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12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 YARDI SYSTEMS, INC.,
16 a California corporation,

17 Plaintiff,

18 v.

18 REALPAGE, INC., a Delaware
19 corporation, and DC CONSULTING,
INC., a Washington, D.C.
20 corporation,

21 Defendants.

22 REALPAGE, INC., a Delaware
23 corporation,

24 Counterclaimant,

25 v.

25 YARDI SYSTEMS, INC., a
26 California corporation,

27 Counterdefendant.
28

Case No. CV11-690 ODW (JEMx)

**COUNTERCLAIMANT REALPAGE,
INC.'S OPPOSITION TO
COUNTERDEFENDANT YARDI
SYSTEMS, INC.'S MOTION TO
DISMISS**

Hearing Date: August 8, 2011

Time: 1:30 p.m.

Place: Courtroom 11, Spring Street

Judge: Hon. Otis D. Wright II

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1 **I. INTRODUCTION**

2 The central issue in this case is whether multifamily real estate owners and
3 property managers should be free to select the vertically-integrated cloud
4 computing provider of their choice.

5 In a detailed pleading that quotes specific, harmful restrictions and
6 inhibitions on customer choice, Counterclaimant RealPage, Inc. (“RealPage”)
7 describes Counterdefendant Yardi Systems, Inc.’s (“Yardi”) anticompetitive
8 conduct in the market for vertically-integrated cloud computing for multifamily real
9 estate owners and property managers in the United States (the “Vertical Cloud
10 Market”).

11 RealPage and Yardi are competing Vertical Cloud providers. As the Vertical
12 Cloud Market formed, RealPage seized a significant technological lead as a result
13 of substantial investment in technology, infrastructure and customer service.
14 Rather than match RealPage’s investments, Yardi has instead attempted to leverage
15 its powerful position in the adjacent Property Management Software Market to
16 contractually prohibit its software customers from using the RealPage Vertical
17 Cloud. These contractual restrictions are *per se* illegal under both the Sherman Act
18 and California’s Cartwright Act. Yardi’s motion to dismiss RealPage’s antitrust
19 claims ignores binding Supreme Court and Ninth Circuit authority and instead
20 deceptively stitches together quotes from factually inapposite cases. As we will
21 show, however, Yardi’s exact legal arguments have been presented by prior
22 litigants and squarely rejected by the courts. For this reason alone, Yardi’s motion
23 to dismiss RealPage’s antitrust claims must be denied.

24 Realizing that its legal arguments are unlikely to succeed, Yardi also asks the
25 Court to evaluate the merits of RealPage’s factual allegations at the motion to
26 dismiss stage. Not only is such an inquiry inappropriate at the pleading stage,
27 RealPage’s highly specific allegations easily pass the *Twombly* “plausibility”
28 threshold. RealPage does not simply allege the existence of Yardi’s contractual

1 restrictions—it quotes these restrictions in its First Amended Counterclaims
 2 (“FAC”), D.I. 34. RealPage further describes how Yardi imposes these conditions.
 3 Yardi’s ability to thwart competition in the Vertical Cloud Market is derived from
 4 its power in the “Property Management Software Market.” FAC ¶ 39. Yardi’s
 5 Voyager software is the leading software in the Property Management Software
 6 Market. *Id.* Furthermore, Yardi’s vast customer base is “locked in” due to the high
 7 switching costs these customers would necessarily incur if Yardi unilaterally
 8 terminated their software licenses. *Id.* RealPage’s pleading describes in great
 9 detail how Yardi has the power to exclude, and has in fact excluded, RealPage from
 10 servicing specific customers.

11 Faced with specific and well-pled anticompetitive acts, Yardi asks the Court
 12 to dive into the facts and weigh them to decide each and every element of
 13 RealPage’s antitrust claims at the pleading stage. Ignoring Ninth Circuit authority
 14 that makes it impermissible for the Court to do so on a motion to dismiss, Yardi
 15 nevertheless asks for a factual determination whether the markets pled by RealPage
 16 are in fact properly drawn and whether Yardi indeed has market power. Such
 17 questions will be the subject of extensive discovery and expert economic testimony.
 18 On a full record at summary judgment or trial, these factual questions can be
 19 resolved. Yardi’s attempt to litigate these issues at the pleading stage is an
 20 invitation to error, and should be rejected.¹

21 **II. REALPAGE HAS ADEQUATELY ALLEGED A *PER SE* TYING**
 22 **CLAIM**

23 To state a claim for *per se* tying in violation of Section 1 of the Sherman Act,
 24 15 U.S.C. § 1, RealPage must allege only “(1) that [Yardi] tied together the sale of

25 ¹ Yardi attempts to dispute certain facts through a declaration submitted by Chad Russell
 26 in support of Yardi’s motion. The Court should disregard this improper extrinsic
 27 evidence. *Butler v. Los Angeles County*, 617 F. Supp. 2d 994, 999 (C.D. Cal. 2008) (“On
 28 a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must
 limit its review to the four corners of the operative complaint, and may not consider facts
 presented in briefs or extrinsic evidence.”).

1 two distinct products or services; (2) that [Yardi] possesses enough economic
 2 power in the tying product market to coerce its customers into purchasing the tied
 3 product; and (3) that the tying arrangement affects a ‘not insubstantial volume of
 4 commerce’ in the tied product market.” *Cascade Health Solutions v. PeaceHealth*,
 5 515 F.3d 883, 913 (9th Cir. 2008) (“*PeaceHealth*”).

6 RealPage alleges that Yardi uses its market power in the Property
 7 Management Software Market (the tying market) to expand its power in the
 8 Vertical Cloud Market (the tied market). Yardi does so by coercing amendment of
 9 its software license agreements to effectively prohibit its software licensees from
 10 using competing vertically-integrated cloud services, including the RealPage Cloud.
 11 FAC ¶¶ 39-40. Such agreements, commonly referred to as “negative ties,” are
 12 condemned by the courts as *per se* violations of the Sherman Act and the
 13 Cartwright Act whenever their effect on commerce is not *de minimis*.

14 **A. Agreements not to purchase a competitor’s product are *per se***
 15 **unreasonable**

16 Yardi contends that agreements not to purchase a tied product are “not *per se*
 17 tying under *PeaceHealth* or any other binding authority.” Mtn. at 8. Yardi is
 18 incorrect. Both the Ninth Circuit and the Supreme Court have recognized that
 19 negative tying agreements can constitute a *per se* violation of the Sherman Act.
 20 Indeed, over twenty years ago the Ninth Circuit explicitly rejected the argument
 21 Yardi now makes to this Court.

