

1 BINGHAM MCCUTCHEN LLP  
2 Geoffrey M. Howard (SBN 157468)  
3 Email: geoff.howard@bingham.com  
4 Bree Hann (SBN 215695)  
5 Email: bree.hann@bingham.com  
6 Chad Russell (SBN 246046)  
7 Email: chad.russell@bingham.com  
8 Three Embarcadero Center  
9 San Francisco, CA 94111-4067  
10 Telephone: 415.393.2000  
11 Facsimile: 415.393.2286

12 Attorneys for Plaintiff and  
13 Counterdefendant  
14 Yardi Systems, Inc.

15 UNITED STATES DISTRICT COURT  
16 CENTRAL DISTRICT OF CALIFORNIA

17 Yardi Systems, Inc.,  
18 Plaintiff,  
19 v.  
20 RealPage, Inc. and DC Consulting,  
21 Inc.,  
22 Defendants.

23 RealPage, Inc.,  
24 Counterclaimant,  
25 v.  
26 Yardi Systems, Inc.,  
27 Counterdefendant.  
28

Case No. CV 11-00690 ODW (JEMx)

**YARDI SYSTEMS, INC.’S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF ITS  
MOTION TO DISMISS PURSUANT  
TO FED. R. CIV. P. 12(B)(6)**

Hearing Date: July 25, 2011  
Time: 1:30pm  
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Judge: Hon. Otis D. Wright II

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1 **I. INTRODUCTION**

2 Yardi Systems, Inc. (“Yardi”) and RealPage, Inc. (“RealPage”) are competing  
3 providers of real property management and accounting software. Yardi brought this  
4 case against RealPage after discovering RealPage had broken into Yardi’s password-  
5 protected customer support website and downloaded substantial amounts of Yardi’s  
6 trade secrets and copyrighted support material. This theft occurred while Yardi was  
7 engaging RealPage in dialogue about Yardi’s concerns that RealPage might be  
8 violating Yardi’s intellectual property rights.

9 In its response to Yardi’s Complaint, RealPage admitted to much of this  
10 downloading. However, RealPage hid those admissions behind 32 pages of alleged  
11 “Counterclaims.” The Counterclaims suffered from a variety of fatal defects that  
12 Yardi disclosed to RealPage in meet and confer discussions. In response, RealPage  
13 filed a major overhaul as “Amended Counterclaims.” Because RealPage failed to  
14 cure those defects, Yardi moves to dismiss five of the six Amended Counterclaims.  
15 RealPage still fails to plead viable antitrust and contractual interference causes of  
16 action. Its unfair competition and prospective interference counterclaims also fail to  
17 the extent they rely on alleged antitrust violations or contractual interference.

18 *Antitrust Counterclaims (Sherman and Cartwright Acts).* RealPage devotes  
19 just a few paragraphs of its Amended Counterclaims to Yardi’s alleged antitrust  
20 violations, accusing Yardi of coercing unidentified Yardi clients into amending their  
21 software licenses. It alleges that these amendments are anticompetitive because they  
22 restrain trade in a market for so-called “vertical cloud services” by precluding the  
23 unidentified clients from hosting Yardi software on RealPage’s systems. The Court  
24 should dismiss the antitrust counterclaims for five reasons.

25 First, although RealPage has stated it intends to proceed on a *per se* tying  
26 theory, its allegations do not support that claim. *Per se* tying occurs when a  
27 defendant uses its power in one product market to force customers to purchase a  
28 *second* product in a *separate* product market. Nowhere does RealPage allege that

1 Yardi has forced customers to purchase *a second product*, much less one in a  
2 separate market. RealPage only alleges that Yardi has prohibited some customers  
3 from hosting Yardi software with RealPage. This is not *per se* tying.

4 Second, RealPage fails to define the “relevant market” affected by Yardi’s  
5 alleged conduct. A relevant market must consist of all interchangeable products, for  
6 example, all software hosting services that customers might reasonably choose  
7 instead of the “RealPage Cloud.” According to RealPage, no such competing  
8 products exist, so the relevant market need not include them. But RealPage  
9 elsewhere contradicts itself, for example, when it admits that “[c]lients should be  
10 free to choose the RealPage Cloud ... *or any other solution that best suits their*  
11 *business needs.*” Because the true relevant market includes these admitted but  
12 unidentified “other solution[s],” RealPage’s market definition fails.

13 Third, RealPage fails to allege market power. The Amended Counterclaims  
14 omit basic facts required to demonstrate a plausible and substantial threat to  
15 competition, such as: the size of the market, its current and potential consumers,  
16 current and potential competitors, or the number or percentage of consumers in the  
17 market affected by Yardi’s alleged conduct. Without alleging that Yardi has the  
18 power to unreasonably restrain trade, RealPage’s antitrust counterclaims fail.

19 Fourth, RealPage fails to allege harm to competition. It does not allege that it  
20 has been excluded from the “vertical cloud” market; to the contrary, RealPage  
21 allegedly created and dominates that market. Nor does it allege that Yardi has  
22 excluded other suppliers from the alleged market, or that new suppliers cannot enter.  
23 The only harm RealPage arguably alleges is to its own bottom line. That is not  
24 “harm to competition” sufficient to state an antitrust claim.

25 Fifth, RealPage fails to identify any agreement in restraint of trade. It alleges  
26 that Yardi and some unidentified customers have amended their license agreements  
27 in an improper way. RealPage does not identify the customers, does not identify the  
28 amendments, and, tellingly, does not state the terms of the original licenses that

1 Yardi supposedly amended. Absent these facts (which RealPage cannot amend to  
2 include), it fails to allege a necessary “agreement in restraint of trade.”

3 ***Contractual Interference.*** RealPage’s counterclaim for contractual  
4 interference fails because it does not allege, as it must, an actual breach or disruption  
5 of any contract between RealPage and a third party.

6 ***Unfair Competition and Prospective Interference.*** Finally, the Court should  
7 dismiss the unfair competition and intentional interference with prospective  
8 economic advantage counterclaims to the extent they rely on RealPage’s flawed  
9 antitrust and contractual interference counterclaims.

10 The form and nature of RealPage’s Amended Counterclaims illustrate why the  
11 five counterclaims discussed above have no basis. RealPage simply has  
12 manufactured these counterclaims, and bolted them in front of its Answer, to divert  
13 attention from its admitted illegal conduct, level inflammatory and irrelevant  
14 accusations at Yardi, and unleash a torrent of expensive discovery.

15 In due course, Yardi will prove all of RealPage’s counterclaims false –  
16 although that is evident on their face. For example, RealPage alleges that starting in  
17 2008 a Yardi employee, who it describes as a “Yardi mole,” “willfully and  
18 maliciously” took RealPage’s “most highly confidential trade secrets” and used them  
19 to “unfairly compete against RealPage.” These allegations are false. Were they true,  
20 RealPage had a duty to disclose them to prospective and current shareholders even  
21 prior to its first public offering in August 2010. It defies logic that RealPage would  
22 instead sit idly by, laboring against the effects of this alleged devastating theft, and  
23 do *nothing* about it until more than two years later when forced to admit to Yardi’s  
24 unrelated allegations. RealPage has made up its many pages of marketing  
25 “allegations” too. For instance, it alleges that its “RealPage Cloud” comprises  
26 “nearly 1,000 physical servers,” but just one month before making that allegation, it  
27 stated in its Annual Report to the SEC that “[t]he RealPage Cloud consists of ... 360  
28 physical servers.” Similarly, RealPage says its “Cloud” is “state-of-the-art” and

1 provides “improved disaster recovery capabilities,” when in reality it has located its  
2 entire facility in two data centers twenty miles apart in Texas, where one  
3 catastrophic event (such as a tornado) could destroy them both.

4 At trial, this case will center around RealPage’s admitted computer fraud,  
5 misappropriation, and infringement. Right now, the Court should dismiss five of  
6 RealPage’s six Amended Counterclaims. RealPage has now twice failed to allege  
7 sufficient facts in support of these counterclaims and instead has pled itself into an  
8 incurable corner. In addition to its contradictory allegations, public statements by  
9 RealPage properly subject to judicial notice foreclose the possibility of any good  
10 faith amendment. The Court should grant Yardi’s motion to dismiss without leave  
11 to amend.

## 12 **II. OVERVIEW OF THE PARTIES AND THE INDUSTRY**

13 Yardi and RealPage both develop and license software and provide related  
14 services for real estate and property management clients. RealPage’s First Amended  
15 Counterclaims, Dkt. No. 34, (“FAC”), ¶¶ 17-18.<sup>1</sup> Yardi calls its flagship software  
16 application product “Voyager.” RealPage calls its primary product “OneSite.” *See,*  
17 *e.g., id.*, ¶ 49. Many other companies develop and license software in competition  
18 with both Yardi and RealPage. *See* Request for Judicial Notice (“RFJN”), Ex. 2.

19 Yardi and RealPage sell support services for their software, as do multiple  
20 competitors for theirs. FAC, ¶ 13. Support services can include “hosting,” which  
21 refers to the location where the software is installed and accessed by the client.  
22 Some clients host their software on computers they own or lease (“on-premises” or  
23 “self hosting”), and pay the software provider, consultants, and/or employees to  
24 maintain the software. *See, e.g., id.*, ¶¶ 2, 43. Other clients host their software  
25 remotely with the provider. This remote hosting goes by various terms. For

26 \_\_\_\_\_  
27 <sup>1</sup> Yardi has also sued defendant DC Consulting, Inc., a surviving entity resulting from RealPage’s  
28 acquisition of Evergreen Solutions, Inc., a provider of software support services for Yardi  
software. DC Consulting answered Yardi’s Complaint and did not bring counterclaims.

1 example, RealPage refers to Yardi’s remote hosting as an application service  
2 provider (“ASP”) model, and refers to its own remote hosting as a Software-as-a-  
3 Service (“SaaS”) remote model. *Id.*, ¶¶ 1-2. Other clients host their software  
4 remotely in third-party data centers. *Id.*, ¶ 36. RealPage refers to its data center for  
5 third-party hosting as a “vertical cloud,” and other third-party data centers as  
6 “industry-agnostic cloud providers.” *Id.*, ¶¶ 3, 37.

7 “Cloud computing” is an imprecise industry term for remote application  
8 hosting. *Cf. id.*, ¶ 3. For instance, RealPage alleges that its remote “SaaS” service is  
9 a “type of cloud computing.” *Id.*, ¶ 1. It also alleges that its newly-announced  
10 “RealPage Cloud” service is “vertically-integrated cloud computing.” *Id.* On the  
11 other hand, RealPage alleges that Yardi’s cloud services are “in fact ASP services.”  
12 *Id.*, ¶ 8. The imprecision is also apparent in RealPage’s replacement of the phrase  
13 “Yardi’s *hosting* services” in its original Counterclaims with the term “Yardi’s *cloud*  
14 service” in its Amended Counterclaims. Declaration of Chad Russell in Support of  
15 Motion to Dismiss (“Russell Decl.”), ¶ 2 & Ex. A (redlines) at new ¶¶ 26-27 (also  
16 replacing “Yardi *hosting* capabilities” with “Yardi *cloud* capabilities”) (emphasis  
17 supplied). Similarly, RealPage’s Amended Counterclaims delete the original  
18 allegation that Yardi’s cloud services are “not what is generally accepted as cloud  
19 computing.” *Id.* at old ¶ 26. In any event, clients choose from these multiple  
20 hosting options for their software according to their preferences. *See* FAC, ¶ 13  
21 (Clients should choose the “solution that best suits their business needs.”).

### 22 III. MOTION TO DISMISS LEGAL STANDARDS

23 To survive a motion to dismiss, a plaintiff must allege sufficient facts.  
24 Relying on “labels and conclusions,” “unwarranted inferences,” or a “formulaic  
25 recitation of the elements” does not suffice without “further factual enhancement.”  
26 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-57, 127 S. Ct. 1955, 1964-66,  
27 167 L. Ed. 2d 929, 940-41 (2007); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.  
28 1998) (“[C]onclusory allegations of law and unwarranted inferences are not

1 sufficient to defeat a motion to dismiss.”). This “factual enhancement” is critical for  
2 antitrust claims because of the “potentially enormous expense of discovery.”  
3 *Twombly*, 544 U.S. at 557, 559-60. Such facts also ensure that a defendant knows  
4 the claims against it. *Id.* at 565 n.10 (“[A] defendant seeking to respond to  
5 plaintiffs’ conclusory allegations in the § 1 context would have little idea where to  
6 begin.”). Therefore, “evidentiary facts” must be alleged because “discovery in  
7 antitrust cases frequently causes substantial expenditures and gives the plaintiff the  
8 opportunity to extort large settlements even where he does not have much of a case.”  
9 *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046-48 (9th Cir. 2008).

10 Thus, a court should not accept as true “a legal conclusion couched as a  
11 factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92  
12 L. Ed. 2d 209, 232 (1986); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 556 U.S. ---,  
13 173 L. Ed. 2d 868, 884 (2009) (“[P]leadings that, because they are no more than  
14 conclusions, are not entitled to the assumption of truth.”). Unwarranted inferences  
15 undeserving of deference include conclusions contradicted by alleged factual details.  
16 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001) (A plaintiff  
17 can “plead himself out of a claim by including ... details contrary to his claims.”).

18 Denying leave to amend a complaint is appropriate when amendment would  
19 be “futile.” *Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau*, 701 F.2d  
20 1276, 1293 (9th Cir. 1983). The Court may consider judicially-noticed documents in  
21 determining futility. *Bracamontes v. Chase Home Fin. LLC*, No. 10-CV-03888,  
22 2011 WL 332527, at \*4 (N.D. Cal. Jan. 31, 2011) (dismissing claim with prejudice  
23 when judicially-noticed document showed that “amendment would be futile”). As  
24 explained in Yardi’s RFJN, Yardi requests that the Court judicially notice two public  
25 documents authored by RealPage in considering the futility of amendment.

#### 26 **IV. REALPAGE FAILS TO STATE ANTITRUST COUNTERCLAIMS**

27 RealPage alleges Yardi has violated Section 1 of the Sherman Act (“Section  
28 1”) and the California Cartwright Act. FAC, ¶¶ 58-64. The pleading requirements

1 under the Sherman and Cartwright Acts are the same. *County of Tuolumne v.*  
2 *Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001). Both claims fail, for five  
3 reasons. First, RealPage has failed to allege a *per se* tying counterclaim. Thus, the  
4 Court must review RealPage’s counterclaims under the “rule of reason” standard.  
5 However, RealPage has also failed to allege four elements of a rule of reason claim:  
6 (1) the “relevant market” at issue; (2) market power sufficient to substantially  
7 restrain trade in the alleged relevant market; (3) actual harm to competition in the  
8 relevant market; and (4) an unreasonable agreement causing the alleged harm to  
9 competition. *Brantley v. NBC Universal, Inc.*, --- F. 3d ----, No. 09-56785, 2011 WL  
10 2163961, at \*3-4 (9th Cir. June 3, 2011); 15 U.S.C. § 1.

