

Litigators of the Week: A Groundbreaking Defense Win in the Algorithmic Pricing Antitrust Suit Against Vegas Hotels

By Ross Todd

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There's a certain gut-level appeal to analogizing the algorithms used in pricing software to the dark-and-smoky rooms in price-fixing cases of yore—at least to the conspiracy-minded among us.

But in the case of casino hotels accused of conspiring with software company Cendyn to boost prices for rooms on the Las Vegas Strip, the Nevada federal judge overseeing things found an analogy that she likes a bit better.

In a [decision handed down](#) last week, Chief U.S. District Judge Miranda Du compared Cendyn's pricing tools to an attorney who benefits from the experience and access to confidential client information gained with each successive legal assignment.

"The attorney does not share one client's confidential information with another, but over time, she (ideally) gets smarter because of what she has learned from each client engagement she has successfully completed," Du wrote.

This analogy works much better for the price-fixing defendants than that "dark-and-smoky room" one.

In last week's ruling, Du dismissed claims against the hotels and the software maker with prejudice. She wrote that "mere use of algorithmic pricing based on artificial intelligence by a commercial entity, without any allegations about any agreement



Courtesy photos

Skadden partner **Boris Bershteyn**, left, and Latham partner **Brendan McShane**, right.

between competitors—whether explicit or implicit—to accept the prices that the algorithm recommends does not plausibly allege an illegal agreement.”

Our litigators of the week are **Boris Bershteyn** of **Skadden, Arps, Slate, Meagher & Flom**, who represents Caesars Entertainment, and **Brendan McShane** of **Latham & Watkins**, who represents Cendyn Group, who handled [arguments last month](#) in front of Du on the defense motion to dismiss.

Lit Daily: Who were your clients and what was at stake?

Brendan McShane: Our client is Cendyn Group, LLC, a provider of world-class software solutions for the

hospitality industry. Among other products, Cendyn offers a set of customizable revenue management software solutions that optimize an individual hotel client's own data to provide it with various tools, including reporting analytics, demand forecasting, and price recommendations. The complaint claimed that the software's algorithmic pricing recommendations facilitated price fixing among Las Vegas casino hotels, and also challenged Cendyn's individual software licensing agreements with its clients as themselves anticompetitive and unlawful. In short, a fundamental and key piece of our client's business model was being challenged in a major antitrust lawsuit.

Boris Bershteyn: Our client was Caesars Entertainment Inc., a global leader in hospitality and gaming. We knew that the facts ultimately would not support the claims in this case, so at stake in the motion to dismiss was avoiding the cost and disruption of discovery—which in an antitrust class action can, regrettably, be significant.

How did this assignment come to you and your firm? Have you been involved in any of the other algorithmic pricing cases now pending across the country?

McShane: We were referred to the CEO and GC of Cendyn by another client who had a great experience with our Austin office transactional partners, and we also had a strong relationship with a Cendyn board member from our involvement in other matters. After a series of discussions that our lead partner, **Sadik Huseny**, had with the executives about the breadth and depth of our antitrust team and experience, we were thrilled to be given the opportunity to represent Cendyn in this important matter.

Latham's antitrust team is involved in several of the other lawsuits across the country involving allegations related to (or claiming to be related to) algorithmic pricing software. Combinations of our antitrust team are representing Cendyn in the Atlantic City casino hotel case, AvalonBay in the RealPage apartment pricing MDL action, MultiPlan in various cases involving reimbursements for out of network

medical services, and CoStar in a matter involving luxury hotels, among others.

Bershteyn: My partner **Ken Schwartz** has worked with Caesars on competition issues in the past, and he was kind enough to introduce me to its general counsel, **Ed Quatmann**, and deputy general counsel, **Paul Georgeson**. Ed and Paul were instrumental to setting our strategy for the defense of the case. And I greatly benefitted from Ken's expertise in the industry.

