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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiff,

v.

GOGO INC.,

Defendant.

Case No. 12-cv-05164-EMC

DEFENDANT GOGO INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: March 28, 2013
Time: 1:30 p.m.
Courtroom: 5
Judge: Hon. Edward M. Chen

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INTRODUCTION

The question before the Court is whether the FAC alleges facts sufficient to "state a claim that is plausible on its face" -- without reliance on speculation, labels and conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As set out in Gogo's opening brief, the FAC fails this dispositive test. Plaintiffs' arguments in opposition do not raise any doubt that the FAC should be dismissed.

Plaintiffs have sued on the claim that Gogo monopolized this new and developing business line through exclusive dealing contracts that locked out competitors and forced airlines to use Gogo's service until 2018. *See, e.g.*, FAC at ¶¶ 24-25. Plaintiffs claim these agreements bound virtually all U.S. airlines -- including United and AirTran. *Id.* at ¶ 23.

But Plaintiffs' allegations in the FAC are mere conclusions that do not state a plausible antitrust claim. Even more devastating to Plaintiffs' case, the FAC and the opposition brief admit key facts that eliminate the possibility of stating a plausible claim, such as:

- After Gogo created this new business line in August 2008, strong rivals entered the allegedly foreclosed market, including Row 44, Panasonic, ViaSat, and others.
- The new entrants have won contracts with major airlines allegedly sewn-up by Gogo, including AirTran and United.
- Gogo's contracts typically allow airlines to terminate if offered a better deal or service by a rival.
- The fleets of two of the largest airlines in the U.S. -- Southwest and United -- are not subject to the challenged contracts.
- A substantial number of aircraft operating domestically are available to be equipped with internet connectivity in free and open competition by all the inflight connectivity service providers.
- Gogo has never made a profit.

These dispositive facts are apparent on the face of the FAC and incorporated documents, and are admitted in the opposition brief. They are not, as Plaintiffs now suggest to avoid dismissal, open issues to be answered down the road. And they are fatal to Plaintiffs' case.

Plaintiffs' main response to Gogo's motion is to ignore their own admissions and contradict the FAC. For example, even though the S-1 registration statement that Plaintiffs incorporate in the FAC expressly states that key airline customers could terminate their contracts with Gogo when a rival offered a better deal (Gogo Opening Brief ("Br.") at 9), Plaintiffs simply ignore this fact and repeat the allegation that the contracts are airtight 10-year deals that the airlines have no ability to exit before 2018. *See, e.g.*, Opposition Brief ("Opp. Br.") at 1. Plaintiffs even impeach their own pleadings. The FAC names United as a major airline allegedly locked up by Gogo's contracts. FAC at ¶11 ("Gogo internet is the exclusive internet access connectivity provider along domestic commercial airlines routes flown by . . . United Airlines."). But in the face of United's recent announcement that it was equipping its aircraft with the service provided by Panasonic and not Gogo, Plaintiffs now contend that United -- one of the largest U.S. airlines by any measure -- is actually a bit player that is "not subject to these exclusive agreements." Opp. Br. at 13. Plaintiffs also argue that Gogo does not dispute that it used long-term exclusive contracts to lock up airlines. *See, e.g.*, Opp. Br. at 5. But Gogo certainly did -- and does -- dispute that representation, because it is wrong.

Plaintiffs' bottom line is that simply alleging an 85-90% market share is enough to state an antirust claim and avoid dismissal. That is absolutely not the law. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system . . . To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."); *Abbyy USA Software House, Inc. v. Nuance Commc'ns Inc.*, No. C 08-01035 JSW, 2008 WL 4830740 at *2 (N.D. Cal. Nov. 6, 2008) (dismissing antitrust claims for failure to plead sufficient facts "even considering its allegations of large market share").

