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## Airline Wi-Fi Provider Gogo Again Seeks To Nix Investor Suit

By **Rachel O'Brien**

Law360 (September 22, 2020, 4:40 PM EDT) -- Airline internet provider Gogo Inc. has urged an Illinois federal judge to toss a proposed shareholder class action for the second time, saying the investors haven't successfully pled securities fraud in claims that the company's executives hid problems with its Wi-Fi system.

In seeking another dismissal from U.S. District Court Judge Jorge L. Alonso, who tossed the suit without prejudice in October 2019, Gogo argued Monday that the third amended complaint again fails to show that executives misled investors about problems with Gogo's new 2Ku satellite-based in-flight Wi-Fi system as a result of de-icing fluid entering the system on some planes.

"In the third amended complaint, plaintiff tries for a fourth time to plead a securities fraud claim against Gogo and the individual defendants, but once again comes up short," the company said in its motion to dismiss.

The suit, which was first filed June 27, 2018, originally listed several plaintiffs, but only Daniel Rogers remains.

Rogers claimed executives covered up the defect, and when the truth was disclosed on May 4, 2018, Gogo's stock price dropped from \$9.59 on May 3 to \$7.86 on May 7, harming Gogo shareholders. But Gogo said this doesn't constitute fraud.

"At worst, as pleaded, defendants' failure to disclose the de-icing problem sooner was a mistake in judging the significance of the problem — not fraud," the company said.

Gogo began installing the 2Ku system on aircraft in 2016, the company said. It began noticing problems in the winter of that year and knew by February 2017 that the leaking de-icing fluid was the culprit, according to the complaint. By October 2017, Gogo developed two potential fixes.

In its fourth quarter 2017 earnings call on Feb. 22, 2018, Gogo said it was experiencing reliability problems with 2Ku, according to the motion. The company also said it disclosed in its Form 10-K filed with the U.S. Securities and Exchange Commission for the year ending December 31, 2017, that it "may be unsuccessful or delayed in widely deploying and operating our 2Ku technology."

Rogers said Gogo executives hid the defect and should have disclosed the issue earlier, but when dismissing the case in October 2019, Judge Alonso said **the complaint was too vague** with "so little factual detail about what defendants knew and when."

In granting leave to amend, the judge said the plaintiff must plead "when defendants knew or should have known of the magnitude of the de-icing problem" and "when the ... problem manifested itself as such a severe problem as to make defendants' statements to investors misleading."

Gogo argued Monday that "the third amended complaint does not come close to meeting these tests."

The latest complaint adds statements from five unnamed former Gogo employees who said "outages

first showed up in a few planes in winter 2016-17," but they don't specify "when, if ever, the problem became something more than just the normal de-bugging of new equipment."

Rogers said Gogo committed fraud to avoid jeopardizing its business plan, but Gogo said "that too is insufficient, because every company has an incentive to avoid jeopardizing its business plan."

Then-Gogo CEO Michael J. Small bought 100,000 shares of Gogo stock in November 2017 after senior management allegedly knew about the problem, evidence that there was no fraud, the motion argued.

"The CEO's investment in Gogo put his own money where the corporate mouth was and is thoroughly inconsistent with fraudulent intent," the motion said. "Because fraudulent intent is an essential element of any claim for securities fraud, that stock purchase is by itself enough to warrant dismissal of the complaint."

Counsel for the parties didn't immediately respond to requests for comment Tuesday.

Rogers is represented by Peter S. Lubin of Lubin Austermeuhle, Nicholas I. Porritt and Adam M. Apton of Levi & Korsinsky, Robert V. Prongay and Casey E. Sadler of Glancy Prongay and Murray LLP, James W. Johnson, David J. Schwartz, Thomas W. Watson and Serena P. Hallowell of Labaton Sucharow LLP.

The Gogo defendants are represented by Jonathan S. Quinn and Andrew G. May of Neal Gerber & Eisenberg LLP, and Jerome S. Fortinsky and Brian H. Polovoy of Shearman & Sterling LLP.

The case is Ashley Pierrelouis v. Gogo Inc. et al., case number 1:18-cv-04473, in the U.S. District Court for the Northern District of Illinois.

--Editing by Amy Rowe.

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