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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KAREN CORNISH-ADEBIYI, et al., *Plaintiffs*, v. CAESARS ENTERTAINMENT, INC., et al., *Defendants*.	HON. KAREN M. WILLIAMS *Civil Action No.* 1:23-cv-02536-KMW-EAP

STATEMENT OF INTEREST OF THE UNITED STATES

INTRODUCTION

The United States, through the U.S. Department of Justice and the Federal Trade Commission ("FTC"), respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Department of Justice "to attend to the interests of the United States" in any case pending in federal court. Both the Antitrust Division of the U.S. Department of Justice and the FTC enforce the

federal antitrust laws, including the Sherman Act, 15 U.S.C. §§ 1 *et seq*., and have a strong interest in their correct application.

In this case, plaintiffs allege that competing casino hotels violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by, among other things, unlawfully agreeing "to use the Rainmaker [pricing algorithm] platform to set prices while knowing and precisely because all other Casino-Hotel Defendants had agreed to do the same." Consolidated Amended Class Action Complaint ("CAC"), ECF No. 80, ¶ 229. Defendants have moved to dismiss the amended complaint. Joint Memorandum of Law in Support of Defendants' Motion to Dismiss, ECF No. 89-1 ("Mot.").

Judicial treatment of the use of algorithms in price fixing has tremendous practical importance. Accordingly, in two other cases, the United States has submitted Statements of Interest addressing the correct principles of law relevant to assessing allegations of algorithmic price fixing: (1) the United States' Statement of Interest and accompanying Memorandum of Law (jointly, "Statement of Interest") in *In re RealPage, Inc., Rental Software Antitrust Litig*., No. 3:23-MD-3071 (M.D. Tenn. Nov. 15, 2023), ECF Nos. 627, 628, attached hereto as Attachments A and B; and (2) the United States' Statement of Interest in *Duffy v. Yardi*, No. 2:23-cv-01391 (W.D. Wa. March 1, 2024), ECF No. 149, attached hereto as Attachment C.

The United States submits this Statement of Interest to summarize the applicable legal principles for claims of algorithmic price fixing and to address two legal errors that defendants appear to make in their motion to dismiss: (1)

defendants' suggestion that plaintiffs must identify direct "communication[s] *between Casino-Hotel Defendants*" to plausibly allege an agreement subject to Section 1 scrutiny, Mot. 3 (emphasis added); *see also* Mot. 10, 34; and (2) defendants' argument that plaintiffs' price-fixing claim must be dismissed because the recommendations generated by Rainmaker's pricing algorithm are not binding, Mot. 19-21, 36-37 & 37 n.10.

Neither position is supportable. Although direct communications among competitors can establish an agreement among them, there is no rule requiring proof of such communications. Section 1 reaches tacit as well as express agreements, and it prohibits competitors from delegating key aspects of pricing decisionmaking to a common entity, even if the competitors never communicate with each other directly. In addition, an agreement among competitors to fix the *starting point* of pricing is per se unlawful, no matter what prices the competitors ultimately charge.

ARGUMENT

There are two central elements of a Section 1 claim: (1) a "contract, combination, or conspiracy," 15 U.S.C. § 1—i.e., "concerted action"—(2) that "unreasonably restrains trade." *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 186, 195 (2010); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004). As discussed in more detail in the United States' Statements of Interest in *In re RealPage* and *Yardi*, algorithmic price fixing is a per se violation of Section 1. *See* Attachments B, C. Defendants do not dispute that proposition, but their motion to

dismiss can be read to advance two incorrect legal arguments regarding the application of the per se rule. We first summarize the appropriate legal framework for analyzing algorithmic price-fixing claims and then address defendants' erroneous arguments.

