23-0600-cv

United States Court of Appeals

for the

Second Circuit

SUSAN GIORDANO, ANGELENE HAYES, YING-LIANG WANG, ANJA BEACHUM, on behalf of themselves and others similarly situated,

Plaintiff-Appellant,

– v. –

SAKS & COMPANY LLC, SAKS INCORPORATED, LOUIS VUITTON USA INC., LORO PIANA & C. INC., GUCCI AMERICA, INC., PRADA USA CORP., BRUNELLO CUCINELLI USA, INC.,

Defendants-Appellees,

FENDI NORTH AMERICA, INC.,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF LAW AND ECONOMICS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

The undersigned amici curiae are law and economics scholars with expertise in antitrust law, economics, and business. They are affiliated with leading universities and economic consulting firms and have decades of experience in academia, private practice, and government service studying law and economics and antitrust. Their names, titles, and affiliations are listed in Appendix A. Amici have no personal interest in the outcome of this litigation, but they share a professional interest in seeing the antitrust laws applied consistently in accordance with settled precedent and sound economics.

This case involves alleged agreements between Saks Incorporated, Saks & Company LLC, and Saks Fifth Avenue LLC (collectively, "Saks") and Louis Vuitton USA Inc. ("Louis Vuitton"), Loro Piana & C. Inc. ("Loro Piana"), Gucci America, Inc. ("Gucci"), Prada USA Corp. ("Prada") and Brunello Cucinelli, USA, Inc. ("Brunello Cucinelli")

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[1] *Amici curiae*'s motion for leave to file this brief is filed concurrently herewith. Pursuant to Fed. R. App. P. 29(a)(4)(E) and L.R. 29.1(b), counsel for *amici* state that no party's counsel authored this brief in whole or in part, and no person other than *amici* or their counsel has made any monetary contributions intended to fund preparation or submission of this brief.

(collectively referred to as "Brand Defendants"), which operate concessions in Saks department stores, not to hire or attempt to hire Saks's luxury retail employees. Amici respectfully submit this brief to demonstrate that sound economic analysis supports the district court's conclusion that the rule of reason applies to the alleged "no-hire" or "no-poach" agreements in issue. Condemning these agreements as *per se* unlawful is contrary to sound economics and antitrust policy as it would stifle legitimate business collaborations and dampen employers' incentives to invest in training their employees.

INTRODUCTION AND SUMMARY OF ARGUMENT

One of Adam Smith's original and enduring insights was that the myriad collaborative business relationships that permeate any competitive economy arise from specialization, which allows enormous improvements in productivity. Adam Smith, *The Wealth of Nations*, Chapter 1, Of the Division of Labor (1776). In this case, Defendant Saks collaborates with Brand Defendants by leasing them "concessions" in its department stores. Brand Defendants operate these storefronts to establish and cultivate direct customer relationships, and to display, promote, and sell their products. A-42 ¶ 21. A customer walking into

Saks might, for example, see an area dedicated to Hermes products. That shopping area, or concession, is leased by Saks to Hermes.

Plaintiffs, luxury retail employees who work in Defendants' stores and "sell and/or manage the sale of luxury goods to consumers," allege that Brand Defendants agreed "not to hire or attempt to hire" Saks employees. A-39 ¶ 1.

The district court correctly recognized that these alleged "no-hire" or "no-poach" agreements are governed by the rule of reason because they are ancillary to a legitimate business collaboration—the collaboration being the Brand Defendants' leasing of floor space from Saks. As the district court noted, the agreements combine vertical and horizontal elements, rendering *per se* treatment inappropriate. Characterizing the restraints as *per se* unlawful, as Plaintiffs urge, would represent a significant departure from precedent and economic logic because *per se* treatment is "reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

ARGUMENT

I. The Alleged No-Poach Agreements Encourage Investment In Employee Training And Facilitate Legitimate Business Collaboration

Agreements that restrict cold-calling or hiring a business partner's employees can play an important role in facilitating productive business collaborations and protecting an employer's investments in their employees, such as by providing training. Absent that protection, companies that engage in legitimate business collaborations, but also compete for employees, would have the incentive to exploit their access to their business partner's employees to recruit them. Companies would face the prospect that their business partners would free-ride on a company's investments in training its employees.[2] If employers cannot protect their investments in their employees when entering into a legitimate business collaboration, that discourages the collaboration, the investment, or both—to the potential detriment of firms, consumers, and employees.

[2] Even in contexts where training is not a significant investment, the costs of recruiting and hiring may also create an incentive to free-ride.

The alleged "no-poach" agreements in this case facilitate legitimate business collaborations between Saks and Brand Defendants while also protecting Saks's incentive to invest in training its employees. Consider a simple example: Employees operating the Hermes concession mentioned above notice that certain Saks employees who work near that concession have excellent interactions with customers and deliver consistent sales, all of which are the result of Saks's training. If Hermes could simply hire those superb employees already trained by Saks, and whom they would not have encountered but for Hermes's leasing floor space in Saks, then clear free-riding would be the result, to the detriment of Saks.

Luxury retail employees receive extensive training. "Selling luxury goods and apparel requires extensive training on service, selling, and product knowledge." A-44 ¶ 32. Luxury retail employees play a critical role in the marketing and sale of Brand Defendants' products. "To create and maintain the distinction between (and demand for) luxury goods over other, lower-priced goods, luxury goods manufacturers have gone to great lengths to market their luxury brands and create shopping experiences for customers." A-42-43 ¶¶ 23–

26. To effectively sell Brand Defendants' products, luxury retail employees must be able to persuasively communicate the brand's ethos and its historical traditions, which in turn requires significant skill and training. A-43 ¶ 27. Saks and Brand Defendants thus invest significant resources into providing luxury retail employees "extensive training on service, selling, and product-knowledge." A-44 ¶ 32. Customers benefit from the "luxury shopping experience" and "customer service" that this training enables luxury retail employees to provide. A-43-44 ¶¶ 27–28.

Economic literature demonstrates the importance of firms' investment in employee training and that training's beneficial effects on both workers and firms through increased productivity and higher compensation. *See* Benoit Dostie, *Who Benefits from Firm-Sponsored Training?*, 145 IZA World of Labor 1 (2020). Firms' investments in training make the sales force more customer-oriented, for example, and that in turn positively impacts the performance of the sales force. *See* Sergio Román et al., *The Effects of Sales Training on Sales Force Activity*, 36 European Journal of Marketing 1344 (2001). Employer-provided training has been shown to be associated with increased

productivity and compensation: One study analyzing 14 years of data from across a wide range of industries in the UK found that a one-percentage point increase in training is associated with a 0.6% increase in productivity and a 0.3% increase in hourly wages. *See* Lorraine Dearden et al., *The Impact of Training on Productivity and Wages: Evidence from British Panel Data*, 68 Oxford Bull. of Econs. and Stats. 397 (2006).

Economists recognize that firm investments in training can benefit employees too. Employees who receive training from their employers generally have higher earnings compared to those who do not. *See, e.g.*, Richard Blundell et al., *Human Capital Investment: The Returns from Education and Training to the Individual, the Firm and the Economy*, 20 Fiscal Studies 1, 7 (1999) ("The private returns from employer-provided and vocational training . . . to individual workers' real earnings have consistently been found to be significant. Individuals undertaking employer-provided or vocational training earn, on average, just above 5 per cent higher real earnings than individuals who have not undertaken such training, with some studies showing higher rates.").

In this case, if training makes luxury retail employees more effective salespeople, they derive a direct financial benefit because they earn sales-based commissions in addition to a base wage. *See, e.g.*, A-58 ¶ 110. And there is reason to think that training does increase sales: "a knowledgeable salesperson can make all the difference for consumers considering purchasing expensive luxury items." A-44 ¶ 34.

The training that luxury retail employees receive is costly to the employer, so a luxury retailer has an incentive to hire its rivals' employees "to take advantage of the efforts its rival has expended in soliciting, interviewing, and training skilled labor." A-49 ¶ 62. Hiring from its rivals would allow the retailer to "save on training costs and receive the immediate benefit of a well-trained, motivated salesperson who knows how to cultivate relationships with customers and enhance the Defendant's brand." A-48 ¶ 53. Prada has an incentive to cold call a Saks employee, for example, "if Prada believed that a certain Luxury Retail Employee performed his or her job well at Saks." A-48 ¶ 56.

The concession arrangement pairs this incentive with the ability to identify and recruit top Saks employees. Brand Defendants leasing space in Saks stores staff their concessions with their own employees.

