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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

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

17 Plaintiffs

18 vs.

19 GOGO INC.,

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

FIRST AMENDED CLASS ACTION
COMPLAINT FOR:

- (1) Violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. Section 1;
- (2) .Violations of Section 2 of the Sherman Antitrust Act, 15 U.S.C. Section 2;
- (3) Violations of the California Cartwright Act, California Bus. & Prof. Code Section 16720, *et seq.*; and
- (4) Violations of California’s Unfair Competition Law, Cal. Bus. & Prof. Code Section 17200, *et seq.*

DEMAND FOR JURY TRIAL

1 **NATURE OF THE ACTION**

2 1. Plaintiffs James Stewart, Joel Milne, and Joseph Strazzullo (collectively
3 “Plaintiffs”), by and through their undersigned counsel, hereby bring this action on behalf of
4 themselves and all other similarly situated persons in the United States who, during the Class
5 Period defined herein, have purchased inflight internet access services on domestic commercial
6 airline flights within the United States from Defendant Gogo Inc. (“Gogo”). Plaintiffs seek
7 monetary, equitable, declaratory, and injunctive relief, as well as attorneys’ fees and costs, as
8 redress for Gogo’s violations of federal antitrust laws and pertinent California statutes. As
9 detailed herein, Gogo has unlawfully obtained and/or maintained monopoly market power in the
10 United States market for inflight internet connectivity on domestic commercial aircraft by resort
11 to anti-competitive conduct that includes a series of long-term exclusive contracts with the major
12 domestic airlines in the United States. These exclusive contracts have the purpose and effect of
13 thwarting competition on the merits and on price, and have permitted Gogo to charge consumers
14 like Plaintiffs and the members of the class they seek to represent supra-competitive prices.

15 **JURISDICTION AND VENUE**

16 2. Count I of this Class Action Complaint states a claim for unlawful agreements in
17 restraint of trade in violation of Section 1 of the Sherman Antitrust Act (the “Sherman Act”), 15
18 U.S.C. Section 1. This Court, therefore, has subject-matter jurisdiction over this count pursuant
19 to 28 U.S.C. Sections 1331 and 1337.

20 3. Counts II and III of this Class Action Complaint state claims for unlawful
21 acquisition and maintenance of monopoly market power, respectively, in violation of Section 2
22 of the Sherman Act, 15 U.S.C. §2. This Court, therefore, has subject-matter jurisdiction over
23 these counts pursuant to 28 U.S.C. Sections 1331 and 1337.

24 4. Count IV of this Class Action Complaint states a claim on behalf of a subclass of
25 California purchasers of Gogo inflight internet service for Gogo’s violations of the California
26 Cartwright Act, Cal. Bus. & Prof. Code §16720, *et seq.* This Court has supplemental subject-
27 matter jurisdiction over these claims pursuant to 28 U.S.C. Section 1367 because the claims arise
28

1 from the same nucleus of operative facts as the remaining claims in this Class Action Complaint
2 over which this Court has original federal question subject-matter jurisdiction.

3 5. Count V of this Class Action Complaint states a claim on behalf of a subclass of
4 California purchasers of Gogo inflight internet service for Gogo's violations of California's
5 Unfair Competition Law, Cal. Bus. & Prof. Code, §17200, *et seq.* (the "UCL"). This Court has
6 supplemental subject-matter jurisdiction over these claims pursuant to 28 U.S.C. Section1367
7 because the claims arise from the same nucleus of operative facts as the remaining claims in this
8 Class Action Complaint over which this Court has original federal question subject-matter
9 jurisdiction.

10 6. This Court also independently has subject-matter jurisdiction over all the counts
11 of this Class Action Complaint pursuant to the Class Action Fairness Act, 28 U.S.C. §1332(d),
12 because this is a class action where the citizenship of the class is diverse from the citizenship of
13 defendant, and where the amount in controversy sought exceeds \$5 million.

14 7. This Court has personal jurisdiction over defendant Gogo because Gogo conducts
15 business within this judicial district, including selling the very services that are at issue in this
16 action to consumers residing within this judicial district. Plaintiff James Stewart is a resident of
17 this judicial district. Venue, therefore, is proper in this judicial district pursuant to 28 U.S.C.
18 Section 1391.

19 PARTIES

20 8. Plaintiff James Stewart is a resident of San Francisco County in the State of
21 California. During the Class Period, Stewart flew on commercial flights within the United States
22 on Virgin America, US Airways and Frontier Airlines, and purchased Gogo inflight internet
23 access services for those flights. Due to Gogo's unlawful actions in violation of the federal
24 antitrust and California statutes, Stewart was subject to a supra-competitive overcharge for his
25 inflight internet access purchases from Gogo. By way of example, just during the past 6
26 months, Plaintiff James Stewart has made purchases of inflight internet access service from
27 Gogo on flights operated by US Airways, Virgin America, Air Tran, American Airlines, and has
28 was charged anywhere between \$12.95 to \$21.95 for these inflight internet access services by

1 Gogo—all at a time when rival inflight internet access service provided by competitor Row 44
2 on Southwest Airlines, for example, was being offered for \$5.00. Due to defendant Gogo’s
3 exclusionary and anticompetitive conduct detailed herein, however, Row 44’s and other less
4 expensive potential offerings were excluded from the broader market and, hence, were unable to
5 provide price-constraining competition to Gogo’s offerings, which have continued to increase in
6 price.

