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6 UNITED STATES DISTRICT COURT
7 FOR THE CENTRAL DISTRICT OF CALIFORNIA
8

9 JASON SALMONSON, individually
10 and on behalf of a class of persons similarly
situated

11 Plaintiff,

12 vs.

13 MICROSOFT CORPORATION,
a Washington corporation;
14 and DOES 1 to 100, Inclusive,

15 Defendants
16

Case No. CV11-5449 JHN (JCx)

(California State Case No. BC 462493)

CLASS ACTION

PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION
AND/OR TO ALTER OR AMEND
JUDGMENT AND/OR FOR RELIEF FROM
JUDGMENT OR ORDER BASED UPON
CHANGE OF LAW; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

Date: March 12, 2012

Time: 2:00 p.m.

(F..R.C.P. RULE 59(e), 60(b))

Action Filed: May 27, 2011

Action Removed: June 30, 2011

The Honorable Jacqueline Nguyen

Court Room: 790

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MOTION FOR RECONSIDERATION AND/OR TO ALTER
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NOTICE OF MOTION

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT ON March 12, 2012, at 2:00 p.m., in the Federal District Court of the United States, Central District located at 255 East Temple Street, Los Angeles, California 90012, in Court Room 790, Plaintiff Jason Salmonson will move the Court for an Order reconsidering and/or altering and/or for relief from the Court's January 6, 2012 Order dismissing the case with prejudice and requesting the entry of an Order denying the motion to dismiss. The motion is made pursuant to F.R.C.P., Rule 59(e) and 60(b), because of a change in controlling law which occurred after the Court took the matter under submission. The motion shall be based upon this notice of motion, the motion, the accompanying points and authorities, Plaintiff's request for judicial notice, Plaintiff's reply brief and all other evidence and argument as may be offered to and heard by the Court at the argument of this motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on January 11, 2012.

DATED: January 12, 2012

SCHREIBER & SCHREIBER, INC.

BY: /s/ Eric A. Schreiber
Eric A. Schreiber, Attorneys for
Plaintiff, Jason Salmonson,
Individually and on Behalf of a
Class of Persons Similarly
Situated

1 **MOTION FOR RECONSIDERATION AND/OR TO ALTER JUDGMENT OR**
2 **ORDER AND/OR RELIEF FROM JUDGMENT AND/OR ORDER**

3 Pursuant to F.R.C.P. Rule 59(e) Plaintiff Jason Salmonson hereby moves the
4 Court for an order for reconsideration and/or to alter the order/judgment rendered by
5 the Court on January 6, 2012 granting the Defendant's motion to dismiss the complaint
6 with prejudice, based upon a change in controlling law. In the alternative, Plaintiff
7 moves the Court under F.R.C.P. Rule 60(b) for reconsideration and/or for relief from
8 the judgment/order rendered on January 6, 2012 dismissing the case with prejudice,
9 based upon a change of controlling law.

10 **I. INTRODUCTION**

11 On August 8, 2011, this Court heard and considered Defendant Microsoft's
12 motion to dismiss Plaintiff's one cause of action complaint under the Song-Beverly
13 Credit Card Act California Civil Code § 1747.08 (the "Act"), on the theory that the Act
14 does not apply to Internet based transactions. On January 6, 2012, after taking the
15 matter under submission, the Court granted the motion without leave to amend, ending
16 the case. However, in the interim, between the time of the hearing on the motion and
17 the decision, there has been a change in law that warrants reconsideration of the January
18 6, 2012 Order (the "Order"). The basis of this motion is that:

19 1. On October 9, 2011, the California Legislature amended the Act, and the Act
20 itself, along with previous drafts of the amended Act make it unmistakably clear that
21 the Legislature is of the opinion that the Act has always applied to both "card not
22 present" transactions (such as Internet-based transactions) as well as traditional face-to-
23 face transactions;

24 2. The Complex Department of the Superior Court of California (Los Angeles
25 branch) has ruled (in three cases) that, under the current version of the Act, that the Act
26 does, in fact apply to Internet transactions; and

27 3. The California Court of Appeal has (at least implicitly) opined that the Act
28 does apply to Internet based transactions, as it rejected a petition for writ of mandate

1 seeking to overturn the Complex Department's ruling on all three Petitions for Writ of
2 Mandate that the Act applies to Internet transactions.

