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Superior Court of California
County of Los Angeles
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Sherri R. Carter, Executive Officer/Clerk
By ________, Deputy
Pedro Martinez

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARY 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

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Date: May 2, 2018
Time: 10:00 a.m.
Dept.: SSC 17

I. INTRODUCTION

This is a consumer action challenging a customer loyalty "rewards" program by an auto parts retailer and service provider. Prior to December 2014, Defendants (collectively referred to as AutoZone) offered a variety of rewards programs across the country. There was no charge to join. The program applicable in this case provided that a $20 "Reward"

could be earned by customers after five purchases of $20 or more; each $20 purchase earned members a "Credit." There was no earning or redemption period.

The terms of the Rewards Program (termed 5/20/20) were modified to create a nationally consistent program in December, 2014. Under the modified program five $20 purchases were required to be made within a 12 month period, and the $20 Reward was required to be used within three months. AutoZone refers to this as the "5 in 12/20/20/3 plan."

Plaintiffs Mary Hughes (Hughes) and Kevin Shenkman (Shenkman), a married couple, allege they signed up for and were participating in AutoZone's original California Rewards Program. They allege they were not made aware of the change to the plan, and were surprised when on March 1, 2016, Shenkman was informed that his fifth $20 purchase would not result in a Reward because he had not made the five purchases within a twelve month period. They allege that the Terms and Conditions applicable to the Rewards Program were not disclosed, were disclosed in such small print as to be improper, and/or are unconscionable to the extent that AutoZone reserved the right to unilaterally change the terms of the Rewards Program so as to effectively deprive them of the benefits they were promised. They further allege the changes were not adequately or accurately disseminated and that advertising for the current program is deceptive because it does not mention that Rewards expire after three months.

Plaintiffs filed this action, seeking redress for the claims of all similarly situated AutoZone reward members. The Complaint alleges the following causes of action: Breach of Contract; Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing; Violation of the Consumer Legal Remedies Act (CLRA) (Cal. Civ. Code §1750 et seq.); Violation of the False Advertising Act (FAL) (Cal. Bus. & Prof. Code §17500 et seq.); Violation of the Unfair Competition Law (UCL) (Cal. Bus. & Prof. Code §17200 et seq.); Fraud.

AutoZone defends on several grounds. It urges Plaintiffs did not have any cognizable injury as a result of the new program. It also contends that the Terms and

Conditions of the program specified that AutoZone "reserves the right to discontinue, restrict, or change the AutoZone Rewards program at any time." And, it contends that it engaged in a vigorous campaign to explain and advertise the new program.

Having considered the parties' briefing, the admissible evidence,[1] and the argument of counsel on May 2, 2018, Plaintiffs' motion is granted in part and denied in part. As is set forth in greater detail below, the admissible evidence shows Plaintiffs have standing and that their claims for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and under the UCL, are properly certified as liability as to those claims can be established without reference to individual issues.

As to the CLRA, FAL, and Fraud claims, individual issues predominate, precluding certification of those claims. In order to establish classwide liability the CLRA and Fraud claims require a showing that each class member was injured "as a result" of the alleged wrongful conduct (CLRA) or relied upon the misrepresentation or omission causing damage (Fraud). Plaintiffs propose to make this showing by the device of a presumption of reliance. That presumption does not arise on the facts of this case as there is no showing that the alleged misrepresentations or omission would have been considered material by all class members.

The FAL claim requires a showing that each member of the class was exposed to the false advertising. On the facts alleged that showing cannot be made on a classwide basis.

II. LEGAL STANDARD

Cal. Code of Civ. Pro. §382 provides for certification of a class, "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court."

[1] Rulings on the objections to evidence are separately filed.

A party seeking class certification has the burden of establishing an ascertainable class and a well-defined community of interest. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435. To show a community of interest among the class members entails examination of three factors: (1) the existence of predominant questions of law or fact; (2) a class representative with claims that are typical of the class; and (3) a class representative who is adequate. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326. Motions for class certification are procedural in nature and do not inquire into the merits of a case. Ibid.

Additionally, the moving party must demonstrate that class treatment is a superior alternative for resolving the litigation. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021; *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1089.

Manageability is an important consideration in the determination the superiority of a class action. The manageability of individual issues is as important as the existence of common questions. *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 29.

There is an exception for CLRA cases. Cal. Civ. Code §1781. Unlike a traditional class case, in a CLRA class action plaintiff need not show substantial benefit to the Court and class members in proceeding as a class action. *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 128, fn.12 (*In Re Vioxx*).

III. THE ADMISSIBLE EVIDENCE

The admissible evidence is to the effect that there was no charge to enroll in the AutoZone Rewards Program. Declaration of Bernadette Pawlak (AutoZone's Director of Loyalty Marketing and Customer Relationship Management), ¶3. Customers who enrolled could do so online or in an AutoZone store by providing their name, address, phone number and email information. Customer service personnel in stores were trained to provide a plastic "Rewards" card and a brochure or "tear sheet" containing the Rewards Program's Terms and Conditions. Id. at ¶5. Customers were not required to sign any contract. Id. at ¶ 7. The plastic card states the card is for use by the member only and is

"subject to present and future program rules. AutoZone reserves the right to discontinue, restrict or change the AutoZone Rewards program at any time without notice." Id. at ¶6 and Exhibit B thereto. Customers enrolled in the Rewards Program receive benefits beyond Rewards, including coupons and rebates. In addition, AutoZone tracks customers' service history and sends them service reminders. Id. at ¶ 4.

Plaintiff Hughes enrolled in the program in an AutoZone store in 2009 and received a plastic card. Hughes did not recall whether she received other material such as the brochure or tear sheet. Declaration of Roger A. Cerda, Exhibit B, Hughes Deposition at 69:9-15; 70: 5-9; 70:21-71:16.