7 9. Plaintiff Joel Milne is a resident of California. During the Class Period, Milne
8 flew on commercial flights within the United States on American Airlines, Virgin America, and
9 US Airways, and repeatedly purchased from Gogo an inflight internet access session that
10 allowed him to access the internet during his flights. Due to Gogo’s unlawful actions in
11 violation of the federal antitrust and California statutes, Mr. Milne was subject to a supra-
12 competitive overcharge for his inflight internet access purchases from Gogo. By way of
13 example, in late 2011, Plaintiff Joel Milne purchased inflight internet access service from Gogo
14 on a flight operated by American Airlines, and has was charged \$14.95 for this inflight internet
15 access service by Gogo—all at a time when rival inflight internet service access provided by
16 competitor Row 44 on Southwest Airlines, for example, was being offered for \$5.00. Due to
17 defendant Gogo’s exclusionary and anticompetitive conduct detailed herein, however, Row 44’s
18 and other less expensive potential offerings were excluded from the broader market and, hence,
19 were unable to provide price-constraining competition to Gogo’s offerings, which have
20 continued to increase in price.

21 10. Plaintiff Joseph Strazzullo is a resident of California. During the Class Period,
22 Strazzullo flew on commercial flights within the United States on American Airlines, Virgin
23 America, and Delta Airlines, and purchased Gogo inflight internet access services for those
24 flights. Due to Gogo’s unlawful actions in violation of the federal antitrust and California
25 statutes, Mr. Strazzullo was subject to a supra-competitive overcharge for his inflight internet
26 access purchases from Gogo. By way of example, since 2010 until mid-2012, Plaintiff Joseph
27 Strazzullo made purchases of inflight internet access service from Gogo on flights operated by
28 Delta, Virgin America, and American Airlines, and has was charged as high as \$10.77 for these

1 inflight internet access services by Gogo—all at a time when rival inflight internet service access
2 provided by competitor Row 44 on Southwest Airlines, for example, was being offered for
3 \$5.00. Due to defendant Gogo’s exclusionary and anticompetitive conduct detailed herein,
4 however, Row 44’s and other less expensive potential offerings were excluded from the broader
5 market and, hence, were unable to provide price-constraining competition to Gogo’s offerings,
6 which have continued to increase in price.

7 11. Defendant Gogo is a corporation organized under the laws of the State of
8 Delaware, and having its principal place of business at 1250 North Arlington Heights Road,
9 Suite 500, Itasca, Illinois 60143. Gogo, formerly known as Aircell, touts itself on its website as
10 “the world’s leading provider of inflight connectivity.” Since August 2008, Gogo has been
11 providing broadband internet access to passengers on commercial aircraft. Currently, Gogo
12 internet is the exclusive internet access connectivity provider along domestic commercial airlines
13 routes flown by AirTran, Alaska Airlines, American Airlines, Delta, Frontier Airlines, United
14 Airlines, US Airways, and Virgin America. Gogo currently provides internet access connectivity
15 to nine out of the ten domestic U.S. airlines. Gogo-equipped planes represent approximately
16 85% of the North American aircraft that provide internet connectivity to its passengers.
17 Approximately 95% of Gogo-equipped planes, moreover, are contracted under ten-year
18 exclusive agreements.

19 **THE RELEVANT MARKET FOR DOMESTIC COMMERCIAL AIRCRAFT**
20 **INFLIGHT INTERNET CONNECTIVITY**

21 12. For purposes of this Class Action Complaint, the relevant antitrust market is
22 defined as the United States market for inflight internet access services on domestic commercial
23 airline flights. The geographic antitrust market is nationwide.

24 13. Many passengers on commercial aircraft within the United States demand or
25 desire access to the internet while in flight. The demand from these passengers has created and
26 supports a market for on-plane internet access connectivity. For these passengers, there are no
27 readily available substitutes to which they can turn. Traditional internet service providers cannot
28 provide internet service to plane passengers, both because traditional cellphone towers or
underground wires relied upon by such providers are not capable of transmitting a signal to

1 commercial aircraft in flight, and also because current federal legislation or regulations prohibit
2 the transmission of cellphone communication signals in flight.

3 14. Defendant is a provider of in-flight internet access. It does so by employing its
4 Air-to-Ground (“ATG”) network, which is comprised of nationwide cellular towers. Instead of
5 being designed to transmit signals from land-based tower to land-based tower or to land-based
6 cellular telephones or computers, however, the ATG towers are designed to beam their
7 transmissions in a general vertical direction so that they can communicate with a commercial
8 aircraft in the sky that is equipped with a corresponding ATG antenna and communications unit
9 within the plane.

