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Superior Court of California  
County of San Francisco

DEC 06 2012

CLERK OF THE COURT  
BY: MEREDITH GRIER  
Deputy Clerk

5 [REDACTED]  
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7 *Attorneys for Plaintiff*  
THE PEOPLE OF THE STATE OF CALIFORNIA

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 CITY AND COUNTY OF SAN FRANCISCO

10  
11  
12 THE PEOPLE OF THE STATE OF  
13 CALIFORNIA,

14 Plaintiff,

15 v.

16 DELTA AIR LINES, INC.,

17 Defendant.

CGC-12-526741

Case No.

COMPLAINT FOR CIVIL PENALTIES,  
PERMANENT INJUNCTION AND  
OTHER EQUITABLE RELIEF FOR  
VIOLATIONS OF BUSINESS AND  
PROFESSIONS CODE SECTION 17200  
(UNFAIR COMPETITION LAW)

18  
19 Plaintiff, the People of the State of California, by and through Kamala D. Harris, Attorney  
20 General of the State of California, alleges the following on information and belief:

21 INTRODUCTION

22 1. In 1972, the People of the State of California made privacy an "inalienable right"  
23 in the California Constitution. (Cal. Const., Art. I, § 1.) The People have charged the Attorney  
24 General with protecting that right. (Cal. Const., Art. V, § 13.)

25 2. The innovations of the 21st Century have created new challenges to privacy.  
26 Today, consumers regularly use computers, smartphones, tablets, and other electronic devices to  
27 share and store sensitive personal information, including their full name, date of birth, contact  
28 information, photographs, bank accounts, credit card numbers, and location information. If a

1 consumer stores this information on a smartphone or other device connected to the Internet, the  
2 consumer's personal information may be accessed by mobile applications that can collect the  
3 stored personal information and share it with third parties, sometimes without the consumer's  
4 knowledge or consent. Accordingly, it is imperative that consumers are clearly and  
5 conspicuously informed of the personal information that is collected from them, how that  
6 information is used, and with whom it is shared so that the consumer is empowered to make an  
7 educated choice about whether to allow a mobile application to access such information.

8 3. In 2004, California enacted the California Online Privacy Protection Act to require  
9 commercial operators of websites and online services, such as mobile applications, to  
10 conspicuously post detailed privacy policies so that consumers know what personal information  
11 operators collect and the categories of third parties with whom operators share or disclose that  
12 personal information. (Cal. Bus. & Prof. Code §§ 22575-22579 ("CalOPPA")<sup>1</sup>.)

13 4. Since at least 2010, Defendant Delta Air Lines, Inc., ("Delta") has operated a  
14 mobile application, called "Fly Delta," for use on smartphones and other electronic devices.  
15 Delta's mobile application may be used to check-in online for an airplane flight, view  
16 reservations for air travel, rebook cancelled or missed flights, pay for checked baggage, track  
17 checked baggage, access a user's frequent flyer account, take photographs, and even save a user's  
18 geo-location. Despite collecting substantial personally identifiable information ("PII") such as a  
19 user's full name, telephone number, email address, frequent flyer account number and PIN code,  
20 photographs, and geo-location, the Fly Delta application does not have a privacy policy. It does  
21 not have a privacy policy in the application itself, in the platform stores from which the  
22 application may be downloaded, or on Delta's website. Users of the Fly Delta application do not  
23 know what personally identifiable information Delta collects about them, how Delta uses that  
24 information, or to whom that information is shared, disclosed, or sold. As demonstrated below,  
25 Delta's conduct violates CalOPPA and California's Unfair Competition Law. (Cal. Bus. & Prof.  
26 Code § 17200 *et seq.*).

27 <sup>1</sup> All statutory references herein are to the Business and Professions Code, unless  
28 otherwise indicated.

