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ENDORSED
FILED
Superior Court of California
County of San Francisco

FEB 11 2013

CLERK OF THE COURT
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

DELTA AIR LINES, INC.,

Defendant.

CASE NO. CGC 12-526741

Date: March 13, 2013
Time: 9:30 a.m.
Dept.: 302

Assigned To: Hon. Marla J. Miller

DEFENDANT DELTA AIR LINES, INC.'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[[Proposed] Order, Request for Judicial Notice, Appendix of Non-California Authorities, and Declarations of Kali Wilson Beyah, Jonathan D. Mayfield, and April S. Karnes Submitted Herewith]

Action Filed: December 6, 2012
Trial Date: None set

FAXED

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All work supervised by a member of the D.C. Bar.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on March 13, 2013, at 9:30 a.m. in Department 302 of the above-captioned Court, Defendant Delta Air Lines, Inc. ("Delta") will and hereby does demur to Plaintiff The People of the State of California's Complaint ("Complaint"), and each and every one of the causes of action alleged therein, for failure to state facts sufficient to constitute a cause of action. Cal. Civ. Proc. Code § 430.10(e).

This demurrer ("Demurrer") is based upon this Notice, the Demurrer, the Memorandum of Points and Authorities in Support Thereof and attached exhibits, the pleadings and papers on file herein, and on such further written submissions or oral argument as may be presented at or before the hearing on this Demurrer.

DEMURRER TO ALL CAUSES OF ACTION IN THE COMPLAINT

Delta hereby demurs to all causes of action asserted against it in the complaint on the following grounds:

First Cause of Action

The first cause of action for violation of Business and Professions Code § 17200, for engaging in unfair competition in violation of California Online Privacy Protection Act §§ 22575 and 22576, fails to state facts sufficient to constitute a cause of action. Cal. Civ. Proc. Code § 430.10(e).

Dated: February 11, 2013

Respectfully submitted,

LATHAM & WATKINS LLP

By _____
David J. Schindler
Attorney for Defendant Delta Air Lines, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

In this unprecedented action targeting Delta's delivery of services, route, and pricing information via its "Fly Delta" mobile application, the State broadly seeks to "permanently enjoin" a commercial airline "from committing any acts of unfair competition, including" violations of a unique state online privacy statute, the California Online Privacy Protection Act ("CalOPPA"). The State further asks the Court to order Delta "to pay Two Thousand Five Hundred Dollars ($2,500) for each violation" of California's unfair and deceptive trade practices statute (Cal. Bus. & Prof. Code Section 17200, or "Section 17200").[1] For several reasons, the Complaint should be dismissed as a matter of law without leave to amend.

First, notwithstanding the Complaint's weak attempt to plead around the issue, under the federal Airline Deregulation Act ("ADA"), the State cannot "enact or enforce a law . . . related to a ***price, route, or service*** of an air carrier." 49 U.S.C. § 41713(b)(1) (emphasis added). This prohibition clearly applies to state consumer protection statutes. As the U.S. Supreme Court has explicitly recognized, Congress was expressly concerned that a patchwork of enforcement standards for consumer protection issues would interfere with interstate commerce by creating significant economic and administrative burdens on air transportation. As a result, Congress prohibited states from engaging in such regulation and instead empowered the U.S. Department of Transportation ("DOT") to regulate unfair and deceptive trade practices by interstate airlines on a federal basis.[2] Even a cursory reading of the Complaint makes clear that the Fly Delta app is not only "related to" airline "price, route, and service[s]" (the prevailing legal standard for determining preemption) – but *Fly Delta is an essential tool in the sale and delivery of Delta's services*. Fly Delta publishes Delta's flight schedules along with rates and pricing for tickets

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[1] All statutory references herein are to the Business and Professions Code, unless otherwise indicated.

[2] The DOT regulates extensively the manner in which airlines post schedules, contracts of carriage, fees, and other consumer protection disclosures on their website. *See* Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,165 (Apr. 25, 2011) (requiring airlines to post consumer protection disclosures on their "website[s] in easily accessible form" and "prominently disclose [fees] on the first screen" of the website homepage). Given this detailed regulation of airlines' websites, if the DOT wanted to require privacy policy displays, there is no doubt that this would be within the DOT's purview.

available for sale, and it allows customers to book tickets and buy ancillary air transportation services.[3] Fly Delta further allows customers to select or change seats, check-in, obtain a boarding pass, pay baggage fees, and check flight status in real time. Indeed, the app transforms a handheld device into a ticketing/check-in/luggage kiosk and secure boarding pass, among other obvious airline "services." On the face of the State's Complaint, it is therefore clear that this action is preempted by the ADA, and that the Court lacks authority to order the requested sweeping "unfair competition" injunction or monetary fines based on the app.

