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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 **PLAINTIFF PEOPLE OF THE STATE OF CALIFORNIA'S OPPOSITION TO DEMURRER BY DEFENDANT DELTA AIR LINES, INC.; MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF** Date: March 13, 2012 Time: 9:30 a.m. Dept: 302 Judge: Hon. Marla J. Miller Trial Date: None Action Filed: December 6, 2012

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I. INTRODUCTION

Plaintiff, the People of the State of California (the "People"), have a constitutional right to privacy, pursuant to Article I, Section 1 of the California Constitution. In order to protect this fundamental right, the California Legislature enacted the California Online Privacy Protection Act of 2003 ("CalOPPA"). (Bus. & Prof. Code §§ 22575-22579.)

CalOPPA simply requires that businesses using Internet Web sites or "online services" such as mobile applications, must notify California consumers how they treat personally identifiable information ("PII") by conspicuously posting a privacy policy. It does not prohibit the collection of any information or restrict the operations of any company.

For many years, Defendant Delta Air Lines, Inc., ("Delta") has operated a Web site (www.delta.com) and, since 2010, a mobile application available on smart phones and other devices, called "Fly Delta." While Delta's Web site has had a privacy policy for some time, its Fly Delta mobile application has not. As a result of this significant breach of the People's privacy rights, the California Attorney General provided notice to Delta that it was violating CalOPPA, and filed its Complaint when Delta failed to timely cure its default.

Delta's Demurrer is completely without merit. It is essentially a disguised motion for summary judgment that offers extensive extrinsic and inadmissible facts unsuited for a demurrer, which is purely a legal challenge as to the sufficiency of the pleading. Such inappropriate allegations include duplicative requests for judicial notice of its own Web site, Fly Delta screenshots, and declarations. Delta's legal arguments fare no better, as they rely upon its inappropriate factual submissions and contain misleading legal analysis, as follows:

First, CalOPPA is merely a disclosure regime that is not preempted by the Airline Deregulation Act. CalOPPA is not directly related to airline fares, routes or services, it does not target or substantially affect Delta's business, and it does not bind Delta to offer any particular fares, routes or services. Second, notwithstanding Delta's tortured statutory analysis, applications that collect PII are online services under CalOPPA. Third, Delta cannot show compliance with CalOPPA because no privacy policy was available from within the application itself, and the generic privacy policy (that users would have to separately access) made no mention of what PII

Fly Delta collects. Fourth, Delta failed to list PII collected via the app in its generic Web site privacy policy, there is no exception in CalOPPA for such failure, and the Complaint indisputably alleges that Delta collected PII that was not disclosed in any policy (e.g., geo-location data and photographs). Finally, there is no "good faith" exception to compliance with CalOPPA. It is thus astonishing that Delta concedes it received the Attorney General's notice and failed to timely cure, yet claims there is no evidence that it knew it was in violation of CalOPPA. Delta has completely failed to in its legal challenge to the Complaint, and its Demurrer should be overruled.

II. LEGAL STANDARD

A demurrer admits the truth of all material facts properly plead, "giv[ing] the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation]." (*Blank v. Kirwan* (1985) 39 Cal.3d. 311, 318.) No other evidence extrinsic to the pleading can be considered, except matters properly the subject of judicial notice. (See *ibid.*; *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.) While a demurrer may be appropriate under federal preemption, "[t]here is a general presumption against federal preemption of a state's traditional police powers, unless the state regulates in an area where there has been a "significant federal presence." (*Miller v. Bank of America, N.A. (U.S.A.)* (2009) 170 Cal.App.4th 980, 985, quoting *U.S. v. Locke* (2000) 529 U.S. 89, 108.) The protection of public health, safety and privacy "falls within the traditional scope of a State's police powers." (See *Sorrell v. IMS Health Inc.* (2011) 131 S.Ct. 2653, 2681-82; e.g., Cal. Const., art. I, § 1.)

