

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO  
3 HONORABLE MARLA J. MILLER, JUDGE PRESIDING  
4 DEPARTMENT NO. 302

5 ---oOo---

6 PEOPLE OF THE STATE OF CALIFORNIA,  
7 Plaintiff,

8 vs.

9 No. CGC-12-526741

10 DELTA AIRLINES, INC.,  
11 Defendant.

\_\_\_\_\_ /

12  
13 Reporter's transcript of proceedings  
14 date of  
15 May 9, 2013  
16

17  
18  
19 A P P E A R A N C E S  
20

21 For the Plaintiff:  
22 ADAM MILLER, Deputy Attorney General

23 For the Defendant:  
24 DAVID SCHINDLER, Esq.

1 May 9, 2013

A.M. Session

2 ----oOo----

3 THE COURT: Line 12, People of the State of  
4 California versus Delta Airlines, demurrer to complaint.

5 Your appearances.

6 MR. MILLER: Adam Miller, supervising deputy attorney  
7 general.

8 THE COURT: Mr. Miller -- no relation to me -- good  
9 morning. Can you use the microphone, please.

10 MR. MILLER: Sure. Adam Miller.

11 MR. SCHINDLER: Good morning, Your Honor, David  
12 Schindler for Latham and Watkins on behalf of defendant  
13 Delta Airlines.

14 THE COURT: Good morning to both of you.

15 I'm going to make a disclosure. Sometimes I fly  
16 Delta Airlines, and I'm a member of the Delta Club. I  
17 don't have very many miles, but I'm a member of the Delta  
18 Airlines frequent fliers.

19 I've never logged into the app. I actually don't  
20 have too many apps. I've never looked at the Delta  
21 Airlines app. This would not affect my ability to be fair  
22 and impartial.

23 Anybody have any questions you want to ask me?

24 MR. MILLER: No, Your Honor.

25 MR. SCHINDLER: On behalf of my client we're pleased  
26 to hear you fly Delta, but other than that, no.

27 THE COURT: I've read all of your papers, and I don't  
28 have a tentative, but I hope that you got my questions.

1 MR. MILLER: Yes, Your Honor, we did.

2 THE COURT: So I will let the plaintiff begin; it's  
3 your demurrer.

4 MR. MILLER: I'm sorry, the defendant.

5 THE COURT: I'm sorry, the defendant, pardon me.

6 I'll let the defendant begin because it's your  
7 papers.

8 MR. SCHINDLER: Your Honor, first let me see if I can  
9 address some of your questions with respect to the status  
10 of the appeal in the National Federation case.

11 It was argued --

12 THE COURT: Can you make sure that the microphone is  
13 on?

14 There you go.

15 MR. SCHINDLER: I'll even speak up. Can you hear me  
16 okay?

17 THE COURT: Yes.

18 MR. SCHINDLER: With respect to the National  
19 Federation case, you asked about the status. The case was  
20 argued before the Ninth Circuit on November 8th, 2012 and  
21 taken under submission at that point, and there has not  
22 been a ruling as of today.

23 The balance of your questions, I think, Your Honor,  
24 sort of all live in the preemption realm and fundamentally  
25 you're asking the question that in our briefs we took on,  
26 that in this context where you have not just a state law,  
27 as you ask in question 4, but you have state action in the  
28 form of the state attorney general seeking in the context

1 to regulate ways in which Delta communicates with its  
2 customers in the form of Business and Professions Code  
3 kind of prosecution. That is absolutely and fundamentally  
4 preempted.

5 You asked in question 4 whether a state law designed  
6 to prevent unfair competent --

7 COURT REPORTER: I'm sorry.

8 THE COURT: Can you speak up and slow down.

9 MR. SCHINDLER: Your fourth question, Your Honor, was  
10 whether a state law designed to prevent unfair competition  
11 and which regulates an airlines's communication with  
12 consumers can be construed as not "not relating to prices,  
13 routes or services" under the ADA.

14 THE COURT: And ADA is the Airline Deregulation Act.

15 MR. SCHINDLER: That's correct, Your Honor.

16 I think the simple answer to that question is there  
17 really is no construction here where it would not be  
18 deemed to be preempted under the ADA.