In 2014 AutoZone modified its various rewards programs and implemented the "5 in 12/20/20/3 plan" nationwide. Beginning in August 2014 it sent direct mailers and e-mails to rewards members informing them of the changes to the Rewards Program, including the revised time period for earning Credits and expiring Rewards. Pawlak Declaration, ¶¶ 19-20, and Exhibits E, F, G & H. Its website also contained such information. Id. at K. Notifications were also placed in the stores and printed on receipts. Id. at Exhibits J and L. There is no evidence Plaintiffs received these notifications.

As of the date of the conversion (December 18, 2014) Plaintiffs had not earned any Rewards (i.e. they had not made five purchases over $20 since enrolling in 2009). However, they had made three purchases of $20 or more. At the time these three purchases were made they had no "expiration" date. Thereafter, plaintiffs made three more purchases —on May 14, 2015, September 8, 2015, and March 1, 2016. By the time of their third purchase, however, the first three Credits had "expired" because Plaintiffs had not made five purchases within twelve months under the terms of the new national program. Pawlak Declaration, ¶¶25-27. Plaintiffs therefore did not qualify for a Reward under the new program.

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IV. ANALYSIS

A. Plaintiffs Have Standing

AutoZone argues that Plaintiffs lack standing with respect to any claim and for that reason alone certification must be denied. Its theory is that Plaintiffs have suffered no cognizable damages as a result of the change in the Rewards Program.

"Standing" goes to the question of whether the plaintiff is the real party in interest and has the right to assert a cause of action under Code of Civil Procedure §369 or other applicable statutes. In the class action context this requirement is generally recognized when the named plaintiff is a member of the class sought to be represented. *Greater Westchester Homeowners Assn., Inc. v. City of Los Angeles* (1970) 13 Cal.App.3d 523.

There is no question that Plaintiffs participated in the AutoZone Rewards Program and thus have the right to bring their individual claims for Breach of Contract and Fraud. That they ultimately may not prevail on the claim by a failure to show damages does not deprive them of the right to assert them.

The statutory claims have particularized standing requirements. Relief under the CLRA is limited to "[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice" unlawful under the act. Cal. Civ. Code § 1780(a) (italics added). *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292 (*Mass Mutual*); *In re Vioxx* at 129; *In re Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 156 (*Steroid Hormone*). Similarly, under the UCL and the FAL the class representatives must be persons who suffered "injury in fact and lost money or property *as a result of*" the unfair competition or false advertising. Bus. & Prof. Code §§17204, 17535, italics added.

AutoZone argues plaintiffs were not damaged because they had no Rewards or Credits taken from them. Instead, it contends their Credits expired because of their own inaction after the change in the Rewards Program. This argument is not persuasive. The evidence is uncontroverted that Rewards have economic value and that Plaintiffs would have earned a Reward but for AutoZone's change in its program. Declaration of Seth

Yohalem, ¶5 and Exhibit B thereto, Pawlak Deposition 122:23-123:4. Under the CLRA, the UCL, and the FAL, Plaintiffs suffered an economic loss as a result of AutoZone's actions—the right to accrue their Credits without time limitations for earning $20 Rewards, and to use the Rewards at any time in the future. They thus suffered a loss "as a result" of the change in the Rewards Program.

Alternatively, AutoZone argues that Plaintiffs did not surrender more or acquire less in their transactions with AutoZone than they would have had the Rewards Program not been altered. This argument, too, is unavailing. Plaintiffs testified that they would not have made any of their $20 purchases had they known AutoZone would impose a 12 month timeframe on earning a Reward or a three month time frame on redeeming it. Shenkman Declaration ¶¶ 6-10; Hughes Declaration ¶¶ 6-8. While there is no allegation that the products Plaintiffs purchased were worth less than what they paid for them, Plaintiffs parted with money to AutoZone in the alleged belief that they would receive a discount in the future, which discount did not materialize because of the changes in the Rewards Program's terms. AutoZone acknowledged at deposition that it considers Rewards to be property of the people entitled to use them and to have economic value. Yohalem Declaration, Exhibit A, Deposition of Kevin Clawson 107:7-11. In these circumstances sufficient economic injury to confer standing is present for the UCL/FAL claims. *Kwikset Corp. v. Superior Court* (2011) 51 Cal. 4th 310, 323; (To establish standing under the UCL and FAL "[a] plaintiff may …have a present or future property interest diminished….").
Further, because plaintiffs allege they would not have acted but for AutoZone's promises, standing is sufficiently established for the CLRA claim. See *Hinojos v. Kohl's Corp.* (9th Cir. 2013) 718 F. 3d 1098, 1108, citing *Klein v. Chevron USA, Inc.* (2012) 202 Cal. App. 4th 1342.

B. The Class is Ascertainable

Ascertainability hinges on class definition, class size, and the means available for identifying class members. *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 849. The primary purpose of the ascertainability requirement is to provide

notice to all potential class members. *Hicks v. Kaufam and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 914 (*Hicks*). In this regard it is important to note that judgments in class actions have preclusive res judicata effects that bind absent class members. Ibid. If class members are to receive individualized monetary damages, due process requires notice and an opportunity to opt out. *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 824, quoting *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 360 ("[T]he takeaway from *Wal-Mart* is that the due process clause requires notice and opt-out rights to class members unless 'the relief sought must perforce affect the entire class at once ....'").

"A class representative has the burden to define an ascertainable class." *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 918.

1. Definition

Because AutoZone began to notify reward members of upcoming changes to the Rewards Program in August 2014, Plaintiffs have divided the class as proposed in the Complaint into two suggested subclasses in order to take into account potential differences between members.

