

S199384

IN THE SUPREME COURT OF CALIFORNIA

APPLE, INC., a California Corporation,

Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent

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

Real Party in Interest

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

**REAL PARTY IN INTEREST DAVID KRESCENT'S MOTION TO TAKE
JUDICIAL NOTICE IN SUPPORT OF HIS ANSWER
BRIEF ON THE MERITS AND PROPOSED ORDER**

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Attorneys for Plaintiff and Real Party in Interest

DAVID KRESCENT

SUPREME COURT
FILED

MAY 31 2012

Frederick K. Ohlrich Clerk

Deputy

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DAVID KRESCENT

Plaintiff David Krescent hereby moves under EVIDENCE CODE § 451-454, for the Court to take judicial notice of all of the following:

1. The second to last (assembly) version of Civil Code § 1747.08 as amended in the California Senate as of May 17, 2011 (which was taken from the official California Legislature website www.legalinfo.ca.gov/pub/11-12/.../ab_1219_bill_20110517_amended_asm_v95.html), a true and correct copy of which is attached hereto and incorporated herein as Exhibit "A." (This is the proper subject of judicial notice pursuant to *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062 fn.5; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal. App.4th 26).

1 Relevance

The entire matter is based upon an interpretation of Civil Code §§ 1747.02 and 1747.08, specifically, whether or not this Act applies to Internet and other remote transactions. The judicial notice request asks this Court to judicially notice a draft version of the law as a basis to determine the intent of the Legislature. Prior drafts of legislation are the proper subject of judicial notice (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062 fn.5; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal. App.4th 26). Evidence of the intent of the Legislature is highly relevant in interpreting the Act, and, in fact, the best

evidence of the Legislature's intent other than the actual language of the Act itself.

2. The Trial Court was not Asked to Take Judicial Notice of the Material

The amended Act was passed close to the time the matter was briefed and so the parties did not ask the Trial Court to take judicial notice of the Act. The Trial Court did, however, at oral argument make mention of the amended law, so the Trial Court was at least aware of either the passage or the proposed passage of the amended Act.

3. Post Order Matters

The Act was amended prior to the issuance of the Order overruling the demurrers, and this judicial notice request does not otherwise seek judicial notice of matters occurring after the Order overruling the demurrers.

DATED: May 29, 2012

SCHREIBER & SCHREIBER, INC.



ERIC A. SCHREIBER, Attorneys for
PLAINTIFF AND REAL PARTY IN
INTEREST DAVID KRESCENT
individually, and on behalf of a class of
persons similarly situated

DECLARATION OF ERIC A. SCHREIBER

I, ERIC A. SCHREIBER, SAY:

1. If called as a witness, I could competently testify to all of the following from my own personal knowledge. I am an attorney duly licensed to practice law before all Courts of the State of California. I am a shareholder of Schreiber & Schreiber, Inc., and am one of the attorneys representing Plaintiff and Real Party in Interest David Krescent in the above-captioned action.

2. Attached hereto and incorporated herein as Exhibit "A" is a true and correct copy of the second to last (assembly) version of Civil Code § 1747.08 as amended in the California Senate as of May 17, 2011 (which was taken from the official California Legislature website www.legalinfo.ca.gov/pub/11-12/.../ab_1219_bill_20110517_amended_asm_v95.html).

3. I believe the following document is both reasonable and necessary to assist in the understanding of the Legislature's intent for its passage of October 2011 amendments to the Song-Beverly Credit Card Act, an issue of importance in Plaintiff's Answer Brief on the Merits.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this May 29, 2012, at Encino, California.

A handwritten signature in black ink, appearing to read 'Eric A. Schreiber', written over a horizontal line.

Eric A. Schreiber



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Beta Site for California Legislative Information.

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1999-2008 Cumulative Statutory Record now available in Legislative Publications. See New Features for more information.

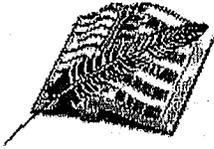
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BILL DOCUMENTS

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Documents associated with AB 1219 in the Session

Status - 10/10/2011 1323 bytes

History - 10/09/2011 3188 bytes

Bill Text

In order to view the PDF version of the bill text documents, you may need a free viewer from Adobe.

