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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

DON SAULIC, individually and on behalf of others similarly situated,)	SA CV 07-610 AHS (PLAx)
)	
Plaintiff,)	ORDER (1) DENYING PLAINTIFF'S
)	MOTION TO CERTIFY CLASS AND
v.)	(2) DENYING REQUESTS FOR
)	JUDICIAL NOTICE
SYMANTEC CORP., et al.,)	
)	
Defendants.)	

I.

PROCEDURAL BACKGROUND

On April 7, 2008, plaintiff Don Saulic ("plaintiff" or "Saulic") filed a Motion for Class Certification ("the Motion") and Request for Judicial Notice. On April 21, 2008, defendant Symantec Corporation ("Symantec") filed opposition. The same day, defendant Digital River, Inc. ("Digital River") (Symantec and Digital River collectively, "defendants"), filed opposition and a Request for Judicial Notice. On May 5, 2008, plaintiff filed a reply thereto. On May 12, 2008, Digital River filed Objections and a Motion to Strike Evidence in reply. On May 19,

1 2008, the matter was heard by the Court and taken under
2 submission. On May 22, 2008, plaintiff filed a Notice of
3 Issuance of Court of Appeal Opinion. On May 29, 2008, Symantec
4 filed a Notice of Later-Decided Supplemental Authority in
5 Opposition to the Motion to Certify. On December 23, 2008,
6 Digital River filed a Notice of Later-Decided Supplemental
7 Authority in Opposition to the Motion to Certify.

8 **II.**

9 **SUMMARY OF COMPLAINT**

10 Plaintiff is a consumer of defendants' products, which
11 it sells online. This class action suit challenges defendants'
12 use of a credit card form with a preprinted space for a
13 customer's personal identifying information ("PII") in the
14 consummation of its online sales as a violation of the
15 Song-Beverly Credit Card Act, California Civil Code § 1747.08
16 ("section 1747.08"). The Song-Beverly Act imposes on businesses
17 three substantive prohibitions:

18 (a) Except as [otherwise] provided . . . no
19 person, firm, partnership, association, or
20 corporation that accepts credit cards for the
21 transaction of business shall do any of the
22 following:

23 (1) Request, or require, as a condition
24 to accepting the credit card as payment
25 in full or in part for goods or
26 services, the cardholder to write any
27 personal identification information upon
28 the credit card transaction form or

1 otherwise.

2 (2) Request, or require as a
3 condition to accepting the credit
4 card as payment in full or in part
5 for goods or services, the
6 cardholder to provide personal
7 identification information, which
8 the . . . corporation accepting the
9 credit card writes, causes to be
10 written, or otherwise records upon
11 the credit card transaction form or
12 otherwise.

13 (3) Utilize, in any credit card
14 transaction, a credit card form
15 which contains preprinted spaces
16 specifically designated for filling
17 in any personal identification of
18 the cardholder.

19 Cal. Civ. Code § 1747.08(a).

20 The Act provides for civil penalties of \$250.00 for the
21 first violation and \$1,000.00 for each subsequent violation. See
22 id. § 1747.08(e).

23 Plaintiff alleges Symantec, using Digital River as its
24 online retailer, violates the statutory requirements of section
25 1747.08 in the following ways: (1) defendants use credit card
26 forms with preprinted spaces specifically designed for filling in
27 PII of the cardholder in violation of section 1747.08(a)(3); (2)
28 defendants request or require PII as a condition of accepting

1 credit card payments in violation of section 1747.08; and (3)
2 these violations are ongoing.

3 **III.**

4 **SUMMARY OF PARTIES' CONTENTIONS**

5 **A. Plaintiff's Motion**

6 **1. Motion for Certification**

7 On January 26, 2007, plaintiff made an online purchase
8 of Norton AntiVirus 2007 ("NAV") from a website owned and/or
9 operated by defendants and entitled www.symantec.com. The
10 purchase allowed him to download NAV to his computer but did not
11 involve the physical shipment of a product. At the purchase
12 screen, Saulic was presented with a credit card form with spaces
13 for filling in PII, and it required that he disclose both his
14 address and telephone number. Using his credit card, which also
15 functions as a debit card, plaintiff completed the purchase and
16 downloaded NAV.

17 On or about March 12, 2008, plaintiff made a renewal
18 purchase of NAV through www.symantecstore.com, which is owned by
19 Symantec and operated by Digital River. Saulic was again
20 presented with a form on which to fill in his credit card
21 information and his address and phone number. He filled in this
22 information and completed the purchase of the renewal rights.
23 The transaction did not involve shipment of a product.