SA-7 ¶ 3 (Brand Defendants "rent space in [] Saks stores and operate relatively independently: they hire their own staff, make their own inventory determinations, and determine the depth and timing of markdowns and pricing."). Concessions put Brand Defendants' employees in close proximity to Saks's employees, giving them the opportunity to observe which Saks employees perform their jobs well and recruit them. SA-24 ¶ 84 ("[C]lose physical proximity" gives Defendants "significant information on each other's employees." They "can observe . . . employees work and productivity firsthand [giving them] important information that could be used to cold call employees that would present the best value propositions."). As the district court noted, and as the Complaint alleged, "absent the no-hire agreement, there would be a continual risk that Brand Defendants would use their concessions in Saks stores to recruit employees." A-239 (citing A-48-49, 53 ¶¶ 56–57, 83). An agreement restricting Brand Defendants' ability to recruit Saks employees addresses this free-rider problem, encouraging the concession arrangement while protecting Saks's investments in its employees.

Courts have long recognized that labor-market restraints in the context of legitimate business relationships can align incentives and promote procompetitive collaborations. *See, e.g.*, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) ("[B]usiness men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers."), *aff'd as modified*, 175 U.S. 211 (1899); *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1110 (9th Cir. 2021) (recognizing that non-solicitation agreement permitted employer to "guard[] its investments" in its employees and collaborate only with competitors who "agree . . . not to abuse the relationship by proactively raiding" its employees).

Economists also recognize that restraints on employees' mobility can protect and encourage investments in employee training. One study found, for example, that prohibiting non-compete clauses would reduce the number of workers receiving training by 14.7% in

occupations that commonly use non-compete clauses. *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 Indus. & Lab. Rel. Rev. 783, 796–97 (2019)). Conversely, another study found that employers tend to provide less training if they are in dense regional labor markets and therefore located near a large number of competitors, indicating that potential labor poaching affects firms' investments in training. *See* Samuel Muehlemann and Stefan Wolter, *Firm-Sponsored Training and Poaching Externalities in Regional Labor Markets*, 41 Reg'l Sci. and Urb. Econs. 560 (2011).

II. Restraints That Are Ancillary To A Legitimate, Collaborative Business Relationship Are Subject To The Rule of Reason

It is widely recognized that collaborations between firms can be efficient and procompetitive. *See Addyston Pipe & Steel*, 85 F. at 281 (enumerating scenarios where a restraint on trade may be justified given the larger partnership or goal of the agreement); Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 1, 6 (Apr. 2000) ("In order to compete in modern markets, competitors sometimes need to collaborate . . . . Such

collaborations often are not only benign but procompetitive . . . .). For example, collaboration between firms may promote competition on a larger scale by making a broader agreement or joint venture possible, or by allowing firms to expand into new markets, fund innovation, or lower production or other costs. *Id.; see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all."). "A collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration." *Antitrust Guidelines for Collaborations Among Competitors* at 6.

When evaluating horizontal agreements that accompany legitimate collaborations, "[t]he most useful classification scheme for antitrust analysis segregates so-called 'naked' and 'ancillary' agreements. This all-important classification largely determines the course of subsequent legal evaluation of any restraint." Areeda & Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES

AND THEIR APPLICATION ¶ 1904 (5th ed., 2023 Cum. Supp.). The district court applied this distinction between "naked" agreements among independent firms, which are where "the restriction on competition is unaccompanied by new production or products," and "ancillary" restraints, which are "part of a larger endeavor whose success they promote." *Major League Baseball Props. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) (quotation omitted).

While naked agreements between horizontal competitors might be *per se* illegal, ancillary restraints are evaluated under the rule of reason. *See, e.g.*, *United States v. Aiyer*, 33 F.4th 97, 115 (2d Cir. 2022) ("[T]he ancillary restraints doctrine, which governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities, exempts such agreements from the per se rule such that the rule of reason applies.") (cleaned up); *Aya Healthcare*, 9 F.4th at 1109 ("Under the 'ancillary restraints' doctrine a horizontal agreement is 'exempt from the per se rule,' and analyzed under the rule-of-reason" if it is ancillary.) (quotation omitted); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985) ("A court must distinguish

between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote.").

Courts have thus declined to apply the *per se* rule to agreements restraining hiring that are ancillary to legitimate collaborations. *See, e.g.*, *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) (finding *per se* rule inapplicable to agreement barring insurance agents from transferring between independent-contractor agencies of insurance company); *Aya Healthcare*, 9 F.4th at 1110–11 (Since "the restraint [a non-solicitation provision in an agreement between healthcare staffing company and healthcare facilities to provide travel nursing services] is ancillary to the parties' broader agreement, the district court correctly subjected it to the rule-of-reason standard."); *see also* Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* 3 (Oct. 2016) ("Naked wage-fixing or no-poaching agreements among employers . . . are per se illegal under the antitrust laws . . . . Legitimate joint ventures (including, for example,

appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.").

