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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 REPLY MEMORANDUM IN SUPPORT OF THE PENDING DEMURRER

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

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1 I. INTRODUCTION

2 The State's Opposition to Demurrer rests on a fundamental misunderstanding of the
3 scope and purpose of the Airline Deregulation Act ("ADA") and of multiple Supreme Court
4 cases clearly barring state consumer protection enforcement actions pursuant to the ADA's broad
5 preemption provision. Congress and the Supreme Court have made clear that state-by-state
6 "disclosure regimes" akin to what the State advances here are prohibited under the ADA.
7 The State has not identified – nor has Delta located – a single post-airline deregulation
8 legal precedent for a State Attorney General successfully enforcing a state consumer protection
9 law against a commercial airline – and for good reason. Unfair competition and consumer
10 protection statutes such as Cal. Prof. and Bus. Code § 17200 and the California Online Privacy
11 Protection Act ("CalOPPA") regulate and affect markets and competition, and are therefore at
12 the heart of the congressional determination to vest exclusive authority in a single federal agency
13 to regulate how a commercial airline provides information and *communicates with* consumers
14 about its fares, schedules, and services.[1] Congress expressly intended that regulatory burdens on
15 air carriers, if any, would be imposed uniformly via the DOT. Even if the DOT has not
16 promulgated a specific rule requiring the posting of a privacy policy on an airline's mobile app,
17 this does not open a door, or create some gap, into which fifty states and their attorneys general
18 may rush to enact and enforce state-specific rules.
19 Moreover, even if CalOPPA could be applied to an air carrier, this free mobile app does
20 not meet the statutory definition of an online service. Indeed, the very statutory construction of
21 an "online service" advanced by the State – encompassing any program or app that includes
22 personal information sent through the Internet – is precisely the standard originally rejected as
23 too vague and burdensome. Furthermore, even if Fly Delta is deemed an online service, Delta's
24 privacy policy was, and is, "reasonably accessible" as a matter of law to every Fly Delta user at
25 Delta.com. Finally, the State has not provided any support for its contention that the Parking
26 Reminder and Delta Sky Club functions collect personal information, as defined in the law.
27 Because the State cannot cure the Complaint's myriad defects, Delta respectfully submits
28

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

that it should be dismissed without leave to amend.

II. ARGUMENT

A. This Action is Completely Preempted by Federal Law Because CalOPPA Impermissibly Subjects Delta to a Patchwork of State Regulation

The State has not identified any controlling legal support for its attempt to enforce CalOPPA or Section 17200 against an air carrier. Moreover, it ignores settled and controlling precedents that bar enactments or enforcement actions "relating to [prices], routes, or services," and further ignores clear Supreme Court precedent that "relating to" is a "broad phrase" that must be given effect "even if a state law's effect on rates, routes or services 'is only indirect.'" *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 386 (1992)). Put simply, Congress gave the DOT – not the states – authority to regulate airline websites, privacy policies, and information practices.

The State correctly observes that "[i]n order to understand the scope of the ADA's preemption, it is key 'to determine what Congress intended to achieve when it enacted the ADA.'" (Opp'n at 4 (citing *Ginsberg v. Northwest, Inc.*, 695 F.3d 873, 875 (9th Cir. 2012)).) Yet the State creatively omits any reference to Congress' clear intent to shield airlines from a "state regulatory patchwork." *Rowe*, 552 U.S. at 373; *see also Tanen v. Southwest Airlines Co.*, 187 Cal. App. 4th 1156, 1170 (2010).

The State's position would inevitably result in a prohibited patchwork of "disclosure regimes" and unfair and deceptive practice enforcement actions that would vary from state to state and impose cumulative regulatory and enforcement burdens on air carriers – precisely what the ADA was intended to prevent. *See* H.R. Rep. No. 98-793, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2857, 2860 (state regulation would be "confusing and burdensome to airline passengers, as well as to the airlines"). Indeed, the preemptive reach of the ADA is well-known to the California Attorney General, as its own website explicitly advises consumers, *and Delta*, that consumer protection claims such as "false advertising and many other illegal practices" are preempted by federal law.[2] The State makes no effort to explain the inconsistent position it takes

