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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DUSTIN GORMLEY, *et al.*,

Plaintiffs,

v.

NIKE INC., *et al.*

Defendants.

Consolidated Case No. C 11-893 SI

**ORDER DENYING PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

Now before the Court is plaintiffs' motion for class certification. Having considered the arguments of the parties and the papers submitted, the Court hereby DENIES plaintiffs' motion. As set forth in this order, the Court denies certification on the ground that the named plaintiffs are not typical because their experiences were not consistent with Nike's "Information Capture Policy" that is challenged in this lawsuit. If plaintiffs wish to amend the complaint to add a new class representative, plaintiffs may seek leave of Court to do so.

BACKGROUND¹

Plaintiffs in these consolidated cases have brought putative class actions on behalf of themselves and a class of consumers, alleging that defendants Nike, Inc., Nike USA, Inc. and Nike Retail Services, Inc. ("Nike") have violated the Song-Beverly Credit Card Act of 1971, Cal. Civ. Code § 1747 *et seq.*,

¹ The parties have raised numerous evidentiary objections. The Court does not rely on the evidence at issue in this order, and accordingly finds it unnecessary to rule on the objections which are therefore moot.

1 by requesting and recording the ZIP codes² of credit card customers through Nike’s “Information Capture
2 Policy.” Consolidated Compl. ¶¶ 2, 13. Section 1747.08 of the Song-Beverly Act provides, in relevant
3 part,

4 (a) Except as provided in subdivision (c), no person, firm, partnership, association, or
5 corporation that accepts credit cards for the transaction of business shall do any of the
6 following:

6 (1) Request, or require as a condition to accepting the credit card as payment in full or
7 in part for goods or services, the cardholder to write any personal identification
8 information upon the credit card transaction form or otherwise.

8 (2) Request, or require as a condition to accepting the credit card as payment in full or
9 in part for goods or services, the cardholder to provide personal identification
10 information, which the person, firm, partnership, association, or corporation accepting
11 the credit card writes, causes to be written, or otherwise records upon the credit card
12 transaction form or otherwise.

11 (3) Utilize, in any credit card transaction, a credit card form which contains preprinted
12 spaces specifically designated for filling in any personal identification information of
13 the cardholder.

13 Cal. Civ. Code § 1747.08(a). “Personal identification information” is defined in section 1747.08,
14 subdivision (b) as “information concerning the cardholder, other than information set forth on the credit
15 card, and including, but not limited to, the cardholder’s address and telephone number.” The Act was
16 amended in 1991 by adding the word “request” to the statute.

17 It is undisputed that during the majority of the class period (February 24, 2010 to February 24,
18 2011), Nike implemented and maintained a policy whereby its cashiers were trained to follow Nike’s
19 “EPOC manual” which required cashiers to perform the following process when conducting a credit card
20 purchase transaction:

21 Step 1: Nike’s cashiers scanned the customer’s merchandise. Once all the merchandise
22 was scanned, the cashier folded and bagged the merchandise and totaled the
23 transaction.

24 Step 2: The customer was instructed to then swipe his or her credit card and Nike’s point-

26
27 ² “ZIP is an acronym that stands for ‘Zone Improvement Plan.’” *Pineda v. Williams-Sonoma*
28 *Stores, Inc.*, 51 Cal.4th 524, 527 n.2 (2011) (citing United States Postal Service mailing standards).

1 of-sale (“POS”) system (via the keypad facing the customer) asked the customer
2 to confirm the total amount due by pressing “Yes” or “No.”

3 Step 3: The POS confirmed the card was authorized by checking with the appropriate
4 financial entity, and the cashier asked the customer to sign on the keypad and then
5 to press “Done” to accept his or her signature. The customer’s receipt printed and
6 the cashier gave the customer the receipt and merchandise; and

7 Step 4: Nike’s cashiers were prompted with a pop-up box on their screen to enter the
8 customer’s ZIP code. The screen on the sales register that allowed the cashier to
9 input a customer’s ZIP code did not appear until after the credit card was
10 authorized and the receipt was printing. If a customer declined to provide a ZIP
11 code, Nike’s cashiers entered any alphanumeric combination (e.g., “n,” “99999,”
12 or even their own ZIP code) into the POS system.

