Dear Retail Clients and Friends,

In the latest development concerning California's Song-Beverly Credit Card Act (the Song-Beverly Act), the California Court of Appeal on May 20 certified for publication *Folgelstrom v. Lamps Plus, Inc.*, --- Cal.Rptr.3d ----, 2011 WL 1902202 (Cal.App. 2 Dist.), 11 Cal. Daily Op. Serv. 6055, 11 Cal. Daily Op. Serv. *Folgelstrom* arose in the context of allegations that specialty lighting retailer Lamps Plus had violated the Song-Beverly Act by asking for customers' ZIP codes in conjunction with credit card purchases.

As part of its decision, the court specifically addressed the availability of privacy-related tort claims and claims for violations of California's unfair competition law, California Business and Professions Code section 17200 (UCL), in conjunction with alleged Song-Beverly Act violations. While it held that the plaintiff could still pursue a potential Song-Beverly Act claim, the court rejected plaintiff's efforts to pursue an invasion of privacy or UCL claim, ruling that an individual does not have enough of a privacy interest in his or her zip code to make collection of that information harmful. **It is important to note, however, that collection of zip codes is still potentially problematic under the Song-Beverly Act and retailers should not change their practices because of this decision.** This ***Morgan Lewis Retail Did You Know?*** describes *Folgelstrom* and its holding.

Background

In *Folgelstrom*, the plaintiff alleged that defendant Lamps Plus had "routinely asked its customers for their ZIP codes during credit card transactions so that it could obtain their home addresses for the purpose of mailing marketing materials to them." 2011 WL 1601990, at *2. In particular, *Folgelstrom* alleged:

> Lamps Plus misrepresents the purpose of requesting the ZIP code, either actively (by falsely stating that it is needed for surveys) or passively (by relying on the customer's mistaken belief that the ZIP code aids in authorizing the credit transaction). Lamps Plus then provides the customer's name, credit card number and ZIP code to Experian Marketing Services, a third party credit reporting agency. Experian th[e]n matches the information provided by Lamps Plus with the customer's address stored in its own records to produce a mailing list, which it licenses to Lamps Plus to use.

Id. Based on the above facts, the plaintiff attempted to assert claims for (1) Song-Beverly Act violations, (2) invasion of privacy, (3) intrusion, and (4) UCL violations.

Lamps Plus, in turn, demurred to all claims. The trial court upheld the demurrer and entered judgment in Lamps Plus's favor. The plaintiff then appealed.

The court of appeal, based on *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524 (2011), reversed the lower court's ruling sustaining the demurrer to and dismissing the plaintiff's Song-Beverly Act claim. *Folgelstrom*, 2011 WL 1601990, at *2. The court of appeal also held, however, that the trial court had properly sustained the demurrer to the plaintiff's claims for (1) constitutional invasion of privacy, (2) common law invasion of privacy (intrusion), and (3) UCL violations. *Id.*

Plaintiff's California Constitution and Common Law Privacy-Based Tort Claims

With respect to a plaintiff's claimed privacy interest in his home address, the court of appeal noted that courts have found constitutional right-to-privacy violations only in the most extreme situations, none of which it found

present in *Folgelstrom. Id.* at *4–6 (citing *Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 360–62 (2000) (holding disclosing abortion clinic's staff's and volunteers' personal information could threaten safety and well-being given the "emotionally charged and often violent debate regarding the abortion issue") and *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 37, 39–40 (1994)).

Applying *Planned Parenthood* and *Hill*, among others, the *Folgelstrom* court held: "In any event, even if we assume that plaintiff has a protected privacy interest in his home address, we conclude that the conduct of which plaintiff complains does not constitute a 'serious' invasion of privacy." 2011 WL 1601990, at *5.

In so holding, the court found:

> Actionable invasions of privacy must be sufficiently serious in nature, scope, and actual or potential impact to constitute an egregious breach of social norms underlying the privacy right." [citing *Hill*] Here, the supposed invasion of privacy essentially consisted of Lamps Plus obtaining plaintiff's address without his knowledge or permission, and using it to mail him coupons and other advertisements. This conduct is not an egregious breach of social norms, but routine commercial behavior.