3 Therefore, this change in law forms a basis for reconsideration and reversal of
4 the Court's Order dismissing the complaint with prejudice.

5 **II. MOTIONS FOR RECONSIDERATION ARE RECOGNIZED UNDER**
6 **F.R.C.P. RULES 59 AND 60**

7 While the F.R.C.P. does not specifically contain a procedure for motions for
8 reconsideration, Courts in the Ninth Circuit recognize motions for reconsideration
9 under F.R.C.P. Rule 59 or 60, as appropriate (*Circuit City Sotres, Inc. v. Mantor* 417
10 F.3d 1060, 1063-64 (9th Cir. 2005)). Here, the motion for reconsideration is appropriate
11 either under F.R.C.P. Rule 59(e) as a motion to alter or amend the judgment (as this
12 motion is made within 10 days of the order dismissing the case with prejudice), or in
13 the alternative under F.R.C.P. Rule 60(b). In general, under Ninth Circuit law,
14 reconsideration is appropriate when the district court is: 1. Presented with newly
15 discovered evidence; 2. Committed clear error or the initial decision was manifestly
16 unjust; or 3. There is an intervening change in controlling law (*School District 1J,*
17 *Multnomah County v. AcandS, Inc.* 5 F.3d 1255, 1263 (9th Cir. 1993).

18 Here, the motion is made within 10 days of the Order (dated January 6, 2012)
19 which is tantamount to judgment as it is the final order terminating the case. The basis
20 is a change in controlling law, as is discussed *infra*.

21 **III. THE AMENDMENTS TO THE SONG-BEVERLY ACT WITHOUT**
22 **QUESTION DEMONSTRATE THAT THE ACT WAS AT ALL TIMES**
23 **INTENDED TO APPLY TO CARD NOT PRESENT TRANSACTIONS SUCH AS**
24 **INTERNET TRANSACTIONS**

25 One of the outstanding issues presented in Microsoft's motion to dismiss was the
26 complete lack of precedent interpreting whether or not the Act applied to "card not
27 present" transactions such as those conducted over the Internet. The only case that
28 even addressed the issue was a Federal District Court opinion *Saulic v. Symantec Corp.*

1 596 F. Supp.2d 1323 (C.D. Cal. 2009), which concluded that under the facts of that
 2 case, that the Song-Beverly Act did not apply to Internet transactions. On October 9,
 3 2011 the Legislature passed emergency legislation amending the Act. This amendment
 4 occurred well after the Court took Defendant’s motion to dismiss under consideration.
 5 While Plaintiff will not provide the full details of the amended Act and all of its
 6 provisions and prior versions here, some crucial provisions of both the amended Act
 7 as well as prior drafts of the Act (which are the proper subject of judicial notice under
 8 both California law [*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062
 9 fn.5; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133
 10 Cal. App.4th 26], as well as Federal Law Fed.R.Evid 201 (b) *see e.g. Louis v,*
 11 *McCormick & Schmick Restaurant Corp.*, 460 F.Supp.2d 1153 (C.D.Cal.2006)), make
 12 it unmistakably clear that the Legislature both intended, and believes that the Act
 13 applies to all transactions, regardless of whether they are in person, or remote [copies
 14 of the amended Act and the second to last version of the Act are incorporated herein
 15 and filed in Plaintiff’s request for judicial notice which is filed concurrently herewith]).

16 *A. The Actual Amended Act*

17 The preamble of the Amended Act (Legislative Counsel Digest) states,

18 This bill would except from the prohibition described above the instance where
 19 the person or entity accepting the card uses the personal information for
 20 prevention of fraud, theft, or identity theft in specified retail motor fuel
 21 transactions. . .

