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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

GOGO INC.,

Defendant.

Case No. 12-cv-05164-EMC

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

Date: January 23, 2014
Time: 1:30 p.m.
Courtroom: 5
Judge: Hon. Edward M. Chen

REDACTED VERSION

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PRELIMINARY STATEMENT

The Court dismissed Plaintiffs' prior complaint because, among other things, Plaintiffs alleged that Gogo had an 85% market share, but failed to take into account all the selling opportunities available to Gogo and its competitors. The Court rejected Plaintiffs' argument that the relevant market should focus on the small sliver of aircraft that have already been equipped with Internet connectivity (only 16%) and ignore the vast majority of aircraft that have not yet been equipped. Plaintiffs now, however, admit that unequipped aircraft should be considered as part of the relevant market, but nonetheless stick with their contention that Gogo has an 85% market share. According to their late-filed opposition brief ("Opp."), Plaintiffs base their calculation on the contents of Gogo's agreements with its airline partners -- none of which contain enough information to calculate market share -- and federal notice pleading standards requiring the Court to assume as true the facts alleged in the complaint. They also contend that they have pled market power by alleging that Gogo has reduced output and charged supracompetitive prices, and that the Court's order dismissing their prior complaint is somehow the product of misrepresentations by Gogo and that this has some relevance to whether the SAC pleads a viable antitrust claim.

Plaintiffs are wrong on all counts. First, all but three of the Gogo contracts attached to the SAC (and one of those is effectively no longer operative) state on their face that the contract at issue relates to certain enumerated aircraft only, not all of the airline's aircraft as Plaintiffs allege. And none of these agreements provide any basis for calculating market share because they contain no statements as to the total number of aircraft in the overall market. Second, Gogo's S-1, which Plaintiffs have incorporated into the SAC, affirmatively shows that Plaintiffs' 85% market share figure is incorrect. Though the Court normally must assume Plaintiffs' allegations to be true, that rule does not apply where, as here, facts incorporated in the complaint directly contradict a plaintiff's allegations. This principle equally applies to Plaintiffs' allegation that Gogo has reduced output, which is directly contradicted by facts in the S-1 indicating that Gogo has in fact increased output significantly since its launch in 2008. Third, the contracts also show that Plaintiffs' entire theory of the case is implausible because, assuming the SAC's market condition

allegations are true, some of Gogo's key partners are able to terminate their agreements with Gogo and sign on with a Gogo competitor -- thus negating Plaintiffs' market foreclosure theory. Last, Plaintiffs' contention that Gogo misled the Court into dismissing the prior complaint is meritless. Gogo's statements were not incorrect, and they were not even the basis for the Court's ruling.

In short, Plaintiffs have pled themselves out of court. They have attached and incorporated documents into their complaint that affirmatively undermine and disprove their theories. Consequently, the Court should dismiss the SAC with prejudice.

ARGUMENT

I. The Contracts Attached to the SAC Do Not Support Plaintiffs' Market Share Allegations

Contrary to Plaintiffs' contentions, the contracts attached to the SAC do not indicate that Gogo's agreements cover a significant portion of the relevant market. Plaintiffs misread these contracts, contending that they "apply on a fleetwide basis, meaning that all of the contracting carrier's domestic planes -- even those planes that had not yet been equipped with internet service hardware -- were locked up by Gogo's exclusive contracts." Opp. at 12. But simply using the word "fleet" in an agreement does not mean that all aircraft are covered by the agreement. For example, the agreement with United covers the "PS Fleet" which includes only 13 Boeing 757 planes, not all of United's hundreds of domestic aircraft. SAC Ex. 8 at 1.[1] [redacted]

[1] Plaintiffs also contend that "[o]nly once United's trial agreement with Gogo expired (which notably was well after Plaintiffs filed their Class Action Complaint, was United free to and did contract with a Gogo-rival for some of its previously unequipped aircraft [sic]." Opp. at 10. [redacted] *See* Abye. Decl. Ex. B at 64.

[redacted] The missing addenda are attached as Exhibits C- F to the Abye Sup. Decl.[3]

But even if these agreements did cover all of the contracting carriers' aircraft, which they do not, Plaintiffs are still no closer to pleading that the agreements afforded Gogo enough market share to even be capable of foreclosing competition in a significant portion of the relevant market. In essence, the agreements may provide a numerator, but do not contain a denominator. Therefore, they cannot be the basis for Plaintiffs' conclusory allegation that Gogo has an 85% market share.