I. Algorithmic Price Fixing Is a Per Se Violation of Section 1

(1) As to the first central element of a Section 1 claim, concerted action exists whenever "separate decisionmakers" are "join[ed] together," thus "depriv[ing] the marketplace of independent centers of decisionmaking." Attachment B at 5-8 (citing *Am. Needle*, 560 U.S. at 195, and other sources). While concerted action encompasses contracts, combinations, and conspiracies, courts often use the shorthand "agreement" to describe the alternatives collectively. *Id.* But "[n]o formal agreement is necessary" under Section 1. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). An agreement can be express—written or spoken—or tacit, whereby "the conspirators' actions . . . indicate [its] existence," *White v. R.M. Packer Co.*, 635 F.3d 571, 575-76 (1st Cir. 2011). *See* Attachment B at 5-8; *see also United States v. Heatherly*, 985 F.3d 254, 262 (3d Cir. 2021) ("A conspiracy does not require an express agreement. A 'tacit agreement' is enough. People can tacitly agree when they 'engage[ ] as a group' to achieve 'a common goal.'") (quoting *United States v. Smith*, 294 F.3d 473, 478 (3d Cir. 2002)); *United States v. Barr*, 963 F.2d 641, 650 (3d Cir. 1992) ("It is well settled that a written or spoken agreement among alleged co-conspirators is unnecessary; rather, indirect evidence of [a] mere tacit understanding will suffice.") (cleaned up). Concerted action can take many

different forms, including competitors' jointly delegating key aspects of decisionmaking to a common entity, such as an algorithm provider. Attachment B at 5-8 (citing *Am. Needle*, 560 U.S. at 204; *Relevent Sports, LLC v. U.S. Soccer Fed'n, Inc.*, 61 F.4th 299, 309 (2d Cir. 2023); and *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-37 (1961)).

Due in part to the many different forms concerted action can take, there are various ways of alleging and proving it. Attachment B at 8-12. While courts frequently look for allegations and evidence of parallel conduct and so-called "plus factors" to prove the existence of an agreement circumstantially, those indicia are not always required to show the existence of concerted action. *Id.* For instance, as the Supreme Court held in *Interstate Circuit v. United States*, 306 U.S. 208 (1939), a tacit agreement can be inferred from an invitation proposing collective action followed by a course of conduct showing acceptance: "It was enough that, knowing that concerted action was contemplated and invited, the [competitors] gave their adherence to the scheme and participated in it." *Id.* at 226-27; Attachment B at 10-12 (citing cases applying *Interstate Circuit*); *see also United States v. Gen. Motors Corp.*, 384 U.S. 127, 142-43 (1966) ("[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.").

The Third Circuit and other courts in this district have recognized that *Interstate Circuit* remains good law. *See In re Ins. Brokerage Antitrust Litig.,* 618

F.3d 300, 332 (3d Cir. 2010) (considering whether defendants' decisions "presuppose concerted action" under *Interstate Circuit*); *Ball v. Paramount Pictures*, 169 F.2d 317, 319 (3d Cir. 1948) (applying *Interstate Circuit*'s tacit-agreement theory); *Viking Theatre Corp. v. Paramount Film Distrib. Corp.*, 320 F.2d 285, 293 (3d Cir. 1963) (similar), *aff'd*, 378 U.S. 123 (1964); *United States v. CIBA GEIGY Corp.*, 508 F. Supp. 1118, 1148 (D.N.J. 1976) (assessing whether, under *Interstate Circuit*, a defendant "proposed a common scheme" inviting participation in a common enterprise); *Sheldon Pontiac v. Pontiac Motor Div., Gen. Motors Corp.*, 418 F. Supp. 1024, 1029 (D.N.J. 1976) (citing *Interstate Circuit* to explain that "a claimant in a Sherman Act case may prevail without producing an express agreement between the alleged conspirators"), *aff'd*, 566 F.2d 1170 (3d Cir. 1977).

(2) As to the second central element of a Section 1 claim (unreasonableness), longstanding Supreme Court precedent establishes that price-fixing agreements among actual or potential competitors—i.e., horizontal price-fixing agreements[1]—are "all banned" whatever their form. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Per se unlawful price fixing includes not only competitors' acting in concert to set the same price at which a product is bought or sold but also competitors' acting in concert to "rais[e], depress[], . . . peg[], or

[1] Horizontal restraints stand in contrast to vertical restraints, which involve situations where "firms at different levels of distribution" agree on matters over which they do not compete—such as a manufacturer's setting the terms for the distribution or sale of its own products. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988). *See* Attachment B at 16 (providing additional explanation of this distinction).

stabiliz[e] the price of a commodity." *Id.* at 223. This prohibition includes agreements to use the same pricing formula—analogous to agreements to use the same pricing algorithm. *Id.* at 224-226 n.59 (condemning as per se unlawful agreement to use the same "formula underlying price policies"); *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 133-36 (1969) (finding per se unlawful the collective delegation of pricing decisions to a joint entity); *see* Attachment B at 17-20.