As for other algorithmic pricing matters, the same Skadden team (Ken, **Mike Menitove**, **Sam Auld**, **T.J. Smith** and I) also represents Caesars in a very similar case in the District of New Jersey, where the motion to dismiss is now pending. Separately, my partner **Karen Hoffman Lent** and I (and another talented Skadden team) are involved in various cases concerning the multifamily housing industry.

Give me the rundown of the defense counsel on this matter and how you divvied up the workload at the motion to dismiss phase.

McShane: Defendants were represented by law firms from across the country, and coordinated effectively to present a single, joint motion to dismiss the complaint. It was a terrific experience working alongside these outstanding lawyers.

Our multi-office team for Cendyn includes myself alongside my partners, **Sadik Huseny** and **Anna Rathbun**, and an absolutely stellar group of associates—**Chris Brown**, **Tim Snyder** and **Graham Haviland**. We were also fortunate to receive assistance from my partners **Katherine Rocco**, **Lawrence Buterman** and **Hanno Kaiser**; and **Colby Williams** of **Campbell & Williams**.

The other defendants' counsel included:

- Caesars Entertainment Inc.: Boris Bershteyn, Ken Schwartz, Michael Menitove and Sam Auld of Skadden; and **Adam Hosmer-Henner**, **Chelsea Latino** and **Jane Susskind** of **McDonald Carano**
- Wynn Resorts Holdings LLC: **Mark Holscher**, **Tammy Tsoumas**, **Leonora Cohen** and **Matthew Solum** of **Kirkland & Ellis**; and **Patrick Byrne** and **Bradley Austin** of **Snell & Wilmer** (Editor's note:

Cohen moved to Gibson, Dunn & Crutcher while the case was pending.)

- Treasure Island LLC: **Patrick Reilly, Arthur Zorio, Emily Garnett** and **Eric Walther** of **Brownstein Hyatt Farber Schreck**
- Blackstone Inc. and Blackstone Real Estate Partners VII L.P.: **Matthew McGinnis, David Hennes** and **Jane Willis** of **Ropes & Gray**; and **Daniel McNutt** and **Matthew Wolf** of **McNutt Law Firm**
- The Rainmaker Group Unlimited Inc.: **Arman Oruc** and **Alicia Rubio-Spring** of **Goodwin Procter**; and **Nicholas Santoro** of **Holley Driggs**

Skadden and Latham worked closely together on briefing the motion to dismiss. Skadden led the overall drafting and handled responsibility for the hub-and-spoke conspiracy claim. Latham drafted the attack on the second, rule of reason claim that challenged Cendyn's individual software license agreements. Along with counsel for the other defendants, our teams worked closely together to collaborate on drafts, balance competing views about arguments, and ultimately put together a winning brief.

The decision at least three times notes persuasive arguments you made at the hearing on the motion to dismiss. Did it feel like you were hitting your mark at the hearing?

Bershteyn: Not exactly. From the first moments of the argument, Chief Judge Du directed the flow of the discussion with a series of direct, probing, and very challenging questions. Her preparation and familiarity with the nuances of the complaint—over 250 pages of it!—were extraordinary, and I was racing to keep up.

And, of course, oral argument presents opportunities for both sides. The antitrust plaintiffs' bar is exceptionally skilled—and this was certainly true of our adversary's advocacy here.

We've all participated in oral arguments where the result felt preordained, for better or for worse. Not here. As best I could tell, Chief Judge Du was genuinely open-minded about key issues and committed to exploring them with counsel. That

didn't make the argument easy. Nor was I confident we would prevail. But I enjoyed every minute.

McShane: I felt the importance of the argument from the outset. Chief Judge Du was extremely prepared and keyed in right away with pointed questions about confidential information, machine learning, and the software's price recommendations. Boris did a masterful job breaking down a long and complex complaint to explain how the allegations could not support the novel antitrust theory being asserted, and he deftly fielded several questions from the judge. My focus was on highlighting the absence of critical allegations about any type of confidential information exchange facilitated by the software, and using the complaint's allegations about my client's marketing materials to point out the many benefits and features of the software products, in order to rebut plaintiffs' unsupported argument that casino hotel clients only use the software to fix room prices.

