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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

**FILED UNDER SEAL -- PUBLIC
REDATED VERSION**

SECOND AMENDED CLASS ACTION
COMPLAINT FOR:

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

DEMAND FOR JURY TRIAL

1 Pursuant to the Court’s Order dated May’ 7, 2013 [Dkt. No. 44], Plaintiffs James Stewart,
2 Joel Milne, and Joseph Strazzullo, by and through their undersigned counsel, hereby file their
3 Second Amended Class Action Complaint.

4 **NATURE OF THE ACTION**

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

19 **JURISDICTION AND VENUE**

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

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

1 the federal antitrust and California statutes, Stewart was subject to a supra-competitive
2 overcharge for his inflight internet access purchases from Gogo. By way of example, just
3 during the year, Plaintiff James Stewart has made purchases of inflight internet access service
4 from Gogo on flights operated by US Airways, Virgin America, Air Tran, American Airlines,
5 and was charged anywhere between \$12.95 to \$21.95 for these inflight internet access services
6 by Gogo—all at a time when rival inflight internet access service provided by competitor Row
7 44 on Southwest Airlines, for example, was being offered for \$5.00. Due to defendant Gogo's
8 exclusionary and anticompetitive conduct detailed herein, however, Row 44's and other less
9 expensive potential offerings were excluded from the broader market and, hence, were unable to
10 provide price-constraining competition to Gogo's offerings, which have continued to increase in
11 price.

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

26 10. Plaintiff Joseph Strazzullo is a resident of California. During the Class Period,
27 Strazzullo flew on commercial flights within the continental United States on American Airlines,
28 Virgin America, and Delta Airlines, and purchased Gogo inflight internet access services for

1 those flights. Due to Gogo's unlawful actions in violation of the federal antitrust and California
2 statutes, Mr. Strazzullo was subject to a supra-competitive overcharge for his inflight internet
3 access purchases from Gogo. By way of example, since 2010 until mid-2012, Plaintiff Joseph
4 Strazzullo made purchases of inflight internet access service from Gogo on flights operated by
5 Delta, Virgin America, and American Airlines, and has was charged as high as \$10.77 for these
6 inflight internet access services by Gogo—all at a time when rival inflight internet service access
7 provided by competitor Row 44 on Southwest Airlines, for example, was being offered for
8 \$5.00. Due to defendant Gogo's exclusionary and anticompetitive conduct detailed herein,
9 however, Row 44's and other less expensive potential offerings were excluded from the broader
10 market and, hence, were unable to provide price-constraining competition to Gogo's offerings,
11 which have continued to increase in price.

12 11. Defendant Gogo is a corporation organized under the laws of the State of
13 Delaware, and having its principal place of business at 1250 North Arlington Heights Road,
14 Suite 500, Itasca, Illinois 60143. Gogo, formerly known as Aircell, touts itself on its website as
15 "the world's leading provider of inflight connectivity." Since August 2008, Gogo has been
16 providing broadband internet access to passengers on commercial aircraft. Currently, Gogo
17 internet is the exclusive internet access connectivity provider along domestic commercial airlines
18 routes flown by AirTran, Alaska Airlines, American Airlines, Delta, Frontier Airlines, US
19 Airways, and Virgin America. During the Class Period, Gogo also provided inflight internet
20 access connectivity service to domestic commercial aircraft of United Air Lines. Gogo currently
21 provides internet access connectivity to nine out of the ten domestic U.S. airlines. Gogo's share
22 of the market for inflight internet access for commercial domestic flights within the continental
23 United States amounts to at least 85%. Approximately 95% of Gogo-equipped planes, moreover,
24 are contracted under ten-year exclusive agreements.

25 **THE RELEVANT MARKET FOR DOMESTIC COMMERCIAL AIRCRAFT**
26 **INFLIGHT INTERNET CONNECTIVITY**

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

1 13. Many passengers on commercial aircraft within the United States demand or
2 desire access to the internet while in flight. The demand from these passengers has created and
3 supports a market for on-plane internet access connectivity. For these passengers, there are no
4 readily available substitutes to which they can turn. Traditional internet service providers cannot
5 provide internet service to plane passengers, both because traditional cellphone towers or
6 underground wires relied upon by such providers are not capable of transmitting a signal to
7 commercial aircraft in flight, and also because current federal legislation or regulations prohibit
8 the transmission of cellphone communication signals in flight.