III. FACTUAL BACKGROUND

Since at least 2010, Delta has operated the Fly Delta application, which is a mobile application ("app") available for download on smartphones and other devices. (Complaint filed December 6, 2012 (the "Complaint"), ¶¶ 8 & 10.) Fly Delta is available on multiple platforms, including Apple and Android. (Complaint, ¶ 10.) The Fly Delta app sends and receives information over the Internet, including collecting names and other PII from individual consumers residing in California. (Complaint, ¶ 12.) As of the date of filing of the Complaint, there was no privacy policy available to consumers within the Fly Delta app itself. (Complaint, ¶¶ 4, 14.) While there was a generic privacy policy on Delta's Web site, this policy did not

mention the Fly Delta app, it did not specifically identify certain PII being collected by the app, and it was not reasonably accessible to consumers of the Fly Delta app. (Complaint, ¶¶ 4, 16.)[1]

In particular, the Delta Web site privacy policy did not disclose that Fly Delta collected consumer (a) geo-location data and (b) photographs. (Complaint, ¶¶ 4, 17.) For example, the Fly Delta app accessing a mobile device's geo-location functionality reflected a local Delta Sky Miles Club. (Complaint, ¶ 18.) But nowhere in the app or on its Web site did Delta disclose to consumers in a privacy policy that it collected this information, i.e., where the consumer and the consumer's mobile device are located. (*Ibid.*)

Similarly, Fly Delta had functionality that permits the user to take and store a photograph, input text, and the geo-location of the device for a "Parking Reminder." (Complaint, ¶ 19.) But nowhere in the app or on the Web site did Delta disclose to consumers in a privacy policy that it collected this information. (*Ibid.*)[2] The Fly Delta app has been downloaded by consumers millions of times since it was released in or about October 2010. (Complaint, ¶ 20.)

In support of its Demurrer, Delta offers extrinsic evidence alleging compliance with CalOPPA. Yet even if factually correct (which the People dispute), it is completely inappropriate in this proceeding, and demonstrates an utter lack of understanding of the demurrer process, to submit factual declarations and requests for judicial notice that cannot be granted.[3]

On October 26, 2012, the Attorney General sent a letter notifying Delta that it was not in compliance with CalOPPA. (Complaint, ¶ 22, Exh. A.) This letter advised Delta that it would be in violation of CalOPPA if it did not comply within thirty (30) days. (*Id.*) On October 30, 2012, Delta stated: "We have received the letter from the Attorney General and intend to provide the requested information." (Complaint, ¶ 23.) Yet, Delta failed to timely comply with CalOPPA. (*Id.*)

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[1] All allegations herein are taken from the Complaint and are as of December 6, 2012.

[2] Delta contends that photographs are not PII. But a photo of the consumer or physical location can definitely identify or locate the consumer, and "permits the physical ... contacting of a specific individual." (Bus. & Prof. Code, § 22577, subd. (a)(6).)

[3] Delta has submitted screenshot of its Web site and app in support of its Demurrer. But declarations and screenshots of Web sites or the Fly Delta app are not suitable for judicial notice, or as a basis for a demurrer. (See Plaintiff's Objections to Defendant Delta's Request for Judicial Notice and Declarations in Support of Demurrer, filed February 28, 2013.)

IV. ARGUMENT

A. The People's CalOPPA Complaint Is Not Preempted by the ADA.

CalOPPA "enacts merely a disclosure regime" that "'simply requires that an operator have a policy and then follow it.'" (*Apple v Superior Court* (Feb. 4, 2013, S199384) 151 Cal.Rptr.3d 841, 855 [13 C.D.O.S. 1297] (citations omitted) (Cal. Supreme Court analysis of CalOPPA) (hereinafter *Apple*).) It applies generally to all companies that collect PII from Californians online. (Bus. & Prof. Code, § 22575, subd. (a).) CalOPPA does not directly regulate or target air carriers, nor does it have a significant impact on the rates, routes, or services of Delta or any other air carriers who are subject to CalOPPA. It simply requires that Delta "conspicuously post" its online privacy practices. (*Id.* at subd. (b).)

The Airline Deregulation Act ("ADA") does not immunize air carriers from state regulation. It was enacted in 1978 because Congress determined that "'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality ... of air transportation services,' ... ." (*Morales v. Trans World Airlines,Inc.* (1992) 504 U.S. 374, 378 (citations omitted).) The ADA contained the following preemption clause: "'[N]o State ... shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier....' 49 U.S.C.App. § 1305(a)(1)."[4] (*American Airlines v. Wolens* (1995) 513 U.S. 219, 222-23.) Despite Delta's insinuations to the contrary, this clause does not preempt *all* state regulation of air carriers – only those regulations that "relate to" rates, routes, or services - but not those regulations which "affect [air carriers] in too tenuous, remote, or peripheral a manner." (See *Morales*, 504 U.S. at p. 390.)

