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GOGO INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiff,

v.

GOGO INC.,

Defendant.

Case No. 12-cv-05164-EMC

DEFENDANT GOGO INC.'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: February 21, 2013
Time: 1:30 p.m.
Courtroom: 5
Judge: Hon. Edward M. Chen

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NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that, on February 21, 2013, at 1:30 p.m. or as soon thereafter as this matter may be heard before the Honorable Edward M. Chen, United States District Judge, in the United States District Court for the Northern District of California, 450 Golden Gate Ave., San Francisco, CA, 94102, Defendant Gogo Inc. will and hereby does move this Court for an order dismissing with prejudice Plaintiffs' putative class action complaint filed October 4, 2012 pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, and lack of standing and injury.

This motion is based on this notice; the accompanying memorandum of points and authorities; the declaration of Mikael A. Abye ("Abye Decl."); the pleadings and papers on file in this action; and such other evidence and arguments as may be presented at the hearing on the motion.

STATEMENT OF ISSUES TO BE DECIDED

1. Does the complaint fail to state a claim for which relief can be granted under the Sherman Act, the California Cartwright Act or the California Unfair Competition Law (Bus. & Prof. Code Section 17200 *et seq.*)?

2 Should the complaint be dismissed because Plaintiff has failed to properly allege standing under Article III or antitrust injury?

3. Should the complaint be dismissed with prejudice because the complaint and facts incorporated in it make amendment futile?

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This Court should dismiss the putative antitrust class action of Plaintiff James Stewart against defendant Gogo, Inc. ("Gogo"). Plaintiff alleges that Gogo has used exclusive dealing contracts with airlines to monopolize the new and emerging market for providing an Internet connection to passengers flying on airplanes. To state a claim, Plaintiff must allege facts showing that Gogo had the monopoly power to raise prices and exclude competitors, and that its contracts foreclosed competition in a substantial portion of the market. But Plaintiff admits in the complaint that exactly the opposite has happened in this business line. Plaintiff concedes that at least two powerful competitors have entered the market with competing technologies and services since Gogo launched its business in 2008. Plaintiff concedes that these new entrants have already won contracts to provide Internet connectivity on Southwest Airlines -- one of the largest airlines in the world in terms of passenger volume -- and JetBlue. These admissions show that the new market for inflight Internet service is dynamic and competitive, and that Gogo has neither foreclosed competition nor excluded competitors, and does not have the monopoly power to control the market. On this basis alone, Plaintiff's complaint should be dismissed.

In addition to foundering on these admissions, the complaint proffers only conclusory allegations, without any facts whatsoever to show that Plaintiff's claims are even remotely plausible. Plaintiff has failed to allege facts showing that: (1) Gogo's contracts blocked any competitor from entering the market or winning contracts; (2) any portion of the alleged market was foreclosed, let alone a substantial portion; or (3) Gogo has the monopoly power to exclude competition and control prices. As if these deficiencies were not enough, Plaintiff also fails to plead facts showing standing to sue or antitrust injury. All Plaintiff offers in the Complaint are conclusions and legal elements. Such threadbare allegations are patently insufficient to justify imposing the burdens and costs of defending an antitrust class action on Gogo.

Although this is the original complaint filed by Plaintiff, this case should be dismissed with prejudice. Plaintiff's allegations stray so far from the facts conceded elsewhere in the complaint itself that allowing him to re-plead his claims would be futile.

BACKGROUND

The new and competitive business of providing inflight Internet connectivity is producing compelling consumer benefits. Airline passengers now have access to a new service that did not exist five years ago. The complaint acknowledges Gogo's role in pioneering this innovation for consumers by alleging that "Gogo was the first inflight Internet connectivity provider to launch such service in the United States in August 2008." Complaint ("Compl.") at ¶ 50.

