WASKOWSKI JOHNSON YOHALEM LLP
SETH YOHALEM, ESQ. (Il. 6284300)
954 W. Washington Blvd. Suite 322
Chicago, IL 60607
Telephone: (312) 278-3156
Fax: (312) 690-4641
Admitted pro hac vice

ROSENFELD, MEYER & SUSMAN LLP
TODD W. BONDER (State Bar No. 116482)
tbonder@rmslaw.com
RYAN M. LAPINE (State Bar No. 239316)
rlapine@rmslaw.com
232 North Canon Drive
Beverly Hills, California 90210-5302
Telephone: (310) 858-7700
Facsimile: (310) 860-2430

Attorneys for Plaintiffs
MARY RUTH HUGHES and KEVIN SHENKMAN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL DISTRICT

MARY RUTH HUGHES, an individual and KEVIN SHENKMAN, an individual, on behalf of themselves and all others similarly situated, Plaintiffs, vs. AUTOZONE PARTS, INC., a Nevada Corporation, AUTOZONE, INC., a Nevada Corporation, AUTOZONE.COM, INC., a Corporate entity of unknown origin; and DOES 1-20, Defendants.	Case No. BC631080 **PLAINTIFFS MARY RUTH HUGHES AND KEVIN SHENKMAN'S REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION** Assigned for all purposes to: **Hon. Maren E. Nelson** [Dept. 17] Date: May 2, 2018 Time: 10:00 a.m. Dept: 17 Complaint Filed: August 18, 2016 Discovery Cut-off: None set Motion Cut-off: None set Trial Date: None set

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

I. INTRODUCTION

As explained in Plaintiffs' opening brief, to induce its customers to make purchases, AutoZone heavily advertised that they would "Get $20" when they made five purchases of over $20. But, AutoZone unilaterally changed its Rewards Program, imposing time limits to earn and redeem the promised $20 Rewards that were either never disclosed to its customers at the times they made purchases or were inadequately disclosed. As a result, most California customers, including Plaintiffs, would not "Get $20" from AutoZone when they made five purchases of over $20. Instead, they collectively lost tens of millions of dollars worth of "expired" Rewards Credits and $20 Rewards.

This case is well-suited to the class action device. Every member of Plaintiffs' proposed subclasses was exposed to the same advertising message; enrolled in the same manner in the same 5/20/20 version of AutoZone's Rewards Program for which neither Rewards nor Rewards Credits expired; received the same card; and made purchases of over $20 for which the Rewards Credit and/or Reward expired. The only potentially material difference is between purchases made before and after AutoZone provided (inadequate) notice of its material changes to its Rewards Program; a difference addressed fully by Plaintiffs' proposed subclasses. Moreover, AutoZone's primary defense, that its Terms and Conditions permitted its conduct, applies equally to all class members.

As a threshold matter, much of AutoZone's response to this prototypical class-action fact pattern is to assert a Statement of "Facts" that directly contradict and/or are unsupported by record evidence, but in any event go only to the ultimate merits. This is both a distraction that the Court need not address and improper. Then, relying on more unsupported "facts" and misinterpretations of operative law, AutoZone argues that class certification should be denied because: Plaintiffs lack standing; individual issues predominate; Plaintiffs' claims are not typical; Plaintiffs are inadequate representatives; and the proposed subclasses are not ascertainable.

All of these arguments fail. ***First***, Plaintiffs have standing. Plaintiffs made five purchases of over $20 that they would not have otherwise made had they known about the

time limitations imposed by AutoZone and they lost out on a $20 Reward as a result. ***Second***, common issues predominate. AutoZone's conduct and its customers' experience were materially the same for each putative class member and the common legal issues this raises predominate over the hypothetical and/or irrelevant individual issues AutoZone postulates. ***Third***, Plaintiffs easily satisfy the operative legal standard for typicality, despite AutoZone's ignoring of that standard. ***Fourth***, Plaintiffs are adequate representatives who will protect the interests of the class. They do not have the "extensive business relationship" with class counsel that AutoZone claims. ***Fifth***, the class definitions make the subclasses readily identifiable through objective characteristics and common transactional facts. For these reasons, the Court should certify Plaintiffs' subclasses.

