

1 AZRA Z. MEHDI (220406)
2 THE MEHDI FIRM
3 One Market
4 Spear Tower, Suite 3600
5 San Francisco, CA 94105
6 Telephone: (415) 293-8039
7 Facsimile: (415) 293-8001
8 Email: azram@themehdifirm.com

9 Attorney for Plaintiff

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 JAMES STEWART, On Behalf of Himself
13 and All Others Similarly Situated,

14 Plaintiff

15 vs.

16 GOGO INC.,

17 Defendant.

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL

Case No.:

CLASS ACTION

COMPLAINT FOR:

KAW

- 18 (1) Violations of Section 1 of the
19 Sherman Antitrust Act, 15 U.S.C.
20 Section 1;
21
22 (2) Violations of Section 2 of the
23 Sherman Antitrust Act, 15 U.S.C.
24 Section 2;
25
26 (3) Violations of the California
27 Cartwright Act, California Bus. &
28 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

NATURE OF THE ACTION

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

JURISDICTION AND VENUE

15
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. Section 1367
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 is a resident within this judicial
17 district. Venue, therefore, is proper in this judicial district pursuant to 28 U.S.C. Section 1391.

18 PARTIES

19 8. Plaintiff James Stewart is a resident of San Francisco County in the State of
20 California. During the Class Period, Stewart flew on commercial flights within the United States
21 on Virgin America, US Airways and Frontier Airlines, and purchased Gogo inflight internet
22 access services for those flights. Due to Gogo's unlawful actions in violation of the federal
23 antitrust and California statutes, Stewart was subject to a supra-competitive overcharge for his
24 inflight internet access purchases from Gogo.

25 9. Defendant Gogo is a corporation organized under the laws of the State of
26 Delaware, and having its principal place of business at 1250 North Arlington Heights Road,
27 Suite 500, Itasca, Illinois 60143. Gogo, formerly known as Aircell, touts itself on its website as
28 "the world's leading provider of inflight connectivity." Since August 2008, Gogo has been

1 providing broadband internet access to passengers on commercial aircraft. Currently, Gogo
2 internet is the exclusive internet access connectivity provider along domestic commercial airlines
3 routes flown by AirTran, Alaska Airlines, American Airlines, Delta, Frontier Airlines, United
4 Airlines, US Airways, and Virgin America. Gogo currently provides internet access connectivity
5 to nine out of the ten domestic U.S. airlines. Gogo-equipped planes represent approximately
6 85% of the North American aircraft that provide internet connectivity to its passengers.
7 Approximately 95% of Gogo-equipped planes, moreover, are contracted under ten-year
8 exclusive agreements.

9 **THE RELEVANT MARKET FOR DOMESTIC COMMERCIAL AIRCRAFT**
10 **INFLIGHT INTERNET CONNECTIVITY**

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

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

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

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

8 14. Row 44's competing offering has several key technological advantages over the
9 service offered by rival Gogo. Row 44's service is faster, offering broadband speeds of 11 Mbps
10 TCP/IP, and 28 Mbps UDP to the plane. In addition, Row 44's satellite-based system allows
11 airlines to offer uninterrupted broadband service across national boundaries, over oceans, and
12 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 15. 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 \$12.95 for passengers
18 wishing to obtain internet access on domestic flights of at least three hours' duration. On some
19 domestic airline carriers, it has recently increased this price to \$17.95 for flights of three hours'
20 duration or more in which passengers purchase inflight internet access through their laptops,
21 while charging \$9.95 for this same flight duration on domestic airline carriers when the inflight
22 internet access is purchase for use on the passenger's mobile device. By contrast, Row 44,
23 which is offered on domestic flights operated by Southwest Airlines, offers its service for a price
24 of merely \$5.00, regardless of the flight's duration.

25 16. Besides Row 44, other providers exist that, but for Gogo's actions more fully
26 described below, would offer competing service that would pose price-constraining competition
27 to Gogo's offering. For example, ViaSat is yet another provider offering a satellite-based system
28 capable of providing inflight broadband internet access to commercial airline passengers.