Chaptered	- 10/09/2011	<u>HTML</u> - 15828 bytes	<u>PDF</u> - 83405 bytes
Enrolled	- 09/20/2011	<u>HTML</u> - 15725 bytes	<u>PDF</u> - 92697 bytes
Amended	- 09/01/2011	<u>HTML</u> - 17271 bytes	<u>PDF</u> - 230902 bytes
Amended	- 08/24/2011	<u>HTML</u> - 16556 bytes	<u>PDF</u> - 170909 bytes
Amended	- 06/22/2011	<u>HTML</u> - 15885 bytes	<u>PDF</u> - 160253 bytes
Amended	- 06/01/2011	<u>HTML</u> - 11233 bytes	<u>PDF</u> - 154483 bytes
Amended	- 05/17/2011	<u>HTML</u> - 11667 bytes	<u>PDF</u> - 155162 bytes
Amended	- 05/04/2011	<u>HTML</u> - 10306 bytes	<u>PDF</u> - 153763 bytes
Amended	- 04/25/2011	<u>HTML</u> - 9614 bytes	<u>PDF</u> - 153844 bytes
Amended	- 03/29/2011	<u>HTML</u> - 3302 bytes	<u>PDF</u> - 143304 bytes
Introduced	- 02/18/2011	<u>HTML</u> - 2732 bytes	<u>PDF</u> - 142566 bytes

Analyses

<u>Assembly Floor</u>	- 09/08/2011 - 11478 bytes
<u>Senate Floor</u>	- 09/01/2011 - 19490 bytes
<u>Senate Floor</u>	- 09/01/2011 - 19971 bytes
<u>Senate Committee</u>	- 08/25/2011 - 22024 bytes
<u>Senate Committee</u>	- 07/04/2011 - 24012 bytes
<u>Assembly Floor</u>	- 06/01/2011 - 12002 bytes
<u>Assembly Floor</u>	- 05/18/2011 - 12569 bytes
<u>Assembly Committee</u>	- 05/09/2011 - 37714 bytes
<u>Assembly Committee</u>	- 04/29/2011 - 22287 bytes

Votes

<u>Assembly Floor</u>	- 09/08/2011 - 1434 bytes
<u>Senate Floor</u>	- 09/07/2011 - 1076 bytes
<u>Senate Committee</u>	- 08/25/2011 - 837 bytes
<u>Assembly Floor</u>	- 06/03/2011 - 1430 bytes
<u>Assembly Committee</u>	- 05/10/2011 - 912 bytes
<u>Assembly Committee</u>	- 05/02/2011 - 977 bytes



BILL NUMBER: AB 1219 AMENDED
BILL TEXT

AMENDED IN ASSEMBLY MAY 17, 2011
AMENDED IN ASSEMBLY MAY 4, 2011
AMENDED IN ASSEMBLY APRIL 25, 2011
AMENDED IN ASSEMBLY MARCH 29, 2011

INTRODUCED BY Assembly Member Perea

FEBRUARY 18, 2011

An act to amend Section 1747.08 of the Civil Code, relating to credit cards.

LEGISLATIVE COUNSEL'S DIGEST

AB 1219, as amended, Perea. Credit cards: personal information.

Existing state and federal law regulate the provision of credit and the use of credit cards. Existing state law prohibits a person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business from requesting or requiring the cardholder to provide personal identification information, which is then recorded, as a condition to accepting the credit card as payment in full or in part for goods or services, but provides various exceptions to this prohibition. Existing law excepts from this prohibition the instance when the person or entity accepting the card is contractually obligated to provide personal identification information in order to complete the transaction or is obligated to collect and record the identification information by federal law. Existing law also permits a person or entity accepting a credit card to record the cardholder's driver's license number or identification card number 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.

This bill would ~~condition the prohibition described above upon the cardholder physically presenting a credit card with a properly functioning magnetic stripe or other electronically readable device. The bill would~~ except from the prohibition described above the instance when the person or entity accepting the card uses the personal information for prevention of fraud, theft, or identity theft and would specify that state law obligations are also permissible reasons to collect and record personal information. *The bill also would except from the prohibition instances when the person or entity accepting the card requests personal information for purposes of verifying a proprietary credit card and the cardholder does not produce it and face-to-face transactions when the credit card does not have a functioning magnetic stripe or is not otherwise electronically readable, subject to specified limitations.*

The bill would delete the authorization of a person or entity accepting a credit card to record the cardholder's driver's license number or identification card number if the cardholder pays for the transaction with a credit card number and does not make the credit card available. The bill would also make a statement of intent with

regard to certain of these provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1747.08 of the Civil Code is amended to read:

1747.08. (a) Except as provided in subdivision (c), ~~if a cardholder physically presents a credit card to an employee, authorized agent, or representative of a person, firm, partnership, association, or corporation as payment, and the credit card has a properly functioning magnetic stripe or other electronically readable device, the~~ no person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business shall ~~not~~ 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.

