

# SUPREME COURT COPY

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No. S178241

SUPREME COURT

**FILED**

IN THE  
SUPREME COURT OF CALIFORNIA

MAY -3 2010

JESSICA PINEDA,  
*Plaintiff and Appellant,*

Frederick K. Ohlrich Clerk

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Deputy

v.

WILLIAMS-SONOMA STORES, INC., a California Corporation,  
*Defendant and Respondent.*

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After a Decision by the Court of Appeal of the State of California  
Fourth Appellate District, Division One  
*Case No. D054355*

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On Appeal from the Superior Court of the County of San Diego  
The Honorable Ronald S. Prager  
*Case No. 37-2008-00086061-CU-BT-CTL*

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**REPLY TO RESPONDENT'S ANSWER BRIEF ON THE MERITS**

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*Defendant and Respondent.* )  
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**REPLY TO RESPONDENT'S ANSWER BRIEF ON THE MERITS**

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**I**

**INTRODUCTION**

This Court can, and should, find as a matter of law that a zip code constitutes "personal identification information," which is specifically defined in California Civil Code Section 1747.08 as "information concerning the cardholder, other than information set forth on the credit card." Cal. Civ. Code §1747.08(b). The particular zip code where a cardholder resides is certainly "information concerning" the cardholder. To be sure, Williams-Sonoma has specifically identified millions of its credit

card customers and obtained their home addresses by collecting their zip codes at the point-of-sale. Williams-Sonoma asks the Court to artificially narrow the breadth of the statute by replacing the express definition with a much more restrictive definition that requires additional criteria and interpretation not found anywhere in the statute. The Court cannot redefine what has already been defined by the Legislature through the express definition set forth in Section 1747.08(b). There is otherwise no reason to construe the definition in a way that would circumvent the legislative purpose behind Section 1747.08 by allowing retailers such as Williams-Sonoma to specifically identify customers through the deceptive practice of requesting their zip codes under the guise of needing them to process their credit card transactions.

Williams-Sonoma does not deny that Section 1747.08 was specifically enacted to curtail the practice of retailers obtaining customer information under the false pretense that such information is necessary to complete credit card transactions. That is exactly what Williams-Sonoma does by requesting credit card customers' zip codes in the midst of their credit card transactions. Williams-Sonoma also does not deny that Section 1747.08 was enacted to protect consumers from receiving unwanted solicitations and marketing. Its entire purpose for collecting zip codes is to obtain its customers' home addresses which it stores in a massive marketing

database. Williams-Sonoma further does not deny that Section 1747.08 was intended to promote consumer safety and to protect consumers from risks such as harassment by store employees and identity theft. Its practice of storing customers' names, addresses, purchase history and credit card numbers subjects consumers to the very safety risks the Legislature sought to enjoin.

Williams-Sonoma instead attempts to redefine "personal identification information" in a self-serving way that would create a loophole for its own deceptive practice. Seemingly ignoring that Section 1747.08 includes an express definition of "personal identification information," Williams-Sonoma goes through a cumbersome analysis of the definitions of the individual words that collectively make up the defined term. This piecemeal analysis is improper and unnecessary. And if we were to depart from the express definition, a reasonable interpretation of the common use of the phrase "personal identification information" certainly must include information that is actually being used to specifically identify millions of Williams-Sonoma customers.

As authority, Williams-Sonoma relies entirely on the Court of Appeal decision in Party City v. Superior Court, (2008) 169 Cal.App.4th 497, as conclusively determining that a zip code cannot constitute "personal identification information." It goes so far as to suggest that this Court is

bound by the Fourth District's holding in Party City, which was blindly followed by the Fourth District Court of Appeal in this case. Party City is the poster child for how bad case law is made. The Party City Court was presented with incomplete and inaccurate facts and arguments by the plaintiff, who had settled the case during the appeal and had no incentive to fully brief or litigate the underlying issues. Indeed, the parties attempted to withdraw the appeal prior to the hearing.

Simply put, this case makes clear that Williams-Sonoma collects its credit card customers' zip codes under false pretenses at the point-of-sale for the sole purpose of using that information to identify its customers. It has specifically identified millions of its credit card customers and obtained their respective home addresses through this process. How can information that is actually being used by Williams-Sonoma to identify millions of its customers not be considered "personal identification information"?

## **II**

### **ISSUE PRESENTED**

Does a retailer violate the Song-Beverly Credit Card Act of 1971 (Civ. Code, §1747 et seq.), which prohibits a retailer from recording a customer's "personal identification information" when the customer uses a credit card in a transaction, by recording a customer's zip code for the purpose of later using it and the customer's name to obtain the customer's

address through a reverse search database?

The issue presented inherently requires the Court to decide whether a zip code constitutes "personal identification information" pursuant to the provisions of Section 1747.08. This would seem to require the Court to revisit, explain and perhaps expressly or implicitly overrule Party City. The Court of Appeal expressly followed its earlier Party City decision, and explained its holding that a zip code cannot constitute "personal identification information" as a matter of law. Opinion, p. 5. If decided in favor of Pineda, the issue certified for review would necessarily impinge upon the Fourth District's ruling in Party City.

Williams-Sonoma nevertheless insists that this Court cannot overturn or depart from Party City. Williams-Sonoma relies on a hyper-technical and restricted construction of the issue certified for appeal, coupled with self-serving speculation as to why this Court did not expressly certify another issue presented by Pineda – i.e., the bare question of "whether a zip code constitutes personal identification information." Williams-Sonoma disregards that the issue the Court certified for review encompasses the basic legal question, while allowing the Court to consider external factors and allegations, such as Pineda's allegation that Williams-Sonoma has used zip codes to identify its customers and obtain their home addresses, and that the zip codes are not required or used to process the

credit card transactions. The more detailed issue certified for review does not preclude the Court from reaching the basic legal conclusion that zip codes are "personal identification information" for purposes of Section 1747.08.

Williams-Sonoma's argument further ignores that the parties may argue, and this Court may address, "any issues fairly included in [the issues to be briefed and argued]." Cal. R. Ct. 8.516(a)(1), 8.516(b)(1) & 8.520(b)(3). The Court is well-within its plenary authority to decide, once and for all, whether a zip code constitutes "personal identification information" within the meaning of Section 1747.08 as a matter of law and expressly or implicitly overturn any Court of Appeal case contrary to its decision.

### III

#### ARGUMENT

##### **A. Pineda Contends That A Zip Code Always Constitutes "Personal Identification Information" Pursuant To Section 1747.08, As Evidenced By The Fact That A Zip Code Can Be Utilized To Obtain The Respective Customer's Home Address**

A zip code is "personal identification information" because a zip code is information that can be, and is, used to specifically identify a person. Williams-Sonoma attempts to frame Pineda's argument as implying that a zip code only becomes "personal identification information" when it is subsequently used to obtain the customer's address through a

reverse search. To be clear, Pineda contends that a credit card customer's particular zip code is always "personal identification information" within the meaning of Section 1747.08. In *support* of this contention, Pineda points out that a zip code can easily be used along with a person's name to obtain the person's home address, and that Williams-Sonoma actually collects and uses its credit card customers' zip codes for this very purpose. Williams-Sonoma's *use* of zip codes to obtain customers' home addresses is compelling *evidence* that zip codes must constitute "personal identification information" in the first instance.<sup>1</sup>

A zip code is "personal identification information" within the meaning of Section 1747.08 at the time it is collected because it falls squarely within the express definition provided in the statute – "information concerning the cardholder" that is not otherwise set forth on the credit card. Pineda relies on this plain black letter definition. Cal. Civ. Code §1747.08(b). As *support* or *evidence* of her position, Pineda points out that (1) as a practical matter, a zip code can easily be used to specifically identify a retailer's credit card customers, (2) Williams-Sonoma has actually used zip codes to specifically identify millions of its customers and obtain

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<sup>1</sup> It has not yet been determined whether Williams-Sonoma's software instantaneously populates its database with the customer's home address during the credit card transaction, or whether this is accomplished after the fact.

their home addresses, (3) Section 1747.08's legislative history makes clear that the Legislature intended to prevent exactly what Williams-Sonoma is doing, and (4) the collection and storage of credit card customers' names, addresses, and credit card numbers in massive marketing databases leads to single acts and devastating large scale identity theft.

