

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RICHARD GIBSON, *et al.*,

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

Plaintiffs,

ORDER

v.

MGM RESORTS INTERNATIONAL, *et al.*,

Defendants.

I. SUMMARY

Plaintiffs Richard Gibson and Heriberto Valiente, on behalf of themselves and all others similarly situated, allege that defendant Hotel Operators¹ 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 pricing software marketed by the same company, Defendant Cendyn Group, LLC. (ECF No. 1 (“Complaint”).) Before the Court is Defendants Cendyn, Caesars, MGM, The Rainmaker Unlimited, Inc.,² Treasure Island, and Wynn’s joint motion to dismiss.³ (ECF No. 91 (“Motion”).) The Court held a hearing (the “Hearing”) on the Motion on October 13, 2023. (ECF Nos. 138 (hearing minutes), 139 (transcript).) As further explained below, because the Complaint suffers from numerous pleading deficiencies,

¹Caesars Entertainment, Inc., Treasure Island, LLC, Wynn Resorts Holdings, LLC, and MGM Resorts International. (ECF No. 1 at 3 n.2.)

²According to the Complaint, Cendyn acquired Rainmaker in 2019, and Rainmaker currently operates as a wholly owned subsidiary of Cendyn. (ECF No. 1 at 3.)

³Plaintiffs responded (ECF No. 109), and Defendants replied (ECF No. 123). While MGM joined the Motion, MGM also filed a separate motion to dismiss the claims against it. (ECF No. 92.) The Court grants that motion in a concurrently issued order, but writes separately in this order to address the joint motion to dismiss because the most pertinent arguments and governing law are somewhat different. The Court also limited oral argument to the joint motion to dismiss in advance of the Hearing. (ECF No. 136.)

1 the Court will grant the Motion. But the Court will give Plaintiffs an opportunity to file an
2 amended complaint within 30 days.

3 **II. BACKGROUND**

4 The following allegations are adapted from the Complaint. Plaintiffs “challenge an
5 unlawful agreement among Defendants to artificially inflate the prices of hotel rooms on
6 the Las Vegas Strip above competitive levels.” (ECF No. 1 at 3.) The gist of the alleged
7 conspiracy is that all of the Hotel Operators agreed to use a shared set of pricing
8 algorithms offered by the Rainmaker subsidiary of Cendyn that recommend
9 supracompetitive prices to the hotel operators. (*Id.*) Plaintiffs define the Las Vegas Strip
10 as “the four-mile stretch in the unincorporated towns immediately south of the City of Las
11 Vegas.” (*Id.* at 3 n.1.) Plaintiffs otherwise explain why the Las Vegas Strip allegedly
12 constitutes a relevant antitrust market, primarily because it is unique. (*Id.* at 13-14.)

13 Plaintiffs further allege that at unknown times, Hotel Operators began using
14 software offered by either Rainmaker or Cendyn that recommends prices to them, and,
15 as a result, started charging higher prices for hotel rooms than the market could otherwise
16 support. (*See generally id.*) Plaintiffs’ Complaint details three different products at one
17 point offered by Rainmaker, and now offered by Cendyn. (*Id.* at 6-11.) Plaintiffs allege
18 that widespread adoption of Rainmaker products in the Las Vegas Strip hotel room
19 market subverted a previously competitive market and has harmed consumers, who now
20 have to pay higher prices for hotel rooms. (*Id.* at 16-20, 26.) Plaintiffs point to academic
21 research and public remarks from an FTC Commissioner to argue that adoption of the
22 same algorithmic pricing software by all competitors in a given market could both increase
23 prices and constitute an impermissible ‘hub and spoke’ antitrust conspiracy assuming that
24 the software allows the competitors to exchange nonpublic information. (*Id.* at 4, 20-22.)
25 Plaintiffs further point to certain ‘plus factors’ supporting their view that Defendants have
26 entered into a conspiracy in violation of the Sherman Act (*id.* at 22-24), and seek to
27 maintain this case as a class action on behalf of all consumers who have rented a hotel
28 room on the Las Vegas Strip from Hotel Operators since January 24, 2019 (*id.* at 24-26).

