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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 **PLAINTIFFS MARY RUTH HUGHES AND KEVIN SHENKMAN'S NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION** DATE: May 2, 2018 TIME: 10:00 a.m. DEPT: 307 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

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NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Rule 3.764 of the California Rules of Court, on May 2, 2018 at 10:00 a.m. in Department 307 of the above-entitled Court, located at 600 South Commonwealth Avenue, Los Angeles, CA 90005, Plaintiffs Kevin Shenkman and Mary Ruth Hughes ("Plaintiffs") will and hereby do request that the Court certify their proposed subclasses.

This motion is brought on the grounds that the proposed subclasses are readily ascertainable based on objective criteria and are numerous, and claimants can be identified by defendants AutoZone Parts, Inc., AutoZone, Inc., and AutoZone.com, Inc.'s (collectively, "AutoZone") records. Within each subclass, common issues predominate as members possess materially identical small-dollar claims, the outcome of which will turn on the same common actions and representations by AutoZone. Plaintiffs have claims typical of both subclasses and, along with their counsel, will adequately protect their interests. Finally, the class action device is not only the superior method for adjudicating this dispute, it is the only feasible manner of doing so.

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This motion for class certification is based upon this notice of motion and motion, the attached Memorandum of Points and Authorities, the declarations of Mary Ruth Hughes, Kevin Shenkman, Seth Yohalem, Todd Bonder, and Ryan Lapine and exhibits thereto, all papers and pleadings on file herein, and upon any further arguments and evidence as may be properly presented at or before the hearing on this matter.

DATED: March 4, 2018

WASKOWSKI JOHNSON YOHALEM LLP
SETH YOHALEM

By: _____
Seth Yohalem

DATED: March 4, 2018

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

By: _____
Ryan M. Lapine

Attorneys for Plaintiffs MARY RUTH HUGHES and KEVIN SHENKMAN

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

AutoZone promised millions of Californians that if they enrolled in AutoZone Rewards, its loyalty program, and made five $20 purchases, they would "Get $20" to spend at AutoZone (the "Rewards Program"). AutoZone's records confirm that AutoZone Rewards provides an enormous benefit to AutoZone: as of 2014, AutoZone made over $3 billion worth of sales through AutoZone Rewards with a margin of $1.6 billion. AutoZone decided, however, that its California consumers should not also benefit from AutoZone Rewards despite its express and material inducements to them.

In 2014, AutoZone implemented a "National Plan Conversion," explicitly designed to "eliminat[e] long-term liability" by unilaterally voiding approximately **750,000 $20 Rewards** and **millions** of Reward Credits earned by its customers through purchases made **before** AutoZone gave them any reason at all to know that Reward Credits or Rewards would expire. Instead of providing $20 of store credit (the "Reward") once customers made five $20 purchases, as it had promised in order to drive sales, AutoZone caused each $20 purchase (the "Reward Credit") to expire after twelve months and each Reward to expire after 90 days. AutoZone applied the conversion retroactively to Rewards and Reward Credits already in its customers' accounts, thereby materially changing the terms of the offer its customers had accepted.

AutoZone's changes also were designed so that the vast majority of its active customers would not be able to earn and redeem the Reward they were promised. According to AutoZone's records, the National Plan Conversion prevents 85% of AutoZone's active Rewards Members from earning Rewards and up to 30% of the members who earn a Reward lose it before they redeem it.

Nonetheless, AutoZone continues to advertise the Rewards Program, without making any meaningful reference to these material limitations. It still promises a simple $20 Reward when customers make five $20 purchases, without disclosing the material limitations of that promise. This causes its customers, such as Plaintiffs, to continue to

make purchases, believing they will earn a $20 Reward only to have the Reward Credits expire. Since the conversion, California Rewards Members have seen **millions** of dollars more worth of Credits and Rewards expire.

To remedy this, Plaintiffs bring a class action, a mechanism particularly well-suited to these facts. AutoZone admits that it provided all of its customers with "basically the same" message regarding the "monetary incentive" associated with its Rewards Program and admits this message was important for its customers to consider in choosing to shop at AutoZone. AutoZone further admits that before its National Plan Conversion, customers making purchases at AutoZone had no reason to know that Rewards or Rewards Credit would expire. AutoZone also admits that after the conversion, it continued to use advertising that did not disclose the time limits, and that the notice it did provide to its customers of the new conditions had glaring, significant errors.

To address AutoZone's conduct, Plaintiffs bring causes of action for breach of contract and contractual breach of the duty of good faith and fair dealing (in the alternative) (First and Second Causes of Action), violation of the Consumers Legal Remedies Act (the "CLRA") (Third Cause of Action), Violation of the False Advertising Law (Fourth Cause of Action), Violation of the Unfair Competition Law (Fifth Cause of Action), and Fraud (Sixth Cause of Action). Plaintiffs request that this Court[1] certify two subclasses, differentiated to address any differences the inadequate notice AutoZone claims to have provided prior its conversion might create:

Subclass 1 (To pursue 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

[1] AutoZone has failed to produce several categories of responsive discovery that it repeatedly represented would be forthcoming, even up until days before this brief was due. Plaintiffs believe they have ample evidence to move for class certification regardless and would be prejudiced by further delay. Plaintiffs will separately move to compel this information. Plaintiffs request that if the Court concludes the present motion lacks sufficient evidentiary support. that it grant their motion to compel and continue the issue of class certification until such time as AutoZone has complied with its discovery obligations.

were deemed expired and never reinstated by AutoZone.[2]

Subclass 2 (To pursue the Third, Fourth, and Fifth Cause 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.

