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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

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Polaris's Opposition invites the Court to ignore binding authority. The UCL, FAL and CLRA are not based on individual issues of reliance but instead impart class wide reliance based on an objective standard - whether a material misrepresentation would be misleading to a reasonable consumer and assess damages based on whether that misrepresentation is material to a reasonable consumer. The Rule 23 analysis requires only that Plaintiff viewed and relied upon the misrepresentation to satisfy Article III, which he did. Under binding California Supreme Court and Ninth Circuit authority, class wide reliance and damage is presumed where there was universal exposure of the Class Members to a material misrepresentation. Given that the case arises out of a uniform misrepresentation about safety on the face of Polaris's vehicles, which Polaris intended to disclose to its customers, Polaris's tries to manufacture individualized predominance issues between different Class Members' vehicle models, i.e., an attempt to narrow the scope of the class definition. Ultimately, Polaris presents a *potential* argument for narrowing the class definition to the RZR vehicle models sold with stock ROPS.[1]

It is uncontested that Polaris misrepresented the features of Class Vehicles via a label present at the point of sale for every Class Member to view when they purchased their vehicle. It is uncontested that Polaris intended consumers to see this label. It is further uncontested that this misrepresentation concerned a mandatory safety feature which the U.S. Consumer Product Safety Commission ("CPSC") required be present in every Class Vehicle pursuant to 15 U.S.C.A. §§ 2056 and 2068. It is uncontested that Polaris did not follow the requirements of 29 C.F.R. §§ 1958.51 and 1928.53, but instead ignored the "whichever is greater" language present therein and used only gross vehicle weight to calculate the strength of its ROPS. Plaintiff's costs-based economic modeling, which attempts to estimate the cost of restoring Class Vehicles to the advertised regulatorily mandate, clearly satisfies predominance.

Whether certain consumers value attributes of products differently than others, or read labels more carefully than others is not important to class certification. If it was, then no class action could ever be certified under the UCL, FAL and CLRA. Yet hundreds of class actions

[1] This was Plaintiff's Subclass definition in the opening Brief.

have been certified under these laws. This is hardly a case where lying to regulators and consumers about a safety-related feature that saves lives should be given a free pass.

To sidestep binding authority on reliance,[2] damages methodologies,[3] and predominance,[4] Polaris presents consumer declarations, declarations from dealerships, and expert reports. Such evidence is unreliable, unfounded, and, more importantly, based on an incorrect counterfactual of treating the mandatory CPSC safety standard as an unimportant footnote to a consumer's purchase of Class Vehicles. Polaris's Class Member declarations are unpersuasive because the Class Members who were subsequently deposed testified that they relied on Polaris meeting federal safety guidelines when they purchased their vehicles and either would have paid less or not purchased them at all if they had known the truth.

Polaris's expert reports fare no better. Despite hiring an economist whose work focuses on economic modeling and a marketing expert whose work focuses on conjoin analysis, neither expert ran a sound study on the value of Class Vehicles meeting OSHA standards. Rather, they ran facially-questionable google searches, looked at marketing materials provided by Polaris, and talked with a handful of Polaris representatives and assumed, without any legitimate basis, that consumers place zero value on preventing their heads from caving in from a defective ROPS that did not come close to meeting mandatory government safety standards.[5]

Dr. Langer testified that giving Class Members the benefit of the bargain, i.e., paying to upgrade vehicles to meet advertised mandatory safety regulations, would "overcompensate" Class Members. She testified that the cost of compliance was virtually zero, as Polaris could replace the existing sticker with one that says the vehicle complied with OSHA's GVW requirements (which is what it already says, is still misleading, and fixes nothing).[6]

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[2] *Stearns v. Ticketmaster Corp*., 655 F.3d 1013 (9th Cir. 2011) (citing *In re Tobacco II Cases*, 46 Cal.4th 298, 312, (Cal. 2009)).

[3] *Nguyen v. Nissan N. Am., Inc*., 932 F.3d 811 (9th Cir. 2019).

[4] *Briseno v. ConAgra Foods, Inc*., 844 F.3d 1121, 1131 (9th Cir. 2017); *Mazza v. Am. Honda Motor Co., Inc*., 666 F.3d 581, 595 (9th Cir. 2012).

[5] Polaris's experts did not conduct a demand-based damages survey. Instead, Polaris simply told them to engage in a pointless exercise of comparing the OSHA label to the ISO label (the wrong counterfactual), to bias the results and make it look like UTV consumers don't value safety. Polaris's experts were shackled by Polaris. Their analysis is regrettably meaningless as a result.

[6] Kristensen Reply Decl. Ex. 5 ("Langer Dep.") at 84:1-85:6. Dr. Langer was asked why she did not analyze whether people would pay less for a vehicle with a sticker on it that says "this ROPS

Dr. Hanssens believed the OSHA regulations were voluntary and conducted his analysis against the ISO standard, the wrong counterfactual. When asked why he did not compare OSHA compliance to no compliance, his response was that Polaris didn't ask him to do that. In other words, Polaris asked him to set up a strawman argument, and he didn't ask questions. These obvious flaws and others reveal Polaris's position to be a fallacy-riddled strawman argument.[7]

Polaris lied to regulators and customers about Class Vehicles meeting mandatory standards for ROPS. Plaintiff merely asks Polaris to protect Class Members in the way that Polaris told the CPSC it would be doing to avoid recalls and involuntary regulation in the first place. Class Vehicles are all defective and unfit to have been sold into the marketplace. This case is much bigger than a simple mislabeling case or a product defect case with sporadic manifestation. Polaris is asking this Court to hold that a universal and prominently-advertised government regulation regarding vehicle safety is not material to a reasonable consumer, and that individual issues predominate despite no vehicles meeting the standard. The only way to enforce this rule is to certify this class.

II. FACTUAL BACKGROUND

A. Class Vehicles Do Not Meet Mandatory CPSC Regulations

Plaintiff must dispel a twofold myth Polaris has propagated: 1) that it meets the OSHA requirements for ROPS on Class Vehicles; and 2) that the choice to satisfy this standard is entirely voluntary and not a federal mandate. Both are false.