II. AUTOZONE'S "FACTS" CONTRADICT THE RECORD

AutoZone's Statement of "Facts" is designed to portray its retroactive imposition of new, previously undisclosed, conditions so as to deprive its customers of the rewards they were promised as something other than a deliberate and deceitful effort to enrich AutoZone. The Court should not decide this issue at the class certification stage *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440. However, many of the "facts" are baseless and contrary to the record.[1] Some examples:

AutoZone contends that "acceptance of the Terms and Conditions was an express condition of the participation in the program." (Opp. Br. at 3.) But the record differs:

> Q. And did anyone ever have to like specifically agree to anything to get the rewards card?
> A. No.

(Clawson 40:17-19; *see also* Pawlak (during enrollment, members ***"were not asked to agree to anything."***); Yohalem Decl., Ex. L at AZ 365818 ("Terms and conditions are not accepted at time of enrollment in store.")

[1] Plaintiffs also object to much of the evidence cited by AutoZone and are concurrently filing such objections. In addition, AutoZone filed meritless objection to Plaintiffs' evidence, many of which were completely frivolous and are now withdrawn. Plaintiffs are filing a formal response to the rest. Finally, while Plaintiffs previously intended to move to compel documents AutoZone promised to produce but did not, after considering the limited record evidence AutoZone cites in its brief, Plaintiffs do not believe it necessary.

AutoZone claims its reference to "legal compliance" on a power point slide titled "Industry Standards and Where We Suck" means "AutoZone was at industry standards with respect to legal compliance." (Bernadette Pawlak Decl. at ¶ 9; Yohalem Decl., Ex. U at AZ 350386.) However, when shown the powerpoint, Bernadette Pawlak, the director of AutoZone's loyalty program, testified that acceptance of terms and condition was an area where AutoZone was trying to improve and explained that her pre-AutoZone industry experience was that terms and conditions were signed electronically. (Pawlak 208:15-209:14; 220:23-221:22; 226:6-228:7.)

AutoZone claims that changes to its Rewards Program were not meant to enrich AutoZone by increasing breakage. (Opp. Br. at 5.) But Kevin Clawson, the marketing manager for AutoZone's loyalty program during the relevant time, testified:

> Q. So one of the benefits to AutoZone of the conversion is an extra $6.3 million in breakage; is that right?
> A. Yes.

(Clawson 102:21-24; *see also* Yohalem Decl. Ex. S at AZ 46897 ("opportunity to reduce some costs in FY15 as we move more customers from 'no expiration' to '3 month expiration' on the new program") and Ex. R (calling increased increase in breakage "tangible and intagible [sic] benefit" of the conversion).) These are only some of the examples of AutoZone misstating the record to suggest, falsely, that this case lacks merit.

III. PLAINTIFFS HAVE STANDING TO BRING THIS CASE

As Plaintiffs explained in their opening brief, Plaintiffs have standing because they made purchases and lost out on a $20 Reward as a result of AutoZone's deceptive conduct. (Opening Br. at 16). Without directly addressing this argument, AutoZone claims that Plaintiffs do not have standing[2] because (1) they never had an issued Reward expire; (2) they could have avoided the expiration of their Rewards by making additional purchases within AutoZone's unilaterally (and retroactively) imposed timeframe; and (3) Reward Credits have no economic value. (Opp. Br. at 8- 9.) AutoZone misunderstands standing.

[2] The typicality and commonality arguments AutoZone raises have nothing to do with *standing*. (*See* Opp. Br. at 8.)

