PETER E. MASAITIS (State Bar No. 202006)
ROGER A. CERDA (State Bar No. 239027)
AMBER A. HANNAH (State Bar No. 308462)
ALSTON & BIRD LLP
333 South Hope Street, Sixteenth Floor
Los Angeles, California 90071
Telephone: (213) 576-1000
Facsimile: (213) 576-1100
peter.masaitis@alston.com
roger.cerda@alston.com
amber.hannah@alston.com

Attorneys for Defendants
AUTOZONE PARTS, INC., AUTOZONE, INC., and AUTOZONE.COM, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

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

Plaintiffs,

v.

AUTOZONE PARTS, INC., a Nevada Corporation, AUTOZONE, INC., a Nevada Corporation, AUTOZONE.COM, INC., a 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 REPLY BRIEF IN SUPPORT OF DEMURRER TO PLAINTIFFS' FRAUD CLAIM AND MOTION TO STRIKE PRAYER FOR PUNITIVE DAMAGES

[Filed concurrently with Supplemental Declaration of Roger A. Cerda]

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Dept.: 307

Complaint Filed: August 18, 2016

I. INTRODUCTION

It is important to recognize that this case is solely about a free loyalty program that offered participants free rewards for doing nothing more than making purchases that they were already making. Plaintiffs admit that there was nothing fraudulent about AutoZone's Reward Program at the time they joined it, and that the Program operated precisely as they understood it would for years. Plaintiffs also do not contend (nor could they) that AutoZone ever promised to maintain this Program in perpetuity or to *never* change the Program's rules. To the contrary, the Program's terms and conditions *explicitly* state that AutoZone may change the Program terms or cancel the Program at any time – as one would expect of a gratuitous reward program of this sort. While this case lacks any merit whatsoever, AutoZone's demurrer is focused on Plaintiffs' fraud claim which is vague, ambiguous and deficiently plead.

Plaintiffs' fraud claim turns exclusively on whether the addition of an expiration period for credits and rewards somehow renders a representation that participants can earn a $20 reward after making five qualifying purchases "fraudulent". It clearly does not. Plaintiffs and every other participant can still earn $20 rewards, they simply must do so within one year. Plaintiffs do not dispute this, contending only that "most customers" would *choose* not to make the required qualifying purchases – but nothing at all *precludes* them from doing so. While Plaintiffs claim they were somehow unaware of the addition of an expiration period to the Program rules, they do not allege that AutoZone ever *concealed* or *misrepresented* this expiration rule. Indeed, Plaintiffs' Complaint makes a binding judicial admission that AutoZone *did* disclose the rule change. Plaintiffs' fraud claim simply defies reason and cannot withstand even a superficial examination of the grounds underlying it.

Plaintiffs' opposition fails to excuse any of the fatal flaws in their fraud claim or prayer for punitive damages. They ignore the controlling authorities that require them to plead the specific details and circumstances of any allegedly fraudulent statements and they cannot logically explain why the challenged statements are purportedly untrue. These failures are fatal, so the fraud claim should be dismissed without leave to amend. Likewise, Plaintiffs' prayer for punitive damages must be stricken because the Complaint fails to properly allege

fraud, and Plaintiffs' other factual allegations fail to establish conduct that could conceivably qualify as malicious or oppressive conduct.

II. PLAINTIFFS' FRAUD CLAIM SHOULD BE DISMISSED

Because Plaintiffs' Opposition attempts to blur the lines between very different representations about the Rewards Program made through different channels (e.g., orally by store employees, in-store signage, tear sheets, mailers, website pages, e-mails, messages on receipts, etc.) in different locales and over different periods of time, it is helpful to first review what Plaintiffs' fraud claim is *not* about. Plaintiffs cannot make any claim with respect to AutoZone's representations that originally caused Plaintiffs to join the Rewards Program because they have acknowledged that up until the time the Program rules changed, the Program functioned exactly the way they expected it to. (Opp., 2:21-22). If the Program worked exactly as promised, the promises made by AutoZone during this period cannot constitute fraud. Nor can these true representations be transmuted into fraudulent statements as a result of acts occurring later in time (e.g. a change of Program rules years later). *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) ("the complaint must allege facts sufficient to plausibly establish that the statement was false ***when made***.")(emphasis added).