Second, even if the ADA did not prohibit the State from regulating the manner in which Delta markets its interstate air transportation services, this action would fail as a matter of law because CalOPPA does not apply to Fly Delta. CalOPPA requires privacy policies to be posted on "commercial Web site[s] or online service[s]." § 22575(a). But Fly Delta is not a "Web site," and it does not qualify as an "online service" under the widely accepted definition of that term, which refers to a genre of computer services (such as America Online, Microsoft Network, and Prodigy) that provide customers with gateway access to online games, shopping, and the Internet more generally. The accepted definition of "online services" is reflected in dictionaries and court decisions contemporaneous with the enactment of CalOPPA in 2003, and there is no legal justification for the State's effort to redefine that term, years later, to encompass a new technology—mobile applications—that did not exist in 2003 and that the drafters of CalOPPA could not have envisioned or sought to regulate.

Third, even if offering a free mobile app somehow transformed Delta into an "online service" provider, a compliant privacy policy was readily available on handheld devices at Delta's mobile site (where the app is routinely downloaded) and at www.delta.com. A privacy policy must be "reasonably accessible" and (among other requirements) list the "personally identifiable information" ("PII") that is collected by the online service. Importantly, under California's unique PII definition, apart from certain listed identifiers, only data elements that are "*maintained* in personally identifiable form in combination with" contact information, or that can

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[3] The option to price and purchase tickets was added to Fly Delta following the filing of this action.

be used to physically contact the user, are PII. Fly Delta does not store the data elements listed in paragraph 13 (c) – (n) of the Complaint unless a user had previously visited delta.com to create a "My Delta" or SkyMiles account. On that page, *the privacy policy link is prominently displayed and express consent to storage of data in a profile is obtained.* The other two data elements alleged to constitute PII – geo-location data and photographs – do not meet the statutory definition of PII because neither are collected or maintained by Delta's servers and, more importantly, do not permit the contacting of an individual. Moreover, even if these two data elements were somehow construed to be PII, Fly Delta prompts users for "just in time" consent when the location features are utilized. In short, Delta met or exceeded California's unique statutory requirements for posting privacy policies.

Fourth, the Complaint fails to allege facts sufficient to demonstrate the requisite scienter for a violation of CalOPPA. As the correspondence cited in the Complaint makes clear, Delta had, and continues to maintain, a reasonable good-faith belief that the State cannot enforce consumer protection laws that relate to Delta's pricing, schedule, and services.[4] The Complaint is devoid of any allegations to negate Delta's good faith belief that the State lacks the authority to enforce its unique statute against an airline.

In the end, this action suffers from numerous fatal defects and reveals a questionable exercise of prosecutorial discretion:

- The request for an injunction is moot because Delta voluntarily posted a privacy policy in the app and app stores within days of receiving the State's inquiry, and the website policy more than adequately addresses every aspect of CalOPPA.
- The target for the State's first-ever prosecution of a violation of CalOPPA is a commercial airline, which has never been subject to this sort of state consumer protection enforcement since the enactment of the ADA in 1978.
- No one was harmed by the lack of an "in app" privacy policy notifying consumers of the obvious and unexceptional fact that information about themselves that they type into the app interface or click to "[a]llow" will be "collected" at their direction.

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[4] *See* Ex. 1 to the Declaration of Kali Wilson Beyah in Support of Defendant Delta's Demurrer ("Beyah Decl.") (attaching a true and accurate copy of Delta's correspondence).

Regardless of the State's motives for bringing this case, it fails as a matter of law, and Delta respectfully submits it must be dismissed.

