

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

Application of

ENCOMPASS AVIATION LLC

For authority to conduct scheduled passenger operations  
as a commuter air carrier under 49 U.S.C. 41738

DOCKET: DOT-OST-2017-0081

**ANSWER OF THE COUNTY OF SAN MATEO, CALIFORNIA IN  
OPPOSITION TO THE APPLICATION OF ENCOMPASS AVIATION  
LLC FOR COMMUTER AIR CARRIER AUTHORITY**

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Pursuant to 49 C.F.R. § 302.204, the County of San Mateo, California (the “County”), respectfully submits this opposition to the Application of Encompass Aviation LLC (“Encompass”) for commuter air carrier authority.

The County opposes Encompass’ Application because this Application appears inextricably entwined with, and intended to promote, an effort by another entity, Surf Airlines, Inc. (“Surf Air”), to evade regulation by the U.S. Department of Transportation (“DOT”). Issuing the requested economic authority to Encompass would promote and encourage an unfair and deceptive practice and unfair method of competition, in violation of 49 U.S.C. § 41712.

Surf Air itself holds no economic authority from DOT nor, apparently, does it possess an operating certificate from the FAA. As detailed below, however, based on the nature of Surf Air’s relationship both with its customers and with Encompass (and other operators) who operate Surf Air’s flights, Surf Air operates as an indirect air carrier that must obtain the appropriate economic authority in order to operate. Moreover, given the way Surf Air holds itself out as providing air

transportation to the public, Surf Air is a *direct* carrier that must obtain the appropriate economic authority in order to operate.

In its Application, Encompass seeks commuter authority to operate Surf Air flights in interstate commerce. Although the County does not challenge Encompass' technical capability to provide interstate commuter air carrier services, the County does object to granting Encompass' requested authority to provide air transportation because granting such authority would allow Surf Air to provide air transportation to its customers without any economic authority of its own. Because Surf Air lacks the appropriate economic authority, DOT should not countenance actions by Encompass that would enable Surf Air's unauthorized operations. Moreover, DOT should consider separately investigating Surf Air and another operator, Advanced Air LLC, which currently operates Surf Air's interstate flights.

As the owner and operator of San Carlos Airport ("SQL"), at which Surf Air and Encompass operate, the County feels strongly that Surf Air and Encompass must secure appropriate regulatory approvals to operate. Surf Air's operations have been highly controversial at SQL because of noise from its aircraft, because of the operational complexity that Surf Air imposes on this small general aviation airport, and because its operations are effectively transforming SQL into a scheduled passenger service facility. Although the County is taking steps to protect SQL, its users and the community from adverse effects of the Surf Air operations, while fulfilling its obligations as a federally-obligated airport sponsor, the County, as both an airport sponsor and the governmental representative of the residents of San Mateo County, must take the appropriate steps to assure that all entities operating at SQL have the appropriate economic authority in order to prevent deceptive trade practices and otherwise to comply with the law.

## **BACKGROUND**

### **A. SURF AIR'S PRE-2017 BUSINESS AND OPERATIONAL MODEL**

Prior to late 2016, Surf Air's operational model was relatively simple: Surf Air provided flights between a number of California cities using aircraft it owned and operated. Surf Air differed, however, from traditional operators in that it purported to operate as a "members only" airline. Under that model, customers paid a flat monthly fee, which entitled them to be called Surf Air members and to have unlimited access to all Surf Air flights. Recently, Surf Air has also started offering prepaid packages of 20 one-way tickets as an alternative for customers who do not want the monthly unlimited flight arrangement.<sup>1</sup> We are aware of no other criteria for "membership" than ability to pay. Surf Air flights operated on a scheduled basis between several California airports, including SQL, using 9-passenger Pilatus PC-12 aircraft. Surf Air held a Part 135 operating certificate from the FAA, which allowed it to conduct on-demand or commuter passenger-carrying operations. As a wholly intrastate operator, however, Surf Air was not an "air carrier" as defined by federal law and did not therefore require economic authority from DOT in order to operate.

### **B. 2017 CHANGES IN LEGAL STRUCTURE OF SURF AIR'S BUSINESS MODEL**

Effective in April 2017, Surf Air changed its legal structure, apparently in anticipation of initiating interstate service, as discussed below. Although Surf Air continues to sell monthly memberships or a package of one-way flights to customers, Surf Air no longer operates the flights and, apparently, has surrendered its Part 135 certificate.<sup>2</sup> Surf Air has leased all of its aircraft to

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<sup>1</sup> <https://www.surfair.com/app/signup/#/start> (last visited July 3, 2017) ("A minimum of 10 round-trips (distributed as 20 one-way flights) must be purchased upon activation. Additional flights may be purchased as needed.")

<sup>2</sup> See Application of Encompass Aviation LLC for Authority to Conduct Scheduled Passenger Operations as a Commuter Air Carrier under 49 U.S.C. 41738, Docket DOT-OST-2017-0081, Application of Encompass LLC at Attachment R (filed June 15, 2017) ("Encompass App").

Encompass Aviation LLC and has entered into an agreement with Encompass for Encompass to operate on behalf of Surf Air.<sup>3</sup> The leased aircraft retain their Surf Air livery, and in all respects appear to be Surf Air aircraft, except for a placard near the door stating that the flight is operated by Encompass.<sup>4</sup>

In its Membership Agreement, Surf Air describes its operation as follows:

Surf is a member-based travel arrangement service. Surf acts solely as agent for its Members in arranging transportation on the Members' behalf. Surf only arranges air transportation with FAA certificated air carriers. Surf is not an operator of aircraft or an air carrier, nor does it hold out, offer, sell or provide air transportation. Surf procures scheduled air transportation and other services, such as ground transportation, aircraft catering, and airport parking, for its Members.<sup>5</sup>

The Membership Agreement also states that:

All flights arranged under this Agreement are operated by Encompass Aviation, LLC, an FAA certificated FAR Part 135 air carrier ("Encompass"), or another Operator, in each case which shall have exclusive direction, control and authority over initiating, conducting or terminating flights ("Operational Control"). Surf is not a FAR Part 135 air carrier and does not provide air carrier services.<sup>6</sup>

It appears that Surf Air continues to set the schedule for operations.<sup>7</sup> Surf Air collects fees from its customers and separately pays Encompass based on their agreement. Surf Air has not requested, and does not possess, any economic authority from DOT or an exemption therefrom.

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<sup>3</sup> *Id.* Encompass has requested that the lease be kept confidential to protect sensitive business information.

<sup>4</sup> *Id.*

<sup>5</sup> Surf Air Membership Agreement For Flights Operated by Encompass Aviation, LLC or Another Third-Party Operator, at § I (Effective Date: April 13, 2017) available at <https://www.surfair.com/us/legal/#section-4>.

<sup>6</sup> *Id.*

<sup>7</sup> Encompass App. at Attachment R.

### C. RECENT CHANGES IN SURF AIR'S OPERATIONS

In addition to its legal restructuring, Surf Air has embarked on a significant expansion. On June 8, 2017, Surf Air announced the acquisition of Rise, which operates a membership-based flight service in Texas very similar to Surf Air's California operation.<sup>8</sup> Surf Air has also begun to offer interstate service.<sup>9</sup> At present, the service is between Hawthorne Municipal Airport in Los Angeles and McCarran International Airport in Las Vegas. Service to Scottsdale Airport in Scottsdale, Arizona is planned. Surf Air has also announced the start of European operations through a subsidiary or affiliated entity.<sup>10</sup>

In order to provide interstate service, Surf Air has entered into an agreement with Advanced Air, LLC, a Part 135 operator. Application of Advanced Air, LLC for Commuter Authority, Docket DOT-OST-2016-0120 Response to Request for Additional Information (Sept. 23, 2016). On April 16, 2017, Advanced Air received authority from DOT to operate as a commuter air carrier in interstate commerce in order to provide that service. Application of Advanced Air, LLC for Authority to Engage in Scheduled Passenger Operations as a Commuter Air Carrier under 49 U.S.C. § 41738, Docket DOT-OST-2016-0120, Final Order (Served April 17, 2017). On June 15, 2017, Encompass filed the Application that is the subject of this proceeding seeking economic authority as a commuter air carrier in order to transport passengers to Las Vegas and Scottsdale on behalf of Surf Air.

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<sup>8</sup> <https://www.surfair.com/app/futureoftravel/#/rise>

<sup>9</sup> *See Id.* Surf Air's schedule also lists Las Vegas as a destination.

<sup>10</sup> Jess McHugh, Business Insider, *This new private jet service offers unlimited flights to Europe (June 27, 2017) (available at: <http://www.businessinsider.com/what-is-surf-air-2017-6> (last visited July 5, 2017))*.

## ARGUMENT

Pursuant to 49 U.S.C. § 41101(a), “an air carrier [or charter air carrier] may provide air transportation only if the air carrier holds a certificate issued under this chapter authorizing the air transportation.” Federal law defines an “air carrier” as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” 49 U.S.C. § 40102(a)(2). Certain air carriers may obtain an exemption from the formal certification requirements. *E.g.* 14 C.F.R. § Part 298 (air taxis); 14 C.F.R. Part 380 (Public Charters); 14 C.F.R. Parts 296 & 297 (Air Freight Forwarders). Whether through the certification or exemption process, however, all air carriers must have the appropriate authority from DOT.