10 15. While Gogo is a provider, indeed the leading provider with approximately 90%
11 market share, of on-plane internet access connectivity, it is not the only such provider. For
12 example, a rival company, known as Row 44, also provides on-plane internet connectivity to
13 commercial passengers within the United States. Unlike Gogo, which relies on its ATG network
14 of land-based cellular towers to provide its service, Row 44 relies on a satellite-based in-flight
15 broadband platform to provide commercial airline passengers with in-flight internet connectivity
16 at broadband speeds.

17 16. Row 44’s competing offering has several key technological advantages over the
18 service offered by rival Gogo. Row 44’s service is faster, offering broadband speeds of 11 Mbps
19 TCP/IP, and 28 Mbps UDP to the plane. In addition, Row 44’s satellite-based system allows
20 airlines to offer uninterrupted broadband service across national boundaries, over oceans, and
21 even in more remote regions of the world. By contrast, Gogo’s service, being dependent on
22 land-based cellular towers is limited in its coverage to the region where Gogo has land-based
23 towers installed. Gogo has admitted that it will be unable to offer worldwide coverage until at
24 least 2015.

25 17. Row 44’s competing offering also has a significant price advantage over Gogo’s
26 current service. During the Class Period, Gogo charged on average \$12.95 for passengers
27 wishing to obtain internet access on domestic flights of at least three hours’ duration. On some
28 domestic airline carriers, it has recently increased this price to \$17.95 for flights of three hours’

1 duration or more in which passengers purchase inflight internet access through their laptops,
2 while charging \$9.95 for this same flight duration on domestic airline carriers when the inflight
3 internet access is purchase for use on the passenger's mobile device. By contrast, Row 44,
4 which is offered on domestic flights operated by Southwest Airlines, offers its service for a price
5 of merely \$5.00, regardless of the flight's duration.

6 18. Besides Row 44, other providers exist that, but for Gogo's actions more fully
7 described below, would offer competing service that would pose price-constraining competition
8 to Gogo's offering. For example, ViaSat is yet another provider offering a satellite-based system
9 capable of providing inflight broadband internet access to commercial airline passengers.
10 Recently, JetBlue, a U.S. low-cost domestic airline carrier announced that it will be offering
11 inflight internet broadband access to its passengers through its partnership with ViaSat, and
12 expects to launch the system in its aircraft in late 2012, pending Federal Aviation Administration
13 certification. More recently, JetBlue announced a postponement of this launch, and now expects
14 that the ViaSat offering of inflight broadband service will now occur in early 2013.

15 19. Despite the existence of competing offerings and the potential for competing
16 offerings from other providers, Gogo has managed to deny consumers the benefits of this actual
17 and potential competition that would exist but for the actions that Gogo has taken and that are
18 detailed below.

19 **GOGO'S MONOPOLY MARKET POWER AND ANTI-COMPETITIVE ACTIONS TO**
20 **OBTAIN OR MAINTAIN IT**

21 20. Late last year, Gogo filed registration papers required by the Securities and
22 Exchange Commission in connection with its planned Initial Public Offering ("IPO"). Those
23 publicly filed papers document that Gogo claimed to possess an 85% share of the market for on-
24 plane internet connectivity within the United States. In fact, by now, and since the time that
25 those papers were filed, it is likely that Gogo's market share has risen to approximately 90%
26 because, upon information and belief, additional airplanes that were contracted to be outfitted
27 with Gogo's equipment have been so equipped. Further, given the disparity in pricing charged
28 by Gogo for an internet session (i.e., \$17.95 per session on flights of at least a three-hour
duration) as compared to the lower price charged by Row 44 on Southwest Airlines-equipped

1 flights (i.e., \$5.00 per session regardless of flight duration), it is likely that if market share were
2 measured in terms of revenues, as opposed to units of sessions sold, Gogo's market share would
3 significantly exceed 90%.

4 21. Regardless, whether the market share figure of 85% referenced in Gogo's IPO
5 papers or the still higher 90% plus figure is credited, Gogo has more than sufficient market
6 power to exclude competition, reduce output, and increase price. In fact, it has done so.