1 **DEFENDANT AND VENUE**

2 5. Defendant Delta Air Lines, Inc., ("Delta") is a corporation incorporated in the  
3 State of Delaware at 2711 Centerville Road, Suite 400, in the City of Wilmington, 19808, County  
4 of New Castle. The name of its registered agent at such address is Corporation Service Company.

5 6. Delta's worldwide headquarters is located in Atlanta, Georgia. Delta is primarily  
6 an air carrier engaged in the business of providing commercial passenger air transportation  
7 throughout the United States and the world.

8 7. Delta provides regularly scheduled flight service from airports in the following  
9 cities in the State of California: San Diego, Palm Springs, Long Beach, Los Angeles, Burbank,  
10 Ontario, Fresno, Mammoth Lakes, San Jose, San Francisco, Oakland, Santa Rosa and Sacramento.  
11 Delta also operates airport lounges in San Francisco, Los Angeles, and San Diego.

12 8. Since at least 2010, Delta has operated the Fly Delta application, which is a mobile  
13 application available for download on smartphones and other devices. The Fly Delta app is  
14 distributed across California. Delta at all times mentioned herein has transacted business in the  
15 City and County of San Francisco and elsewhere within the State of California. The violations of  
16 law described herein occurred in the City and County of San Francisco and elsewhere in the State  
17 of California.

18 **DEFENDANTS' BUSINESS ACTS AND PRACTICES**

19 9. CalOPPA provides that "[a]n operator of a commercial Web site or online service  
20 that collects personally identifiable information through the Internet about individual consumers  
21 residing in California who use or visit its commercial Web site or online service shall  
22 conspicuously post its privacy policy on its Web site ..." (Cal. Bus. & Prof. Code § 22575(a).) In  
23 the case of an "online service," "conspicuously post[ing]" the privacy policy requires that the  
24 required privacy policy be "reasonably accessible ... for consumers of the online service." (Cal.  
25 Bus. & Prof. Code § 22577(b)(5).)

26 10. Delta is an operator of a commercial website located at <http://www.delta.com>.  
27 Delta is also an operator of online services, in the form of mobile applications ("apps") that run  
28 on smartphones and other devices utilizing various mobile platform operating systems, including

1 the following: Apple iOS (e.g., iPhone, iPad), Android, Windows Phone 7, and Blackberry. The  
2 Fly Delta app can be obtained from various mobile apps marketplaces (such as Apple iTunes or  
3 Google Play) as well as from [http://www.delta.com/content/www/en\\_US/mobile.html](http://www.delta.com/content/www/en_US/mobile.html).

4 11. The term “online service” broadly covers any service available over the Internet or  
5 that connects to the Internet, including Internet-enabled gaming platforms, voice-over-Internet  
6 protocol services, cloud services, and mobile applications. By way of example, mobile  
7 applications are deemed “online services” under the federal Children’s Online Privacy Protection  
8 Act, 15 U.S.C. § 6501 *et seq.* (See 76 Fed.Reg. 59807 (Sept. 27, 2011).)

9 12. The Fly Delta app sends and receives information over the Internet, including  
10 collecting PII about individual consumers residing in California who use the Fly Delta app. The  
11 Fly Delta app is thus an online service subject to CalOPPA.

12 13. PII that Delta collects through the Fly Delta app includes at least the following:  
13 (a) Geo-location data;  
14 (b) Photographs;  
15 (c) User’s full name;  
16 (d) Street addresses (residential and billing);  
17 (e) Telephone numbers (including cell, fax and/or pager);  
18 (f) Email addresses;  
19 (g) Delta SkyMiles account number and flight information;  
20 (h) Credit/debit card number(s) and expiration date(s);  
21 (i) Date of birth;  
22 (j) Gender;  
23 (k) Traveler number;  
24 (l) Travel-related information such as travel company, emergency contact(s),  
25 seating preferences, medical needs and dietary requests;  
26 (m) Passport number, nationality and country of residence; and  
27 (n) Corporate contract, employer or affiliation (such as employer name, title  
28 and contract information).