[2] Office of the Attorney Gen., Cal. Dep't of Justice, *Services & Information: Airlines*, http://oag.ca.gov/consumers/general/airlines (last visited Mar. 6, 2013).

with this Court. There is no meaningful distinction between a consumer protection action targeting "false advertising" claims and a consumer protection action targeting alleged violations of state privacy disclosure requirements in an airline's consumer marketing practices.[3]

The ADA explicitly prohibits fifty states from regulating critical business operations like Delta's ability to collect and handle customer information and communicate with customers. Far from "merely a disclosure regime" that allegedly does not "target or substantially affect" the economics of the regulated businesses (Opp'n at 1), privacy regulation is trade regulation.[4] Patchwork laws with unique definitions and compliance requirements (such as CalOPPA) create economic costs, burdens, and impediments to cross-border trade and innovation. These burdens have prompted the White House, Department of Commerce, and FTC to advocate for uniform national – not individual state – privacy laws, and "interoperable" regulatory regimes.[5] The State's position that this consumer protection enforcement action relating to privacy practices is "more like statutes regulating traditional police power over gambling, prostitution or obscenity, than the targeted transportation laws at issue in [*Morales*, *Rowe*, *or Wolens*]" is wrong. (Opp'n at 6.) *Morales* and *Wolens* did not discuss or reject state "transportation laws," but rather, state consumer protection laws just like Section 17200. *See Morales*, 504 U.S. at 378; *Am. Airlines v. Wolens*, 513 U.S. 219, 227 (1995).

The State also proposes that the preemptive effect of the ADA should apply only if Fly Delta was "essential" to Delta's business. (Opp'n at 9.) But this novel "test" for preemption

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[3] Apparently, the State still has not read its statute closely. The law has no requirement to disclose "how [PII] is used," as the State contends. (Opp'n at 9.) In this and other regards, Delta's voluntary actions exceed California's unique take on fair information principles.

[4] *See* Maureen Ohlhausen, Commissioner, FTC, Speech Before the Hudson Institute: The Government's Role in Privacy: Getting it Right (Oct. 16, 2012) ("[N]ew privacy restrictions may have an effect on competition by favoring entrenched entities that already have consumer information over new entrants who need to obtain such information, or encouraging industry consolidation for purposes of sharing data."), http://www.ftc.gov/speeches/ohlhausen/121016governmentrole.pdf.

[5] *See* U.S. Dept. of Commerce, *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework,* Dec. 2010, *available at* http://www.ntia.doc.gov/files/ntia/publications/iptf_privacy_greenpaper_12162010.pdf; FTC, *Protecting Consumer Privacy in an Era of Rapid Change*, Mar. 2012, *available at* http://www.ftc.gov/os/2012/03/120326privacyreport.pdf (noting compliance with different data privacy rules burdens business because consumer data must be transferred between jurisdictions in the ordinary course of operations); White House, *Consumer Data Privacy in a Networked World,* at 37, Feb. 2012, *available at* http://www.whitehouse.gov/sites/defaultfiles/privacy-final.pdf ("Nationally uniform consumer data privacy rules are necessary to create certainty for companies and consistent protections for consumers.").

1 flies in the face of settled ADA doctrine[6]: a statute may be preempted even if it has an indirect
2 impact on a service "*unessential* to airline operations." *Wolens*, 513 U.S. at 226 (emphasis
3 added); *see also Tanen*, 187 Cal. App. 4th at 1165-66 ("pre-emption may occur even if a state
4 law's effect on rates, routes or services 'is only *indirect*'") (emphasis added) (citing *Rowe*, 552
5 U.S. at 370-71). As the State observes, Fly Delta functions as an efficient and innovative
6 mechanism for the publication to consumers of its schedules and fares, as well as a mobile ticket
7 counter, which provides consumers with access to an array of services offered by Delta. (Compl.
8 ¶ 4) (Opp'n at 9-10.) Nevertheless, the State blithely contends that Delta could lawfully be
9 subject to fifty different State regulations because the mobile app is not "essential" to flying
10 airplanes. Under this logic, a state could regulate the way an airline advertises its fares and
11 schedules, issues boarding passes to its customers via airport kiosks, accepts bookings over its
12 telephone reservation lines, and interacts with customers at airport ticket desks. None of those
13 marketing channels are any more "essential" than the Fly Delta app, but all are equally important
14 channels for Delta's delivery of information and services to its customers. The seminal Supreme
15 Court cases make it clear that a state may *not* regulate an air carrier's marketing practice through
16 any of these channels. Just as state regulation of airline kiosks is preempted under the ADA,
17 attempts to regulate a mobile ticket counter like Fly Delta is precisely the type of stifling
18 regulation the ADA sought to prohibit.[7] *See Nat'l Fed'n of the Blind v. United Airlines, Inc.*, No.
19 C 10-04816, 2011 WL 1544524, at *1-2 (N.D. Cal. Apr. 25, 2011).