II. STATEMENT OF FACTS

Delta is an air carrier "engaged in the business of providing commercial passenger air transportation throughout the United States and the world." (Compl. ¶ 6.) In the course of selling, promoting, and delivering these services, Delta operates a website available at www.delta.com, which links to Delta's privacy policy on the homepage. (*See id.* ¶¶ 10, 16; *see also* Ex. 2 to the Declaration of April S. Karnes in Support of Defendant Delta's Demurrer ("Karnes Decl.") (authenticating true and accurate copy of the privacy policy referenced and incorporated in Plaintiff's Complaint).) The privacy policy lists information collected from Delta consumers, how it is used and shared, the choices consumers have regarding collection, sharing and storage of their information, and many other fair information practices consistent with, and exceeding, the narrow categories of disclosures specified in CalOPPA. (Karnes Decl. Ex. 2.)

Delta released a mobile application in late 2010 in the Android and Apple "app stores" and through its World Wide Web-based "mobile" service in 2010.[5] Among other things, the app allows users to: check-in for a flight (Compl. ¶ 4); review flight schedules and currently available ticket pricing, and purchase tickets or ancillary services;[6] rebook cancelled or missed flights (*id.*); indicate seating preferences (*id.* ¶ 13); pay for checked baggage (*id.*); track checked baggage (*id.*); view upcoming reservations (*id.*); access a frequent flyer account (*id.*); locate convenient Delta Sky Clubs (*id.* ¶ 18); create a parking reminder by entering the location of a vehicle and storing a photograph of that location (*id.* ¶ 19); and communicate dietary requests or special medical needs prior to flying.[7] (*Id.* ¶ 13.)

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[5] *See* Mayfield Decl., Exs. 3-5 (attaching true and accurate images of the download screens a user would have seen had they navigated to Google Play, iTunes, or Delta.com as described in Complaint ¶¶ 10, 20).

[6] These features were added to Fly Delta following the filing of this action.

[7] *See* Mayfield Decl., Ex. 5 (attaching true and accurate images of Delta's website listing the myriad services Fly Delta provides).)

The Complaint alleges that Fly Delta "collects" certain data elements that allegedly constitute so-called "personally identifiable information" (a phrase defined in CalOPPA): name, address, email address, telephone number, geo-location data, photographs/parking reminder data, frequent flier account number and flight information, credit/debit card numbers and expiration dates, date of birth, gender, traveler number, travel company, emergency contact(s), seating preferences, medical needs and dietary requests, passport number, nationality and country of residence, corporate contract, and employer or affiliation.[8] (*Id.*) The Complaint does not address whether any of these elements were "maintained in personally identifiable form in combination with an identifier," as the statute requires. *See* § 22577(a). Nor does it identify which elements permit a person to be contacted physically or online (i.e., beyond name, address, telephone number and email, which clearly do). (*Id.*) The geo-location and parking reminder functions are accompanied by "just in time" disclosures requiring affirmative acceptance by end users of the collection or use of these data elements. (*See* Compl. ¶¶ 18-19; Mayfield Decl., Exs. 6, 7, attaching true and accurate copies of these Fly Delta user interfaces.) The app does not store or maintain the data elements listed in in paragraph 13 (c) – (n) unless a user previously created an account on delta.com. (*See* Mayfield Decl., p. 2.)

On that page, every user is presented with the following notice and choice and link to the privacy policy:

> **Save my Secure Flight Passenger Data**
> This check indicates your consent to store your Secure Flight Passenger Data consistent with our **privacy policy**. For Delta members, by checking this box, you also consent to Delta Air Lines, Inc. sharing your information with TSA to be considered for **TSA Pre✓™** at select TSA checkpoints.

(*See* Mayfield Decl., Ex. 8.)

On October 26, 2012, the State (through its Attorney General) wrote to Delta, stating "as we hope you are aware," CalOPPA requires the posting of a separate privacy policy on mobile applications, and that the letter constituted "30 days' notice as required by CalOPPA." (Compl.

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[8] Unless otherwise stated, the facts recited herein are drawn from the Complaint. Delta does not, by stating the allegations herein, concede their accuracy or validity. Delta assumes as true the facts contained in the Complaint solely for the purpose of assessing the legal sufficiency of its claims.

Ex. A.) On November 30, 2012, Delta responded, informing the State that although Delta believes the attempt to compel compliance with CalOPPA is preempted by federal law, Delta would voluntarily post a separate privacy policy on Fly Delta and elsewhere (which it did on December 7, 2012). (*See* Beyah Decl., Ex. 1.) The mobile policy was posted within the app on December 7, 2012. The State disregarded Delta's response and forged ahead with the instant complaint.

