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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PIONEER ELECTRONICS (USA), INC., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; PATRICK OLMSTEAD, Real Party in Interest.	No. B174826 (Super. Ct. No. BC257222)

ORIGINAL PROCEEDINGS in mandate. Wendell Mortimer, Jr., Judge. Writ granted.

Hughes Hubbard & Reed, William T. Bisset, Charles Avrith, and Alicia D. Mew for Petitioner.

No appearance for Respondent.

Lange & Koncius, Joseph J. M. Lange, Jeffrey A. Koncius; Milberg Weiss Bershad & Schulman, Sanford P. Dumain, Michael R. Reese; Robert I. Lax & Associates and Robert I. Lax for Real Party in Interest.

This case concerns the requisite notice and opportunity to assert a consumer's privacy right which must accompany a precertification communication to members of a putative class.[1] As we shall discuss, the court must take reasonable steps to assure that the consumer receives actual notice of his or her right to grant or withhold consent of the release of personal information, and that consent for such release be by the consumer's positive act, rather than by mere failure to respond.

Patrick Olmstead purchased a DVD player from Pioneer Electronics (USA), Inc. (Pioneer). He claims it is defective. He brought suit against Pioneer on his own behalf and on behalf of a putative class of persons who purchased the same model of allegedly defective DVD. Responding to a discovery request by Olmstead, Pioneer produced documents relating to complaints it received from consumers. Olmstead seeks identifying information about these persons; Pioneer asserts their right of privacy under the 1974 amendment to the California Constitution. (Cal. Const., art. I, § 1 (Privacy Amendment).)[2]

The trial court ordered Pioneer to inform the approximately 700 to 800 complaining consumers, by letter, about the lawsuit, Olmstead's request for identifying information in order to contact them, their right to object to release of that information,

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[1] No class has yet been certified. The Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) expressly authorizes postcertification notices in class actions. (See § 1781, subds. (d) & (e).) There is no comparable provision for *precertification* notices. In *Atari, Inc. v. Superior Court* (1985) 166 Cal.App.3d 867, the court found "no persuasive objection to use of this kind of *precertification* communication by class-action plaintiffs to potential class members where, as here, the trial court has been given the opportunity in advance to assure itself that there is no specific impropriety." (*Id*. at p. 871; see also, *Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 580; cf. *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 290, 292-293, 295-300.) The notification letter we discuss in this case is a precertification notice.

[2] This case does not involve waiver by a consumer of his or her right of privacy pursuant to an agreement, such as a release obtained by a seller at the point of sale. We express no opinion with respect to such provisions.

and that failure to respond would be treated as consent to release of the information.

Pioneer seeks our intervention to compel the superior court to vacate that order. It does so on two grounds: that the order is in excess of the court's jurisdiction under Code of Civil Procedure section 1008[3]; and no disclosure of the identifying information should be made without the affirmative consent of the consumer.

The trial court's order was preceded by an earlier order under which the identifying information would be released only if the consumer checked a box indicating consent. We conclude, first, that the trial court had authority to reconsider and modify this order, notwithstanding the requirements of section 1008. On the merits, we conclude that an individual's name and other identifying information are matters embraced within the Privacy Amendment, that adequate steps to assure actual notice is a prerequisite to an assumed waiver of the consumer's right of privacy (Cal. Const., art. I, § 1), and that the measures taken in this case are inadequate.

Waiver may be express or implied. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.) Generally, an implied waiver based on failure to assert a right, including a constitutional right, must be accompanied by an informed intent to relinquish that right. (*Id*. at p. 31; *North Carolina v. Butler* (1979) 441 U.S. 369, 371, 374-375 [waiver implied where no invocation of right to counsel]; *People v. Riva* (2003) 112 Cal.App.4th 981, 989 [waiver implied where defendant, who was not tricked or coerced, understood his rights but chose to speak with police].)

Although not couched in terms of waiver, that is what the trial court essentially meant when it decided that the consumer's failure to respond to Pioneer's letter would be treated as consent to disclosure and contact by Olmstead's counsel. Waiver is the intentional relinquishment of a known right; the foundation of waiver is intent. (*Waller v. Truck Ins. Exchange, Inc., supra,* 11 Cal.4th at p. 31.) A consumer cannot be deemed to have intended to waive his or her right of privacy unless and until the consumer has

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[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

notice of the need and opportunity to assert it. Here, the challenged order does not adequately assure that the consumer will receive actual notice. Absent notice, the consumer is unaware of the need to assert his or her privacy interest and is thereby deprived of a meaningful opportunity to do so. Absent an affirmative response from the consumer, there is no adequate basis to infer that the consumer has consented to the release of personal information.