20 The State's narrow reading of the statute and the phrase "relating to" is also patently
21 incorrect. No "targeted or substantial[] affect" on services is required.[8] (Opp'n at 1.) The

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[6] As the State notes at footnote 4, when Congress made technical amendments to the ADA's preemption provision, Congress stated that it intended no substantive change in the statute. *See* Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). By reenacting the ADA without change, Congress adopted the broad preemption interpretation established in *Morales*. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 n. 4 (2004) (citation omitted).

[7] The United States filed a Statement of Interest in *Nat'l Fed. of the Blind* arguing that the ADA expressly preempts state law claims relating to kiosks. Statement of Interest By the United States at 1 & 2, *Nat'l Fed'n of the Blind*, 2011 WL 1544524. This interpretation, which reflects the view of the DOT, is entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[8] The state's reliance on the Ninth's Circuit narrow definition of "service" in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-66 (9th Cir. 1998) is unavailing. After spending four pages of its opposition relying on this definition, the State concedes that "some courts have called into question

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1 preemptive language used by Congress in the ADA "express[es] a broad pre-emptive purpose," 2 has a "broad scope" and "expansive sweep," and is both "deliberately expansive" and 3 "conspicuous for its breadth." *Morales*, 504 U.S. at 383–84.

4 This case is no different than *Wolens*, where the service at issue was an airline's frequent 5 flyer program, and *Tanen*, where the service was the distribution of airline gift certificates. *See* 6 *Wolens*, 513 U.S. at 221; *Tanen*, 187 Cal. App. 4th at 1160. Fly Delta has an even greater 7 connection to Delta's prices, routes, and services than frequent flyer miles or a gift certificate 8 because it gives customers the ability to search Delta's schedules, check flight status, check-in 9 for a flight, rebook flights, get a boarding pass, pay for baggage and much more. (Compl. ¶ 4.) 10 Even more so than the frequent flyer programs at issue in *Wolens* and *Morales*, the Fly Delta app 11 is directly and inextricably related to the marketing of Delta's air transportation services.

12 The cases relied upon by the State to avoid preemption are easily distinguishable: With 13 one exception pertaining to physical access, none of the cases cited by the State involve 14 consumer protection statutes, much less a state attorney general attempting to apply a specific 15 "disclosure regime" to an air carrier. In contrast, numerous courts have held Section 17200 and 16 consumer protection claims – just like this one – are preempted.[9] *Wolens* completely eliminated 17 any ambiguity as to whether instrumentalities of the State of California (here, the Legislature, the 18 Court, *and* the Attorney General) can impose their own "binding standards of conduct that

19 20 the validity of *Charas'* definition of service." (Opp'n at 8 (citations omitted).) *See Nat'l Fed'n of the Blind*, 2011 WL 1544524, at *5 (distinguishing *Charas*, 160 F.3d at 1265-66, and noting it conflicts with *Rowe*, 552 U.S. at 378).

21 22 23 24 25 26 27 28 [9] *See, e.g.*, *Wolens*, 513 U.S. at 227 (Illinois Consumer Fraud and Deceptive Practices Act); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 541 (7th Cir. 1993) (same); *Galieo Int'l, LLC v. Ryanair, Ltd.*, No. 01-2210, 2002 WL 314500 at *1, *7 (N.D. Ill. Feb. 27, 2002) (same); *Morales*, 504 U.S. at 378 (numerous state consumer protection statutes); *Haley Hill Designs, LLC v. United Parcel Serv., Inc.*, No. 09-4212, 2009 WL 4456209 at *1 (C.D. Cal. Nov. 23, 2009) (Section 17200); *Butler v. United Air Lines, Inc.*, No. C 07-04369 CRB, 2008 WL 1994896 at *7 (N.D. Cal. May 5, 2008) (Section 17200 and other California consumer protection statutes); *In re Am. Airlines, Inc. Privacy Litig.*, 370 F. Supp. 2d 552, 563 (N.D. Tex. 2005) (numerous state deceptive practices and privacy laws); *In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 315-16 (E.D.N.Y. 2005) (same under New York consumer protection statutes); *In re Northwest Airlines Privacy Litig.*, No. 04-126, 2004 WL 1278459, at *3-4 (D. Minn. June 6, 2004) (same under Minnesota Deceptive Trade Practices Act); *Copeland v. Northwest Airlines Corp.*, No. 04-2156, 2005 WL 2365255 at *3 (W.D. Tenn. Feb. 28, 2005) (same under Tennessee Consumer Protection Act); *Brownstein v. Am. Airlines*, No. C-05-3435, 2005 WL 2988720 at *5 (N.D. Cal. Nov. 7, 2005) (Section 17200); *Tanen*, 187 Cal. App. 4th at 1159, 1166-73 (Section 17200 and other California consumer protection and information disclosure statutes); *Fitz-Gerald v. SkyWest Airlines, Inc.*, 155 Cal. App. 4th 411, 423 (2007) (Section 17200).

1 operate irrespective of any private agreement" in the area of unfair and deceptive practices.
2 *Wolens*, 513 U.S. at 229 n.5. As simply stated there, "states may not seek to impose ***their own***
3 ***public policies or theories of competition or regulation*** on the operations of an air [or motor]
4 carrier." *Id* (emphasis added). The Court further reasoned:

5 the [Federal Aviation Act]'s saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from
6 affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between ***what the State dictates*** and
7 what the airline itself undertakes confines courts, in breach-of-contract actions to the parties' bargain, with no enlargement or enhancement based on state laws or
8 policies external to the agreement.

9 *Id.* at 232-33(emphasis added). Here, the State cannot itself dictate, and have its Attorney
10 General enforce through this Court, a state law regulating an airline's communications with
11 consumers under Section 17200.[10]
12 The DOT – not state legislatures or attorneys general – is empowered with regulating
13 airline websites, privacy policies, and information practices. The State may be "unaware of any
14 effort by DOT to regulate privacy of Web sites" (Opp'n at 8 n.7), but in fact (as a search would
15 disclose) the DOT has adjudicated unfair competition claims alleging that an airline violated its
16 own website privacy policy.[11] The DOT's active aviation consumer protection unit enforces[12]

17 [10] The State materially exaggerates the scope and import of the February 2012 document it labels a
18 "Mobile Principles Agreement." (Opp'n at 15 n.9.) The document is explicitly not an agreement and specifically states "[t]his Joint Statement is not intended to impose legally binding obligations on the
19 Participants or affect existing obligations under law." Office of the Cal. Attorney Gen., *Joint Statement of Principles* (Feb. 22, 2012), *available at* https://oag.ca.gov/system/files/attachments
20 /press_releases/n2630_signed_agreement.pdf. Mobile Apps Market Companies such as Apple which signed the Joint Statement of Principles did not agree with or adopt the Attorney General's "opinion"
21 that CalOPPA required apps to conspicuously post a privacy policy, and the only pertinent "principle" is qualified by the statement "[w]here applicable law so requires." *Id.* Delta reasonably
22 believed and believes that the State Legislature, chief law enforcement officer, and state courts are preempted from applying CalOPPA or Section 17200 to its communications with consumers, and that
23 it has, in any event, voluntarily met or exceeded CalOPPA's standards.

[11] *See* Order Dismissing Complaint 2004-9-13, *Third-Party Enforcement Complaint of the Electronic*
24 *Privacy Information Center Against Northwest Airlines, Inc.*, No. OST-2004-16939-10, 2004 WL 2049588, at *8 (D.O.T. Sept. 10, 2004), *aff'd*, Order Affirming Dismissal of Complaint, 2005-3-9
25 (Mar. 7, 2005) (the DOT has the "ability to ensure that the airlines comply with their privacy commitments"). The same claim alleging the airline violated its privacy policy was dismissed as
26 preempted by two Article III courts. *See supra Copeland v. Northwest Airlines Corp.* and *In re Northwest Airlines Privacy Litig.* at n.9.

27 [12] *See, e.g.*, Consent Order 2012-1-1, *AirTran Airways, Inc.*, No. OST 2012-0002, 2012 WL 1048310 (D.O.T. Jan. 4, 2012) (unfair and deceptive advertising practices online); Consent Order 2011-6-1,
28 *Continental Airlines, Inc.*, No. OST 2011-0003, 2011 WL 2168864 (D.O.T. June 2, 2011) (unfair and deceptive fare display on website); Consent Order 2011-2-5, *Virgin America, Inc.*, No. OST 2011-

specific terms: "commercial Web site" and "online service." Each had – and has – a settled technical meaning. Delta's definition of "online service" is not "frozen in time" as the State suggests. (Opp'n at 13.) New technologies abound which readily meet the longstanding technical meaning of "online service."[14] The Newton definition in the 2011 edition is exactly the same as the 2004 edition, both of which define it 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." *Newton's Telecom Dictionary* 837 (26th ed. 2011); *Newton's Telecom Dictionary* 597 (20th ed. 2004).

The State points to no cognizable legal sources or dictionaries that state "online service" means an app or program that sends or receives information through the Internet, or even that "online" modifies "service." Neither the Notice of Proposed Rulemaking from the FTC,[15] nor the four unpublished federal district court opinions,[16] can obscure the plain fact that the term "online service" had and has a technical, distinct meaning, that is not satisfied by the mere fact that a program or app sends and receives information, including personal information, over the Internet. Had the legislature intended "online service" to sweep in all programs or apps that involve the collection of consumer PII, it could have kept the 2002 definition as involving any operator or program that sends or collects information through the Internet. But it did not do so.

The State also contends that having a privacy policy available at Delta.com cannot meet the statutory requirement to post a policy, because a user cannot "technically . . . navigate from within the app to any privacy policy." (Opp'n at 14.) This interpretation – found nowhere in the

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[14] For example, a post-CalOPPA service called Microsoft Xbox-Live, http://www.xbox.com/ en-US/live (last visited Mar. 6, 2013), and other proprietary, networked subscription services offering games, communication tools and access to many other entertainment features would be an example of a post-CalOPPA "online service."

[15] FTC proposed or enacted rules under COPPA should have no relevance or application for air carriers, just as state enacted consumer protection laws do not. *See* 15 U.S.C. § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, *except . . . air carriers and foreign air carriers* subject to the Federal Aviation Act . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce) (emphasis added).

[16] Rather than evidencing a "broad and developing definition of online service," as argued in its Opposition, the unpublished cases contain stray textual references (i.e., search hits), not relevant factual analysis or holdings. If anything, they illustrate the durability and relevance of the Newton and other dictionary references. (Opp'n at 13.)

statute – is unsupportable. Any smartphone user merely must press a "Home" button to return to the home screen, thereby quitting or changing apps, in order to quickly access Delta.com. This is *per se* "reasonable." Furthermore, the State's view that the policy must be posted "conspicuously" *within* the "online service" is directly contradicted by the plain language and legislative history. Following Governor Davis' veto, the version of CalOPPA that ultimately became law "clarif[ied] that the operator of an online service who makes a privacy policy reasonably accessible has complied with the conspicuous posting" requirement. *See* Analysis of Assembly Bill No. 68 (2003-2004 Reg. Sess.), Sept. 5, 2003. With this legislative background, the proper interpretation of the posting requirement is that it must be "reasonably accessible," not that it must appear separately in the mobile app. There is no statutory requirement, or legislative history to support an interpretation requiring that only a policy "within" an "online service" is "reasonably accessible." Delta has always had a policy and it has always been posted where a consumer can find it, on the Delta homepage, or as the first result in a simple Internet search query for Delta Privacy Policy.[17] If – as the State must argue – the app is an "online service" simply because it transmits data "over" the Internet, then the smartphone user's "online" access to the Delta.com homepage privacy policy satisfies any requirement of reasonable accessibility.

C. The "Delta Sky Club Near You" or "Parking Reminder" Options Do not Involve the Collection of "Personally Identifiable Information"

The State fails to address how the "Parking Reminder" or "Delta Sky Club" options involve the collection of "personally identifiable information," a defined statutory term. A piece of information collected from a consumer does not become PII simply because the State holds that opinion. It is for the Court to apply CalOPPA's PII definition, which lists only five data elements that are PII as a matter of law: name, address, email address, telephone number, and social security number. Beyond these listed identifiers, only an "identifier that permits the

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[17] Delta also posted a privacy policy on Fly Delta and in app stores by December 7, 2012, mere days after the State initiated this action. Therefore, this action is essentially moot other than the State's request for some sort of sanction for a putative violation even though Delta posted a privacy policy and not a single consumer was harmed.

1 physical or online contacting of a specific individual" constitutes PII.[18] No allegations about
2 "physical or online contacting" are made in the Complaint, nor could they reasonably be made.
3 A picture of a parking spot does not permit the physical or online contacting of an individual, nor
4 does activation or use of the "Delta Sky Clubs Near You" or "Parking Reminder" option.[19]
5 The State seems to suggest that Delta representatives are lying in wait for passengers to
6 return to the parking lot in order to achieve "physical contact," or that Delta could "contact" or
7 identify someone in the San Francisco area (with a population of over seven million) by virtue of
8 the ordinary operation of the Delta Sky Club Near You feature, or that a global air carrier with
9 hundreds of flights daily can identify a specific individual from a photo of a parking spot.

10 **III. CONCLUSION**

11 Because neither the State's properly asserted facts nor the remaining conclusory
12 allegations adequately state causes of action that are not defeated by preemption and statutory
13 construction arguments, the Complaint must be dismissed. *Schauer v. Mandarin Gems of Cal.,*
14 *Inc.*, 125 Cal. App. 4th 949, 960-61 (2005). Leave to amend is improper because there is no
15 reasonable possibility the defects in the complaint may be cured by any amendment of plaintiff's
16 pleading. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 274–75 (2011).
17
18 Dated: March 6, 2013

Respectfully submitted,
19 LATHAM & WATKINS LLP
20
21 By /s/ David J. Schindler /SCH
David J. Schindler
22 Attorney for Defendant Delta Air Lines, Inc.
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26 [18] Section 22577(a)(7) also defines as PII "information" collected "online" that is "maintain[ed] in personally identifiable form in combination with [another statutory] identifier," but the Complaint contains no such allegations.
27 [19] In any event, as to these two elements, whether PII or not, the policy regarding collection and
28 effective date was plainly stated within the app itself via just-in-time disclosures. *See* Demurrer Exs. 6, 7.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 355 South Grand Avenue, Los Angeles, CA 90071-1560.

On **March 6, 2013**, I served the following document described as:

DEFENDANT DELTA AIR LINES, INC.'S REPLY MEMORANDUM IN SUPPORT OF THE PENDING DEMURRER

by serving a true copy of the above-described document in the following manner:

BY HAND DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server. Under that practice, documents are deposited to the Latham & Watkins LLP personnel responsible for dispatching a messenger courier service or registered process server for the delivery of documents by hand in accordance with the instructions provided to the messenger courier service or registered process server; such documents are delivered to a messenger courier service or registered process server on that same day in the ordinary course of business. I caused a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for hand delivery by a messenger courier service or a registered process server.

Adam Miller, Supervising Deputy Attorney General
Kamala D. Harris, Attorney General of California
Robert Morgester, Senior Assistant Attorney General
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **March 6, 2013**, at Los Angeles, California.

Catherine Molina