III. ARGUMENT

A. Standard of Review

The Court must sustain a demurrer when the complaint "does not state facts sufficient to constitute a cause of action." Cal. Civ. Proc. Code § 430.10(e); *see, e.g.*, *Munn v. Briggs*, 185 Cal. App. 4th 578, 584 (2010). When a plaintiff's claim is preempted, a demurrer should be sustained without leave to amend. *Miller v. Bank of Am.*, 170 Cal. App. 4th 980, 990 (2009). For the purpose of testing the sufficiency of the cause of action, the "demurrer is to be treated as admitting the truthfulness of all properly pleaded factual allegations of the complaint, but not contentions, deductions or conclusions of fact or law." *Porten v. Univ. of S.F.*, 64 Cal. App. 3d 825, 827-27 (1976); *see also Faulkner v. Cal. Toll Bridge Auth.*, 40 Cal. 2d 317, 329 (1953) ("[M]ere conclusions of law . . . are not to be deemed admitted . . . ."). The Court must consider not only the allegations in the complaint but also "any matter of which the court is required to or may take judicial notice." Cal. Civ. Proc. Code § 430.30(a); *see also Groves. v. Peterson*, 100 Cal. App. 4th 659, 667 (2002).

B. Federal Law Completely Preempts This State Attorney General's Consumer Protection Enforcement Action

The plain terms of the ADA and U.S. Supreme Court decisions interpreting the statute's broad preemption clause compel the conclusion that this action is preempted. Indeed, this action falls within the heartland of subjects that Congress sought to preempt under the ADA, which it enacted in 1978 after determining "that maximum reliance on competitive market forces would favor lower airline fares and better airline service." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008) (quotations and citation omitted). To "ensure that the States would not undo

federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting States from enacting or enforcing any law 'relating to [prices], routes, or services' of any air carrier." *Morales v. Trans World Airlines*, 504 U.S. 374, 378-79 (1992) (quoting 49 U.S.C. § 1305(a)(1)).[9] In particular, the ADA provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to a price, route, or service of an air carrier*." 49 U.S.C. § 41713(b)(1) (emphasis added). As Congress determined when it enacted the ADA, this scheme provides a "uniform system" of regulation for the benefit of airlines and consumers alike, as the legislative history of the ADA preemption provision confirms:

> In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R. Rep. No. 98-793, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2857, 2860.[10]

As California courts have affirmatively recognized, "(i)n its application of the ADA, the Supreme Court has twice emphasized the broad scope of the preemption provision." *Tanen v. Southwest Airlines Co.*, 187 Cal. App. 4th 1156, 1160 (2010) (quotations and citation omitted). First, in *Morales*, the Court held that the ordinary meaning of the ADA's key phrase "relating to" is a "broad one – to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with – and the words thus express a broad pre-emptive purpose." 504 U.S. at 383 (quotations and citations omitted). *Morales* held that the ADA bars States from prohibiting deceptive airline fare advertisements through general consumer protection statutes. *Id.* at 391. The Court invalidated a set of state-created airline guidelines that "quite obviously" related to airline fares, *id.* at 379, 387, and rejected the states' arguments that the ADA preempts states only from prescribing actual prices, routes or services, or that "only

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[9] 49 U.S.C. § 1305(a)(1) was recodified in 1994 (after *Morales*) as 49 U.S.C. § 41713(b)(1) to change the old regulatory era word "rate" to "price," with no substantive changes intended. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995).

[10] Consumer protection issues, such as information practices, are not ignored as a result of deregulation. Rather, the Act concentrates enforcement authority with the DOT. *See* H.R. Rep. No. 98-793, at 6, *reprinted in* 1984 U.S.C.C.A.N. at 2862.

state laws specifically addressed to the airline industry are preempted." *Id.* at 385-86.

