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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JASON GEORGE et al.,

Plaintiffs and Appellants,

v.

GUITAR CENTER, INC. et al.,

Defendants and Respondents.

B275956

(Los Angeles County
Super. Ct. No. BC462143)

APPEAL from an order of the Superior Court of Los Angeles County, John Shepard Wiley Jr., Judge. Affirmed.

Robbins Geller Rudman & Dowd, Frank J. Janecek, Jr., Christopher Collins, Susannah R. Conn, Andrew S. Love, Christopher M. Wood; Capstone Law, Jordan L. Lurie, Robert K. Friedl and Cody R. Padgett for Plaintiffs and Appellants.

Stroock & Stroock & Lavan, Steven D. Atlee and Christine E. Ellice for Defendants and Respondents.

INTRODUCTION

Jason George and Justin Hupalo, on behalf of themselves and others similarly situated (collectively plaintiffs), filed a class action complaint against Guitar Center, Inc., Guitar Center Stores, Inc., and Guitar Center Holdings, Inc. (collectively Guitar Center) alleging violations of the Song-Beverly Credit Card Act of 1971 (Act; Civ. Code, § 1747 et seq.).¹ Plaintiffs challenge Guitar Center’s practice of requesting and recording personal identification information when customers in its California stores pay using a credit card. Plaintiffs appeal from the denial of their class certification motion contending the trial court improperly denied the motion based on its erroneous interpretation of the statute.

Section 1747.08, subdivision (a)(2), states that merchants accepting credit cards may not “[r]equest, 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.”² Plaintiffs allege that Guitar Center violated the statute by requesting and recording customers’ personal identification information before completing

¹ All undesignated statutory references are to the Civil Code.

² Section 1747.08, subdivision (b), defines “personal identification information” as “information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder’s address and telephone number.”

their credit card transactions. Plaintiffs moved to certify a class of persons who made credit card purchases at Guitar Center stores and from whom Guitar Center requested personal identification information, or required such information as a condition to accepting a credit card payment, and recorded such information.

The trial court concluded that section 1747.08, subdivision (a)(2), prohibits merchants from requesting personal identification information if the customer would reasonably perceive the request as a condition to accepting a credit card payment. The court found that establishing liability would require individualized proof and common issues of fact or law would therefore not predominate. The court denied class certification.

Because the trial court properly construed the statute and acted within its discretion to deny class certification, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

Guitar Center operates retail stores selling musical instruments and equipment. George purchased merchandise from a Guitar Center store in April and May 2011 using a credit card. During the transactions the sales clerk requested and George provided his telephone number. Hupalo purchased merchandise from a Guitar Center store in April 2011 using a credit card. During the transaction the sales clerk requested and Hupalo provided his telephone number.

Guitar Center collected customers' personal identification information for marketing purposes. Guitar Center's point-of-sale computer system, known as the green screen, prompted sales clerks to enter the customer's name, zip code, and email address. Guitar Center's written policies emphasized the importance of collecting this information.

B. *Plaintiffs' Complaint*

On December 9, 2011, plaintiffs filed a first amended class action complaint against Guitar Center.³ Plaintiffs allege that Guitar Center stores have a policy and practice of requesting and recording personal identification information at the cash register during credit card transactions before the transaction is completed, in violation of section 1747.08. Plaintiffs allege a single cause of action for violation of the statute, seeking civil penalties (*id.*, subd. (e)), declaratory and injunctive relief, disgorgement, and attorney fees.

C. *Guitar Center's Motion for Summary Adjudication*

On November 30, 2012, Guitar Center filed a motion for summary adjudication.⁴ Guitar Center presented evidence that it had modified its point-of-sale computer system and its practices to ensure that its sales clerks requested personal identification information *only after* the customer had presented a credit card payment and the payment had been authorized.

³ Plaintiffs' original complaint is not included in the appellate record.

⁴ Guitar Center's moving papers are not included in the appellate record.