Plaintiffs request that they be allowed to skate by their pleading obligations and fill in the blanks in their case later is also not allowed under the law. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) ("[A] district court must retain the power to insist upon some specificity in

pleading before allowing a potentially massive factual controversy to proceed.") (citation omitted). Plaintiffs must demonstrate a plausible claim before they can seek to engage Gogo in expensive and resource-intensive litigation. *See Iqbal*, 556 U.S. at 678-79 ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."); *see also Patterson v. O'Neal*, 673 F. Supp. 2d 974, 982 (N.D. Cal. 2009) ("Even if there is a possibility that discovery could turn up some hypothetical evidence to support a cause of action, Plaintiffs cannot 'unlock the doors of discovery' if they are 'armed with nothing more than conclusions.'") (quoting *Iqbal*, 556 U.S. at 678).

Plaintiffs have not met these controlling legal standards. After two tries, it is apparent that they cannot allege sufficient facts to state a plausible antitrust claim in this new and developing business line. Consequently, this case should be dismissed with prejudice.

DISCUSSION

I. THE FAC FAILS TO ALLEGE THAT GOGO HAS MARKET OR MONOPOLY POWER

As detailed in Gogo's opening brief, the FAC fails to plausibly plead that Gogo has the market or monopoly power necessary to foreclose competition in a substantial portion of a relevant market. Br. at 11-12. The FAC fails on two scores -- it does not properly allege that Gogo has market power, let alone monopoly power, or that Gogo has foreclosed competition in an anticompetitive way.

Plaintiffs' failure to plausibly allege market power by itself dooms the antitrust claims. Plaintiffs continue to suggest that simply attributing an 85-90% market share to Gogo is enough to save the FAC from dismissal regardless of how the relevant market or market share are defined, or whether anticompetitive conduct is present. Opp. Br. at 9-11. As shown, that is incorrect as a matter of law.

But Plaintiffs' position is even less tenable because their market share allegations are not remotely plausible. "On a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009) (citing *Twombly*, 550 U.S. at 556).

And as the Supreme Court has held, "the boundaries of the relevant market must be drawn with sufficient breadth . . . to recognize competition where, in fact, competition exists." *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962).

To inflate their market share and power allegations, Plaintiffs use an economically and legally irrational approach that limits consideration to a market consisting only of aircraft actually equipped with internet connectivity. This limitation makes no sense because it excludes an essential part of the new and growing business of inflight connectivity -- the large number of unequipped aircraft over which Gogo and its competitors fiercely compete. To plausibly allege market share and power, Plaintiffs must include aircraft that can be equipped during the roll-out of this new technology. Any other approach, and specifically Plaintiffs' artificially restrictive one, generates market share and power allegations that are totally implausible under basic economic principles and the reality of this business. For example, none of the rivals who entered this business line after Gogo debuted its service in August 2008 would have made the large investments of money and time to develop competing satellite-based services if the zone of competition consisted only of the planes Gogo had signed up in the nascent stage of a new business. And Plaintiffs' theory leads to absurd conclusions from an antitrust perspective. Under Plaintiffs' approach, the minute Gogo inked its first contract with an airline for a single aircraft, it became a monopolist that had illegally foreclosed the entire market for in-flight connectivity.

Plaintiffs' approach is particularly implausible in a new technology business like this one, characterized by rapid adoption by new users, the proliferation of rivals, and the development of competing technologies. In this context, market shares limited to an installed base that is static in time have little predictive power and are misleading. This is plainly illustrated by the facts incorporated in the FAC. Every year the number of equipped planes increases dramatically -- between December 2008 and June 2012 Gogo alone went from having equipped 30 such planes to 1,565 planes. Abye Decl., Ex. B at 99. This upward momentum is fueled by the proliferation of Wi-Fi enabled mobile devices, consumer expectations, and inter-airline competition for passengers. *See id.*, Ex. B at 100-01. Unequipped commercial aircraft can be easily converted

into equipped planes overnight. FAC at ¶ 30. And a critically important fact about this new business is the fierce competition to equip previously unequipped planes.[1] As discussed in our opening brief, United just announced that it has contracted with Panasonic, and not Gogo, to equip 300 currently unequipped aircraft with Panasonic's satellite service. Abye Decl., Ex. C at 1.[2]

