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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs

vs.

GOGO INC.,

Defendant.

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Judge: Hon. Edward M. Chen
Hearing Date: March 28, 2013
Hearing Time: 1:30 pm
Courtroom: 5

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Treatises and Law Review Articles:

There is no basis for dismissal here. Defendant Gogo Inc.'s ("Defendant" or "Gogo") motion to dismiss Plaintiffs' First Amended Complaint ("FAC") is without merit and should be rejected out of hand.

INTRODUCTION AND FACTUAL BACKGROUND

Since 2008, Gogo has been in the business of providing inflight internet access to passengers of commercial aircraft within the United States. *See* FAC, at ¶ 11. This is an antitrust class action in which three domestic airline passengers, James Stewart, Joel Milne, and Joseph Strazullo (collectively "Plaintiffs"), allege that Gogo thwarted competition in the relevant United States market for inflight internet services by entering into long-term exclusive dealing contracts with nine out of the ten domestic airline carriers. *Id*. at ¶ 1, 8-11. Through these exclusive contracts of long-term duration, Gogo was able to attain and maintain an approximately 90 percent market share. *Id*. at ¶¶ 20, 21. Assured that its dominant market position was secured and insulated from challenge by way of these long-term exclusive agreements of ten years' duration, Gogo exploited its market power by repeatedly raising prices for its inflight internet services, so much so that its service is currently priced at over four times the price of its only other competitor, an outfit known as Row 44. *Id*. at ¶¶ 8, 26.

Plaintiffs, all of whom were passengers on U.S. commercial aircraft purchased an inflight internet access session while on their respective flights, and unsurprisingly this service was offered by Gogo. Because Gogo has monopoly market power that as a result of its exclusive agreements was free from any significant challenge, Gogo was able to and did charge Plaintiffs a supra-competitive price for their internet inflight access sessions. Plaintiffs now bring suit to seek relief for the antitrust overcharges they sustained as a result of Gogo's antitrust violations.

Gogo's motion is significant for what it does not dispute. It does not dispute that, as Plaintiffs allege, Gogo has entered into long-term exclusive contracts with domestic airline carriers. Nor does Gogo deny that it is the inflight internet access supplier to 9 out of the 10 domestic airline carriers. Nor does Gogo dispute that out of the aircraft that domestic airlines designated to receive internet access service during the time period covered by the FAC (i.e.

December 2008 to the present)[1], "Gogo-equipped planes represented approximately 85% of North American aircraft that provide internet connectivity to their passengers." FAC, at ¶ 27 (quoting Gogo S-1 IPO filing).

Instead, Gogo's opposition is premised on two arguments, both of which are flawed. First, Gogo argues that Plaintiffs have failed to properly allege that Gogo's market power is sufficient to allege significant market foreclosure—an element Gogo claims is required for Plaintiffs to state a claim. *See* Gogo's Br. at 7-12. Second, Gogo argues that Plaintiffs fail to plead antitrust standing. *Id*. at 12-14. Neither argument has merit.

With respect to market foreclosure, Gogo does not and cannot deny that during the time period covered by the FAC, of all the domestic commercial aircraft that U.S. airlines had selected to be equipped with internet access, Gogo provided internet access service to 85 percent of these planes. *See* FAC, at ¶ 27. Indeed, Gogo touted this dominant market position to its prospective investors in its IPO filing. *Id*. And, a full 95% of Gogo-equipped planes were subject to exclusive dealing agreements entered into by Gogo and the carriers. *Id*. A plain reading of these two unassailable facts is that during the period covered by the FAC, Gogo's market share was over 80 percent—far in excess of what is required to show market foreclosure and to state an antitrust violation.[2]

To avoid this ineluctable conclusion, Gogo concocts an argument by which it contends that despite its admission that, "Gogo-equipped planes represented approximately 85% of North American aircraft that provide[d] internet connectivity to their passengers," that should not be the metric of interest because there were many other airplanes in the United States that had no internet access at all, and hence were not subject to Gogo's exclusive agreements. But Gogo's

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[1] Plaintiffs Complaint having first been filed in December 2012 is subject to a four year limitations period applicable to federal antitrust claims.

[2] Because the FAC alleges that of all internet-equipped planes in North America, 85% were equipped by Gogo, and that 95% of the Gogo-equipped planes were subject to Gogo exclusive contracts, the proper share of internet-equipped planes domestically subject to Gogo exclusive contracts is at least 81 percent (i.e., .95 x 85). The resultant market share of inflight internet sessions actually sold to domestic passengers is likely significantly higher because, as Plaintiffs expect discovery to confirm, passengers on the airlines serviced by Gogo purchased internet access far more frequently than passengers on Southwest Airlines, the only domestic carrier that has offered inflight internet service from a supplier other than Gogo.

claim is simply a *non sequitur*. If during the period covered by the FAC domestic airline carriers had, for reasons of their own business judgment, determined that only a certain number of their aircraft were to be equipped with inflight internet access service, the proper focus of inquiry to determine a provider's market share is how many of those planes that airlines had designated to be equipped with internet access service were serviced by the provider of interest, here Gogo. Airplanes that carriers had not allotted to receive internet access service were, by that very definition, simply *not* participants in the relevant market alleged. Neither Gogo nor any other rival provider serviced these aircraft because, by definition, they played no part in the market, as airline carriers had not designated these planes to receive internet service.