Subclass 1 (as to all causes of action):

All persons who: (1) were enrolled in a 5/20/20 plan through an AutoZone store (and not online) in California at the time of the National Plan Conversion; (2) made purchase(s) of over $20 from AutoZone in California using their Rewards account on or ***before*** July 31, 2014; and (3) whose $20 Reward(s) and/or Reward Credit(s) earned through the purchase(s) on or before July 31, 2014 were deemed expired and never reinstated by AutoZone.

Subclass 2 (as to the 3rd, 4th, and 5th causes of action):

All persons who: (1) were enrolled in a 5/20/20 plan through an AutoZone store (and not online) in California at the time of the National Plan Conversion; (2) made purchase(s) of over $20 from AutoZone in California using their Rewards account ***after*** July 31, 2014; and (3) whose $20 Reward(s) and/or Reward Credit(s) earned through the purchase(s) after July 31, 2014 were deemed expired and never reinstated by AutoZone.

These class definitions are sufficient. They use objective characteristics such that identification of class members is possible. *Hicks* at 914.

AutoZone argues that Subclass 2 is overly broad because it includes those who were enrolled in the 5/20/20 plan and made purchases after July 31, 2014. As to those customers AutoZone argues that because it notified customers of the changes to the Rewards Program those customers who made purchases after July 31, 2014 cannot have a claim that they were deceived. This argument goes to the merits of the claims of the proposed sub-class. It does not defeat ascertainability.

2. Class size

Plaintiffs fail to present specific evidence of class size but indicate the population of the subclasses is in the millions. Motion at 11:6. Defendant does not dispute class size and there is adequate evidence of same. Yohalem Declaration, Exhibit D, AutoZone's response to Special Interrogatory 10, which states in part, "At the time of the nationwide plan conversion, there were approximately 7,951,368 California Rewards Member/Accounts enrolled in the 5/20/20 Loyalty Plan and approximately 135,678 California Rewards Member/Accounts enrolled in the 5in6/20/20/18 Loyalty Plan."

3. Means for identifying class members

Plaintiffs assert that the class may be ascertained by objective characteristics such as enrollment location, purchase dates and amounts, and Reward and Credit expirations. Defendant admits that it maintains this information. Yohalem Declaration, Exhibit B, Pawlak Deposition120:11-121:23. A means for identifying class members is shown.

C. There is a Well Defined Community of Interest As to the Claims for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, and Violation of the UCL

The question to be resolved on a motion for class certification is whether the "theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment." *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 407.

As Plaintiffs properly recognize, the elements of each cause of action sought to be asserted on behalf of the class must be examined to determine whether liability as to each member of the class can be determined by common evidence.

1. The Breach of Contract and (Alternative) Breach of Implied Covenant of Good Faith Claims Can Be Established with Common Evidence

Plaintiffs allege that each time they made a purchase at AutoZone of over $20 while presenting their Rewards card they entered into a binding contract with AutoZone. Complaint, ¶60. The alleged terms of the contract were that AutoZone would provide Plaintiffs and class members both the goods they ordered and a Credit that could be redeemed for a $20 Reward after five total purchases of over $20. Id. at ¶61. It is contended AutoZone breached the contract when it "expired" Credits and required any Reward to be used in three months, causing Plaintiffs and class members to lose the value of the Credits and Rewards promised to them. Id. at ¶¶ 63-64.

The second cause of action for Breach of the Covenant of Good Faith and Fair Dealing alleges that in the event AutoZone possessed the right to unilaterally set and change the terms of its reward program, AutoZone's conduct constitutes a breach of the duty of good faith implied in every contract. Complaint at ¶71.

The elements of a breach of contract cause of action are: the existence of a contract; plaintiff's performance or excuse from performance; defendant's breach; resulting damages. *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.

Plaintiffs rely on *Sateriale v. RJ Reynolds Tobacco Co.* (C.D.Cal. December 19, 2014) 2014 U.S.Dist.Lexis 176858 (*Sateriale*), for certification of a class in a reward-program similar to the one alleged here. In *Sateriale*, purchasers of Camel brand cigarettes collected Camel Cash or "C-Notes" with each package of cigarettes purchased. The C-Notes could then be redeemed for merchandise contained in catalogs. In July, 2006, defendant decided to end the Camel Cash program effective March 31, 2007, and made an attempt to let customers know they had approximately 6 months to redeem the C-Notes. However, no merchandise was actually available during that 6 month period.

The trial court's dismissal for failure to state a cause of action was reversed as to breach of contract and promissory estoppel in *Sateriale v. R.J. Reynolds Tobacco Co.* (9th Cir. 2012) 697 F.3d 777. The Ninth Circuit explained that a rewards program of this type is a unilateral contract. Id. at 785-789. "In contrast to a bilateral contract, a unilateral contract involves the exchange of a promise for a performance. The offer is accepted by rendering a performance rather than providing a promise. See Restatement §45 cmt. a. 'Typical illustrations are found in offers of rewards or prizes.'" Id. at 785.

AutoZone argues that the Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing claims require individualized inquiry as to the terms of each class member's contract and whether each class member subjectively believed he or she was performing a contract when making a purchase at AutoZone. Essentially, its theory is that the class members' states of mind must be examined to determine whether a contract was formed or breached as to each class member.

This argument is unavailing. "The terms of a contract are determined by objective rather than subjective criteria. The question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe. (Citation.) Accordingly, '[t]he parties' undisclosed intent or understanding is irrelevant to contract interpretation.' (Citation.)" *Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1111. AutoZone has admitted that customers did not have to specifically agree to anything in order to receive a Rewards card (Yohalem Declaration, Exhibit A., Clawson Deposition 40:13-19), and that there was no signage informing customers that by making a purchase in the reward program they were agreeing to the Terms and Conditions (Yohalem Declaration, Exhibit B, Pawlak Deposition 32:9-34:1). Whether entering the Rewards Program created a contract, whether the contract included the Terms and Conditions, and whether the implied covenant of good faith and fair dealing includes an agreement not to change the Rewards Program in a manner that rendered its benefits "illusory," as alleged at Complaint ¶¶ 71-74, are common questions that may be decided on a classwide basis, as is the question of AutoZone's alleged breach.