Thus, in a business such as the one here, where new technology is being deployed for the first time and new companies are entering the field with competing services and business models, basing market power claims on a static sliver of the alleged relevant market makes no legal sense. Plaintiffs' contention that unequipped commercial aircraft should not be considered for purposes of calculating Gogo's market share and power renders the antitrust claims implausible. [3]

Plaintiffs have run hard from using the correct approach because the facts incorporated in the FAC show a total absence of market or monopoly power in Gogo's hands. In 2010, fewer than 16% of all North American aircraft had been equipped. Abye Decl., Ex. B at 3. Within that 16%, Gogo had equipped 1,056 planes. *Id*. at 88. By June 30, 2012, Gogo expanded by equipping approximately another 500 planes in North America. *Id*. But regardless of what

[1] As discussed in Gogo's opening brief and again below, there is also strong competition to displace service providers on equipped planes. For example, AirTran terminated its Gogo contract and moved to Row 44 after it was acquired by Southwest. Abye Decl., Ex. B at 36, 98. And other key airlines typically have the right to terminate their dealings with Gogo when a rival offers a superior arrangement. *Id*. at 15 (Gogo's "contracts with airline partners from which we derive a majority of our [commercial airline] segment revenue permit each of these airline partners to terminate its contract with us if another company provides an alternative connectivity service that is a material improvement over Gogo Connectivity").

[2] Significantly, Plaintiffs concede that the Court may grant Gogo's request for judicial notice of the fact that United Airlines publically announced it expects to install Panasonic Avionics Corporation's Ku-band satellite technology on 300 of its mainline aircraft by the end of 2013. *See* Opp. Br. at 12, n.5. Then they contend that the "handpicked" press release contains inadmissible hearsay the Court should not consider. Opp. Br. at 12. But they nevertheless submit for this Court's consideration a Gogo press release (Katriel Decl., Ex. 3) and a partially illegible on-line magazine article about Row 44 (Katriel Decl., Ex. 1), without even requesting judicial notice, and then quote and cite these documents for the truth of the matters stated within them. *See, e.g*., Opp. Br. at 3, 11, 14. Any objection Plaintiffs have here has been waived.

[3] Plaintiffs' market power case citations -- *U.S. Anchor Mfg. v. Rule Indus.*, 7 F.3d 986 (11th Cir. 1993), *Servicetrends v. Siemens Med. Sys.*, 870 F. Supp. 1042 (N.D. Ga. 1994) and *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) -- are irrelevant. None of these cases stand for the proposition that market power can be plausibly based on selected slivers of an alleged relevant market.

Gogo's exact current market share is, it is far short of the level required for market or monopoly power. *See Image Technical Servs. v. Eastman Kodak Co*., 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a prima facie case of market power."); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975) ("while 90% of the market 'is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.'") (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945)).[4]

Consequently, the FAC fails to plausibly allege market or monopoly power, and should be dismissed. *See Digital Sun v. Toro Co.*, No. 10-CV-4567-LHK, 2011 WL 1044502, at *3 (N.D. Cal. Mar. 22, 2011) (dismissing Section 2 claim where plaintiff did not sufficiently allege market power); *Rick-Mik Enters. v. Equilon Enters., LLC*, 532 F.3d 963, 972-73 (9th Cir. 2008) (affirming dismissal of Sherman Act Section 1 claim where plaintiff failed to plead facts showing "the amount of power or control" in a relevant market); *POURfect Prods. v. KitchenAid*, No. CV-09-2660-PHX-GMS, 2010 WL 1769413 at *2 (D. Ariz. May 3, 2010) (dismissing Sherman Act Section 2 claim for, among other things, failure to plead monopoly power by not adequately pleading "facts showing that the defendant owns a dominant share of the market").