Due to the vagueness of Plaintiffs' Complaint and the absence of any clarification in Plaintiff's Opposition, AutoZone still has no idea which "representations" about the Program Plaintiffs are actually challenging as fraudulent. This is exactly why Plaintiffs must plead their fraud claim with particularity. They cannot simply cite admittedly true representations from before the Program rules changed as the basis of their claim while disregarding the qualifying language and incorporated terms and conditions that existed in post-change statements. But that appears to be exactly what Plaintiffs have done. They explicitly cite admittedly non-fraudulent advertising, store signage and documents from before the Program rules changed as proof that they pled their fraud claim with sufficient specificity. (Opp., 4:25 – 5:10). No other specific sources of representations are cited anywhere in the Complaint or Opposition.

Plaintiffs' failure to plead with specificity leaves AutoZone with no way of knowing which advertisement of which type in which channel during which period of time is at issue,

in which store Plaintiffs saw signage and when, or what employee from which store made statements to Plaintiffs, and when. This is not an immaterial failure. AutoZone needs to know this information because the specific context matters a great deal. If in writing, what else did the writing say that qualified the statement? If it was oral, what else did the speaker say, and did this person have the authority to speak on behalf of the company? AutoZone is not on notice of the actual challenged conduct because Plaintiffs have inappropriately cherry-picked one phrase and provided no context. "A single out-of-context phrase does not provide Defendant with sufficient notice..." *Samet v. Procter & Gamble* Co., No. 5:12 C-CV-01891 PSG, 2013 WL 3124647, at *9 (granting motion to dismiss where plaintiff pled only select phrases, but failed to provide the entire statement or attach the relevant label).

Plaintiffs' Opposition simply ignores the controlling authorities cited by AutoZone holding that a fraud claim must be pled with specificity for this very reason. The full context of the statements are even more important because Plaintiff allege AutoZone's statements were fraudulent because of what they omitted. To assess whether anything important was omitted, the statement must be taken as a whole. As is often the case, "[a]ny ambiguity... read into any particular statement is dispelled by the promotion as a whole." *Freeman v. Time, Inc.,* 68 F.3d 285, 290 (9th Cir., 1995)(dismissing claim sounding in fraud where plaintiff argued consumers were misled by large print of a sweepstakes promotion because recipients would not read the small print conditions).

A. <u>Plaintiffs Are Not Excused From Pleading Fraud With Particularity</u>

Plaintiffs' response is that it's too bad that AutoZone has no idea which specific statements are alleged to be fraudulent because Plaintiff can avoid its obligation to plead fraud with true particularity by simply contending that their claim is based on a "long-term advertising campaign" and that AutoZone "knows what it said." These arguments fail.

First, and most simply, Plaintiffs' Complaint contains no allegations whatsoever about when or for how long they allege AutoZone made allegedly misleading statements. A critical fact in the *AT&T Wireless* and *General Foods* cases cited by Plaintiffs was that the allegedly fraudulent advertising was alleged to have been consistent over many years. (Opp., 5:11-17).

Here, while Plaintiffs state that AutoZone's Program has been in place for "years," they admit that the statements about it were entirely true for the majority of that time. (Opp., 2:21-22). And, as highlighted in Footnote 1 of Plaintiffs' Opposition (Opp., p. 5), the information included in AutoZone's statements about its Program admittedly changed over time. So, Plaintiffs would have to specify which versions of AutoZone's representations over which period of time constitute this "long-term campaign" of consistent statements. Plaintiffs' Complaint is devoid of such allegations.