1. Polaris Does Not Test to OSHA Guidelines

Class Vehicles do not meet the OSHA requirements for ROPS.[8] Tractor weight testing requires a ROPS manufacturer to test to either the GVW, or 95% of the net engine flywheel horsepower, "whichever is greater." 29 C.F.R. §§ 1928.51(a)(4). Because Class Vehicles range

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does not meet federal safety standards" and her response was that no such label existed in the market so it would be too difficult for her to run that analysis. *Id*. at 75:18-78:19, 231:19-239:22. And yet, that would have been the proper analysis to determine whether people care about the label and the satisfaction of the CPSC standards. Dr. Langer also said the *Nguyen* damages methodology should not be followed, a rejection of binding precedent. *Id*. at 30:10-47:20.

[7] As the Class Members testified, consumers' default assumptions about safety features in products they buy are that respectable manufacturers follow government safety standards.

[8] Plaintiff points to the opening brief, and the facts set forth in Plaintiff's Opposition to Defendant's Motion to Strike and incorporates the evidence cited therein by reference.

from 67 to 180 horsepower and must be under 3,750 lbs. pursuant to ROHVA, it is mathematically always the case that the HP calculation will exceed GVW. Even Polaris's testing company admits that Plaintiff's view of the test is correct and was not being used. Dkt. 86-51 at 63:14-64:10.

In direct contravention of OSHA requirements, Polaris implemented a calculation whereby it wholly ignored horsepower for purposes of compliance, instead building in a 15% "over test margin," and simply multiplying the gross vehicle weight by 1.15, to run its ROPS strength tests. *See* Dkt. 86-55 at 85:14-20; Dkt. 86-54 at 17:9-20:20. Polaris acknowledges that this same procedure was uniformly performed with every Class Vehicle for over a decade. Dkt. 86-50 at 17:17-24; Dkt. 86-53 at 34:19-35:1, 39-42:9; Dkt. 85-55 at 27:21-35:13, 43:9-45:17; Dkt. 86-54 at 22:11-24:14. These facts are not in dispute.

Jim Schmitt, who was in charge of running OSHA certifications for Polaris, admitted that OSHA compliance testing was not being followed in a manner that accounted for the "whichever is greater" language in the regulation, and that if Polaris in fact did so, the ROPS test weight would need to be three times the amount accounted for by using GVW.[9] This would simply require Polaris to test the ROPS at or near what standard automobiles must meet. For Polaris to now argue that Custom Products correctly certified the ROPS comply with 29 C.F.R. § 1928.53 is incorrect. Polaris was complicit in Custom Products' certification and ran ROPS tests ignoring the "whichever is greater" requirements to skirt federal regulations – which Polaris proposed to avoid a recall or stricter regulations for automobile roof strength.

2. The ROHVA Proposed Test Is A Mandatory CPSC Regulation, Not a Standard Polaris Can Elect to Ignore

Polaris's position suffers from a false premise – because OSHA compliance was a voluntary standard proposed by ROHVA, it is completely voluntary for Polaris to sell vehicles that comply with this standard. This is incorrect.[10] Polaris made a pact with the CPSC whereby

[9] Dkt. 85-55 43:2-44:14. Mr. Schmitt admitted since Plaintiff's UTVS are powered by "rather high power horsepower engine, in fact if the HP formula were used in [this] case it would produce a ROPS test weight nearly 3 times the declared GVWR." Dkt. 86-51 at 40:19-45:24.

[10] The fact that it is incorrect affects not only the merits position taken by Polaris in the case, but indeed, its entire misguided predominance defense, as well as the analysis and conclusions reached by its certification experts. After all, California and Ninth Circuit precedent hold that Plaintiff's claims revolve around an objective reasonable consumer standard. Polaris's experts

it would follow these important safety regulations in lieu of involuntary regulations and recalls. Polaris had no discretion whether to follow these regulations. The standards ROHVA adopted, and Polaris agreed to, are the regulatory minimum safety standards adopted by the federal government. Polaris must follow them.

In 2009, the CPSC initiated a Notice of Rulemaking. 74 Fed. Reg. 55495 (Oct. 28, 2009). The OSHA regulations at issue (29 C.F.R. §§ 1928.51-53) were one of two alternative tests ROHVA (Polaris) proposed to the CPSC pursuant to 15 U.S.C. § 2056(b). 15 U.S.C. § 2056(a) sets forth the CPSC's authority to implement involuntary standards that the CPSC determines are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." *Id*. The CPSC can permit the industry to adopt "voluntary standards," which Polaris must follow pursuant to 15 U.S.C. § 2056(b). Typically, the CPSC initiates corrective actions like recalls or involuntary standards only after having first attempted to negotiate voluntary standards. That being said, 15 U.S.C. § 2068 makes it unlawful to "sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product . . . that is . . . subject to voluntary [i.e., negotiated] corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public or if the seller, distributor, or manufacturer knew or should have known of such voluntary corrective action." 15 U.S.C. § 2068(a)(2); RJN Ex D.

Polaris proposed (through ROHVA) to the CPSC a mandatory standard whereby UTVs ROPS must comply with one of two tests: OSHA or ISO. Dkt. 86-51 at 59:19-63:6. ROHVA commenced this action after the CPSC initiated a rulemaking due to a determination that the UTVs were unsafe because they were killing or maiming hundreds of people in rollovers.[11] Polaris thereby warded off CPSC regulation and recalls through an adoption of industry standards. 15 U.S.C. § 2056(b). Polaris cannot ignore OSHA/ISO without running afoul of 15

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ask the Court to conclude that a vehicle manufacturer failing to adhere to mandatory federal government safety standards is not material to a reasonable consumer. This error is not the fault of the experts. Their deposition testimony reveals that Polaris set them up to fail by giving them incorrect information and sending them on a fool's errand.

[11] 16 CFR 1422, Oct. 27, 2009 available: https://www.regulations.gov/document/CPSC-2009-0087-0001; 16 CFR 1422, October 28, 2009, Available here: https://www.federalregister.gov/documents/2009/10/28/E9-25959/standard-for-recreational-off-highway-vehicles.

