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16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN FRANCISCO DIVISION

19	FAITH BAUTISTA, Individually and on)	Case No. 3:15-cv-05557-RS
20	Behalf of All Others Similarly Situated,)	
)	<u>CLASS ACTION</u>
21	Plaintiff,)	
)	SECOND AMENDED CLASS ACTION
22	v.)	COMPLAINT
)	
23	VALERO MARKETING AND SUPPLY)	
	COMPANY,)	<u>DEMAND FOR JURY TRIAL</u>
24)	
	Defendant.)	
25)	
)	

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1 Plaintiff Faith Bautista (“Plaintiff”), individually and on behalf of all others similarly
2 situated, brings this Second Amended Class Action Complaint against Defendant Valero Marketing
3 and Supply Company (“Valero”) and, in support thereof, makes the following allegations, which are
4 based upon the investigation of counsel, facts garnered through discovery, Plaintiff’s personal
5 knowledge, and information and belief:

6 **SUMMARY OF THE ACTION**

7 1. This is a class action brought on behalf of a class of consumers who purchased
8 gasoline with a debit card and were unknowingly charged an undisclosed fee by Valero, in direct
9 violation of California’s consumer protection laws and California’s Financial Code. This action
10 seeks to end Valero’s knowing, intentional, and deliberate debit card processing scheme through
11 which it continues to collect substantial profits from consumers, many of whom are elderly or poor
12 and cannot afford to take an additional financial hit from Valero.

13 2. Valero’s gasoline is sold to consumers through its network of wholly owned,
14 franchised, leased, and branded dealers across the country and the state of California. As such,
15 Valero has a direct stake in the success of its Valero-branded dealers. To drive more sales and
16 increase its own revenue, Valero created a two-tiered pricing program for its dealers, which offers
17 gasoline for sale at a “credit” price and a slightly lower “cash” price; a practice referred to herein as
18 “Split Pricing.”

19 3. Split Pricing generates additional sales and revenue for Valero from consumers
20 hoping to lessen the already heavy burden of gasoline costs by paying for gasoline with a form of
21 payment other than credit. Split Pricing also results in additional sales and revenue for Valero from
22 the holders of Valero’s proprietary Valero-branded credit card (the “Valero Card”). One of the key
23 benefits to the Valero Card is that, despite being a credit card, Valero charges cardholders the lower
24 cash price. Without Valero’s Split Pricing program, the Valero Card would lose much of its appeal.

25 4. In addition to increased gasoline sales, Split Pricing also gives Valero an additional
26 revenue stream: fees for processing debit card payments. Valero-branded dealers are contractually
27 required to use Valero’s Credit Card Processing Network (the “Network”) to process all debit card
28 and credit card payments. Through its Network, Valero collects payments and processing fees

1 directly from consumers and, after skimming its share of the profits, pays the balance to the Valero-
2 branded dealer where the sale was made.

3 5. The majority of gasoline purchases in this country are made with a debit card.
4 Consumers consider a debit card to be a form of cash, and unless they are notified otherwise,
5 consumers expect to pay the same price for goods purchased with a debit card that they would pay
6 using paper currency. Recognizing this reality, debit card issuers like VISA and MasterCard have
7 established rules prohibiting undisclosed fees on debit card transactions in order to protect
8 unsuspecting debit card holders. The California Legislature has also taken steps to protect
9 consumers from undisclosed debit card fees through the enactment of California Financial Code
10 Section 13081(b), which requires the “maximum feasible disclosure” of debit card fees and that
11 consumers be given the option to accept or reject the fee.

12 6. Contrary to the expectations of reasonable consumers, as evidenced by the protective
13 actions taken by VISA, MasterCard, and the California Legislature, Valero’s company policy is to
14 charge the higher credit price on debit card purchases. And, despite the fact that Valero has sole
15 discretion and authority over the disclosures that consumers receive, Valero deliberately refuses to
16 disclose its company policy of charging consumers a higher price than they expect to pay.

17 7. The reason for Valero’s deliberate refusal to disclose its debit card processing fee, as
18 required by VISA, MasterCard, and the California Legislature, is clear: more money. In addition to
19 increased revenue from gasoline sales to deceived consumers who would not have purchased
20 Valero’s gasoline but for Valero’s deceptive scheme, Valero also profits by collecting significantly
21 inflated debit card processing fees. While both debit card and credit card transactions carry a
22 processing fee, that fee is significantly higher for credit cards. By charging the same price for both
23 credit card and debit card purchases, Valero is able to collect the higher credit card processing fee on
24 debit card sales.

25 8. Valero has actual knowledge that its policy of charging a credit price on debit card
26 transactions is deceptive, particularly in light of Valero’s Split Pricing signage, which advertises
27 only a cash price and a credit price, and Valero’s refusal to disclose its debit card processing policy,
28 which leads consumers to believe that they will pay the cash price when paying with a debit card.

1 Since 2011, Valero has received many complaints from irate customers who consider a debit card to
2 be a form of cash and, therefore, feel deceived by Valero’s practices. Those complaints continue to
3 roll in, even after Plaintiff filed this lawsuit and served a written demand on Valero to cease its
4 deceptive practices. Despite having actual knowledge of the consumer deception that it is directly
5 causing, Valero refuses to correct its deceptive signage, disclose its debit card processing policy, or
6 change its policy to process debit cards like cash, as consumers reasonably expect.

7 9. Valero’s scheme harms not only the members of the consumer class who collectively
8 have been swindled out of millions of dollars, it also harms the countless competitors of Valero who
9 do the right thing by clearly disclosing any debit card fees and, therefore, lose customers who are
10 under the false impression that Valero charges no fees, and for that reason, choose Valero over its
11 competitors.

