

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

11 AMY FRASER and PAULA HAUG, on No. 2:13-cv-00520-TLN-DB
12 behalf of themselves and all others
 similarly situated,

13 Plaintiffs, ORDER

14 || v.

15 WAL-MART STORES, INC., a Delaware
16 corporation; and DOES 1 through 50,
inclusive.

17 Defendants.

19 This matter is before the Court pursuant to Defendant Wal-Mart Stores, Inc.’s
20 (“Defendant”) Motion to Determine Whether Subject Matter Jurisdiction Exists pursuant to
21 Federal Rule of Civil Procedure 12(h)(3) (“Rule 12(h)(3)”). (ECF No. 86.) Plaintiffs Amy Fraser
22 and Paula Haug (“Plaintiffs”) filed an opposition to Defendant’s motion. (ECF No. 88.)
23 Defendant also filed a reply. (ECF No. 89.) The Court has carefully considered the arguments
24 raised in Defendant’s motion and reply, as well as Plaintiffs’ opposition. For the reasons set forth
25 below, Defendant’s motion is DENIED.

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1 **I. FACTUAL BACKGROUND**

2 Plaintiffs assert claims under the Song-Beverly Credit Card Act of 1971 Section
3 1747.08(a)(2)¹ (the “Act” or “Section 1747.08(a)(2)”) arising out of Defendant’s alleged
4 requesting and recording of customers’ ZIP codes in its California retail stores. (ECF No. 22.)
5 Plaintiffs contend that Defendant has a company policy where, in each of its California retail
6 stores, credit card customers are asked or even sometimes required to input their ZIP codes into
7 the electronic pin pad device adjacent to the cashier at the checkout stand. (ECF No. 15-1 at 4.)
8 Defendant acknowledged that it did request and record the ZIP codes from those customers using
9 an American Express credit card for purchases exceeding \$50. (ECF No. 15-1 at 4.)
10 Furthermore, Defendant admits to requesting and recording the ZIP codes from customers using
11 Discover credit cards for transactions exceeding \$200. (ECF No. 15-1 at 4.)

12 Defendant explains that in order to allow credit cards as a form of payment, Defendant
13 must enter into acceptance agreements with credit card companies. (ECF No. 16 at 5.)
14 Defendant also explains that in furtherance of preventing criminal activity, many credit card
15 companies have developed ZIP code verification protocols that systematically and
16 instantaneously match the ZIP code entered at the point of sale with the billing ZIP code on the
17 credit card account. (ECF No. 16 at 5.) Defendant states that it uses a customer activated
18 terminal (“CAT”) whenever a customer pays with a credit card. (ECF No. 16 at 6.) When a card
19 is swiped, the CAT prompts the customer to provide any additional information needed
20 depending on the card type. (ECF No. 16 at 6.)

21 **II. PROCEDURAL BACKGROUND**

22 On December 24, 2014, this Court granted Plaintiffs’ Motion for Class Certification.

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¹ The Act, in pertinent part, reads as follows:

25 (a) Except as provided in subdivision (c), no person, firm, partnership,
26 association, or corporation that accepts credit cards for the transaction of business
27 shall do any of the following:
28 (2) Request, or require as a condition to accepting the credit card as payment in
 full or in part for goods or services, the cardholder to provide personal
 identification information, which the person, firm, partnership, association, or
 corporation accepting the credit card writes, causes to be written, or otherwise
 records upon the credit card transaction form or otherwise.

Cal. Civ. Code § 1747.08(a)(2).

1 (ECF No. 22.) The Court found that all four prerequisites of Rule 23(a) were met as well as at
2 least one of the requirements of subpart (b), and therefore certified the Class. (ECF No. 22 at 14.)
3 The Class was certified as follows:

4 All persons in California whom Defendant requested and recorded
5 personal identification information in conjunction with a credit card
6 purchase transaction at a California retail store during the period of
time beginning January 29, 2012 and continuing through the date of
trial.

7 (ECF No. 22 at 4.) Defendant filed a petition to appeal the certification order and that petition
8 was denied by the Ninth Circuit on March 25, 2015. (ECF No. 46-1 at 1.)