7 22. The United States market for inflight internet connectivity on domestic
8 commercial flights is characterized by high barriers to entry. Among these high entry barriers
9 are the high cost of infrastructure required to build a network capable of offering inflight internet
10 connectivity. Further, the market is characterized by restrictive legal and regulatory hurdles that
11 serve to limit competitive entry. For land-based systems, such as Gogo's ATG network, the
12 Federal Communications Commission ("FCC") must provide and approve the required
13 frequency spectrum for such transmissions to take place. No further auctioning of ownership or
14 use rights of frequency spectrums capable of transmitting broadband signals to aircraft are
15 planned to be auctioned off by the FCC until at least the year 2016, thereby making Gogo the
16 exclusive holder of an aircraft-capable frequency spectrum for the foreseeable future. Resort to a
17 satellite-based system is costly and requires partnering with a satellite launching company, as has
18 been done by Row 44. Moreover, Gogo's use of long-term (typically ten-year) exclusive
19 contracts that legally prevent contracting airline carriers from employing any inflight internet
20 connectivity provider, other than Gogo, during the ten-year duration of Gogo's contract, poses
21 another high entry barrier. In the face of this long-term exclusivity that Gogo has secured with
22 respect to the 95% of the commercial aircraft it currently serves, few would-be entrants would
23 find it financially feasible to incur the costs and clear the legal hurdles required for entry into the
24 market when they know that, even upon doing so, the existence of these long-term, exclusive
25 contracts, would prevent these new would-be entrants from being able to take business away
26 from Gogo in the foreseeable future.

27 23. With the exception of Southwest Airlines, Gogo has managed to secure contracts
28 to provide internet access to all other major U.S. airlines that currently offer in-plane internet

1 access, including: AirTran, Alaska Airlines, American Airlines, Delta, Frontier Airlines, United
2 Airlines, US Airways, and Virgin America.

3 24. Rather than achieving or maintaining its monopoly market power through
4 innovation or competition on the merits, however, Gogo has achieved or maintained its dominant
5 market power by resorting to anti-competitive agreements with the airlines on whose planes
6 Gogo's equipment is placed. These agreements take the form of long-term exclusive agreements
7 of ten years' duration during which the contracting airline agrees to contract only with Gogo for
8 inflight internet connectivity services, to the exclusion of any and all competitors that currently
9 exist or that may exist during the duration of these exclusive ten-year contracts.

10 25. With Gogo's service first having launched in August 2008, the first of these Gogo
11 exclusive contracts is not set to expire until the year 2018. Until that time, planes equipped with
12 Gogo's equipment cannot turn to a competing provider, even if that competitor were to offer (as
13 Row 44 currently does) either more attractive technological features, better pricing, or both to the
14 airline's passengers.

15 26. Gogo has, in fact, exercised this monopoly market power, as is evidenced, for
16 example, by its continuous and repeated raising of prices of its own internet inflight internet
17 access service, which now are priced at as high as \$17.95 plus taxes and fees (for a service that
18 was initially priced at as low as \$7.95 or \$9.95 when it launched just a few years ago), even at a
19 time when competing services with little market share are offered for as low as \$5.00 per flight
20 on, for example, Southwest Airlines. Gogo's ability to and actual increase in prices at a time
21 when competing offerings were available on other planes at significant lower prices indicates
22 that, due to these competing offerings' low market share, they did not pose any meaningful
23 price-constraining competition to Gogo's offerings.

24 27. Gogo, itself has admitted in its IPO papers, that its long-term exclusive contracts
25 are a key weapon that allows it to maintain what it calls its "strong incumbent position."
26 Therein, Gogo touts to potential investors that:

27 ***Strong Incumbent Position.*** We are the world's leading provider of in-
28 flight connectivity to the commercial aviation market and a leading provider of in-
flight internet connectivity and other voice and data communications equipment

1 and services to the business aviation market. In our CA [commercial aviation]
2 business, we currently provide Gogo Connectivity to passengers on nine of the ten
3 North American airlines that provide internet connectivity to their passengers. As
4 of September 30, 2011, Gogo-equipped planes represented approximately 85% of
5 North American aircraft that provide internet connectivity to their passengers.
6 ***Approximately 95% of Gogo-equipped planes, representing approximately 42%
7 of our consolidated revenue for the nine months ended September 30, 2011, are
8 contracted under ten-year agreements. Our market leading position also
9 benefits from the exclusive nature of a number of our contracts*** and the
10 significant expense and inefficiencies that an airline would incur by switching to
11 another provider.

12 Gogo's IPO Form S-1 Registration Statement (emphasis added).

13 28. As a provider with 85%-90% market share, Gogo's resort to long-term (ten-year)
14 exclusive contracts forecloses a significant portion of the market for a significant period of time,
15 thereby thwarting competition. The net result is that Gogo's knowledge that it is protected from
16 losing business to competitors on planes on which it has entered into long-term exclusive
17 agreements insulates it from price-constraining competition. These anti-competitive effects are
18 not justified or offset by overriding procompetitive benefits. Further, to the extent that any such
19 procompetitive benefits arise from Gogo's resort to long-term, exclusive contracts, those benefits
20 could be achieved through less restrictive means.

21 29. If Gogo was not insulated from competition by the terms of the long-term
22 exclusive contracts that it has put in place with many of its airlines, it would face the real
23 prospect that if it attempted to raise or maintain prices for its inflight internet connectivity
24 services above a competitive level, it would lose business to competing inflight internet
25 connectivity providers that the airlines would be free to turn to but presently cannot as a result of
26 the Gogo exclusive contracts that are in effect.

