LIU, J.

S199384

IN THE SUPREME COURT OF CALIFORNIA

APPLE, INC., a California Corporation,

Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent

DAVID KRESCENT, individually and on behalf of a class of persons similarly situated

Real Party in Interest

Court of Appeal Case No. B238097
Los Angeles Superior Court Civil Case No. BC463305
(Related to Cases Nos. BC462492 and BC462494)

REAL PARTY IN INTEREST BRIAN LUKO'S ANSWER TO DEFENDANT AND PETITIONER TICKETMASTER, LLC'S PETITION FOR REVIEW

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Supreme Court
State of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Supreme Court Case Number: S199384

Case Name: Krescent v. Apple, Inc.

Please check the applicable box:

X There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208 (e) (1), (2).

Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: Eric A. Schreiber
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Party Represented: Plaintiff and Real Party in Interest, David Krescent

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PURSUANT TO the request of the Clerk of the California Supreme Court, Plaintiff and Real Party in Interest David Krescent ("Plaintiff" or "Krescent") hereby submits his answer to Defendant Apple, Inc.'s ("Defendant" or "Apple") Petition for Review.

I. INTRODUCTION

On June 10, 2011, Plaintiff filed a one cause of action class action complaint against Defendant seeking relief under Civil Code § 1747.08, also known as the Song-Beverly Credit Card Act (the "Act"). Plaintiff alleged that in the course and scope of a credit card transaction, that Defendant, by and through the use of a standardized form, requested and required him to provide his address and phone number as a condition of purchasing music and other software known as "apps" downloaded over the Internet. The lawsuit alleged that Defendant violated the Act by requesting/requiring him to provide personal information, which information was recorded by the Defendant in connection with a credit card transaction, and as permitted by law, Plaintiff sought civil penalties up to the legal maximum of $250 for the first transaction, and up to $1,000 for each subsequent transaction.

On December 7, 2011 the Trial Court heard Defendant, along with Defendants' Ticketmaster, LLC, and eHarmony, Inc., (defendants in related cases) demurrers to their respective complaints. The theory of the demurrers was that the Act does not

apply to remote transactions such as those transacted over the Internet, but rather, the Act applies only to face-to-face brick-and-mortar in person transactions at retail stores. After opposition and hearing, the Trial Court (the Honorable Carl J. West) overruled the demurrers in all three related matters. All defendants filed petitions for writ of mandate, all three of which were summarily denied by the Court of Appeal (Second Appellate District, Division Eight). Thereafter, the defendants have petitioned this Court for review.

II. ISSUES PRESENTED FOR REVIEW

In essence, the petitions all ask the same question, does the Act apply to remote transactions, such as those transacted over the Internet (although it would seemingly also include all non face-to-face transactions such as telephone, facsimile or even a remote pay self-checkout at retail stores or gas pumps), or does the Act only apply to brick-and-mortar face-to-face transactions in retail stores?

There is no case precedent to answer this question save and except one 2007 District Court opinion (*Saulic v. Symantec* 596 F. Supp.2d 1323 (C.D. Cal. 2009)), and thus, the question is one of pure statutory interpretation, especially given the procedural posture of the case—the pleading stage. There is no pending split of authority amongst districts of the Court of Appeal (as there are no Court of Appeal opinions), however, trial courts, and district courts have split on the question of

whether or not the Act applies to Internet based businesses. Furthermore, this Court should be aware that on October 9, 2011, the Legislature via emergency legislation amended the Act, and the amendments to the Act, along with prior drafts of the amendments are discussed later in this answer.[1]

Plaintiff agrees with Defendant on one issue, the interpretation of the Act is an issue of great state importance affecting the privacy rights of millions of California consumers who choose to do their shopping on the Internet, and thus, resolution of the issue is one of state wide importance that should be resolved by this Court under California Rules of Court, Rule 8.500 (b)(1).

III. THE SONG-BEVERLY CREDIT CARD ACT AND RECENT AMENDMENTS

This Court is more than aware of the nature of the Act, based upon its recent opinion in *Pineda v. Williams-Sonoma Stores* (2011) 51 Cal.4th 524 ("*Pineda*"), which held that merely requesting a zip code with nothing more, is sufficient to violate the Act. Retailers of goods or services are forbidden from requesting or requiring, and then recording any personal information in the course and scope of a

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[1]. It should be noted that the issue of exemptions to the Act (Civil Code § 1747.08 (c)(4), was raised in related the *Luko v. eHarmony* matter, but not in the other two, and therefore, Plaintiff in that matter has also requested review of the "required for a special purpose" exception to the Act.

credit card transaction, and those businesses that do must pay civil penalties affixed by a trial court. This Court was certain to note,

> However, the legislative history of the Credit Card Act in general and section 1747.08 in particular demonstrates the Legislature intended to provide **robust consumer protections by prohibiting retailers from soliciting and recording information about the cardholder that is unnecessary to the credit card transaction**. (*Id.* at 535-36, emphasis added).