24 Defendants' use of a computer screen form with spaces
25 for filling in PII and a request for and/or requirement of the
26 disclosure of such information in the context of credit card
27 transactions is in violation section 1747.08(a)(1) and (2).
28 Plaintiff brings the action on behalf of himself and others

1 similarly situated in North and/or South America who have made
2 purchases of goods and/or services from defendants within the
3 prior three years or applicable statute of limitations period.

4 Plaintiff seeks the following relief: (1) civil
5 penalties pursuant to section 1747.08(e) "not to exceed two
6 hundred fifty dollars (\$250.00) for the first violation and one
7 thousand dollars (\$1,000.00) for each subsequent violation"; (2)
8 entry of a preliminary injunction followed by a permanent
9 injunction to bar defendants' continued violations of section
10 1747.08; and (3) attorney's fees and costs.

11 **a. Certification under Rule 23**

12 Plaintiff brings the action on behalf of himself and
13 others similarly situated as stated above, the proposed class to
14 be limited to those persons: (1) who downloaded defendants'
15 products from the Internet without a physical product being sent
16 to them; (2) who used a credit card as payment; (3) whose
17 transactions fall under California law; and (4) from whom
18 defendants required or requested PII and/or used a credit card
19 form in violation of section 1747.08.

20 **i. Numerosity**

21 The class is so numerous as to make joinder
22 impracticable. The numerosity requirement is clearly satisfied
23 because there are millions of class members throughout the United
24 States, Canada, and Latin America. Certification will serve
25 judicial economy.

26 **ii. Commonality/Typicality**

27 Plaintiff's claims, even though there are two
28 defendants, are common and typical because there is a core of

1 salient facts. While Saulic purchased the Symantec NAV from a
2 website that Digital River operated, Saulic was the victim of a
3 "common corporate practice" that extends from Symantec to its
4 agents at Digital River. See Dukes v. Wal-Mart, Inc., 509 F.3d
5 1168, 1180 n.4 (9th Cir. 2007) (a common corporate practice
6 exists where there is a "corporate culture of uniformity").
7 Consequently, every putative class member need not have shopped
8 at the same store or been subjected to the same manager-agent.
9 The Symantec and Digital River agreement demonstrates a shared
10 practice based on centralized decision-making. This agreement
11 provides that Symantec has control over content, requires the
12 recordation, transmittal of PII to Symantec, and requires that
13 the website have the "look and feel" such that customers will
14 believe they are dealing directly with Symantec. Symantec
15 directs its agent, Digital River, to collect several items of PII
16 in each transaction and from each customer. (Ex. 16, the
17 Agreement, pp. 22, 27, 28.)

18 Questions of law and fact are common to the class.
19 There is a system-wide practice employed by and centralized with
20 Symantec that results in the violation of the Act. Under an
21 online sales agreement, Digital River is Symantec's agent. It is
22 therefore appropriate to pursue relief from both parties.

23 Saulic's claim is typical of the class. Although he
24 purchased NAV through Digital River, the same practice of
25 requesting personal information in violation of the Act is
26 practiced across all Symantec sales hosts at Symantec's
27 direction.

28 //

1 **iii. Adequacy of Representation**

2 Saulic is an adequate representative. He is familiar
3 with the gravamen of the claim and has monitored the action. He
4 also has no conflict of interest and, therefore, will represent
5 members of the class fairly.

6 Moreover, Saulic's attorneys are well qualified to
7 conduct the proposed litigation. They have more than ninety
8 years combined experience, including multiple prior class action
9 representations.

10 **b. Certification under Rule 23(b)(2)**

11 Certification pursuant to Rule 23(b)(2) is permissible
12 where injunctive relief predominates the claims, even where money
13 damages are sought. Here, plaintiff seeks injunctive relief
14 because there would be no end to defendants' unlawful practices
15 without it. Moreover, where monetary relief does not depend upon
16 individualized computations and is easy to calculate, courts have
17 found it secondary to injunctive relief.

18 **c. Certification under Rule 23(b)(3)**

19 Alternatively, the Court may certify this action under
20 Rule 23(b)(3) because common issues predominate. Violation of
21 section 1747.08 is the primary issue, and the amount of civil
22 penalties awarded is merely a question of determining their
23 amount and calculating them on behalf of the class.

24 Class treatment is preferable to individual suits
25 because each plaintiff has incurred only a small amount of
26 damages. There is no need to engage in separate prosecution
27 where the damages award is not more than \$1,000.00 per violation.
28 Attorneys will be able to manage the class through the Internet,

1 and defendants' customer e-mail lists will enable notice and
2 class communication.

3 **d. Defining the Class**

4 The class should be defined as all who live in North
5 America/South America and who have made purchases from defendants
6 within the last three years or the applicable statute of
7 limitations period. California law applies to these transactions
8 by either operation of law, the agreement between the customer
9 and defendants, or the transfer of products to California
10 residents. The class is limited to those who used a credit card
11 as payment in full or in part and for whom defendants requested
12 PII as defined in section 1747.08.