Damages are subject to common proof as well. By definition, each class member lost a Credit or $20 Reward when AutoZone changed the terms of the reward program. See *Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1462-1463 (*Marler*).

Likewise, whether AutoZone breached the implied covenant of good faith and fair dealing can be determined as to all class members. If it is established that AutoZone retained the right to alter the terms of the Reward Program without notice, as stated in the Terms and Conditions, the question whether this constitutes a breach of the covenant of good faith implied in every contract is common to all class members.

2. The UCL Claim May Be Certified

Cal. Bus. & Prof. Code §17200 et seq. prohibits any "unlawful, unfair, or fraudulent business act or practice." Cal. Bus. & Prof. Code §17500 provides that it is unlawful to make or disseminate any statement concerning real or personal property or services, which is untrue or misleading, and which is known to be untrue or misleading. In addition it may consist of advertising that is unfair, deceptive or misleading or it may consist of specified conduct prohibited by the FAL (Bus. & Prof. Code §§17500-17577). Any violation of section 17500 is a violation of 17200. The opposite, however, is not true. *Kasky v. Nike* (2002) 27 Cal. 4th 939. In addition, a violation of the CLRA may give rise to a claim under the UCL. *Falk v. GMC* (N.D.Cal. 2007) 496 F.Supp.2d 1088, 1098.

The contours of claims under the UCL and FAL are not fully established. The following, however, is clear: Since the passage of Proposition 64 in 2004, the *named class representatives* must have standing. *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 327 (*Tobacco II*). The same requirement is not imposed on absent class members. Ibid. That is, the class representatives must be persons who suffered injury in fact and lost money or property *as a result of* the unfair competition." Bus. & Prof. Code § 17204, italics added. As discussed, *supra*, Plaintiffs have made this showing. Absent class members need not do so.

Insofar as other requirements to establish a UCL claim are concerned, it is often stated that the UCL has multiple "prongs:" a claim may be based on fraud, unlawful

conduct, or unfair conduct. See generally, Stern, Bus. & Prof. Code Section 17200 Practice (The Rutter Group 2017) at 3:13. Here, both the "unlawful" and "fraudulent" prongs of the UCL are implicated.

AutoZone argues that the "fraud" prong of the UCL claim cannot be established on a classwide basis because there is no showing of a single misrepresentation that is false or misleading and was made to each member of the class. See Opposition to Motion to Certify at page 15, lines 1-4. It does not address the "unlawful" prong.

Plaintiffs allege that AutoZone violated section 19 of the CLRA by inserting an "unconscionable" term in the contract between the parties, i.e. the right to unilaterally modify the terms of the Rewards Program at any time. Complaint at ¶92. This also gives rise to the UCL claim and a common question which may be resolved on a classwide basis: are the Terms and Conditions in the Rewards Program unconscionable?

The "evaluation of unconscionability is highly dependent on context," and "often requires inquiry into the 'commercial setting, purpose, and effect' of the contract or contract provision." *Sanchez v. Valencia Holding Co.* (2015) 61 Cal. 4th 899, 911-12. Unconscionability is a question of law. *DeLeon v. Verizon Wireless, LLC* (2012) 207 Cal. App. 4th 800, 814. There is no assertion that individualized inquiry will be necessary to determine the purpose and effect of the contract or to otherwise examine its terms to determine whether they are unconscionable and the Court does not foresee any. Accordingly, to the extent that the UCL claim is predicated on a claim of unlawful conduct, it is certifiable.

Whether Plaintiffs will be able to establish a violation of the UCL on behalf of the class under the "fraud" prong is debatable and turns both on factual questions (What statements were made that were false or misleading?) and at least one legal question (Must all class members in a UCL action predicated on "fraud," as that term is used in the UCL, have been exposed to the allegedly fraudulent conduct in the same way?). But, given that there is at least a certifiable class for violation of the "unlawful" prong, the Court is of the view that the better approach to the question of whether the UCL "fraud" claim can be

determined on a classwide basis is for Defendants to bring a dispositive motion on this issue after notice is given to the class.

D. The CLRA, Common Law Fraud, and FAL Claims Require Individualized Inquiry, Precluding Their Certification

1. A Presumption of Reliance Is Improper to Support the CLRA Claim

Cal. Civ. Code §1770(a) prohibits a litany of conduct, and as relevant here, the following:

> Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions (California Civil Code § 1770(a)(13);
>
> Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law. (California Civil Code § 1770(a)(14));
>
> Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not (California Civil Code § 1770(a)(16);
>
> Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction (California Civil Code § 1770(a)(17).

In addition, Plaintiffs allege that to the extent AutoZone "claims the contractual right to unilaterally change the terms of its rewards program so as to effectively deprive its rewards members of the benefits they were promised at the time they made purchases," AutoZone violated California Civil Code § 1770(a)(19) (Inserting an unconscionable provision in the contract).

Relief under the CLRA is limited to "[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice" unlawful under the act. Cal. Civ. Code, § 1780(a), italics added.

Plaintiffs' central contention is that AutoZone's representation that customers in the Rewards Program would receive a "$20 Reward" if they made five purchases of over $20,

followed by its decision to change the Rewards program to cause Credits to expire after twelve months and the Reward to expire after three months, is a violation of the CLRA. Complaint ¶ 78. They urge that causation as to all class members may be shown by the use of a presumption of reliance. They further urge that such a presumption is proper because all class members acted upon the representations, which plaintiffs argue are equally material to all class members.

