sure it was strong enough to hold – withhold the weight of the vehicle." *See* PSGD 19.

Albright works in construction and is familiar with OSHA standards for items like ladders, electrical cords, boots and scaffolding. When he purchases electrical equipment or something else for construction, he attempts to make sure it is OSHA approved, which is synonymous with OSHA compliant. *See* PSGD 20.

Albright testified that he saw the OSHA label (sticker) on the Polaris at the time of purchase. He knew OSHA was a good standard. He believed it met OSHA standards, which meant above standard that "mostly goes out and beyond" and that it could handle the weight "so it wouldn't crush you" and that "if you were upside down, it wouldn't squish you." Albright specifically explained that he understood that the approval for the ROPS was "[t]hat it could handle the weight of a rollover." Albright testified that he purchased the vehicle because of the sticker. *See* PSGD 21.

Albright explained that he has enjoyed the vehicle, but he no longer thinks it's safe for his children. Albright testified that he wanted to completely replace the roll bar (ROPS) that came with the vehicle and he had decided to stop operating the vehicle. Albright estimated that based on prices he saw, to replace the roll cage and roof, it would cost around $4,500 and that he was overcharged for his Polaris. *See* PSGD 22.

2. Guzman

Guzman has worked in the construction industry for 14 years. *See* PSGD 23. In or around September 2018, Guzman purchased a 2018 Polaris RZR XP in Orange County, California. *See* PSGD 24.

Guzman made it clear under cross-examination that he would not have purchased the vehicle if it did not have an OSHA sticker on it. Guzman further stated that the OSHA sticker/label was located on the cage. Guzman explained that he understood the reference to any OSHA standard to mean that the cage is strong enough to hold itself if anything did happen. *See* PSGD 25.

Guzman spoke with Albright before he purchased his Polaris, and they discussed that it was OSHA approved. Guzman explained that he understood OSHA approved to mean that "it's safe, that the cage is good" and like any tool that is OSHA approved it is okay to use. The OSHA sticker, it's legit." *See* PSGD 26.

While, Guzman still operates his expensive vehicle in a slower and safer manner, he testified that he does not consider his Polaris vehicle to be safe because the ROPS was not OSHA approved. Guzman explained that the vehicle met his expectations, except for the cage, because it was "not strong enough if it would flip over." *See* PSGD 27.

Guzman was aware that some UTVs are sold new with aftermarket ROPS rather than the stock cages, but he did purchase an aftermarket ROPS because it was too expensive. Guzman purchased his Polaris with $1,000 down payment and $19,800 in financing. The total cash price was $20,741. He is paying approximately $400 a month for the vehicle. Guzman testified that he would like to make his vehicle safer with a cage, but he did not have the funds to pay for the cages he saw quoted at Bert's Mega Mall. Guzman wants a structure with thicker piping, so that it would be stronger than the stock Polaris cage. *See* PSGD 28.

///

Guzman feels cheated because he would not have purchased the vehicle if he knew the label/sticker was false and he does not have the money to purchase an aftermarket cage. *See* PSGD 29.

E. Polaris' Own Market Research Evidences That Consumers Pay More for Stronger ROPS

[redacted] Confidential Pursuant to Protective Order [redacted]

See PSGD 30. [redacted] Confidential Pursuant to Protective Order [redacted]

[redacted] *See* PSGD 31. Confidential Pursuant to Protective Order [redacted]

See PSGD 32.

III. LEGAL BASIS FOR DENIAL OF SUMMARY JUDGMENT

Summary judgment is appropriate only when it is demonstrated that there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1080 (9th Cir. 2004). A fact is material if it might affect the outcome of the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986); *Thrifty Oil Co. v. Bank of America Nat'l Trust & Savings Ass'n.*,

322 F.3d 1039, 1046 (9th Cir. 2002). A dispute is "genuine" as to a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248; *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006). **All reasonable inferences must be drawn in the light most favorable to Plaintiff.** *See Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1018 (9th Cir. 2010).