On November 21, 2014, the trial court denied the motion. The court stated that section 1747.08 prohibits a retailer from collecting personal identification information only if the customer would perceive that providing the information was a condition for the retailer's acceptance of the credit card payment. Plaintiffs submitted declarations by former Guitar Center sales clerks stating that Guitar Center had instructed them to collect personal identification information from every consumer and they could bypass the order of the green screen prompts and collect the personal identification information *during* the course of the transaction. The court concluded, "this evidence raises a triable issue of fact about whether a typical customer would perceive Guitar Center's request for personal information as a condition for use of a credit card."

D. *Plaintiffs' Class Certification Motion*

On May 29, 2015, plaintiffs filed a motion seeking the certification of a class of all persons in California who purchased merchandise at a Guitar Center retail store using a credit card from May 24, 2010 until December 6, 2011, and from whom Guitar Center requested, or required as a condition to accepting a credit card payment, the cardholder's personal identification information and caused such information to be recorded. Plaintiffs filed declarations by their counsel, George, and Hupalo, declarations by former Guitar Center associates and a former department manager, and other evidence in support of their motion.

Plaintiffs argued that a retailer violates section 1747.08 by requesting personal identification information during a credit card purchase before the customer is given a receipt at the

conclusion of the transaction. Given this contention, plaintiffs argued class certification was appropriate for two alternative reasons. First, the court need not decide the specific circumstances of each transaction because the Act precludes a retailer from requesting personal identification information from a customer during the transaction. Accordingly, whether a customer perceives the request to be a condition to accepting the credit card is not relevant to whether a defendant violated the Act. Alternatively, even if customer perception were relevant, plaintiffs argued common issues of fact would predominate because the court could objectively determine whether the “request for personal identification information would have been perceived as required in order to complete a credit card transaction.” Plaintiffs argued there were common issues of law and fact with respect to whether Guitar Center had violated the statute in collecting personal identification information and that class certification was appropriate.

Guitar Center argued in opposition to the motion that the proposed class was not ascertainable, common issues of law or fact did not predominate, and the named plaintiffs’ claims were not typical of the class. Guitar Center argued it complied with section 1747.08 by having its sales clerks request personal identification information only after a credit card payment was authorized, and its sales clerks explained to customers the purpose of the request was to enable them to receive store news and deals, making it clear that the store’s acceptance of a credit card payment was not conditioned on the customer’s providing personal identification information. Because the violation of the Act “hinges on customer perception,” Guitar Center argued common issues of fact did not predominate.

On January 27, 2016, the trial court conducted a hearing on the class certification motion. The court stated its tentative view that Guitar Center's liability under the statute depended on whether the customer understood that he or she need not provide an email address in order to pay by credit card. The court stated this depended on the phrasing of the sales clerk's statements made to the customer, and there was no consistency in the statements made, and on whether the credit card transaction was concluded before or after the request for an email address. The court stated that plaintiffs needed to present statistical evidence to establish liability. The court continued the hearing to allow counsel to file supplemental briefs. The court conducted another hearing on May 3, 2016, followed by an order ruling on the motion.

E. *The Order Denying Class Certification*

On May 3, 2016, the trial court filed an order denying the class certification motion. The order incorporated and adopted the court's oral tentative ruling. The order stated the merits of plaintiffs' claim depended on the proper construction of section 1747.08, subdivision (a)(2), and were enmeshed with the class action requirements. The court disagreed with plaintiffs' contention that violation of the statute was independent of the customer's perception. This "erroneous premise" "doom[ed]" plaintiffs' motion. The trial court stated that section 1747.08, subdivision (a)(2), "says no firm shall request or require the customer's email address 'as a condition' of accepting credit card payment. Thus, it is legal for a business to ask you for your email address, but not as a condition of using your credit card."

The order described a hypothetical in which the customer signs the credit card authorization and the cashier expressly states the credit card transaction is complete before requesting the customer's email address and, in no uncertain terms, tells the customer the purpose of the request is to send the customer promotional materials. In the hypothetical, the customer acknowledges that the credit card transaction is complete and agrees to provide an email address, understanding that the acceptance of a credit card payment is not conditioned on providing an email address. According to the trial court, because the retailer in the hypothetical did not condition payment by credit card on providing an email address, the retailer in the hypothetical did not violate the statute. Under plaintiffs' legal theory, as the court understood it, the retailer in the hypothetical violated the statute, and that theory was untenable.⁵

Alternatively, plaintiffs argued that even if the statute included a reasonable consumer perception standard, some Guitar Center customers provided their email addresses without knowing the credit card transaction was completed, and therefore liability would attach. Under this theory, however, the court found plaintiffs needed to present a statistical plan for managing the individual issues, citing *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 31-32, and plaintiffs had failed to do so.

⁵ The order did not discuss the class certification requirements or state which of those requirements plaintiffs failed to establish. The parties agree the trial court's ruling was based on plaintiffs' failure to show the predominance of common issues of law or fact.

Plaintiffs timely appealed from the order denying class certification.⁶

PLAINTIFFS' CONTENTIONS

Plaintiffs raise two arguments on appeal. First, they contend the trial court erred in its construction of the Act, which led to its erroneous finding that common issues did not predominate, and second, a statistical plan was not required.⁷

DISCUSSION

A. *Class Certification Legal Principles*

A party moving for class certification must show (1) a sufficiently numerous, ascertainable class, (2) a well-defined community of interest among class members, and (3) that certification will provide substantial benefits to litigants and the courts, meaning that a class action is superior to other methods of conducting the litigation. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) “[T]he ‘community of interest requirement embodies three factors: (1) predominant common

⁶ An order denying class certification is appealable if it effectively terminates the class claims and allows only individual claims to proceed, as here. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757-759.)

⁷ On appeal, plaintiffs abandon the alternative argument presented below that even if the Act included a reasonable consumer perception standard, the motion should have been granted. Plaintiffs rest their arguments on appeal on the court’s erroneous construction of the statute.

questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.’ [Citation.]” (*Ibid.*)

“The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’ [Citation.] A trial court ruling on a certification motion determines ‘whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ [Citations.]” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) The certification dispute focuses on whether common or individual questions are likely to arise in the action, rather than on the merits of the case. (*Id.* at p. 327.)

The determination whether the issues which may be jointly tried predominate “hinges on ‘whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.’ [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. ‘As a general rule if the defendant’s liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.’ [Citations.]” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021-1022, fn. omitted (*Brinker*)). “However, . . . class treatment is not appropriate ‘if every member of the alleged class would be required to litigate numerous and substantial

questions determining his individual right to recover following the “class judgment” on common issues. [Citation.]” (*Duran v. U.S. Bank National Assn.*, *supra*, 59 Cal.4th at p. 28.)

In particular, the determination whether common or individual questions predominate depends on “whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence.” (*Brinker*, *supra*, 53 Cal.4th at p. 1024.) This, in turn, may depend “on the precise nature of the element[s] and require resolution of disputed legal or factual issues affecting the merits.” (*Ibid.*) *Brinker* cautioned that “[s]uch inquiries are closely circumscribed” and “must ‘be limited to those aspects of the merits that affect the decisions essential’ to class certification. [Citation.]” (*Ibid.*)

“A class certification motion is not a license for a free-floating inquiry into the validity of the complaint’s allegations; rather, resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit [citation].” (*Brinker*, *supra*, 53 Cal.4th at p. 1023.) A trial court ruling on a class certification motion may decide legal or factual issues affecting the merits only to the extent that such issues are germane to the certification question. (*Id.* at pp. 1023-1024.) A court generally should avoid deciding such issues unless such a decision is necessary to the class certification decision. (*Id.* at p. 1025.)

The trial court here concluded that the proper construction of section 1747.08, subdivision (a)(2), was germane to the

certification question. We agree. The proper construction of the statute, regarding whether it prohibits any request for and recording of personal identification information before the conclusion of a credit card transaction or prohibits such a request only if a reasonable customer would perceive the request as a condition to accepting a credit card payment, affects the evidence required to establish liability and therefore affects the determination whether common or individual issues predominate.⁸ (Cf. *Harrold v. Levi Strauss & Co.* (2015) 236 Cal.App.4th 1259, 1268 (*Harrold*) [held that the proper construction of § 1747.08, subd. (a)(2), affected the determination whether the plaintiffs had shown numerosity, ascertainability, and typicality].)

