

SUPREME COURT  
**FILED**

No. **S199384**

JAN 13 2012

IN THE SUPREME COURT OF CALIFORNIA

**Frederick K. Ohlrich** Clerk

**APPLE INC.**, a California corporation,

**Deputy**

*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 Parties in Interest.*

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

**PETITION FOR REVIEW  
OF A DECISION IN THE COURT OF APPEAL,  
SECOND DISTRICT, DIVISION EIGHT**

PAUL HASTINGS LLP  
DAVID M. WALSH (SB# 120761)  
PAUL W. CANE, JR. (SB# 100458)  
ADAM M. SEVELL (SB# 266428)  
515 South Flower Street, Twenty-Fifth Floor  
Los Angeles, California 90071-2228  
Telephone: (213) 683-6000; Facsimile: (213) 627-0705

Attorneys for Petitioner  
APPLE INC.

No. \_\_\_\_\_

IN THE SUPREME COURT OF CALIFORNIA

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Los Angeles, California 90071-2228  
Telephone: (213) 683-6000; Facsimile: (213) 627-0705

Attorneys for Petitioner  
APPLE INC.

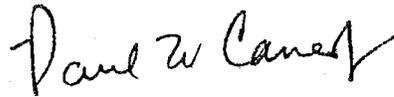
**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Defendant and Petitioner Apple Inc. has no parent corporation, and (to the best of its knowledge) there is no publicly held company that owns 10% or more of Apple Inc.'s outstanding stock. Apple Inc. is aware of no entity or person that has a financial or other interest in the outcome of this proceeding that the justices should consider in determining whether to disqualify themselves.

Respectfully submitted,

DATED: January 13, 2012

PAUL HASTINGS LLP



By: \_\_\_\_\_

Paul W. Cane, Jr.

Attorneys for Petitioner  
APPLE INC.

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## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

This petition presents a legal question that affects millions of California consumers and implicates hundreds of millions of online transactions: Does the Song-Beverly Credit Card Act, Civil Code section 1747.08 — enacted in 1971, and amended in relevant part more than 20 years ago — apply to 21st Century *online* retailers?

Although the trial court correctly observed that the question deserves interlocutory review, the Court of Appeal for the Second Appellate District summarily denied Apple Inc.'s petition for writ review.<sup>1</sup> Apple respectfully requests that this Court grant this petition for review and resolve the open and important question of law it raises. Alternatively, based on new authorities issued in the last few days following the Court of Appeal's order, the Court should issue a grant-and-transfer order directing the Court of Appeal to grant Apple's petition, issue an alternative writ, and decide on the merits the issues raised by the petition.

The Credit Card Act prohibits retailers from requesting from consumers certain personal identification information ("PII") in accepting credit card payments. In *Pineda v. Williams-Sonoma Stores, Inc.* (2001) 51 Cal.4th 524, this Court held that ZIP codes are PII. *Pineda* spawned hundreds of class actions alleging Credit Card Act violations in traditional brick-and-mortar retail stores.

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<sup>1</sup> The trial court's order overruling Apple's demurrer, entered on December 7, 2011, is attached hereto as Exhibit "A." The Court of Appeal's Order Summarily Denying Apple's Petition for Writ of Mandate, Prohibition or Other Appropriate Relief, entered on January 5, 2012, is attached hereto as Exhibit "B."

Online transactions are different. An online retailer sells goods to someone it cannot see. Online retailers therefore must take steps to prevent identity theft and fraud by confirming that purchasers are who they say they are. The Credit Card Act, enacted long before the phenomenon of online sales, cannot reasonably be stretched to cover online transactions without subverting the Act's consumer-protection purposes.

In the action below, real party in interest David Krescent sued Apple, purporting to represent a class of similarly situated individuals. Krescent alleged that Apple violated the Credit Card Act by requesting his address and telephone number before accepting a proffered credit card to pay for Krescent's online purchases. Apple demurred to the Complaint, demonstrating:

1. The plain language of the Credit Card Act — supported by both its legislative history and intent — limits the Act's scope to transactions consummated in traditional brick-and-mortar stores.

2. The only opinion then published on the subject found that the Credit Card Act did not apply to online retailers. (*Saulic v. Symantec Corp.* (C.D.Cal. 2009) 596 F.Supp.2d 1323.)

3. The Credit Card Act should be narrowly construed where, as here, fraud-prevention concerns provide a "legitimate justification" to collect PII. (*Absher v. AutoZone, Inc.* (2008) 164 Cal.App.4th 332, 346.)