As the complaint states, Gogo's service uses a land-based network of cellular towers that are pointed upwards to communicate with aircraft. *Id.* at ¶ 12. This technology is known as air-to-ground or "ATG" technology. *Id.* Since Gogo launched its service in August 2008, at least two powerful new competitors have entered the business of providing inflight Internet services using different technology. One new entrant is a company called Row 44. *Id.* at ¶ 14. Row 44 uses a competing technology based on satellites rather than an ATG network. *Id.* Row 44's satellite system allows it to provide continuous Internet connections across national boundaries and over oceans, while Gogo's ATG network relies on land-based towers. *Id.* Another new entrant is ViaSat, which also provides a competing satellite-based Internet service. *Id.* at ¶ 16.

The new entrants have been successful competitors. Row 44 has already won the business of providing Internet services on all the domestic flights of Southwest Airlines. *Id.* at ¶ 15. ViaSat has already won the business of providing Internet service on JetBlue and will activate that service in late 2012.[1] *Id.* at ¶ 16.

The complaint incorporates other facts highlighting how competitive and dynamic this business line is.[2] Gogo's competitors include not only Row 44 and ViaSat, but also Panasonic

[1] Inflight connectivity is provided by arrangements between the service providers such as Row 44, ViaSat and Gogo, and the airlines that want to offer connectivity within their aircraft fleet. Compl. at ¶ 1. Passengers who want to use the service connect directly with the service provider during flights through laptops, cell phones, and other WiFi-enabled devices. Because this service is new and has only recently been made available to consumers, only about 4.7% of passengers offered Gogo's service in 2010 and 2011 took advantage of it. Abye Decl., Ex. B at 14.

[2] Plaintiff incorporates documents in the complaint that provide these additional facts. The complaint quotes extensively from Gogo's Form S-1 filed with the United States Securities and Exchange Commission to register its securities in relation to making an initial public offering. Compl. ¶¶ 24, 27, 32. The Form S-1, and all subsequent versions of it that were publically available prior to the filing of the complaint, should be considered by this Court under the doctrine

Avionics, Thales and OnAir, all of whom provide inflight connectivity via satellite rather than an ATG network. Abye Decl., Ex. B at 6, 118. The competing technologies offer airlines important distinctions and choices. An ATG service can be installed on an aircraft overnight, limiting the expense associated with taking planes out of service, and has a lighter weight for better fuel efficiency. *Id.* at 4-5. Satellite solutions, on the other hand, provide much wider coverage for flights traveling over oceans and internationally. *Id.* at 99. As the result of strong competition among these many companies and competing technologies, Gogo has been compelled to improve its technology by developing its own satellite-based service and upgrading the ATG network with new cell towers and a next-generation platform known as ATG-4. *Id.* at 2, 21.

In light of the high degree of competition in this business line, Gogo has warned potential investors that competition could subject it to downward pricing pressures and adversely affect growth and profitability. Abye Decl., Ex. B at 19. Indeed, as the Form S-1 indicates, Gogo is not yet profitable and has sustained operating losses in every quarter since launching in 2008. *Id.* at 6, 10.

The facts incorporated in the complaint further underscore that this business is in an early stage and offers the potential for substantial growth. In 2010, only 16% of commercial aircraft in North America and 6% worldwide were equipped with inflight Internet service. Abye Decl., Ex. B at 3. Thus, approximately 84% of North American aircraft are potential targets for installation of Internet connectivity service.

The facts incorporated in the complaint also show that Gogo's contracts are not anticompetitive. Gogo's contracts allow the key airlines to terminate their dealings with Gogo whenever a rival offers a superior service or business arrangement. Abye Decl., Ex. B at 15. In fact, United Airlines recently moved its Internet connectivity service from Gogo to a competitor

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of incorporation by reference. As the Ninth Circuit has stated, "[u]nder the incorporation by reference doctrine in this Circuit, a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment. Specifically, courts may take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the Plaintiff's pleading. A court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Davis v. HSBC Bank*, 691 F.3d 1152, 1160 (9th Cir. 2012) (emphasis added).

for a significant portion of its fleet, and AirTran terminated its contract with Gogo and moved to Row 44 after Southwest acquired it. *Id.* at 36, 98. A major risk factor disclosed by Gogo to potential investors is that its contracts with airlines can be terminated in the face of superior services from rivals. *Id.* at 15-16.