The parties seeking summary judgment, in this case Defendants, bear the burden of demonstrating an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). If a moving party fails to carry its burden of production, then "the nonmoving party has no obligation to produce anything, even if the non-moving party would have the ultimate burden of persuasion." *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102-03 (9th Cir. 2000); *Celotex*, 447 U.S. at 324 (citing Fed. R. Civ. P. 56(c), (e)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010).

IV. MATERIAL FACTS EXIST AND THE LAW PRECLUDES SUMMARY JUDGMENT IN POLARIS' FAVOR

A. Material Facts Establish that Plaintiffs Relied on Polaris' Labels, Just As Polaris Intended

Polaris cannot hide its head in the sand, avoid looking at the facts and the evidence which has been gathered thus far, and advise the Court that Guzman and Albright cannot establish reliance. Polaris' cherry-picking of certain phrases and words during Plaintiffs' testimony demonstrates Polaris' unwillingness to engage with the actual facts. As previously detailed, Polaris' interpretation of Plaintiffs' deposition testimony failed to provide the full detail and context of Plaintiffs' testimony and specifically avoided the statements made by Plaintiffs in support of their UCL, FAL, and CLRA claims.

///

1. Albright Read and Relied on the Misleading Label Posted by Polaris to Purchase the Subject Vehicle

Albright testified that what was important to him in purchasing the vehicle was safety, and in particular "[s]eat belts and the roll bar." When asked what was important about the roll bar, Albright explained it was the OSHA-approved roll bars and "make sure it was strong enough to hold – withhold the weight of the vehicle." *See* PSGD 19.

Albright works in construction and is familiar with OSHA standards for items like ladders, electrical cords, boots and scaffolding. When he purchases electrical equipment or something else for construction, he attempts to make sure it is OSHA approved, which is synonymous with OSHA compliant. *See* PSGD 20.

Albright testified that he saw the OSHA label (sticker) on the Polaris at the time of purchase. He knew OSHA was a good standard. He believed it met OSHA standards, which meant above standard that "mostly goes out and beyond" and that it could handle the weight "so it wouldn't crush you" and that "if you were upside down, it wouldn't squish you." Albright specifically explained that he understood that the approval for the ROPS was "[t]hat it could handle the weight of a rollover." Albright testified that he purchased the vehicle because of the sticker. *See* PSGD 21.

Albright explained that he has enjoyed the vehicle, but he no longer thinks it's safe for his children. Albright testified that he wanted to completely replace the roll bar (ROPS) that came with the vehicle and he had decided to stop operating the vehicle. Albright estimated that based on prices he saw, to replace the roll cage and roof, it would cost around $4,500 and that he was overcharged for his Polaris. *See* PSGD 22.

///

///

2. Guzman Read and Relied on the Misleading Label Posted by Polaris to Purchase the Subject Vehicle

Guzman testified during his deposition that he would not have purchased the vehicle if it did not have an OSHA sticker on it. Guzman further stated that the OSHA sticker/label was located on the cage. Guzman explained that he understood the reference to any OSHA standard to mean that the cage is strong enough to hold itself if anything did happen. *See* PSGD 25.

Guzman spoke with Albright before he purchased his Polaris, and they discussed that it was OSHA approved. Guzman explained that he understood OSHA approved to mean that "it's safe, that the cage is good" and like any tool that is OSHA approved it is okay to use. The OSHA sticker, it's legit." *See* PSGD 26. Guzman saw the sticker Polaris placed on the Subject Vehicle and saw that Polaris advertised that the vehicle complied with OSHA requirements. Guzman testified that he knew about OSHA standards. More importantly, Guzman made it clear under cross-examination that he would not have purchased the vehicle if it did not have an OSHA sticker on it. *See* PSGD 25-29.