In 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." (*Ginsberg v. Northwest, Inc.* (2012) 695 F.3d 873, 875.) In deregulating airlines, "Congress' overarching goal [w]as helping assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market

[4] In 1994 Congress revised this clause (with no substantive change intended) and recodified the ADA to read: "[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); Pub.L. 103-272, § 1(a), 108 Stat. 745.)

forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" (*Rowe v. New Hampshire Motor Transport Assn.* (2008) 552 U.S. 364, 371, citing *Morales, supra,* 504 U.S., at p. 378.) But "[n]othing in the Act itself, or its legislative history, indicates that Congress had a 'clear and manifest purpose' to displace state [laws] in actions that do not affect deregulation in more than a 'peripheral manner.'" (*Charas v. Trans World Airline, Inc.*, (9th Cir. 1998) 160 F.3d 1259, 1265, citing *Morales, supra,* 504 U.S. at p. 390.) Only state laws "with a 'significant impact' on carrier rates, routes, or services" are preempted. (*Rowe*, 552 U.S. at p. 375, citing *Morales, supra,* 504 U.S. at p. 388.)

In order for there to be preemption, "the claim must relate to airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them." (*Tanen v. Southwest Airlines Co.* (2010) 187 Cal.App.4th 1156, 1166-67.) The terms

> [a]irlines' "rates" and "routes" generally refer to the point-to-point transport of passengers. "Rates" indicates price; "routes" refers to courses of travel. It therefore follows that "service," when juxtaposed to "rates" and "routes," refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, "This airline provides service from Tucson to New York twice a day.") **To interpret "service" more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does. It seems clear to us that that is not what Congress intended.**

(*Charas, supra*, 160 F.3d at pp. 1265-66 (emphasis added).)

In *Morales,* the Supreme Court made clear the limitations of the ADA when it said

> we do not … set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relat[e] to" rates; the connection would obviously be far more tenuous. … "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect. 463 U.S., at 100, fn. 21, 103 S.Ct., at 2901, fn. 21. … our decision does not give the airlines carte blanche to lie to and deceive consumers;

(*Morales, supra,* 504 U.S. at p. 390; *accord, Rowe, supra,* 552 U.S. at pp. 370-371.) If the rule was otherwise, "any string of contingencies is sufficient to establish a connection with price, route, or service, [and] there will be no end to ADA preemption. [Citations.]" (*Air Transport Assn. of America v. City and County of San Francisco* (N.D.Cal. 1998) 992 F.Supp. 1149, 1183 (hereafter *Air Transport Assn.*).) This is so even though airline costs might be affected by how restrictive a particular state's law may be. (*Wolens, supra,* 513 U.S. at pp. 234–35.)

In *Morales*, the Supreme Court held that the ADA preempted advertising guidelines from the National Association of Attorneys General ("NAAG"). The NAAG guidelines directly connected to and targeted airline rates because regulation of advertised fares "serve[s] to increase the difficulty of discovering the lowest cost seller ... and [reduce] the incentive to price competitively." (*Morales, supra,* 504 U.S. at pp. 388, 391 ("restricting '[p]rice advertising surely 'relates to' price.'") (citations omitted).) In *Rowe*, the statute forbade "licensed tobacco retailers to employ a 'delivery service' unless that service follows particular ... procedures ... thereby creating a direct 'connection with' motor carrier services." (*Rowe,* 552 U.S. at p. 371.)

CalOPPA does not result in a direct or targeted connection to airline rates, routes or services. Unlike *Morales* (airfare advertising), *Rowe* (trucking) or *Wolens* (frequent flyer program), CalOPPA is directed towards protecting consumer privacy. It is thus more like statutes regulating traditional police power over gambling, prostitution or obscenity, than the targeted transportation laws at issue in these Supreme Court cases.

"Preemption resulting from 'reference to' price, route or service occurs '[w]here a State's law acts immediately and exclusively upon [price, route or service] ... or where the existence of [a price, route or service] is essential to the law's operation.'" (*Air Transport Assn., supra*, 266 F.3d at p. 1071, quoting *Cal. Div. of Labor Standards Enf. v. Dillingham Const., N.A., Inc.,* (1997) 519 U.S. 316, 325; see also *Morales, supra,* 504 U.S. at p. 388.) As to prices and routes, CalOPPA is a broad disclosure regime that does not act at all upon prices or routes, and the existence of prices or routes is not essential to its operation. (See *Apple, supra,* 151 Cal.Rptr.3d at p. 855.)

As to services, "[t]he scope of this preemption, ... has been the subject of considerable dispute, although it is clear that the [ADA] does not preempt all state law based actions related to an airline's conduct." (*Aquino v. Asiana Airlines, Inc.* (2003) 105 Cal.App.4th 1272, 1281-82.) Nearly all of the courts to consider this issue "have grounded their analyses in the effects on competition of the particular state laws at issue, deeming preempted those claims that substitute state regulation for competitive market forces." (*Tanen, supra,* 187 Cal.App.4th at p. 1169.) CalOPPA does not substitute state regulation at all for competitive market forces.

Analysis of preemption under the ADA is also not as simple as Delta would have the Court

believe, since the ADA preemption clause "sets forth an 'illusory test' that defies bright line rules and can only be applied on a case-by-case basis." (*In re Jetblue Airways Corp. Privacy Litig.* (E.D.N.Y. 2005) 379 F.Supp.2d 299, 314, citing *Abdu-Brisson v. Delta Airlines, Inc.* (2d Cir.1997) 128 F.3d 77, 85-86.) Cases that Delta cites concerning privacy claims over ticketing-related issues are thus not automatically applicable in this case. (*In re Jetblue* at p. 304 (release of ticketing Passenger Name Records); *In re American Airlines, Inc., Privacy Litigation* (N.D.Tex. 2005) 370 F.Supp.2d 552, 564 (collection of PII during reservation function).)

The People have made no claim concerning the collection of data during a reservation, in part because at the time of filing such functionality was not possible. (Demurrer, p. 4, fn.6.) Instead, the Complaint addresses Delta's complete failure to provide any privacy policy specific to Fly Delta, or as to its collection of nonprice-related PII, concerning any California consumer using Fly Delta, including non-Delta customers. (See *Morales*, *supra,* 504 U.S., at p. 390.)

Had Congress wanted the Department of Transportation ("DOT") to have exclusive authority over air carriers in every respect, it could have written the ADA's preemption clause to that effect. But Congress did not do that. As a result, courts in California and across the country have recognized that state laws that do not directly relate to "rates, routes, or services" are not preempted. (E.g., *Air Transport Assn., supra,* 992 F.Supp. 1149 (City non-discrimination ordinance); *Ventress v. Japan Airlines* (9th Cir. 2010) 603 F.3d 676, 681-83 (Cal. Labor Code provision); *Gary v. Air Group, Inc.* (3rd Cir. 2005) 397 F.3d 183, 186-187 (state whistleblower statute).) For example, in *Aloha Islandair, Inc. v. Tseu* (9th Cir. 1997) 128 F.3d 1301, 1302-03, there was no ADA preemption "because the connection between the state-law employment discrimination claim and the airline's services was too tenuous, remote, and peripheral to be preempted by ADA." (*Ibid.*)

CalOPPA is no different than general state and local laws and regulations that Delta is subject to within California.[5] To conclude that CalOPPA is preempted would effectively

[5] Thus for example, to the extent Delta operates motor vehicles within California, Delta could not preempt a lawsuit over its failure to comply with vehicle laws, even though such compliance costs money. (See, e.g., Veh. Code, §§ 4000-9808 (Registration of Vehicles), 12500-15325 (Drivers' Licenses), & 21000-23336 (Rules of the Road).)

immunize states from regulating air carriers at all. This plainly was not Congress's intention, and it is unlikely "that the Supreme Court would ... free airlines from most conventional common law claims for tort, from prevailing wage laws, and ordinary taxes applicable to other businesses." (*DiFiore v. American Airlines, Inc.* (1st Cir. 2011) 646 F.3d 81, 87; see, e.g., *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n* (2d Cir. 2011) 634 F.3d 206, 212 (state and local land use regulation not preempted by ADA).) Unlike the laws at issue in *Morales* and *Rowe*, CalOPPA is not an "industry specific directive[] that targets the subject matter made off-limits by the ADA ... ." (See *Altria Group, Inc. v. Good* (2008) 555 U.S. 70, 86, fn. 12.) This is because CalOPPA has nothing whatsoever to do with fares, routes or services.

Some courts "have called into question the validity of *Charas'* definition of 'service'" because *Rowe* appears to expand the definition of "service" in the context of preemption under the Federal Aviation Administration Authorization Act ("FAAAA").[6] (*Foley v. JetBlue Airways* (N.D. Cal. Aug. 3, 2011) 2011 WL 3359730, *7.)[7] In *Rowe,* the state statute was targeted to tobacco retailers but was deemed "connected with" motor carrier services because it specifically referenced a "delivery service" and required the carriers to alter their business. (*Rowe, supra,* 552 U.S. at pp. 371-72.)

But even if *Rowe* did expand the definition of "services" under the ADA beyond the current Ninth Circuit definition in *Charas*, it does not matter here because CalOPPA does not force Delta to offer "services that differ significantly from those that, in the absence of the regulation, the market might dictate." (*Rowe, supra*, 552 U.S. at p. 372.) The state law in *Rowe* was directed towards tobacco retailers, but also would "require carriers to offer a system of services that the

[6] Because the FAAAA's preemption clause was modeled after the ADA's clause, the Supreme Court in *Rowe* relied heavily on its *Morales* ADA analysis. (*Rowe*, 552 U.S. at p. 368.)

[7] Under *Foley*, a state law disability claim for disabled access to airline ticketing kiosks was held not preempted by the ADA, but a similar case found for preemption. (*Nat'l Fed. of the Blind v. United* (N.D.Cal. April 25, 2011, No. C 10–04816 WHA) 2011 WL 1544524, app. pending, 11-16240 (9th Cir.); see *Foley v. JetBlue Airways* (N.D. Cal. Aug. 3, 2011 No. C 10-3882 JCS) 2011 WL 3359730 app. stayed pending decision in *Nat'l Fed. of the Blind*, No. 11-17128 (9th Cir.).) Following *Foley*, DOT initiated proceedings that could establish standards for disabled access to kiosks and Web sites. (See Nondisc. on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports, Supp. Notice of Prop. Rulemaking, 76 Fed. Reg. 59307 (Sept. 26, 2011).) In contrast, the People are unaware of any effort by DOT to regulate privacy of Web sites or mobile apps as applied to air carriers.

market does not now provide (and which the carriers would prefer not to offer) [, and] would freeze into place services that carriers might prefer to discontinue in the future." (*Id.*) Moreover, the law "directly regulates a significant aspect of the motor carrier's package pickup and delivery service. In this way it creates the kind of state-mandated regulation that the [ADA] pre-empts." (*Id.* at p. 373.) In contrast, nothing about CalOPPA regulates Delta's actual products, namely, its fares, routes or services, and nothing about CalOPPA requires Delta to offer services it does not now offer. Delta is free to charge any price, implement any route, collect any PII, or provide any lawful service to its customers, and nothing in CalOPPA interferes with that. All that CalOPPA requires is that Delta simply discloses to California consumers who use its Web site and mobile apps (some of whom may not be Delta customers) what PII may be collected and how it is used.

Although Delta contends Fly Delta is a service *essential* to its business, it is not. Delta's business is not distribution of a free mobile app. Consumers can perform some functions, but they cannot fly using Fly Delta. They need to go to the airport and board a Delta plane in order to do that. There are many other ways that consumers can access the same and greater functionality as Fly Delta, including by telephone, Web site and in-person. Delta's service is its flights, and those activities incidental to it, but Fly Delta is not even accessible to all passengers in flight. (See 47 CFR, § 22.925 (cellular telephones "must not be operated while ... aircraft ... airborne").)

It is hard to see why it is necessary to Delta's business for Fly Delta to geographically track, or collect pictures taken by, California consumers. More importantly, such undisclosed conduct is not related in any way to Delta's fares, routes or service. Indeed, triggering the memory of where someone parked their car with a photo, or tracking a non-customer's location is clearly tenuous, remote, and peripheral from the services that Delta provides. (Complaint, ¶¶ 4, 17, 18.) Enforcement of CalOPPA "neither frustrates the goal of economic deregulation in the airline industry nor significantly affects [Delta's] competitive posture [as t]he ADA is not intended to be a 'safe harbor for airlines from civil prosecution for the civil analogues of criminal offenses.'" (*Peterson v. Cont'l Airlines, Inc.* (S.D.N.Y. 1997) 970 F.Supp. 246, 251; e.g., Penal Code, § 637.7 (illegal to "use an electronic tracking device to determine the location or movement of a person.")

Fly Delta is like a ticket counter, from which Delta provides customers with limited access

to some of its products and service. But it is not Delta's service itself. Just as Delta is foreclosed from claiming preemption over routine state regulation of its ticket counters, preemption does not apply here. After all, a Delta ticket counter is subject to state and local regulation and liability concerning, inter alia, property taxes, land use, and employment. Indeed, in *Air Transport Assn.*, the Ninth Circuit observed that while the City had leverage over airlines, including control over leasing of counter space at San Francisco International Airport, this did not result in the City's non-discrimination ordinance being preempted. This was because, the ordinance "did not bind the Airlines to provide free or discounted tickets to anyone," including registered domestic partners. (*Air Transport, supra,* 266 F.3d at p. 1072.) In other words, the Ninth Circuit found that the City's ordinance did not "have a prohibited connection with a price, route or service [because] the law did not bind[] the air carrier to a particular price, route or service [and did not] interfere[] with competitive market forces within the air carrier industry." (*Ibid.*) Here, CalOPPA does not target airlines, nor does it bind Delta to a particular price, route or service, but simply requires Delta to disclose, and comply with, a conspicuously posted privacy policy.

B. The Fly Delta Mobile App is an Online Service Under CalOPPA.

The California Legislature used the term "online service," in addition to "Web site," to indicate the broad application of CalOPPA to any online Internet activity, both now or in the future. It makes no sense to interpret a technology statute as narrowly as Delta suggests, especially since "[i]n construing statutes that predate their possible applicability to new technology, courts have not relied on wooden construction of their terms." (*Apple, supra,* 151 Cal.Rptr.3d at p. 846.)

Interpreting "online services" to include apps is particularly logical as CalOPPA was modeled after the federal Children's Online Privacy Protection Act of 1998 ("COPPA"), and the Federal Trade Commission ("FTC") unambiguously views mobile apps as being online services. (15 U.S.C. §§ 6501; see *United States v. W3 Innovations LLC* (N.D. Cal. 2011) No. CV-11-03958 (defendant operated online services through mobile applications),<http://ftc.gov/os/caselist/1023251/index.shtm> (as of Feb. 27, 2013); see also COPPA Proposed Rule, 76 Fed.Reg. 59804, 59807 (Sept. 27, 2011) ("**current technologies that access the Internet ... are 'online services'**

…," including "mobile applications") (emphasis added), <http://www.gpo.gov/fdsys/pkg/FR-2011-09-27/pdf/2011-24314.pdf> (as of Feb. 27, 2013).)

Nevertheless, Delta insists that the term "online service" in CalOPPA can only mean technology that existed when CalOPPA was enacted. (Demurrer, p. 2, l. 11-14.) This is completely meritless, and ignores basic principles of statutory construction as well as the intention of the Legislature.

As the California Supreme Court recently confirmed, in interpreting a statute

> we look first to the words of a statute, "because they generally provide the most reliable indicator of legislative intent." … We give the words their usual and ordinary meaning … while construing them in light of the statute as a whole and the statute's purpose … '"we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized … .'"'

(*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529-530 (citations omitted).) "[C]ivil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose." (*Id.* at p. 530.) "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." (*Id.*) "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." (*Id.*) It is clear from the statute itself that the Legislature intended for CalOPPA, a civil consumer protection statute, to broadly protect the constitutional privacy rights of California consumers while conducting business on the Internet. (See Bus. & Prof. Code, §§ 22575, 22578.)

If there was any ambiguity, the California Supreme Court recently observed that CalOPPA "shows that the Legislature knows how to make clear that it is regulating online privacy and that it does so by carefully balancing concerns unique to online commerce." (*Apple , supra,* 151 Cal.Rptr.3d at pp. 854-55.) This is because "[s]tatutory interpretation must be prepared to accommodate technological innovation, if the technology is otherwise consistent with the statutory scheme." (*Ni v. Slocum* (2011) 196 Cal.App.4th 1636, 1652, citing *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1461, 1464–1466.) This is also because

> [f]idelity to legislative intent does not "make it impossible to apply a legal text to technologies that did not exist when the text was created.... Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply

> to all sorts of circumstances they could not possibly envision." (Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) pp. 85–86.)

(*Apple*, *supra,* 151 Cal.Rptr.3d at p. 846.) *O'Grady* concerned whether Web site blogs were "periodical publication[s]" for purposes of the journalism shield law, even though "digital magazines" did not exist when the statute was enacted. (See Cal. Const., art. I, § 2, subd. (b).) The Court of Appeal observed that

> the Legislature was not prescient enough to have consciously intended to include digital magazines within the sweep of the term ["or other periodical publication"]. By the same token, however, it cannot have meant to *exclude* them. It could not advert to them at all because they did not yet exist and the potential for their existence is not likely to have come within its contemplation.

(*O'Grady, supra,* 139 Cal.App.4th at p. 1461.) In the same manner, the Legislature could not have expressly referred to mobile apps such as Fly Delta because mobile apps, and the underlying platforms, technology and devices, simply did not exist in 2003. (See, e.g., *Apple, Inc. v. Motorola Mobility, Inc.* (W.D.Wis. 2011, No. 11-178) 2011 WL 7324582, *9 ("original iPhone went on sale in June 2007"); *In re Apple iPhone 3G and 3GS MMS Marketing and Sales Practices Litigation* (E.D.La. 2012) 864 F.Supp.2d 451, 453 ("iPhone combines ... a telephone, a camera, an internet communication device, a digital music player, etc.—into a single handheld product").) Instead, the California Legislature used the broad term "online service" to refer to any and all Internet services, other than Web sites, that made themselves available to consumers online. This interpretation is squarely consistent with the overall statutory scheme of CalOPPA as well as any intention that can be gleaned from the statute itself and the legislative history.

Furthermore, as the California Supreme Court recently observed, CalOPPA

> was necessary because "[e]xisting law does not directly regulate the privacy practices of online business entities." [Citation.] The bill's author explained that because "many consumers refuse to do business online because they have little protection against abuse," online retailers should be required at least to disclose in their online privacy policies what personal information may be collected and how it is used. [Citations] ["Any policy will do. The bill simply requires that an operator have a policy and then follow it"].)

(*Apple, supra,* 151 Cal.Rptr.3d at p. 855.) Statements of a bill's author are useful in determining legislative intent. (See *Stewart v. Board of Medical Quality Assurance* (1978) 80 Cal.App.3d 172, 183.) According to CalOPPA's author, Senator Joseph Simitian, this disclosure regime

would "provide[] meaningful privacy protection[] that will help foster the continued growth of the Internet economy."[8] (Assem. Com. on Bus. and Professions, Analysis of Assem. Bill No. 68 (2003–2004 Reg. Sess.) as amended Apr. 28, 2003, p. 2.) Under Delta's interpretation, the term "online service" would be a legacy term frozen in time to only refer to specific technology that no longer exists, is completely different, or is in limited use.

The definitions for online service that Delta cites simply demonstrate historical, evolving and often outdated definitions of the term. (E.g., Defendant Delta Air Line, Inc.'s Request for Judicial Notice in Support of Demurrer ("RFJN"), Exh. 10 ("firm that makes ... information ... by means of dialup connections") and Exh. 11 (Compuserve is one of the largest online services).) In contrast, recent published decisions support a broad and developing definition of online services. (See, e.g., *Telesweeps of Butler Valley, Inc. v. Kelly* (M.D. Pa. Oct. 19, 2012, No. 12-1437) 2012 WL 4839010, *4, fn. 3 (Skype); *In re Netflix, Inc., Securities Litigation* (N.D. Cal. Apr. 26, 2012, No. 12-1030) 2012 WL 1496171, *1 (Netflix); *Celorio v. Google Inc.* (N.D. Fla. May 23, 2012, No. 11-79) 2012 WL 2402833, *1 (Google Books); *Karron v. United States* (S.D.N.Y. May 4, 2012, No. 11-1874) 2012 WL 1570849, *3 (PayPal).)

C. Fly Delta Did Not Have Reasonably Accessible Privacy Policy.

A review of the entire statutory scheme as discussed above demonstrates the intention of the Legislature to broadly apply CalOPPA to online commerce and privacy, and to have it apply to current and future technology. In other words, the term "online service" simply refers to any service (other than a Web site) that accesses the Internet online. This is especially so because the term "conspicuously post," which specifies the precise manner in which privacy policies must be posted, provides that online services may post their policy by "any other reasonably accessible means of making the privacy policy available for consumers of the online service." (Compare

[8] After the Attorney General announced an agreement on February 22, 2012, with major mobile platforms to improve compliance with CalOPPA, Senator Simitian praised "her insistence that mobile apps, many of which collect personal information, must comply with the same privacy law that applies to Web sites." ("SIMITIAN PRAISES ATTORNEY GENERAL'S ENFORCEMENT OF ONLINE PRIVACY LAW FOR MOBILE APPS," <http://www.senatorsimitian.com/entry/simitian_praises_attorney_generals_enforcement_of_online_privacy_law_for_mo/> (as of February 27, 2013).)

Bus. & Prof. Code, §§ 22575(a), 22577, subd.(b)(1)-(4) and subd.(b)(5).) This makes it clear that CalOPPA was intended as a flexible statute to address any new online service technology.

Contrary to Delta's arguments, both Web site and online service operators are required to "conspicuously post" a detailed privacy policy. (Bus. & Prof. Code, § 22575, subd. (a).) The only distinction is that online services are not required to comply with specifications in subdivision (b)(1)-(b)(4) of Section 22577. The online services alternative requires the policy to be available within the online service itself, i.e., "for consumers of the online service" means available to consumers within the app. If the Legislature meant otherwise, it would have said so, by providing an alternative to access the policy from the operator's Web site. But it did not.

Indeed, Delta's flawed logic is apparent when considering Delta's mobile Web site, located at <http://m.delta.com>. This is a version of Delta's full Web site, but optimized for mobile devices. This Web site has, as required by CalOPPA, a direct link to Delta's privacy policy. But Fly Delta has no link to any privacy policy. (Complaint, ¶¶ 14-15.) Although Delta contends that "a compliant privacy policy was readily available on handheld devices at Delta's mobile site" (Demurrer, p. 2, l. 21-22.) this is inadequate under CalOPPA. Delta's argument, then, is that a user of Fly Delta would have "ready online access to Delta.com, and was directed to and interacted with that site in the ordinary course of using the app" (Demurrer, p. 13, l. 2-3), but only if the user exited Fly Delta and navigated to Delta.com (or m.delta.com) to view a privacy policy. The user would not, under any circumstances, technically be able to navigate from within the app to any privacy policy. (Complaint, ¶ 14.) More importantly, had a Fly Delta user navigated to Delta.com, they could never find any policy tailored to (or that mentioned) Fly Delta, or the unique PII that was captured, i.e., geo-locational data and photos. (Complaint, ¶¶ 15-19.)

Finally, an online service could develop in the future that did not support independent Web browsing. Under Delta's logic, it does not matter if "a consumer" of such an "online service" cannot find the operator's privacy policy within the online service, because all one need do is find another device and browse to Delta.com. This is not what CalOPPA mandates, because the policy must be "conspicuously posted" for the consumer of the online service.

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D. The Fly Delta Mobile App Collected Personally Identifiable Information That Was Not Disclosed on the Delta.com Web site Privacy Policy.

CalOPPA requires operators to identify the categories of PII collected. (Bus. & Prof. Code, § 22575, subd. (b)(1).) There is no exception for "substantial compliance," and Delta concedes that it "fail[ed] to list a data element" by not specifically identifying geo-locational data and photograph collection in its generic Web site privacy policy. (Demurrer, p. 14, l. 16.)

E. The Complaint Alleges That Delta's Violation of CalOPPA was Knowing and Willful, or Negligent and Material.

It is puzzling to hear Delta contend that it did not know it was in violation of CalOPPA, when Delta acknowledges receiving the Attorney General's 30-day notice, and that there was no "separate privacy policy [posted] on Fly Delta." (Complaint, ¶¶ 22-23; Demurrer, p. 6, l. 1-2.) Delta's "good faith" defense is simply an attempt to argue ignorance of the law, which is more troubling in light of the Attorney General's February 2012 Mobile Principles Agreement.[9] There is ample allegation that Delta knowing and willfully, or negligently and materially, violated CalOPPA. (Bus. & Prof. Code, § 22575, subds. (a) and (b); Complaint, ¶¶ 22-23.) In any event, Delta's "good faith" defense here is simply one more reason to overrule its Demurrer, as any possible good faith defense is fact-dependent, and there are no facts at issue that demonstrate good faith. (E.g., *Hall v. Regents of Univ. of Cal.* (1996) 43 Cal.App.4th 1580, 1586.)

V. CONCLUSION

For the reasons set forth above, Delta's Demurrer should be overruled, or, if sustained, the People should be permitted to amend its Complaint.

Dated: February 28, 2013

Respectfully Submitted,

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[9] (<https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-secures-global-agreement-strengthen-privacy> (as of Feb. 27, 2013).)