Id. at *5–6. Indeed, the court specifically noted that "plaintiff seeks to add gravity to his privacy claims by suggesting that Lamps Plus's conduct increased the risk that he would be victimized in an identity theft scam. This is a speculative conclusion of fact which we may disregard on review of a demurrer." *Id*. at *7 (citation omitted).

Plaintiff's UCL Claim

The court determined that the plaintiff did not have standing to sue for UCL violations because he failed to allege an injury in fact and, likewise, had not lost any money or property. Case law has established that "California's unfair competition statute prohibits any unfair competition, which means 'any unlawful, unfair or fraudulent business act or practice.'" *In re Pomona Valley Med. Group*, 476 F.3d 665, 674 (9th Cir. 2007) (citing Cal. Bus. & Prof. Code § 17200). In order to pursue either an individual or a representative claim under the California unfair competition law, a plaintiff *must* have suffered *an injury in fact and lost money or property* as a result of such unfair competition. *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 849 (2008).

On several occasions, California federal courts have held that a plaintiff who alleged a Song-Beverly Act claim as well as a tagalong UCL claim could not satisfy the UCL's injury-in-fact requirement. *Id.* at 1127. The court in *Folgelstrom* applied this same reasoning in the context of claims asserted in California state court. 2011 WL 1601990, at *4–5:

> Plaintiff cites no authority in support of his novel argument that his address is his intellectual property. Plaintiff did not create his address; rather, the address was assigned by a governmental authority to identify a particular parcel of property and its location for purposes of, among others, public safety, recordkeeping, tax collection and mail delivery. None of the usual incidents of property ownership, such as the right to sell, mortgage, or transfer one's interest in property, adheres in an address. In short, plaintiff's intellectual property rights are not implicated in this case.

Id. at *8. The court went on to find:

> [E]ven if plaintiff had an intellectual property interest in his address, he does not explain how that interest has been economically diminished by Lamps Plus. . . . The fact that the address had value to Lamps Plus, such that the retailer paid Experian a license fee for its use, does not mean that its value to plaintiff was diminished in any way.

Id. The court of appeal also noted, however, that:

> [A]ny claim that plaintiff is entitled to restitution on account of the "sale" of his address would presumably be directed to Experian, the entity which sold the information, not to Lamps Plus, which paid for it. In sum, plaintiff does not allege that he suffered an economic injury as a result of Lamps Plus's challenged business practice.

Id. Even so, this does not appear to diminish the court's primary holding that the plaintiff did not have standing to sue because he had no intellectual property interest in his address and had not suffered an injury for UCL purposes. In fact, nonrestitutionary disgorgement is not available under the UCL. Restitution under the UCL is defined by the California Supreme Court as only those sums that (a) *were given to a defendant by parties in interest* or (b) *in which parties in interest have ownership interests*. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148 (2003). The UCL operates only to return to a person those *measurable amounts* which are *wrongfully taken* by means of an unfair business practice. In other words, "the notion of restoring something to a victim of unfair competition includes two separate components. The offending party must have obtained something to which it was not entitled *and* the victim must have given up something which he or she was entitled to keep." *Id*. at 340.

Because the court left intact the Song-Beverly Act claims, which include a statutory penalty, there is no basis at this time to change any practices or procedures outside of litigation. Retailers facing Song-Beverly Act claims with related invasion of privacy or UCL claims should strongly consider a motion to dismiss based on *Folgelstrom.*

How We Can Help

Our team often assists our clients with understanding the Song-Beverly Act and any claims arising out of or related to the Act. We also recommend changes necessary to comply with current state laws, applying our experience and up-to-date knowledge of retail industry "best practices." Our experience handling many Song-Beverly Act claims in both settlement and litigation means that we are ready to defend any such claims that may arise.

If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis contact or any of our Retail Practice leaders:

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