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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES STEWART, JOEL MILNE, AND JOSEPH STRAZZULLO, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs

vs.

GOGO INC.,

Defendant.

Case No.: 3:12-cv-5164-EMC

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

PUBLIC REDACTED VERSION OF DOCUMENT SOUGHT TO BE FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

Judge: Hon. Edward M. Chen
Hearing Date: January 23, 2014
Hearing Time: 1:30 pm
Courtroom: 5

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Gogo Inc.'s ("Gogo") motion to dismiss Plaintiffs' Second Amended Complaint ("SAC") is without merit and should be denied.

Gogo's Prior Misrepresentation Led To Dismissal Of The First Amended Complaint

For at least the second time in this case, Gogo misrepresents the record in order to attempt to improperly obtain dismissal of Plaintiffs' properly filed pleading. The first time, Gogo obtained dismissal of Plaintiffs' First Amended Complaint ("FAC") by misrepresenting to the Court that Gogo's exclusivity terms in its contracts with domestic airlines applied only on an airplane-by-airplane by basis, as opposed to on a fleetwide basis:

> **Mr. Donato [Gogo's Counsel]:** . . . **So, there you'll see, Your Honor, the way it breaks down is that airlines effectively contract on an aircraft-by-aircraft basis.** Now, having said that, I don't know, and I can't answer for you today, whether or not it's likely they would have multiple service providers in their fleet. I don't know the answer to that. **But I do know that a contract with an airplane does not necessarily require all aircraft in that fleet to be equipped with a particular service provider's connectivity.**

Ex. 1 to Decl. of Roy A. Katriel [Tr. of Hrg. On Mtn. To Dismiss FAC], at 3:17-25 (emphasis added); *see id*. at 3:1-3 (The Court: . . . "The question is, this is being sold, as I take it, on an airplane-by-airplane basis, correct ?" Mr. Donato: "That's correct, Your Honor.").

This protracted in-Court representation to the presiding judge, though false, was crucial to the Court's decision to dismiss the FAC, as is evidenced by the Court's opinion:

> Rather, it appears that the contract binds an airline on an aircraft-by-aircraft basis. In other words, where an airline agreed to have an airplane equipped with Gogo for internet access, *that* airplane would use only Gogo's services (and no other company's) for the ten years. Thus, conceivably, an airline could have some of its airplanes equipped for Gogo's services but use a different internet access provider for its other planes.

Dkt. No. 37 [Order Granting Mtn to Dismiss FAC], at 2:14-18 (italics in original).

We know just how critical this misrepresentation was to the Court's decision because at hearing on the motion to dismiss the FAC, the Court openly stated that if Gogo's exclusive contracts applied on a fleetwide basis and across a sufficient number of airlines, as opposed to merely on an individual aircraft-by-aircraft basis, that scenario would state "a pretty good claim":

> If every plane is available—maybe I misunderstood. I thought once United says, we're going with Gogo, all their thousands of planes are off limit. **If that's the case, I was about to say, then we look at it on an airline-by-airline basis, if they locked up Virgin, if they locked up United, if they locked up American, everybody but Southwest, I guess, what's the market share at that point ? If they locked up 90 percent of the market, well, then you've got a pretty good claim.**

Ex. 1 to Katriel Decl., at 7:17-24 (emphasis added).

Unbeknownst to the Court at that time, the "pretty good claim" scenario that the Court had described is precisely this case. It was unknown to the Court at the time because the description of how Gogo's exclusive contracts worked that was provided to the Court by Gogo's counsel was exactly the *opposite* of how the contracts actually worked. Gogo misinformed the Court (and Plaintiffs) that the contracts applied only on an individual aircraft-by-aircraft basis when, in fact, they apply on a domestic fleetwide, or near fleetwide, basis.

Gogo's falsehood was short-lived. Following dismissal without prejudice of the FAC, Plaintiffs obtained, over Gogo's objection, the actual contracts at issue, which showed that what Gogo had represented to the Court was untrue. Gogo's contracts with its domestic carriers contain exclusivity provisions that apply fleetwide, and not merely on an individual airplane-by-airplane basis. As a result, Gogo's exclusive contracts *do* foreclose competition because they forbid Gogo-contracting carriers from dealing with any other inflight internet provider across the entirety of the carrier's domestic fleets. Had the Court (and Plaintiffs) been aware of this, instead of being deceived by Gogo's misrepresentation, the underpinning of the Court's dismissal order could not have withstood scrutiny, and it is unlikely that the motion would have been granted.

Gogo Shows No Contrition For Its Prior Misrerpresentation And Continues To Distort The Allegations Expressly Made In The Second Amended Complaint

Rather than showing any contrition for its misrepresentation, Gogo does not even address it. Instead, when faced with a SAC that, now armed with the actual contracts at issue, presents undeniable facts of market foreclosure, Gogo double downs on its deception. Blatantly ignoring the allegations of the latest pleading, Gogo now misstates that:

> Despite taking written discovery in the interim, Plaintiffs return without having made any of the amendments suggested by the Court. Instead, they have doubled down on their failed foreclosure theory. *They continue to focus on the legally*

> *irrelevant fact that Gogo once supplied 85% of the actually equipped market and fail to explain yet again why, in an antitrust case involving a new technology and expanding market, the much larger number of unequipped aircraft should be disregarded in the relevant market and foreclosure analysis.*

Gogo's Br. at 2:22-27 (emphasis added).

Of course this is untrue—and demonstrably so. Even a cursory reading of the SAC shows that Plaintiffs do *not* limit their market definition or market power allegations and analysis to only the internet-equipped domestic aircraft but, instead, go to great lengths to emphasize why Gogo's fleetwide exclusivity provisions give it market power in the *entire* domestic fleet relevant market:

> But Gogo's market share goes beyond the 85% of domestic aircraft that are actually equipped to provide inflight internet service that is referenced in Gogo's initial IPO papers. **In fact, Gogo possesses at least an 85% market share of *all* commercial aircraft servicing flights within the continental United States because Gogo has entered into long-term exclusive agreements with most domestic carriers pursuant to which Gogo is the exclusive provider permitted to provide internet service for these carrier's entire or near entire fleet. Thus, even though some of these carriers' whole fleets have yet to be provisioned with inflight internet access service because the installation work has yet to take place or for other reasons, Gogo's contracts still lock up these planes for Gogo exclusively**. The particulars of these Gogo exclusive contracts are detailed at paragraphs 24-51 below, and are attached as Exhibits 1-8 hereto.

SAC, at ¶ 22 (emphasis added) (italics in original, boldface added).

Even had that been all that Plaintiffs pleaded, it would have sufficed to allege market power and foreclosure. It is black-letter law, as reiterated by this Court this year, that "[t]here is no requirement that the 'market power' or 'relevant market' elements of an antitrust claim be pled with specificity." *Oracle America Inc. v. CedarStone America, Inc.*, 938 F. Supp.2d 895, 902 (N.D. Cal. 2013) (quoting *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008)). So, having alleged that Gogo possesses at least an 85% share of the *entire* domestic market for inflight internet service, the SAC would state a more than sufficient market power and foreclosure allegation to render Gogo's exclusive agreements actionable under the Sherman Act. *See, e.g.*, *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1301-02 (9th Cir. 1982) (affirming judgment against antitrust defendant premised on exclusive contracts that foreclosed 24 percent of the market); *Tele Atlas N.V. v. NAVTEQ Corp.*, No. C 05-1673 RMW, 2008 WL 4809441, at *21 (N.D. Cal. Oct. 28, 2008) (upholding antitrust exclusive dealing

case where exclusive contracts may have foreclosed 20-40 percent of the market).

In fact, however, Plaintiffs did not rest on a mere notice pleading of Gogo's market share and market power (even though they were entitled to do so). Instead, their SAC details on a contract-by-contract basis why the fleetwide exclusivity provisions found in Gogo's contracts support this market power and market share allegation. *See* SAC, at ¶¶ 24-51, and at Exs. 1-8 thereto. This is because, even though some portion of the domestic aircraft fleet may remain unequipped with internet service as of yet, these unequipped aircraft have nevertheless been locked up by Gogo because Gogo's fleetwide exclusive contracts forbid the contracting carriers owning these unequipped planes from outfitting them with service from a provider other than Gogo. *See* SAC, at ¶ 22 ("even though some of these carriers' whole fleets have yet to be provisioned with inflight internet access service because the installation work has yet to take place or for other reasons, Gogo's contracts still lock up these planes for Gogo exclusively."). Thus, the Gogo exclusive contracts have taken away even these unequipped planes as available selling opportunities for Gogo's rivals.

So, for example, when Gogo's contract with Alaska Airlines provides that [redacted] *See* SAC, at ¶¶ 24-51.

Ignoring these new allegations, Gogo instead is relegated to raising extraneous matters, suggesting that other providers like Thales, OnAir, Panasonic, or ViaSat are new "competitors" in

the market. *See* Gogo's Mtn To Dismiss at 4:17-18. This attempt is unavailing. The so-called "competitors" that Gogo alludes to, in fact, never operated within the United States during the prior to the filing of Plaintiffs' original Class Action Complaint.[1] Most still do not. *See, e.g.,* http://www.onair.aero/en/commercial-airlines-customers (listing OnAir's airline customers—all of whom are foreign carrier with no U.S. domestic routes) (last visited Dec. 11, 2013); http://www.panasonic.aero/InFlightConnectivity/GlobalCommunicationsSuite/BroadbandConnectivity.aspx (last visited Dec. 11, 2013) (Panasonic website touting that its inflight service is used in "aircraft flying international routes"). Further, during the Class Period, ViaSat made no inflight internet offering to *any* carrier, providing instead only inflight television service.[2] ViaSat attempted to enter the domestic market through a limited offering on domestic JetBlue aircraft but, to date, after three years since that initial attempt, it has still failed to do so. *See* http://www.jetblue.com/flying-on-jetblue/wifi/ (last visited Dec. 11, 2013) (JetBlue website showing that inflight internet through Via Sat is not yet being offered but "[w]e're on track to deliver . . . it in Fall 2013 in partnership with ViaSat").

These entities, which either have never provided any internet service on U.S. domestic flights or have not done so during the period of interest (i.e., from the time of the launch of inflight internet service until the time Plaintiffs filed their antitrust complaint four years later), are of no competitive significance here because Plaintiffs have alleged that the relevant market is the market for inflight internet service on domestic commercial flights within the United States—a geographic market definition that Gogo's motion does not challenge. *See* SAC, at ¶ 12. Plaintiffs supported that allegation with factual assertions that substantiate why a passenger flying on a domestic route would not view an inflight internet service offering provided onboard a flight

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[1] Some of these providers, though separately listed by Gogo are, in fact, corporate affiliates and/or subject to common ownership. For example, LiveTV is an affiliate of ViaSat, and is partly owned by Thales. *See* http://en.wikipedia.org/wiki/LiveTV (last visited Dec. 11, 2013).

