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17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **FOR THE COUNTY OF LOS ANGELES**
19

20 MARY RUTH HUGHES, an individual and
21 KEVIN SHENKMAN, an individual, on behalf
22 of themselves and all others similarly situated,

23 Plaintiffs,

24 v.

25 AUTOZONE PARTS, INC., a Nevada
26 Corporation, AUTOZONE, INC., a Nevada
27 Corporation, AUTOZONE.COM, INC., a
28 Corporate entity of unknown origin; and DOES
1-20,

Defendants.

Case No.: BC631080

[Case Assigned for all purposes to the
Honorable Maren E. Nelson]

**DEFENDANTS AUTOZONE PARTS,
INC., AUTOZONE, INC., AND
AUTOZONE.COM, INC.'S NOTICE OF
DEMURRER AND DEMURRER TO
PLAINTIFFS' FRAUD CLAIM AND
MOTION TO STRIKE PRAYER FOR
PUNITIVE DAMAGES**

[Filed concurrently with Declaration of
Roger A. Cerda; and (Proposed) Order]

Date: June 29, 2017

Time: 10:00 a.m.

Dept.: 307

Complaint Filed: August 18, 2016

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 29, 2017 at 10:00 a.m., or as soon thereafter
3 as this matter may be heard in Department 307 of the above-entitled Court located at 600 South
4 Commonwealth Avenue, Los Angeles, CA 90005, Defendants AutoZone Parts Inc.,
5 AutoZone, Inc., AutoZone.com, Inc. (collectively "AutoZone"), will and hereby demurrer to
6 Plaintiffs Mary Ruth Hughes' and Kevin Shenkman's (collectively "Plaintiffs") Sixth Cause
7 of Action for fraud and move to strike their prayer for punitive damages and all associated
8 allegations.

9 This motion is brought on the grounds that Plaintiffs' fraud claim lacks the specificity
10 required under California law and fails to state a claim for which relief can be granted.
11 Plaintiffs fail to allege the details of any allegedly fraudulent conduct and instead provide only
12 conclusory allegations of ultimate fact. Further, the specific conduct alleged is, on its face,
13 not fraudulent, and the facts already admitted by Plaintiffs preclude any possibility of curing
14 this defect with an amendment.

15 Additionally, AutoZone will and hereby does move this Court to strike the Prayer for
16 punitive damages and the following associated portions of the Complaint:

- 17 1. Paragraph 82, page 15, lines 1-3:
18 "AutoZone acted with malice, oppression and/or fraud in engaging in the California
19 Civil Code § 1770 violations described herein. As a result, Plaintiff and Class Members
20 are entitled to punitive damages."
- 21 2. Paragraph 91, page 16, line 18:
22 "...fraudulent..."
- 23 3. Paragraph 94, page 17, line 20:
24 "...oppressive..."
- 25 4. Paragraph 99, page 18, line 14:
26 "...fraudulent..."
- 27 5. Paragraph 100, page 18, line 17:
28 "...fraudulent..."

1 6. Paragraph 101, page 18, line 101:

2 "...fraudulent..."

3 7. Paragraph 107, page 20, lines 17-21:

4 "...Plaintiff and Class Members seek punitive or exemplary damages pursuant to Civil
5 Code section 3294 in that AutoZone engaged in "an intentional misrepresentation,
6 deceit, or concealment of a material fact known to the defendant[s] with the intention
7 on the part of the defendant[s] of thereby depriving a person of property or legal rights
8 or otherwise injury."

9 8. Prayer for Relief, page 22, line 4:

10 "That Plaintiffs and Class Members be awarded punitive damages"

11 9. Prayer for Relief, page 23, line 1:

12 "That Plaintiff and Class Members be awarded punitive damages as to the appropriate
13 causes of action"

14 10. Prayer for Relief, page 23, line 15:

15 "That Plaintiffs and the other class members be awarded punitive damages"

16 This motion to strike is brought on the grounds that the Complaint fails to allege any
17 conduct that qualifies as malice, oppression or fraud, the allegations lack the specificity
18 required for punitive damages, and the allegations related to punitive damages constitute
19 immaterial, impertinent and scandalous matter that should be stricken.

20 This demurrer and motion to strike is based on this notice, the attached Memorandum
21 of Points and Authorities, all papers and pleadings filed herein, and upon such further
22 arguments and evidence as may be properly presented at or before the hearing on this matter.