B. *Standard of Review*

The trial court is afforded great discretion in ruling on a motion for class certification, and we review the ruling for abuse of discretion. (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at pp. 326-327.) We will not disturb a ruling on class certification unless the ruling is (1) not supported by substantial evidence, (2) based on improper criteria, or (3) based on an erroneous legal assumption. (*Fireside Bank v. Superior Court*, *supra*, 40 Cal.4th at p. 1089.)

An order that is based in part on improper criteria or an erroneous legal assumption must be reversed regardless of whether the order might be proper on other grounds. (*Brinker*, *supra*, 53 Cal.4th at p. 1050; *Linder v. Thrifty Oil Co.* (2000) 23

⁸ We therefore reject plaintiffs' argument that the trial court erred by addressing the merits.

Cal.4th 429, 436.) “We review the trial court’s actual reasons for granting or denying certification; if they are erroneous, we must reverse, whether or not other reasons not relied upon might have supported the ruling.” (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530; *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 995 [court must examine the trial court’s reasons for denying class certification and reverse the order if the court relied on improper criteria or engaged in an erroneous legal analysis].)

The trial court’s legal analysis was based on its construction of section 1747.08, subdivision (a). Statutory construction is a question of law that we review de novo. (*Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 135; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311.)

“Predominance is a factual question; accordingly, the trial court’s finding that common issues predominate generally is reviewed for substantial evidence. [Citation.] We must ‘[p]resum[e] in favor of the . . . order . . . the existence of every fact the trial court could reasonably deduce from the record’ [Citation.]” (*Brinker, supra*, 53 Cal.4th at p. 1022.)

C. *Rules of Statutory Construction*

Our fundamental objective in construing a statute is to ascertain the legislative intent so as to effectuate the purpose of the law. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95.) “[W]e look first to the words of a statute, ‘because they generally provide the most reliable indicator of legislative intent.’ [Citation.] We give the words their usual and ordinary meaning [citation], while construing them in light of the statute as a whole and the statute’s purpose [citation].” (*Pineda v. Williams-*

Sonoma Stores, Inc. (2011) 51 Cal.4th 524, 529-530.) We attempt to “give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.’ [Citations.]” (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 719.)

“““[W]e do not construe statutes in isolation, but rather read every statute “with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.””” [Citation.] We are also mindful of ‘the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.’ [Citations.] ‘If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.’ [Citation.] ‘Only when the statute’s language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation.’ [Citation.]” (*Pineda v. Williams-Sonoma Stores, Inc., supra*, 51 Cal.4th at p. 530.)

Nevertheless, “the “plain meaning” rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each

sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].” (*Absher v. AutoZone, Inc.* (2008) 164 Cal.App.4th 332, 340 (*Absher*), quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

D. *The Act*

1. *Section 1747.08*

Section 1747.08, subdivision (a), states:

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

“(1) 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 write any personal identification information upon the credit card transaction form or otherwise.

“(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.

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

Section 1747.08, subdivision (c), sets forth exceptions to the prohibitions in subdivision (a). Subdivision (c) states that

subdivision (a) does not apply to “[c]ash advance transactions” or if the credit card is being used as a deposit to secure payment. (*Id.*, subd. (c)(1), (2).) Subdivision (a) also does not apply if “[t]he person, firm, partnership, association, or corporation accepting the credit card is contractually obligated to provide personal identification information in order to complete the credit card transaction,” “[t]he person, firm, partnership, association, or corporation accepting the credit card in a sales transaction at a retail motor fuel dispenser or retail motor fuel payment island automated cashier uses the Zip Code information solely for prevention of fraud, theft, or identity theft,” or “[t]he person, firm, partnership, association, or corporation accepting the credit card is obligated to collect and record the personal identification information by federal or state law or regulation.” (*Id.*, subd. (c)(3).) Finally, subdivision (a) does not apply “[i]f personal identification information is required for a special purpose incidental but related to the individual credit card transaction, including, but not limited to, information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders.” (*Id.*, subd. (c)(4).)

