

No. 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 Case Nos. BC462492 and BC462494)

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

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I. INTRODUCTION

Plaintiff agrees that “resolution of the issue [presented in this Petition] is one of state-wide importance that should be resolved by this Court under California Rules of Court, Rule 8.500(b)(1).” (Answer at p. 3.) Likewise, the trial court observed that “appellate resolution of the[] [issues presented in this Petition] may materially assist in the resolution of the litigation.” (Ex. A to Petition.) This Court should grant this Petition and resolve whether the Song-Beverly Credit Card Act (the “Act”) should be extended to online payment transactions where no credit card is presented to the retailer, an issue that implicates significant and far-reaching concerns of e-commerce and online consumer fraud prevention.

Plaintiff takes the extreme position that the Act not only applies to online merchants (it does not), but also prevents them from requesting personal identification information *even to detect or prevent criminal fraud*: “Only a motor fuel dispenser is permitted to obtain personal information for identify theft or fraud protection.” (Answer at p. 7.) The Legislature never intended to apply the Act to online retailers at all, let alone to put them in a worse position than brick-and-mortar retailers who *are* covered by the Act. Indeed, the Act expressly permits *all* retailers covered under the Act to request photo identification to verify a cardholder’s identity (Civ. Code, § 1747.08, subd. (d)), and to collect personal identification for any

legitimate purpose that is “incidental but related to the individual credit card transaction,” including for fraud detection purposes (*id.*, § 1747.08, subd. (c)(4)). Plaintiff’s absurd construction cannot be squared with the Act’s plain language, its legislative history, or common sense.

**II. THE PETITION PRESENTS A NARROW ISSUE OF
STATUTORY CONSTRUCTION APPROPRIATE FOR
IMMEDIATE APPELLATE REVIEW**

The narrow issue before this Court is ideal for appellate review and hinges on a question of basic statutory interpretation: Does the Act apply to virtual online transactions where no credit card is presented to retailers? The Act’s plain language and history leave no doubt that it does not.

The Act was enacted more than forty years ago (1971), at a time when the idea of the Internet, much less purchasing music from the cloud on iTunes, would have seemed like the whimsy of a science-fiction novelist. It is therefore not surprising that the Act does not mention online transactions or in any way contemplate faceless online transactions where no card is presented at all.

To the contrary, the Act’s terms make plain that the Legislature envisioned an in-person transaction in which a credit card is physically presented to the retailer, and where the retailer has the opportunity to request a visual inspection of the customer’s photo identification, such as a driver’s license, to satisfy itself that the credit card transaction is legitimate. (See Civ. Code, § 1747.08, subd. (d) [merchant may “requir[e] the

cardholder, as 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*"]; see also *id.*, § 1747.02 [defining credit card as a “credit device existing for the purpose of being used from time to time *upon presentation* to obtain money, property, labor or services”], emphases added.) Likewise, the Act provides that retailers may not “write” personal information “upon the credit card transaction form” or require customers to write such information on credit card forms that contain “preprinted spaces.” (*Id.*, § 1747.08, subd. (a)(3).) The Act’s plain language has led the overwhelming majority of courts—the lone exception being the trial court here—to correctly affirm that the Act does not apply to card-not-present, virtual transactions over the Internet.¹

In the 40 years that have passed since the Act first became law, it has been amended a handful of times, but nothing in those amendments suggests that the Legislature intended to expand the Act’s scope to the unique circumstances of online transactions. Plaintiff argues that Assembly Bill 1219, enacted in October 2011, which amended the Act to clarify that gas stations can collect ZIP codes at automated pumps, somehow means

¹ *Mehrens v. Redbox Automated Retail LLC* (C.D. Cal. Jan. 6, 2012) 2012 WL 77220 [holding online transactions are not covered under the Act]; *Saulic v. Symantec Corp.* (C.D. Cal. 2009) 596 F.Supp. 2d 1323 [same]; *Gonor v. craigslist, Inc.* (Super. Ct. S.F. County, Aug. 24, 2011, No. CGC-11-511332) [same]; *Salmonson v. Microsoft Corp.* (C.D. Cal. Jan. 6, 2012) 2012 WL 77217 [same, opinion vacated due to judge’s subsequent recusal determination].

that the Legislature intended the Act to extend to online transactions where no card is presented to the retailer. (Answer at pp. 3-8.) But that amendment has nothing to do with online retailers; it is limited to gas stations, which are not online retailers, and does not suggest that the Legislature sought to apply the Act to virtual, Internet transactions. Moreover, gas station payments (even at automated pumps) are nothing like online transactions because they involve a card-present transaction at a brick-and-mortar location. By contrast, in an online purchase, the retailer has no means to confirm whether or not the card is in the customer's possession or even whether the "customer" is a real person (as opposed to a malicious "script" programmed to input unauthorized and/or randomized credit card numbers), heightening the fraud risk significantly. (Compare *Mehrens, supra*, at p. *4 fn. 3 [rejecting the same argument Plaintiff advances here because gas stations are brick-and-mortar establishments with "onsite attendants, who are available to monitor and investigate suspicious credit card use"].)

