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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:11-cv-05449-JHN -JC Date January 6, 2012

Title Jason Salmonson v. Microsoft Corporation et al

Present: The Honorable JACQUELINE H. NGUYEN

Alicia Mamer

Not Reported

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not present

Not present

**Proceedings: ORDER GRANTING DEFENDANT’S MOTION TO DISMISS
THE CASE WITH PREJUDICE [7] (IN CHAMBERS)**

The matter is before the Court on Defendant Microsoft Corporation’s (“Defendant”) Motion to Dismiss for Failure to State a Claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (“Motion”). (Docket No. 7.) The motion is made on the ground that Plaintiff Jason Salmonson’s (“Plaintiff”) *sole* cause of action—violation of the Song-Beverly Credit Card Act of 1971, California Civil Code 1747.08 (hereinafter, “section 1747.08” or “the Act”)—fails to state a claim because section 1747.08 does not apply to online transactions.¹ The Court held a hearing on August 8, 2011, after which the Court took the Motion under submission. Having considered the moving papers, opposition, reply, and supporting documents, as well as the parties’ arguments at the hearing, the Court GRANTS the Motion and dismisses Plaintiff’s sole cause of action with prejudice.

I. FACTUAL BACKGROUND

The pertinent facts, which are culled from the Complaint, are taken as true for purposes of this Motion. (*See* Docket no. 1, Notice of Removal, Ex. A [Compl].)

On March 5, 2011, Plaintiff entered into an online transaction on Defendant’s website to download a copy of Microsoft’s Office Home and Student 2010 software over the Internet. (Compl. ¶¶ 1, 15.) Plaintiff used his credit card to pay for the download. (*Id.* ¶

¹ Plaintiff brought this putative class action on his behalf and on behalf of all similarly situated.

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3.) During this online transaction, Defendant required Plaintiff to provide “his name, home address, phone number, e-mail address, credit card number, credit card expiration date and the credit security code or CCID (credit card identification number).” (*Id.*) Plaintiff tried to complete the transaction without providing his telephone number, but “providing a telephone number was a requirement of completing the credit card purchase.” (*Id.*) Plaintiff then provided his telephone number and the other information, and used his credit card to pay for the download. (*Id.*)

Based on these allegations, Plaintiff asserts that Defendant violated section 1747.08 by requiring him to provide his address and telephone number.

II. DISCUSSION

Section 1747.08 provides in relevant part:

- (a) Except as provided in subdivision (c), no . . . 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 . . . 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.

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- (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.*

Cal. Civ. Code § 1747.08(a) and (b) (emphasis added).

A. Section 1747.08 Does Not Apply to Online Transactions

The issue presented is whether section 1747.08 applies to online transactions in which a credit card is used to obtain a license to use software.

When faced with an issue of statutory interpretation, “we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.” *United States v. 475 Martin Lane*, 545 F. 3d 1134, 1141 (9th Cir. 2008) (quoting *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999)).

Where statutory language is clear and unambiguous, it will be applied according to its terms. *Wilson v. Safeway Stores, Inc.*, 52 Cal. App. 4th 267, 272, 60 Cal. Rptr. 2d 532 (1997). Here, the Act prohibits merchants from requiring the cardholder to *write* personal identification information on the credit card form, requiring the cardholder to provide personal identification information that merchants then *write* on the credit card form, and utilizing forms with *preprinted* spaces for personal identification information. This language suggests that “pen and paper” transactions are contemplated, rather than electronic entry of numbers on a keypad or touchscreen, and the Act makes no specific reference to online or kiosk transactions.

The purpose of the Act further supports an interpretation that it is limited to brick-and-mortar transactions. The original amendment to the Act addressed two privacy concerns: “[F]irst, that with increased use of computer technology, very specific and personal information about a consumer’s spending habits was being made available to anyone willing to pay for it; and second, that acts of harassment and violence were being committed by store clerks who obtained customers’ phone numbers and addresses.”

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Florez v. Linens 'N Things, Inc., 108 Cal.App.4th 447, 452 (2003).

Another court in this district has dealt with this same issue and held that section 1747.08's proscription against collecting personal identification information does not apply to online transactions, finding that the policy and purpose of the Act did not address the unique fraud concerns which accompany such transactions. *Saulic v. Symantec Corp.*, 596 F. Supp. 2d 1323, 1336 (C.D. Cal. 2009).²

The plaintiff in *Saulic* alleged that the defendants violated section 1747.08 by (1) requiring the plaintiff to submit his address and telephone number as a condition of completing an online purchase of software and (2) requiring the plaintiff to submit his address and telephone number again when he renewed the same product online. *Id.* at 1331. In *Saulic*, as here, the download did not involve shipment to the plaintiff of any physical product; rather, the software was downloaded electronically over the Internet. *Id.* at 1325–26. Likewise, in both cases, the plaintiff, “[a]t the purchase screen, . . . was presented with a credit card form with spaces for filling in [personal identification information], and it required that he disclose both his address and telephone number. Using his credit card, . . . plaintiff completed the purchase and downloaded” the software. *Id.* at 1325–26.