9 14. The regulations, licenses, requirements, and technology necessary and available to
10 offer this inflight internet service in the continental United States is different than the technology
11 and/or licenses or regulations required to offer this service internationally and overwater. In
12 addition, while domestic passengers for whom having inflight internet access is important may
13 agree to take connecting flights, if necessary, to get from their domestic origin to their domestic
14 destination while maintaining inflight internet service if such service were unavailable on a
15 nonstop domestic flight between those origin and destination cities, it would be unlikely that any
16 significant number of such domestic passengers would agree to travel on flights connecting
17 abroad or through Hawaii solely to be able to attain inflight internet service during their trip,
18 even if such inflight internet service were unavailable on their domestic nonstop route. Thus, a
19 discrete market exists for antitrust purposes for inflight internet service on domestic commercial
20 flights within the continental United States.

21 15. Defendant is a provider of inflight internet access. It does so, and has done so
22 during the Class Period, by employing its Air-to-Ground (“ATG”) network, which is comprised
23 of nationwide cellular towers. Instead of being designed to transmit signals from land-based
24 tower to land-based tower or to land-based cellular telephones or computers, however, the ATG
25 towers are designed to beam their transmissions in a general vertical direction so that they can
26 communicate with a commercial aircraft in the sky that is equipped with a corresponding ATG
27 antenna and communications unit within the plane.
28

1 16. While Gogo is a provider, indeed the leading provider with approximately 85%
2 market share, of on-plane internet access connectivity within the continental United States, it is
3 not the only such provider. For example, a rival company, known as Row 44, also provides on-
4 plane internet connectivity to commercial passengers within the continental United States.
5 Unlike Gogo, which relies on its ATG network of land-based cellular towers to provide its
6 service, Row 44 relies on a satellite-based in-flight broadband platform to provide commercial
7 airline passengers with in-flight internet connectivity at broadband speeds.

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

16 18. Row 44's competing offering also has a significant price advantage over Gogo's
17 current service. During the Class Period, Gogo charged on average approximately \$15.00 for
18 passengers wishing to obtain internet access on domestic flights of at least three hours' duration.
19 On some domestic airline carriers, Gogo recently increased this price to \$17.95 for flights of
20 three hours' duration or more in which passengers purchase inflight internet access through their
21 laptops, while charging \$9.95 for this same flight duration on domestic airline carriers when the
22 inflight internet access is purchase for use on the passenger's mobile device. More recently,
23 Gogo raised its prices yet again to as high as \$21.95 per flight segment, depending on the flight's
24 duration. By contrast, until recently, Row 44, which is offered on domestic flights operated by
25 Southwest Airlines, offered its service for a price of merely \$5.00, regardless of the flight's
26 duration. Recently, Row 44 raised its price for inflight internet access on Southwest Airlines'
27 flights to \$ 8.00, still well below the current price charged by Gogo for its inferior service.
28

1 19. Besides Row 44, other providers exist that, but for Gogo's actions more fully
2 described below, would offer competing service that would pose price-constraining competition
3 to Gogo's offering. For example, ViaSat is yet another provider offering a satellite-based system
4 capable of providing inflight broadband internet access to commercial airline passengers.
5 Recently, JetBlue, a U.S. low-cost domestic airline carrier announced that it will be offering
6 inflight internet broadband access to its passengers through its partnership with ViaSat. JetBlue
7 expected to launch the system in its aircraft in 2012, pending Federal Aviation Administration
8 certification, but that launch date has been repeatedly delayed and no inflight internet service is
9 currently offered on JetBlue flights.

10 20. Despite the existence of competing offerings and the potential for competing
11 offerings from other providers, Gogo has managed to deny consumers the benefits of this actual
12 and potential competition that would exist but for the actions that Gogo has taken and that are
13 detailed below.

14
15 **GOGO'S MONOPOLY MARKET POWER AND ANTI-COMPETITIVE ACTIONS TO**
16 **OBTAIN OR MAINTAIN IT**

17 21. In late 2011, Gogo filed registration papers required by the Securities and
18 Exchange Commission in connection with its planned Initial Public Offering ("IPO"). Those
19 publicly filed papers document that Gogo claimed that of all commercial domestic aircraft
20 equipped with inflight internet service access, Gogo serviced 85% of these aircraft. In fact, by
21 now, and since the time that those papers were filed, it is likely that Gogo's market share has
22 risen to approximately 90% because, upon information and belief, additional airplanes that were
23 contracted to be outfitted with Gogo's equipment have been so equipped.