In the second case, *Wolens*, a private party asserted claims against an airline in connection with its frequent flier program for allegedly violating Illinois' Consumer Fraud and Deceptive Businesses Act. 513 U.S. at 224-25. The Supreme Court rejected Illinois' attempt to avoid the broad preemptive reach of the ADA through an unsupportable "separation of matters essential from matters unessential to airline operations." *Id.* at 226 (quotations omitted). Notably, the Court defined "services" under § 1305(a)(1) as including "access to flights and class-of-service upgrades." *Id.* In the course of its analysis, the Court recognized that frequent flier programs obviously relate to both prices and services, and that it "need not dwell on the question" any further. *Id.*[11]

More recently, in *Rowe*, the Supreme Court reaffirmed the broad meaning of "services" in the context of federal trucking regulation, which contained a preemption provision virtually identical to the ADA. *Rowe* invalidated two state statutes that regulated the delivery of tobacco products because they directly substituted the state's "governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." 552 U.S. at 372 (quotations omitted). *Rowe*, therefore, "necessarily define[s] 'service' to extend beyond prices, schedules, origins, and destinations."[12] *Nat'l Fed'n of the Blind v. United Airlines, Inc.*, No. C 10-04816, 2011 WL 1544524, at *5 (N.D. Cal. Apr. 25, 2011)

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[11] The Ninth Circuit recently attempted to narrow the Supreme Court's broad interpretation of the ADA's preemption provision, holding that the legislative history suggests that "Congress intended the preemption language only to apply to state laws directly regulating rates, routes or services." *Ginsberg v. Northwest, Inc.*, 695 F.3d 873, 881 (9th Cir. 2012) (quotations omitted). The Supreme Court is currently considering whether to grant certiorari in *Ginsberg*. Notably, the court below in the opinion on appeal readily embraced *Wolens'* "clear distinction between the consumer fraud claim," which were preempted, and "actions that simply give effect to bargains offered by the airlines and accepted by airline customers." *Id.* at 878 (quotations and citation omitted).

[12] Ten years prior to the Supreme Court's holding in *Rowe*, the Ninth Circuit interpreted "services" narrowly, to refer to "the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-66 (9th Cir. 1998). *Charas* was a personal injury case, and held that the ADA did not preempt passengers "run-of-the-mill personal injury claims which did not affect deregulation. The *Charas* definition of 'service,' however, is called into question by [*Rowe*]." *Nat'l Fed'n of the Blind v. United Airlines, Inc.*, No. C 10-04816, 2011 WL 154424, at *5 (N.D. Cal. Apr. 25, 2011) (distinguishing *Charas*).

(quotations and citation omitted). In reaching that result, the Court reasoned that if—as the Supreme Court held in *Wolens*—"federal law pre-empts state regulation of the details of an air carrier's frequent flier program . . . it must pre-empt state regulation of the essential details of a motor carrier's system for picking up, sorting, and carrying goods." *Rowe*, 552 U.S. at 373.

Courts in California have followed the Supreme Court's lead. *Tanen* relied on *Morales*, *Wolens*, and *Rowe*, to hold a claim challenging Southwest Airlines' sale of gift certificates was preempted. *Tanen v. Southwest Airlines Co.*, 187 Cal. App. 4th 1156, 1159 (2010). The court defined "services" broadly: "Tanen's claims relate to 'services' because they concern Southwest's sale of gift certificates that can be used to purchase airline travel." *Id.*

These cases, coupled with Congress' express intent to prohibit states from regulating airlines, leave no doubt that the State lacks jurisdiction to enforce CalOPPA or Section 17200 to require Delta to post a separate privacy policy within the Fly Delta app. *See* § 41713(b)(1); *Morales*, 504 U.S. at 378-79. Ironically, even the California Attorney General has long recognized the broad preemptive reach of the ADA, as stated on its website notice to consumers:

> The United States Supreme Court has ruled that airlines are exempt from state false advertising laws. We are prohibited from bringing any action against airlines for false advertising and many other illegal practices. If you have a complaint about an airline, you should contact the United States Department of Transportation[.]

Office of the Attorney Gen., Cal. Dep't of Justice, *Services & Information: Airlines*, http://oag.ca.gov/consumers/general/airlines (last visited Feb. 8, 2013).

Seeking to compel Delta to comply with CalOPPA via Section 17200 is precisely the type of patchwork state-by-state meddling with airline services that Congress sought to preclude by concentrating consumer protection enforcement authority in the DOT. *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 777 (1st Cir. 1990). California courts also recognize that the ADA prohibits such patchwork regulation:

> [T]o interpret the ADA to permit states to impose their own requirements on the services Southwest offers nationally "could easily lead to a patchwork of state service-determining law, rules, and regulations," [which is] "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace."

Tanen, 187 Cal. App. 4th at 753 (quoting *Rowe*, 552 U.S. at 373). In a post-*Morales* letter

signed by then California Attorney General Lockyer, the National Association of Attorneys General ("NAAG") acknowledged that deceptive practice enforcement actions "in the sale of airline transportation services are not available to the States."[13]

Not surprisingly, federal district courts in other jurisdictions have held in the private plaintiff context that state law privacy claims similar to this claim are expressly preempted by the ADA.[14] *See In re Am. Airlines, Inc. Privacy Litig.*, 370 F. Supp. 2d 552, 563 (N.D. Tex. 2005) (privacy claims brought under Texas law are "expressly preempted because they relate to at least one of American [Airline's] services," which it defined as "items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself" (quotations and citation omitted)); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 315-16 (E.D.N.Y. 2005) (plaintiffs' data privacy claims brought against JetBlue under New York General Business law are preempted because the provision of reservations and sale of tickets is a service and "the communication of company policy concerning data collection and disclosure is reasonably necessary to the facilitation of reservations and ticket sales.").

The State's Complaint, in this case targeting the operation of Fly Delta, falls squarely within the terms of the ADA's broad preemption clause as interpreted by the Supreme Court. There is no question that Fly Delta "relat[es] to rates, routes, or services." Fly Delta acts as a personal Delta ticket counter, where passengers purchase tickets for travel, view reservations, check in, pay for luggage, upgrade seats, and access a host of other features. (Compl. ¶ 4.) The Supreme Court in *Wolens* defined airline "services" as "access to flights and class-of-service upgrades" – both services that Fly Delta offers. *Wolens*, 513 U.S. at 226. Fly Delta provides universal access to Delta promotions and services, and accordingly, falls within the Supreme Court's long settled interpretations of the "price, route and service" language. Indeed, Fly Delta does not merely have "a connection" with Delta's services; *it is Delta's "services."*

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[13] *See* Letter from Nat'l Ass'n of Attorneys Gen. to Sen. Trent Lott et al. (Sept. 8, 2000), *available at* http://hasbrouck.org/documents/NAAG-8SEP2000.pdf.

[14] Indeed, the area of privacy enforcement is particularly susceptible to a "crazy quilt" of inconsistent or even contradictory state by state legislative requirements. *See* Senate Committee on Judiciary, Analysis of Assembly Bill No. 68 ("AB 68") (2003-2004 Reg. Sess.), July 8, 2003.

The State seeks to ignore this action's direct bearing on Delta's "rates, routes, or services," by alleging, in conclusory fashion, that "CalOPPA does not relate to rates, routes or services of any air carrier," and "[a]ny effect of CalOPPA on airline rates, routes or services of air carrier is tenuous, remote or peripheral." (Compl. ¶ 28.) However, conclusory allegations and recitations of legal standards are insufficient to defeat a demurrer, *see Faulkner*, 40 Cal. 2d at 329, and that is also true in preemption cases. *See Ball v. GTE Mobilnet of Cal.*, 81 Cal. App. 4th 529, 540 (2000).

C. CalOPPA Does Not Apply to Fly Delta

Separate and apart from the fact that the putative claims are preempted, the Complaint also fails to state a claim under Section 17200 because Delta has not violated CalOPPA as a matter of law. CalOPPA requires privacy policies to be posted on "commercial Web site[s] or online service[s]." § 22575(a). Fly Delta indisputably is not a website, and the State incorrectly alleges that it qualifies as an "online service."

It is black-letter law that "[t]he words of a statute are to be interpreted in the sense in which they would have been understood at the time of the enactment." *People v. Cruz*, 13 Cal. 4th 764, 775 (1996); *see also Apple Inc. v. Superior Court*, No. 463305, slip op. at 9 (Cal. Feb. 4, 2013) (a statute will not accommodate technological innovation unless consistent with the statutory scheme). California courts apply the "familiar rule of statutory construction" that "technical terms are to be allowed their technical meaning and affect." *Yassin v. Solis*, 184 Cal. App. 4th 524, 531 (2010) (citing *In re Smith*, 88 Cal. App. 464, 467 (1928)); *see also* 2A Singer & Singer, *Sutherland Statutes and Statutory Construction* § 47:29 (7th ed. 2007) ("[T]echnical terms or terms of art used in a statute are presumed to have their technical meaning.").