13 **B. Defendants' Opposition**

14 **1. Symantec**

15 **a. Certification under Rule 23(b)(2) Is**
16 **Unavailable**

17 Under Rule 23(b)(2), a court should not certify a class
18 where a plaintiff is ineligible for injunctive relief. Here,
19 section 1747.08 provides that only the attorney general may seek
20 injunctive relief, and thus, plaintiff's claim fails. A separate
21 section of the statute provides for penalties for private
22 persons. Thus, injunctive relief is not an available remedy for
23 plaintiff. See Religious Tech. Ctr. v. Wollersheim, 796 F.2d
24 1076, 1082 (9th Cir. 1986). Also, California Code of Civil
25 Procedure § 526, the state statute that permits injunctive
26 relief, does not allow for injunctive relief in this
27 circumstance. It is clear that plaintiff's objective is monetary
28 damages, which precludes certification under Rule 23(b)(2).

1 While Rule 23(b)(3) does permit certification for a
2 class seeking damages, it does not apply here because Saulic
3 fails the "superiority" requirement. If the Court certifies the
4 class, the defendants' potential liability would be enormous and
5 completely out of proportion to any harm plaintiff suffered.
6 London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 n.5 (11th
7 Cir. 2003). Denying certification would keep with the rationale
8 of many other cases in similar areas of law. Plaintiff admits he
9 suffered no harm, but the potential damages against defendants
10 would be in the hundreds of millions. Thus, certification of the
11 class should be denied.

12 **b. This Class Cannot Be Certified under Rule**
13 **23(a) Because Saulic Is Not Typical of the**
14 **Proposed Class**

15 Saulic cannot seek certification under Rule 23(a)
16 because he lacks standing and is subject to unique defenses. For
17 certification to be appropriate, a class representative must have
18 a claim and injury related to each defendant. Saulic's
19 transactions do not relate to Symantec, only Digital River.
20 Saulic attempts to circumvent this defect by arguing an unfounded
21 interpretation of the statute and claiming that Symantec would
22 ultimately receive the information. The statute, however, cannot
23 be applied so broadly, and Digital River is Symantec's
24 independent contractor. Thus, Saulic does not demonstrate
25 typicality.

26 Class certification also is inappropriate when the
27 putative class representative is subject to unique defenses.
28 Saulic tried to manufacture his claims rather than just purchase

1 a product as a regular consumer, which makes him unique and
2 renders him an inadequate class member.

3 **c. The Proposed Class Is Not Ascertainable**

4 Saulic's proposed class is vague as to time and
5 membership, which causes it to fail. Plaintiff seeks to certify
6 people in numerous countries and apply California law to all of
7 them, which overlooks principles of due process and comity.
8 Saulic does not establish a legally cognizable basis to extend
9 California's regulation of credit card transactions to the rest
10 of the world.

11 **2. Digital River**

12 **a. The Injunctive Relief Sought Is Unavailable**
13 **and Secondary**

14 Section 1747.08 does not permit a private plaintiff to
15 sue for injunctive relief. Under principles of statutory
16 construction, if the statute does not include a provision, it is
17 excluded. Because injunctive relief is addressed in a different
18 subsection than civil penalties, it is not available to
19 plaintiff. Moreover, the claim is not among the limited forms of
20 injunctive relief enumerated in California Code of Civil
21 Procedure § 526(a). Lastly, injunctive relief is unavailable
22 because plaintiff is not exposed to continuing adverse effects.
23 He was not injured when he made the purchase and, therefore,
24 cannot be experiencing harm that an injunction could cure.

25 **b. The Putative Class Lacks Commonality and**
26 **Predominance**

27 At least two categories of transactions must be
28 excluded from plaintiff's purported class as a matter of law:

1 corporate cards and debit cards. This is because section 1747.08
2 applies only to credit cards. Hundreds of thousands of mini-
3 trials would be required to determine which claims are proper,
4 which is made more difficult because strict encryptions are
5 placed on all customers' card information. As such, commonality
6 and predominance are absent. Moreover, plaintiff fails to
7 specify the time period of the proposed class, and claims under
8 section 1747.08 are subject to a one-year statute of limitations.
9 See Cal. Code Civ. Proc. § 340(a).

10 **c. A Class Action Is Not Superior Because of**
11 **the Gross Disproportionality**

12 Plaintiff suffered no harm and provides no evidence
13 that any putative class members have suffered harm. To determine
14 if any of the putative class members were harmed, more mini-
15 trials would be required. Without any determinable harm, the
16 imposition of civil penalties would greatly outweigh that harm.