Consistent with these cases, the district court correctly determined that *per se* treatment is inappropriate here because the pleadings include "details of (1) a procompetitive collaboration between defendants *and* (2) details illustrating how the challenged agreement is related to that procompetitive collaboration." A-239. Specifically, the Amended Complaint includes allegations that "(1) the Brand Defendants sell their products and have concessions in Saks stores, and (2) absent the no-hire agreement, there would be a continual risk that Brand Defendants would use their concessions in Saks stores to recruit employees." *Id.* (citing A-42, 48-49, 53 ¶¶ 21, 56–57, 83).

III. Saks and Brand Defendants Are In A Vertical Relationship, Making The Alleged Agreements Subject To The Rule Of Reason

Per se treatment is inappropriate for the additional reason that Saks and Brand Defendants are in a vertical relationship: Saks, as a supplier, supplies "floor space" to its customers, Brand Defendants. This is a vertical relationship between buyer and seller. Saks "launch[ed] Brand Defendants' concessions at their Saks stores." A-43

¶ 28. In these concession arrangements, Brand Defendants "rent space in [] Saks stores and operate relatively independently: they hire their own staff, make their own inventory determinations, and determine the depth and timing of markdowns and pricing." SA-7 ¶ 3. In addition, Brand Defendants "sell their goods and apparel through department stores (including Saks)." A-42 ¶ 21. Defendants are also horizontal competitors for labor: they "face[] competition from rival luxury retailers in the labor market for Luxury Retail Employees." A-46 ¶ 39.

Vertical agreements are subject to the rule of reason because their market impact is complex: for example, they might both reduce intrabrand competition and foster interbrand competition at the same time. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (applying rule of reason to vertical minimum-resale-price agreements); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (applying rule of reason to vertical maximum price fixing); *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (applying rule of reason to franchise agreement between manufacturer and retailer that barred retailer from selling franchised products other than from specified locations).

In its decisions holding that vertical agreements should be analyzed under the rule of reason, the Supreme Court has repeatedly emphasized that any departure from the rule of reason "must be based on demonstrable economic effect, rather than . . . upon formalistic line drawing." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (quotation omitted); *see also Leegin*, 551 U.S. at 889 (applying rule of reason in part because "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance").

Plaintiffs suggest that the horizontal aspect of the relationship between Saks and Brand Defendants should control, *see* Plaintiffs-Appellants' Br. at 41–43, but that would vitiate the ancillary-restraints doctrine and greatly expand the scope of conduct falling under the *per se* rule. All no-poach agreements must have some horizontal elements, because even if the participants are in an otherwise vertical relationship, they are horizontal competitors for labor. Concluding that *per se* treatment applies to collaborations with vertical and horizontal elements because they have some horizontal aspects would penalize and discourage a wide swath of potential collaborations that generate

benefits to the companies, their employees, and consumers. *Cf. Bus. Elecs. Corp.*, 485 U.S. at 731 (applying rule of reason to vertical restraint in part because it combats free-riding; the *per se* rule would discourage conduct that may be beneficial to consumers).

The flaws of this argument become clear when one considers the many different contexts in which it could apply. For example, no-hire or non-compete agreements entered into upon the sale of a business also have a horizontal element, to the extent the buyer and seller compete for labor. But the Third Circuit rejected the contention that the *per se* rule applies to no-hire agreements supporting the sale of a business if the transacting parties are "direct competitors for [] labor." *Eichorn v. AT&T Corp.*, 248 F.3d 131, 142-44 (3d Cir. 2001). Instead, the court concluded that these agreements are analyzed under the rule of reason, because antitrust claims that are "not within established categories of antitrust liability are more appropriately analyzed under the rule of reason." *Id.* ("*[P]er se* rules of illegality are the exception to antitrust analysis and are only employed in certain recognized categories.") Holding that these restraints may be *per se* illegal would be contrary to precedent and would call into question a common practice used to

protect the value of the business being acquired. *See, e.g., United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976) ("Covenants not to compete executed in conjunction with the purchase of a business allow the purchaser to obtain the value of the good will for which he has paid.").