Gogo's contention that Plaintiffs fail to plead market foreclosure also relies on the repeated assertion that there are other competing providers of inflight internet access besides Gogo. In fact, only one other provider, Row 44, currently offers inflight internet service to a single domestic airline carrier (compared with Gogo's offering to 9 out of 10 U.S. carriers). That hardly undermines Plaintiffs' claims. To prevail, an antitrust plaintiff need not show total market foreclosure, but instead only that, as here, the defendant's actions have thwarted a significant portion of the market. Here, as industry commentators have widely recognized, "***Row 44's market share is paltry compared to Gogo—which has the business of every WiFi-lovin' airline in America outside of Southwest.***" Ex. 1 to Declaration of Roy A. Katriel (emphasis added). Row 44's presence is demonstrably of no competitive significance to constrain Gogo's market power and pricing, as is evidenced by the fact that Gogo has continued to increase its own pricing even in the face of Row 44's entry into the market with a product offering now priced at one fourth the price charged by Gogo. *See* FAC, at ¶¶ 8, 26.

At the end of the day, contrary to Gogo's distorted arguments, Plaintiffs have alleged that Gogo has entered into exclusive contracts that are of long-term duration and has a market share of at least 85-90 percent, which these exclusive contracts serve to secure and protect from competitive challenge. That is enough to allege market foreclosure, predatory conduct, and to state an antitrust claim.

Bordering on the frivolous, Gogo's second argument to which it devotes little more than a

single page is that Plaintiffs lack antitrust standing. *See* Gogo's Br. at 12. But the very injury that Plaintiffs complain of in the FAC—being subjected to supra-competitive prices as a result of Gogo's anticompetitive conduct—is the quintessential injury that the antitrust laws were designed to protect against and redress. Ultimately, Plaintiffs may succeed or fail in proving the merits of their claims, but the suggestion that they have failed to plead antitrust standing is plainly untenable. As consumers in the market for inflight internet access within U.S. domestic flights who claim they were overcharged as a result of Gogo's foreclosure of competition, Plaintiffs assuredly have met the requirements for antitrust standing.

Gogo's attack on Plaintiffs' Cartwright Act claim is largely derivative and duplicative of Gogo's challenge to Plaintiffs' federal claims, and fails for the same reasons. Gogo's separate argument that the Cartwright Act does not reach unilateral conduct is also beside the point because the conduct complained of is quite obviously not unilateral conduct, but rather concerted conduct; that is, Gogo entering into exclusive contracts with other parties (i.e., airline carriers). Unsurprisingly, California state and federal courts routinely have entertained and upheld Cartwright Act claims premised on exclusive dealing agreements. Because Plaintiffs have alleged both federal Sherman Act and state Cartwright Act violations, they have properly pled the requirements of an Unfair Competition Law claim ("UCL") under Section 17200 of the California Business and Professions Code.

For all the foregoing reasons, as is more fully detailed below, Gogo's motion should be denied in its entirety.

I. PLAINTIFFS PROPERLY STATE FEDERAL ANTITRUST CLAIMS, AND HAVE ALLEGED MARKET POWER AND FORECLOSURE.

A. Plaintiffs Have Properly Pled Facts Supporting Market Foreclosure And Defendant's Market Power.

Gogo's motion starts from the unremarkable proposition that exclusive dealing agreements are not *per se* unlawful under the antitrust laws, and hence are not presumed to be unlawful. *See* Gogo's Br. at 7-8. That much is true, but does not advance Gogo's cause. For while exclusive agreements, unlike say price-fixing agreements, are not outlawed *per se*, courts have not hesitated to uphold antitrust claims premised on exclusive agreements when, as here, the

plaintiff makes a proper showing of the defendant's market power or anticompetitive conduct furthered by these agreements. *See, e.g.*, *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1301-02 (9th Cir. 1982) (affirming judgment against antitrust defendant premised on exclusive contracts that foreclosed 24 percent of the market); *Pecover v. Electronic Arts Inc.*, 633 F Supp.2d 976 (N.D. Cal. 2009) (upholding Sherman Act claim premised on exclusive contract between NFL and Electronic Arts); *Tele Atlas N.V. v. NAVTEQ Corp.*, No. C 05-1673 RMW, 2008 WL 4809441, at *21 (N.D. Cal. Oct. 28, 2008) (upholding antitrust exclusive dealing case where exclusive contracts may have foreclosed 20-40 percent of the market).