1 Recently, JetBlue, a U.S. low-cost domestic airline carrier announced that it will be offering
2 inflight internet broadband access to its passengers through its partnership with ViaSat, and
3 expects to launch the system in its aircraft in late 2012, pending Federal Aviation Administration
4 certification.

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

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

11 18. Late last year, Gogo filed registration papers required by the Securities and
12 Exchange Commission in connection with its planned Initial Public Offering ("IPO"). Those
13 publicly filed papers document that Gogo claimed to possess an 85% share of the market for on-
14 plane internet connectivity within the United States. In fact, by now, and since the time that
15 those papers were filed, it is likely that Gogo's market share has risen to approximately 90%
16 because, upon information and belief, additional airplanes that were contracted to be outfitted
17 with Gogo's equipment have been so equipped. Further, given the disparity in pricing charged
18 by Gogo for an internet session (i.e., \$17.95 per session on flights of at least a three-hour
19 duration) as compared to the lower price charged by Row 44 on Southwest Airlines-equipped
20 flights (i.e., \$5.00 per session regardless of flight duration), it is likely that if market share were
21 measured in terms of revenues, as opposed to units of sessions sold, Gogo's market share would
22 significantly exceed 90%.

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

26 20. The United States market for inflight internet connectivity on domestic
27 commercial flights is characterized by high barriers to entry. Among these high entry barriers
28 are the high cost of infrastructure required to build a network capable of offering inflight internet
connectivity. Further, the market is characterized by restrictive legal and regulatory hurdles that

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

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

21 22. Rather than achieving or maintaining its monopoly market power through
22 innovation or competition on the merits, however, Gogo has achieved or maintained its dominant
23 market power by resorting to anti-competitive agreements with the airlines on whose planes
24 Gogo's equipment is placed. These agreements take the form of long-term exclusive agreements
25 of ten years' duration during which the contracting airline agrees to contract only with Gogo for
26 inflight internet connectivity services, to the exclusion of any and all competitors that currently
27 exist or that may exist during the duration of these exclusive ten-year contracts.
28

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

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

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

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

25. As a provider with 85%-90% market share, Gogo's resort to long-term (ten-year) exclusive contracts forecloses a significant portion of the market for a significant period of time, thereby thwarting competition. The net result is that Gogo's knowledge that it is 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.

26. If Gogo was not insulated from competition by the terms of the long-term exclusive contracts that it has put in place with many of its airlines, it would face the real prospect that if it attempted to raise or maintain prices for its inflight internet connectivity

1 services above a competitive level, it would lose business to competing inflight internet
2 connectivity providers that the airlines would be free to turn to but presently cannot as a result of
3 the Gogo exclusive contracts that are in effect.

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

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

25 29. Gogo’s use of long-term, exclusive contracts serves to insulate it from
26 competition, and to cement and protect its monopoly market power. The net result of Gogo’s
27 resort to long-term exclusive contracts is that consumers like plaintiff and the members of the
28 class they seek to represent have been denied the benefits of competition, have been left with an

1 inferior product offering, and been subject to a supra-competitive overcharge on their purchases
2 of inflight internet connectivity services.

3 CLASS ACTION ALLEGATIONS

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

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

25 33. The claims of the named plaintiff are typical of the claims of the absent class
26 members. Specifically, during the Class Period, plaintiff purchased inflight internet connectivity
27 services from Gogo on domestic airline flights within the United States. Plaintiff alleges, as is
28 alleged on behalf of the absent class members, that due to Gogo’s unlawful and anti-competitive

1 conduct described herein, he was subject to and paid a supra-competitive price for his purchases
 2 from Gogo. Plaintiff, therefore, raises the same claims for redress under the Sherman Act and
 3 state law, as is typical of the claims of the absent class members.

4 33. There are common questions of law and fact that predominate over individual
 5 issues applicable to the individual plaintiff and class members. Among these common questions
 6 of fact and law are the following:

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

19 34. Plaintiff is an adequate representative of the interests of the class. Plaintiff is a
 20 member of the proposed class and subclass and has agreed to bring this action on behalf of the
 21 interests of the class. Plaintiff also has retained competent counsel, experienced in antitrust and
 22 class action litigation to zealously and diligently protect the interests of the class members.

23 36. A class action is a superior and manageable means of adjudicating this action over
 24 individual litigation by each class member, given that the amount at issue for each individual
 25 class member is low relative to the cost of bringing suit, such that classwide litigation provides
 26 the only realistic alternative for class members to seek judicial redress. The class action is also
 27 manageable in that, by definition, the identity of each Gogo purchaser is known to Gogo, as each
 28 such user would be required to complete a registration form online as part of that user's

1 purchase.

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

7 8 9 COUNT I

10 **Violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1** 11 **(on Behalf of a Nationwide Class)**

12 38. Plaintiff hereby incorporates by reference paragraphs 1-37 of this Class Action
13 Complaint with the same force and effect as if these paragraphs had been restated here.

14 39. At various times during the Class Period, while passengers on commercial
15 domestic flights within the United States, plaintiff purchased inflight internet connectivity
16 services from Gogo.

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

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

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

1 done.

2 43. Because Gogo's long-term, exclusive agreements unreasonably restrain trade by
3 thwarting competition in a significant share of the market for a significant period of time, they
4 are unlawful agreements in restraint of trade within the meaning of Section 1 of the Sherman
5 Act.

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

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

14 **COUNT II**

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

16 46. Plaintiff hereby incorporates by reference paragraphs 1-45 of this Class Action
17 Complaint with the same force and effect as if these paragraphs had been restated here.

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

21 48. 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 49. 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, however, acquired that market share and
27 concomitant market power, not through superior business acumen or industry, but rather by
28 resort to long-term, exclusive agreements of ten years' duration, pursuant to which participating

1 airlines cannot offer inflight internet connectivity services from a provider other than Gogo
2 during the life of the ten-year exclusive agreement.

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

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

20 52. Because Gogo's monopoly market power was acquired not by resort to superior
21 industry or business acumen, but rather by resort to these anti-competitive agreements, Gogo has
22 engaged in unlawful acquisition of monopoly market power in violation of Section 2 of the
23 Sherman Act.

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

28 54. Under Section 4 of the Clayton Act, 15 U.S.C. § 15, plaintiff and the members of

the class they seek to represent, as direct 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 unlawful acquisition of monopoly power and corresponding supra-competitive pricing in violation of Section 2 of the Sherman Act.

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)

55. Plaintiff hereby incorporates by reference paragraphs 1-54 of this Class Action Complaint with the same force and effect as if these paragraphs had been restated here.

56. At various times during the Class Period, while passengers on commercial domestic flights within the United States, plaintiff purchased inflight internet connectivity services from Gogo.

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

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

59. Because Gogo was the first inflight internet connectivity provider to launch such service in the United States in August 2008, Gogo was then able to insist upon and employ long-

1 term, exclusive contracts of ten years' duration to shield itself from competition from later
2 entrants that came along after Gogo's initial launch, even when these subsequent entrants
3 provided superior service and more attractive pricing to the consumer. The exclusive contracts
4 of ten-years' duration that Gogo put in place with the majority of the airlines and aircraft it
5 serviced has prevented and continues to prevent these actual and potential competitors from
6 being able to participate in a significant segment of the market for a period of several years, and
7 thereby insulated Gogo from price-constraining competition that would exist but for Gogo's
8 adoption of ten year exclusive contracts in a market in which it has at least an 85% share of the
9 market. Now that Gogo has monopoly market power in the relevant market alleged herein, these
10 long-term, exclusive contracts that are still in place now serve to allow Gogo to maintain its
11 monopoly market power, even at a time when rival providers are offering superior products at
12 more attractive pricing to the consumer.