[2] Instead, LiveTV, an affiliate of ViaSat, provided inflight internet service on *some* United domestic planes only *after* United's Gogo contract expired and after Plaintiffs filed their Class Action Complaint. United still retains Gogo internet service on its 14 domestic transcontinental aircraft. *See* http://www.united.com/web/en-us/Content/travel/inflight/wifi/default.aspx (last visited on Dec. 11, 2013) ("United currently offers Gogo® Internet service exclusively on p.s. Premium Service transcontinental aircraft flying between New York (JFK) and both Los Angeles (LAX) and San Francisco (SFO)").

on an international route to be a viable substitute for that passenger's needs to obtain inflight internet service within the United States. *Id*. at ¶ 14. Plaintiffs also detailed why given the, *inter alia*, different regulatory requirements between the United States and foreign countries as well as technological limitations, providers of inflight internet service on international flights could not easily supply the separate U.S. market for such service, and vice-versa. *Id*. In any event, Gogo's present motion does not even challenge Plaintiffs' product or geographic market definition.[3] In the market for inflight internet service on domestic commercial flights within the United States, the SAC makes clear that Gogo was the sole provider, with the exception of Southwest airplanes that were equipped by Row 44. *See* SAC, ¶¶ 16, 54. Despite Gogo's attempt at misdirection, this unassailable fact is consistent with the SAC's allegation of Gogo's high market share.

Aside from the allegations of high market share (*see* SAC, at ¶ 22, 52) and entry barriers (*id*., at ¶ 53), which make out the accepted circumstantial proof of Gogo's market power, the SAC also independently states market power and foreclosure allegations through *direct* evidence of Gogo's restriction of output and price increases. In dismissing the FAC, the Court acknowledged that market power could be shown directly by evidence of restriction of output and increased pricing. *See* Dkt. No. 37 at 7, n.3 (quoting *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1001 (9th Cir. 2010) for the proposition that "[e]vidence of restricted output and supracompetitive prices is direct evidence of market power."). The Court, nevertheless, concluded that although the FAC "contains allegations of supracompetitive prices, [it] does not contain accompanying allegations of restricted output." *See* Dkt. No. 37 at 7, n.3.

That observation, of course, arose when the Court was still laboring under the misimpression that Gogo's contracts did not apply on a fleetwide basis. Once that misimpression is corrected, the output reducing effect of Gogo's exclusive contracts is evident. That is, absent Gogo's fleetwide exclusivity restrictions, domestic planes owned by Gogo-contracting carriers

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[3] The Court previously rejected Gogo's attempt to challenge Plaintiffs' same geographic market when it was pled as part of the FAC, reasoning that Gogo had improperly raised this challenge only in its reply brief. *See* Dkt. No. 37 at 6, n.2. Gogo's new motion to dismiss the SAC does not raise a market definition challenge either.

that had not, as of yet, been equipped with any internet service (which Gogo claims is the majority of the fleet), could have been outfitted with equipment offered by Row 44 or any other would-be provider. But, because these unequipped planes are still subject to Gogo's fleetwide exclusivity term that bars them from being outfitted with any equipment other than Gogo's, these planes have operated without *any* internet equipment at all, meaning a reduction in output of internet service equipment over what could have existed in the absence of Gogo's contracts.

Now that the fleetwide application of Gogo's exclusivity terms has been uncovered, the SAC affirmatively pleads that "Gogo's exclusive contracts that apply on a fleetwide or near fleetwide basis also serve to reduce output." *See* SAC, at ¶ 59. And, Gogo's record of price increases in the face of this output reduction is undeniable—with Gogo's prices having more than doubled during the Class Period, from a starting point of $9.95 with repeated increases to a price of $21.95 per internet session. *See* SAC, at ¶ 18. Because the SAC now states allegations that provide direct evidence of Gogo's market power, Gogo's motion fails for this independent reason.

Gogo's Reliance On The So-Called Early Termination Clause Fails Again.

Equally unavailing is Gogo's continued reference to the fact that its contracts [redacted] *See* Gogo's Br. at 11:15-12:11. The Court already rejected this same argument before, reasoning correctly that this purported early termination provision was not as easy to invoke as Gogo had represented. *See* Dkt No. 37 at 7:14-8:5 (noting that contrary to Gogo's assertion, "an airline cannot terminate simply because a competitor of Gogo offers a superior service or business arrangement."). The contracts produced since that ruling only confirm the Court's initial reasoning, as they make expressly clear that there is no easy early termination for an airline merely because a competitor offers a technological superior product. Craftily, Gogo avoids quoting the actual contractual language, which would show that the clause does not provide airlines the "easy out" that Gogo claims, and instead selectively quotes only from Gogo's own S-1 SEC registration statement—the very same self-serving description that the Court previously rejected. *See* Gogo's Br. at 6:20-27 (quoting Gogo's

S-1 registration statement that was attached as Ex. B to Abye Decl. but not quoting the actual contractual language in the Delta agreement).

For all the foregoing reasons, as detailed below, Gogo's motion should be denied.

FACTUAL BACKGROUND

The factual predicate to this suit is well known to the Court from the prior pleading and briefing. By way of brief summary, since 2008, Gogo has been in the business of providing inflight internet access to passengers of commercial aircraft within the United States. *See* SAC, at ¶ 11. This is an antitrust class action in which three domestic airline passengers, James Stewart, Joel Milne, and Joseph Strazullo (collectively "Plaintiffs"), allege that Gogo thwarted competition in the relevant United States market for inflight internet services by entering into long-term exclusive dealing contracts with nine out of the ten domestic airline carriers. *Id*. at ¶ 1. Through these exclusive contracts of long-term duration, Gogo was able to attain and maintain an approximately 85 percent or greater market share. *Id*. at ¶¶ 1, 8-11. Assured that its dominant market position was secured and insulated from challenge by way of these long-term exclusive agreements of ten years' duration, Gogo exploited its market power by repeatedly raising prices for its inflight internet services, so much so that its latest increase priced Gogo's service at over four times the price of its only other competitor, an outfit known as Row 44. *Id*. at ¶¶ 18, 20.