Plaintiffs satisfy the class certification requirements for both subclasses. The subclasses are readily ascertainable based on objective criteria and are numerous, and claimants can be identified through AutoZone's records. Within each subclass, common issues predominate as members possess materially identical small-dollar claims, the outcome of which will turn on the same common actions and representations by AutoZone. Plaintiffs have claims typical of both subclasses and, along with their counsel, will adequately protect their interests. Finally, the class action device is not only the superior method for adjudicating this dispute, it is the only feasible manner of doing so.

II. FACTUAL BACKGROUND

A. Class Members Enrolled In The Same 5/20/20 Rewards Program In The Same Manner Based On the Same Messaging

To encourage customers to make purchases at AutoZone, AutoZone has long maintained a customer loyalty program, AutoZone Rewards. (Clawson[3] 17:15-21; Pawlak 139:12-140:8.) As of 2014, sales through AutoZone Rewards exceeded $3 billion annually, with a margin to AutoZone of approximately $1.6 billion. (Declaration of Seth Yohalem ("Yohalem Decl."), Ex. M at AZ 300827). At all operative times, members of AutoZone Rewards ("Rewards Members") "earned" a Reward Credit when they made a qualifying

[2] The proposed subclasses do not include the less than 2% of California Rewards Members who were enrolled in other versions of the program as of the National Plan Conversion or the small number who enrolled online prior to the National Plan Conversion. (Yohalem Decl., Ex. D at Amended Answer to Interrog. 10; Pawlak 225:14-226:5.) True and correct copies of relevant portions of Kevin Clawson's and Bernadette Pawlak's deposition transcripts are attached as Exhibits A and B, respectively, to the Declaration of Seth Yohalem. References to those transcripts are made directly in this brief.

[3] From the end of 2013 to 2016, Kevin Clawson was the marketing manager for AutoZone Rewards. (Clawson 20:19-23; 21:9-15; 75:11-15.) From January 2014 to the present, Bernadette Pawlak was the director responsible for AutoZone Rewards. (Pawlak 11:10-17; 13:12-21).

purchase of over $20; when they acquired five (5) such Reward Credits, they "earned" a $20 Reward – a $20 store credit that could be used at AutoZone. (Clawson Dep. 18:3-18, 52:6-13, 239:1-18; Yohalem Decl., Ex. C at AZ 75 and Ex. D at Amended Answer to Interrog. 10.) Although AutoZone maintained different versions of its Rewards Program throughout the country, this case is limited to class members who were enrolled in the 5/20/20 version of the program in California. Under this version of the program, until AutoZone's National Plan conversion, neither Reward Credits nor $20 Rewards expired. (Yohalem Decl., Ex. C at AZ 75, Ex. D at Amended Answer to Interrog. 10, Ex. E at AZ 49943.) All putative class members enrolled in the AutoZone Rewards Program and made qualifying purchases from AutoZone in the same standard manner. (Pawlak 31:18-32:8; Clawson 42:19-23.)

At all relevant times, across all advertising channels, AutoZone provided class members with a "consistent message," concerning the "value proposition" of AutoZone Rewards: "Get $20 When You Make 5 Qualifying Purchases of $20 or More." (Yohalem Decl., Ex. F at AZ 382868; Clawson 193:11-18; Pawlak 22:23-24:8.) Indeed:

> Q. From personal knowledge in your role as marketing manager, was the message of make 5 purchases and earn $20 the consistent message that was provided to customers across all AutoZone's advertising channels?
>
> A. Yes.
>
> Q. And while the individual ads may have varied, the message was basically the same, right?
>
> A. That is correct.

(Clawson 193:11-18l; *see also* Pawlak 14:8-21:14; 22:10-20; Yohalem Decl., Exs. G, and H at Answer to Special Interrog. 24.) AutoZone recognizes this value proposition as the "monetary incentive" of the program. (Clawson 17:22-28:2.)

AutoZone claims that the promises made by its Rewards Program were limited by "Terms and Conditions" for the program. However, these "Terms and Conditions" were never agreed to by AutoZone's customers. As part of the standardized enrollment process, no one was required to sign any document or otherwise agreed to the "Terms and

Conditions" to enroll in AutoZone's Rewards Program. (Clawson 40:13-19; Pawlak 30:6-19.) Nor did anyone agree to the "Terms and Conditions" when they made purchases. (Pawlak 32:9-34:1.) AutoZone did not even require its employees to provide the "Terms and Conditions" to its customers unless they were specifically requested by the customer. (Pawlak 35:15-25.) Even then, the "Terms and Conditions" were merely printed on the back of tear sheets in 7 or 8-point font. (Yohalem Decl., Ex. I; Clawson 183:16-21.) AutoZone's contemporaneous documents confirm that "Terms and conditions are not accepted at time of enrollment in store" and that this is an area where its "legal compliance" is an "industry standard[s]… ***where we suck.***" (Yohalem Decl., Ex. L at AZ 365818, Ex. U at AZ 350386 [emphasis added].) In any event, agreed to or not, these so-called "Terms and Conditions" were the same for everyone. (Yohalem Decl., Ex. D at Amended Answer to Interrog. 10.)