[4] Notwithstanding Plaintiffs' protests, (Opp. Br. at 13, n.6), the FAC is also subject to dismissal because it does not contain a factual basis to support its alleged United States relevant geographic market. "The relevant geographic market inquiry focuses on that geographic area within which the defendant's customers who are affected by the challenged practice can practicably turn to alternative supplies if the defendant were to raise its prices or restrict its output." *E. I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 441 (4th Cir. 2011). Plaintiffs admit the market share numbers on which they base their allegations relate to "North America," not just the United States. Opp. Br. at 2. They also admit that competition for inflight connectivity occurs both within the U.S. and internationally. Opp. Br. at 13-14. Yet, despite these realities they incorrectly stick to the allegation that the geographic market is limited to the U.S. solely to inflate Gogo's market share. The Sherman Act claim should be dismissed on this basis alone. *See, e.g., Apani Sw., Inc. v. Coca-Cola Enters.*, Inc., 300 F.3d 620, 633 (5th Cir. 2002) (affirming district court dismissal of antitrust complaint after finding plaintiff's "geographic market definition insufficient as a matter of law"); *Lockheed Martin Corp. v. Boeing Co.*, 314 F. Supp. 2d 1198, 1225 (M.D. Fla. 2004) ("A complaint is also legally insufficient where it shows that a plaintiff's proposed relevant market clearly excludes relevant geographic areas, purchasers, or suppliers.").

II. THE FAC FAILS TO ALLEGE THAT GOGO HAS FORECLOSED A SUBSTANTIAL PORTION OF A RELEVANT MARKET

Another fatal defect in the FAC is the failure to allege actionable foreclosure. Plaintiffs have not said anything in the opposition brief to cure this crucial omission.

As detailed in Gogo's opening brief, Plaintiffs must allege substantial foreclosure or face dismissal of the antitrust claims. They have failed this test. The FAC is devoid of any factual allegation of substantial foreclosure, let alone an allegation of foreclosure at an actionable level. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 46-47 (1984) (30% foreclosure not actionable), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Omega Envtl. Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162-63 (9th Cir. 1997) (foreclosure of 38% of market inadequate to support plaintiff's antitrust claim); *Colonial Med. Grp., Inc. v. Catholic Healthcare W.*, No. C-09-2192 MMC, 2010 WL 2108123, at *5 (N.D. Cal. May 25, 2010) (dismissing exclusive dealing claim because "FAC includes no facts, however, from which it reasonably could be inferred that the percentage of the product market foreclosed is sufficiently substantial to support a claim under § 1 of the Sherman Act"); *Abbyy*, 2008 WL 4830740 at *2 (dismissing exclusive dealing claims where plaintiff failed to plead facts showing, among other exclusionary factors, the "degree of the market allegedly foreclosed as a result of these contracts").

Even if Gogo's market share were 85-90% as Plaintiffs incorrectly allege, they still fail to show that substantial foreclosure is a plausible claim, for several reasons. The fact that an airline typically can terminate an agreement with Gogo when a competitor presents a more competitive offer (*see* Abye Decl., Ex. B at 15) is by itself fatal to Plaintiffs' substantial foreclosure claim. As the Ninth Circuit has held, termination rights negate the possibility that a purported exclusive dealing contract can foreclose competition. *See Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 997 (9th Cir. 2010) ("The easy terminability of an exclusive dealing arrangement negates substantially its potential to foreclose competition.") (quotations omitted); *Omega*, 127 F.3d at 1162 (agreement did not foreclose a significant amount of the relevant market because, among other reasons, it allowed for 60-day termination should a

competing manufacturer offer "a better product or a better deal").[5] Indeed, by allowing an airline to switch to a competitor if presented with a better offer, Gogo's agreements encourage competition and are pro-consumer. *See Balaklaw v. Lovell*, 14 F. 3d 793, 799 (2d Cir. 1994) ("Such a situation may actually encourage, rather than discourage, competition, because the incumbent and other, competing anesthesiology groups have a strong incentive continually to improve the care and prices they offer in order to secure the exclusive positions."). Plaintiffs' main argument in response is simply to ignore the airlines' ability to terminate, a fact that is incorporated in the FAC.

The FAC admits other key facts showing that rivals and competition have not been substantially foreclosed. The FAC admits, for example, that several new companies entered the business after Gogo launched its service. *See* Br. at 3-4. The FAC also admits that the new entrants have won substantial contracts with airlines to equip their aircraft. FAC at ¶¶17, 18. Plaintiffs now concede that two of the largest airlines in the United States -- United and Southwest -- use the services of Gogo's rivals for most or all of their connectivity offerings. *See* Opp. Br. at 12-13; FAC ¶ 17. And as noted, Gogo, the alleged monopolist with the power to exclude competitors and raise prices at will, has yet to make a profit. *See* Abye Decl., Ex. B at 6, 10.

