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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.
21

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

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

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

Judge: Hon. Edward M. Chen
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Courtroom: 5

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1 **INTRODUCTION AND SUMMARY OF ARGUMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

24 **Gogo Shows No Contrition For Its Prior Misrepresentation And Continues To Distort The**
 25 **Allegations Expressly Made In The Second Amended Complaint**

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

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

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

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

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

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

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

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

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

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

15 So, for example, when Gogo’s contract with Alaska Airlines provides that [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] See

25 SAC, at ¶¶ 24-51.

26 Ignoring these new allegations, Gogo instead is relegated to raising extraneous matters,
27 suggesting that other providers like Thales, OnAir, Panasonic, or ViaSat are new “competitors” in
28

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

15 These entities, which either have never provided any internet service on U.S. domestic
 16 flights or have not done so during the period of interest (i.e., from the time of the launch of
 17 inflight internet service until the time Plaintiffs filed their antitrust complaint four years later), are
 18 of no competitive significance here because Plaintiffs have alleged that the relevant market is the
 19 market for inflight internet service on domestic commercial flights within the United States—a
 20 geographic market definition that Gogo’s motion does not challenge. *See* SAC, at ¶ 12.

21 Plaintiffs supported that allegation with factual assertions that substantiate why a passenger flying
 22 on a domestic route would not view an inflight internet service offering provided onboard a flight

23
 24 ¹ Some of these providers, though separately listed by Gogo are, in fact, corporate affiliates and/or subject
 25 to common ownership. For example, LiveTV is an affiliate of ViaSat, and is partly owned by Thales. *See*
 26 <http://en.wikipedia.org/wiki/LiveTV> (last visited Dec. 11, 2013).

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

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

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

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

25
 26
 27 ³ The Court previously rejected Gogo's attempt to challenge Plaintiffs' same geographic market when it
 28 was pled as part of the FAC, reasoning that Gogo had improperly raised this challenge only in its reply
 brief. *See* Dkt. No. 37 at 6, n.2. Gogo's new motion to dismiss the SAC does not raise a market definition
 challenge either.

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

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

14
 15 **Gogo’s Reliance On The So-Called Early Termination Clause Fails Again.**

16 Equally unavailing is Gogo’s continued reference to the fact that its contracts [REDACTED]

17 [REDACTED]
 18 [REDACTED] *See* Gogo’s Br. at 11:15-12:11.

19 The Court already rejected this same argument before, reasoning correctly that this purported
 20 early termination provision was not as easy to invoke as Gogo had represented. *See* Dkt No. 37 at
 21 7:14-8:5 (noting that contrary to Gogo’s assertion, “an airline cannot terminate simply because a
 22 competitor of Gogo offers a superior service or business arrangement.”). The contracts produced
 23 since that ruling only confirm the Court’s initial reasoning, as they make expressly clear that there
 24 is no easy early termination for an airline merely because a competitor offers a technological
 25 superior product. Craftily, Gogo avoids quoting the actual contractual language, which would
 26 show that the clause does not provide airlines the “easy out” that Gogo claims, and instead
 27 selectively quotes only from Gogo’s own S-1 SEC registration statement—the very same self-
 28 serving description that the Court previously rejected. *See* Gogo’s Br. at 6:20-27 (quoting Gogo’s

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

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

4 **FACTUAL BACKGROUND**

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

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

1 respectively. *Id.* at ¶¶ 99-110.

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

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

23 Thus, the SAC documents, by quoting and attaching the actual Gogo contracts, that during
24 the Class Period, Gogo had [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 The only exception to this fleetwide or near fleetwide exclusivity among Gogo-contracting
8 carriers was United Airlines, which engaged Gogo’s service on a trial basis on only on its
9 domestic transcontinental fleet for a three-year trial period. See SAC, at ¶¶ 44-45. But even so,
10 Gogo’s agreement with United still provided that [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 [REDACTED] Only once United’s trial agreement with Gogo expired (which
16 notably was well after Plaintiffs filed their Class Action Complaint, was United free to and did
17 contract with a Gogo-rival for some of its previously unequipped aircraft.⁴

18 As the SAC now documents, during the Class Period, Gogo’s exclusive contracts locked
19 up the near entire domestic fleets of 9 out of 10 of the major domestic airlines. The one
20 exception was Southwest Airlines, which was the only domestic carrier that contracted with Row
21 44, the only competitor to Gogo that operated within the United States. See SAC, at ¶ 54.