B. <u>AutoZone Materially Changes Its 5/20/20 Rewards Program</u>

In late 2014, AutoZone materially changed its 5/20/20 Rewards Program as part of a long-planned "National Plan Conversion." (Yohalem Decl., Ex. C; Clawson 78:21-24; 131:21-132:9.) Under the new National Plan, Reward Credits "expired" after 12 months and Rewards "expired" after 90 days if unredeemed. (Clawson Dep.79:4-11; Yohalem Decl., Ex. L at AZ 76, 80).

By AutoZone's deliberate design, these changes made it harder for members of its 5/20/20 program to both earn and redeem Rewards. As AutoZone knew at the time, the average AutoZone Rewards Member makes only 3.8 purchases per year and all relevant segments of its customers make fewer than five purchases of over $20 per year. (Yohalem Decl., Ex. M at AZ 30828, Ex. N at AZ 72260.) Thus, after AutoZone changed its program to require the five purchases to be made within a year, "85% of active Loyalty members never earn a reward in a 12-month timeframe due to infrequent purchase activity (<5 transactions)." (Yohalem Decl., Ex. O at AZ 241454, Ex. P at AZ 241683; Pawlak 180:14-20.) AutoZone's changes also caused up to 30% of members who earn Rewards to lose them before they can redeem them. (Yohalem Decl., Ex. Q; Pawlak 170:11-17.)

Prior to implementing its National Plan Conversion, AutoZone expressly recognized that one of its "benefits" would be to increase "breakage" – dollars earned by Rewards Members which go unredeemed – by millions. (Yohalem Decl., Ex. R at AZ 36647, Ex. S at AZ 46897, Ex. C at AZ 81; Clawson 102:17-20; 111:1-5; 139:23-141:4; Pawlak 58:2-4.)

C. AutoZone Imposes Its New Conditions Retroactively

AutoZone imposed these new material conditions ***retroactively*** on purchases ***already*** made before the National Plan Conversion. (Clawson 79:25-80:25.) AutoZone's new retroactively-imposed conditions caused California Rewards Members to lose ***millions*** of Reward Credits and approximately ***750,000*** $20 Rewards that were earned through purchases before the conversion. (Yohalem Decl., Exs. J at ¶¶ 5-6; K at Amended Responses to Interrogs. 2 and 7.) AutoZone deliberately inflicted this massive loss on its California Rewards Members. For example, AutoZone had planned for its conversion at least two years earlier knowing that "Members in 5/20/20 will have to [sic] most impact to Credit and Rewards Balances." (Yohalem Decl., Ex. Tat 81071.) Later, using corporate speak for enriching itself at its customers' expense, AutoZone expressly touted one feature of its National Plan Conversion as being to "better manage program expense by eliminating long-term liability." (Yohalem Decl., Ex. Rat AZ 36647, Ex. C at AZ 80.)

AutoZone ***admits*** that the rules governing the time to earn and redeem Rewards were something that "would be important for any customer to consider" when deciding to shop at AutoZone. (Clawson 115:20-116:21; Pawlak 142:5-21.) AutoZone also ***admits*** it failed to inform its customers of its known, impending, retroactive change to these rules prior to when it belatedly gave notice of the National Plan Conversion:

> Q. And so at the time someone made a purchase within the 5/20/20 program prior to the national plan conversion and prior to the notice for the national plan conversion, there's nothing they would have known about the fact that the reward they were earning or the credit they were earning might expire one day; correct?
>
> A. Yes. That's how the program worked.

(Pawlak 27:4-10; 147:13-24; *see also* Clawson 164:12-165:15.)

D. AutoZone Fails to Adequately Inform Customers of the Change

AutoZone claims that in August 2014, it began providing notice to its customers of the National Plan Conversion. (Yohalem Decl., Ex. K at Amended Answer to Interrog. 5.) However, AutoZone admits that this notice did not create individual issues amongst the members receiving notice:

> Q. Okay. And for the locations where the 5/20/20 was in place, would everybody have gotten the same message?
>
> A. Yes.
>
> Q. So there were no differences at least among members who were involved in the 5/20/20 plan?
>
> A. That's right.

(Pawlak 190:1-7.)

This common "notice" was defective. AutoZone did not notify its customers of the program's changes in the most obvious ways: it did not orally inform customers of the new conditions when they made purchases after the National Plan Conversion (Clawson 94:10-14); nor did it use its television or radio advertising to inform its customers of the change for reasons; the director of its Rewards Program cannot explain why. (Pawlak 267:4-7.) AutoZone provided standardized messaging of the change on its customers' receipts, but the receipts were replete with errors that made that messaging meaningless. The standardized messaging stated that "As of October, you ***will*** have 12 months to make 5 qualifying purchases of 20 dollars or more to get your 20 dollar reward." (Shenkman Decl., Ex. 1; Pawlak 124:18-23 [emphasis added].) This suggested the new rules would go into effect the following October. Moreover, "October" itself was inaccurate. (Pawlak 134:18-135:15.) This was not an oversight, but rather was because AutoZone "did not have a lot of flexibility." (*Id.*) AutoZone also admits its receipts contained another "error" for all class members and showed their credits as of the incorrect date. (Pawlak 123:15-23.) Although AutoZone telephoned a small number of its most prized customers to explain the conversion, it did not telephone the vast majority of Rewards Members. (Clawson 208:14-209:15.) AutoZone sent an email to some Rewards Members, but it reached, at most, 3% of Rewards Members - AutoZone concedes that any notice via email

or website would have been "minimal." (Yohalem Decl., Ex. M at AZ 30832; Pawlak 260:15-261:14.) AutoZone "likely" did "not" send direct mail notifications to all members. (Pawlak 252:24-253:4).