Despite these facts alleged and incorporated in the complaint itself, Plaintiff contends that passengers using Gogo's service paid supra-competitive prices because Gogo monopolized the market through exclusive dealing contracts that foreclosed rivals. Compl. at ¶ 1. Plaintiff alleges claims under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), as well as the California Cartwright Act (Cal. Bus. & Prof. Code § 16720) and Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq*). *Id.* at ¶¶ 38-76. Plaintiff purports to represent putative classes of national and California-based users. *Id.* at ¶ 31. Plaintiff identifies the alleged relevant market to be "the United States market for inflight Internet access services on domestic commercial airline flights." *Id.* at ¶ 10.

ARGUMENT

I. The Sherman Act And Cartwright Act Claims Should Be Dismissed

"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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must provide "more than [the] unadorned, the-defendant-unlawfully-harmed-me-accusation." *Id.* "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545 (citations omitted); *see also Abbyy USA Software House, Inc. v. Nuance Commc'n Inc.*, No. C 08-01035 JSW, 2008 WL 4830740 at *1 (N.D. Cal. Nov. 6, 2008) (same and dismissing antitrust claims). Pleading facts showing a plausible claim is particularly

important in antitrust cases because, "[a]s the Ninth Circuit has explained, 'discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case.'" *MedioStream, Inc. v. Microsoft Corp.*, No. C-11-03095 RMW, 2012 WL 1413408, at *3 (N.D. Cal. Apr. 23, 2012) (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008)).

To state a claim under the Sherman Act or Cartwright Act for antitrust violations, Plaintiff must at a minimum allege facts showing anticompetitive or predatory conduct. In the absence of anticompetitive conduct, Plaintiff cannot state an antitrust claim regardless of Gogo's alleged market share. *Abbyy*, 2008 WL 4830740 at *2 ("Absent well-pleaded allegations of anticompetitive conduct, Abbyy [plaintiff] may not maintain a cause of action for monopolization, even considering its allegations of large market share."); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 209 n.17 (4th Cir. 2002) (affirming dismissal of Sherman Act claims for lack of anticompetitive conduct where defendant had 90% market share); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987) (affirming dismissal of Sherman Act Section 1 and 2 claims where plaintiffs failed to adequately plead anticompetitive conduct); *MedioStream*, 2012 WL 1413408, at *4-5 (dismissing Section 1 and 2 claims where plaintiffs failed to plead specific facts showing illegal anticompetitive conduct); *Smilecare Dental Grp. v. Delta Dental Plan of Cal.*, 858 F. Supp. 1035, 1037-40 (C.D. Cal. 1994) (dismissing Section 2 claim where plaintiff failed to allege the requisite anticompetitive conduct); *Morton v. Rank Am., Inc.*, 812 F. Supp. 1062, 1067 (C.D. Cal. 1993) (same).

The failure to plead viable Sherman Act claims also means that Plaintiff's California Cartwright Act claim must be dismissed. *See Apple, Inc. v. Psystar Corp*, 586 F. Supp. 2d 1190 1203-04 (N.D. Cal. 2008) ("The Cartwright Act was patterned after Section 1 of the Sherman Act, and the pleading requirements under the two statutes are similar."); *In re Late Fee & Over-Limit Litig.*, 528 F. Supp. 2d 953, 965 (N.D. Cal. 2007) (dismissing Cartwright Act claims because plaintiff had failed to plead a viable Sherman Act claim) (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001)).

A. The Complaint Fails To Allege That Gogo Engaged In Anticompetitive Conduct

1. Exclusive Dealing Arrangements Are Presumptively Legal

As an initial and dispositive matter, the complaint fails to allege any facts showing that Gogo engaged in any predatory or anticompetitive conduct. Plaintiff's predatory conduct claim here consists solely of the allegation that Gogo locked up the market for inflight Internet service through exclusive contracts with the domestic airlines in the United States. But Plaintiff has failed to plead any facts showing that Gogo's contracts have substantially foreclosed competition, or that Gogo even had the market power necessary to impose substantial foreclosure.