U.S.C. § 2068(a)(2); RJN Ex D.

It is unlawful for Polaris to sell a UTV if the ROPS does not comply with either OSHA or ISO. Class Vehicles comply with neither. Thus, Polaris's certification defense assumes a faulty counterfactual. Importantly, a federally-mandated safety feature of a product must be material. But the mislabeling claims here go deeper. Every Class Vehicle is unfit for sale. To hold otherwise, as Polaris urges, would be to undermine the entire federal regulatory system.

Under the applicable regulatory framework, a voluntary standard still must be followed. This Court must view this case through this scope. Accordingly, Plaintiff's merits theory, as well as its recall damages model, are the appropriate, and indeed the only reasonable method of adjudicating this case, because all Class Vehicles are unfit to have been sold to consumers, as Judge Mendez held in *Spencer v. Honda*, 2022 WL 14863071 (E.D. Cal. Oct. 26, 2022).

B. Plaintiff Was Damaged Relying on Polaris's False Statements

Polaris's certification position requires the Court find that Plaintiff did not reasonably rely on a material feature of his vehicle. The individualized issues raised by Polaris are irrelevant under Ninth Circuit class certification standards, except insofar as they inform the materiality analysis, which inherently intersects with and involves only the named Plaintiff in two respects: 1) whether Plaintiff relies on the OSHA sticker; and 2) whether Plaintiff's reliance was material under the objective reasonable consumer standard.

Plaintiff purchased a Class Vehicle. Dkt. 86-3 ¶ 4. Plaintiff was looking for a safe vehicle and was informed by a sales associate about the ROPS meeting OSHA standards, whereafter he observed the OSHA sticker at the point of sale. Kristensen Reply Decl. Ex. 4 ("Berlanga Dep.") at 73:22-76:8; 99:9-20; 101:23-102:7; 104:10–106:22. Plaintiff is familiar with OSHA and understands it relates to safety and that the presence of the OSHA label meant that Polaris met government safety standards for the ROPS. *Id*. at 80:7-18; 99:9-20; 101:23-102:7; 104:10–106:22; 120:11-17; 125:19-126:13. Plaintiff placed value on this representation because he values safety. *Id*. at 109:21-110:19; 117:1-23. Plaintiff would not have purchased his vehicle if Polaris accurately informed that the vehicle did not meet government standards. *Id*. at 109:21-110:19. He barely drives the vehicle anymore and does

not want to sell it to an unknowing consumer who he might put at risk of injury based on the ROPS not meeting required safety standards. 48:18-49:4; 77:25-78:4. He wants to add an aftermarket ROPS to his vehicle to make it safer but it is costly. *Id*. at 73:1-76:8.

C. Class Members Testified That The OSHA Label Was Material And Relevant

Polaris trots out a handful of declarations of consumers that it prepared[12] to support its position that consumers do not care about ROPS safety and that even if its ROPS fails to meet OSHA standards, this would not have impacted consumer decisions to purchase Class Vehicles. But these consumers told a different story that revealed ROPS safety was an important consideration in their decision to purchase Class Vehicles.

For Mr. Score, Polaris's attorneys told him that the ROPS exceeded the standard on the sticker—and thus the lawsuit was meritless—while obtaining his declaration. Score Depo. at 5:4-15. Mr. Score chose Polaris because it was represented as a sturdier and stronger option than its competitors. *Id.* at 8:1-22, 10:14-17, 12:10-17. Had Polaris properly represented that its UTVs did not comply with OSHA standards, it would have been a consideration and would have impacted the price he was willing to pay. *Id.* at 18:16-19:7. This is because the safety of the ROPS is important for UTV purchase by consumers. *Id.* at 20:3-8.

For Mr. Turincio, considered safety when shopping for UTVs. Turincio Depo. at 14:24-15:12. He expected manufacturers would comply with relevant governmental regulations and agreed it was important that vehicles were tested correctly to ensure that the rider does not get crushed in case of a rollover. *Id.* at 21:15-18; 25:10-19; 28:22-29:3. He considered the gross weight represented on the sticker of the vehicle in deciding that it had been adequately tested. *Id.* at 34:20-35:24. Because the sticker indicated the testing weight and that it complied with OSHA standards, he did not feel that he needed to make a further inquiry. *Id.* at 35:25-36:3.

Mr. Carnibucci relied on Polaris to comply with government standards and did not inquire otherwise because Polaris gave him no reason to do so. Carnibucci Depo. at 22:22-23:25; 26:14-18. If the sticker indicated the RZR did not comply with OSHA standards, it would have impacted his decision and potentially made him go with a different manufacturer

[12] Kristensen Reply Decl. Ex. 1 ("Score Depo.") 3:3-5; Ex. 2 ("Carnibucci Depo.") 8:24-9:6; and Ex. 3 ("Turincio Depo.") 9:1-9.

or pay a lower price. *Id.* at 28:1-11; 29:25-30:13. He noted that any consumer would want to know that a vehicle is not complying with government safety regulations. *Id.* at 28:12-15.

Polaris used these consumers to argue safety was not a concern nor was the strength of the ROPS a consideration. But Polaris's own witnesses do not agree with its position. Polaris's evidence presented to the Court of what Class Members believe does not accord with reality.

D. Polaris's Experts Present Strawman Positions

Polaris's certification experts present strawman arguments which ignore binding law regarding reliance, damages, and predominance standards.

1. Dr. Langer

Dr Langer is an economist who specializes in econometrics and economic modeling and has never acted as an expert witness in a case before. Langer Dep. at 25:11-20, 50:14-16, 61:1-62:13. Despite her academic focus, she conducted no relevant modeling and employed no use of econometrics in this case. *Id*. at 172:11-190:25. Her work focusses extensively on regulatory standards, and yet she did not have an understanding in this case that the UTV ROPS OSHA standard was a mandatory regulation pursuant to 15 U.S.C. §§ 2056(b) and 2068(a)(2). *Id*. at 78:20-85:20; 237:10-22. Dr. Langer's opinion can best be summarized as follows: a court should apply the lower of either the cost of compliance (a costs-based supply damages model) or the demand-based harm to consumer (a market demand-based damages model) in determining damages to a class in this case.

Dr. Langer erroneously opined that market demand should be determined by looking at 1) consumer questions at dealerships, 2) dealers' sales pitches to consumers, and 3) whether OSHA labels were a differentiating factor in UTV sales. Langer Report ¶ 13. However, for her demand-based analysis, Polaris erroneously told Dr. Langer to assume that the OSHA standard was not mandatory. She acknowledged that if the OSHA requirement was not voluntary (i.e., required by the CPSC), then it would have "...changed the analysis that I would do" and "I would have investigated different things." Dr. Langer admitted that her analysis would have looked at CPSC concerns regarding ROPS safety as a proxy for consumer demand, if in fact the OSHA requirement was a government mandate. Langer Dep. 90:20-99:23; 107:16-110:10.

Dr. Langer's cost of compliance analysis was also flawed. Rather than determining the cost to Polaris of actually complying with the OSHA standards (the model Plaintiff employs), Dr. Langer simply looked at the cost of replacing the OSHA sticker, and opined that since it was minimal, class members were owed nothing. *Id*. at 88:2-90:19. When presented with a real world example of a consumer who had been denied the benefit of the bargain, Dr. Langer testified that providing a Class Member with a ROPS that actually meets the OSHA standards promised as part of the benefit of the bargain would "overcompensate" the consumer. *Id*. at 30:10-47:20.

2. Dr. Hanssens

Dr. Hanssens is a marketing professor who specializes in conjoin surveys and modeling. Kristensen Reply Decl. Ex. 6 ("Hanssens Depo.") at 37:13-40:10. Despite this, he conducted no modeling and employed no use of conjoin or discrete choice analysis in this case. *Id.* at 74:5-75:18, 146:13-147:14, 156:13-164:11. His consumer demand analysis, like Dr. Langer's, was not conducted from the perspective of a mandatory government safety regulation pursuant to 15 U.S.C. §§ 2056(b) and 2068(a)(2), but rather by comparing Class Vehicles to vehicles that met the ISO standards. When asked why he used the wrong counterfactual for his analysis, rather than comparing Class Vehicles to UTVs that did not meet the ISO/OSHA standards, his response was "I've been not asked to do that." *Id*. at 74:5-75:18, 146:13-147:14, 156:13-164:11. The Polaris surveys he reviewed did not present safety as an option that they could select as important to them. *Id*. at 139:16-143:19. Despite many of Polaris's marketing surveys and other documents produced in discovery showing that Class Members care about and are willing to pay more for greater ROPS strength,[13] Dr. Hanssens did not believe these materials were relevant to his analysis because the marketing materials did not treat OSHA compliance as a "point of difference." *Id*. at 94:5-116:7; 129:7-133:11). He was under the impression that the OSHA sticker was merely an "endorsement" by OSHA. *Id*. at 74:10-76:1; 88:7-90:3; 120:13-121:21; 146:13-147:14. Dr. Hanssens's report does not inform the call of the legal questions in this case.

E. Plaintiff's Experts Reports Further Support Class Certification

Dr. Kneuper's Class Certification Rebuttal Reports reemphasize that a straightforward cost of compliance damages model is the appropriate remedy for Class Members and can be

[13] Dkt. 86-56 at 54:10-56:13, 63:23-65:12, 73:22-76:8.

accomplished using a methodology adopted by the Ninth Circuit in *Nguyen*. Kristensen Reply Decl. Ex 7 and 9.[14] As described in Mr. Burnham's[15] Report, Class Vehicles' ROPS can be retrofitted with an aftermarket kit to improve strength and meet the OSHA test. The cost of doing so for Plaintiff's model is estimated at $1,448.00. Dkt. 86-59. Mr. Burnham hasn't just proposed how to calculate this, he has demonstrated he can do so, and *has* done so. Mr. Burnham will perform a similar analysis on other class vehicles after certification, and then Dr. Kneuper will implement his proposed damages model, which is described by the following formula: average ROPS structure cost + average labor cost) X number of vehicles purchased. Dkt. 86-61 at 13-16. This was all thoroughly briefed in Plaintiff's Opposition to Defendant's Motion to Strike (Dkt. No. 93) and those facts and arguments are incorporated by reference. Notably, Polaris's expert Mr. Breen testified that Polaris could provide this cost estimate for both labor and manufacture/install down to the penny. Kristensen Reply Decl. Ex. 9 at 122:21-124:20.

F. Polaris's Misrepresentation Was Material

As described in the Motion to Strike briefing, Dr. Burnham, found that the OSHA standard was not only misrepresented, but that "the Polaris RZR 570 Structure [Plaintiff's vehicle] design as provided by Polaris **did not comply** with the Standard's requirements for ROPS performance for Side Load Static Testing **by a significant amount** in the requirement for ROPS deflection under load." Dkt. 86-59 at 8. The ROPS on Plaintiff's vehicle failed the OSHA Test by "a failure of 3.16 inches more deformation at test termination than allowed by the Standard." Dkt. 86-59 at 16. This is life-threatening fraud. Polaris cannot point to a case where, under such facts, materiality would not be found. This drives the predominance analysis.

III. LEGAL ARGUMENT

A. Plaintiff Has Met All Standards Under Rule 23

1. Plaintiff Voluntarily Tailors The Certification Position To The Narrower Proposed Class Definition

Polaris makes a number of arguments relating to individualized use of Class Vehicles,

[14] The Reports were originally filed as a rebuttal to Dr. Hanssens and Dr. Langer's class certification opposition reports in Guzman, and so too is it being filed in the same capacity here.
[15] Plaintiff Guzman's engineering expert in the Central District Action is Dr. Glen Stevik. Dr. Kneuper's report from Guzman informs the exact same issues in this case, except here he will rely on the expertise of Mr; Burnham instead of Dr. Stevik for purposes of calculating damages.

with the primary argument highlighting differences in consumer use and preference regarding Rangers. Polaris argues that Rangers, unlike RZRs, are used largely for work on ranches, farms, and other non-recreational uses. Polaris thus implies that consumers using the vehicles for farming, ranching, or other similar use do not care about the ROPS to the degree as those using them for recreation. Polaris also contends that consumer demand for strong ROPS is greater amongst RZR users than Ranger users, because RZR users are more likely to experience a rollover. This is irrelevant as in both Ranger and RZRs, Polaris misled customers and regulators about ROPS meeting OSHA requirements, denying consumers the benefit of the bargain.