The theory underlying the court-made presumption of reliance based on a material misstatement or omission derives from statutory claims under Rule 10b-5 of the Securities and Exchange Act of 1934, 15 U.S.C. 78t, et seq. and is premised in the notion that markets are efficient and that every consumer buying the product was impacted by the misstatement or omission because the statement or omission would necessarily impact the price of the product. See *Blackie v. Barack* (9th Cir. 1975) 524 F. 2d 891; *Basic, Inc. v Levinson* (1988) 485 U.S. 224; *Halliburton v. Erica P. John Fund Inc.* (2014) 134 S.Ct. 2398. The presumption is rebuttable by defendants who show that the price of the product was not impacted. Ibid.

The doctrine has, to some extent, been extended by California courts to consumer cases. Thus, a presumption may be applied to certain statutory claims where plaintiffs can show that the misstatement or omission would necessarily impact a decision to buy the product in the first instance. See *McAdams v. Monier* (2010) 182 Cal. App. 4th 174 (purchaser of roof tile would want to know that product would not retain its color over lifetime of product); *Steroid Hormone* (purchaser would want to know it is illegal to own the product); *Mass Mutual* (purchaser would want to know that company planned to reduce discretionary dividend).

The cases cited by plaintiffs illustrate this principle. *Mass Mutual* involved a proposed class of policyholders of "vanishing premium" life insurance policies, i.e. policies that were allegedly designed to earn dividends sufficient to cover the premiums. Plaintiffs alleged that at the time they purchased the policies Mass Mutual was paying a discretionary dividend rate which Mass Mutual did not intend to maintain. Plaintiffs also

1 alleged that they had evidence they contended showed that Mass Mutual had developed
2 plans to "ratchet down" its dividend over time. Plaintiffs asserted that Mass Mutual's
3 failure to disclose to purchasers its own conclusions about its high discretionary
4 dividend rate and its plans to lower the rate gave rise to liability for violations of the
5 CLRA. On those facts the Court of Appeal found that *whether* the representations were
6 material was a question that was common to the class (*Mass Mutual* at 1294), and that "*[i]f*
7 the undisclosed assessment was material, an inference of reliance as to the entire class
8 would arise, subject to any rebuttal evidence Mass Mutual might offer." Id. at 1295
9 (emphasis added). Put another way, the causation requirement can be satisfied under the
10 CLRA if the record permits an "inference of common reliance" to the class. Id. at 1292-
11 1293.

12 *McAdams*, citing *Mass Mutual*, held that the record permitted an inference of
13 common reliance among the CLRA class because plaintiff tendered evidence that
14 defendant, "knew but failed to disclose to class members that the color composition of its
15 roof tiles would erode to bare concrete well before the end of the tiles' represented 50-year
16 life; and that this failure to disclose would have been material to any reasonable person
17 who purchased tiles in light of the 50-year/lifetime representation, or the permanent color
18 representation, or the maintenance-free representation." *McAdams, supra,* 182 Cal.App.4th
19 at 184.

20 In *Steroid Hormone* plaintiffs alleged that they had been sold a steroid that was
21 illegal to possess without a prescription. In finding that fact was material as to the class
22 sufficient to find classwide reliance and thus causation, the Court noted that "the question
23 that must be answered in this case is whether a reasonable person would find it important
24 when determining whether to purchase a product that it is unlawful to sell or possess that
25 product. It requires no stretch to conclude that the proper answer is 'yes'—we assume that
26 a reasonable person would not knowingly commit a criminal act." *Steroid Hormone* at 157.

27 Plaintiffs do not allege any misrepresentation with respect to a particular product
28 purchased at AutoZone. Instead, they aver that they would have shopped at another

automotive parts retailer entirely if not for the Rewards Program and its promise of $20 rewards. The evidence is to the effect that the terms of the Rewards Program were material to *Plaintiffs* in deciding to shop at AutoZone. Hughes Declaration, ¶8; Shenkman Declaration, ¶¶ 8, 10. Based on that evidence they argue that it is reasonable to assume that *all* customers who are member of the Rewards Program shopped at AutoZone because of the Rewards Program.

A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' [citations]…." *Tobacco II* at 327. Materiality in the context of CLRA claims is judged by the effect on a "reasonable consumer." *Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal. App. 4th 1351, 1360. The problem here is that there is no evidence to support the supposition that the average consumer would give importance to the terms of the Rewards Program in determining to shop at AutoZone, even if one were a member of the program.

Plaintiffs argue that AutoZone has admitted that the statements in its advertising and undisclosed expiration dates were material to all class members in terms of their decision to shop at AutoZone. Fairly construed, however, the cited testimony, offered over a proper "speculation" objection, is to the effect that a customer would value a monetary incentive and that one of the reasons AutoZone offered the Rewards Program was to incentivize customers to shop there. In addition, AutoZone acknowledged that the rules of a rewards program and duration of earnings "are normal things to consider" in a rewards program. Yohalem Declaration, Exhibit A, Clawson Deposition 17:6-18:2; 115:20-116:21; Exhibit B, Pawlak Deposition 137:15-138:8; 139:12-140:8; 142:5-21. This is an insufficient evidentiary showing from which the Court may infer that all class members considered the alleged misstatements and omissions regarding the Rewards Program important in each class member's decision to shop at AutoZone. In the absence of such evidence it is reasonable to assume customers might prefer AutoZone because of the Rewards Program or because they believed it was conveniently located or was open at convenient hours, had

a range of products, had knowledgeable or pleasant customer service personnel, because they received other benefits from the Rewards Program, or for a variety (or combination) of reasons.