The trial court acknowledged the "definite appeal" of Apple's arguments but overruled Apple's demurrer. Those arguments are now even

more appealing. Following the Court of Appeal's summary denial of Apple's writ petition, two additional district courts have held that the Credit Card Act does not apply to online transactions and have specifically addressed the questions raised in the trial court's order overruling Apple's demurrer. Five state and federal courts have now considered whether the Credit Card Act applies to online transactions; all but one have found that it does not. This Court's immediate review is necessary to provide guidance and decide a legal issue that affects millions of California consumers and online businesses every day.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Apple is the defendant in *Krescent v. Apple Inc.*, Los Angeles Superior Court Case BC 463305 (the "Apple Action"). Ticketmaster LLC is the defendant in *Luko v. Ticketmaster*, Los Angeles Superior Court Case BC 462492 (the "Ticketmaster Action"). eHarmony, Inc. is the defendant in *Luko v. eHarmony, Inc.*, Los Angeles Superior Court Case BC462494 (the "eHarmony Action"). On May 27, 2011, Brian Luko (on behalf of himself and a putative class of similarly situated individuals) filed the Ticketmaster Action and the eHarmony Action. On June 10, 2011, David Krescent (on behalf of himself and a putative class of similarly situated individuals) filed the Apple Action. All three cases allege one cause of action: violation of the Credit Card Act.

The Credit Card Act, Civil Code 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.

(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.

On June 30, 2011, the trial court related the Apple, Ticketmaster, and eHarmony Actions. On September 9, 2011, Apple, Ticketmaster and eHarmony separately demurred. The demurrers each demonstrated that the Credit Card Act does not apply to online transactions. On November 7, 2011, the trial court held a consolidated hearing on the demurrers. The court noted the absence of any controlling appellate authority and stated on the record the desirability of appellate review. On December 7, 2011, the court issued an omnibus Order overruling the three demurrers. The court, however, restated that “appellate resolution of the[] [issues presented in this Petition] may materially assist in the resolution of the litigation.” (Ex. “A.”)

On December 27, 2011, Apple petitioned the Court of Appeal

for interlocutory review of the trial court's order. Ticketmaster and eHarmony separately petitioned for the same relief on December 29, 2011. On January 5, 2012, the Court of Appeal summarily denied all three petitions. (Ex. "B.")

Thereafter, two new on-point opinions issued in unrelated cases. *See Salmonson v. Microsoft Corp.* (C.D. Cal. Jan. 6, 2012, No. 2:11-cv-05449-JHN-JC) ["[O]nline transactions . . . present unique fraud concerns, and nothing in the legislative history indicates that the Act was intended to cover online transactions. Nor is there any hint that the Legislature considered the fraud concerns raised in the context of online transactions."]; *Mehrens v. Redbox Automated Retail LLC*, (C.D. Cal. Jan. 6, 2012, No. 2:11-cv-02936-JHN-E) ["[C]ollection of personal information in an online or unattended kiosk transaction may be the only means of verifying a customer's identity in order to prevent credit card fraud. Given the Act's focus on preventing unnecessary use of personal identification information, the language cannot reasonably be read to encompass online transactions, where recording such information is necessary for a legitimate purpose."].<sup>2</sup>

This petition for review followed.

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<sup>2</sup> Copies of the *Salmonson* and *Mehrens* decisions are attached as Exhibits "1" and "2" to the concurrently-filed Appendix of Unpublished Authorities.

## REASONS FOR GRANTING REVIEW

California Rule of Court 8.500(b)(1) provides that the Supreme Court may grant review of a Court of Appeal decision “[w]hen necessary to secure uniformity of decision or to settle an important question of law.” Review of the Court of Appeal’s order below summarily denying Apple’s writ petition is “necessary to secure uniformity of decision” because of conflicting opinions about the application of the Credit Card Act to online transactions, as shown by the following:

1. The trial court’s ruling contradicts the ruling of the San Francisco Superior Court in *Gonor v. craigslist, Inc.* (Super. Ct. S.F. County, Aug. 24, 2011, No. CGC-11-511332)<sup>3</sup> [order sustaining demurrer to complaint]) [the Credit Card Act “on its face does not apply to online transactions”; “applicable case law, legislative intent, and public policy indicate that [online] transactions are not, and should not be, encompassed by [the Credit Card Act],” and *Saulic*, 596 F. Supp. 2d at 1333-34 [“[N]either the language of the Act nor its legislative history suggests the Act includes online transactions.”]].

2. As previously noted, the trial court’s ruling also conflicts with two very recently announced opinions, both of which dismissed class action complaints with prejudice, based on a legal determination that the Credit Card Act does not apply to online transactions.

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<sup>3</sup> The *Gonor* decision is attached as Exhibit “3” to the concurrently-filed Appendix of Unpublished Authorities. The trial court correctly took judicial notice of *Gonor* but did not follow it or even discuss it.

3. *Salmonson* and *Mehrens* also resolve concerns noted by the trial court in its order overruling Apple's demurrer. First, the trial court had distinguished *Saulic* because it was decided on a motion for class certification as opposed to a motion to dismiss or demurrer. *Salmonson* found this procedural distinction to be "immaterial" because "[t]he holding in *Saulic* is based on the court's interpretation of the statute and a review of its legislative history. It does not hinge on evidence outside the pleadings." (Appx. Tab "1" at 6 n.3.) Second, the trial court had invited the Legislature to consider conferring an exemption on online retailers, much as it did in the context of gasoline retailers. *Mehrens* explained that gasoline transactions differed from online transactions because "pay-at-the-pump transactions involve onsite attendants, who are available to monitor and investigate suspicious credit card use. By contrast, there is no attendant monitoring credit card use and identifying suspicious activity at an unmanned Redbox kiosk." (Appx. Tab "2" at 6 n.3.) The Legislature need not "exempt" online retailers in whole or in part from the Credit Card Act because the statute simply does not apply to them.