9 Plaintiffs moved this Court for an order approving Class Notice. (ECF No. 46.)
10 Defendant filed a motion to decertify the Class, alleging that the record before the Court
11 established that: the Class was not ascertainable, that Defendant did not follow a uniform policy
12 of requesting and recording ZIP codes from all of its credit card customers in California during
13 the proposed class period, and that individual issues predominate over any common issues. (ECF
14 No. 51-2 at 1.) Plaintiffs opposed the Defendant's Motion Requesting Decertification. (ECF No.
15 53.)

16 Plaintiffs, along with Defendant, filed a Joint Statement requesting that the Court defer
17 judgment while the parties mediated. (ECF No. 71.) However, Plaintiffs and Defendant were
18 unable to reach an agreement and filed a Joint Status Report concluding mediation. (ECF No.
19 85.)

20 Defendant now requests that this Court consider the United States Supreme Court holding
21 in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) to determine whether Plaintiffs continue to have
22 Article III standing to pursue their claims. (ECF No. 86.) Defendant argues that if the Court
23 finds that *Spokeo* applies and that Plaintiffs lack Article III standing, Rule 12(h)(3) requires the
24 Court to dismiss the action. (ECF No. 86 at 8.) Plaintiffs argue that *Spokeo* does not apply to the
25 facts of this case because the Supreme Court did not render any substantive decision that contains
26 any new legal requirements. (ECF No. 88 at 4.)

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1 **III. STANDARD OF LAW**

2 A party may bring a motion to challenge a court's subject matter jurisdiction under
3 Federal Rule of Civil Procedure 12(b)(1). *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594
4 F.2d 730, 733 (9th Cir. 1979). The objection that a federal court lacks subject-matter jurisdiction
5 may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even
6 after trial and the entry of judgment. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). The
7 challenge can be either facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

8 “When subject matter jurisdiction is challenged under Federal Rule of [Civil] Procedure
9 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion.”
10 *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) (abrogated on
11 other grounds by *Hertz Corp. v. Friend*, 559 U.S. 77 (2010)). “Unless the jurisdictional issue is
12 inextricable from the merits of a case, the court may determine jurisdiction on a motion to dismiss
13 for lack of jurisdiction under Rule 12(b)(1)[.]” *Robinson v. U.S.*, 586 F.3d 683, 685 (9th Cir.
14 2009) (internal citations omitted). “A suit brought by a plaintiff without Article III standing is not
15 a ‘case or controversy,’ and an Article III federal court therefore lacks subject matter jurisdiction
16 over the suit.” *Cetacean Community v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004). If the court
17 determines at any time that it lacks subject matter jurisdiction, “the court must dismiss the
18 action.” Fed. R. Civ. P. 12(h)(3).

19 **IV. ANALYSIS**

20 The question before the Court is whether Plaintiffs alleged a bare procedural violation of
21 Section 1747.08 of the California Song-Beverly Credit Card Act and, if so, whether that is
22 sufficient to confer Article III standing on Plaintiffs. (ECF No. 87 at 3.) Defendant argues that
23 the Court in *Spokeo* held “that a plaintiff must allege something more than a bare procedural
24 violation of the law to satisfy Article III.” (ECF No. 86 at 7.) In the instant case, Plaintiffs assert
25 that Defendant’s actions “exposed [Plaintiffs] to the dangers the statute was designed to prevent”
26 and this is enough to satisfy the requirements of Article III standing. (ECF No. 88 at 6.)

27 To satisfy Article III standing, a plaintiff must allege: (1) an injury-in-fact that is concrete
28 and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the

1 challenged action of the defendant; and (3) that the injury is redressable by a favorable ruling.
2 *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Friends of the Earth, Inc. v.*
3 *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). “The party invoking federal
4 jurisdiction bears the burden of establishing these elements […] with the manner and degree of
5 evidence required at the successive stages of the litigation.” *Lujan v. Defenders of Wildlife*, 504
6 U.S. 555, 561 (1992). In class actions, “the named representatives must allege and show that they
7 personally have been injured.” *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022
8 (9th Cir.2003) (quoting *Pence v. Andrus*, 586 F.2d 733, 736–37 (9th Cir.1978)). The “injury
9 must have actually occurred or must occur imminently; hypothetical speculative or other
10 ‘possible future’ injuries do not count in the standings calculus.” *Schmier v. U.S. Court of*
11 *Appeals for Ninth Circuit*, 279 F.3d 817, 820 (9th Cir.2002) (citing *Whitmore v. Arkansas*, 495
12 U.S. 149, 155 (1990)).