3. Plaintiffs Can Establish Actual Reliance

Plaintiffs saw and relied upon the misleading statement. Unlike the plaintiffs in *Graham v. VCA Antech, Inc.*, No. 2:14-cv-08614-CAS-JC, 2016 WL 5958252 (C.D. Cal. Sept. 12, 2016), both Guzman and Albright saw the sticker and considered the fact that the ROPS met OSHA standards in making the choice to purchase the vehicles. Guzman and Albright did not infer that the sticker was there. Guzman and Albright were aware of the sticker at the time of purchase and factored the roll cages' safety when deciding to make the purchase.

///

///

///

///

Similarly, Plaintiffs here did more than scroll through dense Terms and Conditions and Privacy Policy when using their iPhones than the plaintiffs in *In re iPhone Application Litig.*, 6 F.Supp.3d 1004, 1022-23 (N.D. Cal. 2013). Years after the purchase, Plaintiffs recall specifically seeing the sticker and reading that the ROPS met OSHA requirements.

Plaintiffs' deposition testimony demonstrates actual reliance, or at the very least, reasonable inferences that could be drawn viewed in the light most favorable to Plaintiffs, showing that there is a triable issue of fact on Plaintiffs' UCL, FAL, and CLRA claims. *See Rahman v. Mott's LLP*, No. CV 13-3482 SI, 2014 WL 5282106, at *6-8 (N.D. Cal. Oct. 15, 2014) (finding a triable issue of fact shown by the plaintiff's deposition testimony that the statement on apple juice's packaging caused him to believe the product was safer than others).

Polaris, once again, seeks to confuse the Court as to the actual issues in this matter. Polaris placed a sticker on the Subject Vehicles claiming that the ROPS met OSHA requirements. The specific regulations and section numbers are not relevant. Polaris advertised to consumers that OSHA requirements were met, when in fact, they were not. The Court previously rejected a similar argument by Polaris when addressing its Motion to Dismiss. The Court must do so again.

In *Miller v. Peter Thomas Roth, LLC*, No. C 19-006988 WHA, 2020 WL 363045, at *5 (N.D. Cal. Jan. 22, 2020), a district court rejected a similar argument as the one Polaris makes here. Addressing the defendant's argument in support of a summary judgment motion that a plaintiff's interpretation of a misleading statement of Rose Stem Cell ads was unreasonable, the district court stated that a "reasonable jury could, however, find that [the plaintiff's] interpretation fell close enough to what a reasonable consumer would have understood to satisfy the reliance element." *Id.*

Plaintiffs saw that the sticker/label Polaris placed on its vehicles stated that OSHA's requirements were met. That Plaintiffs could not remember the precise

and exact wording of a label purchased several years previously when undergoing lengthy cross-examination by Polaris' counsel does not preclude their claims. Quite the opposite, even after several years of purchasing the vehicles Plaintiffs both testified that they specifically remembered seeing and discussing the sticker/label and that it was a significant factor that influenced their decision to make the purchases.

Here, as in *Williams v. Gerber Products Co.*, 552 F.3d 934, 939-940 (9th Cir. 2008), the Court must reject the erroneous argument that consumers "should be expected to look beyond misleading representations on the front of the box to discovery the truth from the ingredient list in small print on the side of the box. . . . We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that that ingredient list contains more detailed information about the product that confirms other representations on the packaging." Plaintiffs saw the label Polaris placed on the roll cages that stated that the ROPS met OSHA requirements. There is no requirement in the CLRA, FAL, or UCL that Plaintiffs look in further detail into 29 C.F.R. § 1928.53 to correct the misinterpretations that Polaris caused to induce purchasers of the Subject Vehicles.