12 10. In furtherance of its knowing and intentional scheme to deceive consumers, Valero
13 directly and deliberately engaged in at least four deceptive acts or practices that, both collectively
14 and independently, deceived and continue to deceive reasonable consumers, in violation of
15 California’s Consumers Legal Remedies Act, California Civil Code Section 1750, *et seq.* (the
16 “CLRA”); False Advertising Law, California Business & Professions Code Section 17500, *et seq.*
17 (the “FAL”); and Unfair Competition Law, California Business & Professions Code Section 17200,
18 *et seq.* (the “UCL”). Valero’s unlawful and deceptive acts and practices include:

- 19 • Creating, designing, reviewing, and approving deceptive advertising with
20 actual knowledge that such advertising is deceptive;
- 21 • Disseminating, displaying, and controlling deceptive advertising with actual
22 knowledge that such advertising is deceptive;
- 23 • Processing debit cards at the credit price with actual knowledge that
24 consumers expect to pay the cash price; and
- 25 • Deliberately refusing to disclose or require disclosure of its debit card
26 processing policy with actual knowledge of the consumer deception that its
27 policy causes.

28 11. Valero’s failure to make the “maximum feasible disclosure” of the fees that it
imposes directly on consumers through its debit card processing policy also violates Cal. Fin. Code

1 §13081(b), and Valero’s violation of that statute operates as a predicate for liability under the UCL’s
2 “unlawful” prong.

3 12. By this action, Plaintiff seeks injunctive relief to end Valero’s knowing and
4 intentional scheme to deceive consumers. Specifically, Plaintiff seeks an Order requiring Valero to:

- 5 • Withdraw its deceptive signage from the market;
- 6 • Design future iterations of Split Pricing signage in a manner that puts
7 consumers on notice that Valero charges the credit price on debit card
8 purchases;
- 9 • Clearly disclose its debit card processing policy and the higher fee that it
10 imposes on consumers; and
- 11 • Change its company policy so that Valero processes debit cards at the cash
12 price, as consumers expect.

13 13. Plaintiff also seeks, individually and on behalf of the consumer class, actual damages
14 caused by Valero’s deceptive scheme, as well as punitive damages for Valero’s knowing and
15 intentional violations of law.

16 **PARTIES**

17 *Plaintiff*

18 14. Plaintiff Faith Bautista is a citizen of California residing in San Mateo County.
19 Plaintiff purchased gasoline throughout the Class Period from a number of different Valero-branded
20 dealers in California. Based on the fundamental differences that exist between a debit card and a
21 credit card, including the immediate deduction of cash from a bank account that results in a debit
22 card transaction, Plaintiff considers a debit card to be a form of cash, not credit. Plaintiff never
23 received any prior notice of Valero’s policy of charging the credit price on debit card purchases.
24 Plaintiff would not have purchased gasoline from Valero-branded dealers with a debit card but for
25 Valero’s knowing and intentional scheme to deceive consumers for its own profit.

26 *Defendant*

27 15. Defendant Valero Marketing and Supply Company is a privately held company
28 founded in 1981 that operates as a subsidiary of Valero Energy Corporation and maintains
headquarters at One Valero Way, San Antonio, Texas 78249. Valero is a major supplier of gasoline

1 and sells its gasoline through Valero-branded dealers located throughout the country and the state of
2 California. Valero knowingly, intentionally, and directly engaged in the following acts or practices
3 that, both collectively and independently, deceive reasonable consumers, in violation of California's
4 consumer protection laws:

5 (a) ***First, Valero – not its dealers – created, designed, reviewed, and approved***
6 ***the deceptive advertising with actual knowledge that its Split Pricing signage is deceptively***
7 ***designed.*** As demonstrated by Valero's "Wholesale Branding Manual," Valero has the sole ability,
8 discretion, and authority to design the appearance of the signage and all other elements of its Valero-
9 branded dealers. Valero deliberately designed its Split Pricing signage in a manner that deceives
10 consumers with the specific intent of increasing its own profits through gasoline sales to deceived
11 consumers and inflated debit card processing fees. Despite having actual knowledge that consumers
12 are being misled by its Split Pricing signage, Valero deliberately continues to create, design, review,
13 and approve new iterations of its signage that continue to cause consumer deception.

14 (b) ***Second, Valero – not its dealers – disseminated, displayed, and controlled its***
15 ***deceptive signage with actual knowledge that its signage is deceptive.*** Under the terms of its
16 agreements with dealers, like the "Branded Distributor Marketing Agreement," for example, Valero
17 provides its deceptive Split Pricing signage to its dealers and retains the sole discretion to dictate and
18 change the ***number, type, and location*** of the signage installed at its dealers. Under the terms of
19 those same agreements, Valero maintains ownership of its signage and requires its dealers to return
20 all signage upon the termination of their relationship with Valero. Despite having actual knowledge
21 that its Split Pricing signage is deceptive to consumers, Valero deliberately continues to disseminate,
22 display, and control deceptive signage at Valero-branded dealers in order to continue profiting off
23 the consumer deception that its signage causes.

24 (c) ***Third, Valero – not its dealers – processes debit cards at the higher credit***
25 ***price with actual knowledge that consumers expect to pay the cash price.*** Valero, directly and/or
26 through Valero's payment processing agent, processes debit card payments made at Valero-branded
27 dealers through its Network. Despite having actual knowledge that consumers consider a debit card
28 to be a form of cash and expect to pay the cash price, Valero's company policy is to charge the

1 higher credit price on debit card payments. Valero collects payments directly from consumers and,
2 after skimming its profits and processing fees, pays the remainder to the dealer where the sale was
3 made. Despite having actual knowledge that consumers receive no disclosure of Valero's debit card
4 processing policy, Valero deliberately refuses to change its policy in order to continue profiting off
5 unsuspecting consumers.

