No. 25-

IN THE

Supreme Court of the United States

RICHARD GIBSON AND ROBERTO MANZO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CENDYN GROUP, LLC, THE RAINMAKER GROUP UNLIMITED, INC., CAESARS ENTERTAINMENT INC., TREASURE ISLAND, LLC, WYNN RESORTS HOLDINGS, LLC, BLACKSTONE, INC., BLACKSTONE REAL ESTATE PARTNERS VII L.P., JC HOSPITALITY, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1. This Court has long held that "[e]very agreement concerning trade . . . restrains" to some degree, and that the operative question is therefore whether a restraint is unreasonable. *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Nat'l Soc. of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

Petitioners alleged that competing casino-hotels on the Las Vegas Strip each entered licensing agreements with a common vendor for algorithmic pricing software that generates room-price "recommendations," automatically uploads those prices into hotels' systems, and restricts deviations through "override permissions." App.5a–6a. Petitioners alleged that these contracts unreasonably restrained trade by replacing the hotels' independent pricing decisions with a shared algorithmic default—resulting in supracompetitive prices. App.4a–5a.

The courts below refused to apply the rule of reason, holding that the licensing agreements "do not restrain trade in the relevant market" because the software does not expressly require hotels to implement its pricing recommendations. App.16a, 54a–55a.

The question presented is:

Whether vertical licensing agreements between a common algorithmic pricing vendor and competing firms are categorically exempt from Section 1's rule-of-reason inquiry because the agreements do not expressly compel adherence to the software's pricing recommendations.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings below: (1) *Gibson v. Cendyn Group, LLC*, No. 24-3576, United States Court of Appeals for the Ninth Circuit, with judgment entered on August 15, 2025[1]; and (2) *Gibson v. Cendyn Group, LLC*, No. 2:23-cv-00140-MMD-DJA, United States District Court for the District of Nevada, with final judgment entered on May 8, 2024. There are no other proceedings in state or federal courts, trial or appellate, or in this Court, directly related to this case within the meaning of Rule 14.1(b)(iii).

1. The Ninth Circuit subsequently issued a corrected opinion on September 22, 2025.

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The Ninth Circuit's opinion is reported at 148 F.4th 1069. App.1a. The district court's order dismissing Plaintiffs' claims is unreported. App.31a.

JURISDICTION

The Ninth Circuit entered judgment on August 15, 2025. *Gibson v. Cendyn Grp., LLC*, No. 24-3576 (9th Cir. Aug. 15, 2025), ECF No. 77. The Ninth Circuit denied Plaintiffs' petition for rehearing on December 11, 2025. App.58a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1 of the Sherman Act (15 U.S.C. § 1) provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

INTRODUCTION

The Ninth Circuit held that vertical licensing agreements between a common algorithmic pricing vendor and competing hotels categorically fall outside Section 1—even where the software automatically sets room prices across rivals in a concentrated market—because the agreements do not expressly compel adherence to those prices.

That holding cannot be reconciled with this Court's framework. Section 1 liability does not turn on a simplistic threshold inquiry into whether an agreement "restrains" trade. The reason is straightforward: "[e]very agreement concerning trade . . . restrains" to some degree. *Bd. of Trade*, 246 U.S. at 238. That starting point keeps Section 1 workable: it prevents parties from drafting their way out of scrutiny by preserving nominal discretion. If "restraint" were treated as a gatekeeping category limited to agreements that compel outcomes, Section 1 would become easy to evade and increasingly ill-suited to modern restraints that operate through rules, defaults, and permissioned deviations.

Section 1 avoids that trap by drawing the line somewhere else. Because contracts restrain trade "of their very essence," *Bd. of Trade*, 246 U.S. at 238, Section 1 would, "read literally . . . outlaw the entire body of private contract law." *Nat'l Soc. of Pro. Eng'rs*, 435 U.S. at 688. Instead, liability under Section 1 ordinarily turns on whether a commercial agreement is "adjudged an *unreasonable* restraint" under the rule of reason (or, in limited settings, is determined to be per se unlawful). *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (emphasis in original); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents* , 468 U.S. 85, 98 (1984); *Ohio v. Am. Express Co.*, 585 U.S. 529, 540–41 (2018). That framework is effects-oriented: its "goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" *Am. Ex.*, 585 U.S. at 541 (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)).

The decision below inverts that structure. Petitioners alleged that competing hotels on the Las Vegas Strip entered separate licensing contracts with a common vendor—Cendyn (previously "Rainmaker")—to adopt Cendyn's so-called "revenue-management" software. This software uses an algorithm to generate hotel-room price recommendations; incorporates competitors' prices as inputs; integrates directly with hotels' property-management systems; and can automatically upload its recommended prices in "autopilot" mode, with deviations controlled through "override permissions." App.5a–6a.

Petitioners challenged these licensing contracts, alleging that, by adopting the same vendor's algorithmic pricing system, otherwise competing casino-hotels stopped setting prices independently and instead followed a shared default—thus resulting in supracompetitive room prices on the Strip.

But neither court below reached the rule of reason; instead, they rejected Petitioners' claims at the threshold. The district court held that because Petitioners did "not allege that Hotel Defendants are required to accept" the algorithm's recommended prices and alleged that "the recommendations are often rejected," "it accordingly cannot be that the vertical agreements between Cendyn and Hotel Defendants . . . restrain trade." App.55a. The Ninth Circuit affirmed on the same premise, holding that, because the at-issue license agreements were "for the provision of . . . recommendations," they were "not a *restraint* of a hotel's ability to price its hotel-room rentals" and thus "do not restrain trade in the relevant market." App.23a. The panel reinforced that conclusion by holding that the contracts were not "vertical" agreements at all—

reasoning that, because Cendyn does not supply "raw material, capital, or labor" used in hotel-room production, the licensing agreements were merely "ordinary sales contracts" that "do[] not restrain trade," making dismissal proper "without first applying the rule of reason." App.14a–16a, 26a.

That rule cannot be reconciled with Section 1 or this Court's precedent. Section 1 does not label a contractual agreement a "restraint" only if it compels compliance. It assumes that all contracts restrain trade to some degree, then asks whether a challenged restraint is unreasonable in context. As the United States warned in its amicus brief in this case—across administrations—"[c]ompetitors' joint use of pricing algorithms can have anticompetitive effects even where the algorithms' prices are not binding," and treating the vertical licensing contracts for nonbinding algorithmic pricing as categorically outside Section 1 "could have significant consequences in today's economy." Br. for the United States as Amicus Curiae in Supp. of Pls.-Appellants at 32, *Gibson v. Cendyn Group, LLC*, No. 24-3576 (9th Cir. Oct. 24, 2024), ECF No. 28.

The consequences are already materializing. The panel's threshold reasoning—that a contract is not a "restraint" unless it compels an outcome—has been invoked beyond the algorithmic pricing context as a portable screen against Section 1 scrutiny. In *In re Apple Inc. Smartphone Antitrust Litigation*, Apple invoked *Gibson* to argue that its developer agreements with competing smartwatch manufacturers cannot support Section 1 liability; the United States filed a Statement of Interest urging the court to reject that reliance as "erroneous." Statement of Interest of the United States at

3, No. 2:24-md-03113 (D.N.J. Dec. 16, 2025) (Dkt. 147). And the sole authority on which the panel relied—a passage from the Areeda-Hovenkamp treatise—does not support the panel's conclusion. Professor Hovenkamp himself has stated that the Ninth Circuit "got this one wrong," observing that the software at issue was "basically selling cartel production services." Herbert Hovenkamp (@Sherman1890), X (Oct. 4, 2025), https://x.com/Sherman1890/status/1974581681035350179. Petitioners do not cite that view as authority. They cite it because it underscores how untenable the panel's categorical exemption is even on its own terms.

This case is an ideal vehicle to restore the settled framework. Petitioners abandoned their separate hub-and-spoke theory on appeal. App.8a. The only surviving claim is a narrow rule-of-reason challenge to written licensing agreements. The Ninth Circuit affirmed dismissal by adopting a categorical rule—no compulsion, no restraint, no Section 1 inquiry. That question is cleanly presented, important, and ripe for this Court's review.

STATEMENT OF THE CASE

A. The market and the alleged pricing mechanism.

This case concerns hotel-room rentals on the Las Vegas Strip (hereafter the "Strip"). App.5a. Petitioners are consumers who purchased rooms from competing Strip hotels. App.3a. Respondents include five of the Strip's largest casino-hotels (collectively, the "Hotel Defendants"), all of which contracted to use algorithmic pricing software from a common vendor, Cendyn

(previously "The Rainmaker Group," or "Rainmaker"[2]). Since at least 2015, all five Hotel Defendants have used Cendyn's pricing algorithms. App.7a.

Petitioners did not allege a traditional horizontal agreement whereby hotel competitors met and signed a single price-fixing pact. Instead, competing hotels each signed separate contracts with the same vendor to use a shared pricing system. That system collects detailed, continuously updated market data—including rivals' prices—uses an algorithm to generate recommended room rates, and feeds those rates directly into the hotels' pricing systems in ways that replace independent price-setting. Petitioners alleged that these contracts replaced independent pricing decisions among direct competitors with a shared algorithmic default—and that the resulting alignment of Hotel Defendants' prices above competitive levels harmed competition.

As the panel summarized, Cendyn sells two revenue-management products: "GuestRev" and "GroupRev." App.5a–6a. GuestRev is "a pricing algorithm that recommends prices for individual hotel rooms," while GroupRev does the same for group bookings. App.5a–6a. Hotels provide GuestRev "granular pricing and occupancy data on a continuous basis," and it generates "pricing recommendations . . . on an at-least daily basis." App.5a. GuestRev "is directly integrated with hotel operators' property management systems." App.5a. The panel also described "RevCaster," a "rate shopping" tool integrated into GuestRev that "collect[s] public pricing information,"

2. Cendyn acquired Rainmaker in 2019, and has continued to license the software at issue.

making "competitor pricing . . . easily incorporated as a factor in setting pricing." App.6a.

Cendyn did not market its software as a neutral information service. It urged hotels to "[en]trust [their] profitability" to its algorithms, promising that by "shift[ing] focus from occupancy and rate to profitability"—that is, by abandoning the competitive discipline that had historically driven casino-hotels to keep room prices low to fill rooms and maximize gaming revenue—hotels could "supercharge profit" and increase revenues by 10 to 12 percent. First Am. Class Action Compl. ¶¶4, 53, 73, 77, 128, 166, ECF No. 144 (D. Nev. Nov. 27, 2023). The strategy worked as promised: beginning in 2015, coincident with Rainmaker's integration of competitor pricing into its algorithms, Hotel Defendants began raising prices in tandem—outpacing other Las Vegas hotels, casino-hotels nationally, and a peer Strip hotel that did not use Rainmaker's algorithm. *Id.* ¶¶ 212–222. Hotel Defendants' prices rose even as Las Vegas tourism flattened and then declined from 2015 to 2023, a pattern consistent with competitors prioritizing shared profitability over the occupancy-driven rivalry that had previously characterized the Strip. *Id.* To reinforce adherence, Cendyn's platform tracked each hotel's acceptance rate, deployed an "Action Index" that prompted hotels to match competitors' pricing, and offered "fully managed pricing services" through client advisors. *Id.* ¶¶ 118, 121–126, 202.

The panel's own recitation of facts undermines its conclusion. The panel acknowledged that licensees "can even set GuestRev on 'autopilot,' such that its prices are directly and automatically uploaded into the hotel's property management system," App.5a; that Cendyn's

marketing materials report a 90% acceptance rate for its pricing recommendations, App.7a; and that "GuestRev requires its licensees to have 'override permissions' to deviate from GuestRev's recommended prices"—without which "the software would not permit a user to override the recommendations," App.5a–6a. A pricing output that is automatically implemented absent specialized permission to deviate is not meaningfully advisory. It is a default that structures how rivals price.

B. Proceedings below.

The district court dismissed with prejudice. App.31a. It did not hold that Petitioners failed to plead a relevant market, market power, or antitrust injury. Instead, it held that they failed to plead any "restraint of trade" because they did "not allege that Hotel Defendants are required to accept the prices" the software recommends and alleged that "the recommendations are often rejected." App.55a. The court then drew a categorical conclusion: "it accordingly cannot be that the vertical agreements between Cendyn and Hotel Defendants to license GuestRev and GroupRev restrain trade." App.55a.

The Ninth Circuit affirmed. App.1a. Petitioners had abandoned a separate hub-and-spoke claim on appeal, and the only remaining theory was their rule-of-reason challenge to the licensing contracts.

The panel described Section 1 as requiring "a causal link between a contested agreement and an anticompetitive restraint of trade in the relevant market" *before* that agreement is subject to the rule of reason. App.3a. Applying that framework, it held that "the

agreements here, as alleged, do not restrain trade in the relevant market" because an "agreement for the provision of . . . recommendations itself is not a *restraint* of a hotel's ability to price its hotel-room rentals." App.16a, 23a. The agreements did not, in the panel's view, "restrain any Hotel Defendant's ability to sell hotel rooms 'in accordance with their own judgment'"—and therefore fell outside Section 1. App.22a–23a (quoting *Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960)).

The panel also rejected Petitioners' characterization of the contracts as vertical. It reasoned that, because Cendyn does not contribute "the raw materials, capital, or labor necessary" for hotels' provision of rooms, the parties "do not have a vertical relationship in the relevant antitrust market." App.15a–16a. Instead, it relied on a "leading antitrust treatise" to conclude that the at-issue contracts were instead "ordinary sales contract[s]" that "do[] not restrain trade." App.16a (quoting 6 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (5th ed. 2023) ¶ 1437a ("Areeda & Hovenkamp")). The panel further rejected Petitioners' reliance on *Board of Trade* and related cases by reasoning that a contrary rule would force a hotel to "defend its business practices" in the hotel room market if they were, for example, to "enter a contract with a painter for the painting of the hotel's dining room[.]" App.25a.

The panel did not address whether Petitioners plausibly alleged anticompetitive effects, market power, or antitrust injury. It did not need to, on its reasoning, because it never reached the rule of reason. On the panel's view, none of Petitioners' allegations about autopilot,

override permissions, anticompetitive effects, or market structure mattered. The licensing contracts were categorically outside Section 1, and the case was over.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's compulsion-based "no restraint" rule conflicts with this Court's Section 1 framework.

The decision below rests on a legal rule that cannot be reconciled with Section 1's text or this Court's precedent: a contract is not "in restraint of trade" unless it expressly compels a party to adopt a recommended price. App.23a. That rule converts "restraint" from the beginning of analysis into an escape hatch that exempts a category of contracts from scrutiny. *Board of Trade* rejected that structure long ago, and this Court has repeatedly reaffirmed why.

1. Section 1 reaches "every contract . . . in restraint of trade." 15 U.S.C. § 1. This Court has never read that phrase to create a threshold exemption for agreements that preserve nominal discretion. To the contrary, the Court has explained that if one treated restraint as a gatekeeping category, "every" would become empty. The statute would condemn almost nothing or be evaded with ease.

Board of Trade is the canonical explanation. The Court there confronted a rule that regulated grain trading. Rather than treating whether the rule "restrained" trade as a binary question, the Court explained why that would be the wrong starting point: "Every agreement concerning trade, every regulation of trade, restrains.

To bind, to restrain, is of their very essence." 246 U.S. at 238. Because restraints are ubiquitous, the Court rejected "so simple a test, as whether [the agreement] restrains competition," and instead instructed courts to determine—based on "the relevant facts"—whether the restraint "merely regulates and perhaps thereby promotes competition" or "may suppress or even destroy competition." *Id.*

The Court has restated this same architecture over the years. In *Professional Engineers*, it recognized that, because "restraint is the very essence of every contract," "read literally, § 1 would outlaw the entire body of private contract law"—and explained that the "Rule of Reason . . . has served [the] purpose" of "giv[ing] shape to the statute's broad mandate by drawing on common-law tradition" and "focus[ing] directly on the challenged restraint's impact on competitive conditions." 435 U.S. at 688. In *Northwest Wholesale*, it explained that, because "every commercial agreement restrains trade," Section 1 liability turns on "whether [an agreement] is adjudged an *unreasonable* restraint." 472 U.S. at 289; *see also Bd. of Regents*, 468 U.S. at 98 (explaining that "every contract is a restraint of trade" and that Sherman Act was "intended to prohibit only unreasonable restraints of trade."). More recently, *American Express* reiterated that Section 1 "outlaw[s] only unreasonable restraints," and that the rule of reason is designed "to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." 585 U.S. at 540–41 (cleaned up).

Those cases establish an ordered sequence. The presence of a contract or agreement between distinct

economic actors is the threshold for concerted action. The fact that an agreement binds and restrains to some degree is the reason Section 1 applies at all. And the central merits inquiry is whether the restraint is unreasonable. The decision below disrupts that sequence by converting "restraint" from the premise of analysis into a categorical screen—holding that agreements preserving nominal discretion are not restraints at all. That categorical no-restraint rule cannot be reconciled with Section 1's text or this Court's framework, which treats restraint as inherent in agreement and reasonableness as the operative inquiry.

2. The district court's test was explicit: because Petitioners did not allege hotels were "required" to accept recommendations and alleged recommendations were "often rejected," "it accordingly cannot be" that the contracts restrain trade. App.55a. The Ninth Circuit affirmed on the same grounds, reasoning that an agreement "for the provision of . . . recommendations itself is not a *restraint* of a hotel's ability to price its hotel-room rentals," and thus—definitionally—cannot restrain trade in the hotel-room market. App.23a. Under that logic, a contract becomes a restraint only if it contains a command.

The panel reinforced that categorical approach by attaching a label to that same idea: it characterized the challenged agreements as "ordinary sales contract[s]" that, in its view, "do[] not restrain trade" in the hotel-room market. App.16a. The sole authority it invoked for that proposition was a treatise passage by Areeda and Hovenkamp. *Id.* (citing and quoting Areeda & Hovenkamp ¶ 1437a). But that passage does not identify a category of contracts immune from Section 1. Instead, it uses the term "ordinary sales contract" to make a rule-of-reason point

consistent with this Court's holding in *Board of Trade*: due to the "very ubiquity" of "vertical agreements between actual or would-be suppliers and customers," "only a few will be of antitrust concern," and in particular those that can effectively aggregate market shares and thus increase the risk of lower output and higher prices—precisely what Petitioners alleged. *See* Areeda & Hovenkamp ¶ 1437a.

"Ordinary," in other words, describes prevalence, not immunity. Ordinary contracts are the very instruments through which restraints are implemented: exclusive dealing, tying, resale-price maintenance, and platform rules are all commonplace commercial agreements. Their legality turns on context and competitive effect, which is why this Court has insisted that nearly all vertical restraints are judged under the rule of reason. *See Am. Ex.*, 585 U.S. at 541. A court cannot convert the ubiquity of a contractual form into categorical exemption.

This misreading is underscored by the treatise author himself. After the panel decision issued, Professor Hovenkamp publicly explained that the Ninth Circuit "got this one wrong," observing that the software arrangement described in the opinion was "basically selling cartel production services." Herbert Hovenkamp (@Sherman1890), X (Oct. 4, 2025), https://x.com/Sherman1890/status/1974581681035350179. Petitioners cite that statement not as law, but as confirmation that the panel's categorical "ordinary contract" immunity is not compelled by—and is in fact contrary to—the sole authority on which it relied.

The panel's approach is unprecedented and creates a new category of agreements that are incapable of

restraining trade in the relevant market and therefore do not need to be analyzed under the rule of reason. But Section 1 does not say "every contract that requires." It says "every contract . . . in restraint of trade." 15 U.S.C. § 1. A contract may restrain trade by changing the structure of decisionmaking—by creating a default, centralizing a rule, limiting who can deviate, imposing friction for deviation, or substituting a shared mechanism for independent judgment. Those are restraints in the plain sense. Whether they are reasonable—including how they operate, in practice, to affect commerce—is a question for the rule of reason.

The panel's formalistic focus on express commands also ignores the commercial reality alleged in Petitioners' complaint. A pricing output that defaults to "autopilot" and requires specialized "override permissions" to reject is not meaningfully advisory; it is a functional default that structures how rivals compete. Section 1 examines the practical operation of restraints, not only their contractual labels. And this Court's rule-of-reason precedents confirm that courts must evaluate restraints based on their practical operation and competitive effects, not their formal features or labels. *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 97 (2021) ("The whole point of the rule of reason is to furnish 'an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint . . . .'" (quoting *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 781 (1999))); *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 343 (1982) ("[T]he rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition."); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809–10 (1946).

3. The panel's compulsion rule also conflicts with this Court's treatment of restraints that operate through rules and managed discretion. Section 1 has never required an agreement to compel a final outcome. In *Socony-Vacuum*, a price-fixing conspiracy was unlawful even though the arrangement was "wholly voluntary" and participants could (and did) deviate. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 194, 222 (1940) ("Any combination which tampers with price structures is engaged in an unlawful activity."). In *Professional Engineers*, the restraint eliminated competitive bidding without compelling any particular fee. *Nat'l Soc. of Pro. Eng'rs*, 435 U.S. at 692. And in *Indiana Federation of Dentists*, the agreement suppressed information that shaped competition without dictating prices. *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459–61 (1986). These cases reflect the same settled principle: discretion does not negate restraint. Agreements routinely restrain trade by structuring how rivals compete rather than by mandating specific terms. That principle reflects the broader concern animating Section 1's concerted-action requirement: the "'central evil'" addressed by the statute is the elimination of "independent centers of decisionmaking." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 195 (2010). Petitioners alleged exactly that—competing hotels replaced independent pricing judgments with a shared algorithmic default that structured their competitive behavior through a common vendor's system.

The Ninth Circuit's "no restraint unless required" rule is thus not a refinement of Section 1 doctrine but a stark departure from it. The practical stakes of this doctrinal error are addressed in Part C, *infra*. But the concern is immediate: the panel's rule would exempt

from Section 1 an increasingly prevalent category of commercial arrangement at the precise moment when regulators, academics, and the United States itself have urged that such arrangements be evaluated for their competitive effects.

4. The panel described Section 1 as requiring "a causal link between a contested agreement and an anticompetitive restraint of trade in the relevant market." App.3a. In the abstract, it is blackletter law that antitrust plaintiffs must connect an alleged injury to a challenged agreement. But the panel converted that unobjectionable idea into a doctrinal mistake: it treated agreements as "causing" restraints, and then held that because the software did not compel implementation, the agreements caused no restraint—and Section 1 never applied.

This reframing simply restates the panel's categorical no-restraint rule in causation terms. As the American Antitrust Institute explained below, the agreement element of Section 1 is a single element—proof that the parties have engaged in concerted action—not a two-part inquiry into (1) whether there is an agreement and (2) whether the agreement restrains trade. Br. for the Am. Antitrust Inst. as Amicus Curiae in Supp. of Reh'g En Banc at 5–6, *Gibson v. Cendyn Group, LLC*, No. 24-3576 (9th Cir. Oct. 9, 2025), ECF No. 86.1. *Board of Trade*'s insight that "[e]very agreement concerning trade . . . restrains" means there is no daylight between "an agreement" and "an agreement in restraint of trade"; requiring proof that an agreement "caused" a restraint collapses into proving the existence of the agreement itself. *Id.*

The panel thus misidentified what causal link antitrust plaintiffs must connect. Plaintiffs need not show that an agreement caused a restraint—that is redundant. They must show that an agreement caused anticompetitive effects. That inquiry is the rule of reason, and it is where causation has always lived—alongside the separate requirement of antitrust injury. It does not operate as a threshold screen for whether Section 1 applies at all. Indeed, that is precisely why this Court developed the rule of reason—to assess how agreements operate in practice without converting Section 1 into a prohibition on all contracting. *See United States v. Am. Tobacco Co.*, 221 U.S. 106, 180 (1911) (without rule of reason, Section 1 would "be at war with itself by annihilating the fundamental right of freedom to trade").

The panel's misstep matters because it introduces a second-order gatekeeper: courts can demand "causation" in the form of compulsion before they will even consider competitive effects. But the proper approach is familiar and workable. If a plaintiff cannot plausibly connect a challenged contract to competitive harm, *Twombly* permits dismissal. That is a pleading and merits inquiry, not a categorical exemption from Section 1.

The panel's caricature of Petitioners' argument underscores this confusion. It treated *Board of Trade*'s premise—that every agreement restrains trade in some sense—as if it would expose routine contracts to frivolous litigation, positing that hotels might have to "defend [their] business practices" in the hotel-room market if they were to "enter a contract with a painter for the painting of the hotel's dining room." App.25a. But *Board of Trade* does not create boundless antitrust liability; it rejects only the

idea that some agreements fall outside Section 1 because they are not "restraints" at all.

Section 1's real limiting principles operate at the rule-of-reason and pleading stages, and they are demanding: plaintiffs must plausibly allege a relevant market, market power, antitrust injury, and anticompetitive effects—and ultimately prove them under the rule of reason. Most "ordinary" contracts fail those filters because they have no plausible relationship to competition in any relevant market. That is a reason to dismiss under ordinary pleading and merits standards, not a reason to create a categorical "no restraint" exemption for entire classes of contracts whenever they preserve discretion. The Ninth Circuit's fanciful hypotheticals cannot justify a doctrine that would immunize real-world restraints implemented through modern systems.

B. The panel's narrow conception of vertical relationships further illustrates its departure from this Court's Section 1 framework.

The panel reinforced its no-restraint holding with an artificially narrow conception of vertical relationships. It reasoned that, for an agreement between firms to be "vertical," (1) those firms must be "up or down the supply chain in the relevant market" and (2) the agreement must be for the provision of an "input," which the panel defined to include only "raw material, capital, or labor." App.14a–15a (citing *Input*, 7 Oxford English Dictionary (2nd ed. 1989)). Because Cendyn's software is not raw material, capital, or labor that "goes into the production of hotel rooms for rentals," the panel concluded, it is not "up the supply chain" from hotels in the hotel room market—and

thus the at-issue software-licensing agreements are not vertical restraints. App.15a. The panel in turn relied on this re-categorization to justify its conclusion that the licensing agreements were "ordinary sales contracts" that "do not restrain trade" in the hotel-room market.

This reasoning warrants correction because it adopts a conception of vertical relationships that is difficult to reconcile with this Court's Section 1 cases and risks distorting the statute's application in modern markets. Section 1 has long distinguished horizontal agreements (among competitors) from vertical agreements (between firms at different levels of economic activity). *See Am. Ex.*, 585 U.S. at 541. Nothing in that framework requires the upstream firm to supply physical inputs used directly in producing the downstream product. This Court has routinely evaluated vertical agreements under the rule of reason for their effects on competition in downstream markets—including agreements involving intangible service relationships and transactional infrastructure, not just physical goods. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 462–63 (1992) (evaluating tying claim where equipment manufacturer's control over replacement parts foreclosed competition in the distinct aftermarket for service); *Am. Ex.*, 585 U.S. at 541–42 (applying rule-of-reason analysis to contractual restraints imposed by a credit-card network on merchants, even though the network operates as a transaction intermediary rather than a supplier of merchants' goods or services). The panel's requirement that a vertical partner supply "raw material, capital, or labor" that "goes into the production" of the downstream product adds a limitation foreign to Section 1.