22 In *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th
 23 Cir. 1990) (“*Kodak I*”), plaintiffs, a group of independent service organizations
 24 (“ISOs”), brought suit against Kodak for, among other things, illegal tying based on
 25 Kodak’s policy of conditioning its sale of copier parts to consumers on the
 26 condition they agree *not* to purchase service from the ISOs. *Id.* at 614-15. Kodak
 27 argued that because it “does not force owners to buy service” but only “requires
 28 owners not to buy ISO service to receive parts,” it could not be liable for tying. *Id.*

1 at 615. The Ninth Circuit rejected this argument, holding that an agreement not to
 2 purchase can indeed constitute an illegal tie. *Id.* (“Kodak . . . misconceives the
 3 nature of tying agreements.”) (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1,
 4 5-6, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545, 550 (1958)). Yardi’s argument here—that
 5 “RealPage does not allege that Yardi has forced the purchase of any second product
 6 . . . only that Yardi has convinced some clients *not* to purchase something from
 7 RealPage” (Mtn. at 8)—is the exact argument that was rejected in *Kodak*. What is
 8 more, not only was Yardi’s argument rejected by the Ninth Circuit in *Kodak*, the
 9 Supreme Court subsequently affirmed the Ninth Circuit’s reasoning. *Eastman*
 10 *Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 463, 112 S. Ct. 2072,
 11 2080, 119 L. Ed. 2d 265, 281-82 (1992) (“*Kodak II*”) (“[R]espondents have
 12 presented sufficient evidence of a tie between service and parts. The record
 13 indicates that Kodak would sell parts to third parties only if they agreed *not to buy*
 14 service from ISO’s.”) (emphasis added).

15 *Kodak* was unquestionably a *per se* tying case, and the Ninth Circuit’s
 16 holding, affirmed by the Supreme Court, forecloses Yardi’s unsupported argument
 17 that negative tying is a “form[] of rule of reason tying” and not a *per se* violation.
 18 Mtn. at 8; *see Kodak I*, 903 F.2d at 615 (noting that the issue on appeal was
 19 “whether Kodak’s refusal to sell spare parts to equipment owners unless they agree
 20 not to use ISOs constitutes a tying arrangement *per se* unreasonable under [15
 21 U.S.C § 1]”); *Kodak II*, 504 U.S. at 461-62 (stating the elements of a *per se*
 22 violation).²

23
 24 ² Yardi acknowledges, as it must, that the prohibition against negative ties was recognized
 25 again in 2008 by the Ninth Circuit in *PeaceHealth*: “A § 1 violation can also occur when
 26 the customer promises not to take the tied product from the defendant’s competitor.”
 27 *PeaceHealth*, 515 F.3d at 913 n.23. Yardi shrugs off *PeaceHealth* by claiming that the
 28 court there “cit[ed] no such cases.” Mtn. at 8. However, Yardi neglects to mention that
 the *PeaceHealth* court cited the leading antitrust treatise, which, in turn, cites to the Ninth
 Circuit and Supreme Court opinions in *Kodak*. *PeaceHealth*, 515 F.3d at 913 n.23 (citing
 10 P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 1752c n.8 at 263 (2d ed. 2004)).

1 California’s Cartwright Act, like the Sherman Act, also deems negative tying
2 agreements to be *per se* unlawful. Indeed, negative ties are prohibited by the plain
3 text of Cal. Bus. & Prof. Code § 16727, entitled: “Lease or sale of goods under
4 agreement with lessee or purchaser not to use or deal in competitor’s goods.” That
5 statute provides: “It shall be unlawful for any person to lease or make a sale or
6 contract for the sale of goods, merchandise, machinery, supplies, [or] commodities
7 . . . on the condition, agreement or understanding that the lessee or purchaser
8 thereof shall not use or deal in the goods . . . or services of a competitor or
9 competitors of the lessor or seller” *See also UAS Management, Inc. v. Mater*
10 *Misericordiae Hosp.*, 169 Cal. App. 4th 357, 366, 87 Cal. Rptr. 81, 87 (2008)
11 (noting that tying arrangements involve a seller who “refuses to sell [a] product
12 unless the buyer buys (or agrees not to buy from seller’s competitor) a separate
13 product over which the seller does not have extensive independent market
14 power. . . . Such arrangements are unlawful unless their effect on commerce is *de*
15 *minimis*.”) (citing *PeaceHealth*, 515 F.3d at 912).

16 Yardi incorrectly relies on *Broadcast Music, Inc. v. Colombia Broad. System,*
17 *Inc.*, 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979), to suggest that RealPage
18 seeks an improper extension of *per se* liability. *Broadcast Music*, a price fixing
19 case that does not address tying, predates the Supreme Court’s opinion in *Kodak II*
20 and has no bearing on the requirements for a *per se* tying violation. The law is
21 clear that contractual restrictions such as those alleged here, tying the sale of one
22 product to an agreement not to use a competitor’s separate product, may constitute
23 *per se* tying provided the remaining elements of the *per se* test are met. RealPage
24 has adequately alleged these remaining elements, as set forth below.³

25
26 _____
27 ³ While the section of Yardi’s motion dealing with *per se* liability does not address the
28 remaining elements of the *per se* test, certain aspects of Yardi’s separate rule of reason
argument touch on these elements. For convenience, RealPage will address those
elements in its discussion of *per se* tying.

1 **B. Yardi has tied together the sale of two distinct products or services**

2 Whether a tying agreement involves two distinct products or services “turns
3 not on the functional relation between them, but rather on the character of the
4 demand for the two items.” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2,
5 19, 104 S. Ct. 1551, 1562, 80 L. Ed. 2d 2, 17 (1984), *abrogated on other grounds*,
6 *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 126 S. Ct. 1281, 164
7 L. Ed. 2d 26 (2006). The agreement must “link two distinct markets for products
8 that [are] distinguishable in the eyes of buyers.” *Id.* There also must be “sufficient
9 consumer demand so that it is efficient for a firm to provide” the products
10 separately. *Kodak II*, 504 U.S. at 462.

11 The tying market at issue in this case is the Property Management Software
12 Market. The Property Management Software Market consists of Yardi’s Voyager
13 and other “property management software system[s] designed to integrate property
14 management functions and accounting.” FAC ¶ 39. The tied market at issue is the
15 Vertical Cloud Market, which is the “market for vertically-integrated cloud
16 computing for multifamily real estate owners and property managers in the United
17 States.” *Id.*

18 RealPage sufficiently alleges that the Property Management Software Market
19 and Vertical Cloud Market are distinct. Both products are provided separately.
20 *See, e.g.*, FAC ¶ 2 (noting that some Voyager users host their software “on-
21 premises,” *i.e.*, without purchasing any cloud hosting service). Furthermore,
22 Voyager and other property management software products are single software
23 applications. The RealPage Cloud and other vertically-integrated cloud services
24 “aggregate[] applications from multiple software providers into a single system
25 that is vertically-integrated and managed holistically.” FAC ¶ 4 (emphasis added).
26 It is odd for Yardi to argue that property management software is the same product
27 as a cloud hosting service when it advertises on its website its own cloud service
28 separate from its software products. FAC ¶ 38. Furthermore, Yardi’s president

1 encourages Voyager users to consider Yardi’s cloud offerings over the RealPage
2 Cloud. FAC ¶ 44. Indeed, Yardi has sold property management software for years
3 but only recently entered the Vertical Cloud Market, demonstrating that there is
4 “sufficient consumer demand so that it is efficient for a firm to provide” the
5 products separately. *Kodak II*, 504 U.S. at 462; FAC ¶¶ 25, 38.