27 30. The real nature of that prospect of Gogo, in the absence of its long-term exclusive
28 contracts, losing business to a competing, lower-priced inflight internet connectivity provider, is
borne out by the fact Gogo, itself, underscores that, "[o]ur in-flight connectivity and
entertainment systems can generally be installed overnight." Thus, an airline that was presented
with a more competitive offering for internet service connectivity aboard its aircraft could
readily switch to such a provider without incurring inordinate aircraft downtime or switching

1 costs. Gogo's long-term and exclusive contracts, however, prevent any of that from happening
2 because, as Gogo boasts in its IPO papers, "[w]e generally have the exclusive right to provide
3 passenger internet connectivity services on Gogo installed aircraft throughout the term of the
4 agreement."

5 31. Of course, in a world devoid of Gogo's long-term exclusive contracts, an airline
6 need not decide to actually switch providers in order to constrain Gogo's pricing of its services to
7 passengers. Rather, the mere prospect that Gogo could lose business to such lower-priced
8 competitors would serve to constrain Gogo's ability to charge supra-competitive pricing and
9 maintain or increase its market share. This is particularly so given that the competitive offerings
10 now in the market (but unavailable to most domestic airline flights due to Gogo's restrictive
11 agreements) are of superior technological quality than Gogo's ATG-based service, both in terms
12 of the reach of the connectivity (nationwide versus worldwide) and the speed of the connection.
13 In the face of these more advanced and lower-priced competitive offerings, had Gogo not been
14 shielded by the long-term exclusive contracts it employed, it would not be able to maintain or
15 increase its market share, while continuing to charge supra-competitive prices, as it has done.

16 32. Gogo's use of long-term, exclusive contracts serves to insulate it from
17 competition, and to cement and protect its monopoly market power. The net result of Gogo's
18 resort to long-term exclusive contracts is that consumers like Plaintiffs and the members of the
19 class they seek to represent have been denied the benefits of competition, have been left with an
20 inferior product offering, and been subject to a supra-competitive overcharge on their purchases
21 of inflight internet connectivity services.

22 **CLASS ACTION ALLEGATIONS**

23 33. Pursuant to Federal Rule of Civil Procedure 23(b)(2)-(3), Plaintiffs bring Counts
24 I-III of this action as a class action on behalf of themselves and all similarly situated consumers
25 who, during the Class Period, purchased inflight internet access connectivity services from
26 defendant Gogo on domestic flights within the United States. In addition, Plaintiffs bring Counts
27 V and VI of this Class Action Complaint on behalf of a subclass of California consumers of
28 Gogo inflight internet services during the Class Period. Specifically and explicitly excluded

1 from the class and subclass definitions are defendant Gogo, as well as any of its employees and
2 relatives, affiliates and agents, as well as all federal, state, and local governmental entities, and
3 the judicial officers assigned to this case. The Class Period for purposes of this Class Action
4 Complaint spans from September 30, 2008 until such date as the Court enters a ruling on
5 whether to certify this action as a class action. Plaintiffs reserve the right to amend this class and
6 subclass definition as case circumstances warrant.

7 34. The class is so numerous that joinder of all putative class members as parties
8 would be impracticable. Although Plaintiffs are not presently aware of the exact size of the
9 class, Gogo has documented in its IPO registration papers that “[f]rom the inception of our
10 service in August 2008 to September 30, 2011, we provided more than 15 million Gogo sessions
11 to more than 4.4 million registered unique users.” Because the Class Period asserted in this
12 Class Action Complaint goes beyond September 30, 2011, this 4.4 million number of unique
13 registered users is substantially higher. In any event, the number of purchasers of Gogo’s
14 inflight internet services on commercial flights within the United States is so large that joinder
15 would be impracticable, thereby satisfying the numerosity requirement.

16 35. The claims of the named Plaintiffs are typical of the claims of the absent class
17 members. Specifically, during the Class Period, Plaintiffs purchased inflight internet
18 connectivity services from Gogo on domestic airline flights within the United States. Plaintiffs
19 all allege, as is alleged on behalf of the absent class members, that due to Gogo’s unlawful and
20 anti-competitive conduct described herein, they were subject to and paid a supra-competitive
21 price for their purchases from Gogo. Plaintiffs, therefore, raise the same claims for redress under
22 the Sherman Act and state law, as is typical of the claims of the absent class members.