In summary, the cases relied upon by Plaintiffs require an evidentiary showing, not present here, that all members of the class would have considered the misrepresentations or omissions *as to the Rewards Program* important in making their decision to shop at AutoZone before a presumption of reliance may be used as a method for showing the class was damaged "as a result of" a violation of the CLRA claim. The Court cannot presume that the element of damages *resulting from* the alleged misrepresentations/omissions arise simply because the named plaintiffs allege *they* would have shopped elsewhere but for their understanding of the Rewards Program. This is particularly so because of the evidence that the plastic card provided to customers disclosed that the Terms and Conditions of the program could be modified and in light of the various information available on the website, the Terms and Conditions sheet, and the like.

Finally, that the present advertising may be misleading is not sufficient to show causation. There is no showing that all members of the proposed classes have seen the advertising or consider it misleading in light of other facts known to them.

The situation here is akin to *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644. In that case plaintiff brought a class action under the CLRA, alleging the defendants had represented and marketed orange juice as "fresh" and "without additives" which in fact was reconstituted from frozen concentrate and contained additives, facts that were disclosed on the label but not read by the plaintiff. In finding these claims were not appropriate for class treatment under the CLRA, the trial court found that based on the record before it the issue whether any asserted misrepresentation induced the purchase of defendant's orange juice would vary from consumer to consumer, causing individual issues to predominate over any common issues. Id. at 668-669. So, too, here. While AutoZone may have initiated the Rewards Program to induce customers to shop with it, there is no evidentiary showing that in fact this is why all class members did so. Lacking classwide

evidence that the alleged misrepresentations and omissions were material to *all* class members and thus that they suffered damages *as a result* of the claimed improper conduct, the CLRA claim will devolve into individual inquiries, making it unsuitable for class treatment. See also *Fairbanks v. Farmers New World Life Ins. Co.* (2011) 197 Cal. App. 4th 544, 565 (where class alleged misrepresentations as to "policy permanence" certification properly denied where the materiality of such representation to any given policyholder was a matter of individual proof); *Cohen v. DIRECTV, Inc.*, (2009) 178 Cal. App. 4th 966, 980 (*Cohen*)(trial court properly declined to certify CLRA claims were it examined the nature of the claims in plaintiff's case, and juxtaposed those claims against the respective positions of the class members, including considering whether all class members showed actual reliance on allegedly misleading marketing material).

2. The Fraud Claims Give Rise to Individual Issues

A plaintiff alleging common law fraud by an affirmative misrepresentation or omission must show (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of the falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638, quoting 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 676, p. 778.

AutoZone properly argues that the common law fraud claims cannot be certified as reliance as to each class member must be shown, causing individual issues to predominate over any common questions. As the United States District Court for the Northern District of California recently recognized: "By its nature, reliance is an individualized inquiry that demands individualized proof unless a presumption of reliance applies." *Colman v. Theranos, Inc.* (N.D.Cal. May 31, 2018, No. 16-cv-06822-NC) 2018 U.S.Dist.LEXIS 92360 at *25.

Plaintiffs rely on *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 914 (*Vasquez*) and *Marler* for the proposition that their claims for fraud may be properly tried in a class

action, again arguing that reliance may be shown on a class-wide basis based on a presumption of reliance. Their argument is not persuasive.

There are circumstances, as set forth in *Vasquez*, where a presumption arises that the class as a whole relied on a misrepresentation. These cases are ones in which all class members were subjected to the same affirmative representation of a material fact that is standardized by reason of a selling script or similar device. As the Supreme Court explained in *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082: "[*W*]h*en the same material misrepresentations have actually been communicated to each member of a class,* an inference of reliance arises as to the entire class." Id. at 1095, emphasis in original.

For example, in *Vasquez* all consumers were sold the product in question by a common standard script. Materiality was shown by the fact that the consumers were required to verify that they had read the statements in question.

Marler also does not assist Plaintiffs and in fact supports AutoZone's position. There, false promises of affordability if residents of a mobile home park would vote to convert the park into a condominium development were made to all members of the class or their representative, the homeowners' association. As the Court of Appeal observed: "[P]laintiffs present evidence that all class members directly received and relied on the Park owners' representations. Marler said they received offers to purchase lots 'within an established price range—from $110,000 to $150,000.' Plaintiffs detrimentally relied because the Park owners gave them prices they did not intend to use, and raised them after the conversion vote when it was too late to challenge the conversion." *Marler* at 1464.

In short, as with the CLRA claim, Plaintiffs' fraud claims will devolve into individual inquiries as to what class members were told (Did they or did they not receive the tear sheet or brochure and did they or did they not see the advertising?) and whether they then relied on same in deciding to shop at AutoZone.

Moreover, it is to be noted that the presumption referenced in *Vasquez* and *Marler* is just that—a presumption. It is rebuttable by competent evidence, including a showing by AutoZone that in choosing to shop at AutoZone individual class members would not

have ascribed the same importance to the rewards program that plaintiffs did. As the Court in *Hale v. Sharp Healthcare* (2014) 232 Cal.App.4th 50 observed, the Supreme Court encourages courts to "be 'procedurally innovative' in managing class actions," but "'procedural innovation must conform to the substantive rights of the parties,' including the right for the defendant to litigate its affirmative defenses." Id. at 66.

Accordingly, the claim for common law fraud cannot be certified.

3. The FAL Claim Cannot Be Certified

The FAL, codified in Bus. & Prof. Code §§17500 et. seq., is narrower than section 17200 and requires a showing of actual "advertising," as well as a showing of scienter (i.e. that the advertiser knew the advertisements was false or misleading or, in the exercise of reasonable care, should have known it to be). *People v. Forest E. Olson Inc.* (1982) 137 Cal. App. 3d 137. The standing and relief provisions are the same as under the UCL. See Bus. & Pro. Code § 17535.

Here, the FAL claim cannot be certified because it is not shown that all members of the proposed class were exposed to the advertising in question. *Cohen* at 980.