13 Defendant asserts that “Plaintiffs allege only a bare procedural violation of [Section
14 1747.08]” and that “the alleged statutory violation is not sufficient by itself to satisfy the injury in
15 fact requirement” of Article III. (ECF No. 86 at 8.) Defendant argues that “Plaintiffs do not
16 allege that they suffered a concrete injury … [and that] they seek only ‘civil penalties.’” (ECF
17 No. 86 at 5.) Defendant concludes by stating that the application of *Spokeo* should lead the Court
18 to find that Plaintiffs’ allegations do not survive under Article III standing requirements. (ECF
19 No. 86 at 8.)

20 Plaintiffs argue that “[t]he allegations in this case are simply not of a technical nature
21 where no harm is imaginable.” (ECF No. 88 at 6.) Plaintiffs explain that the information
22 collected by Defendant “exposes Plaintiffs to hackers as well as Defendant’s own improper
23 usage.” (ECF No. 88 at 6.) Therefore, Plaintiff argues, Defendant’s actions constitute a legal
24 violation, significant risk to Plaintiffs, and, thus, a concrete violation of Section 1747.08.

25 In *Spokeo* the plaintiff alleged that Spokeo, an online background check company,
26 reported inaccurate information about him to its customers. *Spokeo*, 136 S. Ct. at 1543. The
27 plaintiff then sued Spokeo, alleging that the defendant operated its website in violation of the Fair
28 Credit Reporting Act (“FCRA”). *Id.* The Ninth Circuit held that the plaintiff had adequately

1 alleged an injury in fact because he sufficiently alleged that “Spokeo violated his statutory rights”
2 and that his “personal interests in the handling of his credit information [were] individualized
3 rather than collective.” *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (2014). The Supreme Court
4 reversed finding that the Ninth Circuit erred in its standing analysis by focusing solely on whether
5 the plaintiff’s purported injury was “particularized” without also assessing whether it was
6 sufficiently “concrete.” The Court stated that “[t]he Ninth Circuit’s injury-in-fact analysis elided
7 the independent ‘concreteness’ requirement. Both observations it made concerned only
8 ‘particularization,’ i.e., the requirement that an injury ‘affect the plaintiff in a personal and
9 individual way.’” *Spokeo*, 136 S. Ct. at 1543 (quoting *Lujan*, 504 U.S. at 560).

10 The Supreme Court further stated that a “‘concrete’ injury must be ‘de facto’; that is, it
11 must actually exist.” *Id.* at 1548; *See* Black’s Law Dictionary 479 (9th ed. 2009). The Court
12 clarified that, though tangible injuries are easier to recognize as “concrete,” many of the Court’s
13 previous cases have shown that intangible injuries can also qualify as concrete. *Id.* at 1549; *See*,
14 *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of Lukumi*
15 *Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise). “In determining whether an
16 intangible harm constitutes injury in fact, both history and the judgment of Congress play
17 important roles.” *Spokeo*, 136 S. Ct. at 1549. “Congress may ‘elevat[e] to the status of legally
18 cognizable injuries concrete, de facto injuries that were previously inadequate in law.’” *Id.*
19 (quoting *Lujan*, 504 U.S. at 578).

20 However, the Supreme Court stated that “Congress’ role in identifying and elevating
21 intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact
22 requirement whenever a statute grants a person a statutory right and purports to authorize that
23 person to sue to vindicate that right.” *Spokeo*, 136 S. Ct. at 1549. “Article III standing requires a
24 concrete injury even in the context of a statutory violation.” *Id.* Therefore, the Court reasoned, a
25 plaintiff cannot allege a bare procedural violation absent a concrete injury and still be able to
26 satisfy the Article III injury-in-fact requirement. *Id.*; *See Summers v. Earth Island Institute*, 555
27 U.S. 488, 496 (2009) (“[D]eprivation of a procedural right without some concrete interest that is
28 affected by the deprivation ... is insufficient to create Article III standing”).