Second, Plaintiffs fundamentally misconstrue the nature of the information that is missing from AutoZone's purportedly misleading statements. They focus only on the allegedly "consistent" message that participants can earn a $20 Reward when they make five qualifying purchases, and ignore the fact that they contend this statement is only fraudulent *because of the information that it omits*, i.e., information about expiration periods. It is therefore insufficient for Plaintiffs to point only to the "tag line" without also identifying the specific advertising, store signage or oral message from an employee that contained the tag line **and** allegedly omitted any reference to the Program rules or terms and conditions.

Plaintiffs do not, and cannot, allege that information about the Program's expiration periods was omitted from every statement AutoZone ever made about its Rewards Program, so Plaintiffs' identification of the specific representations that they were (a) exposed to and (b) that allegedly omitted this information is *critical*. To AutoZone's knowledge, that information was never omitted from any of its messaging, so for Plaintiffs to plead a prima facie claim of fraud by omission, they must identify the specific statements – within the relevant time period after the Program rules changed – that omitted information about the expiration periods. Nothing in the *AT&T Wireless* or *General Foods* cases excuses Plaintiffs from this obligation.

Similarly, Plaintiffs' argument that AutoZone already possesses complete information about the conduct at issue is wrong. AutoZone has no idea what specific statements Plaintiffs read or heard, and because the statements varied over time, varied from store to store, and varied in the manner of presentation, until Plaintiff identifies what specific statements they relied upon, AutoZone is not on notice of the basis of Plaintiffs' claim.

The best (and only) argument Plaintiffs could come up with on this point is that AutoZone already knows in which store Plaintiff enrolled. (Opp., 7:3-10). However, Plaintiffs cannot base its fraud claim on any tag line of "Earn a $20 Reward when you make 5 purchases of $20 or more" that existed at the time of their enrollment because they admit that these statements were true when they enrolled and remained true for years afterward. (Opp., 2:21-22). The store in which Plaintiffs enrolled tells AutoZone nothing about where Plaintiffs *years later* read or heard statements about the Program that they contend were false at the time made, or, critically, what the complete content of those statements included. AutoZone obviously does not agree that any of its representations about the Program omitted the information that Plaintiffs contend was "inadequately disclosed". Indeed, Plaintiffs' allegations of "inadequate disclosure" admit that the information was disclosed. The burden therefore remains squarely on Plaintiffs to identify those specific representations that they saw or heard and that exemplify the omission of information that they have thus far only generally and vaguely alleged.

B. Plaintiffs Are Precluded From Claiming Concealment or Non-Disclosure

As AutoZone pointed out in its moving papers, what Plaintiffs actually plead in their Complaint is a failure to "adequately disclose" the rules of the Rewards Program. (Complaint, ¶103, Sub-sections b, c, d, e and f). By way of example, Plaintiffs expressly premise their fraud claim on this allegation: "Failing to adequately disclose to Plaintiffs… that AutoZone had, in fact, changed its rewards program to make rewards credits expire within twelve months." (Complaint, ¶103(d)). Even "inadequate" disclosure is still disclosure. Plaintiffs did not allege that AutoZone "concealed" the Program's terms or "deliberately" failed to disclose the terms to Plaintiffs, as they now argue in their Opposition. Plaintiffs' subjective feelings about the adequacy of AutoZone's efforts to disclose cannot convert these allegations into a cognizable fraud claim. Plaintiffs' opposition cites no authority to the contrary.

The cases Plaintiffs do cite involve specific allegations that the defendant "failed to disclose" or "concealed" important information that was necessary for the defendants' statements not to be misleading. (Opp., 8:1-8). No such allegations exist here, so these cases are inapposite. Plaintiffs cite no case law – and AutoZone is aware of none that exists – for

the proposition that a fraud by omission claim can stand where the plaintiff admits that the defendant did in fact disclose the challenged information, even if subjectively "inadequately".