17 **d. Choice of Law Issues Predominate**

18 Section 1747.08 can only apply to putative class
19 members' transactions if choice of law principles allow it.
20 There are several distinct groups of transactions for which the
21 Court must determine choice of law. For example, Minnesota law
22 expressly governs the majority of purchases made after February
23 12, 2008, based on the terms and conditions accepted at the time
24 of purchase. Additionally, California law does not apply to
25 Digital River because, contrary to plaintiff's argument,
26 Symantec's End User License Agreement does not apply to the sale
27 transaction and Digital River is not a party to that contract.
28 See Cal. Civ. Code §§ 1550, 1558, 1580. Further, customers who

1 contracted for the extended download service agreed to Minnesota
2 law at the time of purchase. Consequently, the Court would be
3 required to inquire into each putative class member's purchase to
4 adequately determine choice of law.

5 It would be improper and unconstitutional to apply
6 California law to extraterritorial purchases. Plaintiff relies
7 on Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 242,
8 110 Cal. Rptr. 2d 145 (2001), to argue that California law should
9 apply. That case is inapplicable because none of the
10 prerequisites necessary are found here. For example, unlike
11 Wershba, Digital River is a Minnesota company with its principal
12 place of business there.

13 Plaintiff also fails to meet his burden of
14 demonstrating a suitable and realistic plan for trial of the
15 class claims. Plaintiff does not explain how each of the states
16 and countries included in the putative class balance their
17 interests in preventing fraud and identity theft with
18 California's concern of protecting PII. This failure also
19 defeats certification.

20 **e. Plaintiff Is Atypical and Inadequate**

21 Plaintiff lacks standing because he made his purchase
22 with a debit card. The majority of the class used a credit card,
23 and plaintiff's interests are antagonistic to the other putative
24 class members. Plaintiff made a second online purchase with
25 another card but did so only to shore up his standing. A person
26 cannot establish injury and standing by spending money solely to
27 pursue litigation. See Buckland v. Threshold Enters., Ltd., 155
28 Cal. App. 4th 798, 815, 66 Cal. Rptr. 3d 543 (2007). Plaintiff

1 is also subject to an unclean hands defense, which makes his
2 claims atypical from those of the purported class. If plaintiff
3 is successful, it will promote credit card fraud and identity
4 theft.

5 **f. Counsel Are Inadequate as Class Counsel**

6 Plaintiff's counsel are inadequate because they lack
7 class action experience. They fail to argue tenable legal
8 positions, fail to provide an adequate class definition, and fail
9 to provide a realistic plan to manage the case. Thus, counsel
10 are inadequate to perform as class counsel.

11 **C. Plaintiff's Reply**

12 **1. This Action Should Be Certified under Rule**
13 **23(b)(2)**

14 The Court should certify under 23(b)(2) because that
15 provision does not require class notice or opt-outs. Also, the
16 injunctive remedy predominates where damages are easily
17 calculated by a uniform measure across the class. DeMarco v.
18 Nat'l Collector's Mint, Inc., 229 F.R.D. 73, 81 (S.D.N.Y. 2005).
19 Thus, injunctive relief predominates here because damages will be
20 uniform. Plaintiff seeks injunctive relief because defendants
21 continue their illegal practices. Even if Minnesota law applies,
22 it too has a statute that bans collection of PII. Thus, if
23 Minnesota law applies to some of the class, the class definition
24 may be adjusted accordingly.

25 Certification under 23(b)(2) is not limited to civil
26 rights cases. Courts certify many consumer class actions.
27 Plaintiff has the right to pursue an injunction under California
28 law under California Code of Civil Procedure § 526, and section

1 1747.08 is not as narrow as defendants read it. If the
2 legislature intended to restrict section 1747.08 in that fashion,
3 it would have written the law in that language.

4 **2. Certification Is Proper under Rule 23(b)(3)**

5 Plaintiff has no conflict of interest with the class
6 and will vigorously prosecute the matter. Plaintiff's renewal of
7 his subscription was not illegal, and his prior experience as a
8 plaintiff makes him better able to participate in the case.

9 Additionally, plaintiff suffered an injury: not being able to
10 withhold his PII, which is what he testified to at deposition.
11 Plaintiff's interests also are not contrary to the class because
12 there is no exception in section 1747.08 for the prevention of
13 fraud.

14 Symantec designed the website, which Digital River
15 manages, to look like it is controlled by Symantec, and plaintiff
16 made his purchases in essence from both; moreover, plaintiff's
17 debit card functions as both a debit card and credit card, and,
18 thus, he has standing to bring suit against both defendants.
19 Because a violation occurs upon the mere presentation of a credit
20 card form that asks for PII, any consumer subjected to such a
21 violation has standing to enjoin a future occurrence for the same
22 illegal act. Friends of the Earth, Inc. v. Laidlaw Env't Serv.,
23 Inc., 528 U.S. 167, 168, 120 S. Ct. 693, 145 L. Ed. 2d 610
24 (2000). Plaintiff is typical of the class because defendants'
25 conduct constitutes a uniform practice directed against all
26 customers on their web sites.