6 (d) *Fourth, Valero – not its dealers – deliberately refuses to disclose, or require*
7 *disclosure of, its debit card processing policy, despite having actual knowledge of consumer*
8 *deception.* Through contractual agreements with its dealers, Valero has the sole discretion and
9 authority over the disclosures that consumers receive. Debit card fees are material to consumers, and
10 because Valero has superior knowledge of the fees it imposes on unsuspecting consumers, it has a
11 duty to disclose those fees. Despite having actual knowledge that consumers find Valero's debit
12 card processing policy to be deceptive, Valero deliberately refuses to disclose its debit card
13 processing policy in order to continue profiting off the resulting consumer deception.

14 16. In the alternative, Valero is directly liable for aiding and abetting unlawful and
15 deceptive acts and practices that violate the CLRA, FAL, and UCL. Valero has actual knowledge
16 that consumers are being deceived into unknowingly paying undisclosed fees on debit card
17 transactions. Despite having actual knowledge of the consumer deception, Valero continues to
18 provide substantial and necessary assistance to the deceptive scheme alleged herein, with the specific
19 intent of increasing its own profits. Specifically, Valero knowingly and deliberately provided
20 substantial assistance, and continues to provide substantial assistance, to the deceptive scheme
21 alleged herein by:

- 22 • Creating, designing, reviewing, and approving deceptive signage to be
23 displayed at Valero-branded dealers;
- 24 • Permitting Valero-branded dealers to use and display deceptive signage;
- 25 • Processing debit cards like credit cards and imposing the higher processing
26 fee on debit card holders; and
- 27 • Refusing to disclose or require Valero-branded dealers to disclose Valero's
28 deceptive debit card processing policy.

1 Valero charges the higher credit price on debit card purchases, rather than the cash price that
 2 consumers expect:¹



14
15 22. Split Pricing generates additional sales and revenue for Valero from consumers
 16 hoping to lessen the already heavy burden of gasoline costs by using a form of payment other than
 17 credit. Split Pricing also results in additional sales and revenue from Valero Card purchases. One of
 18 the key benefits to the Valero Card is that, despite being a credit card, Valero charges cardholders
 19 the lower cash price. Without Valero's Split Pricing program, the Valero Card would lose much of
 20 its appeal.

21 ***Reasonable Consumers Expect to Pay***
 22 ***the Cash Price When Using a Debit Card***

23 23. The majority of consumers purchase gasoline with a debit card. When those
 24 consumers drive by Valero's Split Pricing sign, they must make a determination as to which price
 25 will apply to a debit card. A reasonable consumer would invariably conclude that the cash price
 26 applies because consumers consider a debit card to be a form of cash, not a credit card.

27
 28 ¹ A larger version of this image is attached hereto as **Exhibit A**.

1 24. Valero has actual knowledge that consumers expect to pay the cash price when
2 paying with a debit card. Over the years, Valero has received countless complaints from consumers
3 who were deceived by Valero’s deceptive scheme. Those complaints include statements like this:
4 “It’s unfortunate that a company does not a[*sic*] appreciate its customers enough to give them the
5 best price they can when using a form of payment ***that is the same as cash.***” (Emphasis added).

6 25. There are plenty of reasons why reasonable consumers consider a debit card to be a
7 form of cash, not credit. ***First***, whereas consumers must demonstrate positive credit history to obtain
8 a credit card, virtually anyone with a checking account can obtain a debit card to spend the money in
9 his or her checking account in a safe and convenient manner. Many consumers also cannot obtain a
10 credit card because they cannot afford the high interest rates or annual fees that credit card
11 companies charge. These consumers, which include students, the elderly, and other low income
12 Americans, are very aware of the fact that a debit card is not a credit card. And the very poorest
13 Americans who desire the convenience and security of a debit card but cannot even open a checking
14 account must rely on “prepaid” debit cards like the Gold VISA[®] Prepaid Card, which, like other
15 debit card issuers, explicitly warns cardholders that “***This is not a credit card.***”²

16 26. ***Second***, consumer-oriented Internet content consistently draws a distinction between
17 debit cards and credit cards. For example, a July 2010 article in *Consumer Reports Magazine*
18 entitled “Debit or credit: Which card to use?”³ warns consumers that, unlike with credit card
19 transactions:

20 Some hotels, gas stations, restaurants, auto rental companies, and retailers put a hold
21 on the money in your checking account until a debit transaction is processed, which
22 might take up to several days for signature-based payments. What’s more, the
23 amount that’s blocked can significantly exceed the amount of your purchase. These
24 holds can prevent you from accessing the funds in your bank account and result in
25 bounced checks, declined transactions, or overdraft charges.

26 ² Gold Visa Prepaid Card, <https://goldvisa.accountnow.com> (last visited Sept. 21, 2016).

27 ³ *Debit or credit: which card to use?*, CONSUMER REPORTS MAGAZINE (July 2010),
28 <http://www.consumerreports.org/cro/magazine-archive/2010/july/money/-debit-or-credit/overview/index.htm>.

1 27. Likewise, *Investopedia*, an Internet site devoted to investing education, advises
2 consumers that:

3 Credit and debit cards typically look almost identical, with 16-digit card numbers,
4 expiration dates and PIN codes. *But that's where the similarity ends.* Debit cards
5 allow bank customers to spend money that they have by drawing on funds that they
6 deposited with the card provider. Credit cards allow consumers to borrow money
7 from the card issuer up to a certain limit in order to purchase items or withdraw
8 cash.⁴