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

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

23 62. As direct purchasers from Gogo, plaintiff and the members of the class they seek
24 to represent have been injured in their business or property by Gogo's anti-competitive conduct
25 by, *inter alia*, being subjected to and paying supra-competitive pricing for their inflight internet
26 connectivity purchases from Gogo during the Class Period.

27 63. Under Section 4 of the federal Clayton Act, plaintiff and the members of the class
28 they seek to represent, as direct 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 unlawful maintenance of monopoly power and corresponding supra-competitive pricing in violation of Section 2 of the Sherman Act.

COUNT IV

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

64. Plaintiff hereby incorporates by reference paragraphs 1-63 of this Class Action Complaint with the same force and effect as if these paragraphs had been restated here.

65. 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.

67. 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.

68. As direct purchasers from Gogo, plaintiff 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.

69. Under California Business and Professions Code Section 16750, plaintiff 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)

70. Plaintiff hereby incorporates by reference paragraphs 1-69 of this Class Action Complaint with the same force and effect as if these paragraphs had been restated here.

1 71. The conduct engaged in by Gogo, as alleged herein, constitutes “unfair
2 competition” within the meaning of Business & Professions Code Section 17200. Specifically,
3 “unfair competition” is defined to include any “unlawful, unfair or fraudulent business act or
4 practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [Bus.
5 & Prof. Code §17500, *et seq.*].”

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

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

- 10 (a) engaging in conduct as part of a business practice that is still ongoing;
- 11 (b) engaging in conduct where the utility of such conduct, if any, is
12 outweighed by the gravity of the consequences to plaintiff and class Members;
- 13 (c) engaging in conduct that is immoral, unethical, oppressive, unscrupulous,
14 or substantially injurious to plaintiff and class Members; and
- 15 (d) engaging in conduct that undermines or violates the spirit or intent of the
16 antitrust consumer protection laws alleged in this Complaint; and
- 17 (e) engaging in conduct that threatens competition at its incipiency by
18 thwarting competition among rival and/or would-be competing inflight internet access service
19 providers within the United States because it forbids airlines subject to Gogo’s long-term
20 exclusive contracts from contracting with these actual or would-be competitors of Gogo during
21 the effective term of these long-term exclusive contracts.

22 74. Gogo’s conduct described herein was undertaken as part of a business practice,
23 and is still ongoing.

24 75. Plaintiff and members of the Class, as direct purchasers of Gogo’s inflight
25 internet access services, conveyed money to Gogo in the form of the purchase prices paid to
26 Gogo for the inflight internet services they purchased from Gogo.

27 76. Plaintiff and the class members have standing to and do seek equitable relief
28 against Gogo, including an order of equitable restitution that would restore to plaintiff and the

1 class members the interest or moneys conveyed to Gogo during Gogo's unlawful and/or unfair
2 business practices within the Class Period.

3
4 **PRAYER FOR RELIEF**

5 WHEREFORE, plaintiff and the class and subclass pray for judgment from this Court
6 against defendant, as follows that:

7 A. The Court determine that: this action may be maintained as a class action;
8 plaintiff and his counsel be designated as class representatives and class counsel, respectively;
9 and reasonable notice of this action be given to the members of the class;

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

12 C. Damages be awarded according to proof, that plaintiff and the class and subclass
13 be awarded compensatory and treble damages as well as their reasonable attorneys' fees, costs of
14 suit, and disbursements;

15 D. Plaintiff and the class and subclass be awarded pre- and post-judgment interest;

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

19 F. Plaintiff and the class and subclass obtain such other and further relief as the
20 Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all counts.

DATED: October 4, 2012

THE MEHDI FIRM


AZRA Z. MEHDI

Spear Tower
One Market, Suite 3600
San Francisco, CA 94105
Telephone: (415) 289-8093
Facsimile: (310) 289-8001
E-mail: azram@themehdifirm.com

Attorney for Plaintiff