6 **C. Yardi has used its economic power to coerce customers into**
7 **agreeing not to use the RealPage Cloud**

8 The standard for determining economic power in a tying market “does not
9 . . . require that the defendant have a monopoly or even a dominant position
10 throughout the market for the tying product.” *Fortner Enters., Inc. v. U.S. Steel*
11 *Corp.*, 394 U.S. 495, 502-03, 89 S. Ct. 1252, 1258, 22 L. Ed. 2d 495, 505 (1969).
12 Indeed, “economic power over the tying product can be sufficient even though the
13 power falls far short of dominance and even though the power exists only with
14 respect to some of the buyers in the market.” *Id.* RealPage alleges that Yardi has
15 economic power (also referred to as market power) in the Property Management
16 Software Market (the tying market). FAC ¶ 39.

17 **1. Yardi possesses market power in the Property Management**
18 **Software Market**

19 Yardi’s market power in the Property Management Software Market derives
20 from (1) the “widespread adoption of its Voyager software,” which Yardi’s website
21 touts as “the industry-leading asset and property management software solution,”⁴
22 FAC ¶ 39, and (2) the high switching costs faced by its locked-in base of Voyager
23 users, *id.* ¶¶ 39-40, 60. *See Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336,
24 1341-42 (9th Cir. 1984) (defendant found to have market power in the tying market
25

26 ⁴ Yardi’s market power is not limited to Voyager. Yardi describes itself in its Complaint
27 as “the global leader in asset and property management solutions, servicing more than
28 15,000 businesses representing seven million residential units and seven billion square
feet of commercial space in the United States, Canada, Europe, Asia, and Australia.”
(D.I. 1 at ¶ 17).

1 in part because “many of defendant’s customers were ‘locked in’ to the use of
2 [defendant’s software]”).

3 Yardi acknowledges that RealPage’s economic power theory relies partly on
4 the switching costs Voyager users face, Mtn. at 21, but does not challenge the
5 adequacy of RealPage’s switching cost and lock-in allegations. Nor could it, as
6 RealPage specifically explains *why* Voyager users face high switching costs.
7 Voyager users would face high switching costs “associated with conversion, data
8 migration, new license fees, and disruption of day-to-day business.” FAC ¶ 39.
9 RealPage further alleges that Yardi’s tying agreements have been imposed on
10 “existing licensees that have already purchased Voyager.” FAC ¶ 40. These
11 customers were already locked in at the time Yardi imposed tying arrangements by
12 amending customers’ then-existing licenses. *Id.*

13 Instead, Yardi relies on *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532
14 F.3d 963 (9th Cir. 2008), for the proposition that RealPage must allege
15 “quantitative facts” demonstrating Yardi’s power in the Property Management
16 Software Market. Mtn. at 14. *Rick-Mik* does not support Yardi’s assertion. There,
17 plaintiff *Rick-Mik*, a franchisee, brought suit against its franchisor, Equilon,
18 alleging that Equilon had illegally tied the sale of its franchises to an agreement by
19 franchisees to use its credit card processing services. 532 F.3d at 966. The Ninth
20 Circuit held that *Rick-Mik* had failed to adequately allege market power in the
21 ostensible tying market for “gasoline franchises” because the complaint contained
22 “no specific allegations at all as to the franchise market” other than that Equilon
23 “rank[s] number one in the industry in branded gasoline stations.” *Id.* at 972.
24 Critically, the *Rick-Mik* complaint contained no factual allegations “regarding the
25 amount of power or control that Equilon has over prospective franchisees” or “*the*
26 *relative difficulty of a franchisee to switch franchise brands.*” *Id.* (emphasis
27 added). The Ninth Circuit noted that percentage figures regarding the market were
28 simply one “example” of what *Rick-Mik* could have alleged to demonstrate market

1 power absent these allegations. *Id.*⁵

2 Here, unlike in *Rick-Mik*, RealPage alleges that Yardi has power over its
3 customers and that they are locked in to Yardi’s property management software
4 product by virtue of the high switching costs they face. FAC ¶¶ 39-40, 60. Yardi’s
5 power over its customers “is evidenced by its ability to prevent customers from
6 exerting freedom of choice in selecting their vertical cloud providers.” FAC ¶ 39;
7 *see infra* Section II.C.2. RealPage also alleges, based on the limited market data
8 available, that Voyager is used to manage over 25,000 apartment sites in the United
9 States. FAC ¶ 39 (“market share figures are not readily available in this new
10 market”). These factual allegations are more than sufficient to defeat a motion to
11 dismiss. *See Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1052 (9th
12 Cir. 2008) (“[M]arket power is in this case a factual question. Resolution of the
13 market power question on a Rule 12(b)(6) motion is therefore inappropriate in this
14 case.”); *Allen-Myland, Inc., v. International Bus. Machs. Corp.*, 33 F.3d 194, 206
15 (3d Cir. 1994) (whether switching costs and lock-in created market power is “an
16 issue of fact”); *Cf. Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 340
17 (D. Vt. 2010) (“[d]ismissals for insufficient pleading of market power are rare pre-
18 discovery”).

19 Finally, RealPage’s allegations of coercion—including its specific allegations
20 of coercion relating to Clients 1 and 3—also constitute direct and specific evidence
21 of Yardi’s market power in the relevant tying markets. FAC ¶¶ 42, 47. *Cf. Rebel*
22 *Oil Co. v. Atlantic. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (“Market
23 power may be demonstrated through . . . direct evidence of the injurious exercise of
24 market power.”).

25 _____
26 ⁵ Yardi falsely suggests that the Ninth Circuit dismissed *Rick-Mik*’s complaint with
27 prejudice because it was “fundamentally flawed.” Mtn. at 14 (citing *Rick-Mik*, 532 F.3d
28 at 977). In truth, the Ninth Circuit declined to allow *Rick-Mik* to amend because it had
“allowed judgment to enter specifically so that it could appeal the granting of the motion
to dismiss” and thereby “waived its right to amend.” *Id.*

1 2. **Yardi has coerced its customers into negative tying**
2 **agreements**

3 RealPage also adequately alleges that Yardi’s conduct was coercive. Where
4 a tying condition “is express on the face of [an] agreement, the element of
5 [coercion] has been directly inferred.” W. Holmes & M. Mangiaracina, *Antitrust*
6 *Law Handbook* § 2.18, p. 310 (2010–11 ed.) (collecting cases); *see also Mozart Co.*
7 *v. Mercedes-Benz of N. Am., Inc.*, 593 F. Supp. 1506, 1517 (N.D. Cal. 1984) (tying
8 language in a contract “by itself has considerable ‘coercive potential’”). Here,
9 RealPage alleges an express tying agreement in Yardi’s license agreements. FAC
10 ¶ 40. Coercion is thus inferred.