9 28. *Third*, there are clear and fundamental differences between debit cards and credit
10 cards. No cash is deducted from the cardholder's bank account. Instead, the cardholder receives a
11 bill at the end of each month. Cardholders may wish to pay off their entire credit card balance, or
12 they may wish to pay only a portion of the balance each month in order to retain some cash in their
13 bank account. Of course, unpaid credit card balances can accrue significant interest that the
14 cardholder must eventually pay. Moreover, credit card issuers typically charge cardholders an
15 annual fee. In stark contrast, a debit card payment results in an immediate deduction of cash from
16 the cardholder's checking account, which is then immediately collected by Valero through its
17 Network. Cardholders do not receive a bill at the end of each month to settle accounts and they pay
18 no interest on their purchases. "Prepaid" debit cards, like the Gold VISA[®] Prepaid Card, for
19 example, function in the same way except that the cash is withdrawn from a dedicated account into
20 which the cardholder deposits cash for the sole purpose of later spending that cash through the
21 prepaid debit card. As Valero recognizes in its "Credit Card Sales Guide," which sets forth Valero's
22 credit and debit card processing policies that Valero-branded dealers are obligated to follow, debit
23 cards are also eligible to receive "cash back" on purchases, unlike credit cards. Therefore,
24 reasonable consumers consider a debit card to be a safer and more convenient way to carry and
25 spend cash.

26 29. Recognizing that consumers do not expect to pay anything over the cash price when
27 using a debit card, issuers like VISA and MasterCard have taken steps to protect cardholders from
28

⁴ Mark P. Cussen, *Credit vs. Debit Cards: Which is Better?*, INVESTOPEDIA (May 20, 2016),
<http://www.investopedia.com/articles/personal-finance/050214/credit-vs-debit-cards-which-better.asp>. (emphasis added).

1 undisclosed fees, like the fees Valero imposes. For example, even where, unlike here, consumers are
2 given the option to process a debit card as “credit” or “debit,” VISA requires that “Visa debit Card
3 Transactions are *not* assessed a US Credit Card Surcharge[, and that] [i]t is made clear to the
4 Cardholder that surcharges are not permitted on debit Transactions[.]” (Emphasis added).⁵

5 30. The California Legislature has also taken steps to protect consumers from undisclosed
6 debit card fees through the enactment of Cal. Fin. Code §13081(b), which requires the “maximum
7 feasible disclosure” of debit card fees and that consumers be given the option to accept or reject the
8 fee.

9 31. Even Valero distinguishes between debit cards and credit cards throughout its Credit
10 Card Sales Guide, which provides for different processing procedures for credit cards and debit
11 cards. This is an admission that Valero itself considers a debit card to be a form of cash that must be
12 collected immediately through Valero’s Network at the time of sale

13 *Despite Having Actual Knowledge that Consumers*
14 *Expect to Pay the Cash Price, Valero Deliberately*
15 *Charges the Credit Price on Debit Card Purchases*

16 32. Valero-branded dealers are contractually required to use Valero’s Network to process
17 all debit card and credit card payments. Valero’s company policy is to charge the credit price on
18 debit card purchases processed through its Network. Through this policy, Valero generates
19 increased revenue from both increased gasoline sales to deceived consumers who do not realize they
20 are being overcharged and from inflated debit card processing fees that it collects from unsuspecting
21 consumers. While both debit card and credit card transactions carry a processing fee, that fee is
22 significantly higher for credit cards. Credit card processing fees represent a percentage of the total
23 sale price, so they can quickly grow along with the value of the transaction. By contrast, debit cards
24 carry a flat fee capped by federal law at \$0.21 per transaction, plus five basis points multiplied by the

24 ⁵ See Visa International Operating Regulations, attached hereto as **Exhibit B**; see also
25 MasterCard’s policy prohibiting surcharges on debit card, attached hereto as **Exhibit C**; “Q&A” by
26 Visa to its network of merchants informing them that they may not charge consumers any additional
27 fee or surcharge on debit card purchases, attached hereto as **Exhibit D**; Visa infographic informing
28 merchants that they may not charge any additional fee or surcharge on debit card purchases, attached
hereto as **Exhibit E**; correspondence from Visa to its network of merchants informing them of the
aforementioned settlement and instructing them not to charge additional fees or surcharges on debit
card purchases, attached hereto as **Exhibit F**.

1 value of the entire transaction. By charging the same price for credit card and debit card purchases,
 2 Valero is able to collect the significantly higher credit card processing fee on debit card sales.

3 ***Valero Deliberately Refuses to Disclose Its***
 4 ***Deceptive Debit Card Processing Policy***

5 33. Valero has sole discretion and authority over the disclosures that consumers receive.
 6 Yet, despite Valero's superior knowledge of its debit card processing policy, and its actual
 7 knowledge that Valero's policy is deceptive to consumers, Valero deliberately refuses to disclose its
 8 policy:⁶



21 34. Consumers paying with a debit card and expecting to pay the cash price look first to
 22 the card reader on the POS device, which instructs them to "Insert card and remove." A screen
 23 above the card reader labeled "Instructions" then guides the consumer through the steps to authorize
 24 a payment.

25 35. Because Valero's company policy is to process debit cards like credit cards, the
 26 POS device simply asks for a zip code without providing the cardholder with any options, such as to

27 _____
 28 ⁶ A larger version of this image is attached hereto as **Exhibit G**.

1 enter a personal identification number (“PIN”). The digital screen then instructs the cardholder to
2 begin fueling. At that point, reasonable consumers begin fueling their vehicle, as instructed,
3 completely unaware that they were charged a higher price.