The panel's reliance on a 1989 dictionary definition of "input" is particularly ill-suited to contemporary commerce. As the American Antitrust Institute explained below, in modern markets, data and pricing systems are themselves inputs into competitive decisionmaking. Br. for the Am. Antitrust Inst. as Amicus Curiae in Supp. of Reh'g En Banc at 7–8, *Gibson v. Cendyn Group, LLC*, No. 24-3576 (9th Cir. Oct. 9, 2025), ECF No. 86.1 (citing, inter alia, Yan Carriere-Swallow & Vikram Haksar, *The Economics and Implications of Data: An Integrated Perspective* at 9, IMF Departmental Paper No. 2019/013, Int'l Monetary Fund (Sept. 23, 2019) (in the "modern economy," "data is an input into the production of goods and services"). A firm that licenses a pricing system does not supply hotel rooms, but it may nonetheless shape competition in that market by influencing how competitors price their products. That vertical agreements are evaluated by their competitive effects, not by whether the upstream firm supplies brick-and-mortar inputs, is precisely why this Court has insisted that such agreements be analyzed under the rule of reason. *See, e.g.*, *Leegin*, 551 U.S. at 882–84; *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723–26 (1988).

The panel's market-location reasoning also confuses where restraints are imposed with where their effects are felt. Vertical agreements, by definition, are implemented outside the downstream product market; their significance lies in their impact within that market. Treating the absence of same-market participation as dispositive would exclude virtually all vertical restraints from Section 1 scrutiny—a result incompatible with this Court's consistent instruction that vertical agreements are judged under the rule of reason based on their competitive effects. *See Am. Ex.*, 585 U.S. at 541.

In short, a vendor need not supply hotel rooms—or any physical input into them—to participate in the competitive process that determines their prices. If, as Petitioners plausibly allege, a pricing-software license alters how competing hotels set prices, it is a vertical agreement affecting competition in the hotel-room market and should be analyzed under ordinary Section 1 principles. The panel's contrary reasoning threatens to leave courts without a doctrinal framework for evaluating the vertical agreements through which an increasingly common category of commercial arrangement is implemented.

C. The question presented is important and warrants review.

The Ninth Circuit's categorical no-restraint rule matters beyond hotel-room pricing on the Las Vegas Strip. The decision arises in the context of algorithmic pricing—a practice that is rapidly proliferating across industries including hospitality, residential rental housing, airline tickets, and consumer goods. Regulators and academics have warned that competitors' use of shared pricing algorithms can facilitate tacit coordination and supracompetitive pricing even where the algorithms' outputs are nominally "recommendations." *See, e.g.*, Br. for the United States as Amicus Curiae in Supp. of Pls.-Appellants at 27, *Gibson v. Cendyn Group, LLC*, No. 24-3576 (9th Cir. Oct. 24, 2024), ECF No. 28; Br. for the Am. Antitrust Inst. as Amicus Curiae in Supp. of Reh'g En Banc at 13–15, *Gibson v. Cendyn Group, LLC*, No. 24-3576 (9th Cir. Oct. 9, 2025), ECF No. 86.1.

The concern is not limited to algorithms that pool confidential data. Empirical research demonstrates that

industry-wide use of a common pricing algorithm can elevate prices "only through its effects on competition"—that is, because competitors' market behavior aligns through the use of a shared decisionmaking framework, not because the algorithm serves as a conduit for private information. *See* Stephanie Assad et al., *Autonomous Algorithmic Collusion: Economic Research and Policy Implications* at 15 (Toulouse Sch. of Econ., Working Paper No. 1210, 2021). The panel's holding provides a roadmap for evading antitrust scrutiny: a vertical agreement for the provision of algorithmic pricing services can be structured around nonbinding "recommendations" with nominal opt-out rights, and under the decision below, that label alone immunizes the agreement from rule-of-reason analysis—regardless of its alleged competitive effects.

But the decision's reach extends well beyond algorithmic pricing. The panel's threshold reasoning—that a contract does not "restrain trade in the relevant market" unless its terms directly compel an anticompetitive outcome—is already being invoked to defeat Section 1 claims that have nothing to do with pricing algorithms. In *In re Apple Inc. Smartphone Antitrust Litigation*, plaintiffs alleged that Apple's Developer Program License Agreements with competing smartwatch manufacturers restricted those competitors' access to key technical capabilities, thereby limiting competition in the smartwatch market. Apple moved to dismiss, arguing that the contracts did not "restrain trade in the relevant market" and urging the court to rely on *Gibson*. Statement of Interest of the United States at 2–3, *In re Apple Inc. Smartphone Antitrust Litig.*, No. 2:24-md-03113 (D.N.J. Dec. 16, 2025) (Dkt. 147). The United States filed a Statement of Interest urging the court to reject

that invitation, explaining that such "reliance would be erroneous." *Id.* at 3. The government's reasoning tracks this Court's framework precisely: "By its terms, Section 1 applies to 'every contract . . . in restraint of . . . trade'"; this Court "long has recognized that every contract restrains trade"; and "[e]very contract, then, is concerted action; whether a contract violates Section 1 depends on whether the contract unreasonably restrains trade." *Id.* at 5 (quoting 15 U.S.C. § 1). When the United States tells a federal court that a published circuit decision is wrong and should not be followed, this Court's intervention is warranted.

The government's participation in *Gibson* itself confirms the point. The United States appeared as amicus in the court of appeals—across administrations—warning that "[c]ompetitors' joint use of pricing algorithms can have anticompetitive effects even where the algorithms' prices are not binding," and that the district court's error "could have significant consequences in today's economy" if adopted by the panel. Br. for the United States as Amicus Curiae in Supp. of Pls.-Appellants at 32, *Gibson v. Cendyn Group, LLC*, No. 24-3576 (9th Cir. Oct. 24, 2024), ECF No. 28. That consistent, cross-administration concern underscores that the question presented is not a partisan or policy-driven dispute but a fundamental question about how Section 1 operates.

Importantly, correcting the panel's error does not require this Court to decide whether the challenged contracts are unlawful. It requires only that the courts below apply the correct Section 1 framework. The district court and the Ninth Circuit never evaluated Petitioners' allegations of a relevant market, market power, price

alignment among competitors using the same algorithm, or departure from historical pricing patterns—all of which remain live and would be assessed on remand under ordinary rule-of-reason principles.

Petitioners ask for a holding that is both faithful to precedent and readily administrable: a contract is not categorically exempt from Section 1 merely because it preserves nominal discretion; the proper inquiry is whether, in context, the restraint is unreasonable under the rule of reason. That holding would preserve the ability of courts to dismiss implausible claims under ordinary pleading standards—including *Twombly*'s plausibility requirement and the rule of reason's own filters—while ensuring that plausible restraints are analyzed where Section 1 places the analysis: in the inquiry into unreasonableness.

D. This case is an excellent vehicle.

The question presented is cleanly framed. Because Petitioners abandoned their separate hub-and-spoke theory on appeal, the appeal and this petition present only the purely legal question the Ninth Circuit decided. The only surviving claim is a straightforward rule-of-reason challenge to written licensing agreements. The Ninth Circuit affirmed dismissal by adopting a categorical rule: no compulsion, no restraint, no Section 1 inquiry. The case does not require the Court to wade into disputed facts, market definition, or the mechanics of horizontal coordination. Nor does it require the Court to address whether certain forms of algorithmic coordination should be treated as per se unlawful or analyzed under a quick-look framework. It presents a single, threshold legal question about Section 1's structure.

The posture of the case strengthens the vehicle. The Ninth Circuit's decision rests entirely on its categorical legal holding about the vertical licensing agreements. The question is thus squarely presented: when competitors independently contract with the same vendor, and those contracts are alleged to produce anticompetitive effects, does Section 1 require courts to evaluate those effects under the rule of reason—or may courts dismiss the claim at the threshold based solely on the contracts' form? No factual disputes stand between the Court and the answer to that question.

The panel's separate discussion of whether multiple licensing contracts may be evaluated "in the aggregate" does not impair the vehicle. App.26a. That holding is not independent; it is derivative of the threshold premise this petition challenges. The panel began its aggregation analysis by reiterating that each licensing agreement "do[es] not restrain competition in the relevant market at all." App.27a. It then reasoned that because the individual contracts were not restraints, there was no basis to evaluate their combined effects: "Plaintiffs . . . fail[ed] to plead facts" showing that any particular agreement "has a discrete effect on competition." App.28a. But that conclusion follows directly from the panel's categorical premise. If individual licensing agreements for algorithmic pricing services can constitute restraints—the very question presented—then they can have discrete competitive effects, and aggregation analysis proceeds under ordinary rule-of-reason principles. Indeed, the panel's opinion recognizes that where restraints like those pled here do have a "discrete effect" on competition, aggregation is permitted. App.27a (citing *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659,

665 (9th Cir. 2009)); *see also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1302 (9th Cir. 1982) (where cumulative anticompetitive effect is alleged, courts may evaluate the overall market effects of a defendant's contracts rather than examining each contract in isolation).

Respondents argued below that Petitioners "d[id] not address this independent ground for dismissal." Defs.-Appellees' Resp. to Pet. for Reh'g En Banc at 16, *Gibson v. Cendyn Group, LLC*, No. 24-3576 (9th Cir. Nov. 6, 2025), ECF No. 89.1. That is because the aggregation holding collapses once its premise is removed: if the panel's categorical exemption of the at-issue contracts from Section 1 scrutiny is wrong, its aggregation holding falls with it—and the lower courts can address on remand whether the contracts' cumulative effects state a claim under the rule of reason.

Finally, this case does not require the Court to address whether or under what circumstances competitors' common use of algorithmic pricing software can give rise to horizontal coordination claims—whether premised on the exchange of confidential data or on other theories of concerted action. Those questions are being actively litigated in other cases and involve distinct factual and legal questions not presented here. That separation is what makes this a cleaner vehicle for the question presented. Petitioners' claim is narrower and purely legal: whether vertical licensing agreements for algorithmic pricing services are categorically exempt from Section 1 merely because they do not expressly compel adherence to the software's pricing recommendations. No disputed questions about the nature or existence of horizontal

coordination stand between the Court and the answer. The Court can establish the correct threshold framework for vertical agreements—that Section 1's rule-of-reason inquiry applies—without foreclosing or prejudging the distinct questions about horizontal coordination that other cases present.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 11, 2026

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-3576
D.C. No. 2:23-cv-00140-MMD-DJA

RICHARD GIBSON; ROBERTO MANZO,

Plaintiffs-Appellants,

v.

CENDYN GROUP, LLC; THE RAINMAKER GROUP UNLIMITED, INC.; CAESARS ENTERTAINMENT, INC.; TREASURE ISLAND, LLC; WYNN RESORTS HOLDINGS, LLC; BLACKSTONE INC.; BLACKSTONE REAL ESTATE PARTNERS VII L.P.; JC HOSPITALITY, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

Argued and Submitted May 12, 2025
San Francisco, California

Filed August 15, 2025

Appendix A

Before: Carlos T. Bea and Ana de Alba, Circuit Judges, and Jeffrey Vincent Brown, District Judge.*

OPINION

BEA, Circuit Judge:

Does it violate Section 1 of the Sherman Act ("Section 1") for competing hotels each to purchase a license to use the same price-recommendation software? It would undoubtedly violate Section 1 were those competing hotels to agree among themselves to abide by a third party's pricing recommendations when pricing their own hotel rooms. But the question this case presents, by contrast, is whether Plaintiffs sufficiently state a Section 1 claim when they allege that the competing hotels *independently* purchased licenses for the same software, which software is alleged to have provided pricing recommendations, and which software did not share any licensing hotel's confidential information among the competing licensees.

Plaintiffs argue that the mere identification of a contract (in this case, the licensing agreement between a hotel and a software-provider), when paired with the allegation that prices rose after the adoption of the contract, is sufficient to allege a Section 1 violation. According to Plaintiffs' logic, the district court erred when it dismissed Plaintiffs' complaint for failure to

* The Honorable Jeffrey Vincent Brown, United States District Judge for the Southern District of Texas, sitting by designation.

allege a restraint of trade without first analyzing the contested agreement under the "rule of reason". Here, however, Plaintiffs did not allege facts sufficient to permit a plausible inference that the agreements for the provision of the revenue-management software effected a restraint of trade *in the relevant market*—hotelroom rentals on the Las Vegas Strip. Neither the terms nor the operation of the licensing agreements are alleged to have harmed competition by affecting the competitive incentives in the relevant market, nor did the licensing agreements restrain any party's ability to compete in the relevant market.

Plaintiffs push for a rule in which the choice of several competitors to contract with the same service-provider, when followed by higher prices, is sufficient to require antitrust scrutiny under the rule of reason. But Section 1 requires a causal link between the contested agreement and an anticompetitive restraint of trade in the relevant market. Because, as alleged here, neither the terms nor the operation of the disputed licensing agreements imposed any such anticompetitive restraints, we affirm the judgment of the district court which dismissed Plaintiffs' Section 1 claims with prejudice.

I.

Plaintiffs, a putative class, regularly traveled to Las Vegas, Nevada, and rented hotel rooms on the Las Vegas Strip. In their present complaint, Plaintiffs alleged that they paid higher prices for their hotel rooms due to Defendants' anticompetitive conduct. Plaintiffs initially alleged two anticompetitive agreements in violation of

Section 1 of the Sherman Act. First, they alleged that certain hotels on the Las Vegas Strip ("Hotel Defendants")[1] agreed among themselves to purchase the license to the same revenue-management software products from Defendant Cendyn Group, LLC ("Cendyn")[2] and to abide by Cendyn's pricing algorithms' recommendations. (As discussed in more detail below, Plaintiffs "abandon[ed]" their appeal of the district court's dismissal of this claim.) Second, Plaintiffs alleged that the number of individual agreements between Cendyn and Hotel Defendants to license Cendyn's software products resulted, "[i]n the aggregate," in anticompetitive effects in the form of

1. The Hotel Defendants are Caesars Entertainment, Inc. ("Caesars", operator of Bally's, Caesars Palace, The Cromwell Hotel and Casino, Flamingo Las Vegas, Harrah's Las Vegas, The Linq Hotel and Casino, Paris Las Vegas, and Planet Hollywood Resort and Casino); Treasure Island, LLC ("Treasure Island", operator of Treasure Island Hotel and Casino); Wynn Resorts Holdings, LLC ("Wynn", operator of Wynn Las Vegas and Encore Wynn Las Vegas); Blackstone Inc. and Blackstone Real Estate Partners VII L.P., (collectively "Blackstone", operator of The Cosmopolitan of Las Vegas); JC Hospitality LLC ("JC Hospitality", operator of Virgin Hotels Las Vegas, LLC and Hard Rock Hotel & Casino Las Vegas).

