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Attorneys for Plaintiffs
MARY RUTH HUGHES and KEVIN SHENKMAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL DISTRICT

MARY RUTH HUGHES, an individual and KEVIN SHENKMAN, an individual, on behalf of themselves and all others similarly situated, Plaintiffs, vs. 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 **NOTICE OF RULING** Assigned for all purposes to: **Hon. Maren E. Nelson** [Dept. 307] Complaint Filed: August 18, 2016 Discovery Cut-off: None set Motion Cut-off: None set Trial Date: None set

TO ALL PARTIES HERETO AND TO THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that (1) Defendants Autozone Parts, Inc., Autozone, Inc., and Autozone.com, Inc.'s Demurrer to Plaintiffs' Fraud Claim and Motion to Strike Prayer for Punitive Damages; (2) the Request for Judicial Notice in Support of Plaintiffs Mary Ruth Hughes and Kevin Shenkman's Opposition to Defendants' Demurrer to Plaintiffs' Fraud Claim and Motion to Strike Prayer for Punitive Damages; and (3) Plaintiffs Mary Ruth Hughes and Kevin Shenkman's Motion to Strike Declaration of Roger A. Cerda in Support of Demurrer to Plaintiffs' Fraud Claim and Motion to Strike Prayer for Punitive Damages came on for noticed hearing on June 29, 2017 at 9:00 a.m. in Department 307 of the above-entitled court, the Honorable Maren E. Nelson presiding. A Joint Status Conference also took place at the hearing, pursuant to the Court's March 10, 2017 Initial Status Conference ruling. Ryan M. Lapine of the law firm of Rosenfeld, Meyer & Susman LLP and Seth Yohalem of the law firm of Waskowski Johnson Yohalem appeared on behalf of Plaintiffs Mary Ruth Hughes and Kevin Shenkman ("Plaintiffs"). Roger Cerda of the law firm of Alston & Bird LLP appeared on behalf of Defendants Autozone Parts, Inc., Autozone, Inc., and Autozone.com, Inc. ("Defendants").

After considering all moving and opposing papers and arguments of counsel, the Court issued the following rulings:

1. The Court adopted its Tentative Ruling. The Tentative Ruling is attached hereto as Exhibit "A." Therein, the Court made the following rulings:

   A. Defendants Autozone Parts, Inc., Autozone, Inc., and Autozone.com, Inc.'s Demurrer to Plaintiffs' Fraud Claim is **OVERRULED**;

   B. Defendants' Motion to Strike Prayer for Punitive Damages is **DENIED**;

   C. The Request for Judicial Notice in Support of Plaintiffs Mary Ruth Hughes and Kevin Shenkman's Opposition to Defendants' Demurrer to Plaintiffs' Fraud Claim and Motion to Strike Prayer for Punitive Damages is **GRANTED**; and

D. Plaintiffs Mary Ruth Hughes and Kevin Shenkman's Motion to Strike Declaration of Roger A. Cerda in Support of Demurrer to Plaintiffs' Fraud Claim and Motion to Strike Prayer for Punitive Damages is **GRANTED**.

2. Defendants have 30 days from June 29, 2017 to file and serve an answer to Plaintiffs' complaint;

3. The parties shall attend a telephonic Informal Discovery Conference to Address Outstanding Issues on July 13, 2017 at 12:00 noon Pacific Standard Time. The parties shall file a joint statement on the matters to be addressed at the Informal Discovery Conference no later than July 11, 2017.

4. Plaintiffs' contemplated class certification motion shall be heard on January 11, 2018 at 10:00 a.m. in the above-titled court, located at 600 Commonwealth Avenue, Los Angeles, California 90005. The parties shall determine the briefing schedule, with all briefs to be filed by no later than December 28, 2017.

Plaintiffs were ordered to give notice.

DATED: June 30, 2017

ROSENFELD, MEYER & SUSMAN LLP
TODD W. BONDER
RYAN M. LAPINE

By: _____
Ryan M. Lapine

Attorneys for Plaintiffs MARY RUTH HUGHES and KEVIN SHENKMAN

EXHIBIT A

Case: *Mary Ruth Hughes, et al. v. AutoZone Parts, Inc et al.*
Case No.: BC631080
Motion(s): Demurrer of Defendant AutoZone to fraud cause of action; Motion to Strike request for and references to punitive damages
Service: Case Anywhere
Hearing: June 29, 2017 at 8:30 a.m.