This Court went to great lengths to discuss the fact that retailers are forbidden from acquiring any more consumer information than is necessary to complete a credit card transaction. Thus, in *Pineda*, even the request for a zip code alone, which was unnecessary to complete a credit card transaction, and thus allowed a retailer to use that information along with the credit card number to look up information for marketing purposes, was held to be a violation of the Act.

An analysis of all of the following demonstrates that it is unmistakably clear that the Act applies to all businesses whether or not they are brick-and-mortar, remote, or in some cases, both.

A. The Language of the Act Itself

The opening line of the Act states,

> (a) 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**: (*emphasis added*).

It is without question that the language of the Act is to be read as an all-inclusive prohibition on all businesses regardless of the form of the transaction; hence the incredibly broad language with no limitations. While Internet based transactions did not exist in 1991 when the most recent significant version of the Act was enacted (until the 2011 amendment), facsimile and telephone transactions did. In essence, an Internet transaction is nothing more than a technologically advanced remote transaction. The Legislature was no doubt aware of fraud concerns associated with remote transactions such as those that existed when the Act was passed, and could have exempted such transactions, but chose not to do so. Thus, clearly, the all-inclusive language of the Act makes it clear that no retailer, whether in person, or remotely has the right to collect personal information not required to complete the transaction, as a condition of a credit card purchase.

B. The October 9, 2011 Amendments to the Act, Along With Prior Drafts Thereof Make the Legislature's Intent that the Act Applies to Remote Transactions Unmistakably Clear

While the October 9, 2011 amendments to the Act appear to only deal with motor fuel dispensers, the actual language demonstrates the Legislature's intent to determine that all transactions, either remote or face-to-face, are included under the Act's protection. This is proven in two ways: 1. The amendments solely apply to pay-

at-the-pump transactions, which includes gasoline islands with no attendant or person present; and 2. Because the Legislature specifically permitted gas stations by way of an exemption to use personal information solely to verify credit cards and for no other purpose, it stands to reason that since no other business received this exemption the mere fact that a transaction is remote does not provide an exemption to the mandates of the Act.

1. The Actual Amended Act

The preamble of the Amended Act (Legislative Counsel Digest) states,

> This bill would except from the prohibition described above the instance where the person or entity accepting the card uses the personal information for prevention of fraud, theft, or identity theft in specified retail motor fuel transactions. . .

Similarly, Subsection (3)(B) of the Act (exceptions to the law) notes,

> The person. . . accepting the credit card in a sales transaction at a retail motor fuel dispenser or retail motor fuel payment island **automated cashier** uses the personal identification information solely for prevention of fraud, theft, or identity theft or uses the personal information for any of these purposes concurrently with a purpose permitted under paragraph (4). (Emphasis added).[2]

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[2]. It should also be noted that Civil Code 1747.02 (n)(o) (the definition section) notes that a "retail motor fuel dispenser" is a device that can use a **remote electronic payment system**, **where an employee or agent of the seller is not present**. This provides further evidence that remote (card not present) transactions are and have always been covered by the Act, as motor fuel dispensers are the only type of remote transaction under the Act which allows personal information to be

Naturally, if **all** cases of identity theft or fraud protection for remote transactions were already and automatically exempted from the statute, there would be no need to create a special exception for motor fuel dispensers. Similarly, the motor fuel island exception applies to automated cashiers as well, which is, in essence virtually identical to a remote transaction (such as an Internet transaction, or self-checkout at a store) because it is done remotely by computer, as opposed to an in-person purchase—providing further evidence that the Act applies, and has always applied to all forms of transactions, whether in-person or remote. Thus, while the basis of *Saulic* was that Internet businesses are exempt from the Act due to the need to prevent fraud, identity theft and theft, clearly, the Legislature does not believe this is the case. Accordingly, the Defendant (which is clearly not a motor fuel dispenser) does not, and did not have the right to collect personal information, even for the purposes of theft or fraud protection.