11 **A. RealPage Fails To Allege *Per Se* Tying**

12 Section 1 claims are presumptively analyzed under a “rule of reason” analysis.  
13 *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S. Ct. 1276, 1279, 164 L. Ed. 2d 1, 7  
14 (2006). As opposed to rule of reason claims, agreements are “*per se*” prohibited  
15 only when “so plainly anticompetitive that no elaborate study of the industry is  
16 needed to establish their illegality.” *Id.* (citation and quotation omitted). Courts do  
17 not declare an agreement *per se* illegal until they have had “considerable experience”  
18 with the category of misconduct alleged. *Broad. Music, Inc. v. Colom. Broad. Sys.,*  
19 *Inc.*, 441 U.S. 1, 9-10, 99 S. Ct. 1551, 1557, 60 L. Ed. 2d 1, 10 (1979) (reversing  
20 recognition by the Second Circuit of new form of *per se* prohibited conduct).  
21 Although RealPage agreed its Counterclaims did not present a *per se* counterclaim,  
22 and amended them after Yardi contended that not even a rule of reason counterclaim  
23 properly was alleged, it now asserts a *per se* “tying” counterclaim under *Cascade*  
24 *Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008). Russell Decl., ¶¶ 3-  
25 5 & Exs. B & C. This counterclaim fails, because RealPage does not allege that  
26 Yardi has forced customers to purchase a second Yardi product.

27 Not all tying arrangements are illegal. To the contrary, “many tying  
28 arrangements ... are fully consistent with a free, competitive market.” *Ill. Tool*

1 *Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45, 126 S. Ct. 1281, 1292, 164 L. Ed 2d  
2 26, 41 (2006). The “essential characteristic” of illegal tying is that a seller has  
3 “force[d] the buyer into the purchase of a tied product.” *Jefferson Parish Hosp.*  
4 *Dist. No. 2 v. Hyde*, 466 U.S. 2, 12, 104 S. Ct. 1551, 1558, 80 L. Ed. 2d 2, 13 (1984).  
5 Therefore, “[t]he Supreme Court has developed a unique *per se* rule for illegal tying  
6 arrangements,” which requires allegations that the defendant (1) tied together the  
7 sale of two distinct products or services, and (2) has enough economic power in the  
8 market for the first product to force customers to purchase the second product in the  
9 second market. *PeaceHealth*, 515 F.3d at 913. The Ninth Circuit distinguishes this  
10 “unique” *per se* rule from other “rarely encounter[ed]” but conceivable forms of rule  
11 of reason tying, such as “when the customer promises not to take the tied product  
12 from the defendant’s competitor.” *Id.* at 912 n.23 (citing no such cases).

13 *PeaceHealth* involved allegations that the defendant had forced consumers to  
14 purchase its “primary and secondary care” hospital services along with its distinct  
15 “tertiary care” services. *Id.* at 912. The Ninth Circuit reversed a grant of summary  
16 judgment because there were issues of fact as to whether the plaintiff could prove the  
17 alleged forced purchase of the second product. *Id.* at 912-16. In doing so, the Ninth  
18 Circuit also rejected the plaintiff’s argument for a lower *per se* standard, stating “the  
19 Supreme Court has emphasized that the coerced purchase of the tied product is the  
20 key aspect of an illegal tie.” *Id.* at 913-914 (citing *Jefferson Parish*, 466 U.S. at 12).

21 In contrast to *PeaceHealth*, RealPage does not allege that Yardi has forced the  
22 purchase of *any* second product, much less any Yardi product in RealPage’s alleged  
23 “vertical cloud” market. Instead, it alleges only that Yardi has convinced some  
24 clients *not* to purchase something from RealPage. FAC, ¶ 59-61. That is not *per se*  
25 tying under *PeaceHealth* or any other binding authority. Indeed, by asserting that  
26 Yardi’s alleged conduct qualifies as *per se* tying, RealPage contradicts *Broadcast*  
27 *Music*’s requirement of “considerable experience with certain business  
28 relationships” before classifying conduct as *per se* objectionable. *Broad. Music*, 441

1 U.S. at 9-10. Accordingly, the Court should dismiss RealPage’s allegations to the  
2 extent RealPage now contends it states a *per se* counterclaim.

3 Yardi now addresses the four elements RealPage fails to satisfy under the rule  
4 of reason standard.

5 **B. RealPage’s Relevant Market Fails As A Matter Of Law**

6 Under the rule of reason standard, RealPage must allege a legally sufficient  
7 “relevant market” affected by the anticompetitive conduct. *Rebel Oil Co., Inc. v.*  
8 *Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (“Market definition is  
9 crucial. Without [it], it is impossible to determine market share.”).

10 The relevant market is a *product* market – *i.e.*, “consumers do not define the  
11 boundaries of the market.” *Colonial Med. Grp., Inc. v. Catholic Healthcare West*,  
12 No. C-09-2192, 2010 WL 2108123, at \*3-4 (N.D. Cal. May 25, 2010) (citation and  
13 quotation omitted). It includes products with “reasonable interchangeability for the  
14 purpose for which they are produced.” *United States v. E.I. du Pont de Nemours &*  
15 *Co.*, 351 U.S. 377, 404, 76 S. Ct. 994, 1012, 100 L. Ed. 1264, 1285 (1956)  
16 (cellophane was reasonably interchangeable with other packaging materials, despite  
17 costing up to three times more). Reasonably interchangeable products are  
18 competing products sold by “the group or groups of sellers or producers who have  
19 actual or potential ability to deprive each other of significant levels of business.”  
20 *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1196 (N.D. Cal. 2008) (citation  
21 and quotation omitted). An alleged relevant market is facially unsustainable and  
22 should be dismissed if it “does not encompass all interchangeable substitute  
23 products.” *Colonial Med.*, 2010 WL 2108123, at \*3 (citing *Queen City Pizza, Inc. v.*  
24 *Domino’s Pizza, Inc.*, 124 F.3d 430, 436 (3rd Cir. 1997)).

25 RealPage alleges that Yardi’s anticompetitive conduct affects a so-called  
26 “vertical cloud” market, which allegedly includes “vertically-integrated cloud  
27 computing for multifamily real estate owners and property managers in the United  
28 States.” FAC at ¶¶ 37, 59. RealPage uses the term “vertically-integrated cloud

1 computing” in various ways, but consistently equates it only with hosting services  
2 offered by RealPage. *See, e.g., id.*, ¶ 3 (“RealPage is the first cloud computing  
3 provider to offer ‘vertically-integrated’ systems.”). This market definition fails as a  
4 matter of law for at least three reasons.

5 First, RealPage uses *consumers* to define a *product* market. RealPage does  
6 not allege why hosting services bought by “multifamily real estate owners and  
7 property managers” (*i.e.*, alleged “vertical cloud” services), and which allegedly are  
8 “highly scalable” and can be “quickly upsized or downsized,” are not  
9 interchangeable with hosting services bought by other types of customers. *Id.*, ¶¶ 21,  
10 37. Similarly, the plaintiff in *Colonial Medical* first defined its market as services  
11 provided to “inmates of the California prison system,” then amended its definition to  
12 services provided to “prison inmates.” 2010 WL 2108123, at \*3-4. The court  
13 dismissed both the original and amended claims because each definition was “legally  
14 insufficient.” *Id.* RealPage fails to state antitrust claims for the same reason.