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28 //

1 **3. Common Issues of Law and Fact Predominate**

2 Defendants admit they employ a uniform practice of
3 requesting and requiring customers to disclose their personal
4 information, which is sufficient alone to prove commonality.
5 This vitiates the need for mini-trials to determine whether a
6 plaintiff used a particular type of card. Additionally,
7 defendants cannot attempt to avoid a class suit merely because
8 their own encryption process makes it more difficult to determine
9 the class members. Six Mexican Workers v. Ariz. Citrus Growers,
10 904 F.2d 1301, 1306-07 (9th Cir. 1990). The Court can accept
11 defendants' statements that over 90% of their purchases are
12 credit card transactions, which would obviate any speculative
13 need for mini-trials.

14 Moreover, defendants fail to conclusively prove that
15 there is a choice of law issue. Defendants must show a conflict
16 between California law and those of other states, which they did
17 not do. There is no choice of law impediment to certifying the
18 class.

19 **4. Discretion To Award Penalty Does Not Render Class**
20 **Inferior**

21 There is no danger here of "annihilating" damages
22 because section 1747.08 provides for a fixed minimum penalty.
23 Ninth Circuit law holds that class action complaints seeking
24 statutory penalties should not be denied certification for
25 concern of annihilating damages. See id., at 1309-10. The due
26 process doctrine should not be used to frustrate class action
27 certification.

28 //

1 **5. The Class Is Adequately Defined**

2 The statute of limitations is unquestionably three
 3 years and does not prevent class certification. Additionally,
 4 defendants acknowledge that over 90% of the transactions are by
 5 credit card, so the class is ascertainable. The purchase of
 6 extended download service is irrelevant to determining class
 7 members because those customers were still requested to provide
 8 PII. Lastly, the class must include all purchasers who are
 9 California residents, and defendants' choice-of-law concerns
 10 cannot limit the class because they made their product available
 11 broadly.

12 **IV.**

13 **DISCUSSION**

14 **A. Legal Standard for Plaintiff To Bring Suit against**
 15 **Defendants**

16 The Court of Appeals for the Ninth Circuit has held
 17 that standing may be addressed before class certification where,
 18 as here, the court is not considering a global class settlement.
 19 Easter v. Am. W. Fin., 381 F.3d 948, 962 (9th Cir. 2004) (holding
 20 that the Supreme Court's decision in Ortiz v. Fibreboard Corp.,
 21 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999), did not
 22 require considering class certification before standing); see
 23 also Lee v. Oregon, 107 F.3d 1382, 1390 (9th Cir. 1997)
 24 ("Standing is a jurisdictional element that must be satisfied
 25 prior to class certification.").

26 To establish standing, a plaintiff must show, among
 27 other things, he has suffered an injury in fact, defined as "an
 28 invasion of a legally protected interest which is (a) concrete

1 and particularized and (b) actual or imminent, not conjectural or
2 hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555,
3 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The "injury in
4 fact" requirement under Article III "turns on the nature and
5 source of the claim asserted," and in some cases, an injury in
6 fact "may exist solely by virtue of 'statutes creating legal
7 rights, the invasion of which creates standing. . . .'" Warth v.
8 Seldin, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343
9 (1975) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3,
10 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973)). "Essentially, the
11 standing question in such cases is whether the constitutional or
12 statutory provision on which the claim rests properly can be
13 understood as granting persons in the plaintiff's position a
14 right to judicial relief." Id.

15 **1. Plaintiff's Standing under the Act**

16 The Act has no separate or additional standing
17 requirement. It merely requires that a consumer engaged in a
18 credit card transaction in which PII was requested or required in
19 violation of the Act. See Cal. Civ. Code § 1747.08(a).

20 Plaintiff alleges defendants violated the statute with
21 regard to him first on January 26, 2007, when he made an online
22 purchase of NAV and was required to submit his address and
23 telephone number as a condition of completing an online
24 transaction, and second on March 12, 2008, when he renewed his
25 NAV product online and was again required to submit his address
26 and telephone number. (See Mot. Ex. 17, Saulic Decl., pp. 3-4,
27 ¶¶ 10-14.)

28 //

2. Plaintiff's Standing to Sue Symantec

Symantec argues plaintiff lacks standing as against it because plaintiff never purchased anything from Symantec. While the purchases were for Symantec products, the transactions in which the PII were requested occurred through Digital River. Therefore, plaintiff did not suffer any wrong at the hands of Symantec.