Where, as here, the exclusive contracts are implemented by a party having sufficient market power and/or in a manner that significantly forecloses competition, exclusive dealing agreements run afoul of the antitrust laws. Here, there is no dispute that Gogo has implemented exclusive dealing agreements with airline carriers. The only pertinent inquiry, therefore, is whether these agreements sufficiently foreclosed competition in the relevant market. To gauge that question, courts generally look not only at the peculiarities of the specific market at issue (an inherently fact-laden inquiry), but also at the defendant's market power, which is typically assessed by reference to its market share. A high market share coupled with a showing of high barriers to entry generally suffices to make a showing of the defendant's market power. *See Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 366 (9th Cir. 1988); *see also Dooley v. Crab Boat Owners Ass'n*, No. C-02-676-MHP, 2004 WL 902361, at *10 (N.D. Cal. Apr. 26, 2004) ("Based on the evidence of defendants' market share and barriers to entry, a reasonable factfinder could determine that defendants have acquired monopoly power within the relevant market.").[3]

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

Prior to assessing the defendant's market share or power, it is necessary to define the relevant antitrust market. Here, the antitrust relevant market alleged in the FAC is the market for inflight internet services within domestic (i.e. U.S.) commercial flights. *See* FAC, at ¶ 12. Examining not only the allegations of the FAC, but Gogo's own statements in its SEC filings, it is evident that Plaintiffs have adequately stated Gogo's sufficient market share and power so as to have significantly foreclosed the market through the use of its long-term exclusive agreements.

As the term implies, "market share" is determined by dividing the total number of sales in the relevant market by the number of sales made by the defendant—a straightforward definition of the term that courts and antitrust regulators have steadfastly employed time and again. *See U.S. Anchor Mfg. Co. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993) ("Despite the seemingly broad array of factors employed by the Federal Trade Commission, the principal judicial device for measuring actual or potential market power remains *market share*, *typically measured in terms of a percentage of total market sales*."). As one court has plainly stated, *"[a] defendant's share of the total product market is calculated as its unit sales divided by the total unit sales of all the firms producing the same, or reasonably similar, products."* *Servicetrends Inc. v. Siemens Medical Sys., Inc.*, 870 F. Supp. 1042, 1053, n.5 (N.D. Ga. 1994) (emphasis added). Applying that widely accepted definition here to assess Gogo's market share during the period covered by the FAC, the proper inquiry is: out of the total number of inflight internet access sessions sold on domestic commercial aircraft, how many were sold by Gogo ?

The FAC quite clearly supplies facts from which a fact-finder could determine that Gogo's share of the relevant market was, in fact, significant. Indeed, it is not only the FAC that asserts as much, but Gogo's own IPO documents filed with the SEC, which assert that, "Gogo-equipped planes represented approximately 85% of North American aircraft that provide internet connectivity to their passengers." FAC, at ¶ 27 (quoting Gogo's S-1 filing). That fact assuredly supports Plaintiffs' allegation that Gogo possessed an 85-90 percent market share. FAC, at ¶¶ 20, 21, 28. Undeniably, such a high market share more than suffices to show market foreclosure and to render the use of exclusive dealing contracts actionable under the antitrust laws. Both the United States Court of Appeals for the Ninth Circuit and this Court have upheld antitrust claims

premised on exclusive dealing agreements where the defendant's market share was far below that alleged here. *See, e.g., Twin City Sportservice, Inc., Inc.*, 676 F.2d at 1301-02 (antitrust claim premised on exclusive contracts upheld where defendant's market share was 24%); *Tele Atlas N.V.*, 2008 WL 4809441, at *21 (in assessing exclusive dealing antitrust claim, "[l]evels of foreclosure between 20% and 40% may represent a "substantial share" of the market.").

Nor is there any dispute that Gogo's employ of long-term exclusive dealing contracts with airline carriers was a significant factor in allowing Gogo to safeguard this dominant market share from competitive loss to actual or would-be competitors. That much is made clear by Gogo boasting to prospective investors that its dominant market position is protected precisely by the presence of these long-term exclusivity deals:

> Approximately 95% of Gogo-equipped planes, . . ., are contracted under ten-year agreements. ***Our market leading position also benefits from the exclusive nature of a number of our contracts.***

FAC, at ¶ 27 (quoting Gogo S-1 IPO filing) (emphasis added)

Taken together, all these allegations (which are confirmed by Gogo's own SEC filings) suffice to plausibly plead that Gogo has an 85-90 percent share of the market for inflight internet access within the domestic U.S. commercial flights, and that Gogo has either attained or maintained that high market share by resort to long-term exclusive dealing agreements.

B. Gogo's Attempt To Dispute Its Market Power And Market Foreclosure Relies On An Erroneous Argument.

In a transparent but failed attempt to escape the natural conclusion of these allegations and of its own representations, Gogo now concocts a contrived argument to claim that its actual market share "was not more than 16%." Gogo's Br. at 12. Gogo's argument, however, does not withstand scrutiny. It relies on the proverbial sleight of hand to confuse the pertinent concept of relevant market that is to be used in assessing a defendant's market share or market power with the altogether separate issue of the prospect for the market base to expand in the future.

Gogo does not deny (because it has admitted as much in its SEC filings) that in the period covered by the FAC, Gogo provided inflight internet service to 9 out of the 10 domestic airlines. FAC, at ¶ 27 (*quoting* Gogo's S-1 filings). Nor does it deny that "Gogo-equipped planes

represented approximately 85% of North American aircraft that provide internet connectivity to their passengers." *Id*. To assess what Gogo's market share was during the post-2008 period covered by the FAC, it is precisely these factors that form the predicate to the market share inquiry. That is, out of the aircraft that airline carriers allotted or permitted to be provisioned with internet inflight service, Gogo serviced 85% of these. Unsurprisingly, therefore, if one was a domestic airline passenger in the post-2008 period who purchased inflight internet service, chances are fairly close to 9 out of 10 that one made that purchase from Gogo (because Gogo provided about 90 percent of such session sales). Viewed in this straightforward and largely undisputed light, it is quite clear that Gogo possessed a market share of approximately 85-90 percent or more of actual inflight internet sessions sold during the period of interest. Only passengers who flew on Southwest airlines would have been able to avoid dealing with Gogo for their inflight internet purchases on domestic flights.

