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7 **Attorneys for Plaintiffs**

8 **UNITED STATES DISTRICT COURT**
 9 **CENTRAL DISTRICT OF CALIFORNIA**

10 NORMA ROTHMAN, individually, and
on behalf of all others similarly situated,

11 Plaintiff,

12 v.

13
 14 GENERAL NUTRITION
 CORPORATION a Pennsylvania
 15 corporation, and DOES 1-500,

16 Defendants.

Case No.: CV11-03617 SJO (RZx)
*Assigned for all purposes to the
 Honorable S. James Otero*

17 CLASS ACTION

18 **PLAINTIFF'S REPLY
 MEMORANDUM OF POINTS AND
 19 AUTHORITIES IN SUPPORT OF
 MOTION FOR CLASS
 20 CERTIFICATION**

Date Action Filed: March 16, 2011
 Trial Date: TBD

21 Date of Hearing: Vacated

1 **I. INTRODUCTION**

2 Plaintiff, Norma Rothman, (“Plaintiff” and/or “Ms. Rothman”), hereby
3 submits her Reply as follows:

- 4 • Evidence demonstrates that at all relevant time periods Defendant, General
5 Nutrition Corporation (“GNC” or “Defendant”) maintained a policy of
6 requesting and recording customer ZIP codes in connection with credit card
7 transactions in violation of the Song-Beverly Act (the “Act”) and, further, it
8 illegally used said information for marketing purposes in direct contradiction
9 of the Act. (See ¶¶ 5 and 6 of the Supplemental Declaration of Ridout (“Supp.
10 Decl. of Ridout”); See also the Declaration of Paul Katz.)
- 11 • *All* stores, corporate owned or franchised, were required to adhere to GNC’s
12 policies and procedures regarding the operation of Point of Sale (“POS”)
13 registers, which included the collection of ZIP codes. (See Supp. Decl. of
14 Ridout at ¶ 7.)
- 15 • The Act mandates that “[N]o person, firm, partnership, association, or
16 corporation that accepts credit cards for the transaction of business shall ...: [¶]
17 ... [¶] (2) Request, or require as a condition to accepting the credit card as
18 payment in full or in part for goods or services, the cardholder to provide
19 *personal identification information*, which the person, firm, partnership,
20 association, or corporation accepting the credit card *writes, causes to be*
21 *written, or otherwise records upon the credit card transaction form or*
22 *otherwise*. [Emphasis added.]” California Civil Code §1747.08(a).
- 23 • As it is unequivocal, the Act does not require a showing of “subjective
24 perception” of a “condition” in connection with the subject transaction (*Florez*
25 *v. Linen ‘N Things, Inc.* (2003) 108 Cal.App.4th 447).
- 26 • Ms. Rothman is an adequate and typical representative of the Class.

27 For reasons set forth herein, Plaintiff submits that the present motion be granted.
28

1 added.]”³ Indeed, in order to *enforce* such a policy, you must first *have* such a
2 policy.⁴

3 Finally, Defendant *admits* that it specifically used the illegally obtained ZIP
4 codes in direct contradiction of the very purpose of the Act, *e.g.* preventing the
5 misuse of said Personal Identification Information (“PII”) for marketing purposes.
6 (*Absher v. Auto Zone, Inc.* (2008) 164 Cal.App.4th 332, 345.) Defendant confirms:
7 “...GNC states that purposes for requesting zip code information include...assistance
8 in determining store locations...”⁵

9 **B. Defendant Misstates “The Law Related to the Song-**
10 **Beverly Act” Which Undermines It’s Entire Opposition**

11 A violation of the Act *is not predicated on the subjective belief of a credit*
12 *card holder* when requested to provide PII. Defendant’s erroneous assertion
13 otherwise is repeatedly cited throughout Defendant’s opposition in support of its
14 contentions that, 1) Plaintiff’s proposed class is not ascertainable, 2) the Act claim
15 presented cannot be predicated on facts common to class members, 3) the Plaintiff’s
16 claim is not typical of the putative class claim, and 4) individual questions
17 predominate over common questions. As Defendant’s central legal premise is
18 simply wrong, all contentions based on this erroneous premise are similarly without
19 merit.

20 The Act in clear and concise language identifies the acts which constitute a
21 violation of the Act and contains no exemption based on the “subjective belief” of a
22 credit card holder. To the contrary, the Act *was amended in 1991 to prevent*
23 *retailers from evading the prohibition against requesting and recording PII by*
24

25 ³ *Id.*

26 ⁴ *Id.*

27 ⁵ *See* Defendant’s Responses to Plaintiff’s First Set of Interrogatories To Defendant
28 General Nutrition Corporation at 5:15-26; 5:27-6:11; and 6:12-24, attached as
Exhibit “A” to Ridout Decl. (Docket #25.)

1 ***claiming credit card holders voluntarily provided PII during credit card***
2 ***transactions.*** (*Florez v. Linen and Things*, 108 Cal.App.4th at 447, 450 (2008).)

3 In *Florez*, the California Court of Appeal held that contrary to the very
4 assertion Defendant now makes, ***violation of the Act is not predicated on whether a***
5 ***credit card holder voluntarily provides PII as requested by a retailer.*** (*Id.* at 453.)
6 The court in *Florez* interpreted the Act as impacted by its 1991 amendment adding
7 the term “requesting.” In this regard, the court observed that an interpretation of the
8 protections of the Act must be undertaken by consideration of the purpose of the Act
9 from the perspective of a credit card holder who is requested to provide PII. (*Id.* at
10 452, 453.) Defendant conflates this interpretative tool improperly suggesting that
11 liability under the Act is somehow predicated on the “perspective” of the credit card
12 holder. The court in *Florez* did not so hold and, in fact, ***rejected*** the very contention
13 asserted by Defendant that liability under the Act is predicated on the state of mind
14 of the credit card holder. To the contrary, *Florez* held, in part, that the very purpose
15 and effect of the Act’s 1991 amendment was to ***prevent*** evasion of the Act’s
16 prohibitions and protections by retailers who claim that credit card holders
17 “voluntarily” provided PII. (*Id.*) Defendant’s erroneous interpretation of the holding
18 in *Florez* was also rejected by the district court in *Korn v. Polo Ralph Lauren Corp.*,
19 644 F.Supp.2d 1212, 1216 (E.D. Cal. 2008).

20 As Defendant’s central legal premise is contrary to the Act and the relevant
21 case law interpreting it, all contentions based on this erroneous premise (*e.g.* that
22 Plaintiff’s proposed class is not ascertainable, that the Plaintiff’s claim cannot be
23 predicated on facts common to class members, that the Plaintiff’s claim is not typical
24 of the putative class claim, and that individual questions predominate over common
25 questions), are similarly without merit.

26 ///

27 ///

28 ///

C. Plaintiff and Class Counsel Demonstrate That They Will Adequately Represent the Class

Defendant’s reference to Plaintiff’s participation in any other actions wherein another retailer’s alleged activities violated the Act is simply irrelevant. (*See* Supp. Decl. of Ridout at ¶ 3.) Plaintiff clearly and succinctly testified that she understands her obligations as class representative in this Action, and her willingness to pursue the rights of the class at the risk of her own financial loss. (*Id.* at Exhibit “D.”) Plaintiff also confirmed her commitment as a class representative, in writing, before this action was filed. (*Id.* at ¶ 8 and Supp. Decl. of Norma Rothman at ¶ 5.)

Finally, with respect to Defendant’s assertion that class counsel is somehow inadequate, class counsel submits to this Court that the pleadings filed in support of this motion are anything but “generic” or “assembly line” quality as Defendant’s suggest.⁶

D. Individual Questions Do Not Predominate Over Common Questions

Defendant’s contention that Plaintiff has not established any common questions is simply wrong. Defendant completely ignores the quintessential common question in an action predicated on the Act—did Defendant request and record class members’ ZIP codes in connection with sales transactions? The evidence proffered in connection with this Motion demonstrates the existence of such a common question. Simply stated: Did Defendant request and record a class member’s ZIP code in connection with a credit card transaction? Plaintiff submits that the answer to this question is “yes,” approximately 798,000 times over.

Dated: November 17, 2011 By: /s/ Christopher P. Ridout
Christopher P. Ridout, CA Bar No. 143931
Attorneys for Plaintiff

⁶ Counsel submits its sincere apologies to this Court and opposing counsel for any confusion the mis-citation to the Ninth Circuit’s decision in Dukes v. Wal-Mart, which was overruled by the Supreme Court. (*See* Supp. Decl. of Ridout at ¶9.)

CERTIFICATE OF SERVICE

RE: ROTHMAN v. GENERAL NUTRITION CORPORATION
(CV11-03617 SJO (RZx))

I certify that on November 17, 2011, I caused to be served a true and correct copy of the document:

**PLAINTIFF'S REPLY MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION FOR CLASS
CERTIFICATION**

upon all parties by ECF Notification of Filing to the following address(es):

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