2. Defendant The Rainmaker Group, Unlimited, Inc. ("Rainmaker") developed the software products at issue and licensed them to Hotel Defendants before 2019. In 2019, Cendyn acquired Rainmaker and licensed the products thereafter. Nothing in this case turns on the details or timing of Defendants' corporate parentage. For the sake of simplicity, we refer to the software provider as "Cendyn."

artificially inflated prices.[3] Plaintiffs define the relevant antitrust market as the rental of hotel rooms from hotels located on the Las Vegas Strip, a four-mile stretch in the unincorporated towns near Las Vegas, Nevada.

According to the allegations in the complaint, Cendyn is a private company that provides technology for the hospitality industry. Plaintiffs' allegations concern three of Cendyn's software products: GuestRev, GroupRev, and RevCaster (the "software products" or "revenue-management software").

GuestRev is a pricing algorithm that recommends prices for individual hotel rooms. GuestRev is the "core element" of Cendyn's revenue-management platform. To use GuestRev, hotels provide GuestRev with granular pricing and occupancy data on a continuous basis. GuestRev then generates pricing recommendations for a hotel's guest rooms on an at-least daily basis. GuestRev provides personalized pricing for every guest and is directly integrated with hotel operators' property management system. Licensees can even set GuestRev on "autopilot," such that its prices are directly and automatically uploaded into the hotel's property management system. While GuestRev requires its licensees to have "override permissions" to deviate from GuestRev's recommended

3. While Plaintiffs styled this claim as being aimed at the "set" of agreements between Cendyn and each individual Hotel Defendant, Count 2 on its own terms does not allege an agreement among Hotel Defendants to act so as to make the "set." Rather, the term "set" is Plaintiffs' conclusory term for the number of individual agreements between Cendyn and each Hotel Defendant.

prices, GuestRev does not require a hotel to implement its pricing recommendations.[4]

GroupRev is "a pricing algorithm specifically tailored for quoting custom rates for group travel." GroupRev appears frequently to have been licensed to clients who also licensed GuestRev. The complaint does not specify whether GroupRev offers the same "autopilot" functionality, nor does it state whether deviation from its recommendations requires override permissions.

RevCaster is "a 'rate shopping' tool integrated into GuestRev." RevCaster "collect[s] public pricing information" so that "competitor pricing is easily incorporated as a factor in setting pricing." A "key part of what makes GuestRev effective" is that it provides the ability for hotels to "use competitor pricing in implementing their own pricing."

Although the precise rate at which Hotel Defendants implemented the software products' pricing recommendations is not in the record, Plaintiffs allege

4. According to the complaint, "GuestRev's pricing function allows pricing managers to 'mark pricing recommendations for upload, override and mark for uploads, make a recommendation or an override persistent, and send the recommendation or override to the [property management system].'" However, "to override a pricing recommendation, a revenue manager must have override permissions." Without the permissions, the software would not permit a user to override the recommendations. The complaint does not allege which employees had override permissions, nor does it allege the requirements for obtaining override permissions.

that "Cendyn has repeatedly touted on its website and in marketing materials that GuestRev's pricing recommendations are accepted 90% of the time."

Plaintiffs allege that each user provides Cendyn with non-public pricing and occupancy data, which the software products then use in their algorithms to generate recommendations. Plaintiffs, however, do not allege that Cendyn pools, shares, or uses the confidential information provided by a given Hotel Defendant into the pricing recommendations it generates for any *other* Hotel Defendant.

The Hotel Defendants adopted the relevant revenue-management products over the course of a decade. Caesars began using the software that would become GuestRev in late 2004, Wynn in 2008, Treasure Island by around 2010, Hard Rock by at least 2014, and Cosmopolitan of Las Vegas by at least 2014. All Hotel Defendants were using GuestRev in 2015, when Rainmaker acquired RevCaster, which allowed competitor pricing to be integrated easily into the pricing recommendations GuestRev offered. All Hotel Defendants used GuestRev until at least 2021-two years after Cendyn acquired Rainmaker.[5] All Hotel Defendants licensed GroupRev as well.

5. At this stage of the proceeding, nothing in this case turns on whether or when Hotel Defendants stopped using Cendyn's revenue-management software.

Appendix A

Procedural History

Plaintiffs sued Defendants, alleging two violations of Section 1 of the Sherman Act. In their first claim ("Count 1"), Plaintiffs allege that Hotel Defendants participated in an illegal "hub-and-spoke" agreement in which Hotel Defendants agreed among themselves to adopt Cendyn's revenue-management software and abide by the pricing algorithms' recommendations. The district court found that even accepting the factual allegations as true and drawing all reasonable inferences in Plaintiffs' favor, Plaintiffs failed to plead sufficient facts from which the court could infer such an agreement indeed existed among Hotel Defendants. The district court thereby dismissed Count 1 under Rule 12(b)(6).

Although Plaintiffs initially argued in support of Count 1 in their appellate briefing, they ultimately "abandoned[ed] their appeal of the [district] court's dismissal of the separate hub-and-spoke claim Plaintiffs [brought] in Count [1]."

In their second claim ("Count 2"), Plaintiffs allege that the number of individual agreements between Cendyn and each Hotel Defendant to license Cendyn's software products resulted, "[i]n the aggregate," in anticompetitive effects in the form of artificially inflated prices for hotel rooms on the Las Vegas Strip.[6]

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6. Although both claims arise under Section 1 of the Sherman Act and out of the same set of facts, the counts allege different agreements. Count 1 regards an agreement among Hotel Defendants to use Cendyn, whereas Count 2 alleges several

II.

We exercise appellate jurisdiction under 28 U.S.C. § 1291. We review the dismissal of a complaint under Rule 12(b)(6) *de novo*. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046 (9th Cir. 2008). We accept all allegations of material fact as true and construe them in the light most favorable to the nonmoving party. *Burgert v. Lokelani Bernice Pauahi Bishop Tr.*, 200 F.3d 661, 663 (9th Cir. 2000).

III.

A.

"The antitrust laws of the United States aim to protect consumers by maintaining competitive markets." *In re Musical Instruments and Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015). Section 1 of the Sherman Act thereby prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce" in interstate commerce. 15 U.S.C. § 1.

The Supreme Court has clarified that, despite the text of Section 1, not *every* agreement in restraint of trade violates Section 1. *United States v. Topco Assoc's, Inc.*, 405 U.S. 596, 606-607 (1972). Rather, only unreasonable restraints of trade are illegal. *Id.* And those unreasonable

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individual agreements, each being between an individual Hotel Defendant and Cendyn. Thus, Plaintiffs allege distinct Section 1 violations, not alternative theories of liability.

restraints must be "effected by a contract, combination, or conspiracy." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (citation omitted).

Agreements can be tacit or express. *Id*. Evidence parties "signed agreements assigning certain contract rights" evinces "an agreement among two or more entities." *Paladin Assoc's. Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1154 (9th Cir. 2003) (cleaned up).

Contracts, like "[e]very agreement concerning trade," restrain trade. *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). "To bind, to restrain, is of their very essence." *Id*. But to allege a Section 1 violation requires more than merely identifying a contract. "Rather, the plaintiff must allege an 'actual adverse effect on competition' caused by" the disputed agreement. *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200 (9th Cir. 2012) (citation omitted). And of course, "to plead injury to competition . . . sufficiently to withstand a motion to dismiss, 'a [Section 1] claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably.'" *Id*. at 1198 (citation omitted).

Once an agreement that restrains trade is alleged, to state a Section 1 claim a Plaintiff must allege sufficient facts from which the court could infer the agreement is unreasonable. *Topco*, 405 U.S. at 606-607. To determine whether an agreement in restraint of trade is unreasonable, courts apply different standards for evaluating different types of agreements. Antitrust law characterizes these different types of agreements as "horizontal," "vertical,"

or "hub-and-spoke," based on the economic relationships of the parties to the agreement in restraint of trade. *See Musical Instruments*, 798 F.3d at 1192-93.

A horizontal agreement is "an agreement among competitors on the way in which they will compete with one another." *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1108 (9th Cir. 2021) (citation omitted). Some horizontal agreements, such as "agreements among competitors to fix prices, divide markets, and refuse to deal" are "per se" violations of Section 1. *Musical Instruments*, 798 F.3d at 1191. Once such a horizontal agreement is proven, "no further inquiry into the practice's actual effect on the market or the parties' intentions is necessary to establish a [Section 1] violation." *Id.* Those restraints of trade are per se violations of Section 1 because they "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

Vertical agreements, by contrast, are "agreements made up and down a supply chain, such as between a manufacturer and a retailer." *Musical Instruments*, 798 F.3d at 1191. To determine whether a restraint of trade caused by a vertical agreement is unreasonable, it is "analyzed under the rule of reason, whereby courts examine 'the facts peculiar to the business, the history of the restraint, and the reason why it was imposed,' to determine the effect on competition in the relevant product market." *Id.* at 1191-92 (citation omitted). Under the rule of reason, courts ask whether "the challenged conduct has a substantial anticompetitive effect that harms consumers

in the relevant market." *CoStar Grp., Inc. v. Com. Real Est. Exch., Inc.*, 141 F.4th 1075, 1084 2025 (9th Cir. 2025) (cleaned up).

"A hub-and-spoke conspiracy is simply a collection of vertical and horizontal agreements." *Musical Instruments*, 798 F.3d at 1192. The respective horizontal and vertical agreements composing such a conspiracy are analyzed according to the per se rule and the rule of reason, as applicable. *Id.* at 1192-93.

B.

Plaintiffs appeal from the district court's order dismissing with prejudice Plaintiffs' complaint for failure to state a claim. To determine whether Plaintiffs sufficiently alleged a Section 1 violation, it is important first to delineate with which allegations we are dealing, and with which allegations we are no longer concerned. Plaintiffs "abandon[ed]" their appeal of the district court's dismissal of Count 1. Count 1 regarded the alleged "hub-and-spoke" agreement—namely, the allegation that Hotel Defendants agreed among themselves to abide by Cendyn's pricing recommendations. We therefore do not address the district court's decision that Plaintiffs failed to allege sufficient facts from which could be inferred the existence of an agreement among Hotel Defendants to license Cendyn's revenue-management software and abide by its pricing recommendations. *See Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406, 1408 n.1 (9th Cir. 1990).

C.

In Claim 2, Plaintiffs allege that the number of agreements between Cendyn and each Hotel Defendant "[i]n the aggregate" "resulted in anticompetitive effects in the form of artificially inflated prices in the relevant market of hotel rooms in the Las Vegas Strip market."

The district court found, and Defendants do not dispute on appeal, that Plaintiffs sufficiently alleged that all Hotel Defendants "licensed and used" Cendyn's software products.[7] An agreement to license software services (i.e., a licensing agreement) is an "agreement" within the meaning of Section 1. *See Paladin*, 328 F.3d at 1154; *see also Bd. of Trade.*, 246 U.S. at 238. To determine whether the licensing agreements violate Section 1, we must determine whether the agreements are alleged to restrain trade in the relevant market. Only if so, do we determine whether such restraints are unreasonable.

There can be no question that the licensing agreements restrain *some* trade. *Bd. of Trade*, 246 U.S. at 238. That is, such a licensing agreement would impose on a Hotel Defendant the obligation to pay money to Cendyn, which money would be restrained from its use elsewhere. And it would restrain Cendyn from refusing to provide to that Hotel Defendant use of the software identified in the agreement. To determine whether "an injury to

7. Throughout this opinion, we refer to the agreement for the provision of the software products as "licensing agreements" or "contracts."

competition flows from" this agreement, however, we must analyze the operation of the restraint of trade imposed by the agreement alleged in the relevant antitrust market. *Brantley*, 675 F.3d at 1201.

The parties characterized the agreements between Cendyn and each Hotel Defendant as "vertical," but that description is not an accurate use of the term "vertical" in the antitrust context. A vertical restraint is a "restraint[] . . . imposed by agreement between firms at different levels of distribution." *Bus. Electr. Corp. v. Sharp Electr. Corp.*, 485 U.S. 717, 730 (1988). In other words, vertical restraints operate "up and down a supply chain, such as between a manufacturer and a retailer." *Musical Instruments*, 798 F.3d at 1191.

Here, relative to Hotel Defendants, Cendyn is not up or down the supply chain in the relevant market: hotel-room rentals on the Las Vegas Strip. The relevant market is defined by the products that can serve as effective substitutes for each other. *Ohio v. Am. Express Co.*, 585 U.S. 529, 543 (2018). Thus, companies can operate in the same *industry* (the hotel industry) without operating in the same *market* (the market for hotel-room rentals on the Las Vegas Strip). Hotel Defendants provide hotel-room rentals, and Cendyn provides revenue-management software to Hotel Defendants. While hotels may use Cendyn's revenue-management software to maximize profits, the software is not an input that goes into the production of hotel rooms for rentals. *See Input*, 7 *Oxford English Dictionary* (2nd ed. 1989) ("The total of resources necessary to production, including raw materials, use

of machinery, and manpower, which are deducted from output in calculating assets and profits."). Cendyn's provision of advisory services to the hotel industry does not thereby render Cendyn "up the supply chain" from Hotel Defendants in the market for hotel-room rentals on the Las Vegas Strip.