1 Plaintiffs allege a single claim for violation of Section 1 of the Sherman Act. (*Id.* at
 2 26-29.) Plaintiffs state, “Defendants’ conspiracy is a *per se* violation of Section 1 of the
 3 Sherman Act. In the alternative, Defendants’ conspiracy violates section 1 of the Sherman
 4 Act under the Rule of Reason.” (*Id.* at 27.) Defendants jointly move to dismiss the
 5 Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (ECF No. 91.)

6 **III. DISCUSSION**

7 As the Court stated at the Hearing, there are numerous deficiencies in Plaintiffs’
 8 Complaint under the Sherman Act pleading standards that the United States Court of
 9 Appeals for the Ninth Circuit applied in interpreting *Bell Atl. Corp. v. Twombly*, 550 U.S.
 10 544 (2007). For example, Plaintiffs’ “complaint does not answer the basic questions: who,
 11 did what, to whom (or with whom) . . . and when?” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d
 12 1042, 1048 (9th Cir. 2008). The Court accordingly agrees with Defendants that it must
 13 dismiss Plaintiffs’ Complaint. However, the Court will grant Plaintiffs leave to amend, as
 14 it cannot say that amendment would be futile. The Court includes a non-exhaustive
 15 discussion of the deficiencies with Plaintiffs’ Complaint below.

16 **A. What Agreement?**

17 One significant issue with Plaintiffs’ Complaint is that it fails to plausibly allege
 18 Defendants entered into an agreement. “The crucial question prompting Section 1 liability
 19 is whether the challenged anticompetitive conduct stems from lawful independent
 20 decision or from an agreement, tacit or express.” *In re Dynamic Random Access Memory*
 21 (*DRAM*) *Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 46 (9th Cir. 2022) (citing *Twombly*,
 22 550 U.S. at 553) (internal quotation marks and brackets omitted). A Section 1 claim
 23 therefore “must contain sufficient factual matter, taken as true, to plausibly suggest that
 24 an illegal agreement was made.” *Id.* (citing *Twombly*, 550 U.S. at 556). For plaintiffs
 25 relying on allegations of parallel conduct, to state a plausible Section 1 claim, the plaintiffs
 26 “must include additional factual allegations that place that parallel conduct in a context
 27 suggesting a preceding agreement.” *Id.* at 46-47 (citing *Twombly*, 550 U.S. at 557). In
 28 other words, the plaintiffs “must allege something more than conduct merely consistent

1 with agreement in order to ‘nudge[] their claims across the line from conceivable to
2 plausible.’” *Id.* at 47 (citing *Twombly*, 550 U.S. at 570).

3 Plaintiffs suggested at the Hearing that this requirement of an agreement applies
4 only to the particular antitrust theory at issue in *Kendall*, 518 F.3d 1042, which Plaintiffs
5 characterized as a secret per se conspiracy. (ECF No. 139 at 25.) But all Sherman Act
6 complaints must plausibly allege the existence of an agreement—at least a tacit one. For
7 example, *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir.
8 2015), discusses a “hub-and-spoke conspiracy” like the theory Plaintiffs include in their
9 Complaint (ECF No. 1 at 4, 22). But *Musical Instruments* also states, “§ 1 of the Sherman
10 Act prohibits *agreements* that unreasonably restrain trade by restricting production,
11 raising prices, or otherwise manipulating markets to the detriment of consumers.” 798
12 F.3d at 1191 (citations omitted, emphasis added); *see also* *DRAM*, 28 F.4th at 46 (“a
13 claim brought under Section 1 must contain sufficient factual matter, taken as true, to
14 plausibly suggest that an illegal agreement was made.”). And indeed, even Plaintiffs
15 allege that they “challenge an unlawful agreement among Defendants to artificially inflate
16 the prices of hotel rooms on the Las Vegas Strip above competitive levels.” (ECF No. 1
17 at 3.)