The plaintiff in *Saulic* filed a motion for class certification, alleging that collection of personal identification information as a condition of a transaction to download software violates section 1747.08. Denying the motion, the court held that section 1747.08 did not apply to his online transaction, and accordingly ruled that “plaintiff’s claim cannot be maintained.” *Id.* at 1336. In analyzing whether plaintiff had standing to bring his claim, the court noted that, “[p]laintiff does not cite, and the [c]ourt does not find, any state or

² Plaintiff argues that the court’s opinion regarding *Saulic*’s ability to maintain a claim is merely *dicta* because it was both unnecessary and inappropriate for Judge Stotler to reach the legal question in a class certification proceeding. (Opp’n at 8.) This argument is unavailing because the motion for class certification was denied *because* the transaction at issue was not covered by section 1747.08 and thus, *Saulic*’s “claim [could not] be maintained.” *Saulic*, 596 F. Supp. 2d at 1336. In other words, the plaintiff’s inability to maintain a cognizable claim formed the basis for denying the class certification motion.

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federal case in which a violation of section 1747.08 is found based on an online transaction.” *Id.* at 1332. To determine whether section 1747.08 applies to online transactions, the court in *Saulic* examined the purpose of section 1747.08. Judge Alicemarie H. Stotler observed:

The purpose of the Act appears to be to protect consumer privacy in the course of a retail transaction, and [the California Assembly Committee on Finance and Insurance] analysis suggests the Act was *specifically passed with a brick-and-mortar merchant environment in mind*. While the use of computer technology is mentioned, the language does not suggest the Legislature considered online transactions or the perils of misappropriation of consumer credit information in an online environment where there is no ability to confirm the identity of the customer. Neither the language of the Act nor its legislative history suggests the Act includes online transactions.

Id. at 1333–34 (emphasis added). Recognizing that online transactions raise unique fraud concerns, the court highlighted that “[i]n an online transaction, without a request for [personal identification information], online merchants must ultimately accept payment with nothing more than a name and credit card number—there is no ‘verification.’” *Id.* at 1335. Finding that the Act is apparently concerned with the use of personal identification information for unsolicited marketing, not as a fraud prevention measure, the court held that “online transactions are not encompassed within the Act.” *Id.* at 1336.

The Court finds Judge Stotler’s reasoning in *Saulic* persuasive. The Act was intended to combat the practice of collecting customer information that would ultimately be used for the sole benefit of the merchant corporation. In the context of a brick-and-mortar transaction, a customer’s identity can be verified by having a salesperson examine the customer’s driver’s license or passport. Thus, it is unnecessary to record a customer’s personal information in a brick-and-mortar transaction, and the only ascertainable reason for doing so would be for improper marketing or solicitation purposes. By contrast, collection of personal information in an online 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

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information is necessary for a legitimate purpose.³

³ Plaintiff attempts to distinguish *Saulic* by relying on the fact that the court there faced a class certification motion, not a 12(b)(6) motion. (Opp'n at 9–10.) The distinction is immaterial. The 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. Therefore, Plaintiff's procedural distinction does not alter this Court's analysis.

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B. *Pineda* Supports Dismissal

Plaintiff argues that *Saulic* was decided prior to *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524 (2011), a recent California Supreme Court case interpreting the Act and examining its legislative history. (Opp’n at 10.) In *Pineda*, the court addressed the issue of “whether section 1747.08 is violated when a business requests and records a customer’s *ZIP code* during a credit card transaction.” 51 Cal. 4th at 527 (emphasis added). Having reviewed the statute’s plain language, protective purpose, and legislative history, the court in *Pineda* held that a ZIP code constitutes “personal identification information” as that phrase is used in section 1747.08. *Id.* Therefore, requesting and recording a cardholder’s ZIP code, without more, violates the Act. *Id.* at 527–28.

However, *Saulic*’s discussion of the legislative history of section 1747.08 is consistent with *Pineda*. In *Pineda*, the court explained that in 1990, the Legislature enacted 1747.8 (later renumbered as section 1747.08) “seeking ‘to address the misuse of personal identification information for, inter alia, marketing purposes, and [finding] that there would be no legitimate need to obtain such information from credit card customers if it was not necessary to the completion of the credit card transaction.’” *Pineda*, 51 Cal. 4th at 534 (citation omitted, alteration in original). “The statute’s overriding purpose was to ‘protect the personal privacy of consumers who pay for transactions with credit cards.’” *Id.* (citations omitted). The court concluded that “the legislative history of the [Act] in general, and section 1747.08 in particular, demonstrates the Legislature intended to provide robust consumer protections by prohibiting retailers from soliciting and recording information about the cardholder that is *unnecessary* to the credit card transaction.” *Id.* at 535–36 (emphasis added).

Because *Pineda* involved a face-to-face transaction, there was “no legitimate need to obtain such information from credit card customers” in that case. 51 Cal. 4th at 534. As discussed above, the online transactions in *Saulic* and the case at hand 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. Therefore, the Court finds section 1747.08 does not apply to online transactions.

III. CONCLUSION

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Based on the foregoing, Plaintiff's sole cause of action is dismissed. Because no amendment can cure the defect in the Complaint, the matter is dismissed with prejudice.

IT IS SO ORDERED.⁴

_____ : _____ N/A

Initials of Preparer AM

⁴ The parties filed requests for judicial notice concurrent with their briefs. The Court need not reach these requests as they have no bearing on the ultimate disposition of this motion.