11 Furthermore, RealPage alleges that Yardi has “threaten[ed] to terminate the
12 software licenses of Yardi clients that choose to host software in the RealPage
13 Cloud.” FAC ¶ 12. Such threats further evidence and support an inference of
14 coercion. *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1426 (9th Cir.
15 1995). In *Datagate*, an employee of Rockwell, a Hewlett-Packard (“HP”)
16 customer, testified at deposition that “two HP employees . . . told him that HP
17 would not provide software service if Rockwell purchased hardware service from a
18 third party.” *Id.* Reversing a grant of summary judgment for HP, the court found
19 this evidence “sufficient to establish a disputed issue of material fact as to whether
20 HP imposed a coercive tying arrangement on Rockwell” because “[i]t can readily
21 be inferred from [the employee’s] testimony that HP’s threat to withhold software
22 service precluded Rockwell from considering other providers of hardware service.”
23 *Id.* Here, as in *Datagate*, the allegations in the FAC provide ample basis for
24 inferring that Yardi’s threats precluded its customers from considering the
25 RealPage Cloud. FAC ¶ 39.

26 **D. Yardi’s tying agreements affect a “not insubstantial” volume of**
27 **commerce**

28 The volume of commerce element of the *per se* tying test “makes no

1 reference to the scope of any particular market or to the share of that market
2 foreclosed by the tie.” *Datagate*, 60 F.3d at 1425 (quoting *Fortner*, 394 U.S. at
3 501) (holding that a tying agreement may be *per se* unlawful even if it only affects
4 a single customer). Rather, the inquiry focuses on “whether a total amount of
5 business, substantial enough in terms of dollar-volume so as not to be merely *de*
6 *minimis*, is foreclosed to competitors by the tie.” *Id.* RealPage satisfies this
7 standard.

8 As just one example, RealPage alleges that Yardi bound Client 1 to a newly-
9 amended license agreement that foreclosed access to Yardi’s competitors in the
10 Vertical Cloud Market, including RealPage. FAC ¶ 42. RealPage further alleges
11 that Client 1 was prepared to use the RealPage Cloud, but was prevented from
12 doing so by Yardi’s amended license agreement, depriving RealPage of over
13 \$100,000 per year in revenue. *Id.* Thus, the amount of business affected by Yardi’s
14 negative tying agreement is *at least* this much.

15 The Ninth Circuit has directly held that a dollar volume of \$100,000 per year
16 is “not insubstantial.” *Datagate*, 60 F.3d at 1426 (“[A] dollar volume of \$100,000
17 per year for an unspecified number of years would hardly be *de minimis*.”). Indeed,
18 amounts as low as \$10,000 have been held “not insubstantial.” *Tic-X-Press, Inc. v.*
19 *Omni Promotions Co.*, 815 F.2d 1407, 1419 (11th Cir. 1987). Thus, RealPage
20 adequately alleges that Yardi’s tying agreement affects a “not insubstantial” volume
21 of commerce.⁶

22 * * *

23 In sum, RealPage’s detailed factual allegations demonstrating Yardi’s ability
24 to coerce its customers into entering into agreements not to use competing vertical
25

26 ⁶ Because this prong of the test looks only to the absolute dollar amount affected, without
27 regard to the scope of the market at issue, Yardi is liable for *per se* tying even if the
28 evidence ultimately supports Yardi’s factual argument that “other hosting services” (Mtn.
at 11) are a reasonable substitute for vertically-integrated cloud products like the RealPage
Cloud.

1 cloud providers are more than sufficient to state a claim for *per se* tying. *Cargill,*
2 *Inc. v. Budine*, No. CV-F-07-349, 2007 WL 4207908, at *4 (E.D. Cal. Nov. 27,
3 2007) (“[T]he elements of coercion, market power and effect on commerce . . . are
4 questions of fact that require discovery and a fact-finder to resolve.”). Although
5 Yardi struggles mightily to convince the Court that antitrust claims are subject to a
6 heightened pleading standard, they are not. RealPage is required only to meet the
7 lenient pleading standard in Rule 8(a). *See id.* Because RealPage has met and
8 easily exceeded this pleading standard with respect to its *per se* tying claims,
9 RealPage’s Sherman Act and Cartwright Act claims should both be allowed to
10 proceed on this theory.

11 **III. REALPAGE HAS ADEQUATELY STATED A CLAIM UNDER THE**
12 **RULE OF REASON**

13 Even if the Court were somehow to conclude that RealPage has failed to state
14 a claim for *per se* tying, RealPage also adequately alleges a violation of the
15 Sherman Act and the Cartwright Act under the “rule of reason” standard.

16 To state a claim under the rule of reason, RealPage must allege “(1) a
17 contract, combination or conspiracy among two or more persons or distinct
18 business entities; (2) by which the persons or entities intended to harm or restrain
19 trade or commerce among the several States, or with foreign nations; (3) which
20 actually injures competition.” *Brantley v. NBC Universal, Inc.*, ___ F.3d ___, No.
21 09-56785, 2011 WL 2163961, at *3 (9th Cir. June 3, 2011) (quoting *Kendall v.*
22 *Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008)).

23 RealPage alleges that Yardi’s amended license agreements violate the rule of
24 reason in two different ways: (1) they are contracts that unreasonably restrain trade
25 in the Vertical Cloud Market, and (2) they are unlawful tying agreements that
26 unreasonably restrain trade in the Vertical Cloud Market. *See County of Tuolumne*
27 *v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1157 (9th Cir. 2001) (“A tying arrangement
28 which is not unlawful *per se* may be invalidated under the rule of reason. . . .”)

1 (internal quotation omitted).

2 **A. RealPage has adequately pleaded the existence of the Vertical**
3 **Cloud Market**

4 RealPage alleges that Yardi’s conduct restrains trade in the Vertical Cloud
5 Market. FAC ¶ 37. The Vertical Cloud Market is unique, and distinct from
6 industry-agnostic cloud computing services, because it caters to the “specialized
7 needs of multifamily real estate owners and property managers.” *Id.*

8 As a threshold matter, the Ninth Circuit has made clear that the validity of a
9 “relevant market” is typically a factual question, not a legal question. *Newcal*, 513
10 F.3d at 1045; *see also High Tech. Careers v. San Jose Mercury News*, 996 F.2d
11 987, 990 (9th Cir. 1993) (market definition depends on “a factual inquiry into the
12 ‘commercial realities’ faced by consumers”). Alleged relevant markets ordinarily
13 survive Rule 12(b)(6) scrutiny subject to factual testing by summary judgment or at
14 trial. *Newcal*, 513 F.3d at 1045.