The degree of proof necessary to establish standing differs at various stages of the proceedings. Lujan, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," but "[i]n response to a summary judgment motion . . . the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." (citations omitted)).

Here, plaintiff shows that he visited a website with the "Symantec" name that sold "Symantec" branded products. While it is true that Digital River manages the sales of Symantec products, a review of Symantec and Digital River's "Second Amended and Restated Symantec Online Store Agreement" (the "Agreement") suggests that Symantec is a proper party. (Mot. Ex. 16, p. 236.) The Agreement entered into with Digital River makes Digital River the online distributor for Symantec products. The Agreement requires that the online "Storefront" for Symantec products "meet Symantec's specifications and . . . contain all features, including graphical components that comprise the 'look and feel' of Symantec's Storefront." (Id. at 239.)

1 Additionally, Digital River is to prominently identify itself as
2 "Symantec's contracted vendor." (Id.) The Agreement also states
3 that Symantec "shall have sole discretion regarding the Content
4 (other than pricing information for Symantec Products), structure
5 and look and feel of the Storefront." (Id. at 240.) The
6 Agreement specifies that "Digital River shall permit Customers to
7 make orders directly through the Internet via online order
8 forms." (Id. at 242.) This evidence suffices to establish
9 Symantec as a proper party.

10 **B. Transactions Covered by the Act**

11 Plaintiff contends that if his transaction was of the
12 type defined by the statute and if the information requested was
13 of a type prohibited by the statute, he has standing to sue even
14 if he did not suffer any personal harm or loss. While no injury
15 in fact is required under the statute, the Court finds, as set
16 forth below, that plaintiff's transaction was not of a type
17 defined by the statute.

18 The Act's subdivisions, paraphrased, prohibit
19 defendants from "(1) having the cardholder write personal
20 information on the credit card form, (2) having the cardholder
21 furnish personal information for [defendants] to write on the
22 credit card form, and (3) using forms containing preprinted space
23 for personal information." TJX Cos., Inc. v. Superior Court, 163
24 Cal. App. 4th 80, 88, 22 Cal. Rptr. 3d 114 (2008). The Act makes
25 no reference to online credit card transactions.

26 Plaintiff does not cite, and the Court does not find,
27 any state or federal case in which a violation of the Act is
28 found based on an online transaction. See Korn v. Polo Ralph

1 Lauren Corp., ---F. Supp. 2d---, No. CV S07-02745, 2008 WL
2 2225743 at *1 (E.D. Cal. May 28, 2008) (alleging violation for
3 request of PII in credit card transactions at "Defendant's retail
4 store located in Vacaville, California"); Romeo v. Home Depot
5 U.S.A., Inc., No. 06CV1505, 2007 WL 3047105, at *1 (S.D. Cal.
6 Oct. 16, 2007) (alleging violation for request of PII in credit
7 card refund transaction at "Defendant's store"); Thompson v. Home
8 Depot, Inc., No. 07CV1058, 2007 WL 2746603, at *1 (S.D. Cal.
9 Sept. 18, 2007) (alleging violation for request of PII in credit
10 card transactions at "Home Depot Inc.'s retail store"); Linder v.
11 Thrifty Oil Co., 23 Cal. 4th 429, 434, 97 Cal. Rptr. 2d 179
12 (2000) (alleging violation of section 1747.8 of Song-Beverly
13 Credit Card Act of 1971 (renumbered as section 1747.08 in 2004)
14 for request of PII in credit card transactions for gasoline
15 purchases); Absher v. AutoZone, Inc., 164 Cal. App. 4th 332, 78
16 Cal. Rptr. 3d 817 (2008) (alleging violation for request of PII
17 in credit card transactions at auto parts store); Florez v.
18 Linens 'N Things, Inc., 108 Cal. App. 4th 447, 451, 133 Cal.
19 Rptr. 2d 465 (2003) (alleging violation for request of PII in
20 credit card transactions at retail outlets).¹

21 **1. Interpreting the Act and Its Purpose**

22 Where statutory language is clear and unambiguous, it
23 will be applied according to its terms. Wilson v. Safeway
24 Stores, Inc., 52 Cal. App. 4th 267, 272, 60 Cal. Rptr. 2d 532
25

26 ¹ See also Party City Corp. v. Superior Court, No.
27 D053530, --- Cal. Rptr. 3d ---, 2008 WL 5264023 (Cal. Ct. App.
28 Dec. 19, 2008) (holding that Party City's request for a zip code
in a brick-and-mortar transaction does not violate section
1747.08).