E. AutoZone Continues to Mislead Customers After the Conversion

Moreover, even after the National Plan Conversion, AutoZone continued to deceptively market its Rewards Program, using the same message it had used before the change, omitting references to the new material limitations it had imposed. For example, the landing page of the AutoZone Rewards Website stated: "Earn a $20 Reward When You Make 5 Purchases of $20 Or More" without any mention of Rewards or Reward Credits expiring and a mere asterisk saying to "see terms and conditions." (Yohalem Decl., Ex. W; Clawson 161:20-163:24). AutoZone also continued to run television and internet advertisements which stated that customers would earn a $20 Reward when they made five purchases of $20 or more without any mention of time limitations. (Yohalem Decl., Ex. X.; Pawlak 190:14-200:10.) One television campaign run in 2017, states "Our AutoZone Rewards Program is simple. Spend 20 bucks five times and earn a $20 Reward" without any mention of time limits. (Yohalem Decl. at _.) AutoZone explains this omission as "it's television...you can get away with about a second." (Pawlak 192:24-193:5.)

F. Plaintiffs' Experience Was Typical

Plaintiffs Mary Ruth Hughes and Kevin Shenkman, a married couple, enrolled in AutoZone Rewards at a 5/20/20 store in California and shopped at AutoZone in order to earn a $20 Reward when they made five purchases of over $20. (Shenkman Decl. ¶¶ 6-11; Hughes Decl. ¶¶ 3, 6-8.) According to AutoZone's records, on July 30, 2014, Plaintiffs made a purchase of over $20 for which a Reward Credit was credited to their account. (Yohalem Decl., Ex. Y at AZ 365.) This was before AutoZone provided any notice of the National Plan Conversion. (Pawlak 147:13-17.) Plaintiffs made four additional purchases subsequent to when AutoZone contends it began providing notice of the changes, culminating on March 1, 2016. (Yohalem Decl., Ex. Y at AZ 364.) Plaintiffs would have earned a $20 Reward but for AutoZone's changes to its Rewards Program.

(Pawlak 122:23-123:4, Yohalem Decl., Ex. Y.) At the time they made each of these purchases, Plaintiffs believed they would earn a $20 Reward when they made five purchases of over $20 and were unaware that either Reward Credits or Rewards would expire. (Shenkman Decl at ¶¶6-10; Hughes Decl. at ¶¶6-8.) However, Plaintiffs did not receive the $20 Reward to which they were entitled, because AutoZone deemed their Reward Credits expired. (*Id.*; Yohalem Decl., Ex. Y; Shenkman Decl., ¶11.) Plaintiffs would not have made their purchases if they had known that AutoZone could or would cause their Reward or Reward Credits to expire. (Shenkman Decl. ¶¶ 6-10; Hughes Decl. ¶¶6-8.) They bring this case to rectify AutoZone's misconduct because, without the class action device, millions of misled AutoZone customers like them will have no effective recourse at all. (Shenkman Decl. ¶ 14; Hughes Decl. ¶ 9.)

III. ARGUMENT

A. Operative Standards For Class Certification

To address the risk that small claimants may be left without legal redress, California has an expressed public policy in favor of class actions and directs its courts to use "innovative procedural tools" to make class treatment feasible. *Sav-On Drug Stores v. Superior Court* (2004) 34 Cal.4th 319, 339-40; *Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 578; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469. "Since the judicial system substantially benefits by the efficient use of its resources, class certification should not be denied so long as the absent class members' rights are adequately protected." *Richmond*, 29 Cal.3d at 474.

The court looks to each cause of action separately to determine if it should be certified. *See Shelly v. City of L.A.* (1995) 36 Cal.App.4th 692, 696; *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 672 (assessing plaintiffs' causes of action separately for certification). The "use of subclasses is an appropriate device to facilitate class treatment." *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 134 (citations omitted). The Court is not to determine the merits of the case in determining whether to certify a class and "generally should eschew" deciding "threshold legal or factual

questions" unless "resolution of such issues" is necessary for class certification. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1025; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440.