15 Yardi’s three arguments fundamentally misunderstand both RealPage’s
16 allegations and the applicable law. First, contrary to Yardi’s assertion, RealPage is
17 not alleging a consumer-based market. Rather, RealPage alleges a product market
18 tailored to the specific needs of a group of consumers. Second, RealPage alleges
19 *why* there are no adequate substitutes for a Vertical Cloud product. Indeed, Yardi’s
20 own website clearly articulates the unique benefits of a vertically-integrated cloud.
21 Third, RealPage’s acknowledgment that some Voyager users host their software on-
22 premises in no way undermines RealPage’s market definition because these users
23 are not participants in any hosting market; rather, they are self-hosting.

24 Yardi’s argument that RealPage impermissibly uses consumers to define a
25 product market (Mtn. at 10) mischaracterizes the relevant law. Yardi correctly
26 states that the relevant market is a product market and that “consumers do not
27 define the boundaries of the market.” *See Newcal*, 513 F.3d at 1045; *see also*
28 *Colonial Med. Grp., Inc. v. Catholic Healthcare W.*, No. C-09-2192, 2010 WL

1 2108123, at *3-4 (N.D. Cal. May 25, 2010). This rule is not meant to imply,
2 however, that consumers are irrelevant in defining a product market. To the
3 contrary, as explained in one of the cases cited by Yardi, “whether products are part
4 of the same or different markets under antitrust law depends on whether *consumers*
5 view those products as reasonable substitutes for each other.” *Apple Inc. v. Psystar*
6 *Corp.*, 586 F. Supp. 2d 1190, 1196 (N.D. Cal. 2008) (emphasis added).

7 The purpose of the principle Yardi cites is to condemn attempts to define
8 product markets in terms of consumers where the identity of the consumer has no
9 impact on the product itself. For example, it would be impermissible to define a
10 product market as “cars sold to attorneys” because there is no difference between a
11 car sold to an attorney and a car sold to any other consumer group. On the other
12 hand, there is a legitimate product market for race cars—that is cars sold to the
13 group of consumers comprised of race car drivers—because the characteristics of
14 the product are impacted by the identity of the ultimate consumer and their use of
15 the product. RealPage’s relevant market is akin to a market for race cars, not a
16 market for cars that happen to be sold to attorneys. RealPage is not using
17 consumers to define the market. Rather, RealPage is alleging a market specifically
18 tailored to a particular industry, who in turn happen to be the people who
19 necessarily buy it. RealPage has not merely alleged a product that consists of
20 vertically-integrated cloud computing services that happen to be sold to multifamily
21 real estate owners and property managers. Rather, RealPage has alleged that it and
22 Yardi, “the primary competitors in the Vertical Cloud Market,” have systems and
23 personnel “uniquely positioned to provide IT infrastructure for real estate
24 enterprises,” FAC ¶ 38, and “*designed specifically* to address the needs of
25 multifamily real estate owners and property managers,” FAC ¶ 3 (emphasis added).

26 The only case Yardi cites as authority for its consumer-based market
27 argument actually *supports* the rule that it is permissible to define a product as
28 tailored to a particular consumer group. As Yardi explains, in *Colonial Medical*

1 *Group, Inc. v. Catholic Healthcare West*, the court held that a relevant market
2 defined as medical services provided to “prison inmates” was “legally insufficient.”
3 2010 WL 2108123, at *3-4. What Yardi leaves out is that the court in *Colonial*
4 *Medical* did not dismiss the complaint because the alleged relevant market was
5 targeted to consumers in a specific industry. Rather, the court took issue with the
6 fact that the specific industry to which the services were targeted was not properly
7 defined because the complaint did not explain why medical services provided to
8 “prison inmates” were distinct from such services provided to jail and military
9 inmates. Therefore, *Colonial Medical* does not support Yardi’s argument that
10 relevant markets may not be defined in terms of products targeted to a particular
11 consumer group. It merely supports the uncontroversial proposition that the
12 boundaries of the targeted consumer group must be clearly defined and explained.
13 *Id.*

14 Yardi also contends that RealPage fails to adequately distinguish “industry-
15 agnostic” cloud service providers. Mtn. at 10. Yardi simply chooses to ignore
16 RealPage’s allegations. RealPage specifically alleges that “industry-agnostic cloud
17 providers are not adequate substitutes for a vertical cloud offering” because they
18 “cannot satisfy the specialized needs of multifamily real estate owners and property
19 managers.” *Id.*

20 The Court need look no further than Yardi’s own statements to understand
21 why industry-agnostic cloud providers are not an adequate substitute for a
22 vertically-integrated cloud service. As noted in the FAC, Yardi’s website describes
23 the benefits of its own vertically-integrated cloud service, Yardi Cloud Services.
24 FAC ¶ 38 (“As a leading provider of real estate software and services, Yardi is
25 uniquely positioned to provide IT infrastructure for real estate enterprises . . .”).
26 Indeed, Yardi advertises its own cloud offering by highlighting its ability to offer
27 support “specific to the industry.” *Id.* Given its public statements, Yardi cannot
28 reasonably now contend that the Court should determine, without any record before

1 it, that generalized, industry-agnostic cloud offerings can adequately satisfy the
2 specialized needs of multifamily real estate owners.

3 Finally, Yardi claims that RealPage impermissibly excludes multiple *other*
4 “hosting services” from its market definition with no factual basis. Mtn. at 11.
5 Specifically, Yardi argues that RealPage has no basis for excluding ASP and on-
6 premises hosting options given that RealPage acknowledges that some Yardi
7 customers host Voyager on-premises or use Yardi’s single-application ASP service.
8 *Id.* (citing FAC ¶ 2). This argument again distorts RealPage’s allegations, and
9 misunderstands the boundaries of a relevant market. RealPage acknowledges that
10 *vertically-integrated* ASP hosting *with Yardi* is a substitute for hosting in the
11 RealPage Cloud—that is, in fact, exactly what Yardi Cloud Services is: a vertically-
12 integrated ASP hosting option tailored to the property management industry. FAC
13 ¶¶ 8, 38. Indeed, this is the primary way Yardi competes with RealPage in the
14 Vertical Cloud Market.

15 Single-application (rather than vertically integrated) ASP hosting, on the
16 other hand, is an inadequate substitute for a vertically-integrated cloud service. In a
17 single-application ASP hosting scenario, a client accesses its own individual copy
18 of a software program (such as Voyager) remotely via the internet. FAC ¶ 2. The
19 client is still required to maintain and service its own information technology
20 systems (*e.g.*, enterprise accounting, human resources, or email programs). Cloud
21 computing services such as the RealPage Cloud and Yardi Cloud Services, on the
22 other hand, host and integrate *all* of a client’s information technology systems,
23 obviating the need for the client to invest in its own IT infrastructure, hardware
24 maintenance, service, and other related costs. *Id.* This type of service is
25 fundamentally different than a one-off, single-application hosting option, and the
26 two are thus alleged to be inadequate substitutes. FAC ¶¶ 2, 4, 23-24.

27 Finally, on premises “hosting,” also known as self-hosting, is not a
28 competing service that needs to be excluded from the Vertical Cloud Market,

1 because it merely reflects customers who have withdrawn from the market entirely.
2 As Yardi’s motion acknowledges, with on-premises hosting “the client installs and
3 runs Yardi software on its own computer server.” Mtn. at 11; FAC ¶ 2. This sub-
4 set of consumers has thus chosen not to obtain services in the Vertical Cloud
5 Market, or any other market. This is analogous to car owners who perform their
6 own service and maintenance—they are simply not in the market for a mechanic,
7 nor would they reasonably be considered competitors of mechanics.

8 In sum, the Vertical Cloud Market is not a “facially unsustainable” market.
9 At trial or on a motion for summary judgment, Yardi can test whether as a factual
10 matter these more generalized cloud offerings are able to satisfy the specialized
11 needs of multifamily real estate owners. At this stage of the proceedings, however,
12 RealPage has adequately pled the existence of the Vertical Cloud Market
13 sufficiently to defeat a Rule 12(b)(6) motion.⁷ *Delano Farms Co. v. Cal. Table*
14 *Grape Comm’n*, 623 F. Supp. 2d 1144, 1176 (E.D. Cal. 2009) (“[C]ourts hesitate to
15 grant motions to dismiss for failure to plead a relevant product market.”).

16 **B. RealPage has adequately alleged an agreement between Yardi and**
17 **its customers**

18 Stretching the boundaries of legitimate argument, Yardi asks this Court to
19 hold that RealPage’s allegations regarding Yardi’s amended license agreements are
20 “devoid of plausible factual context.” Mtn. at 18. It is difficult to understand how
21 Yardi can in good faith make this argument given that RealPage’s Counterclaims
22 quote specific language from Yardi’s own amended license agreements. FAC ¶ 40.
23

24 _____
25 ⁷ Yardi also makes much of RealPage’s statement that “Clients should be free to choose
26 the RealPage Cloud, Yardi Cloud Services, or any other solution that best suits their
27 business needs.” FAC ¶ 13. RealPage is simply stating that its and Yardi’s clients should
28 be free to choose any other *Vertical Cloud Market* solution without fear of Yardi’s threats,
coercion, and tying restrictions. As RealPage’s pleading makes clear, “Yardi’s conduct . .
. has . . . denied its own Voyager customers the ability to freely choose the vertically-
integrated cloud services that fit their needs.” FAC ¶ 41.

1 Yardi asks the Court to dismiss RealPage’s antitrust counterclaims on the
2 ground that RealPage has not “identified the alleged agreements and the parties to
3 them.” Mtn. at 18. This argument is disingenuous. As Yardi well knows, on May
4 6, at Yardi’s specific request, RealPage disclosed the identity of each exemplar
5 client described in the Counterclaims. (Their identities were concealed in the
6 Counterclaims as filed simply in order to protect confidential business information.)
7 RealPage, however, is not required at the pleading stage to name every Voyager
8 customer subject to Yardi’s coerced prohibition against using the RealPage Cloud,
9 nor could it. *Twombly* instead requires a plaintiff merely to specifically plead
10 “enough factual matter (taken as true) to suggest that an agreement was made.”
11 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, 167 L. Ed.
12 2d 929, 940 (2007). RealPage specifically quotes language from the agreement(s)
13 in question. RealPage alleges that Client 1 was bound by an amended license
14 agreement and, as a result, was unable to use the RealPage Cloud:

15 “Worse yet, after Client 1 had already purchased Voyager, Yardi
16 created newly-revised software license agreements in which the major
17 change was to prohibit the client from using the RealPage Cloud.
18 When Client 1 asked Yardi to modify the license agreement to allow it
19 to use the RealPage Cloud, Yardi refused. As a result of the pressure,
20 communications, and unlawful agreements imposed by Yardi, Client 1
21 announced that it could not use the RealPage Cloud, thus depriving
22 RealPage of over \$100,000 per year in lost revenue.”

23 FAC ¶ 42. In a myopic reading of these allegations, Yardi argues that they
24 “do not support the existence of an ‘amended license agreement’ or a locked-
25 in client.” Mtn. at 21.

26 Only discovery will determine how many restrictive agreements Yardi
27 has imposed on its customers containing the language quoted in paragraph
28 40 of the FAC (which is on its face a negative tie). Yardi’s motion

1 acknowledges that RealPage requested that Yardi produce these agreements.
2 Mtn. at 18 n.4. Yardi neglects to mention, however, that it has flatly refused
3 to produce the agreements (or provide any other discovery concerning the
4 counterclaims it has moved to dismiss),⁸ while this motion, in turn, seeks
5 dismissal of RealPage’s counterclaims for failing to “identif[y] any of the
6 alleged parties to any of the alleged ‘amended license agreements.’” This
7 Catch 22 cannot support Yardi’s motion.

8 **C. RealPage has adequately alleged that Yardi intended to harm or**
9 **restrain trade**

10 RealPage alleges that Yardi intends to restrain trade in order to “stop
11 RealPage’s cloud progress,” “lock [consumers] into Yardi’s lagging business
12 model,” and allow Yardi time to “expand its competing cloud computing offering.”
13 FAC ¶¶ 2, 12-13. RealPage further explains that Yardi’s inferior technology
14 prevents it from fairly competing with the RealPage Cloud, thus providing a motive
15 for Yardi’s anticompetitive conduct. FAC ¶¶ 8-10, 25-28. Yardi does not contest
16 that RealPage has adequately pleaded this element.

17 **D. RealPage has adequately alleged injury to competition**

18 Yardi contends that RealPage has alleged only injury to itself and not injury
19 to competition. Mtn. at 14. Yardi is incorrect. RealPage has alleged at least four
20 distinct injuries to competition, as set forth below. Each is independently sufficient
21 to meet the element of injury to competition at the pleading stage.

22 In structuring its argument, Yardi cites *Adaptive Power Solutions, LLC v.*
23 *Hughes Missile Sys. Co.*, 141 F.3d 947, 951-52 (9th Cir. 1998), for the proposition
24 that, to plead injury to competition, RealPage “must allege” both reduction in
25 competition and barriers to entry. Mtn. at 14. *Adaptive Power* is a summary
26 judgment opinion that has no bearing on, and does not even discuss, the standards
27 for pleading injury to competition. Relevant cases addressing the standards for

28 ⁸ Given Yardi’s stonewalling, RealPage will shortly be filing a motion to compel.