23 36. There are common questions of law and fact that predominate over individual
24 issues applicable to the individual plaintiffs and class members. Among these common
25 questions of fact and law are the following:

- 26 ♦ the definition of the relevant market(s);
 - 27 ♦ defendant’s market power within these relevant market(s);
- 28

- 1 ♦ whether defendant resorted to unlawful, anti-competitive exclusive contracts
- 2 to either achieve and/or maintain its monopoly market power in the alleged
- 3 relevant antitrust market;
- 4 ♦ whether defendant's practices amounted to an unlawful restraint of trade in
- 5 violation of Section 1 of the Sherman Act;
- 6 ♦ whether defendant's practices amounted to unlawful monopolization in
- 7 violation of Section 2 of the Sherman Act;
- 8 ♦ whether Plaintiffs and the class members sustained injury to their business
- 9 and/or property caused by reason of defendant's alleged violations; and
- 10 ♦ the proper measure of damages and any other remedy.

11 37. Plaintiffs are adequate representatives of the interests of the class. Plaintiffs are
12 member of the proposed class and subclass and have agreed to bring this action on behalf of the
13 interests of the class. Plaintiffs also have retained competent counsel, experienced in antitrust
14 and class action litigation to zealously and diligently protect the interests of the class members.

15 38. A class action is a superior and manageable means of adjudicating this action over
16 individual litigation by each class member, given that the amount at issue for each individual
17 class member is low relative to the cost of bringing suit, such that classwide litigation provides
18 the only realistic alternative for class members to seek judicial redress. The class action is also
19 manageable in that, by definition, the identity of each Gogo purchaser is known to Gogo, as each
20 such user would be required to complete a registration form online as part of that user's
21 purchase.

22 39. Gogo has also acted or refused to act on grounds generally applicable to the class.
23 Gogo has entered into and adhered to exclusive long-term contracts with its contracting airlines
24 that have the purpose and effect of preventing class members, who have been passengers on
25 these airlines, from obtaining their inflight internet connectivity services on the domestic flights
26 of these carriers within the United States, from a source other than Gogo.

COUNT I

**Violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1
(on Behalf of a Nationwide Class)**

1
2
3
4 40. Plaintiffs hereby incorporate by reference paragraphs 1-39 of this Class Action
5 Complaint with the same force and effect as if these paragraphs had been restated here.

6 41. At various times during the Class Period, while passengers on commercial
7 domestic flights within the United States, Plaintiffs purchased inflight internet connectivity
8 services from Gogo.

9 42. Gogo provides inflight internet connectivity services to aircraft operated by nine
10 out of the ten major North American commercial airlines. In 95% of the commercial aircraft in
11 which Gogo provides such services, it does so subject to long-term, exclusive contracts, of ten
12 years' duration.

13 43. Gogo's market share in the relevant market defined herein is at least, and has at
14 all relevant times, been at least 85%. Gogo's resort to long-term, exclusive agreements, pursuant
15 to which participating airlines cannot offer inflight internet connectivity services from a provider
16 other than Gogo during the life of the ten-year exclusive agreement, therefore, foreclose
17 competition in a substantial portion of the relevant market for a significant period of time.

18 44. The proximate result, purpose, and effect of Gogo's long-term, exclusive
19 agreements is to foreclose competition in the relevant market, insulate Gogo from actual and
20 potential price-constraining competition, and thereby allow Gogo to charge supra-competitive
21 prices for its inflight internet connectivity services on domestic U.S. flights, as Gogo has, in fact,
22 done.

23 45. Because Gogo's long-term, exclusive agreements unreasonably restrain trade by
24 thwarting competition in a significant share of the market for a significant period of time, they
25 are unlawful agreements in restraint of trade within the meaning of Section 1 of the Sherman
26 Act. In fact, even though the offerings of competitors Row 44 and ViaSat are of a different and
27 superior technology, defendant Gogo does not take the position that this now-available superior
28 technology from competing providers permits those airlines under an exclusive contract with
Gogo to terminate their contract with Gogo.

1 entrants that came along after Gogo's initial launch, even when these subsequent entrants
2 provided superior service and more attractive pricing to the consumer. The exclusive contracts
3 of ten-years' duration that Gogo put in place with the majority of the airlines and aircraft it
4 serviced has prevented and continues to prevent these actual and potential competitors from
5 being able to participate in a significant segment of the market for a period of several years, and
6 thereby insulated Gogo from price-constraining competition that would exist but for Gogo's
7 adoption of ten-year exclusive contracts in a market in which it has at least an 85% share of the
8 market.

9 53. The proximate result, purpose, and effect of Gogo's long-term, exclusive
10 agreements is to have allowed Gogo to accrue a monopoly market share and monopoly market
11 power in the relevant market, foreclose competition in the relevant market, insulate Gogo from
12 actual and potential price-constraining competition, and thereby allow Gogo to charge supra-
13 competitive prices for its inflight internet connectivity services on domestic U.S. flights, as Gogo
14 has, in fact, done.

15 54. Because Gogo's monopoly market power was acquired not by resort to superior
16 industry or business acumen, but rather by resort to these anti-competitive agreements, Gogo has
17 engaged in unlawful acquisition of monopoly market power in violation of Section 2 of the
18 Sherman Act.