Plaintiffs seek to certify subclasses for both the CLRA and non-CLRA claims. For CLRA claims, Plaintiffs must show impracticality, that common issues predominate, that Plaintiffs' claims are typical, and that Plaintiffs will fairly and adequately represent the interests of the class. Cal. Civ. Code § 1781. For non-CLRA claims, Plaintiffs must show that the class action will have "an ascertainable and a well-defined community of interest among class members." *Sav-On Drug Stores, supra,* 34 Cal.4th at 326. "The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Id.* (citations omitted). For non-CLRA claims, Plaintiffs must also show superiority. *Caro v. Procter and Gamble Co.* (1993) 18 Cal.App.4th 644, 654. These requirements are similar. *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 128, fn. 12. The primary differences are that certification of CLRA claims is mandatory if the requirements of section 1781 are met and Plaintiffs need not show superiority, whereas the trial court has discretion in certifying a class action under section 382. *Id.*; *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 134-136; *see also Bell v. American Title Ins.* (1991) 226 Cal.App.3d 1589, 1603. Plaintiffs satisfy the requirements for certification of both the CLRA and non-CLRA claims.

B. <u>Ascertainability and Impracticality Are Satisfied</u>

To satisfy the ascertainability requirement, the court need only determine whether the class is readily identifiable. *Evans v. Lasco Bathware, Inc.*, 178 Cal. App. 4th 1417,1422 (2009); *see also Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 706 (1967). Class members are readily identifiable when the class is defined by "objective characteristics" and "common transactional facts." *Evans*, 178 Cal. App.4th at 1422. Here, the class is readily identifiable by the following objective characteristics: enrollment location, purchase dates and amounts, and Reward and Credit expirations. AutoZone readily

admits that it maintains this information. (Pawlak 120:11-121:23.)

The exact number of parties necessary for a class action to meet the impracticality threshold is indefinite, but far below the number of class members here. *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 811 (holding that a class of approximately 200 persons was sufficiently numerous). In this case, both of the proposed subclasses total millions of potential claims and easily pass this threshold.

C. Common Questions Predominate for Each Claim

Since the claims of each subclass member will present the same questions, common issues predominate. In determining predominance, "[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions—not between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding whatsoever." *Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1219 *citing Sav-On Drug Stores, Inc., supra*, 34 Cal.4th at 339, fn. 10. "A theory of liability that a defendant has a uniform policy that allegedly violates the law is by its nature a common question eminently suited for class treatment." *Nicodemus*, 3 Cal.App.5th at 1218 (internal quotations and citations omitted). "Predominance is a comparative concept, and the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate." *Sav-On Drug Stores, supra,* 34 Cal.4th at 334. Individual issues do not render class certification inappropriate so long as such issues may effectively be managed. *Id.* Here, individual inquiry is unnecessary because the facts establishing liability are the same for all class members. The only potential defense that arguably distinguishes class members' claims — AutoZone's purported notice to the class — is addressed by Plaintiffs' proposed subclasses.

1. Breach of Contract Claims (First and Second Causes of Action)

Plaintiffs seek to certify Subclass 1 to pursue breach of contract claims (including an alternative claim for breach of the duty of good faith and fair dealing) based on

AutoZone's failure to provide the benefits it promised through its loyalty program at the time they made their purchases. California courts have recognized that breach of contract cases with far more individual issues than the present case still satisfy predominance. *See, e.g., Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1463. Federal courts considering cases similar to this one have found class treatment of contract claims appropriate. *See, e.g., Sateriale v. RJ Reynolds Tobacco Co.* (C.D.Cal. Dec. 19, 2014) No. 2:09-cv-08394-CAS(SSx) 2014 U.S.Dist.LEXIS 176858, at *24-28 (certifying breach of contract class based on rewards promised in a customer loyalty program); *In re Southwest Airlines Voucher Litig.* (N.D.Ill. Aug. 26, 2013), No. 11 C 8176 2013 U.S.Dist.LEXIS 120735, at *12-13 aff'd by *Levitt v. Southwest Airlines Co. (In re Southwest Airlines Voucher Litig.)* (7th Cir. 2015) 799 F.3d 701, 704 (certifying settlement class over objection for breach of contract based on airline's failure to honor free drink coupons). This Court should reach the same conclusion on similar facts.

The elements of breach of contract are: "the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages." *First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745. These present common issues.

AutoZone made the same legally operative offer to the members of Subclass 1 when it provided members of Subclass 1 "basically the same" message that they would "get $20" if they made five qualifying purchases of over $20. (Clawson 165:10-16; 193:11-18); *See generally Sateriale v. R.J. Reynolds Tobacco Co.* (9th Cir. 2012) 697 F.3d 777, 785-788 (finding advertisements for a customer loyalty program were an offer to be accepted by performance and collecting numerous authorities providing for same); *Donovan v. Rrl Corp.* (2001) 26 Cal.4th 261, 266 (published advertisement constituted offer to be accepted by tendering the purchase price). AutoZone admits no members of Subclass 1 had any reason to know at the time of their purchases that Rewards or Reward Credits could expire. (Clawson 164:12-165:15; Pawlak 147:13-24). This makes AutoZone's offer common.

In turn, all members of Subclass 1 accepted AutoZone's offer and performed on the contract in the same manner when they made purchases of over $20 from AutoZone using their Rewards account. Civ. Code, § 1584; *Sateriale* at 785-788. Their subjective views of AutoZone Rewards are irrelevant. *Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1111 (internal citations and quotations omitted) (undisclosed understanding is irrelevant to contract meaning). Thus, this too is common.