Failure to obtain the appropriate DOT authorization as required by 49 U.S.C. § 41101 or other DOT licensing requirements is considered an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712. *See* U.S. Dep’t of Transp., *The Role of Air Charter Brokers in Arranging Air Transportation* at 1 (Oct. 8, 2004). An entity purporting to act as a broker or agent will be found to violate Section 41101 if it “hold[s] out air transportation in its own right or enter[s] as [a] principal[] into contracts with customers to provide air transportation.” *Id.* Further, authorized air carriers violate Section 41712 by using their authority to facilitate the unauthorized operations of unauthorized air carriers. *Id.* at 2.

As shown below, Surf Air is an indirect or direct air carrier that lacks any DOT authority to operate. Because Encompass seeks DOT authority to operate as a commuter air carrier to operate certain interstate flights for Surf Air, Encompass’ Application should be denied to avoid authorizing violations of Section 41712.



**A. SURF AIR IS AN “INDIRECT AIR CARRIER”**

An “indirect air carrier” is “any person who undertakes to engage indirectly in air transportation operations and who uses for such transportation the services of a direct air carrier.” 14 C.F.R. § 380.2 (2014). That definition perfectly describes Surf Air’s operation. Surf Air promises its members a suite of flight services, including access to a pre-established and non-negotiable schedule of flights between specific airports, and then retains the operators to provide that air transportation. Although Surf Air’s membership-based business model (in which customers pay on monthly or for a package of one-way tickets) may be different from traditional indirect carriers, it is operating as a classic indirect carrier nonetheless, and therefore, must obtain economic authority from DOT.

Surf Air presumably seeks to be considered an agent/broker based on the language in its Membership Agreement that it “acts solely as agent for its Members in arranging transportation on the Members’ behalf.” But the self-serving use of agency language cannot change the economic and practical reality of how its business operates and how it represents itself to the public. Closer scrutiny of Surf Air’s operation in light of DOT enforcement decisions establishes that Surf Air is not acting in its purported agency role.

If an entity “hold[s] out air transportation in [its] own right or enter as [a] principal[] into contracts with customers to provide air transportation,” it will be considered an indirect air carrier requiring DOT economic authority. U.S. Dep’t of Transp., *The Role of Air Charter Brokers in Arranging Air Transportation* at 1-2 (Oct. 8, 2004). The key factor for distinguishing an indirect carrier from a broker is whether the entity is acting as an agent for the traveler or the direct air carrier, in which case the entity is *not* an indirect (or direct) air carrier and requires no economic

authority from DOT. But if the entity is acting as a *principal* on either side of the transaction, it requires economic authority from DOT. *Id.* As DOT has explained:

With respect to payment for the proffered air transportation, two separate transactions commonly occur: (1) the air charter broker collects all of the monies paid by the charter customer pursuant to the broker's contract with the customer, and (2) the air charter broker then turns over a portion of these monies to the direct air carrier pursuant to the broker's separate contract with the carrier. In such instances, the air charter broker is not acting as an agent for the operating carrier or for the charter customer. Rather, the air charter broker is acting as a principal in both transactions, and, with respect to its relationship with the customer, is engaged in air transportation as an indirect air carrier without economic authority in contravention of the statutory and Department licensing requirements described above.

*Id.* This excerpt aptly describes Surf Air's relationships with its customers and operators (Encompass and Advanced) and DOT has applied that policy to find violations of Section 41712 in specific matters virtually indistinguishable from Surf Air's operations.

For example, DOT recently entered into a Consent Order to resolve violations of DOT regulations by Paradigm Jet Management, Inc. and IBX Jets LLC. Paradigm is a valid direct air carrier. IBX held no economic authority from DOT but did own aircraft, which it leased to Paradigm. IBX contracted directly with customers to provide air transportation, and then entered into an agreement with Paradigm to operate the leased IBX aircraft to transport IBX's customers. *Paradigm Jet Management, Inc., Violations of 49 U.S.C. § 41712*, DOT Order 2017-4-2, Consent Order at 2, Docket OST 2017-0001 (served April 17, 2017). As DOT explained

In practice, IBX, independent of Paradigm, contracted directly with customers seeking air service, promising to provide them air transportation while collecting and holding all of the monies paid by those customers. There was no privity of contract between the customers seeking air service and Paradigm, and Paradigm allowed IBX to be the principal in the transaction to which the ultimate customer looked for performance of the contracts for air transportation.

*Id.* at 2-3.

Although the Consent Decree was between DOT and Paradigm, DOT noted that IBX had acted unlawfully as an indirect air carrier and “engag[ed] in air transportation without a license.”

*Id.* at 3. Paradigm acted unlawfully because it “facilitated IBX’s engaging in indirect air carrier services without any economic authority.” *Id.*

The Department also found that Fly Blade, Inc., an entity with a business model similar to Surf Air’s, had acted as an unauthorized indirect air carrier. *Fly Blade, Inc., Violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR Part 399*, DOT Order 2015-4-6, Consent Order Docket No. OST 2015-0002 (served April 10, 2015). Fly Blade did not hold any economic authority from DOT and did not own or operate any aircraft. “Fly Blade utilizes the services of a Part-135 on-demand air carrier, Liberty Helicopters, Inc., (Liberty) to operate flights for consumers requesting air transportation.” *Id.* at 2. DOT concluded that Fly Blade was an unauthorized indirect air carrier because it operated a system in which the first person to book a flight on a given aircraft contracted with Fly Blade for the entire cost and capacity of the aircraft. That passenger’s price on future flights would be reduced if other paying customers agreed to join the flight. *Id.* at 2-3. Because Fly Blade contracted directly with the customer for the cost of the flight, Fly Blade was found to be an indirect carrier.<sup>11</sup>

The nature of Surf Air’s relationships with its members on the one hand, and its aircraft operators on the other hand are virtually indistinguishable from the factors that led DOT to find that IBX and Fly Blade were indirect air carriers. First, Surf Air acts as the principal with respect

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<sup>11</sup> DOT also determined that FlyBlade was a *direct* air carrier because “FlyBlade’s website and smartphone application contained language, statements, and images of aircraft painted in the company’s logo that could have led a consumer to reasonably conclude that FlyBlade was a direct air carrier. Through marketing strategies such as these, FlyBlade created the erroneous impression that it was a direct air carrier.” *Id.*

to the travelers, despite disclaimers in its contractual statements. Surf Air solicits and sells membership to members. The membership agreement is between the traveler and Surf Air in which Surf Air promises to provide specific air travel on designated aircraft, to destinations determined by Surf Air, and on a schedule established by Surf Air. Surf Air specifically advertises that schedule, and other flight services, as the benefits of membership in Surf Air. Surf Air charges a membership fee that entitles members to those flights and services. Surf Air collects from its members all of the air fare – in the form of flat-fee membership dues that do not vary based on the member’s actual travel – and holds that money as its own. There is no direct contract or agreement between the traveler and Encompass or other aircraft operators.

Moreover, Surf Air does not act as a true agent. Travelers do not ask Surf Air to locate an operator to provide a flight at a time and route of the traveler’s choosing. Rather, Surf Air sets flights times and routes, and will only “arrange” travel for members on the flights that Surf Air has already selected. To paraphrase Henry Ford, Surf Air will “arrange” any flight for its members, as long as it is a flight on a Surf Air-liveried plane and on a route and time Surf Air has already advertised on its schedule. Surf Air is no more an agent for its members than, for example, United Airlines is an agent of its customers when it places the traveler on one of United’s independent commuter operators branded as United Express.

Those facts make Surf Air a principal with respect to its members in the same way that IBX and Fly Blade were principals. *See also City Skies, Inc. and Ronald E. Mays, Violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR Part 380, DOT Order 2010, Consent Order (Served Nov. 2, 1010) (Respondents acted as an indirect air carrier by soliciting passengers a specified flight, accepting all payment for the flight, and separately chartering with a direct air carrier for the flight).* The fact that Surf Air members are not responsible for the entire cost of a flight, as

was the case in Fly Blade, is a distinction without a difference. In both cases, the traveler's transaction is solely with Surf Air (or Fly Blade), which entitles the traveler to travel on the terms *Surf Air* (or Fly Blade) promised, without privity or other contractual relationship with the actual operator.

Second, Surf Air also acts as a principal with respect to its operators. Surf Air contracts directly, and in its own name, with Encompass (and Advanced) to provide the transportation Surf Air promises to its customers.<sup>12</sup> While we have not seen the contracts, it appears that Surf Air determines the schedule and all other aspects of travel on its own behalf. All of the flights are conducted on aircraft in Surf Air livery. Under that arrangement, neither Encompass nor Advanced has retained Surf Air as its agent to find passengers for their aircraft. To the contrary, Surf Air appears to contract with Encompass (or Advanced) directly for the entire flight, regardless of how many Surf Air customers actually fly on it. Indeed, Encompass leased all of Surf Air's aircraft in order to accommodate Surf Air's needs. If anything, Encompass and Advanced appear to be acting as agents for Surf Air by doing what Surf Air requires to serve Surf Air's members. Surf Air itself subleases space at SQL and has a permit to conduct business at SQL in order to provide its customers with the flight services it promised. Tellingly, Encompass does not lease space at SQL and has no visible presence at SQL, as would typically be the case if it provided flight services as a principal. Again, there is no contractual privity between the travelers and the operators; their only contractual privity is with Surf Air.