The fatal flaw in Plaintiff's theory is that exclusive dealing arrangements are not inherently anticompetitive. *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010). To the contrary, "[t]here are well recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition." *Id.* (quoting *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997)). Thus, exclusive dealing arrangements are analyzed under the rule of reason. *Omega*, 127 F.3d at 1162. And courts presume that exclusive dealing arrangements do not violate the antitrust laws. *See E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 30 (2d Cir. 2006) (noting that "exclusive distributorship arrangements are presumptively legal") (citing *Elec. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 245 (2d Cir. 1997)); *see also* XI Areeda & Hovenkamp, Antitrust Law ¶1810, at 136 (3d ed. 2012) (stating that "it seems clear that the potential of exclusive dealing to produce beneficial results greatly exceeds their potential for harm, and they should be presumptively lawful in all but a few carefully defined circumstances").[3]

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[3] For similar reasons, possession of a monopoly is also not inherently illegal. "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. . . . To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis in original).

2. Exclusive Dealing Claims Require Facts Showing Substantial Market Foreclosure

Exclusive dealing arrangements potentially raise antitrust concerns only "if the effect is to foreclose competition in a substantial share of the line of commerce affected." *Allied*, 592 F.3d at 996 (quoting *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.") (O'Connor, J. concurring); *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993) ("Exclusive dealing contracts may also benefit customers and are unlawful only upon a particularized showing of unreasonableness."). Consequently, as this Court has held, to state an antitrust claim based on exclusive dealing arrangements, "Plaintiff must allege more than simply the existence of an exclusive contract." *Abbyy*, 2008 WL 4830740 at *2; *see also Kingray, Inc v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1196-97 (S.D. Cal 2002) (dismissing complaint where plaintiffs made only conclusory allegations that exclusive contracts were intended to harm competition).

3. Plaintiff Has Failed To Plead Substantial Market Foreclosure And The Complaint Concedes Foreclosure Did Not Occur

Plaintiff has completely failed to plead any facts showing substantial market foreclosure. He alleges repeatedly that certain Gogo contracts are purportedly exclusive (*see, e.g.*, Compl. ¶¶ 41, 42, 51, 60), but does not provide any facts whatsoever showing that these contracts foreclosed a substantial portion of the alleged relevant market to competitors, or blocked rivals from entering the business or winning contracts. Plaintiff does not provide a single fact showing that Row 44, ViaSat, or any other rival has been foreclosed from the market by Gogo's contracts. Plaintiff does not even try to describe the extent of foreclosure as a percentage of the market, which is crucial to the viability of his claim because foreclosure below 30 to 40% of the alleged market is not actionable. *See, e.g., Jefferson Parish*, 466 U.S. at 46-47 (30% foreclosure not actionable because "[p]lainly . . . the arrangement forecloses only a small fraction of the [relevant] markets."); *Omega*, 127, F.3d at 1162-63 (foreclosure of 38% of market inadequate to support plaintiff's

antitrust claim); *B & H Med., L.L.C. v. ABP Admin., Inc.*, 526 F.3d 257, 266 (6th Cir. 2008) ("Courts routinely observe that 'foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent.'") (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004)); *Colonial Med. Grp., Inc. v. Catholic Healthcare W.*, No. C-09-2192 MMC, 2010 WL 2108123, at *5 (N.D. Cal. May 25, 2010) (same). These deficiencies mandate dismissal of the complaint. *Abbyy*, 2008 WL 4830740, at *2 (dismissing exclusive dealing claims where plaintiff failed to plead facts showing, among other exclusionary factors, the "degree of the market allegedly foreclosed as a result of these contracts").