In *Chowning v. Kohl's Department Stores, Inc.*, No. CV 15-08673 RGK (SPx), 2016 WL 1072129, at *3-4 (C.D. Cal. Mar. 15, 2016), the Court denied the defendant's summary judgment motion on the basis that the plaintiff had proffered sufficient evidence on reliance as the plaintiff had provided evidence that the disclosures as to the sale price of a clothing item would have affected her decision to purchase the item based on the difference between the original price and sale price. The *Chowning* Court reviewed the plaintiff's evidence in the light most favorable to plaintiff and determined that there was a genuine dispute of material fact as to whether the plaintiff "would have purchased Defendant's merchandise

absent the price-comparison scheme." *Id.* Here, too, Plaintiffs have offered sufficient evidence to demonstrate that the ROPS sticker stating that it met with OSHA requirements was not only material, but was a significant factor in deciding whether to purchase the Polaris UTVs. *See Troyk v. Farmers Group, Inc.*, 171 Cal.App.4th 1305, 1350-51 (2009) (denying summary judgment when the moving party had failed to demonstrate that there were no triable issues of material facts as to UCL standing); *Stathakos v. Columbia Sportswear Company*, No. 15-cv-04543, 2017 WL 1957063, at *9 (N.D. Cal. May 11, 2017) (denying summary judgment because the plaintiffs had raised triable issues of material facts as to reliance on the defendant's misrepresentations in purchasing items); *Huynh v. Quora, Inc.*, No. 5:18-cv-07597-BLF, 2020 WL 7495097, at *18 (N.D. Cal. Dec. 21, 2020) (noting that the plaintiff had raised a genuine dispute of material fact as to reliance).

4. Plaintiffs Know that Polaris Made Misleading Statements That the ROPS Cages Met OSHA Requirements

Instead of denying that they lied to people about their vehicles meeting safety regulations, Polaris argues that Plaintiffs do not know the intricacies and details of 29 C.F.R. § 1928.53, and, because Plaintiffs cannot perform a perfect recitation of 29 C.F.R. § 1928.53, that Plaintiffs could not have relied on Polaris' misleading statements on the ROPS labels. One would have to have an understanding of federal safety regulations, a background in law, a background in physics, a background in mathematics, and a natural disposition to believe that every company lies to them about everything, in order to delve into the nuances of the conflicting statements in Polaris' ROPS labels, or even understand that they are conflicting statements at all. Rather, a reasonable consumer would simply see that Polaris tells them that the vehicles are safe based on federal standards and certifications and then would reasonably rely on the truth of this statement, rather than assuming they are being lied to and sold an unsafe product. The claims withstand legal scrutiny under the reasonable consumer test.

B. Material Facts Establish that Plaintiffs Did Not Receive the Benefit of the Bargain

Polaris argues that as long as the product is usable, there can be no UCL, FAL, and CLRA claims for misrepresentation. Polaris' claims would upend the civil justice system of holding companies liable for misrepresentations made to entice consumers to purchase their products. That is not reality and is not the law.

The California Supreme Court saw through similar arguments in *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (2011). In *Kwikset*, the plaintiff sued the defendants for misrepresentation on labeling that locksets were "Made in U.S.A." when, in fact, the locksets contained screws or pains that were made in Taiwan or involved latch subassembly performed in Mexico. *Id.* at 317-318. The *Kwikset* plaintiff alleged that he did not receive the benefit of the bargain and had standing to bring UCL and FAL claims because a product's origin was material and a significant factor in deciding to purchase the product. *Id.* at 328-337. The defendants made arguments that the locksets were functional and that their place of origin or assembly did not interfere with their purpose and thus, that the plaintiff lacked standing to bring the claims. *Id.* The Supreme Court disagreed with the defendants and stated that "[f]or each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she *paid more for* than he or she otherwise might have been willing to pay if the product had been labeled accurately." *Id.* at 329-330.

The Ninth Circuit reiterated its *Kwikset* holding in *Hinojos v. Kohl's Corp.*, 718 F.3d 1098 (9th Cir. 2013) and stated that "*Kwikset* held that the 'benefit of the bargain' defense is permissible only if the misrepresentation that the consumer alleges was not 'material.' A representation is 'material,' however, if a reasonable consumer would attach importance to it *or* if the 'maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as

important in determining his choice of action." *Id.* at 1107 (citing *Kwikset*, 51 Cal.4th at 332-333). Plaintiffs testified that the label informing them that the ROPS met OSHA requirements was important to them and a significant factor in the decision-making process. [redacted] Confidential Pursuant to Protective Order [redacted] *See* PSGD 16.

