

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

Plaintiff,

-against-

MICHAELS STORES, INC.,

Defendant.

Civil Action No. _____

Class Action Complaint

Jury Trial Demanded

11 10920

Plaintiff, Melissa Tyler, by her attorneys, Meiselman, Denlea, Packman, Carton & Eberz P.C., as and for her class action complaint, alleges, with personal knowledge as to her own actions, and upon information and belief as to those of others, as follows:

Nature of this Case

1. This action seeks to redress Michaels Stores, Inc.'s ("Michaels") unlawful invasion of its customers' privacy and disregard for the laws of the Commonwealth of Massachusetts designed to protect consumers' rights to be free from intrusive corporate data collection and marketing. In callous disregard for the rights of Massachusetts consumers, Michaels collects ZIP codes from its customers when they make purchases using credit cards at its retail stores. Michaels' employees do not ask customers for their ZIP codes because the credit card companies require that Defendant do so, nor do Michaels' employees request ZIP codes for verification purposes.

2. Rather, Michaels collects ZIP codes for its own business purposes. On information and belief, Defendant uses a customer's ZIP code and name to identify that

customer's address and/or telephone number using commercially available databases. Michaels is thus able to use that personal identification information for intrusive marketing purposes, which may include Michaels' own direct marketing, such as sending junk mail directly to consumers' homes without their permission, or even selling that personal identification information to third parties.

3. As Michaels, a sophisticated international corporation, is fully aware, the collection of ZIP codes from consumers using credit cards violates Mass. Gen. Laws ch. 93 § 105, which 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 form. Personal identification information shall include, but shall not be limited to, a credit card holder's address or telephone number.

4. This suit is brought pursuant to Mass. Gen. Laws ch. 93 § 105 and ch. 93A § 9 on behalf of a class of Massachusetts consumers whose personal identification information was wrongfully collected by Michaels from May 23, 2007, to the present. It seeks, *inter alia*, injunctive relief, statutory damages, treble damages, attorneys' fees, and the costs of this suit.

Jurisdiction and Venue

5. Jurisdiction in this civil action is authorized pursuant to 28 U.S.C. § 1332(d), as minimal diversity exists, there are more than 100 class members, and the amount in controversy is in excess of \$5 million.

Parties

6 Plaintiff Melissa Tyler is a citizen and resident of the Commonwealth of Massachusetts. On several occasions in the past year, when making a credit card

purchase at a Michaels in Everett, Massachusetts, Ms. Tyler was asked to provide her ZIP code. Under the mistaken impression that she was required to do so in order to complete the transaction, she complied. Subsequently, Ms. Tyler received unwanted marketing material from Michaels.

7. Defendant Michaels Stores, Inc. is a corporation established under the laws of the State of Delaware, with its principal place of business located in Irving, Texas. On information and belief, Michaels maintains a policy of writing consumers' credit card numbers, ZIP codes and names on an electronic credit card transaction form in connection with credit card purchases.

Operative Facts

8. Data mining is one of the more pernicious practices in which retailers engage. Like crows collecting shiny bits of silver to line their nests, retailers like Michaels use whatever means necessary to collect customer data so that they can better market their wares. Indeed, the collection of personal identification information is rampant, and it results in intrusive direct marketing and the invasion of consumers' privacy, as consumers' identities and purchasing habits become valuable commodities which can be bought and sold without their consent.

9. Responding to consumers' cries for protection, many states, including the Commonwealth, have enacted laws designed to prevent retailers from using a consumer's decision to pay with a credit card as an excuse for collecting personal identification information. In California, for instance, The Beverly-Song Credit Card Act, Cal. Civ. Code § 1747.08(a) provides that:

[N]o person . . . that accepts credit cards for the transaction of business shall . . . [r]equest, 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 . . . accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.

§ 1747.08(b) provides that “‘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.”

10. In applying this statute, the California Supreme Court has held that a consumer’s ZIP code is “personal identification information” within the meaning of the statute. To reason otherwise, “would permit retailers to obtain indirectly what they are clearly prohibited from obtaining directly, ‘end-running’ the statute’s clear purpose. This is so because [such information] . . . could easily be used to locate the cardholder’s complete address or telephone number.” Pineda v. Williams-Sonoma Stores, Inc., 51 Cal. 4th 524, 532-33, 246 P.3d 612 (2011). The California Court also reasoned that:

[A] ZIP code is readily understood to be part of an address; when one addresses a letter to another person, a ZIP code is always included. The question then is whether the Legislature, by providing that ‘personal identification information’ includes ‘the cardholder’s address’ (§ 1747.08, subd. (b)), intended to include components of the address. The answer must be yes. Otherwise, a business could ask not just for a cardholder’s ZIP code, but also for the cardholder’s street and city in addition to the ZIP code, so long as it did not also ask for the house number. Such a construction would render the statute’s protections hollow. Thus, the word ‘address’ in the statute should be construed as encompassing not only a complete address, but also its components.”