19 And I think in addition to that, if you look not just  
20 at Wolens, Morales and Rowe, the Supreme Court cases, but  
21 focus even Tanen, the California Court of Appeal case,  
22 there is a very bright line that all these cases strike  
23 between a state action where you have the state attorney  
24 general seeking to act, which really goes directly to this  
25 concept of the patchwork regulation.

26 And ironically, Your Honor, you asked as well what is  
27 the significance of the Department of Transportation of  
28 the United States filing a statement of interest in the

1 National Federation case. And I should note that they  
2 also filed an amicus brief in the Ninth Circuit in the  
3 context of the argument that took place in the Ninth  
4 Circuit, and it mirrors in large part the statement of  
5 interest that was filed below.

6 The significance of that, Your Honor, really speaks  
7 to the notion that the Department of Transportation really  
8 is charged with regulating in this space. And even just  
9 to give you a sense of what's going on as recently -- and  
10 I provided to this to Miller just a few minute ago because  
11 in light of your questions last night when I got here,  
12 there is a publication in the national register of a  
13 hearing that is taking place on May 21st, 2013 -- this is  
14 simply a notice in the federal register that the  
15 Department of Transportation published -- of a meeting  
16 that speaks specifically to the exact issues that we're  
17 talking about here. The question of the consumer privacy.  
18 Among the things to be addressed are what information is  
19 collected and by whom, who retains information, et cetera.

20 Again, this is not dispositive of -- the fact of a  
21 meeting of -- public meeting is not dispositive of the  
22 issue, but it speaks to the question you asked. To the  
23 extent that the United States and the Department of  
24 Transportation has effectively weighed into the fray  
25 consistent with what the Supreme Court has said,  
26 consistent with what the California Court of Appeal has  
27 said, that's the significance of the statement of interest  
28 and the amicus brief filed in National Federation.

1           If you have specific questions, I'm happy to answer  
2 them, but I'm mindful of your time.

3           THE COURT: Thank you.

4           Mr. Miller, good morning.

5           MR. MILLER: Thank you, Your Honor.

6           So counsel has raised a particular issue in response  
7 to your first question, which I think illustrates the  
8 different between some of the other court cases cited by  
9 counsel in the demurrer and the case involved here.

10          You put in your question, question number 4, whether  
11 state law --

12          THE COURT: Slow down, please.

13          MR. MILLER: Whether a state law designed to prevent  
14 unfair competition and which regulates an airline's  
15 communication --

16          THE COURT: Please. I know you're reading from  
17 something, you and I know what it says, but if you want a  
18 transcript you will need to slow down.

19          MR. MILLER: I apologize both to you and the court  
20 reporter.

21          Whether a state law designed to prevent unfair  
22 competition and which regulates an airline's communication  
23 with consumers can be construed as not relating to prices,  
24 routes or services under the ADA. And the issue here is a  
25 dichotomy between consumers and customers. You'll note  
26 that counsel for Delta said this is about communication  
27 with our customers, and that is not an issue or that is  
28 not the position of the People.

1           The People's concern is this is communication or  
2 collection of PII, personally identifiable information,  
3 from California consumers, some of whom, unlike yourself,  
4 may not be or ever be customers of Delta.

5           The Fly Delta app is not only available and  
6 downloaded by Delta customers, it is available to anybody  
7 in the State of California.

8           THE COURT: Is that really a difference that makes a  
9 difference under the cases law? Let's say, for example,  
10 there was a billboard, and it was an airline billboard,  
11 and some state, California, decided that it was misleading  
12 and they brought a 17200 action because Delta was  
13 advertising on Highway 101.

14           Well, Delta customers might see it. Anybody might  
15 see it. Somebody who never flies Delta may see it. But  
16 the fact that people who didn't fly Delta might see it, do  
17 you think that that would allow the State to try to bring  
18 a 17200 action regulating the false advertising on a  
19 billboard just because some people saw it who weren't  
20 Delta customers?

21           MR. MILLER: I'm glad Your Honor brought that up, the  
22 hypothetical, because it's one that I've considered as  
23 well.

24           You're correct that under Morales if it's purely an  
25 unfair advertising claim, then Morales says the Airlines  
26 Regulations Act would preempt.

27           But what if Delta put up a billboard on Highway 01  
28 with obscenity on it, with a naked picture of a woman. Or

1 if they decided to post a billboard on the side of this  
2 building, do you think the City and County of San  
3 Francisco would have something to say about?