Guzman and Albright purchased the Polaris Subject Vehicles because they saw the sticker/label that stated the ROPS complied with OSHA requirements. This information was material as Plaintiffs paid tens of thousands of dollars for a safe vehicle that complied with OSHA standards and paid handsomely for it even though the Subject Vehicles did not actually comply with 29 C.F.R § 1928.53 and Polaris knew that. Polaris seeks to blame Plaintiffs for its own misrepresentations and chastises them for not having these expensive vehicles as deadweights. Plaintiffs testified that they have used the vehicles, but have not been able to operate them as intended, as they wanted to operate them, because the roll cages are not as they were labeled and are not safe. Guzman testified that he operated the vehicle at lower speeds to account for the roll cage issue and Albright has stopped operating his Polaris UTV. Plaintiffs have paid more for UTVs which they cannot operate as they want, as they are advertised to do, because of the ROPS safety issue, which would crush them if there was a rollover. But for the misrepresentation, Plaintiffs would have paid much less for the Polaris UTVs or purchased UTVs from another manufacturer. As it is, in order to meet the safety requirements that Plaintiffs thought they paid for, aftermarket or OEM replacement ROPS could be manufactured to meet the advertised standard.

Polaris' reliance on *Johnson v. Mitsubishi Digital Elec. America, Inc.*, 365 F.App'x 830, 832 (9th Cir. 2010) is misplaced. In *Johnson*, the district court and Ninth Circuit found that the plaintiff lacked standing because the television advertised as "1080p" was capable of receiving 1080p through its antenna rather

than the HDMI ports the plaintiff believed. As such, all the plaintiff had to do to have a 1080p signal television was connecting an antenna that would enable the signal to be sent. *Id.* at 832-833. The *Johnson* plaintiff could fix the "misrepresentation" by simply attaching an antenna that provided a 1080p signal. Plaintiffs cannot do so here. The Polaris stock ROPS did not, and cannot, comply with OSHA requirements of 29 C.F.R. § 1928.53 because Polaris cheated on the tests necessary to comply with the OSHA requirements.

Similarly, *Browe v. Evenflo Co., Inc.*, No. 14-4690 ADM/JJK, 2015 WL 3915868 (D. Minn. June 25, 2015) is inapposite here. *Browe* dealt with Minnesota consumer protection statutes and makes no mention of CLRA, FAL, or UCL and their requirements. Thus, the *Browe* Court was not reviewing the facts of the case under the standards the Court must analyze here. Further, the product at issue was a child car seat. The child car seat is not worth tens of thousands of dollars. A child car seat could easily be repurchased through numerous brick and mortar retailers or even through online shopping on a whim. The *Browe* plaintiff had failed to make the minimal effort of purchasing a new car seat. *Id.* at *4. Plaintiffs, however, have testified that the Polaris UTVs they have purchased are not safe, are not safe for their children, and have looked into replacement costs. Replacing the ROPS cost thousands of dollars.

Like any vehicle, the UTVs must be turned on and driven in order to maintain its working components. Plaintiffs, however, have not received the value of the product for which they paid. To make sure UTVs' ROPS' safe, aftermarket ROPS must be purchased. The fact is that Plaintiffs paid more than they should have for the Polaris UTVs and are not stuck with the UTVs. Plaintiffs' complaint of the UTVs demonstrates their dissatisfaction with the vehicles and the purchases.

Plaintiffs paid more for UTVs than they should have as a result of Polaris' misrepresentations. Polaris is not entitled to the benefit of the bargain defense as Plaintiffs have demonstrated that the misrepresentation was material. Plaintiffs did

not obtain the benefit of the bargain and, in fact, must spend thousands of dollars extra to meet the standard they thought they had initially paid for with the initial purchase.