19 55. As direct purchasers from Gogo, Plaintiffs and the members of the class they seek
20 to represent have been injured in their business or property by Gogo's anti-competitive conduct
21 by, *inter alia*, being subjected to and paying supra-competitive pricing for their inflight internet
22 connectivity purchases from Gogo during the Class Period.

23 56. Under Section 4 of the Clayton Act, 15 U.S.C. § 15, Plaintiffs and the members of
24 the class they seek to represent, as direct purchasers from Gogo, have standing to and do hereby
25 seek monetary (including treble damages), injunctive and declaratory relief, as well as attorneys'
26 fees and costs, as redress for Gogo's unlawful acquisition of monopoly power and corresponding
27 supra-competitive pricing in violation of Section 2 of the Sherman Act.
28

COUNT III

**Violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2
(on Behalf of a Nationwide Class for Unlawful Maintenance of Monopoly)**

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4 57. Plaintiffs hereby incorporate by reference paragraphs 1-56 of this Class Action
5 Complaint with the same force and effect as if these paragraphs had been restated here.

6 58. At various times during the Class Period, while passengers on commercial
7 domestic flights within the United States, Plaintiffs purchased inflight internet connectivity
8 services from Gogo.

9 59. Gogo provides inflight internet connectivity services to aircraft operated by nine
10 out of the ten major North American commercial airlines. In 95% of the commercial aircraft in
11 which Gogo provides such services, it does so subject to long-term, exclusive contracts, of ten
12 years' duration.

13 60. Gogo's market share in the relevant market defined herein is at least, and has at
14 all relevant times, been at least 85% – a market share that, along with the structure of the market,
15 the barriers to entry, and actions taken by Gogo – has granted Gogo monopoly market power.
16 As is detailed in paragraphs 46-54, *supra*, Gogo is alleged to have acquired this monopoly
17 market power not through superior business acumen or industry, but rather by resort to resort to
18 long-term, exclusive agreements of ten years' duration, pursuant to which participating airlines
19 cannot offer inflight internet connectivity services from a provider other than Gogo during the
20 life of the ten-year exclusive agreement. Regardless of whether Gogo actually acquired its
21 monopoly market power lawfully or unlawfully, Gogo has continued to maintain its monopoly
22 market power by resort to these long-term exclusive contracts that are still in place, and the
23 earliest of which is not set to expire at least until the year 2018.

24 61. Because Gogo was the first inflight internet connectivity provider to launch such
25 service in the United States in August 2008, Gogo was then able to insist upon and employ long-
26 term, exclusive contracts of ten years' duration to shield itself from competition from later
27 entrants that came along after Gogo's initial launch, even when these subsequent entrants
28 provided superior service and more attractive pricing to the consumer. The exclusive contracts
of ten-years' duration that Gogo put in place with the majority of the airlines and aircraft it

1 serviced has prevented and continues to prevent these actual and potential competitors from
2 being able to participate in a significant segment of the market for a period of several years, and
3 thereby insulated Gogo from price-constraining competition that would exist but for Gogo's
4 adoption of ten year exclusive contracts in a market in which it has at least an 85% share of the
5 market. Now that Gogo has monopoly market power in the relevant market alleged herein, these
6 long-term, exclusive contracts that are still in place now serve to allow Gogo to maintain its
7 monopoly market power, even at a time when rival providers are offering superior products at
8 more attractive pricing to the consumer.

9 62. Regardless of how Gogo acquired its monopoly market power, the proximate
10 result, purpose, and effect of Gogo's long-term, exclusive agreements is to have allowed Gogo to
11 maintain the monopoly market share and monopoly market power in the relevant market, and
12 thereby foreclose competition in the relevant market, insulate Gogo from actual and potential
13 price-constraining competition, and to allow Gogo to charge supra-competitive prices for its
14 inflight internet connectivity services on domestic U.S. flights, as Gogo has, in fact, done.

15 63. Because Gogo's monopoly market power, however, acquired, has been
16 maintained not by resort to superior industry or business acumen, but rather by resort to these
17 anti-competitive agreements, Gogo has engaged in unlawful maintenance of monopoly market
18 power in violation of Section 2 of the Sherman Act.

19 64. As direct purchasers from Gogo, Plaintiffs and the members of the class they seek
20 to represent have been injured in their business or property by Gogo's anti-competitive conduct
21 by, *inter alia*, being subjected to and paying supra-competitive pricing for their inflight internet
22 connectivity purchases from Gogo during the Class Period.

23 65. Under Section 4 of the federal Clayton Act, Plaintiffs and the members of the
24 class they seek to represent, as direct purchasers from Gogo, have standing to and do hereby seek
25 monetary (including treble damages), injunctive and declaratory relief, as well as attorneys' fees
26 and costs, as redress for Gogo's unlawful maintenance of monopoly power and corresponding
27 supra-competitive pricing in violation of Section 2 of the Sherman Act.
28

COUNT IV

**Violations of the California Cartwright Act, Cal. Bus. & Prof. Code Section 16720, et seq.
(on Behalf of a California Subclass)**

66. Plaintiffs hereby incorporate by reference paragraphs 1-65 of this Class Action Complaint with the same force and effect as if these paragraphs had been restated here.