It is too late for Plaintiffs to change this core aspect of their claim. The allegations in their Complaint that AutoZone did disclose the rules of its Program – just not "adequately" in Plaintiffs' subjective estimation – is a binding judicial admission. *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1155 (2012) ("The admission of fact in a pleading is a judicial admission..."); *See also, Setliff v. E.I. Du Pont de Nemours & Co.*, 32 Cal. App. 4th 1525 (1995) (admission in plaintiff's complaint that he could not identify the manufacturer of the defective product was binding and precluded him from later alleging he was injured by a particular defendant's product). Plaintiffs cannot now amend around their binding admission that AutoZone did disclose the rules of its Program.

C. The Court May and Should Consider the Program's Terms and Conditions, Which Are Incorporated By Reference in the Complaint

Plaintiffs' Complaint expressly alleges a contract. (Complaint, First Cause of Action). The contract Plaintiffs allege is not attached to the Complaint, but it is incorporated by reference, which allows AutoZone to refer to it and its terms and conditions on demurrer. It does not matter at all that Plaintiffs claim not to recall seeing the terms and conditions; the point is that their claims (including fraud) are entirely premised upon a contractual relationship between themselves and AutoZone, so in evaluating the sufficiency of their pleading, it is essential that the Court see the terms of the alleged contract. *See e.g., Ingram v. Flippo*, 74 Cal. App. 4th 1280, 1285 n.3 (1999) ("Since the contents of the letter and media release form the basis of the allegations in the complaint, it is essential that we evaluate the complaint by reference to these documents."); *See also, Hotel Employees & Rest. Employees Local 2 v. Vista Inn Mgmt. Co.*, 393 F. Supp. 2d 972, 979 (N.D. Cal. 2005) ("Documents appropriate for inclusion through this exception must be integral to the plaintiff's complaint...).[1]

[1] Local Rule 3.1112(l) does not require documents incorporated by reference to be submitted via Request for Judicial Notice, nor does AutoZone ask the Court to take judicial notice of the existence of a contract – it needn't, as Plaintiffs have already alleged the contract. Ironically, after criticizing AutoZone for referencing the terms and conditions in its demurrer, Plaintiffs further criticize AutoZone for not submitting more "extrinsic evidence," such as evidence that Plaintiffs accepted the

Plaintiffs next make a big stretch to try to argue that their fraud claim is somehow based upon a misrepresentation about what the terms and conditions contain. (Opp., 12:2-5). This is not a claim that exists in Plaintiffs' Complaint. Plaintiffs make no allegations about representations regarding what is or is not in the Program's rules or terms and conditions, so the *Pacific State Bank* case Plaintiffs' cite is entirely inapplicable. (Opp., 12:5-7).

Not yet done with flights of fancy, Plaintiffs next attempt to argue that the Rewards Program terms and conditions are unconscionable and/or violate the CLRA. Neither is true, but importantly, neither issue is before this Court. There is no motion pending challenging the enforceability of the terms and conditions. But briefly, a contract of adhesion is not unconscionable where "the complaining party had reasonably available alternative sources of supply from which to obtain the goods or services free of the terms claimed to be unconscionable." *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal.App.3d 758, 768 (1988). Further, "when the challenged term is in a contract concerning a nonessential recreational activity, the consumer always has the option of simply foregoing the activity." *Belton v. Comcast Cable Holdings, LLC,* 151 Cal.App.4th 1224, 1245-46 (2007) (listening to digital music through cable programming was a nonessential recreational activity). Participation in an entirely free loyalty reward program that provides free rewards is the epitome of a "nonessential activity."