22 Indeed, highlighting the significant entry barriers into this market, JetBlue announced in 2011 that
23 it expected to initiate inflight internet service domestically through another company, ViaSat but a
24 full three years later, that plan has still to come to fruition, as reports of the difficulties plaguing

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

1 ViaSat's entry into the domestic market detail. *See*

2 [http://travel.usatoday.com/alliance/flights/boardingarea/post/2011/08/The-Wandering-Aramean---](http://travel.usatoday.com/alliance/flights/boardingarea/post/2011/08/The-Wandering-Aramean---Another-potential-setback-for-LiveTV8217s-in-flight-internet-service/416333/1)
3 [Another-potential-setback-for-LiveTV8217s-in-flight-internet-service/416333/1](http://travel.usatoday.com/alliance/flights/boardingarea/post/2011/08/The-Wandering-Aramean---Another-potential-setback-for-LiveTV8217s-in-flight-internet-service/416333/1) (last visited Dec.
4 11, 2013) (reporting on ViaSat's failed satellite launch delaying launch of ViaSat on JetBlue).

5
6 **I. PLAINTIFFS PROPERLY PLEAD FACTS SHOWING MARKET FORECLOSURE.**

7
8 **A. Gogo's Fleetwide Exclusive Contracts With A Majority Of Domestic Carriers Means That Gogo Has Locked Out Most Domestic Planes From Being Available Selling Opportunities To Rivals.**

9
10 While exclusive agreements, unlike say price-fixing agreements, are not outlawed *per se*
11 under the federal antitrust laws, courts have not hesitated to uphold antitrust claims premised on
12 exclusive agreements when, as here, the plaintiff makes a proper showing of the defendant's
13 market power or anticompetitive conduct furthered by these agreements. *See, e.g., Twin City*
14 *Sportservice, Inc.*, 676 F.2d at 1301-02 (affirming judgment against antitrust defendant premised
15 on exclusive contracts that foreclosed 24 percent of the market); *Pecover v. Electronic Arts Inc.*,
16 633 F Supp.2d 976 (N.D. Cal. 2009) (upholding Sherman Act claim premised on exclusive
17 contract between NFL and Electronic Arts); *Tele Atlas N.V.*, 2008 WL 4809441, at *21
18 (upholding antitrust exclusive dealing case where exclusive contracts may have foreclosed 20-40
19 percent of the market).

20 Where, as here, the exclusive contracts are implemented by a party having sufficient
21 market power and/or in a manner that significantly forecloses competition, exclusive dealing
22 agreements run afoul of the antitrust laws. A high market share coupled with a showing of high
23 barriers to entry generally suffices to make a circumstantial showing of the defendant's market
24 power and ability to foreclose competition. *See Oahu Gas Service, Inc. v. Pacific Resources, Inc.*,
25 838 F.2d 360, 366 (9th Cir. 1988); *Dooley v. Crab Boat Owners Ass'n*, No. C-02-676-MHP, 2004
26 WL 902361, at *10 (N.D. Cal. Apr. 26, 2004) ("Based on the evidence of defendants' market
27 share and barriers to entry, a reasonable factfinder could determine that defendants have acquired
28

1 monopoly power within the relevant market.”).⁵ During the first round of pleading and briefing,
2 the Court explained the analysis governing the market foreclosure analysis:

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

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

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

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

24
25 ⁵ The FAC identified specific high barriers to entry into the market that are not disputed or
26 addressed in Gogo’s motion. These indisputable entry barriers include: need to obtain regulatory
27 approval to provide any inflight communication; the need to obtain FCC spectrum access if one
28 intends on providing inflight internet access through use of cellphone towers, as Gogo has done;
and, the significant expense of securing available satellites if one is to alternatively offer service
using satellite-based communications. *See* FAC, at ¶ 22; *see also* Ex. B. to Abye Decl. at p. 21
(Gogo’s s-1 filing identifying the high “cost and extended lead time” of deploying satellite based
technology).

1 carriers were no longer within the “range of selling opportunities reasonably open to
2 [competitors]” *Omega Environmental*, 127 F.3d at 1162 (quoted in Dkt. No. 37 at 6:17-24).

3 Under the scenario that we now know actually existed during the Class Period, as opposed to the
4 one that Gogo falsely portrayed, Plaintiffs do make a showing of market foreclosure.

