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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 NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 28, 2013
Time: 1:30 p.m.
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Judge: Hon. Edward M. Chen

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NOTICE OF MOTION AND MOTION TO DISMISS AMENDED COMPLAINT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that, on March 28, 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' First Amended Class Action Complaint ("FAC") filed December 31, 2012 (Dkt. No. 18) 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 FAC 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 FAC be dismissed because Plaintiffs have failed to properly allege antitrust injury?

3. Should the FAC be dismissed with prejudice because Plaintiffs have already amended their claims and the facts incorporated in the FAC, and facts subject to judicial notice, make further amendment futile?

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This Court should dismiss the putative antitrust class action of Plaintiffs James Stewart, Joel Milne, and Joseph Strazzullo ("Plaintiffs") against defendant Gogo, Inc. ("Gogo"). Plaintiffs allege 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, Plaintiffs 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 Plaintiffs admit in the First Amended Complaint ("FAC") that exactly the opposite has happened in this business line. At least two powerful competitors have entered the market with competing technologies and services since Gogo launched its business in 2008. Plaintiffs concede 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. Just after the FAC was filed, United Airlines announced that it will equip 300 mainline aircraft with a competitors' technology by the end of 2013. These facts show that the new market for inflight Internet service is dynamic and wide open. Gogo has neither foreclosed competition nor excluded competitors, and does not have the monopoly power to control the market. On this basis alone, Plaintiffs' FAC should be dismissed.

In addition to foundering on these admissions, the FAC proffers only conclusory allegations, without any facts whatsoever to show that Plaintiffs' claims are even remotely plausible. Plaintiffs have 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, Plaintiffs also fail to plead facts showing standing to sue or antitrust injury. All Plaintiffs offer in the FAC 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.

At this point, Plaintiffs' case should be dismissed with prejudice. Gogo previously moved to dismiss Plaintiffs' original complaint on grounds very similar to those raised here. Rather than oppose that motion, Plaintiffs chose to file the FAC. The FAC continues to suffer from the same deficiencies that Gogo attacked earlier. It is clear that Plaintiffs' ability to satisfy their pleading obligations is not improving over time. Because Plaintiffs have already enjoyed two chances to state a claim and because their allegations stray so far from the facts conceded in the FAC itself, allowing them a third chance to re-plead their claims would be futile and should be denied.

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." FAC at ¶ 52.

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 ¶ 14. This technology is known as air-to-ground or "ATG" technology. *Id.* Since Gogo launched its service in August 2008, at least three 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 ¶ 15. 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 at* ¶ 16. Two other new entrants are ViaSat and Panasonic, which also provide a satellite-based Internet service. *Id.* at ¶ 18; Abye Decl., Ex. B at 6.

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. FAC at ¶ 17. ViaSat has already won the business of providing Internet service on JetBlue and will activate that

service in early 2013.[1] *Id.* at ¶ 18. Additionally, in January 2013, United Airlines announced that it would be using Panasonic's satellite-based service on 300 aircraft in its fleet. Abye Decl., Ex C.[2]

The FAC incorporates other facts highlighting how competitive and dynamic this business line is.[3] Gogo's competitors include not only Row 44, ViaSat, and Panasonic, but also 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

[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. FAC 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] Gogo requests that the Court take judicial notice of the fact that in a press release dated January 15, 2013 (Abye Decl., Ex. C), United Airlines publically announced it expects to install Panasonic Avionics Corporation's Ku-band satellite technology on 300 of its mainline aircraft by the end of 2013. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 814, 817 (C.D. Cal. 2004) ("the Court may take judicial notice of press releases").

[3] Plaintiffs incorporate documents in the FAC that provide these additional facts. The FAC 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. FAC ¶¶ 24, 27, 32. The Form S-1, and all subsequent versions of it that were publically available prior to the filing of the FAC, should be considered by this Court under the doctrine 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) (internal citations and quotations omitted).