1 (1997). At oral argument, plaintiff agreed that online
2 transactions are not specifically covered by the Act, but counsel
3 argued that application of the Act to online transactions is a
4 natural outgrowth of the increase in online purchases; while
5 online transactions are not included in the language of the Act,
6 as a consumer credit card transaction, they are covered by the
7 Act's prohibitions. See Cal. Civ. Code § 1747.08(a)(3)
8 (prohibiting use "in any credit card transaction, of a credit
9 card form which contains preprinted spaces specifically
10 designated for filling in any personal identification of the
11 cardholder"). The statutory language is silent as to both the
12 form of the credit card transaction and whether the request is
13 made in person or online. Plaintiff's contention warrants a
14 study of the purpose of the Act's prohibition on collection of
15 PII in the course of a credit card transaction.

16 To interpret a statute, the Court should look first to
17 its plain language, and then construe the law with its object and
18 policy concerns in mind. United States v. 475 Martin Lane, 545
19 F.3d 1134, 1141 (9th Cir. 2008). "When a natural reading of the
20 statutes leads to a rational, common-sense result, an alteration
21 of meaning is not only unnecessary, but also extrajudicial." Az.
22 State Bd. for Charter Schs. v. U.S. Dep't of Educ., 464 F.3d
23 1003, 1008 (9th Cir. 2006). As noted in Florez, the original
24 enactment of the 1991 amendment to the Act addressed two privacy
25 concerns: "[F]irst, that with increased use of computer
26 technology, very specific and personal information about a
27 consumer's spending habits was being made available to anyone
28 willing to pay for it; and, second, that acts of harassment and

1 violence were being committed by store clerks who obtained
2 customers' phone numbers and addresses." 108 Cal. App. 4th at
3 452 (citing California Assembly Committee on Finance and
4 Insurance, Background Information Request on Assembly Bill No.
5 2920. Stats. 1990, ch. 999, § 1 [A.B. No. 2920])). The purpose
6 of the Act appears to be to protect consumer privacy in the
7 course of a retail transaction, and this Committee analysis
8 suggests the Act was specifically passed with a brick-and-mortar
9 merchant environment in mind. While the use of computer
10 technology is mentioned, the language does not suggest the
11 Legislature considered online transactions or the perils of
12 misappropriation of consumer credit information in an online
13 environment where there is no ability to confirm the identity of
14 the customer. Neither the language of the Act nor its
15 legislative history suggests the Act includes online
16 transactions.

17 **2. Applying *National Federation of the Blind v.***
18 **Target Corp.**

19 Plaintiff cites *National Federation of the Blind v.*
20 *Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006). There,
21 plaintiffs brought an action against Target Corporation claiming
22 its online retail presence, Target.com, was inaccessible to the
23 blind in violation of federal and state laws prohibiting
24 discrimination against the disabled. Id. at 949. Defendants
25 argued the complaint failed to state a claim because "Target.com
26 is not a place of public accommodation within the meaning of the
27 ADA" or state anti-discrimination law. Id. at 951. The district
28 court rejected defendants' argument, finding "to the extent that

1 plaintiffs allege that the inaccessibility of Target.com impedes
2 the full and equal enjoyment of goods and services offered in
3 Target stores, the plaintiffs state a claim [under the ADA]. . .
4 ." Id. at 956.

5 The basis for the court's decision in National
6 Federation does not assist in the analysis of the Act. In
7 National Federation, defendants argued that the Ninth Circuit's
8 determination that places of "public accommodation" under the ADA
9 are "actual, physical places" and accordingly Target.com can only
10 violate the ADA if it "denies physical access to Target's brick-
11 and mortar stores." Id. at 954 (citing Weyer v. Twentieth
12 Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000)
13 (finding places of "public accommodation" under the ADA are
14 "actual, physical places")). National Federation rejected this
15 argument, relying on the Ninth Circuit's interpretation of the
16 scope of discrimination covered by the ADA, wherein it has found
17 "discrimination in the enjoyment of goods, services, facilities
18 or privileges, is that *whatever* goods or services the place
19 provides, it cannot discriminate on the basis of disability in
20 providing enjoyment of those goods and services." Id. (citing
21 Weyer, 198 F.3d at 1115). Accordingly, National Federation found
22 "the inaccessibility of Target.com denies the blind the ability
23 to enjoy the services of Target stores." Id. at 955. This
24 analysis did not simply adopt an expansive reading of the ADA to
25 include online retailers. Rather, it looked to the legislative
26 purpose of the statute to determine whether its application to
27 the website was consistent with the intent of the statute.

28 Here, plaintiff does not offer, and the Court does not

1 find, a similar justification for expanding the application of
2 the Act to online transactions. Consistent with National
3 Federation, application of the Act to online transactions must
4 advance the Act's purpose.