4 THE COURT: But the Morales case does -- I think it's  
5 Morales that says that we're not saying that there could  
6 never be any regulation. But the reason that Morales is  
7 saying something like obscenity, and I think they gave  
8 some other examples --

9 MR. MILLER: Prostitution, gambling.

10 THE COURT: Yes. The reason they say airlines aren't  
11 exempt from prosecution or from state liability for those  
12 things has nothing to do with whether they are customers  
13 or not. I think they're just trying to show that, as I  
14 think one of the cases said, I think the 9th Circuit case,  
15 that the airlines have sovereign immunity. I mean there  
16 are some things that don't fall within the rationale for  
17 deregulation of the airlines.

18 But I don't know that turns on the fact that it's  
19 Delta customers versus the rank and file person. Because  
20 it has nothing to do with running an airline.

21 MR. MILLER: Well, the distinction that Morales  
22 brought is that there a line. And Morales says we don't  
23 know where it is. They define the edge of that line being  
24 prostitution, obscenity and gambling. Other cases mention  
25 that as well. Rowe mentions it as well.

26 THE COURT: But this isn't that. Do you think it is?

27 MR. MILLER: We think it is.

28 THE COURT: So you think this case is more like



1 prostitution, obscenity and gambling than it is the  
2 privacy laws or the Consumer Fraud Act in Wolens or the  
3 privacy laws in the Jet Blue case, the New York case?

4 MR. MILLER: Yes, Your Honor, and that actually  
5 references the recent federal rulemaking notice that  
6 Mr. Schindler just referred to.

7 What those cases, the Jet Blue, privacy cases, all  
8 talk about -- and related privacy cases -- are information  
9 such as passenger name records, PNR. These are records  
10 which the airlines are required to collect under federal  
11 law, federal regulations. And the issue I believe that is  
12 being discussed by the notice, which Mr. Schindler only  
13 for the first time gave me --

14 THE COURT: And which I don't have in front of me.

15 MR. MILLER: What I'm trying to point out is there  
16 are certain privacy issues when the airlines are in  
17 possession of legitimately obtained PII. When I book a  
18 ticket, when you book a ticket, there are certain concerns  
19 that DOT and the federal government have over that PII.

20 We're not talking about that data. We're talking  
21 about an earlier step. We're talking about the step when  
22 I have my cell phone in my hand and I download Fly Delta  
23 just to see what it is.

24 THE COURT: Do you have that on your phone?

25 MR. MILLER: I have Fly Delta conveniently enough.  
26 And of course, my phone is off right now for obvious  
27 reasons. I have the app on my phone. It now knows I'm in  
28 the City of San Francisco. We don't know how granular

1 that information is because we haven't done discovery yet,  
2 but we know we're within San Francisco.

3 We also know if I park I can put a note in the app  
4 that says you are parked here.

5 And I can also take pictures. Now, counsel, with all  
6 respect, is somewhat dismissive of these. They even say  
7 in their papers "what, do you think, a Delta employee is  
8 going to follow to your car when you return?"

9 THE COURT: Mr. Miller, isn't the point here not that  
10 those things are on the phone, but I thought the whole  
11 point of your lawsuit was simply there needs to be a  
12 disclosure that those things are on the app.

13 MR. MILLER: The Supreme Court recently said in the  
14 Apple versus Superior Court case earlier this year, Cal  
15 OPPA, California Online Privacy Protection Act, Business  
16 and Professions Code 22575 through 79, is merely a  
17 disclosure regime.

18 THE COURT: Okay.

19 MR. MILLER: There is nothing that we are telling  
20 Delta or Fly Delta that they have to do.

21 THE COURT: Aren't you telling them how they need to  
22 communicate information to their customers?

23 MR. MILLER: No. We're only requiring them to do a  
24 notice.

25 One good question for you to consider is what's  
26 actually referred to in the amicus brief and also, I  
27 believe also, in the notice of interest that the DOJ filed  
28 -- not the DOT, but the DOJ filed in the district court

1 case.