Only a motor fuel dispenser is permitted to obtain personal information for identity theft or fraud protection. Even then, the **sole** use must be such protection and all other uses are forbidden–meaning the gas station must actually use each piece of information solely for identity theft or fraud protection and no other purpose. The

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requested for card verification, identity theft and fraud prevention. Naturally, if all remote transactions were exempt, there would be no need to create this special exemption at all.

complaint has alleged that Defendant used the information for marketing purposes, and did not solely use the phone number and address for fraud or identity theft protection, if anything the complaint alleges that the Defendant did not use the Plaintiff's personal information for fraud or identity theft prevention at all, but rather for its own marketing purposes. Since the issue involves a demurrer the allegations of the complaint must be deemed true for that purpose (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591).

2. The Second to the Last Version of the Act

Even more instructive that the Legislature, without question believes that the Act has, at all times applied to card-not-present transactions, including Internet transactions, is the second to final version of the amended Act (which prior version is, as stated before, the proper subject of judicial notice). This version of the Act, as amended on May 17, 2011 makes all of the following crucial points:[3]

Subsection (i) notes,

> It is the intent of the amendments made by this act adding this subdivision to **clarify existing law**. These clarifying amendments continue to protect personal identification information while allowing and recognizing the

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[3]. It should be noted California law permits the taking of judicial notice of prior versions and drafts of legislation (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062 fn.5; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal. App.4th 26).

> legitimate need for a person. . . to use personal information for the purposes authorized by this section. These amendments recognize, in part, legitimate business practices designed to address the increased potential for identity theft that results if the cardholder is not present or the credit card does not function correctly. (Emphasis added).

As a matter of statutory interpretation under California law, when the Legislature uses such "clarification" language, it is not making a prospective, nor a retrospective amendment, but rather, stating what the law is and has always been (*Stockton Savings & Loan Bank v. Massanet* (1941) 18 Cal.2d 200, 204). Thus, in clarifying, the Legislature has noted, without doubt that the Act has **always** applied to card-not-present transactions, including those commenced over the Internet.

Additionally, proposed subsection (c)(3)(B) notes,

> The person. . . accepting the credit card uses the personal identification information **solely** for prevention of fraud, theft, or identity theft or uses the personal information for any of these purposes concurrently with a purpose permitted under paragraph (4). (Emphasis added).

Furthermore proposed subsection (c)(6) is specially designed for face-to-face situations where the credit card does not properly function or is not electronically readable, then the merchant is further permitted to obtain personal information and then immediately delete or destroy it.

While this language ultimately did not make the final cut of the Act (the language solely creates a special exception for motor fuel dispensers), its words,

especially combined with the Legislature's clarification make it more than clear that the Act was, at all times designed to apply both to in-person **and** card-not-present transactions. There would be no need to even consider rules regarding remote transaction identity theft protection prohibitions if the Act did not apply to card-not-present transactions. Similarly, if the Act applied **only** to face-to-face transactions, there would be no need to include a special subsection for face-to-face transactions. Rather the inclusion of these specialized subsections is further evidence that the Legislature believes the Act applies to **all** forms of credit card transactions, not simply those done in person.

The Amended Act, as well as those prior versions of the Act under consideration by the Legislature make it unmistakably clear, the Act has at all times applied to **all** credit card transactions, including those transacted in person, those done with an automated cashier, or computer, and those done remotely, such as fax, phone or Internet.

C. This Court in Addition to Most Courts Throughout the Country Have Held That Internet Based Businesses are Subject to the Same Rules and Laws as Other Businesses

The law is full of examples of extending traditional rules of law to the Internet and businesses who operate over the Internet. For example:

1. Personal jurisdiction (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054), examining traditional bases of minimum contact to find personal jurisdiction in part based upon a commercial Internet website;

2. Freedom of speech (*Vo v. City of Garden Grove* (2004) 115 Cal. App.4th 425 "We perceive no rationale by which CyberCafes should be accorded less protection than any of these older or more traditional businesses." [*Id.* at 433]);

3. Infringement (*Brookfield Communications v. West Coast Entertainment Corporation* 174 F.3d 1036 (9th Cir. 1999)). Infringement claims over the Internet are examined under the same standard as traditional businesses;

4. Consumer protection (*Ford Motor Company v. Texas Department of Transportation* 264 F.3d 493 [transaction over the Internet treated the same as any other transaction]; *Butler v. Adoption Media, LLC* 486 F.Supp.2d 1022 (N.D. Cal. 2007) [Unruh Act applies to Internet based business even though it was passed many years before the prevalence of the Internet]);

5. Even the Song-Beverly Act has dealt with the modern-era issue of email collection. The Court of Appeal in *Powers v. Pottery Barn, Inc.* (2009) 177 Cal. App.4th 1039, had no problem determining that a request for an email address also violated the Act. While at its heart, the opinion dealt with the lack of Federal preemption, the Court of Appeal at least implicitly held that the collection of email

addresses violated the Act, even though the Act was passed before the prevalent use of email addresses, and does not specifically mention email addresses as personal information.