E. Plaintiffs Have Claims Typical of the Class

"Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. 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." *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502, internal quotes and citations omitted. In evaluating this argument the Court limits its analysis to Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing, and claims under the UCL, as those are the only claims in which individual issues do not predominate.

Here, Plaintiffs are members in AutoZone's reward program who allege damages based on the change in terms, which, they allege, were not part of any contract they entered into with AutoZone.

AutoZone argues that Plaintiffs' claim that the Terms and Conditions do not apply to them is not typical of other class members who were in fact aware of the Terms and Conditions. Relatedly, AutoZone argues that Plaintiffs' position is not typical because the average customer would agree that it is perfectly normal to modify the terms of a reward program. Awareness of the Terms and Conditions is not an element of the contract or UCL claims. The Terms and Conditions either were or were not part of the contract, and either are or are not unconscionable. Whether Plaintiffs knew about them is irrelevant as the failure to read a contract's terms ordinarily does not bar their enforcement, even when the contract is one of adhesion, if the party had a reasonable opportunity to learn the facts by reading the contract. *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 423.

AutoZone also argues that Plaintiffs have not had a Reward expire. Under the class definitions for each subclass, class members need only have a Reward *or* a Credit expire. AutoZone admits that some of Plaintiffs' "Credits" (purchases towards the five needed for a reward) expired as a result of the changes in the Rewards Program. Yohalem Declaration, Exhibit B, Pawlack Deposition 121:23 – 123:4; Exhibit Y.

AutoZone urges that Plaintiffs are not typical because they had minimal involvement with the Rewards Program and only made purchases to obtain Rewards. These issues are irrelevant to the breach of contract and UCL claims as framed.

Finally, AutoZone argues that Plaintiffs are also atypical because they allege they did not receive notice of the changes to the Rewards Program. It asserts that other customers did receive notice and acted accordingly by either redeeming awards or making additional purchases. This argument, like the others, is irrelevant to the breach of contract and UCL claims. The issues are whether the contract permits AutoZone to change the Terms and Conditions and if so, whether such a term is unconsionable. It may well be that when the case is tried, if it is established that the contract both permitted changes and required notice thereof, that member of the class who received notice (as determined by

AutoZone's records) will have no claim for damages. But, this does not render Plaintiffs atypical.

F. Plaintiffs Are Adequate Representatives

One proposed class representative (Shenkman) was a law school classmate of proposed class counsel Yohalem. The two are friends and have at times worked on cases together. In these circumstances, the question of adequacy must be carefully examined.

> The majority of courts ... have refused to permit class attorneys, their relatives, or business associates from acting as the class representative. The most frequently cited policy justification for this line of cases arises from the possible conflict of interest resulting from the relationship of the putative class representative and the putative class attorney. Since possible recovery of the class representative is far exceeded by potential attorneys' fees, courts fear that a class representative who is closely associated with the class attorney would allow settlement on terms less favorable to the interests of absent class members.
>
> ...
>
> Class litigation ... must be monitored by an informed and independent plaintiff and simply cannot be left for the lawyers to manage. The court concludes that when putative class counsel are not monitored by an independent and informed client and when that counsel has taken significant action in the case without court oversight or approval, the only adequate class representative ... is a class member who is well-informed about the action and independent of its counsel.
>
> *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1264-1265, internal quotations and citations omitted.

Shenkman states the following about his relationship with Yohalem:

The two of them overlapped at Columbia Law School one semester and have kept in touch over the years.

They worked on a class action regarding "Kobe Beef" in the Circuit Court of Cook County, Illinois (*Schittino v. Marriott, et al.*, No. 13 CH 23202), which resulted in Marriott prevailing on an individual summary judgment motion and the case settled; neither Shenkman nor Yohalem recovered any fees.

The two worked on another Illinois case involving Kobe Beef (*Hertsberg v. Champps Operating Corporation*, Case No. 2013 CH 18590), also in Cook County and also resulting in no fees.

Shenkman's practice has shifted to focusing on California Voting Rights Act claims. Because of their divergent practices it is unlikely he will co-counsel with Yohalem or his firm in the future.

Shenkman has never represented a client in any way referred to him by Yohalem or his firm.

Neither his firm (Shenkman & Hughes, PC) nor he and his wife have an extensive business relationship with Yohalem or his firms, presently have no business relationship, and do not intend to have any business relationship in the future.

The entirety of their business relationship consists of the two cases they worked on together.

The idea that he would risk his professional relationship with the goal of enriching Yohalem is ludicrous. He called Yohalem because he believes in him as an attorney who is best suited to pursue this case.

Yohalem states the following about his relationship with Shenkman:

They were co-counsel in *Schittino v. Marriott*, to which Shenkman was admitted pro hac vice; in ruling against their client the court praised the work put into the case by all sides (Exhibit Z); neither counsel recovered any fees.

He worked briefly as co-counsel with Shenkman on *Hertsberg v. Champps Operating Corporation*, which effectively ended almost immediately when Champps' parent declared bankruptcy; neither attorney recovered any fees.

Yohalem and his firm have no plans to co-counsel with Shenkman or his firm in the future.

As to Hughes, Yohalem states that he has known her for many years.

In these circumstances, where there is no fee sharing arrangement between Plaintiffs and Yohalem it appears Shenkman can adequately oversee Yohalem. Unlike in *Apple Computer*, where the proposed class representative was a lawyer in the very firm that was proposed to be class counsel, along with another firm that frequently served as co-counsel, the connection between Shenkman and Yohelem consists of two instances of working together in the past with no plans to do so in the future and no incentive (beyond that inherent in all class actions seeking fees from defendant or a common fund) to disadvantage the class so as to benefit themselves.