13 Stonebarger Decl. Ex. B; McKinley Decl. ¶¶ 3-8, Ex. A-M.

14 The technical specifications for the point-of-sale software states that “a new function will be
15 created that when a trade transaction is complete, that is, when the receipt and tender(s) have been
16 exchanged between the cashier/associate and the customer, the cashier/associate will be prompted to ask
17 the customer for their ZIP code.” McKinley Decl. ¶ 3, Ex. A. Nike’s corporate designee testified that
18 each ZIP code captured by Nike at the point-of-sale is specifically associated with the Transaction ID
19 for the purchase transaction. Stonebarger Decl. Ex D (McKinley depo. at 34-35). It is undisputed that
20 this same point-of-sale software was used in every one of Nike’s California retail locations and was not
21 modified until February 17, 2011.³ It is also undisputed that Nike trained each of its employees on the
22 use of this point-of-sale system, and that Nike employees were required to receive a certificate of
23 compliance verifying their training on the POS system before Nike would permit the employee to work
24 as a cashier.

25 Nike also permanently affixed signs to the counters at each sales register stating:

26
27 ³ On February 17, 2011, Nike changed the software in its California retail stores so cashiers
28 could no longer input customers’ zip codes.

1 Nike will ask for your ZIP code during all purchases and returns. This information is
2 used for marketing and consumer research only. Providing your zip code is voluntary
3 and not required to complete your transaction. Under the specific terms for our posted
4 return policy, additional information will be required when processing a return.

5 McKinley Decl., Ex. N.⁴

6 During the class period, once the customer's ZIP code was requested and recorded in Nike's
7 POS system, the following information was stored by Nike in a data storage platform that was created
8 for Nike by NSB Retail Solutions, Inc.: (1) the date of purchase; (2) the store location; (3) the specific
9 items purchased and related information; (4) the customer's method of tender (e.g., credit card
10 payment); (5) the customer's name as listed on the credit card; and (6) the customer's ZIP code.

11 All of the information that was obtained by Nike at the POS was also transmitted on a daily basis
12 to a third-party information broker/vendor named Merkle, Inc. Merkle was Nike's consumer
13 relationship management vendor. Pursuant to a contract with Nike, Merkle would match the customer
14 information provided by Nike (including names, zip codes, and transaction IDs) to consumer profiles
15 in Merkle's possession and supplement the information provided by Nike with additional information
16 such as the address of the consumer. Based upon the results of Merkle's matching of Nike's customers'
17 information, Merkle would create Nike consumer profiles and store these profiles on behalf of Nike. The
18 purpose for Nike's use of Merkle was to coordinate marketing that would target various groups of
19 consumers.

20 In support of class certification, plaintiffs submitted evidence that, during the class period,
21 Nike's ZIP code request policy was implemented at every Nike retail store in California, and ZIP codes
22 were requested and recorded during approximately 561,179 transactions. Stonebarger Decl., Ex. A at
23 36:12-14, G at 3:15-18. Defendants have submitted, *inter alia*, the deposition testimony of the three
24 named plaintiffs. Mr. Gormley and Ms. McCartney both testified that cashiers asked them for their ZIP
25 codes before providing them with their receipts and merchandise. Brown Decl. Ex. 1 (Gormley depo.
26 at 84-85, 202-03); Ex. 2 (McCartney depo. at 118, 138-39, 121, 152-53). Ms. Hartman testified that
27 although she could not remember any details about the credit card transaction that is the basis of her
28 claim, she was sure that she had not received her receipt or merchandise before she was asked for her

⁴ This sign also contained the same information in Spanish.

1 ZIP code. *Id.* Ex. 3 (Hartman depo. at 112-14).

2
3 **LEGAL STANDARD**

4 Class certification is warranted where a plaintiff demonstrates that all of the requirements of
5 Federal Rule of Civil Procedure 23(a) are satisfied and at least one of the requirements of Rule 23(b)
6 is satisfied. *See* Fed. R. Civ. P. 23; *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). Rule
7 23(a) provides that a court may certify a class only if (1) the class is so numerous that joinder of all
8 members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or
9 defenses of the representative parties are typical of the claims or defenses of the class, and (4) the
10 representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

11 In addition to demonstrating that the Rule 23(a) requirements are met, plaintiff must establish
12 one or more of the following grounds for maintaining the suit as a class action pursuant to Rule 23(b):
13 (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive
14 relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact
15 predominate and the class action is superior to other available methods of adjudication. Fed. R. Civ.
16 P. 23(b).

17 In determining the propriety of a class action, the court must focus solely on whether the
18 requirements of Rule 23 are met, not whether the plaintiff has stated a cause of action or will prevail on
19 the merits. *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003). Accordingly, the court must accept
20 as true the substantive allegations made in the complaint. *In re Petroleum Prods. Antitrust Litig.*, 691
21 F.2d 1335, 1342 (9th Cir. 1982). However, although the court may not require preliminary proof of the
22 substance of the plaintiff's claims, it "need not blindly rely on conclusory allegations which parrot Rule
23 23 requirements," but may also "consider the legal and factual issues presented by plaintiff's
24 complaint." 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 7.26 (4th ed. 2005). The
25 court should conduct an analysis that is as rigorous as necessary to determine whether class certification
26 is appropriate. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

1 Defendants also contend that there is no violation of the statute if a customer voluntarily provides
2 his or her ZIP code for a purpose unrelated to paying with a credit card, and therefore that the class is
3 overbroad and individual issues predominate. Plaintiffs contend that there is no voluntariness defense,
4 and that the statute prohibits any request for personal information in conjunction with a credit card
5 transaction. The parties' arguments center on the meaning of the word "request" in the statute. The
6 statute provides that "no person, firm, partnership, association, or corporation that accepts credit cards
7 for the transaction of business shall . . . Request, or require as a condition to accepting the credit card
8 as payment in full or in part for goods or services, the cardholder to provide personal identification
9 information, which the person, firm, partnership, association, or corporation accepting the credit card
10 writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise."
11 Cal. Civ. Code § 1747.08(a). Plaintiffs contend that a retailer violates this section by (1) requesting
12 personal identification information from a credit card customer and then recording it, *or* (2) requiring
13 a customer to provide such information as a condition to accepting the credit card as payment and then
14 recording it. Defendants argue that courts have rejected plaintiffs' expansive interpretation of the
15 statute, and that "[i]f, as the plaintiffs . . . urge, the phrase 'as a condition to accepting the credit card'
16 does not apply to the word request, then nothing ties a violation of the Act to a credit card transaction
17 at all." *Gass v. Best Buy Inc.*, 279 F.R.D. 561, 569 (C.D. Cal. 2012).

18 In *Florez v. Linens 'N Things, Inc.*, 108 Cal. App. 4th 447 (2003), the California Court of Appeal
19 analyzed whether the Song-Beverly Act prohibited a retailer from requesting a customer's personal
20 information at the inception of a purchase transaction, before the customer announced his or her
21 preferred method of payment. The court first noted that "section 1747.8⁶ is a consumer protection
22 statute, and the retailer's request for personal identification information must be viewed from the
23 customer's standpoint. In other words, the retailer's unannounced subjective intent is irrelevant. What
24 does matter is whether a consumer would perceive the store's 'request' for information as a 'condition'

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26 from February 24, 2010 through February 24, 2011." This is not a fail-safe class because the class is
27 defined neutrally and if Nike's ZIP code capture policy is found legal, the class members are bound by
28 this adverse judgment.

⁶ The section was subsequently renumbered to its current location, Cal. Civ. Code § 1747.08.

1 of the use of a credit card.” *Id.* at 451.

2 Viewed from this perspective, we think there is nothing ambiguous or unclear
3 about the statute. By its plain language, it prohibits a “request” for personal
4 identification information in conjunction with the use of a credit card. As the Senate
5 Committee on the Judiciary Analysis of Assembly Bill No. 1477 explains, section
6 1747.8 was amended to add the word “request,” and “[t]his bill would clarify that
7 persons may neither require nor request, as a condition to accepting the credit card, the
8 taking or recording of personal identification information from the cardholder. (Current
9 law states such information may not be required, but does not prohibit requesting such
10 information.)”

11 ...

12 LNT insists its employees did nothing to suggest the provision of a telephone
13 number was a requirement or condition of payment by credit card. Because there was
14 no discernible link between the request and the use of the credit card, LNT claims
15 section 1747.8 does not apply here. As LNT interprets it, section 1747.8 allows a
16 retailer to request consumer telephone numbers before the manner of payment is
17 known because the timing of the request eliminates any concern that the provision of
18 such information is a condition of credit card payment.

19 The argument is not persuasive. As evidenced by the 1991 amendment, section
20 1747.8 is designed to prevent a “request” for personal information, because a customer
21 might perceive that request as a condition of credit card payment. In effect, the 1991
22 amendment prevents a retailer from making an end-run around the law by claiming the
23 customer furnished personal identification data “voluntarily.” In fact, the Enrolled Bill
24 Report of the California Department of Consumer Affairs, Assembly Bill No. 1477
25 (1991–1992 Reg. Sess.), specifically addressed this problem, noting “[t]his bill would
26 prohibit requesting or requiring that information.” As we read it, the legislative intent
27 suggests the 1991 amendment simply clarified that a “request” for personal
28 identification information was prohibited if it immediately preceded the credit card
transaction, even if the consumer’s response was voluntary and made only for
marketing purposes.

19 *Id.* at 451-52. The *Florez* court also stated,

20 We note that nothing prevents a retailer from soliciting a consumer’s address
21 and telephone number for a store’s mailing list, if that information is provided
22 voluntarily. Retailers are not without options in this regard. A merchant can easily
23 delay the request until the customer tenders payment or makes his or her preferred
24 method of payment known. If the payment is made with cash, and the customer is so
25 inclined, personal identification information can be recorded at that time.
26 Alternatively, retailers could delete a customer’s personal identification information
27 as soon as the customer reveals an intention to pay by credit card. In other words, the
28 statutory mandate can hardly be described as draconian. None of these alternatives
represents any great imposition on retailers.

25 *Id.* at 451-52.

26 In *Absher v. AutoZone, Inc.*, 164 Cal. App. 4th 332 (2008), the California Court of Appeal
27 reiterated that “Subdivision (a)(1) now prohibits merchants from *requesting or requiring* credit card
28 customers to write personal identification information on a credit card form *as a condition precedent*

1 to accepting payment by credit card. Similarly, (a)(2) prohibits merchants from requesting or requiring
2 credit card customers to provide personal identification information—as a condition precedent to
3 accepting payment by credit card—so that the merchant can write the information on the credit card
4 form.” *Id.* at 342 (emphasis added). Thus, under *Florez* and *Absher*, the Song-Beverly Act prohibits
5 merchants from requesting personal identification information as a condition precedent to accepting
6 payment by a credit card, but the statute is not violated if a customer provides such information
7 voluntarily for a purpose unrelated to processing the credit card transaction. *See Gass*, 279 F.R.D. at
8 570 (requesting personal identification for enrollment in rewards program did not violate Song-Beverly
9 Act); *Davis v. Devanlay Retail Group, Inc.*, No. 2:11-CV-01719-KJM-CKD, 2012 WL 6589204, at
10 *3 (E.D. Cal. Dec. 17, 2012) (quoting *Florez* and holding that “[t]he permissibility of a retailer’s request
11 for a customer’s personal information turns on ‘whether a consumer would perceive the store’s
12 ‘request’ for information as a ‘condition’ of the use of a credit card.’”).

13 Plaintiffs argue that the plain language of the statute prohibits any request for personal
14 identification information in conjunction with a credit card transaction. While plaintiffs’ argument is
15 not without force, this Court is required to interpret the statute in a manner consistent with that of the
16 California courts in *Florez* and *Absher*. Plaintiffs also rely on the California Supreme Court’s statement
17 in *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524, 527 (2011), that “requesting and recording
18 a cardholder’s ZIP code, without more, violates [the Song-Beverly Act].” However, *Pineda* did not
19 address whether the statute prohibits any “request” for personal information in conjunction with a credit
20 card payment. Instead, *Pineda* only decided the question of whether ZIP codes constituted “personal
21 identification information” within the meaning of the statute. *See id.* at 530 (“[T]he outcome of this case
22 hinges on whether a cardholder’s ZIP code, without more, constitutes personal identification information
23 within the meaning of section 1747.08.”); *see also Davis*, No. 2:11-CV-01719-KJM-CKD, 2012 WL
24 6589204, at *4 (“Additionally, the *Pineda* court’s statement that ‘requesting and recording a
25 cardholder’s zip code, without more, violates [Song Beverly],’ 51 Cal.4th at 527, 120 Cal.Rptr.3d 531,
26 246 P.3d 612, was merely clarifying that zip codes alone without street address information still
27 constitute PII.”).

28 Plaintiffs assert that the California Court of Appeal rejected defendants’ arguments in an

1 unpublished case, *Carson v. Michaels Stores, Inc.*, No. D055477, 2011 WL 2120195 (Cal. Ct. App. May
2 31, 2011). In *Carson*, the court cited *Pineda* for the proposition that ZIP codes constituted personal
3 identification information. *Id.* at *3. The court also held, “Michaels also asserted that it did not violate
4 the Act as it did not condition acceptance of Carson’s credit card upon her disclosing her ZIP code.
5 However, based upon *Pineda*, these contentions no longer have merit because *Pineda* held (1) a
6 cardholder’s ZIP code ‘constitutes ‘personal identification information’ as that phrase is used in section
7 1747.08’ and (2) ‘requesting and recording a cardholder’s ZIP code, without more, violates the statute.’”
8 *Id.* This Court does not consider *Carson* persuasive authority because *Pineda* did not examine whether
9 the statute prohibited any request for PII in conjunction with a credit card transaction, and *Carson* did
10 not discuss *Florez* or *Absher*, both of which are published decisions.⁷

11 Defendant argues that certification should be denied because “in determining whether § 1747.08
12 has been violated, the Court must analyze . . . whether the individual at issue (plaintiff or absent class
13 member) did actually perceive Nike’s request for their ZIP code to be a condition to accepting their
14 credit card.” Docket No. 86 at 16:7-8. However, courts have held that a customer’s subjective belief
15 is irrelevant, and instead the merchant’s policy “must be evaluated under an objective standard.” *Davis*,
16 2012 WL 6589204, at *4 (“Although *Davis* argues that her deposition shows she believed her zip code
17 was necessary to make her purchase . . . , her personal belief is irrelevant.”); *Juhline v. Ben Bridge*
18 *Jeweler, Inc.*, No. 11cv2906–WQH–NLS, 2012 WL 3986316, at *5 (S.D. Cal. Sept. 11, 2012) (“A court
19 applies an objective test to determine whether a retailer’s request for personal identification information
20 would be perceived as a condition of credit card payment.”); *cf. Korn v. Polo Ralph Lauren Corp.*, 644
21 F. Supp. 2d 1212, 1216 (E.D. Cal. 2008) (“A plain reading of the statute, as further supported by
22 legislative intent, supports the *Florez* court’s holding that a defendant is not allowed to request such
23 information because ‘a customer might perceive that request as a condition of credit card payment’ . . .
24 As such, plaintiff need not expressly allege that he believed such information was necessary to complete
25