Not only has Plaintiff failed to plead adequate facts, the complaint affirmatively shows that substantial foreclosure did not occur. As detailed above, the complaint and Form S-1 acknowledge that rivals such as Row 44 and ViaSat have entered the market with competing satellite-based services and have won business from multiple airlines, including Southwest (and its acquisition AirTran), JetBlue, and United. Compl. ¶¶ 15, 16; Abye Decl., Ex. B at 98. Row 44 and ViaSat achieved these market successes during the time when Plaintiff contends that Gogo had locked up the market against competitors with exclusive dealing contracts. The fact that Row 44, ViaSat and other competitors have not complained about being foreclosed in the market also speaks volumes about the weakness of Plaintiff's claims.

Moreover, as shown above (*see* Background), the key airlines working with Gogo were free to terminate the allegedly long-term exclusive contracts any time a rival offered a better deal. *See* 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"). "The easy terminability of an exclusive dealing arrangement negates substantially its potential to foreclose competition." *Allied*, 592 F.3d at 997 (quotation marks omitted); *see also Omega* 127, F.3d at 1162 (agreement did not foreclose a significant amount of the relevant market because, among other reasons, it allowed for termination should a competing manufacturer offer "a better product or a better deal"); *Balaklaw v. Lovell*, 14 F. 3d 793, 799 (2d Cir. 1994) (stating for a terminable exclusive dealing contract that

"[s]uch a situation may actually encourage, rather than discourage, competition, because the incumbent and other, competing anesthesiology groups have a strong incentive continually to improve the care and prices they offer in order to secure the exclusive positions").

4. The Complaint Fails To Use A Proper Market For Foreclosure Effects

Even if Plaintiff had adequately alleged substantial foreclosure, which is far from the case, he has failed to plead foreclosure in the proper full-range market required to state a claim. As the Ninth Circuit has emphasized, a plaintiff cannot focus merely on a subset of the alleged relevant market to claim foreclosure:

> The foreclosure effect, if any, depends on the market share involved. The relevant market for this purpose includes the full range of selling opportunities reasonably open to rivals, namely all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations.

Omega, 127 F.3d at 1162 (emphasis added); *see also Tampa Electric*, 365 U.S. at 328 ("[T]he competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited[.]").

Here, Plaintiff has tried to stack the deck against Gogo by improperly focusing on a fraction of the alleged relevant market for the foreclosure claim. Plaintiff repeatedly alleges that "Gogo-equipped planes represent approximately 85% of the North American aircraft that provide Internet connectivity to its passengers." *See, e.g.*, Compl. ¶¶ 9, 18. The apparent intent is to imply that Gogo has locked up an 85% share of the market. But this allegation is highly misleading. It refers only to the aircraft actually equipped with Internet service capability. That tiny subset of the alleged market is not a proper focus for pleading Plaintiff's foreclosure claims. The correct focus is the "full range" of aircraft in North America that can be equipped to provide Internet service. As noted above, only 16% of the full range of aircraft was equipped for Internet connectivity in 2010. Therefore, 84% of North American aircraft were unequipped and represent the growth and sales potential for all competitors in the inflight Internet business. That is the

proper market for Plaintiff's foreclosure claim, and that full-range market demonstrates how highly implausible Plaintiff's foreclosure claims are.[4]

B. The Complaint Fails To Allege Monopoly Power

Although further consideration of the complaint is unnecessary given the total failure to plead anticompetitive conduct, Plaintiff's Section 2 monopolization claims suffer from an additional independent defect. The monopolization claims fail because the complaint does not adequately allege that Gogo possesses monopoly power.

A basic element of a monopolization claim is that the defendant has monopoly power in the alleged relevant market. *Allied*, 592 F.3d at 998 (stating that "the possession of monopoly power in the relevant market" is an "essential element to a successful claim of Section 2 monopolization"). Monopoly power is the power to exclude competition or control prices. *Cal. Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 735 (9th Cir. 1979); *POURfect Prods. v. KitchenAid*, No. CV-09-2660-PHX-GMS, 2010 WL 1769413 at *2 (D. Ariz. May 3, 2010). Consequently, Plaintiff must plead facts showing that the putative monopolist had the power to exclude competitors or control prices. *Rick-Mik Enters. v. Equilon Enters., LLC*, 532 F.3d 963, 972-73 (9th Cir. 2008) (affirming dismissal where plaintiff failed to plead facts showing "the amount of power or control" in a relevant market); *Digital Sun v. Toro Co.*, No. 10-CV-4567-LHK, 2011 WL 1044502, at *3 (N.D. Cal. Mar. 22, 2011) (dismissing Section 2 claim where plaintiff did not sufficiently allege market power); *Colonial Med. Grp.*, 2010 WL 2108123 at *7 (dismissing Section 2 claim where complaint "includes no facts to support a finding that [defendant] has the ability to control the prices" in alleged relevant market).