Finally, Plaintiffs cite Cal. Civ. Code §1770(a)(17) and argue that it would render the Program terms and conditions unenforceable, but it does no such thing. First, that statute governs "rebate" programs, of which AutoZone's Rewards program is not one. *See, Pollard v. Ericsson*, 125 Cal. App. 4th 214, 220 (2004); *Kramer v. Intuit Inc.,* 121 Cal. App. 4th 574 (2004). Second, if Plaintiffs' flawed interpretation of the CLRA were correct, the entire Rewards Program would be prohibited, because it has always required a participant to make four more qualifying purchases after their first purchase in order to earn a Reward. The addition of a time limit for those four subsequent purchases does not change that fact in any

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terms and conditions (which acceptance was, in any event, evidenced by Plaintiffs' participation in the Rewards Program). (Opp., 11:6-8).

way. However, Plaintiffs clearly are not challenging the legality of the entire Rewards Program – and that is because they know it is not prohibited by the CLRA.

D. Plaintiffs' Fraud Theory Is Not Plausible On Its Face

Finally, the Court should not lose sight of the fact that, even taking Plaintiffs' fraud claim at full face value, the claim simply makes no sense. Even if Plaintiffs were correct that AutoZone "inadequately disclosed" the applicable Program rules or terms and conditions, there is simply nothing untrue about the statement that participants can earn a $20 Reward after making 5 qualified purchases. Plaintiffs expressly admit in the Complaint that it was true for years. (Complaint, ¶25). And it remained true even after the Program rules changed. Plaintiffs admit as much in their brief, where the most they can do is speculate that "most customers" will not choose to make five qualifying purchases within one year. (Opp., 3:8-10). The fact that it might be more difficult than Plaintiffs would like to earn a $20 Reward or that Plaintiffs may not chose to make the qualifying purchases, does not make it any less true that the Program does in fact allow Plaintiffs to earn a $20 Reward after five qualifying purchases. The statement is true. Plaintiffs cite no authority whatsoever for the proposition that a fraud claim is cognizable under California law where, as here, the challenged statement is true on its face and the terms and applicable conditions are noted and available for review.

Implicit in Plaintiffs' theory of their claim is the conclusion that the only way AutoZone could have made its Program advertising non-misleading is to somehow embed all of the applicable rules and terms and conditions into the Program's "tag line." They say as much in their Complaint at paragraph 43 where they criticize AutoZone because its "website does not say 'Earn a $20 Reward, ***which remains valid for three months***, when you make 5 purchases of $20 or more ***in a twelve-month span***!'" Plainly, this is not what is required. It has always been perfectly acceptable to announce the basics of an offer and defer to program rules and terms and conditions the explanation of the often numerous details of that offer.

To play out the absurdity of Plaintiffs' theory, the above-edited version of the Program's "tag line" could still be challenged as misleading by omission because it does not also state that the Program's terms and conditions permit AutoZone to further modify or

terminate the Rewards Program altogether. It also does not specify what items or amounts do not count toward a "purchase of $20 or more," such as the sales tax on a purchase. In other words, if Plaintiffs' theory of fraud were valid, AutoZone, and literally every other company in the U.S. that promotes any kind of offer or customer reward program that has terms and conditions, would have to figure out a way to cram every applicable term and condition into every instance in which the Program's "tag line" is displayed – every in-store banner sign, every advertisement of any type, even every store employee's verbal reference to the Program. This is not the solution to the problem of individuals ignoring an offer's terms. Indeed, the only reason Plaintiffs even brought their lawsuit is because they chose not to read the Program's always-available and admittedly disclosed rules or terms and conditions. Plaintiffs' fraud claim should be dismissed for all of the reasons set forth above.

III. THE COURT SHOULD STRIKE PLAINTIFFS' PUNITIVE DAMAGES

At most, Plaintiffs' Complaint is a breach of contract case. If AutoZone was entitled to make the challenged changes to its Rewards Program, all of Plaintiffs' claims fail. If the change was not permitted for some reason, AutoZone theoretically breached its contract with Plaintiffs and might owe contract damages. Plaintiffs attempt to spin this narrow conduct into multiple other claims in an effort to expand available damages. As shown above, the effort to convert it into a fraud claim was unsuccessful – that claim must be dismissed, so allegedly fraudulent conduct cannot be the basis for Plaintiffs' prayer for punitive damages.