To have ***standing***, Plaintiffs need only establish that their ***own*** damages were caused by AutoZone's conduct. *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 328. Plaintiffs each testified that they would not have made any of their $20 purchases at AutoZone if they had known AutoZone would impose a 12-month timeframe on earning a Reward or a three-month time frame on redeeming it. (Shenkman Decl. ¶¶ 6-10; Hughes Decl. ¶¶6-8.) This exact fact pattern satisfies standing:

> A consumer… can satisfy the standing requirement of section 17204 by alleging… that he or she would not have bought the product but for the misrepresentation. That assertion is sufficient to allege causation—the purchase would not have been made but for the misrepresentation. It is also sufficient to allege economic injury.

Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 330; *see also Brod v. Sioux Honey Ass'n Coop* (N.D.Cal. 2012) 895 F.Supp.2d 972, 978) (similar). Moreover, AutoZone admits that $20 Rewards have economic value and Plaintiffs would have earned a $20 Reward were it not for AutoZone's change to its Rewards Program. (Clawson 105:21-106:11; Pawlak 122:23-123:4.) Furthermore, Rewards Credits themselves can be used to earn a Reward. While AutoZone tells this Court that the Rewards Credits it took away from its customers have "no economic value," it deemed unauthorized transfers of Rewards Credits by its employees to be "tantamount to stealing." (Pawlak 78:18- 81:9.)

IV. COMMON ISSUES PREDOMINATE FOR EACH OF PLAINTIFFS' CLAIMS

As set forth in Plaintiffs' opening brief, the facts common to each subclass create common issues which predominate over individual issues. First, all members of both subclasses enrolled in the same 5/20/20 version of AutoZone's Rewards Program under which neither Rewards nor Rewards Credits ever expired. (Yohalem Decl., Ex. C at AZ 75, Ex. D at Amended Answer to Interrog. 10, Ex. E at AZ 49943.) Second, all members of both subclasses went through the same enrollment process at an AutoZone store prior to August 1, 2014 and made purchases in the same manner. (Pawlak 31:18-32:8; Clawson 42:19-23.) While AutoZone now claims that this constituted acceptance of its Terms and Conditions, it does not dispute that the process was the same for everyone. (*Id.*) Moreover,

the Terms and Conditions, to the extent they govern, are also the same for everyone. (Yohalem Decl., Ex. D at Amended Answer to Interrog. 10.)[3] Third, AutoZone directed a long-running advertising campaign message of "Get $20 When You Make 5 Qualifying Purchases of $20 or More" to all members of both subclasses. (Yohalem Decl. Ex. F at AZ 382868; Clawson 193:11-18; Pawlak 14:8-21:14; 22:10-24:8.) This consistent message was "basically the same" across all of AutoZone's advertising and part of Ms. Pawlak's job was to "keep messaging consistent throughout [AutoZone's] advertising." (Clawson 193:11-13; Pawlak 21:15-18.) Fourth, all members of both subclasses made purchase(s) of over $20 for which they lost the Reward Credit and/or Reward they originally earned from the purchases.

The one fact that potentially distinguishes class members from one another is the "notice" and change in advertising that AutoZone purports to have provided with its National Plan Conversion beginning August 1, 2014. (Yohalem Decl., Ex. K at Amended Answer to Interrog. 5.) This may differentiate the subclasses from one another, but within each subclass, it does not create a material difference. Members of Subclass 1 all made purchases ***before*** August 1, 2014, when AutoZone concedes they had no reason to know that Rewards or Rewards Credits could expire. (Clawson 164:12-165:15; Pawlak 147:13-24.) Members of Subclass 2 all made purchases ***after*** August 1, 2014. To the extent AutoZone's notice and new advertising changed things, AutoZone concedes that it did so in the same way for all members of its 5/20/20 plan: everybody "would [] have gotten the same message" and "there were no differences at least among members who were involved in the 5/20/20 plan." (Pawlak 190:1-7.) Against these many common facts, AutoZone raises several flawed arguments.

A. <u>Breach of Contract</u>

[3] AutoZone claims some members enrolled online, but these members are excluded from the class. (Opening Br. at 2-3.) Moreover, this option did not even begin until July 2014, one month before the operative cutoff date for the class members to have enrolled, so the number of members even potentially affected by this option is minimal. (Pawlak 30:1-5.) AutoZone also has attempted to claim language on the back of members Rewards Card provides a defense. However, AutoZone concedes all members of its Rewards Program received cards with the exact same language. (Pawlak 36:5-20).