Plaintiff's monopoly power claim fails for the same reasons as his exclusionary conduct claims -- Plaintiff has failed to plead any facts showing that Gogo could exclude competitors or control prices. As detailed above, the complaint concedes the opposite. Gogo's rivals have entered the market and won contracts with airlines. The complaint also concedes that Gogo has not controlled prices. Plaintiff alleges that Row 44 offers its service at a substantially lower

[4] Plaintiff has also failed to allege plausible relevant product or geographic markets, or provide facts adequate to support the relevant market it purports to identify.

competing price (Compl. at ¶ 15), and Gogo has warned potential investors of downward pressure on its prices due to competition (*see* Section I.A.3 above). This is hardly the picture of a monopolist ruling a market.

Moreover, as the Form S-1 incorporated in the complaint shows (*see* Section I.A.4 above), Gogo's share of the full-range market of North American aircraft was not more than 16% in 2010. That share falls far below the levels required to state a claim for monopolization. *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."); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975) ("while 90% of the market 'is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.'") (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945)); *see also POURfect Prods.*, 2010 WL 1769413, at *2 (dismissing Sherman Act Section 2 claim for, among other things, failure to plead monopoly power by not adequately pleading "facts showing that the defendant owns a dominant share of the market").

II. The Complaint Fails To Allege Standing Or Antitrust Injury

Plaintiff's complaint should also be dismissed because he fails to adequately plead plausible claims of standing to sue under Article III and antitrust injury. Like all plaintiffs in a federal civil case, Plaintiff must meet the requirements of Article III standing, which require proof of actual injury, causation and redressability. *See Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008) ("Article III standing requires proof of injury-in-fact, causation, and redressability . . . . For Article III purposes, an antitrust plaintiff establishes injury-in-fact when he has suffered an injury which bears a causal connection to the alleged antitrust violation.") (quotations omitted); *Low v. LinkedIn Corp.*, No. 11-CV-01468-LHK, 2011 WL 5509848 at * 2-3 (N.D. Cal., Nov. 11, 2011) (stating Art. III standing requirements and dismissing complaint for failing to satisfy them).

Because this is an antitrust case, Plaintiff is also required to meet the more rigorous requirement of alleging antitrust standing, which requires a showing of injury of the type the

antitrust laws were intended to prevent. *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x. 554, 557 (9th Cir. 2008) (citing *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 372 (9th Cir. 2003) and *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 901 (9th Cir. 2008)); *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 991 (N.D. Cal. 2010) ("to establish standing under the federal antitrust laws, Plaintiff must have suffered an antitrust injury, that is, 'an injury of the type the antitrust laws were intended to prevent and that flows from that which makes Defendant's acts unlawful.'") (citation omitted).

The complaint meets none of these prerequisites for Plaintiff to sue. The complaint fails to plead a plausible basis for injury-in-fact and causation under Article III. Plaintiff alleges he was injured by supra-competitive overcharges. *See* Compl. at ¶¶ 29, 53, 62, 68. But the complaint never says how much Plaintiff actually paid for the Gogo service he used. It completely omits any allegation whatsoever about the price Plaintiff allegedly paid. Instead, it merely generalizes about Gogo's alleged price points and compares them to a flat-rate $5.00 price charged on Southwest flights by Row 44. *Id.* at ¶¶ 15, 18.