(b) For purposes of this section "personal identification information," means 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.

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

(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.

(2) Cash advance transactions.

(3) If any of the following applies:

~~(1) The person, firm, partnership, association, or corporation accepting the credit card:~~

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

(B) ~~Uses~~ The person, firm, partnership, association, or corporation accepting the credit card uses the personal identification information solely for prevention of fraud, theft, or identity theft or uses the personal information for any of these purposes concurrently with a purpose permitted under paragraph (4).

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

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

(5) If personal identification information is requested to verify that a person has a proprietary credit card account with the person, firm, partnership, association, or corporation and that person does not produce the proprietary credit card at the time of the transaction. For purposes of this paragraph a "proprietary credit card" means a credit card issued by the person, firm, partnership, association, or corporation.

(6) If, in a face-to-face transaction, the credit card does not have a properly functioning magnetic stripe or is otherwise not electronically readable, the person, firm, partnership, association, or corporation may record only the cardholder's name, credit card account number, and expiration date; and provided further that the personal identification information that is required is used only to complete the transaction, or for a purpose authorized by this section, and is thereafter deleted, discarded, or destroyed.

(d) This section does not prohibit any person, firm, partnership, association, or corporation from requiring the cardholder, as a condition to accepting the credit card as payment in full or in part for goods or services, to provide reasonable forms of positive identification, which may include a driver's license or a California state identification card, or where one of these is not available, another form of photo identification, provided that none of the information contained thereon is written or recorded on the credit card transaction form or otherwise.

(e) Any person who violates this section shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation and one thousand dollars (\$1,000) for each subsequent violation, to be assessed and collected in a civil action brought by the person paying with a credit card, by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred. However, no civil penalty shall be assessed for a violation of this section if the defendant shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error made notwithstanding the defendant's maintenance of procedures reasonably adopted to avoid that error. When collected, the civil penalty shall be payable, as appropriate, to the person paying with a credit card who brought the action, or to the general fund of whichever governmental entity brought the action to assess the civil penalty.

(f) The Attorney General, or any district attorney or city attorney within his or her respective jurisdiction, may bring an action in the superior court in the name of the people of the State of California to enjoin violation of subdivision (a) and, upon notice to the defendant of not less than five days, to temporarily restrain and enjoin the violation. If it appears to the satisfaction of the court that the defendant has, in fact, violated subdivision (a), the court may issue an injunction restraining further violations, without requiring proof that any person has been damaged by the violation. In these proceedings, if the court finds that the defendant has violated subdivision (a), the court may direct the defendant to pay any or all costs incurred by the Attorney General, district attorney,

or city attorney in seeking or obtaining injunctive relief pursuant to this subdivision.

(g) Actions for collection of civil penalties under subdivision (e) and for injunctive relief under subdivision (f) may be consolidated.

(h) The changes made to this section by Chapter 458 of the Statutes of 1995 apply only to credit card transactions entered into on and after January 1, 1996. Nothing in those changes shall be construed to affect any civil action which was filed before January 1, 1996.

(i) It is the intent of the amendments made by the act adding this subdivision to clarify existing law. These clarifying amendments continue to protect personal identification information while allowing and recognizing the legitimate business need for a person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business to use personal identification information ~~to appropriately process and complete all components of customer transactions and to protect consumers against criminal activity, such as identity theft, which is currently the largest source of consumer complaints to the Federal Trade Commission~~ *for the purposes authorized by this section*. These amendments recognize, in part, legitimate business practices designed to address the increased potential for identity theft that results if the cardholder is not present or if the credit card does not function correctly.

ORDER

The court having read and considered the motion of Plaintiff and Real Party in Interest, David Krescent hereby GRANTS the motion and will take judicial notice of

1. The second to last (assembly) version of Civil Code § 1747.08 as amended in the California Senate as of May 17, 2011.

IT IS SO ORDERED

Dated, _____, 2012

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

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

On May 30, 2012, I served the foregoing document described as MOTION TO TAKE JUDICIAL NOTICE on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope in the United States mail at Encino, California, addressed as follows:

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Clerk of the Court
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Los Angeles, California 90005

X Via U.S. Mail: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the 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.

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

Executed May 30, 2012 at Encino, California.


Raquel Matsubayashi