15 Second, even within its insufficient consumer-based “vertical cloud” market,  
16 RealPage fails to distinguish “industry-agnostic” providers. FAC, ¶ 37. RealPage  
17 says only that these providers are not adequate substitutes for “vertical cloud”  
18 providers because they “cannot satisfy the specialized needs” of RealPage’s target  
19 customers. *Id.* This statement acknowledges that other cloud competitors exist, yet  
20 then fails to allege facts to justify omitting them from the relevant market. *Twombly*,  
21 550 U.S. at 554-57; *Pareto*, 139 F.3d at 699.

22 Though legally deficient, RealPage’s omission is understandable. It admits, as  
23 it must, that “*most* cloud computing providers are industry agnostic,” and it knows  
24 that its counterclaims fail if (among other reasons) Yardi’s alleged conduct has no  
25 effect on “*most*” suppliers competing in the same market as RealPage. FAC, ¶ 3  
26 (emphasis supplied). However, RealPage must allege plausible facts explaining *why*  
27 these admitted competitors do not have the “actual or potential ability” to deprive  
28 RealPage of business. *Apple*, 586 F. Supp. 2d at 1196; FAC, ¶¶ 3, 37. Indeed, as

1 RealPage elsewhere admits, *consumers* (whether or not excluded by RealPage from  
2 its market definition) decide which hosting platform meets their needs. *See* FAC, ¶  
3 13 (“Clients should be free to choose ... any other solution that best suits their  
4 business needs.”); *Colonial Med.*, 2010 WL 2108123, at \*3 (Substitutability is  
5 measured “from the point of view of the buyers.”). RealPage’s self-serving  
6 conclusion that its product is superior does not suffice. The Court should not defer  
7 to the perfunctory allegation that industry-agnostic providers do not compete with  
8 RealPage.

9 Third, RealPage excludes multiple *other* hosting services in addition to  
10 “industry-agnostic” providers, also with no factual basis. For example, RealPage  
11 alleges that existing hosting options for Yardi software alone includes “(1) the ‘on-  
12 premises’ approach, in which the client installs and runs Yardi software on its own  
13 computer server; and (2) the Application Service Provider (‘ASP’) approach, in  
14 which the client accesses its version, or ‘instance,’ of Yardi software via the Internet  
15 from computer servers located at Yardi’s own facilities.” FAC, ¶ 2. Since Yardi’s  
16 clients admittedly include multifamily real estate owners and property managers, *id.*,  
17 ¶ 18, RealPage has thus alleged that its target “vertical cloud” customers choose  
18 Yardi’s on-premises and ASP hosting services. That means those services have the  
19 “actual or potential ability” to deprive RealPage of business. *Apple*, 586 F. Supp. 2d  
20 at 1196. RealPage’s counterclaims fail by not alleging facts to justify omitting those  
21 services its alleged market. *Twombly*, 550 U.S. at 554-57; *Pareto*, 139 F.3d at 699.

22 In fact, RealPage repeatedly contradicts its market definition by alleging that  
23 industry consumers can, do, and *should* choose other options along the hosting  
24 services spectrum over the RealPage “Cloud.” As one example, RealPage alleges  
25 that Yardi software is *not* “ideally suited” for hosting in a vertical cloud. FAC, ¶ 5  
26 (“*Unlike on-premises or ASP software applications* [such as Yardi Voyager],  
27 RealPage’s SaaS applications are ideally suited for this vertically-integrated cloud  
28 system.”) (emphasis supplied). But RealPage fails to allege how software *not suited*

1 for hosting in a vertical cloud reasonably can be hosted *only in a vertical cloud*, as  
2 its market definition requires. As another example, RealPage alleges that “[m]ost of  
3 Yardi’s so-called ‘cloud’ offerings are in fact ASP services.” *Id.*, ¶ 8. However,  
4 RealPage fails to explain why it includes Yardi’s cloud/ASP services along with  
5 RealPage in the relevant market, *id.*, ¶ 38, *but no other “in fact ASP” providers.*<sup>2</sup>

6 In sum, RealPage repeatedly acknowledges that industry consumers freely  
7 choose hosting services interchangeable with RealPage’s alleged new “vertical  
8 cloud” service. Its failure either to include these services in its relevant market  
9 definition, or to allege facts demonstrating they are not interchangeable for antitrust  
10 purposes, means that the Court should dismiss its antitrust counterclaims. *Apple*,  
11 586 F. Supp. 2d at 1196; *Queen City Pizza*, 124 F.3d at 437-38; *see also Davies v.*  
12 *Genesis Med. Ctr.*, 994 F. Supp. 1078, 1098-99 (S.D. Iowa 1998) (dismissing a  
13 “narrow market” contradicted by “many factual assertions” in the complaint).

#### 14 C. RealPage’s Market Power Allegation Fails

15 As a third ground for dismissal, RealPage fails to allege that Yardi possesses  
16 market power. *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 72 (9th  
17 Cir. 2008) (“A failure to allege power in the relevant market is a sufficient ground to  
18 dismiss an antitrust complaint.”). Hypothesizing about “conceivable impairments of  
19 competition” does not mean that “any such impairment has occurred or is likely, or  
20 much less is substantial in magnitude.” *Dickson v. Microsoft Corp.*, 309 F.3d 193,  
21 207 (4th Cir. 2002) (internal citation and quotation omitted). Rather, a claim must  
22 “allege facts demonstrating that the defendants played a significant role in the  
23 relevant market.” *Id.* (internal citation and quotation omitted). Additionally, to state

24 \_\_\_\_\_

25 <sup>2</sup> RealPage originally alleged that “[w]hile Yardi purports to offer some ‘cloud’ services, they are  
26 in reality nothing of the sort. Yardi offers a narrow set of ASP hosting services. ... This  
27 rudimentary hosting model is not what is generally accepted as cloud computing, i.e., ‘on demand’  
28 access to shared applications.” Russell Decl., ¶ 2 & Ex. A (redlines) at old ¶ 26. When Yardi  
informed RealPage it intended to move to dismiss, RealPage deleted these allegations and added  
the exactly opposite assertion that “RealPage and Yardi are the primary competitors in the vertical  
cloud market.” *Compare id.* at old ¶ 26 with new ¶ 38; FAC, ¶ 38.

1 a claim based on the use of market power in one market to restrain trade in a second  
2 market, the plaintiff must allege facts demonstrating that the two markets are, in fact,  
3 separate and distinct from each other. *See Rick-Mik Enters.*, 532 F.3d at 974-75  
4 (dismissing antitrust claim based on inter-market coercion because the failure  
5 properly to allege “separate and distinct product[s]” was “fatal”).

6 RealPage alleges that “through amended license agreements, imposed on its  
7 clients after they have licensed Voyager,” Yardi has the power to “coerce its  
8 customers (a substantial share of potential vertical cloud customers) into *not using*  
9 the RealPage Cloud.” FAC, ¶¶ 60-61 (emphasis supplied). These allegations fail to  
10 state a claim for at least three reasons. *Twombly*, 550 U.S. at 554-57.