Plaintiffs, all of whom were passengers on U.S. commercial aircraft, purchased inflight internet access sessions while on their respective flights, and unsurprisingly this service was offered by Gogo. *Id*. at ¶¶ 8-10. Because Gogo has monopoly market power that as a result of its exclusive agreements was free from any significant challenge, Gogo was able to and did charge Plaintiffs a supra-competitive price for their internet inflight access sessions. *Id*. Plaintiffs bring suit to seek relief for the antitrust overcharges they sustained as a result of Gogo's antitrust violations. They assert a federal antitrust claim under Section 1 of the Sherman Act, challenging Gogo's exclusive contracts with domestic carriers as being agreements in restraint of trade (SAC, at ¶¶ 73-80), as well as two claims under Section 2 of the Sherman Act for unlawful acquisition and maintenance of monopoly power, respectively (*Id*. at ¶¶ 81-98). In addition, Plaintiffs plead two state law claims under California's Cartwright Act and Unfair Competition Law,

respectively. *Id*. at ¶¶ 99-110.

Gogo's pending motion does not dispute Plaintiffs' antitrust product or geographic market definition. That is, Gogo's motion does not challenge that there is a relevant antitrust market for inflight internet service for passengers on domestic commercial aircraft within the United States. Also of significance, on this round of amended pleading, Gogo does not dispute (though it vigorously did so before) that, by and large, Gogo's contracts with domestic airlines contain exclusivity terms that apply across the entire or near entire domestic fleet of these contracting carriers. *See* Gogo's Mtn. at 6:13-22. Instead, Gogo's pending motion focuses on the single argument that Plaintiffs have not pled facts that could support a showing of market foreclosure because, in Gogo's words, Plaintiffs have not made any significant amendments to their prior pleading. *See* Gogo's Br. at 2:22-27; 6:23-7:2.

In asserting as much, however, Gogo plainly ignores the wholly changed nature of the SAC, which now presents a universe where Gogo's exclusive contracts do not impact merely a few airplanes of a particular carrier that happen to be equipped with internet service, leaving the rest of that airline's aircraft unaffected. That may have been the operating belief during the pendency of the FAC, where the Court was advised by Gogo's counsel that Gogo's exclusive contracts applied only on a particular airplane at a time, leaving the remainder of the carrier's fleet open to receiving the business of rival internet service providers. Now that Gogo's representation has been shown to be false, the SAC dramatically alters the landscape by showing and alleging that Gogo's exclusive contracts with 9 out of the 10 domestic carriers, by and large, applied across the entirety of these carriers' domestic fleets, thereby taking all of these airlines' domestic aircraft off the market as available opportunities for Gogo's rivals to solicit.

Thus, the SAC documents, by quoting and attaching the actual Gogo contracts, that during the Class Period, Gogo had [redacted]

[redacted]

The only exception to this fleetwide or near fleetwide exclusivity among Gogo-contracting carriers was United Airlines, which engaged Gogo's service on a trial basis on only on its domestic transcontinental fleet for a three-year trial period. *See* SAC, at ¶¶ 44-45. But even so, Gogo's agreement with United still provided that [redacted] Only once United's trial agreement with Gogo expired (which notably was well after Plaintiffs filed their Class Action Complaint, was United free to and did contract with a Gogo-rival for some of its previously unequipped aircraft.[4]

As the SAC now documents, during the Class Period, Gogo's exclusive contracts locked up the near entire domestic fleets of 9 out of 10 of the major domestic airlines. The one exception was Southwest Airlines, which was the only domestic carrier that contracted with Row 44, the only competitor to Gogo that operated within the United States. *See* SAC, at ¶ 54. Indeed, highlighting the significant entry barriers into this market, JetBlue announced in 2011 that it expected to initiate inflight internet service domestically through another company, ViaSat but a full three years later, that plan has still to come to fruition, as reports of the difficulties plaguing

[4] Notably, highlighting that the relevant markets for inflight internet service on domestic and international flights are distinct and separate, when United's trial agreement with Gogo ended, United chose to contract with two separate providers—one for its domestic fleet and another for its international aircraft fleet. *See* http://blog.apex.aero/ife/united-gets-serious-about-wi-fi-installs-mobile-boarding-pass-scans-expand-to-all-its-us-airports/ (dated Jul. 29, 2013) (reporting that United contracted with Panasonic for its international fleet and with LiveTV for its domestic fleet).

ViaSat's entry into the domestic market detail. *See* http://travel.usatoday.com/alliance/flights/boardingarea/post/2011/08/The-Wandering-Aramean---Another-potential-setback-for-LiveTV8217s-in-flight-internet-service/416333/1 (last visited Dec. 11, 2013) (reporting on ViaSat's failed satellite launch delaying launch of ViaSat on JetBlue).

I. PLAINTIFFS PROPERLY PLEAD FACTS SHOWING MARKET FORECLOSURE.

A. Gogo's Fleetwide Exclusive Contracts With A Majority Of Domestic Carriers Means That Gogo Has Locked Out Most Domestic Planes From Being Available Selling Opportunities To Rivals.