1 pleading injury to competition are addressed below, and they demonstrate that
2 RealPage’s allegations are more than sufficient to overcome Yardi’s motion.

3 1. **Yardi’s license agreements foreclose competition from a**
4 **class of competitors, not just RealPage**

5 Yardi’s license agreements not only prohibit Voyager users from using the
6 RealPage Cloud, but *any other hosting service offered by a property management*
7 *software company*, as well. As explained in the Counterclaims, Yardi’s amended
8 license agreements prohibit licensees from “using any ‘contractor’ to implement or
9 host Yardi software.” FAC ¶ 40. The agreements define “contractor,” in turn, as “a
10 provider, or an affiliate of a provider, of real property management and accounting
11 software marketed primarily to the real estate industry.” *Id.* While this definition
12 was “designed by Yardi to include RealPage,” *id.*, Yardi did not limit the definition
13 to RealPage. It is not difficult to see why. Yardi recognizes that property
14 management software companies are “uniquely positioned to provide IT
15 infrastructure for real estate enterprises.” *Id.* ¶ 38. By preventing *any* property
16 management software company from hosting Voyager, Yardi has foreclosed its
17 most likely current and future competitors in the Vertical Cloud Market from a
18 significant market segment (Voyager users).

19 Even assuming that Yardi’s license agreements currently affect only
20 RealPage, this does not mean that RealPage has alleged only “injury to itself.”
21 Mtn. at 14. A tying agreement that “forecloses an entire class” from a market is
22 prohibited even if its “practical effect” is that “only [one person] [is] foreclosed.”
23 *County of Tuolumne*, 236 F.3d at 1159 (analyzing a rule of reason tying claim).

24 Yardi’s brazen attempt to expand its influence in the Vertical Cloud Market
25 by prohibiting its customers from using the cloud services of *any other property*
26 *management software company* (including, but not limited to, RealPage) is a clear
27 threat to competition.
28

1 2. **Yardi is leveraging its market power in the Property**
2 **Management Software Market to exclude competitors in the**
3 **Vertical Cloud Market**

4 In a rule of reason tying case, harm to competition is inferred when a
5 business leverages market power in the tying market to foreclose competition in the
6 tied market. *Brantley*, 2011 WL 2163961, at *4 (“[T]ying agreements can
7 constitute an injury to competition when ‘the seller has market power over the tying
8 product,’ and the seller ‘can leverage this market power through tying arrangements
9 to exclude other sellers of the tied product.’”) (quoting *PeaceHealth*, 515 F.3d at
10 912)). As demonstrated in Section III.C, RealPage alleges that Yardi leverages its
11 market power in the Property Management Software Market to foreclose
12 competition in the Vertical Cloud Market. This coercive leveraging is a presumed
13 injury to competition.

13 3. **Yardi’s license agreements substantially foreclose**
14 **competition in the Vertical Cloud Market**

15 RealPage adequately alleges that Yardi’s agreements threaten to substantially
16 foreclose competition in the Vertical Cloud Market. Yardi’s Voyager software is,
17 according to Yardi’s website, “the industry-leading asset and property management
18 software solution.” FAC ¶ 39. It is used to manage over 25,000 apartment sites in
19 the United States. *Id.* Yardi’s Voyager customers represent “a substantial share of
20 potential vertical cloud customers.” FAC ¶ 60. Yardi’s coercive tactics and market
21 power in the Property Management Software Market have caused at least two
22 prospective RealPage Cloud customers to abandon their plans to use the service.
23 FAC ¶¶ 42, 47. Moreover, these two customers were simply used as “exemplars”
24 of customers affected by Yardi’s new policy of coercively restricting its customers’
25 choice of vertical cloud providers.

26 Yardi argues that RealPage has not adequately alleged a risk of substantial
27 market foreclosure because its license agreements do not prohibit licensees from
28 hosting other, non-Yardi applications in the RealPage Cloud. Mtn. at 15. Yardi

1 misses the point. Its license agreements do not need to foreclose an *entire* market
2 to constitute an unreasonable restraint of trade. Indeed, Yardi forgets one of the
3 “principal evils” of tying agreements: they “foreclose the tying party’s competitors
4 from a *segment* of the tied product market.” *Kentucky Fried Chicken Corp. v.*
5 *Diversified Packaging Corp.*, 549 F.2d 368, 375 (5th Cir. 1977) (emphasis added).

6 The cases Yardi cites in support of its remaining arguments are readily
7 distinguishable. *Adaptive Power* involved a refusal to deal that arguably impaired
8 competition for a period of four to ten months, leading the court to conclude that
9 “[a]ny harmful effect on competition in the present case was, at most, temporary.”
10 *Adaptive Power*, 141 F.3d at 952. Here, RealPage has alleged that Yardi’s
11 restrictive license agreements “are of unlimited duration.” FAC ¶ 40. Similarly, in
12 *Fallstaff Brewing Co. v. Stroh Brewery Co.*, 628 F. Supp. 822 (N.D. Cal. 1986), the
13 court held that the element of harm to competition was not adequately pleaded in
14 light of the saturated nature of the market at issue. *Id.* at 828. Here, the relevant
15 market (the Vertical Cloud Market) is narrow and discrete. The market is
16 dominated by Yardi and RealPage, who are the “primary competitors” in the
17 Vertical Cloud Market. FAC ¶ 38. Both cases are thus readily distinguishable.

18 In sum, RealPage has met its burden in pleading the fact-intensive issue of
19 market foreclosure. *Cf. E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637
20 F.3d 435, 452 n.12 (4th Cir. 2011) (market foreclosure should not be decided on a
21 motion to dismiss).

22 4. **Yardi’s conduct is harming innovation and preventing**
23 **RealPage from achieving economic scale**

24 In addition to the harms discussed above, Yardi’s conduct has “prevented
25 RealPage from achieving economic scale” and has denied consumers “the
26 innovations and lower prices that would ensue from customers choosing RealPage
27 of their own volition and RealPage growing and continuing to innovate.” FAC
28 ¶ 41. In other words, Yardi’s restrictive agreements are preventing RealPage from

1 reaching a critical mass of customers that will allow it to reduce costs. These
2 savings will either be passed on to the consumer or invested in innovative new
3 cloud computing technology. In either case, competition in the Vertical Cloud
4 Market will be enhanced.