Agreements among companies that have both vertical and horizontal elements are common and often procompetitive, and therefore are properly evaluated under the rule of reason. A common example is a "dual distribution" agreement, where a manufacturer sells its products both through independent dealers and directly to customers, in effect acting as its own dealer. Brand Defendants adopt a variation of this practice, selling both through their own boutiques and through Saks and other department stores. A-42 ¶ 21.

In these hybrid relationships, restraints are vertical in the sense that they are imposed by the manufacturer upon its dealers, and horizontal in the sense that they are imposed by the manufacturer, acting as a dealer, on competing independent dealers. In this context, restraints that would otherwise be *per se* illegal if entered into between horizontal competitors—such as restraints allocating customers or

territories, or setting resale prices—are properly evaluated under the rule of reason. *See* Areeda & Hovenkamp, *supra*, ¶ 1605 ("dual distribution restraints must not be generally equated with conventional horizontal restraints and condemned categorically on that account").

The reason is that "the rationale for per se condemnation of conventional horizontal market divisions does not generally fit and therefore should not govern." *Id.* at 1605b. As the Fifth Circuit has explained, "[t]he rationale for each per se rule is an economic analysis of the agreement, an analysis of the potential economic advantages which might motivate the parties to a particular type of agreement. A per se rule is applicable to a particular case if and only if the economic analysis which justifies the rule applies to the particular case." *Abadir & Co. v. First Miss. Corp.*, 651 F.2d 422, 426 (5th Cir. 1981) (applying rule of reason to market allocation agreement between companies in a dual distribution relationship); *Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 663 F.2d 405, 409–10 (2d Cir. 1981) (adopting Fifth Circuit's analysis).

"Most recent decisions," including those in the Second Circuit, "have unsurprisingly concluded that dual distribution restraints are

vertical and therefore subject to the rule of reason." Areeda & Hovenkamp, *supra*, ¶ 1605b; *see also Beyer Farms, Inc. v. Elmhurst Dairy, Inc.*, 35 F. App'x 29 (2d Cir. 2002) (applying rule of reason because "[plaintiff] alleged in its complaint that [defendants] were engaged in a dual-distributorship relationship, or both a vertical and horizontal relationship") (summary order); *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997) ("[V]ertical restraints are generally subject to 'rule of reason' analysis . . . even if the distributor and manufacturer also compete at the distribution level . . . .") (citation omitted); *2238 Victory Corp. v. Fjallraven USA Retail, LLC*, 2021 WL 76334, at *5 (S.D.N.Y. Jan. 8, 2021) ("Because the Complaint describes a mixed vertical and horizontal relationship between Fjallraven and Netrush, any agreement between them is scrutinized under the rule of reason and is not categorized as *per se* unlawful under the Sherman Act."); *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 2011 WL 1044898, at *2 (S.D.N.Y. Mar. 10, 2011) ("[C]laims alleging a vertical relationship or mixed vertical and horizontal relationships must be evaluated under the rule of reason."), *aff'd on other grounds*, 711 F.3d 68 (2d Cir. 2013).

A superficial application of *per se* treatment to these agreements would subject economic actors to heightened scrutiny and potential condemnation of conduct that could ultimately prove to be procompetitive. Many of these actors might choose not to engage in that procompetitive or output-enhancing conduct, rather than take on the heightened costs, disruption, uncertainty, and legal risks of protracted litigation.

IV. *Per Se* Treatment Is Reserved For Conduct That Is Invariably Anticompetitive

Because the alleged no-poach agreements in issue are not invariably and universally anticompetitive, they do not fall in the narrow category of *per se* unlawful conduct. Courts "presumptively appl[y] rule of reason analysis" in Sherman Act cases. *Dagher,* 547 U.S. at 5. "*Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" *Id*. (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692)); *see also Khan*, 522 U.S. at 10 (noting that "most antitrust claims are analyzed under a 'rule of reason[]'").

Conduct subject to the *per se* rule is "categorically unreasonable" and "inherently anticompetitive"; "[t]o justify a *per se* prohibition a

restraint must have manifestly anticompetitive effects, and lack any redeeming virtue." *Aiyer*, 33 F.4th at 114–15 (citing *Leegin,* 551 U.S. at 886). "Where cooperation is inherent in an enterprise, *per se* treatment is not always the appropriate measure of antitrust illegality. Absent a showing that a presumption of anticompetitive effect is appropriate, we apply the rule of reason." *Bogan*, 166 F.3d at 514 (citation omitted). "The Supreme Court is 'slow to . . . extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" *Id.* (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986)).