AutoZone breached the contract and each member of Subclass 1 lost a Rewards Credit and/or $20 Reward when AutoZone imposed new conditions retroactively to the relevant purchases. (Clawson 79:25-80:25.) Once again, this is a common issue.

Because the evidence concerning the formation of the relevant contracts, performance by members of Subclass 1, and AutoZone's breach are materially identical, these are all common issues. So too is the fact of damages, since all class members lost a Reward or Reward Credit. Differences in individual damages do not defeat predominance. *See, e.g.., Marler, supra,* 199 Cal.App.4th at 1463.

AutoZone's stated "Terms and Conditions" defense also presents common issues. AutoZone concedes none of the class members actually signed or otherwise expressly agreed to its Terms and Conditions. (Yohalem Decl., Ex. I; Clawson 40:13-19; 183:13-21; Pawlak 32:9-34:1). Accordingly, the Terms and Conditions are not part of AutoZone's contractual relationship with its customers. *C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1500 (refusing to enforce indemnification provisions contained on an unsigned, but paid invoice); *Expeditors Int'l. v. Official Creditors Comm. of CFLC, Inc. (In re CFLC, Inc.)* (9th Cir. 1999) 166 F.3d 1012, 1018 (applying California law, refusing to enforce unsigned provision on the back of an invoice despite years of business with the same form invoice); *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 516 (finding that a seller's terms limiting liability were not part of the agreement with the purchaser, despite express statements on the seller's invoices that acceptance was conditioned on assent to those terms, because the purchaser "never expressed such assent"). In any event, the relevant conduct is the same and the issue is common.

Moreover, even if the Terms and Conditions were a part of AutoZone's contractual relationship with its customers, this hypothetical defense also presents common, not individual, issues and would not allow AutoZone to unilaterally take away the benefits its customers had earned through their purchases. Under California law, a contractual right to unilaterally modify a contract is limited by the duty of good faith and fair dealing, which specifically "***precludes amendments that operate retroactively to impair accrued rights.***" *Cobb v. Ironwood Country Club*, (2015) 233 Cal.App.4th 960, 963 (emphasis added). Moreover, terms within a contract of adhesion that "effectively insulate the drafting party form liability" are unconscionable. *Sonic-Calabasas A, Inc. v. Moreno*, (2013) 57 Cal.4th 1109, 1171. Here, the Terms and Conditions, whatever their significance, are the same for all class members. (Yohalem Decl., Ex. D at Amended Answer to Interrog. 10). Thus, application of the foregoing legal principles creates common issues.

2. <u>Consumer Legal Remedies Act (Third Cause of Action)</u>

Plaintiffs satisfy the predominance requirement for both subclasses with respect to their CLRA claim. To recover under the CLRA, a Plaintiff must show a violation of the CLRA which causes damages. *See* Cal. Civ. Code. § 1780. Plaintiffs claim AutoZone's bait and switch violated sections 1770(a)(13); (14); (16) and (17) of the CLRA, and, if the Terms and Conditions were part their contract, section 1770(a)(19). Plaintiffs' subclasses account for any differences AutoZone's attempted notice might create. Within each subclass, each of these elements presents common questions.

First, as AutoZone's advertising message was "basically the same," whether it violated the CLRA will be a common question within both subclasses. (Yohalem Decl., Ex. F; Clawson 17:22-18:13; 193:11-18; Pawlak 22:10-23:4.). Whether a representation is deceptive under the CLRA is an objective question, measured by "whether it is likely to mislead a reasonable consumer." *See, e.g., Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 680; *In re ConAgra Foods, Inc.* (C.D.Cal. 2015) 90 F. Supp. 3d 919, 983. In addition, by imposing undisclosed conditions in order to earn and redeem a $20 Reward which could only be fulfilled subsequent to purchases, AutoZone violated section

1770(a)(17). In any event, the same objective analysis applied to the same common evidence will yield the same common answer within each subclass.

Second, the issue of damages is common for both subclasses. All members of both subclasses lost something, either $20 Rewards or Reward Credits, and losing something is all that is required. *See, e.g.., McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174, 186-187 (reversing denial of class certification under CLRA despite differences in damages where class-wide damages all "stem from the same source" of non-disclosure); *Kizer v. Tristar Risk Management* (2017) 13 Cal.App.5th 830, 841-842.

Third, the issue of causation is common for both subclasses. Plaintiffs are "entitled to show that [Defendant's] alleged deceptive conduct caused the same damage to the class by showing that the alleged misrepresentation was material." *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 156; *see also Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292 ("Plaintiff may establish causation as to each [class member] by showing materiality as to all"). A representation "is deemed material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Id.*, at 156-157.

Here, AutoZone concedes that that its offer of a $20 Reward was designed to encourage customers to make purchases at AutoZone, that "an ordinary customer would attach importance to the reward offering that AutoZone gives them," and that the timeframe to earn and redeem Rewards "would be important for any customer to consider." (Clawson 17:6-18:2, 115:20-116:11; Pawlak 137:15-138:8; 139:12-140:8). This common proof establishes causation on a class-wide basis for both subclasses. *Steroid Hormone Product Cases*, *supra*, 181 Cal.App.4th at 157; *see also Guido v. L'Oreal, USA, Inc.* (C.D.Cal. July 1, 2013, No. CV CV 11-1067 CAS (JCx)) 2013 U.S.Dist.LEXIS 94031, at *28.). These common issues predominate.