Unable to contest these basic facts, Gogo now argues that these verifiable, objective facts do not matter because there were a large number of domestic airline planes that were *not* equipped with *any* inflight internet service equipment during this same time period. *See* Gogo's Br. at 5:8-9 ("In 2010, only 16% of commercial aircraft in North America . . . were equipped with inflight Internet service."). From this unremarkable proposition, Gogo argues that if all of these planes are accounted for in the mix, then (and only then) Gogo's market share cannot be said to have exceeded 16%, and its exclusive contracts cannot be said to have foreclosed any significant share of the market. *Id*. at 12:12. But Gogo's sleight of hand is unavailing. The unequipped planes that Gogo attempts to now throw into the mix in a failed attempt to reduce its market share are simply irrelevant to determine what Gogo's market share actually was during the period covered by the FAC. By definition, when airlines made the decision that these aircraft would not be equipped with *any* internet service, these airplanes were not participants in the relevant market. Gogo's market share quite obviously was not in any way diminished by the presence of these unequipped airplanes because, by the very concept of having been designated by their airlines carriers as unequipped for internet service, these airplanes were not supplied by *any* internet provider.

As the cases instruct (*see* page 6 *supra*), to determine market share, one divides the "*unit sales [of the defendant] by the total unit sales of all the firms producing the same, or reasonably similar, products."Servicetrends, Inc.*, 870 F. Supp. at 1053, n.5 (emphasis added). Sales that were not made by anybody simply play no part in the market share or market power calculus because, by their very definition, these were not sales that were lost to any competitor.[4]

Gogo cites with emphasis *Omega Environmental v. Gilbarco, Inc.,*127 F.3d 1157 (9th Cir. 1997), a case decided on summary judgment, for the proposition that in assessing the extent of foreclosure brought about by an antitrust defendant's conduct, "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." *Omega Environmental*, 127 F.3d at 1162 (quoted in Gogo's Br. at 10:16-18). Rather than aiding Gogo's cause, however, *Omega Environmental's* quoted passage confirms the flawed nature of Gogo's argument. Aircraft that airlines had decided not to equip with any internet access service quite obviously were not within the "full range of selling opportunities reasonably open" to any internet service provider and hence cannot be relied upon by Gogo to attempt to reduce its market power. What matters, in the words of *Omega Environmental*, is not such unattainable sales, but "the market share involved." *Id*. Here, that market share for Gogo during the period of interest was 85-90 percent.

Equally unconvincing is Gogo's statement that despite its long-term exclusive dealing contracts with a majority of domestic airlines, Plaintiffs are unable to show market foreclosure because other competitors were able to enter the market. *See* Gogo's Br. at 3:24. Once again

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[4] *Accord Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). In *Kodak*, the United States Supreme Court upheld the plaintiffs' claim that Kodak's refusal to sell replacement Kodak parts to independent service operators, thereby forcing Kodak photocopier owners to purchase their replacement parts exclusively from Kodak, stated an antitrust claim. The Court rejected Kodak's contention that it lacked market power in repair parts (the alleged tied market) because there was a whole potential universe of photocopy users who would turn to machines other than Kodak if Kodak attempted to raise its part prices above the competitive level. The existence of this potential universe of non-Kodak users, however, was insufficient to make Kodak's defense because the tying market was limited to only Kodak photocopiers and, hence, only the actions of users of Kodak photocopying machine were pertinent to the ultimate analysis. So too here, it is the action of only those aircraft that were designated to be internet enable during the period of interest that is pertinent to the analysis.

Gogo's argument is fatally flawed—both factually and as a legal matter. As a factual matter, though Gogo claims that there were a number of competitors who entered the domestic inflight internet service market after Gogo employed its exclusive contracts, that is incorrect. Only Row 44 has done so—the other competing offering (ViaSat) referenced in Gogo's motion has not even launched yet, and no certain date for its availability has been set. *See* FAC, ¶ 18. Besides that factual inaccuracy, moreover, Gogo's argument is legally flawed. That one (or more) competitor was able to enter the market despite Gogo's long-term exclusive contracts with a majority of airline carriers does nothing to defeat Plaintiffs' antitrust claims. To prevail, an antitrust plaintiff assuredly is not required to show that all competitors were totally foreclosed from the market as a result of the defendant's conduct. Instead, the plaintiff need only show that the defendant's allegedly anticompetitive conduct foreclosed only a substantial portion of the market. As one federal court of appeal has explained in upholding an exclusive dealing antitrust case:

> Under that Section of the Sherman Act, it is not necessary that all competition be removed from the market. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.

United States v. Denstply, Inc., 399 F.3d 181, 191 (3d Cir. 1995).