This distinction may seem opaque here, especially given that Cendyn provides pricing advicea service that can appear to be wrapped up in the production of the product itself. But take, for example, a tax adviser of whom a hotel is a client. A tax adviser could also provide suggestions to that hotel. A tax adviser could affect that hotel's bottom line, inasmuch as he could charge a fee (eating into a company's profits) or make a suggestion regarding tax loopholes (increasing a company's profits). But that a tax adviser provides suggestions to a hotel does not mean that he operates in the production of hotel-room rentals "at [a] different level[] of distribution" from the hotel that receives his advice. *Bus. Electr. Corp.*, 485 U.S. at 730. So too here. Cendyn's revenue-management software products serve a "back-office" function; they are not used to make hotel rooms available in the first instance.

This is not to say that service-providers cannot be in vertical relationships with their clients. Nor is this to say that Cendyn is incapable of being in a vertical relationship with Hotel Defendants as a general matter. The distinction here lies in the relationship of the parties to the relevant market. Here, Cendyn does not contribute the raw materials, capital, or labor necessary for Hotel Defendants' production of hotel-room rentals on the

Las Vegas Strip—such rentals constituting the relevant antitrust market. Cendyn and Hotel Defendants therefore do not have a vertical relationship in the relevant antitrust market.

D.

Given that the licensing agreement between Cendyn and an individual Hotel Defendant is not horizontal (as it is not between competitors) and given that it is not vertical (as the parties to the agreement do not operate at different levels of distribution in the relevant market), where does that leave us? This agreement appears to be an "ordinary sales contract," which, according to a leading antitrust treatise, "does not restrain trade" and "without [which], trade would be impossible." 6 Phillip E. Areeda & Hovenkamp, *Antitrust Law* (5th Ed. 2023) ¶ 1437a.

While we do not have occasion to state whether it is always true that ordinary sales contracts do not restrain trade, we can say that the agreements here, as alleged, do not restrain trade *in the relevant market*. As alleged, the licensing agreements certainly imposed obligations on Cendyn and on each Hotel Defendant *as to each other* for the provision of and payment for the software products. But the licensing agreements do not restrain trade in the market for hotel-room rentals on the Las Vegas Strip because the licensing agreements do not restrain competition among Hotel Defendants in that market, nor do they restrain the parties' abilities to compete in that market.

Appendix A

1.

First, the licensing agreements as alleged here do not affect the competitive incentives in the market for hotel-room rentals on the Las Vegas Strip. Competition is "[t]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties." *Competition*, *Black's Law Dictionary* (12th ed. 2024). Black's Law Dictionary further notes that "[t]he essence of competition is rivalry." *Id* (quotation marks and citation omitted). In a competitive market, a firm's incentive to make more money by raising prices is "tempered by price competition as individual firms attempt to capture greater market share." *Musical Instruments*, 798 F.3d at 1194 n.8.

An *agreement* among Hotel Defendants to follow Cendyn's pricing recommendations would harm competition because individual hotels would no longer be motivated to compete on price were they to know that they could price their goods without risk of their rivals undercutting their prices and capturing their market share. But here, Plaintiffs do not contest the district court's finding that they failed to allege facts from which such an agreement among Hotel Defendants could be inferred. And that an agreement between competitors to obtain and use Cendyn's software products would stifle competition does not render the individual Hotel Defendants' *independent* choices to use Cendyn's software products anticompetitive. Rather, competitors engage in what antitrust law calls "parallel conduct" when they make the same independent business decisions as each other. *Musical Instruments*,

798 F.3d at 1193. But allegations of parallel conduct, "such as competitors adopting similar policies around the same time in response to similar market conditions," are "insufficient to state a claim" under Section 1. *Id.* And even consciously parallel conducti.e., similar conduct resulting from "observation of [one's] competitors' decisions" and "the pressures of an interdependent market"-does not violate Section 1. *Id.* at 1195.

Thus, even were all Hotel Defendants aware of their competitors' adoption and use of Cendyn's software products, their subsequent choices to adopt Cendyn's software products themselves, absent evidence of agreement among Hotel Defendants to do so, is insufficient to state a Section 1 claim.[8] (And, of course, to the extent Plaintiffs allege facts suggesting an agreement of Hotel Defendants to license Cendyn's software products, that would go only to Count 1, the appeal of which claim has been waived.)

Rather than eliminating competition, pricing one's hotel rooms in a manner calculated to maximize profits is how one competes. Cendyn's revenue-management software, therefore, holds itself out as a tool in the struggle for commercial advantage; by itself, it does not take away that struggle.

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8. This analysis might change if Plaintiffs had alleged that Cendyn shared the confidential information of each competing hotel among the licensees. But Plaintiffs do not allege such information-sharing occurred here.

Appendix A

Why don't the independent choices of Hotel Defendants to obtain pricing advice from the *same company* harm competition, as alleged here? Because here, obtaining information from the same source does not reduce the incentive to compete. Take, for example, a hypothetical firm that specializes in market research of the preferences of customers who patronize hotels on the Las Vegas Strip. Many hotels on the Las Vegas Strip would perceive a business advantage to learning about their customers' preferences, and they might hire the firm as a result. Hotels that hired the research firm might take advantage of this newfound knowledge of their consumer base by making changes to their properties and services offered. For example, hotels that learned that their potential customers prioritize sleeping late after a night at the casino might offer a later check-out time for a premium. Here, you see how hotels privy to this market research might make better informed decisions regarding their offerings and charge higher prices as a result. Competing hotels with the same knowledge might also make the same changes. But the fact that competing hotels possess the same knowledge regarding the preferences of their potential customers does not take away any hotel's incentive to compete on quality or price; they remain just as motivated to compete with each other as before they obtained the research.

While antitrust law restricts *agreements* between competitors regarding how to compete, it does not require a business to turn a blind eye to information simply because its competitors are also aware of that same information. Nor does it require businesses to decline to take advantage

of a service because its competitors already use that service. Holding otherwise would impose a rule that businesses cannot use the same service providers as their competitors. In the example above, such a holding would require hotels whose competitors hired the research firm to either seek consumer research from another (possibly inferior) firm or to refrain from obtaining such research regarding its customers altogether. Plaintiffs cite no authority for such a rule. Indeed, such a requirement could ultimately *harm* competition, as it would take away a means by which competitors might compete.

In light of Plaintiffs' decision to "abandon[]" their appeal of Claim 1, we assume that there is no agreement among Hotel Defendants to license Cendyn's software products. Given that assumption, the independent licensing agreements alleged do not harm the competitive incentives in the market for hotel-room rentals on the Las Vegas Strip because the provision of the pricing information does not affect the incentive to compete in that market. The disputed agreements therefore do not restrain trade by harming competition.[9]

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9. Plaintiffs argue that Cendyn's software "effect[ed] a fundamental change in [Hotel Defendants'] business strategy," resulting in "a shift from [Hotel Defendants'] historical focus on maximizing revenue by increasing occupancy to focus on maximizing 'profitability' by charging higher room rates—even though this decreases occupancy." To the extent Plaintiffs' argument depends on an anticompetitive agreement among Hotel Defendants, this argument is unavailing after Plaintiffs "abandon[ed]" that claim. And while Plaintiffs characterize Cendyn as effecting a change in Hotel Defendants' business

2.

Second, as alleged, the licensing agreements, which agreements were for the provision of and payment for Cendyn's software products, did not restrain the abilities of Hotel Defendants to compete in the relevant market. The absence of restraints limiting any party's ability to compete in the relevant market distinguishes this case from other cases on which Plaintiffs rely. In *Musical Instruments*, we cited to *Leegin Creative Leather Products Inc., v. PSKS, Inc.* for the proposition that as a general matter, "purely vertical restraints may unreasonably restrain trade in violation of [Section 1]." *Musical Instruments*, 798 F.3d at 1192 n.3 (citing 551 U.S. 877, 898-89 (2007)). In *Leegin*, the Supreme Court held that a vertical agreement in which "a manufacturer [agreed] with its distributor to set the minimum price the distributor [could] charge for the manufacturer's goods" was subject to evaluation pursuant to the rule of reason to determine whether the agreement violated Section 1. 551 U.S. at 881-82. There, the agreement between the manufacturer and the distributor restrained the distributor's ability to compete *in the relevant antitrust market* because it limited how a distributor could price the products it sold in that market. *Id.* at 882-84.

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strategy, they identify only a "shift from . . . maximizing revenue" to "maximizing 'profitability.'" Assuming this shift in focus occurred, it would not be anticompetitive for a firm to maximize profitability—indeed, a basic economic assumption is that a firm's aim is to maximize profit, not gross revenue.

By contrast, here the relevant antitrust market is that of hotel-room rentals on the Las Vegas Strip, but the restraint which provides for the payment for and provision of software products, not the rental price of the hotel rooms is not alleged to have limited the parties' abilities to compete in the market for hotel-room rentals on the Las Vegas Strip.

Plaintiffs cite *Plymouth Dealers' Association of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960), for the proposition that antitrust law does not require that an agreement affirmatively restrain a party's decision-making to restrain trade. In *Plymouth*, we affirmed the judgment of conviction under Section 1 of a car-dealership association that "published a price list and circulated it to its members." 279 F.2d at 130, 135. This non-binding price list was used by car dealers as "an agreed starting point" for the selling price of cars. *Id.* at 132. Plaintiffs argue that Cendyn's recommended prices function similarly to the nonbinding price list and likewise violate Section 1. In *Plymouth*, however, we held the starting point in the price list was "agreed upon between competitors." 279 F.2d at 132. That the price list on its own terms did not bind the dealers is of no matter because it is the agreement among competitors to use the price list that restrained competition. And such an agreement, even if imperfectly followed or not fully enforced, "interfere[d] with 'the freedom of traders and thereby restrain[ed] their ability to sell in accordance with their own judgment.'" *Id.* (citation omitted). Here, by contrast, Plaintiffs have not alleged an agreement among Hotel Defendants to each use Cendyn's services.

Lacking an agreement among Hotel Defendants that interferes with their individual freedoms to rent hotel rooms in accordance with each Hotel Defendant's own judgment, we look to Cendyn's licensing agreement to determine whether it contains such restraints. And here, the agreement for the provision of and payment for software products does not restrain any Hotel Defendant's ability to sell hotel rooms "in accordance with their own judgment."[10] *Id.* (citation omitted). While a hotel might adopt Cendyn's pricing recommendations at high rates because it trusts the recommendations or wants the ease of implementing the recommendations, the agreement for the provision of the recommendations itself is not a *restraint* of a hotel's ability to price its hotel-room rentals.

Contrast the disputed licensing agreements here with a type of vertical agreement that can violate Section 1: exclusive dealing. "Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010). These agreements violate Section 1 when the agreement's effect "foreclose[s] competition in a substantial share of

10. Of course, the fact that Hotel Defendants were not required to accept the pricing recommendations of Cendyn's software products would not immunize Hotel Defendants from Section 1 liability for horizontal price-fixing. After all, Cendyn could provide non-binding recommendations and competing hotels could all agree to abide by those recommendations. But such an agreement among competing hotels would be a hub-and-spoke conspiracy, any claim of which was waived here.

the line of commerce affected." *Id.* (citation omitted). An exclusive dealing agreement that prevents a buyer from purchasing goods from a different vendor restrains that buyer's ability to compete in the market in which the goods of the foreclosed vendors would have been used. Here, by contrast, the alleged agreement is for the *provision* of certain software products with no exclusion of other software products. The agreement does not prevent Hotel Defendants from using other services, nor does it dictate how Hotel Defendants may otherwise compete in the market for hotel-room rentals on the Las Vegas Strip. Hotel Defendants' trade is not restrained in the market for its hotel-room rentals.

Plaintiffs rely on *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), and *Board of Trade* for the proposition that whenever a contract is identified, that contract must be analyzed pursuant to the rule of reason. *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) ("[E]very commercial agreement restrains trade. Whether this action violates [Section 1] of the Sherman Act depends on whether it is adjudged an *unreasonable* restraint." (citation omitted)); *Bd. of Trade*, 246 U.S. at 238 ("[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition . . . [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.").

But Plaintiffs' cited cases do not support the notion that *every contract* a business enters opens it up to antitrust scrutiny *as to any other aspect of the business*. In *Northwest Wholesale*, for example, the Supreme Court held that a party's expulsion from a joint buying cooperative must be analyzed under the rule of reason, as opposed to per se analysis. 472 U.S. at 298. There, the Court held that the restraint (a concerted refusal to deal) should have been analyzed to determine whether "the cooperative possesses market power or unique access to a business element necessary for effective competition." *Id*. In other words, the agreement not to deal with a specific party must be analyzed in the context of the market in which the respective businesses are competing. But Plaintiffs, in arguing that every contract warrants scrutiny under the rule of reason, ask for more. By their logic, a hotel would have to defend its business practices in the market for hotel-room rentals under the rule of reason were it to, say, enter a contract with a painter for the painting of the hotel's dining room, or a contract to sponsor a matching campaign for a charitable cause. A hotel could expect this litigation even when the contracts for the painter or for participation in the matching campaign do not harm competition or prevent a hotel from competing in the market for hotel-room rentals. This interpretation of Section 1 misreads its purpose and our caselaw. The statement that as a general matter a restraint of trade is analyzed under the rule of reason does not support the holding that every contract triggers scrutiny pursuant to the rule of reason—regardless whether the contract imposes a restraint of trade in the relevant market at all.

Because the licensing agreements for the provision of software services did not restrain how Hotel Defendants could compete in the market for hotel-room rentals on the Las Vegas Strip as alleged, they do not restrain trade in the relevant market.[11] Absent this restraint of trade in the relevant market, the district court did not err in finding that the agreement did not violate Section 1 without first applying the rule of reason.

E.