Regardless of Plaintiff's qualms regarding these issues, to streamline and avoid what Plaintiff ultimately views as a distraction, Plaintiff voluntarily agrees to narrow the proposed class definition to only encompass RZR vehicles, i.e., the proposed Subclass.[16] Polaris argues that the class definition is overbroad because it includes vehicles sold without a stock ROPS. This is inaccurate, as the class definition includes only vehicles "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."[17] Accordingly, Plaintiff hereby requests certification as to the following Class:

> 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.

B. Plaintiff Is Typical and Adequate

Polaris's sole basis for arguing Plaintiff's atypicality is premised on an incorrect legal standard.[18] The test under California law for a misrepresentation is an objective reasonableness

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[16] A narrow tailoring of the class definition in such a manner to address arguments raised by a defendant in an opposition brief is appropriate. *See Abdeljalil v. General Elec. Capital Corp*., 306 F.R.D. 303, 306 (S.D. Cal. 2015); *Wolf v. Hewlett Packard Company*, 2016 WL 7743692 *8 fn. 4 (C.D. Cal. Sept. 1, 2016); *Raffin v. Medicredit, Inc.*, 2017 WL 131745 *7 (C.D. Cal. Jan. 3, 2017); *Zaklit v. Nationstar Mortgage LLC*, 2017 WL 3174901 *8 (C.D. Cal. July 24, 2017); *McCurley v. Royal Seas Cruises, Inc*., 331 F.R.D. 142, 161-64 (S.D. Cal. 2019)).

[17] Polaris advises that the models of RZRs that were not certified to OSHA standards include: RZR XP Turbo S (2 seat variant), RZR Pro XP Turbo S, and RZR RS1. These models are not part of the proposed class certification definition.

[18] "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 course of conduct.'" *Hanon v. Dataproducts*

standard. Plaintiff need only be a member of the class definition with Article III standing to bring the claims to be typical of the Class. *Briseno v. ConAgra Foods, Inc*., 844 F.3d 1121, 1131 (9th Cir. 2017); *Mazza v. Am. Honda Motor Co., Inc*., 666 F.3d 581, 595 (9th Cir. 2012) (class representatives who paid more for or purchased a product due to a defendant's deceptive conduct have suffered an "injury in fact" that establishes Article III standing); *Bates v. United Parcel Serv., Inc*., 511 F.3d 974, 985 (9th Cir. 2007) ("[t]he plaintiff class bears the burden of showing" that "at least one named plaintiff" meets the Article III standing requirements).

Plaintiff purchased a RZR UTV that was "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 testified that he relied on the OSHA sticker and was injured by the purchase of class vehicles and the deception of Polaris towards consumers and federal regulators regarding the ROPS meeting federal safety standards under OSHA. Polaris's typicality arguments are thinly veiled attempts to argue a lack of predominance (on erroneous grounds addressed below). Plaintiff is typical. "[A] court must be wary of a defendant's efforts to defeat representation of a class on grounds of inadequacy when the effect may be to eliminate any class representation." *Kline v. Wolf*, 702 F.2d 400 (2d Cir.1983).

D. Plaintiff Presents Common Issues of Fact and Law

This Class is brought on behalf of purchasers of Class Vehicles – i.e. Polaris RZR UTVs with stock ROPS that were advertised on the face of the product, and represented to the CPSC to meet the OSHA standards when in fact Polaris did not test to the OSHA standards. Every Class Vehicle was advertised to satisfy the OSHA standards in a uniform manner on the face of the product. None of the Class Vehicles meet the OSHA standard, or were tested to it despite Polaris having told the CPSC and consumers that the opposite was true for over a decade. Sales

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Corp., 976 F.2d 497, 508 (9th Cir. 1992). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; [but] they need not be substantially identical." *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2015 WL 4776932, at *9 (C.D. Cal. May 27, 2015) (citing *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998)). California's objective test for consumer protection statutes, does not turn on the "claimant's particular state of mind." *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 539 (N.D. Cal. 2012). Thus, the fact that consumers may have been affected by the alleged misrepresentation in unique or different ways is not central to typicality. *Astiana v. Kashi Co*., 291 F.R.D. 493, 502–03 (S.D. Cal. 2013); *Wolf*, 2016 WL 7743692, at *11-12.

records at dealerships can be used to identify and contact Class Members. This will generate common answers, which will be determinative of class inclusion. Other common questions in this case include but are not limited to: (a) whether an objective reasonable consumer would find the mislabeling of OSHA compliance material to their purchase (*Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011));[19] (b) how much a "reasonable consumer" suffered in restitution and damages as a result of the purchase; and (c) whether the labeling at issue in this case was false, deceptive, or otherwise violative of the UCL, FAL and CLRA.

If Polaris's position on predominance were correct, individualized issues would predominate in every case involving product mislabeling. But no Court has ever held that to be the standard.[20] In fact, the Ninth Circuit, California Supreme Court and majority of district courts have held otherwise. This Court should decline Polaris's invitation to venture into uncharted territory.

1. Individualized Issues of Reliance, Standing, Materiality, and Damages Do Not Predominate

The Ninth Circuit has held that individual issues of reliance and standing are not a legitimate basis to deny class certification in a CLRA/UCL case, as reliance is determined via an objective reasonable consumer standard.[21] Prevailing district court authority supports this holding as well.[22] As one court put it:

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[19] Defendant spends a great deal of effort arguing the merits of the materiality issue and asking the Court to assume the results of a consumer survey, but this is wholly improper at the certification stage. Basic logic suggests the advertisement of OSHA compliance (a federally-mandated safety standard) on the face of the ROPS was material. After all, why would Polaris spend millions lobbying the federal government and working with regulators and ROHVA to develop a standard, only to claim it is immaterial. Polaris' position is nonsensical.