C. Material Facts Establish Causation As the Polaris Vehicles Did Not Meet Plaintiffs' Expectations

Polaris simply repeats its reliance argument when it claims there was no casual link between Plaintiffs' reliance and their damages. As explained before, genuine issues of material facts exist that evidence any causal link. Guzman spoke with Albright before he purchased his Polaris, and they discussed that it was OSHA approved. *See* PSGD 26. Guzman explained that he understood OSHA approved to mean that "it's safe, that the cage is good" and like any tool that is OSHA approved it is okay to use. The OSHA sticker, it's legit." *Id.* Guzman saw the sticker Polaris placed on the Subject Vehicle and saw that Polaris advertised that the vehicle complied with OSHA requirements. Guzman testified that he knew about OSHA standards. More importantly, Guzman made it clear under cross-examination that he would not have purchased the vehicle if it did not have an OSHA sticker on it. *See* PSGD 25.

Albright testified that he saw the OSHA label (sticker) on the Polaris at the time of purchase. He knew OSHA was a good standard. He believed it met OSHA standards, which meant above standard that "mostly goes out and beyond" and that it could handle the weight "so it wouldn't crush you" and that "if you were upside down, it wouldn't squish you." Albright specifically explained that he understood that the approval for the ROPS was "[t]hat it could handle the weight of a rollover. Albright testified that he purchased the vehicle because of the sticker. *See* PSGD 21.

Both Plaintiffs explained they sought out stronger aftermarket ROPS after spending approximately $20,000 on their original vehicles. *See* PSGD 22 & 28. The costs to obtain replacement ROPS ranges from $1,500 to $4,000. *See* PSGD 32.

Albright testified that he wanted to completely replace the roll bar (ROPS) that came with the vehicle and he had decided to stop operating the vehicle. Albright estimated that based on prices he saw, to replace the roll cage and roof, it would cost him $4,500 and that he was overcharged for his Polaris. *See* PSGD 22.

D. Albright Has Not Pled Any Legal Remedy and His UCL Claims Stands as a Matter of Law

Albright has not pled any legal remedy other than the equitable relief sought under the UCL. Albright seeks injunctive relief under the UCL on behalf of the public to prevent Defendant from continuing to engage in prohibited business practices. As the California Supreme Court recently opined, the primary purpose of civil penalties under the UCL and FAL is "to secure obedience to statutes and regulations imposed to assure important public policy objects… The focus of [both] statutes scheme[s] is preventative." *Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda Cty.*, 9 Cal. 5th 279, 326 (2020). The injunctive relief sought is thus "designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff," which is clearly distinguishable from a request for damages intended to redress the injury in fact suffered by the putative Class. *Id.* at 323 (The UCL and FAL explicitly authorize "injured private individuals to obtain injunctive relief to prevent a business from continuing to use the practice to the detriment of other consumers and to obtain restitution and other clearly equitable relief."); *Kitazato v. Black Diamond Hosp. Investments, LLC*, 655 F.Supp.2d 1139, 1147 (D. Haw. 2009) (explaining that the remedy at law is inadequate where "it is not sufficient to protect the party from a particular harm.") (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-312 (1982)).

In addition, a plaintiff may seek inconsistent remedies based on the same set of facts. *See Kraif v. Guez*, No. CV1206206SJOSHX, 2013 WL 12121362, at *3 (C.D. Cal. Apr. 16, 2013) (citing *Waffer Internat. Corp. v. Khorsandi*, 69