**B. "Including But Not Limited To" is A Phrase of Enlargement**

In Section 1747.08(b), the Legislature specifically 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." Cal. Civ. Code § 1747.08(b) (emphasis added). The Legislature uses the phrase "and including," which plainly means "and this includes." It then instructs that the express definition is "not limited to" the cardholder's address and telephone number.

Williams-Sonoma misreads the instructive portion of the definition to mean "such as the cardholder's address and telephone number," and then claims the principal of *ejusdem generic* requires that any and all forms of "personal identification information" must be similar to telephone numbers or addresses (however subjective that analysis might be).

As this Court has previously found, "[a] more reasonable reading of the phrase 'including, but not limited to,' is that the Legislature intended to

authorize the commission to take such other remedial action as in its judgment seems appropriate to redress a particular unlawful employment practice and to prevent its recurrence, thus eliminating the practice." Dyna-Med, Inc. v. Fair Employment & Housing Comm., (1987) 43 Cal.3d 1379, 1390. "A reading of the phrase as permitting only additional corrective remedies comports with the statutory construction doctrines of *ejusdem generis*." Id. at 1390-1391. "The doctrine of *ejusdem generis*...states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class of those enumerated." Id. at 1391, n. 12. Along with the person's name, a zip code is the vital portion of a person's home address that allows retailers such as Williams-Sonoma to specifically identify the person's full address. Because a person's name and zip code can be easily used to obtain the remaining portion of the individual's home address through a reverse search database, there is little practical distinction.

The principle of *ejusdem generis* requires that a statute be interpreted in a way that furthers its legislative purpose, and not in a way that defeats it. See People v. Kelly, (2007) 154 Cal.App.4th 961, 967. It would defeat the purpose of Section 1747.08 to prohibit retailers from requesting and collecting customers' telephone and address information, but

allow them to covertly obtain this very information by requesting and collecting customers' zip codes under the deceptive guise of needing this information to process credit card transactions.

**C. Party City Was the Result of a "Perfect Storm" of Misinformation, Incorrect Assumptions, and External Circumstances that Led to An Incorrect Decision**

Williams-Sonoma wants to rely on a perceived loophole, created by Party City, to escape liability for its premeditated and systematic practice of obtaining its customers' home addresses through trickery and deceit.

Williams-Sonoma incredulously argues that zip codes are not "personal identification information" despite that its sole purpose for collecting zip codes is to specifically identify customers and obtain their home addresses. Section 1747.08's express definition of "personal identification information" cannot be so narrowly construed as to allow Williams-Sonoma to circumvent the statute.

In confirming the Trial Court's judgment, the Fourth District Court of Appeal followed and extended its prior ruling in the Party City case, wherein the Party City Court concluded that a zip code is not "personal identification information" within the meaning of section 1747.08(b) because a zip code is not facially individualized information. Opinion, p. 5. Unfortunately, the Party City court was presented with incomplete and inaccurate information. As a preliminary matter, it is worth nothing that the

litigants in that case settled during briefing and prior to the hearing. They attempted to withdraw the appeal given the settlement, but the request was denied.

Despite agreeing to keep the appeal on the grounds of public importance, the Party City Court refused to consider amicus briefs submitted in support of plaintiff's position, instead relying on the plaintiff, who had already settled, to present and litigate the position. Not surprisingly, the plaintiff had little or no incentive to litigate the issue, and did a poor job of it. For instance, the plaintiff failed to offer any evidence that knowing a person's particular zip code would make it any easier to identify his or her home address.

A ZIP Code is not an address, but only a portion of it, and knowing a stand-alone ZIP Code has not been shown to be potentially more helpful in locating a specific person than knowing his or her state or county of residence.

Party City, 169 Cal.App.4th at 518. The Party City Court also expressly recognized that the plaintiff in that case did not make any evidentiary showing that the present state of technology allows for the use of a zip code to locate individuals. Id. at 505 fns. 5, 6.

The Party City Court relied on the following facts that were particular to the defendant retailer in that action: (i) "ZIP Code information is made available only to the company's marketing department and ZIP

Code data is transmitted there alone, without customer names or credit card numbers; and [(ii)] the company does not maintain a system or database that would allow it to locate a particular California customer's address or telephone number utilizing only ZIP Code, name or credit card number." Id. at 504. The lack of evidentiary proof that Party City was actually using customers' zip codes to obtain their addresses, or that knowing a person's zip code was even potentially more helpful in locating a person than knowing his or her state or county of residence, clearly weighed into the Court's decision. *See Id.* at 518.