4. Neither the trial court nor the Court of Appeal had the benefit of *Salmonson* and *Mehrens*. Apple was unable to present the new authorities to the Court of Appeal by way of a rehearing petition because that court lost jurisdiction as soon as it issued its order denying Apple's writ petition.

Review is further warranted because it would settle a discrete and important issue. This petition presents to the Court a pure question of law for which there is no appellate precedent and which potentially disposes, not just of this case, but also two related class actions (against

Ticketmaster and eHarmony), now before the same trial court. (Apple is informed that Ticketmaster and eHarmony separately will petition for review.) The underlying issue is one of recurring and increasing significance as online sales grow. It implicates the rights of millions of California consumers and the potential obligations of online retailers across the State. Whatever may be the right legal answer, this Court should *provide* that answer (or instruct the Court of Appeal to do the same). California consumers and retailers need guidance on the law that applies to hundreds of millions of online transactions.

A. **The Trial Court’s Decision Conflicts With *Gonor, Saulic,***  
**(And Now) *Salmonson and Mehrens.***

The trial court overruled Apple’s demurrer and held that the Credit Card Act applies to online transactions. That decision conflicts with four others.

In *Gonor*, the San Francisco Superior Court considered whether the Credit Card Act applies to online purchases of classified ads. Plaintiff alleged that defendant’s online system required him to provide certain PII, including his telephone number and address, to pay by credit card. The San Francisco court held that defendant’s collection of PII in connection with internet commerce did not violate the Credit Card Act because the statute does not cover online transactions. The court sustained without leave defendant’s demurrer. (Appx. Tab “3.”)

In *Saulic*, the plaintiff purchased from defendant’s website anti-virus software. The online retailer “required that [plaintiff] disclose both his address and telephone number.” (*Saulic, supra*, 596 F.Supp.2d at

pp. 1325-26.) The district court found that “[n]either the language of the Act nor its legislative history suggests the Act includes online transactions.” (*Id.* at pp. 1333-34.) Rather, the legislative history “suggests the Act was specifically passed with a brick-and-mortar merchant environment in mind,” rather than any supposed “perils of misappropriation of consumer credit information in an online environment.” (*Id.* at p. 1333.) Indeed, it would foster identity theft and fraud to deprive online retailers of information to verify a purchaser’s identity. (*Id.* at pp. 1335-36.)

Now, in just the last few days, *Salmonson* and *Mehrens* have issued, joining *Gonor* and *Saulic* in an unbroken line of authorities contradicting the trial court’s ruling here. The conflict in the lower court decisions alone provides good reason to grant this petition to announce a definitive rule of law.<sup>4</sup>

**B. Extending The Credit Card Act To Online Transactions Would Undermine Consumer Protection And Foster Fraud.**

The Credit Card Act is a consumer-protection statute. One cannot construe that Act without considering the public interest in preventing identity theft. As *Saulic* explained, “[R]ecent state and district

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<sup>4</sup> There is no benefit to waiting to review the issue until this case reaches a different procedural posture. If a statute simply does not apply, a demurrer is the proper time to say so. (See, e.g., *Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 233 [affirming order sustaining demurrer without leave to amend; the consumer-protection statute at issue did not cover the disputed transactions].) That particularly is true here, because countless online transactions occur every day, without authoritative legal guidance to retailers and consumers.

court decisions give deference to a competing interest: fraud prevention through PII collection.” (*Saulic, supra*, 596 F.Supp.2d at p. 1334.)

A court construing a statute must consider the legislative intent and public policy underlying the statute. “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. . . . [I]f a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed.” (See *Absher, supra*, 164 Cal.App.4th at p. 340 [holding the Credit Card Act inapplicable to certain transactions] [citations omitted]; see also *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [“Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.”] [citation and alteration omitted]; *Wang v. Wal-Mart Real Estate Bus. Trust* (2007) 153 Cal.App.4th 790, 801 [a statute open to more than one interpretation should be interpreted so as to “avoid anomalous or absurd results”].)

In two recent cases, plaintiffs contended that the Credit Card Act prohibited requests for PII when a purchaser sought a refund for returning merchandise previously purchased by credit card. Courts in both cases concluded that, whatever the Credit Card Act’s statutory language might suggest, the statute “does not apply to merchandise returns,” in part because “there are substantial opportunities for fraud and it behooves the merchant to identify the person who returns merchandise[.]” (*TJX Cos. v. Super. Ct.* (2008) 163 Cal.App.4th 80, 87-89; see also *Absher, supra*, 164 Cal.App.4th at p. 339 [“returns of merchandise are arguably different” from the original purchase transaction because, among other reasons, the

merchant has an interest in preventing fraud].)