Cal.App.4th 1261, 1276 (1999)); *Roam v. Koop*, 41 Cal.App.3d 1035, 1039 (1974) ("Ordinarily a plaintiff need not elect, and cannot be compelled to elect, between inconsistent remedies during the course of trial prior to judgment.") (citations omitted); *see also Eason v. Roman Catholic Bishop of San Diego*, 414 F.Supp.3d 1276, 1282 (S.D. Cal. 2019) ("No controlling authority prevents a plaintiff from pleading alternative legal remedies.") Furthermore, where the plaintiff seeks remedies both at law and in equity, the claims for equitable relief may be allowed if they arise from a theory distinct from that underlying the claim for damages. *See, e.g., Johnson v. Nissan N. Am., Inc.*, 272 F.Supp.3d 1168, 1186 (N.D. Cal. 2017) (citing *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 933 (N.D. Cal. 2012)). Here, one plaintiff seeks remedies under the UCL (Albright) and another (Guzman) remedies under the CLRA and FAL.

E. Plaintiffs' Desire to Not Purchase a Stock Polaris ROPS Does Not Preclude Injunctive Relief

The FAL and UCL are both equitable statutes, providing for recovery of restitution, injunctive relief, attorneys' fees and costs of suit. *Mohebbi v. Khazen*, 50 F.Supp.3d 1234 (N.D. Cal. 2014); Cal. *Bus. & Prof. Code* §§ 17203 and 17535. A plaintiff may obtain restitution or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. *Stearns v. Select Comfort Retail Corp.*, 763 F.Supp.2d 1128 (N.D. Cal. 2010).

Substantial evidence exists that Polaris is engaged in a scheme to inform consumers that their ROPS comply with an OSHA standard when they categorically do not. To argue that Plaintiffs do not have standing to bring a claim for injunctive relief because if they purchase a product from Defendant in the future, Plaintiffs will see through Polaris' charade is not only disingenuous but would completely undermine any attempt at injunctive relief under the FAL, UCL, and CLRA. The Ninth Circuit resolved a circuit split on this issue in ruling on *Davidson*

v. Kimberly-Clark Corp., 873 F.3d 1103, 1115 (9th Cir. 2017)**.**

The Ninth Circuit in *Davidson*, resolved the circuit split clearly, stating unequivocally that:

> "today, we resolve this district court split in favor of plaintiffs seeking injunctive relief. We hold that 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, because the consumer may suffer an "actual and imminent, not conjectural or hypothetical" threat of future harm…Knowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future. In some cases, the threat of future harm may be the consumer's plausible allegations that 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."

Id. at 1115.

Henderson v. Gruma Corp., No. CV 10-04173 AHM (AJWx), 2011 WL 1362188, at *2-3 (C.D. Cal. Apr. 11, 2011) is instructive on this issue. In *Henderson,* class representatives and plaintiffs purchased Mission Guacamole and Mission Spicy Bean Dip products in various grocery stores throughout the state. The plaintiffs alleged that these Mission products contained "substantial and dangerous levels of artificial transfat," a substance linked to cardiovascular disease, diabetes, and cancer, and claimed that they were misled by the "misrepresentations, material omissions, and deceptive acts" of Gruma Corporation's product labeling, and in reliance on these misrepresentations, purchased the Mission products. *Id.* at *1. The defendant moved to dismiss the plaintiffs' injunctive relief claims on the basis that "there is no threat of future injury, as '[the p]laintiffs are now aware of the FDA requirements for label disclosures and the ingredients in Gruma's products and allege they will not purchase the products at issue in the future.' *Id.* at *7 The Court declined to rule in favor of Defendants. Specifically, the *Henderson* Court stated that the plaintiffs had demonstrated actual injury, and that:

> "If the Court were to construe Article III standing for FAL and UCL claims as narrowly as the Defendant advocates, federal courts would be precluded from enjoining false advertising under California consumer protection laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter ("once bitten, twice shy") and would never have Article III standing. *See, e.g., Fortyune v. American Multi–Cinema, Inc.*, No. CV 10–5551, 2002 WL 32985838, *7 (C.D. Cal. Oct.22, 2002) (Manella, J.) ("If this Court rules otherwise [and does not find standing], like defendants would always be able to avoid enforcement of the ADA. This court is reluctant to embrace a rule of standing that would allow an alleged wrongdoer to evade the court's jurisdiction so long as he does not injure the same person twice.") (citing *Parr v. L & L Drive–Inn Restaurant*, 96 F.Supp.2d 1065, 1080 (D. Hawai'i 2000) (Yamashita, M.J.)).