II. The Court Should Not Assume Plaintiffs' Allegation That Gogo Has an 85% Market Share to Be True

Because facts incorporated in the SAC affirmatively show that Gogo did not have an 85% market share, the Court should not assume Plaintiffs' contrary conclusory allegation to be true. Based on statements in Gogo's S-1 indicating that Gogo equipped 85% of 16% of North American aircraft, Plaintiffs alleged in their prior complaint that Gogo had at least an 85% share of a relevant market consisting of only equipped planes. *See* MTD Order at 6. The Court subsequently rejected Plaintiffs' market share allegation, stating that the 85% figure "shows little" in light of the fact that Plaintiffs had not considered the full range of selling opportunities in their allegation. *Id.* at 7. Rather than recalculate Gogo's market share based on data available in the S-1, however, Plaintiffs chose instead to simply allege -- without any factual basis -- that the 85% market share figure

[3] For purposes of Gogo's motion to dismiss, the Court may consider the portions of Gogo's contracts that Plaintiffs omitted to attach to the SAC under the incorporation by reference doctrine. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) ("We have extended the incorporation by reference doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint.") (citations omitted); *see also In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1166 (S.D. Cal. 2010) ("One purpose of the [incorporation by reference doctrine] is to prevent a plaintiff from quoting an isolated statement from a document in the complaint, when the complete document refutes the allegations.") (quotations omitted).

applies not only to equipped aircraft, but also to unequipped aircraft. SAC ¶ 22; Opp. at 3. And when Gogo challenged this completely unsupported allegation in its moving papers (*see* MPA at 8-10), Plaintiffs essentially responded that they need not plead market share with specificity and that the Court should just accept their allegation as true because it is in their complaint. Opp. at 3, 14.[4]

But notwithstanding the federal pleading standards, Plaintiffs' position is untenable in light of factual statements in the S-1 directly contradicting it. For example, the original S-1, from which Plaintiffs presumably derived their original 85% market share allegation, indicates that Gogo's market share, in a relevant market consisting of both equipped and unequipped aircraft, is less than 20%, rather than Plaintiffs' alleged 85%. The S-1 states that in 2011 Gogo had equipped 85% of 16% of commercial aircraft in North America. Abye Decl., Ex. A at 3-4. This would give Gogo a market share of 13.6%. The S-1 also states that an additional 525 unequipped aircraft were under contract with Gogo. *Id*. at 1. Adding these unequipped aircraft to Gogo's market share increases it to 19.6%.[5] These facts directly contradict Plaintiffs' 85% market share figure and affirmatively demonstrate that Gogo's market share is far below that which is required for a *prima facie* showing of market power. *See Image Technical Servs, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a *prima facie* case of market power."); *see also, e.g., PNY Technologies, Inc. v. Sandisk Corp.*, No. C-11-4689 YGR, 2012 WL 1380271, at *9 (N.D. Cal. April 20, 2012) (dismissing Sherman Act claim stating "courts require a 65% market share to establish a *prima facie* showing of monopolistic market power. . . . PNY's Complaint in its current form at best articulates only a 40% share . . . . Accordingly, PNY has failed to plead sufficient facts supporting an allegation of monopoly power") (citations omitted).

[4] Plaintiffs also contend that the contracts attached to the SAC support their 85% figure, but, as detailed above (*see* Point I, *supra*), the contracts provide no basis for calculating market share because they contain no information as to how many aircraft are in the market.

[5] The additional 525 aircraft under contract to be equipped bring the total number of aircraft under contract with Gogo in September 2011 to 1,702. If 1,177 represents approximately 13.6% of the market, then 1,702 represents approximately 19.6% of the market (*i.e.* 1177/1702=13.6/19.6).

In light of these facts incorporated into the SAC, Plaintiffs' contention that merely stating in the SAC that Gogo had an 85% market share is sufficient to meet their pleading burden is without merit. In situations such as this -- where an allegation in the complaint is contradicted by facts in a document incorporated or attached to the complaint -- the Court should disregard the erroneous allegation. *See Chung v. Johnston*, C 09-02615 MHP, 2009 WL 3400658, at *3 (N.D. Cal. Oct. 20, 2009), *aff'd*, 441 F. App'x 536 (9th Cir. 2011) ("The court may disregard allegations contradicted by facts established by reference to documents attached as exhibits to the complaint, or on which the complaint necessarily relies."); *Raines v. Switch Mfg.*, C-96-2648 DLJ, 1997 WL 578547, at *3 (N.D. Cal. July 28, 1997) ("If the attached documents contradict the allegations in the complaint, a court may dismiss the claims under Rule 12(b)(6)."") (citing *Durning v. First Boston Corp.*, 815 F.2d 1265 (9th Cir. 1987)).