We shall order, on remand, that the trial court fashion an order that provides reasonable assurance that the consumers receive actual notice of the right to grant or withhold consent to release of personal information, and that such information not be released as to any consumer unless that consumer affirmatively agrees to such release.

FACTUAL AND PROCEDURAL SUMMARY

Olmstead filed a motion to compel Pioneer to provide unredacted copies of consumer complaints it had received about the allegedly defective DVDs. The motion sought to require Pioneer to disclose the names and contact information of the complainants.

At a March 2004, hearing, the court stated that "the names are probably protected unless there's a Colonial Life letter that goes out." (The reference was to *Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785 [disclosure of names and addresses of third parties in bad faith insurance action proper only if those parties specifically authorized release by signing and dating an enclosed form that so stated].) The clerk's minute for that proceeding reflects that the court ordered Pioneer "to write a 'Colonial Pen' letter and then reveal the names of those consumers who do not object." The court's decision was refined in an order issued later that month. In it, the court stated that it "is in receipt of two versions of a 'Colonial Life' letter to customers" and that "[t]he major difference is whether or not an affirmative response should be required. In order for the letter to have any meaning, it should require an affirmative response, as did the letter in the Colonial Life case."

The court then authorized the following text:

"'Dear Consumer:

"'In August, 2001, litigation was filed in California in which the plaintiff alleges that Pioneer DVD Players are not compatible with the DVD Video Standard and as such, are incapable of playing all DVD discs. As part of the litigation, Pioneer was required to provide the plaintiff's counsel with a copy of the record that it made of information or complaints you provided some time ago when you contacted Pioneer's customer service department about your Pioneer DVD Player. Before doing so, however, Pioneer removed all identifying information regarding your name, address and telephone number. The court has now directed that Pioneer send you this notice so that you can decide whether to authorize Pioneer to disclose your personal information to the plaintiff's counsel so they may contact you.

"'If you agree to the disclosure of this information to the plaintiff's counsel, please check the box on the enclosed form and return it to the address shown on the form. *Not responding to this letter will be treated as declining contact from Plaintiff's counsel.*'" (Italics added.)

Olmstead moved for reconsideration and clarification of this order. In April 2004, the court granted his motion, vacated its March order, and adopted Olmstead's new "proposed language for the letter on pages 8 & 9 of [the] motion."

This new letter differs from the old in three material respects: (1) in the third sentence, it substituted "your name, address, telephone number, fax number and e-mail address" in place of "your name, address, and telephone number"; (2) in the fourth sentence, it substituted the same language in place of "personal information"; and (3) in the final paragraph it added "do not" before "agree" and substituted "agreeing to" in place of "declining" and "by" in place of "from." The effect of these changes was to state that identifying information for the purpose of contact *would* be released *unless* the addressed consumer objected to the release.

Later that month, the court stayed its April order pending writ review by this court. We issued an alternative writ. We now grant the petition for writ of mandate.

DISCUSSION

I

Pioneer contends the superior court was without jurisdiction to enter its April 2004, order because Olmstead's motion for reconsideration and clarification failed to comply with the requirements of section 1008.[4] Courts of Appeal are divided on the

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[4] Section 1008 provides: "(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.

"(b) A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion.

"(c) If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order.

"(d) A violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7. In addition, an order made contrary to this section may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending.

"(e) This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.

"(f) For the purposes of this section, an alleged new or different law shall not include a later enacted statute without a retroactive application.

"(g) This section applies to all applications for interim orders."

application of that statute to preclude reconsideration beyond the limited scope it provides.

"Some Courts of Appeal have stated that the power to correct judicial error in interim orders before judgment is an inherent judicial power derived from the California Constitution, and therefore this power cannot be impaired by statute. (See, e.g., *Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1451 [1 Cal.Rptr.3d 162]; *Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 210 [132 Cal.Rptr.2d 89]; *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 388 [130 Cal.Rptr.2d 754]; *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1042 [126 Cal.Rptr.2d 310]; *Blake v. Ecker* (2001) 93 Cal.App.4th 728, 739, fn. 10 [113 Cal.Rptr.2d 422]; *People v. Castello* (1998) 65 Cal.App.4th 1242, 1247-1250 [77 Cal.Rptr.2d 314].) Other Courts of Appeal have held that statutory restrictions on a court's power to reconsider its interim rulings, such as the restrictions found in . . . section 1008, are valid and constitutional. (See, e.g., *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1200 [69 Cal.Rptr.2d 592].)" (*People v. Delouize* (2004) 32 Cal.4th 1223, 1231, fn. 2 [noting but not deciding which line of cases is correct].)