2 THE COURT: In the Delta case?

3 MR. MILLER: The National Federation case.

4 And that is what is the service that Cal OPPA  
5 requires Fly Delta to provide.

6 THE COURT: I'm sorry?

7 MR. MILLER: That is what is the service that Cal  
8 OPPA requires Fly Delta to provide.

9 In Rowe, the service was if you're a trucker, you  
10 must provide accountability and tracking if you're going  
11 to deliver tobacco in the State of New Hampshire. So the  
12 issue there was you have to do something more, you have to  
13 add a service, you have to actually pay for more drivers,  
14 you have to pay for tracking software. Whatever it is.

15 We are not telling Delta what they can do. They can  
16 take that geolocation data, they can take that picture  
17 data, they can take whatever they want as long as it's  
18 otherwise legal and do what they want. All they have to  
19 do is tell consumers they're doing that, and they didn't  
20 do that yet.

21 In fact --

22 THE COURT: How is that different from the Southwest  
23 case, the Tanen case, where you have a gift certificate --  
24 a flight certificate?

25 MR. MILLER: That's clearly directly related to  
26 fares, routes and services.

27 THE COURT: Will you please slow down. Thank you so  
28 much. For the court reporter.

1 MR. MILLER: That's clearly related to routes, fares  
2 or services.

3 THE COURT: What about these services?

4 I'm not taking judicial notice of anything, by the  
5 way, in reaching my decision. But let me find the  
6 complaint. Just a minute.

7 Here we have this application that can be used --  
8 this is just out of the People's complaint, paragraph 4 --  
9 to check in online, to rebook cancelled or missed flights,  
10 to pay for checked baggage, to track checked baggage, to  
11 review reservations for air travel.

12 This seems to me it's clearly related to -- the  
13 restriction or the regulation that you're seeking to  
14 impose here is clearly related to a service that the  
15 airline provides, and you're requiring them to communicate  
16 something in connection with the provision of that service  
17 on the Delta app.

18 MR. MILLER: It's not just related to those specific  
19 passenger records that a customer might actually submit to  
20 the airline.

21 I agree to a certain extent the privacy cases that  
22 the defendant has cited that you refer to do suggest that  
23 once a passenger name record has been established that  
24 preemption may occur.

25 But we're talking about a preliminary step before the  
26 consumer has actually become a customer and taken some  
27 action to purchase a ticket.

28 THE COURT: Do you think that the cases, the Supreme

1 Court cases and the cases that construed that ADA, want  
2 you to get into that kind of granular analysis?

3 I mean what Tanen says -- and I'm reading Tanen  
4 versus Southwest Airline Company, 187 Cal.App.4th, 1156, a  
5 2010 case. It says what is relevant under Wolens and the  
6 other federal cases discussed above "is not whether the  
7 services provided by the airlines are peripheral but  
8 whether the relevant state laws have a direct or  
9 peripheral effect on deregulation."

10 Even the title of the complaint here is a complaint  
11 for violations of Business and Professions Code Section  
12 17200 (unfair competition law). So the enforcement of the  
13 particular privacy statute is enforced through the unfair  
14 competition law, which is designed to make competition  
15 fair, which seems to me to make a pretty darned good case  
16 that you're talking about regulating the provisions of a  
17 service by an airline in the face of the preemption clause  
18 of the ADA.

19 To me -- and then I'm going to let you talk.

20 To me, I see a continuum. On the one hand there's  
21 prostitution, obscenity and gambling, which it would be  
22 hard to say has anything to do with the prices, routes or  
23 services of an air carrier.

24 Then on the another part of the continuum are the  
25 common law claims which have been carved out from the  
26 preemption. So a tort or a contract. Your sue Delta  
27 because they -- I don't know, your luggage got damaged or  
28 something that relates to some individual relationship

1 that you have with Delta. Maybe that's not a good one  
2 because that may be too close to the way airlines run.  
3 But anyway, when you have a contract claim with Delta,  
4 somebody worked for Delta and was terminated or somebody  
5 was frequent flyer and was kicked out of the club. I  
6 think that's another one of the case that we have where  
7 that was allowed to go forward. So those are not  
8 preempted.

9 But here we're talking about a service, which are all  
10 those things that I enumerated in paragraph 4 of the  
11 complaint, and the communication to a customer and an  
12 action being brought by the State pursuant to a state  
13 statute designed to regulate competition or make  
14 competition fair.

15 MR. MILLER: Well, the Business and Professions Code  
16 17200 et seq. is often referred to as the unfair  
17 competition law or the Unfair Business Practical Act.  
18 Sometimes it's referred to UCL. However it is not just  
19 limited to competition issues.