1 “This does not mean, however, that the risk of real harm cannot satisfy the requirement of
2 concreteness.” *Spokeo*, 136 S. Ct. at 1549. The Supreme Court explained that “the violation of a
3 procedural right granted by statute can be sufficient in some circumstances to constitute injury in
4 fact … [and] a plaintiff in such a case need not allege any additional harm beyond the one
5 Congress has identified.” *Id.* at 1549–50, *See Federal Election Comm’n v. Akins*, 524 U.S. 11,
6 20–25 (1998) (confirming that a group of voters’ “inability to obtain information” that Congress
7 had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen v.*
8 *Department of Justice*, 491 U.S. 440, 449 (1989) (holding that two advocacy organizations’
9 failure to obtain information subject to disclosure under the Federal Advisory Committee Act
10 “constitutes a sufficiently distinct injury to provide standing to sue”). The Court in *Spokeo*
11 recognized that the law has permitted recovery by victims even if their harms are difficult to
12 prove or measure. *Spokeo*, 136 S. Ct. at 1549. Additionally, in regards to Section 1747.08, “the
13 legislative history of … [S]ection 1747.08 in particular, demonstrates the Legislature intended to
14 provide robust consumer protections.” *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524,
15 535–36 (2011).

16 The Song-Beverly Credit Card Act states that a retailer may not request “personal
17 identification information” when a consumer makes a credit card purchase. Cal. Civ. Code §
18 1747.08(a)(2). The California Supreme Court held that “personal identification information”
19 includes a person’s ZIP code because it is part of an individual’s address, is similar in character to
20 an address or telephone number which are also considered personal identification information,
21 and can be used with a credit card holder’s name to locate his or her home address. *Pineda*, 51
22 Cal. 4th at 531–32. Therefore, the court in *Pineda* held that requesting and recording a
23 cardholder’s ZIP code violates the Song-Beverly Credit Card Act. *Id.* at 527. This Court agrees
24 with the California Supreme Court and finds that the Song-Beverly Credit Card Act confers
25 standing on plaintiffs who sufficiently allege violations of Section 1747.08. This Court reasons
26 that properly alleging a violation of Section 1747.08 confers standing on a plaintiff due to the fact
27 that the statute was designed to protect consumers from harms such as abuse by retailers of
28 private consumer information. *Id.* at 534.

1 In the instant case, Plaintiffs allege that Defendant violated Section 1747.08 by requesting
2 and recording the ZIP codes from its customers. (ECF No. 15-1 at 9.) Plaintiffs argue that
3 Section 1747.08 “was passed to combat retailers’ improper collection of personal identification
4 information that leads to undesired marketing contact, credit card fraud, identity theft and even
5 stalking.” (ECF No. 88 at 6.) Accordingly, Plaintiffs assert that Section 1747.08 “provides for
6 mandatory civil penalties to be assessed against those who violate the law because of the
7 imminent danger such a violation presents to the consumer.” (ECF No. 88 at 6.) Defendant
8 argues that, besides seeking “only civil penalties,” Plaintiffs do not allege that they suffered a
9 concrete injury. (ECF No. 86 at 5.) This Court disagrees.

10 The holding in *Spokeo* does not have as broad an application as Defendant argues.
11 Defendant asserts that *Spokeo* applies in the instant case because the issue here is similar to that
12 discussed in *Spokeo*. (ECF No. 86 at 4–5.) Thus, Defendant argues, Plaintiffs must allege more
13 than a “bare procedural violation” in order to constitute a concrete injury that satisfies Article III
14 standing requirements. (ECF No. 88 at 8.)

15 In their reply to Plaintiffs’ opposition, Defendant points to various cases that have issued
16 rulings based on the holding in *Spokeo* in order to argue that the Court should rule in a similar
17 manner to those cases. (ECF No. 89 at 4–7.) One such case is *Hancock v. Urban Outfitters, Inc.*,
18 No. 14-7047, 2016 WL 3996710 (D.C. Cir. July 26, 2016), where the plaintiffs alleged that the
19 defendants unlawfully collected their zip codes in violation of the District of Columbia’s
20 consumer protection statutes. (ECF No. 89 at 4.) However, while the facts in *Hancock* are
21 similar to the instant case, the plaintiffs in *Hancock* do not allege “any invasion of privacy,
22 increased risk of fraud or identity theft, or pecuniary or emotional injury.” *Hancock*, 2016 WL
23 3996710, at *3. Therefore, the court in *Hancock* ruled that “without any plausible allegation of
24 Article III injury, the complaint fails to state a basis for federal court jurisdiction.” *Id.* However,
25 in this case Plaintiffs have alleged that Defendant’s actions exposed them to “undesired marketing
26 contact, credit card fraud, identity theft, and even stalking.” (ECF No. 88 at 6.) Therefore, this
27 Court finds that the two cases are dissimilar and that the court’s ruling in *Hancock* has no effect
28 on this case.

