UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

RICHARD GIBSON, *et al.*,

Plaintiffs,

v.

MGM RESORTS INTERNATIONAL, *et al.*,

Defendants.

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

ORDER

I. SUMMARY

Plaintiffs Richard Gibson and Heriberto Valiente, on behalf of themselves and all others similarly situated, allege that defendant Hotel Operators[1] 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,

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

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

[3]Plaintiffs 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.)

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

II. BACKGROUND

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

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

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

III. DISCUSSION

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

A. What Agreement?

One significant issue with Plaintiffs' Complaint is that it fails to plausibly allege Defendants entered into an agreement. "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) (citing *Twombly*, 550 U.S. at 553) (internal quotation marks and brackets omitted). A Section 1 claim therefore "must contain sufficient factual matter, taken as true, to plausibly suggest that an illegal agreement was made." *Id.* (citing *Twombly*, 550 U.S. at 556). For plaintiffs relying on allegations of parallel conduct, to state a plausible Section 1 claim, the plaintiffs "must include additional factual allegations that place that parallel conduct in a context suggesting a preceding agreement." *Id.* at 46-47 (citing *Twombly*, 550 U.S. at 557). In other words, the plaintiffs "must allege something more than conduct merely consistent

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

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

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

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

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

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

[4]That 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.

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

B. Who, When?

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

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

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

///

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'

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

Paragraph 8 of the Complaint is a good example:

> "Defendant Hotel Operators, who collectively have market power in the Las Vegas Strip Hotel Market, provide real-time pricing and supply information 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."

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

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

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

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

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

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

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

in order to 'nudge[ ] their claims across the line from conceivable to plausible."') (citation omitted).

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

D. Rule of Reason and Leave To Amend

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

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

[5]Indeed, 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

[6]Plaintiffs' 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.

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 Defendants' joint motion to dismiss (ECF No. 91) is granted as specified herein.

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

DATED THIS 24th Day of October 2023.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE