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## California Court Denies Class Certification in Post-*Pineda* ZIP Code Case Against Retailer

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*Recently, Judge S. James Otero of the U.S. District Court for the Central District of California denied plaintiff Norma Rothman's class certification motion in connection with her complaint under California's Song-Beverly Credit Card Act of 1971. The case was filed on the heels of the February 10, 2011 California Supreme Court ruling in Pineda v. Williams-Sonoma Stores, Inc., which held that a consumer's "ZIP code constitutes 'personal identification information' as that phrase is used in section 1747.08" of the Act.*

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The California Supreme Court's decision in *Pineda* was the catalyst to over 200 putative class actions in California in the last nine months. Plaintiff Norma Rothman's March 16, 2011 complaint names General Nutrition Corporation ("GNC") and alleges that Rothman purchased items using her credit card, that GNC "requested and/or required Plaintiff to provide her ZIP code" in connection with the transaction, and that GNC recorded her ZIP code information in its computer system.

On November 1, 2011, Judge Otero denied Rothman's motion to certify the class of "[a]ll persons who engaged in a credit card transaction during the last one (1) year at one of Defendants' retail stores located in the State of California, and who were requested or required to provide personal identification information at the time of the credit card transaction." He recognized that the "proposed class includes individuals who voluntarily gave Defendant their personal information to join the Gold Card program and individuals from whom Defendant requested personal information for the purpose of shipping or delivering goods" – individuals who have not suffered a violation of the Act, qualifying for express exceptions in the Act, and were "not proper members of a class seeking redress." More fundamentally, Judge Otero ruled that the proposed class definition did not "limit the class to individuals whose personal information was recorded by Defendant. The Act does not prohibit companies from merely asking for personal identifying information."

Judge Otero further determined that Rothman's motion did not satisfy the requirements of Federal Rule of Civil Procedure 23(a), finding as follows:

**Numerosity.** Rothman did not present "any evidence regarding the number of individuals who had their personal information requested when they attempted to consummate a credit card transaction at one of Defendant's California stores." However, GNC provided some preliminary evidence regarding

the number of credit card transactions in which ZIP code information was requested, information highlighting "the large number of individuals from whom Defendant did request ZIP code information."

**Commonality.** Rothman did not cite "a fact or item of any evidentiary weight to support her contention that Defendant had a uniform policy of requesting ZIP code information (or other personal information) from its customers." In contrast, GNC had presented evidence that it did not have a uniform policy of requesting ZIP code information; franchise stores are independently owned and operated. Judge Otero found that "if the personal information is requested as opposed to required, whether there has been a violation of the Act would depend upon whether the individual consumer reasonably believed that providing his personal information was a condition of consummating the credit card transaction," citing *Florez v. Linens 'N Things, Inc.*, 108 Cal. App. 4th 447, 451-53 (2003). This analysis "will vary with each consumer, based on factors such as when during the credit card transaction the information was requested and the exact wording of the request."

**Typicality.** Rothman presented no evidence of a "common scheme." Also, there "are unique defenses specific to various class members," including that "individual class members gave their information voluntarily (either as part of the Gold Card program or otherwise) or that class members gave their information for shipping or delivery purposes." And, GNC could argue that "in individual circumstances, the timing or wording of a request made it so that no reasonable consumer would have interpreted the request as a condition for the use of the credit card."

**Adequacy of representation.** Judge Otero was "not convinced that Plaintiff's current counsel is capable of adequately representing that class." Counsel cited multiple times to *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007), a decision that was famously reversed by the U.S. Supreme Court earlier this year, including citing *Dukes* for the precise point of law that was overruled. "[E]ither that Plaintiff's counsel are not familiar enough with class actions to competently represent a class or that this motion was mere boilerplate, a rote class certification motion that is updated only to fit in the facts of the particular case without checking whether the cases cited remain valid points of law."

This comes as good news for the many retailers who have been named in the wave of class actions filed after *Pineda* and may serve as a deterrent to others considering such actions.

- [Click here](#) to read the Judge Otero's November 1, 2011 Order
- [Click here](#) to read Pillsbury Client Alert "California Supreme Court: "Requesting and Recording a Cardholder's ZIP Code" Violated State Law."

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