When CalOPPA was enacted, "online service" had a well-understood technical meaning. The nation's leading telecommunications dictionary defined "online service" as "[a] commercial service that gives computer users (i.e. its customers) access to a variety of online offerings such as shopping, games and chat rooms, *as well as access to the Internet.* America Online and Microsoft Network (MSN) are examples of an online service." *Newton's Telecom Dictionary* 837 (26th ed. 2004) (emphasis added); *see also, e.g., Webster's New World Computer Dictionary*

262 (10th ed. 2003) ("[a] for-profit firm that makes current news, stock quotes, and other information available to its subscribers. . . . The rise in public Internet greatly reduced the market for online services; the leading services (including AOL) reconfigured themselves as Internet service providers (ISP)."); *Random House Personal Computer Dictionary* 393 (3rd ed. 1999) ("[a] business" that provides "an infrastructure in which subscribers can communicate with one another, either by exchanging e-mail messages or participating in online conferences (forums)" and allows "subscribers" to connect with "third-party information providers" to get "stock quotes, news stories hot off the wire, articles from many magazines and journals"). This established technical meaning of "online service" was also reflected in a variety of judicial decisions using that term.[15]

Unlike an "online service," Fly Delta does not give users access to the Internet; nor does it otherwise serve as a gateway platform by which customers can access news, shopping, and games provided by third-party businesses. It is not in any way analogous to America Online, Prodigy, Microsoft Network, CompuServe, or the other "online services" envisioned by CalOPPA's drafters and, therefore, is not subject to CalOPPA's requirements as a matter of law.

D. Even if Fly Delta Was an Online Service, Delta Has Not Violated CalOPPA Because Any Required Disclosures Were "Reasonably Accessible" to California Consumers

The State incorrectly conflates distinct statutory requirements for the posting of privacy policies. (*See* Compl. ¶¶ 23, 24.) Operators of a website are required to "conspicuously post," while operators of an "online service" may post using "any other reasonably accessible means." §§ 22575(a), 22577(b)(5). As an alleged operator of an online service, Delta would only be required to post a "reasonably accessible" privacy policy – which Delta had. Delta's privacy policy disclosed the categories of personal information that Delta collected, the categories of third-party-persons with whom Delta may share that information, the process available for reviewing and requesting changes, the process for notifying consumers of material changes, and

[15] *See, e.g., Green v. Am. Online*, 318 F.3d 465, 469 (3d Cir. 2003); *Charles E. Hill & Assocs., Inc. v. Amazon.com*, No. 2:02-CV-186, 2005 WL 2488715, at *1 (E.D. Tex. Oct. 7, 2005); *ACLU v. Reno*, 929 F. Supp. 824, 833 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

the effective date.[16] Any California consumer who downloaded the app, and certainly any consumer transmitting information to Delta via the app, had ready online access to delta.com, and was directed to and interacted with that site in the ordinary course of using the app. Indeed, the Complaint alleges specifically that "the Fly Delta app can be obtained from . . . http:www. delta.com/content/www/en_US/ mobile.html." (*See* Compl. ¶ 10.) Any consumer downloading the app from delta.com navigated to that page from the homepage, where the policy is not only reasonably accessible, but also 'conspicuously' posted as CalOPPA requires. On this basis alone, the Complaint fails.

Moreover, most of the fourteen data elements alleged in Paragraph 13 of the Complaint to be "collected" cannot meet CalOPPA's unique statutory definitions of PII. Pleading a legal conclusion that a particular data element is PII is not adequate to survive a demurrer. *See Faulkner*, 40 Cal. 2d at 329. To qualify under CalOPPA's unique definition of PII, triggering the need for a posted policy, a data element must either: (a) "permit[] the physical or online contacting of a specific individual" or be "maintain[ed] in personally identifiable form in combination with an identifier." § 22577(a)(6), (7). The State failed to plead, and cannot plead, these necessary factual allegations. The Fly Delta app will only "maintain" (as opposed to merely use) the data elements listed in Complaint paragraph 13(c) - (n) (name, contact data, TSA data, gender, date of birth, etc.) if a user had previously visited delta.com to "create an account." If a user did not previously create an account, or "My Delta" profile on delta.com, it is functionally impossible for the app to maintain these data elements – which a user can only input on delta.com. (*See* Mayfield Decl., p. 2.) And except for obvious identifiers such as name and contact information, data that is collected but not "maintained" does not constitute PII under the plain language of CalOPPA.