Section 1747.08, subdivision (d), states that section 1747.08 “does not prohibit . . . requiring the cardholder, as a condition to accepting the credit card as payment in full or in part for goods or services, to provide reasonable forms of positive identification, which may include a driver’s license or a California state identification card, or where one of these is not available, another form of photo identification, provided that none of the information contained thereon is written or recorded on the credit card transaction form or otherwise. . . .” The statute establishes

a civil penalty for violations and provides for injunctive relief. (*Id.*, subds. (e), (f).)

2. *The Consumer Perception Test*

Several California courts have considered the question whether the clause “as a condition to accepting the credit card as payment” modifies the word “[r]equest” (§ 1747.08, subd. (a)(2)). Every California court to have considered this issue has found that it does. The consumer perception test was the natural product of that connection. In other words, a request for personal identification information violates section 1747.08, subdivision (a)(2), if a consumer would reasonably perceive the request to be a condition to accepting the credit card as payment. The consumer’s perception is an integral part of the analysis.

In *Florez v. Linens ‘N Things, Inc.* (2003) 108 Cal.App.4th 447 (*Florez*), the court stated former section 1747.8 unambiguously “prohibits a ‘request’ for personal identification information in conjunction with the use of a credit card. As the Senate Committee on the Judiciary Analysis of Assembly Bill No. 1477 (1991-1992 Reg. Sess.) explains, [former] section 1747.8 was amended to add the word ‘request’ and ‘[t]his bill would clarify that persons may neither require *nor request*, as a condition to accepting the credit card, the taking or recording of personal identification information from the cardholder. . . .” (*Id.* at p. 451.)

The court also found that because “[former] section 1747.8 is a consumer protection statute, . . . the retailer’s request for personal identification information must be viewed from the customer’s standpoint. In other words, the retailer’s unannounced subjective intent is irrelevant. What does matter is

whether a consumer would *perceive* the store’s ‘request’ for information as a ‘condition’ of the use of a credit card.” (*Florez, supra*, 108 Cal.App.4th at p. 451.)⁹ *Florez* built the analytical framework of the consumer perception test. Once the request was modified by the condition, the customer’s reasonable perception of that request became the touchstone of the analysis.

Next came *Absher, supra*, 164 Cal.App.4th 332. Reviewing the legislative history, the court similarly found, “The word

⁹ In a contradictory fashion, *Florez* stated “the 1991 amendment simply clarified that a ‘request’ for personal identification information was prohibited if it immediately preceded the credit card transaction, even if the customer’s response was voluntary and made only for marketing purposes” (*Florez, supra*, 108 Cal.App.4th at p. 453), but also stated, “nothing prevents a retailer from soliciting a consumer’s address and telephone number for a store’s mailing list, if that information is provided voluntarily” (*id.* at p. 451). Due in part to this contradictory language, the Ninth Circuit Court of Appeals in *Davis v. Devanlay Retail Group, Inc.* (9th Cir. 2015) 785 F.3d 359 asked the California Supreme Court for guidance concerning the proper interpretation of the statute. (*Id.* at p. 360.) The California Supreme Court denied the request and declined to answer the question. (*Davis v. Devanlay Retail Group, Inc.* (2015) 2015 Cal. Lexis 5833, S226264.) Two weeks after *Davis* issued its request for clarification to the California Supreme Court, the First District Court of Appeal, Division Three, issued its opinion in *Harrold, supra*, 236 Cal.App.4th 1259. *Harrold* held (1) the clause “as a condition to accepting the credit card as payment” (§ 1747.08, subd. (a)(1) & (2)) modifies the term request (*Harrold* at p. 1266) and (2) a request for personal identification information violates the statute only if the customer would reasonably understand the request as a condition to accepting a credit card payment (*id.* at p. 1268).

‘request’ was added to subdivision (a)(1) and (2) to ‘prevent a “request” for personal information, because a customer might perceive that request as a condition of credit card payment.’” (*Id.* at p. 342, quoting *Florez, supra*, 108 Cal.App.4th at p. 453.) *Absher* quoted language from the analysis of Assembly Bill No. 1477 by the Assembly Committee on Banking, Finance and Public Indebtedness, stating that under the bill “merchants ‘may neither require nor request, as a condition to accepting the credit card, the taking or recording of personal identification information from the cardholder.’” (*Absher*, at p. 342.) *Absher* stated, “subdivision (a)(2) prohibits merchants from requesting or requiring credit card customers to provide personal identification information—as a condition precedent to accepting payment by credit card—so that the merchant can write the information on the credit card form.” (*Id.* at p. 343.) *Absher* rejected the plaintiff’s argument the language “as a condition to accepting the credit card as payment” modified the word “require” but did not modify the word “request.” (*Id.* at p. 344.)¹⁰

The court in *Harrold* also rejected the plaintiff’s argument that the statutory language “as a condition to accepting the credit card as payment” modified only “require” and not “[r]equest.” (*Harrold, supra*, 236 Cal.App.4th at pp. 1265-1266.) After reviewing the legislative history and case law, the court stated, “the very purpose of adding ‘request’ to the statute was to apply

¹⁰ Because the issue in *Absher* involved whether the Act applied to returns of merchandise instead of purchases, the court did not need to and did not reach the issue whether the consumer perception test applied. The court found returns were not covered under the Act. (*Absher, supra*, 164 Cal.App.4th at p. 346.)

the prohibition against conditioning the acceptance of a customer's credit card to a request as well as to a requirement. The clause clearly was intended to apply to both a request and a requirement.”¹¹ (*Id.* at p. 1266.)

Next, the *Harrold* court addressed the issue of the customer's reasonable perception concerning the request. In *Harrold*, the defendant's policy was to request a customer's email address only after the customer had paid for the purchase and the cashier had handed the customer a receipt and the bagged merchandise. (*Harrold, supra*, 236 Cal.App.4th at pp. 1263-1264.) The court observed, “while the statute is intended to protect consumer privacy and to prohibit merchants from obtaining personal identification information under the mistaken impression the information is required to process a credit card transaction, the Act is not intended to forbid merchants from

¹¹ Several courts interpreting the statute considered and rejected the last antecedent rule. The rule “provides that ‘qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.’ [Citations.]” (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680; accord, *Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, 1152.) Concluding the last antecedent rule was inapplicable, *Harrold* stated: “First, the rule does not apply if the clause in question is equally applicable to the words before and after the comma. [Citation.] And secondly, the rule does not apply “[w]here the sense of the entire act requires that a qualifying word or phrase apply to several preceding wo[r]ds.” [Citations.] [¶] Both exceptions apply in the present case.” (*Harrold, supra*, 236 Cal.App.4th at pp. 1266-1267; see *Absher, supra*, 164 Cal.App.4th at p. 344 [applying the rule would lead to anomalous result].)

obtaining such information voluntarily, if the customer understands that the information need not be disclosed in order to use a credit card. Neither the legislative history nor the cases that have interpreted the statute indicate that the Act prohibits merchants from requesting personal identification information if the request is not made under circumstances suggesting that a credit card will not be accepted as payment without such information.” (*Id.* at p. 1266.) The court went on to cite with approval several federal district court cases supporting the proposition “that the statute is violated only if the request is made under circumstances in which the customer could perceive the request for personal identification information as a condition of completing a credit card transaction.” (*Id.* at p. 1267, citing *Gass v. Best Buy Co., Inc.* (C.D.Cal 2012) 279 F.R.D. 561, 570-571.) After analyzing the statute, legislative history and case law, the court concluded, “the Act is violated only if the request is made under circumstances in which the customer could reasonably understand that the e-mail address was required to process the credit card transaction, and since such an understanding could not reasonably be conveyed by a request made after the transaction has been concluded, those requirements are not met.” (*Harrold*, at p. 1268.) *Harrold* therefore found the plaintiffs had failed to satisfy the class action requirements and affirmed the denial of class certification. (*Ibid.*)

Several federal authorities are in accord. (E.g., *Gossoo v. Microsoft Corp.* (C.D.Cal. Oct. 9, 2013, No. CV 13-2043) 2013 WL 5651271, p. 1 [“the test . . . ‘is whether a consumer would *perceive* the store’s “request” for information as a “condition” of the use of a credit card”]; *Dean v. Dick’s Sporting Goods, Inc.* (C.D.Cal. July

26, 2013, No. CV 12-7313) 2013 WL 3878946, p. 5; *Yeoman v. Ikea U.S. West, Inc.* (S.D.Cal. Feb. 27, 2013, No. 11CV701) 2013 WL 12069024, p. 13 [“A court applies an objective test to determine whether a retailer’s request for personal identification information would be perceived as a condition of credit card payment”]; *Gormley v. Nike Inc.* (N.D.Cal. Jan. 28, 2013, No. C 11-893) 2013 WL 322538, p. 7 [“the [c]ourt will apply an objective standard to determine whether Nike’s policy for requesting ZIP codes would be perceived as a condition of credit card payment”]; *Juhline v. Ben Bridge Jeweler, Inc.* (S.D.Cal. Sept. 11, 2012, No. 11CV2906) 2012 WL 3986316, p. 5; *Gass v. Best Buy Co., Inc.*, *supra*, 279 F.R.D. at p. 570 [“If the customer reasonably perceives the request for (personal identification information) as a condition of completing the credit card transaction, the Act has been violated”]; *Rothman v. General Nutrition Corp.* (C.D.Cal. Nov. 17, 2011, No. CV 11-03617) 2011 WL 6940490, p. 6 [“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”].)¹²

¹² In contrast, at least for purposes of deciding whether to grant a motion to dismiss the complaint, some federal courts have held that a plaintiff need not allege that a request for personal identification information was a condition to accepting a credit card payment, but need only allege the defendant requested such information in conjunction with a credit card transaction. (*Korn v. Polo Ralph Lauren Corp.* (E.D.Cal. 2008) 644 F.Supp.2d 1212, 1215-1216; *Shabaz v. Polo Ralph Lauren Corp.* (C.D.Cal. 2008) 586 F.Supp.2d 1205, 1209.)

Consistent with the foregoing authorities, we conclude “as a condition to accepting the credit card as payment” modifies both “require” and “[r]equest” (§ 1747.08, subd. (a)(2)). As such, the statute prohibits merchants from requesting personal identification information if the customer would reasonably perceive the request as a condition to accepting a credit card payment.

E. *The Trial Court Properly Denied Class Certification*

The trial court concluded that Guitar Center’s liability under section 1747.08, subdivision (a)(2), depended on whether the customer reasonably understood that he or she need not provide an email address in order to pay by credit card. The court stated that this depended on the phrasing of the sales clerk’s statements made to the customer and on whether the credit card transaction was concluded before or after the request for an email address. The court stated there was no consistency in the phrasing of the statements made to customers, implying that individual questions predominated regarding liability.

The trial court properly interpreted the statute, as discussed above. Contrary to plaintiffs’ argument, substantial evidence supports the court’s finding the sales clerks did not adhere to a script and used inconsistent language when requesting customers’ personal identification information. Guitar Center presented declarations by its sales clerks that scripts were not used when requesting personal identification information. Guitar Center encouraged its sales clerks to engage customers in a natural, conversational manner, and the dialogue varied from customer to customer. Given the lack of uniformity and the need for individualized proof regarding the language of

the request in order to determine whether the customer would reasonably perceive the request as a condition to accepting a credit card payment, substantial evidence supports the finding that common questions do not predominate. Accordingly, the trial court did not abuse its discretion in denying class certification.¹³

DISPOSITION

The order denying the class certification motion is affirmed. Guitar Center is entitled to costs on appeal.

BENSINGER, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

¹³ To succeed on their second contention that the court erred when it required them to present a statistical plan, plaintiffs circle back and argue that because the statute does not require them to present any evidence concerning the consumer's reasonable perception as part of the liability equation, they were not required to present any statistical evidence. Having rejected plaintiffs' underlying premise, we conclude plaintiffs have shown no error.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.