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. *Id.* 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 FAC 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. *Id.* at 3. Thus, approximately 84% of North American aircraft are potential targets for installation of Internet connectivity service.

The facts incorporated in the FAC 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. *Id.* at 15. In fact, 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, Plaintiffs contend that passengers using Gogo's service paid supra-competitive prices because Gogo monopolized the market through exclusive dealing contracts that foreclosed rivals. FAC at ¶ 1. Plaintiffs allege 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 ¶¶ 40-77. Plaintiffs purport to represent putative classes of national and California-based users. *Id.* at ¶ 33. Plaintiffs identify the alleged relevant market to be "the United States market for inflight Internet access services on domestic commercial airline flights." *Id.* at ¶ 12.

ARGUMENT

I. The Sherman 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 for antitrust violations, Plaintiffs must at a minimum allege facts showing anticompetitive or predatory conduct. In the absence of anticompetitive conduct, Plaintiffs 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).

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

1. Exclusive Dealing Arrangements Are Presumptively Legal

As an initial and dispositive matter, the FAC fails to allege any facts showing that Gogo engaged in any predatory or anticompetitive conduct. Plaintiffs' 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 Plaintiffs have 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 Plaintiffs' 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").[4]

2. Exclusive Dealing Claims Require Facts Showing Substantial Market Foreclosure

An exclusive dealing arrangement potentially raises antitrust concerns only "if its 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. Plaintiffs Have Failed To Plead Substantial Market Foreclosure, And The FAC Concedes Foreclosure Did Not Occur

Plaintiffs have completely failed to plead any facts showing substantial market foreclosure. They allege repeatedly that certain Gogo contracts are purportedly exclusive (*see, e.g.*, FAC ¶¶ 43, 44, 53, 62) but do 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. Plaintiffs do not provide a single fact showing that Row 44,

[4] 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).

ViaSat, Panasonic, or any other rival has been foreclosed from the market by Gogo's contracts. Plaintiffs do not even try to describe the extent of foreclosure as a percentage of the market, which is crucial to the viability of their 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 FAC. *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 have Plaintiffs failed to plead adequate facts, the FAC affirmatively shows that substantial foreclosure did not occur. As detailed above, rivals such as Row 44, ViaSat, and Panasonic entered the market after Gogo and have won business from multiple airlines, including Southwest (and its acquisition AirTran), JetBlue, and United. FAC ¶¶ 17, 18; Abye Decl., Ex. B at 98; Abye Decl., Ex C. Row 44, ViaSat, and Panasonic won their contracts at precisely the time when Plaintiffs contend that Gogo had locked up the market against competitors with exclusive dealing contracts. The fact that Row 44, ViaSat, Panasonic, and other competitors have not complained about being foreclosed in the market also speaks volumes about the weakness of Plaintiffs' claims.

Moreover, as shown above (*see* Background), the key airlines working with Gogo were free to terminate the allegedly long-term exclusive contracts if 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 FAC Fails To Use A Proper Market For Foreclosure Effects

Even if Plaintiffs had adequately alleged substantial foreclosure, which is far from the case, they have 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, Plaintiffs have tried to stack the deck against Gogo by improperly focusing on a fraction of the alleged relevant market for the foreclosure claim. Plaintiffs repeatedly allege that "Gogo-equipped planes represent approximately 85% of the North American aircraft that provide Internet connectivity to its passengers." *See, e.g.*, FAC ¶¶ 11, 20. 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 Plaintiffs' 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 Plaintiffs' foreclosure claim, and that full-range market demonstrates how highly implausible Plaintiffs' foreclosure claims are.[5]

B. The FAC Fails To Allege Monopoly Power

Although further consideration of the FAC is unnecessary given the total failure to plead anticompetitive conduct, Plaintiffs' Section 2 monopolization claims suffer from an additional independent defect. The monopolization claims fail because the FAC does not properly 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") (internal citations and quotation marks omitted). 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, Plaintiffs 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

[5] Plaintiffs have also failed to allege plausible relevant product or geographic markets or provide facts adequate to support the relevant market it purports to identify.

facts to support a finding that [defendant] has the ability to control the prices" in alleged relevant market).