3. <u>Unfair Competition and False Advertising (Fourth and Fifth Causes of Action)</u>

AutoZone's deceptive conduct also satisfies the predominance requirements for the Unfair Competition and False Advertising laws. "[T]o state a claim under either the UCL

or the false advertising law, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived." *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312. A claim is viable even if some members of the public are not deceived. *Massachusetts Mutual Life Ins. Co., supra,* 97 Cal.App.4th at 1292 (certifying class despite evidence that defendant has "warned purchasers and its agents" of the allegedly fraudulent conduct); *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312 citing *Kasky v. Nike, Inc*. (2002) 27 Cal.4th 939, 951; *see also McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174, 192 (recognizing that "*individualized* proof of reliance and injury is *not* required for nonrepresentative class members" and reversing denial of class certification on UCL claim) (emphasis in original).

As with claims under the CLRA, establishing that a representation was deceptive under these laws is determined by a "reasonable consumer" test and not the subjective experiences of individual customers. *Colgan, supra,* 135 Cal.App.4th at 680. The issue of whether a reasonable consumer would be deceived is a common issue that predominates. Plaintiffs also can establish a violation of the UCL based on AutoZone's violations of the CLRA, which, as shown above, also are common and predominate. *Gutierrez v. Carmax Auto Superstore* (2018) 19 Cal.App.5th 1234, 1265.

Plaintiffs need only establish their ***own*** damages caused by AutoZone's violations to represent a class. *In re Tobacco II Cases, supra,* 46 Cal.4th at 328. Plaintiffs made purchases and lost out on a $20 Reward as a result of AutoZone's deceptive conduct. (Yohalem Decl., Ex. Y; Shenkman Decl. at ¶¶ 5-10; Hughes Decl. at ¶¶ 5-8; Pawlak 122:23-123:4.) AutoZone has acknowledged that such Rewards were the "property of the people who were entitled to use the rewards." (Clawson 107:7-11). Accordingly, Plaintiffs were damaged. To bring class-wide claims under these statutes, Plaintiffs need not show either causation or actual damages on behalf of the class. *Steroid Hormone Product Cases, supra,* 181 Cal.App.4th at 155 (certifying classes under FAL and UCL statutes and recognizing restitution was appropriate of any funds the defendant "may have…acquired by means of" its violations of these statutes).

The UCL and FAL allow for restitution and injunctive relief, but not damages. Cal. Bus. & Prof. Code §§ 17203; 17535; *In re Tobacco II Cases, supra,* 46 Cal.4th at 312. Injunctive relief is proper where "a threat that the misconduct to be enjoined is likely to be repeated in the future." *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 465. Here, AutoZone continues to deceptively market its Rewards Program. (Pawlak 190:8-202:12; Yohalem Decl., at ¶¶ 27-36, Ex. X.). Class-wide restitution is warranted if Plaintiffs can show "the existence of a 'measurable amount' of restitution, supported by the evidence." *Vioxx Cases, supra,* 180 Cal.App.4th at 136. Here, AutoZone's records detail expired rewards and credits, which can be used to determine a "measurable amount" of restitution. (Pawlak 121:2-6.). As with similar cases of consumer misrepresentation, this case warrants certification of Plaintiffs' UCL and FAL claims. *McAdams, supra,* 182 Cal.App.4th at 192 (reversing denial of class certification on UCL claims where defendant failed to disclose defects to consumers); *Steroid Hormone Product Cases, supra,* 181 Cal.App.4th at 155; *Massachusetts* Mutual, *supra,* 97 Cal.App.4th at 1291.

4. Fraud (Sixth Cause of Action)

Common issues also predominate for Plaintiffs' common law fraud claim with respect to Subclass 1, since AutoZone's change to its program and its impending "impact to Credit and Reward Balances" was widely contemplated, but not disclosed for years prior. (E.g. Yohalem Decl., Ex. T at 81071.) California courts have long recognized that common law fraud claims may lend themselves to the class action device where they may be proved through common proof. *Vasquez, supra,* 4 Cal.3d at 811-812; *Marler, supra,* 199 Cal.App.4th at 1463-1464 (reversing and remanding denial of class certification on common law fraud claim.) Here, all of the necessary elements of fraud may be proven on a class-wide basis through common evidence. Since AutoZone made the same material representations, the truth or falsity of the representations will be the same for all subclass members. Since, the relevant advertisements and decision to change the Rewards Program were made at the corporate level, the scienter requirements for fraud will be the same for the entire subclass. (Pawlak 14:14-20:14; 45:21-46:9.) Finally, as with the CLRA claims,

reliance may be proved on a class-wide basis through common proof based on the materiality of AutoZone's misrepresentations. *Vasquez, supra,* 4 Cal.3d at 811-812.