[20] "See *Ewert v. eBay, Inc*., 2010 WL 4269259 *12 (N.D. Cal. Oct. 25, 2010).

[21] *Stearns v. Ticketmaster Corp*., 655 F.3d 1013 (9th Cir. 2011) (citing *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009)); *Morales v. Kraft Foods Group, Inc*., 2015 WL 10786035 at *5-10 (C.D. Cal. June 23, 2015); *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 485-90 (S.D. Cal. 2013)*; Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d. 1152 (9th Cir. 2012); *Johnson v. Gen Mills, Inc*., 275 F.R.D. 282, 288-89 (C.D. Cal. 2011); *Forcellati v. Hyland's, Inc*., 2014 WL 1410264 at *9 (C.D. Cal. April 9, 2014); *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F.Supp.3d 1050, 1105 (C.D. Cal., 2015).

[22] *See Waller* at 477-78, citing *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 532 (C.D. Cal. 2011). ("the majority of authority indicates that it is improper for this Court to analyze unnamed class members' Article III standing."); *Aho v. AmeriCredit Fin. Servs., Inc*., 277 F.R.D. 609, 623 (S.D. Cal. 2011); and *In re Google AdWords Litig*., 2012 WL 28068 at *10 (N.D .Cal. Jan. 5, 2012).

> The Ninth Circuit said [Polaris's certification defense] was wrong, chiefly because it found the district court got the underlying, substantive law wrong. Claims brought under the UCL are governed by the reasonable consumer test, whereby a plaintiff need only show that members of the public are likely to be deceived by the business practice at issue. *Id*. at 1020; see also *Williams v. Gerber Prods. Co*., 552 F.3d 934, 938 (9th Cir.2008). In other words, under California law there are no reliance and causation elements to a UCL claim in the first instance, and so "the district court's concerns about reliance and causation were not well taken." Id. (citing *In re Tobacco II Cases*, 46 Cal.4th 298, 312, 93 Cal.Rptr.3d 559, 207 P.3d 20 (Cal.2009)). (Tobacco II is a seminal case in which the California Supreme Court clarified that "relief under the UCL is available without individualized proof of deception, reliance, and injury." 46 Cal.4th at 320, 93 Cal.Rptr.3d 559, 207 P.3d 20 . . . .

Waller v. Hewlett-Packard Co., 295 F.R.D. 472, 476 (2013).[23] As the Ninth Circuit has clarified, *Mazza*'s dicta regarding reliance "taken in context signifies only that it must be possible that class members have suffered injury, not that they did suffer injury, or that they must prove such injury at the certification phase." *Torres v. Mercer Canyons Inc*., 835 F.3d 1125, 1137 n. 6 (9th Cir. 2016). Polaris's articulation of the law surrounding individualized damages issues, materiality, reliance, standing, and consumer preference is simply wrong as a matter of law and need not be given weight.

The Ninth Circuit has affirmed its interpretation of *In re Tobacco II Cases*, 46 Cal.4th 298 (Cal. 2009)) ("*Tobacco II*") as not requiring a showing of class wide reliance or damages where there was universal exposure of Class Members to a material misrepresentation.[24] *Tobacco II*

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[23] *See also Schramm v JPMorgan Chase Bank, N.A*., Case No. 09–09442 JAK (FFMx) 2011 WL 5034663 *5 (C.D. Cal. Oct. 19, 2011); *O'Shea v. Epson America, Inc*., Case No. 09–8063 PSG 2011 WL 4352458 *3-4 (C.D. Cal. Sept. 19, 2011).

[24] *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 595–96 (9th Cir. 2012) ("[T]he California Supreme Court [in *Tobacco II*] reconfirmed that class members do not need to demonstrate individualized reliance, and that Proposition 64 imposes its reliance requirements only on the named plaintiff, not unnamed class members.... In the absence of the kind of massive advertising campaign at issue in Tobacco II, the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading."); *Torres v. Mercer Canyons Inc*., 835 F.3d 1125, 1137 n. 6 (9th Cir. 2016); *Moorer v. StemGenex Med. Grp., Inc*., 830 Fed.Appx. 218, 219 (9th Cir. Nov. 24, 2020) ("these statutes allow plaintiffs to establish reliance and causation by showing that the class was exposed to a material misrepresentation.") *Walker v. Life Insurance Company of the Southwest*, 953 F.3d 624 (9th Cir. 2020) ("We have repeatedly relied on Tobacco II in recognizing what amounts to a conclusive presumption of reliance in UCL cases.") citing *Stearns v. Ticketmaster Corp*., 655 F.3d 1013, 1021, n13 (9th Cir. 2011); *In re Hyundai & Kia Fuel Economy Litig*., 926 F.3d 539, 560 (9th Cir. 2019) ("When misrepresentations are made as part of a nationwide, concerted marketing effort, it makes no difference to the predominance analysis whether consumers encounter them in different guises.); *Bradach v. Pharmavite, LLC*, 735 Fed.Appx. 251, 254 (May 17, 2018) ("CLRA and UCL claims are ideal for class certification because they will not require the court to investigate class members' individual interaction with the product"); *Friedman v.*

shows a clear differentiating line between cases where the entire class was exposed to substantially similar labels where class certification is upheld, and cases where things like online advertisements, television or radio ads were not as uniformly-consumed by the purchasing public and the courts found individualized issues, where Class members never were "exposed" to the misrepresentations. Mislabeling class actions get certified. Class actions based on a pervasive marketing scheme can go either way. Plaintiff brings the former.

Second, Polaris' Director of Product Compliance had the following to say about the placement of OSHA stickers on every Class Vehicle:

> 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?
>
> 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 location visible to the consumer, because it informs them of important ROPS safety concerns prior to purchase. Keller Depo 85:19-85:13. This case involves material safety defects that lead to consumer deaths, and mandatory CPSC regulations requiring the stickers which serve as the source of Plaintiff's alleged misrepresentation claims. Every Class Member was exposed to this, as intended by ROVA, the CPSC and Polaris. Reliance and damages are therefore inferred according to the Ninth Circuit and California Supreme Court.