4 36. *After* the POS device instructs the cardholder to begin fueling, a small digital screen
5 to the right of the POS device displays a price labeled only as “price per gallon.” That price also
6 appears on small, dimly lit, digital screens sitting at waist level, which are also labeled only as “price
7 per gallon.” Those small and dimly lit screens do not cure the consumer deception for several
8 reasons. First, a reasonable consumer does not expect the price at the dispenser to be different from
9 the price advertised on Valero’s street sign, so there is no reason to pay close attention to the
10 dispenser in order to confirm Valero’s advertised price. Second, a reasonable consumer would not
11 recognize the “price per gallon” to be the credit price rather than the cash price that they expect
12 because Valero does not expressly label it as such. Moreover, the difference between the cash price
13 and the credit price can be as little as \$0.04 per gallon, so a reasonable consumer would not notice
14 the differential. A reasonable consumer also would not recall the exact dollar amounts advertised on
15 Valero’s street sign but, rather, would simply remember that Valero advertised a cash price that was
16 lower than the credit price. Therefore, it is reasonable for a consumer to believe that the “price per
17 gallon” displayed on the fuel dispenser represents the cash price they expect. And if there were any
18 doubts, they would be quickly dispelled by a large white decal appearing directly below the “price
19 per gallon” display that advises consumers in bold, black, uppercase letters that it “**INCLUDES**
20 **CASH DISCOUNT.**”

21 37. In the unlikely event that an extra-savvy consumer were to both notice the small
22 “price per gallon” displays and also suspect that the price appeared to be off by a few cents, the only
23 way to confirm that suspicion would be to walk away from the fuel dispenser island in order to see
24 the prices advertised on Valero’s street sign, which is not always visible from where the consumer is
25 standing. But the law does not require reasonable consumers to be suspicious, or to investigate their
26 suspicions.

27 38. The first and only time that Valero discloses its higher charge is on the sales receipt,
28 after a sale is completed, and only if the cardholder requests one. By that time, of course, it is too

1 late for the consumer who has been deceived because unlike with other retail products, consumers
2 cannot simply return the overpriced gasoline for a refund.

3 39. Valero has actual knowledge that consumers receive no disclosure of Valero's debit
4 card processing policy. First, Valero does not offer its dealers any such disclosures in the Wholesale
5 Banding Manual, and it does not require dealers to make any such disclosures. Second, countless
6 customers have made complaints, like the following, directly to Valero: "I have *recently realized*
7 that the gas prices I thought I was paying at your stations wasnt [*sic*] accurate. . . . These prices are
8 not even listed which in my opinion should be illiegal [*sic*]. . . . People have the right to know
9 exactly what they are paying and sneaky practices . . . lose all respect in my eyes." (Emphasis
10 added).

11 ***Valero Is Knowingly and Intentionally***
12 ***Engaging in Business Acts and Practices***
13 ***that are Deceptive to Consumers***

14 40. Valero has actual knowledge that its acts and practices alleged herein are deceptive to
15 consumers, but it refuses to correct its practices in order to continue profiting off deceived
16 consumers. Valero has acquired this actual knowledge from not only this lawsuit and Plaintiff's
17 written demand that Valero cure its deceptive practices, but also from countless customer complaints
18 that it has received since at least 2011 to the present. Those angry customers informed Valero that
19 they were deceived by Valero's deceptive acts and practices alleged herein. For example, customers
20 made the following complaints during the Class period directly to Valero:

- 21 • I just finished putting gas a [*sic*] one of your Valero Stations and *the price*
22 *displayed on [the] pump was not the amount charged* when it began
23 pumping gas. (Dec. 12, 2011).
- 24 • I have purchased fuel at this station because it was usually the most
25 affordable price, and it was close to my home. *I was very disappointed to*
26 *see that Valero now charges my debit card as if it was a credit card instead*
27 *of the past practice of treating it like cash.* Because of this policy change, I
28 will *purchase gas and other items some where [sic] else.* (Jan. 19, 2012).
- I used my Debit card to purchase 18.436 gallons of gas. I should have been
charged \$4.039/gal but *when I received the billing receipt* I found I was
charged \$4.079/gal (which was Credit card price). *I felt I was overbilled*
\$.75 cents. . . . They need to upgrade their software *to inform the patrons*

1 *when entering a card as to what they will be billed*, so the patron can cancel
 2 before pumping gas. . . . *most other stations* display preferred option [sic]
 before inserting card, authorization and purchase. (June 28, 2012).

- 3
- 4 • About 4 weeks ago at 6am I purchased gas at a Valero gas station in San
 5 Jose, CA with my debit card. The gas attendaed[sic]/shift manager charged
 6 me the Credit Price for gas. When I told him that I paid and selected debet
 [sic] he told me *it was Company Policy that the debit card users were given
 the Credit Price for gas.* (Dec. 26, 2012).

 - 7 • I have recently realized that *the gas prices I thought I was paying at your
 8 stations wasnt [sic] accurate.* The stations put the cash prices but
 9 apparently there is a separate atm price. *These prices are not even listed
 10 which in my opinion should be illiegal [sic]. . . . People have the right to
 know exactly what they are paying* and sneaky practices by a person or a co.
 11 lose all respect in my eyes. Sorry but wont [sic] be going back to valero
 [sic]. (Jan. 13, 2013).

 - 12 • I used my DEBIT card on 4/28/13 at the Snappy Food store at 1700 S
 13 Chester Ave, Bakersfield, CA 93304. The sign said \$3.799 for unlead [sic].
 14 The pump said \$3.899. The very rude woman clerk said I chose [sic] the
 15 Credit Card feature. *It did not offer me a choice and I do not have a credit
 caard[sic], only a debit card. I feel I was overcharged.* It was only 80 cents,
 16 but *it is still misleading* and that store *must make a small fortune* every
 17 week, on the people it gouges. I will never buy another gallon from Valero,
 18 unless it is the only station within 300 miles and my car is on empty. (Apr.
 19 30, 2013).

 - 20 • I just filled up my vehicle, paying at the pump with my debit card. The cash
 21 price was posted at the street at 4.069. I was charged 4.159/ gallon. When I
 22 asked inside, *I was told that debit or credit both paid the higher price. . . .* If
 23 this is a new company wide policy I will look to other suppliers for my fuel!
 (May 8, 2014).

 - 24 • Cust called in the following: Customer states he filled up on 08/18/2014 in
 25 the morning and did not receive cash price posted. *Customer would like to
 26 confirm if he comes back to site he will get cash price when he pumps.*
 (Aug. 18, 2014).