As set forth in Plaintiffs' opening brief, common issues predominate on their contract claims for Subclass 1. All members received the same offer from AutoZone through its advertising and accepted the offer and performed on the contract in the same manner by enrolling in the Rewards Program and making purchases of over $20. (Opening Br. at 12-13.) The subjective views of class members are irrelevant to issues of contract formation and interpretation. (Opening Br. at 13 (citing *Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1111).) Moreover, AutoZone breached the contract in the same manner, when it changed the 5/20/20 Program and all class members were damaged when they lost Reward(s) and/or Reward Credit(s) earned through purchases made before the change. (Opening Br. at 13.)

AutoZone does not dispute that all members of Subclass 1 entered into contractual relationships with AutoZone, but challenges that the relationships were all the same. (Opposition Br. 10.) AutoZone claims that the contracts could have been different because of "(1) whether or not class members received or were aware of the Terms and Conditions; (2) agreed or accepted the Terms and Conditions. (3) understood that participation in the Rewards Program was subject to the Terms and Conditions, and/or (4) reasonably believed there were no Terms and Conditions that governed the program." (Opposition Br. at 11). AutoZone likewise claims acceptance, performance and breach are individual issues because of differences in the mindsets of class members. (Opposition Br. at 12-13.)

AutoZone's claim that the operative contracts could be different is based on a faulty premise that what individual class members were aware of, knew, or actually believed matters to any of these issues. While it is true as AutoZone posits, that assent may be manifested in many ways, "[m]utual assent is determined under an ***objective standard applied to the outward manifestations or expressions of the parties***, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." *Long v. Provide Commerce, Inc.* (2016) 245 Cal.App.4th 855, 862 (internal citations omitted) (finding no agreement to linked terms of use based on internet purchase absent express assent). AutoZone has not identified any manner in which the "outward

manifestations or expression of the parties" differed from class member to class member. Indeed, the record evidence is that the outward manifestations of all class members were materially the same. They all received the same messaging from AutoZone, enrolled in AutoZone Rewards in the same manner, and made purchases in the same way. (Clawson 79:25-80:25, 164:12-165:16, 193:11-18; Pawlak 31:18-32:8, 42:19-23, 147:13-24.)

Finally, even if AutoZone could articulate a legal theory through which some class members agreed to its Terms and Conditions, the Terms and Conditions still would not permit AutoZone to impose new conditions after the time of purchase which negatively affected class members' accrued rights. Under California law, a contractual right to unilaterally modify a contract, such as the right AutoZone purports to have relied upon in its Terms and Conditions, 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). Thus, even if some class members agreed in some way to AutoZone's Terms and Conditions, AutoZone still could not make a change in 2014 which negatively affected the rights they had earned through their earlier purchases, such as by adding expiration dates that previously did not exist. If this duty of good faith were absent, the unilateral modification term would be unconscionable. *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 706-707. Again, this is a common question and does not depend on any class member's individual experience or subjective belief.

B. <u>CLRA</u>

As set forth in Plaintiffs' opening brief, common issues predominate for Plaintiffs' CLRA claims because: (1) AutoZone provided the materially identical message to all members of each subclass, the legality of which will be tested objectively; (2) all members of both subclasses were damaged by AutoZone's deceptive messaging by losing Rewards and/or Rewards Credits that would not have expired but for the conditions AutoZone failed to disclose and/or adequately disclosed; and (3) AutoZone has conceded that both its advertising message that customers would "Get $20" when they made five purchases of

over $20 and the time to earn and redeem Rewards were important considerations for its customers, and thus material, so reliance can be presumed class-wide. (Opening Br. at 13-14.) AutoZone makes several flawed arguments in response.