D. Plaintiffs Satisfy Typicality And Adequacy

Plaintiffs satisfy the typicality and adequacy requirements for class certification. Typicality is satisfied if the "class representative has claims or defenses typical of the class." *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1090-1091. This does not require that the class representatives have "*identical* interests with the class members," only that they be "s*imilarly* situated." *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46 (emphasis in original). Plaintiffs were exposed to the same advertising message as both subclasses and based on this message, they made purchases for which their Reward Credits expired. (Yohalem Decl., Ex. Y; Shenkman Decl. ¶¶ 5-10; Hughes Decl. 5-8.) They made such purchases both before AutoZone provided any purported notice of its National Plan Conversion and after AutoZone allegedly provided notice of its National Plan Conversion. (*Id.*) This satisfies the typicality requirement for both subclasses. *McAdams, supra,* 182 Cal.App.4th at 186-187. (Plaintiffs proper representatives where they were members of only one of four categories of purchasers of product, but with respect to all purchasers, Defendant failed to disclose material facts). The fact that Plaintiffs, a married couple, shared an account does not change things or make them atypical. (Clawson 45:20-48:6; Pawlak 37:22-38:7.)

Plaintiffs and their counsel also are adequate representatives who have and will continue to vigorously represent the class' interests. *See, e.g., Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 352-353 (adequacy exists where Plaintiffs' interests not antagonistic to the class and Plaintiffs and their counsel could "adequately represent the class by vigorously and tenaciously protecting the class members' interests"). Plaintiffs and their counsel have aggressively pursued this case for two years, won motion practice in federal and state court, reviewed hundreds of thousands of pages of documents, and conducted and defended multiple depositions. (Yohalem Decl. ¶ 3; Lapine Decl., ¶ 2.) Plaintiffs, who closely follow this case, bring it to see justice done for the millions of

Californian, who, like themselves, made purchases from AutoZone under false pretenses. (Shenkman Decl. ¶¶ 14-17; Hughes Decl. ¶¶ 9-11.) Moreover, both class firms have high-stakes litigation experience, including class actions and mass torts, and have the resources to pursue this case. (Yohalem Decl. ¶¶ 39-48; Bonder Decl. at ¶ 2; Lapine Decl. ¶3.).

In the interests of full transparency, Waskowski Johnson Yohalem LLP ("WJY"), one of the class firms, had a prior co-counseling relationship with Shenkman & Hughes PC, the class representatives' firm. That case is over and did not result in any revenue for either firm. (Yohalem Decl. ¶¶ 50-57; Shenkman Decl. ¶¶ 19-24.) Mr. Yohalem also briefly co-counseled with Shenkman & Hughes PC in another case which did not result in any revenue while he was an associate at his former firm, Scandaglia & Ryan. (Yohalem Decl. ¶¶ 58-60; Shenkman Decl. ¶ 25-26.) WJY and Shenkman & Hughes' practices now differ significantly and it is unlikely they will co-counsel again in the foreseeable future. (Yohalem Decl. ¶ 63; Shenkman Decl. ¶¶27-29.) In particular, Shenkman & Hughes PC now focuses on remedying violations of the California Voting Rights Act, a California-specific subject matter for which it has received much acclaim, but with which WJY, an Illinois firm that practices primarily commercial litigation has no involvement or experience. (Yohalem Decl ¶ 63; Shenkman Decl. ¶ 27-29.). Yohalem and Shenkman knew each other from their overlapping time attending Columbia Law School and have remained in touch. (*Id.*) Rosenfeld, Meyer & Susman LLP ("RMS"), the other class firm, has no prior relationship with Shenkman & Hughes PC or its principals. (Lapine Decl. ¶4.).

This limited prior co-counsel relationship is far from an ongoing close business relationship that might pose an adequacy issue or make Plaintiffs unable to protect the interests of the class. *See*, *Richmond*, *supra*, 29 Cal.3d at 470 ("only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status"); *compare Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1275 (disqualifying counsel because of a "close business association" where class representative had been co-counsel in 13 other cases, including 6 active cases and where

class representative's own firm was initially co-counsel in the same proceeding).[4]

E. The Class Device Is Superior to Any Conceivable Alternative

Lastly, here, there are "substantial benefits from certification that render proceeding as a class superior to the alternatives" as required for non-CLRA claims. *See, e.g., Brinker, supra,* 53 Cal.4th at 1021. As set forth in Plaintiffs' Trial Plan, there are millions of small-dollar claims that can be decided on a class-wide basis by applying objective criteria to common evidence, namely AutoZone's class-wide representations, which AutoZone has conceded were material. (*see* Trial Plan, filed concurrently.) Class-wide damages for each subclass can be calculated based on AutoZone's records; this protects AutoZone's due process rights. *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 752-753; *Bruno v. Super. Ct.* (1981) 127 Cal.App.3d 120, 128-129. Accordingly, this Court should certify both subclasses under California's longstanding rule that "[g]enerally, a class suit is appropriate when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer" *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1537.

IV. CONCLUSION

For the reasons stated above, Plaintiffs request that the Court certify their proposed subclasses.

DATED: March 21, 2018

WASKOWSKI JOHNSON YOHALEM LLP

By: _____
Seth Yohalem

DATED: March 21, 2018

ROSENFELD, MEYER & SUSMAN LLP

By: _____
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[4] Should the Court find Plaintiffs unsuitable class representatives, Plaintiffs request the Court grant leave to amend to name new representatives, per California law. *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 999 (lack of adequate class representative does not justify denial of class certification. Court must allow Plaintiffs an opportunity to amend to name a suitable class representative); *see also Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772, 776-777¶ .