Defendant's cases are inapposite. In *Dunn v. Costco Wholesale Corporation*, 2021 WL 4205620 (C.D. Cal. July 30, 2021), defendant provided a consumer survey demonstrating less than 2% the Class held the misrepresentation material to their purchase, while Plaintiff presented

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AARP, Inc., 855 F.3d 1047, 1055 (9th Cir. 2017)

no evidence of materiality. Thus, the presumptions of *Tobacco II* stemming from material misrepresentations did not apply.[25] *Woolley v. Ygrene Energy Fund, Inc*., 2021 WL 4690971 (9th Cir. Oct. 7, 2021) involved a fraudulent omission claim, where there was no evidence that even the named plaintiff read the offending agreement or relied on it, much less that the terms were material. There were questions about whether the class members were all exposed to the terms at issue in the class certification motion.[26] *Singh v. Google LLC*, 2022 WL 94985 (N.D. Cal. Jan. 10, 2022) challenged click fraud for Google AdWords, but the source of the misrepresentations was an obscure web page on Google's terms, and a blog posting, hardly the source of misrepresentations that would be considered pervasive like those in Plaintiff's case. The court held there were individualized issues of exposure. *Bennett v. N. Am. Bancard, LLC*, 2022 WL 1667045 (S.D. Cal. May 25, 2022), by Polaris' own admission, involved claims where not all putative class members were exposed to the alleged misrepresentations at issue, again, differentiating the case from Plaintiff's alleged source of misrepresentation.

With the exception of *Dunn*, none of Defendant's authorities involved mislabeling. None involved uniform material misrepresentations, mandatory regulatory requirements, safety issues, or were implicated by *Tobacco* and its progeny.

In this case, we know that the misrepresentations relating to the ROPS meeting OSHA standards were material to a reasonable consumer for at least four reasons:

1. The CPSC regulation is not being met, and this is a mandatory government safety standard
2. The advertisement was visibly placed on the face of the vehicle and intended by Polaris to be seen by its customers
3. The amount of deflection on the ROPS per Mr. Burnham's findings upon his review of the vehicles show that there is a catastrophic failure by Polaris that would cause somebody to potentially be killed in a rollover due to the amount of failure under the test.
4. Plaintiff testified that it was material to his decision to purchase the vehicle.

The misrepresentation was plainly material, and legally as a result, Plaintiff's evidence meets the

[25] The decision also is likely incorrectly decided, as it relies on orders predating *Tobacco II*. Plaintiff failed present an expert damages model.

[26] Polaris speculates that some class members wouldn't have seen the sticker, because the sticker may have been removed. This position is based on speculation that there even is such a class vehicle or a consumer. Even so, such a consumer would not be a class member under the proffered definition, which includes only those vehicles "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."

standards of predominance under overwhelming binding legal authority.

2. Plaintiff Presents a Feasible Damages Methodology

The opinions of Dr. Langer and Dr. Hanssens, fly in the face of binding California Supreme Court and Ninth Circuit precedent as well as federal regulatory law and, more importantly are based on a factually erroneous "but for" aka "counterfactual" scenario that cannot legally exist in the market. The crux of the dispute can be boiled down to how this Court should determine damages. Ninth Circuit precedent holds that damages are a post-certification issue that need not be addressed now. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987 (9th Cir. 2015); *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513–14 (9th Cir. 2013); Differences in damage calculations do not defeat class certification after *Comcast*. *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014); *Nguyen v. Nissan N. Am.*, 932 F.3d 811, 817 (9th Cir. 2019); *Lambert v. Nutraceutical, Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017).[27] Plaintiff extensively discussed the status of predominance's intersection with damages in the Opposition to Motion to Strike that will be heard contemporaneously with class certification, and incorporates those arguments and citations by reference.

Polaris is not permitted to legally sell or manufacture UTVs in the United States unless the ROPS comply with either OSHA or ISO standards. Accordingly, every Class Vehicle is defective insofar as it would need to be retrofitted with a replacement ROPS to meet the standard. Consumer demand for the mandatory safety regulation can be inferred by the existence of the federally mandated standard, given that the standard under *Stearns*, *In re Tobacco II Cases* and their progeny are those of an objective reasonable consumer. Polaris would have to convince this Court that it was objectively unreasonable and immaterial to a reasonable consumer to rely on manufacturers of vehicles to adhere to federal safety mandates. No Court in the country would hold that. Dr. Kneuper's methodology is simple – average cost of parts plus average price of labor

[27] District Court decisions siding with this position are overwhelming. *Wolf v. Hewlett Packard Company*, 2016 WL 7743692 *13-14 (C.D. Cal. Sept. 1, 2016); *Testone v. Barlean's Organic Oils*, 2021 WL 4438391 (S.D. Cal. Sept. 28, 2021); *Bailey v. Rite Aid Corp.*, 338 F.R.D. 390 (N.D. Cal. 2021); *Mulderrig v. Amyris, Inc.*, 340 F.R.D. 575, 591 (N.D. Cal. 2021); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084 (N.D. Cal. 2018); *Culley v. Lincare Inc.*, No., 2016 WL 4208567 at *2 (E.D. Cal. Aug. 10, 2016); *In re Optical Disk Drive Antitrust Litig.*, 2016 WL 467444 at *7 (N.D. Cal. Feb. 8, 2016); *Guido v. L'Oreal, USA*, 2014 WL 6603730 at *8 (C.D. Cal. July 24, 2014); *Ralston v. Mortg. Invs. Grp.*, 2011 WL 6002640 (N.D. Cal. Nov. 30, 2011).

times total vehicles. Mr. Burnham proved he can calculate this for one model, and there is no reason to expect large differences between different models that would prevent him from doing the same across other class vehicles post certification.

Rather than presenting this analysis genuinely – i.e. presenting it as a mandatory safety regulation, Polaris instead presents the issue as a "voluntary standard" which Polaris has the discretion to ignore. Both of its damages experts were under the mistaken impression that the OSHA standards were not mandatory. Therefore, both experts based their analysis on an erroneous counterfactual–that Polaris could simply remove the OSHA sticker or replace it with a different sticker and continue selling the vehicles as is—and accordingly their reports are red herrings. Dr. Langer acknowledged that had Polaris accurately presented her with the tasks of developing an analysis, her analysis as to materiality would have been conducted as follows:

> You want to understand what the government finds important, what the industry finds important, and how they find common ground. And I think those types of questions, broadly defined, are the types of things I would want to understand if this were -- if, you know, you were talking about something that the CPSC had actually put forth as a requirement.

Id. In other words, Dr. Langer would analyze the consumer demand side of her proposed methodology by asking the CPSC about the importance of consumer safety with respect to compliant ROPS. Dr. Langer's cost of compliance analysis suffers from the same problem, because she assumes that the cost of complying with the government standard is merely the cost of replacing the sticker. But replacing the ROPS sticker is not going to make them suddenly comply with OSHA. Replacing the ROPS with an OSHA-compliant structure would make the vehicles OSHA-compliant, i.e. the very proposal made by Dr. Kneuper as to how to calculate class wide damages. Dr. Hanssens testified similarly – that Polaris had not presented his task as one where Class Vehicles were compared to vehicles that advised that they did not meet government safety standards with respect to ROPS, and so he did not conduct his consumer demand analysis from the perspective of a mandatory government safety regulation. Hanssens Depo. 74:5-75:18, 146:13-147:14, 156:13-164:11 ("I've been not asked to do that.").

Determining consumer demand, for which the CPSC is effectively acting as a proxy to the objective reasonable consumer, is relatively easy to do so by looking at the regulatory history surrounding the 2009 rulemaking. 16 CFR 1422, Oct. 27, 2009; and 16 CFR 1422, October 28,

2009. Obviously the CPSC believed this to be very important, *so important that the agency does not even permit UTVs to be sold into the market without OSHA/ISO compliant ROPS installed by manufacturers*. It follows therefore that using Dr. Langer's and Dr. Hanssens' own proposed methodology, CPSC proxy consumer demand would be in fact exceed Dr. Kneuper's proposed recall/retrofit model, because "demand" is mandatory and *supersedes market factors*. It also follows that cost of compliance methodology would require actually testing for, building and installing a compliant ROPS. Otherwise, the vehicles cannot be legally sold in the first place. This is the true cost of compliance. Once these disputes are accurately distilled using the correct framework and counterfactuals, both sides' experts appear to agree on a methodology in principle.

Finally, we circle back to *Nguyen v. Nissan North America, Inc*., 932 F.3d 811 (9th Cir. 2019) - binding authority on the appropriateness of a recall model approach to damages in a vehicle class action. Polaris argues that *Nguyen* does not set forth the correct methodology because Class Vehicles are not defective. This is wrong. All Class Vehicles were mislabeled and are unfit to be legally manufactured and released into the market without an OSHA/ISO compliant ROPS. Plaintiff seeks only to provide Class Members the money it would cost to pay for the retrofit, so they receive the benefit for which they bargained when they bought a Class Vehicle that should have come with an OSHA-compliant ROPS and let the market dictate what happens from there. This is sensible, manageable, and legally far more tenable than Polaris's position, which asks the Court to infer that consumers don't place *any* value on federal safety mandates for UTVs despite their documented propensity to kill occupants in rollovers.

E. Hybrid Certification is Warranted

Polaris's opposition to certification of a hybrid class action misses the mark. 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. Public injunctive relief is indeed a codified substantive right of California consumers under the UCL, a distinct remedy unavailable under the CLRA. *McGill v. Citibank, N.A.*, 2 Cal.5th 945 (2017). The Ninth Circuit recently held that a previously deceived consumer has standing to seek an injunction. *Davidson v. Kimberly-Clark*

Corp., 873 F.3d 1103, 1115 (9th Cir. 2017); *see also Henderson v. Gruma Corp.*, No. CV 10-04173 AHM (AJWx), 2011 WL 1362188, at *2-3, 7-8 (C.D. Cal. Apr. 11, 2011).

Injunctive relief is not only a procedural right set forth under Rule 23(b)(2), but also a substantive right under the UCL. 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 complied with mandatory safety regulations imposed by the CPSC or at the very least didn't lie about such compliance. There is no testimony in the record to suggest that Plaintiff would be unwilling to buy a Polaris UTV in the future if Polaris stopped falsely advertising that the OSHA standers were met, and simply redesigned the ROPS to actually meet the standards, as required. Accordingly, Polaris has failed to demonstrate either mootness or a lack of standing, which are the only two legal bases upon which to challenge the issue. Absent that, the injunctive relief claims should be certified. Hybrid certification will ensure that all aspects of Plaintiff's substantive claims are given credence.[28] It is warranted here, as Polaris continues to misrepresent mandatory safety features to customers and the CPSC despite what has happened throughout this litigation, and will continue to do so until forced otherwise.

IV. CONCLUSION

Again, this case is exactly why class actions exist and are so important to protecting consumer rights. Denying class certification would be essentially to hold that it is impossible to certify any consumer class action based on product mislabeling, or failure to adhere to federal safety guidelines. The Ninth Circuit and California Supreme Court clearly believe otherwise. Polaris has given no legitimate reason to deny class certification, and clearly does not deserve a free pass for what it has done. Plaintiff's Motion should be granted.

Dated: July 26, 2023

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[28] See *Raffin v. Medicredit, Inc*., 2017 WL 131745 (C.D. Cal. Jan. 3, 2017)

Christopher W. Wood

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CERTIFICATE OF SERVICE

I certify that on Wednesday, July 26, 2023, a true and correct copy of the attached **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION; DECLARATION OF JOHN P. KRISTENSEN; REQUEST FOR JUDICIAL NOTICE; EXHIBITS 1-9** was served via email and on all parties of record pursuant to Fed. R. Civ. P. 5:

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