III. Key Agreements Attached to the SAC Affirmatively Negate Plaintiffs' Foreclosure Theory

Despite Plaintiffs' contentions, Gogo has never described its termination provisions as an "easy out." Opp. at 7. Some of the contracts attached to the SAC, however, contain termination provisions that would be triggered under the market conditions alleged in the SAC. For example, the SAC alleges that Row 44 has rolled out its product on Southwest; it has "several key technological advantages over the ATG service provided by rival Gogo"; and it provides faster and cheaper connectivity services. SAC ¶¶ 17-18. If all these facts were true, [redacted]

SAC Ex. 6 § 11.2.4; *see also* Abye Decl., Ex. B at 15 (Gogo's "contracts with airline partners from which we derive a majority of our [commercial airline] segment revenue permit each of these airline partners to terminate its contract with us if another company provides an alternative connectivity service that is a material improvement over Gogo Connectivity").

Accordingly, although the [redacted] termination is not an "easy out," it effectively curtails Gogo's ability to exclude competitors and control prices under the fact scenario described in the SAC and thereby renders Plaintiffs' market foreclosure theory implausible. *See United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990) ("There is universal agreement that monopoly power is the power to exclude competition or control prices."); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

The fact that new entrants have entered into agreements with domestic airlines allegedly locked up by Gogo further buttresses the implausibility of Plaintiffs' theory. *Compare* SAC ¶ 24 (Plaintiffs allege all AirTran aircraft are locked up by Gogo for 10 years), *with* Abye Decl. Ex. B at 64 (except for planes being sold to Delta, AirTran's business is moving to Row 44); *also compare* SAC ¶ 46 (Plaintiffs allege "no rival internet equipment provider could work with United on any part of United's fleet"), *with* Abye Decl. Ex. B at 109 (United recently entered into an

agreement with a Gogo competitor to provide connectivity on all or a significant portion of its fleets).[6]

IV. The SAC Does Not Plead Market Power Though Restricted Output/Supracompetitive Pricing

Plaintiffs miss the mark with their argument that the SAC pleads Gogo has market power under a restricted output/ supracompetitive pricing theory. Opp. at 16-17. Courts have found that market power exists when, by "restricting its own output, [a competitor] can restrict marketwide output and, hence, increase marketwide prices." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *see also Church & Dwight Co. v. Mayer Labs., Inc*., 868 F. Supp. 2d 876, 897 (N.D. Cal. 2012) ("There are two ways of demonstrating market power: directly or circumstantially. Under the direct method, [plaintiff] must put forth evidence of restricted output and supracompetitive prices.") (quotations omitted). The SAC does not come close to meeting these requirements.

First, despite Plaintiffs' conclusory allegations, Gogo has not restricted output, but in fact has significantly *increased* output over the relevant period. Between August 2008 and September 2011, Gogo *increased* the number of equipped planes from 30 to 1,177. Abye Decl. Ex. A at 82. And between September 2011 and March 2013, Gogo brought this total up to 1,878. *Id*. Ex. B at 97, 109.

Second, Plaintiffs fail to plead that prices were supracompetitive. They allege nothing more than that prices increased over time and that Gogo's prices were higher than those of Row 44. This alone is insufficient to show supracompetitive pricing. *See Church*, 868 F. Supp. 2d at 897 ("high prices are not equivalent to supracompetitive prices"); *Somers v. Apple, Inc*., No. C 07-06507 JW, 2011 WL 2690465, at *5-6 (N.D. Cal. June 27, 2011), *aff'd.*, 729 F.3d 953 (9th Cir. 2013) (dismissing complaint and holding that plaintiff's comparison of prices of defendant's product with prices of a competitor's product was insufficient to support plaintiff's claim of supracompetitive pricing).

[6] Plaintiffs devote considerable space in their brief and cite to a number of out-of-record websites for the proposition that some Gogo competitors may have not entered the U.S. prior to the filing of Plaintiffs' original complaint. *See* Opp. at 5, 10, 11, 14. These points, however, are irrelevant to the instant motion.

Last, Plaintiffs contend that by purposely not equipping certain aircraft, Gogo has somehow given itself the opportunity to increase consumer prices on equipped aircraft. Opp. at 17. But this is illogical. The restricted output/supracompetitive pricing doctrine is premised on the concept that "[p]rices increase marketwide in response to the reduced output because consumers bid more in competing against one another to obtain the smaller quantity available." *Rebel Oil*, 51 F.3d at 1434. This model, however, is inapplicable in this case because not supplying connectivity to one plane will have little or no bearing on the demand for connectivity on a second plane that is equipped. Accordingly, Plaintiffs' argument that the SAC pleads Gogo has market power under a restricted output/ supracompetitive pricing theory fails.