Id. Mass. Gen. Laws ch. 93 § 105 is on all fours with the California statute.

11. Michaels violates Mass. Gen. Laws ch. 93 § 105. When consumers use credit cards to make purchases at Michaels’ retail stores, the employees at check-out ask consumers for their ZIP codes. The employee subsequently writes that ZIP code into an electronic credit card transaction form. On information and belief, Michaels uses

this information not for verification, but instead for its own improper purposes. In particular, Michaels has the ability to match the customer's name and ZIP code with an address and/or telephone number, the very information § 105 prohibits it from obtaining.

12. Consumers, like Plaintiff, have a statutorily created privacy interest in not having to divulge their personal identification information, including ZIP codes, which Michaels violates.

Class Action Allegations

13. Plaintiff bring this action on her own behalf and additionally, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of a class of all persons in Massachusetts whose ZIP code was recorded by Michaels when such persons made a purchase using a credit card from May 23, 2007 to the present.

14. Excluded from the Class is Defendant; any parent, subsidiary, or affiliate of Defendant; any entity in which Defendant has or had a controlling interest, or which Defendant otherwise controls or controlled; and any officer, director, employee, legal representative, predecessor, successor, or assignee of Defendant.

15. This action is brought as a class action for the following reasons:

a. The Class consists of thousands of persons and is therefore so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

b. There are questions of law or fact common to the Class that predominate over any questions affecting only individual members, including:

i. whether Defendant violated Mass. Gen. Laws ch. 93 § 105, thereby violating Mass. Gen. Laws ch. 93A § 2;

ii. whether Defendant is being unjustly enriched by, among other things, selling Plaintiff and the Class's personal identification information to third parties;

iii. whether Plaintiff and the Class have sustained damages and, if so, the proper measure thereof; and

iv. whether Defendant should be enjoined from the continued collection of ZIP codes from consumers using credit cards, and whether such a practice should be declared unlawful.

c. The claims asserted by Plaintiff are typical of the claims of the members of the Class;

d. Plaintiff will fairly and adequately protect the interests of the Class, and Plaintiff has retained attorneys experienced in class and complex litigation, including litigation involving consumer protection;

e. Prosecuting separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for Michaels, to wit, whether it can lawfully collect ZIP codes from consumers who make purchases using credit cards;

f. Michaels has acted on grounds that apply generally to the Class, namely unlawfully collecting consumer ZIP codes, so that final injunctive relief prohibiting Michaels from continuing to do so is appropriate with respect to the class as a whole;

g. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, for at least the following reasons:

i. Absent a class action, Class members as a practical matter will be unable to obtain redress, Defendant's violations of its legal obligations will continue without remedy, additional consumers and purchasers will be harmed, and Defendant will continue to retain its ill-gotten gains;

ii. It would be a substantial hardship for most individual members of the Class if they were forced to prosecute individual actions;

iii. When the liability of Defendant has been adjudicated, the Court will be able to determine the claims of all members of the Class;

iv. A class action will permit an orderly and expeditious administration of Class claims, foster economies of time, effort, and expense and ensure uniformity of decisions;

v. The lawsuit presents no difficulties that would impede its management by the Court as a class action; and

vi. Defendant has acted on grounds generally applicable to Class members, making class-wide monetary and injunctive relief appropriate.

16. Defendant's violations of Mass. Gen. Laws ch. 93 § 105, itself a violation Mass. Gen. Laws ch. 93A § 2, are applicable to all members of the Class, and Plaintiff is entitled to have Defendant enjoined from engaging in illegal, deceptive and unfair conduct in the future.

FIRST CAUSE OF ACTION

(Violation of Massachusetts Unfair Trade Practices Act, Mass. Gen. Laws ch. 93A)

17. Plaintiff repeats and re-alleges the allegations contained in the Paragraphs above as if fully set forth herein.

18. Mass. Gen. Laws Ch. 93 § 105(a) provides that:

No person, firm, partnership, corporation or other business entity 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 form. Personal identification information shall include, but shall not be limited to, a credit card holder's address or telephone number. The provisions of this section shall apply to all credit card transactions.