18 Plaintiffs must therefore include factual allegations in their Complaint that could
19 plausibly allege an agreement between Defendants, *see, e.g., Kendall*, 518 F.3d at 1047,
20 but they have not. Indeed, it is unclear from the Complaint whether all Hotel Operators
21 use the same pricing algorithm even though Plaintiffs allege that Hotel Operators have
22 colluded to adopt a shared set of pricing algorithms. (ECF No. 1 at 3.) *See also Kendall*,
23 518 F.3d at 1047 (“[T]erms like ‘conspiracy,’ or even ‘agreement,’ are border-line: they
24 might well be sufficient in conjunction with a more specific allegation—for example,
25 identifying a written agreement or even a basis for inferring a tacit agreement, ... but a
26 court is not required to accept such terms as a sufficient basis for a complaint.”) (quoting
27 *Twombly*, 550 U.S. at 557). Plaintiffs explain in the Complaint that Rainmaker is a
28 subsidiary of Cendyn, and Rainmaker offers at least three different products, but then do

1 not state which products each Hotel Operator uses—much less that each Hotel Operator
2 uses the same one. (*See generally* ECF No. 1.)

3 For example, Plaintiffs allege that “MGM is one of Cendyn’s clients and uses its
4 revenue management software.” (ECF No. 1 at 12.) But Plaintiffs do not say which
5 revenue management software MGM uses. And Plaintiffs allegations are substantially
6 identical as to Caesar’s, Treasure Island,⁴ and Wynn. (*Id.*) The Court therefore cannot
7 say which pricing algorithms each Hotel Operator uses, making it impossible to infer that
8 all Hotel Operators agreed to use the same ones. Later in the Complaint, Plaintiffs allege
9 that Hotel Operators shifted to a new strategy of letting some rooms go unfilled “facilitated
10 by Rainmaker,” but are not specific about which Rainmaker pricing algorithms they are
11 referring to. (*Id.* at 16.) Plaintiffs go on to allege that the MGM-operated Borgata Hotel in
12 Atlantic City, New Jersey uses GuestRev, but that hotel is not within Plaintiffs’ defined
13 market area of the Las Vegas Strip. (*Id.* at 17.) Analogously, Plaintiffs allege that Omni
14 Hotels & Resorts uses GroupRev, but Omni Hotels & Resorts is not a Defendant. (*Id.* at
15 19.) In sum, the Complaint lacks allegations about which pricing algorithms each Hotel
16 Operator uses at its properties on the Las Vegas Strip sufficient to allow the Court to infer
17 they are all using the same pricing algorithms, which could, in turn, perhaps lead the Court
18 to infer that they entered into an agreement to use the same pricing algorithms.

19 Nor do Plaintiffs allege that Hotel Operators are required to accept the prices that
20 the unspecified pricing software recommends to them, further undermining the plausibility
21 of their conclusory allegations that Defendants entered into a conspiracy to charge higher
22 prices by accepting the prices recommended to them by algorithmic pricing software. Both
23 in their opposition and at the Hearing, Plaintiffs pointed to their allegation derived from
24 Rainmaker’s website that GuestRev’s pricing recommendations are accepted 90% of the
25 time in response to this argument. (ECF No. 1 at 6.) But as Defendants point out, this
26 allegation does not speak to the acceptance rate of the hotels on the Las Vegas Strip,

27
28 ⁴That said, Plaintiffs otherwise allege that Treasure Island was using GuestRev in 2012. (ECF No. 1 at 7-8.) Similar allegations are lacking for the other Hotel Operators.