Or, as an authoritative treatise on antitrust law makes clear, exclusive dealing agreements may thwart competition and be actionable despite the presence of other competitors:

> A set of strategically planned exclusive dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its products or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

Herbert Hovenkamp, *Antitrust Law* ¶ 1802c, at 64 (2d ed.2002).

This is precisely the fact-pattern Plaintiffs allege (and largely confirmed by Gogo's filings). Through its long-term exclusive contracts with 9 out of 10 domestic airlines, Gogo locked up those planes designated by these carriers to receive inflight internet service. Thus, during the period of interest, though Row 44 was able to enter the market with an arguably superior quality product that was offered at a significantly reduced price compared to Gogo's service, Row 44 was relegated to only being able to supply its service to passengers of one

airline—Southwest. Not surprisingly, therefore, commentators have noted that, "***Row 44's market share is paltry compared to Gogo—which has the business of every WiFi-lovin' airline in America outside of Southwest.***" Ex. 1 to Katriel Decl. (emphasis added). And it was precisely because Row 44's market share during the period covered by the FAC was able to be kept in check by Gogo's exclusive contracts that Gogo was able to increase its prices repeatedly without regard to the dramatically lower price offered by Row 44. That is, knowing that it had effectively secured for itself through its long-term exclusive contracts the overwhelming majority of aircraft designated to receive inflight internet service during the period of interest, Gogo could and did raise its pricing without having to fear that it would lose that aircraft's business to Row 44.

Gogo's attempt to seek dismissal of the antitrust claims by claiming a reduced market share, therefore, is without merit. Certainly, it does not provide the basis for resolving the market foreclosure inquiry on a motion to dismiss.

C. At Worst, Gogo's "Market Foreclosure" Argument Raises A Fact-Intensive Inquiry That Cannot Be Resolved On The Pleadings.

As shown, Gogo's "market share" argument is demonstrably flawed. Therefore, Gogo's assertion that Plaintiffs have failed to plead sufficient market share or market power to allege the requisite market foreclosure is unavailing. That suffices to deny Gogo's motion.

Aside from that, however, Gogo's market foreclosure argument is particularly unsuited to being resolved on a motion to dismiss. This is because, as this Court has recognized, "[s]ubstantial foreclosure depends on many factors—the parties' market strength, the degree of exclusivity, business justifications for the agreement, duration of the agreement, barriers to entry in the market, etc." *Church & Dwight Co., Inc. v. Mayer Laboratories, Inc.*, No. 10-cv-4429-EMC, 2011 WL 1225912, at *6 (N.D. Cal. Apr. 1, 2011) (Chen, J.) (*quoting In re Microsoft Corp. Antitrust Litig.*, 699 F. Supp.2d 730, 755 (D. Md. 2010)). Assessment of all these identified factors is a fact-laden exercise that goes well beyond the pleadings. Perhaps for this reason, Gogo's counsel volunteered during the parties Case Management Conference that, "it's going to be a pretty, I think, fact-intensive discussion if we get past the motion to dismiss stage." *See* Ex. 2 to Katriel Decl. [Transcript of CMC Proceedings statement of Gogo's Counsel, James Donato], at 3:11-13. Not surprisingly, therefore, the principal cases cited in Gogo's brief involve decisions

that were rendered not at the pleadings stage, but on summary judgment or later. *See Omega Environmental Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997) (cited in Gogo's Br. at 7, 9, 10) (foreclosure effect of exclusive agreements decided on summary judgment on basis of evidence presented); *Twin City Sportservice*, 676 F.2d at 1296-97 (cited in Gogo's Br. at 12) (upholding judgment against antitrust defendant premised on exclusive dealing's foreclosure of market decided only after full trial).

D. Gogo's Resort To An Extrinsic Hearsay Press Release Does Not Advance Its Argument.

While, as shown, Gogo's discussion of unequipped aircraft has no bearing on what Gogo's actual market share and power were during the period covered by the FAC, Gogo evidently argues that the base of unequipped aircraft poses a measure of potential market expansion for rival providers, such that Gogo's heretofore high market share will be reduced in the future. To support this speculative forecast, Gogo relies on a hearsay press release by United Airlines extrinsic to the FAC that purports to show that United will be giving its inflight internet business in the future to another provider. *See* Ex. C to Abye Decl. Aside from the hearsay nature of this press release that is neither subject to judicial notice nor suitable for consideration on a motion to dismiss, there are several other flaws in Gogo's reliance on this document and argument.[5]

For starters, the United press release purports to address only actions that may be undertaken by United some time (likely years) in the future. It has no bearing on the time period covered by the FAC, i.e., the time since December 2008 until the filing of the complaint (and, indeed, to date). Further, Gogo handpicked a press release of only United Airlines to the exclusion of all other carriers, but United was one of only two carriers that were not subject to Gogo's exclusive contracts because it had signed up with Gogo on a limited "trial" basis only. As Gogo's IPO filing explained, "[w]e provide Gogo Connectivity to passengers on Delta Air Lines,

[5] While the Court may take judicial notice that this public press release was issued, the accuracy of the facts asserted therein are not ones that are "not subject to dispute" and hence are not subject to judicial notice or consideration at this motion to dismiss stage. *See Witriol v. LexisNexis Group*, No. C-05-2392-MJJ, 2006 WL 4725713, at *3 (N.D. Cal. Feb. 10, 2006) (unless incorporated in complaint, accuracy of press release is not subject to judicial notice or of