20 THE COURT: I realize that. But just looking at  
21 Tanen. Tanen says here's the test:

22 First, does the claim derive from the enactment or  
23 enforcement of state law. And the answer here has to be  
24 yes. Because whether you call it the unfair competition  
25 statute or Business and Professions Code 17200 et seq., it  
26 clearly derives from the enforcement of a state law, the  
27 Cal OPPA and 17200.

28 Do you disagree with that?

1 MR. MILLER: Well, I think Tanen also says at page  
2 1166 or 67, the claim must relate to airlines' rates,  
3 routes or services.

4 THE COURT: That's the second prong. But do you  
5 agree with me on the first prong that the claim does  
6 derive from the enactment or enforcement of a state law?

7 MR. MILLER: In term of Cal OPPA and UCL?

8 THE COURT: Yes.

9 MR. MILLER: Yes.

10 THE COURT: Okay. So that's where the argument lies.  
11 Do the claims relate to airline price, routes or services,  
12 either by expressly referring to them or by having a  
13 significant economic effect on them. That's the Tanen  
14 test.

15 MR. MILLER: Right, but under Rowe and Morales, a  
16 significant economic effect has to be does the law require  
17 the addition of some service that they have to fly another  
18 route or they have to change their advertising.

19 The amount of effort to be expended by Delta to cure  
20 this fault, which they've had plenty of time to do, is  
21 minimal. In fact, the record shows in a letter from Delta  
22 to the attorney general indicating after the 30-day period  
23 under Cal OPPA has expired that they didn't think they  
24 were required to do so, but they would comply six weeks in  
25 the future.

26 The day after we filed our lawsuit, they provided a  
27 notice within the app.

28 THE COURT: All right, do you have anything further?

1 I interrupted you a lot.

2 MR. MILLER: That's all right. This is your  
3 courtroom.

4 Do you want me to talk a little bit about the kiosk  
5 cases?

6 THE COURT: Sure.

7 MR. MILLER: Because there are a number of ways that  
8 can be distinguished.

9 First of all, the statute that is the basis for the  
10 Department of Justice filing their notice provides that  
11 they can file -- and I believe it's 28 USC 5671. It  
12 basically says the United States can file notices in state  
13 or federal court about concerns of it.

14 They haven't done that in our case.

15 THE COURT: I think Judge Alsup invited them to.  
16 That's what I gathered.

17 MR. MILLER: It hasn't happened here yet.

18 THE COURT: I'm not going to. And the reason I asked  
19 the question was I wondered about to what extent I should  
20 take into account that the Justice Department in that case  
21 thought that the regulation of the kiosks was preempted.

22 MR. MILLER: I think the difference is that the kiosk  
23 is markedly different from the mobile app that we're  
24 talking about here. The kiosk is something fixed. It's  
25 kind of like this table: I can't take it with me. I  
26 can't put it in my pocket. It doesn't track my location.  
27 Obviously it's at the airport.

28 But these things that we carry around with us all the



1 time, if you're like me you carry them all the time. They  
2 know where you are at all times. And that's not a bad  
3 thing. There's a lot of procompetitive and innovative  
4 features that companies can enter into. And the State of  
5 California is very interested in encouraging businesses to  
6 do that. The problem is some people don't want that.

7 THE COURT: But at a kiosk you can do a lot of the  
8 same things you can do on the mobile app, based on what I  
9 read in Judge Alsup's decision and looking simply at the  
10 complaint, paragraph 4 in this case. It performs a lot of  
11 the same functions.

12 MR. MILLER: That's correct, but it doesn't have  
13 geolocational ability. It can't take your photo. Unlike  
14 a kiosk, your mobile device is a platform for many other  
15 applications and functionality. It's not portable. It's  
16 not always available to the consumer both in the airport  
17 or hundred miles away from the airport.

18 THE COURT: So it provides a service in a different  
19 way. Does that mean that it's not preempted?

20 MR. MILLER: We think it is to the extent we're not  
21 talking about an actual passenger transaction. We are  
22 talking about a consumer such as yourself who may use  
23 Delta, they just download the app and never use it. Or a  
24 customer like me, and I will disclose that I have in the  
25 past flown Delta as well, but maybe I download Fly Delta  
26 and I don't have an interest in buying a ticket. It knows  
27 where I am at all times, and this information is not  
28 disclosed to the client.