24 22. But Gogo's market share goes beyond the 85% of domestic aircraft that are
25 actually equipped to provide inflight internet service that is referenced in Gogo's initial IPO
26 papers. In fact, Gogo possesses at least an 85% market share of *all* commercial aircraft
27 servicing flights within the continental United States because Gogo has entered into long-term
28 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,

1 even though some of these carriers' whole fleets have yet to be provisioned with inflight internet
2 access service because the installation work has yet to take place or for other reasons, Gogo's
3 contracts still lock up these planes for Gogo exclusively. The particulars of these Gogo
4 exclusive contracts are detailed at paragraphs 24-51 below, and are attached as Exhibits 1-8
5 hereto.

6 23. Thus, given Gogo's exclusive contracts with the overwhelming majority of
7 domestic airline carriers, and given that these exclusive contracts do not apply on an airplane-by-
8 airplane basis but rather apply across a carrier's entire or near entire domestic fleet, the Gogo
9 exclusive contracts have permitted Gogo to foreclose competition and obtain and/or maintain
10 monopoly market power in the relevant market for inflight internet access service on commercial
11 airline flights within the continental United States.

12 **GOGO'S CONTRACTS WITH DOMESTIC CARRIERS**

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1 http://en.wikipedia.org/wiki/Delta_Air_Lines_fleet

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THE HIGH BARRIERS TO ENTRY

52. Gogo's fleetwide or near fleetwide exclusive contract with the foregoing domestic

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28 6 [REDACTED]

1 carriers means that it possesses and, during the Class Period, has possessed a market share of
2 85 % or higher of the relevant market for inflight internet access services on domestic airline
3 flights within the continental United States.

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

24 54. With the exception of Southwest Airlines, Gogo has managed to secure contracts
25 to provide internet access to all other major U.S. airlines that currently offer in-plane internet
26 access, including: AirTran, Alaska Airlines, American Airlines, Delta, Frontier Airlines, United
27 Airlines, US Airways, and Virgin America.

28 55. The high barriers to entry into this relevant market is also evidenced by the fact

1 that ViaSat, who was initially touted to provide inflight internet service to JetBlue flights as early
2 as 2011, has seen its planned entry repeatedly and significantly delayed, so much so, that despite
3 the foregoing announcement, ViaSat has yet to successfully enter the market or provide any
4 inflight internet service on any domestic JetBlue flights.

5 **GOGO'S MONOPOLY MARKET POWER**

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

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

19 58. Gogo has, in fact, exercised this monopoly market power, as is evidenced, for
20 example, by its continuous and repeated raising of prices of its own internet inflight internet
21 access service, which now are priced at as high as \$21.95 plus taxes and fees (for a service that
22 was initially priced at as low as \$7.95 or \$9.95 when it launched just a few years ago), even at a
23 time when competing services with little market share were offered for as low as \$5.00 or \$8.00
24 per flight on, for example, Southwest Airlines. Gogo's ability to and actual increase in prices at
25 a time when competing offerings were available on other planes at significant lower prices
26 indicates that, due to these competing offerings' low market share, they did not pose any
27 meaningful price-constraining competition to Gogo's offerings.
28

1 59. Gogo's exclusive contracts that apply on a fleetwide or near fleetwide basis also
2 serve to reduce output. In the absence of these fleetwide or near fleetwide exclusive agreements,
3 other rivals, like Row 44, could manufacture and attempt to sell competing products to some of
4 these carriers' domestic aircraft. But, given the existence and effect of Gogo's exclusive
5 contracts, rivals like Row 44 are unable to do so, and hence the exclusive contracts effectively
6 take these otherwise existing products off that portion of the market.

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

10 ***Strong Incumbent Position.*** We are the world's leading provider of in-
11 flight connectivity to the commercial aviation market and a leading provider of in-
12 flight internet connectivity and other voice and data communications equipment
13 and services to the business aviation market. In our CA [commercial aviation]
14 business, we currently provide Gogo Connectivity to passengers on nine of the ten
15 North American airlines that provide internet connectivity to their passengers. As
16 of September 30, 2011, Gogo-equipped planes represented approximately 85% of
17 North American aircraft that provide internet connectivity to their passengers.
18 ***Approximately 95% of Gogo-equipped planes, representing approximately 42%
19 of our consolidated revenue for the nine months ended September 30, 2011, are
20 contracted under ten-year agreements. Our market leading position also
21 benefits from the exclusive nature of a number of our contracts*** and the
22 significant expense and inefficiencies that an airline would incur by switching to
23 another provider.