We agree with the cases that hold trial courts retain inherent judicial power to reconsider rulings such as the March 2004 order in this case. Thus, we conclude the superior court did not act in excess of its jurisdiction in doing so. We proceed to the merits.

II

Olmstead contends that consumers who contacted Pioneer have no "expectation of privacy or confidentiality in the contact information they freely offered to Pioneer, a consumer electronics company -- presumably so that they could be contacted regarding their complaint in the future[,]" or, if they do, only "'minimal privacy interests'" are implicated. We do not agree.

Under the Privacy Amendment to the California Constitution, "the *definition* of the right of privacy is simply the 'right to be left alone.' (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972),

argument in favor of Prop. 11, p. 27; cf. *Olmstead v. United States* [(1928)] 277 U.S. [438,] 478 [72 L.Ed. [944,] 956] (dis. opn. of Brandeis, J.) [calling the right of privacy the 'right to be let alone']; Warren & Brandeis, *The Right to Privacy* (1890) 4 Harv. L.Rev. 193, 193 [to similar effect].)" (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 81, fn. omitted.)

"[T]he right to be left alone . . . is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us." (Ballot Pamp., *supra*, text of Proposed Stats. & Amends. to Cal. Const., p. 27.)

"Fundamental to our privacy is the ability to control circulation of personal information. This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them." (Ballot Pamp., *supra*, text of Proposed Stats. & Amends. to Cal. Const., p. 27.)

This right to privacy "is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution. [It] should be abridged only when there is compelling public need." (Ballot Pamp., *supra*, text of Proposed Stats. & Amends. to Cal. Const., p. 27.)

The right to privacy also is reflected in other enactments. Thus, the Information Practices Act of 1977 (Civ. Code, § 1798 et seq.) includes express findings that "(a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies[;] [¶] (b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information[;] and [¶] (c) In order to protect the privacy of

individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits." (Civ. Code, § 1798.)

The right of privacy protects the individual's reasonable expectation of privacy. Whether a legally recognized privacy interest exists is a question of law for the court to decide. Whether the circumstances give rise to a reasonable expectation of privacy is a mixed question of law and fact for the court to decide. (*Hill v. National Collegiate Athletic Assn., supra,* 7 Cal.4th at p. 40.)

In a case concerning the right of householders not to receive advertising and solicitations by mail, the United States Supreme Court reiterated "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality[.]" (*Rowan v. Post Office Dept.* (1970) 397 U.S. 728, 737.) That court "has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property." (*Ibid*.) It held that a householder may circumscribe the right of a mailer to communicate with him "by an affirmative act of . . . giving notice that he wishes no further mailings from that mailer." (*Ibid*.; see also pp. 737-738 [receipt of commercial mail solicitations impingement of strong privacy interest not to be disturbed in citizen's home]; *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 357-359 [disclosure of names, addresses, and telephone numbers for contact implicates privacy interest in sanctity of home].)

To do less "would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit[.]" (*Rowan v. U.S. Post Office Dept., supra,* 397 U.S. at p. 737.)

A person's right of privacy as to his or her home includes the right to allow or prevent disclosure of the address of that home for the purpose of contact by mail. It also extends to disclosure of his or her unlisted telephone number to a stranger. Similarly, the individual may choose to limit the privacy intrusion by restricting not just the kind of contact permitted but also the potential number of contacts. Disclosure of the consumer's

name, address, telephone number, fax number, and e-mail address implicates this privacy interest.

Contrary to Olmstead's argument, the consumers in this case cannot be deemed to have given up privacy interests in their identifying information to others merely by contacting Pioneer about allegedly defective DVD players.

"Case law is clear that '"[w]aiver is the intentional relinquishment of a known right after knowledge of the facts." [Citations.] The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].' (*City of Ukiah v. Fones* (1962) 64 Cal.2d 104, 107-108 [48 Cal.Rptr. 865, 410 P.2d 369]; *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515] ['"'Waiver always rests upon intent.'"']; [citations].) The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. (*Brookview Condominium Owners' Assn. [v. Heltzer Enterprises-Brookview* (1990)] 218 Cal.App.3d [502,] 513.)" (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th 1, 31.)