It is not necessary for conspirators always to adhere to pricing recommendations for a challenged price-fixing scheme to be per se unlawful. Attachment C at 3-4, 6-7 (citing cases and authorities). Courts including the Third Circuit have explained that, just as competitors cannot agree to fix their *final* prices, competitors cannot agree to fix the *starting point* for pricing; both types of agreements corrupt the decentralized price-setting mechanism in the market, whether or not they ultimately succeed in raising or stabilizing prices. *Id.* at 4-5 (citing cases holding that it is per se illegal for competitors to fix advertised list prices or sticker prices, even if consumers do not ultimately pay those prices); *Flat Glass*, 385 F.3d at 362-63 ("An agreement to fix prices is . . . a per se violation of the Sherman Act even if most or for that matter all transactions occurred at lower prices.") (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002)).

II. The Court Should Reject Defendants' Two Incorrect Limitations on the Application of the Per Se Rule

In their motion to dismiss, defendants appear to suggest that plaintiffs must allege competitor-to-competitor communications to plausibly allege an agreement subject to Section 1 scrutiny. Defendants also claim that because pricing recommendations generated by Rainmaker's algorithms are non-binding, defendants have not engaged in price fixing as a matter of law. Neither proposition is correct.

A. No Legal Rule Requires Plaintiffs To Allege Competitor-To-Competitor Communications

(1) Communications among competitors can be highly probative of an agreement among them. *See, e.g.*, *Flat Glass*, 385 F.3d at 369; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1234 (3d Cir. 1993); *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 655-56, 673-74 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

But there is no legal requirement that a plaintiff must allege specific communications directly among competitors merely to allege an agreement subject to Section 1. Simply put, "an actionable horizontal conspiracy does not require direct communication among the competitors." *Ins. Brokerage*, 618 F.3d at 331. This is so for two reasons. First, Section 1 is "broad enough" to "encompass a purely tacit agreement to fix prices." *High Fructose Corn Syrup*, 295 F.3d at 654 (7th Cir. 2002); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) ("tacit"

agreements qualify).[2] Thus, proof of conspiracy could be based on actions alone. Second, courts have repeatedly inferred horizontal agreements among competitors based on communications to (or passed through) an organizer or other intermediary. *See* Attachment B at 9-12, 19-21 (citing cases, including *Interstate Circuit*).[3]

Even assuming *arguendo* that competitor-to-competitor communications may be necessary to render allegations of concerted action plausible in some cases, this would not be one of them. The alleged purpose of the hotel pricing algorithm is to act as a "shared pricing agent for all the Casino-Hotel Defendants," CAC ¶ 9, and hence to make such communications unnecessary; that is, the competitors can more efficiently communicate with the algorithm provider instead of communicating directly with multiple competitors. So long as the algorithm provider and its competitor clients are connected through this common agent in "a unity of purpose or a common design and understanding," *Lifewatch Servs. Inc. v. Highmark Inc.*, 902 F.3d 323, 333 (3d Cir. 2018), they are acting in concert. *Cf. Ins. Brokerage*, 618 F.3d at 337 (recognizing that a Section 1 conspiracy can "depend[] upon the

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[2] Concerted action encompasses a "tacit agreement," *Twombly*, 550 U.S. at 553, but not conscious parallelism (sometimes called "tacit collusion"), which refers to a particular type of interdependent action that sometimes occurs in oligopolistic markets, *see Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

[3] *See also, e.g.*, *United States v. Masonite Corp.*, 316 U.S. 265, 274-76 (1942) (involving bilateral settlement contracts between competitor and licensor); *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 824-25 (S.D.N.Y. 2016) (involving Uber's Driver Terms contract between drivers and the Uber application)); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 932 (7th Cir. 2000) (finding unlawful agreement among manufacturers where retailer Toys "R" Us communicated assurances "from manufacturer to competing manufacturer" that each was complying with a proposed boycott).

participation of a 'middle-man', even if that middleman conceptualized the conspiracy, orchestrated it . . . and collected most of the booty.") (quoting *United States v. All Star Indus.*, 962 F.2d 465, 473 (5th Cir. 1992)).