5 The fact is that, during the pendency of Gogo’s exclusive contracts, and directly as a result
6 of Gogo’s exclusive contracts, [REDACTED]

7 [REDACTED]
8 [REDACTED] Indeed, Gogo’s own S-1 registration statement acknowledges
9 the reality that Gogo’s locking up of nearly the entire domestic fleet means that there is very little
10 available opportunity for sales inflight internet service left within the domestic fleet.

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

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

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

22 **B. Gogo’s Conclusory References To So-Called “Competitors” Does Nothing To**
23 **Defeat The Allegations Of Gogo’s Market Power.**

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

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

1 domestic carriers that were in place during the Class Period. Unable to continue to misstate that
2 reality now that the contracts have been produced, Gogo instead engages in misdirection by
3 suggesting that other “competitors” beyond Gogo and Row 44 existed (presumably to argue that
4 Gogo lacked a sufficiently high market share). But this conclusory sleight of hand does not work.
5 The so-called “competitors” that Gogo points to simply did not exist within the domestic market.
6 LiveTV, an affiliate of ViaSat in which Thales has a partnership interest, and which now offers
7 service on some United planes, only began that offering after Gogo’s trial agreement with United
8 expired, well after Plaintiffs made their purchases or filed their Class Action Complaint. Worse
9 yet for Gogo, the other players it has referenced, Panasonic and OnAir, have never offered service
10 on any domestic airplanes, and they still do not. ViaSat has been trying to enter the U.S. market
11 on a limited basis by planning to equip some domestic JetBlue planes with internet service, but
12 after three years since announcing those plans, it has still been unable to do so, highlighting the
13 significant barriers to entry in this market. *See*

14 [http://travel.usatoday.com/alliance/flights/boardingarea/post/2011/08/The-Wandering-Aramean---
15 Another-potential-setback-for-LiveTV8217s-in-flight-internet-service/416333/1](http://travel.usatoday.com/alliance/flights/boardingarea/post/2011/08/The-Wandering-Aramean---Another-potential-setback-for-LiveTV8217s-in-flight-internet-service/416333/1) (last visited Dec.
16 11, 2013) (reporting on ViaSat’s failed satellite launch delaying launch of ViaSat on JetBlue).
17 Gogo’s resort to referencing these providers in a foreign market, therefore, does nothing to
18 advance its attack on Plaintiffs’ proper pleading of Gogo’s high market share.

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

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

1 all of Gogo's conclusory allegations of competitor presence, and even if this presence were to
2 reduce Gogo's market share during the Class Period to something less than 85 percent, Gogo still
3 fails to argue what Gogo's corresponding market share of the domestic fleet would be. Even if
4 these providers (most of whom are absent from the domestic U.S. market) were shown to reduce
5 Gogo's market share below 85 percent as Gogo posits, that would still not advance Gogo's cause.
6 The Ninth Circuit and other courts have consistently upheld exclusive contract antitrust claims
7 with market shares exponentially below 85 percent. *See Twin City Sportservice, Inc.*, 676 F.2d at
8 1301-02 (affirming judgment against antitrust defendant premised on exclusive contracts that
9 foreclosed 24 percent of the market); *MediaStream Inc. v. Microsoft Corp.*, 869 F. Supp.2d 1095,
10 1103 (N.D. Cal. 2012) ("a monopolist's use of exclusive contracts, in certain circumstances, may
11 give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50%
12 share usually required in order to establish a § 1 violation.") (internal quotations omitted); *Tele*
13 *Atlas N.V.*, 2008 WL 4809441, at *21 (upholding antitrust exclusive dealing case where exclusive
14 contracts may have foreclosed 20-40 percent of the market).

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

25 Because Plaintiffs have pled that Gogo possessed at least an 85% market share (SAC, at ¶¶
26 22, 52), and supported those allegations by specific factual recitations of all of Gogo's contracts
27 that demonstrated that Gogo had locked up the overwhelming majority of domestic fleet aircraft
28 through its exclusive contracts (*id.* at ¶¶ 24-51), and because the SAC also pleads the existence of

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

3 **C. Plaintiffs Have Also Shown Gogo’s Market Power and Market Foreclosure**
4 **Through Direct Evidence.**

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

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

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

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

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

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

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

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

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

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

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

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

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

12 13 **II. PLAINTIFFS PROPERLY PLED STATE LAW CLAIMS.**

14 **A. The Cartwright Act Claim Is Properly Pled.**

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

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

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

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

13 **B. There Is No Basis To Dismiss Plaintiffs’ UCL Claim.**

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

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

22 **CONCLUSION**

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