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

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

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

7 63. The real nature of that prospect of Gogo, in the absence of its long-term exclusive
8 contracts, losing business to a competing, lower-priced inflight internet connectivity provider, is
9 borne out by the fact Gogo, itself, underscores that, “[o]ur in-flight connectivity and
10 entertainment systems can generally be installed overnight.” Thus, an airline that was presented
11 with a more competitive offering for internet service connectivity aboard its aircraft could
12 readily switch to such a provider without incurring inordinate aircraft downtime or switching
13 costs. Gogo’s long-term and exclusive contracts, however, prevent any of that from happening
14 because, as Gogo boasts in its IPO papers, “[w]e generally have the exclusive right to provide
15 passenger internet connectivity services on Gogo installed aircraft throughout the term of the
16 agreement.”

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

28 65. Gogo’s use of long-term, exclusive contracts serves to insulate it from

1 competition, and to cement and protect its monopoly market power. The net result of Gogo's
2 resort to long-term exclusive contracts is that consumers like Plaintiffs and the members of the
3 class they seek to represent have been denied the benefits of competition, have been left with an
4 inferior product offering, and been subject to a supra-competitive overcharge on their purchases
5 of inflight internet connectivity services.

6 **CLASS ACTION ALLEGATIONS**

7 66. Pursuant to Federal Rule of Civil Procedure 23(b)(2)-(3), Plaintiffs bring Counts
8 I-III of this action as a class action on behalf of themselves and all similarly situated consumers
9 who, during the Class Period, purchased inflight internet access connectivity services from
10 defendant Gogo on domestic flights within the continental United States. In addition, Plaintiffs
11 bring Counts V and VI of this Class Action Complaint on behalf of a subclass of California
12 consumers of Gogo inflight internet services during the Class Period. Specifically and explicitly
13 excluded from the class and subclass definitions are defendant Gogo, as well as any of its
14 employees and relatives, affiliates and agents, as well as all federal, state, and local governmental
15 entities, and the judicial officers assigned to this case. The Class Period for purposes of this
16 Class Action Complaint spans from September 30, 2008 until such date as the Court enters a
17 ruling on whether to certify this action as a class action. Plaintiffs reserve the right to amend this
18 class and subclass definition as case circumstances warrant.

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

28 68. The claims of the named Plaintiffs are typical of the claims of the absent class

1 members. Specifically, during the Class Period, Plaintiffs purchased inflight internet
2 connectivity services from Gogo on domestic airline flights within the continental United States.
3 Plaintiffs all allege, as is alleged on behalf of the absent class members, that due to Gogo's
4 unlawful and anti-competitive conduct described herein, they were subject to and paid a supra-
5 competitive price for their purchases from Gogo. Plaintiffs, therefore, raise the same claims for
6 redress under the Sherman Act and state law, as is typical of the claims of the absent class
7 members.

8 69. There are common questions of law and fact that predominate over individual
9 issues applicable to the individual plaintiffs and class members. Among these common
10 questions of fact and law are the following:

- 11 ♦ the definition of the relevant market(s);
- 12 ♦ defendant's market power within these relevant market(s);
- 13 ♦ whether defendant resorted to unlawful, anti-competitive exclusive contracts
14 to either achieve and/or maintain its monopoly market power in the alleged
15 relevant antitrust market;
- 16 ♦ whether defendant's practices amounted to an unlawful restraint of trade in
17 violation of Section 1 of the Sherman Act;
- 18 ♦ whether defendant's practices amounted to unlawful monopolization in
19 violation of Section 2 of the Sherman Act;
- 20 ♦ whether Plaintiffs and the class members sustained injury to their business
21 and/or property caused by reason of defendant's alleged violations; and
- 22 ♦ the proper measure of damages and any other remedy.

23 70. Plaintiffs are adequate representatives of the interests of the class. Plaintiffs are
24 member of the proposed class and subclass and have agreed to bring this action on behalf of the
25 interests of the class. Plaintiffs also have retained competent counsel, experienced in antitrust
26 and class action litigation to zealously and diligently protect the interests of the class members.