23 DATED: May 4, 2017

24 **ALSTON & BIRD LLP**

25 
26 Roger A. Cerda

27 Attorneys for Defendants

28 **AUTOZONE PARTS, INC., AUTOZONE, INC., and
AUTOZONE.COM, INC.**

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiffs claim that it was wrongful for AutoZone to modify the terms of its loyalty
4 rewards program (“Rewards Program”), even though the black and white contractual terms of
5 that program *explicitly permit AutoZone to make the very changes Plaintiffs complain*
6 *about*. Like many reward programs these days, AutoZone included an expiration period in
7 which credits and rewards must be redeemed. AutoZone gave ample advance notice of this
8 change to program participants via direct mailers, e-mails, notices on AutoZone’s website,
9 signage and displays in AutoZone stores, notices on purchase receipts, and communications
10 by store employees. Plaintiffs do not deny AutoZone’s comprehensive disclosure efforts, but
11 rather, allege that they nonetheless were somehow unaware of the change in terms (that
12 occurred several years ago). They do not even allege that the change of terms or explicit details
13 of the program were undisclosed, but rather that AutoZone “failed to adequately disclose”
14 them. Out of this, Plaintiffs attempt to assert a fraud claim and a prayer for punitive
15 damages. Neither is properly pled or available based on the facts Plaintiffs have already
16 admitted.

17 Plaintiffs’ fraud claim fails to identify any specific statements or representations by
18 AutoZone that are actually false. This is readily apparent on the face of the
19 Complaint. Plaintiffs do not allege that anyone at AutoZone promised them that their credits
20 or rewards would *never* expire. They cannot allege this because the Terms and Conditions
21 governing the Rewards Program explicitly state that rewards and credits earned by members
22 are subject to an expiration period. Instead, Plaintiffs speak only of representations that are
23 demonstrably true for any customer who uses his or her credits before they expire. And
24 importantly, none of these allegations identify the specific wording used, what else was said,
25 who made the statements, or when or by what means they were made. Not only are the facts
26 alleged by Plaintiffs insufficient to plead a fraud claim, they preclude Plaintiffs from curing
27 this defect because Plaintiffs cannot “plead around” their existing admissions.

28 Plaintiffs’ prayer for punitive damages and related allegations must be stricken for

1 similar reasons. Nothing alleged in the Complaint constitutes “despicable” conduct rising to
2 the level of malice or “cruel and unjust hardship” constituting oppression. This is a claim
3 about setting an expiration limit on *free bonus rewards* that program participants earn through
4 qualifying purchases, not the sort of “vile, base, contemptible, miserable, wretched or
5 loathsome” actions that must be alleged to properly plead a claim for punitive damages. Even
6 if all of Plaintiffs’ allegations were taken as true, none of those allegations supports a showing
7 of fraud, malice or oppression, so all claims for punitive damages must be stricken.

8 **II. FACTUAL BACKGROUND**

9 Plaintiffs Mary Ruth Hughes and Kevin Shenkman, a married couple who are both
10 experienced attorneys, commenced this action on August 18, 2016, by filing a Complaint in
11 the California Superior Court for the County of Los Angeles against Defendants AutoZone
12 Parts, Inc., AutoZone, Inc., and AutoZone.com, Inc. (collectively “AutoZone”). The matter
13 was removed and then remanded to this Court. As alleged in the Complaint, for several years
14 AutoZone has offered its customers a free opportunity to earn store credit based on the
15 purchases they were already making. AutoZone gave members of its Rewards Program \$20
16 in store credit (“Rewards”) for every five qualifying purchases of over \$20 they made (each
17 qualifying purchase resulting in a “Credit”). (Complaint, ¶¶ 21, 25.)

18 As set forth in the Terms and Conditions, the specific rules that govern a member’s
19 Rewards Program account, such as the period of time a member has to accrue five Credits in
20 order to earn a Reward, and the period of time a member has to redeem Rewards, are
21 determined by the particular loyalty plan in place at the AutoZone store where the member
22 enrolled.¹ Different participating AutoZone stores were subject to different types of plans.

23
24 ¹ Attached as Exhibits A & B to the Declaration of Roger A. Cerda (“Cerda Decl.”) are the
25 AutoZone Rewards Program Terms and Conditions that were in place in 2008 and updated in
26 2015, respectively. The AutoZone Rewards Program Terms and Conditions are incorporated
27 by reference in the Complaint as an integral and necessary basis of Plaintiffs claims against
28 AutoZone. Where a written instrument is the foundation of a claim, it is incorporated into the
pleading and may be considered on demurrer. *See Columbia Casualty Co. v. Northwestern
Nat. Ins. Co.*, 231 Cal. App. 3d 457, 468-69 (1991).