Conversely, there is nothing on the Encompass or Advanced websites to suggest that the Surf Air flights are actually Encompass or Advanced flights. For example, neither operator presents the Surf Air schedule as its own, as one would expect if Surf Air were acting as an agent.

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<sup>12</sup> Encompass Application at Attachments N and R.

To the contrary, the Encompass website directs Surf Air customers to the Surf Air website for schedule and other flight information and the Advanced website provides no information about scheduled service and mentions only its direct charter business.<sup>13</sup> There is no indication that Surf Air is in any way acting as an agent for Encompass or Advanced. As in *City Skies* and *Paradigm*, Surf Air is a principal with respect to its dealings with its operators, which makes it an indirect air carrier.

Given the foregoing, Surf Air's operation is a classic indirect carrier operation and its "innovative" business model is simply a distraction. Surf Air promises its members a suite of transportation services – including scheduled flights to and from specific destinations on designated aircraft in Surf Air livery – in exchange for payments made to Surf Air. In order to fulfill those promises, Surf Air separately contracts with operators – Encompass and Advanced – and dictates virtually all aspects of the service – schedule, aircraft type, airport, and livery – other than the actual operation of the flight. Neither Surf Air's membership model nor its contractual disclaimers change the fact that it acts as a classic "indirect carrier" under DOT precedent. Its attempts to characterize itself as an "agent" or "broker" simply fails to withstand scrutiny.<sup>14</sup>

## **B. SURF AIR IS A DIRECT AIR CARRIER**

The key to DOT's analysis of whether an entity is a direct air carrier, even if it does not itself actually operate aircraft, is whether it "holds out" as actually providing air transportation.

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<sup>13</sup> <http://encompassaviation.com/> (last visited on July 5, 2017); <http://advancedaircharters.com/> (last visited on July 5, 2017).

<sup>14</sup> The fact that Surf Air discloses, at least in places, that Surf Air flights are operated by others does not change the fact that Surf Air is acting as an indirect carrier. If anything, those disclosures reinforce the fact that Surf Air is an indirect carrier because it highlights that Surf Air enters as principal "into contracts with customers to provide air transportation," which make it an indirect carrier in the same way that DOT found *City Skies*, *Paradigm* and *FlyBlade* to be indirect carriers. At most, those disclosures may prevent Surf Air from being considered a direct air carrier, although, as discussed below, they fail to do that as well.

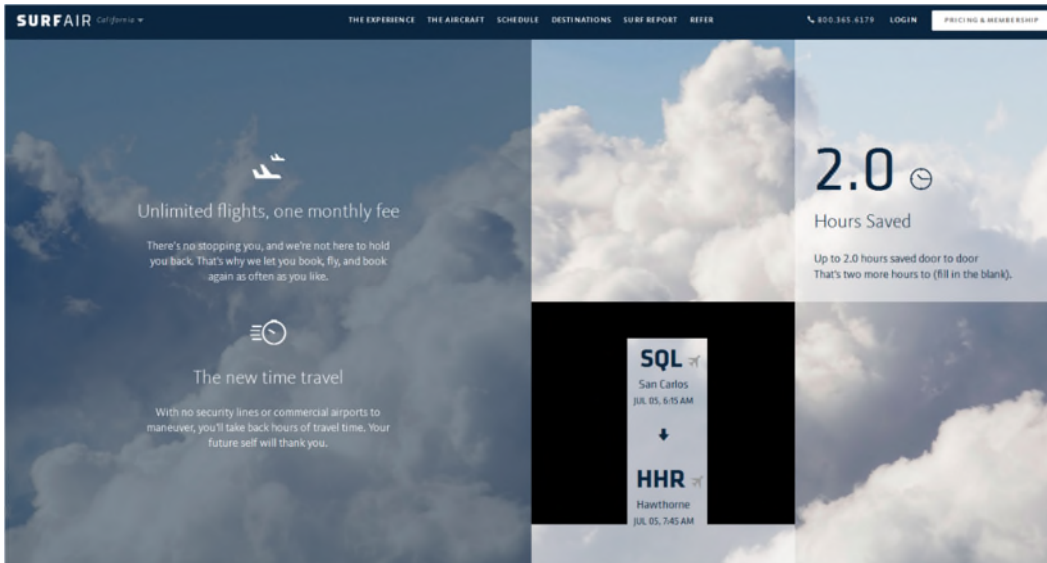
Thus, DOT found that Fly Blade was a direct air carrier because “Fly Blade’s website and smartphone application contained language, statements, and images of aircraft painted in the company’s logo that could have led a consumer to reasonably conclude that Fly Blade is a direct air carrier.” *Fly Blade, Inc., Violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR Part 399*, DOT Order 2015-4-6, Consent Order at 2-3, Docket No. OST 2015-0002 (served April 10, 2015). Through marketing strategies such as these, Fly Blade created the erroneous impression that it was a direct air carrier.” *Id.* Similarly, DOT found that City Skies was a direct air carrier by “referring to itself as the ‘first air carrier to originate non-stop service to Cancun, post Hurricane Katrina, from beautiful Louis Armstrong International Airport in New Orleans.’”<sup>15</sup>