Plaintiffs' opposition specifically identifies only three allegations in their Complaint that they claim support a prayer for punitive damages, none of which pass muster. (Opp., 13:26-28). They first reference alleged "deceptive practices", but that, and any related allegations, are part of Plaintiffs' fraud claim. That claim fails for all of the reasons explained above, so cannot be a basis for punitive damages. Allegations regarding both the change to the Rewards Program rules and the application of those new rules "after the fact", allegedly making the contract "illusory", are bases for Plaintiffs' breach of contract claim, for which punitive damages are not available as a matter of law.

What Plaintiffs seek to convert a breach of contract into a tort claim. Their prayers for

punitive damages, which are unavailable for a breach of contract, exemplifies this problem. *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 95 (1995)("'there are real problems in applying the substitute remedy of a tort recovery – with our without punitive damages – outside the insurance area'"). This is why Plaintiffs must tie their allegations of malice or oppression to specifically-identified conduct that at least facially warrants punitive damages. Plaintiffs do not, and seek to excuse their failure by citing only to inapposite federal court cases, which are not binding on this Court, and most of which simply stand for the proposition that where a claim for fraud has been properly alleged, punitive damages are not precluded. *See,* Opp., 14:3-8, citing *Chulick-Perez v. Car Max Auto Superstores, LLC* and *Overholt v. Carmax Auto Superstores California, LLC*. Here, Plaintiffs cannot rely on their defective fraud claim to support a prayer for punitive damages. Plaintiffs greatly exaggerate the support their cited cases provide – indeed, the *Morgan v. AT&T Wireless Services, Inc.* case (Opp., 14:16-18) does not address the availability of punitive damages at all.

Plaintiffs failed to properly plead fraud, and the Complaint contains no facts outside of the fraud claim from which the Court can reasonably conclude that Plaintiffs are capable of demonstrating malice or oppression. On its face, the Complaint pleads no "vile, base, contemptible, miserable, wretched or loathsome" conduct. The Court should therefore strike all allegations of punitive damages.

IV. CONCLUSION

The Court plays an important gate-keeping function at the pleading stage, which is necessary to protect defendants from incurring the costs of defending claims that, on their face, lack merit. For all of the reasons set forth herein and in AutoZone's moving papers, Plaintiffs' fraud claim and prayer for punitive damages lack merit and AutoZone respectfully requests that the Court sustain AutoZone's demurrer and grant its motion to strike in its entirety.

DATED: June 15, 2017

ALSTON & BIRD LLP

Roger A. Cerda
Attorneys for Defendants AUTOZONE PARTS, INC., AUTOZONE, INC., and AUTOZONE.COM, INC.

PROOF OF SERVICE

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. I am over the age of eighteen years and not a party to the action in which this service is made.

On June 15, 2017, I served the document(s) described as **DEFENDANTS AUTOZONE PARTS, INC., AUTOZONE, INC., AND AUTOZONE.COM, INC.'S REPLY BRIEF IN SUPPORT OF 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 June 15, 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

SERVICE LIST

Todd W. Bonder, Esq.
Ryan M. Lapine, Esq.
ROSENFELD, MEYER & SUSMAN LLP
232 North Canon Drive
Beverly Hills, CA 90210-5302

Attorneys for Plaintiffs
Mary Ruth Hughes and Kevin Shenkman

Telephone: (310) 858-7700
Facsimile: (310) 860-2430
Email:
tbonder@rmslaw.com
rlapine@rmslaw.com

Seth Yohalem, Esq.
WASKOWSKI JOHNSON YOHALEM LLP
954 W. Washington Blvd, Suite 720
Chicago, IL 60607

Attorneys for Plaintiffs
Mary Ruth Hughes and Kevin Shenkman

Telephone: (312) 278-3156
Facsimile: (312) 690-4641
syohalem@wjylegal.com