1 I think the only way that Nation Federation --

2 THE COURT: Is it different if I get a free airline  
3 travel certificate in the mail from Delta or Southwest and  
4 I never use it and it doesn't comply with California law  
5 about travel certificates not having expiration dates?

6 Would Tanen say that just because it came to me as  
7 unsolicited mail that it could be regulated whereas it  
8 couldn't be regulated if I was a customer of the airline?

9 MR. MILLER: I don't think that undated certificate  
10 is really a question here in this case.

11 THE COURT: No, but the reason I'm bringing it up is  
12 you seem to keep drawing a distinction between the nature  
13 of the relationship between the user of the app and Delta.  
14 That somebody might download it and never look at it.

15 How is that different from me receiving an airline  
16 travel certificate in the mail unsolicited, and then I  
17 later find out it violates California law because it's  
18 expired.

19 MR. MILLER: How about if it has a picture of a naked  
20 woman on it?

21 THE COURT: You see, I don't happen to think those  
22 analogies are particularly useful because they're so far  
23 afield of what we're talking about. So I'm not going to  
24 answer the question. But I don't find it the least bit  
25 persuasive.

26 MR. MILLER: Counsel has mentioned this issue of the  
27 concern of the ADA is with patchwork regulation from 50  
28 states. And certainly that's a concern. But the fact is

1 Delta is already subject to patchwork regulation in all 50  
2 states and throughout the world. In the United States the  
3 Congress in '78 when they enact ADA decided they wanted to  
4 limit that somewhat. But it's not complete. There is a  
5 line, and we do not believe our enforcement of Cal OPPA  
6 under the UCL crosses that line.

7 To the extent that the Court might be inclined to  
8 grant the demurrer and permit permission to amend, one  
9 suggestion I might make is we typically file UCL claims in  
10 the alternative, "unlawful, unfair or fraudulent." To the  
11 extent the Court has concern with that kind of broad  
12 anti-competitive approach, this case is very simple. They  
13 violated Cal OPPA, this is a UCL, it's an unlawful claim,  
14 and it could be limited to that.

15 THE COURT: I'm sorry, I'm not sure I'm following.  
16 How would you propose to amend the complaint to avoid the  
17 preemption issue?

18 It would still be the same Cal OPPA issue but you  
19 would recast it differently?

20 MR. MILLER: Right now it's pled in the alternative  
21 as a violation of the UCL, as unlawful, unfair or  
22 fraudulent business practice. Instead it would be  
23 redrafted as being lawful.

24 THE COURT: But it would just be under a different  
25 prong of the Business and Professions Code?

26 MR. MILLER: A single prong.

27 THE COURT: Thank you.

28 MR. MILLER: The other thing I would just point out

1 is under Rowe we believe that Cal OPPA as enforced under  
2 our UCL merely affects the non-price aspects of Delta's  
3 airline communication with its consumers.

4 THE COURT: Thank you very much for your argument.  
5 I'm sorry to ask you so many questions.

6 Did you have anything else, Mr. Schindler?

7 MR. SCHINDLER: Only, Your Honor, if you have  
8 questions, I'm happy to follow up.

9 If I could, I want to provide to the clerk for Your  
10 Honor the notice of hearing that I referred to earlier.

11 Can I approach?

12 THE COURT: Mr. Miller, do you have any objection to  
13 that?

14 MR. MILLER: I do.

15 THE COURT: You can make it part of the record to  
16 have it on appeal if you want, but I'm not going to  
17 consider it.

18 MR. SCHINDLER: That's fine.

19 MR. MILLER: The only thing is to the extent that  
20 you're inclined to dismiss the demurrer, I just have a  
21 revised order which reflects today's date.

22 THE COURT: Thank you. Why don't we wait on that.  
23 Is the matter submitted?

24 MR. SCHINDLER: Yes, Your Honor.

25 MR. MILLER: Yes, Your Honor.

26 THE COURT: I'm going to grant the demurrer on the  
27 preemption grounds without leave to amend. My decision  
28 wouldn't be different if it were to be amended simply to

1 be a complaint under the "unlawful" ground.