(2) Defendants' emphasis on plus factors does not provide a sound basis for requiring evidence of competitor-to-competitor communications either. *See* Mot. 1-12, 16-33. When plaintiffs base their allegations of an agreement on parallel conduct by the defendants, looking for "plus factors" can be a helpful way to evaluate whether that conduct stems from concerted action instead of independent action. Attachment B at 8-12. But alleging plus factors is unnecessary when, as here, a common entity such as an algorithm provider proposes a common plan such that its invitation inherently contemplates concerted action—e.g., by inviting a group of competitors to jointly delegate key aspects of pricing decisionmaking to it. *Id.*; *see, e.g.*, CAC ¶¶ 18, 172, 220, 224, 314, 357, 360-61; Plaintiffs' Opposition to Defendants' Motion to Dismiss, ECF No. 92 at 14 (asserting that the casino-hotel defendants "accepted Rainmaker's anticompetitive invitation [to fix prices] through words and deeds").

In any event, even under a plus-factors approach, there is no legal rule requiring allegations of communications among competitors. To survive dismissal under that approach, plaintiffs "must allege facts that, if true, would establish at least one 'plus factor.'" *Ins. Brokerage*, 618 F.3d at 322-23. While communications among competitors are one example of a plus factor, *Flat Glass*, 385 F.3d at 364-68, the Third Circuit has noted that an agreement can be proved by showing that

defendants "adopted a common plan *even though no meetings, conversations, or exchanged documents are shown*," *id.* at 361 (emphasis added), and has held that other plus factors are sufficient to state a Section 1 claim. For instance, in *Lifewatch*, the Third Circuit held that a seller of telemetry monitors plausibly alleged that Blue Cross Blue Shield Association and five of its member insurance plan administrators conspired to deny coverage of telemetry monitors without relying on competitor-to-competitor communications. The court reached its conclusion in part based on plaintiff's allegations of an "auditing mechanism" that Blue Cross used to enforce the plan administrators' compliance with a model policy to deny coverage for telemetry monitors, "a particular time when a [member insurance plan administrator] declined to cover telemetry monitors due to pressure" from the association and its member administrators, and "the improbability that the same coverage decision would be reached by nearly all the [competitors] independently." 902 F.3d at 335. The "agreement and enforcement mechanism pled" in that case "provide[d] the 'reasonably founded hope that the [discovery] process will reveal relevant evidence.'" *Id.*

Similarly, in *Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr.*, Civ. No. 11-1290 RMB KMW, 2012 WL 1390249 (D.N.J. Apr. 19, 2012), a hospital alleged that certain medical centers conspired under Section 1 to exclude a competing cardiac provider by transferring patients exclusively to themselves. The court accepted allegations of "(1) a large shift in patient transfers, inuring to the [defendants'] benefit, consistent with the alleged agreement; (2) that that shift was

made in spite of increased medical risks and costs; and (3) coercive conduct by the [defendants'] alleged co-conspirators, in the face of contrary legal obligations, in enforcement of the alleged agreement" as sufficient to "place[] the allegations of parallel conduct 'in a context that raises a suggestion of a preceding agreement.'" *Id.* at *3.

For these reasons, to the extent defendants are arguing that competitor-to-competitor communications are required to plead concerted action, their position lacks legal support. Such a requirement would also make little practical sense at the pleading stage because plaintiffs rarely have access to competitor-to-competitor communications before discovery. Imposing such a requirement could pose an insuperable bar to recovery.

B. Fixing the Starting Point of Prices is Per Se Illegal, Even If Ultimate Prices May Deviate.

Finally, defendants mistakenly claim that, because Rainmaker's recommendations are non-binding, the challenged conduct is not per se unlawful price fixing. Mot. 19-21, 36-37 & 37 n.10. This is inconsistent with Section 1 precedent holding that it is per se illegal to fix list or sticker prices, even where the ultimate prices charged are different. *See* Attachment C at 4-6. Such agreements are banned because "[a]ny combination which tampers with price structures . . . directly interfer[es] with the free play of market forces." *Socony-Vacuum*, 310 U.S. at 221; *see* Attachment C at 4. Defendants' position also is inconsistent with case law stating that the violation is the agreement—not how often it is followed, *id.* at 6-7; p. 7, *supra*. Indeed, under defendants' view of the law, a price-fixing cartel

could evade per se treatment simply by inviting participation by some competitors who tend to deviate from the fixed prices or by agreeing to allow some deviation. For these reasons, this Court should reject defendants' attempt to narrow the definition of price fixing.

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