**No. 24-3006**

# United States Court of Appeals
# for the Third Circuit

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**CORNISH-ADEBIYI, *et al.***,
*Plaintiffs-Appellants*,

v.

**CAESARS ENTERTAINMENT, INC., *et al.***,
*Defendants-Appellees.*

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On Appeal from the United States District Court for the
District of New Jersey, Camden Vicinage
(No. 1:23-CV-02536-KMW-EAP, Judge Karen M. Williams)

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**BRIEF OF OPEN MARKETS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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## CORPORATE DISCLOSURE STATEMENT

As required by Federal Rule of Appellate Procedure 26.1, I certify that amicus curiae Open Markets Institute is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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## INTEREST OF THE *AMICUS CURIAE*

The Open Markets Institute (OMI) is a non-profit organization dedicated to protecting democracy and individual liberties from concentrated economic power and control. OMI does so by promoting fair competition throughout our political economy, a broadly shared prosperity, and innovation that serves the public interest. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public. It does not accept any funding or donations from for-profit corporations.[1]

## INTRODUCTION

Price fixing has been illegal for centuries because, as a society, we have deemed it unfair for companies to cooperate for their collective benefit at the expense of consumers, suppliers, and workers. As an ever growing number of firms turn to technology like algorithms and Artificial Intelligence to optimize their operations, the ability of firms to work together to fix prices and take other coordinated actions is rapidly becoming more sophisticated and more difficult to detect. Courts must apply longstanding law against such collusive conduct and put firms on notice that this type of business behavior will not be tolerated regardless of the technology used.

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[1] All parties consent to the filing of this *amicus* brief. No counsel for any party authored this brief in whole or in part. Apart from *amicus curiae*, no person contributed money intended to fund the brief's preparation and submission.

1. Concerted activity among competitors to fix prices is per se unlawful under the Section 1 of the Sherman Act. Businesses are required to act independently when making key business decisions, including pricing decisions. Thus, cartels formed with the intent or "effect of raising, depressing, fixing, pegging, or stabilizing prices" is per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

2. The plaintiffs presented sufficient evidence to show that the defendants, the Casino-Hotels and Cendyn, [2] were fixing hotel room prices in Atlantic City through a hub-and-spoke conspiracy. The Casino-Hotels were not acting independently when they worked with Cendyn to use its revenue management software, Rainmaker, to raise hotel rental rates to supracompetitive levels. The facts show that the Casino-Hotels had a motive to enter into the conspiracy and acted contrary to their interests by participating in the scheme. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 322 (3d Cir. 2010). They had motive because supracompetitive profits would raise revenue for all members of the cartel. They also acted contrary to their interests because changing strategy to

[2] "Casino-Hotels" refers to the corporate parent Defendants and affiliates Caesars Entertainment, MGM Resorts, Hard Rock International, and Seminole Hard Rock Support Services, and their respective Atlantic City casino-hotels: Caesars Atlantic City, Harrah's Atlantic City, Tropicana Atlantic City, Bally's Atlantic City, Borgata, and Hard Rock Atlantic City. "Cendyn" refers to both Cendyn Group and its predecessor The Rainmaker Group.

raise rental prices, even as occupancy rates declined, would have worked against their economic self-interest in a competitive market. This change in strategy works only if there was a prior understanding that their competitors would likewise change strategy. *See United States v. Apple*, 791 F.3d 290, 316-17 (2d Cir. 2015).

The district court erred when it held that the plaintiffs failed to produce evidence of preceding agreement among the Casino-Hotels. The district court apparently got hung up on the fact that (1) the members of the cartel did not exchange confidential information through Rainmaker and, (2) Rainmaker did not pool the Casino-Hotels' proprietary, non-public information into a common data set when it made pricing recommendations. This is not a required element of a hub-and-spoke conspiracy, and we encourage the court to reject the insertion of a pleading element that does not and should not exist. While sharing information and pooling data can be compelling evidence, other evidence may also be presented to show the existence of a preceding agreement. What matters is that Casino-Hotels had an agreement, whether tacit or express, to use a common agent to jointly set prices—an arrangement that amounts to a price-fixing conspiracy. *See Ins. Brokerage*, 618 F.3d at 322.

3. The "machinery" used to jointly set prices is irrelevant for legal liability. *Socony*, 310 U.S. at 223. Liability turns on whether independent businesses centralized their decision-making processes. *Am. Needle, Inc. v. Nat'l*

*Football League*, 560 U.S. 183, 199-200 (2010). The Casino-Hotels centralized the price-setting process through the use of Rainmaker and, thus, "deprive[d] the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984).