2 This is an action for civil penalties and injunction  
3 for violation of Business and Professions Code 17200. The  
4 ADA has a provision that states that a state court may not  
5 enact or enforce a law, regulation or other provision  
6 having the force and effect of law related to a price,  
7 route or service of an air carrier. That's 49 United  
8 States Code section 1305(a)(1).

9 Accepting the allegations in the complaint as true, I  
10 find that this preemption provision bars the lawsuit.

11 In making this rule I'm not taking judicial notice of  
12 anything that was submitted by either side in connection  
13 with the demurrers. I know there were objections by both  
14 sides to each other's submissions, but I don't find it  
15 necessary to take judicial notice of anything to make my  
16 ruling.

17 The State is suing Delta for violation of Business  
18 and Professions Code 17200 and specifically for failing to  
19 comply with the statute governing the online privacy  
20 Business and Professions Code 22575 to 22579. This is a  
21 consumer protection/right of privacy law. It is not a  
22 common law claim, a personal injury action or the  
23 enforcement of a contract set by the defendant and an  
24 individual or entity. So we have a state law and state  
25 action in seeking to enforce it.

26 I've looked closely at the Supreme Court cases that  
27 govern in this area, Morales versus TWA, Wolens and Rowe  
28 by analogy. The Court in Morales tells us that the term

1 "relating to" has a meaning and that the words express a  
2 broad preemptive purpose.

3 In Morales the ADA preempted states from enforcement  
4 of consumer fraud statutes against deceptive airline  
5 advertising. Although Morales did carve out an area where  
6 state action was considered to be "too tenuous, remote or  
7 peripheral" to have preemptive effect and didn't say where  
8 that line would be drawn. I do not think on the record  
9 before me that the line is drawn to exclude this case from  
10 preemption.

11 In Wolens the Court determined fairly expeditiously  
12 that the Illinois Consumer Fraud Act could not be applied  
13 to American Airlines in a lawsuit over its frequent flier  
14 program. The language of the Illinois Consumer Fraud Act  
15 is not all that dissimilar to our state's unfair  
16 competition law.

17 And there are many other cases that are cited in the  
18 parties' briefs where statutes like our unfair competition  
19 law were found to be preempted when they were a basis to  
20 enforce actions against an airline.

21 All the cases are summarized in Tanen versus  
22 Southwest Airlines Company, which I read. Applying the  
23 test in Tanen, this claim does derive from the enactment  
24 or enforcement of state law, and I believe that it does  
25 relate to airline prices, route or services. In this  
26 instance services.

27 I think that this is -- this case is in effect an  
28 attempt to apply a state law designed to prevent unfair

1 competition which regulates an airline's communication  
2 with its consumers, and I think it's preempted.

3 And in reaching that conclusion I'm persuaded by  
4 cases such as Jet Blue -- and I'll get the cite for that.  
5 In Re Jet Blue Airways Corporation Privacy Litigation,  
6 379F Supp.2d, 299, an Eastern District of New York case  
7 from 2005 and other such privacy cases in connection with  
8 the airlines.

9 That's my ruling.

10 I want to thank both counsel for superb briefs and  
11 for their great arguments this morning.

12 MR. SCHINDLER: Thank you. Do we need to prepare an  
13 order?

14 THE COURT: Please.

15 MR. SCHINDLER: Thank you.

16 THE COURT: If you want to just say it's sustained  
17 without leave to amendment, I can sign that right now.

18 MR. SCHINDLER: That would be fine with us.

19 THE COURT: Is that all right with you, Mr. Miller?

20 MR. MILLER: Yes, Your Honor.

21 THE COURT: Because there was a proposed order.

22 MR. MILLER: Change the date, Your Honor.

23 THE COURT: I will.

24 So this says sustains the demurrer and dismisses the  
25 complaint with prejudice.

26 ----oOo----

27

28

CERTIFICATE OF REPORTER

1  
2 I, Anthony C. Vaughn, Certified Shorthand Reporter,  
3 Certificate Number 6185, do hereby certify that I was the  
4 Official Court Reporter assigned to the herein captioned  
5 case; that I reported in shorthand the proceedings and  
6 subsequently caused said shorthand to be prepared into  
7 English.

8 I further certify that the foregoing is a full, true  
9 and correct reflection of the proceedings had in the  
10 herein-captioned case.

11 May 14, 2013

\_\_\_\_\_  
12 Anthony C. Vaughn, CSR  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28