1 and is thus not reflective of the Hotel Operators' acceptance rate. And even assuming
 2 that all Hotel Operators are using GuestRev at their properties on the Las Vegas Strip—
 3 which Plaintiffs do not allege in their Complaint—this allegation does not establish that
 4 hotels who use GuestRev must accept the prices it recommends to them. Indeed, it
 5 implies that 10% of hotels that use GuestRev do not. Plaintiffs further attempt to link this
 6 statement to the Las Vegas Strip with Confidential Witness 1's estimate that, "Rainmaker
 7 Group's products are used by 90% of the hotels on the Las Vegas Strip." (*Id.* at 4.) But
 8 GuestRev is but one of the at least three products (those described in the Complaint) that
 9 Rainmaker offers, so this statistic does not speak directly to the percentage of hotels on
 10 the Las Vegas Strip that use GuestRev. And even if it did, certain hotels operated by
 11 Hotel Operators on the Las Vegas Strip could be within the 10% that do not use
 12 Rainmaker products, and/or the 10% that do not accept recommendations from
 13 GuestRev. In sum, the Court cannot plausibly infer from the allegations in the Complaint
 14 that Hotel Operators are required to accept the recommendations provided by a particular
 15 software pricing algorithm. This is a fatal deficiency in the Complaint as currently drafted,
 16 as without an agreement to accept the elevated prices recommended by the pricing
 17 algorithm, there is no agreement that could either support Plaintiffs' theory or otherwise
 18 make out a Sherman Act violation given the other allegations in the Complaint.

19 **B. Who, When?**

20 The Complaint also does not say who entered into the purported agreement to use
 21 the same pricing algorithms beyond 'Hotel Operators.' While the Court is not persuaded
 22 that *Kendall* requires the names of the specific employees that entered into the purported
 23 agreement, Plaintiffs must say more than 'Hotel Operators.' See *Kendall*, 518 F.3d at
 24 1048 (9th Cir. 2008) (rejecting allegations that "the Banks" "knowingly, intentionally and
 25 actively participated in an individual capacity in the alleged scheme" as too conclusory);
 26 see also *Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.*, 166 F. Supp. 3d 988, 995
 27 (N.D. Cal. 2015) ("Defendant Insurers are large organizations, and Plaintiffs' bare
 28 allegation of a conspiracy would be essentially impossible to defend against."). Plaintiffs

1 also allege that Rainmaker hosts annual conferences where Hotel Operators have the
2 opportunity to network with Rainmaker employees, but the Complaint does not allege that
3 employees of any particular Defendant attended, much less provide names or
4 anonymized references to the individual employees from each Defendant who attended
5 and therefore could have entered into agreements. (ECF No. 1 at 24.) *Cf. Musical*
6 *Instruments*, 798 F.3d at 1196 (“mere participation in trade-organization meetings where
7 information is exchanged and strategies are advocated does not suggest an illegal
8 agreement.”). Thus, to the extent Hotel Operators entered into any agreements at these
9 Rainmaker conferences—though that is not clearly alleged, either—it is unclear who
10 entered into such agreements.

11 In addition, Plaintiffs are transparent that they do not know when the purported
12 conspiracy began. Indeed, Plaintiffs allege that the alleged conspiracy began “at a time
13 currently unknown[.]” (ECF No. 1 at 26.) Plaintiffs mention that Treasure Island began
14 using GuestRev in 2012, but do not allege when MGM began using any software that
15 includes pricing algorithms on the Las Vegas Strip (much less GuestRev), or when
16 Caesars or Wynn began using any software that includes pricing algorithms. (*Compare*
17 *id.* at 7-8 *with id.*) Thus, the Court cannot plausibly infer that all Hotel Operators began
18 using particular pricing software at or around the same time, which could potentially allow
19 the Court to draw the inference that they entered into an agreement to do so. *See Musical*
20 *Instruments*, 798 F.3d at 1195-96 (rejecting the plaintiffs’ contention that manufacturers’
21 adoption of similar policies over the course of several years could constitute a plus factor
22 indicating parallel conduct). At the Hearing, Plaintiffs’ counsel suggested that he now has
23 a better sense of the timing based on some limited discovery received and independent
24 investigation he has conducted since filing the initial Complaint, but those suggestions go
25 more to whether the Court should grant Plaintiffs leave to amend than whether the
26 allegations in the Complaint are sufficient—because Plaintiffs’ counsel was referring to
27 information admittedly not in the Complaint.