The overwhelming impression from Surf Air’s description of its services is that Surf Air holds itself out as providing air transportation. First, the name “Surf Airlines” overtly proclaims it is an airline which, in common understanding, provides air transportation. That impression is reinforced by the fact that the aircraft Surf Air uses all have the same livery that displays the name “Surf Air.” Surf Air’s dramatic use of photographs of Surf Air aircraft in flight throughout its website underscores that impression.

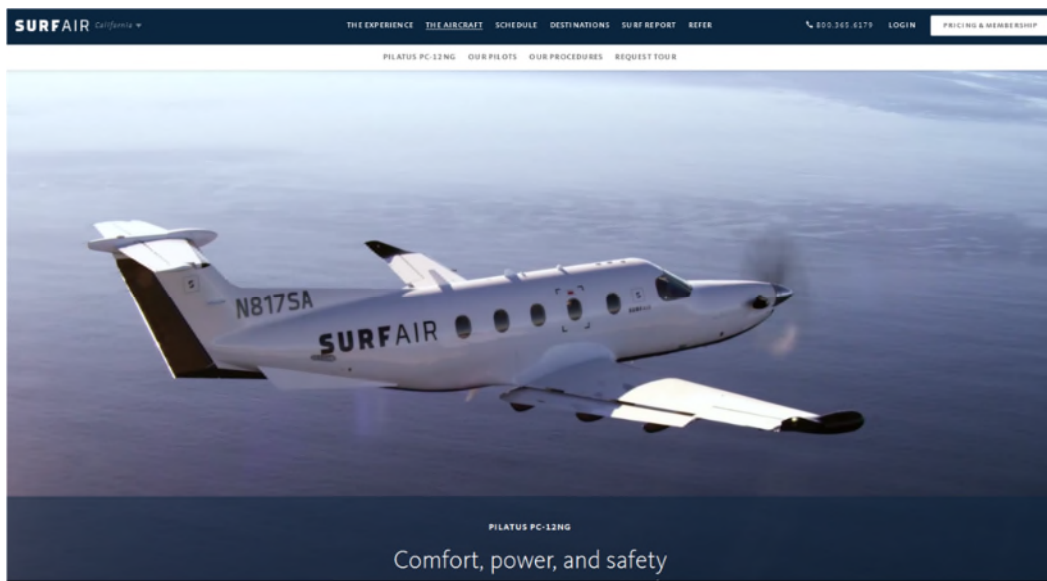
Second, the overall presentation on Surf Air’s website is that Surf Air provides a network of scheduled flights to its members. The home page displays the Surf Air flights in progress together with departure and arrival times, and provides the following reason to become a member:

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<sup>15</sup> *Id.* at 3.



“The Aircraft” page features an aircraft in flight in Surf Air livery, conveying the clear impression that Surf Air is providing flight services itself:



The impression is reinforced on the home page and under “Destinations,” where the lead language states:

### WHERE WE FLY

Now serving 12 California destinations with many more to come<sup>16</sup>

<sup>16</sup> <https://www.surfair.com/us/destinations/>



Under “The Experience,” Surf Air describes “The Surf Air Experience” as:

The Surf Air Experience  
Unlimited flights made  
simple, efficient and effortless

Surf Air offers an innovative all-you-can-fly membership that empowers you to travel quickly, simply, and comfortably, anywhere in California. That means streamlined booking and convenient private airports, where you can arrive just 15 minutes before your flight and take off in the comfort of custom-designed executive aircraft. It’s not too good to be true—it’s just Surf Air.<sup>17</sup>

Under the “Surf Report” tab, the first posted item appears to be a news article, although the publication is not identified, headlined “5 Reasons to Fly Surf Air,” that makes repeated statements that “Surf Air flies ...” or described “Surf Air flights ....” The item does not make any reference to a third-party operator and creates the overall impression that Surf Air is providing flight services itself. A subsequent News item (also not attributed to a publication) describes Surf Air’s new Las Vegas service as follows:

#### NEWS

Now Boarding: Surf Air → Las Vegas

by Megan Martin May 23, 2017

Whether it’s a night of high-stakes tables, world-renowned cuisine, or iconic performances you’re after, Vegas is flush with entertaining possibility. Even better: a weekend is about all you need to get your fix. Which is part of the reason we’re reinstating our flights from Hawthorne and San Jose to Las Vegas beginning Friday, June 9th. The other part? You asked us to.<sup>18</sup>

The constant references to “we,” clearly referring to Surf Air, to Surf Air’s flights, and to other aspects of the Surf Air experience create the distinct impression that Surf Air is offering and

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<sup>17</sup> <https://www.surfair.com/us/the-experience/>

<sup>18</sup> <https://www.surfair.com/us/surf-report/now-boarding-surf-air-%E2%86%92-las-vegas/>. See also <https://www.surfair.com/us/aircraft/>.

providing air transportation using its fleet of aircraft and operating on its schedule of flights and destinations. Applying the reasoning DOT applied in the Fly Blade Consent Order, Surf Air is a direct air carrier.

Surf Air has gone to pains in other places assert that the flights are provided by others. As quoted above, Surf Air's membership agreement, which is included in the "Legal" section of Surf Air's website, states that Encompass or others actually operate the aircraft. In other discrete places too, Surf Air has been careful to state that it uses "third party operating partners" to operate the aircraft<sup>19</sup> or "arranged convenient scheduled service" to Las Vegas.<sup>20</sup>

These isolated assertions are not enough to erase the overall impression to the traveling public that Surf Air holds out as providing air transportation. They are placed in specific places, but carefully not included in other places. Those disclosures are strategically placed fig leaves that do little to detract from the clear message that Surf Air is itself providing air transportation to its members through some relationship with an aircraft operator that is opaque to travelers. Indeed, the references to "our aircraft type" and "our third party operators" tend to obscure any idea that the third party operators are independent operators, and no specific operator is mentioned.

The statement in the Membership Agreement is also not enough to erase the impression Surf Air otherwise seeks to create. To the public, that statement is hidden in the "Legal" section of the Surf Air website, which can only be found by looking at the very bottom of the home page and then clicking on and reading the Membership Agreement. DOT has found in other cases that including disclosures of third-party operators in opaquely titled sections of a website (such as "Terms" or "Terms and Conditions") is not sufficient disclosure. *Mauvia, LLC, Violations of 49*

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<sup>19</sup> <https://www.surfair.com/us/aircraft/>

<sup>20</sup> <https://www.surfair.com/us/destinations/las-vegas/>

*U.S.C. §§ 41101 and 41712 and 14 CFR Part 380*, Order No. 2012-11-3, Consent Order at 3 (served Nov. 6, 2012) (finding that a public charter violated 14 C.F.R. § 380.30(b) by failing to disclose the applicable operator-participant contract when it included the contract in a “terms and conditions” tab but did not otherwise disclose the arrangement).

Moreover, Surf Air’s “members only” model does not mean that Surf Air provides private carriage, precluding it from being considered an “air carrier.” The FAA Advisory Circular on “Private Carriage Versus Common Carriage of Persons or Property,” makes clear that the open membership model of Surf Air makes it a common carrier. To be a private carrier, the carrier must limit carriage to a few contracts; 18-24 contracts has been considered too many “because it held itself out to serve the public generally to the extent of its facilities.” FAA, AC No. 120-12A, *Private Carriage Versus Common Carriage of Persons or Property* ¶ 4(d) (April 24, 1986). Moreover, “a carrier flying charters for only one organization may be a common carrier if membership in the organization and participation in the flights are, in effect, open to a significant segment of the public.” *Id.* at ¶ 4(f). Similarly, the fact that an operator limits its services to certain kinds of traffic – such as chartering an entire aircraft rather than selling individual seats – can be a common carrier because it offers that service to the general public. *Id.* at ¶ 4(e). Second, DOT seems to recognize that an entity providing common carriage through a membership system can be an air carrier. Letter from D.J. Gribbin, DOT General Counsel, to Greg Abbot, Texas Attorney General, date Nov. 3, 2008, explaining that certain state laws were preempted because they related to the price, route, or service of a subscription-based air ambulance service, meaning that the membership-based model did not make the operator something other than an air carrier.

Under all of those factors, Surf Air is a common carrier, despite its “members only” marketing approach. Surf Air has thousands of members and does not appear to limit the number

of its members. Membership is open to the public at large, limited only by a willingness to pay. Air travel may be limited to members, but there is no meaningful limit on who can become a member. Indeed, membership is not required to access Surf Air's schedule, or to take a test flight. Surf Air certainly "holds out" as offering air transportation services to anyone willing to pay their fees, making it a common carrier and, because of its interstate operations to Las Vegas, an air carrier engaged in interstate air transportation.