While exclusive agreements, unlike say price-fixing agreements, are not outlawed *per se* under the federal antitrust laws, courts have not hesitated to uphold antitrust claims premised on exclusive agreements when, as here, the plaintiff makes a proper showing of the defendant's market power or anticompetitive conduct furthered by these agreements. *See, e.g.*, *Twin City Sportservice, Inc.*, 676 F.2d at 1301-02 (affirming judgment against antitrust defendant premised on exclusive contracts that foreclosed 24 percent of the market); *Pecover v. Electronic Arts Inc.*, 633 F Supp.2d 976 (N.D. Cal. 2009) (upholding Sherman Act claim premised on exclusive contract between NFL and Electronic Arts); *Tele Atlas N.V.*, 2008 WL 4809441, at *21 (upholding antitrust exclusive dealing case where exclusive contracts may have foreclosed 20-40 percent of the market).

Where, as here, the exclusive contracts are implemented by a party having sufficient market power and/or in a manner that significantly forecloses competition, exclusive dealing agreements run afoul of the antitrust laws. A high market share coupled with a showing of high barriers to entry generally suffices to make a circumstantial showing of the defendant's market power and ability to foreclose competition. *See Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 366 (9th Cir. 1988); *Dooley v. Crab Boat Owners Ass'n*, No. C-02-676-MHP, 2004 WL 902361, at *10 (N.D. Cal. Apr. 26, 2004) ("Based on the evidence of defendants' market share and barriers to entry, a reasonable factfinder could determine that defendants have acquired

monopoly power within the relevant market.").[5] During the first round of pleading and briefing, the Court explained the analysis governing the market foreclosure analysis:

> In defining the relevant market, a court must look at the '*full range of selling opportunities reasonably open to [competitors],* namely all the product and geographic sales they may readily compete for.'

Dkt No. 37 at 6:17-20 (quoting *Omega Envtl. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (internal quotation marks omitted, emphasis added)).

Because the Court was led to believe that Gogo's exclusive contracts operated only on an individual aircraft-by-aircraft basis, leaving the rest (and bulk) of the carrier's fleet unaffected, the Court reasoned that the entire remainder of the carriers' fleets were within the "full range of selling opportunities reasonably open to [competitors]." *Id*. at 6:17-24. Thus, the Court concluded that *if the bulk of the domestic carriers' airplanes were unequipped with internet service and were not subject to any contractual commitment to be outfitted with Gogo's service*, they remained open to receive the business or Gogo's competitors. *Id*. at 6:21-24. Thus, under *these* circumstances, unless Plaintiffs could plead that some technological or other barriers prevented these supposedly unequipped and uncommitted planes from being serviced by competitors, Plaintiffs had failed to plead market foreclosure because this supposedly vast universe of uncommitted domestic planes remained open to all providers. *Id*. at 6:21-7:8.

But, of course, we now know that this assumption was incorrect. In fact, Gogo's contracts *did* apply on a fleetwide basis, meaning that all of a contracting carrier's domestic planes—even those planes that had not yet been equipped with internet service hardware—were locked up by Gogo's exclusive contracts. The 9 out of 10 Gogo contracting carriers were contractually committed to use only Gogo for any planes within their domestic fleets that the carriers outfitted with internet service. As a result, *all* of the domestic planes of Gogo-contracting domestic

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[5] The FAC identified specific high barriers to entry into the market that are not disputed or addressed in Gogo's motion. These indisputable entry barriers include: need to obtain regulatory approval to provide any inflight communication; the need to obtain FCC spectrum access if one intends on providing inflight internet access through use of cellphone towers, as Gogo has done; and, the significant expense of securing available satellites if one is to alternatively offer service using satellite-based communications. *See* FAC, at ¶ 22; *see also* Ex. B. to Abye Decl. at p. 21 (Gogo's s-1 filing identifying the high "cost and extended lead time" of deploying satellite based technology).

carriers were no longer within the "range of selling opportunities reasonably open to [competitors]" *Omega Environmental*, 127 F.3d at 1162 (quoted in Dkt. No. 37 at 6:17-24). Under the scenario that we now know actually existed during the Class Period, as opposed to the one that Gogo falsely portrayed, Plaintiffs do make a showing of market foreclosure.

The fact is that, during the pendency of Gogo's exclusive contracts, and directly as a result of Gogo's exclusive contracts, [redacted] Indeed, Gogo's own S-1 registration statement acknowledges the reality that Gogo's locking up of nearly the entire domestic fleet means that there is very little available opportunity for sales inflight internet service left within the domestic fleet.

> We face limitations on our ability to grow our domestic operations. . . Our growth may slow, or we may stop growing altogether, to the extent that **we have exhausted all potential airline partners *as we approach installation on full fleets* and maximum penetration rates on all flights**.

Dkt. No. 66 [Ex. B. to Abye Decl.], at 23 (emphasis added).

Thus, even Gogo's own SEC documents now acknowledge what Plaintiffs' SAC alleges. Gogo's resort to fleetwide exclusive contracts with most "all potential airline partners" means that there are little remaining selling opportunities within the domestic market open to Gogo rivals. The market has been foreclosed, and that foreclosure has been brought about largely as a result of Gogo's long-term, fleetwide, exclusive contracts with the overwhelming majority of domestic airlines.

B. Gogo's Conclusory References To So-Called "Competitors" Does Nothing To Defeat The Allegations Of Gogo's Market Power.