In sum, Plaintiffs plead facts in the FAC that negate the possibility of stating a plausible substantial foreclosure claim. The Court should dismiss the Sherman Act claims. *See, e.g*, *Abbyy*, 2008 WL 4830740 at *2.

[5] Plaintiffs state that "courts have upheld 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." Opp. Br. at 4-5. Notably, none of the cases they cite for this proposition deal with contracts that are easily terminable. In *Tele Atlas*, the court emphasized that none of the contracts at issue "contained an easy method for terminating the agreement." *Tele Atlas N.V. v. NAVTEQ Corp.*, No. C-05-01673 RMW, 2008 WL 4809441 at *21-22 (N.D. Cal. 2008). Similarly, there is no indication that the contracts at issue in *Twin City*, which the court described as giving the defendant an "impregnable competitive position," were terminable. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir. 1982). Nor do the agreements at issue in *Pecover* appear to have been terminable. *See Pecover v. Elec. Arts Inc.*, 633 F. Supp. 2d 976 (N.D. Cal. 2009).

III. THE FAC FAILS TO ALLEGE ANTITRUST INJURY OR STANDING

Plaintiffs' effort to allege antitrust injury and standing are also legally inadequate. Plaintiffs allege supra-competitive prices as the grounds for standing and antitrust injury. But that allegation is based solely on the claim that Gogo's prices are higher than Row 44's. FAC at ¶¶ 9-10; Opp. Br. at 16. This is insufficient as a matter of law.

Plaintiffs are required to plead facts to support the allegation that Gogo's prices are supra-competitive. If they fail to do that, as they have, they face dismissal. *See Coalition for ICANN Transparency v. Verisign, Inc*., 464 F. Supp. 2d 948 (N.D. Cal. 2006) (dismissing Sherman Act claim for, among other reasons, failure to adequately plead facts to support "conclusory" allegation that "prices are supra-competitive"). And, as detailed in Gogo's opening brief (Br. at 12-14), the mere comparison of Gogo's prices to those of Row 44 is not enough to state a plausible claim for supra-competitive prices. *See, e.g., Somers v. Apple, Inc.*, No. C 07-06507 JW, 2011 WL 2690465 at *5-6 (N.D. Cal. June 27, 2011) ("the allegation that 'competitor Real Networks' pricing . . . was priced lower than Defendant's . . . the Court has already found insufficient to support the allegation that Apple's iTMS pricing was supracompetitive"); *see also Kaiser Found. v. Abbot Labs.*, No. CV 02-2443-JFW, 2009 WL 3877513 (C.D. Cal Oct. 8, 2009) ("Plaintiff's argument that the fact that [Defendant's drug] costs more than generic [drug] is 'direct evidence' of Defendant's supra-competitive pricing and, thus, Defendant's alleged monopoly power is unpersuasive.").[6]

Plaintiffs' argument about Gogo's alleged price increases misses the point -- price increases are not sufficient to allege supra-competitive pricing. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993) ("[T]he occurrence of a price increase

[6] Plaintiffs argue that "virtually every court . . . has concluded that direct purchaser plaintiffs making such allegations of an overcharge readily meet the antitrust standing requirements." Opp. Br. at 17. Plaintiffs' cited cases, however, do not support this proposition. *See Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109 (N.D. Cal. 2008). In *Reiter*, the Supreme Court ruled on the isolated issue of whether consumers alleging price-fixing by manufacturers of hearing aids had suffered injury in their "business or property" under the Clayton Act. *Reiter*, 442 U.S. at 342. The *In re: TFT-LCD* court held that purchasers of finished goods could claim antitrust injury based on defendants' price-fixing of component parts, even though they had purchased "downstream." *In re: TFT-LCD*, 586 F. Supp. 2d at 1119. Neither of these cases dealt with the issue raised here – whether a plaintiff asserted enough facts to claim a defendant charged supra-competitive prices.

does not in itself permit a rational inference of . . . supracompetitive pricing. Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand."). This is especially true, contrary to Plaintiffs' arguments (Opp. Br. at 18), in light of the fact that Gogo has not made any profit, let alone monopoly profits. *See Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 271 (2d. Cir. 2001) ("A monopolist presumably always charges the highest available price to maximize its profits without attracting competitors to enter the market.").