1 For example, the AutoZone store in which Plaintiffs enrolled where under the “5/20/20”
2 loyalty plan, which had no specified period of time to earn Credits or redeem Rewards. Other
3 stores in California had different loyalty plans, which did have expiration periods for members
4 to earn Credits and redeem Rewards. In order to simplify the Rewards Program, in or about
5 late 2014 AutoZone converted all of the existing loyalty plans in California to a “5in12/20/20-
6 3MO” loyalty plan, in which Credits would expire after one year and Rewards would expire
7 if not redeemed within three months. (Complaint, ¶30.)

8 Under the Terms and Conditions governing the Rewards Program, AutoZone fully
9 reserved the right to make these types modifications. For example, the Terms and Conditions
10 which Plaintiffs agreed to when signing up for the Rewards Program allowed AutoZone “to
11 cancel, modify or restrict any aspect of the Program at any time with or without notice.”
12 (Cerda Decl., Ex. A at §4.a; Ex. B at §3.a.) The Terms and Conditions expressly state that
13 “AutoZone reserves the right to change the program in place at any AutoZone store at any
14 time in its sole discretion without prior notice to Member.” (*Id.*, Ex. A at § 3.I.b; Ex. B at §
15 2.I.b.) This includes the right to change, at any time, the value of the credits earned by
16 members, the number of credits needed to earn rewards, the period of time members have to
17 use credits to earn rewards, and the period of time members have to use rewards. (*Id.*, Ex. A
18 at §§ 3.I.b. & 3.I.h; Ex. B at §§ 2.I.b. & 2.I.i.) Indeed, the Terms and Conditions made clear
19 that Rewards and Credits were subject to an expiration period depending on the plan in place
20 at the AutoZone store where the member enrolled and upon certain events such as the failure
21 to earn Rewards within the relevant time period. (*Id.*, Ex. A at §§ 3.I.b., 3.I.e and 3.I.f; Ex. B
22 at §§ 2.I.b., 2.I.f. and 2.I.g.)

23 Moreover, Rewards Program members like Plaintiffs received ample notice regarding
24 any modifications that might impact their existing Credits or Rewards. For example,
25 beginning in August 2014 (several months prior to the date that changes to the Rewards
26 Program became effective) members received notice of the program change via a series of
27 direct mailers. These mailers also provided members with specific information regarding their
28 Rewards Program account, including current reward balances (along with expiration date),

1 number of existing credits, and amount of credits necessary to earn an additional \$20 Reward.

2 Additionally, members received notice of the changes to the Reward Programs when
3 visiting AutoZone locations via display signs located throughout the store, via
4 communications from store employees, and via language printed on the members'
5 receipts. Also, members who logged on to their Rewards Program account online at
6 www.autozonerewards.com prior to the plan change were directed to a landing page notifying
7 them of the upcoming changes to the program, including the revised time period for earning
8 Credits and expiring Rewards. Moreover, in addition to receiving advance notification
9 regarding the changes in the Rewards Program, members with an e-mail address on file were
10 sent e-mail notifications alerting them of expiring rewards.

11 Notwithstanding all of these efforts to notify members of the program changes,
12 Plaintiffs allege that they did not become aware of the changes until 2016. (Complaint, ¶26.)
13 AutoZone provides the above facts for purposes of explanatory context and factual
14 background, but its motion is based only on the arguments set forth below.

15 Plaintiffs assert claims against AutoZone for (1) breach of contract; (2) breach of
16 implied covenant of good faith and fair dealing; (3) violation of the California Consumer Legal
17 Remedies Act (CLRA); (4) violation of the California False Advertising Act; (5) violation of
18 California's Unfair Competition Law (UCL); and (6) fraud and seek to certify a class of all
19 California consumers similarly situated. Plaintiffs seek, among other relief, punitive damages
20 based on the CLRA, UCL, and fraud claims. (Complaint, pp. 22:4; 23:1; 23:15.) While
21 AutoZone believes none of Plaintiffs' claims have merit, this motion addresses only Plaintiffs'
22 flawed fraud claim and prayers for punitive damages.

23 **III. PLAINTIFFS' FRAUD CLAIM FAILS TO ALLEGE FRAUDULENT**
24 **CONDUCT WITH THE REQUISITE SPECIFICITY, OR AT ALL**

25 A complaint is subject to demurrer when it fails to state facts sufficient to constitute a
26 cause of action. Cal. Code of Civ. Proc. § 430.10. A pleading must, on its face, contain
27 sufficiently pled facts to support a cause of action, and the conclusions of a pleader must be
28 disregarded. *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 572 (1973). Contentions, deductions,

1 and conclusions of fact or law that are alleged in the complaint are not properly considered in
2 judging the adequacy of the pleading. *Kisekey v. Carpenters' Trust for So. Cal.*, 144 Cal. App.
3 3d 22, 228 (1983). Where the facts alleged do not give rise to any valid cause of action, a
4 demurrer is properly sustained. *Lopez v. City of San Diego*, 190 Cal. App. 3d 678, 680-81
5 (1987).

6 Under California law, fraud must be pled with specificity; general and conclusory
7 allegations do not suffice. *See Stansfield v. Starkey*, 200 Cal. App. 3d 59, 74 (1990). "This
8 particularity requirement necessitates pleading facts which show how, when, where, to whom,
9 and by what means the representations were tendered." *Id.* at 73. When asserting a fraud claim
10 against a corporate defendant, the plaintiffs' burden is even greater; the plaintiff must "allege
11 the names of the persons who made the allegedly fraudulent representations, their authority to
12 speak, to whom they spoke, what they said or wrote, and when it was said or written."
13 *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991) (citations
14 omitted). Essentially, the allegations of fraud must "provide the defendants with the fullest
15 possible details of the charge so they are able to prepare a defense to this serious attack."
16 *Goldrich v. Natural Y Surgical Specialties, Inc.* 25 Cal. App. 4th 722, 782 (1994).

17 **A. Plaintiffs' Complaint Fails To Allege Fraud With Specificity**

18 Plaintiffs have not met their pleading burden. Plaintiffs fail to allege the "who, what,
19 when, where, and how" of the communications regarding the Rewards Program that they
20 contend were fraudulent. The Complaint only generally alleges that "AutoZone" represented
21 "through advertising, store signage, and interactions with AutoZone employees" that Plaintiffs
22 would receive \$20 store credit for every five purchases they made over \$20. (Complaint ¶21,
23 103(a).) Plaintiffs do not even attempt to allege when, where, or through what medium the
24 "advertising" appeared. Plaintiffs allege that AutoZone operates "five thousand" retail stores
25 with "hundreds" of locations in California (Complaint ¶ 18), but offers no indication of where
26 the challenged "store signage" was displayed, when it was displayed or what the signage said
27
28

1 that was allegedly fraudulent.² Significantly, Plaintiffs offer no indication of what *else* the
2 signage said that referenced their particular loyalty plan or the Rewards Program's Terms and
3 Conditions. The Complaint also fails to include the names of any AutoZone employees who
4 purportedly made any allegedly fraudulent representations, who they allegedly made those
5 representations to, the basis for their authority to speak on behalf of AutoZone, or, most
6 importantly, what those individuals specifically said.

7 Plaintiffs likewise fail to explain how the specific language used on AutoZone signage
8 or by AutoZone employees (which has not been identified) was "untrue." It is not enough to
9 generally allege that, in Plaintiffs' particular circumstances, they may not have used their own
10 Credits or Rewards before they expired. Rather, to state a claim for fraud, they must be able
11 to allege that a specifically-identified representation that Credits and Rewards are available to
12 program participants was untrue. The allegations in the Complaint are devoid of any of the
13 specificity required to give AutoZone notice of the alleged misconduct and do not satisfy the
14 heightened California pleading standard for fraud. Plaintiffs' fraud claim should be dismissed
15 on this basis alone.

16 **B. The Complaint Fails To State A Claim For Fraud That Is Plausible On Its**
17 **Face**

18 Plaintiffs' fraud claim should be dismissed for the additional reason that, based on the
19 facts already alleged, Plaintiffs are incapable of alleging that AutoZone made a representation
20 that was *actually false*. Plaintiffs' own allegations demonstrate that AutoZone did not make
21 any false representations, but rather acted in accordance with the terms and conditions of its
22 Rewards Program and openly disclosed those terms and the changes made to them. (*See*,
23 Complaint ¶ 28.)

24 Plaintiffs allege that AutoZone promised them Rewards for Credits earned. (Complaint
25 ¶ 21.) Plaintiffs admit that, "for years...the [rewards] program worked as AutoZone promised,
26 with AutoZone giving them \$20 store credit every time they made five purchases of over \$20."
27

28 ² This is important because the type of loyalty plan available to Plaintiffs and other program participants differed by AutoZone stores.

1 (Complaint ¶ 25.) Thus, by Plaintiffs' own admission, AutoZone's representations during this
2 period – the representations that Plaintiffs specifically allege caused them to sign up for and
3 participate in the program – were not false. Plaintiffs cannot plead around this admission, and
4 are therefore foreclosed out of any argument that any representation made to them before the
5 program terms changed was false.

6 While Plaintiffs allege that AutoZone modified the terms of their particular loyalty plan
7 and caused Credits and Rewards to eventually expire, nowhere in the Complaint do Plaintiffs
8 allege that AutoZone *affirmatively represented* that the terms of their loyalty plan would never
9 change or that the Credits and Rewards would never expire. **To the contrary, the AutoZone**
10 **Rewards Program Terms and Conditions made clear that Credits and Rewards were**
11 **subject to expiration under various circumstances:**

- 12 • “This Reward will be accessed through the Member’s Card and *will be valid for*
13 *a set time period* as determined by the Program in place at the AutoZone store
14 where Member enrolled.” (Cerde Decl., Ex. A at § 3.I.b; Ex. B at § 2.I.b.)
15 (emphasis added)
- 16 • “All Credits *may be expired if a Member has not accumulated sufficient*
17 *purchases to earn a Reward within the relevant period of time* as determined
18 by the Program in place at the AutoZone store where Member enrolled.” (*Id.* at
19 Ex. A at § 3.I.e; Ex. B at § 2.I.f.)(emphasis added).
- 20 • “Credits remaining on a Member’s account *will expire* at the conclusion of the
21 Program in place at the AutoZone store where Member enrolled or at the sole
22 discretion of AutoZone, whichever occurs first.” (*Id.* at Ex. A at § 3.I.f; Ex. B
23 at § 2.I.g.)(emphasis added).
- 24 • “AutoZone, in its sole discretion and **without prior notice to Member, may**
25 **change (i) the minimum in-store transaction value needed to earn a Credit,**
26 **(ii) the value of the Credit earned by the Member, (iii) the number of**
27 **Credits needed to earn a reward, (iv) the period of time the Member has to**
28 **use Credits to earn Rewards; and (v) the period of time Member has to use**

1 **Rewards.”** (*Id.* at Ex. A at § 3.I.h; Ex. B at § 2.I.i.)(bold in original).

2 Plainly, Plaintiffs’ fraud claim cannot be premised upon the falsity of a representation
3 that was never made.

4 That leaves us with new representations made by AutoZone about the Rewards Program
5 *after* the change in the loyalty plan was made. This seems to be the focus of Plaintiffs’ claim,
6 but again, they have not identified a single specific representation that is untrue (and, as noted
7 above, have not pled the specific who, what, when or how of any representation with
8 particularity). It remains true that Rewards Program participants receive a \$20 Rewards upon
9 earning five Credits, which is all Plaintiffs have generally indicated that AutoZone
10 represented. (Complaint, ¶ 21.) The time period during which participants must earn the
11 Credits or redeem their Rewards may be shorter, but both the Credits and Rewards are still
12 available. A typical AutoZone customer who purchases several cases of oil, tools or other
13 automotive parts over the course of separate visits could easily earn all five Credits over the
14 course of a single year, at which point that customer would have earned his or her \$20 Reward.
15 It would not be unusual for AutoZone customers who are auto mechanics or auto enthusiasts
16 to make dozens of individual purchases throughout a typical year. Plaintiffs do not (and
17 cannot) identify a single representation that AutoZone made that was *actually false*.

18 Accordingly, Plaintiffs’ fail to allege facts sufficient to state a claim for fraud against
19 AutoZone that is plausible on its face. In addition to failing to plead the claim with the
20 requisite specificity, the fraud claim should also be dismissed for failure to allege a false
21 representation.

22 **C. Plaintiffs’ Allegations Of “Inadequate Disclosure” Are Insufficient to**
23 **Plead Fraud**

24 The remainder of Plaintiffs’ fraud claim rests on what they describe as AutoZone’s
25 “failure to adequately disclose” the program terms. (Complaint, ¶ 103.b–c.) However,
26 subjectively inadequate disclosure – as opposed to an omission or intentional concealment –
27 does not a fraud claim make. Noticeably absent from the Complaint is any allegation that
28 AutoZone *intentionally concealed or outright omitted disclosure* of the terms and conditions

1 of the program.