19. Michaels is a corporation that accepts credit cards for retail transactions.

20. When a consumer uses credit cards at Michaels' retail stores in Massachusetts, a Michaels' employee requests that consumer's ZIP code. The Michaels' employee then writes that ZIP code into the credit card transaction form, which is on the computerized check-out register used to process the point-of-sale transaction. Consumers typically provide this information in the mistaken belief that providing a ZIP code is necessary to complete the transaction.

21. The ZIP code is part of a credit card holder's address, and is therefore personal identification information under Mass. Gen. Laws Ch. 93 § 105(a). Michaels and other retailers are also able to use a customer's name and ZIP code to determine their address or telephone number using commercially available databases.

22. Mass. Gen. Laws ch. 93 § 105(c) provides that the collection of personal identification information is a per se violation of Mass. Gen. Laws ch. 93A § 2: "Any

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.”

23. Mass. Gen. Laws ch. 93A § 9 provides that:

Any person . . . who has been injured by another person’s use or employment of any method, act or practice declared to be unlawful by section two . . . may bring an action in the superior court . . . for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper . . . Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons.

24. Plaintiff and the Class have been injured by Michaels’ collection of ZIP codes and Defendant’s subsequent use of their personal identification information.

Mass. Gen. Laws. Ch. 93 § 105 creates a protected privacy interest held by consumers in not having to divulge personal identification information, including their ZIP codes, merely to use a credit card. In addition, Plaintiff and the Class were injured by Michaels’ appropriation of their economically valuable personal identification information without consideration.

25. In compliance with Mass. Gen. Laws. Ch. 93A § 9(3), on March 11, 2011, Plaintiff’s counsel sent Defendant a written demand for relief by Federal Express, identifying Ms. Tyler as a claimant and reasonably describing the unfair or deceptive act alleged herein and the injury she and other Class members suffered. By letter dated April 5, 2011, Defendant acknowledged receipt of that demand letter.

SECOND CAUSE OF ACTION
(Unjust Enrichment)

26. Plaintiff repeats and re-alleges the allegations contained in Paragraphs 1-16 as if fully set forth herein.

27. Defendant knowingly and willingly accepted benefits from Plaintiff and the Class, to wit, their economically valuable personal identification information, while providing Plaintiff and the Class nothing in return.

28. Under the circumstances described herein, it is inequitable for Defendant to retain the full monetary benefit of that information at the expense of Plaintiff and the Class.

29. By engaging in the conduct described above, Defendant has unjustly enriched itself at the expense of Plaintiff and the Class and is required, in equity and good conscience, to compensate Plaintiff and the Class for the appropriation of their personal identification information, the amount of such compensation to be determined at trial.

THIRD CAUSE OF ACTION
(Declaratory Relief Pursuant to 28 U.S.C. §§ 2201 *et seq.*)

30. Plaintiff repeats and re-alleges the allegations contained in Paragraphs 1-16 as if fully set forth herein.

31. An actual controversy, over which this Court has jurisdiction, has arisen and now exists between the parties relating to the legal rights and duties of Plaintiff and Defendant for which Plaintiff desires a declaration of rights.

32. A declaratory judgment is necessary to determine Plaintiff and Class members' rights in connection with the unlawful collection of ZIP codes by Defendant,

including, among other things, a declaration that Defendant has violated Mass. Gen. Laws. Ch. 93 § 105.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant as follows:

1. Certifying this action as a class action, with a class as defined above;
2. On Plaintiff's First Cause of Action, awarding against Defendant statutory damages that Plaintiff and the other members of the Class have suffered as a result of Defendant's actions in the amount of \$25.00 per class member, trebled;
3. On Plaintiff's Second Cause of Action, awarding against Defendant damages that Plaintiff and the other members of the Class have suffered as a result of Defendant's actions;
4. On Plaintiff's Third Cause of Action, declaring that Defendant's practice of unlawfully collecting of ZIP codes is a violation of Mass. Gen. Laws. Ch. 93 § 105;
5. Awarding Plaintiff and the Class interest, costs and attorneys' fees; and
6. Awarding Plaintiff and the Class such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Federal Rule of Civil Procedure Rule 38, Plaintiff hereby demands a trial by jury.

DATED: May 20, 2011

Respectfully submitted,

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

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