5 3. The Act's Purpose

6 While the legislative purpose of the Act was to
7 "address the misuse of personal information for, *inter alia*,
8 marketing purposes," recent state and district court decisions
9 give deference to a competing interest: fraud prevention through
10 PII collection. Absher, 164 Cal. App. 4th at 345. Numerous
11 cases have recently sought an expansive reading of the Act to
12 include a prohibition on requests for PII when a customer
13 requests a refund for the return of merchandise purchased by
14 credit card, as well as the purchase transaction itself. See
15 Korn, 2008 WL 2225743, at *1; Romeo, 2007 WL 3047105, at *1; TJX
16 Cos., 163 Cal. App. 4th at 80; Absher, 164 Cal. App. 4th at 339.
17 California courts and district courts have all reached the same
18 conclusion: the Act "does not apply to credit card refund
19 transactions." Romeo, 2008 WL 2697229, at *1 (citing TJX Cos.,
20 163 Cal. App. 4th at 87-88).

21 Rejecting a reading of the statute which would extend
22 its application to refund transactions, a California appeals
23 court cited the legislative history of the Act, noting that in
24 adopting the Act the legislature found "no need for the retailer
25 to request" PII to complete a credit card transaction "since the
26 credit card issuer already has that information." TJX Cos., 163
27 Cal. App. 4th at 89 (citing Enrolled Bill Report of the
28 California Department of Consumer Affairs, Assembly Bill No. 1477

1 (1991-1992 Reg. Sess.)). Comparing the interest in collecting
2 PII for refund transactions versus purchases, TJX Companies found
3 that "[t]he same considerations do not apply to merchandise
4 returns. Here there are substantial opportunities for fraud and
5 it behooves the merchant to identify the person who returns
6 merchandise, which subsequent examination may disclose to have
7 been used, damaged, or even stolen." TJX Cos., 163 Cal. App. 4th
8 at 89. Similarly, Absher found "returns of merchandise are
9 arguably different," than the original purchase transaction
10 because the merchant: (1) has an interest in preventing employee
11 fraud in the course of the transaction and (2) if the product has
12 been used or damaged, there may be "a legitimate need to contact
13 the customer who made the return." 164 Cal. App. 4th at 346.

14 **4. Fraud Concerns with Online Transactions**

15 As in refund transactions, an online transaction raises
16 fraud concerns. Defendants point out that there are numerous
17 differences between a "brick and mortar" purchase and an online
18 purchase and the merchant's ability to ensure the cardholder is
19 who she claims to be. For example, an in-person transaction
20 provides the merchant with the opportunity to check the
21 customer's signature on her credit card against the signature on
22 the credit card slip. (Decl. of Andrew Barker ¶ 44 ("Barker
23 Decl.")) Additionally, the merchant can ask for picture
24 identification to compare the person in front of them to the name
25 on the credit card. (Id.) Certain credit cards even include the
26 consumer's picture imprinted on the card, allowing the merchant
27 to confirm that the cardholder is who she claims to be. In an
28 online transaction, without a request for PII, online merchants

1 must ultimately accept payment with nothing more than a name and
2 credit card number - there is no "verification."

3 Plaintiff asserted at oral argument the existence of
4 numerous ways to confirm the identity of the cardholder in an
5 online transaction without relying on PII. Defendants counter,
6 however, with an extensive explanation of the Digital River fraud
7 prevention process wherein PII is compared against various "data
8 point for conflicts and irregularities" that flags a potentially
9 fraudulent transaction. (Id. ¶ 47.) When Digital River's "fraud
10 indicators" suggest a potentially fraudulent transaction, they
11 call the consumer to verify the transaction. (Id. ¶ 51.) In
12 addition, Digital River notes that its payment processor,
13 "Paymentech," also uses customer PII to run its own fraud checks.
14 (Id. ¶ 52.) Digital River also uses the customer's phone number
15 to address any online delivery problems that cannot be resolved
16 through e-mail. (Id. ¶ 55.)

17 The Court must recognize plaintiff's argument that
18 identity theft is a potential concern where PII is shared. But,
19 plaintiff did not offer, and the Court does not find, any support
20 for protecting this interest in online transactions in the Act or
21 its legislative history. Instead, the Act appears to be
22 concerned with the use of PII for unsolicited marketing. In
23 keeping with the precedents finding that refund transactions are
24 outside the category of transactions covered by the Act because
25 of the unique fraud concerns created by those transactions, the
26 Court also finds online transactions are not encompassed within
27 the Act. Thus, plaintiff's claim cannot be maintained.

28 //

V.

CONCLUSION

For the foregoing reasons, the Court denies plaintiff's Motion for Class Certification. Plaintiff's and Digital River's Requests for Judicial Notice are denied and evidentiary objections are overruled.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the clerk shall serve a copy of this Order on counsel for all parties in this action.

DATED: January 5, 2009.

ALICEMARIE H. STOTLER
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U.S. DISTRICT JUDGE