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Between not alleging what software Hotel Operators all agreed to use, who entered into any purported agreement, and when they entered into any agreement, the Court cannot infer parallel conduct from the Complaint. “Under *Twombly*, parallel conduct, such as competitors adopting similar policies around the same time in response to similar market conditions, may constitute circumstantial evidence of anticompetitive behavior.” *Id.* at 1193. But as described above, Plaintiffs’ allegations in the Complaint do not suggest that Hotel Operators adopted similar pricing policies around the same time—the Court has little information from the Complaint about which precise software products Hotel Operators are using, or when any of them save Treasure Island may have begun using any product now offered by Cendyn. And without plausible allegations of parallel conduct, Plaintiffs’ alleged plus factors are not relevant. See *Bona Fide Conglomerate, Inc. v. SourceAmerica*, 691 F. App’x 389, 391 (9th Cir. 2017) (“Plus factors’ are relevant only if the complaint adequately alleges parallel conduct among the defendants.”) (citing *Musical Instruments*, 798 F.3d at 1193-94).

C. Hub and Spoke

Plaintiffs further allege a hub and spoke conspiracy in their Complaint, but their allegations do not support such a theory because Plaintiffs never quite allege (though they suggest by implication) that Hotel Operators get nonpublic information from other Hotel Operators by virtue of using insufficiently specified algorithmic pricing software. (ECF No. 1 at 4, 21-22 (referring to FTC Commissioner Maureen K. Ohlhausen’s public statement describing how algorithmic pricing could contribute to a valid hub-and-spoke theory), 26 ¶ 88 (referring to what appears to be a horizontal agreement between Hotel Operators (the spokes) to use algorithmic pricing software created by Rainmaker (the hub), where that horizontal agreement would make the ‘rim’).) Indeed, as Commissioner Ohlhausen described it, a successful hub and spoke theory of Sherman Act liability based on the use of algorithmic pricing depends in part on the exchange of nonpublic information between competitors through the algorithm. (ECF No. 1 at 4, 21-22.) And as Defendants’

1 counsel argued at the Hearing, Plaintiffs attempt to create an inference of the exchange
2 of nonpublic information in their Complaint without actually alleging such an exchange.

3 Paragraph 8 of the Complaint is a good example:

4 “Defendant Hotel Operators, who collectively have market power in the Las
5 Vegas Strip Hotel Market, provide real-time pricing and supply information
6 to the Rainmaker Group. This competitive data is taken by the Rainmaker
Group and fed through its algorithms, which then generate forward-looking,
room-specific pricing recommendations to Defendant Hotel Operators.”

7 (ECF No. 1 at 4.) This says that confidential information is fed in, but less clearly out, of
8 the algorithms. One inference that can be drawn from ‘through,’ however, is that
9 confidential information comes back out. But this paragraph does not explicitly say that
10 one Hotel Operator ever receives confidential information belonging to another Hotel
11 Operator. Moreover, it is unclear whether the pricing recommendations ‘generated’ to
12 Hotel Operators include that confidential information fed in; perhaps they only get their
13 own confidential information back, mixed with public information from other sources.

14 Similar ambiguity exists in other paragraphs, such as paragraph 10; “CW2 stated
15 that Rainmaker Group’s algorithms include information for Hotel Operators on whether a
16 hotel was “overbooked” as well as recommendations related to the revenue of the hotel.”
17 (*Id.* at 5.) This does not say whether the ‘information’ and ‘recommendations’ include non-
18 public information from other hotels. In addition, Plaintiffs allege that GuestRev allows
19 pricing from nearby casinos to factor into pricing recommendations if clients select that
20 option, but does not say whether that information is nonpublic. (*Id.* at 6.) And the ambiguity
21 continues in paragraph 14, where “CW1 stated that hotels would tell Rainmaker Group
22 ‘who their competitors were,’ and Rainmaker would then ‘shop’ the data from those
23 competitors. GuestRev would then use this data to ‘forecast[] demand.’” (*Id.* at 7.) Again,
24 Plaintiffs do not specify whether that data Rainmaker is shopping around is public or
25 nonpublic. Public pricing data is available from hotel websites, Expedia, and the like—
26 that could be the information ‘shopped’ back to a client. In any event, paragraph 10 does
27 not explicitly state the competitor information being described as nonpublic. The same
28