Gogo glosses over the fleetwide exclusive nature of its agreements with nearly all

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[6] Gogo touts the fact that when AirTran was bought out by Southwest, AirTran, having merged with Southwest, was able to equip AirTran aircraft with Row 44's service previously contracted by Southwest. *See* Gogo's Br. at 4:11-12. But that a carrier must be bought out and merged with a separate entity in order to avoid the reach of Gogo's exclusive contracts hardly amounts to a showing of an easily avoidable contract or of a readily open and available opportunity for Gogo's rivals. This is only underscored when one considers that Gogo actually sued (unsuccessfully) Southwest and AirTran after the buyout, arguing that even though AirTran had been bought out and was now a part of Southwest, AirTran was still bound to the 10-year contract with Gogo. *Id*. (referencing litigation between Gogo and AirTran after buyout).

domestic carriers that were in place during the Class Period. Unable to continue to misstate that reality now that the contracts have been produced, Gogo instead engages in misdirection by suggesting that other "competitors" beyond Gogo and Row 44 existed (presumably to argue that Gogo lacked a sufficiently high market share). But this conclusory sleight of hand does not work. The so-called "competitors" that Gogo points to simply did not exist within the domestic market. LiveTV, an affiliate of ViaSat in which Thales has a partnership interest, and which now offers service on some United planes, only began that offering after Gogo's trial agreement with United expired, well after Plaintiffs made their purchases or filed their Class Action Complaint. Worse yet for Gogo, the other players it has referenced, Panasonic and OnAir, have never offered service on any domestic airplanes, and they still do not. ViaSat has been trying to enter the U.S. market on a limited basis by planning to equip some domestic JetBlue planes with internet service, but after three years since announcing those plans, it has still been unable to do so, highlighting the significant barriers to entry in this market. *See* http://travel.usatoday.com/alliance/flights/boardingarea/post/2011/08/The-Wandering-Aramean---Another-potential-setback-for-LiveTV8217s-in-flight-internet-service/416333/1 (last visited Dec. 11, 2013) (reporting on ViaSat's failed satellite launch delaying launch of ViaSat on JetBlue). Gogo's resort to referencing these providers in a foreign market, therefore, does nothing to advance its attack on Plaintiffs' proper pleading of Gogo's high market share.

In any event, for purposes of Gogo's pending motion to dismiss, Gogo's factual challenge to Plaintiffs' asserted market share is irrelevant. A complaint and a motion to dismiss is not the filing where parties are required to carry out their dueling tally of unit sales and market shares. Rather, as the Ninth Circuit and this Court have held, "[t]here is no requirement that the 'market power' or 'relevant market' elements of an antitrust claim be pled with specificity." *Oracle America Inc..*, 938 F. Supp.2d at 902 (quoting *Newcal Indus.,* 513 F.3d at 1045).

Regardless, Gogo fails to show that the mere presence of these purported rivals or the mere fact that after the Gogo-United trial agreement expired, United switched some of its domestic aircraft to LiveTV so diminished Gogo's market share so as to strip Gogo of sufficient market power to state an antitrust claim. That is, even if one could accept at the pleadings stage

all of Gogo's conclusory allegations of competitor presence, and even if this presence were to reduce Gogo's market share during the Class Period to something less than 85 percent, Gogo still fails to argue what Gogo's corresponding market share of the domestic fleet would be. Even if these providers (most of whom are absent from the domestic U.S. market) were shown to reduce Gogo's market share below 85 percent as Gogo posits, that would still not advance Gogo's cause. The Ninth Circuit and other courts have consistently upheld exclusive contract antitrust claims with market shares exponentially below 85 percent. *See Twin City Sportservice, Inc.*, 676 F.2d at 1301-02 (affirming judgment against antitrust defendant premised on exclusive contracts that foreclosed 24 percent of the market); *MediaStream Inc. v. Microsoft Corp.*, 869 F. Supp.2d 1095, 1103 (N.D. Cal. 2012) ("a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.") (internal quotations omitted); *Tele Atlas N.V.*, 2008 WL 4809441, at *21 (upholding antitrust exclusive dealing case where exclusive contracts may have foreclosed 20-40 percent of the market).

Nowhere does Gogo's motion provide any accounting to show that even under its version of events, the presence of OnAir, LiveTV, or United's post-Class Period switch to LiveTV for some of its domestic aircraft, sufficiently diminishes Gogo's market share so as to bring it below the minimal thresholds required to state an antitrust claim premised on exclusive contracts. Thus, Gogo's conclusory allusion to so-called "competitors" cannot lead to dismissal. At the end of the day, while Gogo may be free to attempt to dispute Plaintiffs' market share calculation, that factual dispute is not one to be carried out or resolved at the pleadings stage. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980) ("Where such an inference is not implausible on its face, an allegation of a specific market share is sufficient, as a matter of pleading, to withstand a motion for dismissal.").

Because Plaintiffs have pled that Gogo possessed at least an 85% market share (SAC, at¶¶ 22, 52), and supported those allegations by specific factual recitations of all of Gogo's contracts that demonstrated that Gogo had locked up the overwhelming majority of domestic fleet aircraft through its exclusive contracts (*id*. at ¶¶ 24-51), and because the SAC also pleads the existence of

sufficient barriers to entry (*id*. at ¶ 53), Plaintiffs have properly pled circumstantial proof of Gogo's ability to foreclose market competition in violation of the Sherman Act.

C. Plaintiffs Have Also Shown Gogo's Market Power and Market Foreclosure Through Direct Evidence.

Plaintiffs' substantiated allegations of Gogo's high market share and barriers to entry suffice to make out a circumstantial case of Gogo's market power and ability to foreclose competition. *See Dooley*, 2004 WL 902361, at *10. Market share, however, is not an end in itself, and serves simply as the strongest or best proxy of market power. *Id*. An antitrust plaintiff, however, may also show a defendant's market power directly by introducing evidence or allegations of the defendant's ability to restrict output and raise prices. *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("Market power may be demonstrated through either of two types of proof. One type of proof is direct evidence of the injurious exercise of market power. If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition."). Not only does the SAC make out a circumstantial case of market power through its allegations of Gogo's high market share and entry barriers, it also offers factual allegations of direct evidence of Gogo's market power.