1           14.     Although the Fly Delta app collects California consumers' PII, there is no privacy  
2 policy available to consumers within the app itself. In other words, the privacy policy required by  
3 CalOPPA to be conspicuously posted is not accessible to consumers of the Fly Delta app, so  
4 California consumers do not know how Delta is collecting, managing or sharing the PII collected  
5 by the Fly Delta app.

6           15.     For example, a consumer can provide credit or debit card information to pre-pay  
7 for checked baggage on the Fly Delta app, but there is no disclosure on the Fly Delta app of this  
8 collection of PII, nor whether this or any other PII may be shared with third parties.

9           16.     Delta's website, located at [http://www.delta.com/content/www/en\\_US/privacy-](http://www.delta.com/content/www/en_US/privacy-and-security.html)  
10 [and-security.html](http://www.delta.com/content/www/en_US/privacy-and-security.html), does contain a privacy policy about Delta's website (the "Delta website"). But  
11 this privacy policy does not mention the Fly Delta app, and is not reasonably accessible to  
12 consumers of the Fly Delta app.

13           17.     While the privacy policy on Delta's website describes some of the PII collected by  
14 Delta on their website, Delta does not disclose anywhere several types of PII that the Fly Delta  
15 app collects, but the Delta website does not collect. For example, the Fly Delta app collects  
16 consumer (a) geo-location data and (b) photographs. The Delta website privacy policy does not  
17 indicate that it collects geo-location data or photographs.

18           18.     In the Fly Delta app, if the consumer chooses the "Traveling with Us" option, then  
19 the "Delta Sky Clubs" option, the Fly Delta app suggests "Delta Sky Clubs Near You" by  
20 accessing the consumer's mobile device geo-location functionality (*e.g.*, GPS). For example, an  
21 Android device located in San Francisco, California, using the Fly Delta app reflects a Delta Sky  
22 Club also in San Francisco. But nowhere in the Fly Delta app or on the Delta website does Delta  
23 disclose to consumers in a privacy policy that it is collecting this form of PII, *i.e.*, where the  
24 consumer and the consumer's mobile device is currently located.

25           19.     Similarly, if the consumer chooses the "Traveling with Us" then "Parking  
26 Reminder" options within the Fly Delta app, the consumer is able to take and store a photograph  
27 within the Fly Delta app using the mobile device's camera. The consumer can also store text (*e.g.*,  
28 "Garage G, 3rd floor, stall 101") and select a "Save This Location" option, which presumably

1 collects and stores the consumer's GPS location based upon the geo-location of the mobile device.  
2 But nowhere in the Fly Delta app or on the Delta Website does Delta disclose to consumers in a  
3 privacy policy that it is collecting these forms of PII.

4 20. The Fly Delta app has been available for download from the Google Play  
5 (formerly known as Android Market) and Apple iTunes marketplaces since at least October of  
6 2010. Since that time, Delta has provided updated versions of the Fly Delta app on Apple iTunes  
7 approximately 15 times. The current versions of the Fly Delta app were last released June 15,  
8 2012 (Google) and June 22, 2012 (Apple). The Fly Delta app has been downloaded by  
9 consumers millions of times since October of 2010 without the conspicuously posted privacy  
10 policy required by CalOPPA.

11 21. CalOPPA provides that "[a]n operator shall be in violation of this subdivision  
12 [requiring conspicuous posting of its privacy policy] only if the operator fails to post its policy  
13 within 30 days after being notified of noncompliance," and the violation is made either (a)  
14 knowingly and willfully; or (b) negligently and materially. (Cal. Bus. & Prof. Code §§ 22575(a)  
15 and 22576.)

16 22. On or about October 26, 2012, the California Attorney General sent a letter by  
17 U.S. Mail to Delta, addressed to Richard B. Hirst, Senior Vice President and General Counsel, to  
18 a Delta post office box address in Atlanta, Georgia, notifying Delta of its noncompliance with  
19 CalOPPA. A true and correct copy of said letter is attached hereto and incorporated by reference  
20 herein as Exhibit A.