2 Moreover, a fraud claim based on failure to disclose information requires a predicate
3 duty to disclose. *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 807 (2007).
4 The Complaint contains no allegation that AutoZone owed Plaintiffs any such duty, and for
5 good reason - the Rewards Program Terms and Conditions specifically state that AutoZone
6 has the right to modify the program *without notice*. (See Cerda Decl., Ex. A at § 3.I.h; Ex. B.
7 at § 2.I.i.)("AutoZone, in its sole discretion and **without prior notice to Member**, may change
8 (i) the minimum in-store transaction value needed to earn a Credit, (ii) the value of the Credit
9 earned by the Member, (iii) the number of Credits needed to earn a reward, (iv) the period of
10 time the Member has to use Credits to earn Rewards; and (v) the period of time Member has
11 to use Rewards."); *id* at Ex. A § 4.a.; Ex. B at § 3.a.)("AutoZone reserves the right to cancel,
12 modify or restrict any aspect of the Program at any time **with or without notice.**")(emphasis
13 added).

14 Accordingly, Plaintiffs' attempt to premise its fraud claim on the adequacy of
15 AutoZone's disclosure of the change in plan terms is insufficient to plead fraud and the demur
16 must be sustained.

17 **IV. PLAINTIFFS' PUNITIVE DAMAGES ALLEGATIONS SHOULD BE**
18 **STRICKEN**

19 Under Cal. Code of Civil Procedure Section 436, a Court may strike from a pleading,
20 "any irrelevant, false, or improper matter inserted in any pleading." It is well-settled that an
21 improper claim for damages (including a claim for punitive damages) is properly attacked by
22 a motion to strike. *See, Grieves v. Superior Court*, 157 Cal.App.3d 159, 163-164 (1984).
23 Claims for punitive damages are particularly susceptible to a motion to strike because they are
24 never awarded as a matter of right; instead, they are awarded as a form of public punishment
25 to deter evil intent and actions. *Schumate v. Johnson Publishing Company*, 139 Cal.App.2d
26 121, 135 (1956). Punitive damages are generally disfavored under California law. *Beck v.*
27 *State Farm Mutual Auto Insurance*, 54 Cal.App.3d 347, 355 (1976).
28

1 **A. Plaintiffs Fail To Plead A Basis For Punitive Damages**

2 Plaintiffs allege punitive damages as part of their Third Cause of Action alleging
3 violations of California's Consumer Legal Remedies Act ("CLRA"), their Fifth Cause of
4 Action alleging violations of the California Unfair Competition Law ("UCL"), and their Sixth
5 Cause of Action for fraud. However, none of Plaintiffs' allegations associated with these
6 claims contain specific, factual allegations that support a claim of punitive damages. The
7 Complaint contains only vague, conclusory allegations of "wrongful conduct" based on
8 AutoZone's decision to modify the terms of its Rewards Program. These allegations are
9 inadequate, and should therefore be stricken, for the reasons set forth below.

10 California Civil Code section 3294 allows for punitive damages "where it is proven by
11 clear and convincing evidence that the defendant has been guilty of oppression, fraud, or
12 malice." Cal. Civ. Code, § 3294(a). California Civil Code section 3294 provides definitions
13 of malice, oppression and fraud as follows:

14 “(1) ‘Malice’ means conduct which is intended by the defendant
15 to cause injury to the plaintiff or despicable conduct which is
16 carried on by the defendant with a willful and conscious disregard
17 of the rights or safety of others.

18 (2) ‘Oppression’ means despicable conduct that subjects a
19 person to cruel and unjust hardship in conscious disregard of that
20 person's rights.

21 (3) ‘Fraud’ means an intentional misrepresentation, deceit, or
22 concealment of a material fact known to the defendant with the
23 intention on the part of the defendant of thereby depriving a person
24 of person of property or legal rights or otherwise causing injury.”

25 California Civil Code § 3294.

26 Despicable conduct is conduct that is “so vile base, contemptible, miserable, wretched or
27 loathsome that it would be looked down upon and despised by ordinary people.” *Mock v.*
28 *Michigan Millers Mutual Ins. Co.*, 4 Cal.App.4th 306, 331 (1992).

1 When a defendant must defend itself against a claim for punitive damages, “fairness
2 demands that he receive adequate notice of the kind of conduct charged against him.” *G.D.*
3 *Searle & Co. v. Superior Court*, 49 Cal.App.3d 22, 29 (1975). A complaint that merely quotes
4 section 3294 elements is insufficient to support a claim for punitive damages. *Gombos v. Ashe*,
5 158 Cal.App.2d 517, 529 (1958), *overruled on other grounds by Taylor v. Super. Ct.*, 24 Cal.3d
6 890 (1979) (“Certainly the mere characterization of the conduct challenged as willful,
7 reckless, wrongful and unlawful is not of itself sufficient to charge the malice in fact required
8 to sustain a [claim] for punitive damages.”) Thus, punitive damages allegations should be
9 stricken if they do not contain sufficient facts to apprise the defendant of the basis upon which
10 the plaintiff seeks such damages. *G.D. Searle*, 49 Cal.App.3d at 29.

11 In *G.D. Searle*, the court considered the allegation that a defendant “willfully and
12 knowingly placed defective products on the market and wrongfully, knowingly, and willfully
13 acted in complete disregard of plaintiff’s implicit reliance upon defendants’ implicit
14 representations of safety.” The court ruled that these allegations were not sufficient to support
15 a punitive damages award because they were “opaque, unstable and compound averments”
16 which “evade reduction to exactitude”, and further explained that “[n]otwithstanding the
17 relaxed pleading criteria, certain tortious injuries demand firm allegations. Vague, conclusory
18 allegations of fraud or falsity may not be rescued by the rule of liberal construction. *Id.* at 27
19 (internal citations omitted).

20 Likewise, in *John H. Smith III v. Superior Court*, 10 Cal.App.4th 1033 (1992), the court
21 granted a motion to strike similar to the one at issue here, because the complaint’s allegations
22 were too conclusory. The complaint contained a single paragraph which alleged, in part,
23 “[s]aid acts and omissions were undertaken with a conscious and knowing disregard of the
24 interests and rights of plaintiff and to benefit the defendants . . . financially, and were part and
25 parcel of a scheme and plan to defraud plaintiff. Defendants’ conduct . . . was thus such as to
26 constitute oppression, fraud or malice.” *Id.* at 1036. The *Smith* court struck these allegations,
27 holding that they were insufficient to support a claim for punitive damages.

28 Here, Plaintiffs’ allege in their CLRA claim, that AutoZone violated provisions of the

1 CLRA, but assert no allegations of any particular malicious, oppressive, or fraudulent conduct
2 by AutoZone. (Complaint, ¶¶ 78, 79.) Instead, the Complaint simply lists the CLRA
3 provisions that AutoZone allegedly violated and, like the complaints in *G.D. Searle and Smith*,
4 includes a conclusory paragraph that “AutoZone acted with malice, oppression and/or fraud in
5 engaging in the California Civil Code § 1770 violations...” (Complaint, ¶ 82.) A general
6 allegation that “AutoZone acted with oppression and/or fraud” is a meaningless legal
7 conclusion absent supporting facts. Plaintiffs’ failure to plead such facts leaves AutoZone
8 with inadequate notice.

9 Plaintiffs’ request for punitive damages under the UCL claim fails for the same reason.
10 Plaintiffs allege that AutoZone violated California Business & Professions Code § 17200 by
11 making “...misrepresentations and omissions of material fact about its rewards program... and
12 violating the [CLRA].” (Complaint ¶91). Again, Plaintiffs fail to properly allege facts
13 constituting any supposed malicious, oppressive, or fraudulent behavior by AutoZone. The
14 Complaint does not specify how any alleged misrepresentation or omission was carried out
15 maliciously or oppressively. Moreover, Plaintiffs cannot rely on the conduct they allege as
16 violating the CLRA, because as described above, that claim also does not specify what actions
17 were malicious, oppressive or fraudulent. Finally, as described above, Plaintiffs have failed
18 to plead any fraudulent conduct. Therefore, there is no basis for the punitive damages claim
19 under the UCL cause of action and for this same reason the claim for punitive damages under
20 the fraud claim fails as well.