5 Stifled innovation and the lost opportunity to achieve economies of scale can
6 constitute harm to competition. *In Re Hypodermic Prods. Antitrust Litig.*, No. 05-
7 CV-1602, 2007 WL 1959224, at *14 (D.N.J. June 29, 2007) (injury to competition
8 adequately pleaded where, had competitors not been foreclosed from the market,
9 they would have “increased their sales and achieved economics of scale, their costs
10 would have fallen, and thus they would have been able to provide their products at
11 even lower prices, further pressuring [defendant] to lower its prices in response”).

12 Yardi cites *Brantley*, 2011 WL 2163961, at *5 for the proposition that
13 “[h]arm to consumers,’ including ‘reduced choice or increased prices,’ does not
14 satisfy the requirement of injury to competition.” Mtn. at 14. *Brantley* was a
15 consumer class action in which the plaintiffs “disavow[ed] any intent to allege that
16 practices [at issue] . . . foreclosed rivals from competing.” 2011 WL 2163961, at
17 *4. Thus, in *Brantley*, there was no competitor alleged to be excluded. Without
18 any exclusion or impact on the competitive process, the Ninth Circuit simply ruled
19 that higher prices or reduced choice are insufficient to find an injury to competition.
20 *Id.* Here, RealPage alleges actual exclusion as a result of Yardi’s agreements,
21 which explicitly foreclose RealPage and other property management software
22 providers from “implementing or hosting” Voyager and directly harm the
23 competitive process. Yardi’s foreclosure of a rival competitor thus has caused an
24 injury to competition *and* harmed consumers. In contrast, *Brantley* only involved
25 an alleged harm to consumers and is therefore inapposite.

26 **IV. REALPAGE HAS ADEQUATELY ALLEGED THAT YARDI**
27 **INTERFERED WITH ITS CONTRACTUAL RELATIONS**

28 RealPage properly alleges the elements of interference with contract.

1 RealPage need only allege (1) a valid contract between RealPage and a third party;
2 (2) Yardi’s knowledge of this contract; (3) Yardi’s intentional acts designed to
3 induce a breach *or disruption* of the contractual relationship; (4) actual breach *or*
4 *disruption* of the contractual relationship; and (5) resulting damage. *See Pac. Gas*
5 *& Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 3-4
6 (1990). Contrary to Yardi’s argument, Mtn. at 23, RealPage is not required to
7 allege actual breach.

8 RealPage alleges that it had valid contracts with its clients, including Client
9 1. RealPage alleges that its relationship with Client 1 “culminated in the
10 negotiation and signing of a Letter Agreement for Interim Services on August 1,
11 2010.” FAC ¶ 42; *see also id.* ¶ 72. RealPage then alleges that Yardi had
12 knowledge of these contracts, including Client 1’s contract. FAC ¶ 42 (“When
13 Yardi learned of the Letter Agreement. . .”). RealPage describes exactly how
14 Yardi, with knowledge of RealPage’s contract, intentionally interfered: “Yardi
15 advised Client 1 that it could not continue with the Letter Agreement When
16 Client 1 asked Yardi to modify the [newly-revised Yardi license agreement] to
17 allow it to use RealPage Cloud, Yardi refused.” *Id.* Thus, RealPage has alleged a
18 contract, Yardi’s knowledge of the contract, and Yardi’s intentional interference.

19 RealPage then pleads actual disruption and specific resulting damage from
20 the interference. The FAC states “[a]s a result of the pressure, communications,
21 and unlawful agreements imposed by Yardi, Client 1 announced that it could not
22 use the RealPage Cloud.” FAC ¶ 42. This disruption caused real and measurable
23 damage: “Client 1 announced that it could not use the Real Page Cloud, thus
24 depriving RealPage of over \$100,000 per year in lost revenue.” *Id.* All five
25 elements of a tortious interference claim therefore have been explicitly pled and
26 Yardi’s motion to dismiss this claim should be denied. *Pac. Gas & Elec. Co.*, 50
27 Cal. 3d at 1126.⁹

28 ⁹ The cases Yardi cites stand only for the unremarkable—and inapplicable—proposition
REALPAGE, INC.’S OPPOSITION TO
MOTION TO DISMISS
NO. CV11-690 ODW (JEMx)

1 **V. REALPAGE’S UNFAIR COMPETITION AND TORTIOUS**
2 **INTERFERENCE CLAIMS ARE BASED ON YARDI’S**
3 **ANTICOMPETITIVE CONDUCT, ITS UNFAIR AND FRAUDULENT**
4 **BUSINESS PRACTICES AND ITS THEFT OF REALPAGE TRADE**
5 **SECRETS**

6 Yardi seeks dismissal of RealPage’s interference with prospective economic
7 advantage and unfair competition claims “to the extent they rely on dismissed
8 counterclaims.” Mtn. at 23. First, both claims explicitly rely on Yardi’s
9 misappropriation of trade secrets claim (a claim Yardi does not challenge by its
10 motion) as a predicate unlawful and wrongful act, separate and apart from any
11 antitrust violations. FAC ¶¶ 79, 85. Moreover, RealPage also alleges that Yardi’s
12 business practices are unfair and fraudulent. FAC ¶¶ 84-85. Unfair business
13 practices and fraudulent business practices constitute additional, independent
14 violations of California’s unfair competition law, distinct from unlawful business
15 practices, and neither requires a predicate illegal act. FAC ¶ 85; *Berryman v. Merit*
16 *Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554-56, 62 Cal. Rptr. 3d 177, 185-87
17 (2007) (citing Cal. Bus. & Prof. Code § 17200). Dismissal of these claims is thus
18 improper because both stand independently of RealPage’s antitrust claims and
19 because both are adequately pled.

20 **VI. CONCLUSION**

21 For the foregoing reasons, Yardi’s Motion to Dismiss should be denied.¹⁰

22 that dismissal is appropriate where the pleader completely fails (1) to allege “ANY
23 existing contracts,” *Kentmaster Mfg. Co. v. Jarvis Prods. Corp.*, 146 F.3d 691, 695 (9th
24 Cir. 1998); (2) to identify ANY of its interfered-with customers, *Yanik v. Countrywide*
25 *Home Loans, Inc.*, No. CV-10-6268, 2010 WL 4256312, at *5-6 (C.D. Cal. Oct. 18,
26 2010); or (3) to even attempt to identify ANY part of its amended complaint supporting its
27 theory. *Philips Med. Capital, LLC v. Med. Insights Diagnostics Ctr., Inc.*, 471 F. Supp.
28 2d 1035, 1046 (N.D. Cal. 2007).

¹⁰ Should the Court dismiss any of RealPage’s Counterclaims, leave to amend should be
granted. Fed. R. Civ. P. 15(a)(2) (“The court should freely give leave when justice so
requires.”); Standing Order Regarding Newly Assigned Case, D.I. 8, at 5-6 (collecting
cases). Leave to amend is appropriate in this case because Yardi raises no defect that
cannot be cured through amendment. Nothing in Yardi’s improper request for judicial
notice changes this result.

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