Tentative:

- Grant the Request for Judicial Notice
- Grant Plaintiffs' Motion to Strike
- Overrule the Demurrer
- Deny Defendants' Motion to Strike

Motion papers considered:

- Notice of Demurrer to Fraud Claim; Demurrer; Motion to Strike; and Supporting Memorandum of Points and Authorities filed 05/04/17
- Cerda Declaration in support of Defendant's Demurrer filed 05/04/17
- Plaintiffs' Opposition to Demurrer and Motion to Strike filed 05/25/17
- Request for Judicial Notice in support of Plaintiffs' Opposition filed 05/25/17
- Plaintiff's Motion to Strike Cerda Declaration filed 05/25/17
- Defendants' Reply Brief filed 06/15/17
- Defendants' Opposition to Plaintiff's Motion to Strike Cerda Declaration 06/15/17

I. Background

Plaintiffs Mary Ruth Hughes and Kevin Shenkman's ("Plaintiffs") allegedly participated in a rewards program with Defendants AutoZone Parts, Inc., AutoZone, Inc., and AutoZone.com, Inc. (collectively "Defendants"), pursuant to which Plaintiffs received a $20 reward for every five purchases they made in Defendants' stores that totaled more than $20. Plaintiffs allege that at some point, after years of participating in this rewards system, Defendants unilaterally and without notice instituted a new requirement that the five purchases occur within a 12-month period to count, and that the $20 reward be used within three months, or it would expire. This resulted in the loss of rewards that Plaintiffs had not yet used because they believed there was no expiration date. Plaintiffs seek to represent a class of similarly situated individuals. Based on these changes, Plaintiffs filed a complaint on August 18, 2016, alleging:

1. Breach of Contract;
2. Breach of the Implied Covenant of Good Faith and Fair Dealing;
3. Violation of the Consumer Legal Remedies Act;

4. Violation of the False Advertising Act;
5. Violation of Unfair Competition Law; and
6. Fraud

The action was removed to federal court on October 27, 2016. On January 10, 2017, the matter was remanded.

Defendants filed the instant demurrer and motion to strike on May 04, 2017. Plaintiffs filed an opposition on May 25, 2017, along with their own motion to strike the declaration accompanying Defendants' demurrer. Defendants filed a reply on June 15, 2017, along with an opposition to Plaintiffs' motion to strike.

II. Preliminary Issue

Defendants bring a demurrer and a motion to strike simultaneously in the same document. Although a demurrer and motion to strike must be noticed for hearing for the same time (CRC, Rule 3.1322), they should be filed as separate documents. (See, e.g., Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (June 2017 Update) § 7:162.1.)

III. Request for Judicial Notice

Plaintiffs request judicial notice of three documents filed by Defendants with the Central District of California during the brief period when the instant action had been removed to federal court. (See RJN Exhs. A-C.) Pursuant to Evid. Code § 452(d), these documents, which were filed in *Hughes, et al., v. AutoZone Parts, Inc. et al.* (C.D. Cal. 2016) Case No. 2:16-cv-08009, are court records for which judicial notice is appropriate. (Note, however, that the truth of matters asserted in such documents is not subject to judicial notice. (See *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 597.)) Accordingly, Plaintiff's request for judicial notice is granted. In addition, the specific representation in USDC by Defendant that it has information available to it as to when and where plaintiffs joined the program is an admission that the Court may notice.

IV. Legal Standard

A demurrer for sufficiency tests whether the complaint states a cause of action. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.) "[Courts] treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Id.* at 745.) "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed (Cal. Code Civ. Proc., §§ 430.30, 430.70). The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." (*Id.* at 747.) "As a general rule in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.] The courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

California law also authorizes a party to move to strike matter from an opposing party's pleading if it is irrelevant, false, or improper. (CCP §§ 435; 436(a).) Motions may also target pleadings or parts of pleadings which are not filed or drawn in conformity with applicable laws, rules or orders. (CCP § 436(b).)

V. Analysis

Defendants demurs to the sixth cause of action for fraud arguing Plaintiffs failed to plead it with sufficient particularity.

"The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. [Citation.]" (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1255 [91 Cal.Rptr.3d 532, 543, 203 P.3d 1127, 1135].) Generally, fraud must be pled with particularity. (*Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 707 [72 Cal.Rptr. 441].) "This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered. [Citation.]" (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73 [269 Cal.Rptr. 337].)

Plaintiffs essentially acknowledge that they did not plead the 'who, when, what, where, how,' of fraud, but argue that this is unnecessary where, as here, Plaintiffs allege a course of dealing that constitutes fraud. The Court agrees.