1 goes for paragraphs 16 and 17; Plaintiffs do not allege the competitor information is
2 nonpublic. (*Id.* at 7-8, 8.)

3 Perhaps the paragraph that gets closest to alleging that Rainmaker facilitates the
4 exchange of nonpublic information between competitors is Paragraph 22, but the
5 statements in that paragraph are conclusory and followed by vague statements about
6 how Rainmaker clients all attend the same conferences: “Hotel Operators also
7 understand that their competitors participate in and contribute data to the pricing and
8 forecasting services offered by Rainmaker Group.” (*Id.* at 10.) Paragraph 57 also gets
9 close but does not quite say that nonpublic information from one hotel would be shared
10 with another hotel; “Rainmaker Group’s algorithms are fueled by information provided by
11 Hotel Operators, including real-time access to their competitively sensitive and nonpublic
12 data on their occupancy, rates, and guests.” (*Id.* at 19.) This could be referring to the
13 Hotel Operators’ own nonpublic information. Indeed, that is the most logical reading—that
14 ‘their’ means ‘Hotel Operators,’ getting real time access to their own nonpublic data.

15 Paragraph 69 alleges it as a plus factor, “exchanges of competitively sensitive
16 information among horizontal competitors,” but the corresponding paragraph that offers
17 a more fulsome explanation, paragraph 74, says:

18 “Fifth, Rainmaker Group and participating Hotel Operators have ample
19 opportunities to collude. Rainmaker Group has hosted in-person “annual
20 user conferences, where feedback is really solicited”. The conference
21 gathers Hotel Operators with Rainmaker Group executives to network,
22 exchange insights and ideas, and discuss revenue management tools and
23 new products coming. CW3, who attended Rainmaker user conferences,
24 stated “We kind of all know each other because you all show up to this little
25 conference together.” Hotel Operators would typically send employees from
26 their revenue management teams, although CEOs and CFOs might also
27 attend.”

24 (*Id.* at 22, 24 (footnote omitted).) This does not quite say that the Rainmaker algorithm
25 itself exchanges nonpublic information; it only says that employees of Hotel Operators
26 have the opportunity to exchange information at conferences that they may attend. And
27 of course, a possibility does not make an allegation plausible. See *DRAM*, 28 F.4th at 47
28 (“plaintiffs must allege something more than conduct merely consistent with agreement

1 in order to ‘nudge[] their claims across the line from conceivable to plausible.’”) (citation
2 omitted).

3 Finally, in paragraph 89, Plaintiffs allege that Defendants, in pertinent part,
4 “knowingly used algorithms that incorporated information from other Defendants in setting
5 pricing recommendations,” but again, this does not say nonpublic information. (*Id.* at 26-
6 27.) Consulting public sources to determine how to price a hotel room by viewing your
7 competitor’s rates does not violate the Sherman Act. *See, e.g., In re Citric Acid Litig.*, 191
8 F.3d 1090, 1103 (9th Cir. 1999) (“Although the possession of competitor price lists is
9 consistent with conspiracy, it does not, at least in itself, tend to exclude legitimate
10 competitive behavior.”) (citations omitted). In sum, Plaintiffs do not allege that—even
11 assuming all Hotel Operators use the same Rainmaker or Cendyn algorithmic pricing
12 software—Hotel Operators exchange nonpublic information with each other through their
13 use of that same software. Accordingly, Plaintiffs have not sufficiently alleged a hub and
14 spoke theory in their Complaint consistent with the theory described in *Musical*
15 *Instruments* and also included in the Complaint.⁵