The threat of fraud is even more acute in the context of internet sales. The online retailer does not know and cannot see the purchasers, and therefore does not know if they are who they claim to be. Online merchants have fewer tools to verify a purchaser's identity than do their brick-and-mortar retail counterparts. In an in-person transaction, the merchant may ask for photo identification to verify that the customer is, in fact, the credit-card holder. That cannot occur online. If online customers cannot be asked for information beyond the numbers printed on their credit cards, the retailer cannot verify customers' identities and prevent fraud. Precluding online merchants from taking simple measures to verify customer identity would undermine the very policy of consumer protection that the Credit Card Act was intended to foster. (See *Absher*, *supra*, 164 Cal.App.4th at p. 346 [the Credit Card Act cannot reasonably apply where "there appears to be some legitimate justification for such access [to PII] other than marketing purposes"]; *Saulic*, *supra*, 596 F.Supp.2d at p. 1335 ["As in refund transactions, an online transaction raises fraud concerns."].)

Here, however, the trial court (while acknowledging that fraud and identity theft "is widespread . . . in online credit card transactions"), declined to construe the Credit Card Act to allow online retailers to guard against it.<sup>5</sup>

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<sup>5</sup> The trial court noted that this Court's decision in *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, drew no "distinction between online credit transactions and 'brick-and-mortar' credit transactions." But *Pineda* had no reason even to consider, let alone draw, this distinction. The defendant there, Williams-Sonoma, was a brick-and-mortar retailer whose  
(continued...)

**C. The Language Of The Credit Card Act Reveals That It Does Not Cover Online Retailers.**

The trial court here looked to see whether the Act contained an “exempti[on]” for online retailers. Obviously there is no such express exemption; online retail sales did not exist when the statute was enacted or amended in relevant part, so there was nothing then to “exempt.” Finding no express “exemption,” the court found that the Credit Card Act applied.<sup>6</sup>

Other courts, by contrast, have analyzed the issue differently. They looked to see if there was any indication, based on the entirety of the statute and its plain language, whether the statute reached online sales. That language demonstrates that the Act is not silent on the issue, and that Apple is correct. For example:

The statute permits merchants to “requir[e] the cardholder, as

(...continued)

alleged violations occurred at the physical point of sale. Online transactions were not at issue.

<sup>6</sup> The trial court invited the Legislature to consider conferring an exemption on online retailers. (Ex. “A”: “Just as a gasoline retailer may request a customer’s zip code [pursuant to one of the Act’s exemptions] to verify the card being used, online retailers may be justified in requesting [PII] to verify the credit card purchase. The Legislature has specifically addressed the issue with respect to gasoline retailers, and may do the same with respect to online retailers . . .”). But there is no need to “exempt” transactions from a statute that does not cover them in the first place. Gasoline stations are brick-and-mortar establishments plainly subject to the Credit Card Act. Legislative action — an express exemption — therefore was necessary to allow gasoline merchants to guard against fraud by asking for customer ZIP codes. The absence of a similar exemption for online retailers proves nothing, because the Legislature never would “exempt” those retailers in whole or in part from a statute that simply does not apply to them.

a condition to accepting the credit card . . . , to provide reasonable forms of positive identification, which may include a driver’s license or a California state identification card.” (Civ. Code, § 1747.08, subd. (d).) Online merchants by definition cannot request or inspect either of these tangible forms of identification. And, even if they could, seeing a driver’s license photo — proffered by a purchaser that the online retailer cannot see — is useless to guard against identity theft.

In addition, the Credit Card Act refers to a “credit card form which contains *preprinted* spaces.” (*Id.* § 1747.08, subd.(a)(3) [emphasis added].) Website pages are digitized displays. By their very nature they do not contain *printed* spaces.

The Credit Card Act plainly was written to cover — and it still covers<sup>7</sup> — only brick-and-mortar retailers. As the court in *Ewert v. eBay, Inc.*, (N.D. Cal. March 21, 2008), 2008 WL 906162, recognized in holding that the California Auction Act, Civil Code section 1812.601 *et seq.* did not apply to online auctions, applying a statute written for in-person transactions to an online context “is like trying to put a round peg in a square hole.” The trial court’s holding in these cases, and its potentially devastating effect on fraud prevention, is the product of such a forced effort and should be reviewed and reversed.

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<sup>7</sup> Section 1747.08 has been amended four times since its enactment, most recently in 2005. (See Stats. 1990, ch. 999 (A.B. 2920), § 1, as amended by Stats. 1991, ch. 1089 (A.B. 1477), § 2, eff. Oct. 14, 1991; Stats. 1995, ch. 458 (A.B. 1316), § 2, renumbered § 1747.08 and as amended by Stats. 2004, ch. 183 (A.B. 3082), § 29; amended by Stats. 2005, ch. 22 (S.B. 1108), § 14.) The Legislature had several opportunities to expand the scope of the Credit Card Act to cover online transactions, but it did not do so.

**CONCLUSION**

For the reasons set forth above, Apple respectfully requests that the Court grant the petition for review and resolve the pure question of law it raises.

Alternatively, if the Court would prefer that the Court of Appeal first decide the question raised by Apple's petition, it should issue a grant-and-transfer order directing the Court of Appeal to grant Apple's petition, issue an alternative writ, and decide Apple's petition on the merits, with the benefit of the new authorities (*Salmonson* and *Mehrens*) that issued after the Court of Appeal's order.

Respectfully submitted,

DATED: January 13, 2012

PAUL HASTINGS LLP

By: \_\_\_\_\_



Paul W. Cane, Jr.

Attorneys for Petitioner  
APPLE INC.

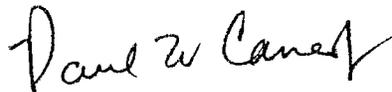
**CERTIFICATE OF COMPLIANCE**  
**PURSUANT TO CALIFORNIA RULE OF COURT 8.504(D)**

In accordance with California Rule of Court 8.504(d), counsel for Petitioner hereby certifies that this **PETITION FOR REVIEW** (including footnotes) contains 3,520 words, as determined by our law firm's word processing system.

Respectfully submitted,

DATED: January 13, 2012

PAUL HASTINGS LLP



By: \_\_\_\_\_

Paul W. Cane, Jr.

Attorneys for Petitioner  
APPLE INC.

LEGAL\_US\_W # 70090117.4

# **EXHIBIT A**

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**LOS ANGELES  
SUPERIOR COURT**

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES**

BRIAN LUKO, individually and on behalf of a  
class of persons similarly situated,

Plaintiff,

v.

TICKETMASTER, a Delaware corporation; and  
DOES 1 to 100, inclusive,

Defendants.

LASC Case Nos: BC462492  
BC462494  
BC463305

**COURT'S RULING AND ORDER RE:  
DEFENDANTS' DEMURRERS TO  
COMPLAINTS**

Hearing Date: November 7, 2011

BRIAN LUKO, individually and on behalf of a  
class of persons similarly situated,

Plaintiff,

v.

EHARMONY, INC., a Delaware corporation;  
and DOES 1 to 100, inclusive,

Defendants.

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

Plaintiff,

1 v.

2 APPLE, INC., a California corporation; and  
3 DOES 1 to 100, inclusive,

4 Defendants.

5  
6 I.

7 **BACKGROUND**

8 In these related putative consumer class cases, Plaintiffs allege that the Defendants,  
9 Ticketmaster, eHarmony, Inc. ("eHarmony"), and Apple, Inc. ("Apple") unlawfully requested, as  
10 a condition of purchasing items or services on the Defendants' Internet websites, certain Personal  
11 Identification Information ("PII"), in violation of the Song-Beverly Credit Card Act of 1971 (the  
12 "Credit Card Act").

13 Plaintiff Luko alleges that when he purchased services on the eHarmony.com dating  
14 website using his credit card, eHarmony unlawfully required as a condition of his purchase that  
15 he provide his telephone number and address. Similarly, in his complaint against Ticketmaster,  
16 Plaintiff Luko alleges that Ticketmaster required him to provide his address and telephone  
17 number as a condition to completing his online credit card purchase of event tickets. Finally,  
18 Plaintiff Krescent alleges that Apple requested, inter alia, his address and telephone number, in  
19 connection with his online purchases for digital media (music downloads) on the Apple website.  
20 The Plaintiffs in these cases allege that by asking for the PII, Defendants violated California's  
21 Song-Beverly Credit Card Act ("the Act"), codified at Civil Code §1747.08. Plaintiffs seek  
22 statutory penalties for the alleged violations, as well as attorneys' fees under CCP §1021.5 and  
23 costs. The Defendants have each demurred to the individual complaints.

24 For the reasons discussed *infra*, the demurrers are all overruled.  
25

1  
2 **II.**

3 **REQUESTS FOR JUDICIAL NOTICE**

4 Defendant Ticketmaster has requested judicial notice of the following:

5 A. FEDERAL TRADE COMMISSION, AVOIDING CREDIT AND CHARGE  
6 CARD FRAUD, FACTS FOR CONSUMERS, available at  
<http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre07.pdf>;

7 B. FEDERAL TRADE COMMISSION, CONSUMER SENTINEL NETWORK  
8 DATA BOOK (Mar. 2011), available at  
<http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2010.pdf>;  
9 and

10 C. LIEBERMAN RESEARCH GROUP, UNISYS SECURITY INDEX: UNITED  
11 STATES ((Feb. 21, 2011), available at  
[http://www.unisyssecurityindex.com/system/reports/uploads/101/original/Unisys  
12 %20Security%20Index%20-%20US%20-%20February%202011.pdf](http://www.unisyssecurityindex.com/system/reports/uploads/101/original/Unisys%20Security%20Index%20-%20US%20-%20February%202011.pdf).

13 The request is granted as to Exhibits A and B pursuant to Evidence Code §452(c) and/or  
14 §452(h). The Request is granted as to Exhibit C pursuant to Evidence Code §452(h).

15 Defendant eHarmony requests judicial notice of the following:

16 A. August 24, 2011 Order sustaining the demurrer without leave to amend in  
17 *Gonor v. craigslist, Inc.*, SFC Case No. CGC-11-511332;

18 B. Complaint in *Doe v. Match.com*, LASC Case No. BC458927, filed April 13,  
2011; and

19 C. State Department, Bureau of Consular Affairs, pronouncement entitled,  
20 "Internet Dating and Romance Scams," accessible at  
[http://travel.state.gov/travel/cis\\_pa\\_tw/financial\\_scams/financial\\_scams\\_4554.htm](http://travel.state.gov/travel/cis_pa_tw/financial_scams/financial_scams_4554.htm)  
21 1.

22 The request is granted as to Exhibits A and B pursuant to Evidence Code §452(d), as these are  
23 records of a state court. The Court does not judicially notice the truth of Exhibits A and B.

24 Further, the Court notes that the *Gonor* order is not binding on this Court's determination. The  
25 request is granted as to Exhibit C pursuant to Evidence Code §§452(c) and (h).

1 Finally, Plaintiffs request judicial notice of the following:

2 1. That a party cannot search the Dru Sjodin National Sex Offender Public  
3 Website by phone number; and

4 2. That a party cannot search the Megan's Law Sex Offender Database by phone  
5 number.

6 The request is denied as to both items. Neither fact is subject to judicial notice under Evidence  
7 Code §§452 or 453.

### 8 III.

### 9 DEMURRERS

#### 10 Standards on Demurrer

11 CCP § 430.10(e) is grounds for a demurrer when the complaint fails to state facts  
12 sufficient to constitute a cause of action. For purposes of ruling on a demurrer, material facts  
13 properly pleaded in the complaint must be taken as true. *Serrano v. Priest* (1971) 5 Cal.3d 584,  
14 491. A demurrer may challenge only defects that appear on the face of the pleading or from  
15 matters which are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 31; *Donabedian*  
16 *v. Mercury Ins. Co.* (2004) 116 Cal.App.4<sup>th</sup> 968, 994; Weil & Brown, Civ. Pro. Before Trial  
17 (The Rutter Group 2010) ¶7:8.

18 The function of a demurrer is to test the legal sufficiency of a complaint, but not the  
19 truthfulness of the allegations. *Donabedian v. Mercury Ins. Co.*, *supra*, 116 Cal.App.4<sup>th</sup> at 994;  
20 Weil & Brown, Civ. Pro. Before Trial (The Rutter Group 2010 ¶7:5). Demurrers are to be  
21 sustained where a pleading fails to plead adequately any essential element of the cause of action.  
22 *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4<sup>th</sup> 857, 879-80.

23 "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters.  
24 Therefore, it lies only where the defects appear on the face of the pleading or are judicially  
25 noticed (Code Civ. Proc., §§ 430.30, 430.70). The only issue involved in a demurrer hearing is

1 whether the complaint, as it stands, unconnected with extraneous matters, states a cause of  
2 action." *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747. *Accord McKenney v. Purepac*  
3 *Pharmaceutical Co.* (2008) 162 Cal.App.4th 72, 79. When considering demurrers, courts read  
4 the allegations liberally and in context. *McKenney, supra*, 167 Cal.App.4th at 77; *Taylor v. City*  
5 *of Los Angeles Dept. of Water and Power* (2006) 144 Cal.App.4th 1216, 1228.

### 6 Discussion

7 The sole cause of action in each of the operative Complaints is for violation of Civil Code  
8 §1747.08. Civil Code §1747.08 provides in pertinent part as follows:

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

11 (1) Request, or require as a condition to accepting the credit card as payment in  
12 full or in part for goods or services, the cardholder to write any personal  
identification information upon the credit card transaction form or otherwise.

13 (2) Request, or require as a condition to accepting the credit card as payment in  
14 full or in part for goods or services, the cardholder to provide personal  
15 identification information, which the person, firm, partnership, association, or  
16 corporation accepting the credit card writes, causes to be written, or otherwise  
records upon the credit card transaction form or otherwise.

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

19 (b) For purposes of this section "personal identification information," means  
20 information concerning the cardholder, other than information set forth on the  
21 credit card, and including, but not limited to, the cardholder's address and  
telephone number.

22 (c) Subdivision (a) does not apply in the following instances:

23 (1) If the credit card is being used as a deposit to secure payment in the event of  
default, loss, damage, or other similar occurrence.

24 (2) Cash advance transactions.

25 (3) If any of the following applies:

1 (A) The person, firm, partnership, association, or corporation accepting the  
2 credit card is contractually obligated to provide personal identification information  
in order to complete the credit card transaction .

3 (B) The person, firm, partnership, association, or corporation accepting the  
4 credit card in a sales transaction at a retail motor fuel dispenser or retail motor fuel  
5 payment island automated cashier uses the Zip Code information solely for  
prevention of fraud, theft, or identity theft.

6 (C) The person, firm, partnership, association, or corporation accepting the  
7 credit card is obligated to collect and record the personal identification  
information by federal or state law or regulation.

8 (4) If personal identification information is required for a special purpose  
9 *incidental but related to the individual credit card transaction*, including, but not  
10 limited to, information relating to *shipping, delivery, servicing, or installation of  
the purchased merchandise*, or for special orders.

11 (d) This section does not prohibit any person, firm, partnership, association, or  
12 corporation from requiring the cardholder, as a condition to accepting the credit  
13 card as payment in full or in part for goods or services, to provide reasonable  
14 forms of positive identification, which may include a driver's license or a  
15 California state identification card, or where one of these is not available, another  
16 form of photo identification, provided that none of the information contained  
thereon is written or recorded on the credit card transaction form or otherwise. If  
the cardholder pays for the transaction with a credit card number and does not  
make the credit card available upon request to verify the number, the cardholder's  
*driver's license number or identification card number* may be recorded on the  
credit card transaction form or otherwise. (Emphasis added.)

17 While Defendants demur separately to the individual complaints, their position is largely  
18 the same. Defendants claim that in each of the online transactions at issue, the PII requested  
19 from the Plaintiffs was required for special purposes incidental but related to the credit card  
20 transaction – to verify customers' identities and to prevent fraudulent transactions for online  
21 purchases (and in the case of eHarmony, to potentially prevent sex offenders and scam artists  
22 from registering with the site). Defendants further claim that the Act does not apply to online  
23 credit card transactions. *Saulic v. Symantec Corp.* (C.D. Cal. 2009) 596 F.Supp. 1323, 1335-  
24 1336.

1 Statutory interpretation is a legal question. *Creditors Collection Service v. Hanzell*  
2 *Vineyards, Ltd.* (1992) 5 Cal.App.4<sup>th</sup> Supp. 1, 4; *Spanish Speaking Citizens Found. v. Low*  
3 (2000) 85 Cal.App.4<sup>th</sup> 1179, 1214. It is long settled that courts read the statute as a whole to  
4 give the words their proper context, meaning, and effect. *Vasquez de Mercado v. Superior Court*  
5 (*McClung*) (2007) 148 Cal.App.4<sup>th</sup> 711, 715 (“[t]he words of the statute should be given their  
6 ordinary and usual meaning and should be construed in their statutory context. These canons  
7 generally preclude judicial construction that renders part of the statute ‘meaningless’ or  
8 ‘inoperative.’”)

9 “In construing statutory language, [courts] must ‘apply reason, practicality, and common  
10 sense....If possible, the words should be interpreted to make them workable and reasonable...in  
11 accord with common sense and justice....” *Eckert v. Sup. Ct.* (1999) 69 Cal.App.4<sup>th</sup> 262, 266.

12 “In the construction of a statute...the office of the Judge is simply to ascertain and  
13 declare what is in terms or in substance contained therein, *not to insert what has been omitted*, or  
14 to omit what has been inserted; and where there are several provisions or particulars, such a  
15 construction is, if possible, to be adopted as will give effect to all.” CCP §1858 (emphasis  
16 added); *Cal. Fed. Sav. & Loan Ass’n. v. City of Los Angeles* (1995) 11 Cal.4<sup>th</sup> 342, 351; *Mfrs.*  
17 *Life Ins. Co. v. Sup. Ct.* (1995) 10 Cal.4<sup>th</sup> 257, 274. *See also* CCP §1859 (Legislature’s intent is  
18 to be pursued, if possible; a particular intent will control a general one that is inconsistent with  
19 it).

20 With these standards in mind, the Act itself is silent on exempting online credit card  
21 transactions from its purview (and otherwise does not address online credit card transactions  
22 specifically). While Defendants’ assertions with respect to preventing fraud have definite appeal  
23 (a problem which the Court acknowledges is widespread in credit transactions generally, and in  
24 online credit card transactions specifically), the Court is not prepared, at the pleading stage, to  
25 read the Act as completely exempting online credit transactions from its reach.

1 Further, whether the information requested by online retailers is reasonably necessary to  
2 complete the transaction, whether for security purposes in the case of E-Harmony, or for  
3 purposes of fraud protection in the case of all three Defendants, or as a requirement of the credit  
4 card issuers, can only be determined on a factual record. Just as a gasoline retailer may request a  
5 customer's zip code to verify the card being used, online retailers may have be justified in  
6 requesting personal identifying information to verify the credit card purchase. The Legislature  
7 has specifically addressed the issue with respect to gasoline retailers, and may do the same with  
8 respect to online retailers if determines that they should be exempted from the provisions of the  
9 statute.

10 The Court finds that the fact that *Saulic* arose from an order on class certification  
11 distinguishes that case from the instant litigation. While the Court recognizes that the *Saulic*  
12 court conducted a thorough analysis of the statute, there was an opportunity to conduct class  
13 discovery in that case, and the issues in *Saulic* did not arise at the pleading stage. In any event,  
14 however, *Saulic* is not binding on this Court's determination (nor is *Gonor*, a trial court order  
15 sustaining a demurrer without leave to amend on grounds that the Act does not apply to online  
16 transactions).