First, AutoZone claims there is nothing "false" in its common advertising message that customers would "Earn a $20 Reward when you make 5 purchases of $20 or more." (Opp. Br. at 12-13.) But, this advertising ***was*** literally false. For example, Plaintiffs made five purchases of over $20 but did not "Earn a $20 Reward." (Yohalem Decl., Ex. Y; Pawlak 122:23-123:4.) Further, deceptiveness is broader than falsity; "[u]nder the CLRA, even if representations and advertisements are true, they may still be deceptive because [a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable." *Jones v. Credit Auto Center, Inc.* (2015) 237 Cal.App.4th Supp. 1, 11 (citations omitted); *see also Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1357-1358,1362 (claim that satellite television had 50 channels potentially deceptive where all channels were not available simultaneously.) In any event, this is a merits question irrelevant to class certification. *Linder*, *supra*, 23 Cal.4th at 439-440.

Next, AutoZone claims that "Plaintiffs failed to produce evidence establishing that all members relied on uniform deceptive advertising regarding the expiration of Rewards and Credits." (Opp. Br. at 13.) However, Plaintiffs did not need to make this showing. It is enough to show that the misrepresentations were material, at which point, class-wide reliance is presumed. *McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174, 183-184 (finding that manufacturer's failure to disclose that color of roof tiles would fade prior to the end of their useful life permitted class-wide inference of causation regarding its affirmative statements that tiles had 50-year lifespan and were maintenance free); *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 156-157 ("[t]he fact a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all").

AutoZone's claim that some members may have read its Terms and Conditions also offers no defense to Plaintiffs' CLRA claims. *Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 909 (finding economic injury under the CLRA where Plaintiffs were lured by misleading advertisement regarding price discount, but were still aware of true price before they made the purchase); *Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, 13 (similar); *Walters v. Target Corp.*, (S.D.Cal. Oct. 18, 2017, No. 3:16-cv-01678-L-MDD) 2017 U.S.Dist. LEXIS 173498, at *6-7) ("it simply does not follow that one can affirmatively misrepresent the nature of a product and then use fine print in a contract to immunize it from consumer protection law claims"); *Williams v. Gerber Prods. Co.* (9th Cir. 2008) 552 F.3d 934, 938-39 (similar).

AutoZone next asserts that "class members have not been exposed to a single, uniform 'deceptive' representation that can be addressed by common proof." (Opp. Br at 14.) AutoZone cites no record evidence which supports its assertion and it is unclear what exactly AutoZone is arguing. To the extent AutoZone is merely arguing that the messaging that accompanied the National Plan Conversion differentiates class members, its concern is remedied by Plaintiffs' subclasses. If AutoZone is arguing that class members were not exposed to the materially identical message, then its claim contradicts the record evidence that within each subclass, each member received the same message. (Yohalem Decl., Ex. F at AZ 382868; Clawson 193:11-18; Pawlak 14:8-21:14; 22:10-24:8, 190:1-7.) Finally, if AutoZone is claiming that class members might have relied on different individual advertisements that did not differ materially, then it is mistaken as to the law; the cumulative impact of a long-term advertising campaign can give rise to CLRA claims. *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1249-1262.

AutoZone next claims that Plaintiffs cannot show materiality. (Opp. Br. at 14.) However, as Plaintiffs' set forth in their opening brief, AutoZone's advertising and the undisclosed expiration dates were highly material and AutoZone witnesses conceded as much. (Clawson 17:6-18:2, 115:20-116:11; Pawlak 137:15-138:8; 139:12-140:8.) This establishes class-wide causation. *Steroid Hormone Product Cases* (2010) 181 Cal.App.4th

145, 156-157. *Caro v. Procter & Gamble Co.* (1992) 18 Cal.App. 4th 644, 677 is inapposite. In *Caro*, there were express disavowals of the alleged misrepresentation on the product face and the named plaintiff was not even misled. *Id.* at 668.

Finally, AutoZone argues that its Terms and Conditions (if accepted by class members as AutoZone claims) cannot give rise to a CLRA unconscionability claim. (Opp. Br. at 14.) This too is a merits argument. In any event, AutoZone's claim, that its Terms and Conditions, printed on the back of tear sheet in 7 to 8 point font, are not procedurally unconscionable, because "the consumer always has the option of simply forgoing the activity" is wrong. AutoZone cites only an unpublished federal case. Controlling ***California*** law provides that "absent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives." *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 585. Notably, AutoZone does not dispute substantive unconscionability.

C. UCL and FAA, and Fraud

AutoZone's claim that individual issues predominate for Plaintiffs' UCL and FAA claims tracks its flawed CLRA argument that members were not exposed to the same advertisement. As explained above, the record evidence shows there were no material differences in the messaging members of each subclass received. In any event, the California Supreme Court has recognized the propriety of UCL and FAA claims in the context of long-term advertising campaigns such as this one. *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 324. Moreover, California courts reject AutoZone's claim that because some members of its Rewards Program might have known about the expiration dates, no UCL/FAA class action is viable. *Massachusetts Mutual Life Ins. Co .v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292 (certifying class despite evidence that defendant has "warned purchasers and its agents" of the allegedly fraudulent conduct).

AutoZone also claims Plaintiffs cannot show class-wide reliance with respect to their fraud claim. However, as with their CLRA claim, Plaintiffs can establish class-wide reliance through the materiality of AutoZone's misrepresentations and omissions. *Vasquez*

v. Superior Court (1971) 4 Cal.3d 800, 811-812.

D. AutoZone Misstates California Law With Respect to Damages

Finally, AutoZone claims that individual inquiries regarding the calculation of damages defeat predominance. Citing only the ***federal*** *Comcast Corp. v. Behrend* decision, AutoZone argues that certification must be denied because "Plaintiffs have offered no evidence on how 'damages are capable of measurement on a class-wide basis.'" (Opp. at 15-16 citing *Comcast Corp. v. Behrend* (2013) 133 S.Ct. 1426, 1433.) However, California Courts have considered and rejected this doctrine, ruling that "[d]amage calculations have little, if any, relevance at the certification stage before the trial court and parties have reached the merits of the class claims." *Williams v. Superior Court* (2013) 221 Cal.App.4th 1353, 1365-1366 (***"contra, Comcast Corp. v. Behrend"***).[4] As Plaintiffs pointed out but AutoZone ignored, under ***California*** law, so long as there are common issues as to the existence of damages, a class action may be maintained. (Opening Br at 13, 15 (citing *Marler v. E.M. Johansing, LLC* (2011), 199 Cal.App.4th 1463; *McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174, 186-187).)

V. PLAINTIFFS SATISFY TYPICALITY

As Plaintiffs explained in their opening brief, they satisfy the typicality requirement for both subclasses because just like members of Subclass 1, they made at least one purchase of over $20 from AutoZone before August 1, 2014 for which they lost a credit and/or reward and just like members of Subclass 2, they made at least one purchase after August 1, 2014 for which they lost a credit and/or reward. (Opening Br. at 18.) AutoZone responds by claiming that Plaintiffs cannot satisfy typicality because of "facts, circumstances, and allegations that are unique to them." (Opp. Br. at 16). However, this is not the operative legal standard.[5]

[4] In any event, as shown in Plaintiffs' trial plan, damages can be determined at trial on a class-wide basis using aggregate totals of expired Rewards and Rewards Credits. Because Plaintiffs trial plan was merely illustrative, Plaintiffs shall not separately reply further.

[5] *Fireside Bank v. Superior Court* (2007) 40 Cal.4th. 1069, 1091 merely held that unique defenses do not defeat typicality unless they are "likely to become a major focus of the litigation." The language cited by AutoZone comes from its explanation for why the individual defenses raised in the case do not defeat typicality.

Typicality merely "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.***" *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1509 (emphasis added, citations omitted). The test for typicality is only "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." *Id.* (citations omitted). AutoZone's arguments all fail under this standard:

- AutoZone claims that Plaintiffs have not themselves had a $20 Reward expire. (Opp. Br. at 16-17.) But as with every other class member, Plaintiffs suffered the "same or similar injury" of not getting the benefits promised to them when they made purchases from AutoZone of over $20;
- AutoZone claims other class members had different views of the "the contractual relationship between them and AutoZone" and AutoZone's expiration of Rewards and Rewards Credits (Opp. Br. at 17[6]), but cites no evidence for this claim or legal principle that would make it matter;
- AutoZone claims other class members were aware of AutoZone's notice, but again cites no evidence for the claim or legal principle which would make it relevant;[7]
- AutoZone claims Plaintiffs had "minimal engagement with the Rewards Program" and that their "purchasing behavior" was "atypical" (Opp. Br. at 17-18), but again offers no evidence this was true or any legal authority for why it would be relevant.

Put simply, AutoZone's typicality arguments have no merit.

VI. PLAINTIFFS ARE ADEQUATE CLASS REPRESENTATIVES

AutoZone also claims that Plaintiffs are not adequate class representatives, because their alleged "extensive business relationship" with class counsel, Seth Yohalem, would

[6] AutoZone claims Plaintiffs differ from Rewards Members who enrolled online, but these persons are excluded from the class definitions. (Opening Br. at 2-3.)

[7] AutoZone claims that class members "acted on the notice" by "redeeming their rewards or credits" and by "seeking reinstatement of any expired rewards or credits." However, the class definition includes only persons who lost rewards and/or credits and for whom the expired rewards or credits were never reinstated. (Opening Br. at 2-3.)

cause them to "have an interest in maximizing the recovery of attorney's fees" rather than seeking the maximum recovery for the class. (Opposition Br. at 18-19.) AutoZone's claim is false and insulting.

The relationship between Mr. Yohalem and Plaintiffs (or more accurately, their law firm Shenkman & Hughes, PC) is as described in Plaintiffs' opening brief and accompanying declarations. Both Mr. Yohalem and Mr. Shenkman have remained in touch since they overlapped in law school for one semester and, through Mr. Shenkman, Mr. Yohalem has known Ms. Hughes for many years. (Yohalem Decl. at ¶ 49, Shenkman Decl. at ¶20.) While Mr. Yohalem and Plaintiffs are friends (although they would not characterize their relationship as "close friends"), there is no part of their friendship that might compromise their ability to represent the class' interests.

The relationship between Mr. Yohalem and Plaintiffs is most certainly not the "extensive business relationship" AutoZone asserts, or the sort of "close business connection" that might disqualify Plaintiffs from serving as class representatives. The entirety of their co-counseling relationship consists of two putative class actions filed in 2013, while Mr. Yohalem was an associate at his former firm. (Yohalem Decl. at ¶¶ 51-58; Shenkman Decl. at ¶¶ 21-26.) Neither case generated any revenue. (*Id.*) One ended almost immediately after being filed when the Defendants' parent company declared bankruptcy. (Yohalem Decl. at ¶ 59; Shenkman Decl. at ¶ 26.) The other case generated no revenue and ended with a walk-away individual settlement after the Court entered summary judgment. (Yohalem Decl. at ¶¶ 54-56; Shenkman Decl. at ¶¶ 23-24.) Neither firm has any intention of partnering again with the other in the future, as both Mr. Yohalem and Mr. Shenkman, officers of the Court, have attested to under oath. (Yohalem Decl. at ¶ 63; Shenkman Decl. at ¶ 28.) There also has never been much of a referral relationship between the firms and there is presently none. (Yohalem Supp. Decl., Ex. DD, ("Shekman Dep.") at 46:21-47:11.)[8] It is simply not the case that Plaintiffs, who have

[8] AutoZone's cites a Breitbart.com "article" attacking Mr. Shenkman's work protecting Latino voting rights and various other media sources. According to AutoZone, this "notoriety" disqualifies Mr. Shenkman from being a class representative because class

never received any fees from any part of their supposed "extensive business relationship" with Mr. Yohalem, have a financial interest in selling out the class to enrich Mr. Yohalem.

"[O]nly a conflict that goes to the heart of the very subject matter of the litigation" will render class representatives inadequate. *E.g. Richmond*, 29 Cal.3d at 470. While a co-counseling relationship can potentially be a basis for inadequacy, courts are directed to examine the particular facts of each case. *Susman v. Lincoln American Corp.* (7th Cir. 1977) 561 F.2d 86, 93-96. Under *Apple v. Superior Court*, the operative test is whether there is a "close business connection" between class representatives and their counsel. *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1275. Here, there is presently no business connection whatsoever, no future business connection contemplated, and only a minimal business connection in the past. AutoZone has cited no case (nor are Plaintiffs aware of any) where a co-counseling relationship as limited as this one has been held to make class Plaintiffs inadequate, particularly where the co-counseling relationship had ended. In *Apple*, the class plaintiff and class counsel were co-counsel in 13 other cases, including 6 active cases and including the litigation that was at issue. The cases cited by the *Apple* Court also involved far more extensive co-counseling and financial interdependence. Other courts have allowed Plaintiffs with far more intertwined relationships with class counsel to serve as class representatives. *Price v. FCC Nat'l Bank* (N.D.Ill. Aug. 18, 1992, No. 92 C 2164) 1992 U.S.Dist.LEXIS 12497, at *6-7) (certifying class despite fact that one Plaintiff's sister was employee of class counsel and Plaintiff had received free legal advice from him and another Plaintiff had worked in a law office of husband who had served as co-counsel of class counsel in the past.); *Gross v. GFI Grp., Inc.* (S.D.N.Y. Aug. 23, 2017, No. 14cv9438) 2017 U.S.Dist.LEXIS 134908, at *2-3, 9) (plaintiff adequate despite being childhood friends and brother-in law of class counsel).

Moreover, the concern articulated in *Apple* of the named plaintiff "simply lending his name to a suit controlled entirely by the class attorney" is absent here. *Apple* at 1279.

---

members may not "want to partake in the instant action." (Opp. Br. at 19.) It is unlikely most Californians share Breitbart.com's view of Latino voting rights, but regardless it is irrelevant to whether Mr. Shenkman will protect the class' interests.

Here, Plaintiffs were upset by AutoZone's conduct and thought the matter well suited to the class action device, at which point, Mr. Shenkman reached out to Mr. Yohalem to pursue the matter. (Shenkman Dep. 11:14-12:10; Shenkman Suppl. Dec. at ¶ 4.) Since filing the case, Mr. Shenkman has spent dozens of hours overseeing class counsel's work for which it is highly unlikely he will be compensated in manner commensurate to the effort he contributed. (Shenkman Dep. at 42:9-43:8.) In addition, as a practical matter, Mr. Shenkman and Ms. Hughes are likely to provide better protection to the class than most class representatives. Plaintiffs have a strong understanding of class action law and regularly appear in the California state courts, including having recently appeared before this Court. (Shenkman Supp. Decl. at ¶ 8.) Accordingly, if for no other reason than to uphold their professional reputations, they will be incentivized to uphold their fiduciary duties to the class. (*Id.*) Finally, while it is not the only important protection for the class, if there were a settlement, this Court could reject it if there were reason to think any of AutoZone's concerns were present.

VII. THE SUBCLASSES ARE ASCERTAINABLE

Finally, AutoZone claims Plaintiffs' proposed subclasses are not ascertainable, because they include members who AutoZone asserts do not have claims. However, the concern AutoZone raises is a ***predominance*** issue addressed above. ***Ascertainability*** is merely concerned with whether class members can be readily identified through "objective characteristics" and "common transactional facts." *Evans v. Lasco Bathware, Inc.* (2009) 178 Cal. App. 4th 1417, 1422; *see also Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 706. AutoZone does not dispute that members can be so identified.

VIII. CONCLUSION

For foregoing reason, Plaintiffs request that the Court certify their proposed subclasses.

DATED: April 16, 2018

WASKOWSKI JOHNSON YOHALEM LLP
SETH YOHALEM

By: _____
Seth Yohalem