27 71. A class action is a superior and manageable means of adjudicating this action over
28 individual litigation by each class member, given that the amount at issue for each individual

1 class member is low relative to the cost of bringing suit, such that classwide litigation provides
2 the only realistic alternative for class members to seek judicial redress. The class action is also
3 manageable in that, by definition, the identity of each Gogo purchaser is known to Gogo, as each
4 such user would be required to complete a registration form online as part of that user's
5 purchase.

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

11
12
13 **COUNT I**

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

16 73. Plaintiffs hereby incorporate by reference paragraphs 1-72 of this Class Action
17 Complaint with the same force and effect as if these paragraphs had been restated here.

18 74. At various times during the Class Period, while passengers on commercial
19 domestic flights within the continental United States, Plaintiffs purchased inflight internet
20 connectivity services from Gogo.

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

25 76. Gogo's market share in the relevant market defined herein is at least, and has at
26 all relevant times, been at least 85%. Gogo's resort to long-term, exclusive agreements, pursuant
27 to which participating airlines cannot offer inflight internet connectivity services from a provider
28 other than Gogo in their entire or near entire domestic fleets during the life of the exclusive
agreements, therefore, foreclose competition in a substantial portion of the relevant market for a

1 significant period of time.

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

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

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

18 80. Under Section 4 of the Clayton Act, 15 U.S.C. §15, Plaintiffs and the members of
19 the class they seek to represent, as direct purchasers from Gogo, have standing to and do hereby
20 seek monetary (including treble damages), injunctive and declaratory relief, as well as attorneys'
21 fees and costs, as redress for Gogo's violations of Section 1 of the Sherman Act.

22 **COUNT II**

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

25 81. Plaintiffs hereby incorporate by reference paragraphs 1-80 of this Class Action
26 Complaint with the same force and effect as if these paragraphs had been restated here.

27 82. At various times during the Class Period, while passengers on commercial
28 domestic flights within the continental United States, Plaintiffs purchased inflight internet
connectivity services from Gogo.

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

5 84. Gogo's market share in the relevant market defined herein is at least, and has at
6 all relevant times, been at least 85%. Gogo, however, acquired that market share and
7 concomitant market power, not through superior business acumen or industry, but rather by
8 resort to long-term, exclusive agreements, pursuant to which participating airlines cannot offer
9 inflight internet connectivity services on their entire or near entire domestic fleets from a
10 provider other than Gogo during the life of the exclusive agreements.

11 85. Because Gogo was the first inflight internet connectivity provider to launch such
12 service in the United States in August 2008, Gogo was then able to insist upon and employ long-
13 term, exclusive contracts to shield itself from competition from later entrants that came along
14 after Gogo's initial launch, even when these subsequent entrants provided superior service and
15 more attractive pricing to the consumer. The exclusive contracts that Gogo put in place with the
16 majority of the airlines and aircraft it serviced has prevented and continues to prevent these
17 actual and potential competitors from being able to participate in a significant segment of the
18 market for a period of several years, and thereby insulated Gogo from price-constraining
19 competition that would exist but for Gogo's adoption of long-term exclusive contracts in a
20 market in which it has at least an 85% share of the market.

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

27 87. Because Gogo's monopoly market power was acquired not by resort to superior
28 industry or business acumen, but rather by resort to these anti-competitive agreements, Gogo has

1 engaged in unlawful acquisition of monopoly market power in violation of Section 2 of the
2 Sherman Act.

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

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

12
13 **COUNT III**

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

16 90. Plaintiffs hereby incorporate by reference paragraphs 1-88 of this Class Action
17 Complaint with the same force and effect as if these paragraphs had been restated here.

18 91. At various times during the Class Period, while passengers on commercial
19 domestic flights within the United States, Plaintiffs purchased inflight internet connectivity
20 services from Gogo.

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

25 93. Gogo's market share in the relevant market defined herein is at least, and has at
26 all relevant times, been at least 85% – a market share that, along with the structure of the market,
27 the barriers to entry, and actions taken by Gogo – has granted Gogo monopoly market power.
28 As already detailed herein, Gogo is alleged to have acquired this monopoly market power not
through superior business acumen or industry, but rather by resort to resort to long-term,

1 exclusive agreements, pursuant to which participating airlines cannot offer inflight internet
2 connectivity services from a provider other than Gogo on their entire or near entire domestic
3 fleets during the life of the exclusive agreements. Regardless of whether Gogo actually acquired
4 its monopoly market power lawfully or unlawfully, Gogo has continued to maintain its
5 monopoly market power by resort to these long-term exclusive contracts that are still in place,
6 and the earliest of which is not set to expire at least until the year 2018.

7 94. Because Gogo was the first inflight internet connectivity provider to launch such
8 service in the United States in August 2008, Gogo was then able to insist upon and employ long-
9 term, exclusive contracts of ten years' duration to shield itself from competition from later
10 entrants that came along after Gogo's initial launch, even when these subsequent entrants
11 provided superior service and more attractive pricing to the consumer. The exclusive contracts
12 that Gogo put in place with the majority of the airlines and aircraft it serviced has prevented and
13 continues to prevent these actual and potential competitors from being able to participate in a
14 significant segment of the market for a period of several years, and thereby insulated Gogo from
15 price-constraining competition that would exist but for Gogo's adoption of long-term exclusive
16 contracts in a market in which it has at least an 85% share of the market. Now that Gogo has
17 monopoly market power in the relevant market alleged herein, these long-term, exclusive
18 contracts that are still in place now serve to allow Gogo to maintain its monopoly market power,
19 even at a time when rival providers are offering superior products at more attractive pricing to
20 the consumer.

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

27 96. Because Gogo's monopoly market power, however, acquired, has been
28 maintained not by resort to superior industry or business acumen, but rather by resort to these

1 anti-competitive agreements, Gogo has engaged in unlawful maintenance of monopoly market
2 power in violation of Section 2 of the Sherman Act.

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

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

12
13 **COUNT IV**

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

16 99. Plaintiffs hereby incorporate by reference paragraphs 1-98 of this Class Action
17 Complaint with the same force and effect as if these paragraphs had been restated here.

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

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

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

1 Period.

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

6 **COUNT V**

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

9 104. Plaintiffs hereby incorporate by reference paragraphs 1-103 of this Class Action
10 Complaint with the same force and effect as if these paragraphs had been restated here.

11 105. The conduct engaged in by Gogo, as alleged herein, constitutes "unfair
12 competition" within the meaning of Business & Professions Code Section 17200. Specifically,
13 "unfair competition" is defined to include any "unlawful, unfair or fraudulent business act or
14 practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [Bus.
15 & Prof. Code §17500, *et seq.*]."

16 106. Defendant committed "unlawful" business acts or practices for, among other
17 reasons, violating California's Cartwright Act, Cal. Bus. & Prof. Code Section 16720, *et seq.*, as
18 well as Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

19 107. Defendant committed "unfair" business acts or practices, by among other things:

- 20 (a) engaging in conduct as part of a business practice that is still ongoing;
- 21 (b) engaging in conduct where the utility of such conduct, if any, is
22 outweighed by the gravity of the consequences to Plaintiffs and class Members;
- 23 (c) engaging in conduct that is immoral, unethical, oppressive, unscrupulous,
24 or substantially injurious to Plaintiffs and class Members; and
- 25 (d) engaging in conduct that undermines or violates the spirit or intent of the
26 antitrust consumer protection laws alleged in this Complaint; and
- 27 (e) engaging in conduct that threatens competition at its incipiency by
28 thwarting competition among rival and/or would-be competing inflight internet access service

1 providers within the United States because it forbids airlines subject to Gogo's long-term
2 exclusive contracts from contracting with these actual or would-be competitors of Gogo during
3 the effective term of these long-term exclusive contracts.

4 108. Gogo's conduct described herein was undertaken as part of a business practice,
5 and is still ongoing.

6 109. Plaintiffs and members of the Class, as direct purchasers of Gogo's inflight
7 internet access services, conveyed money to Gogo in the form of the purchase prices paid to
8 Gogo for the inflight internet services they purchased from Gogo.

9 110. Plaintiffs and the class members have standing to and do seek equitable relief
10 against Gogo, including an order of equitable restitution that would restore to Plaintiffs and the
11 class members the interest or moneys conveyed to Gogo during Gogo's unlawful and/or unfair
12 business practices within the Class Period.

13
14 **PRAYER FOR RELIEF**

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

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

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

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

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

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

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

3
4 **DEMAND FOR JURY TRIAL**

5 Plaintiffs demand a trial by jury on all counts.

6 DATED: August 29, 2013

THE KATRIEL LAW FIRM

7
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