The Party City Court recognized that "statutory interpretation is not conducted in a vacuum, and the factual context of a particular dispute will give shape to the application of statutory construction principles." Id. at 521. Because the factual context of this case makes it clear that a zip code is not merely a group identifier, but rather serves to specifically identify the home address of an individual when combined with the name from the credit card, zip codes must fall within the definition of "personal identification information" as set forth in Section 1747.08(b).

**D. The Legislative History Explaining The Problem To Be Addressed By Section 1747.08 Must Be Considered As It Affirmatively Establishes That The Statute Was Enacted To Prohibit The Collection Of Information From Consumers Under False Pretenses During Credit Card Transactions**

Section 1747.08 must be liberally construed "to the end of fostering its objectives." Young v. Bank of America, (1983) 141 Cal.App.3d 108,

114. The liberal construction analysis requires the Court to consider the legislative history to determine the objectives of Section 1747.08.

Under the heading "**The Problem**," the Legislature found that:

Consumers are led to mistakenly believe that such additional information is a necessary condition to complete the credit card transaction, when, in fact, it is not. Retailers acquire this additional personal information for their own business purposes – for example, to build a mailing list which they can subsequently use for their own in-house marketing efforts, or sell to direct mail specialists or to others.

(Exhibit 3, pp. 85, 135.)

Williams-Sonoma argues that the "motley collection of author's statements, committee reports, internal memoranda and lobbyist letters" may represent attempts by interested parties to influence the judiciary after the bill has been passed. *See* Answer Brief at p. 23 (*citing* Diamond Multimedia Systems, Inc. v. Superior Court, (1999) 19 Cal.4th 1047).

However, the "Background Summary for AB 2920" quoted above and articulating "The Problem" to be addressed, is a document explaining to the Legislature what the bill is about before it is passed. It evidences the

Legislature's intent and understanding of the remedial purpose of the bill it subsequently passed into law.

Williams-Sonoma further contends that Section 1747.08 was originally enacted for the sole purpose of preventing retailers from utilizing a pre-printed credit card form with a space for customers to provide a telephone number. *See Answer Brief at p.3.* This is simply false. This baseless argument is quickly dispensed with by looking at the statute itself, which prohibits three different types of practices: (1) having the cardholder record his/her "personal identification information"; (2) requesting the cardholder for his/her "personal identification information" and recording it; and (3) utilizing a credit card form containing a preprinted space to record any "personal identification information" of the cardholder.<sup>2</sup> Use of

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<sup>2</sup> Section 1747.08 provides:

(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:

(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.

a preprinted transaction form is only one of the three prohibited practices. Importantly, Williams-Sonoma's practice of requesting and recording "personal identification information" is specifically prohibited by subsection (2) above.

**E. There Is No Loophole For The Legislature To Close, As It Was The Court Of Appeal In Party City That Improperly Narrowed The Express Definition Supplied By The Legislature**

Williams-Sonoma argues that the loophole created by the Court of Appeal's decisions in Party City, which allows retailers to circumvent the statute by collecting zip codes during credit card transactions and then using them to obtain home addresses, should be presented to the California Legislature, rather than the California Supreme Court. But it is the Court of Appeal, not the Legislature, that created this loophole. The California Legislature broadly drafted the definition of "personal identification information" as set forth in Section 1747.08(b) to prevent retailers from circumventing the statute. The Court of Appeal has artificially narrowed the express definition drafted by the Legislature to exclude zip codes.

Pineda relies on the simple black letter definition of "personal identification information" found directly in the statute. Because a zip

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(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.

codes undoubtedly constitutes "information concerning the cardholder" that is not set forth on the credit card, a zip code falls squarely within this definition. Conversely, the Trial Court and the Court of Appeal ignored the express definition and applied a much more restrictive definition of "personal identification information." Specifically, both Courts inserted an additional criteria into the definition by requiring that the information be "unique" to the cardholder, rather than merely "concerning" the cardholder as set forth in the express definition. Exhibit 11, pp. 386-389; Opinion, p. 5.

The express definition of "personal identification information" is certainly broad enough to include zip codes. Courts are without the ability to rewrite or redefine the express definition provided by the Legislature. But perhaps most importantly, there is no reason to add additional criteria or otherwise interpret the express definition in a manner that creates a loophole allowing retailers to request and record zip codes. If a retailer is allowed to collect zip codes during credit card transactions for the purpose of obtaining the cardholder's home address through a reverse search database, then Section 1747.08 would be made void and meaningless. This cannot be allowed. It is a Maxim of Jurisprudence that "[a]n interpretation which gives effect is preferred to one which makes void." Cal. Civ. Code § 3541. "These canons [of judicial interpretation] generally preclude judicial construction that renders part of the statute 'meaningless or inoperative.'"

Hassan v. Mercy American River Hospital, (2003) 31 Cal.4th 709, 715-16 (citing Manufacturers Life Ins. Co. v. Superior Court, (1995) 10 Cal.4th 257, 274).

**F. This Appeal Does Not Present Issues Relating To The Amount Of Civil Penalties To Be Awarded Against Williams-Sonoma**

The issue in this appeal relates to Williams-Sonoma's liability pursuant to Section 1747.08. Williams-Sonoma's potential monetary exposure is completely irrelevant. See Linder v. Thrifty Oil, (2000) 23 Cal.4th 429. In Linder, this Court specifically rejected the argument that a defendant would face economic annihilation through the potential civil penalties to be imposed pursuant to Section 1747.08. Id. at 447. The Court reasoned that Section 1747.08 provides a court discretion to determine the appropriate amount of any penalties and noted that "there is an entire range of penalties available." Id.; see also The TJX Cos., Inc. v. Superior Court (2008) 163 Cal.App.4th 80, 86 (holding that the penalties under Section 1747.08 "could span between a penny (or even the proverbial peppercorn we all encountered in law school) to the maximum amounts authorized by the statute.")

Williams-Sonoma's asserted fear of potential liability for "hundreds of millions (if not billions) of dollars" in "crippling" penalties is an irrelevant and insincere smoke screen. The trial court has discretion to

determine the appropriate penalty amounts after weighing all of the relevant facts, circumstances and expert testimony.

#### **G. Williams-Sonoma's Constitutional Attacks On Section 1747.08 Fail**

Williams-Sonoma's argument that interpreting "personal identification information" to include zip codes would render the statute unconstitutional is a circular argument that really amounts to a broad constitutional attack on the entire statute. If the Legislature can preclude retailers from collecting telephone numbers and addresses during credit card transactions, it can likewise prohibit retailers from collecting zip codes.

1. ***Section 1747.08 Provides Adequate Notice as to the Fact That the Collection of Zip Codes During Credit Card Purchase Transactions is Prohibited, and thus, Is Not Vague***

Williams-Sonoma argues that Section 1747.08 is violative of due process based on the argument that the statute is vague. Specifically, Williams-Sonoma contends that, based upon the plain language of the statute, a retailer could not have been aware that the collection of zip codes during credit card purchase transactions violates Section 1747.08 if the retailer utilizes the zip codes to surreptitiously obtain customer home addresses.

It is disingenuous of Williams-Sonoma to argue that it could not have foreseen liability under Section 1747.08 as a result of its conduct of requesting and recording zip codes, a portion of an address, for the purpose of using the zip code and the customer's name to obtain the full addresses of its respective customers. Williams-Sonoma was certainly aware that it was illegal to collect its customers' addresses in conjunction with credit card transactions. Ignorance of the law is otherwise no defense.

If there was any confusion as to the prohibitions set forth in Section 1747.08 - which Pineda submits would be the result of feigned ignorance - one would not be without options. Indeed, what seems to be largely ignored by Williams-Sonoma is the fact that Section 1747.08 only prohibits the collection of "personal identification information" in conjunction with credit card transactions. Retailers are completely free to ask for any information they may so desire so long as it is done separate and apart from the credit card transaction. The Court of Appeal in Florez v. Linens 'N Things, (2003) 108 Cal.App.4th 447, explicitly held that "the statutory mandate can hardly be described as draconian," as Williams-Sonoma would have this Court believe. Id. at 52. But the problem with requesting zip codes outside of the credit card transaction, from Williams-Sonoma's perspective, is that customers will know it is not being used to process the transaction and, consequently, will not freely give up this information.

In sum, Williams-Sonoma should not be able to defend its conduct by attempting to read ambiguity into Section 1747.08 when none exists, especially when its conduct clearly evidences its full working knowledge of the prohibitions of Section 1747.08.

**2. *Section 1747.08 Provides Adequate Constitutional Safeguards that Prevent the Implementation of Any Oppressive Penalties***

Williams-Sonoma is plainly wrong in arguing that the civil penalties to be imposed for violations of Section 1747.08 are oppressive such that they can be found to violate due process. There remains a well-established line of cases, agreeing with the this Court's reasoning in Linder, and rejecting any contention that due process concerns are implicated as Williams-Sonoma contends.

In White v. E-Loan, Inc., (N.D. Cal. Aug. 2006) 2006 U.S. Dist. Lexis 62654, the court held that class certification is proper even in situations where a defendant faces annihilation damages. Id. \*24. The court's reasoning was that while the damages faced by E-Loan were substantial they can be reduced if E-Loan is found liable. Id. \*24-25. Specifically, the court relied on Murray v. GMAC Mortg. Corp., (7<sup>th</sup> Cir. 2006) 434 F.3d 948, 954 for the proposition that an "an award that would be unconstitutionally excessive may be reduced. . .but constitutional limits

are best applied after a class has been certified." Similarly, the court found Parker v. Time Warner Entertainment Co., L.P., (2d Cir. 2003) 331 F.3d 13, 22 to be persuasive for the idea that "it may be that in a sufficiently serious case the due process clause might be invoked, not to prevent certification, but to nullify that effect and reduce the aggregate damage award. . . At this point in this case, however, these concerns remain hypothetical."

**3. *Section 1747.08 Does Not Implicate Any First Amendment Issues***

Williams-Sonoma argues that Section 1747.08 is unconstitutional because it imposes an unlawful restraint on Williams-Sonoma's right to free speech. See Answer Brief, pp. 32, 33 and 37. A "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Berry v. City of Santa Barbara, (1995) 40 Cal.App.4th 1075, 1084. Section 1747.08 is content-neutral. It does not restrict the right of retailers to convey any specific message. It merely limits the collection of unnecessary personal information in conjunction with credit card transactions to protect consumers. The content-neutral test must be applied.

A content-neutral restriction on speech will be upheld if "it furthers an important or substantial governmental interest; if the governmental

interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Turner Broadcasting System, Inc. v. F.C.C., (1994) 512 U.S. 622, 662. Section 1747.08 was passed to protect consumers. This constitutes a substantial government interest that is not related to the suppression of free expression. Section 1747.08 does not seek to regulate speech outside of the minimal duration of a credit card transaction, which is the minimum protection necessary to protect consumers. Retailers such as Williams-Sonoma are free to request and collect information from their customers, so long as they do not do it in connection with processing their credit cards. This certainly does not pose any unreasonable restriction on free speech.

Williams-Sonoma also argues that its conduct is constitutionally protected as commercial speech. But Williams-Sonoma ignores one critical element in its argument – to be afforded First Amendment protection, commercial speech must not be misleading. This essential fact was addressed in Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n., (1980) 447 U.S. 557, in which the Supreme Court held that:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. *For commercial speech to come within that provision, it at least must concern*

*lawful activity and not be misleading.* Next we ask whether the asserted governmental interest is substantial. *If both* inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest and whether it is not more extensive than is necessary to serve that interest.

Id. at 566 (emphasis added). The Complaint alleges that Williams-Sonoma's request for personal identification information during the credit card purchase transaction was misleading, so no further analysis is necessary. (Exhibit 1, pp.10:13-18) "The government may ban forms of communication more likely to deceive the public than to inform it..." Id. at 563. Preventing consumers from being misled into believing their personal identification information is necessary to process credit card transactions was the principal purpose behind Section 1747.08.