The Court has already acknowledged that Plaintiffs' have adequately pled Gogo's supracompetitive price increases—a component of direct proof of a defendant's market power. *See* Dkt. No. 37 at 7, n.3. The same allegations are also present in the latest pleading. *See* SAC, at ¶¶ 18, 58 (noting that Gogo exercised its monopoly power to raise prices repeatedly without losing customers or market share to Row 44). Nevertheless, the Court held that Plaintiffs' FAC did "not contain accompanying allegations of restricted output." *Id*. That conclusion, however, was formed at a time when the Court was operating under the assumption that Gogo's exclusive contracts applied only on a plane-by-plane basis, as opposed to fleetwide. Now that the true scope of Gogo's fleetwide exclusive contracts has been revealed, Gogo's capacity to reduce output and thereby increase prices is apparent.

Gogo admits that there is a universe of domestic planes unequipped with any internet service. *See* Gogo's Br. at 2:26-27. Many of these planes belong to carriers under contract with Gogo. In the prior round of briefing when Gogo claimed that the exclusivity applied only on an

aircraft-by-aircraft basis, Gogo argued that the presence of these unequipped aircraft showed the vast opportunity for market expansion by Gogo's rivals. But in the universe that actually exists, as opposed to the one previously misrepresented by Gogo, where Gogo's exclusivity terms apply on a fleetwide basis, the result is different. Instead of presenting available opportunities to Gogo's rivals, these unequipped planes still within the fleet that is subject to Gogo's exclusivity provisions illustrate how these contracts provide Gogo with the power to restrict output.

Specifically, if Gogo's fleetwide exclusivity restriction did not exist, then airlines under contract with Gogo that had unequipped planes within their domestic fleet could choose to outfit these planes with equipment from Row 44 or other potential competitors. Thus, for example, if Gogo were unable to meet the carrier's demand for these unequipped planes, or if Gogo's terms were less attractive than the new offerings of Row 44 or other rivals, the carrier could choose to outfit these unequipped planes with equipment offered by Gogo's rivals. Gogo's fleetwide exclusivity provision, however, prevents this from happening. And Gogo-contracting airlines have been contractually forbidden from equipping these planes with such rival service, having them fly instead without any internet service equipment on board. Thus, by ensuring that its contracting airlines cannot turn to any rivals even for those domestic fleet aircraft that Gogo currently does not service, Gogo has and is able to restrict output and prevent rival equipment from being placed in otherwise unequipped planes. The SAC, therefore, explicitly alleged this restriction of output. *See* SAC, at ¶ 59 ("Gogo's exclusive contracts that apply on a fleetwide or near fleetwide basis also serve to reduce output. In the absence of these fleetwide or near fleetwide exclusive agreements, other rivals, like Row 44, could manufacture and attempt to sell competing products to some of these carriers' domestic aircraft. But, given the existence and effect of Gogo's exclusive contracts, rivals like Row 44 are unable to do so, and hence the exclusive contracts effectively take these otherwise existing products off that portion of the market.").

The economic reality is apparent. Knowing that its contracting carrier is contractually forbidden from turning elsewhere for service on these unequipped planes, Gogo can restrict the output to these planes or raise its prices without fearing loss of business from this carrier to

Gogo's rivals. This is the very essence of monopoly market power.

Moreover, there is no doubt that Gogo has exercised its monopoly market power (i.e., the power to reduce output) to raise prices. *Id*. at ¶ 58. As the SAC documents, during the Class Period, Gogo raised prices continually, almost tripling its prices, at a time when its lone rival, Row 44, was offering its superior satellite-based product for as little as a fourth of Gogo's price. *Id*. at ¶¶ 18, 58. Yet, there is no evidence or allegation that Gogo lost any market share to Row 44 during the course of these repeated price increases. The ability to raise prices without concomitant loss of market share or business to competitors is the hallmark of monopoly market power and of the ability to foreclose competition. *See Jensen Enter. Inc. v. Oldcastle Precast Inc.*, 2009 WL 440492, at *6 (N.D. Cal. Feb. 23, 2009) ("Antitrust injury 'means injury from higher prices or lower output, the principal vices proscribed by the antitrust laws.') (quoting *Nelson v. Monroe Regional Med. Ctr.*, 925 F.2d 1555, 1564 (7th Cir. 1991)).

Because Plaintiffs have alleged direct evidence of Gogo's market power and foreclosure, Gogo's motion fails for this independent reason.

D. Contrary To Gogo's Self-Serving Assertions There Is No Easy Early Termination To Gogo's Contracts.

As a last resort, Gogo argues that even though it contracted on a fleetwide exclusive basis with 9 out of the 10 domestic carriers during the Class Period, so as to make these fleets unavailable to Gogo's rivals, there really is no harm or foul here because, Gogo claims, its contracts contained [redacted] This self-serving characterization is inaccurate and, unsurprisingly, the Court has already rejected this argument when it ruled on Gogo's previous motion to dismiss the FAC. Therein, the Court explained:

> The Court notes, however, contrary to what Gogo claims, it does not appear that the contracts allow the key airlines to terminate their dealings with Gogo whenever a rival offers a superior service or business arrangement. . . .Based on [Gogo's SEC filing], an airline cannot terminate simply because a competitor of Gogo offers a superior service or business arrangement; rather, there is an additional condition that must be satisfied – e.g., 'failing to adopt [the competitor's] service would likely cause competitive harm to the airline,' and notably, the passenger on the airplane.

Dkt. No. 37 at 7:14-8:5 (quoting Gogo's SEC filing, other internal quotations and citations omitted).

Nothing in Gogo's renewed motion serves to disturb the Court's ruling. In fact, Gogo craftily avoids even quoting the actual contractual language that supposedly contains this "early termination" provision, relegating itself to merely quoting again just the same SEC filing language that the Court previously found unavailing. *See* Gogo's Br. at 11:16-20 (quoting its own SEC filings as opposed to the actual contractual language in Delta's Agreement to describe the so-called "early termination" clause in Delta's contract with Gogo). In fact, the actual language of the Delta contract provides [redacted]

This is hardly an "easy out" clause that alleviates the market foreclosure effects of Gogo's fleetwide exclusivity contracts across the domestic market. Moreover, as the SAC documents, even when superior satellite technology was offered by Row 44 that far surpassed Gogo's then ground-based cellular tower offering, Gogo did not take the position that this competing superior

[7] The Delta Agreement was also attached as Exhibit 6 to the Declaration of Roy A. Katriel in Supp. of Plaintiffs' Motion for Leave To File A Motion For Reconsideration.

offering allowed airlines to terminate their agreements with Gogo in favor of Row 44. *See* SAC, at ¶ 78. To the contrary, the record shows that Gogo was relentless in pursuing any carrier that attempted to terminate its agreement with Gogo prior to its term. *See* n.6 *supra*. Certainly, this complex and difficult early termination clause does not provide a basis for concluding on the pleadings that the clause alleviates the market foreclosure effects of Gogo's exclusive contracts. To do so, Gogo would have to provide much more factual detail about how this clause worked in practice, if at all. *See Tele Atlas, N.V.*, 2008 WL 4809441, at *20 ("The Supreme Court has emphasized that whether a contract creates an exclusive dealing arrangement depends on the contract's 'practical effect' and its 'practical application.'") (*quoting Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

Gogo's motion to dismiss Plaintiffs' federal antitrust claims should be denied.

II. PLAINTIFFS PROPERLY PLED STATE LAW CLAIMS.

A. The Cartwright Act Claim Is Properly Pled.

Gogo relies on the same flawed arguments it raised as to Plaintiffs' federal antitrust claims to seek dismissal of Plaintiffs California Cartwright Act count. *See* Gogo's Br. at 13:3-27. For the same reasons that these arguments fail to secure dismissal of the federal Sherman Act claims, they also fail and should be rejected with respect to Plaintiffs' Cartwright Act count.

Separately, Gogo also argues that the Cartwright Act claim should be dismissed for the independent reason that the Cartwright Act does not reach "unilateral conduct." *Id*. at 13:16-27. This argument simply misses the mark. All of the conduct alleged against Gogo is concerted conduct; namely, implementation of bilateral exclusive contracts with airline carriers. This is not unilateral conduct, and plainly is within the reach of the Cartwright Act. Unsurprisingly, therefore, California state and federal courts have routinely upheld Cartwright Act claims premised on exclusive agreements, and have done so in cases where the actual market foreclosure resulting from the exclusive agreement was far less than that alleged here. *See, e.g., Fisherman's Wharf Bay Cruise Corp. v. Superior Court*, 114 Cal. App.4th 309, 335-339 (2003) (upholding Cartwright Act claim premised on exclusive dealing that foreclosed 20 percent of market);

Redwood Theatres, Inc. v. Festive Enterprises, Inc., 200 Cal. App.3d 687, 713 (1988) ("We conclude that the alleged [exclusive] agreements with Paramount Pictures and Warner Bros., if proved, would present a triable issue of an unreasonable restraint of trade under the Cartwright Act."); *Pecover*, 633 F. Supp.2d at 983 ("Accordingly, the exclusive licenses themselves, described adequately in the complaint, constitute the conduct giving rise to the Cartwright Act claim."). The two cases cited by Gogo did not involve any multi-party agreements, much less exclusive contracts, and thus may be disposed of summarily. *See Apple Inc. v. Psystar Corp.*, 586 F. Supp.2d 1190, 1203 (N.D. Cal. 2008) (cited in Gogo's Br. at 14:23-25 (Cartwright failed because unlike this case it "fails to allege any concerted action or inter-firm agreement."); *Garon .v eBay, Inc.*, No. C 10-05737 JW, 2011WL 6329089 (N.D. Cal. Nov. 30, 2011) (cited in Gogo's Br. at 14:21-22) (no agreement of any kind alleged).

Gogo's attempt to dismiss Plaintiffs' Cartwright Act claim should likewise be rejected.

B. There Is No Basis To Dismiss Plaintiffs' UCL Claim.

Gogo raises no separate or independent arguments in support of its motion to dismiss Plaintiffs' UCL claim. Rather, it argues that because Gogo maintains that Plaintiffs federal and state antitrust claims fail, the UCL claim should be dismissed "for the same reasons." Gogo's Br. at 14:1-9. As already shown, however, Plaintiffs have properly stated both federal and state antitrust claims, and hence also state an actionable UCL claim. *See Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, No. CV 09-0560, 2011 WL 2678879, at *15 (E.D. Cal. Jul. 7, 2011) (UCL claim upheld to the extent it was premised on Sherman Act claim that was upheld).

Gogo's motion to dismiss Plaintiffs' UCL claim should be denied.

CONCLUSION

For all the foregoing reasons, Gogo's motion to dismiss should be DENIED in its entirety. If the Court were to grant the motion in any respect, Plaintiffs respectfully request leave to file an amended complaint to address any deficiencies identified by the Court in the current pleading.

DATED: December 11, 2013

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