21 23. On or about October 30, 2012, several media sources reported that Delta had  
22 released a statement that said: "We have received the letter from the Attorney General and intend  
23 to provide the requested information." (See <http://articles.latimes.com/2012/oct/30/business/la-fi-tn-atty-gen-kamala-harris-puts-mobile-apps-on-notice-about-privacy-20121030>, accessed  
24 December 6, 2012.) As of the date of filing, the Fly Delta app on multiple platforms still does not  
25 have a privacy policy conspicuously posted, *i.e.*, reasonably accessible to consumers within the  
26 apps.  
27  
28

1 24. Delta has violated CalOPPA by failing to conspicuously post a privacy policy in  
2 the Fly Delta app following 30 days' notice of noncompliance, either (a) knowingly and willfully;  
3 or (b) negligently and materially.

4 25. Under Section 22576, an operator of a commercial website is also in violation of  
5 CalOPPA if they fail to comply with the provisions of its posted privacy policy either (a)  
6 knowingly and willfully; or (b) negligently and materially. This separate violation of CalOPPA  
7 does not require that the operator be given 30 days' notice of noncompliance.

8 26. Delta has additionally violated CalOPPA by failing to comply with the provisions  
9 of its privacy policy, either (a) knowingly and willfully; or (b) negligently and materially.

10 27. The Fly Delta app is not the primary commercial activity of Delta, which is to sell  
11 tickets for commercial passenger air transportation throughout the United States and the world.  
12 Delta does not charge for download of its Fly Delta app.

13 28. CalOPPA is not directed towards air carriers such as Delta but applies to all  
14 "operator[s] of a commercial Web site or online service ..." (Cal. Bus. & Prof. Code § 22575(a).)  
15 CalOPPA does not relate to rates, routes or services of any air carrier. Any effect of CalOPPA on  
16 airline rates, routes or services of any air carrier is tenuous, remote or peripheral. CalOPPA does  
17 not significantly impact federal deregulation of air carriers.

18 FIRST CAUSE OF ACTION

19 VIOLATIONS OF BUSINESS AND PROFESSIONS CODE SECTION 17200

20 (UNFAIR COMPETITION – SECTION 22575)

21 29. Plaintiff realleges Paragraphs 1 through 28 and incorporates these Paragraphs by  
22 reference as though they were fully set forth in this cause of action.

23 30. Delta has violated the Unfair Competition Law, Business and Professions Code  
24 section 17200 *et seq.*, by committing unlawful, unfair, or fraudulent business acts and practices.  
25 These acts or practices include, but are not limited to, the following:

26 (a) Delta has continued to fail to conspicuously post a privacy policy in its Fly  
27 Delta app, in violation of CalOPPA, despite receiving written notice on or about October 26,  
28 2012, from the Attorney General that the Fly Delta app was noncompliant with Section 22575 of

1 CalOPPA. Delta has accordingly failed to comply with Section 22575, and such unlawful failure  
2 to comply is made either (i) knowingly and willfully; or (ii) negligently and materially, pursuant  
3 to Section 22576.

4 (b) Delta has further violated Section 22576, by failing to even comply with  
5 the website privacy policy posted on the Delta website, in that the Fly Delta app does not comply  
6 with the Delta website privacy policy, and such unlawful failure to comply is made either (i)  
7 knowingly and willfully; or (ii) negligently and materially.

8 PRAYER FOR RELIEF

9 WHEREFORE, Plaintiff prays for judgment as follows:

10 1. That under California Business and Professions Code section 17203, Delta, its  
11 successors, agents, representatives, employees, and all persons who act in concert with Delta be  
12 permanently enjoined from committing any acts of unfair competition, including the violations  
13 alleged in the First and Second Causes of Action.

14 2. That under California Business and Professions Code section 17206, Delta be  
15 ordered to pay Two Thousand Five Hundred Dollars (\$2,500) for each violation of California  
16 Business and Professions Code section 17200 by Delta, as proved at trial.