Similarly, Williams-Sonoma's contention that Section 1747.08's restriction on speech is unconstitutionally overbroad fails. The overbreadth doctrine only applies when there is a showing that the government's banning of unprotected speech has coincidentally prohibited or chilled a substantial amount of protected speech in the process. Ashcroft v. Free Speech Coalition, (2002) 535 U.S. 234, 255. Williams-Sonoma cannot make any showing that Section 1747.08 has chilled or prohibited any *protected speech* – let alone that such prohibition is substantial. Section 1747.08 only prevents the unnecessary collection of personal identification

information during the minimal duration of a credit card purchase transaction. Compliance with Section 1747.08, therefore, can hardly be held to prohibit or chill a substantial amount of protected speech.

#### **H. Williams-Sonoma's Desperation Argument As To This Court's Jurisdiction Should Be Ignored**

Williams-Sonoma contends that this Court is without jurisdiction to hear this matter, based on the argument that the Court did not grant Pineda's Petition for Review, or provide an extension, within the initial requisite time. Consequently, Williams-Sonoma contends that Pineda's Petition was denied by operation of law and the Court could not enter its *nunc pro tunc* order as of January 22, 2010, granting itself an extension.

There are two types of potential errors at issue: clerical or judicial. Importantly, clerical errors can be corrected by the Court on its own motion. In re Candelario, (1970) 3 Cal. 3d 702, 705 ("a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts.")(quotations and citations omitted). "The power exists independently of statute and may be exercised in criminal as well as in civil cases." Id. The fact that the order was entered *nunc pro tunc*, and the Petition for Review was subsequently granted, is *prima facie* evidence as to the occurrence of a clerical error. The parties were not prejudiced in any way by the Court granting itself a short extension of time

to determine whether or not to grant the Petition for Review. Certainly this Court has jurisdiction to review this matter.

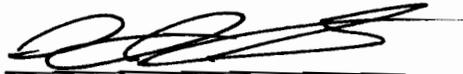
#### IV

### CONCLUSION

Williams-Sonoma's systematic collection of zip codes under the deceptive guise of needing them to process the customers' credit card transactions is arguably the most deceptive violation of Section 1747.08. If Williams-Sonoma wants its customers' addresses, it merely needs to request them in a lawful manner. This would ensure that it is only marketing to those customers that desire to receive the information. For all of the reasons set forth herein, and for the additional reasons set forth in her Opening Brief on the Merits, Plaintiff and Appellant, Jessica Pineda, respectfully requests that the Appellate Court Opinion be reversed, the Trial Court's Judgment be vacated and that this case be remanded to the Trial Court for further proceedings, and for all further appropriate relief.

DATED: May 2, 2010

Respectfully submitted,  
STONEBARGER LAW, APC

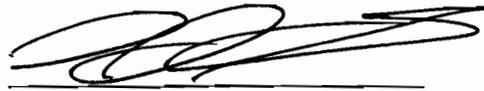
By:   
Gene J. Stonebarger  
Richard D. Lambert  
Attorneys for Plaintiff and Appellant

## **CERTIFICATE OF WORD COUNT**

I, Gene J. Stonebarger, hereby certify as follows:

1. I am one of the attorneys for Jessica Pineda, Appellant herein.
2. The word count of this document is 5,465 words, according to the word count function of the computer program used to prepare it.
3. I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and would competently testify to such if called as a witness.

Executed this 2nd day of May, 2010, at Folsom, California.



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GENE J. STONEBARGER

## DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the County of Sacramento, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 75 Iron Point Circle, Suite 145, Folsom, California 95630.

2. That on May 3, 2010 declarant served the **OPENING BRIEF ON THE MERITS** on the interested parties listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid:

*Via Hand Delivery*  
*Original and 13 copies:*

Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

*Via Federal Express*  
*One (1) copy to each of the following:*

Court of Appeal, Fourth District, Division One  
Symphony Towers  
750 B Street, Suite 300  
San Diego, CA 92101

Honorable Ronald S. Prager  
San Diego Superior Court  
Central Division  
Department 71  
330 W. Broadway  
San Diego, CA 92101

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***Attorneys for Defendant and Respondent,  
Williams-Sonoma Stores, Inc.***

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 3, 2010, at Folsom, California.

  
\_\_\_\_\_  
Richard D. Lambert