The cases cited by AutoZone do not counsel otherwise. In *Redman v. RadioShack Corp.* (7th Cir. 2014) 768 F.3d 622, 638, the lead plaintiff was employed by a law firm where class counsel former were employed; while plaintiff was found to be adequate the court did feel the need to remind them, "of the importance of insisting that named plaintiffs be genuine fiduciaries, uninfluenced by family ties or friendships." The proposed class representative in *London v. Wal-Mart Stores, Inc.* (11th Cir. 2003) 340 F.3d 1246, 1255, was inadequate because he and class counsel had been friends for many years and plaintiff was counsel's stockbroker. None of these facts are present here. The fact that Shenkman and Yohalem are law school friends who have kept in touch and who have worked together on two cases is insufficient for the Court to deem Shenkman an inadequate class representative, or Yohelem inadequate counsel.

In all other ways Shenkman and Hughes appear to be adequate. Their declarations express an awareness of the duties attendant to their roles. Hughes Declaration, ¶9 -11; Shenkman Declaration, ¶¶ 14, 15.

Yohalem appears to have sufficient knowledge of class action litigation to make him an adequate class counsel. Yohalem Declaration, ¶¶ 38-48. Further, additional counsel represent the class, including the law firm of Rosenfeld, Meyer & Sussman, LLP, which is not alleged to have any conflict, real or perceived.

G. Manageability is Shown As to the Breach of Contract/Implied Covenant/UCL Claims

Plaintiffs have submitted a trial plan that sufficiently demonstrates the manageability of the issues to be tried. As for the Breach of Contract, Breach of the Implied Covenant and UCL claims, the issues to be tried are:

(1) Was there a unilateral offer via advertisements accepted through performance? (Did class members enroll in the Rewards Program?)

(2) Were the Terms and Conditions part of the contract whether or not provided to the class members or read by them?

(3) If the Terms and Conditions were incorporated by reference, was actual notice required before they could be changed?

(4) Were the changes a unilateral amendment that improperly impaired an accrued right?

(5) Were the Terms and Conditions unconscionable?

(6) Did the class suffer damage?

These are largely legal questions needing little evidence other than testimony that members of the class received the plastic card stating that "AutoZone reserves the right to discontinue, restrict or change the AutoZone Rewards program at any time without notice." In addition, testimony that some class members received notice of the changes while others did not may be required. However, these are facts easily established. As to the issue of damages, by definition all class members had Rewards or Credits expire. While there may

be a subclass who cannot assert a claim for damages if the first question is answered affirmatively and the second negatively, those members may be identified from AutoZone's records showing to whom it gave notice by mail, regular or electronic.

The manageability issues with respect to the CLRA, FAL, and Fraud claims are far greater. This is so because the claims require a showing either that the class members were damaged as a result of the claimed misconduct (CLRA and Fraud claims), or that each member of the class was exposed to the false advertising. On the facts alleged that showing cannot be made on a classwide basis.

V. CONCLUSION AND ORDER

Plaintiffs have met the requirements for certification of the Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and UCL claims. There is a well-defined and ascertainable class of sufficient size. The theory of recovery as to those claims appear to be amenable to class treatment as they present common legal and factual questions. The proposed class representatives have claims that are typical of the class, and they and proposed counsel are adequate. Plaintiffs' motion for class certification is therefore granted as to those claims only.

The Court will conduct a Status Conference regarding the form of notice to be given to the class and steps going forward on September 7, 2018, ~~2018~~ at 9:00 a.m. in Department 17, 312 N. Spring Street, Los Angeles CA 90012. Counsel shall meet and confer as to a proper form of Notice. If a form is agreed upon it shall be jointly submitted five court days in advance of the hearing. If there is no agreement, each party's proposal and the reasons therefore shall be set forth in a jointly submitted filing five court days in advance of the hearing.

Dated: 7/20/18

Maren E. Nelson
MAREN E. NELSON
JUDGE OF THE SUPERIOR COURT

Documents Considered

Filed March 21, 2018
Plaintiffs' Mary Ruth Hughes and Kevin Shenkman's Notice of Motion and Motion for Class Certification
Declaration of Kevin Shenkman
Declaration of Mary Ruth Hughes
Declaration of Todd W. Bonder
Declaration of Ryan Lapine
Declaration of Seth Yohalem
Plaintiffs Ruth Hughes and Kevin Shenkman's Trial Plan

Filed March 22, 2018
Notice of Errata to Declaration of Seth Yohalem

Filed April 9, 2018
Defendants' Opposition to Plaintiffs' Motion for Class Certification
Defendants' Evidentiary Objections to Declaration of Seth Yohalem
Defendants' Evidentiary Objections to Declaration of Kevin Shenkman
Defendants' Evidentiary Objection to Declaration of Mary Ruth Hughes
Declaration of Bernadette Pawlak
Declaration of Roger A. Cerda
Defendants' Response to Plaintiffs' Trial Plan

Filed April 19, 2018
Plaintiffs' Mary Ruth Hughes and Kevin Shenkman's Reply
Supplemental Declaration of Seth Yohalem
Supplemental Declaration of Kevin Shenkman
Plaintiffs Mary Ruth Hughes and Kevin Shenkman's Evidentiary Objections to the Declaration of Roger A. Cerda
Plaintiffs Mary Ruth Hughes and Kevin Shenkman's Evidentiary Objections to the Declaration of Bernadette Pawlak
Plaintiffs Mary Ruth Hughes and Kevin Shenkman's Response to Defendants' Evidentiary Objections to Declaration of Plaintiff Mary Ruth Hughes
Plaintiffs Mary Ruth Hughes and Kevin Shenkman's Response to Defendants' Evidentiary Objections to Declaration of Plaintiff Kevin Shenkman
Plaintiffs Mary Ruth Hughes and Kevin Shenkman's Response to Defendants' Evidentiary Objections to Declaration of Seth Yohalem

Uploaded April 20, 2018
Second Supplemental Declaration of Seth Yohalem

Uploaded April 25, 2018