American Airlines, Virgin America, Alaska Airlines, US Airways, Frontier Airlines and Air Tran Airways pursuant to long-term agreements with these airlines. We also provide Gogo Connectivity to passengers *on a small number of aircraft operated by United Airlines and Air Canada pursuant to trial agreements*." Ex. A to Abye Decl., at p. 1 [Gogo's Form S-1 filed Dec. 22, 2011) (emphasis added). United's decision whether to continue to deal with Gogo, therefore, says nothing about the effect of Gogo's exclusive contracts because United was not subject to these exclusive agreements. Nor was United a significant contributor to Gogo's market share during the period covered by the FAC because by Gogo's own admission, United's decision to equip very few of its planes with internet access service affected only "a small number of aircraft . . . pursuant to trial agreements." So even if the aircraft that United had agreed to equip with internet access during the relevant time period could have had their Internet access service switched to another supplier, this small number of aircraft United had allotted for internet service would not materially impact Gogo's market share.

Beyond all of that, the hearsay United press release does not stand for the proposition for which Gogo attempts to cite it. Here, the relevant market being alleged is the market for inflight internet service on *domestic* airline travel. The United press release deals primarily with aircraft serving international travel, noting that "[t]he aircraft, a Boeing 747 outfitted with Panasonic Avionics Corporation's Ku-satellite band technology, serves transatlantic and Pacific routes." Ex. C. to Abye Decl. at 1. United does go on to state that it has also equipped "*two* Airbus A319 serving domestic routes," (*id*., emphasis added), and that "it expects to complete installation of satellite-based WiFi on 300 mainline aircraft by the end of this year." *Id*. The press release provides no information on how many, if any, of the additional "mainline" aircraft to be equipped with this technology are to be used on domestic, as opposed to international, routes. International flights, however, fall outside the market definition and pose no competitive check on the offerings or pricing of internet services offered on wholly domestic flights.[6]

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consideration on motion to dismiss).

[6] There is an ample factual basis to define the geographic market to encompass U.S. flights as opposed to all flights worldwide. The technology that may and has been employed by Gogo to provide inflight internet service domestically would not work (and hence could not compete) to

Moreover, Gogo's attempt to gain mileage out of United's hearsay document is short-lived in light of Gogo's own press releases from the same time period. Merely a week after the United's press release was issued (which purported to announce future plans involving 300 aircraft), Gogo issued its own press release in which it boasted that, far from shrinking, Gogo's offerings were expanding to more domestic aircraft—far more than the number of aircraft alluded to in United's press release. As Gogo's January 22, 2013 press release detailed:

> Gogo, a global leader of in-flight connectivity and a pioneer in wireless in-flight digital entertainment solutions, announced today that, to date, it has been selected to outfit *more than 400 aircraft* with its Ku-band satellite connectivity services across several major airlines operating in the U.S. and internationally.
>
> In addition to reaching a milestone with its satellite-based connectivity services, Gogo has hit additional milestones with its various connectivity solutions. Today, Gogo has its Air to Ground (ATG) solution installed on more *than 1,700 aircraft and its next generation ATG technology – ATG-4 – installed on more than 100 aircraft, bringing its total number of installed aircraft to more than 1,800 across nine major airlines.*
>
> 'Gogo continues to play a leading role in helping passengers connect at 30,000 feet in the U.S. and, soon, around the world,' said Gogo's president and CEO Michael Small. 'In addition to our roll-out of in-flight Internet, we have been able to continue to deploy our wireless in-flight entertainment solution, Gogo Vision.'
>
> Gogo Vision allows passengers to watch a movie on their own Wi-Fi enabled tablet or laptop. Today, the service is installed on more than 300 American, Delta and US Airways aircraft. *Gogo expects to have more than 1,500 aircraft installed with Gogo Vision by the end of 2013*.

Ex. 3 to Katriel Decl. [Gogo Jan. 22, 2013 Press Release], at 1.

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provide service on overwater international flights. (FAC, at ¶ 16). Similarly, provision of internet access on international flights would be subject to regulations and constraints of foreign regulatary authorities that would be different from and inapplicable to wholly domestic inflight internet offerings. See Ex. B to Abye Decl. at p. 21 (citing varying, unfamiliar, and unclear regulatory hurdles for offering inflight internet service on international travel as hurdle). Moreover, the effective area of competition for domestic U.S. passengers is the United States—it is of little comfort to U.S. consumers flying between San Francisco and New York that rival inflight internet access may be available on a foreign trip between say, Washington and Rome. *See TYR Sport, Inc. v. Warnaco Swimwear Inc.*, 709 F. Supp.2d 802, 816 (C.D. Cal. 2010) ("The relevant geographic . . . can be demonstrated by the existence of certain barriers to entry, or insulation from a larger geographic market, such that supply and demand are inelastic with the larger market. The boundaries of a market can also be shown by such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.") (internal citations and quotations omitted).

Thus, even if United's extrinsic and hearsay press release could be credited at this motion to dismiss stage (and it cannot), and even if it was limited solely to domestic aircraft (and it was not), and even if it applied to the actual period of interest covered by the FAC (and it does not), it still would not make the point that Gogo claims. As Gogo's own press release makes clear, any United domestic aircraft that may be outside the reach of Gogo's exclusive contracts in the future and that may be equipped by a rival provider, are more than offset by new aircraft to be internet-equipped by Gogo and operated by carriers with which Gogo does have exclusive contracts. The extrinsic and hearsay United press release, therefore, hardly affords Gogo a basis to dismiss the FAC.

E. Plaintiffs' Allegations Plausibly Support A Showing Of Gogo's Exercise Of Market Power.

Plaintiffs' allegation of Gogo's market power and foreclosure is not only sufficiently pled to readily defeat any motion to dismiss, it is also plausibly supported by the actual facts pled in the FAC—facts that are undisputed. In this regard, Plaintiffs allege that within a relatively small span of time since it began offering its inflight internet service, Gogo has raised its prices repeatedly. *See* FAC, at ¶ 26. So what started out as a service for which Gogo charged $ 7.95 soon increased to $ 9.95, then to $12.95, before seeing additional price raises to $17.95, and eventually to the $21.95 per session paid by Plaintiff James Stewart. *Id*. at ¶¶ 8, 26. All this was occurring at a time when the only other provider of domestic inflight internet service, Row 44, which was relegated by Gogo's exclusive contracts to dealing only with Southwest Airlines, priced its superior offering at $5.00 (as it continues to do). *Id*. at ¶ 17. There is no indication that Gogo's price increases resulted in any loss of customers during the 5-year period covered by the FAC that would cause Gogo to rescind the price increases during this time (instead, Gogo continued to increase its price increases even more).

As the Ninth Circuit and leading antitrust scholars have explained, "[m]arket power is the seller's ability to raise and sustain a price increase without losing so many sales that it must rescind the increase." *United States v. LSL Biotechnologies*, 379 F.3d 672, 696-97 (9th Cir. 2004) (*citing* William M. Landes & Richard A. Posner, "Market Power in Antitrust Cases," 94 Harv. L.

Rev. 937, 939 (1981)). These allegations of Gogo's repeated price increases without sustaining any appreciable loss of customers during the period of interest, though perhaps not dispositive in and of themselves, makes out a plausible factual allegation supporting Plaintiffs' pleading of Gogo's market power. It may be that upon reaching the merits of the case, Gogo may be able to defend its repeated price increases by proffering benign explanations, but the pertinent point for present purposes is that these price increases alleged in the FAC provide a factual underpinning and support for Plaintiffs' assertion of Gogo's market power.[7]

For all of the foregoing reasons, Gogo's argument that Plaintiffs failed to properly allege the requisite market foreclosure should be rejected.

II. PLAINTIFFS READILY SATISFY THE ELEMENTS OF ANTITRUST STANDING.

Gogo's second basis for seeking dismissal of Plaintiffs' Sherman Act counts has even less merit. (Perhaps recognizing as much, Gogo devotes a mere page and a half to it). In conclusory fashion, Gogo maintains that Plaintiffs fail to satisfy antitrust standing. *See* Gogo's Br. at 12. This argument is readily disposed of.

Plaintiffs properly allege that they were passengers on U.S. domestic commercial flights and purchased inflight internet services from Gogo on some of these flights. They also detail that, as a result of Gogo's long-term, exclusive dealing agreements, coupled with Gogo's market power, Gogo overcharged them for their purchases. Their allegations detail the specific prices they each paid, describe the repeated price increases imposed by Gogo, and contrast that to the significantly lower priced offering provided by the lone competitor, Row 44.

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[7] Gogo ineffectively cites *Somers v. Apple Inc.*, C-07-06507 JW, 2011 WL 2690465, at *5-*6 (N.D. Cal. Jun. 27, 2011) (cited in Gogo's Br. at 13) for the purported proposition that merely comparing the defendant's pricing to that of competitors is insufficient to allege supra-competitive pricing. Unlike Plaintiffs' allegations of Gogo's continuous price increases, however, in *Somers*, that "Plaintiff d[id] not allege that Defendant's prices varied during the relevant period in any way." 2011 WL 2690465, at *5. Without an allegation of any price increase, the *Somers'* court merely found unremarkably that there was no factual allegation showing that defendant's exercise of market power. But these Plaintiffs have made the precise allegation found missing in *Somers*, thereby rendering that decision of no import to this case.

Under any construct, these allegations readily satisfy any antitrust standing analysis. At least ever since the United States Supreme Court decision in *Reiter v. Sonotone Corp*., 442 U.S. 330 (1979), it has been the law of the land that the best suited plaintiff to maintain an antitrust suit is a consumer who purchases a product in the relevant market, and alleges that he was subjected to an anticompetitive overcharge as a result of the defendant's conduct. *Id*. at 332 ("Here, where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her 'property' under § 4."). This is exactly what Plaintiff has alleged. Since *Reiter*, virtually every court faced with the issue (including this one) has concluded that direct purchaser plaintiffs making such allegations of an overcharge readily meet the antitrust standing requirements. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F.Supp.2d 1109, 1118 (N.D. Cal. 2008) ("Here, the complaint alleges that the direct purchaser plaintiffs purchased TFT–LCD products directly from cartel members at supra-competitive prices as the result of a conspiracy to fix prices. Defendants do not cite any case holding that a plaintiff who purchases directly from an alleged cartel does not have standing.").