67. The same conduct alleged in Count I of this Class Action Complaint as stating a claim for an unlawful agreement in restraint of trade in violation of Section 1 of the Sherman Act also states a claim under the California Cartwright Act.

68. The same conduct alleged in Counts II and III of this Class Action Complaint through which Gogo used long-term exclusive contracts to foreclose competition and thereby unlawfully acquire and/or maintain its monopoly market power, respectively, in violation of Section 2 of the Sherman Act also states a claim under California's Cartwright Act.

69. As direct purchasers from Gogo, Plaintiffs and the members of the class they seek to represent have been injured in their business or property by Gogo's anti-competitive conduct in violation of the California Cartwright Act by, *inter alia*, being subjected to and paying supra-competitive pricing for their inflight internet connectivity purchases from Gogo during the Class Period.

70. Under California Business and Professions Code Section 16750, Plaintiffs and the members of the class they seek to represent, as purchasers from Gogo, have standing to and do hereby seek monetary (including treble damages), injunctive and declaratory relief, as well as attorneys' fees and costs, as redress for Gogo's violation of the Cartwright Act.

COUNT V

**Violations of California's UCL, Cal. Bus. & Prof. Code Section 17200, et seq.
(on Behalf of a California Subclass)**

71. Plaintiffs hereby incorporate by reference paragraphs 1-70 of this Class Action Complaint with the same force and effect as if these paragraphs had been restated here.

72. The conduct engaged in by Gogo, as alleged herein, constitutes "unfair competition" within the meaning of Business & Professions Code Section 17200. Specifically, "unfair competition" is defined to include any "unlawful, unfair or fraudulent business act or

1 practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [Bus.
2 & Prof. Code §17500, *et seq.*].”

3 73. Defendant committed “unlawful” business acts or practices for, among other
4 reasons, violating California’s Cartwright Act, Cal. Bus. & Prof. Code Section 16720, *et seq.*, as
5 well as Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

6 74. Defendant committed “unfair” business acts or practices, by among other things:

7 (a) engaging in conduct as part of a business practice that is still ongoing;

8 (b) engaging in conduct where the utility of such conduct, if any, is
9 outweighed by the gravity of the consequences to Plaintiffs and class Members;

10 (c) engaging in conduct that is immoral, unethical, oppressive, unscrupulous,
11 or substantially injurious to Plaintiffs and class Members; and

12 (d) engaging in conduct that undermines or violates the spirit or intent of the
13 antitrust consumer protection laws alleged in this Complaint; and

14 (e) engaging in conduct that threatens competition at its incipiency by
15 thwarting competition among rival and/or would-be competing inflight internet access service
16 providers within the United States because it forbids airlines subject to Gogo’s long-term
17 exclusive contracts from contracting with these actual or would-be competitors of Gogo during
18 the effective term of these long-term exclusive contracts.

19 75. Gogo’s conduct described herein was undertaken as part of a business practice,
20 and is still ongoing.

21 76. Plaintiffs and members of the Class, as direct purchasers of Gogo’s inflight
22 internet access services, conveyed money to Gogo in the form of the purchase prices paid to
23 Gogo for the inflight internet services they purchased from Gogo.

24 77. Plaintiffs and the class members have standing to and do seek equitable relief
25 against Gogo, including an order of equitable restitution that would restore to Plaintiffs and the
26 class members the interest or moneys conveyed to Gogo during Gogo’s unlawful and/or unfair
27 business practices within the Class Period.

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PRAYER FOR RELIEF

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2 WHEREFORE, Plaintiffs and the class and subclass pray for judgment from this Court
3 against Defendant, as follows that:

4 A. The Court determine that: this action may be maintained as a class action;
5 Plaintiffs and their counsel be designated as class representatives and class counsel, respectively;
6 and reasonable notice of this action be given to the members of the class;

7 B. Defendant be permanently enjoined from continuing in any manner the violations
8 alleged in this Class Action Complaint;

9 C. Damages be awarded according to proof, that Plaintiffs and the class and subclass
10 be awarded compensatory and treble damages as well as their reasonable attorneys' fees, costs of
11 suit, and disbursements;

12 D. Plaintiffs and the class and subclass be awarded pre- and post-judgment interest;

13 E. Plaintiffs and the class and subclass obtain such other and further injunctive and
14 declaratory relief as allowed under the Sherman and Clayton Acts, the California Cartwright Act,
15 the California UCL, or other statutes applicable to this Class Action Complaint; and

16 F. Plaintiffs and the class and subclass obtain such other and further relief as the
17 Court may deem just and proper.

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DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all counts.

DATED: December 31, 2012

THE KATRIEL LAW FIRM

/s/ Roy A. Katriel
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