Insofar as the record shows, the consumers who disclosed identifying information to Pioneer did so in order to communicate with that company about what they perceived as a defective product. Absent evidence to the contrary, and none is suggested, this was a specific and limited communication. It cannot be construed as a wholesale consent that Pioneer or anyone disseminate the information to third parties who seek it in order to contact consumers about litigation.

III

Pioneer, as custodian of the relevant documents, has standing to assert the privacy interests of its customers in the identifying information. (See *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 658.) We turn to the manner in which these privacy interests must be asserted. The touchstone is notice and opportunity to consent or object to release of the information.

Supreme Court decisions describe two ways in which this may be accomplished. One places the burden on the *privacy holder* to object, seek a protective order, or initiate other legal proceedings to protect his or her interest. (*Valley Bank of Nevada v. Superior Court, supra,* 15 Cal.3d 652 [*Valley Bank*].) The other places the burden on the *discovery proponent* to obtain the signed written authorization of the privacy holder. (*Colonial Life & Accident Ins. Co. v. Superior Court, supra*, 31 Cal.3d 785 [*Colonial Life*].) No authority has been cited to us that describes other possible alternatives, but that is not to say none exists.

As we shall discuss, neither *Valley Bank* nor *Colonial Life* involved the privacy interests of an individual in his or her name and identifying information and to be free from contact by others. The *Valley Bank* approach, which requires the consumer to affirmatively object to impingement of these privacy interests, makes perfect sense in the limited circumstances of that case, which involved a small number of persons whose identities already were known to the parties. It is inadequate when applied to a mass mailing to persons whose identities are not known by the party seeking discovery. The proposed mailing in this case would be to some 700 to 800 consumers.

Unless reasonable measures are taken to assure actual notice to these consumers, they will not be afforded a reasonable opportunity to object. Waiver of the fundamental right of privacy cannot be the product of inaction (failure to object) on the part of an unknowing consumer, because in the situation presented to us, the consumer has neither manifested an intent to waive this right, nor agreed that inaction be taken as consent. The *Colonial Life* approach, which requires a signed written authorization pursuant to the express provisions of the Insurance Information and Privacy Protection Act (Ins. Code, § 791 et seq.), is a reasonable way and probably the best way to assure actual notification. Nonetheless, as we shall discuss, it is not the only way.

In *Valley Bank*, the Bank sued the real parties in interest (real parties) for the balance allegedly due on a promissory note executed and delivered in connection with a $250,000 loan to those parties, who asserted a fraud defense. Real parties sought discovery of certain banking records of "seven named persons and corporations" and the

Teamsters Union. The Bank requested a protective order on behalf of these known individuals and entities. (§ 2019, subd. (b)(1).) The trial court ordered disclosure of the information subject to limitations as to time and particular financial transactions. (*Valley Bank, supra,* 15 Cal.3d at pp. 654-655.)

The Supreme Court pointed out that, unlike the case of a lawyer-client or physician-patient privilege, there is "no bank-customer privilege," and that under "existing law, when bank customer information is sought, the bank has no obligation to notify the customer of the proceedings, and disclosure freely takes place unless the bank chooses to protect the customer's interests and elects to seek a protective order on his behalf." (*Valley Bank, supra,* 15 Cal.3d at pp. 656-657.)

Nonetheless, the court concluded the Privacy Amendment's protection of "the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life." (*Valley Bank, supra*, 15 Cal.3d at p. 656.) The court stated that "'[a] bank customer's reasonable expectation is that, *absent compulsion by legal process*, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes.'" (*Valley Bank, supra,* 15 Cal.3d at p. 657, quoting *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 243.)

The court required that, in "[s]triking a balance between the competing considerations, . . . before confidential customer information may be disclosed in the course of civil discovery proceedings, the bank must take reasonable steps to notify its customer of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his [or her] interests by objecting to disclosure, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered." (*Valley Bank, supra*, 15 Cal.3d at p. 658; see also *Olympic Club v. Superior Court* (1991) 229 Cal.App.3d 358, 361, 365 [applying *Valley Bank* approach to "associational privacy interests"].)

The April 2004 order of the trial court approved Olmstead's version of the consumer letter, which purports to follow *Valley Bank*. In pertinent part, it would read: "If you do not agree to the disclosure of [your name and other identifying information for

the purpose of contact] to [Olmstead]'s counsel, please check the box on the enclosed form and return it to the address shown on the form. Not responding to this letter will be treated as agreeing to be contacted by [Olmstead's] counsel."