11 First, RealPage does not allege two separate markets. The only distinction it  
12 alleges, without factual support, is that “Voyager and the RealPage Cloud are  
13 distinct products.” FAC, ¶ 61. This two-brand *product* comparison is irrelevant.  
14 *See In re Air Passenger Comp. Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443,  
15 1457 (C.D. Cal. 1988) (“Producers engage in product differentiation *because* they  
16 are involved in a highly competitive market and are merely attempting to compete  
17 with other brands.”) (emphasis in original). Instead, RealPage must (and fails to)  
18 distinguish its alleged “property management software” *market* from its alleged  
19 “vertical cloud” *market*. *Rick-Mik Enters.*, 532 F.3d at 974-75. Failing to do so  
20 dooms its antitrust counterclaims.

21 Second, as discussed in Section IV.E below, RealPage fails to allege that  
22 Yardi *actually* has coerced customers to agree to license amendments. In fact,  
23 several purported exemplars contradict any inference that Yardi has done so.  
24 *Cf. Korea Kumho Petrochemical v. Flexsys Am. LP*, No. C07-01057, 2008 WL  
25 686834, at \*9 (N.D. Cal. Mar. 11, 2008) (dismissing an antitrust claim in part  
26 because the plaintiff’s “only concrete factual allegation regarding ... market power  
27 cuts against the conclusion that [defendant] enjoyed market power”).

28 Third, RealPage fails to allege that Yardi has market power in the alleged

1 market for “property management software.” FAC, ¶ 60. A typical, well-pled claim  
2 would include descriptive facts about the alleged market, which the Court then could  
3 use to assess an allegation of market power. *See, e.g., Rick-Mik Enters.*, 532 F.3d at  
4 972-73 (dismissing an antitrust claim for failing to allege market power because the  
5 complaint alleged no quantitative facts about the parties’ or other competitors’  
6 presence in the purported relevant market). RealPage alleges only that Yardi  
7 Voyager is “industry leading” and “is used to manage over 25,000 apartment sites.”  
8 FAC, ¶ 60. Similarly, the plaintiff in *Rick-Mik* alleged only that the defendant  
9 “rank[ed] number one in the industry,” leading the Ninth Circuit to hold that such  
10 lack of detail was “fundamentally flawed,” making dismissal with prejudice  
11 appropriate. *Rick-Mik Enters.*, 532 F.3d at 972, 977. RealPage’s “fundamentally  
12 flawed” allegations should be dismissed without leave to amend as well.

13 **D. RealPage Fails To Allege Harm To Competition**

14 As a fourth ground for dismissal, RealPage fails to allege injury to *competition*  
15 as opposed to injury to itself. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-  
16 28, 344, 82 S. Ct. 1502, 1523-25, 1534, 8 L. Ed. 2d 510, 535-37, 547 (1962); *see*  
17 *also Falstaff Brewing Co. v. Stroh Brewery Co.*, 628 F. Supp. 822, 831 (N.D. Cal.  
18 1986) (“To require defendants to further defend an anti-trust action, where it appears  
19 that plaintiffs cannot properly allege, much less prove, anything beyond mere  
20 business torts or unfair trade practices, would be a gross miscarriage of justice.”).

21 “Harm to consumers,” including “reduced choice or increased prices,” does  
22 not satisfy the requirement of injury to competition. *Brantley*, 2011 WL 2163961,  
23 at \*6 (upholding dismissal of antitrust claim by this District, stating “[i]n the absence  
24 of any allegation of injury to competition, as opposed to injuries to consumers, we  
25 conclude that plaintiffs have failed to state a claim for an antitrust violation”).

26 Instead, a plaintiff must allege (1) reduction in *competition* in the relevant  
27 market “of significant magnitude,” and (2) barriers prohibiting new suppliers from  
28 replacing any allegedly excluded competitors. *Adaptive Power Solutions, LLC v.*

1 *Hughes Missile Sys. Co.*, 141 F.3d 947, 951-52 (9th Cir. 1998) (“[A] temporary  
2 decline in the number of competitors ... is not significant enough to be classified as  
3 an injury to competition under the Sherman Act.”). RealPage alleges neither.

4 ***Reduction in Competition.*** As to the first element, RealPage does not (and  
5 could not) allege that Yardi has reduced competition by excluding RealPage from  
6 the purported “vertical cloud” market. To the contrary, RealPage alleges that  
7 customers are flocking to its “Cloud,” filling up “1,000 physical servers” in which  
8 RealPage has invested “over \$100 million.” FAC, ¶ 22.

9 RealPage also does not allege that Yardi has denied consumers access to  
10 “vertical cloud” providers. Yardi’s alleged license amendments restrict only a  
11 client’s “way of implementing or hosting the Yardi Voyager software.” *Id.*, ¶ 40.  
12 RealPage specifically alleges that those consumers may host *any or all* of their  
13 software applications in the “RealPage Cloud.” *See, e.g., id.* at ¶ 1 (alleging the  
14 option to host “*all* of the IT systems used by [a client]”) (emphasis supplied), ¶ 4  
15 (alleging RealPage adjusts “*if* a client wants to host non-RealPage software”)  
16 (emphasis supplied), ¶ 23 (“The RealPage Cloud allows clients to ... mov[e] *all* of  
17 their applications to the cloud.”) (emphasis supplied), ¶ 43 (describing a client using  
18 the “RealPage Cloud” for “most of its IT needs”). Yardi’s alleged restrictions  
19 therefore do not prevent clients from participating in the supposed “vertical cloud”  
20 market, even as narrowly (and improperly) defined, by hosting their other  
21 applications in the “RealPage Cloud.”

22 Furthermore, RealPage offers no facts to suggest that Yardi’s alleged conduct  
23 could “significant[ly]” harm competition in the alleged “vertical cloud market.”  
24 *Adaptive Power Solutions*, 141 F.3d at 951-52. To the contrary, RealPage  
25 repeatedly alleges instances in which Yardi is powerless to do so. For example,  
26 RealPage alleges that “*several* RealPage Cloud clients use the RealPage Cloud as  
27 their computing platform to host a variety of software, *including their Yardi Voyager*  
28 *property management software.*” FAC, ¶ 36 (emphasis supplied). “Several” clients

1 using the RealPage “Cloud” to host Yardi software is a vague allegation, but it  
2 exceeds the number of identified customers coerced by Yardi’s supposed “market  
3 power” – *i.e.*, zero. *See* Section IV.E, below. RealPage offers no explanation for  
4 how these clients have evaded Yardi’s alleged coercion, or how RealPage’s alleged  
5 ability to win enough “cloud” deals over Yardi to enjoy “success similar to  
6 Salesforce.com and Google” squares with its purported concern that Yardi is  
7 stamping out competition. FAC, ¶¶ 7, 28. RealPage thus fails to state a claim by  
8 failing to allege facts demonstrating that Yardi’s alleged conduct has foreclosed  
9 “substantial” competition. *Colonial Med.*, 2010 WL 2108123, at \*6 (dismissing  
10 antitrust claim because there were no facts “from which it reasonably could be  
11 inferred that the percentage of the product market foreclosed is sufficiently  
12 substantial to support a claim under § 1 of the Sherman Act”).

13 ***Barriers to Entry.*** As to the second element, RealPage does not allege that  
14 Yardi has prevented other “vertical cloud” providers from hosting Yardi software, or  
15 that Yardi’s conduct prevents new suppliers from entering the alleged “vertical  
16 cloud” market. *Cf. Adaptive Power Solutions*, 141 F.3d at 951-52; *see also Falstaff*  
17 *Brewing Co.*, 628 F. Supp. at 828 (“[T]he elimination of a single competitor ... will  
18 not constitute an injury to competition compensable under the Sherman Act.”).

19 Thus, even accepting RealPage’s conclusions and unwarranted inferences, the  
20 effect of Yardi’s conduct *at most* is to deprive RealPage of *additional* revenue that  
21 affected customers might be willing to pay RealPage to add Yardi hosting to the  
22 bundle of other “vertical cloud” services clients can freely purchase from RealPage,  
23 by RealPage’s own admissions. *See, e.g.*, FAC, ¶ 47 (“Yardi’s actions have  
24 damaged RealPage by causing it to lose revenue, reputational benefit, and profit”  
25 attributable to Yardi Voyager when a client otherwise “move[d] its data center to the  
26 RealPage Cloud.”). Nothing in RealPage’s Amended Counterclaims indicates that  
27 this incremental potential profit rises to “significant magnitude.” *Adaptive Power*  
28 *Solutions*, 141 F.3d at 951-52. But even if it were significant, alleged harm to

1 RealPage’s business does not qualify as harm to competition. *Brown Shoe Co.*, 370  
2 U.S. at 344; *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812-13 (9th Cir.  
3 1988) (Even a “substantial loss [by] a competitor does not equal injury to  
4 competition.” Rather, it is “the impact upon competitive conditions in a definable  
5 market which distinguishes the antitrust violation from the ordinary business tort.”)  
6 (internal citations and quotations omitted); *Falstaff Brewing Co.*, 628 F. Supp. at 827  
7 (Failure to allege an “adverse effect on competition as distinguished from effects on  
8 plaintiff’s own business ... will not satisfy the pleading requirements of Section 1.”).

9 RealPage’s original Counterclaims included these same gaps, claiming *only*  
10 that Yardi’s alleged conduct “has had and continues to have anticompetitive effects.”  
11 Russell Decl., ¶ 2 & Ex. A (redlines) at new ¶ 59. RealPage responded to Yardi’s  
12 meet and confer efforts by amending to add, “[a]bsent Yardi’s anticompetitive  
13 restrictions, RealPage would reach optimal economic scale and Yardi customers and  
14 non-Yardi customers would enjoy lower prices, greater innovation and freedom of  
15 choice to select the vertical cloud provider that best suits their needs.” *Id.* at new  
16 ¶ 61; FAC, ¶ 61. These factually-devoid allegations are no less conclusory than  
17 before, and warrant dismissal on that basis alone. *Twombly*, 550 U.S. at 554-57.  
18 Further, RealPage’s alleged potential for lower prices or greater choice do not alone  
19 suffice to allege harm to competition. *Brantley*, 2011 WL 2163961, at \*5.<sup>3</sup>

## 20 **E. RealPage Does Not Allege An Anticompetitive Agreement**

21 As the fifth basis for dismissal, RealPage does not allege an unreasonable  
22 “agreement” causing harm to competition. *Twombly*, 550 U.S. at 553-54.

23 Alleging the existence of an unidentified agreement does not suffice. *Int’l*  
24 *Norcent Tech. v. Koninklijke Philips Elecs. N.V.*, No. CV 07-00043, 2007 WL  
25 4976364, at \*10 (C.D. Cal. Oct. 29, 2007) (“As with the magic words ‘coerce,’  
26 ‘combine,’ and ‘conspiracy,’ a mere allegation that parties entered into an agreement

27 <sup>3</sup> If these allegations suffice, then plaintiffs always could ensure invasive antitrust discovery by  
28 alleging that loss of income prevented optimal economic scale, lower prices, and innovation.

1 to restrain trade does not suffice to state a § 1 claim.”). Rather, RealPage must  
2 identify the alleged agreements and the parties to them. *Rick-Mik Enters.*, 532 F.3d  
3 at 975-76 (upholding dismissal of an antitrust claim that failed to identify the  
4 “numerous” parties with whom defendant allegedly agreed); *E & E Co., Ltd. v. Kam*  
5 *Hing Enters., Inc.*, No. C-08-0871, 2008 WL 3916256, at \*1-2 (N.D. Cal. Aug. 25,  
6 2008) (dismissing antitrust claims alleging agreements with “unidentified key  
7 suppliers” and unidentified “various manufacturers in China”).

8 **1. The Court Should Not Accept RealPage’s Formulaic**  
9 **Allegations of “Amended License Agreements”**

10 RealPage alleges that “Yardi has entered into agreements that restrain  
11 competition” in the form of “amended license agreements, imposed on its clients  
12 after they have licensed Voyager and are locked in to its high switching costs,  
13 whereby the client agrees at Yardi’s demand to explicitly, or in effect, not to [sic]  
14 use the RealPage Cloud.” FAC, ¶¶ 59-61. This conclusion, devoid of plausible  
15 factual context, fails to state a claim under *Twombly*.

16 Like RealPage, the *Twombly* plaintiff pled Section 1 claims. *Twombly*, 550  
17 U.S. 544. Like RealPage, the *Twombly* plaintiff alleged unspecified agreements. *Id.*  
18 In light of an antitrust claim’s “potentially enormous expense of discovery,” the  
19 Supreme Court held that “a conclusory allegation of agreement at some unidentified  
20 point does not supply facts adequate” to state a Section 1 claim.<sup>4</sup> *Id.* at 557, 559-60;  
21 *see also Kendall*, 518 F.3d at 1046-48.

22 RealPage does not identify – in the way *Twombly* and its progeny require –  
23 any “amended” agreements summarily alleged in its Amended Counterclaims. FAC,  
24 ¶¶ 59-61. Nor does it allege that Yardi has forced license amendments on *all* of  
25 Yardi’s Voyager clients (which might arguably identify the alleged agreeing parties

26 <sup>4</sup> RealPage has served 138 document requests on Yardi seeking, for example, “All CUSTOMER  
27 CONTRACTS” (No. 28), “All DOCUMENTS relating to or reflecting any actual or contemplated  
28 changes or amendments to any CUSTOMER CONTRACT” (No. 29), and “All DOCUMENTS  
constituting or reflecting meeting notes, reports, minutes, summaries, preparation, or presentation  
materials with YARDI customers” (No. 34). Russell Decl., ¶ 6 & Ex. D. Courts warn against this  
type of “extortion.” *Kendall*, 518 F.3d at 1047; *Twombly*, 550 U.S. at 558-59.

1 at issue). In fact, RealPage alleges the opposite. For example, “Client 2” – a “top  
2 ten property management firm” – allegedly moved its Yardi software *to the*  
3 *RealPage “Cloud”* after a competitive bid process against Yardi. *Id.*, ¶¶ 43-45.  
4 RealPage makes no allegation that Yardi imposed an “amendment” to Client 2’s  
5 Voyager license preventing Client 2’s freedom to choose the RealPage “Cloud.”  
6 Instead, it complains that Yardi’s bid allegedly drove down the price RealPage could  
7 extract from Client 2 – a *more* competitive outcome for the consumer. *Id.*

8 Without having identified any of the alleged parties to any of the alleged  
9 “amended license agreements,” RealPage has not alleged facts necessary to state a  
10 Section 1 claim. *Int’l Norcent Tech.*, 2007 WL 4976364, at \*10; *Rick-Mik Enters.*,  
11 532 F.3d at 975-76; *E & E Co.*, 2008 WL 3916256, at \*1-2.

