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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TAMMIE DAVIS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

No. 2:11-CV-01719-KJM-CKD

vs.

DEVANLAY RETAIL GROUP, INC.,
AND DOES 1 THROUGH 50,
INCLUSIVE,

ORDER

Defendants.

On June 25, 2010, Tammie Davis filed suit against Devanlay Retail Group, Inc. (“Devanlay”) on behalf of herself and others similarly situated in the Superior Court of California, County of Placer. (Compl., ECF 1.) Davis alleged that Devanlay violated the Song-Beverly Credit Card Act, Cal. Civ. Code § 1747.08, (“Song-Beverly”) by requesting and recording the personal identification information (“PII”) of their retail store customers who pay with credit cards, including when Davis made a purchase at a Lacoste store operated by Devanlay. (*Id.* ¶¶ 2, 10, 14-21.) Devanlay removed the case to this court on June 27, 2011. (ECF 1.) On June 5, 2011, Devanlay moved for summary

1 judgment. (ECF 20.)¹ Davis filed her opposition to the motion on July 11, 2012 (ECF 25) and
2 Devanlay submitted its reply on July 20, 2012 (ECF 20). The court heard oral argument for Devanlay’s
3 motion for summary judgment on October 26, 2012. For the reasons set forth below, the court
4 GRANTS Devanlay’s motion for summary judgment.

5 I. BACKGROUND

6 Devanlay has written “Policies and Procedures” and a “Company Orientation
7 Handbook” (“Handbook”) that it provides to new Lacoste store employees during training, which are
8 also available to all store employees in hard copy and through the store’s intranet. (Decl. of Jennifer
9 Jackson, ECF 39-5 ¶¶ 5-6, 13.) Both the Policies and Procedures and the Handbook contain the
10 following language:

11 There are several state laws that prohibit retailers who accept credit or
12 debit cards for purchases from asking customers for [PII] during a credit
13 or debit card transaction. [PII] means information concerning the
14 cardholder, other than information set forth on the credit or debit card,
including, but not limited to, the cardholder’s address, home or business
telephone number, and social security number.

15 Additionally, there is nothing that prevents [Devanlay] from soliciting a
16 customer’s address and telephone number for a store’s mailing list, so long
17 as the solicitation is done separate and apart from the credit or debit card
18 transaction. Therefore, requests for this type of information should only
be made after the purchase has been processed and finalized, and the
customer must be told that providing the information is completely
voluntary.

19 (*Id.* Ex. A, ECF 39-6; Ex. B, ECF 39-7 (emphasis omitted).) In the Policies and Procedures, this
20 language is followed by a chart explaining the “Client Capture Laws State by State.” The chart indicates

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26 ¹ Devanlay originally filed its motion for summary judgment and supporting documents in
27 redacted form (ECF 20, 31) and Davis likewise filed her original opposition and supporting documents
28 in redacted form (ECF 26). On August 6, 2012, the court ordered the parties to file unredacted versions.
Although the filing dates in this order refer to the original versions of the filings, the court cites to pages
within the unredacted versions filed at ECF 39, 43 and 44.

1 that in California, a cashier may not

2 request, or require as a condition to accepting a credit/debit card as
3 payment, that the cardholder write PII on the credit/debit card transaction
4 form or otherwise; or that the cardholder provide PII, which [the cashier]
then write[s], cause[s] to be written, or otherwise record[s] on the
credit/debit card transaction form or otherwise [].

5 (Ex. A, ECF 39-6.) In the Handbook, the language is followed by a list of states, including California,
6 in which the Handbook instructs that “[a cashier] can capture customer information AFTER the
7 transaction has been processed.” (Ex. C, ECF 39-8.) Devanlay tells its Lacoste cashiers during training
8 that the transaction is processed once the customer has received his or her receipt. (Dep. of Jennifer
9 Suzanne Jackson at 7, Ex. A, ECF 39-3.)

10 Davis visited Devanlay’s retail store in Roseville, California on April 2, 2010. (Decl. of
11 Tammie Davis ¶ 2, Ex. F, ECF 43-7.) She brought an item to the cash register to purchase it with her
12 credit card. (*Id.* ¶ 3.) As Davis “was putting [her] credit card in [her] purse, [the cashier] asked [her],
13 ‘What’s your [zip] code?’” (Dep. of Tammie Davis at 4, Ex. B, ECF 39-4.) Davis did not receive her
14 merchandise until after the cashier requested her zip code. (*Id.* at 9.) At the October 26 hearing, the
15 parties agreed that Davis did not remember whether the cashier had given Davis her receipt before
16 asking for Davis’s code.