22 Similarly, Subsection (3)(B) of the Act (exceptions to the law) notes,

23 The person. . . accepting the credit card in a sales transaction at a retail motor
 24 fuel dispenser or retail motor fuel payment island **automated cashier** uses the
 25 personal identification information solely for prevention of fraud, theft, or
 26 identity theft or uses the personal information for any of these purposes
 27 concurrently with a purpose permitted under paragraph (4). (Emphasis added).¹

28 ¹. It should also be noted that Civil Code 1747.02 (n) (the definition
 section) notes that a “retail motor fuel dispenser” is a device that can
 use a remote electronic payment system, where an employee or agent of
 the seller is not present. This provides further evidence that remote

1 Naturally, if all cases of identity theft or fraud protection were already and
2 automatically exempted from the statute, there would be no need to create a special
3 exception for motor fuel dispensers. Similarly, the motor fuel island exception applies
4 to automated cashiers as well, which is, in essence virtually identical to a remote
5 transaction (such as an Internet transaction, or self-checkout at a store) because it is
6 done by computer as opposed to an in-person purchase—providing further evidence
7 that the Act applies, and has always applied to all forms of transactions, whether in-
8 person or remote. Thus, while the basis in *Saulic*, and the apparent basis for the Trial
9 Court’s ruling was that Internet businesses are exempt from the Act due to the need to
10 prevent fraud, identity theft and theft, apparently, the Legislature does not believe this
11 is the case, and thus, Defendant (who is clearly not a motor fuel dispenser) does not,
12 and did not have the right to collect personal information even for the purposes of theft
13 or fraud protection.

14 Only a motor fuel dispenser is permitted to obtain personal information for
15 identity theft or fraud protection. Even then, the sole use must be such protection and
16 all other uses are forbidden—meaning the merchant must actually use each piece of
17 information solely for identity theft or fraud protection and no other purpose. The
18 complaint has alleged that Defendant used the information for marketing purposes and
19 did not solely use the phone number and address for fraud or identity theft protection,
20 if anything the complaint alleges that the Defendant did not use the Plaintiff’s personal
21 information for fraud or identity theft prevention at all.

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(card not present) transactions are and have always been covered by the Act, as motor fuel dispensers are the only type of remote transaction under the Act wherein personal information may be requested for card verification, identity theft and fraud prevention. Naturally, if all remote transactions were exempt, there would be no need to create this special exemption at all.

1 *B. The Second to the Last Version of the Act*

2 Even more instructive that the Legislature, without question believes that the Act
3 has, at all times applied to card-not-present transactions, including Internet transactions,
4 is the second to final version of the amended Act (which prior version is, as stated
5 before, the proper subject of judicial notice). This version of the Act, as amended on
6 May 17, 2011 makes all of the following crucial points:

7 Subsection (I) notes,

8 It is the intent of the amendments made by this act adding this subdivision to
9 **clarify existing law**. These clarifying amendments continue to protect personal
10 identification information while allowing and recognizing the legitimate need for
11 a person. . . to use personal information for the purposes authorized by this
12 section. These amendments recognize, in part, legitimate business practices
13 designed to address the increased potential for identity theft that results if the
14 cardholder is not present or the credit card does not function correctly.
15 (Emphasis added).

16 As a matter of statutory interpretation under California law, when the Legislature
17 uses such “clarification” language, it is not making a prospective, nor a retrospective
18 amendment, but rather, stating what the law is and has always been (*Stockton Savings*
19 *& Loan Bank v. Massanet* (1941) 18 Cal.2d 200, 204). Thus, in clarifying, the
20 Legislature has noted, without doubt that the Act has **always** applied to card-not-
21 present transactions, including those commenced over the Internet.

22 Additionally, proposed subsection (c)(3)(B) notes,

23 The person. . . accepting the credit card uses the personal identification
24 information **solely** for prevention of fraud, theft, or identity theft or uses the
25 personal information for any of these purposes concurrently with a purpose
26 permitted under paragraph (4). (Emphasis added).

27 Furthermore proposed subsection (c)(6) is specially designed for face-to-face
28 situations where the credit card does not properly function or is not electronically
readable, then the merchant is further permitted to obtain personal information and then
immediately delete or destroy it.

 While this language ultimately did not make the final cut of the Act (the language
applies to create a special exception solely for motor fuel dispensers), its words,

1 especially combined with the Legislature's clarification make it more than clear that the
2 Act was, at all times designed to apply both to in-person **and** card-not-present
3 transactions. There would be no need to even consider rules regarding remote
4 transaction identity theft protection prohibitions if the Act did not apply to card-not-
5 present transactions. Similarly, if the Act applied **only** to face-to-face transactions,
6 there would be no need to include a special subsection for face-to-face transactions,
7 rather the inclusion of these specialized subsections is further evidence that the
8 Legislature believes the Act applies to **all** forms of credit card transactions, not simply
9 those done in person.

10 The Amended Act, as well as those prior versions of the Act under consideration
11 by the Legislature make it unmistakably clear, the Act has at all times applied to **all**
12 credit card transactions, including those transacted in person, those done with an
13 automated cashier, or computer, and those done remotely, such as fax, mail or Internet.
14 Therefore, this October 9, 2011 change in law, which occurred after the Court took the
15 motion under submission on August 8, 2011, provides grounds for this Court to
16 reconsider its Order, as now current law, provides sufficient grounds to deny
17 Defendant's motion to dismiss and permit the case to proceed.

18 *C. The Complex Department's Overruling of Demurrers in Three Similar Cases*
19 *Combined with the Court of Appeal's Denial of Writs for Petition of Mandate Provides*
20 *Further Evidence That the Act Applies to All Transactions Including Internet*
21 *Transactions*

22 On December 7, 2011, Department 324 of the Superior Court of California, Los
23 Angeles Branch (the Honorable Carl J. West) overruled demurrers in three Song-
24 Beverly Credit Card cases (*Luko v. Ticketmaster*, LASC case No. BC 462492²; *Luko*
25 *v. eHarmony, Inc.*, LASC Case No. BC 462494; and *Krescent v. Apple, Inc.* LASC case

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27 ². It should be noted that defendant's counsel in the *Ticketmaster* case is
28 the same law firm representing defendant Microsoft in the instant
matter.

1 No. BC 463305). A copy of the Superior Court's ruling is attached to Plaintiff's
2 request for judicial notice. The basis of the Complex Court's reasoning was that the
3 Act did, in fact, apply to Internet transactions. Of particular importance is that this
4 ruling occurred after the amendments to the Act, whereas *Saulic* was decided prior to
5 the amendments. Of even greater importance is that all three defendants in those cases
6 filed Petitions for Writ of Mandate to the California Court of Appeal, and the Court of
7 Appeal summarily denied all three petitions. While the denials were summary denials,
8 naturally, at least, implicit in these denials is that the Court of Appeal believes that the
9 Act, applies to Internet based transactions, else, the Court of Appeal would have
10 granted the Petitions for Writ of Mandate, and ordered the Superior Court to reverse
11 itself. Therefore, the amendments to the Act, the Complex Court's overruling of
12 demurrers claiming the Act does not apply to Internet based transactions, and the Court
13 of Appeal's denial of Petitions for Writ of Mandate all point to one conclusion, the
14 California Legislature and Courts believe that, at all times the Act has applied to remote
15 transactions, such as those conducted over the Internet.

16 **IV. CONCLUSION**

17 Reconsideration is appropriate under F.R.C.P. Rules 59(e) or 60(b). Here the
18 basis for reconsideration is a change in controlling law. The Act was amended while
19 the motion to dismiss was under consideration by this Court. The amendments to the
20 Act, prior drafts of the amended Act, rulings by the Complex Court as well as the at
21 least, implicit ruling by the Court of Appeal all demonstrate that the Act was, at all
22 times intended to, and did apply to all transactions, including remote or Internet based
23 transactions. Therefore, this Court should reconsider its January 6, 2012 ruling
24 granting the Defendant's motion to dismiss with prejudice, and should instead enter an
25 order overruling the motion to dismiss and permitting the case to proceed on the merits.

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1 DATED: January 12, 2012

SCHREIBER & SCHREIBER, INC.

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BY: /s/ Eric A. Schreiber
Eric A. Schreiber, Attorneys for
Plaintiff, Jason Salmonson,
Individually and on Behalf of a
Class of Persons Similarly
Situated

CERTIFICATE OF SERVICE

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I, hereby certify that a true and correct copy of the foregoing document was served on counsel of record via ECF Notice of Electronic Filing in accordance with the Federal Rules of Civil Procedure and Local Rule 5-3.3 on January 12, 2012

/s/ Eric A. Schreiber
Eric A. Schreiber