Moreover, determining whether the *per se* rule or the rule of reason applies should not be burdensome, or else "we should apply the rule of reason from the start." *Broad. Music*, 441 U.S. at 19 n.33. "That is why the *per se* rule is not employed until after considerable experience with the type of challenged restraint." *Id.* The *per se* rule applies to a restraint that "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Id.* at 19–20; *see also NYU Hosps. Ctr. v. League of Voluntary Hosps. & Homes of N.Y.*, 318 F. Supp. 3d 622, 634 (S.D.N.Y. 2018) (granting

motion to dismiss because the conduct did not fall within the established categories of restraints that warrant *per se* treatment).

Accordingly, there is a strong presumption that the rule of reason applies, and a departure from the rule of reason must be "justified by demonstrable economic effect." *Bus. Elecs. Corp.*, 485 U.S. at 726; *see also* Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 Geo. L.J. 835, 878–79 (2016) ("Declaring all horizontal restraints inherently suspect would presumptively condemn all manner of cooperation necessary to allocate resources to their highest valued use, relegating economic actors to cooperation achieved through atomistic interaction in the spot market or complete integration."). In the context of a legitimate collaboration, *per se* treatment may apply if either (1) the collaboration is "essentially a sham, offering no reasonable prospect of any efficiency-enhancing benefit to society," or (2) the challenged restraint "is not reasonably necessary to achieve any of the efficiency-enhancing

benefits" of the collaboration.[3] *Major League Baseball Props.*, 542 F.3d at 338 (Sotomayor, J., concurring).

Plaintiffs seeking *per se* treatment of a no-poach agreement bear the burden of alleging a naked horizontal restraint. *See Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 727–28 (6th Cir. 2019) (plaintiff bears the burden to show "that the challenged conduct ha[s] the characteristics necessary to justify per se condemnation") (citing *Nw. Wholesale Stationers, Inv. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) ("A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects.")). The Seventh Circuit's opinion in *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699 (7th Cir. 2023), is not to the contrary. The Court noted that plaintiffs had pleaded a horizontal

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[3] The Second Circuit has not adopted the "reasonably necessary" formulation as the standard for ancillarity. Then-Judge Sotomayor's influential concurrence concludes that "a challenged restraint must have a reasonable procompetitive justification, related to the efficiency-enhancing purposes of the joint venture," and cites the similar formulation in *Polk Bros.* that ancillary restraints are "those that are part of a larger endeavor whose success they promote." *Major League Baseball Props.*, 542 F.3d at 339 (Sotomayor, J., concurring) (citing *Polk Bros.*, 776 F.2d at 188-89).

restraint insofar as McDonalds also operates restaurants that compete with its franchisees' restaurants, and the Court could not determine whether the restraint qualified as ancillary by looking at the language of the complaint. *Id.* at 705.

At a minimum, as Plaintiff concede (Plaintiffs-Appellants' Br. at 38), they must "raise a plausible inference that the restraint is naked"—a burden that plaintiffs had met in cases they rely upon.[4] Here, by contrast, as the district court noted, the pleadings included details of both a procompetitive collaboration between Saks and Brand Defendants and details illustrating how the challenged agreement is related to that procompetitive collaboration, namely that "absent the no-hire agreement, there would be a continual risk that Brand

[4] *See Borozny v. Raytheon Techs. Corp.*, 2023 WL 348323, at *6–8 (D. Conn. Jan. 20, 2023) ("Plaintiffs' complaint adequately alleges that the no-poach agreements at issue had no legitimate business purpose and thus did not satisfy the ancillary restraint doctrine," noting that plaintiffs alleged that "Defendants' agreements are naked restraints of trade that serve no purpose except for stifling competition"); *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, 2022 WL 4465929, at *10–11 (N.D. Ill. Sept. 26, 2022) ("[T]he CAC's allegations contain no suggestion that the non-solicitation agreements were ancillary to some procompetitive business purpose. Rather, as pleaded, the non-solicitation agreements were naked agreements that served only to reduce competition for Defendants' senior employees.").

Defendants would use their concessions in Saks stores to recruit employees." A-239. Under these circumstances, *per se* treatment is inappropriate.

CONCLUSION

For the foregoing reasons, this Court should affirm.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of 2d Cir. Rule 29.1(c) because, excluding the parts of the documents exempted by Fed. R. App. P. 32(f), this document contains 5,286 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word in a proportionally spaced typeface in Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF participants.

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