1 Defendant also directs the Court to consider *Medellin v. IKEA U.S.A. W., Inc.*, No.
2 11CV921 WQH (BGS), 2011 WL 5104362 (S.D. Cal. Oct. 27, 2011). (ECF No. 89 at 5.) In
3 *Medellin*, the plaintiff brought a class action against defendant alleging that defendant had
4 unlawfully collected and recorded ZIP codes in violation of Section 1747.08. *Medellin*, 2011 WL
5 5104362, at *1. Defendant points out that the district court found for the plaintiff individually
6 even though the defendant argued that the plaintiff lacked standing. (ECF No. 89 at 5.)
7 Defendant also states that the court decertified the class and that the plaintiff appealed the
8 decertification to the Ninth Circuit. (ECF No. 89 at 5.) Defendant argues to the Court that the
9 plaintiff filed a motion to dismiss her appeal based on the holding in *Spokeo*. (ECF No. 89 at 5.)
10 The Court interprets Defendant's case illustration to be Defendant's argument that the Court
11 should hold that the class in the instant case should be decertified in light of the fact that other
12 plaintiffs fail to show standing in similar cases. However, the Ninth Circuit has not issued a
13 ruling in the *Medellin* case and this Court refuses to base its ruling on the perceived reasoning of
14 another plaintiff's actions. Therefore, this Court again finds that Defendant has not provided this
15 Court with a sufficient reason to find that Plaintiffs lack standing.

16 The Court in *Spokeo* stated that "the violation of a procedural right granted by statute can
17 be sufficient in some circumstances to constitute injury in fact." *Spokeo*, 136 S. Ct. at 1549.
18 Additionally, the *risk* of real harm can satisfy the requirement of concreteness. *Id.* (emphasis
19 added). Accordingly, this Court finds that Plaintiffs adequately allege a procedural violation of
20 Section 1747.08 sufficient to satisfy Article III standing requirements. Additionally, even if this
21 Court were to consider Defendant's request to follow the holding of *Spokeo*, the Court finds that
22 Plaintiffs sufficiently allege concrete harm because they assert that Defendant's collection of their
23 ZIP codes exposed them to undesired marketing contact, credit card fraud, identity theft, stalking,
24 and hackers. (ECF No. 88 at 6.)

25 At this point, the Court is left to consider Defendant's Motion to Decertify the Class in
26 order to determine if Plaintiffs can still bring their claims. Plaintiffs brought their cause of action
27 in state court and Defendant properly removed it to federal court under the Class Action Fairness
28 Act of 2005 ("CAFA"). (Def.'s Not. of Rem., ECF No. 1) This Court then granted Plaintiffs'

1 Motion for Class Certification and the Ninth Circuit denied Defendant's petition to appeal the
2 certification. (ECF No. 22 & 46-1 at 2.) Defendant now asks this Court to consider whether
3 Plaintiffs still satisfy the requirements of Rule 23. (ECF No. 51-2.) As long as the Court
4 continues to find that Plaintiffs adequately meet the Rule 23 standards to maintain a class action,
5 then Plaintiffs will have standing to bring their claims in this Court. However, this issue will be
6 addressed in a subsequent order. In regards to Defendant's motion to determine whether subject
7 matter exists, the Court finds that the holding in *Spokeo* does not apply and this Court continues
8 to have subject matter jurisdiction in this case.

9 **V. CONCLUSION**

10 For the reasons set forth above, the Court DENIES Defendant's Motion to Determine
11 Whether Subject Matter Jurisdiction Exists (ECF No. 86).

12 **IT IS SO ORDERED.**

13 Dated: October 17, 2016

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Troy L. Nunley
17 United States District Judge
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