Based on their ongoing business relationship with the Bank, the small number of named customers in that case reasonably could be expected to open a letter from the Bank, and thus, obtain actual notice of the impending impingement upon their privacy and the opportunity to assert their privacy rights. No similar relationship exists between Pioneer and the 700 to 800 DVD consumers whose privacy interests are at stake in this case. Nor is there in place any safeguard to warn the consumers not to simply throw away unopened Pioneer's letters as junk mail, or against the prospect that the mail simply is not delivered. Under the trial court's proposed order, the inference of waiver would be without remedy, for the result would be disclosure of privacy protected personal identifying information.

Colonial Life involved an action against an insurer for bad faith settlement based in part on a claimed violation of the insurance unfair trade practices law. (Ins. Code, § 790.03, subd. (h).) "Section 791.13 [of the Insurance Information and Privacy Protection Act] prevents an insurance company from disclosing 'any personal or privileged information about an individual collected or received in connection with an insurance transaction. . . .'" (*Colonial Life, supra,* 31 Cal.3d at p. 792, fn. 10.) An exception exists if the individual's consent is obtained.

The court stated, "Without doubt, the discovery of the names, addresses and files of other . . . claimants with whom [the adjuster] attempted settlements is relevant to the subject matter of this action and may lead to admissible evidence." (*Colonial Life, supra,* 31 Cal.3d at p. 792, fn. omitted.) Discovery, however, would not be permitted absent the claimant's consent. In this regard, the court approved a procedure whereby the letter to be sent to the claimants would include, as required under Insurance Code section 791.13, an authorization form, which the claimants were to sign, date and return within a certain time. (*Ibid*.)

Waiver of the fundamental right of privacy (Cal. Const., art. I, § 1) cannot depend on what would amount, in effect, to a conclusive presumption that a letter from Pioneer, essentially a stranger, was received, opened and read, rather than disregarded as junk mail. (Cf. Evid. Code, §§ 630, 641 [presumption letter properly addressed and mailed is received in ordinary course of mail affects burden of providing evidence, not burden of proof].)

The April 2004 order is deficient because it infers waiver of the consumers' right of privacy without providing reasonable assurance that the consumers actually intended to waive that right, without any positive act by the consumer. Requiring an express consent from the consumer, rather than inferring waiver from passive conduct alone is appropriate in this case. This is so not only because of the importance of the rights but also because anything less would place a burden on consumers that they never agreed to bear. This deficiency was not, but could have been, remedied through other measures which would reasonably ensure the consumers receive actual notice and consent to disclosure of personal identifying information.

Trial courts are vested with discretion in addressing "[t]he variances of time, place, and circumstance which may invoke application of" the notice and opportunity requirements and may condition "'disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances.' [Citation.]" (*Valley Bank, supra*, 15 Cal.3d at p. 658.)[5]

Under the circumstances of this case, it was incumbent on the trial court to fashion a means of notification that assures that the consumer receive actual notice and, hence, an opportunity to assert his or her right of privacy before the consumer is deemed to have

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[5] We considered deciding, alternatively, that the court's order was an abuse of discretion without treating the constitutional issues. We invited counsel to respond to this alternative. They have done so, and we have considered their responses. We have decided not to rest our decision on this alternative ground because the *reason* that the order was an abuse of discretion is that it presented too great a risk of leading to a violation of the consumers' constitutional right of privacy.

given up that right. Requiring a signed written authorization from the consumer is consistent with established waiver principles and *Colonial Life*, and probably is the best means for accomplishing the objective of the notification.

So long as a specific, signed positive response from the consumer is required before personal identifying information about the consumer is released, the communication may be by straight mail or more formal means, such as certified or registered mail, or restricted delivery mail. (See U. S. Postal Service, Publication 123 [Consumer's Guide to Postal Rates and Fees], June 30, 2002.) The notification must not only inform the consumer of the right to waive or object to the release of personal identifying information, but also of the means of doing so. Waiver must depend on an affirmative manifestation of consent by the consumer, whether by written correspondence, email, facsimile, or other writing.

The requirement of actual notification and an affirmative reply as requisites to disclosure of personal identifying information is not burdensome. But they are essential to protection of the privacy interests safeguarded by the right to privacy. We require no more, but no less, than that.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its order allowing disclosure and contact if no response from the consumer; to conduct further proceedings; and to enter a new order consistent with the views expressed in this opinion. The alternative writ, having served its purpose, is discharged. Petitioner to have its costs pursuant to California Rules of Court, rule 56 (l)(1).

CERTIFIED FOR PUBLICATION.

EPSTEIN, P.J.

We concur:

HASTINGS, J.

CURRY, J.