Against this longstanding body of law, Gogo cites merely two cases to support its argument. For the reasons, already detailed at footnote 7 *supra*, *Somers* is inapplicable here. Specifically, in *Somers*, which unlike this case was an *indirect purchaser* action, the only factual allegation supporting the plaintiffs' claims of supra-competitive pricing were comparisons of the defendant's prices with that of one competitor. But in *Somers*, that "Plaintiff d[id] not allege that Defendant's prices varied during the relevant period in any way." 2011 WL 2690465, at *5. Without an allegation of any price increase, the *Somers'* court merely found unremarkably that there was no factual allegation showing that defendant's exercise of market power. But these Plaintiffs have made the precise allegation found missing in *Somers*; namely that Gogo *did* implement repeated price increases over an extended period of time, thereby rendering that decision of no import to this case. Gogo also cites *Midwest Auto Auction v. McNeal*, No. 11-14562, 2012 WL 3478647, at *5-*6 (E.D. Mich. Aug. 14, 2012) (cited in Gogo's Br. at 13:26-28), but that case has even less relevance, as it dealt not with an allegedly overcharged customer

complaining of antitrust overcharges, but with a dejected bidder suing a competitor. It clearly has no bearing here.

Lastly, without any citation to any authority, Gogo argues that Plaintiffs' FAC should be dismissed for lack of antitrust standing because Gogo alleges that it has sustained losses, as opposed to profits since 2008. This fanciful argument is legally irrelevant. The United States Supreme Court has long held that even those actors that never turn a profit may be held liable under the antitrust laws. *See American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) ("it is beyond debate that nonprofit organizations can be held liable under the antitrust laws.").

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

III. PLAINTIFFS PROPERLY PLED STATE LAW CLAIMS.

A. The Cartwright Act Claim Is Properly Pled.

Gogo relies on the same flawed arguments it raised as to Plaintiffs' federal antitrust claims to seek dismissal of Plaintiffs California Cartwright Act count. *See* Gogo's Br. at 14:7-14. For the same reasons that these arguments fail to secure dismissal of the federal Sherman Act claims, they also fail and should be rejected with respect to Plaintiffs' Cartwright Act count.

Separately, Gogo also argues that the Cartwright Act claim should be dismissed for the independent reason that the Cartwright Act does not reach "unilateral conduct." *Id*. at 14:15-25. This argument simply misses the mark. All of the conduct alleged against Gogo is concerted conduct; namely, implementation of bilateral exclusive contracts with airline carriers. This is not unilateral conduct, and plainly is within the reach of the Cartwright Act. Unsurprisingly, therefore, California state and federal courts have routinely upheld Cartwright Act claims premised on exclusive agreements, and have done so in cases where the actual market foreclosure resulting from the exclusive agreement was far less than that alleged here. *See, e.g., Fisherman's Wharf Bay Cruise Corp. v. Superior Court*, 114 Cal. App.4th 309, 335-339 (2003) (upholding Carwright Act claim premised on exclusive dealing that foreclosed 20 percent of market); *Redwood Theatres, Inc. v. Festive Enterprises, Inc.*, 200 Cal. App.3d 687, 713 (1988) ("We conclude that the alleged [exclusive] agreements with Paramount Pictures and Warner Bros., if

proved, would present a triable issue of an unreasonable restraint of trade under the Cartwright Act."); *Pecover v. Electronic Arts Inc.*, 633 F. Supp.2d 976, 983 (N.D. Cal. 2009) ("Accordingly, the exclusive licenses themselves, described adequately in the complaint, constitute the conduct giving rise to the Cartwright Act claim."). The two cases cited by Gogo did not involve any multi-party agreements, much less exclusive contracts, and thus may be disposed of summarily. *See Apple Inc. v. Psystar Corp.*, 586 F. Supp.2d 1190, 1203 (N.D. Cal. 2008) (cited in Gogo's Br. at 14:23-25 (Cartwright failed because unlike this case it "fails to allege any concerted action or inter-firm agreement."); *Garon .v eBay, Inc.*, No. C 10-05737 JW, 2011WL 6329089 (N.D. Cal. Nov. 30, 2011) (cited in Gogo's Br. at 14:21-22) (no agreement of any kind alleged).

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

B. There Is No Basis To Dismiss Plaintiffs' UCL Claim.

Gogo raises no separate or independent arguments in support of its motion to dismiss Plaintiffs' UCL claim. Rather, it argues that because Gogo maintains that Plaintiffs federal and state antitrust claims fail, the UCL claim should be dismissed "for the same reasons." Gogo's Br. at 15:2. As already shown, however, Plaintiffs have properly stated both federal and state antitrust claims, and hence also state an actionable UCL claim. *See Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, No. CV 09-0560, 2011 WL 2678879, at *15 (E.D. Cal. Jul. 7, 2011) (UCL claim upheld to the extent it was premised on Sherman Act claim that was upheld).

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

CONCLUSION

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

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