21 A fair summary of this case is that Plaintiffs are upset that Credits and Rewards they
22 had earned long ago expired before they could use them. These allegations do not come close
23 to identifying the type of malicious or oppressive conduct that would legitimately give rise to
24 punitive damages. *See, e.g., Taylor v. Superior Court*, 24 Cal.3d 890 (1979) (operating a motor
25 vehicle while intoxicated constitutes “malice”); *Greenfield MHP Associates, L.P. v. Ametek,*
26 *Inc.*, 145 F.Supp.3d 100 (S.D. Cal. 2015) (allegation that manufacturer dumped toxic waste
27 into the ground sufficient to demonstrate malice or oppression). The conduct Plaintiffs allege
28 – changing the terms of a free rewards program – amounts to nothing more than a legitimate

1 and practical business decision. The Complaint on its face, simply does not demonstrate “vile,
2 base, contemptible, miserable, wretched or loathsome” conduct that would be “looked down
3 upon and despised by ordinary people.” The fact that AutoZone’s change in program terms
4 caused Plaintiffs dissatisfaction could not possibly warrant the imposition of punitive
5 damages.

6 Because Plaintiffs have failed to properly allege facts constituting any supposed
7 “malicious”, “oppressive” or “fraudulent” behavior by AutoZone, Plaintiffs’ claim for punitive
8 damages is unsupported and must be stricken.

9 **V. PLAINTIFFS SHOULD NOT BE GRANTED LEAVE TO AMEND**

10 A court may sustain a demurrer without leave to amend if amendment would be futile.
11 *Tyco Indus., Inc. v. Superior Court*, 164 Cal. App. 3d 148, 153 (1985). “[A] party may not
12 amend a pleading to contradict an allegation made in the earlier version of the pleading ...
13 plaintiff is bound by the later allegation.” *Pulver v. Avco Fin. Servs.*, 182 Cal. App. 3d 622,
14 635 (1986). Here, Plaintiffs are bound by their existing allegations regarding the alleged
15 “wrongful conduct,” and that conduct, on its face, is not fraudulent nor does it constitute malice
16 or oppression. For all of the reasons set forth above, the deficiencies in Plaintiffs’ claims
17 cannot be cured by amendment. Accordingly, the Court should dismiss the fraud claim and
18 strike the punitive damages allegations without leave to amend.

19 **VI. CONCLUSION**

20 For all of the foregoing reasons, AutoZone respectfully requests that the Court grant
21 this demurrer and motion to strike in its entirety.

22 DATED: May 4, 2017

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26 _____
Roger A. Cerda

27 Attorneys for Defendants
28 **AUTOZONE PARTS, INC., AUTOZONE, INC., and
AUTOZONE.COM, INC.**

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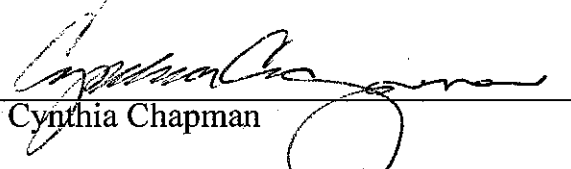
I, Cynthia Chapman, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Alston & Bird LLP, 333 South Hope Street, Sixteenth Floor, Los Angeles, CA 90071.

On May 4, 2017, I served the document(s) described as **DEFENDANTS AUTOZONE PARTS, INC., AUTOZONE, INC., AND AUTOZONE.COM, INC.'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' FRAUD CLAIM AND MOTION TO STRIKE PRAYER FOR PUNITIVE DAMAGES** on the interested parties in this action as follows: **See Attached Service List**

- BY MAIL: I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, the correspondence would be deposited with the United States Postal Service at 333 South Hope Street, Los Angeles, California 90071 with postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm. Following ordinary business practices, I placed for collection and mailing with the United States Postal Service such envelope at Alston & Bird LLP, 333 South Hope Street, Los Angeles, California 90071.
- BY UPS NEXT DAY AIR: I deposited such envelope in a facility regularly maintained by UPS with delivery fees fully provided for or delivered the envelope to a courier or driver of UPS authorized to receive documents at Alston & Bird LLP, 333 South Hope Street, Los Angeles, California 90071 with delivery fees fully provided for.
- BY FACSIMILE: I telecopied a copy of said document(s) to the following addressee(s) at the following number(s) in accordance with the written confirmation of counsel in this action.
- By E-Service: Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses through Case Anywhere. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- [State] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- [Federal] I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 4, 2017, at Los Angeles, California.


Cynthia Chapman

Mary Ruth Hughes, et al. v. AutoZone Parts Inc., et al.,
Los Angeles County Superior Court
Case No. BC631080

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