16 **D. Rule of Reason and Leave To Amend**

17 Plaintiffs allege a rule of reason theory in the alternative (ECF No. 1 at 27) at the
18 end of their Complaint and argue in their opposition that they have alleged adequate facts
19 to support such a theory in their Complaint (ECF No. 109 at 21-27). However, the Court
20 agrees with Defendants that this theory is not explicitly pleaded in the Complaint—the
21 factual allegations in the Complaint attempt to make out a hub and spoke theory of
22 Sherman Act liability. (ECF No. 1 at 3, 26.) The Court instead views this as a good reason
23 to grant Plaintiffs leave to amend. And there are others.

24 But starting with the rule of reason theory, Plaintiffs point to allegations in their
25 Complaint supported by Rainmaker’s marketing materials that Hotel Defendants are
26 customers of Rainmaker, and thus now Cendyn. (ECF No. 109 at 21 (citing ECF No. 1 at

27
28 ⁵Indeed, and as described above, the theory is not alleged in a way that would be
sufficient as described by Commissioner Olhausen in Plaintiffs’ Complaint either. (ECF
No. 1 at 4, 21-22.)

6 n.6).) It is thus possible that all Hotel Operators are using, for example, GuestRev, as that is now a product offered by Cendyn. This could support a rule of reason theory, as the press release tends to evidence vertical agreements, and thus supports granting Plaintiffs leave to amend to allege their alternative rule of reason theory more explicitly.

Plaintiffs' counsel also argued at the hearing that he has received some discovery from Defendants since filing this case and has continued his investigation pertinent to the case through public sources, so he represented that he would have many additional facts he could allege that are not present in the Complaint if given the opportunity to amend.⁶ The Court cannot of course say what those factual allegations might be, as they are not before the Court. But based in pertinent part on these representations, the Court cannot find that amendment would be futile and will therefore grant Plaintiffs leave to file an amended complaint curing at least the deficiencies outlined in this order within 30 days. See, e.g., *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (stating that leave to amend should be "freely given when justice so requires") (quoting Fed. R. Civ. P. 15(a)).

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

⁶Plaintiffs' counsel further explained at the Hearing he was waiting to move to amend until the Court identified any deficiencies with the Complaint so he could work to address them. Plaintiffs' alternative request for leave to amend in opposition to the Motion (ECF No. 109 at 30) and at the Hearing does not strictly comply with LR 15-1—and the Court thus directs Plaintiffs' counsel to review the Court's Local Rules and comply with them going forward. However, "[t]he court may *sua sponte* or on motion change, dispense with, or waive any of these rules if the interests of justice so require." LR IA 1-4. The interests of justice are better served by resolving cases on their merits, and granting Plaintiffs leave to amend would give the Court a better chance at adjudicating the merits of this case. See, e.g., *Thompson v. Hous. Auth. of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986) (mentioning "the public policy favoring disposition of cases on their merits"). Moreover, "[i]n exercising its discretion, 'a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities.'" *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). The Court thus waives the strict application of LR 15-1, and will permit amendment.

1 determines that they do not warrant discussion as they do not affect the outcome of the
2 Motion before the Court.

3 It is therefore ordered that Defendants' joint motion to dismiss (ECF No. 91) is
4 granted as specified herein.

5 It is further ordered that the Complaint (ECF No. 1) is dismissed, in its entirety, but
6 without prejudice and with leave to amend. In particular, the Court grants Plaintiffs leave
7 to file an amended complaint. Any amended complaint must be filed within 30 days of the
8 date of entry of this order. If Plaintiffs do not comply with this amendment deadline, the
9 Court may dismiss Plaintiffs' claims with prejudice and without further advance notice to
10 Plaintiffs.

11 DATED THIS 24th Day of October 2023.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE