

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

MELISSA TYLER, on behalf of herself
and all others similarly situated,

Plaintiff,

-against-

MICHAELS STORES, INC.,

Defendant

Hon. William G. Young

Civil Action No. 1:11-cv-10920-WGY

**MOTION FOR ORDER CERTIFYING LEGAL QUESTIONS
TO THE MASSACHUSETTS SUPREME JUDICIAL COURT**

Pursuant to Rule 1:03 of the Rules of the Supreme Judicial Court, Plaintiff Melissa Tyler, on behalf of herself and all others similarly situated, hereby moves this Court to enter an Order certifying the following questions to the Massachusetts Supreme Judicial Court:

1. Does a retailer's per se violation of Massachusetts General Laws, chapter 93, section 105(a) constitute an injury for which an aggrieved consumer can seek redress under Massachusetts General Laws, chapter 93A, section 9?
2. Does Massachusetts General Laws, chapter 93, section 105(a) create an actionable privacy right in the absence fraud?

These questions are proper for certification pursuant to Supreme Judicial Court Rule 1:03, the Uniform Certification of Questions of Law Rule, because they are determinative of the cause pending in this Court and there is no controlling precedent in the decisions of the Supreme Judicial Court. See Boston Gas Co. v. Century Indem. Co., 529 F.3d 8, 15 (1st Cir. 2008). A proposed Memorandum and Order which sets forth more fully the reasons for certification is attached.

Dated: White Plains, New York
January 13, 2012

Respectfully submitted,

**MEISELMAN, DENLEA, PACKMAN,
CARTON & EBERZ P.C.**

By: /s D. Greg Blankinship
D. Greg Blankinship (BBO 655430)
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Attorneys for Plaintiff

LOCAL RULE 7.1(a)(2) CERTIFICATE

I hereby certify that counsel for Plaintiff has conferred with opposing counsel in a good faith attempt to resolve or narrow the issues concerning this motion before its filing.

/s/ D. Greg Blankinship

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent via U.S. first class mail to those indicated as non-registered participants on January 13, 2012.

/s/ D. Greg Blankinship

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

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**[PROPOSED] MEMORANDUM AND ORDER CERTIFYING
LEGAL QUESTIONS TO THE MASSACHUSETTS SUPREME JUDICIAL COURT**

Pursuant to Supreme Judicial Court Rule 1:03, the Uniform Certification of Questions of Law Rule, and upon motion of Plaintiff, the United States District Court for the District of Massachusetts certifies the following questions to the honorable Supreme Judicial Court of Massachusetts. These questions are proper for certification because they are determinative of the above captioned matter pending before the District Court and it appears to the District Court that there is no controlling Supreme Judicial Court precedent.

I. QUESTION OF LAW TO BE ANSWERED

1. Does a retailer's per se violation of Massachusetts General Laws, chapter 93, section 105(a) constitute an injury for which an aggrieved consumer can seek redress under Massachusetts General Laws, chapter 93A, section 9?
2. Does Massachusetts General Laws, chapter 93, section 105(a) create an actionable privacy right in the absence fraud?

II. NATURE OF THE CONTROVERSY IN WHICH THE QUESTION AROSE

These certified questions arose in the context of a dispute between a consumer and a multistate retail chain. The Class Action Complaint (“Compl.”)¹ alleges that on several occasions during the past year, Plaintiff Melissa Tyler (“Tyler”) made credit card purchases at Michaels Stores, Inc. (“Michaels”) in Everett, Massachusetts, and that she was asked to provide her ZIP code number when she made those purchases. Compl. ¶ 6. Tyler provided the information, under the mistaken impression that she was required to do so to complete the transaction. Id. ¶¶ 6, 20. Tyler alleges that Michaels’ employees entered her and other customers’ ZIP codes on the computerized check-out register used to process the point-of-sale transaction. Id. ¶ 20. The cash register contained an electronic “form” in which Michaels’ employees entered the credit card number, the card holder’s name, and ZIP code. Id. ¶¶ 7, 20.

The credit card issuer did not require Michaels to request its customers’ ZIP codes to process their transactions, id. ¶ 1, nor did Michaels request the ZIP code for verification of the card holder’s identity. Id. Rather, Michaels used Tyler’s name and ZIP code in conjunction with other commercially available databases to find her address and phone number. Id. ¶ 21. Tyler then received unwanted marketing materials from Michaels. Id. ¶ 6. Having obtained Tyler’s full address, Michaels was also in a position to sell Plaintiff’s valuable personal identification information to third parties. Id. ¶¶ 2, 8.

Tyler brings this suit against Michaels for violation of Massachusetts General Laws, chapter 93, section 105(a) (the “Act” or “Section 105(a)”). The Act provides that:

No person . . . that accepts a credit card for a business transaction shall write, cause to be written or require that a credit card holder write personal identification information, not required by the credit card issuer, on the credit card transaction

¹ For purposes of adjudicating Defendants’ motion to dismiss, the Court assumed that factual allegations contained in the Class Action Complaint were true.

form. Personal identification information shall include, but shall not be limited to, a credit card holder's address or telephone number.

Tyler has sued on behalf of herself and a putative class, claiming that Michaels unlawfully requested customers' ZIP codes when processing their credit card transactions in violation of the Act. She brings a three count complaint alleging that the violation of the Act amounted to a per se violation of Massachusetts General Laws, chapter 93A, section 9, caused unjust enrichment, and entitles Tyler to declaratory relief pursuant to 28 U.S.C. §§ 2201-2202. On January 6, 2012, this Court granted Defendant's motion to dismiss on the basis that the mere collection of personal identification information, while being a per se violation of the Act and therefore Chapter 93A, section 2,² did not, without more, sufficiently allege an injury cognizable under chapter 93A, section 9. This is a case of first impression.

III. Certification Is Appropriate.

There is no controlling precedent in the decisions of the Supreme Judicial Court addressing the issue of whether a retailer's per se violation of Massachusetts General Laws, chapter 93, section 105(a) constitutes an injury for which an aggrieved consumer can seek redress under Massachusetts General Laws, chapter 93A, section 9, or whether Massachusetts General Laws, chapter 93, section 105(a) creates an actionable privacy right in the absence fraud. These issues are determinative of the case because, absent injury cognizable under chapter 93A, Plaintiff's statutory consumer protection claim fails.

Accordingly, this District Court certifies the following questions to the Supreme Judicial Court:

² Massachusetts General Laws, chapter 93, section 105(d) provides that "[a]ny violation of the provisions of this chapter shall be deemed to be an unfair and deceptive trade practice, as defined in section 2 of chapter 93A."

1. Does a retailer's per se violation of Massachusetts General Laws, chapter 93, section 105(a) constitute an injury for which an aggrieved consumer can seek redress under Massachusetts General Laws, chapter 93A, section 9?
2. Does Massachusetts General Laws, chapter 93, section 105(a) create an actionable privacy right in the absence fraud?

WHEREFORE the District Court for the District of Massachusetts hereby certifies the foregoing questions to the Supreme Judicial Court.

SO ORDERED.

DATED: January ____, 2012.

Judge William G. Young
District Judge