Plaintiffs style Claim 2 as being aimed at the "set" of agreements between Cendyn and Hotel Defendants and argue that the agreements restrain trade "in the aggregate." To the extent the term "set" implies the existence of a conspiracy between the Hotel Defendants as members of the "set," any such claim would go to an agreement between competitorsi.e., a horizontal agreement. Count 2 cannot act as a backdoor to find such an agreement because Plaintiffs waived a finding of any such horizontal agreement when they abandoned

11. This case does not present the question regarding whether an agreement in which a firm independently delegates *binding* pricing decisions to a third party is necessarily a restraint of trade. Of course, any such parties might be structurally incapable of enacting certain restraints of trade. Here, for example, Cendyn and an individual Hotel Defendant cannot enter a price-fixing agreement (because the agreement is not between competitors) or a resale-price-maintenance agreement (as neither party is selling the products of the other). But the question whether a binding delegation of pricing to a third party restrains trade was not presented by Plaintiffs' allegations, so we do not reach that issue here.

Count 1. Additionally, Count 2 on its own terms contains no factual allegations of a horizontal component to the agreements. Rather, it challenges the mere existence of a number of (non-horizontal and non-vertical) licensing agreements, and calling that number of agreements a "set" is not an allegation of fact; it is merely a conclusion of the pleader. Alleging the existence of a number of licensing agreements, however, absent the allegation of any horizontal conspiracy, does not sufficiently allege a Section 1 violation because antitrust law provides no mechanism by which courts can evaluate the independent agreements between Cendyn and each Hotel Defendant "in the aggregate."

In *Atlantic Richfield*, this Court found that a grouping of individual agreements could not be "aggregated" for the purposes of determining whether together they acted as an unreasonable restraint of trade because the plaintiffs did not allege that each agreement had a discrete effect on competition. *William O. Gilley Enters., Inc. v. Atlantic Richfield Co.*, 588 F.3d 659, 665 (9th Cir. 2009) (per curiam). As alleged here, the agreements between Cendyn and each Hotel Defendant do not have a "discrete effect" on competition; indeed, for the reasons provided above, the agreements do not restrain competition in the relevant market at all.

Plaintiffs argue that "each agreement here *does* have a discrete effect on competition: the higher prices charged by each [Hotel Defendant] compared to relevant benchmarks." True, increased prices can serve as evidence of "a substantial anticompetitive effect" in the context

of certain agreements. *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 834 (9th Cir. 2022) (citation omitted). But that does not mean an individual firm's independent choice to charge higher prices itself harms competition. Here, Plaintiffs confuse cause and effect—higher prices can be a possible *result* of anticompetitive behavior, but charging a higher price by itself is not anticompetitive. Indeed, an allegation that "an agreement has the effect of . . . increasing prices to consumers does not sufficiently allege an injury to competition" because raising prices can be "fully consistent with a free, competitive market." *Brantley*, 675 F.3d at 1202. Plaintiffs therefore fail to plead facts which demonstrate each agreement has a discrete effect on competition.

Neither does footnote 3 of *Musical Instruments* provide for the aggregation of the individual licensing agreements. In *Musical Instruments*, we noted that a "rimless hub-and-spoke conspiracy" is "a collection of purely vertical agreements," and that "such a conspiracy may yet unreasonably restrain trade." 798 F.3d at 1192 n.3. In other words, where different parties (the "spokes") enter individual agreements with a central party (the "hub") but there is no agreement between the spokes (the "rim"), that configuration constitutes a collection of purely vertical agreements. We made this observation in the context of noting that "the respective vertical and horizontal agreements [of a hub-and-spoke conspiracy] can be analyzed either under the rule of reason or as violations per se." *Id.* at 1192. In other words, just as a single vertical agreement might unreasonably restrain trade, so too might "a collection of purely vertical agreements."

Id. at 1192 n.3. But the reference to a "collection of purely vertical agreements," absent a "conspiracy," does not provide a basis for the aggregation of non-vertical agreements—none of which individually restrains trade in the relevant market—to find a restraint of trade.[12]

Plaintiffs essentially argue for a rule in which a business's entry into any contract typical in its industry, when followed by higher prices, is sufficient to trigger antitrust scrutiny under the rule of reason as to any other aspect of the business. This rule does not comport with the logic of Section 1 or our precedents. To make out a Section 1 claim, Plaintiffs must allege a restraint of trade in the relevant market that causes an "actual adverse effect on competition." *Brantley*, 675 F.3d at 1200 (citation omitted). Here, where the disputed licensing agreements are not alleged to affect the competitive incentives in the relevant market, and where the alleged agreements between Cendyn and each Hotel Defendant are not alleged to restrain a party's ability to compete in the relevant market, Plaintiffs fail to plead a restraint of trade that causes an actual adverse effect on competition in the relevant market. Because the agreement for the provision of software and its payment does not operate as a restraint in the relevant market at all, in Count 2 Plaintiffs fail to plead a Section 1 violation. Thus, no analysis under the rule of reason is required.

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12. Indeed, in footnote 3 we cited to *Dickson v. Microsoft Corp.*, which noted that "the Supreme Court was clear: a wheel without a rim is not a single conspiracy." 309 F.3d 192, 203-204 (4th Cir. 2002); *Musical Instruments*, 798 F.3d at 1192 n.3.

IV.

Plaintiffs have failed to allege sufficient nonconclusory facts to support the plausible inference that the individual agreements between Cendyn and Hotel Defendants unreasonably restrained trade in the market for hotel-room rentals on the Las Vegas strip.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA, FILED MAY 8, 2024

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

Case No. 2:23-cv-00140-MMD-DJA

RICHARD GIBSON, *et al.*,

Plaintiffs,

v.

CENDYN GROUP, LLC, *et al.*,

Defendants.

Filed May 8, 2024

ORDER

I. SUMMARY

Plaintiffs Richard Gibson and Roberto Manzo, on behalf of themselves and all others similarly situated, allege that Defendants, a software company, and companies that operate hotels on the Las Vegas Strip, unlawfully restrained trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.* ("Sherman Act") by

artificially inflating the price of hotel rooms after agreeing to all use software marketed by the software company, Defendant Cendyn Group, LLC. (ECF No. 144 ("FAC").) Before the Court is Defendants Blackstone Real Estate Partners VII L.P., Blackstone, Inc., CENDYN Group, LLC, Caesar's Entertainment, Inc., The Rainmaker Unlimited, Inc., Treasure Island, LLC, and Wynn Resorts Holdings, LLC's joint motion to dismiss the FAC.[1] (ECF No. 160 (the "Motion").)[2] The Court held a hearing (the "Hearing") on the Motion on April 24, 2024. (ECF Nos. 170 (setting hearing), 175 (clarifying the Hearing is only on this Motion), 181 (hearing minutes).) As further explained below, the Court will dismiss the FAC with prejudice because Plaintiffs have not plausibly alleged a tacit agreement between Defendants or a restraint on trade in part because Hotel Defendants are not required to and often do not accept the pricing recommendations generated by Cendyn's products, Plaintiffs have already been given an opportunity to amend, and they have given no indication that they could further amend to remedy the deficiencies of their FAC.

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1. The Court refers herein to Blackstone Real Estate Partners VII L.P. and Blackstone, Inc. collectively as Blackstone. The Court refers herein to Cendyn Group, LLC, and The Rainmaker Unlimited Inc. collectively as Cendyn unless context requires the Court to refer to Rainmaker before it was acquired by Cendyn. The Court refers to all Defendants except for Cendyn collectively as Hotel Defendants herein.

2. Plaintiffs filed a response (ECF No. 167), and Defendants filed a reply (ECF No. 168).

II. BACKGROUND

The broad contours of the factual background of this case remain unchanged since the Court's prior order dismissing the original complaint in its entirety, but with leave to amend. (ECF No. 141 at 2-3.) The FAC adds many paragraphs of allegations going to the same 'hub-and-spoke' conspiracy alleged in the original complaint and adds a second claim for relief alleging a violation of Section 1 of the Sherman Act that challenges a set of vertical agreements between Cendyn and Hotel Defendants, which combine to allegedly restrain trade. (ECF No. 144 at 219-220; *see also generally id.*) Thus, the Court incorporates by reference the background discussion from the prior order (ECF No. 141 at 2-3) along with summarizing the following additional allegations adapted from the FAC.

Hotel Defendants own and/or operate hotel/casinos on the Las Vegas Strip. (*Id.* at 18-20.) Rainmaker, and then Cendyn after it acquired Rainmaker in 2019, offers two products licensed and used by all Hotel Defendants—which contain integrated sets of pricing algorithms—called GuestRev and GroupRev. (*Id.* at 8, 34-76.) Among other features, these two products—GuestRev for individual rooms and GroupRev for groups (like conferences)—recommend to customers how to price their hotel rooms. (*Id.* at 34-72 (as to GuestRev), 72-76 (as to GroupRev).) Rainmaker launched the product it eventually rebranded as GuestRev in 2001. (*Id.* at 34.) Rainmaker launched GroupRev in 2013. (*Id.* at 72.) Starting in 2015, both products began to incorporate a feature called RevCaster, a "rate shopper product for collecting public

pricing information[,]" "so that competitor pricing is easily incorporated as a factor in setting pricing." (*Id.* at 36, 47.)

Hotel "Defendants began using Rainmaker's revenue management system at various points in time." (*Id.* at 86.) Specifically, Caesars began using GuestRev around 2004, and the Cosmopolitan began using it in 2014; the other Hotel Defendants began using it at different times between those two points in time. (*Id.* at 86-106.)

The FAC also includes many allegations going to how the products work and how Hotel Defendants use them, which the Court discusses in more detail below as part of its analysis.

III. DISCUSSION

Defendants move to dismiss both claims for relief asserted in the FAC. The Court addresses Defendants' Motion as to both claims in turn, below.

A. First Claim: Hub and Spoke

Plaintiffs allege that Defendants violated the Sherman Act by entering a hub and spoke conspiracy, consisting of a series of vertical agreements between Cendyn (the hub) and Hotel Defendants (the spokes), with a rim made from the tacit agreements between Hotel Defendants to use Cendyn's GuestRev and GroupRev products knowing that their competitors were as well.[3] (ECF No. 144 at 218-

3. "A traditional hub-and-spoke conspiracy has three elements: (1) a hub, such as a dominant purchaser; (2) spokes,

219.) Defendants argue that this claim should be dismissed because Plaintiffs do not plausibly allege a tacit agreement between Hotel Defendants, more specifically arguing the FAC does not cure four of the key defects[4] the Court

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such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir. 2015) (citation omitted).

4. The Court agrees with Plaintiffs that their FAC has cured one of the four key deficiencies that the Court previously identified: which algorithm each of the Hotel Defendants uses. (ECF No. 141 at 4-5 (pointing out this deficiency).) Defendants argue Plaintiffs have not cured this deficiency because each user can customize the algorithms within the revenue management products it uses by selecting the criteria and competitors that a customer would like to use to generate room price predictions, but do not allege which specific criteria any Hotel Defendant used, and thus have not alleged which algorithm each Hotel Defendant uses. (ECF No. 160 at 17-18.) Plaintiffs counter that this argument is too granular, and they have adequately addressed the Court's concerns regarding the original complaint: that they now allege each Hotel Defendant used GuestRev and GroupRev during the pertinent time. (ECF No. 167 at 18-19.) The Court agrees with Plaintiffs.

Plaintiffs allege in their FAC, unlike in their original complaint, that each Hotel Defendant used GuestRev and GroupRev during the pertinent time. (ECF No. 144 at 86-106.) This remedies the issue that the Court pointed out in its prior order. (ECF No. 141 at 4-5.) Indeed, Defendants seek in their Motion a new, higher level of specificity than the Court contemplated requiring in its prior order without citing any legal authority beyond the Court's prior order. (ECF No. 160 at 18.) But the Court's prior order does not sufficiently support Defendants' argument. (ECF No. 141 at 4-5.) Requiring that each Defendant use the same algorithms in the same way, by selecting the

previously identified in the original complaint, and further arguing that the new allegations in the FAC (as opposed to the initial complaint) merely expose further fatal defects with Plaintiffs' first claim. (ECF No. 160 at 17-35.) The Court agrees with Defendants in pertinent part.

"The 'crucial question' prompting Section 1 liability is 'whether the challenged anticompetitive conduct 'stems from [lawful] independent decision or from an agreement, tacit or express.'" *In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 46 (9th Cir. 2022) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). In granting Plaintiffs leave to amend their original complaint, the Court was essentially giving Plaintiffs another chance to answer this question. And even though the FAC contains many more allegations than

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same inputs, requires too much. An algorithm is not defined by its inputs, but instead by its rules. *See, e.g.*, Kristian Lum and Rumman Chowdhury, *Opinion: What is an "algorithm"? It depends whom you ask*, MIT Technology Review (Feb. 26, 2021), https://perma.cc/4YZH-38BW ("While there's no universally accepted definition, a common one comes from a 1971 textbook written by computer scientist Harold Stone, who states: 'An algorithm is a set of rules that precisely define a sequence of operations.'") (hyperlink omitted).

More broadly, the Court agrees with Plaintiffs that, particularly drawing all inferences in their favor as the Court must at the pleading stage, they now allege enough in the FAC in terms of alleging that all Hotel Defendants used GuestRev and GroupRev during the pertinent time. (ECF No. 144 at 86-106.) *See also Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1003 (9th Cir. 2018) (stating that the Court must draw "all reasonable inferences in favor of the" Plaintiffs) (citation omitted).

the original complaint did, Plaintiffs have not plausibly alleged that the challenged conduct stems from a tacit agreement between Hotel Defendants.

The Court took the approach in its prior dismissal order of elaborating on a non-exhaustive list of deficiencies, but all these deficiencies are best understood as different reasons why Plaintiffs had not plausibly alleged a tacit agreement among Hotel Defendants to raise prices for hotel rooms by all using Cendyn's software. And while the Court discusses below the three key deficiencies that the Court both identified in its prior order and persist in the FAC, those too are best understood as alternative and determinative reasons why Plaintiffs have not plausibly alleged a tacit agreement in the FAC, either. Said otherwise, Plaintiffs' allegations that Defendants entered into a tacit agreement to fix prices still have not crossed the line from conceivable to plausible despite the multitude of additional allegations in the FAC. This case remains a relatively novel antitrust theory premised on algorithmic pricing going in search of factual allegations that could support it.