17 Defendants also rely in part on *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4<sup>th</sup>  
18 524 for the notion that the Act only applies to traditional "brick-and-mortar" transactions rather  
19 than online transactions that did not exist when the Act was passed and that, the Defendants  
20 conted, the Legislature never considered.<sup>1</sup> However, the Supreme Court in *Pineda* notes that  
21 "the Legislature intended to provide robust consumer protections by prohibiting retailers from  
22 soliciting and recording information about the cardholder that is unnecessary to the credit card  
23  
24  
25

---

<sup>1</sup> See Defendant eHarmony's Demurrer at 10, fn.6.

1 transaction.” *Pineda*, 51 Cal.4<sup>th</sup> at 536. In any event, *Pineda* did not itself make any such  
2 distinction between online credit transactions and “brick-and-mortar” credit transactions.

3 In sum, until the legislature specifically exempts online credit card transactions from the  
4 purview of the Act, the Court will not (and cannot) read such a provision into the statute. For the  
5 reasons discussed *supra*, the demurrers are overruled.

6  
7 **IV.**

8 **RULING AND ORDER**

9 For the foregoing reasons, the demurrers of Defendants Ticketmaster, eHarmony, and  
10 Apple are overruled. Defendants shall have twenty (20) days from today to answer the  
11 complaints in the individual cases. The Court sets a further status conference in these cases for  
12 January 25, 2012 at 9 a.m. The parties are to file a joint statement by January 20, 2011, with a  
13 proposed discovery plan. Notwithstanding the Court’s view that the issues presented cannot be  
14 adjudicated on demurrer, the Court believes that upon development of a factual record, the issues  
15 can be adjudicated in advance of trial. Online retailers may be justified in requesting personal  
16 identifying information to verify credit card purchases as permitted by Section 1747.08(d),  
17 however such a determination cannot be made without a factual record before the Court.

18 The issues addressed in this Ruling and Order present controlling questions of law as  
19 to which there are substantial grounds for difference of opinion. Pursuant to Code of Civil  
20 Procedure § 166.1, the Court finds that appellate resolution of these issues may materially assist  
21 in the resolution of the litigation.

22  
23 Dated: December 7, 2011

**CARL J. WEST**

24  
25 

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Carl J. West  
Judge of the Superior Court

# **EXHIBIT B**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

APPLE INC.,

Petitioner,

v.

SUPERIOR COURT OF THE STATE  
OF CALIFORNIA FOR THE COUNTY  
OF LOS ANGELES,

Respondent.

DAVID KRESCENT et al.,

Real Parties in Interest.

B238097

(Super. Ct. No. BC463305)

**ORDER**

COURT OF APPEAL - SECOND DISTRICT

**FILED**

JAN 05 2012

JOSEPH A. LANE

Clerk

We have read and considered the petition for writ of mandate filed on

December 27, 2011.

The petition is denied.



BIGELOW, P. J.



RUBIN, J.



FLIER, J.

David Walsh  
Paul, Hastings, Janofsky & Walker  
515 South Flower Street  
25th Floor  
Los Angeles, CA 90071-2371

Case Number B238097  
Division 8

APPLE INC.,  
Petitioner,  
v.  
SUPERIOR COURT OF LOS ANGELES COUNTY,  
Respondent;  
DAVID KRESCENT,  
Real Party in Interest.

**PROOF OF SERVICE**

STATE OF CALIFORNIA )  
CITY OF LOS ANGELES AND COUNTY OF ) ss:  
LOS ANGELES )

I am employed in the City of Los Angeles and County of Los Angeles, State of California. I am over the age of 18, and not a party to the within action. My business address is 515 S. Flower St., 25th Floor, Los Angeles, CA 90071-2228.

On January 13, 2012, I served the foregoing document(s) described as:

**PETITION FOR REVIEW OF A DECISION IN THE COURT OF APPEAL, SECOND DISTRICT, DIVISION EIGHT**

on the interested parties by placing a true and correct copy thereof in a sealed envelope(s) addressed as follows:

Edwin C. Schreiber, Esq.  
Eric A. Schreiber, Esq.  
Schreiber & Schreiber, Inc.  
16501 Ventura Blvd., Suite 401  
Encino, CA 91436-2068  
Tel: 818-789-2577  
Fax: 818-789-3391  
*Attorneys for Plaintiff David Krescent*

Superior Court of California,  
County of Los Angeles  
Central Civil West Courthouse  
Dept. 322  
600 S. Commonwealth Ave.  
Los Angeles, CA 90005

Court of Appeal,  
2nd Appellate District  
Ronald Reagan State Building  
300 S. Spring Street  
2nd Floor, North Tower  
Los Angeles, CA 90013



**VIA PERSONAL DELIVERY:**

I caused such document(s) listed above to be personally delivered, by Nationwide Legal, Inc., to the offices of the addressee(s) pursuant to CCP § 1011.

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

Executed on January 13, 2012, at Los Angeles, California.

Linda Young  
(Print Name)

  
(Signature)