Id. at 7-8. [7]

The *Henderson* Court further opined that to prevent the plaintiffs from bringing suit on behalf of a class in federal court would surely thwart the objective of California's consumer protection laws, stating "That objective is "to protect both consumers *and competitors* by promoting fair competition in commercial markets for goods and services." *Id.* Further, the Court noted that the defendant had not presented evidence or even alleged that it has removed its allegedly misleading advertising from its products, indicating, "With such advertising remaining on supermarket shelves, Plaintiffs, as representatives of a class, should be entitled to pursue injunctive relief on behalf of all consumers in order to protect consumers from Defendant's alleged false advertising." *Id.*

The same is true in the instant case. Plaintiffs should not be precluded from

[7] Plaintiffs note that the Court also referenced, *Fortyune* an ADA case, in which the plaintiff also sought injunctive relief. In preempting an argument by the defendant that this ruling only applies to false advertising cases, the *Henderson* Court makes clear that this is not the case, but that in any case in which a plaintiff consumer is seeking injunctive relief as a redress of wrongs, this "once bitten, twice shy" view on whether a plaintiff has established Article III standing will have a chilling effect, and should be avoided.

seeking injunctive relief on behalf because they are now aware of Polaris' false claims of Defendant and the faulty product itself. This Court should not endorse Defendants' attempt to knowingly continue to sell fraudulently labeled products by misconstruing bare procedural technicalities in favor of rampant and continued fraud.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court deny Polaris' Motion.

Dated: March 26, 2021

Respectfully submitted,

By: */s/ John P. Kristensen*

John P. Kristensen (SBN 224132)
KRISTENSEN LLP

Todd M. Friedman (SBN 216752)
LAW OFFICES OF TODD M. FRIEDMAN, P.C.

Christopher W. Wood (SBN 193955)
DREYER BABICH BUCCOLA WOOD CAMPORA, LLP

Attorneys for Plaintiffs and all other similarly situated

CERTIFICATE OF SERVICE

I certify that on Friday, March 26, 2021, a true and correct copy of the attached **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** and accompanying documents were served via CM/ECF on each participant of record, including the following parties pursuant to Rule 5 of the FEDERAL RULES OF CIVIL PROCEDURE:

David A. Klein
KIRKLAND & ELLIS LLP
2049 Century Park East, Suite 3700
Los Angeles, CA 90067
Telephone: (310) 552-4200
Facsimile: (310) 552-5900
david.klein@kirkland.com

Counsel for All Defendants

Andrew Bloomer
Paul Collier
Jonathan K. Tshiamala
Richard C. Godfrey
Wendy Bloom
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
andrew.bloomer@kirkland.com
paul.collier@kirkland.com
jonathan.tshiamala@kirkland.com
rgodfrey@kirkland.com
wendy.bloom@kirkland.com

Counsel for All Defendants

Todd M. Friedman
Adrian R. Bacon
LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21550 Oxnard Street, Suite 780
Woodland Hills, California 91367
Telephone: (877) 619-8966
Facsimile: (866) 633-0028
tfriedman@toddflaw.com
abacon@toddflaw.com

Co-Counsel for All Plaintiffs

Christopher W. Wood
Neil J. Ferrera
DREYER BABICH BUCCOLA WOOD CAMPORA, LLP
20 Bicentennial Circle
Sacramento, California 95826
Telephone: (916) 379-3500
Facsimile: (916) 379-3599
cwood@dbbwc.com
nferrera@dbbwc.com

Co-Counsel for All Plaintiffs

/s/ John P. Kristensen
John P. Kristensen