III. THE ISSUE BEFORE THE COURT IS AN IMPORTANT ONE FOR THE CALIFORNIA ECONOMY AND CRIMINAL FRAUD PREVENTION

The reach of this critical issue is not limited to Apple, eHarmony, or Ticketmaster—it impacts millions of daily online transactions and every corner of e-commerce around the globe. Online commerce is an essential and rapidly expanding part of our economy. The figures are staggering. In

2011, online sales in the United States reached \$256 billion, up 12 percent from 2010.² Online retail is a central feature of the California economy—sixty-four percent of all Californians now report using the Internet to purchase goods and services.³

The dramatic rise in e-commerce has witnessed a similar escalation in online computer crime and theft, compounded by the challenges inherent in verifying identity and detecting unauthorized credit card activity in a virtual transaction with no tangible credit card, photo ID, or human interaction. Online fraud is a serious problem. It drives up retailers' costs, increases consumers' prices, and dilutes our already scarce law enforcement resources. In 2010, the Internet Crime Complaint Center, a partnership between the FBI and National White Collar Crime Center, received 34,606 complaints from California alone.⁴

Yet, according to Plaintiff, because Apple “is clearly not a motor fuel dispenser,” it somehow “does not, and did not have the right to collect personal information, even for the *purposes of theft or fraud protection.*”

² comScore 2012 U.S. Digital Future in Focus <http://www.comscore.com/Press_Events/Presentations_Whitepapers/2012/2012_US_Digital_Future_in_Focus> (as of Feb. 25, 2011).

³ Public Policy Institute of California, *PPIC Statewide Survey: Californians & Information Technology* (2011) <<http://www.ppic.org/main/publication.asp?i=985>>.

⁴ *California IC3 2010 Internet Crime Report* <<http://www.ic3.gov/media/annualreports.aspx>>.

(Answer at p. 7, emphasis added.) Plaintiff's untenable construction⁵ would result in absurd consequences never contemplated by the Legislature. Online retailers must be able to request personal information because of the basic necessities of operating in a virtual marketplace where they do not interact with a physical credit card, view a driver's license, or otherwise have the means to spot red flags that would suggest they are dealing with a criminal.⁶ An online merchant's sole means to verify identity or detect credit card fraud is to collect personal identification information to verify "that the cardholder is who she claims to be." (*Saulic v. Symantec Corp.* (C.D. Cal. 2009) 596 F.Supp.2d 1323, 1335.)

Even the Los Angeles County Superior Court, which issued the decision at issue, collects the very same personal information that Plaintiff targets here (address, telephone number, and e-mail address) when it processes credit card transactions for the purchase of court filings.⁷ It

⁵ Even if Plaintiff were correct that the Act extends to online, card-not-present transactions—and it does not—Plaintiff's position that online retailers cannot collect personal identification information would be entirely unfounded because the Act expressly permits retailers to collect such information for any "special purpose incidental but related to the individual credit card transaction," which includes fraud prevention. (Civ. Code, § 1747.08(c)(4).)

⁶ Online retailers also necessarily require personal information for a variety of other legitimate purposes, including to recognize, communicate with, and provide ongoing customer service to consumers.

⁷ <<https://www.lasuperiorcourt.org/onlineServices/civilImages>>.

should. As the court's website explains, it "takes online fraud very seriously and coordinates with local and Federal authorities to prosecute anyone attempting to use stolen credit cards"⁸

IV. THIS COURT SHOULD ACT NOW TO RESOLVE THE SPLIT OF AUTHORITY ON THIS IMPORTANT ISSUE

Resolution of this issue is necessary to avoid arbitrary and disparate treatment of online retailers engaged in identical practices. To see the unjust effect of the differential treatment of this issue on California retailers, one need only compare the situation of Apple to that of craigslist. Apple and craigslist were accused of the same alleged violations of the Act through online credit card transactions, but craigslist was sued in San Francisco Superior Court, while Apple was sued in Los Angeles Superior Court. The San Francisco Superior Court promptly and correctly confirmed that the Act does not apply to online transactions and therefore dismissed the case against craigslist with prejudice. *Gonor v. craigslist, Inc.* (Super. Ct. S.F. County, Aug. 24, 2011, No. CGC-11-511332). Apple's demurrer, on the other hand, though raising precisely the same arguments, was denied. This conflict (created solely by the trial court's ruling below) has led to the untenable situation where these companies have different rules applying to their e-commerce operations.

⁸ *Ibid.*

These companies are not the only entities in need of this Court's guidance. The United States Court of Appeals for the Ninth Circuit is currently being presented with this important issue of California law in *Mehrens v. Redbox Automated Retail LLC*, No. 12-55234, without the benefit of this Court's definitive interpretation.

The Supreme Court should address this issue now, not wait for it to play out for many months or years while a cloud of uncertainty hangs over California e-commerce—one of the most vital sectors of our distressed economy. The parties agree that the time is ripe for this Court to provide guidance on this important issue, not only for the litigants before it, but for all Californians, retailers and consumers alike.

V. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant review in this case and stay all proceedings in the trial court pending that review as requested in Apple's Petition filed in the Court of Appeal.

Respectfully submitted,

DATED: February 29, 2012

GIBSON DUNN & CRUTCHER LLP

By: Ashley Beringer *AS*
S. Ashlie Beringer

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 **REPLY IN SUPPORT OF PETITION FOR REVIEW** (including footnotes) contains 1,994 words (including footnotes), as determined by our law firm's word processing system.

Respectfully submitted,

DATED: February 29, 2012

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PROOF OF SERVICE

I, Teresa Motichka, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of 18 and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 555 Mission Street, Suite 3000, San Francisco, CA 94105. On February 29, 2012, I served the within:

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

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown in the following manner:

SEE ATTACHED SERVICE LIST

- X **BY FACSIMILE:** (by causing the above-referenced document to be facsimiled to the California Supreme Court at (415) 865-7183, attention Frederick K. Ohlrich and Jennifer L. Casados.)
- X **BY MAIL:** On February 29, 2012, I placed a true copy in a sealed envelope addressed to each person specifying service by U.S. Mail at the address shown. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
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I certify under penalty of perjury that the foregoing is true and correct, that the foregoing documents(s) were printed on recycled paper, and that this Certificate of Service was executed by me on February 29, 2012, at San Francisco, California.


Teresa Motichka
Teresa Motichka

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