V. Gogo Never Misled the Court

Plaintiffs' contentions that Gogo somehow misled the Court into ruling in its favor on the prior motion to dismiss are unfounded, inaccurate, and nothing more than a distraction from the issue at hand -- the SAC's failure to state a Sherman Act claim.

As an initial matter, at the hearing on the last motion to dismiss, Gogo's counsel explicitly informed the Court that he was not making any factual representations about the contents of the contracts at issue. *See* Katriel Decl. Ex. 1 at 25:14-17 (Mr. Donato: "I want to be clear we haven't done any discovery. I'm not testifying about the contents of the other contracts."). And, as detailed above (*see* Point I, *supra*), Gogo's statements that its airline agreements did not necessarily require all aircraft in an airline's entire fleet to be equipped is accurate and responsive to the Court's general line of inquiry as to whether the contracts at issue covered all of an airline's aircraft or just specific planes. *See id*. at 7:18- 8:3.

> **The Court:** I thought once United says we're going with Gogo, all their thousands of planes are off limits. If that's the case, I was about say, then we look at it on [an] airline-by-airline basis. If they locked up Virgin, if they locked up United, if they locked up American, everybody but Southwest . . . If they locked up 90 percent of the market, well, then you've got a pretty good claim.
>
> On the other hand, if every plane is open and United could say . . . 747s and 737s and 757s, but not our Airbuses, we are going to put one kind, then there's a different matter.

Moreover, as the Court explicitly noted in the MTD Order, *Plaintiffs* did not purport to plead that Gogo's contracts excluded competition on unequipped planes. MTD Order at 2 ("Although the above allegations suggest that Gogo's exclusive contracts with the airlines effectively operated as a wholesale bar preventing the contracting airline from using an internet access provider other than Gogo on any of its planes, Plaintiffs clarified at the hearing that this was not in fact the case."). Indeed, at the hearing, Plaintiffs' counsel contended that unequipped aircraft were not even part of the relevant market because the carriers had chosen to not equip them. Katriel Decl. Ex. 1 at 9:14-18

> **The Court**: Whatever it is, someone has 10 percent of their planes that are equipped with internet service . . . What's preventing the other 90 percent, some of that, from going to any of the competitors?
>
> **Mr. Katriel**: What's preventing other competitors, like Row 44, from going to equipping [sic] those other planes is the fact that those other planes haven't been designated by the airlines as not to be equipped with internet service. They are not in the market. They are not buyers. The airlines have decided - -
>
> **The Court**: So it's not because they are bound by an exclusionary agreement; it's because they don't want to – they decided not to

Accordingly, Plaintiffs' contention that Gogo somehow misled the Court into ruling in its favor is without merit.

VI. The SAC Fails to State a Cartwright Act or UCL Claim

Plaintiffs' effort to save the Cartwright Act claim is misdirected. The reason why this claim fails is that it simply repackages the federal Sherman Act claims, and when the federal claims fail, the entire Cartwright Act claim necessarily fails with them. *In re Late Fee & Over-Limit Litig.*, 528 F. Supp. 2d 953, 965 (N.D. Cal. 2007); Br. at 13. [7]

Plaintiffs' other contentions about the Cartwright Act are irrelevant in light of this but also can be easily dispatched. The claim that the FAC falls within the reach of the Cartwright Act because it alleges exclusive dealing contracts involving third parties is off point because this case features contracts that allow for competitors with superior products to compete. *See* Abye Decl.,

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

Ex. B at 18. None of the cases cited by Plaintiffs involve terminable contracts, nor do any of those cases hold, as Plaintiffs suggest, that all exclusive dealing arrangements are actionable under the Cartwright Act. The Cartwright Act only prohibits those exclusive arrangements that effectively cut-off access to the market by new entrants. *See Fisherman's Wharf Bay Cruise Corp. v. Super. Ct.*, 114 Cal. App. 4th 309, 335 (2003) ("In California, exclusive dealing arrangements are not deemed illegal per se."); *Redwood Theatres, Inc. v. Festival Enters., Inc., et al.*, 200 Cal. App. 3d 687, 713 (1988) (holding that the actionability of the exclusive license agreements between film distributors and exhibitors turns on "the question of free access to markets"). But Gogo's contracts do not cut-off free access for competitors with superior products. *See* Point III, *supra*. Consequently, they do not involve concerted action that falls within the ambit of the Cartwright Act.

CONCLUSION

Because the SAC not only fails to state a claim, but affirmatively incorporates facts demonstrating that no claim is possible, the Court should dismiss the SAC with prejudice.

DATED: December 19, 2013

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