26 ⁷ Plaintiffs also contend that “[t]he fact that there is no voluntariness exception is further
27 confirmed by the ‘anti-waiver’ provision in Section 1747.04, which provides that “[a]ny waiver of the
28 provisions of [the Song-Beverly Act] is contrary to public policy, and is void and unenforceable.” Cal.
Civ. Code § 1747.04. However, whether the requirements of a statute can be waived is a distinct
question from what constitutes a violation of the statute.

1 the transaction.”). Thus, the Court will apply an objective standard to determine whether Nike’s policy
2 for requesting ZIP codes would be perceived as a condition of credit card payment, and this question
3 can be resolved on a class basis.

4
5 **II. Rule 23(a)**

6 Rule 23(a)(3) requires the named plaintiffs to show that their claims are typical of those of the
7 class. To satisfy this requirement, the named plaintiffs must be members of the class and must “possess
8 the same interest and suffer the same injury as the class members.” *Gen. Tel. Co. of Sw. v. Falcon*, 457
9 U.S. 147, 156 (1982) (quotation marks and citation omitted). The typicality requirement “is satisfied
10 when each class member’s claim arises from the same course of events, and each class member makes
11 similar legal arguments to prove the defendant’s liability.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1124
12 (9th Cir. 2010) (citation omitted). Rule 23(a)(3) is “permissive” and only requires that the named
13 plaintiffs’ claims be “reasonably co-extensive with those of absent class members.” *Hanlon*, 150 F.3d
14 at 1020.

15 The Court finds that although the typicality requirement is not stringent, plaintiffs have not
16 demonstrated that they are typical of the class they seek to represent. The consolidated complaint
17 challenges Nike’s “Information Capture Policy,” and yet all of the named plaintiffs testified that their
18 experiences were not consistent with that policy. Mr. Gormley and Ms. McCartney both testified that
19 cashiers asked them for their ZIP codes before providing them with their receipts and merchandise, and
20 Ms. Hartman testified that although she could not remember any details about the credit card transaction
21 that is the basis of her claim, she was sure that she had not received her receipt or merchandise before
22 she was asked for her ZIP code because she would not have provided her ZIP code if the request had
23 been made after she was provided her receipt and merchandise. However, under the Nike policy that
24 is the subject of this lawsuit, cashiers were prompted to request ZIP codes after giving customers their
25 receipts and merchandise. Plaintiffs do not dispute that this was the Nike policy, but instead argue that
26 the timing of the request for ZIP codes is irrelevant because the statute prohibits any request for personal
27 identification information in conjunction with a credit card transaction. As discussed above, the Court
28 disagrees with this interpretation of the statute. Because the legality of Nike’s policy depends on

1 whether a consumer would perceive the store's request for a ZIP code as a condition of the use of a
2 credit card, the timing of that request is relevant.

3 Accordingly, the Court finds that the named plaintiffs are not typical of the class they seek to
4 represent, and DENIES class certification on this ground. As such, the Court finds it unnecessary to
5 address defendants' challenges to the adequacy of these named plaintiffs.⁸

6
7 **CONCLUSION**

8 For the foregoing reasons, the Court hereby DENIES plaintiffs' motion for class certification.
9 Docket No. 63. If plaintiffs wish to amend the complaint to add a new class representative, plaintiffs
10 may seek leave of Court to do so.

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12 **IT IS SO ORDERED.**

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14 Dated: January 28, 2013



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SUSAN ILLSTON
United States District Judge

⁸ The Court notes, however, that it appears that plaintiffs have established numerosity, commonality, and the Rule 23(b)(3) requirements.