## ARGUMENT

### I. Concerted action among business rivals to fix, raise, or stabilize prices is unlawful under the Sherman Act.

Under § 1 of the Sherman Act, "[e]very contract, combination . . ., or conspiracy, in restraint of trade" is unlawful. 15 U.S.C. § 1; *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997). When a firm makes decisions regarding key aspects of its business such as the price of goods and services that it buys and sells, it is expected to make those decisions independently. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007). It has long been understood that coordination among independent actors regarding key business decisions, including pricing, is simply not allowed under the Section 1 of the Sherman Act. *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010) ("The relevant inquiry… is whether there is a contract, combination ..., or conspiracy amongst separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests.") (internal quotations omitted).

The Sherman Act's prohibition on competing businesses jointly setting prices and other terms is well-established. For nearly a century, the courts have held that "[t]he power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

The Supreme Court announced the modern per se rule in 1940 when it held that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). By using such capacious language, the Court outlawed myriad joint price-setting combinations, not simply those that fixed prices at a particular level. In categorically proscribing these arrangements, the Court used moralistic language and described them as "beyond the pale." *Id.* at 221. In line with the broad prohibition in *Socony*, the Court subsequently stated that "the per se rule applies even when the effect upon prices is indirect." *United States v. Gen. Motors Corp.*, 384 U.S. 127, 147 (1966).

The prohibition on collusion between business rivals has been repeatedly affirmed by the courts. While the Supreme Court replaced per se rules with the rule of reason in cases challenging most vertical restraints, *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*,

551 U.S. 877 (2007), the Court continued to preserve and affirm the per se rule against coordination among business rivals. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam); *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 356 (1982).

The Supreme Court has not wavered from this position, stating, "Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (itialics in original). In a similar spirit, this Court recognized, "Restraints that are per se unlawful include horizontal agreements among competitors to fix prices." *In re Processed Egg Prods. Antitrust Litig.*, 962 F.3d 719, 726 (3d Cir. 2020) (quoting *Leegin*, 551 U.S. at 886). Based on this long line of precedent, the Supreme Court declared collusion among competitors to be the "supreme evil of antitrust."[3] *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

[3] Nevertheless, Congress affirmatively authorized and even encouraged certain forms of cooperation among certain classes of comparatively powerless actors, such as employees, farmers, and ranchers. 29 U.S.C. § 151 (National Labor Relations Act); 7 U.S.C. § 291 (Capper-Volstead Act). *See also Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 313-14 (1st Cir. 2022) (describing elements of the antitrust labor exemption).

## II. The district court failed to recognize that the evidence presented was sufficient to show the existence of a hub-and-spoke conspiracy.

Competitors cannot circumvent the per se rule against price fixing by using a third party to act as a middleman, "even if that middleman conceptualized" and "orchestrated" the conspiracy. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 337 (3d Cir. 2010). This type of arrangement is a per se violation because using a common agent to explicitly or implicitly fix, stabilize, or peg prices for the group is the functional equivalent of a direct conspiracy. *See United States v. Apple, Inc.*, 791 F.3d 290, 323 (2d Cir. 2015) ("[H]orizontal agreements with the purpose and effect of raising prices are per se unreasonable because they pose a 'threat to the central nervous system of the economy'; that threat is just as significant when a vertical market participant organizes the conspiracy.") (quoting *Socony*, 310 U.S. at 224 n.59).

Collusion facilitated by a third party is referred to as a hub-and-spoke conspiracy. The "hub" of the operation is a middleman that forms a series of vertical relationships with the "spokes" (i.e., upstream or downstream market participants that compete against one another). *See* Barak Orbach, *Hub-and-Spoke Conspiracies*, 15 Antitrust Source 1 (2016). To establish an illegal hub-and-spoke conspiracy, the plaintiff must show an explicit or tacit agreement between the "spokes." *See Ins. Brokerage*, 618 F.3d at 327 (quoting *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th

Cir.2008) ("The critical issue for establishing a *per se* violation with the hub and spoke system is how the spokes are connected to each other.")). Importantly, "it has long been settled that [an] explicit agreement is not a necessary part of a Sherman Act conspiracy." *General Motors*, 384 U.S. at 142-43.

Under current Sherman Act jurisprudence, parallel vertical arrangements, on their own, are not unlawful. *See Ins. Brokerage*, 618 F.3d at 321 (explaining that parallel conduct, including "conscious parallelism," is not illegal unless there is a preceding agreement). Plaintiffs must offer evidence that tends to show the "spokes" were not acting independently. *Id.* at 322, 327. This type of evidence is often referred to as "plus factors" and "may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." *Id.* at 322 (internal quotations omitted).

This Court has identified at least three plus factors "which may indicate the existence of an actionable agreement." *Id.* at 321. These include "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy." *Id.* at 322.

The plaintiff, however, is not required to definitively foreclose the possibility that the competitors acted independently. *Apple*, 791 F.3d at 315-16.

Instead, as the Supreme Court wrote, "the antitrust plaintiff should present direct or circumstantial evidence that *reasonably tends* to prove" the defendants had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (emphasis added) (quotations omitted). The plaintiff does not have "to exclude *all* possibility that the [defendants] acted independently." *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928, 934-35 (7th Cir. 2000) (emphasis added). As the Seventh Circuit recognized, such a requirement "would amount to an absurd and legally unfounded burden to prove with 100% certainty that an antitrust violation occurred." *Id.* at 935. Accordingly, the court added, "The test states only that there must be *some* evidence which, if believed, would support a finding of concerted behavior." *Id.* (emphasis in original).

In this case, the district court held that because the Casino-Hotels did not (1) exchange confidential information through Rainmaker, or (2) that confidential, non-public information was not pooled by the software before making pricing recommendations, the "rim" of the hub-and-spoke conspiracy was absent. We encourage this Court to reject such a narrow reading of the law. The district court has created a pleading element that does not and should not exist. While the exchange of information and the pooling of data could be compelling evidence that shows co-conspirators had a preceding agreement, there are other plus factors that

could likewise raise an inference that competitors had engaged in concerted behavior.

The plaintiffs offered evidence that showed the Casino-Hotels were not acting independently and the district court erred when it ignored this evidence. *See Ins. Brokerage*, 618 F.3d at 322. First, the Casino-Hotels "had a motive to enter into a price fixing conspiracy." *Id.* The motive was increased revenue from higher prices—even when hotel rooms sat empty. "In a competitive industry . . . a firm would cut its price with the hope of increasing its market share if its competitors were setting prices above marginal costs." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004). But if the Casino-Hotels could be sure that their competitors were likewise increasing prices, the fear of being undercut decreases and revenue would increase across the board.

Second, the Casino-Hotels "acted contrary to [their] interests," *Ins. Brokerage*, 618 F.3d at 322, when they adopted a new strategy that emphasized charging more for rooms while simultaneously reducing occupancy rates. Historically, the hotel industry has prioritized occupancy rates (or heads-in-beds) because an empty hotel room earns no profits. In particular, casinos would rather rent out a room at a reduced rate, or for free, because their guests are more likely to spend money on the gaming floor, thus increasing overall revenue.

After adopting Rainmaker, however, the Casino-Hotels took the opposite approach. They began charging higher nightly rates for rooms and stopped reducing rates even if that meant the rooms remained empty. This change in strategy would be logical only if they had assurances that their competitors were likewise adopted the same strategy. In a recent case out of Washington State, the district court analyzed a similar set of facts in the apartment rental market. *Duffy v. Yardi*, No. 2:23-CV-01391-RSL, 2024 WL 4980771 (W.D. Wash. Dec. 4, 2024). It stated:

> The Court also finds persuasive the argument that raising rental prices regardless of occupancy and/or competitiveness would, in a competitive market, work against each lessor defendant's economic self-interest. It is only in the presence of a prior understanding that competitors would likewise raise rates that such conduct appears rational. These factors provide a context that suggests "a preceding agreement, not merely parallel conduct that could just as well be independent action."

*Id.* at *4 (quoting *Twombly*, 550 U.S. at 557). In other words, these actions make sense only if they "got together and exchanged assurances of a common action." *Ins. Brokerage*, 618 F.3d at 327.

Additionally, the Casino-Hotels accepted Cendyn's invitation to participate in the scheme and they knew their competitors had also accepted its invitation. App. at 254 & 262 – 63. It has long been understood that "[a]cceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate

commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 843 (9th Cir. 2022), *cert. denied sub nom. The Nat'l Ass'n of Realtors v. The PLS.com, LLC*, ––– U.S. ––––, 143 S. Ct. 567, 214 L.Ed.2d 336 (2023) (quoting *Interstate Cir., Inc. v. United States*, 306 U.S. 208, 227 (1939)).

All of the evidence, taken together, certainly raises an inference that the Casino-Hotels were not acting independently. The court disregarded the directive that "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) ("Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."). Instead, the court erred when it looked at each individual part in isolation and determined that each piece did not rise to the level of a conspiracy before dismissing it and moving onto the next piece of evidence.

The Casino-Hotels had a common motive, adopted policies that normally would have gone against their economic self-interest, and adopted these

substantially similar policies despite the risk of being undercut by the competition. This scheme rises to the level of a conspiracy and is per se illegal.

## III. The machinery of price fixing is irrelevant for antitrust liability.

Concerted activity "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984). Thus, collective decision-making on price and other key terms is banned under the Sherman Act. Importantly, the "machinery" used to fix prices is "immaterial." *Socony*, 310 U.S. at 223. The centralization of decision-making by otherwise independent entities is the primary question for legal liability, not the process used by the actors. *Am. Needle*, 560 U.S. at 199-200.

The technology and methods used to jointly fix prices do not change the legal inquiry. The Supreme Court in *Catalano* catalogued assorted methods of fixing, raising, or stabilizing prices among competitors and noted they were all per se illegal. *Catalano*, 446 U.S. at 646-48. Whether the price coordination was done in the proverbial smoke-filled room, over the phone or email, or through the conscious common use of a third-party software company, the conduct is per se illegal. Joint price-setting may be more sophisticated when rivals consciously use a third party's algorithm than when two executives agree to set a price floor over drinks. Both, however, are equally illegal.

Whether the conspiracy is successful in full measure also does not matter. Competitors do not need to agree to a particular price and fully abide by it. Even eliminating one aspect of price competition is enough to invite per se condemnation. *Catalano*, 446 U.S. at 649. Moreover, the success of the conspiracy is immaterial for antitrust liability. Just because a collusive scheme among rivals to raise prices was not fully successful does not "absolve them from their violation of the law." *Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128, 133 (9th Cir. 1960).

The district court erred when it concluded that Rainmaker relied on public, as opposed to confidential, information in setting prices for the competing hotel defendants. In the view of the district court, this fact made the joint price-setting permissible under the Sherman Act. But as the *Socony* Court stated, "the machinery employed by a combination for price-fixing is immaterial." *Socony*, 310 U.S. at 223. Illegality under the Sherman Act does not turn on the use of a particular formula, data, or mechanism for raising prices. Rather the mere joining of forces to raise, fix, or stabilize prices by two or more competitors is illegal. *Id.* The centralization of decision-making, not the precise ways in which this power is used, is what counts for legal liability. *See Citizen Pub. Co. v. United States*, 394 U.S. 131, 135-36 (1969) (holding that a joint operating agreement amounted to illegal price fixing).

The Supreme Court has condemned as per se illegal joint practices that had less of a direct impact on prices than what the plaintiffs alleged against the Defendants in this case. Among other practices, the Court ruled that an agreement to abide by previously announced prices is per se illegal. *Sugar Inst. v. United States*, 297 U.S. 553, 601-02 (1936). The Court also held that agreements to end sales on credit and not to discuss prices until after a customer selected a contractor are per se illegal. *Catalano*, 446 U.S. at 648-49; *Nat'l Soc. of Pro. Engineers v. United States*, 435 U.S. 679, 692 (1978). The conduct here had a much more direct and clear impact on prices in comparison. Accordingly, it is per se illegal.

**CONCLUSION**

For the reasons stated above, the order granting the motion to dismiss should be reversed.

Dated: January 28, 2025

Respectfully submitted,

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## COMBINED CERTIFICATIONS

I, Jason Rathod, am duly admitted to practice law before the United States Court of Appeals for the Third Circuit.

This brief was prepared on a computer using Microsoft Word 365. The font is Times New Roman, 14-point, double spaced. The word count of the body of the brief, including footnotes and point headings, as calculated by Microsoft Word 365, is 3473 words.

I, Jason Rathod, hereby certify that the brief is served in compliance with the Court's rules and the electronic PDF version has been properly served on the Court on the date of the ECF filing of this brief.

I, Jason S. Rathod, hereby certify that a virus check was performed on this brief and that it is free from viruses. The check was performed with approved antivirus software.

January 28, 2025 — */s/ Jason Rathod*

Jason Rathod