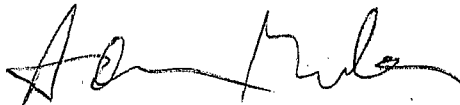
17 3. That Plaintiff recovers its costs of suit herein, including attorneys' fees and costs  
18 of investigation.

19 4. For such other and further relief as the Court may deem just and proper.

20 Dated: December 6, 2012

Respectfully Submitted,

21 KAMALA D. HARRIS  
22 Attorney General of California  
23 ROBERT MORGESTER  
24 Senior Assistant Attorney General

25   
26 ADAM MILLER  
27 Supervising Deputy Attorney General  
28 *Attorneys for*  
THE PEOPLE OF THE STATE OF CALIFORNIA

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# **EXHIBIT A**

KAMALA D. HARRIS  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



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October 26, 2012

Richard B. Hirst  
Senior Vice President and General Counsel  
Delta Airlines, Inc.  
PO Box 20706  
Atlanta, GA 30320-6001

RE: Notice of Non-Compliance with California Online Privacy Protection Act

Dear Mr. Hirst:

I am the Supervising Deputy Attorney General for this office's new Privacy Enforcement and Protection Unit. This letter is being sent to Delta Airlines, Inc., ("Delta") pursuant to the California Online Privacy Protection Act ("CalOPPA," Cal. Bus. & Prof. Code §§ 22575-22579, copy enclosed). Protecting the online privacy of California residents is one of the Attorney General's top priorities, and the Privacy Enforcement and Protection Unit is charged with enforcing California state and federal privacy laws as well as California residents' constitutionally guaranteed right to privacy.

As we hope you are aware, CalOPPA requires that "an operator of a commercial Web site or online service that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its commercial Web site or online service" must post a privacy policy that complies with specified requirements. Cal. Bus. & Prof. Code § 22575(a) and (b). The privacy policy must be "conspicuously" posted, and in the case of an online service, "reasonably accessible ... for consumers of the online service." Cal. Bus. & Prof. Code § 22575(a) and § 22577(b)(5). A Web site or online service operator that collects personally identifiable information ("PII") and "fails to post its policy within 30 days after being notified of noncompliance" is in violation of CalOPPA. Cal. Bus. & Prof. Code § 22575(a).

An operator of a mobile application ("app") that uses the Internet to collect PII is an "online service" within the meaning of CalOPPA. An app's commercial operator must therefore conspicuously post its privacy policy in a means that is reasonably accessible to the consumer. Having a Web site with the applicable privacy policy conspicuously posted may be adequate, but only if a link to that Web site is "reasonably accessible" to the user within the app. Under California's Unfair Competition Law, Business and Professions Code sections 17200 *et seq.*, violations of CalOPPA may result in penalties of up to \$2,500 for each violation, i.e., for each

October 26, 2012  
Delta Airlines, Inc.  
Page 2

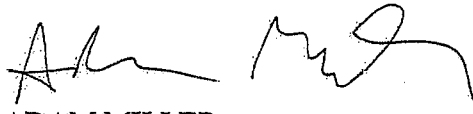
copy of the unlawful app downloaded by California consumers. Cal. Bus. & Prof. Code § 17206(a).

**It appears that your "Fly Delta" app, available through the Apple App Store and Google Play platforms, does not currently have a privacy policy reasonably accessible for consumers. Therefore this letter constitutes 30 days notice that the Fly Delta app is non-compliant with CalOPPA.**

Please respond to the undersigned within 30 days of the date of this letter with the following information: a) Delta's specific plans and timeline to comply with CalOPPA; or b) why you believe this app is not covered by CalOPPA.

If you have any questions regarding this letter please feel free to contact me at the above telephone number or addresses.

Sincerely,



ADAM MILLER  
Supervising Deputy Attorney General

For KAMALA D. HARRIS  
Attorney General

AM:

Enclosures as noted