**C. BECAUSE SURF AIR IS OPERATING AS AN UNAUTHORIZED INDIRECT OR DIRECT AIR CARRIER, ENCOMPASS' APPLICATION FOR AUTHORITY SHOULD BE DENIED BECAUSE IT SEEKS TO FACILITATE SURF AIR'S UNAUTHORIZED OPERATIONS**

Although the County has no basis upon which to question Encompass' technical fitness to provide interstate air transportation services, the County is compelled to oppose Encompass' Application because, if granted, Encompass would facilitate the unauthorized operations of Surf Air. As detailed above, Surf Air is operating as an indirect and/or direct air carrier without economic authority from DOT. Encompass seeks authority for the express purpose of providing interstate flight services for Surf Air. For the same reasons that DOT took enforcement action against Paradigm for facilitating unauthorized indirect air carrier operations by IBX, DOT should deny Encompass' Application to prevent Surf Air from taking advantage of Encompass' authority to facilitate Surf Air's unauthorized operations.

If anything, the case against Encompass (and Surf Air and Advanced Air) is stronger than the case against Paradigm and IBX because the arrangement between Encompass and Surf Air seems carefully designed to avoid DOT regulation of Surf Air. As of late 2016, Surf Air owned and operated its own aircraft in intrastate travel, and therefore did not require economic authority from DOT. When Surf Air decided to add interstate service, which would have made it a direct carrier, it changed its model, as described above, to cease direct operations itself and to use the

services of other direct air carriers to provide its service. Accordingly, Surf Air leased all of its aircraft to Encompass and then contracted with Encompass to provide the full use of those aircraft for Surf Air's customers. Surf Air further contracted with Advanced Air to provide its Las Vegas flights, and Advanced Air then sought economic authority from DOT to provide interstate service.<sup>21</sup> Now Encompass also seeks economic authority to provide Surf Air's interstate service.

Thus, Surf Air's entire legal structure seems designed to circumvent direct regulation by DOT, and Encompass is seeking economic authority from DOT only to facilitate Surf Air's plan. No matter how Surf Air may try to obscure what is going on, Encompass flies Surf Air customers on Surf Air-owned and liveried aircraft according to a schedule set by Surf Air. For all intents and purposes, Surf Air operates and controls the operation even though it lacks any economic authority to provide flight air transportation, directly or indirectly. Encompass (and Advanced) facilitate that service by allowing Surf Air to use their operating authority as a device to shield Surf Air from direct regulation by DOT. As DOT found with respect to Paradigm, Encompass' role is an abuse of DOT's economic authority and can constitute a violation on its own. Accordingly, DOT should deny Encompass' Application until Surf Air obtains the appropriate economic authority from DOT.

## **CONCLUSION**

For the foregoing reasons, the County respectfully asks DOT to deny the Application of Encompass for authority to operate as a commuter air carrier because approving the Application would facilitate the unauthorized operations of Surf Air. In addition, the County respectfully requests that DOT investigate: (1) Surf Air for operating as a direct or indirect air carrier without

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<sup>21</sup> Because Advanced Air does not operate at SQL, the County was not served with Advanced Air's Application and was not otherwise aware that Advanced Air had sought or received economic authority from DOT until after the Application had been approved.

the appropriate economic authority from DOT; and (2) Advanced Air for using its economic authority to facilitate the unauthorized operations of Surf Air.

July 6, 2017

Respectfully Submitted



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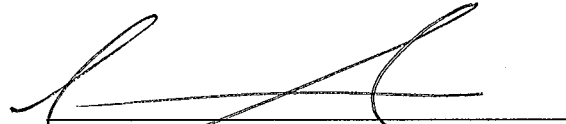
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## CERTIFICATION

Pursuant to Title 18 United States Code Section 1001, I, John Nibbelin, Chief Deputy County Counsel, in my individual capacity and as the authorized representative of the pleader, have not in any manner knowingly and willfully falsified, concealed or failed to disclose any material fact or made any false, fictitious, or fraudulent statement or knowingly used any documents which contain such statements in connection with the preparation, filing or prosecution of the pleading. I understand that an individual who is found to have violated the provisions of 18 U.S.C. section 1001 shall be fined or imprisoned not more than five years, or both.

A handwritten signature in black ink, appearing to read 'John Nibbelin', is written over a horizontal line. The signature is stylized with a large initial 'J' and a long horizontal stroke.

Name: John Nibbelin  
Title: Chief Deputy County Counsel

Dated: July 6, 2017

## CERTIFICATE OF SERVICE

I hereby certify that I have on this 6th day of July 2017, served the foregoing **Answer of The County of San Mateo, California in Opposition to the Application of Encompass Aviation LLC for Commuter Air Carrier Authority** via email upon the persons shown in the following service list:

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