Plaintiffs' monopoly power claim fails for the same reasons as their exclusionary conduct claims -- Plaintiffs have failed to plead any facts showing that Gogo could exclude competitors or control prices. As detailed above, the FAC concedes the opposite. Gogo's rivals have entered the market and won contracts with airlines. The FAC also concedes that Gogo has not controlled prices. Plaintiffs allege that Row 44 offers its service at a substantially lower competing price (FAC at ¶ 17), and Gogo has warned potential investors of downward pressure on its prices due to competition (*see* Abye Decl., Ex. B at 19). This is hardly the picture of a monopolist ruling a market.

Moreover, as the Form S-1 incorporated in the complaint shows Gogo's share of the full-range market of North American aircraft was not more than 16% in 2010 (*see* Section I.A.4 above). 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 per cent would be enough; and certainly thirty-three per cent 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 FAC Fails To Allege Standing Or Antitrust Injury

Plaintiffs' FAC should also be dismissed because they fail to plead antitrust injury and standing to sue. Like all plaintiffs in a federal civil case, Plaintiffs 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, Plaintiffs are 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).

Plaintiffs have failed to allege antitrust injury and the right to bring an antitrust claim. To plead antitrust injury, Plaintiffs "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. Plaintiffs have not alleged antitrust injury because the FAC utterly fails to state any factual foundation for the allegation that Gogo's prices were actually supra-competitive. The FAC makes references to Row 44's price on Southwest but is silent about what the pricing trends and practices were in the market overall. No other competitors' prices are mentioned. A mere comparison to a rival's competing price fails to satisfy Plaintiffs' 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).

In addition, as detailed above, Plaintiffs have failed to allege any facts showing that Gogo has foreclosed a substantial portion of the alleged market, engaged in any predatory conduct, or 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. Plaintiffs have failed to allege any basis for antitrust injury.

III. Plaintiffs' Cartwright Act Claim Should Be Dismissed

"The Cartwright Act was patterned after Section 1 of the Sherman Act, and the pleading requirements under the two statutes are similar." *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1203-04 (N.D. Cal. 2008). Therefore, because Plaintiffs have failed to state a Sherman Act claim (*see* Sections I and II above), their Cartwright Act claim should be dismissed. *See e.g., 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)).

The Cartwright Act claim is also defective for the independent reason that the FAC only alleges unilateral conduct, which is not actionable under the Cartwright Act. *See e.g., Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986) (the Cartwright Act "does not address *unilateral* conduct"). Accordingly, the Court should also dismiss the Cartwright Act claim for failure to allege a combination. *See id.* (affirming dismissal of Cartwright Act claim, stating "[t]his claim is not cognizable under the Cartwright Act, for it fails to allege any combination"); *see also e.g.,Garon v. eBay, Inc.*, No. C 10-05737 JW, 2011 WL 6329089, at *6 (N.D. Cal. Nov. 30, 2011) ("Because Plaintiffs have not alleged that Defendant collaborated with another interest in restraint of trade, they have not alleged a violation of the Cartwright Act."); *Psystar*, 586 F. Supp. 2d at 1203-04 ("[Among other failures] the counterclaim alleges only unilateral anticompetitive conduct. The Cartwright Act claim, therefore, must be dismissed.")

IV. Plaintiffs' UCL Claim Should Be Dismissed

Plaintiffs' 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. FAC at ¶¶ 71-77. 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

Despite filing two complaints, Plaintiffs have failed to allege any facts stating a plausible case against Gogo for anticompetitive conduct, monopolization, or any other claim. Because Plaintiffs have already enjoyed ample opportunity to state a claim and because the facts in the FAC show that Plaintiffs cannot allege a plausible claim even if provided with leave to further 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.") (internal citations and quotation marks 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").

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