Boris, I'm curious in particular about the analogy that came up in your argument comparing the plaintiff's machine learning theory to an attorney improving skills over time with the benefit of experience and access to confidential client information over repeated client engagements. Had you road-tested that analogy prior to the hearing? Or was that something the judge brought out through her own questioning?

Bershteyn: A bit of both. The analogy was not among my anticipated talking points, but it came up during a discussion among all the defense counsel in Las Vegas the day before the argument.

This reminds me to mention that this victory was only possible through close collaboration among a large team of extraordinary counsel for all the defendants—all of whom should share in this recognition. Each lawyer—both national antitrust practitioners like us and expert Nevada counsel—contributed greatly to the briefing and oral argument preparation. We did not always agree, but everyone was unfailingly gracious in disagreement. I was especially thrilled to collaborate with two good friends: Adam Hosmer-Henner from McDonald

Carano (Caesars' Nevada counsel, an exceptionally shrewd guide to local practice, and a Skadden alum!) and Tammy Tsoumas from Kirkland (counsel for Wynn, whose litigation judgment is remarkable). In fact, I'm pretty sure that it was Tammy's insights that got me thinking about this analogy.

The judge also notes that you included a helpful timeline in your motion to dismiss showing that hotels started subscribing to the relevant products up to a decade apart from one another. Who gets credit for making it visually clear there was no simultaneous action here?

Bershteyn: I'm so glad you noticed this visual. Every ounce of credit belongs to my indispensable colleague Sam Auld, who immediately identified the flaw in the complaint's timeline—and then worked tirelessly to find the perfect way to illustrate it.

While the DOJ has filed statements of interest in the New Jersey hotel case and the rental pricing MDL pending in the Middle District of Tennessee, there was no such filing here, right? What factor did that play?

McShane: DOJ did not file a statement of interest in this case, but Judge Du was well aware of the DOJ's arguments. Plaintiffs referenced the statements filed in *RealPage* and *Yardi* heavily in their opposition to the motion to dismiss, and after DOJ filed its statement in the New Jersey case, plaintiffs moved for leave to file the statement as "supplemental authority." Judge Du denied that motion, noting that the court was not required to give the DOJ's views "any special deference." The motion to dismiss order also addressed DOJ's arguments and held that the amended complaint in this case failed to plausibly allege that the hotel defendants had actually outsourced their pricing

decisions to Cendyn's software by agreeing to accept the software's recommendations.

This ruling is heavily rooted in the facts of this particular set of arrangements between the hotels and the software provider and the absence of any agreements between the hotels themselves. What can defendants in other algorithmic pricing cases take from the judge's decision?

Bershteyn: Some other cases actually present a very similar fact pattern. For example, the New Jersey case (which you highlighted in your previous question) concerns the same revenue management software and an overlapping group of hotels. I think the problems Chief Judge Du highlighted in plaintiffs' amended complaint exist in equal measure in that case. More broadly, I see the same fundamental shortcomings—including the absence of plausible evidence of an agreement among the users of revenue management software—throughout the recent algorithmic pricing cases.

What will you remember most about this matter?

McShane: Preparing on top of a video blackjack machine. The day before the hearing, the defense group flew into Las Vegas and met for a strategy session at a local law firm. Following the meeting, Sadik Huseny and I returned to our casino to debrief and further prepare. In search of options, we end up sitting in the casino's sports book and poring over pages and pages of complaint allegations that we spread out on top of video blackjack machines, and we hammered out bullets for the next day's argument.

Bershteyn: Our client's trust and guidance, fellow defense counsel's intelligence and grace, Skadden team's fastidiousness and camaraderie, and the court's thoughtful and thorough consideration.