Defendants first argue in pertinent part that Plaintiffs still have not alleged that Hotel Defendants began using GuestRev and GroupRev around the same time, which—as the Court found in its prior order—tends to undermine Plaintiffs' argument that Hotel Defendants' decisions to use these products evidence an agreement instead of independent conduct. (ECF No. 160 at 18-19.) Plaintiffs counter that this argument ignores the substance of Plaintiffs' alleged claims of parallel conduct, which are

not tied to the dates that Hotel Defendants began using GuestRev but rather their parallel use of GuestRev starting in 2015 when GuestRev integrated public competitor prices from RevCaster for the first time—and Hotel Defendants began charging higher prices shortly thereafter. (ECF No. 167 at 19-20.) Plaintiffs further argue that Hotel Defendants agree to continue participating in the conspiracy each year when they renew their licensing agreements with Cendyn for GuestRev. (*Id.* at 20.) The Court continues to find that the timing of when Hotel Defendants began to use GuestRev and GroupRev renders a tacit agreement among them implausible.

On the one hand, "[i]t is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators." *Interstate Cir. v. United States*, 306 U.S. 208, 227, 59 S. Ct. 467, 83 L. Ed. 610 (1939); *see also United States v. Masonite Corp.*, 316 U.S. 265, 275, 62 S. Ct. 1070, 86 L. Ed. 1461, 1942 Dec. Comm'r Pat. 777 (1942) (citing *Interstate Cir.*). But on the other hand, allegations that defendants "adopted [] policies over a period of several years, not simultaneously" did "not raise the specter of collusion" in *Musical Instruments*, 798 F.3d at 1196. So is this case more like *Interstate Cir.* and *Masonite*, as Plaintiffs argued at the Hearing, or *Musical Instruments*, as Defendants did?

This case is more like *Musical Instruments*. Indeed, there is a key difference between the allegations in the FAC and *Interstate Cir.* and *Masonite*. In those cases, competitors all agreed to charge the same prices. *See*

Interstate Cir., 306 U.S. at 231 ("the 25 cents admission price was to be required of all alike, forcing increases in admission price ranging from 25 per cent. to 150 per cent[.]"); *Masonite*, 316 U.S. at 271 (explaining how Masonite set the minimum and maximum sale prices and retained the sole right to set prices under the pertinent agreements). As further explained below (because the parties also address it as a standalone argument), Plaintiffs do not allege that all Defendants agreed to be bound by GuestRev or GroupRev's pricing recommendations, much less that they all agreed to charge the same prices—and indeed allege to the contrary that Cendyn has difficulty getting its customers to accept the prices it recommends in GuestRev and GroupRev. (ECF No. 144 at 10 ("CW 1 stated that Rainmaker engaged in a 'never-ending battle' to convince clients not to override its pricing recommendations[. . .]").) And it would be more plausible to infer a tacit rim when each spoke agreed to charge the price that the hub demanded as each spoke decided to enter into an agreement with the hub requiring each of the spokes to charge a certain price. But here, Plaintiffs do not allege that each spoke—Hotel Defendants—ever agreed to charge a price that the hub—Cendyn—demanded them to charge. The analogy to *Interstate Cir.* and *Masonite* accordingly does not quite work. And it would thus be too implausible to infer that each Hotel Defendant was signing up for a price fixing conspiracy when it agreed to license and use GuestRev and GroupRev. As alleged, there is no existing agreement to fix prices that a later-arriving spoke could join.

Instead, given the allegations in the FAC—which have not materially changed from the original complaint—that

Hotel Defendants began licensing GuestRev and GroupRev at different times over an approximately 10-year period[5] and never agreed to charge the prices GuestRev and GroupRev recommended to them, the only plausible inference that the Court can draw is that the timing "does not raise the specter of collusion." *Musical Instruments*, 798 F.3d at 1196. Instead, and even drawing all inferences in Plaintiffs' favor, the allegations to the effect that Hotel Defendants agreed to license GuestRev and GroupRev—perhaps in response to Cendyn's marketing materials listing all their customers, the golf outings and open bars Cendyn hosts, or because GuestRev has various useful features[6]—over the course of some 10 years merely suggest that Hotel Defendants had a "similar reaction to similar pressures within an interdependent market, or conscious parallelism." *Musical Instruments*, 798 F.3d at 1196. This contrasts with the implausible inference of a tacit agreement between Hotel Defendants that Plaintiffs would like the Court to draw. And the allegations about Defendants' parallel use of GuestRev starting in 2015 do not plausibly allow for such an inference either because, as

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5. Defendants made a timeline that is helpful in terms of visualizing the gaps in time between each Hotel Defendant's decision to license GuestRev. (ECF No. 160 at 18.)

6. Defendants persuasively argued at the Hearing that even Plaintiffs allege in their FAC that GuestRev has various features that might make it useful to Hotel Defendants beyond providing pricing recommendations, which further undermines the plausibility of Plaintiffs' theory that Hotel Defendants licensed GuestRev so that they could collude to raise prices. (ECF No. 160 at 13 (summarizing allegations in the FAC describing GuestRev's various features).)

Defendants pointed out, GuestRev and GroupRev merely integrated public competitor prices through RevCaster starting in 2015. (ECF No. 167 at 19-20.) That technical change does not speak to any agreement between Hotel Defendants. The Court thus again finds that the gaps in time between when Hotel Defendants agreed to license GuestRev and GroupRev suggest a tacit agreement between them is implausible.

Defendants then argue that Plaintiffs still do not, and cannot, allege that Hotel Defendants exchange any non-public information with each other by using GuestRev or GroupRev—and as the Court previously found, consulting public sources to see your competitors' rates in reaching decisions about how to price hotel rooms does not violate the Sherman Act. (ECF No. 160 at 19-20.) Defendants further argue that, like in their original complaint, Plaintiffs attempt to create an inference that GuestRev facilitates the exchange of nonpublic information without quite alleging it by alleging that GuestRev uses machine learning techniques on data input into it—though Defendants suggest the most plausible inference that can be drawn from those allegations is that GuestRev seeks to improve itself as it receives more data. (*Id.* at 20.)

Plaintiffs counter that they need not allege the exchange of non-public information between Hotel Defendants because they allege that Hotel Defendants delegated their pricing decisions to Cendyn by using GuestRev and GroupRev and changed their behavior to optimize for revenue instead of occupancy—as they had historically done. (ECF No. 167 at 24-27.) However,

Plaintiffs cite sources in this section—a Department of Justice ("DOJ") statement of interest in a case called *Yardi* and comments from former FTC chairman Maureen Ohlhausen—that both discuss the exchange of confidential information between the spokes and the hub even in the quotations excerpted in Plaintiffs' brief. (*Id.*) Moreover, Plaintiffs state that "Defendants make no serious attempt to distinguish this case from *RealPage*[,]" and hold that case up as an analogue the Court should consider (*id.* at 26-27), but the *RealPage* court distinguished that case from this one precisely because the complaint in that case included allegations of the exchange of otherwise confidential information between competitors through the algorithm, while this case did not. *See In re RealPage, Inc., Rental Software Antitrust Litig. (No. II)*, Case No. 3:23-MD-03071, ___ F.Supp.3d ___, 2023 U.S. Dist. LEXIS 230200, 2023 WL 9004806, at *17 (M.D. Tenn. Dec. 28, 2023).[7] Thus, even Plaintiffs' proffered persuasive authority—they offer no binding authority—does not support Plaintiffs' argument.

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7. To the extent it is not obvious, the Court distinguishes *RealPage*, 2023 U.S. Dist. LEXIS 230200, 2023 WL 9004806, for the same reason that the *RealPage* court distinguished this case. This case does not involve allegations of competitors pooling their confidential or proprietary information in the dataset that the pertinent algorithm runs on, while that case did. *See* 2023 U.S. Dist. LEXIS 230200, [WL] at *17 ("the Multifamily Complaint unequivocally alleges that RealPage's revenue management software inputs a melting pot of confidential competitor information through its algorithm and spits out price recommendations based on that private competitor data[.]").

But more to the point, the Court agrees with Defendants that Plaintiffs' failure to plausibly allege the exchange of confidential information from one of the spokes to the other through the hub's algorithms is another fatal defect with their first claim because it too compels the conclusion that there is no rim. And to be clear, Plaintiffs do not explicitly allege or argue that Hotel Defendants share confidential information with each other by using GuestRev or GroupRev. (ECF Nos. 144 at 47 ("Rainmaker itself has publicly touted how RevCaster, its rate shopper product for collecting public pricing information, is integrated with GuestRev so that competitor pricing is easily incorporated as a factor in setting pricing."), 167 at 26 ("While the competitor pricing data incorporated into GuestRev via RevCaster may be public[...]").) As the Court held in its prior order, consulting your competitors' public rates to determine how to price your hotel room—without more—does not violate the Sherman Act. (ECF No. 141 at 11 (citing *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999)).) This is in part because the Supreme Court has interpreted the Sherman Act to "prohibit only *unreasonable* restraints of trade." *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 833 (9th Cir. 2022), *cert. denied sub nom. The Nat'l Ass'n of Realtors v. The PLS.com, LLC.*, 143 S. Ct. 567, 214 L. Ed. 2d 336 (2023) (citation omitted).

There is nothing unreasonable about consulting public sources to determine how to price your product. Indeed, in *Prosterman v. Am. Airlines, Inc.*, 747 F. App'x 458, 462 (9th Cir. 2018), the United States Court of Appeals for the Ninth Circuit found that a third party clearinghouse of

public pricing and rules information for airline fares did not plausibly facilitate collusion between the defendant airlines who both used it and simultaneously changed their rules to eliminate a loophole allowing for lower fares on some flights, rejecting the plaintiffs' attempts to point to this arrangement as a plus factor, affirming the district court's decision to dismiss the pertinent complaint, and also noting its skepticism that membership in trade organizations was suggestive of collusion. *See id.* Extending from *Prosterman*, Plaintiffs only allege that Hotel Defendants are getting public data about other Hotel Defendants by using GuestRev or GroupRev, and that does not suggest collusion.

Plaintiffs also suggested in their briefing and at the Hearing that their allegations about 'machine learning' plausibly suggest that Hotel Defendants exchange confidential information with each other by using GuestRev, but those allegations do not plausibly give rise to such an inference upon closer inspection. Plaintiffs specifically point to paragraphs 257-265 of the FAC. (ECF No. 167 at 24.)

As mentioned, these paragraphs do not plausibly allege that Hotel Defendants exchange confidential or proprietary information with each other by using GuestRev. That said, the first two paragraphs in this section allege it in a conclusory fashion. (ECF No. 144 at 152-53 (¶¶ 257-58).) But the factual allegations supporting these conclusory allegations that follow do not plausibly support them. *See Twombly*, 550 U.S. at 557 (2007) (noting that a conclusory allegation "[g]ets the complaint

close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.") (citation omitted). Specifically, "CW 1 stated that 'we used data across all our customers for research.'" (*Id.* at 153.) But using data across all your customers for research does not plausibly suggest that one customer has access to the confidential information of another customer—it instead plausibly suggests that Cendyn uses data from various customers to improve its products. Paragraphs 259 and 260 discuss and excerpt a white paper that Cendyn paid to have written, but neither the excerpts nor the rest of the white paper reference GuestRev or GroupRev. (*Id.* at 153-55.) And Plaintiffs' counsel conceded at the Hearing that the white paper is not specifically discussing GuestRev or GroupRev. The following paragraph excerpts a blog post from Cendyn's website written by Dan Skodol, but it generally discusses the benefits of optimizing for revenue instead of occupancy, accurate demand forecasting, and machine learning—he does not say anything about GuestRev or GroupRev, much less that they facilitate the exchange of confidential information between competitors. (*Id.* at 156-57.) Similarly, the following paragraph generally explains what machine learning is and why it may be beneficial in the context of the hotel/casino business. (*Id.* at 157.) And Paragraph 263 describes the backgrounds of several data scientists who have worked for Rainmaker, highlighting their experience with machine learning techniques. (*Id.* at 157-159.) These paragraphs do not plausibly suggest the exchange of confidential information between competitors.

Paragraphs 264 and 265 get closer to plausibly supporting Plaintiffs' theory, but notably exclude any mention of confidential information. (*Id.* at 159.) Indeed, paragraph 265 states, "Defendant hotel operators have not directly exchanged information with each other." (*Id.*) But other sentences in these paragraphs describe how GuestRev can be integrated with each hotel's property management system, and state that Hotel Defendants have 'pooled' their data in a central hub—Rainmaker's revenue management system. (*Id.*) But the pool of data is not described as containing confidential or proprietary information, so these allegations do not plausibly suggest the "melting pot of confidential competitor information" that the *RealPage* court found important in permitting that case to proceed. 2023 U.S. Dist. LEXIS 230200, 2023 WL 9004806, at *17. So, overall, these two paragraphs do not plausibly suggest that Hotel Defendants exchange confidential information with each other by using GuestRev or GroupRev, either.

Indeed, Plaintiffs' counsel conceded at the Hearing that, to the extent the FAC alleges anything about the exchange of confidential information, those allegations are based on their "machine learning" theory—that the algorithms improved over time by running on confidential information provided by each Hotel Defendant. No Hotel Defendant gets direct access to the confidential information of another but gets the benefit of a system that has gotten better since it was launched in 2001 because it has run on the confidential data of many others in the past. In other words, the algorithms got better at predicting optimal hotel room pricing with the benefit of

information provided by each customer. But this does not plausibly suggest that Hotel Defendants tacitly agreed to fix prices by licensing GuestRev or GroupRev. Even drawing all inferences in Plaintiffs' favor, it merely suggests GuestRev or GroupRev might be compelling to a Hotel Defendant because it offers better pricing recommendations than it used to. That is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 554 (2007). It does not render Plaintiffs' first claim plausible.