12 **2. None of RealPage’s Purported “Exemplar” Client**  
13 **Descriptions Allege Anticompetitive “Amended License**  
**Amendments”**

14 RealPage alleges relationships with seven Yardi clients to whom it has  
15 assigned code names. FAC, ¶¶ 42-49. It alleges these clients are “specific examples  
16 of Yardi’s anticompetitive and tortious interference with RealPage clients.” *Id.*,  
17 ¶ 41. That statement is misleading. RealPage does not reference *any* of these  
18 clients, or Yardi’s alleged conduct relating to them, in its *antitrust* counterclaims.  
19 *Id.*, ¶¶ 58-70. This omission is intentional: RealPage instead specifically names  
20 these clients in its *interference* counterclaims. *Id.*, ¶¶ 73, 77. RealPage does not get  
21 a “free pass to the summary judgment stage” when its best “examples” of Yardi’s  
22 misconduct do not allege the “amended license agreements” on which RealPage  
23 bases its antitrust counterclaims. *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124,  
24 1132 (C.D. Cal. 2007) (“[A]s masters of their Complaint, Plaintiffs must allege the  
25 best facts for their case. Presumably, Plaintiffs have done so ... .”).

26 The table below demonstrates, for six of the seven “exemplar” clients, that  
27 RealPage has not alleged, and in some cases has contradicted, an amended license  
28 agreement imposed by Yardi (“Client 1” is discussed further below).

Coded Client	Alleged Relevance	Cite
"Client 2"	Named in interference with prospective economic advantage <i>only</i> . RealPage won a bid against Yardi and now hosts this client's Yardi software in its cloud. Contradicts RealPage's antitrust allegations that Yardi prevents clients from being hosted in the RealPage cloud.	¶¶ 43-45
"Client 2-A"	Not named for <i>any</i> counterclaim. "Recently signed" contract with Yardi that allegedly prohibits RealPage from "implementing" the software interface. No allegation related to cloud services or a coerced amended license.	¶ 46
"Client 2-B"	Not named for <i>any</i> counterclaim. Yardi allegedly refused to permit RealPage to "support" an "upgrade" that this customer is allegedly "planning." No allegation related to cloud services or a coerced amended license.	¶ 46
"Client 3"	Named in interference with prospective economic advantage <i>only</i> . Customer moved its data center to the RealPage cloud despite Yardi allegedly having "demanded" that it not do so. No allegation related to a coerced amended license.	¶ 47
"Client 4"	Named in interference with prospective economic advantage <i>only</i> . Client allegedly did not choose RealPage as its "implementation consultant." No allegation related to cloud services or a coerced amended license.	¶ 48
"Client 5"	Named in interference with prospective economic advantage <i>only</i> . Client has allegedly switched from Yardi software to RealPage software (rather than the reverse). No allegation related to cloud services or a coerced amended license.	¶ 49

For "Client 1," the lone remaining client "exemplar," RealPage alleges that "after Client 1 had already purchased Voyager Yardi created newly-revised software license agreements." FAC, ¶ 42. This allegation is also misleading, and does not support RealPage's antitrust counterclaims, for three reasons.

First, RealPage does not allege, as it must, that Client 1 *agreed* to Yardi's supposed "newly-revised" license. RealPage fails to state a claim on this basis alone: the heart of its Section 1 and Cartwright Act counterclaims is an agreement

1 between two or more entities in restraint of trade. *Twombly*, 550 U.S. at 554-57.

2 Second, RealPage does not allege that Yardi *amended* an existing Client 1  
3 license. RealPage’s antitrust allegations rely on “amended license agreements.”  
4 FAC, ¶ 61. If Yardi had amended Client 1’s license, RealPage could have said so,  
5 even if only on information and belief. Alternatively, RealPage could have attached  
6 any alleged license and amended license to its Counterclaims or Amended  
7 Counterclaims. It did neither. Instead, different from the “amendments” in its  
8 antitrust allegations, RealPage alleges that Yardi “created newly-revised software  
9 license agreements” after Client 1 “purchased” Voyager. *Compare id.*, ¶ 42 with  
10 ¶ 61. RealPage alleges no facts to suggest that Client 1 had a pre-existing Yardi  
11 license *or* that Yardi introduced an amendment to any such license.

12 Third, RealPage does not allege high switching costs. RealPage’s antitrust  
13 allegations rely on Yardi’s power over customers disadvantaged by the “high  
14 switching costs associated with re-aligning their IT systems and transferring their  
15 data to a new software architecture.” *Id.*, ¶ 60. If Client 1 was forced to sign an  
16 amendment because of switching costs, RealPage could have said so. Instead, it  
17 alleges only that Yardi created an agreement “after Client 1 had already purchased  
18 Voyager” (and did not make even this allegation until the Amended Counterclaims).  
19 *Id.*, ¶ 42; Russell Decl., ¶ 2 & Ex. A (redlines) at new ¶ 42. A mere “purchaser” is  
20 not locked in under RealPage’s alleged criteria. RealPage is silent as to whether  
21 Yardi had *delivered* the software, whether Client 1 had *installed* the software,  
22 whether Client 1 had begun *using* the software, or whether Client 1 had committed  
23 its “IT systems” or “data.” FAC, ¶ 40. RealPage alleges no facts to suggest that  
24 Client 1 was handicapped by the “switching costs” central to its antitrust allegations  
25 (*if* it agreed to a license amendment, which RealPage also does not allege).  
26 *Compare id.*, ¶ 42 with ¶ 61.

27 The Client 1 allegations thus do not support the existence of an “amended  
28 license agreement” or a locked-in client. Indeed, RealPage’s careful word choice

1 signals that it knows no such antitrust violation exists.

2 After two iterations of the Counterclaims, the Court should take note that  
3 RealPage continues to explicitly reference (some of) these “exemplar” clients in  
4 stating its interference counterclaims, while excluding them *all* from its antitrust  
5 counterclaims. *Compare id.*, ¶¶ 71-82, with ¶¶ 58-70. RealPage is right to continue  
6 to exclude them; they do not belong there. But its antitrust counterclaims cannot  
7 survive when its best efforts to identify even a single agreement, after months of  
8 investigation and two complaints, fail. *Zella*, 529 F. Supp. 2d at 1132.

9 **V. REALPAGE FAILS TO STATE A COUNTERCLAIM FOR**  
10 **INTERFERENCE WITH CONTRACT**

11 An interference with contract claim must allege, among other elements, a valid  
12 contract with a third party and actual breach or disruption of the contract. *Pac. Gas*  
13 *& Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 3  
14 (1990); Judicial Council of Cal. Civ. Jury Instructions (CACI) No. 2201.

15 Courts should dismiss contractual interference claims that do not identify the  
16 contract at issue and/or allege facts describing how the contract was “actually  
17 breached or disrupted.” *G & C Auto Body Inc. v. Geico Gen. Ins. Co.*, No. C06-  
18 04898, 2008 WL 687371, at \*11 (N.D. Cal. Mar. 11, 2008); *Kentmaster Mfg. Co. v.*  
19 *Jarvis Prods. Corp.*, 146 F.3d 691, 695 (9th Cir. 1998) (dismissing claim because  
20 plaintiff did “not identif[y] any existing contracts and does not even directly allege  
21 that any contracts were breached”); *Yanik v. Countrywide Home Loans, Inc.*, No. CV  
22 10-6268, 2010 WL 4256312, at \*5-6 (C.D. Cal. Oct. 18, 2010) (dismissing claim  
23 because plaintiff “failed to identify facts establishing the contracts with which  
24 defendants allegedly interfered”).

25 The only agreement identified by RealPage in support of its contractual  
26 interference counterclaim is an alleged “Letter Agreement for Interim Services” with  
27 “Client 1.” FAC, ¶¶ 42, 72. RealPage otherwise refers to unspecified “contracts  
28 with third parties.” *Id.*, ¶ 72. Excluding Client 1, RealPage’s counterclaim fails

1 because RealPage has not identified any of the supposed “third parties” at issue, the  
2 contracts with which Yardi has allegedly interfered, or the nature of any alleged  
3 breach or disruption. *Kentmaster*, 146 F.3d at 695; *Yanik*, 2010 WL 4256312, at \*5.

4 Nor does the alleged Client 1 “Letter Agreement for Interim Services” save  
5 the counterclaim. RealPage alleges that Client 1 “*announced* that it could not use  
6 the RealPage Cloud,” but does *not* allege, as it must, that Client 1 breached the  
7 “Letter Agreement,” or how Yardi disrupted performance of the “Letter Agreement.”  
8 FAC, ¶ 42 (emphasis supplied). In fact, RealPage does not allege, nor is there any  
9 reason to infer, that performance under the “Letter Agreement” required RealPage to  
10 host Client 1’s Yardi software in its “Cloud.” *Id.* If no Yardi hosting was required,  
11 then no alleged restriction by Yardi could have caused a breach or disruption.

12 RealPage thus alleges no facts to warrant concluding that Yardi “did interfere  
13 with or disrupt RealPage’s contractual relationships,” *id.*, ¶ 73, and the Court should  
14 dismiss the interference with contract counterclaim. *G & C Auto Body*, 2008 WL at  
15 687371, at \*11; *Philips Med. Capital, LLC v. Med. Insights Diagnostics Ctr., Inc.*,  
16 471 F. Supp. 2d 1035, 1046 (N.D. Cal. 2007) (dismissing interference claims based  
17 on “conclusory language that merely repeats the elements of these torts”).

18 **VI. REALPAGE’S UNFAIR COMPETITION AND PROSPECTIVE**  
19 **INTERFERENCE COUNTERCLAIMS FAIL TO THE EXTENT THEY**  
20 **RELY ON DISMISSED COUNTERCLAIMS**

21 If the Court dismisses the antitrust and/or contractual interference  
22 counterclaims, it also should dismiss RealPage’s unfair competition and prospective  
23 interference counterclaims to the extent they rely on antitrust or contractual  
24 interference allegations. *See* FAC, ¶¶ 79, 85 (referencing “violation of the antitrust  
25 laws” as alleged unlawful predicate acts); *Kentmaster*, 146 F.3d at 694-96 (affirming  
26 dismissal of unfair competition claim based on dismissed antitrust claims); *In re Cal.*  
27 *Title Ins. Antitrust Litig.*, No. C 08-01341, 2009 WL 3756686, at \*8 (N.D. Cal. Nov.  
28 6, 2009) (dismissing unfair competition claim “to the extent it relies on [dismissed]  
alleged antitrust violations”).

1 **VII. THE COURT SHOULD NOT GRANT ANOTHER AMENDMENT**

2 Courts should deny leave to amend when amendment would be “futile.”  
3 *Klamath-Lake Pharm. Ass’n*, 701 F.2d at 1293. An amended complaint “may only  
4 allege other facts consistent with the challenged pleading.” *Reddy v. Litton Indus.,*  
5 *Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) (internal citation and quotation omitted).  
6 A court has “particularly broad” discretion to deny leave to amend “where plaintiff  
7 has previously amended the complaint,” as here. *Ascon Props., Inc. v. Mobil Oil*  
8 *Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989); *see also Int’l Norcent Tech.*, 2007 WL  
9 4976364, at \*15-16 (denying leave to file a second amended complaint that  
10 “allege[d] essentially the same claim pled in the original complaint”).

11 The Court may judicially notice documents to consider futility. *Bracamontes*,  
12 2011 WL 332527, at \*4; *see also Tarque v. Nat’l Rental Car Fin. Corp.*, No. CV 08-  
13 3882, 2009 WL 2711951, at \*5 (C.D. Cal. Aug. 26, 2009) (denying motion to amend  
14 when “judicially noticed facts” established that it would “be futile for Plaintiff to  
15 amend his complaint”). Yardi requests that the Court take judicial notice of two  
16 publicly-available documents authored by RealPage. RFJN, Exs. 1 & 2.

17 The first document is RealPage’s most recent Form 10-Q Quarterly Report,  
18 filed with the SEC on May 9, 2011 – eight days before RealPage filed its Amended  
19 Counterclaims. *Id.*, Ex. 1. RealPage asserts in the Report that “[t]he market for our  
20 solutions is *intensely competitive, fragmented and rapidly changing* with relatively  
21 *low barriers to entry.*” *Id.* (emphasis supplied). RealPage continues, “[w]ith the  
22 introduction of *new technologies and market entrants*, we expect *competition to*  
23 *intensify in the future.*” *Id.* (emphasis supplied). It also states that it “face[s]  
24 competition primarily from point solution providers, including traditional software  
25 vendors, application service providers, or ASPs, and other software as a service, or  
26 SaaS, providers.” *Id.* RealPage admits that it provides services “marketed” as the  
27 “RealPage Cloud” to only “some of [its] customers.” *Id.*

28 The second document is a RealPage press release issued on April 25, 2011 –

1 almost a month after RealPage filed its original Counterclaims. RFJN, Ex. 2. In the  
2 release, RealPage’s Vice President of Cloud Computing states, “Most companies use  
3 a *mish-mash of different software systems, with varying degrees of integration. ...*  
4 Many top companies within the multifamily industry have chosen the RealPage  
5 Cloud *over traditional hosting providers* because it works better and provides a cost-  
6 effective solution to meet their IT needs.” *Id.* (emphasis supplied).

7 These documents admit in just a few sentences what RealPage’s Amended  
8 Counterclaims tip-toe around for 32 pages – *i.e.*, that real estate software owners  
9 choose from a spectrum of “intensely competitive” and “rapidly changing” hosting  
10 providers, and that “some” have chosen the “RealPage Cloud” while “most” have  
11 chosen a “mish-mash” of systems with “varying degrees of integration.” RFJN,  
12 Exs. 1 & 2. In the face of these public statements, including to the SEC, RealPage  
13 cannot now allege that Yardi has foreclosed substantial competition or prevented  
14 market entry by new suppliers, or that customers do not choose any other hosting  
15 solutions over the “RealPage Cloud.”

16 Attempting again to amend the Amended Counterclaims would be futile,  
17 including because no good faith amendments consistent with RealPage’s first two  
18 complaints could account for these public statements by RealPage management.

## 19 **VIII. CONCLUSION**

20 RealPage has now had two opportunities to attempt to state causes of action  
21 for antitrust violations and interference with contract. For all of the reasons stated  
22 above, the Court should dismiss RealPage’s Second, Third, and Fourth Amended  
23 Counterclaims without leave to amend. The Court should also dismiss RealPage’s  
24 Fifth and Sixth Amended Counterclaims (unfair competition and prospective  
25 interference) to the extent they rely on any dismissed counterclaims.

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