Simply put, Courts have not hesitated to hold that traditional rules and laws apply to Internet based businesses, even when such laws were passed well before the prevalence and use of the Internet. A transaction conducted over the Internet is still, at its heart a transaction---the exchange of goods or services for money, and thus, such transactions are covered by the same rules as all other businesses. Therefore, the mere fact that the Defendant conducts its business over the Internet does not mean it is entitled to collect any more personal information than is necessary to complete the credit card transaction—the same as any other business.

D. The Identity Theft Protection Concerns Stated in Saulic Are Overreaching in Response to the Act's Purpose

The only published opinion, the *Saulic* case, a District Court opinion which is binding on no one other than the parties thereto, expressed grave concerns that businesses needed personal information for fraud and identity theft protection. While a noble goal, to simply exempt all Internet and remote transactions based upon this claim would defeat the very purpose of the Act. The Act exists to protect the privacy of consumers and to prevent merchants from overreaching and seeking more

information than they need to complete a credit card transaction. Thus, were Internet businesses simply exempt from the law based upon fraud concerns, these merchants could ask consumers for all sorts of information unrelated to, and unnecessary to complete the credit card transaction. This would eviscerate the statute's protections. Exempting all Internet merchants from the statute under the penumbra of "fraud prevention" is much like seeking to kill an ant with an atomic bomb. If the concern is fraud prevention, then Internet businesses should not be entitled to ask for any more information than is reasonably necessary for such narrow and specific purpose. Conversely, a complete exemption would permit Internet retailers to both acquire far more information than is necessary, and would allow them to use that information for non-permitted purposes, such as marketing, or sale to the highest bidder. Thus, wholly exempting all remote transactions flouts and destroys the Act's protections.

For example, the Complaint alleges (which allegations must be taken as true for purposes of demurrer *Serrano v. Priest* (1971) 5 Cal.3d 584, 591), that Defendant did not need Plaintiff's telephone number or address to complete his credit card transaction, but instead recorded this information for its own purposes, including marketing. It would be unfair to allow an Internet based business to overreach and obtain information it does not need for fraud or security protection simply because it transacts its business remotely. Even a motor fuel dispenses is only permitted to

use personal information for fraud and identity theft protection, and is not allowed to use such information for any other purpose.

Defendant's position is to the contrary----because it asserts (rightly or wrongly) that there are greater security concerns for Internet transactions, Defendant has the unfettered right to ask for any information it so desires, irrespective of whether it is necessary and related to the transaction or actually used for fraud prevention. If this were true, an Internet seller would also have the right to do whatever it chooses to do with this information, including marketing purposes or even selling the information to the highest bidder. This position flies in the face of the consumer protections of the Act. The mere fact that Defendant sells its merchandise over the Internet does not mean it is wholly exempt from the Act. A tempered approach is a better one, Internet businesses are not wholly exempt from the law, rather, like every other business, it cannot ask for any more information than is necessary to complete the credit card transaction. The purpose of the Act is the protection of consumer privacy, and providing a complete exemption to Internet businesses to ask for any information, whether necessary to the completion of the transaction or not, vitiates the Act's protection for millions of California consumers.

E. Exempting Internet Businesses From the Act Would Lead to Absurd, Unfair and Inconsistent Results

Why should a consumer who chooses to do his or her shopping over the Internet, as opposed to at a retail store, give up his or her right to privacy? An Internet consumer should have the same rights of privacy as a retail store shopper—that is, a merchant, regardless of form should not be permitted to collect any more information than it needs to complete the credit card transaction. If anything, too much information in the hands of an Internet retailer is far more dangerous for a consumer. A consumer who has provided his or her information to an Internet merchant is but one data hack away from having all of his or her personal information exposed or stolen. With the passage of the Act, the Legislature has provided robust consumer protection for consumer's personal information, and, as such there is no basis to exclude a large class of retailers based upon their method of doing business.

The following hypothetical demonstrates why it is inappropriate to completely exempt Internet businesses from the Act.

A retail store sells merchandise: 1. In store; 2. Via phone/fax catalog orders; and 3. Over the Internet. Consumer wishes to buy the identical shirt from retailer:

1. Clearly, if consumer purchases the shirt in-store, the retailer is forbidden from asking for an address or telephone number under the Act;

2. If consumer makes a catalog purchase via phone or facsimile, the language of the Act clearly forbids asking for a phone number or address unless that information is absolutely necessary to complete the transaction (for example the retailer might need an address to ship the shirt); or

3. Consumer could also order the shirt over the retailer's Internet commerce website. The same rules that apply to a catalog purchase should apply to the Internet order, i.e how much information does the retailer absolutely need to complete the credit card transaction, versus how much information does the retailer desire, either for research, marketing, or, perhaps selling the consumer's personal information to the highest bidder.

Thus, if remote or Internet transactions are exempted from the Act, the same consumer, buying the same item from the same retailer would be entitled to full protection of his or her personal information if he or she chooses to go to the store to make a purchase, yet would lose all rights of privacy and personal information protection if he or she chooses to shop from home over the Internet. Without question, categorically exempting Internet businesses leads to absurd, unfair and inconsistent results for California consumers. A consumer should not give up his or

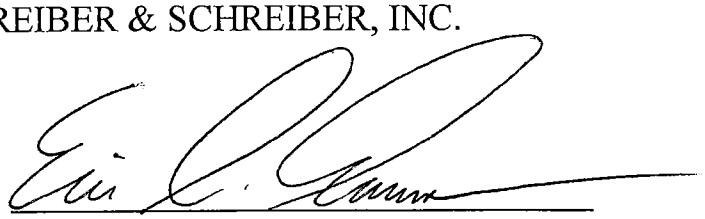
her rights of privacy solely because he or she chooses to shop over the Internet. The same rules should apply to all merchants, regardless of whether they sell their goods and services over the Internet or in a retail store—a merchant cannot ask for any more information than is necessary to complete a credit card transaction, and merchants who do so must pay the civil penalty authorized by the Act.

IV. CONCLUSION

The issue of whether the Song-Beverly Credit Card Act applies to Internet businesses and other businesses that engage in remote transactions is an issue of great state importance, and either does, or will affect the privacy rights of millions of California consumers. Thus, to that end, Plaintiff, by and through this answer agrees with Defendant, this Court should grant the Petition for Writ of Review to resolve this issue.

DATED: February 23, 2012

SCHREIBER & SCHREIBER, INC.

BY: 

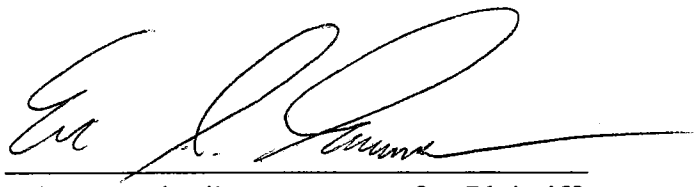
Eric A. Schreiber, Attorneys for Plaintiff and Real Party in Interest David Krescent, Individually and on Behalf of a Class of Persons Similarly Situated

WORD COUNT CERTIFICATION

1. I am an attorney duly licensed to practice law before all courts of the State of California. I am employed by Schreiber & Schreiber, Inc., and am one of the attorneys representing Plaintiff and Real Party in Interest David Krescent in the above-captioned matter. I make this certification pursuant to California Rules of Court, Rule 8.504 (d) which requires all answers to petitions for review to be less than 8,400 words in length.

2. On February 23, 2012, I had my computer perform a word count, which indicated that the Plaintiff and Real Party in Interest's answer to Defendant's petition for review is 4090 words in length.

Dated: February 23, 2012



Eric A. Schreiber, attorney for Plaintiff
and Real Party in Interest, David Krescent

PROOF OF SERVICE BY FACSIMILE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action; my business address is 16501 Ventura Boulevard, Suite 401, Encino, California 91436.

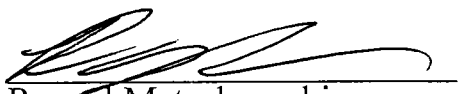
On February 24, 2012 I served the following document described as ANSWER TO PETITION FOR REVIEW on the interested parties in this action by facsimile:

Paul W. Cane, Jr., David M. Walsh, Adam M. Sevell
Paul Hastings, LLP
Facsimile: (213) 627-0705

X Via Facsimile

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed February 24, 2012 at Encino, California.



Raquel Matsubayashi