> The requirements for pleading fraud in most cases is well established: " ' "fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus " 'the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect.' " [Citation.] [¶] This particularity requirement necessitates pleading facts which "show how, when, where, to whom, and by what means the representations were tendered." ' " ' [Citation.]" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc., supra,* 171 Cal.App.4th at p. 1384, 89 Cal.Rptr.3d 659.) If a fraud claim is based upon failure to disclose, and "the duty to disclose arises from the making of representations that were misleading or false, then those allegations should be described." (*Ibid.*)
>
> But as the Supreme Court has noted, there are "certain exceptions which mitigate the rigor of the rule requiring specific pleading of fraud." (*Children's Television, supra,* 35 Cal.3d at p. 217, 197 Cal.Rptr. 783, 673 P.2d 660.) For example, where a fraud claim is based upon numerous misrepresentations, such as an advertising campaign that is alleged to be misleading, plaintiffs need not allege the specific advertisements the individual plaintiffs relied upon; it is sufficient for the plaintiff to provide a representative selection of the advertisements or other statements to indicate the language upon which the implied misrepresentations are based. (*Id.* at p. 218, 197 Cal.Rptr. 783, 673 P.2d 660.) But the court also noted that where a claim of fraud is based upon a long-term advertising campaign, which "may seek to persuade by cumulative impact, not by a particular representation on a particular date ... [p]laintiffs should be able to base their cause of action upon an allegation that they acted in response to an advertising campaign even if they cannot recall the specific advertisements." (*Id.* at p. 219, 197 Cal.Rptr. 783, 673 P.2d 660.)

(*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1261-62.)

Plaintiffs allege that "through advertising, store signage, and interactions with AutoZone employees," they were convinced to participate in a rewards program that included no expiration dates (Compl. ¶ 21); that the physical cards they received as part of this program contained no mention of an expiration date (Compl. ¶ 22, 40); that after years of participating in the program without experiencing an expiration date, Defendants implemented an expiration date without informing Plaintiffs (Comp. ¶ 24-25, 29); that they only learned of the expiration when an employee refused to honor rewards Plaintiffs argue they had properly earned and were entitled to use (Compl. ¶ 26-28); and that even after this occurred, as of the date of the filing of the

complaint, Defendants' website continued to advertise the rewards program without mentioning any expiration dates (Compl. ¶ 42 ["For example, on the front page of its current rewards website, AutoZone prominently advertises its rewards program by stating 'Earn a $20 Reward when you make 5 purchases of $20 or more!"]).

In sum, Plaintiffs allege:

> AutoZone made a series of misrepresentations, omissions and false promises to Plaintiffs and Class Members designed to mislead them into believing that under the AutoZone's rewards program, if they made five purchases over $20, they would receive 20 Rewards dollars. These misrepresentations, omissions, and false promises included:
>
> a. Telling Plaintiffs and Class Members that if they made five purchases of $20 or more, they would receive 20 rewards dollars when AutoZone had no present intention of honoring this commitment with respect to the vast majority of its customers;
> b. Failing to adequately disclose at the time Plaintiffs and Class Members became rewards members that AutoZone claimed the right to unilaterally expire rewards points without notice;
> c. Failing to adequately disclose to Plaintiffs and Class Members that AutoZone intended to change its rewards program to make credits expire within twelve months;
> d. Failing to adequately disclose to Plaintiffs and members of the class that AutoZone had, in fact, changed its rewards program to make rewards credits expire within twelve months;
> e. Failing to adequately disclose to Plaintiffs and Class Members that AutoZone intended to change its rewards program to make $20 rewards expire within three months;
> f. Failing to adequately disclose to Plaintiffs and members of the class that AutoZone had, in fact, changed its rewards program to make rewards expire within three months; and
> g. Continuing to advertise its rewards program by stating that members would earn 20 rewards dollars when they made five purchases of over $20, when, in fact, most rewards members would never meet the criteria to receive rewards dollars.

(Compl. ¶ 103.)

This is sufficient to apprise Defendants of the charges levied against them, with sufficient specificity that Defendants can reasonably respond. (See *Morgan v. AT&T Wireless Services, Inc., supra*, 117 Cal.App.4th at 1262 ["These allegations were sufficient to satisfy the purposes of the specificity requirement: to furnish the defendant with certain definite charges which can be

intelligently met and to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud."] [internal quotations omitted].) Moreover, as Plaintiffs properly note, to the extent there are questions about the precise date when Plaintiffs joined the program, or the precise location where Plaintiffs joined the program, Defendants have previously represented to the federal court that such information is already in its possession. (RJN Exh. A, Pawlak Decl. ¶ 3.) (See *Tenet Healthsystem Desert, Inc. v. Blue Cross of Cal.* (2016) 245 Cal.App.4th 821, 838 ["[L]ess specificity is required of a complaint when it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy; even under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party."] [internal quotations omitted].)

Accordingly, the Court declines to sustain Defendants' demurrer on this ground.