These allegations are completely inadequate to show standing under Article III. Plaintiff cannot claim he has been injured by paying supra-competitive prices when he never states what price, if any, he actually paid. In fact, Plaintiff may have paid a price lower than the price Row 44 allegedly would have charged. As the Form S-1 incorporated in the complaint shows, Gogo used a tiered pricing system and offers prices at or below the alleged Row 44 price. *See* Abye Decl., Ex. B at 107 (showing that Gogo's prices range from $1.95 to $17.95 per flight); Compl. at ¶ 15 (alleging that Row 44 "offers its service for a price of merely $5.00, regardless of the flight's duration"). Plaintiff may have actually paid less than $5.00 for inflight connectivity. We do not know because the complaint does not say, and that ambiguity is fatal to Plaintiff's ability to allege Article III standing.

In addition, Plaintiff utterly fails to state any factual foundation for the allegation that Gogo's prices were actually supra-competitive. The complaint makes a passing reference to Row 44's price on Southwest, but is silent about what the pricing trends and practices were in the market overall. A mere comparison to a rival's competing price fails to satisfy Plaintiff's

obligation to plead facts showing supra-competitive pricing. *See Somers v. Apple, Inc.*, NO. C 07-06507 JW, 2011 WL 2690465, at *5-6 (N.D. Cal. June 27, 2011) (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 supra-competitive pricing); *Midwest Auto Auction, Inc. v. McNeal*, NO. 11-14562, 2012 WL 3478647, at *5-6 (E.D. Mich Aug. 14, 2012) (comparison to competitor's sale prices was insufficient to support plaintiff's claim of antitrust injury).

These same factors show that Plaintiff has also failed to allege antitrust injury and the right to bring an antitrust claim. To plead antitrust injury, Plaintiff "must sufficiently allege that the competitive process has been harmed." *Sambreel Holdings LLC v. Facebook, Inc.*, No. 12cv668-CAB (KSC), 2012 WL 5995240, at *6 (S.D. Cal. Nov. 29, 2012); *POURfect Prods.*, 2010 WL 1769413 at *5. As detailed above, Plaintiff has failed to allege any facts showing that Gogo has foreclosed a substantial portion of the alleged market or engaged in any predatory conduct. In addition, Plaintiff has failed to provide facts showing that Gogo is reaping monopoly profits by charging supra-competitive prices. To the contrary, the facts incorporated in the complaint state the exact opposite -- Gogo has realized operating losses every quarter since launching its service in 2008. Abye Decl., Ex. B at 6, 10. Plaintiff has failed to allege any basis for antitrust injury.

III. Plaintiff's UCL Claim Should Be Dismissed

Plaintiff's claim under the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, should also be dismissed. This claim is based entirely on the same exclusive dealing conduct referred to in the antitrust claims. Compl. at ¶¶ 70-76. Consequently, the UCL claim fails for the same reasons. *LiveUniverse*, 304 F. App'x at 557 (where same conduct is alleged for both federal antitrust and Section 17200 claim, conclusion of no antitrust violation precludes Section 17200 claim); *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1147 (N.D. Cal. 2011) ("Under California law, if the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason, then the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not unfair toward consumers.") (quotations omitted); *Psystar*, 586 F. Supp. 2d at 1204 (same).

CONCLUSION

Plaintiff has failed to allege any facts stating a plausible case against Gogo for anticompetitive conduct, monopolization or any other claim. This Court should dismiss the complaint. Because the facts in the Complaint show that Plaintiff cannot allege a plausible claim even if provided with leave to amend, this case should be dismissed with prejudice. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988) ("[I]f a complaint is dismissed for failure to state a claim upon which relief can be granted, leave to amend may be denied . . . if amendment of the complaint would be futile. If the district court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency, then the dismissal without leave to amend is proper.") (quotations and citations omitted); *see also, e.g.*, *Applestein v. Medivation, Inc.*, 861 F. Supp. 2d 1030, 1044 (N.D. Cal. 2012) (dismissing complaint with prejudice for, among other reasons, the complaint contained factual "contradictions that cannot be undone by a further amendment").

DATED: December 10, 2012

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