 - 27 • CC Center sent the following complaint – *site is not charging cash/credit
 28 price correctly.* (Oct. 21, 2014).

 - Customer called in the following: Customer states this station is not giving
 the cash price when customer fills up. . . . Customer does not want to be
 contacted but would like the issue resolved. (Jan. 14, 2015).

- 1 • Customer called in the following: *[P]lay with debit card, doesn't give cash*
 2 *price[.]* (Jan. 16, 2015).
- 3 • The station . . . *is not charging the cash price*. The *customer. . . was upset*.
 4 (June 9, 2015).
- 5 • Donald called stated that he *didn't get cash price* on 09/07. (Sept. 11, 2015).
- 6 • . . . called – said station *refused to adjust to cash price* for fuel on 12/05/15.
 7 (Dec. 8, 2015).
- 8 • Received a call from Donny stating he went to this station and used his
 9 Debit card. . . . Donny then got gas and noticed he was charged the Credit
 10 price and not the cash price. He went in and spoke with the attendant. The
 11 attendant stated even when he used his debit card it is like Credit because he
 12 used a card. *Donny does not feel this is right. He states there is no sign up*
 13 *stating Debit is the same a [sic] Credit. He would like a sign put up about*
 14 *debit and credit being the same*. (Jan. 6, 2016).
- 15 • Christopher left msg, I returned his call. He says the store had *false*
 16 *advertising on gas price*. The signed [sic] shows \$2.13 but then they
 17 charged him \$2.29 *for using he [sic] debit card[.]* (Feb. 16, 2016).
- 18 • I've been a long time customer of the Valero store in Reedley and other
 19 locations for a long time. I normally fill up 2-3 times a week. I always pay
 20 with a debit card and noticed about couple months ago that I was now
 21 paying the higher credit price when using my debit card. It didn't used to be
 22 that way. *I have since started purchasing my gas and diesel at a different*
 23 *brand station that does not charge extra to use a debit card*. It's
 24 unfortunate that a company does not a [sic] appreciate its customers enough
 25 to give them the best price they can when using a *form of payment that is*
 26 *the same as cash*. (Mar. 30, 2016).
- 27 • Amanda called to advise she purchased fuel at this station *thinking she was*
 28 *getting the cash price* even though she used her debit card[.] (July 12,
 2016).⁷

41. The response from Valero's manager of territory sales to the Valero-branded dealers involved in these complaints was predictably curt and unapologetic: "Your cashier is correct. . . debit sales receive the credit price at all cash/credit sites (*Valero policy*). . . . Please contact the customer and resolve the problem, then advise us of the resolution." (Emphasis added).

⁷ Emphasis added throughout.

1 Network, Valero collects debit card payments, together with processing fees, directly from
2 cardholders and, therefore, Valero directly imposes a fee on debit card customers and is the
3 “operator” of the POS devices at Valero-branded dealers, within the meaning of the statute.

4 47. The statute also applies to the POS devices at Valero-branded dealers. Section
5 13081(c) provides that the term ““point-of-sale device’ *includes* any device used for the purchase of
6 a good or service where a personal identification number (PIN) is required[.]” (Emphasis added).
7 Under the plain language of the statute, the term “includes” is a word of enlargement, not limitation.
8 Therefore, the statute does not *exclude* from its definition a device that, solely due to the deceptive
9 acts and practices alleged herein, does not ask for a PIN. The POS device at Valero-branded dealers
10 *would* require a PIN for debit card transactions were it not for Valero’s deceptive policy of
11 processing debit cards like credit cards. To allow Valero to circumvent the protective statute by
12 deceptively processing a debit card as a credit card in order to impose undisclosed fees on
13 cardholders would subvert the California legislature’s stated intent to “maximize consumer
14 awareness of fees at point-of-sale devices” by requiring the “maximum feasible disclosure.”
15 §13081(a)(3).

16 48. Valero’s violation of Section 13081(b) serves as a predicate for Valero’s liability
17 under the “unlawful” prong of the UCL.

18 *Valero’s Scheme Has Caused*
19 *Millions of Dollars in Damages to*
20 *Unsuspecting Consumers and*
21 *Valero’s Competitors*

22 49. Debit cards have become increasingly popular over the last several years. While only
23 300 million debit card transactions were completed in 1990, that number exploded to 37.6 *billion* by
24 2009, and approximately 40.8 *billion* debit card transactions were completed each year during the
25 Class Period. Today, it has been reported that over 80% of consumers rely on debit cards for
26 everyday purchases like gasoline. Therefore, Valero’s deceptive scheme has caused California
27 consumers, including Plaintiff and the Class, millions of dollars in damages during the Class Period.

28 50. But Valero’s scheme does not harm only the members of the consumer class who
have collectively been swindled out of millions of dollars. It also harms the countless competitors of

1 Valero who do the right thing by clearly disclosing any debit card fees and, therefore, lose customers
2 who are under the false impression that Valero charges no fees, and for that reason, choose Valero
3 over its competitors.

4 *Plaintiff Was Deceived by Valero's Scheme*

5 51. Plaintiff is a resident of South San Francisco, California. At various times throughout
6 the Class Period, Plaintiff purchased gasoline from a number of Valero-branded dealers throughout
7 California where Valero advertised Split Pricing.

8 52. Based on the fundamental differences between a debit card and a credit card,
9 including the immediate deduction of cash from a checking account that results in a debit card
10 transaction, Plaintiff considers a debit card to be a form of cash, not credit.

11 53. Plaintiff never received any prior notice of Valero's debit card processing policy of
12 charging a higher credit price, or any amount in excess of the cash price, on debit card purchases.

13 54. The Valero-branded dealer located at 6989 Mission Street, Daly City, California is
14 one example of the many Valero-branded dealers where Plaintiff purchased gasoline with a debit
15 card during the Class Period. Plaintiff saw the cash and credit prices advertised on Valero's Split
16 Pricing sign and concluded that the cash price would apply to her debit card purchase. Plaintiff
17 followed the instructions on the POS device to insert her debit card. The digital screen above the
18 card reader labeled "Instructions" asked for a zip code and provided Plaintiff with no options, such
19 as to enter a PIN.

20 55. Plaintiff either did not notice the "price per gallon" displayed on the fuel dispenser or
21 she did not recognize the price to be Valero's credit price. After the sale was completed, Plaintiff
22 requested a receipt and was surprised to learn that she had been charged the credit price rather than
23 the advertised cash price that she expected to pay:

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DALY CITY GAS , L386847489801
 6989 MISSION ST
 DALY CITY , CA
 94014
 10/26/2015 01:11:21 PM 027965298
 XXXX XXXX XXXX 2360 Mastercard
 INVOICE 001445
 AUTH 266352
 PUMPH 3
 REGULAR CR 10.8750
 PRICE/GAL 2.939
 FUEL TOTAL \$ 31.96
 Subtotal = \$ 31.96
 Tax = \$ 0.00
 Total = \$ 31.96
 CREDIT \$ 31.96
 APPROVED 266352

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56. Plaintiff would not have purchased gasoline from Valero-branded dealers with a debit card but for Valero’s knowing and intentional scheme.

57. As a result of Valero’s false, deceptive, and misleading practices, Plaintiff suffered damages in an amount to be proved at trial, but no less than the jurisdictional minimum of this Court.

CLASS ACTION ALLEGATIONS

58. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf the following proposed Class:

All persons who paid for Valero-branded gasoline with a debit card in the state of California between July 1, 2011 and the present and were charged a “credit” price that was higher than the “cash” price.

59. Subject to additional information obtained through further investigation and discovery, the foregoing definition of the Class may be expanded or narrowed by amendment or amended complaint.

60. Specifically excluded from the Class is Valero, its officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint venturers or entities controlled by Valero, and their heirs, successors, assigns, or other persons or entities related to or affiliated with Valero and/or its officers and/or directors, the judge assigned to this action, and any member of the judge’s immediate family.

61. **Numerosity.** The members of the Class are so numerous that individual joinder is impracticable. Upon information and belief, Plaintiff alleges that the Class contains many hundreds

1 of thousands of members. The precise number of Class members is unknown to Plaintiff. The true
2 number of Class members is known by Valero, however, and thus may be notified of the pendency
3 of this action by first class mail, electronic mail, or published notice.

4 62. ***Existence and predominance of common questions of law and fact.*** Common
5 questions of law and fact exist as to all members of the Class and predominate over any questions
6 affecting only individual Class members. These common legal and factual questions include, but
7 are not limited to, the following:

8 (a) whether Valero created, designed, reviewed, and/or approved deceptive
9 advertising;

10 (b) whether Valero disseminated and controlled deceptive advertising;

11 (c) whether Valero adequately disclosed its policy of charging a higher price on
12 debit cards;

13 (d) whether Valero’s acts and practices would deceive a reasonable consumer;

14 (e) whether Valero aided and abetted deceptive acts and practices that would
15 deceive a reasonable consumer;

16 (f) whether Valero is an operator of a POS device within the meaning of Cal. Fin.
17 Code §13081(b);

18 (g) whether the POS devices at Valero-branded dealers meet the definition of a
19 “POS device” within the meaning of Cal. Fin. Code §13081(b);

20 (h) whether Valero violated the CLRA;

21 (i) whether Valero violated the FAL;

22 (j) whether Valero violated the “unlawful” prong of the UCL;

23 (k) whether Valero violated the “unfair” prong of the UCL;

24 (l) whether Valero violated the “fraudulent” prong of the UCL;

25 (m) whether Valero violated Cal. Fin. Code §13081(b);

26 (n) whether Valero’s violations of law were committed knowingly and/or
27 intentionally;

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1 (o) whether Plaintiff and the other Class members have sustained monetary loss
2 and the proper measure of that loss;

3 (p) whether Plaintiff and the other Class members are entitled to punitive
4 damages; and

5 (q) whether Plaintiff and the other Class members are entitled to declaratory and
6 injunctive relief.

7 63. **Typicality.** Plaintiff's claims are typical of the claims of the other Class members in
8 that Valero deceived Plaintiff in the very same manner that it deceived each of the other Class
9 members.

10 64. **Adequacy of representation.** Plaintiff will fairly and adequately protect the interests
11 of the Class. Plaintiff has retained counsel highly experienced in complex consumer class action
12 litigation, and Plaintiff intends to vigorously prosecute this action. Further, Plaintiff has no interests
13 that are antagonistic to those of the members of the Class.

14 65. **Superiority.** A class action is superior to all other available means for the fair and
15 efficient adjudication of this controversy. The damages or other financial detriment suffered by
16 individual Class members is relatively small compared to the burden and expense that would be
17 involved in individual litigation of their claims against Valero. It would, thus, be virtually
18 impossible for the Class, on an individual basis, to obtain effective redress for the wrongs committed
19 against them. Furthermore, even if Class members could afford such individualized litigation, the
20 court system could not. Individualized litigation would create the danger of inconsistent or
21 contradictory judgments arising from the same set of facts. Individualized litigation would also
22 increase the delay and expense to all parties and the court system from the issues raised by this
23 action. By contrast, the class action device provides the benefits of adjudication of these issues in a
24 single proceeding, economies of scale, and comprehensive supervision by a single United States
25 District Court, and presents no unusual management difficulties under the circumstances here.

26 66. In the alternative, the Class may also be certified because:
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1 (a) the prosecution of separate actions by individual Class members would create
2 a risk of inconsistent or varying adjudication with respect to individual Class members that would
3 establish incompatible standards of conduct for Valero;

4 (b) the prosecution of separate actions by individual Class members would create
5 a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the
6 interests of other Class members not parties to the adjudications, or substantially impair or impede
7 their ability to protect their interests; and

8 (c) Valero has acted or refused to act on grounds generally applicable to the Class
9 as a whole, thereby making appropriate final declaratory and injunctive relief with respect to the
10 members of the Class as a whole.

11 67. Alternatively, certain issues relating to Valero's liability may be certified pursuant to
12 Fed. R. Civ. P. 23(c)(4).

13 **COUNT I**

14 **Violation of the CLRA, Cal. Civ. Code §1750, et seq.**

15 68. Plaintiff realleges and incorporates by reference the allegations above as though fully
16 set forth herein.

17 69. The CLRA "shall be liberally construed and applied to promote its underlying
18 purposes, which are to protect consumers against unfair and deceptive business practices and to
19 provide efficient and economical procedures to secure such protection." Cal. Civ. Code §1760.

20 70. Plaintiff and the other Class members are consumers as defined by Cal. Civ. Code
21 §1761(d).

22 71. Gasoline is a good as defined by Cal. Civ. Code §1761(a).

23 72. Valero violated and continues to violate the CLRA by engaging in the following
24 practices proscribed by Cal. Civ. Code §1770(a) in transactions that were intended to result in, and
25 did result in, the sale of goods to consumers, including Plaintiff and other Class members:

26 (a) Representing that goods or services have sponsorship, approval,
27 characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a
28 sponsorship, approval, status, affiliation, or connection which he or she does not have (§1770(a)(5));

1 (b) Advertising goods or services with intent not to sell them as advertised
2 (§1770(a)(9)); and

3 (c) Making false or misleading statements of fact concerning reasons for,
4 existence of, or amounts of price reductions (§1770(a)(13)).

5 73. Specifically, as detailed herein, Valero violated the CLRA by creating and displaying
6 signage that advertised cash and credit prices for gasoline but, despite having actual knowledge that
7 consumers consider a debit card to be a form of cash, not credit, Valero deliberately refused to
8 disclose its policy of charging the higher credit price on debit card payments. Valero had superior
9 knowledge of its debit card processing policy, which is difficult for consumers to discover on their
10 own, and, therefore, Valero had a duty to disclose its policy but refused to do so in order to continue
11 to profit off unsuspecting consumers. In the alternative, as detailed herein, Valero is liable for
12 knowingly providing substantial assistance to a deceptive scheme that violates the CLRA.

13 74. Valero's deceptive acts and practices alleged herein are likely to deceive, and in fact,
14 did deceive, reasonable members of the public, including Plaintiff and the other Class members, who
15 consider a debit card to be a form of cash, not credit, and, therefore, do not expect to pay the higher
16 credit price.

17 75. Valero's deceptive acts and practices alleged herein deceived Plaintiff and the other
18 Class members who would not have purchased gasoline from Valero-branded dealers with a debit
19 card but for Valero's intentional and knowingly deceptive scheme.

20 76. Pursuant to Cal. Civ. Code §1782(d), Plaintiff seeks an order enjoining the above-
21 described wrongful acts and practices of Valero and for restitution and disgorgement.

22 77. Pursuant to Cal. Civ. Code §1780(d), Plaintiff has prepared and attached an affidavit
23 stating facts showing that this action has been commenced in a county described as a proper place
24 for the trial. *See Exhibit H.*

25 78. Pursuant to Cal. Civ. Code §1782, on December 3, 2015, Plaintiff's counsel sent a
26 notice and demand letter by certified mail to Valero, c/o its General Counsel, Jay Browning, One
27 Valero Way, San Antonio, Texas 78249, attached as **Exhibit I.**

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1 84. Pursuant to Cal. Bus. & Prof. Code §17203, Plaintiff seeks an order enjoining the
2 above-described wrongful acts and practices of Valero and for restitution and disgorgement.

3 **COUNT III**

4 **Violations of the UCL, Cal. Bus. & Prof. Code §17200, et seq.**

5 85. Plaintiff realleges and incorporates by reference the allegations above as though fully
6 set forth herein.

7 86. The UCL prohibits unfair competition, which the statute defines as any business act
8 or practice that is either: (1) unlawful; (2) unfair; or (3) fraudulent.

9 87. As detailed herein, Valero violated the “fraudulent” prong of the UCL by creating and
10 displaying deceptive signage that advertised cash and credit prices for gasoline but, despite having
11 actual knowledge that consumers consider a debit card to be a form of cash, not credit, Valero
12 deliberately refused to disclose its policy of charging the higher credit price on debit card payments.
13 Valero had superior knowledge of its debit card processing policy, which is difficult for consumers
14 to discover on their own, and, therefore, Valero had a duty to disclose its policy but refused to do so
15 in order to continue collecting higher fees from unsuspecting consumers. In the alternative, as
16 detailed herein, Valero is liable for knowingly providing substantial assistance to a deceptive scheme
17 that violates the “fraudulent” prong of the UCL.

18 88. Valero’s intentional and knowingly deceptive scheme also violates the “unfair” prong
19 of the UCL because the injury to consumers is substantial, is not outweighed by any countervailing
20 benefits to consumers or to competition, and is not an injury that consumers themselves could
21 reasonably have avoided.

22 89. Valero’s intentional and knowingly deceptive scheme, as detailed herein, also violates
23 the “unlawful” prong of the UCL because Valero’s scheme violates the following laws:

- 24 • Cal. Fin. Code §13081(b);
 - 25 • the CLRA; and
 - 26 • the FAL.
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JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, and Local Rules of this Court, Plaintiff respectfully demands trial by jury on all issues so triable.

DATED: September 23, 2016

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