The only two elements not fully addressed in the delta.com policy are geo-location and parking reminder data. (*See* Compl. ¶¶ 13(a), 13(b), 18, 19.) Neither meets the statutory definition of PII. First, as alleged (and in practice), neither permits the physical or online

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[16] The court may take judicial notice of the privacy policy and other pertinent content on available at http://www.delta.com, which is referenced in the Complaint at paragraph 10.

contacting of an individual. Second, as alleged (and in practice) neither is "maintained in personally identifiable form in combination with [a statutory]... identifier," such as name or contact information. Third, even if these two elements were PII, the required information practices were plainly stated within the app itself via "just in time" disclosures. (*See* Mayfield Decl., Exs. 6, 7.) Fly Delta did not access geo-location or parking reminder data except in response to an explicit user direction to execute this function. (*See id.*) These in-app notices are therefore reasonably accessible, *see* § 22575(a), identify what is collected, *see* § 22575(b)(1), inform the consumer what actions Delta will take, *see* § 22575(b)(2), (3), and are effective the moment they appear on the screen and the user accepts or declines the request/service. *See* § 22575(b)(4).

E. The Section 22576 Claim Must be Dismissed For Failure to Plead Any Facts Showing Delta Violated Its Posted Privacy Policy

The Complaint states no facts to support the bare conclusion that Delta failed to comply with its own website privacy policy. (*See* Compl. ¶¶ 25, 26, 30(b).) The Complaint alleges Delta's website policy did not mention two data elements collected via the application, (*see id.* at ¶ 17), but simply failing to list a data element does not mean Delta failed to "comply" with its posted policy. The Complaint fails to allege a single fact to support such an allegation. (*See id.* at ¶ 26.) The posted policy stated "[t]he types of information you provide to us voluntarily, from your browser *and from transactions with Delta* . . . include, *but are not limited to* . . . ." (*See* Karnes Decl., Ex. 2 (listing specific categories) (emphasis added).) The Complaint does not plead any ways in which Delta did not observe practices stated in its policy, and therefore the allegation fails as a matter of law to state a violation of CalOPPA or Section 17200.

F. The State Pleads No Facts to Support the Required Scienter Element of Section 22576

To maintain a claim under Section 22576, the State must prove that Delta possessed the requisite mental state. The scienter allegations are predicated entirely upon the fact that the State wrote to Delta in late October 2012. (*See* Compl. ¶¶ 22, 24.) In that letter, the State asked Delta "why you believe this app is not covered by CalOPPA." (*Id.*) Delta's response, that the ADA

preempted the enforcement of such laws, confirmed Delta's reasonable good-faith belief that CalOPPA and Section 17200 did not apply.[17] (*See* Beyah Decl., Ex. 1.) Delta's good-faith belief negates the scienter requirement (whether willful, negligent, or otherwise) and the State has plead no facts to show otherwise. *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70, n. 20 (2007) (objectively reasonable interpretation of a statute defeats scienter); *Stark v. Superior Court*, 52 Cal. 4th 368, 402 (Cal. 2011) (willfulness lacking if good faith belief present).

IV. CONCLUSION

For the foregoing reasons, Delta respectfully submits that the demurrer should be sustained without leave to amend because under applicable substantive law there is no reasonable possibility that amendment could remedy the Complaint's numerous defects. *Dalton v. East Bay Mun. Utility Dist.*, 18 Cal. App. 4th 1566, 1570-71 (1996).

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Respectfully submitted,

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[17] Delta's good faith belief is further underscored not only by the State's own website (Office of the Attorney Gen., *supra,* at 9.) but also by the failure of California's own Office of Privacy Protection to articulate, or even contemplate, any legal requirement for apps to post privacy policies. In its definitive compliance guide for companies, published *after* the 2007 introduction of "app store" technologies, the State makes no reference to the need for mobile applications to consider or apply CalOPPA, and offers no guidance on how they might reasonably or meaningfully do so. Cal. Off. of Privacy Prot., *Recommended Practices on California Information-Sharing Disclosures and Privacy Policy Statements* (Apr. 2008), *available at* http://www.privacy.ca.gov/business/infosharing.pdf.