Defense counsel persuasively analogized the pricing algorithms to an attorney's practice at the Hearing. He argued you can think of Plaintiffs' machine learning theory as to GuestRev and GroupRev as no different than an attorney improving her skills over time with the benefit of experience and access to confidential client information she gains with each client engagement. The attorney does not share one client's confidential information with another, but over time, she (ideally) gets smarter because of what she has learned from each client engagement she has successfully completed. And in time, clients seek her out because she has, for example, developed expertise in antitrust law. But that does not plausibly suggest that each new client who seeks out the attorney is entering into an agreement with every client she has ever worked with. How could it? And the same goes for Plaintiffs' machine learning theory. Thus, mere use of algorithmic pricing based on artificial intelligence by a commercial entity, without any allegations about any agreement between competitors—whether explicit or implicit—to accept the

prices that the algorithm recommends does not plausibly allege an illegal agreement, or "raise a reasonable expectation that discovery will reveal evidence of illegal agreement" sufficient to survive the Motion. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

Moreover, and to the extent Plaintiffs contend their theory alleged in the FAC does not strictly depend on the exchange of confidential information between competitors, Defendants' counsel also persuasively pointed out at the Hearing that this argument is based on Hotel Defendants having allegedly 'delegated' their decisionmaking on price to Cendyn—but Plaintiffs have not actually alleged such a delegation. (ECF No. 167 at 24-25 (arguing about delegation).) This is because Plaintiffs have not alleged that Hotel Defendants agreed to be bound by GuestRev or GroupRev's pricing recommendations—Hotel Defendants may accept or reject them, and apparently often did. (ECF No. 144 at 10.) The most plausible definition of delegate that Plaintiffs seem to be relying on here is "[t]o send as a representative with authority to act[.]" DELEGATE, Black's Law Dictionary (11th ed. 2019). But Plaintiffs have not alleged that Hotel Defendants have given Cendyn authority to act. GuestRev and GroupRev cannot set prices for Hotel Defendants. These products can merely make recommendations that Hard Rock, for example, accepted "in some circumstances while Hard Rock overrode the recommendations in other cases." (ECF No. 144 at 102.) Despite their argument to the contrary, Plaintiffs have not alleged that Hotel Defendants delegated their pricing decisions to Cendyn.

In sum, the Court does not find that Plaintiffs have plausibly alleged that Hotel Defendants exchange confidential information with each other—directly or indirectly—by using GuestRev. This matters because exchanging confidential information with your competitors by all agreeing to use GuestRev would be more suggestive of an agreement. But merely using GuestRev or GroupRev without exchanging confidential information with your competitors is more suggestive of a "[lawful] independent decision" to use a product that allegedly helps hotels do more than just decide how to price their hotel rooms in any event—such as analyzing potential guest value and forecasting demand based on historical data. (ECF No. 160 at 13 (referring to allegations in the FAC).) *See also In re DRAM*, 28 F.4th at 46 (the source of the quotation).

Defendants next—and finally, for purposes of Plaintiffs' first claim—argue that Plaintiffs' allegations in the FAC cannot overcome the Court's prior finding that Plaintiffs cannot make out a Sherman Act violation without alleging that Hotel Defendants are required to accept the pricing recommendations made by GuestRev, highlighting pertinent allegations in the FAC to the effect that GuestRev's pricing allegations are frequently rejected to underline the point. (ECF No. 160 at 20-21.) Plaintiffs counter that they need not allege that GuestRev's pricing recommendations are accepted 100 percent of the time, instead contending that they have plausibly alleged Hotel Defendants either accept GuestRev's pricing recommendations enough of the time to disrupt an otherwise competitive market or that Hotel Defendants at least use GuestRev's recommendations as starting points

to set prices. (ECF No. 167 at 22-24.) Plaintiffs rely on two DOJ statements of interest in the *RealPage* and *Yardi* cases, along with the Court's decision in *Alvarado v. W. Range Ass'n*, Case No. 3:22-cv-00249-MMD-CLB, 2023 U.S. Dist. LEXIS 122127, 2023 WL 4534624, at *8 (D. Nev. Mar. 21, 2023), to support this argument. (ECF No. 167 at 22-23.) The Court again agrees with Defendants.

As mentioned several times, Plaintiffs allege in the FAC that Hotel Defendants are not required to accept the prices that GuestRev proposes for their hotels. (ECF No. 144 at 10 (alleging that customers may override GuestRev's proposed prices, and indeed, that they often did because "Rainmaker engaged in a 'never-ending battle' to convince clients not to override its pricing recommendation"), 39-40 (citing Cendyn marketing materials that GuestRev recommendations are accepted 90% of the time), 60 (explaining how customers may override pricing recommendations), 68 (describing a training video that explains how a customer can override a pricing recommendation), 102 ("CW 4 further stated that Hard Rock automatically accepted Rainmaker's pricing recommendations in some circumstances while Hard Rock overrode the recommendations in other cases.").) Indeed, as indicated by the final excerpt in that citation, the FAC only contains specific allegations regarding Hard Rock, and Plaintiffs only allege as to Hard Rock that Hard Rock accepted the pricing recommendations sometimes. (*Id.* at 102.) Thus, as in the original complaint, Plaintiffs do not allege that Hotel Defendants are required to accept the pricing recommendations provided by GuestRev or GroupRev.

This matters because an agreement to accept pricing recommendations from GuestRev or GroupRev could more plausibly give rise to an inference of an agreement between Hotel Defendants. If they all agreed to outsource their pricing decisions to a third party, and all agreed to price according to the recommendations provided by that third party, it would be plausible to infer the existence of a collusive agreement to fix prices. But the allegations that could plausibly support that sort of inference do not exist in the FAC.

And Plaintiffs' arguments to the effect that the Court should draw implausible inferences from the pertinent allegations in the FAC are unpersuasive. For example, Plaintiffs again included the figure from Cendyn marketing material that GuestRev's pricing recommendations are accepted 90% of the time, but the Court rejected an identical allegation based on that same figure as not determinative in its order dismissing the original complaint. (ECF No. 141 at 5-6.) The Court rejects that argument for the same reason here. And Plaintiffs go to some lengths in terms of allegations included in the FAC to allege that GuestRev's user interface is set up to encourage customers to accept GuestRev's pricing recommendations—that pricing recommendations must be overridden, and graphical elements within the software itself discourage overriding recommended prices—but these allegations are ultimately contradicted by Plaintiffs' allegation that "Rainmaker engaged in a 'never-ending battle' to convince clients not to override its pricing recommendation[.]" (ECF No. 144 at 10.) Plaintiffs also argue that Hotel Defendants' decisions to continue using

GuestRev and public praise for the product suggest that 'the competitive process was disrupted' but that argument does not account for Plaintiffs' other allegations to the effect that GuestRev has other features that customers may select for, such as demand forecasting based on historical data and predictions regarding guest revenue. (*Compare* ECF No. 167 at 23 *with* ECF No. 160 at 13 (summarizing pertinent allegations in the FAC).) Thus, it is implausible to infer that Hotel Defendants only use GuestRev because they have entered into a tacit agreement to accept Cendyn's pricing recommendations, let alone to fix prices.

This brings the Court back to perhaps the primary issue with the FAC that links the three issues described above together and renders Defendants' persuasive authority further distinguishable—Plaintiffs do not plausibly allege in the FAC that Hotel Defendants tacitly agreed to fix prices. The gap in time between when they all began using GuestRev, the missing allegations regarding the exchange of confidential information, and the lack of any allegations to the effect that Hotel Defendants were required to accept GuestRev's pricing recommendations all point to the conclusion that Hotel Defendants never agreed to fix prices by using GuestRev or GroupRev. And to the extent it needs to be mentioned, there are also no specific, nonconclusory allegations in the FAC that Hotel Defendants ever agreed to fix prices. These key absences render the Court's other recent Sherman Act decision distinguishable, where the Court found the defendants had agreed to fix wages at a certain level, though some defendants later departed from that agreement and paid

some sheepherders more. *See Alvarado v. W. Range Ass'n*, Case No. 3:22-cv-00249-MMD-CLB, 2023 U.S. Dist. LEXIS 122127, 2023 WL 4534624, at *8 (D. Nev. Mar. 21, 2023). In contrast, in the FAC, there are no plausible allegations suggesting that any Hotel Defendants ever agreed to fix prices or agreed to accept pricing recommendations. Thus here, unlike there, there is no agreed-upon price to depart from.

Without a plausible agreement, Plaintiffs' first claim cannot proceed. The Court grants Defendants' Motion as to the first claim for relief.

B. Second Claim: Set of Vertical Agreements

Plaintiffs allege in their second claim that Defendants violated the Sherman Act because Hotel Defendants entered into a series of vertical agreements with Cendyn to use GuestRev or GroupRev, which had the anticompetitive effect of artificially inflating hotel room prices, and thus harmed consumers. (ECF No. 144 at 220.) Plaintiffs further allege there are no procompetitive justifications for these arrangements, and to the extent Defendants offer any justifications, Defendants' combination could have been achieved by less anticompetitive means. (*Id.*)

"Vertical agreements [. . .] are analyzed under the rule of reason, whereby courts examine 'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,' to determine the effect on competition in the relevant product market." *In re Musical Instruments*, 798 F.3d at 1191-92. More specifically, courts

use a three-step burden shifting framework under which, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Ohio v. Am. Express Co.*, 585 U.S. 529, 541, 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018) (citation omitted). If the plaintiff carries that burden, the burden shifts back to the defendant to show a procompetitive rationale for the restraint. *See id.* "If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* at 542 (citation omitted).

Defendants first argue that the vertical agreements between Cendyn and individual Hotel Defendants do not restrain trade because Plaintiffs identify no agreements that constrain Hotel Defendants' ability to unilaterally set prices. (ECF No. 160 at 35-36.) In response, Plaintiffs point to their allegations to the effect that Hotel Defendants' average room prices became more expensive relative to the Venetian, a hotel that does not use GuestRev, and Las Vegas Strip hotels became more expensive relative to hotel rooms in other markets, particularly starting in 2015 when RevCaster was integrated into GuestRev and accordingly incorporated competitors' prices. (ECF No. 167 at 38-41.) Plaintiffs further argue that this harmed competition in at least two ways; higher prices and because the vertical agreements facilitated collusion between Hotel Defendants. (*Id.* at 41-43.) Alternatively, Plaintiffs counter that they have plausibly alleged indirect harm to competition because they have plausibly alleged that Hotel

Defendants have market power in their defined market area, and they have alleged based on economic research that having multiple competitors in the same market using the same pricing algorithm harms competition. (*Id.* at 43-46.) The Court again agrees with Defendants.

As described above, Plaintiffs do not allege that Hotel Defendants are required to accept the prices that GuestRev and GroupRev (the products offered by the other side of the challenged vertical agreements, Cendyn) recommend to them—and indeed allege that the recommendations are often rejected. Thus, Hotel Defendants have not agreed to restrain their ability to price their hotel rooms in any way by licensing GuestRev or GroupRev. It accordingly cannot be that the vertical agreements between Cendyn and Hotel Defendants to license GuestRev and GroupRev restrain trade. And "[i]t is axiomatic that '[t]o constitute a Section 1 violation, the contract, combination, or conspiracy must be in restraint of trade.'" *Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir. 1987) (citation omitted); *see also generally id.* (affirming dismissal of Sherman Act claim). In sum, the Court also grants Defendant's Motion as to Plaintiffs' second claim for relief.

Turning more broadly back to considering both claims in the FAC, the Court will not grant Plaintiffs leave to amend. Plaintiffs:

> were already granted leave to amend once and were given an opportunity to conduct discovery to discover the facts needed to plead

> their causes of action, yet their First Amended Complaint contained [some of] the same defects as their original Complaint. Appellants fail to state what additional facts they would plead if given leave to amend, or what additional discovery they would conduct to discover such facts. Accordingly, amendment would be futile.

Kendall, 518 F.3d at 1051-52.[8] The Court will dismiss the FAC with prejudice.

IV. CONCLUSION

The Court notes that the parties made several arguments and cited several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Motion before the Court.

It is therefore ordered that the Motion (ECF No. 160) is granted.

It is further ordered that the FAC (ECF No. 144) is dismissed, in its entirety, with prejudice.

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8. Plaintiffs merely state at the end of their response to the Motion, "[h]owever, Plaintiffs respectfully request that, if the Court grants Defendants' motions in whole or in part, it provide Plaintiffs with 21 days to file a motion for leave to amend pursuant to Local Rule 15-1." (ECF No. 167 at 48.) They do not explain how they could amend to state plausible claims, nor do they otherwise address amendment in their response. Amendment would thus be futile.

The Clerk of Court is directed to enter judgment accordingly and close this case.

DATED THIS 8th Day of May 2024.

/s/ Miranda M. Du
MIRANDA M. DU
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT, FILED DECEMBER 11, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-3576

D.C. No. 2:23-cv-00140-MMD-DJA
District of Nevada,
Las Vegas

RICHARD GIBSON AND ROBERTO MANZO, *et al.*,

Plaintiffs-Appellants,

v.

CENDYN GROUP, LLC; *et al.*,

Defendants-Appellees.

Filed December 11, 2025

ORDER

Before: BEA and DE ALBA, Circuit Judges, and BROWN, District Judge.*

Judge de Alba has voted to deny the petition for rehearing en banc, and Judge Bea and Judge Brown so

* The Honorable Jeffrey Vincent Brown, United States District Judge for the Southern District of Texas, sitting by designation.

recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. Accordingly, Appellants' petition for rehearing en banc (Dkt. No. 82) is **DENIED**.