The fact (admitted by incorporation in the FAC) that Gogo's contracts are typically terminable when an airline is presented with a better offer also negates Plaintiffs' conclusory statements that they were harmed "as a result of Gogo's long-term, exclusive dealing agreements, coupled with Gogo's market power." Opp. Br. at 16. The challenged agreements could not have led to supra-competitive pricing for two dispositive reasons. One, as detailed above, the portion of the alleged market subject to the challenged contracts is well below any actionable foreclosure level. Two, even if the foreclosure is analyzed under Plaintiffs' improper focus on actually equipped aircraft, no substantial foreclosure is possible because Row 44 or any other competitor could displace Gogo by making better offers. *See* Abye Decl., Ex. B at 15. The fact that airlines compete with each other through, among other things, offering passenger services further buttresses this point as it is implausible that any airline would refuse to deal with a Gogo competitor offering better services and pricing to its passengers. *See id.* at 100-01.

Accordingly, the Sherman Act claims should be dismissed because the FAC fails to allege antitrust injury and standing. *See Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1102 (9th Cir. 1999) (to have standing, injury must be "attributable to an anticompetitive aspect of the practice under scrutiny") (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)); *Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008) (affirming dismissal of antitrust claim where there was no causal relationship between the alleged higher price of books paid by plaintiff and the challenged marketing agreement between Amazon.com and Borders Group, Inc.).

IV. THE FAC FAILS TO STATE A CLAIM UNDER THE CARTWRIGHT ACT

Plaintiffs' effort to save the Cartwright Act claim is misdirected. The reason why this claim fails is that it simply repackages the federal Sherman Act claims, and when the federal claims fail, the entire Cartwright Act claim necessarily fails with them. *In re Late Fee & Over-Limit Litig.*, 528 F. Supp. 2d 953, 965 (N.D. Cal. 2007); *see also* Br. at 14.[7]

Plaintiffs' other contentions about the Cartwright Act are irrelevant in light of this, but also can be easily dispatched. The claim that the FAC falls within the reach of the Cartwright Act because it alleges exclusive dealing contracts involving third parties is off point because this case features contracts that are terminable. *See* Abye Decl., Ex. B at 15. None of the cases cited by Plaintiffs involve terminable contracts, nor do any of those cases hold, as Plaintiffs suggest, that *all* exclusive dealing arrangements are actionable under the Cartwright Act. The Cartwright Act only prohibits those exclusive arrangements that effectively cut-off free access to the market by new entrants. *See Fisherman's Wharf Bay Cruise Corp. v. Super. Ct.*, 114 Cal. App. 4th 309, 335 (2003) ("In California, exclusive dealing arrangements are not deemed illegal per se."); *Redwood Theatres, Inc. v. Festival Enters., Inc., et al.*, 200 Cal. App. 3d 687, 713 (1988) (holding that the actionability of the exclusive license agreements between film distributors and exhibitors turns on "the question of free access to markets"). But Gogo's contracts do not cut-off free access to the market for inflight internet services, as set out previously. Consequently, they do not involve concerted action that falls within the ambit of the Cartwright Act.

CONCLUSION

For these reasons, and the reasons in Gogo's opening brief, Gogo respectfully requests that the Court dismiss the FAC in its entirety. Because Plaintiffs have already filed original and

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[7] The UCL claim should be dismissed for this same reason. *See LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x. 554 (9th Cir. 2008); *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1147 (N.D. Cal. 2011).

amended complaints, and cannot allege facts sufficient to state a plausible claim, dismissal should be with prejudice.

DATED: March 6, 2013

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