Defendants next argue that even if Plaintiffs are not required to plead with specificity, they have still failed to allege sufficient facts to state a viable claim for fraud. Defendants' rely on the terms and conditions for the rewards program to demonstrate they were permitted to alter the terms of the rewards program, including instituting an expiration date, at any time, without notice to participants. In support of this proposition, Defendants submit the declaration of their counsel, Roger Cerda, who attaches to his declaration a copy of the programs terms and conditions as of 2008, and a copy of the terms and conditions as of 2015. (Cerda Decl. ¶¶ 3-4, Exh. A-B.)

Plaintiffs move to strike this declaration. Plaintiffs argue a demurrer can only be based on the face of the pleadings and matters which are subject to judicial notice, and argue further that Defendants' terms and conditions are not subject to judicial notice. In support of this argument, Plaintiffs cite to the proposition that "the existence of a contract between private parties cannot be established by judicial notice." (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145.)

Defendants respond by arguing that under the doctrine of incorporation by reference, the terms and conditions necessarily were incorporated into the pleadings. For this proposition, Defendants cite to a case in which a complaint cited excerpts from a letter and made reference to a press release, but failed to attach or incorporate either. The defendants provided the full documents with their demurrer, and the court took judicial notice of the documents because they

were referenced within the complaint. (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, fn. 3.) Defendants also seek to distinguish *Gould,* the case Plaintiff's rely on, by noting in that case, the parties disputed whether there even was a written contract. That was the basis for the court's holding that the contract could not be judicially noticed—the plaintiff's allegations that there was no contract had to be treated as true for purposes of the demurrer. Here, by contrast, Defendants argue Plaintiffs are explicitly alleging the existence of a contract.

The Court concludes this situation is closer to *Gould* than it is to *Ingram*. Defendants have made no showing—nor even made an attempt at showing—that Plaintiff were made aware of these terms and conditions at the time they signed up for the rewards program. Indeed, Defendants do not even explain what the attached documents are: Exhibit A looks as though it is a copy of a physical document, presumably a flier or poster, Exhibit B looks as though it is possibly text from a website. But that is mere speculation. While the Court does not question that the terms are authentic, there is no explanation of what the documents are, how widely available they were, whether it was Defendants practice to provide new program participants with such documents, or whether Defendants have reason to believe Plaintiff's ever received notice of such terms and conditions. While Plaintiff's do assert a breach of contract cause of action, and clearly allege the existence of a contract, they also clearly allege they were never informed either that Defendants maintained the right to change the terms of the program or that Defendants had changed the terms of the program. (Compl. ¶¶ 36-42.)

For the foregoing reasons, the Court concludes it is inappropriate for it to consider Defendants' terms and conditions at this stage. Plaintiffs' motion to strike the declaration of Cerda is GRANTED. Defendants' demurrer to the sixth cause of action is OVERRULED.

Finally, the Court addresses Defendants' motion to strike punitive damages from the complaint. Defendants seek to strike one paragraph from the third cause of action, for violation of California's Consumer Legal Remedies Act; five uses of the word 'fraudulent' from five paragraphs in the fifth cause of action, for violation of Bus. & Prof. Code §§ 17200, et seq.; one paragraph from the sixth cause of action for Fraud; and three instances in the prayer for relief that seek punitive damages.

The Court concludes Plaintiffs have sufficiently alleged fraudulent actions, and that punitive damages may therefore be appropriate pursuant to Civ. Code § 3294. Although Plaintiffs' cause of action for fraud comes after Plaintiffs third and fifth causes of action, and is

accordingly not incorporated therein, the underlying factual allegations that support the sixth cause of action for Fraud (Compl. ¶¶ 18-47) have properly been incorporated into the third and fifth causes of action. Although Plaintiffs may ultimately be unable to prove fraud by clear and convincing evidence, as required by Civ. Code § 3294, at this stage, the Court concludes Plaintiffs have properly alleged fraudulent behavior, and are accordingly entitled to seek punitive damages.

Defendants' motion to strike is therefore DENIED.

PROOF OF SERVICE BY CASE ANYWHERE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

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 232 North Canon Drive, Beverly Hills, California 90210-5302.

On June 30, 2017, I served on the interested parties in said action the within:

NOTICE OF RULING

Roger A. Cerda
Peter E. Masaitis
ALSTON & BIRD LLP
333 South Hope Street
Sixteenth Floor
Los Angeles, California 90071

[X] BY ELECTRONIC MAIL VIA CASE ANYWHERE: In accordance with the Court's Order Authorizing Electronic Service dated March 10, 2017, I served the above document(s) via electronic transmission to CASE ANYWHERE.

Executed on June 30, 2017, at Beverly Hills, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Cathleen Trope
(Type or print name)

Cathleen Trope
(Signature)