17 II. SUMMARY JUDGMENT STANDARD

18 A court will grant summary judgment “if . . . there is no genuine dispute as to any
19 material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). The
20 “threshold inquiry” is whether “there are any genuine factual issues that properly can be resolved only
21 by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v.*
22 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party bears the initial burden of showing the
23 district court “that there is an absence of evidence to support the nonmoving party’s case.” *Celotex*
24 *Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to the nonmoving party, which “must
25 establish that there is a genuine issue of material fact . . .” *Matsushita Elec. Indus. Co. v. Zenith Radio*
26 *Corp.*, 475 U.S. 574, 585 (1986). In carrying their burdens, both parties must “cit[e] to particular parts
27 of materials in the record . . . ; or show [] that the materials cited do not establish the absence or presence
28 of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”

1 FED. R. CIV. P. 56(c)(1); *see also Matsushita*, 475 U.S. at 586 (“[the nonmoving party] must do more
2 than simply show that there is some metaphysical doubt as to the material facts”). Moreover, “the
3 requirement is that there be no *genuine* issue of *material* fact Only disputes over facts that might
4 affect the outcome of the suit under the governing law will properly preclude the entry of summary
5 judgment.” *Anderson*, 477 U.S. at 247-48 (emphasis in original).

6 In deciding a motion for summary judgment, the court draws all inferences and views all
7 evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587-88;
8 *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008). “Where the record taken as a whole could not
9 lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’”
10 *Matsushita*, 475 U.S. at 587 (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289
11 (1968)).

12 III. ANALYSIS

13 1. Devanlay’s Policies Under Song-Beverly

14 The Song-Beverly Act “imposes fair business practices for the protection of consumers.”
15 *Florez v. Linens ‘N Things, Inc.*, 108 Cal. App. 4th 447, 450 (2003) (citations omitted). To address
16 some retailers’ practice of using customers’ PII obtained during credit card transactions to find their full
17 addresses, *id.* at 449, Song-Beverly states that retailers may not:

18 [r]equest, or require as a condition to accepting the credit card as payment
19 in full or in part for goods or services, the cardholder to provide [PII],
20 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.

21 CAL. CIV. CODE § 1747.08(a). Specifically, Song-Beverly was enacted to address two concerns:
22 “[F]irst, that with increased use of computer technology, very specific and personal information about a
23 consumer’s spending habits was being made available to anyone willing to pay for it; and second, that
24 acts of harassment and violence were being committed by store clerks who obtained customers’ phone
25 numbers and addresses.” *Florez*, 108 Cal. App. at 452 (citing *California Assembly Committee on*
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1 *Finance and Insurance, Background Information Request on A.B. 2920, 1989-1990 Sess. (Cal. 1990).*²

2 “[T]he Legislature intended to provide robust consumer protections by prohibiting retailers from
3 soliciting and recording information about the cardholder that is unnecessary to the credit card
4 transaction.” *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524, 536 (2011).

5 Song-Beverly does not entirely forbid stores from obtaining customers’ personal
6 information. In *Florez*, the court explained that stores whose customers voluntarily provide personal
7 information do not violate Song-Beverly. 108 Cal. App. 4th at 451. Stores have several options to
8 legally obtain customers’ personal information:

9 A merchant can easily delay the request [for a customer’s personal
10 information] until the customer tenders payment or makes his or her
11 preferred method of payment known. If the payment is made with cash,
12 and the customer is so inclined, personal identification information can be
13 recorded at that time. Alternatively, retailers could delete a customer’s
14 personal identification information as soon as the customer reveals an
15 intention to pay by credit card.

16 *Id.* at 451-52. The permissibility of a retailer’s request for a customer’s personal information turns on
17 “whether a consumer would *perceive* the store’s ‘request’ for information as a ‘condition’ of the use of a
18 credit card.” *Id.* at 451 (emphasis in original). Using this standard, the *Florez* court determined that a
19 retailer’s policy of requesting customers’ phone numbers before customers announce that they plan to
20 pay by credit card violated Song-Beverly. *Id.* at 453. The court rejected the retailer’s argument that the
21 “timing of the request eliminates any concern that the provision of such information is a condition of
22 credit card payment,” explaining that “[the retailer’s] interpretation leads to an absurd conclusion, i.e.,
23 the retailer may evade the statutory prohibition by rushing to obtain the information before the customer
24 makes his or her payment preference known. That interpretation, if allowed, would completely
25 undermine the purpose of the statute.” *Id.*

26 Other courts have reviewed retailers’ policies under the standard articulated in *Florez*.
27 For example, requesting a customer’s personal information after the customer has handed his or her
28 credit card to the cashier, but before the receipt is printed, violates Song-Beverly. *Juhline v. Ben Bridge*

27 ² As requested by Davis, the court takes judicial notice of the legislative history providing
28 additional evidence of the goals behind the Song-Beverly Act. (Pl.’s Request for Judicial Notice, ECF
43-10.)

1 *Jeweler, Inc.*, No. 11cv2906-WQH-NLS, 2012 WL 3986316, at *5 (S.D. Cal. Sept. 11, 2012). In
2 contrast, a retailer’s request for a customer’s personal information after the customer indicated he or she
3 was a member of the retailer’s rewards program does not violate Song-Beverly because the customer
4 would reasonably understand that retailer would use the information to look up membership information
5 in the retailer’s database, rather than as a condition to using a credit card. *Gass v. Best Buy Co., Inc.*,
6 279 F.R.D. 561, 572-73 (C.D. Cal. 2012).

7 Devanlay argues that its policy for obtaining customers’ zip codes is consistent with
8 Song-Beverly because the policy instructs cashiers to ask for a customer’s zip code only after the
9 customer has already received her receipt, in contrast to the policy of requesting a customer’s personal
10 identification information before the customer reveals she wants to pay by credit card that was struck
11 down in *Florez*. (Def.’s Mot. for Summ. J. at 16, ECF 39.) Davis responds that even at the moment
12 when the customer has been given the receipt, “the customer is still engaged in the transaction while
13 standing at the same point-of-sale and interacting with the same cashier.” (Pl.’s Opp’n to Mot. for
14 Summ. J. at 10, ECF 43.) Davis contends that Devanlay’s policy violates Song-Beverly, as the
15 transaction is still ongoing. (*Id.*)

16 Under *Florez*, the crucial issue in this case is not whether the transaction has reached an
17 official end when the cashier requests personal information from the customer; it is whether under
18 Devanlay’s policy, a customer would reasonably believe that providing the zip code is necessary to
19 complete the transaction. Although Davis argues that her deposition shows she believed her zip code
20 was necessary to make her purchase (Pl.’s Opp’n to Mot. for Summ. J. at 17, ECF 43), her personal
21 belief is irrelevant. Rather, Devanlay’s policy must be evaluated under an objective standard. *See, e.g.*,
22 *Korn v. Polo Ralph Lauren Corp.*, 644 F. Supp. 2d 1212, 1216 (E.D. Cal. 2008) (plaintiff’s subjective
23 belief that personal information was necessary to complete the transaction was not critical to
24 determination of whether a store’s policy violated Song-Beverly). Viewed objectively, Devanlay’s
25 policy of waiting until the customer has her receipt in hand conveys that the transaction has concluded
26 and that providing a zip code is not necessary to complete the transaction. (*See* Pl.’s Opp’n to Mot for
27 Summ. J. at 17, ECF 39.) Davis provides no countervailing reasonable interpretation.

1 Davis makes additional arguments but they mischaracterize the law defining permissible
2 practices under Song-Beverly. First, Davis argues that the language of Section 1747.08(a) does not
3 allow retailers to “request[] [PII] and then record[] it.” (Pl.’s Opp’n to Mot. for Summ. J. at 15, ECF 43).
4 Defendants are correct that this statutory interpretation would mean that retailers may never request and
5 record customers’ PII and exceeds Song-Beverly’s focus on conditions of accepting a credit card as
6 payment. *Gass*, 279 F.R.D. at 569 (noting that under plaintiff’s interpretation, “nothing ties a violation
7 of [Song-Beverly] to a credit card transaction at all”). Additionally, the *Pineda* court’s statement that
8 “requesting and recording a cardholder’s zip code, without more, violates [Song Beverly],” 51 Cal. 4th
9 at 527, was merely clarifying that zip codes alone without street address information still constitute PII.

10 2. Safe Harbor Provision

11 Devanlay argues that even if the cashier who handled Davis’s transaction violated
12 Devanlay’s official policies by requesting Davis’s zip code before giving her a receipt, Devanlay itself is
13 not liable under Song-Beverly because of the statute’s “Safe Harbor” provision. (Def.’s Mot. for
14 Summ. J. at 12, ECF 39.) This provision states that

15 [N]o civil penalty shall be assessed for a violation of this section if the
16 defendant shows by a preponderance of the evidence that the violation was
17 not intentional and resulted from a bona fide error made notwithstanding
 the defendant's maintenance of procedures reasonably adopted to avoid
 that error.

18 CAL. CIV. CODE § 1747.08(e). Although Davis disputes that Devanlay’s policy meets the requirements
19 of the Safe Harbor provision, she also argues that the provision is irrelevant because the cashier who
20 conducted her transaction acted according to Devanlay’s policy. (Pl.’s Opp’n to Mot. for Summ. J. at
21 20-21, ECF 43.) The court has determined that Devanlay’s policy does not violate Song-Beverly.
22 However, if it did, the Safe Harbor Provision shields Devanlay from liability. If the cashier requested
23 Davis’s zip code before giving Davis her receipt, this would have been an unintentional error that
24 violated Devanlay’s policy. *See Romeo v. Home Depot*, 2007 WL 3047105, No. 06CV1505 IEG
25 (WMc), at *3 (S.D. Cal. Oct. 16, 2007) (explaining that the Safe Harbor provision applies when an
26 individual store employee acts in violation of official store policy).

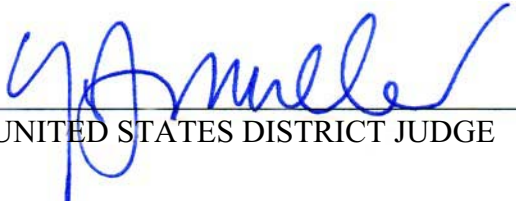
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1 Accordingly, for the foregoing reasons, defendant's motion for summary judgment is
2 GRANTED.

3 IT IS SO ORDERED.

4 DATED: December 14, 2012.

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8 UNITED STATES DISTRICT JUDGE

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